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COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

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LEO C. BRUTSCHE
Appellant

VS

CITY OF KENT, a Municipal corporation
Respondent

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

- A. Plaintiff proved its prima facie case for negligence and it was error to dismiss this claim.
1. What is the prima facie case for negligence?
 2. What is the duty of care owed by officers to innocent property owners during execution of a search warrant and what is the duty of the cities that employ the officers?
 3. Did the Plaintiff prove Defendant breached its duty of care?
 4. Is the question of the reasonableness of using the battering rams to open doors during the execution of a search warrant a factual issue for the trier of fact?
 5. Did the Plaintiff show proximate cause and damages?
 6. Is the City of Kent negligent for failure to adequately train for and supervise the use of battering rams?
 7. Is the City of Kent vicariously negligent for the acts of the officers?
 8. Does the public duty doctrine apply?
- B. Plaintiff proved its prima facie case for trespass and it was error to dismiss this claim
1. What is the prima facie case for trespass?

2. Were the officers justified and/or privileged to destroy Plaintiff's doors and door jams during the execution of the search warrant and could the City of Kent use any such privilege or justification?
- C. Plaintiff proved its prima facie case for Unconstitutional "taking"
1. What is the prima facie case for an Unconstitutional taking and can it include activities engaged in by officers executing a search warrant?
 2. Were the officers justified and/or privileged to destroy Plaintiff's doors and door jams during the execution of the search warrant or does the EGGLESTON holding only apply to preservation of evidence?
- D. The Defendant City of Kent waived its conditional immunity by acting as a swat team without authority
1. Did use of a swat team prior to valid consideration of the Interlocal Cooperative Agreement violate the delegation doctrine?
 2. Did violation of the delegation doctrine by Kent's executive department void its authority?
 3. Did the City of Kent waive its conditional immunity by acting without authority in using a swat team?
- E. The trial court should not have awarded

costs and attorneys fees to the City of Kent

1. If the summary judgment is reversed, so should the award of fees to City if Kent?

F. This court should award fees to Appellant Brutsche pursuant to 42 USC Sec. 1988(b)

1. Can fees be awarded pursuant to 28 U.S.C. Sec. 1988?

I. STATEMENT OF THE CASE

This case stems from a raid conducted by officers and Building Code officials who were looking for drugs or city code violations. C.P. 31, lines 18-23. No drugs nor violations were found. C.P. 31, lines 21-22; See also the INVENTORY AND RETURN OF SEARCH WARRANT, C.P. 86, at page 87, answer to item 7. During the raid, Plaintiff offered to escort the officers around the premises and open all doors with his keys. C.P. 89, lines 11-14, paragraph 5. The officers declined Plaintiff's offer and instead used a battering ram to enter the various buildings. C.P. 135, lines 8-10; The officers used battering rams or "breaching devices" on the doors to gain access as quickly as possible to minimize officer safety concerns. C.P. 45, lines 10-16. In his declaration in opposition to the summary judgment, Mr. Brutsche pointed out that the battering ram was unnecessary because using his keys would have been much quicker and quieter, thus taking less time and would not alert

criminals, had there been any. C.P. 89, lines 18-23, paragraph 7. Plaintiff offered to escort the officers around his property because he knew there were no drugs nor code violations. C.P. 90. lines 3-9. Use of the battering ram caused extensive damage to Plaintiff's doors, door jams and windows. C.P. 90, lines 10-20. The Plaintiff hired a carpenter who repaired the door jams and doors for the sum of \$4,921.51. C.P. 90, lines 16-18, See also Declaration of James Warner, C.P. 131-133. Plaintiff gave due notice of his claims to the respective Defendants and after the statutory period and rejection, Plaintiff sued. C.P. 3-7.

The City used its own officers plus officers from various other cities and towns. C.P. 43, Declaration of Darren Majack.... Unfortunately, this was illegal and violated the delegation doctrine because the City Council had not been given an opportunity to discuss and approve the Interlocal Cooperative Agreement until four months after the raid. C.P. 70-85; Appendix, Exhibit A.

The agreement to form and use a swat team was later duly approved and ratified by Mayor White on November 13, 2003. C.P. 81. But back at the time of the raid, July 10, 2003, as the agency with primary territorial jurisdiction, the City of Kent did not have authority to use the swat team members and their battering ram. C.P. 81.

There were never any drugs nor code violations on the property. C.P. 90, lines 3-9. No evidence was seized in the raid. C.P. 86-87. The City Code Enforcement Official did "red-tag" the mobile home for not having doors. C.P. 207, lines 16-25. The matter was dropped when Mr. Werner made the repairs and no City file was kept on the raid. C.P. 200, lines 9-12; see also C.P. 91, lines 8-10. Plaintiff's son, Jim Brutsche, was injured when the officers forced him to lay down on broken glass and tasserred him, but Jim was later taken to the hospital and eventually released without charge. See C.P. 91 and 86-87.

II. STANDARD OF REVIEW

The review of a summary judgment is de novo, and courts apply the same standard as the trial court. SEATTLE vs MIGHTY MOVERS, 152 Wn.2d 343, 348 (2004). A summary judgment is appropriate only "...if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material facts and that the moving party is entitled to judgment as a matter of law." Id. citing CR 56(c).

Summary judgment for a defendant is not appropriate when the plaintiff comes forward with evidence sufficient to establish the existence of each element of its cause of action. BLUMENSHEIN vs VOELKER, 124 Wash. App. 129, 136 (Div.III, 2004). If Plaintiff has shown its prima facie case, the Court may affirm only if there were no issues of material fact. BABCOCK vs STATE, 116 Wn.2d 596, 598 (1991).

III. ARGUMENT

A. Plaintiff proved its prima facie case for negligence

1. Prima facie elements for negligence

The prima facie elements for negligence are:

(1) a legal duty owed by the defendant to the plaintiff, (2) breach of the duty, and (3) injury to the plaintiff proximately caused by the breach.

HERTOG vs CITY OF SEATTLE, 138 Wn.2d 265, 275

(1999); RESTATEMENT (SECOND) OF TORTS, Sec. 281.

In his response, Plaintiff asserted that:

The defendants owed a particular duty to me not to destroy my property. I bought the property in 1993 and have owned it exclusively ever since. My claims are not based upon any "public duty", but upon my right to own, possess, use and enjoy my property without having it destroyed by the defendants.

C.P. 89, line 23 through C.P. 90, line 3.

Property owners have rights in their property.

WASHINGTON STATE CONST., Art. 1, Sec. 3 and 16.

Plaintiff asserted that the City of Kent and its officers owed him a duty to use ordinary care when entering the doors of his property, but breached that duty by using a swat team armed with

battering rams and little training or supervision.

C.P. 89.

2. Duty of care owed by officers to innocent property owners during execution of a search warrant and the duties of the cities that employ the officers.

The duty that generally applies in negligence cases is the duty to exercise ordinary care.

MATHIS vs AMMONS, 84 Wn.App. 411, 415-16 (Div.II, 1996). Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances. WPI 10.02. Generally, everyone has the duty to exercise ordinary care, unless the legislature proscribes certain conduct, in which case the statute establishes the standard of care. CALLAN vs O'NEIL, 20 Wash. App. 32, 36-7 (Div.I, 1978).

With regard to the officers use of the battering rams to enter Plaintiff's buildings there is no legislative proscriptions and the default standard of care would be ordinary care.

With regard to the City of Kent's duties to train and supervise those officers, as the agency

with primary territorial jurisdiction, the City of Kent had the duty to see that the swat team met reasonable training or certification standards and followed reasonable standards. R.C.W. 10.93.130(2003).

With regard to employment of an extra-jurisdictional swat team for use on local search warrants, the legislature has directed that the legislative bodies of cities review any such interlocal cooperative agreements before it is to take effect. R.C.W. 39.34.030(2)(2003). The legislature also requires cities to record the interlocal cooperative agreement to thus publish notice of the agreement to the public. R.C.W. 39.34.040 (2003). Thus, a city's liability stems not from any decision it makes regarding use of a swat team but where it fails to properly consider an interlocal agreement or fails to warn its citizens through recording. Id. The Interlocal Cooperative Agreement for the swat team was belatedly ratified in November, 2003. C.P. 81. The agreement was published still later on March

25, 2004, C.P. 70.

