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SUPREME COURT  
OF THE STATE OF WASHINGTON

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Leo C. Brutsche,

Appellant,

v.

CITY OF KENT, a Washington municipal corporation,

Respondent/Cross-Appellant.

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CITY'S ANSWER TO PETITION FOR REVIEW

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STATE OF WASHINGTON  
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**ORIGINAL**

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## I. INTRODUCTION

This lawsuit arose out of Leo Brutsche's claim that the City of Kent should be liable for physical damage to various doors and door jambs caused by the Special Response Team (hereinafter "SRT"), a specially trained group of police officers from a variety of south King County jurisdictions, during the execution of a search warrant for a suspected methamphetamine lab located on Brutsche's property. The search warrant was obtained based on probable cause to believe that Leo Brutsche's son, James Brutsche, who resided in a mobile home on the premises, was involved in the illegal manufacture of methamphetamines. The Division I Court of Appeals affirmed the trial court's summary judgment dismissal of Mr. Brutsche's lawsuit because he could not, under Washington law, assert any viable legal basis to support his claims against the City.

Leo Brutsche claims that during the execution of this criminal search warrant, and despite the obvious risk of injury or death posed to both police officers and innocent bystanders, the SRT should have stopped and allowed Mr. Brutsche to open doors to the various buildings subject to this warrant. Throughout the course of this lawsuit, Mr. Brutsche has chosen to ignore these risks and has consistently refused to acknowledge the

involvement of his son, James Brutsche, with illegal drugs.<sup>1</sup>

Mr. Brutsche is unable to meet any of the criteria set forth in RAP 13.4(b) for acceptance of review by the Supreme Court. The Court of Appeals decision is not in conflict with any Washington Supreme Court decision or any published Court of Appeals' decision. As discussed below, both the trial court and the Division I Court of Appeals properly applied well established state and federal law in dismissing Brutsche's property damage claim. This case does not present any significant question of either state or federal constitutional law, nor does it involve an issue of substantial public interest that should be determined by the Court. In short, review by the Supreme Court in this case is not merited.

## **II. THE CITY'S COUNTERSTATEMENT OF THE CASE**

### **A. COUNTER-STATEMENT OF FACTS.**

On July 8, 2003, the Honorable Linda G. Thompson of the King County District Court, Renton Division, signed a search warrant authorizing the search of an abandoned warehouse, various outbuildings, eight semi-trailers, and a pink and white mobile home located at 426 Naden Avenue in an industrial area in Kent. CP 316-318. The search warrant specifically authorized the police to search James Brutsche, Leo Brutsche's now deceased son, as well as any locked containers and

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<sup>1</sup> As described in more detail below, James Brutsche subsequently died in a methamphetamine lab explosion that occurred on the same premises where this search warrant was executed.

numerous abandoned or disabled vehicles parked within the fenced boundary at the Naden Avenue address. CP 316. Leo Brutsche has at all relevant times owned the property subject to the search warrant.

On July 10, 2003, the SRT was summoned to execute the search warrant because of the high risk nature of executing warrants on methamphetamine labs. CP 43-44, 46-47. Unfortunately, as discussed below, this particular search was “compromised” when James Brutsche and another suspect saw the police from their vantage point on the porch of the mobile home where James Brutsche resided. CP 44, 48. As the SRT arrived in several fully marked police vehicles, with officers in clearly marked police uniforms, an announcement was made three times (using a police vehicle loudspeaker) that the police had arrived with a search warrant for 426 Naden Avenue. CP 48. As soon as James Brutsche 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. For this reason, it was necessary to use a breaching device to gain entry into the mobile home. CP 44, 48. Once the glass door was breached, 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.

