

64833-1

64833-1

No. 64833-1-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

ESTATE OF HARB,

Appellant,

vs.

KING COUNTY SHERIFF'S OFFICE, et al.,

Respondents.

ORIGINAL

FILED
COURT OF APPEALS
DIVISION I
2010 OCT -14 PM 3:32

REPLY BRIEF OF APPELLANT ESTATE OF HARB

Kevin M. Winters, WSBA 27251
Attorney for Appellant Estate of Harb

Hawkes Law Firm, P.S.
19929 Ballinger Way N.E., Suite 200
Shoreline, WA 98155
206-367-5000

TABLE OF CONTENTS

Table of Contents..... i

Table of Authorities iii

I. UNDERSTANDING WHICH KING COUNTY ARGUMENTS APPLY TO WHICH ISSUES IS KEY 1

II. THE EVIDENCE OF RECORD DEMONSTRATES THAT THE ESTATE HAS MADE AT LEAST A *PRIMA FACIE* CASE FOR VICARIOUS LIABILITY 1

A. King County's Entire Argument on Vicarious Liability Consists of Nothing But Straw Men 2

B. King County Does Not Anywhere Address the Estate's Actual Vicarious Liability Case 6

1. Nor Does King County Address the Circumstantial Evidence Supporting the Estate's Vicarious Liability Claim 8

C. King County Does Not Anywhere Address Relevant Case Law on Vicarious Liability 10

D. Summary on Vicarious Liability..... 13

III. SUMMARY DISMISSAL OF THE ESTATE'S DIRECT LIABILITY CLAIMS WAS ERROR..... 13

A. The Public Duty Doctrine Does Not Apply to Either the Estate's Common Law Negligent Supervision Claim or the Estate's Direct Negligence Claim Under R2 Torts § 317 13

B. The Estate Has Established the Contested Elements of its § 317 Direct Negligence Claim..... 16

1.	King County's Duty to Mr. Harb Was to Safeguard Dangerous Instrumentalities	16
2.	King County Does Not Argue that the Estate Failed to Raise a Material Issue of Fact on Either Breach or Damages	18
C.	Direct Liability Under Common Law Negligent Supervision	19
D.	Other Arguments Applicable Only to Direct Liability Claims	20
1.	Duty: Liability for Criminal Acts of Others	21
2.	The Harm Was Foreseeable and Foreseen	22
3.	Causation Has Been Established	24
IV.	CONCLUSION	25

TABLE OF AUTHORITIES

Case Authority

<u>Bordon v. State,</u> 122 Wn. App. 227, 95 P.3d 764 (2004)	24-25
<u>Dickinson v. Edwards,</u> 105 Wn.2d 457, 716 P.2d 814 (1986)	5, 10, 11
<u>McNew v. Puget Sound Pulp & Timber Co.,</u> 37 Wn.2d 495, 224 P.2d 627 (1950)	2, 5, 7, 10
<u>Parilla v. King County,</u> 138 Wn. App. 427, 157 P.3d 879 (2007)	21
<u>Petersen v. State,</u> 100 Wn.2d 421, 671 P.2d 230 (1983)	16, 17, 21
<u>Poundstone v. Whitney,</u> 189 Wash. 494, 65 P.2d 1261 (1937)	5, 7, 10
<u>Rahman v. State,</u> 150 Wn. App. 345, 208 P.3d 566 (2009)	5, 10
<u>Schooley v. Pinch's Deli Market, Inc.,</u> 134 Wn.2d 468, 951 P.2d 749 (1998)	23
<u>State v. Graham,</u> 130 Wn.2d 711, 927 P.2d 227 (1996)	6
<u>Stiefel v. City of Kent,</u> 132 Wn. App. 523, 132 P.3d 1111 (2006)	14
<u>Taggart v. State,</u> 118 Wn.2d 195, 822 P.2d 243 (1992)	16
<u>Titus v. Tacoma Smeltermen's Union Local No. 25,</u> 62 Wn.2d 461, 383 P.2d 504 (1963)	2

