

79252-6

COPY RECEIVED
FEB 21 2006
Keating, Bucklin & McCosmick, Inc., P.S.

NO. 56620-2

COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

LEO C. BRUTSCHE
Appellant

vs

CITY OF KENT, a Municipal corporation
Respondent

REPLY BRIEF OF APPELLANT/CROSS RESPONDENT

Jerald A. Klein
823 Joshua Green Bldg.
Seattle, WA 98101-236
(206) 623-0630
Attorney for Appellant
WSBA No. 9313

FILED
COURT OF APPEALS
STATE OF WASHINGTON
DIV. I
2006 FEB 21 AM 10:35

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iv

I. RESTATEMENT OF ASSIGNMENTS AND ISSUES
ON APPEAL AND CROSS-APPEAL.....1

II. SUPPLEMENTAL STATEMENT OF THE CASE.....4

III. ARGUMENT.....10

 A. The officers used excessive force
 in battering down the doors.....10

 B. Destroying the doors and doorjamb
 constituted a compensable taking.....11

 1. Police power regulation can
 trigger a "taking".....11

 2. The destruction of Plaintiff's
 doors and doorjamb was a
 taking per se.....16

 3. EGGLESTON is restricted to
 cases involving preservation
 of evidence.....18

 C. Police executing a search warrant are
 subject to claims for negligence.....20

 1. The City of Kent owed a duty
 of reasonable care to Brutsche..20

 2. Negligence is not a new cause
 of action.....23

 3. This case does not involve any
 public duty, only the private
 duty owed to a private citizen
 regarding his private property..24

4.	The Defendant brought the swat team to Plaintiff's property but failed to supervise the team.....	26
D.	Destruction of the doors and doorjams constituted a trespass.....	27
E.	RCW 10.93.070(3) does not apply.....	29
1.	The outside officers were not acting in response to a request for assistance, but had usurped control of the swat team.....	29
2.	The City of Kent failed to adopt the mutual law enforcement assistance agreement and failed to supervise its outside "assistants".....	30
F.	The Delegation Doctrine prevents usurpation of the Kent's legislative authority by an unelected officer from Tukwila.....	31
2.	The lack of legitimacy of the swat team means the City waives its qualified immunity.....	35
3.	The City of Kent waived its qualified immunity by acting without authority in using a swat team ultra vires.....	37
G.	No qualified immunity for City of Kent.	39
H.	The Trial Court did not abuse its discretion in fixing the amount of fees awarded to City of Kent but award should be vacated.....	40

1.	Brutsche appealed the award of fees as the award should be vacated with the summary judgment.	40
2.	The trial court did not abuse its discretion in setting the amount of fees awarded to City of Kent...	41
I.	The trial courts findings an reasonable and necessary fees are clear.....	47
1.	The trial court.s findings shows the amount of reasonable fees.....	47
2.	The City waived any objections by preparing and proposing the form of the fee award.....	48
J.	Attorneys fees on appeal.....	49
1.	Fees should be awarded to Brutsche.....	49
2.	No fees should be awarded to City of Kent.....	49
IV.	CONCLUSION.....	50
APPENDIX		
	AFFIDAVIT OF ATTESTATION OF DOCUMENTS...C.P.	68-87
	DECLARAION OF JAMES WARNER.....C.P.	131-133
	CERTIFICATION OF LEO C. BRUTSCHE OPPOSING SUMMARY JUDGMENT.....C.P.	134-137
	MOTION & AFFIDAVIT FOR PUBLICATION OF DEPOSTION.....C.P.	191-224
	AFIDAVIT OPPOSING REQUEST FOR EXCESSIVE FEES.....C.P.	329-379