After James Brutsche was apprehended and placed in custody, the police proceeded to search the remaining areas subject to the search warrant, including the abandoned warehouse, several open outbuildings, eight semi-trailers and the various abandoned or disabled vehicles located within the fenced compound. CP 45, 49. The SRT needed to gain access to the remaining buildings as quickly as possible because of obvious safety concerns for the police officers, and it was necessary to breach several interior warehouse doors to effectuate the search warrant. CP 45, 49. It was unknown to the SRT whether other people on the premises might be dangerous or non-compliant, or might attempt to destroy evidence of methamphetamines on the premises. CP 45, 49. While the various buildings were being searched, a secure perimeter was also set up by the police to prevent the escape of any unaccounted for suspects and to avoid possible contamination of the crime scene. CP 49.

While Leo Brutsche claims he arrived while the subject search was underway, and offered to use his keys to open various doors for the police, it would have violated the SRT's standard operating procedure to allow Leo Brutsche access to a potential crime scene until after the search had been completed. CP 50. This procedure not only maintained the integrity of the potential crime scene, but also ensured the safety of both innocent bystanders and the police in a very high risk environment. CP 50.

Although the search was “compromised,” as described above, this does not change the fact that the police had probable cause to obtain this search warrant, specifically information causing them to believe that James Brutsche was involved in the illegal manufacture of methamphetamines. CP 316. While the SRT did not find any drugs or code violations during this particular search, approximately one year later James Brutsche died in a methamphetamine lab explosion that occurred in the same mobile home that was searched on July 10, 2003. CP 250, 251.

**B. TRIAL COURT PROCEEDING.**

On June 24, 2005, the City filed a motion seeking summary judgment dismissal of all of Leo Brutsche’s claims against the City. CP 51; CP 53-67. On July 22, 2005, the Honorable Brian D. Gain granted the City’s motion, dismissing Brutsche’s lawsuit in its entirety with prejudice. CP 225-26.

**C. THE COURT OF APPEALS DECISION.**

In a unanimous (unpublished) opinion, the Division I Court of Appeals affirmed the dismissal on summary judgment. The Court ruled that the exercise of police power in executing the search warrant, specifically the destruction of Leo Brutsche’s doors, did not constitute a taking, and that the damage to Mr. Brutsche’s property was not actionable under either a negligence or trespass theory.

### III. ARGUMENT

#### A. THE COURT OF APPEALS PROPERLY RULED THAT BRUTSCHE'S PROPERTY DAMAGE CLAIM IS NOT ACTIONABLE IN NEGLIGENCE.

##### 1. The Appellate Court's Ruling is Consistent with the General Rule that Law Enforcement Activities Are Not Reachable in Negligence.

The threshold determination in any negligence suit is whether a duty of care is owed by the defendant to the plaintiff. Absent such a duty, no cause of action for negligence exists. *Keates v. Vancouver*, 73 Wn. App. 257, 265, 869 P.2d 88 (1994). Whether a particular class of defendants owes a duty to a particular class of plaintiffs presents a question of law that is dependent on mixed considerations of "logic, common sense, justice, policy, and precedent." *Keates*, 73 Wn. App. at 265, quoting *King v. Seattle*, 84 Wn.2d 239, 250, 525 P.2d 228 (1974). As stated in *Keates*, the primary question in determining if a legal duty exists is whether the conduct in question is unreasonably dangerous, i.e., "the risks of harm outweigh the utility of the activity." *Keates*, 73 Wn. App. at 266. A defendant whose conduct is not unreasonably dangerous owes no duty. *Keates, supra*.

In *Keates*, the Court held that police officers do not owe any duty to use reasonable care to avoid inadvertent infliction of emotional distress on criminal investigation subjects. *Keates*, a suspect in his wife's murder, sought damages against the police on the basis of outrage and negligent

infliction of emotional distress. In affirming the dismissal of Keates' lawsuit, the Court noted that it is in society's best interest that criminals be promptly apprehended and punished.

Because the utility of the law enforcement function outweighs the criminal suspect's interest in freedom from emotional distress, "[t]he law ... closely circumscribes the types of causes of action which may arise against those who participate in law-enforcement activity" . . . As a general rule, law enforcement activities are not reachable in negligence.