3. The question of the reasonableness of using the battering rams to open doors during the execution of a search warrant is a factual issue for the trier of fact.

What constitutes reasonable care and whether a defendant breached its duty are generally questions of fact. *HERTOG vs. CITY OF SEATTLE*, 138 Wn.2d 265, 275 (1999); *TRAVIS vs BOHANNON*, 128 Wn. App. 231, 240 (Div.III, 2005). Brutsche claimed that the practice of using a battering ram to breach the doors was unreasonable under the circumstances. C.P. 89, lines 18-20. He points out that use of the keys would have been much quicker, quieter and safer than banging on the doors with the battering ram until they eventually became splinters. C.P. 89, lines 18-23; C.P. 135, lines 18-23. Officer Majack claimed that the battering rams were necessary in order to gain access to the buildings as quickly as possible to minimize officer safety concerns. C.P. 45, lines 12-15. But there was damage to the door jams. C.P. 89, lines 6-8. This means

that the battering ram was not used properly, or at least not used in a way that would obtain access quickly. The photos of the doors show that the battering ram did not open the doors by forcing the latch past the strike plate but by smashing up the doors until the latch casing fell away from the strike plate. C.P. 224. (The trial clerk's copy of Exhibit 4 from the Swanberg deposition is of poor quality. A copy of the Exhibit 4 is attached hereto in the Appendix as Exhibit B). Keys would have been much quicker. C.P. 135, lines 18-23. As explained by Mr. Brutsche:

Letting me open the doors before the raid or after the facility was "secured" would have been safer and less destructive. I knew there were no illegal drugs nor weapons on the property. I offered to escort the officers throughout my property at the time of the raid because I knew there was no genuine officer safety concerns nor any illegal activities.

C.P. 136, lines 3-9. Ordinary care would have meant the officers using Brutsche's keys, or at least using a crow bar or other prying device, or at the very least, ramming the doors where the

latch casing was located rather than in the middle of the door.

4. Is the City of Kent negligent for failure to adequately train for and supervise the use of battering rams

Plaintiff alleges that the City was negligent in failing to train and supervise the officers in using the battering ram. C.P. 5. lines 6-13 (Amended Complaint). The City eventually delegated its responsibility to the Swat team Board to make "...written policies, regulations, and operational procedures..." within 90 days of the effective date of the agreement. C.P. 119, first full paragraph. However, these "operational procedures" would not come into effect until about a year after the raid (March 25, 2004 + 90 days). Thus, back on July 10, 2003, there were no rules, regulations nor operational procedures to govern such matters as when and how to use battering rams. Thus, there could not have been any training, and the damage proved the lack of training.

The Interlocal Cooperative Agreement calls

for the Board to appoint the Tactical Commander who has supervisory authority. C.P. 119, second full paragraph. However, the person in charge of the swat team was Lieutenant Villa of the Tukwila Police Department. C.P. 46, lines 15-19. His authority to act (or supervise) in Kent first required "prior written consent" of the Kent chief of police. R.C.W. 10.93.070. The Kent Chief of Police's authority would come from the Mayor whose authority was not given until November 13, 2003. C.P. 126. Lacking authority to discipline Villa, the City abrogated its duty to supervise.

A jury could find the City to be negligent. A jury could find that there was more than one proximate cause of Plaintiff's injuries. However, the concurrent negligence of a third party does not break the chain of causation between the original negligence and the injury. TRAVIS vs BOHANNON, 128 Wn. App. 231, 242 (Div. III, 2005). Thus, the negligence of the officers in destroying Plaintiff's doors and door jams is merely a concurrent negligence to the

City's negligence in employing untrained swat teams for search warrants and in failing to maintain a supervisory chain of command over the non-employee, extra-jurisdictional team. Id.

5. The City of Kent is vicariously negligent for the acts of the officers using the battering ram

A municipal corporation such as the City of Kent can act only through its agents, and when its agents act within the scope of their employment, their actions are the actions of the city itself. HOUSER vs CITY OF REDMOND, 91 Wn.2d 36, 40 (1978) The declaration of Officer Majack shows that the officers used the battering rams to open doors as part of their duties to execute the search warrant. C.P. 45, lines 14-16. Thus, the officers were acting within the scope of their duties and the city is liable for any negligence in using the battering rams even though predicated on respondent superior. SAVAGE vs STATE, 127 Wn.2d 434, 439 (1995). Although the qualified immunity of police officers at one time shielded their employers, the immunity was eliminated by the

Supreme court in SAVAGE vs STATE in 1995. 127 Wn2d 434, 442-43 (1995).

6. The public duty doctrine does not apply

The Washington Courts have uniformly enforced liability on the state and local governments for negligence involving any private duty. In the landmark decision of BENDER vs SEATTLE, our Supreme Court held that police officers were not immune from tort liability for their discretionary acts taken during an investigation of a crime. 99 Wn2d 582, 589-90. BENDER involved a local jeweler's right to be free from slander and false arrest. There was never any "public duty" involved, only Bender's private rights.

Another landmark decision was EMPLOYCO PERSONNEL vs SEATTLE, where the Supreme Court held that a municipal corporation could be held liable for the property damage arising from an employee's negligence in failing to identify the location of a underground electrical line. 117 Wn.2d 606, 615-6. (1991), As stated by the Court:

A municipality may be held liable for

injuries to property belonging to another. It is firmly established that in a proper case a city may be held liable on the theory of negligence. A city may be held liable for either a negligent act of commission or a negligent act of omission. A city's negligence need not be the sole cause of an injury, but if its negligence concurs with that of another to produce a wrong, both of the tortfeasors may be held liable.

117 Wn.2d at 615-16. Plaintiff and other businesses had their power cut off and business disrupted when the electrical line was cut because a City worker did not identify the location of an underground power line. Id. at 609.

Thus, there is no sovereign immunity for torts, either intentional or caused through negligence, when the injury is to a private right, such as Plaintiff's private property rights.

EMPLOYCO PERSONNEL, supra. Cases dealing with public rights or public duties are inapplicable to this case where the only right being enforced is a single plaintiff's private right to peaceably enjoy his private property.

B. Plaintiff proved its prima facie case for trespass

1. The prima facie case for trespass

Washington Courts rely on the Restatement
(Second) of Torts Section 158 (1965) for the
elements of trespass:

One is subject to liability to another for
trespass, irrespective of whether he thereby
causes harm to any legally protected interest
of the other, if he intentionally

(a) enters land in the possession of the
other, or causes a thing or a third
person to do so, or

(b) remains on the land, or

(c) fails to remove from the land a
thing which he is under a duty to
remove.

BRADLEY vs AMERICAN SMELTING, 104 Wn.2d 677, 681
(1985). The officers intended to go onto
Plaintiff's land and the Defendant City of Kent
caused the SWAT team to go onto Plaintiff's land.
However, Plaintiff is not claiming damages from
the mere entry but for the destruction to his
doors and door jams during the trespass. The
RESTATEMENT explains:

(2) One who properly enters land in the
exercise of any privilege to do so, and
thereafter commits an act which is tortious,
is subject to liability only for such
tortious act, and does not become liable for
his original lawful entry, or for his lawful
acts on the land prior to the tortious
conduct.

RESTATEMENT (Second) OF TORTS, Sec. 214(2). Thus,

regardless of any privilege arising from the search warrant, the officers are liable for the tortious act committed after entry. See FRANKIN vs NORTSHORE UTIL. DIST., 96 Wn. App. 118, 123 (Div., I, 1999). Plaintiff's claim for trespass has nothing to do with the officers executing the search warrant, but only with the pointless, tortious property destruction.

