

SUPREME COURT NO. 79252-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

LEO C. BRUTSCHE,

Petitioner,

vs.

CITY OF KENT, a municipal corporation,

Respondent.

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

The Honorable Brian Gain, Judge

PETITIONER'S ANSWER TO AMICUS BRIEF OF
WASHINGTON STATE ASSOCIATION OF
MUNICIPAL ATTORNEYS

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I. Introduction

The amicus brief of Washington State Association of Municipal Attorneys (hereinafter “WSAMA”) contains misstatements of fact and red herring claims. This reply is submitted to show that the amicus brief does not furnish any basis to deny relief to Mr. Brutsche.

II. Corrections to Factual Misstatements in WSAMA Brief

The first red herring/factual misstatement by WSAMA concerns the allegations regarding Jim Brutsche’s alleged actions inside his home when the SWAT team attacked.¹ Jim is petitioner Pat Brutsche’s son. The estate of Jim Brutsche was not a party to this lawsuit. No claims concerning the SWAT team assault on Jim’s home were brought in this case. The court below did not litigate or determine the factual accuracy of any of the assertions about Jim Brutsche’s actions.²

A second red herring/factual misstatement is the City’s claim that Jim was involved with “illegal drugs” and died in a “meth lab” explosion one year after the SWAT raid. Those claims are false, for three reasons. First, Leo Brutsche visited his son daily and never saw any indication of drug activity. CP 135. Second, the officers’ search inventory after the raid shows that no persons nor property were seized. No drugs, paraphernalia, or meth lab equipment were found, anywhere on the property. In short, the SWAT raid

¹ WSAMA Amicus Brief, pages 1-2.

² WSAMA in its brief on pages 1-2.

was a tragic, shocking mistake. CP 86-87. Third, Jim died in an accident which involved a leaking propane tank, not drug manufacturing. CP 137.

III. *Property Owners Can Recover From a Municipality for the Negligent Damage to or Destruction of Property Caused by Police Officers During the Execution of a Search Warrant.*

A. *This Is Not a “Public Duty Doctrine” Case.*

WSAMA first claims that the “public duty doctrine” precludes a common law negligence claim here.³ WSAMA is incorrect. This is not a public duty doctrine case. As this Court recently noted, “We have almost universally found it unnecessary to invoke the public duty doctrine to bar a plaintiff’s lawsuit.” *Osborn v. Mason County*, 157 Wn.2d 18, 27, 134 P.3d 197 (2006), quoting *Bailey v. Forks*, 108 Wn.2d 262, 266, 737 P.2d 1257, 753 P.2d 523 (1987). As in *Osborn*, “this case is no exception.” *Ibid*.

In negligence actions against a government, Washington Courts follow the rule that to be actionable, the duty must be one owed to the injured plaintiff, and not one owed to the public in general. *Cummins v. Lewis County*, 156 Wn.2d 844, 852, 133 P.3d 458 (2006). The duty breached must be owed to the injured person as an individual and not merely the breach of an obligation owed to the public in general. *Id*. If the municipal duty is owed to an individual, the public duty doctrine does not apply. *Cummins, supra*, at 853. The issue of deciding whether the four exceptions apply is just a way of asking if the City had a duty to begin with. *Harvey v. Snohomish County*,

³ Petitioner did not raise a “public duty doctrine” issue in the petition for review. The City did not raise the issue in its answer to the petition.

124 Wn. App. 806, 811, 103 P.3d 836 (Div.1, 2004). For an example, if a police officer is racing to execute a search warrant and strikes an innocent pedestrian in the crosswalk, none of the public duty exceptions apply, but the officer still owes that pedestrian a duty of care.

Here, the police raided Mr. Brutsche's property and caused property damage. In executing the warrant, the officers had a duty not to do unnecessary damage to the property. They had a duty to conduct the search as to do the least damage to the property consistent with a thorough investigation. *Goldsby v. Stewart*, 158 Wash. 39, 41, 290 P. 422 (1930). In short, the police owed a duty to Mr. Brutsche as the injured plaintiff. This is not a "public duty doctrine" case. WSAMA's claim in this regard is another red herring.

B. *A Municipality Is Liable for the Negligent Damage to or Destruction of Property Caused by Police Officers During Service of a Search Warrant.*

As noted above, police have a duty not to cause unnecessary property damage or destruction while executing a search warrant. If there were no such rule, police could negligently damage or destroy an entire building, or a city block of buildings, without any remedy available to the property owner. This Court has recognized this danger. In *Goldsby*, the Court noted that under a logical extension of the position taken by the police therein, officers could remove "well-nigh an entire building" without being held accountable. *Goldsby, supra*, 158 Wash. at 42.