73 Wn. App. at 267 (citations omitted).

The Court's holding in *Keates* was premised on its determination that the utility of police interrogation vastly outweighs the risk of inflicting emotional distress on a criminal suspect. The Court of Appeals in the case at bar directly applied this analysis in concluding that the police owed no duty to Brutsche:

Similarly, the utility of duly authorized police searches vastly outweighs the risk of unnecessary property damage. We are aware of no considerations of logic, common sense, justice, policy, or precedent that support making the execution of warrants an exception to the general rule that law enforcement activities are not reachable in negligence.

(*See*, Court of Appeals' opinion at 6-7.)

The appellate court correctly ruled that the SRT did not owe a duty to avoid negligent, incidental damage to Brutsche's property while in the process of executing a facially valid search warrant. Absent such a duty, Brutsche's negligence claim fails as a matter of law.

**2. Brutsche's Claim that a Negligence Standard Applies to Police Conduct when Executing a Search Warrant is Meritless.**

Contrary to Brutsche's claims, the decision of the Court of Appeals is not in conflict with any *applicable* decisions of the Supreme Court. All of the cases Brutsche cites in support of his assertion that a negligence standard applies to police officers when executing a search warrant are readily distinguishable.

Brutsche's reliance on *Goldsby v. Stewart*, 158 Wash. 39, 290 Pac. 422 (1930) is without basis.<sup>2</sup> In *Goldsby*, the plaintiffs alleged that, during execution of a search warrant to locate intoxicating liquor on the premises, law enforcement officers "destroyed and tore apart partitions in the building, tore up floors and casings, cut electrical wires used for lighting the premises, and removed therefrom one of the entrance doors to the second floor . . ." *Goldsby*, 158 Wash. at 40. The Court in *Goldsby* stated that, when executing a search warrant, "officers of the law should do no unnecessary damage to the property to be examined, and should so conduct the search as to do the least damage to the property consistent with a thorough investigation." *Goldsby*, 158 Wash. at 41. However, the primary holding in *Goldsby* was that, because the case facts were sharply

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<sup>2</sup> *Goldsby* is an obscure case that has been cited only twice in the 76 years since it was written: once in *Goldsby v. Stewart*, 168 Wash. 699, 13 P.2d 32 (1932), (i.e., the same case, which was appealed a second time following a remand and retrial), and more recently by the Court of Appeals in the case at bar.

disputed and the credibility and weight of witness testimony was crucial, the trial court erred in taking the case from the jury and summarily dismissing plaintiffs' action. The Court in *Goldsby* did not even mention or discuss, much less apply any type of negligence standard to police conduct during the execution of a search warrant.

Contrary to Brutsche's assertion, holding that police should not do unnecessary damage to property during the execution of a search warrant is not equivalent to stating that the police owe a duty of ordinary care in this context. Furthermore, the Court's statements in *Goldsby* are fully consistent with the well-established rule that "the police may take whatever steps are reasonably necessary in executing duly authorized warrants." *Duran v. City of Douglas, Arizona*, 904 F.2d 1372, 1376 (9th Cir. 1989), citing *Dalia v. United States*, 441 U.S. 238, 257-58, 60 L.Ed.2d 177, 99 S. Ct. 1682 (1979). Inherent in the statement that police may take reasonably necessary steps to execute search warrants is that they should do "no unnecessary damage to the property to be examined," the Court's words in *Goldsby*. In *Dalia*, the U.S. Supreme Court specifically noted that officers executing search warrants on occasion must damage property in order to perform their duty, and this is permissible under the Fourth Amendment. *Dalia*, 441 U.S. at 258. In addition, under Washington law, the execution of a search warrant does not become unreasonable solely because the search could have been accomplished by

less obtrusive means. *Torrey v. Tukwila*, 76 Wn. App. 32, 34, 882 P.2d 799 (1994). In short, *Goldsby* is neither on point nor controlling, and provides no support for Brutsche's negligence claim.