TABLE OF AUTHORITIES

ALLINGHAM vs SEATTLE, 109 Wn.2d 947,
953-4 (1988).....49

BABCOCK vs STATE, 116 Wn.2d 596,
598 (1991).....38

BANK OF AMERICA vs HUBERT, 153 Wn.2d 102,
123 (2004).....41

BENDER vs SEATTLE, 99 Wn.2d 582,
589-90 (1983).....22, 24, 25

BRADLEY vs AMERICAN SMELTER, 104 Wn.2d
677, 681 (1985).....27

CALLAN vs O'NEIL, 20 Wash. App. 32,
36-7 (Div., I, 1978).....22

CAR WASH ENTERPRISES vs KAMPANOS, 74 Wn.App.
537, 546 (1994).....48

DES MOINES vs GRAY BUSINESSES LLC,
130 Wn. App. 600 (2005)..12, 13, 14, 16

EGGLESTON vs PIERCE COUNTY, 148 Wn.2d 760,
(2003)18, 19, 20

EMPLOYCO PERSONNEL vs SEATTLE, 117 Wn.2d
606, 615-16 (1991).....24, 25, 26

FETZER vs WEEKS, 122 Wn.2d 141,
151 (1993).....42, 44

FORD vs BOARD OF HEALTH, 16 Wn.App. 709,
711 (1977).....47

GOLDSBY vs STEWART, 158 Wash. 39 (1930)....11,
20, 21, 23, 24

GUIMONT vs calrk, 121 Wn.2d 586 (1993).....12

GUFFY vs STATE, 103 Wn.2d 144, 152 (1984).....	38
HOUSER vs CITY OF REDMOND, 91 Wn.2d 36, 40 (1978).....	27
KEATS vs VANCOUVER, 73 Wn.App. 257 (1994).....	22, 24
LOEFFELHOLZ vs C.L.E.A.N., 119 Wn.App. 665, 690 (2004).....	47, 50
LORETTO vs TELEPROMPTER MANHATTAN CATV, 458 U.S. 419, 426, 102 S.Ct. 3164 (1982).....	15, 17
MANUFACTURED HOUSING COMMUNITIES OF WASHINGTON vs STATE, 142 Wn.2d 347(2000).....	13, 14, 15, 17
MAHLER vs SZUCS, 135 Wn.2d 398, 433 (1998).....	41, 42, 45, 48
MATHIS vs AMMONS, 84 Wn. App. 411, 415-16 (Div., 1996).....	20
MCKINNEY vs TUKWILA, 103 Wn.2d 391, 407 (Div.I, 2000).....	31, 35, 36
MCNEIL vs POWERS, 123 Wn.App. 577, 592 (Div.III, 2004).....	49
NORTHWEST INVEST. vs NEW WEST FED., 64 Wn.App. 938, 945 (1992).....	48
PA.COAL CO., vs MAHON, 260 U.S. 393, 43 S. Ct. 158 (1927).....	18
PENN CENTAL TRANSPORTATION CO., vs NEW YORK, 438 U.S. 104, 98 S. Ct. 2646 (1976).....	17
PETERS vs VINATIERI, 102 Wn. App. 641, 655 (2000).....	28

PORTER vs UNITED STATES, 473 F.2d 1329 (5th Cir., 1976).....	19
PRUITT vs DOUGLAS COUNTY, 116 Wn. App. 547, 559 (2003).....	17
SAVAGE vs STATE, 127 Wn.2d 434, 439 (1995).....	27
SCHMIDT vs CORNERSTONE INVESTMENTS, 115 Wn2d 148, 169 (1990).....	41
SHEIMO vs BENGSTON, 64 Wn. App. 545, (1992)....	23
STATE vs BARTHOLOMEW, 56 Wash. App. 617, 621 (Div., I, 1990).....	29, 34, 35, 40
STATE vs GUNWALL, 106 Wn.2d 54, 61-2 (1986).....	17
STATE vs PLAGGEMEIER, 93 Wn.App. 472, 480 (Div, II, 1999).....	31, 32, 33, 36
STEELE vs HOUSTON, 603 S.W.2d 786 (Tex., 1980).....	19
STORK RESTAURANT CORP. vs MCCAMPBELL, 55 F.2d 687 (1932).....	21
TURNER vs SERIFF OF MARION COUNTY, 94 F.Supp.2d 866, 984 (S.D.Indiana,2000).....	28
U.S. vs NINE-200 BARRELL TANKS OF BEER, 6 F.2d 401 (D. Rhode Island, 1925)...	21
WALKER vs DENVER, 720 P.2d 619, 621 (1988)....	21
WASHINGTON STATE CONST., Art. 1, Sec. 16.....	17
R.C.W. 4.92.090.....	24, 38
R.C.W. 4.96.010.....	24, 38