2. The officers were not justified or privileged to destroy Plaintiff's doors and door jams during the execution of the search warrant and the City of Kent can not use such privilege or justification

The requirements for state law qualified immunity from lawsuits arising from police activity are that the officer (1) carries out a statutory duty, (2) according to procedures dictated to him by statute and superiors, and (3) acts reasonably. MCKINNEY vs TUKWILA, 103 Wn. App. 391, 407 (Div. I, 2000). Officers Majack and Villa did not address the reasonableness of rams versus keys or other less destructive and quicker means of entry. C.P. 45, lines 10-16; C.P. 49, line 25 through C.P. 50, line 5.

An agent's immunity from civil liability generally does not establish a defense for the principal. Restatement (Second) of Agency Sec 217 (1858); BABCOCK vs STATE, 116 Wn2d 596, 620 (1991). Accordingly, the immunities of governmental officials do not shield the governments which employ them from tort liability, even when liability is predicated upon respondeat superior. BABCOCK, supra at 620. Likewise, the governmental immunity granted government officials under 42 U.S.C. Sec. 1983 is a personal defense which shields the official from suit in his or her personal capacity but not in his or her official capacity, and personal defenses do not apply in suits against governmental entities. BABCOCK, at 620-21, citing KENTUCKY vs GRAHAM, 473 U.S. 159, 105 S. Ct. 3099 (1985). Thus, the City of Kent may not avail itself of any qualified immunity that might be available to its officers. BABCOCK, AT 620; HERTOG vs SEATTLE, 138 Wn.2d 265, 292 (1999), SAVAGE vs STATE, 127 Wn2d, 434, 443 (1995)

In 1961, our Legislature exercised its Constitutional authority under Article II, Section

26 and waived sovereign immunity. R.C.W. 4.92.090.

The waiver reads:

The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

R.C.W. 4.92.090(2003). In 1967 the Legislature clarified that the waiver applied to its subdivisions and cities:

(1) All local governmental entities, whether acting in a governmental or proprietary capacity shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation.

R.C.W. 4.96.010(1).

- C. Plaintiff proved its prima facie case for Unconstitutional "taking"
- 1. Brutsche's Right to Own property and "takings" under the Fifth Amendment and Article I, Section 16

This case involves Plaintiff's right to own property and the City's duty not to destroy Plaintiff's property. The common law has recognized that property owners such as Plaintiff

have had a private cause of action for trespass
BRADLEY vs AMERICAN SMELTING, 104 Wn.2d 677, 683-4
(1985). This right is guaranteed in the Fifth
Amendment to the U.S. Constitution, which states
in pertinent part:

...nor shall any person be ... deprived of
life, liberty, or property, without due
process of law; nor shall private property be
taken for public use without just
compensation.

U. S. CONSTITUTION, 5th Amend. The corresponding
duty was expressly visited upon the states with
the adoption of the Fourteenth Amendment which
reads in part:

...nor shall any state deprive any person
of life, liberty or property, without due
process of law ...

U. S. CONSTITUTION, 14th Amend. Still later,
Washington State adopted its constitution which
again guaranteed Mr. Brutsche's right to own
private property, saying:

No person shall be deprived of life, liberty
or property without due process of law

WASHINGTON STATE CONSTITUTION, Art. I, Sec. 3.

The drafters of Washington's Constitution went on
to say:

No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, ...

WASHINGTON STATE CONSTITUTION, Art. I, Sec. 16.

Courts require an analysis of the difference between analogous provisions of the State and Federal Constitution. STATE vs GUNWALL, 106 Wn.2d 54, 61-62 (1986). The notable textual difference is in the State's use of the phrase "...taken or damaged..." in Article I, Section 16. This suggests broader coverage by the State's Constitution. But Federal Courts interpret the U.S. Constitution as covering both damage and taking. Some government takings permanently deprive a property owner of his property and are takings "per se". LORETTO vs TELEPROMPTER MANHATTAN CATV CORP, 458 U.S. 419, 426, 102 S. Ct. 3164 (1982). Such takings arise from a permanent physical occupation and result in a taking without regard to other factors a Court would examine in a regulatory taking. LORETTO, at 426. Other takings occur when a government acts under its police power to regulate the use of property.

PENN CENTRAL TRANSPORTATION CO., vs NEW YORK, 438 U.S. 104, 98 S. Ct. 2646 (1978).

Washington State Courts also look to see if there has been some physical invasion resulting in permanent damage. Any governmental activity that invades or interferes with the right to use and enjoy property is a taking. PRUITT vs DOUGLAS COUNTY, 116 Wn. App. 547, 559 (2003). The right to compensation is determined by asking whether the governmental action deprived the property owner of a valuable right. MANUFACTURED HOUS. CMTYS. OF WASH. 142 Wn.2d 347, 367 (2000). A governmental taking executed without the formal procedures of eminent domain is called an inverse condemnation. PHILLIPS vs KING COUNTY, 136 Wn2d 846, 957 (1998). For an inverse condemnation, the property owner must prove (1) a taking or damaging (2) of private property (3) for public use (4) without just compensation being paid (5) by a governmental entity that has not instituted condemnation under Title 8 R.C.W. SHOWALTER vs CITY OF CHENEY, 118 Wn. App. 543, 548 (2003).

Brutshce's affidavit makes clear that he bought the property in 1993 and has owned it ever since. C.P. 135, line 25. Further, he states his property was damaged by the swat team of which Kent was a part in its "War on Drugs", a public purpose. C.P. 135. The Interlocal Cooperative Agreement shows that the Mayor of Kent ratified the agreement. C.P. 174. Municipal corporations may ratify prior acts of their agents so long as the city has authority. CHRISTIE vs PORT OF OLYMPIA, 27 Wn.2d 534, 544-5 (1947). Kent had authority to enter into the Interlocal Cooperative Agreement. R.C.W. 39.34. A principal's ratification makes the prior act authorized, retroactively. Because the City accepted the benefits of the agreement, (i.e. conducting a swat team raid) the City became obligated as the principal. Id. In this case the City of Kent accepted the benefits of the swat team and property destruction to "red-tag" Plaintiff's property for lack of doors. C.P. 207, lines

16-25.

Thus, Brutsche showed his "takings" claim under both the U.S. Constitution's Fifth Amendment and the State's Article I, Section 16, as there was a "state action" by the City adoption of the Interlocal Cooperative Agreement, a "per se" taking with the permanent, physical destruction of the doors and door jams, and damages as shown by Mr. Werner, the carpenter.

2. Damage to private property pursuant to the State's police power is a compensable taking under Washington's Constitutional Article I, Sec. 16 when it is a taking "per se" or when regulation deprives the owner of a valuable right

Both the majority and the minority in *EGGLESTON vs PIERCE COUNTY*, recognized that actions taken by a City using its police powers can result in a compensable taking when the action goes "too far". 148 Wn2d 760, n.6, (2003) dissents of J. Alexander, J. Ireland and J. Sanders. The majority opinion cited the hornbook case of *PA. COAL CO., vs MAHON*, 260 U.S. 393, 43 S. Ct. 158 (1922). The majority's holding only applies to

the preservation of evidence and is:

Based on the principles underlying our jurisprudence and evidence from an 1886 Oregon Supreme Court case, we conclude that in 1889, the production of evidence or testimony would not have been considered a taking.

EGGLESTON, supra at 769. Brutsche's doors and door jams were not preserved as evidence, but were smashed to splinters. The resulting kindling was not taken as evidence nor did the SWAT team make any effort to preserve the kindling for some criminal prosecution.

The EGGLESTON court went on to stress:

We stress we do not examine the applicability of substantive or procedural due process, the fourth fifth, or fourteenth amendments to the United States Constitution, Washington Constitution article I, section 7, arbitrary and capricious governmental action, outrage, trespass, 42 U.S.C. Sec. 1983, or any other cause of action that might be brought.

EGGLESTON, supra at 775-6. Thus, the EGGLESTON holding is expressly limited to state takings claims for the temporary taking of evidence.

