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STATE OF WASHINGTON

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SUPREME COURT
STATE OF WASHINGTON

SUPREME COURT OF THE STATE OF WASHINGTON

LEO C. BRUTSCHE,

Petitioner,

v.

CITY OF KENT, a Washington municipal corporation, and KING
COUNTY, a political subdivision of the State of Washington,

Respondents.

BRIEF OF AMICUS CURIAE, WASHINGTON STATE
ASSOCIATION OF MUNICIPAL ATTORNEYS IN SUPPORT
OF THE RESPONDENTS

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I. IDENTITY OF AMICUS CURIAE

Amicus is the Washington State Association of Municipal Attorneys (hereinafter WSAMA) the organization of municipal attorneys representing the cities and towns across the State.

II. STATEMENT OF CASE

Amicus, WSAMA references and incorporates herein the Statements of the Case as set forth in the pleadings of the Respondents, City of Kent and King County, relative hereto.

However, for emphasis and specific reference, Amicus submits the following factual summary in supplementation of the facts presented by the Respondents: The search warrant that was issued by the King County District Court was executed with caution because of the high risk nature of executing warrants on methamphetamine labs. CP 43-44, 46-47.

As soon as James Brutsche, the Petitioner's son, saw the police approaching the main residence, he ran inside the trailer home, slammed the sliding glass door shut, and attempted to barricade himself inside by placing a dowel at the bottom of the sliding door, CP 44, 48, requiring the police to use a breaching device to gain entry into the mobile home. CP 44, 48. Thereafter, James Brutsche remained combative and uncooperative, and physically fought with the police officers trying to arrest him. CP 45, 49. It was necessary to use a taser against James

Brutsche so that he could be taken into custody. CP 45, 49. Additionally, as reflected in the declarations of the officers, people involved in the methamphetamine trade are typically paranoid, irrational, and often armed and dangerous. CP 44, 47. Finally, further indicative of the danger associated with methamphetamine labs, the Petitioner's son (James Brutsche) died in a methamphetamine lab explosion in the mobile home located on his father's property approximately one year later. CP 250, 251.

III. SUMMARY OF ARGUMENT

The common law of Washington State does not provide for a negligence action against police officers executing a valid search warrant issued by a Judge. Creation of a new negligence action under such circumstances would unreasonably punish governmental entities and unnecessarily deter lawful law enforcement work in the State of Washington.

In addition, the Washington State Constitution's Eminent Domain provisions were not intended to apply to execution of a Judge's lawful search warrant. Case law from other states as well as this Court's prior decision in *Eggleston v. Pierce County*, 148 Wn.2d 760, 64 P.3d 618 (2003) preclude such a cause of action. The original intent of the Constitutional language and policy considerations weigh heavily against overturning *Eggleston*.

IV. ARGUMENT

A. THE COMMON LAW OF WASHINGTON STATE DOES NOT RECOGNIZE A NEGLIGENCE CLAIM FOR EXECUTION OF A VALID SEARCH WARRANT.

1. The Public Duty Doctrine Precludes a Common Law Negligence Claim in this Case.

A cause of action for negligence exists only if the defendant owes a duty of care to the plaintiff. *Osborn v. Mason County*, 157 Wn.2d 18, 27, 134 P.3d 197 (2006). Under the public duty doctrine, a public entity has a duty of care when it owes a duty to an injured plaintiff but does not have a duty of care when it owes a duty to the public in general. *Id.* This basic principle of law has been paraphrased by this Court as “a duty to all is a duty to no one.” *Id.*

The public duty doctrine holds that a public entity is liable for negligence *only* if it has a statutory or common law duty of care, and the exceptions to the public duty doctrine indicate when such a statutory or common law duty exists. *Id.* “The question whether an exception to the public duty doctrine applies is thus another way of asking whether the State had a duty to the plaintiff.” *Id.*, quoting, *Taggart v. State*, 118 Wn.2d 195, 218, 822 P.2d 243 (1992).

There are four exceptions to the public duty doctrine. *Cummins. v. Lewis County*, 156 Wn.2d 844, 853, 133 P.3d 458 (2006). If one applies,

the government will be held to owe a duty to the plaintiff. *Id.* While a city or county may have a duty “to protect its citizens in a colloquial sense,” it “does not have a *legal* duty to prevent every foreseeable injury.” *Osborn*, 157 Wn.2d at 28 (emphasis in original).

The four exceptions to the public duty doctrine are (1) legislative intent (2) failure to enforce (3) the rescue doctrine and (4) a special relationship. *Cummins*, 156 Wn.2d at 854, fn.7

Petitioner has completely failed to submit any facts supporting an argument that one of the exceptions to the public duty doctrine exists. Under the circumstances, therefore, Petitioner has not met his burden to show the existence of a duty.