Vollendorff v. United States,
951 F.2d 215 (9th Cir. 1991) 11-13

Statutory Authority

RCW 9.41.060(1) 7
RCW 9.41.050 7

Other Authority

Restatement 2d of Torts § 317 13, 15-19
Restatement 2d of Torts § 315 15-16, 17, 21
Restatement 2d of Torts § 319 15-16, 17, 21

I. UNDERSTANDING WHICH KING COUNTY ARGUMENTS APPLY TO WHICH ISSUES IS KEY

Analysis of the issues presented in this appeal requires an understanding of which King County arguments apply to which issues. There are two main issues presented: (1) King County's vicarious liability for Deputy Zana's negligence, and (2) King County's direct liability for its own acts and omissions. King County's response brief contains many arguments against reversing the trial court, but only indirectly identifies which issue arguments apply to. Each argument does not apply to all issues.

Neither in its summary judgment briefs nor in its appellate response brief does King County argue the public duty doctrine applies to the vicarious liability claim. It takes a close reading to determine that King County's public duty doctrine arguments only apply to the direct negligence claims—and not the vicarious liability claim. Response at 14, 16. The same is true for King County's arguments regarding duty, foreseeability, and causation. At 18-19 (duty), at 17 (foreseeability), and at 23 (causation).

II. THE EVIDENCE OF RECORD DEMONSTRATES THAT THE ESTATE HAS MADE AT LEAST A *PRIMA FACIE* CASE FOR VICARIOUS LIABILITY

Thus, on the estate's vicarious liability claim, only one issue

is presented: is King County vicariously liable for Deputy Zana's negligence? Vicarious liability depends on whether Deputy Zana was acting within scope of his employment as a King County Sheriff's Deputy. Titus v. Tacoma Smeltermen's Union Local No. 25, 62 Wn.2d 461, 383 P.2d 504 (1963). The test is whether Deputy Zana was "directly or indirectly serving his employer" when he routinely loaded his "off-duty" firearm with KCSO-issued ammunition, and brought it into his home to facilitate being armed when meeting his "off-duty" obligations. McNew v. Puget Sound Pulp & Timber Co., 37 Wn.2d 495, 497-98, 224 P.2d 627 (1950).

The estate submits that the record evidence demonstrates Officer Zana did these things in order to meet his general common law duty and his employer's expectations to be prepared for a police response and to protect himself even when he is "off-duty"—and that in doing so Deputy Zana was behaving in a way entirely consistent with the long-standing custom and practice of all Washington police officers. Moreover, like all police officer employers in Washington, King County was aware of this custom and practice of its employees and authorized and encouraged it because it served King County's interests.

A. King County's Entire Argument on Vicarious

Liability Consists of Nothing But Straw Men

King County's briefing on the vicarious liability issue consists of nothing more than setting up a factual "straw man" and then applying an equally "straw man" version of Washington law. Because King County only argues against these "straw man" creations, it never addresses the relevant facts, the controlling law, or the estate's actual argument on the vicarious liability issue.

King County argues that "Harb claims that Mr. Zana was acting within the scope of his employment when Mr. Bistryski killed Mr. Harb. It is unclear how this could be so, given that Mr. Zana was off duty and in bed when Bistryski feloniously stole Mr. Zana's personal handgun and then murdered Mr. Harb." At 7. This straw man is easily shown to be what it is. First, the estate has never argued that the appropriate time frame is the moment when Mr. Harb was killed. In fact, the estate specifically argued to the trial court that this was *not* the pertinent time-frame, as did defendant Chestnut Hill Associates. Rather, as in its opening brief (29-30), the estate argued the relevant time frame was when Deputy Zana left his weapon loaded with KCSO ammunition unsecured in the home he shared with Mr. Bistryski. CP 134-35, 337, 314-15.

Second, King County's logic is, well, illogical. The relevant

time frame is almost never when the harm occurred, but when the negligence occurred. Applying King County's "logic" to a highway design case, a government would be vicariously liable for its highway engineer's negligence only if the harm occurred during normal work hours. Any harm occurring at night, on weekends, or on holidays would occur when the engineer was "off-duty," so there would be no vicarious liability in those instances. Of course, that is not the law because the law is not absurd. The estate's vicarious liability claim appropriately focuses on the negligent acts and omissions of Deputy Zana which caused Mr. Harb's death, and the manner in which they relate to his employment.

