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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 372057-3

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

RECEIVED

APR 09 2020

Office of the City Attorney

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CECILIA BURTON  
Appellant,

V.

CITY OF SPOKANE  
Respondent

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR SPOKANE COUNTY

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BRIEF OF APPELLANT

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### ASSIGNMENT OF ERROR

1. The trial court erred in granting defendant's motion for dismissal under CR 12(b) (6).

### ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. Did the trial court err in granting dismissal of the complaint under CR 12(b) (6), when it failed to acknowledge the existence of hypothetical facts which supported the legal sufficiency of Cecilia Burton's claims for relief?
2. Did the trial court err in failing to give consideration to the rights of a survivor of a victim of crime under Chapter 7.69 RCW?

### STATEMENT OF THE CASE

Public records indicate that on June 26,2016, Melvin Rouse II, son of Cecelia Burton, died in what was believed to be a homicide. CP 3. Upon learning of the death of her son, Ms. Burton, who resided in California, began attempts to retrieve her son's personal effects, which included a wallet, jewelry, and other items of personal property, gathered by the Spokane Police Department. Ms. Burton made repeated efforts, including trips to Spokane from her home in California, to collect that property from the Police Department. Despite her entreaties, the police failed to provide her with an investigative report of what had happened to her son, an inventory of her son's property, or any items of the property.

CP 3,4. Because of this refusal of disclosure, or return of the property, and because of the emotional toll produced by the impact of her futile efforts, Ms. Burton filed this lawsuit.

The lawsuit was filed on July 24, 2019. CP 1-5. The City of Spokane responded by moving, pursuant to CR 12(b) (6), with the assertion that the complaint did not support a cognizable claim for relief. CP 6,7. On October 18, 2019, an order of dismissal of the lawsuit was entered by the Honorable Raymond Clary, Judge of the Spokane County Superior Court. For this Court's convenience, a copy of Ms. Burton's complaint, the solitary bone of contention in the trial court, and this Court, is attached as Appendix A.

Ms. Burton's allegations in her complaint pled the tort of conversion, the tort of intentional infliction of severe emotional distress, and negligence of the police in their handling of the mother's requests for return of her son's property. Ms. Burton, as mother of the decedent Rouse, is recognized by statute in Washington as having the rights to treatment of her as a survivor of a victim of crime. RCW 7.69.030(7). This statute contemplates prompt return to the victim's survivor, of property belonging to the victim which is not required to be held as evidence.

## ARGUMENT

1. The trial court erred in failing to acknowledge the existence of hypothetical facts which supported the legal sufficiency of Plaintiff's claims for relief.

A trial court's decision on a motion to dismiss for failure to state a claim for relief is reviewed de novo. CR 12 (b)(6); *Cutler v. Phillips Petroleum Co.*, 125 Wn. 2d 755, 881 P.2d 216 (1994).

A court may dismiss a complaint under CR 12(b)(6) only "if it appears beyond a reasonable doubt that no facts exist that would justify recovery". *Cutler*, supra, at 755. Dismissal under this Rule is appropriate when "there is not only an absence of facts that could be raised by the complaint to support a claim of relief, but there is no hypothetical set of facts that would conceivably be raised by the complaint to support a legally sufficient claim". *Daniels v. State Farm Mutual Automobile Insurance Company*, 193 Wn.2d 563, 571, 444 P. 3d 582 (2019), citing *Worthington v. Westnet*, 182 Wn. 2d 500, 505, 341 P.3d 995 (2015). In the CR12(b)(6) context, reviewing courts "must presume that all of the plaintiff's allegations are true and must draw all reasonable inferences in favor of the plaintiff from those factual allegations". *Gorman v. City of Woodinville*, 175 Wn. 2d 68, 71, 283 P. 3d 1082 (2012). Even hypothetical facts not in the record may be considered in the determination of whether

dismissal of the complaint was proper. *Lahey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922 n. 9, 296 P. 2d 860 (2013). Only in circumstances, “where plaintiff’s claim remains legally insufficient even under his or her proffered hypothetical facts, dismissal pursuant to CR 12(b)(6) is appropriate.” *Future Select Portfolio Management Inc v. Tremont Grp. Holdings, Inc.*, 180 Wn. 2d 954, 962, 331 P. 3d 29 (2014).