2. Petitioner’s Arguments are Insufficient to Demonstrate a Common Law Cause of Action for Negligent Execution of a Search Warrant in Washington State.

Petitioner relies on an obscure 1930 decision, *Goldsby v. Stewart*, 158 Wash. 39, 290 P. 422 (1930), as the only source of direct Washington State authority for the proposition that there is a common law claim for negligent execution of a valid search warrant.

Petitioner’s reliance on *Goldsby* is misplaced. The defendants in *Goldsby* were individual public officials, not cities or counties. Moreover, as the City of Kent has pointed out, the outcome of *Goldsby* is “fully consistent with the well-established rule that ‘the police may take

whatever steps are reasonably necessary in executing duly authorized warrants.” City of Kent’s Answer to Petition for Review, p. 9. The *Goldsby* court “*did not even mention or discuss, much less apply any type of negligence standard to police conduct during the execution of a search warrant.*” *Id.* (emphasis in original).

Moreover, the history of government liability in the State of Washington does not support the Petitioner’s argument. Although the state had complete immunity prior to 1961, Washington cities and counties could be held liable for torts prior to that time. Michael Tardif and Rob McKenna, *Washington State’s 45-Year Experiment in Governmental Liability*, 29 Seattle U.L. Rev. 1, 5-6 (2005). Yet, cities were generally immune from tort claims for police functions:

Cities had liability for proprietary functions, which included common city services such as water, electricity, sewer, garbage, and maintenance of streets and sidewalks. The primary areas of municipal immunity were governmental functions, such as police, parks, and health.

Id. Nothing could be more of a routine police function than performing a lawful search. Moreover, limited local government liability before 1961 was “consistent with common law doctrines at that time.” *Id.*

In addition to a lack of historical support, policy considerations weigh heavily against Petitioner’s invitation to create such a cause of action. Police searches are already tightly controlled by the law. The

Fourth Amendment to the United States Constitution categorically prohibits the issuance of any search warrant except one “particularly describing the place to be searched and the persons or things to be seized.” *Maryland v. Garrison*, 480 U.S. 79, 84, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987). A valid warrant ensures that the search “will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.” *Id.*

Furthermore, courts have recognized that “police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving....” *See Graham v. Connor*, 490 U.S. 386, 396-397, 109 S. Ct. 1865, 1872, 104 L.Ed.2d 443 (1989). Therefore, “While the purposes justifying a police search strictly limit the permissible extent of the search, the Court has also recognized the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants.” *Maryland*, 480 U.S. at 87.

Moreover, constitutional violations and other forms of unlawful searches already result in the highest sanction imaginable for law enforcement agencies: exclusion of the evidence obtained, which may be essential to convicting a dangerous criminal. Creation of a new source of civil liability for governmental misconduct in this area is unnecessary and

excessively punitive. In an effort to avoid tort claims, police agencies would likely forego lawful searches resulting in a chilling effect on law enforcement work in general in the State of Washington. The exclusionary rule already gives police agencies sufficient incentive to prevent officer misconduct.

In addition, since breach of a duty is often a factual question for juries, opening the door to negligence claims for lawful searches could lead to the overburdening of judicial resources. It would also result in the diversion of already strained government financial resources to defending and compensating claimants impacted by the thousands of police searches undertaken every day in the state. Petitioner is only requesting compensation for his doors. However, presumably he could also claim emotional distress or other non-economic harm under such a cause of action.

Based on the foregoing, Amicus urges the Court to reject Petitioner's invitation to find a negligence claim in common law where none previously existed and to resist creating a new cause of action when the result would be excessive punishment for government misconduct and a resulting chilling effect on law enforcement activities in the State of Washington.

B. CONSTITUTIONAL TAKINGS PROVISIONS WERE NOT INTENDED TO APPLY TO EXECUTION OF A JUDGE'S LAWFUL SEARCH WARRANT.

Petitioner also urges the Court to recognize a constitutional takings cause of action for damage to property during execution of a Judge's lawful search warrant. Petitioner seeks support from other jurisdictions on this issue, namely Texas and Minnesota. However, it appears that all other state courts deciding the issue have found that constitutional takings provisions were not intended to and do not apply to the lawful exercise of police power.

In *Kelley v. Story County Sheriff*, 611 N.W.2d 475 (Iowa 2000), the Iowa Supreme Court conducted an extensive review of other state law on the issue and concluded that damage to the doors of a property owner caused during a lawful arrest did not amount to a taking under the Iowa Constitution. *Kelley*, 611 N.W.2d at 482. Presenting facts similar to this case, the plaintiff claimed damage to the two front doors of his residence caused when law enforcement officers forced the door open pursuant to a lawful arrest warrant. *Kelley*, 611 N.W.2d at 477. The court affirmed the lower court's conclusion that the damage caused to Kelley's property was "more in the nature of a tort" and did not constitute a taking of private property within the meaning of the Iowa Constitution. *Id.* at 481.