King County then sets up another straw man, claiming its manual "prohibits deputies from getting involved in incidents while off duty, particularly in their own neighborhoods." At 9. This is misleading. The actual manual provision provides that when "the situation could possibly result in someone being injured or a loss of or damage to property" then "off-duty" officers should get involved. CP 293. This is further demonstrated by the next subsection providing that "in all other situations" officers should just call the police. Thus—as the estate has argued all along—Sheriff's Deputies are expected to be prepared when "off-duty" to intervene

when they encounter the possibility of injury or property damage.

King County's next straw man reduces the estate's vicarious liability argument to a single sentence lifted from a long discovery answer, thereby completely ignoring the estate's full marshaling of all facts of record and all case law supporting the estate's vicarious liability argument. Cf. Response at 7-8 to Opening at 20-36.

King County's next straw man is its presentation of Washington law on of "scope of employment" for vicarious liability purposes. At 8. King County limits its description of Washington law to a misleading quote from the case of Rahman v. State, 150 Wn. App. 345, 350 P.2d 566 (2009). This quote is misleading because it implies that the Rahman Court held that a plaintiff must prove that the employee was engaged in "duties required of him by his contract of employment, or by specific direction of his employer"—when in actuality the Rahman Court held no such thing. In fact, the Rahman Court went on to cite, quote, and discuss at length all of the Washington case law favorable to the estate cited in the estate's brief. Id. at 351, 356, 357 (McNew); at 352, 356 (Dickinson); at 355-57 (Poundstone). Ultimately, the only case relied upon by King County, Rahman, reversed and entered summary judgment for the plaintiff claiming vicarious liability—

based on the authorities relied on by the estate. Id. at 359.

This is King County's entire vicarious liability argument. That King County puts all its eggs in the "straw man" basket shows how weak King County's case on vicarious liability really is.

B. King County Does Not Anywhere Address the Estate's Actual Vicarious Liability Case

Nowhere in its appellate response brief does King County address the estate's actual vicarious liability argument. The estate's argument on the vicarious liability issue has been fully explained in the estate's response to King County's summary judgment motion, CP 132-36, in the estate's motion for reconsideration, CP 336-40, and in the estate's opening appellate brief. At 20-36. King County's utter failure to address the substance of the estate's position seems like a concession that it has no legitimate basis to contest the estate's arguments.

In summary, the estate has argued throughout as follows:

- Police officers have a common law duty to act as police officers at all times—even when "off-duty." State v. Graham, 130 Wn.2d 711, 718, 927 P.2d 227 (1996) ("Under the common law, a police officer on "off-duty" status is not relieved of the obligation as an officer to preserve the public peace and to protect the lives and property of the citizens of the public in general.") ("police officers are considered to be under a duty to respond as police officers 24 hours a day") ("We hold that an off-duty police officer is a public servant").

- This duty and obligation is reflected in both employer expectations and police officer custom and practice, under both of which police officers in Washington arm themselves when "off-duty" in order to 1) be prepared to respond as police officers and 2) protect themselves from job-related threats to their safety. CP 261-63, 163:7-9, 164:6-7 and 12-14, 305, 293.
- In recognition of this duty and the manner in which police officers carry it out, police officers are authorized by the Legislature to carry concealed weapons at all times, without an otherwise-required permit. RCW 9.41.050, RCW 9.41.060(1).
- In order to facilitate being armed when "off-duty," police officers bring firearms into their homes. These "off-duty" weapons must be loaded with KCSO-issued ammunition. CP 164.
- Thus, police officers bringing firearms into their homes for use when "off-duty" is:
 - 1) "incidental to the acts expressly or impliedly authorized" by the employer, Poundstone v. Whitney, 189 Wash. 494, 499, 65 P.2d 1261 (1937)
 - 2) "directly or indirectly serving his employer," McNew, 37 Wn.2d at 497-98, and
 - 3) "the purpose of serving the employer's business actuates the employee to any appreciable extent." Id.

The estate submits that the record evidence supports not just one but all three of the alternative standards constituting a *prima facie* case of vicarious liability. In fact, the evidence of record is so one-sided that no reasonable jury could find that Deputy Zana's actions related to his "off-duty" weapon was *not* related to his job as a Deputy Sheriff, and therefore summary judgment should have been entered in the estate's favor.