Hypothetical facts, by definition, are not proved facts. However, the Washington Supreme Court has stated: “there is no reason why the ‘hypothetical situation should not be that which the complaining party contends actually exists’ ”. *Halvorson v. Dial*, 89 Wn. 2d 673, 674-675, 574 P.2d 13 (1975). The Washington Supreme Court has observed that “any hypothetical situation conceivably raised by the complaint defeats a CR12(b)(6) motion if it is legally sufficient to support plaintiff’s claim.” *Bravo v. Dolasen Cos.*, 125 Wn.2d 745,750, 888 P. 2d 147(1995). That “hypothetical situation” need not be a part of the record and can be first produced in the course of appellate review of a CR 12(b)(6) dismissal. *Id.* Resolution of the existence or non-existence, of the “hypothetical facts”, amounting to any hypothetical facts which can be inferred reasonably from the wording of the complaint, should be assessed through presentation of factual evidence before a trier of fact.

The role of hypothetical facts is implicated in each of Ms. Burton's three causes of action. Ms. Burton was, by statute, a survivor of a victim of crime, a non-hypothetical fact; and because of that status, the police owed her, to some degree, a duty of cooperation, response, and responsiveness. The same statute creates a "special relationship" between the police and the survivor of a victim of crime. The extent of the relationship and its consequences bears upon the mother's claim of negligence. As mother of Melvin Rouse II, she was his representative and entitled to recover her son's property, absent some hypothetical claim of privilege to retain the property in the face of her claim of conversion of the property. The complaint also lays sufficient groundwork for the hypothetical fact that Ms. Burton sustained severe emotional distress as a result of her repeated encounters with police diversion or indifference to her heightening state of frustration and disbelief.

Among the hypothetical facts which would support and indict negligent police behavior toward Ms. Burton, are the hypotheses that Mr. Rouse's property had been lost or mis-labeled by the police, that the police became impatient and dismissive of Ms. Burton's persistent inquiries, or that the police neglected to inquire of the County Prosecuting Attorney, the exclusive governmental agent responsible for prosecutions of felonies, whether some, or all, of her son's effects could be released to Ms. Burton.

2. The trial court erred in failing to give consideration to the rights of a survivor of a victim of crime under Chapter 7.69 RCW.

Ms. Burton's complaint states that the police declined her proposal, consistent with the provisions of RCW 7.69.030(7), that her son's property should be photographed and then returned to the mother. CP 4. Ms. Burton falls within the statutory class, and rights, of a survivor of a victim of crime. RCW 7.69.020 and 7.69.030. That latter statute contemplates the expeditious return of property, "when it is no longer needed as evidence". Id. Assuming a responsible police investigation in connection with the death, it seems reasonable to hypothesize that any appropriate forensic work had been completed by the time of the filing of Ms. Burton's lawsuit, roughly 3 years after her son's death. The statute requires, "when feasible", prompt photographing and return of the property within 10 days of the taking of the property. RCW 7.69.030(7). The issues of Ms. Burton's rights under the statute, and the role of noncompliance with the statute as bearing upon issues of law enforcement negligence, remain open questions in the case,

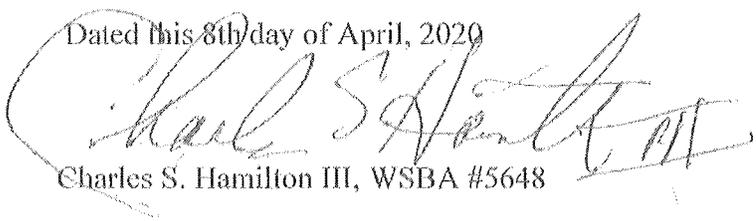
CONCLUSION

Cecilia Burton submits that the order of dismissal in this case does not reflect the common judicial caution that dismissals under CR 12 (b) (6) should be entered rarely and with care. To succeed in its motion, the

Defendant has the burden of establishing the patent futility of further proceedings because of the facial insufficiency of Ms. Burton's complaint, a complaint which describes her repeatedly stone-walled efforts to retrieve memorabilia of her son's existence. At this juncture of the case, the Defendant has chosen to plead nothing by way of an affirmative defense or explanation of its resistance to her requests. Ms. Burton is, by statute, a survivor of a victim of crime with the attending entitlements applicable to that status. It is submitted that she should be entitled to more than another summary dismissal of her efforts to retrieve those metaphorical tokens of her son's existence which the Spokane Police Department has not needed to withhold from her.

Ms. Burton respectfully urges that the order dismissing this action should be vacated and that this matter should be set on for trial and that she be awarded those costs on appeal to which she is entitled.

Dated this 8th day of April, 2020

  
Charles S. Hamilton III, WSBA #5648

Attorney for Appellant/ Plaintiff

# APPENDIX A

COPY  
Original Filed  
JUL 24 2019  
Timothy W. Fitzgerald  
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT FOR SPOKANE COUNTY  
STATE OF WASHINGTON

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1  
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9 CECILIA BURTON,

Plaintiff,

10 v.

11 CITY OF SPOKANE

12 Defendant.

NO.