The dissenting opinions (Ireland, Alexander and Sanders) all focused on how an actual destruction of property should be a "taking",

following decisions in other States (e.g. STEELE vs HOUSTON, 603 S.W.2d 786 (Tex., 1980)) and Federal courts reviewing the issue under the U.S. Constitution (e.g. PORTER vs UNITED STATES, 473 F.2d 1329 (5th Cir, 1976)). But the majority (Chambers) was careful to point out that Mrs. Eggleston could have asked the lower court to limit or review the evidence preservation order, thereby minimizing its effects. EGGLESTON at 776.

The City of Kent drapes itself in the district court search warrant like Abbie Hoffman wearing the American Flag at the Chacago 8 trial. But there is a major difference between the search warrant in this case and the second search warrant in EGGLESTON that specifically authorized seizing the blood splattered walls. The walls from Mrs. Eggleston's home were taken pursuant to the second search warrant for the murder charge. EGGLESTON v. PIERCE COUNTY, 148 Wn.2d 760, 764 (2003). No evidence was collected in this case and the search warrant said nothing about collecting doors or door jams, nor does it authorize destroying them.

There was no evidence to preserve from the raid on Brutsche's property. The return of the search warrant indicates that no property was seized. C.P. 87. The doors and door jams were not seized as evidence but simply smashed to pieces. Thus, the EGGLESTON holding does not apply, and its dicta simply suggests that if Defendants had taken the doors as evidence, they could be returned without incurring a state takings action.

D. The Defendant City of Kent waived its conditional immunity by acting as a SWAT team without authority

1. The Special Response Team Had Not Been Legally Established at the Time of The Raid

The Defendant asserts it had legal authority to call in the Special Response Team or "SWAT team" to execute the search warrant and search for drugs and code violations. This is not true. For there to be legal authority, there had to be a valid interlocal cooperative agreement complying with R.C.W. 39.34. STATE vs PLAGGEMEIER, 93 Wn. App. 472, 480 (Div.II, 1999). However, as shown by the attached Interlocal Cooperative Agreement

between Auburn, Federal Way, Kent, Renton, Tukwila, and the Port of Seattle for the creation of the Valley Special Response Team, the agreement was not signed by Kent's Mayor until November 13, 2003, four months after the raid. Furthermore, the agreement was not recorded until March 25, 2004, eight months after the raid. The wording of R.C.W. 39.34 is mandatory:

Appropriate action by ordinance, resolution or otherwise pursuant to law of the governing bodies of the participating public agencies shall be necessary before any such agreement may enter into effect.

R.C.W. 39.34.030(2)(2003). Furthermore:

Prior to its entry into force, an agreement made pursuant to this chapter shall be filed with the county auditor.

R.C.W. 39.34.040(2003). The Court of Appeals has held that these provisions are mandatory and agreements without legislative action and filing are invalid. STATE vs PLAGGEMEIER, supra at 481.

In the PLAGGEMEIER holding, the Court held that the agreement was invalid for failing to comply with R.C.W. 39.34, but also held that the cross-deputising paragraph ("consent agreement")

was valid because it did not violate the delegation doctrine (that the legislative branch is delegated authority to contract) and the agreement was several. PLAGGEMEIER, 93 Wn. App, at 483. However, the Interlocal Cooperative Agreement that created the swat team in our case contains no "consent" or cross-deputizing provisions and even if it did, the wording of the agreement is so integrated that it would be impossible to find the agreement to be several. To be severable, the promises must be independent such that elimination of one promise would not eliminate the bargain. PLAGGEMEIER, at 482. Since the Interlocal Cooperative Agreement for the Valley Special Response Team has only the one joint promise to form and run the team, elimination of that one promise would eliminate the entire "bargain". Thus, the Interlocal Cooperative Agreement for the Swat team is not severable, and the team was not authorized to carry out the raid on Plaintiff's property.

R.C.W. 10.93.070 provides specific

enumerated authority to general authority
Washington Peace officers to act outside their
jurisdiction, including...

(3) ...in response to a request of a peace
officer with enforcement authority;

...

(5) When the officer is executing an arrest
warrant or search warrant,...

However, R.C.W. 10.93.070(5) does not authorize a
police officer to participate in the execution of
any search warrant anywhere in the state. STATE
vs BARTHOLOMEW, 56 Wash. App. 617, 621 (Div.I,
1990). Rather, it provides that an officer who
has obtained a valid warrant may go outside his
jurisdiction to execute that warrant. Id. Thus,
the extra-jurisdictional officers from the swat
team did not have authority under R.C.W.
10.93.070(5). BARTHOLOMEW, supra at 621.

The subsection R.C.W. 10.93.070(3) allows
for responses to requests for assistance from a
police officer with authority, but the request
must be for needed assistance. BARTHOLOMEW,
at 622. As stated in the BARTHOLOMEW case:

Nor can an agency holding a warrant
request unneeded assistance to enable

another agency to conduct an otherwise illegal search.

BARTHOLOMEW, supra at 622. Since operation of the swat team before compliance with the mandates of R.C.W. 39.34.030 and 040 was illegal, the Defendant was not authorized by R.C.W. 10.93.070 to violate the delegation doctrine and frustrate the Legislature's mandate for democracy.

2. The Lack of Legitimacy of the Swat Team Means the City waived its Qualified Immunity

The requirements for state law qualified immunity from lawsuits arising from police activity are that the officer (1) carries out a statutory duty, (2) according to procedures dictated to him by statute and superiors, and (3) acts reasonably. *McKINNEY vs TUKWILA*, 103 Wn. App. 391, 407 (Div. I, 2000). As the agency with primary territorial jurisdiction, the City of Kent had the duty to see that the swat team met reasonable training or certification standards and followed reasonable standards. R.C.W. 10.93.130(2003). This could not have been done before the Interlocal Cooperative Agreement became

effective. In fact, the agreement provides that the swat team's Board would prepare written policies, regulations and operational procedures within ninety (90) days following the execution of the agreement. See paragraph VIII Governance. Thus, it was not possible for the City of Kent to ensure that the swat team complied with procedures, such as when to use a battering ram, at the time of the raid. This failure precludes the City from any qualified immunity as a matter of law. MCKINNEY, supra at 407; R.C.W. 39.34.030(2)(2003).

Although the Defendant is acting in what is known as the War on Drugs, allocating government resources to this activity has become controversial. The King County Bar Association has actually come out against the War on Drugs as wasteful and possibly racist. See:

<http://www.kcba.org/druglaw/index.html>

Recently, Norm Stamper, the ex-police chief for the City of Seattle, has published a book in which he states:

I say its time to withdraw the troops in the war on drugs.

N.Stamper, BREAKING RANK, c.2005, page 24. Chief Stamper talks about the enormous costs and waste of resources consumed in the war on drugs. Id.

Kent violated the delegation doctrine by engaging the swat team before its legislative body had a chance to consider allocating government resources into other public endeavors, and before the public had a chance to alert the City Council to the potential for property destruction when using a swat team armed with battering rams.

PLAGGEMEIER, supra at 481. For code cities like Kent all authority rests in the legislative body. R.C.W. 35A.11.020. Only the legislative body has authority to engage in intergovernmental action:

The legislative body of a code city may exercise any of its powers or perform any of ist functions including purchasing and participate in the financing thereof, jointly or in cooperation, as provided for in chapter 39.34.

Thus, there is just no authority for Officer Majack or Mayor White to administratively create or agree to create an interjurisdictional swat

team. R.C.W. 39.34.030(2) requires that agreements for cooperative action be first approved by ordinance (ie. legislative adoption). Furthermore, and contract must be approved by the governing (legislative) body. R.C.W. 39.34.080.