Brutsche's assertion that the Court of Appeals' dismissal of his negligence claim conflicts with several Supreme Court cases is equally without merit. On pages 7-8 of his Petition for Review, Brutsche string cites (without any meaningful analysis) eight Supreme Court cases, none of which supports his claim that a negligence standard applies to police conduct when executing a search warrant.

For example, in *Joyce v. Dep't of Corrections*, 155 Wn.2d 306, 119 P.3d 825 (2005), the Court held that once the State takes charge of a convicted offender in the community (i.e., via supervision by a community corrections officer or a parole officer), it has a duty to take reasonable precautions to protect against reasonably foreseeable dangers posed by the offender's dangerous propensities. The Court in *Joyce* relied heavily on *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 247 (1992), where the Court initially imposed this duty in connection with parolees. In *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002), a personal injury suit arising out of a motor vehicle accident, the Court held that municipal corporations owe a duty to all persons to build and maintain their roadways in a reasonably safe condition for ordinary travel, regardless of a person's own negligence or degree of fault in a given case. In *Stalter v.*

*State*, 151 Wn.2d 148, 86 P.3d 1159 (2004), the Court held that jail personnel have a duty to take steps to promptly release a detainee once they know or should know, based on information provided to them, that the person they are holding is not the person named in the arrest warrant. In *Bender v. Seattle*, 99 Wn.2d 582, 664 P.2d 492 (1983), while the Court limited the scope of the discretionary act exception in connection with criminal investigations and the filing of criminal charges, it did not create any new cause of action in negligence against either the police or against the municipalities that employ them. In commenting on *Bender*, the Division I Court of Appeals specifically noted that “a lack of immunity does not show the presence of a duty.”<sup>3</sup>

Brutsche’s attempt to apply the quote from *Employco Personnel Services, Inc. v. City of Seattle*, 117 Wn.2d 606, 615-616, 817 P.2d 1373, 1379 (1991) (*see* Brutsche’s Petition at 8) is completely without basis. In *Employco*, the Washington Supreme Court held that the City of Seattle was not immune from liability for the negligence of municipal workers who failed to identify the location of an underground electrical line, cut it and caused a power outage. The duty of a city worker to avoid cutting a power line has absolutely nothing to do with a police search pursuant to a valid warrant. *Employco*, like all of the other cases cited at 7-8 of

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<sup>3</sup> *See*, Court of Appeals’ opinion, at 7, appended to Brutsche’s Petition For Review.

Brutsche's Petition, is readily distinguishable and underscores the fact that a negligence analysis is inapplicable to Brutsche's case.

**B. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISMISSAL OF BRUTSCHE'S TRESPASS CLAIM.**

As noted in the appellate court's decision, Brutsche acknowledges that the SRT was authorized to enter his property,<sup>4</sup> but claims damages for the allegedly "tortious property destruction" that subsequently occurred.<sup>5</sup> Brutsche premised this claim on the Restatement (Second) of Torts §214(2),<sup>6</sup> which provides that one who enters land with a privilege to do so is still subject to liability for a tortious act committed while on the property. In essence, Brutsche's citation to §214(2) represented another attempt to assert a negligence argument under the guise of trespass law, and was properly rejected by both the trial court and the Division I Court of Appeals. As the appellate court noted, "Brutsche does not clearly explain why breaking his doors was tortious."<sup>7</sup>

In his Petition for Review (at 9-10), Brutsche now claims that he at all times sought damages under the trespass *ab initio* doctrine, and that the Court of Appeals' decision conflicts with *Hamilton v. King County*, 195 Wash. 84, 79 P.2d 697 (1938). This claim is without merit, since Brutsche did not even mention the concept of trespass *ab initio* until he filed his

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<sup>4</sup> See, Court of Appeals' opinion, at 9.

<sup>5</sup> See, *Appellate Brief of Brutsche*, at 26.

<sup>6</sup> See, *Appellate Brief of Brutsche*, at 25.