R.C.W. 7.06.060(2)	45
R.C.W. 10.93.020(7)	23
R.C.W. 10.93.040	23, 27, 39
R.C.W. 10.93.070	34, 35
R.C.W. 10.93.070(3)	29, 34, 40
R.C.W. 10.93.070(5)	34
R.C.W. 10.93.130	30, 35
R.C.W. 35A.11.020	36
R.C.W. 39.34.030(2)	23, 29, 32, 35, 36, 37
R.C.W. 39.34.040	23, 29, 32, 35
R.C.W. 39.34.080	37
42 USC Sec. 1983	19, 49
42 USC Sec. 1988	49
MAR 7.3	41
RESTATEMENT (SECOND) OF TORTS, Sec. 158	27
RESTATEMENT (SECOND) OF TORTS, Sec. 211	28
RESTATEMENT (SECOND) OF TORTS, Sec. 214(2)	28
WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY, c. 1987	45

I. RESTATEMENT OF ASSIGNMENTS AND ISSUES ON
APPEAL AND CROSS-APPEAL

- 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 doorjams 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 Inter-local 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 of Kent?
- F. This court should award fees to Appellant Brutsche pursuant to 42 USC Sec. 1988(b)
1. Can fees be awarded pursuant to 42 U.S.C. Sec. 1988?
- G. There is no qualified immunity for the City of Kent.
1. Can a municipality enjoy the qualified immunity of its officers?
 2. Can there be a qualified immunity for the City's negligence in failing to supervise or train?
- H. The trial court did not abuse its discretion in fixing the amount of fees awarded to City of Kent, but the award should be vacated with the summary judgment
1. Should the award of fees be vacated along with the summary judgment?
 2. Did the trial court abuse its discretion in setting the amount of fees awarded to City of Kent?
- I. The trial court made clear findings and conclusions based on a sufficient record in setting the amount of fees for Kent.
1. Did the trial court's award of fees indicate the court's finding as to the material issue of the amount of reasonable and necessary fees?
 2. Did the City of Kent waive any objections by preparing and proposing the form of the award?

J. Fees should be awarded to Appellant

1. Should attorneys fees be awarded to Brutsche on appeal?
2. Should any fees be awarded to Respondent?

II. SUPPLEMENTAL STATEMENT OF THE CASE

The key fact in this case is that there never were any code violations nor drugs on the property. Although the city's Code Enforcement Officer may have "red tagged" the property, this was due to the lack of doors after the raid. See Publication of Deposition, C.P. 207, lines 16-25. Plaintiff mitigated the damages by hiring a contractor to replace the doors and doorjambs. Certification of Leo C. Brutsche..., C.P. 136, paragraphs 10 and 11. The officers looking for drugs found nothing and filed their Inventory And Return of Search Warrant indicating that "no property was seized". See Affidavit of Attestation of Documents, C.P. 87. The red tag issue was dropped after Mr. Werner repaired the doors. Certification of Leo C. Brutsche... C.P. 137, paragraph 14. At his deposition, the Inspector indicated that the mobile home was a "manufactured

structure" and he did not have authority to red tag the mobile. Publication of Deposition, C.P. 205, line 23 through page 206, line 5. Thus, neither the officers looking for code violations nor the officers looking for drugs found any evidence. Thus, no officer was preserving any evidence such as the blood spattered wall in the EGGLESTON case.

Another important fact omitted in the Respondents brief was the military nature of the raid. The swat team entered the compound with an armored personnel carrier. Publication of Deposition, C.P. 208, lines 1-10. Inspector Swanberg described it as a "squat, long, tank". Id. at line 5. Jim Brutsche was not running into his home to resist arrest, correct code violations or hide drugs, but to escape an ATF, Waco-style attack by thirty officers with military vehicles.

The Brief of Respondent claims that inside the mobile home, Jim Brutsche resisted arrest and that was the basis for the decision to enter the other structures immediately to prevent others from arming themselves or destroying drugs.

Of course there were no others and there were no drugs, but the alleged resistance contradicts the facts alleged by Brutsche:

13. I do not believe Jim resisted arrest. The police use of the battering ram broke the glass of the mobile home. I saw lacerations to Jim's face and chest from broken glass on the floor. I saw the trauma impact to his forehead. I saw wounds to his back which I believe to be taser wounds. After the raid, I saw the large pool of blood on the floor of the mobile home where Jim had lain on the floor. I believe that Jim's wounds were caused by the police as he lay on the floor.