3. The City of Kent waived its qualified immunity by acting without authority in using a SWAT team ultra vires

Because the City of Kent lacked authority for what it did and failed to employ procedures for what it did, it is no surprise that some of its agents acted roughly during the raid. The gravamen of the Complaint is that it was unnecessary for the SWAT team to use the battering ram on Plaintiff's doors when Plaintiff's keys were available and Plaintiff offered to unlock all the doors. C.P. 5-6 (Amended Complaint); see also C.P. 89, lines 6-10. The required elements for an officer's qualified immunity are that she (1) carried out a statutory duty, (2) according to procedures dictated by statute and superiors, and (3) acted reasonably. *GUFFEY vs STATE*, 103 Wn.2d 144, 152 (1984). Plaintiff has shown material

issues of fact with regard to whether the officers were reasonable in using the battering ram. C.P. 135, lines 18-23. Plaintiff has also shown that the officers lacked authority to conduct the raid as a multi-jurisdictional swat team. C.P. 126. Without the swat team board in place, there was no way for Kent to discipline, supervise or control actions of the officers from the Port of Seattle or Tukwila. Thus, there can be no qualified immunity for the officers conduct. BABCOCK vs STATE, 116 Wn.2d 596, 618 (1991).

In any event, the City's direct, negligent acts or omissions are not subject to any immunity as the State has waived immunity and qualified officer immunity does not cover the City's acts. BABCOCK vs STATE, supra at 620 (holding that the waiver of R.C.W. 4.92 precludes immunity for the State and, by implication, R.C.W. 4.96 would preclude immunity for municipal corporations).

E. The trial court should not have awarded costs and attorneys fees to the City of Kent

On September 16, 2005, the trial court

awarded costs and fees to the Defendant City of Kent for having prevailed in its motion for summary judgment. Plaintiff appealed the September 16, 2005 award by filing and serving its Amended Notice of Appeal on September 19, 2005, pursuant to RAP 2.4(g) and 7.2(d). Plaintiff requests this Court vacate the September 16, 2005 award as the summary judgment supporting the award should be vacated for the reasons contained in this brief.

F. Plaintiff should be awarded costs and reasonable attorneys fees on appeal

42 USC Sec. 1988(b) provides that in any action or proceeding to enforce a provision of Section 1983, the court, in its discretion, may award the prevailing party a reasonable attorneys fee as part of the costs. 42 USC Sec. 1988(b)(2003). Plaintiff's "takings" claim is based on the Fifth Amendment which provides: "...nor shall private property be taken for public use without just compensation." U.S. CONSTITUTION, 5th Amend. This Court may award fees pursuant to Section 1988(b), provided

Plaintiff has asked for damages in his Amended Copmplaint. ALLINGHAM vs SEATTLE, 109 Wn.2d 947, 953-54 (1988). Plaintiff specifically requested such compensatory damages in its pleading. C.P. 6-7.

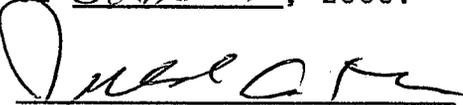
The Supreme Court holds that the amount in controversy is a "vital" factor in determining the reasonableness and necessity of a fees request. FETZER vs WEEKS, 122 Wn.2d 141, 150 (1993). Here, the economic damages remaining are less than \$2,500.00, however, the award of fees to the City in the amount of \$4,050.00 brings the Plaintiff's loss to over \$6,000.00. Counsel's affidavit will reflect this factor. The appropriate measure of reasonable fees is the lodestar method. MAHLER vs SZUCS, 135 Wn.2d 398, 433 (1998). Plaintiff's costs include the filing fee of \$250.00, the clerk's papers cost of \$138.50 and fees include hours at Plaintiff's counsel's customary and usual rate per hours for this type of work. The itemization of reasonable and necessary hours will be filed with the affidavit of fees and

expenses, if fees are awarded.

CONCLUSION

Brutsche requests the Court overturn both the summary judgment and the award of fees to the City of Kent as this matter involved material issues of fact that should be decided by a jury. Plaintiff's declarations set forth the elements for his prima facie claims and the Interlocal Cooperative Agreement documents that no qualified immunity was available to the Defendant's agents. The City was negligent in unleashing the swat team before rules, regulations, and procedures were established and failed to train the officers when and when not to use keys rather than battering rams. No qualified immunity exists for the City's acts and omissions. Thus, the summary judgment and award of fees should be vacated and this matter remanded for trial.

Dated this 8th day of October, 2005.


Jerald A. Klein, #9313
Attorney for Brutsche

The undersigned hereby certifies under penalty of perjury under the Laws of the State of Washington that he served a copy of the above BRIEF OF APPELLANT to City of Kent on the 10th day of October, 2005, at the following address:

Chloethiel W. DeWeese
Richard B. Jolley
Keating, Bucklin & McCormack
800 Fifth Ave., Suite 4141
Seattle, WA 98104-3175

I certify under penalty of perjury under the law of the State of Washington that the above is true and correct.

Date: 10/10/05
Seattle, Washington


Jerald A. Klein, #9313
Attorney for Brutsche

EXHIBIT A



20040325000463

FEDERAL WAY CI AG
PAGE 001 OF 014
03/25/2004 11:12
KING COUNTY, WA

32 00

Return Address

Name City of Federal Way

Address Attn: Police Dept.
P.O. Box 9718

City, State, Zip Federal Way, WA 98063

Document Title(s) (or transactions contained therein):

1. Interlocal Cooperative Agreement between
2. Auburn, Federal Way, Kent, Renton, Tukwila,
3. and the Port of Seattle, for creation of the
4. Valley Special Response Team

Reference Number(s) of Documents assigned or released:
(on page _____ of document(s))

Grantor(s) (Last name first, then first name and initials)

- | | |
|--|-----------------|
| 1. City of Federal Way | City of Renton |
| 2. City of Auburn | City of Tukwila |
| 3. City of Kent | Port of Seattle |
| 4. Additional names on page _____ of document. | |

Grantee(s) (Last name first, then first name and initials)

- | | |
|--|-----------------|
| 1. City of Federal Way | City of Renton |
| 2. City of Auburn | City of Tukwila |
| 3. City of Kent | Port of Seattle |
| 4. Additional names on page _____ of document. | |

Legal description (abbreviated: i e lot, block, plat or section, township, range)

Additional legal is on page _____ of document.

Assessor's Property Tax Parcel/Account Number

Additional legal is on page _____ of document

The Auditor/Recorder will rely on the information provided on the form. The staff will not read the document to verify the accuracy or completeness of the indexing information provided herein.

WASHINGTON STATE COUNTY AUDITOR/RECORDER'S
INDEXING FORM (Cover Sheet)

**INTERLOCAL COOPERATIVE AGREEMENT BETWEEN AUBURN,
FEDERAL WAY, KENT, RENTON, TUKWILA, AND THE PORT OF
SEATTLE, FOR CREATION OF THE**

VALLEY SPECIAL RESPONSE TEAM

I. PARTIES

The parties to this Agreement are the Port of Seattle and the municipalities of Auburn, Federal Way, Kent, Renton, and Tukwila, each of which is a municipal corporation operating under the laws of the State of Washington

II. AUTHORITY

This Agreement is entered into pursuant to Chapters 10 93, 39 34, and 53 08 of the Revised Code of Washington

III. PURPOSE

The parties hereto desire to establish and maintain a multi-jurisdictional team to effectively respond to serious criminal occurrences as described below

IV. FORMATION

There is hereby created a multi-jurisdictional team to be hereafter known as the "Valley Special Response Team" ("SRT"), the members of which shall be the Port of Seattle, and the cities of Auburn, Federal Way, Kent, Renton, and Tukwila. As special needs arise, it may be necessary to request from other law enforcement agencies assistance and/or personnel, at the discretion of the SRT Incident Commander and/or the SRT Tactical Commander

V. STATEMENT OF PROBLEM

King County and the municipalities within the Puget Sound area have experienced increasingly violent criminal confrontations due to increased gang activity, increased drug abuse, increased urbanization, and increased population densities. The ability to safely control, contain, and resolve criminal conduct such as civil disobedience, barricaded subjects, hostage situations, gang member arrests, high risk felony arrests, and narcotic/high risk search warrants has strained resources of the members' individual police department specialty teams

Law enforcement efforts directed at dealing with these violent confrontations have, for the most part, been conducted by law enforcement agencies working independently. A multi-jurisdictional effort to handle specific serious criminal confrontations, as well as weapons of mass destruction, will result in more effective pooling of personnel, improved utilization of municipal funds, reduced duplication of equipment, improved

training, development of specialized expertise, and increased utilization/application of a combined special response team. The results of a multi-jurisdictional effort will be improved services for the citizens of all participating jurisdictions, increased safety for officers and the community, and improved cost effectiveness.