WSAMA attempts to distinguish *Goldsby* by noting that “the defendants in *Goldsby* were individual public officials, not cities or counties.”⁴ This also is a red herring. This Court has held that “municipalities are generally held to the same negligence standards as private parties”. *Keller v. City of Spokane*, 146 Wn.2d 237, 242-243, 44 P.3d 845, 847 (2002). It is well established that in a proper case a city may be held liable on a theory of negligence for injuries to property belonging to another. *Employco Personnel Services, Inc. v. City of Seattle*, 117 Wn.2d 606, 615-616, 817 P.2d 1373, 1379 (1991). See *Osborn, supra*, 157 Wn.2d at 27, 134 P.2d at 203 (noting that a public entity is liable in tort to the same extent as if it were a private person or corporation).

WSAMA then proceeds to a discussion of what it claims was “limited local government liability before 1961”.⁵ The police raid in this case occurred in 2003.

C. *The So-Called “Policy Considerations” Cited by WSAMA Lack Merit.*

WSAMA then claims that we are inviting the Court to create a new cause of action.⁶ This contention is simply wrong. We are not seeking to create a new cause of action. *Goldsby* established a duty not to cause unnecessary property damage or destruction during the service of a search

⁴ WSAMA Amicus Brief, page 4.

⁵ WSAMA Brief, page 5.

⁶ WSAMA Brief, pages 5 and 7.

warrant. In our petition for review and supplemental brief, we cited seven decisions of this Court and one decision of the Court of Appeals which hold that various types of law enforcement activities are reachable in negligence.⁷ The Court of Appeals case we cited concludes that police officers had a duty to act with reasonable care in connection with protecting property from destruction by a third party. *Coffel v. Clallam County*, 47 Wn. App. 397, 403-405, 735 P.2d 686, 690-691 (1987).

In short, petitioner's negligence cause of action is well established. We do not need to invite the Court to create a new cause of action.

WSAMA then claims that police searches "are already tightly controlled by the law". WSAMA Brief, page 5, citing *Maryland v. Garrison*, 480 U.S. 79, 84, 107 S. Ct. 1013, 94 L. Ed. 2d 72 (1987). *Maryland* is a Fourth Amendment case involving the Warrant Clause's requirement that a warrant contain a particular description of the things to be seized. The Fourth Amendment Particularity Clause is irrelevant here. Our negligence cause of action does not address the sufficiency of the description of things to be seized in the warrant.⁸

WSAMA next contends that there should be no negligence remedy due to the exclusionary rule.⁹ This is another red herring. The exclusionary rule

⁷ Petition for Review, pages 5-8.

⁸ WSAMA repeatedly refers to the warrant as a "valid warrant". As opposing counsel know, we challenged the validity of the search warrant in a separate federal court proceeding against King County. King County officers acquired the warrant. King County settled with us.

⁹ WSAMA Amicus Brief, pages 6-7.

is irrelevant to this case. No evidence was found, none was seized, and no criminal prosecution resulted from the raid on Mr. Brutsche's property.

WSAMA next claims that "opening the door to negligence claims" would "result in the diversion of already strained government financial resources".¹⁰ This claim is also a red herring for two reasons.

First, as demonstrated in our petition for review and our supplemental brief, over the years this Court has repeatedly held that law enforcement activities can be reachable in negligence. These decisions have not resulted in any unreasonable burden on municipal finances.

Second, the incredulity of this claim is demonstrated by the facts of this case. This matter began in arbitration. The cost to repair the property damage was \$4,921.51. CP 90, lines 16-18; *see also* Declaration of James Warner, CP 131-133. King County settled with Mr. Brutsche for the amount of \$2,500.00. *See* Arbitration Award, CP 345. Accordingly, given the King County settlement, the City of Kent faced a property damage claim in the amount of \$2,421.51.

Rather than resolving the claim, the City litigated the case to the hilt in Superior Court and claimed costs and fees in the amount of \$27,124.00 in that court.¹¹ In Superior Court, the City of Kent spent over eleven times the amount of the property damage claim fighting the case. This does not include the appeal. This suggests that the City (or its insurance carrier) is awash in

¹⁰ WSAMA Brief, page 7.

