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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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CECILIA BURTON  
Appellant,

v.

CITY OF SPOKANE  
Respondent.

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**APPELLANT'S REPLY BRIEF**

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## RESTATEMENT OF THE CASE

Cecilia Burton, Appellant, has sued the City of Spokane and its Police Department for failure to release to her the property of her son, Melvin Rouse II, who was killed in what is reported as a homicide on the date June 26, 2016. Her complaint in this case alleges claims of the torts of conversion, intentional infliction of severe emotional distress, and negligence. CP 2-5.

Ms. Burton has engaged in an uneven and fruitless struggle with the Spokane Police Department in a lengthy effort to recover her dead son's property, which included a wallet, jewelry and a number of other personal items. CP 2-5. The Spokane Police Department refused to return those items to her. Instead, it has, through the City of Spokane, filed a motion to dismiss this action pursuant to CR 12(b)(6), alleging that Ms. Burton's complaint fails to state a claim upon which relief may be granted. The City has interposed no denials, no affirmative defenses, no sworn statements, or any factual disclosure supporting its motion. Instead, it has elected to rest its argument solely on the wording of the complaint.

As noted below, the basis for the motion is simply the bald assertion by the City's attorney that the law enforcement investigation exemption of Washington's Public Records Act, Chapter 42.56, allows the police to withhold the property of Ms. Burton's son. A second argument

addresses a perception of the duties owed by the police department to an unknown and presently hypothetical criminal defendant. Against Ms. Burton's claims as a survivor of a victim of crime, the City invokes, vicariously for her son's murderer, the 14th Amendment's counsel that the police must take efforts to preserve for prosecution, what it seems to claim, as material exculpatory evidence. What actual exculpatory evidence is claimed to exist is presently a mystery to Ms. Burton.

### **ARGUMENT**

#### **A. AN ATTORNEY'S COMMENTS IN A BRIEF SHOULD NOT BE CONSIDERED AS FACT BY THE COURT IN A CR 12(b)(6) HEARING**

An attorney's argument in a brief is not a substitute for presentation of a cognizable basis for that proponent's choice of a CR 12(b)(6) motion. As noted in Ms. Burton's initial brief, she, and not the City/Movant, is entitled to offer hypothetical facts in her rejoinder to the CR 12(b)(6) motion. Appellant's Brief, p.7. Counsel for the Police Department is not entitled to offer hypothetical explanations for police behavior at this stage of the proceedings. Defense counsel's rebuttal to Ms. Burton's claims of intentional and injurious disregard of her request for return of her son's property is based upon an unsupported statement that there is an open and active homicide investigation in Ms. Burton's son's case. Respondent's Brief, p.3. Counsel's comment is not under oath,

is not a statement made by the police department, and should not be considered as a cognizable response supporting the City's motion.

Ms. Burton objects to the attempt to have the attorney speak for the client and moves to strike that assertion from the City's argument. Without verification in the form of a declaration or affidavit, references to a police investigation should not be considered as validating the City's abstract claim of an investigative exemption to release of property. That law enforcement investigative privilege or exemption has not been formally injected as a defensive pleading in this case.

**B. THE LAW ENFORCEMENT EXEMPTION TO THE PUBLIC RECORDS ACT DOES NOT APPLY TO THE PERSONAL EFFECTS OF MELVIN ROUSE II**

There is an appreciable distinction between what are "records" and what are "things". The body of Melvin Rouse II should not be considered a "public record". Nor should his jewelry, wallet, and other personal effects be considered "public records". The City offers the wording of RCW 42.56.240 to suggest that the law enforcement investigative exemption in Washington's Public Records Act as a bar to recovery of her son's property by Ms. Burton, a survivor of a victim of crime. Reliance is placed on the provision which protects from disclosure to the public:

- (1) Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to

discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy.  
RCW 42.56.240(1).