The Oklahoma Supreme Court reached a similar conclusion in *Sullivant v. City of Oklahoma City*, 940 P.2d 220 (Okla 1997). The *Sullivant* court considered a takings claim from a landlord who suffered damage to the doors of an apartment during police officers' execution of a valid search warrant. The court concluded that the Oklahoma State Constitution takings provision "clearly relates to condemnation proceedings," that the court had never allowed parties to use the provision as a basis for recovery against government for tortious acts, and that, "In the present case, the police intended to execute a search warrant, not to take or use landlord's property." *Sullivant*, 940 P.2d at 225.

Other state courts have reached the same conclusion. See *McCoy v. Sanders*, 113 Ga.App. 565, 148 S.E.2d 902 (1966) (holding that damage to a landowner's pond during the search for a murder victim was not a compensable taking); *Indiana State Police v. May*, 469 N.E.2d 1183 (Ind.Ct.App. 1984) (concluding that damage caused by police in a private home during apprehension of a murder suspect did not amount to a taking).

Petitioner's reliance on *Steele v. City of Houston*, 603 S.W.2d 786 (Tex. 1980) and *Wegner v. Milwaukee Mutual Insurance Co.*, 479 N.W.2d 38 (Minn. 1992) is questionable. In its opinion rejecting a takings claim

for the lawful exercise of police power, the Supreme Court of California stated,

The opinion in *Steele* is poorly reasoned and internally inconsistent. The opinion in *Wegner* relies primarily upon the faulty reasoning in *Steele*. Neither decision gives serious consideration to the body of authority governing actions for inverse condemnation. Accordingly, we decline to follow these decisions.

Customer Company v. City of Sacramento, 10 Cal.4th 368, 388, 41 Cal.Rptr.2d 658, 895 P.2d 900 (1995).

In *Customer Company*, the Supreme Court of California rejected a takings claim from a store owner who suffered property damage during the arrest of a suspect in his store. The court noted that “Application of the just-compensation clause in the present case would mean, for example, that every time a police officer fires a weapon in the line of duty, that officer exercises the power of eminent domain over any property that the officer reasonably could foresee might be damaged as a result.” *Customer Company*, 10 Cal.4th at 388-89.

The *Customer Company* decision is “especially important” to this court’s analysis “because its taking clause was a model for our own.” *Eggleston v. Pierce County*, 148 Wn.2d 760, 772 n.8, 64 P.3d 618 (2003). Furthermore, drawing from historical analysis of the federal takings clause, the *Customer Company* court noted, “While the legislative history

of the [federal] Compensation Clause is sparse, on one point there is no historical doubt: from the beginning of the republic to the present, the ‘sacred principle of compensation’ has always been understood paradigmatically to express the state’s obligation to indemnify owners of property taken through an assertion of eminent domain.” *Customer Company*, 10 Cal.4th at 379, *quoting* Rubinfeld, *Usings*, 102 Yale L.J. 1077, 1081-1082, italics omitted (1993).

This Court has commented similarly: “To suggest that property rights of an individual (other than protection against the sovereign in regard to eminent domain) are created and protected by Const. art. I, §16 (amendment 9) misconstrues its sole purpose.” *Arnold v. Melani*, 75 Wn.2d 143, 151, 449 P.2d 800 (1968). Indeed the very title of Wash. Const. art. I § 16 is “Eminent Domain.”

Adding to these arguments, the *Eggleston* decision itself contains an important footnote that is directly relevant to Petitioner’s claim and that casts additional considerable doubt on his suggestion that a takings claim exists. The *Eggleston* majority noted,

The parties do not address the relevance, if any, of the judiciary’s independent constitutional authority to enter preservation orders or search and arrest warrants. Clearly, the judiciary can not exercise eminent domain and may rearrange property rights in accordance with law without it being a taking of property. *See* Wash. Const. art. IV; *State v. Fields*, 85 Wn.2d 126, 530 P.2d 284 (1975); RCW

2.04.190 (“The supreme court shall have the power to prescribe ... [the process] of taking and obtaining evidence.”).

Eggleston, 148 Wn.2d at 770, fn.7.

The Court’s footnote points to a highly relevant and important fact: the search that led to the damaged property in this case was conducted to effect a Judge’s warrant issued pursuant to the Supreme Court’s inherent authority, not as a result of legislative action akin to a proceeding in eminent domain.

C. PUBLIC POLICY MANDATED THAT THE PETITIONER’S ARGUMENT BE REJECTED.

Each year over one hundred law enforcement officer are killed in the line of duty.¹ Public policy mandates that police be given wide latitude in effecting their law enforcement duties.