Certification of Leo C. Brutsche...C.P. 135, paragraph 13. Lacerations to the chest from broken glass on the floor imply there was no resistance. Inspector Swanberg also saw the large pool of blood on the floor near the door during his inspection for code violations.

Publication of Deposition, C.P. 204. If there was no resistance other than trying to keep off the glass while being hand-cuffed, then the Respondent's rationale for breaching Plaintiff's doors without keys evaporates.

Another important fact ignored by the Respondent is that when the Plaintiff approached Sergeant Sidell about using keys, he offered his

keys to the Sergeant and well as offered to escort the officers and open the doors for them.

See Certificate of Leo C. Brutsche, C.P. 135 paragraph 5 (offers keys to Sidell), C.P. 136, lines 6-9 (offers to escort officers). If there was a legitimate concern for Leo's safety during the raid, then the officers could have just borrowed the keys and used them to open the doors.

As explained by Brutsche:

7. I believe the custom or practice of using a battering ram to breach the doors is unreasonable under the circumstances here. Use of my keys would be much quicker and quieter, making the entry much safer for the officers. Also, keys would not damage the doors and the door jams like the battering ram.

Certification of Leo C. Brutsche...C.P. 135, paragraph 7.

The availability of keys raises the issue of the reasonableness of using battering rams to enter the warehouse and the buildings occupied by the tenants that were not included in the search warrant. The officers claimed they used battering rams or "breaching devices" on the doors to gain access as quickly as possible to minimize officer safety concerns. See Declaration of Darren

Majack..., C.P. 45, lines 10-16. However, the City never disputed Brutsche's assertion that the keys would have been quicker, quieter and therefore safer for the officers. As explained by Brutsche:

At the time, I offered my keys to the officer in charge, Sergeant Jaime Sidell, and I offered to escort the officers around my property and open all doors for them. Sergeant Sidell rejected my offer saying "...we have our own way of getting in ..." meaning use of the battering ram was the Defendants' officially sanctioned policy.

Affidavit Opposing 12(B)(6) Motion, C.P. 32, lines 12-17.

Another issue of fact that the City glosses over is whether the officers from other towns were assisting Kent in executing the search warrant as allowed under R.C.W. 10.93.070(3) or whether the outside officers were not assisting but in charge, and therefore beyond the reach of Kent's command structure and supervision. Officer Villa stated that he is an officer from Tukwila but that he was in charge. Declaration of Lieutenant Mike Villa..., C.P. 49, line 27 through C.P. 50, line 3. Mr. Brutsche assumed Sergeant Sidell was in charge. Declaration of Leo C. Brutsche..., C.P.

135, paragraph 6. Code Enforcement Officer Swanberg was in charge of the code violations inspection and "red-tagged" the property for no doors. Swanberg should have stopped the door battering as it led to the code violation. Publication of Deposition, C.P. 197, lines 8-25. The facts of this case show that no one was in charge because the City of Kent had failed to supervise the raid and did not have a mutual law enforcement assistance agreement in place to maintain a command structure that would have prevented the door bashing getting out of hand.

Finally, Plaintiff must once again correct the City's slander regarding Jim Brutsche. The City insists on maintaining that Jim Brutsche's death in 2004, one year after the raid, was due to the explosion of a meth lab. Plaintiff has always maintained that what happened a year after the raid is irrelevant, however, has always vindicated Jim by correcting the City's slander by explaining that Jim's death was due to a propane tank leak and has nothing to do with any methamphetamine lab. See Certification of Leo C.

Brutsche, C.P. 137, paragraph 15.

III. ARGUMENT

- A. The officers should not have battered down the doors.

The gravamen of Plaintiff's claim is that the City and its agents should not have entered the Plaintiff's buildings by using a battering ram in a manner that destroyed the doors and doorjams. Plaintiff offered to let the officers use his keys, but the offer was rejected. Certification of Leo C. Brutsche... C.P. 135, paragraph 5. Alternatives would be to use a burglars tool, or a crow bar to force the latch past the strike plate. As stated by Brutsche, he claims that there were drugs or meth labs or weapons on the property were false. Certification of Leo C. Brutsche... C.P. 135, paragraph 9. Leo Brutsche visited his son almost daily and never saw any indication of illicit activities. Certification of Leo C. Brutsche..., C.P. 136, paragraph 12. Furthermore, the Return Affidavit showed that no evidence was

seized, proving that there were no illicit activities at the property. See Affidavit of Attestation..., C.P. 87, paragraph 7. This all goes to show that the search warrant was based on one-sided and faulty information.