COMPLAINT FOR DAMAGES

13 CECILIA BURTON, Plaintiff herein, files her complaint for damages against this  
14 Defendant and its employees in the manner as follows:

15 I. PARTIES

16 I.1. Plaintiff Cecilia Burton is over the age of 18 years. She is the mother of  
17 Melvin Rouse, II, now deceased.

18 I.2. The City of Spokane has the capacity to be sued as a private person. At all  
19 times relevant, it has been responsible for the acts and omissions of officers of the Spokane  
20 Police Department.  
21

22 II. JURISDICTION AND VENUE

23 II.1 The Court has jurisdiction of the subject matter and parties herein.  
24  
25  
26

1 II.2. Venue of this action lies properly in Spokane County, the site of the alleged  
2 wrongful acts and omissions in this case.

3 III. FACTS GIVING RISE TO LIABILITY

4 III.1. It has been reported that on June 26, 2016, Melvin Rouse, II was the victim of  
5 a homicide. The case was investigated by the City of Spokane Police Department. Following  
6 the communication to Plaintiff of the death of her son, Plaintiff made repeated and ongoing  
7 efforts to learn the facts surrounding the death of her son, and to recover her son's personal  
8 effects. In the following years, Cecilia Burton made two trips to Spokane from California in  
9 attempts to recover her son's personal effects. She has requested a copy of the police  
10 investigation of the murder of her son prepared by Spokane police investigators. Although  
11 she is informed that the Spokane Police Department is in possession of her son's personal  
12 effects, including personal jewelry, personal wallet and contents, and other items, the  
13 Spokane Police Department refuses to return those items to her, based, it appears, on a claim  
14 that the investigation is ongoing.

15  
16  
17 III.2. Cecilia Burton has been unable to persuade the Spokane Police Department to  
18 return to her her son's personal effects, despite the proposal that photographs of the items  
19 would be sufficient preservation for any future action. The refusal of the police to provide  
20 Cecilia Burton with her son's personal property has caused her substantial emotional distress  
21 and the expenses of two trips from California to Spokane. The refusal continues to aggravate  
22 Ms. Burton's emotional sufferings.

23  
24 III.3. The ongoing refusal to provide the mother with the personal effects of her son  
25 constitutes the tort of conversion.

1 III.3 The refusal to provide the mother of Melvin Rouse, II, with his personal effects  
2 or an account of his murder constitutes the tort of intentional infliction of severe emotional  
3 distress.

4 III.4 The refusal to return the effects of the son to his mother or to provide her with  
5 information relating to the death of her son, constitutes negligence.

6 III.5 As a proximate result of the wrongful acts and omissions of the Defendant and  
7 its employees, Plaintiff has suffered economic loss, severe emotional distress, pain and  
8 suffering, and loss of enjoyment of life, and damages generally in a monetary amount which  
9 will be established at time of trial. Plaintiff's injuries and damages are ongoing.

10  
11 **IV. WAIVER OF PHYSICIAN-PATIENT PRIVILEGE**

12 Plaintiff hereby notes her intent to waive the physician-patient privilege insofar  
13 as waiver is required by the terms of RCW 5.60.060 (4) (b). That waiver shall extend no farther  
14 than is required by that statute. The waiver shall take effect on the 99th day following the  
15 filing of this lawsuit.

16  
17 **V. PRAYER FOR RELIEF**

18 WHEREFORE, having fully set forth her complaint for damages against this  
19 Defendant and its employees, Plaintiff prays for the following relief:

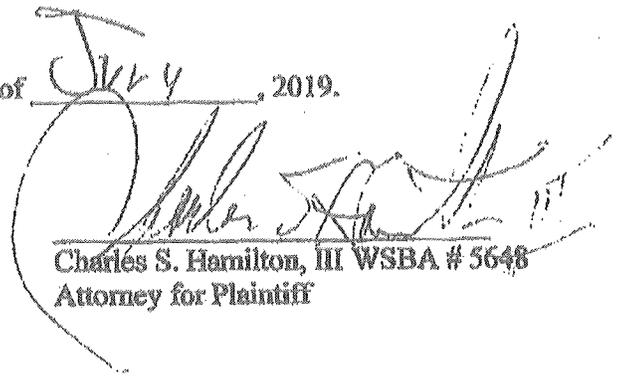
20 V.1. That Plaintiff be awarded a money judgment against the Defendant that will  
21 fully and fairly compensate her for her injuries and damages sustained in this case;

22 V.2. That Plaintiff be awarded all statutory costs and disbursements incurred in the  
23 course of this action;  
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V.3. That the Court accord Plaintiff such other relief, including the return to Plaintiff of the personal effects of her son, as it finds to be fair and equitable in the circumstances of the case.

DATED this 10th day of July, 2019.



Charles S. Hamilton, III WSBA # 5648  
Attorney for Plaintiff