¹¹ *See* Unpublished Opinion of the Court of Appeals, page 10, reproduced in the Petition for Review, page A-10.

money. WSAMA's claim of "already strained government financial resources" is a red herring.

IV. *The Damaging or Destruction of the Property of an Innocent Third Party by Police Activity, Where No Evidence Is Seized or Prosecution Instituted, Constitutes a Compensable Taking Under Article I, § 16 of the Washington Constitution.*

Petitioner's property was damaged by police action. The police found no evidence. They seized nothing. There was no criminal prosecution. Under these circumstances, this Court should find a compensable taking. Mr. Brutsche should not be required to shoulder the economic burden of the police activity here.

The talisman of a taking is government action which forces some private persons alone to shoulder affirmative public burdens, 'which, in all fairness and justice, should be borne by the public as a whole.'

Mission Springs, Inc. v. City of Spokane, 134 Wn.2d 947, 964, 954 P.2d 250 (1998) (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960)). Such is the case here.

The cases cited by WSAMA are distinguishable.¹²

¹² In *Kelley v. Storey County Sheriff*, the Iowa Supreme Court interpreted a constitutional provision which contained no provision for compensation for *damage* to private property, unlike the Washington constitution. See *Kelley*, 611 N.W.2d 475, 47 (Iowa, 2000). Unlike the instant case, Mr. Kelly did not allege that the amount of force used by the officers to enter his residence was unreasonable. *Kelley*, 611 N.W.2d at 481. Here, we assert that the officers caused unnecessary property damage to buildings on the property during their search.

Sullivant v. City of Oklahoma City, 940 P.2d 220 (Oklahoma, 1997), is distinguishable because in that case, unlike the instant case, evidence was seized when the search warrant was executed. *Sullivant*, 940 P.2d at 221. We also note that the Supreme Court's decision on the takings issue was a 5 to 4 decision. *Sullivant*, 940 P.2d at 227. We further note that the Supreme Court ruled unanimously in favor of the landlord on his tort claim for damages arising from the search. *Sullivant*, 940 P.2d at 227.

(continued...)

The amicus submits several red herring “public policy” claims. They “wave the bloody shirt” by asserting that law enforcement officers get killed in the line of duty. While that is a tragic fact, it is not relevant to the issues in this appeal.

Finally, WSAMA asserts that the police had legitimate reasons to cause property damage during the raid. Whether or not their reasons were legitimate has yet to be tested in a trial. It is important to note that under the Just Compensation Clause, compensation is required whether or not the damage was “proper”.¹³ Granting compensation in this case does not abrogate or interfere with the right of police officers to carry out their duties. It simply requires that any damage done in the process to the property of an innocent third party be duly compensated by the municipality. We seek to compensate

¹²(...continued)

McCoy v. Sanders, 113 Ga. App. 565, 148 S.E.2d 902 (1966), involved a different legal system. The court concluded that relief was not available because Georgia had not waived its immunity from suit and the county was not liable because there was no Georgia statute permitting tort claims for such losses. *McCoy*, 113 Ga. App. at 570-571.

In *Indiana State Police v. May*, 469 N.E.2d 1183 (Ind. Ct. App. 1984), the court stated that “The sole issue on appeal is whether the State is immune from liability under the immunity section of the Tort Claims Act, ...”. *May*, 469 N.E.2d at 1183. The court’s discussion of the taking issue is one sentence long, and merely states that it “is without merit”. 469 N.E.2d at 1184. The court furnished no discussion in support of its conclusion. In the face of the authorities cited by petitioner, this one-sentence discussion cannot be persuasive.

The case of *Customer Company v. Sacramento*, 10 Cal.4th 368, 41 Cal.Rptr.2d 658, 895 P.2d 900 (1995) turned on a unique reading of California’s constitution as requiring a “public work” or “public improvement” for there to be a public use, justifying just compensation. *Customer*, at 383-384. This resulted in the majority citing the Tort Claims Act as controlling rather than award just compensation under California’s takings clause. *Customer*, at 391. Our constitutional provision has not been and should not be construed so narrowly. See cases cited in our petition for review and supplemental brief.

¹³ See, e.g., cases discussed in our supplemental brief.

the injured, rather than punishing the injurer. See Petitioner's Supplemental Brief, pages 17-20.

V. Conclusion

The assertions made by WSAMA in its brief are without merit.

DATED this the 5th day of October, 2007.

Respectfully submitted,

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