1. Nor Does King County Address the Circumstantial Evidence Supporting the Estate's Vicarious Liability Claim

In addition to the direct evidence above, there is also substantial circumstantial evidence showing vicarious liability.

First, there is the fact that prior to Mr. Harb's murder, King County supervisors got intimately involved on numerous occasions in what it now claims as Deputy Zana's private affairs which are unrelated to his employment and beyond its ability to control. King County got involved in Deputy Zana's lending his private automobile to Mr. Bistryski—instructing Deputy Zana not to let Mr. Bistryski use his car. CP 182, 50:8-9. King County got involved in Mr. Bistryski's mental health treatment and alcohol abuse, instructing Deputy Zana to end their relationship if Mr. Bistryski did not comply with treatment or if he continued drinking. CP 215-17. Finally, King County got involved in how Deputy Zana secured weapons in the home he shared with Mr. Bistryski. CP 229. Nowhere does King County explain how the events leading up to Mr. Harb's murder could be unrelated to Deputy Zana's employment, when all of the above precursors to that event are so related to his employment to warrant such extensive, ongoing intervention. That is because it cannot be done.

Second, in addition to the events prior to Mr. Harb's murder, the actions of Deputy Zana on the night of the murder constitute circumstantial evidence that "off-duty" actions can most definitely be within the scope of his employment. After he heard the first shot, Deputy Zana got out of bed and got himself intimately involved in the police response, accessing police radio communications and ultimately disarming and arresting Mr. Bistryski. CP 75-76, 271-72. Nowhere does King County explain how these actions can be reconciled with King County's position that "off-duty" and "at home in bed" categorically preclude employment-related activities. That is because it cannot be done.

Third, Deputy Zana was subject to employer discipline for what King County now claims are "off-duty" actions. These "off-duty" actions include a public presentation at a non-approved seminar, but are primarily based on his relationship and dealings with Mr. Bistryski, the events preceding Mr. Harb's death, and the events which unfolded surrounding Mr. Harb's death. CP 283-84. Nowhere does King County explain how Deputy Zana's actions resulting in termination¹ can be reconciled with King County's position that everything related to Mr. Bistryski, an "off-duty"

weapon loaded with KCSO ammunition, and Mr. Harb are so completely unrelated to employment that there is no vicarious liability. That is because it cannot be done.

C. King County Does Not Anywhere Address Relevant Case Law on Vicarious Liability

As noted above, King County in its response brief cited only Rahman as the test for determining vicarious liability, and ignored the extensive case law relied on by the estate—McNew, Poundstone, and Dickenson.

The McNew standards (supra at 7) are much different than King County sets forth and argues. Nowhere does King County even try to argue that the facts do not meet the McNew test, nor explain how the estate's arguments that the record evidence easily satisfies this test are somehow flawed. King County simply offers nothing in its briefing on this controlling authority.

Likewise, the Poundstone test (supra at 7) is a much different standard than King County sets forth and argues. Nowhere does King County even attempt to argue that the facts of record here do not meet the Poundstone test, nor explain how the estate's arguments that the record evidence easily satisfies this test

1 Deputy Zana ultimately resigned in lieu of termination.

are somehow flawed. King County simply offers nothing.

Nor did King County address the Supreme Court's holding in Dickinson that a *prima facie* case of vicarious liability is established when there is evidence that employee's attending an off-hours banquet served the employer's interests in enhancing employee relations and its expense was deducted as a business expense. As discussed in the estate's opening brief, there are persuasive parallels between the facts here and in Dickenson. Yet King County did not even mention the Dickinson case, let alone attempt to argue that the facts of record here are distinguishable or that the estate's reliance on Dickinson is misplaced. King County simply offers nothing in its briefing on this controlling authority.

The estate also relied heavily on the Vollendorff case. In Vollendorff, the 9th Circuit held that a *prima facie* case for vicarious liability is established by evidence showing that an Army officer, required for a tropical tour of duty to take over several weeks an anti-malaria medication that is extremely toxic to children, took the medicine home, transferred it out of the child-proof container, and left it on his kitchen countertop. Thus, the employer was vicariously liable to his granddaughter, who was permanently brain-damaged from ingesting one of the pills when in the house while the

employee was on vacation.