VI. TEAM OBJECTIVES

The individual specialty units from each participating jurisdiction will be consolidated and combined to form the SRT. The SRT shall service each participating jurisdiction. The SRT shall also be available to outside law enforcement agencies as provided by chapter 10 93 RCW.

The objective of the SRT shall be to provide enhanced use of personnel, equipment, budgeted funds, and training. The SRT shall respond as requested by any of the participating jurisdictions and provide a coordinated response to high-risk incidents.

VII. DURATION AND TERMINATION

The minimum term of this Agreement shall be one (1) year, effective upon its adoption. This Agreement shall automatically be extended for consecutive one (1) year terms, unless terminated pursuant to the terms of this Agreement.

A jurisdiction may withdraw its participation in the SRT by providing written notice of its withdrawal, and serving such notice upon each Executive Board member of the remaining jurisdictions. A notice of withdrawal shall become effective ninety (90) days after service of the notice on all participating members.

The SRT may be terminated by a majority vote of the Executive Board. Any vote for termination shall occur only when the police chief of each participating jurisdiction is present at the meeting in which such vote is taken.

VIII. GOVERNANCE

The affairs of the team shall be governed by an Executive Board ("Board"), whose members are composed of the police chief, or his/her designee, from each participating jurisdiction. Each member of the Board shall have an equal vote and voice on all Board decisions. All Board decisions shall be made by a majority vote of the Board members, or their designees, appearing at the meeting in which the decision is made. A majority of Board members, or their designees, must be present at each meeting for any actions taken to be valid. A presiding officer shall be elected by the Board together with such other officers as a majority of the Board may decide.

There shall be a minimum of four (4) Board meetings each year. One meeting shall be held in March of each year to review the prior year's service. Another meeting shall be held in August of each year to review and present a budget to the participating jurisdictions. At least two (2) other meetings shall be held each year to review the SRT's activities and policies. The presiding officer, or any Board member, may call extra meetings as deemed appropriate. The presiding officer shall provide no less than forty-eight (48) hours notice of all meetings to all members of the Board, PROVIDED,

however, that in emergency situations, the presiding officer may conduct a telephonic meeting or poll of Board members to resolve any issues related to such emergency

The Board shall develop SRT written policies, regulations, and operational procedures within ninety (90) calendar days of the execution of this Agreement. The SRT written policies, regulations, and operational procedures shall apply to all SRT operations. Thus, to the extent that the written policies, regulations, and operational procedures of the SRT conflict with the policies, regulations, and operational procedures of the individual jurisdictions, the SRT written policies, regulations, and procedures shall prevail.

IX. STAFF

A Tactical Commander, which shall be a command level officer, shall be appointed annually by the Board to act as the principal liaison and facilitator between the Board and the members of the SRT. The Tactical Commander shall operate under the direction of the presiding officer of the Board. The Tactical Commander shall be responsible for informing the Board on all matters relating to the function, expenditures, accomplishments, training, number of calls that the SRT responds to, problems of the SRT, and any other matter as requested by the Board. The Tactical Commander may be removed by action of the Board at anytime and for any reason, with or without cause.

The Tactical Commander shall prepare monthly written reports to the Board on the actions, progress, and finances of the SRT. In addition, the Tactical Commander shall be responsible for presenting rules, procedures, regulations, and revisions thereto for Board approval.

Each jurisdiction shall contribute seven (7) full-time commissioned officers, which shall include at least one (1) Sergeant or other first level supervisor, to be assigned to the SRT. The personnel assigned to the SRT shall be considered employees of the contributing jurisdiction. The contributing jurisdiction shall be solely and exclusively responsible for the compensation and benefits for the personnel it contributes to the SRT. All rights, duties, and obligations of the employer and the employee shall remain with the contributing jurisdiction. Each jurisdiction shall be responsible for ensuring compliance with all applicable laws with regard to employees and with provisions of any applicable collective bargaining agreements and civil service rules and regulations.

The Board may appoint the finance department of a participating jurisdiction to manage the finances of the SRT. Before appointing the finance department of a particular jurisdiction to manage the finances of the SRT, the Board shall consult with the finance department of the jurisdiction and obtain its approval. The duty of managing the finances of the SRT shall be rotated to other participating jurisdictions at the discretion of the Board.

The Board may, at its discretion, appoint one (1) or more legal advisors to advise the Board on legal issues affecting the SRT. The legal advisor(s) shall be the legal representative(s) for one or more of the jurisdictions participating in the SRT. The legal

advisor(s) shall, when appropriate or when requested by the Board, consult with the legal representatives of all participating jurisdictions before rendering legal advice

X. COMMAND AND CONTROL

During field activation of the SRT, an Incident Commander, SRT Tactical Commander, and SRT Team Leader(s) will be designated. The duties and procedures to be utilized by the Incident Commander, the SRT Tactical Commander, and the SRT Team Leader(s) shall be set forth in the standard operating procedures approved by the Board. The standard operating procedures approved by the board may designate other personnel to be utilized during an incident.

XI. EQUIPMENT, TRAINING, AND BUDGET

Each participating jurisdiction shall acquire the equipment of its participating SRT members. Each participating jurisdiction shall provide sufficient funds to update, replace, repair, and maintain the equipment and supplies utilized by its participating SRT members. Each participating jurisdiction shall provide sufficient funds to provide for training of its participating SRT members.

The equipment, supplies, and training provided by each jurisdiction to its personnel participating in the SRT shall be equal to those provided by the other participating jurisdictions.

Each member jurisdiction shall maintain an independent budget system to account for funds allocated and expended by its participating SRT members.

The Board must approve any joint capital expenditure for SRT equipment.

XII. DISTRIBUTION OF ASSETS UPON TERMINATION

Termination shall be in accordance with those procedures set forth in prior sections. Each participating jurisdiction shall retain sole ownership of equipment purchased and provided to its participating SRT members.

Any assets acquired with joint funds of the SRT shall be equally divided among the participating jurisdictions at the asset's fair market value upon termination. The value of the assets of the SRT shall be determined by using commonly accepted methods of valuation. If two (2) or more participating jurisdictions desire an asset, the final decision shall be made by arbitration (described below). Any property not claimed shall be declared surplus by the Board and disposed of pursuant to state law for the disposition of surplus property. The proceeds from the sale or disposition of any SRT property, after payment of any and all costs of sale or debts of the agency, shall be equally distributed to those jurisdictions participating in the SRT at the time of dissolution in proportion to the jurisdiction's percentage participation in the SRT as of the date of dissolution. In the event that one (1) or more jurisdictions terminate their participation in the SRT, but the SRT continues to exist, the jurisdiction terminating participation shall be deemed to have waived any right or title to any property owned by the SRT or to share in the proceeds at the time of dissolution.

Arbitration pursuant to this section shall occur as follows

- A. The jurisdictions interested in an asset shall select one (1) person (Arbitrator) to determine which agency will receive the property. If the jurisdictions cannot agree to an Arbitrator, the chiefs of the jurisdictions participating in the SRT upon dissolution shall meet to determine who the Arbitrator will be. The Arbitrator may be any person not employed by the jurisdictions that desire the property.
- B. During a meeting with the Arbitrator, each jurisdiction interested in the property shall be permitted to make an oral and/or written presentation to the Arbitrator in support of its position.
- C. At the conclusion of the presentation, the Arbitrator shall determine which jurisdiction is to receive the property. The decision of the Arbitrator shall be final and shall not be the subject of appeal or review.