Perhaps none of the law enforcement tasks with which police officers are involved presents a greater level of danger and uncertainty than drug related investigations. As was noted in the facts of this case, the search warrant was a part of criminal drug investigation involving the Petitioner’s own son who later died because of a methamphetamine lab explosion. When police are responding to these types of cases, they

¹ http://njlawman.com/2002_line_of_duty_deaths.htm

cannot afford to be nonchalant, cavalier about or distracted from their duties.

Contrary to the civic and moral duty each citizen has to cooperate with police investigations, *Gardner v. Loomis Armored Inc.*, 128 W.2d 931, 942, 913 P.2d 377 (1996); *Gasper v. Peshastin High-Up Growers*, 131 Wn. App. 630, 128 P.3d 627 (2006), the facts of this case show that not only did the Petitioner's son not cooperate, he actively resisted and fought the police in their investigations and their efforts to serve the search warrant.

Further recognition of the fundamental public duty to assist police was stated by the Illinois Supreme Court in *Palmateer v. International Harvester Company*, 85 Ill 2d, 124, 132, 421 N.E. 2d 876, 52 Ill Dec. (1981), as follows:

There is no public duty more basic, nothing more implicit in the concept of ordered liberty, than the law enforcement of the state's criminal code. There is no public duty more important or fundamental than the one favoring the protection of the lives and property of citizens.

Police find themselves grappling with issues implicating that public policy on a daily basis. It is for these reasons that courts have recognized that law enforcement investigation of criminal activity can call for strong measures, even conduct that might otherwise be repugnant to society and unsuitable in other settings. Officers have appropriately

solicited the purchase of drugs in undercover operations (*see State v. Emerson*, 10 Wn. App. 235, 242, 517 P.2d 245 (1973)) and police officers have been permitted to use some deceitful conduct and conduct which might otherwise violate state laws in order to detect and eliminate criminal activity. *State v. Lively*, 130 Wn.2d 1, 20, 921 P.2d 1035 (1996) (*citing State v. Emerson, supra*).

In this case, again, because of the particularly insidious nature of methamphetamine and the significant danger of methamphetamine lab investigations, even more dangerous than other types of illegal drug cases, police do not have the luxury of approaching these investigations with anything other than the utmost seriousness. For these reasons, even if the Petitioner's property were damaged in the service of the search warrant (aside from the fact that this damage was actually caused/precipitated by the Petitioner's own son who locked the door and resisted and fought the police), the actions of the police to serve the search warrant were legitimate and understandable. The propriety of the police actions in this case must be acknowledged, as it should be for similar actions by any police department across the state and across the country.

Police cannot afford to wait when they're attempting to serve a search warrant in a drug case, where evidence can disappear quickly. This is especially so with respect to meth lab cases where other potential

dangers exist. Additionally, it is not reasonable to allow or expect private citizens to "open the door" (as the Petitioner purportedly offered) once the police have had their efforts to serve the search warrant resisted, such as where the petitioner's son locked the door.

The Petitioner is asking the Court to recognize this new basis of tort liability, but with respect to tort liability, it must be asked whether it is reasonable to place a private citizen at risk in cases such as this in order to avoid damaging property. Had the police allowed a private citizen, even the Petitioner in this case, to unlock the door, if the private citizen suffered property damage, or was harmed by the person resisting the police, the tort issues would be more complicated, to say the least.

Ultimately, if police officers have to worry about incurring tort liability for property damage in the event they are confronted with resistance when serving a search warrant during a criminal investigation, that would distract them from focusing on the duties at hand. If wondering or worrying about that tort liability causes the police to hesitate when faster action is called for, the results could be a less than effective job of investigating the criminal activity, and/or – worse yet – injury or loss of life.

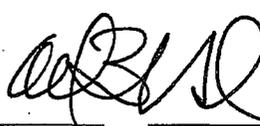
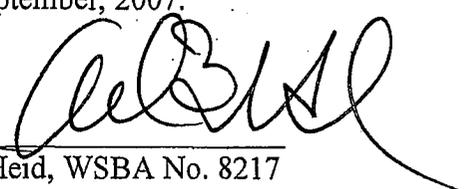
The focus of police officers serving search warrants should be on what they need to do and how this can be done most efficiently and

effectively. Again, especially in drug investigations, the police should not have to put private citizens in harms way even if for the purpose of potentially preventing property damage. That is essentially what the Petitioner is suggesting, but that is unreasonable.

V. CONCLUSION

Based on the foregoing, Amicus Curiae Washington State Association of Municipal Attorneys respectfully requests that this Court affirm the Court of Appeals decision rejecting Petitioner's claims.

Respectfully submitted this 17th day of September, 2007.

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