King County briefly addressed Vollendorff, at 10, but in a way that is completely irrelevant. King County's only argument is that Vollendorff is distinguishable because the employee was *required* to take the medicine by his employer, and according to King County, Deputy Zana was not *required* to be armed while "off-duty." Even if the estate conceded that being armed while "off-duty" was not *required* (despite all the conflicting evidence), King County's argument entirely misses the point.

The vicarious liability test applied by the Vollendorff Court was "if the purpose of serving the employer's business actuates the servant to any appreciable extent, the employer is vicariously liable for conduct of the employee within the agency, even if the predominant motive of the employee is to benefit himself or a third party." 951 F.2d 215 at ¶ 23. The Vollendorff Court had no difficulty concluding that when an employer required certain actions, the employee's compliance was actuated to an appreciable extent by the employer's business purposes. Vollendorff in no way stands for the proposition (or cites Washington law as requiring)—as King County would have it—that for vicarious liability the employee must be meeting a *requirement* of the employer.

King County's argument that Vollendorff is distinguishable would only carry weight if the relevant test for vicarious liability was an employer requirement. Since that is not Washington law and has not been since before WW II, King County's argument is misplaced. Moreover, as recited in the estate's opening brief, the Vollendorff Court went on to address each of the defendant's arguments about the time of, the place of, and the extent of personal preferences in the employee's actions—the same arguments made by King County in this case—and rejected them all on long-standing Washington law. King County did not address any of these points in its response brief.

D. Summary on Vicarious Liability

King County has utterly failed to address the substance of the estate's case on vicarious liability. The estate submits that King County has in effect conceded the merits of the estate's case that King County should be held vicariously liable as a matter of law.

III. SUMMARY DISMISSAL OF THE ESTATE'S DIRECT LIABILITY CLAIMS WAS ERROR

A. The Public Duty Doctrine Does Not Apply to Either the Estate's Common Law Negligent Supervision Claim or the Estate's Direct Negligence Claim Under Restatement 2d Torts § 317

King County argues the trial court properly dismissed the

estate's direct liability claims because they are barred by the public duty doctrine. This is incorrect. As noted in the estate's opening brief, whether the public duty doctrine applies depends on whether or not the governmental entity's actions at issue are "governmental functions." "Governmental functions are those generally performed exclusively by governmental entities." Stiefel v. City of Kent, 132 Wn. App. 523, 529, 132 P.3d 1111 (2006)

As also noted in the estate's opening brief, determining whether a function performed by government is exclusively a governmental function is an exercise in labeling. King County labels the function at issue here as "supervising deputy sheriffs," which of course is only done by governments. At 15. But it is at least as accurate to label the function at issue here as "supervising employee safeguarding of entrusted dangerous instrumentalities," which is not something done solely by governments.

King County does not anywhere explain why its label should be adopted by this court over the estate's label, nor why selecting its label would better comport with Washington case law. As argued in the estate's opening brief, describing the function at issue here narrowly best fits with Washington case law on this issue. At 48-49. Were this a case involving obvious police-only functions—

functions—SWAT team tactics, law enforcement priorities, vehicle chase policies—then King County would have a good point. But this case does not involve police policy or tactics—it involves making sure dangerous instrumentalities entrusted to employees for use in their jobs are secured against falling into dangerous hands. There is nothing unique about that function, nor has King County shown that any policy, procedure, or practice essential to police operations would be affected by ensuring dangerous instrumentalities do not create danger in outside hands. Because securing dangerous instrumentalities is not something only governments do, the public duty doctrine does not apply to either of the estate's direct negligence claims against King County.

Even if the public duty doctrine does apply, there are exceptions. The estate agrees that, if the public duty doctrine applies because the label applied to the action at issue is "performed exclusively by governmental entities," then the result is dismissal of the estate's common law negligent supervision claim, because no exceptions apply to that claim.