Why intentional withholding of all of the personal property of Mr. Rouse should be considered “essential to effective law enforcement” is devoid of explanation. Moreover, that investigative exemption applies only to what can be considered ‘public records’ under the wording of the Public Records Act. In RCW 42.56.010(3), the definition of “Public Record” is limited to “any writings”.

What are “Writings” for purposes of the Act is further defined by RCW 42.56.010(4) as “handwriting, typewriting printing, photostating, photographing, and every other means of recording”. There is a clear dichotomy between what is addressed by the exemption and what is requested by Ms. Burton: the unambiguous distinction between “records” and “things”. The City has presented no reason or precedent explaining why employment of the Public Records Act and a Public Records exemption, which must be strictly construed, should abet the etymological leap from “public records” to physical items of personal property.

Aside from the question of whether RCW 42.56.240 applies to physical things, that occasion for expansion of the exemption has not been supported by the Defendant in any affirmative, evidentiary, or precedential

manner. Support for textual metamorphosis of the exemption at this stage in the proceedings is offered by analogy only. This approach is not compatible with the legislative mandate that the Public Records Act “shall be liberally construed and its exemptions narrowly construed...” RCW 42.56.030. The Washington Supreme Court has held that the law enforcement investigative exemption does not apply categorically to an investigation file where a request has been made under the Public Records Act for revelation of investigative information. *Sargent v. Seattle Police Department*, 179 Wn.2d 376, 314 P.3d 1093 (2013). That case cautions that the Public Records Act requires narrow construction of that Chapter’s exemptions. As the court indicated “disclosure is therefore mandated unless the agency can demonstrate proper application of the statutory exemption to the specific information; the agency bears the burden of proof.” *Id.* at 385. That court went on to state “we simply hold that the SPD had the burden to parse the individual documents and prove to the trial court why nondisclosure was essential to effective law enforcement.” *Id.* at 390. The City has not borne its burden of proving that its “parsings” survive the mandates of the Act.

In assessing the sufficiency of a claim of the law enforcement exemption in the public records context, reviewing courts have looked to “(1) “affidavits by people with direct knowledge of and responsibility for

the investigation...”; (2) whether resources are allocated to the investigation; and (3) whether enforcement proceedings are contemplated.” *Newman v. King County*, 133 Wn.2d 565, 573, 947 P.2d 712, 716 (1997) (citing *Dickerson v. Department of Justice*, 992 F.2d 1426, 1431-32 (6th Cir. 1993)). As the *Newman* court noted, this type of inquiry “requires an agency to explain why documents fall within the exemption and provide a basis to define the scope of the exemption.” *Id.* at 573. An attorney’s comments in a brief do not satisfy that obligatory exposition.

Even assuming for purposes of argument that the Public Records Act applies in this instance, the City has not attempted to shoulder its burden of “parsing” the “documents” which it chooses to withhold from Ms. Burton. At this stage of the proceeding an affirmative claim of exemption is aethereal. The Washington Supreme Court has reviewed the question of what constitutes a “claim of exemption” under RCW 42.56.550(6). It made clear that there must be a detailed elaboration of what records are being withheld and which individual exemption applies to the records. *Rental Hous. Ass’n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 537, 199 P.3d 393 (2009). That kind of elaboration is non-existent in this case. In *Rental Housing*, failure to affirmatively assert and identify sufficiently a claim of exemption was found to override the

one-year statute of limitations applicable to a claim under the Public Records Act. As the court stated, “a valid claim of exemption under the PRA should include the sort of ‘identifying information’ a privilege log provides.” *Id.* at 538. Additionally, in regards to the investigative exemption, there must be a showing that the relevant investigation is “open and active.” *Newman v. King County*, 133 Wn.2d. 565, 574, 947 P. 2d. 712 (1997);

The reviewable record is devoid of any showing that the police investigation of the of the death of Melvin Rouse II, if open, is in any way active. One might reasonably assume that were the initial investigation to have been at some point both open and active, then efforts to obtain fingerprint evidence or DNA evidence from the property of Melvin Rouse would have been undertaken. If forensic testing has been performed, those results might provide some heft to the City’s 14th Amendment argument. However, there is no showing that forensic testing, and results, have been accomplished. If no usable forensic evidence has been obtained by the police, the 14th Amendment argument becomes even more speculative and the “active investigation” would seem to have become inert.