<sup>7</sup> See, Court of Appeals' opinion, at 9.

reply brief.<sup>8</sup> Contrary to Brutsche's assertion, the issue of trespass *ab initio* was not raised either in his assignments of error or in his opening brief. "An issue raised and argued for the first time in a reply brief is too late to warrant consideration." *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Furthermore, this case is readily distinguishable from *Hamilton*, in which the Court imposed liability against King County for constructing a drainage ditch too close to a building used for the breeding of mink, resulting in the demise of plaintiff's 1936 mink crop.<sup>9</sup> The Court of Appeals' rejection of Brutsche's trespass claim does not conflict with the Supreme Court's holding in *Hamilton*, and provides no basis for acceptance of review pursuant to RAP 13.4(b)(1).

**C. RCW 10.93 AUTHORIZED THE POLICE TO EXECUTE THE SEARCH WARRANT REGARDLESS OF THE EXISTENCE OF ANY INTERLOCAL AGREEMENT.**

Brutsche's assertion that whether the City of Kent complied with the Interlocal Cooperation Act (RCW 39.34) prior to deploying the SRT presents an issue of substantial public interest warranting Supreme Court review is without merit. Pursuant to RCW 10.93.070(3) (part of the Washington Mutual Aid Peace Officers' Powers Act), any police officer in

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<sup>8</sup> See, *Brutsche's Appellate Reply Brief*, at 28.

<sup>9</sup> Plaintiff's citation to *Turner v. Sheriff of Marion County*, 94 F.Supp.2d 966, 984 (S.D. Ind. 2000), an Indiana case applying the doctrine of trespass *ab initio* to police officers who executed a search warrant on the wrong house, is equally misplaced and has no bearing on Brutsche's case.

Washington is empowered to enforce criminal laws throughout the state in response to the request of a peace officer who has enforcement authority. The Kent police unquestionably had enforcement authority to execute a warrant on property located in Kent. The SRT officers were called to assist the Kent police because of their particular expertise in executing high risk warrants involving criminal drug activity. Thus, RCW 10.93.070(3) directly empowered the SRT to execute this warrant. As a result, the fact that the interlocal agreement setting up the SRT may not have been signed or ratified prior to execution of the search warrant is irrelevant, as evidenced by *State v. Plaggemeier*, 93 Wn. App. 472, 969 P.2d 519 (1999), the very case cited by Brutsche in support of his argument that the SRT acted without authority.

In *Plaggemeier*, the Court specifically rejected defendant's claim that a city police officer who arrested him outside of city limits lacked legal authority for the arrest because an interlocal agreement among five law enforcement agencies had not been ratified or filed as required by RCW 39.34. The Court noted that RCW 10.93 authorizes extra-jurisdictional enforcement action in six circumstances, and that a mutual law enforcement assistance agreement constitutes only one of those circumstances. In *Plaggemeier*, the arrest was authorized by the consent provision set forth in RCW 10.93.070(1). In this case, as explained above, the actions of the SRT were specifically authorized by RCW 10.93.070(3).

In both cases, the existence of an interlocal agreement was irrelevant because the actions of the police officers were specifically authorized by RCW 10.93. In this case, the Division I Court of Appeals properly rejected Brutsche's argument to the contrary.<sup>10</sup>

**D. THE COURT OF APPEALS PROPERLY RULED THAT PROPERTY DAMAGE RESULTING FROM THE PROPER EXERCISE OF POLICE POWER DOES NOT CONSTITUTE A COMPENSABLE TAKING.**

**1. Police Power and the Power of Eminent Domain Are Two Distinct and Separate Powers of Government.**

Mr. Brutsche's assertion that the minimal property damage he sustained during the execution of this search warrant constituted a compensable constitutional "taking" is without merit, and was properly rejected by both the trial and appellate courts. Throughout this litigation, Brutsche has improperly relied on the doctrine of eminent domain, which has no relevance to this case, and has persistently ignored the distinction between the exercise of police power and the power of eminent domain. Brutsche's attempt to merge the power of eminent domain with the police power exercised in this case is improper, since these constitute completely separate powers of government. *Eggleston v. Pierce Co.*, 148 Wn.2d 760,

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<sup>10</sup> See, Court of Appeals' opinion, at 9, in which the Court stated that "the officers from other jurisdictions were asked to participate in this particular search, and therefore did not need the interlocal agreement to authorize their activity in Kent. See, RCW 10.93.070(3)."