But that is not true regarding the § 317 claim. King County argues there is no public duty doctrine exception here because there is no "special relationship" (as defined in the § 319 negligent

supervision cases). King County is simply wrong. Washington adopted the general rule of § 315. Petersen v. State, 100 Wn.2d 421, 426, 671 P.2d 230 (1983). In doing so, Washington also adopted §§ 316-320, which are specific circumstances under which the general rule of § 315 apply. Taggart, 118 Wn.2d at 219.² Moreover, *all* Washington cases applying § 315 have held that there is an exception to the public duty doctrine for these kinds of cases. Id. at 218. Because § 315 has been adopted by the Supreme Court and held to be an exception to the public duty doctrine, and because § 317 is merely another circumstance under which the general rule of § 315 applies, then the public duty doctrine does not apply to § 317 cases like this one. King County simply did not even address this argument.³

B. The Estate Has Established the Contested Elements of its § 317 Direct Negligence Claim

1. King County's Duty to Mr. Harb Was to Safeguard Dangerous Instrumentalities

First, King County asserts it had no duty to Mr. Harb

² "In the Restatement (Second) of Torts, sections 316 through 320 define various "special relations" that, in accordance with the general principle stated in § 315, give rise to a duty to control a third person."

³ It should also be noted that King County does not assert or argue that § 317 does not apply in Washington or has not been adopted into Washington law.

individually because it had no relationship with Mr. Harb. At 16. But King County ignores the fact that in § 315 cases—which include both § 319 "negligent supervision" cases and § 317 cases like this one—the duty owed is to everyone. Peterson, 100 Wn.2d at 429 ("the scope of this duty is not limited to readily identifiable victims, but includes anyone foreseeably endangered.").

Second, King County asserts that no dangerous instrumentality was involved here, and therefore under § 317 it had no duty to Mr. Harb. The assertion is that the KCSO-issued ammunition which Deputy Zana loaded into his "off-duty" weapon is not dangerous until it is in a gun. This argument is misplaced. It cannot reasonably be argued that firearm bullets are not dangerous. Bullets are legally recognized as being dangerous, otherwise why else would hollow-point bullets be illegal? Moreover, the mere fact that bullets must be combined with a gun does not change the analysis. Under this logic, a gun is not dangerous either because it needs bullets to operate. Carrying this to its logical conclusion, no loaded gun is ever dangerous until combined with an ill-intentioned person. In other words, "guns don't kill people, people do." This faulty reasoning would force one to conclude that even poisons and environmental toxins are not

dangerous, because a person or the environment must be exposed to them before they can do any harm. What makes an instrumentality dangerous is the harm it can do in the wrong hands, and bullets in the wrong hands are dangerous because they create the means by which people are empowered to kill.

Third, King County argues that § 317 does not apply because it "could not 'control' Mr. Zana's private life, much less his domestic partner's private life." This is another red herring. The estate is not arguing that King County is under any duty to "control" every aspect of the lives of Deputy Zana and/or Mr. Bistryski. Rather, it is arguing that King County had a duty to control how Deputy Zana managed the dangerous ammunition King County required him to use in the "off-duty" weapon Deputy Zana used to meet his "off-duty" obligations as a police officer, CP 164, *i.e.*, to prevent its getting into the wrong hands. The estate introduced evidence that King County did have the ability to control how its officers secured the ammunition KCSO provided. CP 165, 304. Thus, under § 317, there is a duty to ensure that Deputy Zana did not expose others to danger by mishandling KCSO ammunition.

2. King County Does Not Argue that the Estate Failed to Raise a Material Issue of Fact on Either Breach or Damages

Negligence liability requires duty, breach, causation and damages. King County only argued it had no duty under § 317—it did not argue that, even if it did have such a duty, there was no breach. Thus, whether there is record evidence on King County's breach of § 317 is not at issue in this appeal. Nor does King County argue that the estate has failed to prove damages. King County's argument on causation will be addressed below.

C. Direct Liability Under Common Law Negligent Supervision

King County argues the estate's common law negligent supervision claim should be dismissed because Deputy Zana's "off-duty" activities are "outside the scope" of its duty to supervise him. At 24-25. But as discussed above regarding vicarious liability, Deputy Zana's "off-duty" activities at issue here are in fact intimately related with his job as a police officer. Moreover, KCSO supplied the ammunition used by its employee to meet his "off-duty" obligations, and there is no claim that it could not control how its employees handled KCSO-issued ammunition.