XIII. LIABILITY, HOLD HARMLESS, AND INDEMNIFICATION

It is the intent of the participating jurisdictions to provide services of the SRT without the threat of being subject to liability to one another and to fully cooperate in the defense of any claims or lawsuits arising out of or connected with SRT actions that are brought against the jurisdictions. To this end, the participating jurisdictions agree to equally share responsibility and liability for the acts or omissions of their participating personnel when acting in furtherance of this Agreement. In the event that an action is brought against any of the participating jurisdictions, each jurisdiction shall be responsible for an equal share of any award for or settlement of claims of damages, fines, fees, or costs, regardless of which jurisdiction or employee the action is taken against or which jurisdiction or employee is ultimately responsible for the conduct. The jurisdictions shall share equally regardless of the number of jurisdictions named in the lawsuit or claim or the number of officers from each jurisdiction named in the lawsuit or claim. This section shall be subject to the conditions and limitations set forth in subsections A through G below.

- A. Jurisdiction Not Involved In SRT Response. In the event that a jurisdiction or its personnel were not involved in the SRT response to the incident that gives rise to a claim or lawsuit, and judgment on the claim or lawsuit does not, in any manner, implicate the acts of a particular jurisdiction or its personnel, such jurisdiction shall not be required to share responsibility for the payment of the judgment or award.
- B. Intentionally Wrongful Conduct Beyond the Scope of Employment. Nothing herein shall require, or be interpreted to require indemnification or payment of any judgment against any SRT personnel for intentionally wrongful conduct that is outside of the scope of employment of any individual or for any judgment of punitive damages against any individual or jurisdiction. Payment of any award for punitive damages shall be the

sole responsibility of the person or jurisdiction that employs the person against whom such award is rendered

- C. Collective Representation and Defense The jurisdictions may retain joint legal counsel to collectively represent and defend the jurisdictions in any legal action. Those retaining joint counsel shall share equally the costs of such representation or defense.

In the event a jurisdiction does not agree to joint representation, the jurisdiction shall be solely responsible for all attorneys fees accrued by its individual representation or defense

The jurisdictions and their respective defense counsel shall make a good faith attempt to cooperate with other participating jurisdictions by, including but not limited to, providing all documentation requested, and making SRT members available for depositions, discovery, settlement conferences, strategy meetings, and trial

- D. Removal From Lawsuit In the event a jurisdiction or employee is successful in withdrawing or removing the jurisdiction or employee from a lawsuit by summary judgment, qualified immunity, or otherwise, the jurisdiction shall nonetheless be required to pay its equal share of any award for or settlement of the lawsuit, PROVIDED, however, that in the event a jurisdiction or employee is removed from the lawsuit and subsection (A) of this section is satisfied, the jurisdiction shall not be required to pay any share of the award or settlement

- E. Settlement Process It is the intent of this Agreement that the jurisdictions act in good faith on behalf of each other in conducting settlement negotiations on liability claims or lawsuits so that, whenever possible, all parties agree with the settlement or, in the alternative, agree to proceed to trial. In the event a claim or lawsuit requires the sharing of liability, no individual jurisdiction shall be authorized to enter into a settlement agreement with a claimant or plaintiff unless all jurisdictions agree with the terms of the settlement. Any settlement made by an individual jurisdiction without the agreement of the remaining jurisdictions, when required, shall not relieve the settling jurisdiction from paying an equal share of any final settlement or award

- F. Defense Waiver This section shall not be interpreted to waive any defense arising out of RCW Title 51

- G. Insurance The failure of any insurance carrier or self-insured pooling organization to agree to or follow the terms of this section shall not relieve any individual jurisdiction from its obligations under this Agreement

XIV. NOTICE OF CLAIMS, LAWSUITS, AND SETTLEMENTS

In the event a claim is filed or lawsuit is brought against a participating jurisdiction or its employees for actions arising out of their conduct in support of SRT operations, the jurisdiction shall promptly notify the other jurisdictions that the claim or lawsuit has been initiated. Any documentation, including the claim or legal complaints, shall promptly be provided to each participating jurisdiction.

Any jurisdiction or member who believes or knows that another jurisdiction would be liable for a claim, settlement, or judgment that arises from a SRT action or operation, shall have the burden of notifying each participating jurisdiction of all claims, lawsuits, settlements, or demands made to that jurisdiction. In the event a participating jurisdiction has a right, pursuant to section XIII of this Agreement, to be defended and held harmless by another participating jurisdiction, the jurisdiction having the right to be defended and held harmless shall promptly tender the defense of such claim or lawsuit to the jurisdiction that must defend and hold the other harmless.

XV. COMPLIANCE WITH THE LAW

The SRT and all its members shall comply with all federal, state, and local laws that apply to the SRT.

XVI. ALTERATIONS

This Agreement may be modified, amended, or altered by agreement of all participating jurisdictions and such alteration, amendment, or modification shall be effective when reduced to writing and executed in a manner consistent with paragraph XX of this Agreement.

XVII. RECORDS

Each jurisdiction shall maintain training records related to the SRT for a minimum of seven (7) years. A copy of these records will be forwarded and maintained with the designated SRT Training Coordinator. All records shall be available for full inspection and copying by each participating jurisdiction.

XVIII. FILING

Upon execution hereof, this Agreement shall be filed with the city clerks of the respective participating municipalities, the Director of Records and Elections of King County, the secretary of state, and such other governmental agencies as may be required by law.

XIX. SEVERABILITY

If any part, paragraph, section, or provision of this Agreement is held to be invalid by any court of competent jurisdiction, such adjudication shall not affect the validity of any remaining section, part, or provision of this Agreement.

XX. MUNICIPAL AUTHORIZATIONS

This Agreement shall be executed on behalf of each participating jurisdiction by its duly authorized representative and pursuant to an appropriate resolution or ordinance of the governing body of each participating jurisdiction. This Agreement shall be deemed effective upon the last date of execution by the last so authorized representative. This Agreement may be executed by counterparts and be valid as if each authorized representative had signed the original document.

By signing below, the signor certifies that he or she has the authority to sign this Agreement on behalf of the jurisdiction, and the jurisdiction agrees to the terms of this Agreement.

<u>[Signature]</u> Mayor, City of Auburn	<u>4/17/03</u> Date	<u>[Signature]</u> City Attorney, City of Auburn	<u>4/09/03</u> Date
<u>[Signature]</u> City Clerk, City of Auburn	<u>9/17/03</u> Date		

_____ Mayor, City of Renton	_____ Date	_____ City Attorney, City of Renton	_____ Date
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City Clerk, City of Renton Date

_____ Mayor, City of Tukwila	_____ Date	_____ City Attorney, City of Tukwila	_____ Date
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City Clerk, City of Tukwila Date

_____ Mayor, City of Kent	_____ Date	_____ City Attorney, City of Kent	_____ Date
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City Clerk, City of Kent Date

_____ City Manager, City of Federal Way	_____ Date	_____ City Attorney, City of Federal Way	_____ Date
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City Clerk, City of Federal Way Date

_____ Executive Director, Port of Seattle	_____ Date	_____ Port Counsel, Port of Seattle	_____ Date
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 Mayor, City of Auburn Date City Attorney, City of Auburn Date

 City Clerk, City of Auburn Date

 Mayor, City of Renton Date City Attorney, City of Renton Date

 City Clerk, City of Renton Date

 Mayor, City of Tukwila Date City Attorney, City of Tukwila Date

 City Clerk, City of Tukwila Date

 Mayor, City of Kent Date City Attorney, City of Kent Date

 City Clerk, City of Kent Date

[Signature] 6/2/03 *[Signature]* 6/2/03
 City Manager, City of Federal Way Date City Attorney, City of Federal Way Date

[Signature] 6/2/03
 City Clerk, City of Federal Way Date

 Executive Director, Port of Seattle Date Port Counsel, Port of Seattle Date

FILED 6/2/03 10:00 AM IN CLERK'S OFFICE OF THE CLERK OF SUPERIOR COURT

XX. MUNICIPAL AUTHORIZATIONS

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Mayor, City of Auburn Date _____
City Attorney, City of Auburn Date