767, 64 P.3d 618 (2003). This distinction was clearly articulated by the court in *Eggleston*:

Police power and the power of eminent domain are essential and distinct powers of government . . . Courts have long looked behind labels to determine whether a particular exercise of power was properly characterized as police power or eminent domain. But clearly, not every government action that takes, damages, or destroys property is a taking. “Eminent domain takes private property for a public use, while the police power regulates its use and enjoyment, *or if it takes or damages it, it is not a taking or damaging for the public use, but to conserve the safety, morals, health and general welfare of the public.*”

148 Wn.2d at 767-8 (emphasis in original, citing *Conger v. Pierce County*, 116 Wash. 27, 36, 198 Pac. 377 (1921) (additional citations omitted).

**2. The Court of Appeals’ decision is consistent with the Supreme Court holding in *Eggleston v. Pierce County*.**

In *Eggleston v. Pierce County, supra*, the Supreme Court specifically held that property damage to a house, sustained during the execution of a search warrant by police, was not a compensable taking because it was the result of the valid exercise of police power and not the exercise of the State’s power of eminent domain. In doing so, the Court specifically analyzed Washington constitutional history, “the continuing vitality of the separate doctrines of eminent domain and police power,” and concluded “extending takings to cover this alleged deprivation of rights would do significant injury to our constitutional system.” *Eggleston*, 148 Wn.2d at 773, 775.

In *Eggleston*, the police rendered plaintiff's home uninhabitable when it removed a load bearing wall pursuant to a search warrant issued in connection with a murder charge against her son. After examining the Washington State Constitution, and citing and discussing cases from other jurisdictions, the Court concluded:

After a careful survey, we are aware of no case that holds or even supports the proposition that the seizure or preservation of evidence can be a taking.

148 Wn.2d at 770.

Brutsche's attempt to limit the holding in *Eggleston*, by claiming that it applies only to the seizure or preservation (as opposed to the gathering) of evidence is meritless, as the court in *Eggleston* specifically held that the "gathering and preservation of evidence is a police function, necessary for the safety and welfare of society." *Eggleston*, 148 Wn.2d at 769. The fundamental purpose in executing the search warrant on Mr. Brutsche's property was to gather evidence of serious criminal conduct, specifically the suspected illegal manufacture of methamphetamines. The fact that there was no actual seizure of evidence or criminal prosecution against James Brutsche is irrelevant, and Brutsche's attempt to distinguish *Eggleston* on such grounds is meritless.

The Court of Appeals correctly ruled that, pursuant to *Eggleston*, the destruction of Mr. Brutsche's doors did not constitute a taking, and

properly rejected Brutsche's numerous attempts to distinguish the holding in *Eggleston*:

Brutsche attempts to distinguish this case in several ways. First, Brutsche notes that the Supreme Court recognized that even an exercise of police power can be a taking when it goes too far. See *Eggleston*, 148 Wn2d at 760 n.6. But inasmuch as that court declined to hold that rendering a home uninhabitable went too far, we cannot hold that the destruction of doors went too far.

Second, Brutsche contends *Eggleston* is limited to claims for the temporary preservation of evidence, whereas his doors were permanently destroyed. But the destruction there was just as complete; the State rendered a home uninhabitable. Thus, we cannot find in *Eggleston* the distinction proposed by Brutsche.

Third, Brutsche notes that the search warrant here did not authorize destroying doors, while the *Eggleston* warrant explicitly authorized seizing the walls in question. With respect to the authority of the officers executing the search warrant to break these doors, this distinction is immaterial. See, *Dalia v. United States*, 441 U.S. 238, 257, 99 S. Ct. 1682, 60 L.Ed.2d 177 (1979).