King County next argues at length about constitutional limitations to its ability to "intervene" in the Zana-Bistryski relationship or put an end to it. In making these arguments, King

County conveniently ignores the fact that, prior to Mr. Harb's death, it intervened in these areas, "counseled" Deputy Zana about these things, and threatened Deputy Zana with violations if he kept it up. Deputy Zana changed nothing, King County did nothing, and Mr. Harb was killed. Then, after Mr. Harb's death, King County punished Deputy Zana with termination for exactly the things King County now claims it has no power over.

Moreover, the estate's police policies, practices, and procedures expert—who has extensive local experience supervising police officers—opines that King County could and should have intervened in the relationship to eliminate the danger of Mr. Bistriski accessing dangerous weapons, and at the very least could and should have required Deputy Zana to only bring duty-related weapons and ammunition (including weapons used to meet "off-duty" obligations) into the home he shared with Mr. Bistriski if they were kept in a lock-box or otherwise kept away from Mr. Bistriski's access. CP 165. King County cites no case holding that a police agency is constitutionally precluded from taking such steps to preclude a violent, dangerous, mentally unstable felon from accessing loaded firearms used by a police officer.

D. Other Arguments Applicable Only to Direct

Liability Claims

1. Duty: Liability for Criminal Acts of Others

King County argues the general rule in Washington is that liability cannot attach for the criminal acts of others unless an exception applies, and no exception applies here. But King County's argument was considered and rejected in the very case King County cites as authority!

Thus, in keeping with the general rule that an individual has a duty to avoid reasonably foreseeable risks, if a third party's criminal conduct is reasonably foreseeable, an actor may have a duty to avoid actions that expose another to that misconduct. . . [This rule] allows the imposition of a duty only when the risk of harm is recognizable, and only when a reasonable person would have taken the risk into account.

Thus, King County's contention that a duty to guard against the criminal conduct of a third party may only arise when there exists a special relationship between either the actor and the criminal third party, or between the actor and the victim of that criminal conduct, fails.

Parrilla v. King County, 138 Wn. App. 427, 437, 157 P.3d 879 (2007). Moreover, King County ignores the fact that almost every § 315 case considered by higher courts in Washington (primarily § 319 cases) has involved a third party criminal act, and this has never meant there was no duty. See, e.g., Peterson, supra.

2. The Harm Was Foreseeable and Foreseen

King County argues Mr. Bistryski taking Deputy Zana's weapon and using it to commit murder was unforeseeable as a matter of law. This argument is without merit. The record evidence amply demonstrates the foreseeability of Mr. Bistryski's violence and of his access to Deputy Zana's weapons. It shows that Mr. Bistryski was violent, was violent against others, was convicted of felony theft of guns to use against others, and was unstable due to a serious mental health condition. It also shows that Deputy Zana used poor judgment, failed to recognize the danger created by his poor judgment, used especially poor judgment when an object of his affection was involved, and did not store his guns and ammunition in a lock box or a safe in his home. This is more than enough to demonstrate that the combination of Mr. Bistryski and Mr. Zana's loaded weapons would result in violence and tragedy.

But beyond its foreseeability, there is the record evidence that what happened here was *actually foreseen* by King County. Both times Mr. Bistryski attempted suicide before Mr. Harb's death he violently attacked the responding King County officers. CP 208; 222-26. This led one of the responding officer's to conclude:

A copy of this incident was provided to the Mental

Health Professionals at Harborview with the recommendations of committing Christopher so he can get the help he needs. This is an ongoing pattern [of] suicide attempts and **dangerous confrontations with citizens and police. Christopher is clearly a major danger to himself as well as to others.**

CP 224.⁴ In response to Mr. Bistryski's actions, KCSO Sergeant

Keeney spoke with Deputy Zana:

I strongly suggested that he might want to consider obtaining another roommate because of Bistryski's unstable mental capacities. **I went on to ask him if he had a gun safe or lock box in the residence. Zana replied that he did not.** I remember suggesting that he invest in a lock box . . . I further suggested that Zana lock his police equipment in the trunk of his patrol car until he could obtain a lock box.