The City destroyed the doors and doorjambes by inviting the officers to Plaintiff's property but failing to supervise them or train them in how to enter locked doors with available keys. In any event, these are factual issues for a jury. *GOLDSBY vs STEWART*, 158 Wash. 39 (1930).

- B. Destroying the doors and doorjambes constituted a compensable taking
 - 1. Police power regulation can trigger a "taking"

The Brief of Respondent/Cross-Appellant City of Kent (herein "Brief of Respondent") asserts that the police power and power of eminent domain are two distinct and separate powers, and that there can never be a "taking" when a municipality exercises its police power. Actually, "takings" often occur from exercise of the police power as when the state regulates tenancy obligations.

MANF. HOUSING vs STATE, 142 Wn.2d 347 (2000). A noted commentator observed:

One of the most interesting issues in eminent domain cases is the question of what constitutes a "taking" of private property for which just compensation should be made. Recently, much of the debate surrounding takings has concerned land use regulations. Land use regulations have been attacked as "takings" under this provision as well as under the due process clause.

Utter and Spitzer, THE WASHINGTON STATE CONSTITUTION, page 31, on Article I Section 16. Justice Utter went on to discuss the "Orion-Presbytery" test for when regulation constitutes a taking. Id. Today, the case of GUIMONT vs CLARK provides the analytical framework for a regulatory taking. 121 Wn2d 586 (1993). As stated in GUIMONT, a "taking" involves any governmental action that

...destroys or derogates any fundamental attribute of property ownership, including the right to possess, to exclude others, to dispose of property, or to make some economically viable use of the property

GUIMONT vs CLARKE, 121, Wn.2d 586, 603 (1993).

A recent case involving police powers and whether its exercise constituted a taking was DES MOINES vs GRAY BUISNESSES. 130 Wn. App. 600

(Div.I, 2005). The Court reviewed a municipal regulation precluding mobile home parks from leasing to new tenants without the owner filing a site plan. The Court held that the regulation did not constitute a regulatory taking as the restriction on use (renting to mobile home owners) did not eliminate a fundamental attribute of ownership like the right of first refusal in MANUFACTURED HOUSING, 142 Wn.2d 347, 370 (2000).

What is particularly interesting about the DES MOINES case is that the trial court treated the regulation as an inverse condemnation, awarding attorneys fees pursuant to R.C.W. 8.25.075. See DES MOINES, supra, at 607, in the FACTS section. In layman's terms, the power of eminent domain is the power to initiate condemnation pursuant to Title 8 R.C.W. and is distinguished from other government powers by the initial legislative pronouncement of a public use and necessity. In GRAY BUSINESSES, Division I used the phrase "power of eminent domain" to refer to any taking of private property for a public use during a physical occupation. DES

MOINES vs GRAY BUSINESSES, 130 Wn. App. 600 (2005); 2005 Wn. App. LEXIS 3090, page 8; HN 4. The DES MOINES Court was following the Supreme Court's definition in MANUFACTURED HOUSING that the power of eminent domain under Article I, Section 16 of the State Constitution includes all government takings of private property, whether for public or private use. See MAN'F HOUSING, 142 Wn.2d 347, at 369. Using this Court's definition of the power of eminent domain rather than the narrow sense of the phrase used by Respondent, the Brutsche taking would be an exercise of the power of eminent domain as the SWAT team destroyed the doors and doorjambes for their own personal safety which served the public interest of officer safety and occurred during their occupation of Brutsche's property. See Declaration of Darren Majack..., C.P. 45, paragraph 10. Certification of Leo C. Brutsche..., C.P. 135. According to the the Court of Appeals, "...the analysis ends there, and the public entity must pay compensation." Id.