Court of Appeals' opinion at 4-5.

Brutsche's attempt to undermine the holding in *Eggleston*, by arguing that it "is in conflict with *Conger v. Pierce County*, 116 Wn. 27, 198 P. 377 (1921) (see Petition For Review, at 13) is without basis. The specific question in *Conger* was whether counties that had straightened portions of the Puyallup River, in an attempt to prevent it from overflowing and damaging county property, were liable to a landowner whose property was subsequently eroded and washed away. After carefully distinguishing between the power of eminent domain and the exercise of police power, the Court in *Conger* specifically held that the

counties' conduct constituted the exercise of eminent domain. Consequently, the counties were deemed liable to the landowner, pursuant to Washington Constitution, Article 1, §16. Contrary to Brutsche's assertion, *Eggleston* is entirely consistent with the analysis and holding in *Conger*.

Brutsche's claim that *Eggleston* is in conflict with *Dickgieser v. State*, 153 Wn.2d 530, 105 P.3d 26 (2005) (*see*, Petition For Review, at 13-14) is equally without merit. In *Dickgieser*, the court held that the State's logging and modifications to a stream bed constituted a public use that could support plaintiff's inverse condemnation claim. *Dickgieser*, like *Conger*, involved the exercise of eminent domain, and is irrelevant to the appropriate exercise of police power in executing a search warrant.

The Court of Appeals properly rejected Brutsche's attempt to invoke the doctrine of eminent domain as inapplicable to the case facts. The Special Response Team's actions had nothing to do with eminent domain, but rather were undertaken pursuant to the State's police power. As a result, no compensable taking occurred.

**E. BRUTSCHE HAS NO TAKINGS CLAIM BASED ON FEDERAL CONSTITUTIONAL LAW.**

Brutsche improperly claims that the property damage to his doors constituted a taking under the Fifth and Fourteenth Amendments to the United States Constitution. *See*, Petition For Review, at 14-15. But the

Court in *Eggleston* specifically noted that no taking would be found under federal constitutional law:

The federal courts have considered the question of whether the seizure of evidence is a taking under federal constitutional law, and it appears to us that they would not find the injury to Mrs. Eggleston to be a takings. (Citing *Hurtado v. United States*, 410 U.S. 578, 93 S. Ct. 1157, 35 L.Ed.2d 508 (1973)).

*Eggleston*, 148 Wn.2d at 774.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L.Ed.2d 868 (1982), the sole case cited by Brutsche in support of his federal constitutional argument, the United State Supreme Court ruled that the installation of cable television in plaintiff's apartment building, pursuant to a New York statute requiring a landlord to permit cable television on this property, constituted a taking for which compensation was required. *Loretto* is readily distinguishable from the execution of a search warrant in this case, and provides no basis whatsoever for Brutsche's takings claim.

#### **IV. CONCLUSION**

Based on the foregoing, Brutsche has failed to meet any of the criteria for acceptance by the Supreme Court of his Petition For Review. Accordingly, Brutsche's petition should be denied.

Respectfully submitted this 11<sup>th</sup> day of October 2006.

KEATING, BUCKLIN & McCORMACK,



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Chloethiel W. DeWeese, WSBA #9243

Richard B. Jolley, WSBA #23472

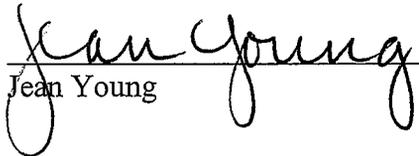
Attorneys for Respondent/Cross-Appellant

**CERTIFICATE OF SERVICE**

I certify that I served a copy of *City's Response to Petition for Review* upon all parties of record on the 17<sup>th</sup> day of October 2006, via United States Postal Service as follows:

Jerald A. Klein  
Attorney at Law  
1425 Fourth Avenue, Suite 518  
Seattle WA 98101

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

  
\_\_\_\_\_  
Jean Young