CP 229. Sgt. Keeney also discussed with Deputy Zana Mr.

Bistryski's felony convictions. After this episode, Deputy Zana filed a statement, which concluded (CP 231):

Christopher is clearly a danger to himself and obviously to others.

Finally, King County's argument ignores Washington law to the effect that foreseeability does not require perfect foresight of exactly what will take place, but merely a recognizable general field of danger. Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d 468, 478, 951 P.2d 749 (1998). The harm that befell Mr. Harb was

plainly foreseeable, and was actually foreseen by KCSO personnel.

3. Causation Has Been Established

King County argues the estate has no evidence on causation but instead relies on speculation, citing and discussing at length Bordon v. State, 122 Wn. App. 227, 95 P.3d 764 (2004). But Bordon was a case about the lack of required expert testimony, and so has no relevance here. In Bordon, the plaintiff's causation theory was that, had the DOC properly informed the trial court about all or even most of the killer's criminal supervision violations, the killer would have been in jail and would not have killed his victim. The Bordon Court held that determining what the court would have done with complete information about the criminal's supervision violations was not within the common experience or knowledge of the jury, and therefore expert testimony was required to make a *prima facie* case. Without it, the jury was forced to speculate, so plaintiff's case failed.

Bordon has no relevance here because the question of whether or not Mr. Bistryski's access to Deputy Zana' loaded firearm was a proximate cause of Mr. Harb's death is not beyond

4 Cf. King County's claim that it "is undisputed" that King County did not know Mr. Bistryski had used violence against others. Response at 28.

the understanding of the jury absent expert testimony. The undisputed facts that Mr. Bistryski killed Mr. Harb with a firearm, that he had no other weapons available to him when he attacked Mr. Harb, and that he was a small, slight person unable to kill with his bare hands, are more than enough evidence to prove that "but for" access to the loaded firearm he would not have killed Mr. Harb.⁵ No expert testimony is required for a jury to understand and apply these facts and to make an informed decision on causation.

IV. CONCLUSION

Based on Washington law and the demonstrated facts of the case, the Estate of Harb respectfully requests that this court reverse the trial court's summary judgment orders dismissing the estate's vicarious liability and direct liability claims against King County, and remand with either instructions to enter summary judgment for the estate or for trial.

Respectfully Submitted on OCT 1ST, 2010.

HAWKES LAW FIRM, P.S.



Kevin M. Winters, WSBA 27251
Attorneys for Appellant Estate of Harb

⁵ In addition, despite multiple physical altercations involving Mr. Bistryski at the bar that night, he did not kill anyone else. In fact, he got the worst of the violence. CP 73.

FILED
COURT OF APPEALS DIV. I
STATE OF WASHINGTON
2010 OCT -4 AM 10:32

**COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON**

ESTATE OF HARB, vs. KING COUNTY,	Appellant,	No. 64833-1-I
Respondent.		DECLARATION OF SERVICE OF APPELLANT'S REPLY BRIEF

ORIGINAL

COMES NOW the undersigned and declares under penalty of perjury under the Laws of the State of Washington as follows:

1. I am of legal age, have personal knowledge of the facts set forth herein, and am competent to testify.
2. I am an employee of Hawkes Law Firm, P.S., 19929 Ballinger Way N.E., Shoreline, WA 98155, attorney of record for appellant in this matter.
3. Per RAP 18.6(b), on October 1, 2010, I sent by U.S. mail, first class postage prepaid, an original and one copy of the Reply Brief of Appellant Estate of Harb, addressed to:

Court of Appeals, Division I
One Union Square
600 University Street
Seattle, WA 98101-4170

4. Per RAP 18.6(b), on October 1, 2010, I sent by U.S. mail, first class postage prepaid, a true and correct copy of the Reply Brief of Appellant Estate of Harb to counsel of record for all parties, addressed as follows:

Attorneys for Respondent King County
Kristofer J. Bundy, WSBA 19840
John W. Cobb
500 Fourth Ave., Ste. 900
Seattle, WA 98104
206-296-8820

DATED at Shoreline, Washington on October 1, 2010.


Kevin M. Winters
Kevin M. Winters