City Clerk, City of Auburn Date

Mayor, City of Renton Date _____
City Attorney, City of Renton Date

City Clerk, City of Renton Date

Mayor, City of Tukwila Date _____
City Attorney, City of Tukwila Date

City Clerk, City of Tukwila Date

Jim White 11-13-03 _____
Mayor, City of Kent Date _____
City Attorney, City of Kent Date *11/13/03*

Brenda Jacober 11-14-03
City Clerk, City of Kent Date

City Manager, City of Federal Way Date _____
City Attorney, City of Federal Way Date

City Clerk, City of Federal Way Date

Executive Director, Port of Seattle Date _____
Port Counsel, Port of Seattle Date

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_____ Mayor, City of Auburn	_____ Date	_____ City Attorney, City of Auburn	_____ Date
_____ City Clerk, City of Auburn	_____ Date	_____ City Attorney, City of Renton	_____ Date
<i>Jesse Tanner</i> _____ Mayor, City of Renton	<i>5-22-03</i> _____ Date	<i>Lawrence J. Warner</i> _____ City Attorney, City of Renton	<i>5-22-03</i> _____ Date
<i>Bonnie J. Walton</i> _____ City Clerk, City of Renton	<i>5-22-03</i> _____ Date		
_____ Mayor, City of Tukwila	_____ Date	_____ City Attorney, City of Tukwila	_____ Date
_____ City Clerk, City of Tukwila	_____ Date		
_____ Mayor, City of Kent	_____ Date	_____ City Attorney, City of Kent	_____ Date
_____ City Clerk, City of Kent	_____ Date		
_____ City Manager, City of Federal Way	_____ Date	_____ City Attorney, City of Federal Way	_____ Date
_____ City Clerk, City of Federal Way	_____ Date	_____ Port Counsel, Port of Seattle	_____ Date
<i>Thomas T. Murray</i> _____ Executive Director, Port of Seattle	<i>7-10-03</i> _____ Date	<i>Linda J. Strout</i> _____ Port Counsel, Port of Seattle	<i>7-11-03</i> _____ Date

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_____ City Clerk, City of Auburn	_____ Date		
_____ Mayor, City of Renton	_____ Date	_____ City Attorney, City of Renton	_____ Date
_____ City Clerk, City of Renton	_____ Date		
_____ Mayor, City of Tukwila	_____ Date	_____ City Attorney, City of Tukwila	_____ Date
_____ City Clerk, City of Tukwila	_____ Date		
_____ Mayor, City of Kent	_____ Date	_____ City Attorney, City of Kent	_____ Date
_____ City Clerk, City of Kent	_____ Date		
_____ City Manager, City of Federal Way	_____ Date	_____ City Attorney, City of Federal Way	_____ Date
_____ City Clerk, City of Federal Way	_____ Date		
<i>Tommy Lee</i> Executive Director, Port of Seattle	_____ Date	<i>Lucinda J. Starnes</i> Port Counsel, Port of Seattle	_____ Date

STATE OF WASHINGTON
County of King

The Director of Records & Elections, King County, State of Washington and exofficio Recorder of Deeds and other instruments, do hereby certify the foregoing copy has been compared with the original instrument as the same appears on file and of record in the office, and that the same is a true and perfect transcript of said original and of the whole thereof.

Witness my hand and official seal this _____ day
of JUN 28 2005 19 _____

Director of Records & Election:

By [Signature]
Deputy



EXHIBIT B

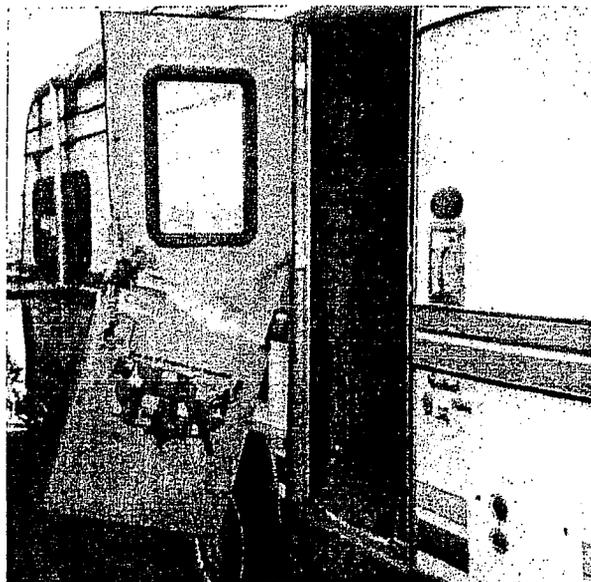
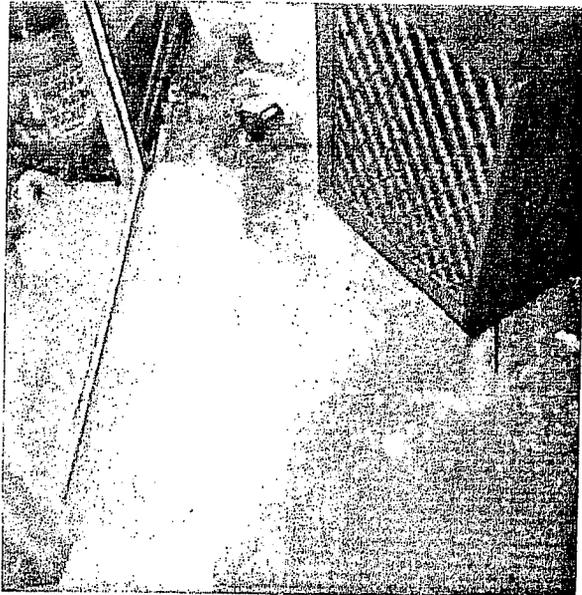
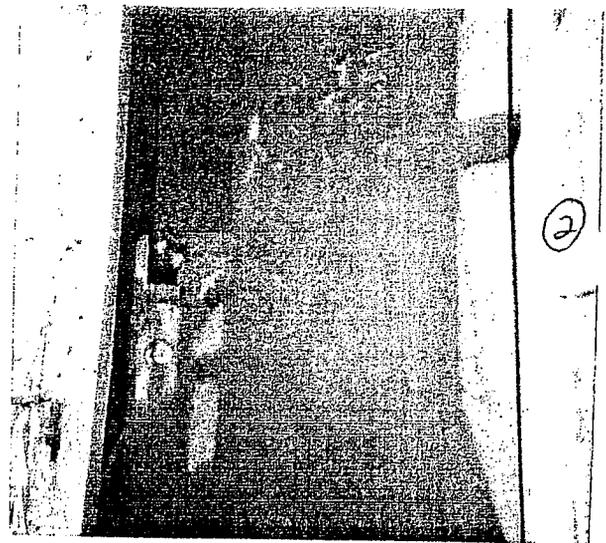
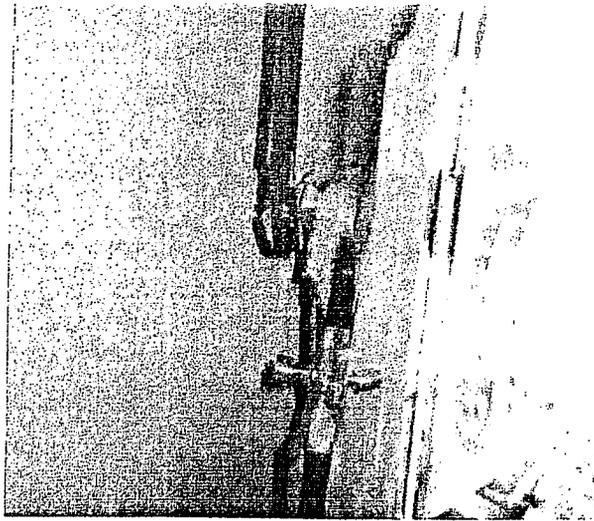


EXHIBIT 14
WITNESS SWAN BERG
DATE 6/27/05
SUSAN COOKMAN