Whether the underlying regulation is an

exercise of the police power or eminent domain does not determine whether this is a "taking" but rather what is the "actual effect". MANUFACTURED HOUSING, supra at 369. In MANUFACTURED HOUSING, the actual effect of the right of first refusal was to transfer the right to sell from the park owner to the tenants. Id. at 366. also LORETTO vs TELEPROMPTER MANHATTAN CATV CORP. 458 U.S.419, 102 S. Ct. 3164 (1982)(invasive taking). Even in a regulatory taking as in GRAY BUSINESSES the court must engage in ad hoc factual inquires into the particular economic impact of the regulation on specific property under the case's unique circumstances.

Brutsche alleged that the particular economic impact of the swat team using a battering ram on his doors was to diminish the value of his property by \$30,000.00, which he mitigated by hiring the carpenter, Mr. Warner to repair the doors and doorjambes at the reasonable cost of \$4,921.51. Certification of Leo C. Brutsche..., C.P. 136, paragraphs 10 and 11. Gray Businesses L.L.C. did not suffer any destruction of property

and had the alternatives of renting the spaces for drayage, condominiumising the spaces and selling them to the tenants, or just submitting the site plan and continue renting to mobile home owners. Brutsche had no alternatives because the City red-tagged his property. Certification of Leo C. Brutsche..., C.P. 88, paragraph 14. In any event, the trial court below granted summary judgment without studying the "actual effect" of the door bashing and without any economic balancing of the City's aversion to using the quicker, quieter and safer mechanism of keys versus the private property owner's interest in having doors to keep out vagrants and vermin. Order Granting Defendant City..., C.P. 225-227. Thus, if this court can not order the trial court to reverse and enter judgment for Plaintiff, at least it should be remanded for a takings analysis. DES MONIES, supra

2. The destruction of Plaintiff's doors and doorjambs was a taking per se

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. WASH. CONST., Art.I, Sec. 16; See GUNWALL analysis in MANUFACTURED HOUSING, supra at 356-360. Any governmental activity that invades or interferes with the right to use and enjoy property is a taking. FRUITT 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, such as the right to occupy and possess, the right to exclude others. MANUFACTURED HOUS. CMTYS. OF WASH. 142 Wn.2d 347,

367 (2000). With their destruction, Plaintiff lost the right to possess his doors and without the doors he lost the right to exclude others from his property.

3. EGGLESTON is restricted to cases involving the preservation of evidence

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 horn book 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 doorjambes 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.

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.

C. Police executing a search warrant are subject to claims for negligence

1. The City of Kent owed a duty of reasonable care to Plaintiff.

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). Furthermore, Respondent and its officers have a specific duty to avoid unnecessary damage to property when executing a search warrant. GOLDSBY vs STEWART, 158 Wash. 39, 41 (1930). As stated by the Supreme Court:

In 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 vs STEWART, supra at 41. The GOLDSBY case

involved officers removing a door during execution of a search warrant for use as evidence. Id. The Supreme Court held that whether or not respondents had, in searching appellant's property, unnecessarily damaged the same, and thereby rendered themselves liable to appellant was a matter for the jury to decide. GOLDSBY, at 41-42.

In WALKER vs CITY OF DENVER, the plaintiff's actions for trespass and conversion were reinstated because the officers had destroyed a bar and removed other fixtures during execution of a search warrant for illicit alcohol sales. 720 P.2d 619, 621 (1988).

Officers who enter under a warrant and rightfully seize certain property, but wrongfully seize other property are liable as trespassers ab initio for the property wrongfully seized. U.S. vs NINE-200 BARRELL TANKS OF BEER, 6 F.2d 401 (D. Rhode island, 1925); See also STORK RESTAURANT CORP. vs MCCAMPBELL, 55 F.2d 687 (1932).

Respondent's cite to KEATS vs VANCOUVER is misplaced. Division II held that police officers owe no duty to use reasonable care to avoid

inadvertent infliction of emotional distress on the subjects of criminal investigations. KEATES, 73 Wn.App. at 269. the court went on to say:

This does not mean that plaintiffs may not obtain emotional distress damages as compensation for the officers breach of some other duty.

Thus, KEATES expressly does not apply to Brutsche's claim for breach of the duty to use reasonable care not to damage property, and expressly does not apply to Brutsche's claim for actual, but mitigated, diminution damages. The Amended Complaint does not even ask for emotional distress damages. The holding in KEATS simply carves out a narrow exception for emotional distress cases that proves the general rule that officers owe reasonable care to property owners when conducting police activities. BENDER vs SEATTLE, 99 Wn.2d 582, 589-90 (1983).