**C. THERE IS NO PRESENT SHOWING OF POTENTIAL VIOLATION OF A CONSTITUTIONAL DUTY TO PRESERVE MATERIAL EXCULPATORY EVIDENCE**

The City argues, without legally cognizable support, that compliance with Ms. Burton's requests for her dead son's personal items may have the potential to violate the 14th Amendment's proscriptions against failure to preserve material exculpatory evidence. The City interposes the defenses of a hypothetical defendant in a hypothetical criminal prosecution at the emotional expense of Ms. Burton. It is clear that there exists a duty incumbent on the prosecution, in an actual prosecution, "to disclose material exculpatory evidence to the defense and a related duty to preserve such evidence for use by the defense." *State v. Wittenbarger*, 124 Wn.2d 467, 475, 880 P.2d 517 (1994) (citing *California v. Trombetta*, 467 U.S. 479, 81 L.Ed.2d 413, 104 S. Ct. 2528 (1984)). That duty is "limited to evidence that might be expected to play a significant role in the suspect's defense." *Trombetta*, supra at 488. This "duty of preservation is not an absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." *Wittenbarger*, supra at 475. Material evidence "must both possess an exculpatory value that was apparent before it was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *State v. Armstrong*, 188 Wn.2d 333, 345, 394 P.3d 373, 379 (2017) (citing *Trombetta*, supra 467 U.S. at 489). Failing to preserve evidence by the

police is not a denial of due process unless a hypothetical defendant at trial can show bad faith by the prosecuting authorities. *Trombetta*, supra at 477.

A case from the Ninth Circuit assesses the application of the bad-faith standard with regard to preserving evidence. *Cunningham v. City of Wenatchee*, 345 F.3d 802 (9th Cir. 2003). In that case, the Ninth Circuit found that the failure of the police to collect for forensic purposes, physical evidence such as a victim's bedsheet and her clothing, was not constitutionally fatal. *Id.* at 812. That court noted that though the investigation might have been negligent or incomplete, it was not conducted in bad faith.

The United States Supreme Court has determined that failure to preserve a swab containing semen samples from a sodomized child rectum did not constitute failure to perform a prosecutorial duty to preserve evidence. *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L.Ed.2d 281 (1988). In *Arizona*, a semen sample taken from a victim was found to be insufficient for comparison with a sample from an actual defendant. The forensic tests taken were inadequate and unsuccessful and therefore inconclusive in identifying the actual assailant. *Id.* at 54. The United States Supreme Court found that in the absence of a showing of bad faith on the part of the police, there was no constitutional infirmity. *Id.*

at 58. In the present case the police have failed to show why the withheld property has any exculpatory potential.

In the present case, the City seems to assert the position that it has no duty to assert whether there is any actual or potential material exculpatory evidence on the personal effects of Melvin Rouse II. That position, presented without an affirmative showing of investigative utility of the property, does not sustain the City's burden of providing the court with a rationale for granting the motion to dismiss Ms. Burton's complaint.

**D. APPELLANT'S STATUTORY AND CONSTITUTIONAL RIGHTS AS A VICTIM OF CRIME SHOULD BE RECOGNIZED**

Washington's Constitution and state legislation require, at the least, that law enforcement agents make a reasonable effort to ensure that victims, survivors of victims of crimes are accorded certain rights. RCW 7.69.030; Const. art. I, § 35. One of those rights is described:

“to have any stolen or other personal property expeditiously returned by law enforcement agencies or the Superior Court when no longer needed as evidence. When feasible, all such property, except weapons, currency contraband, public property subject to evidentiary analysis, and property which ownership is disputed, shall be photographed and returned to the owner within 10 days of being taken.”  
RCW 7.69.030(7).

That statutory duty owed to Ms. Burton should involve explanation to Ms. Burton of the evidentiary need for the property. The record is devoid of any affirmative evidentiary showing of need or justification for refusing to return her son's property to her. Without some showing of the evidentiary need to deny Ms. Burton property, which may be precious to her alone, the City is in a position of asking the Court to accept speculation as a basis for denying a survivor of a victim of crime her statutory rights to the metaphorical remains of her son.

The argument of the duty of preservation of exculpatory evidence currently comes as hypothetical: that the property *could* provide exculpatory evidence in the case of a future homicide investigation and prosecution. How and why specific items of property are reasonably deemed exculpatory is simply not addressed by the City.

### **CONCLUSION**

The parties both agree that the appellate standard of review is "de novo". The parties also seem to agree that CR 12(b)(6) motion should rarely be granted by a reviewing court. The granting of the motion depends upon a finding that the wording of the complaint is, in and of itself, self-defeating. The standard for review lies with the proposition that the complaint must be found beyond a reasonable doubt to present no possible claim for relief.

The Defendant claims that Washington's Public Records Act should apply to this case. However, what is at issue is a debate over the return of physical property and not disclosure at the request of a member of the public for public records.

Ms. Burton has not made a request for public records under Washington's Public Records Act. That being the case, it is submitted that consideration of the wording of the Public Records Act has no bearing on the issues before the Court. Additionally, if the Court were to be persuaded that it could borrow the infrastructure of the Public Records Act for its course of analysis, it remains beyond dispute that the relevant portion of that Act, i.e. the law enforcement investigative exemption, must be strictly construed against a law enforcement agency. Additionally, there must be a threshold articulation by that agency of why the exemption should apply to the specific request.

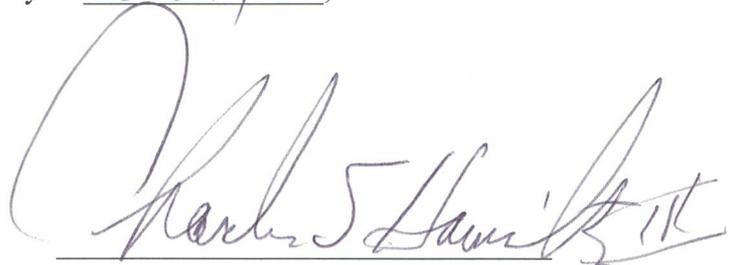
The City has argued that depriving Ms. Burton of her son's possessions is condoned by application of the 14th Amendment's requirement that law enforcement agents preserve material exculpatory evidence. However, what particularized evidence falls within the realm of that proscription is not addressed in the City's motion.

Ms. Burton submits also that as a survivor of a victim of crime, she has certain rights that may not be ignored through proffer of an

unsubstantiated suggestion that the withheld property, in its entirety, has material and exculpatory value. The Crime Victims Chapter seems clear in expressing its intent that, absent presentation by law enforcement agents of convincing reasons to the contrary, a crime victim's property must be returned to the victim's family with expedition. Ms. Burton respectfully submits that the burden of articulating persuasive facts underlying the blanket refusal to return her son's property to Ms. Burton has not been sustained by the City of Spokane. It has increased the emotional harm to the grieving mother.

For the reasons set forth above, Cecilia Burton urges that the City's CR 12(b)(6) motion should be denied and that this matter should be remanded for trial by the trial court.

DATED this 15<sup>th</sup> day of July, 2020.

A handwritten signature in cursive script, reading "Charles S. Hamilton III". The signature is written in black ink and is positioned above the printed name and title.

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**LAW OFFICE OF CHARLES S. HAMILTON III**

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