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).

The officers using the battering rams to

enter Plaintiff's buildings owed reasonable care not to do unnecessary damage. GOLDSBY vs STEWART, 158 Wash. 39, 41 (1930)

The City of Kent had the duties to train and supervise any SWAT team, as the agency with primary territorial jurisdiction. SHEIMO vs BENGSTON, 64 Wn. App. 545, 550 (1992); R.C.W. 10.93.020(7). The City of Kent is liable for claims against the SWAT team members as the primary commissioning agency. R.C.W. 10.93.040. The City of Kent has other statutory duties with regard to employing an extra-jurisdictional SWAT team. R.C.W. 39.34.030(2)(2003); R.C.W. 39.34.040 (2003). Thus, the City and its officers owed duties of care to Plaintiff which were breached.

2. Negligence is not a new cause of action

Respondent claims that the abolition of sovereign immunity did not create any new causes of action. However, officers have been liable for their tortious conduct during execution of search warrants since, at least, 1930, which predates the waiver of municipal liability in

R.C.W. 4.96.010 as well as the waiver of State sovereign immunity in R.C.W. 4.92.090. GOLDSBY vs STEWART, 158 Wash. 39 (1930).

3. This case does not involve any public duty, only the private duty owed to a private citizen regarding his private property

Brutsche's Amended Complaint does not allege a breach of any public duty, only the breach of a private duty owed to him, a private person, to use ordinary care when handling his private property. See Amended Complaint, C.P. 3-7. Respondent's reliance on cases such as DEVER and KEATS is misplaced because they involved an alleged breach of the duty to conduct criminal investigations carefully. KEATS vs VANCOUVER, 73 Wn. App. 257, 269 (1994). Because the Amended Complaint does not allege breach of a public duty, Respondent makes up a "duty to protect public safety", then alleges its a public duty and not a duty owed to Brutsche individually. The Respondent does not address the applicable cases of BENDER vs SEATTLE and EMPLOYCO PERSONNEL vs SEATTLE, which deal with private duties owed to private parties such as Brutsche. 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 impinging on private rights 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 and there was never any "public duty" involved, only Bender's private rights. Bender was not complaining about breach of the public duty to conduct investigations, but the private duties not to slander or assault. Id.

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 torfeasors may be held liable.

117 Wn.2d at 615-16.

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.

4. The Defendant brought the swat team to Plaintiff's property but failed to supervise the team

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 Brief of Respondent did not address Appellant's assertion that the negligence of the officers in destroying Brutsche's windows, doors and doorjams 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. See Brief of Appellant, Section III. A. 4. Nor did the Brief of Respondent question the vicarious liability of the City for acts of its officers. See Brief of Appellant, Section III. A.5 The City is liable for the acts of its officers and those acting under its authority both statutorily under R.C.W. 10.93.040 as well as under respondeat superior. HOUSER vs CITY OF REDMOND, 91 Wn.2d 36, 40 (1978); SAVAGE vs STATE, 127 Wn.2d 434, 439 (1995).

D. Destruction of the doors and doorjambs constituted a trespass.

BRADLEY vs AMERICAN SMELTING is analogous to this case because the tortfeasor (ASARCO and Kent) caused injury to property of the plaintiff (people living in Ruston and Brutsche) by causing a third person or thing (swat team / arsenic) to enter the land of the plaintiff where they/it did damage. BRADLEY vs AMERICAN SMELTING, 104 Wn.2d 677, 681 (1985); Restatement (Second) of Torts, Section 158 (1965) (defining trespass).

The Brief of Respondent questions whether

Restatement (Second) of Torts, Sec. 214(2), (that a privileged trespasser is still liable for her torts) can be applied to police. Section 214(2) was applied where officers were alleged to have caused emotional distress while executing a search warrant in TURNER vs SHERIFF OF MARION COUNTY, 94 F.Supp.2d 866, 984 (S.D. Indiana, 2000). the TURNER court observed:

Under the doctrine of trespass ab initio, a person who lawfully enters property under color of law (e.g. a government agent or private individual acting under legal authority) then later abuses that authority by a positive act of misconduct will be considered a trespasser ab initio and liable in trespass for his acts from the first moment of his entry.

TURNER, supra at 984. Furthermore, Restatement (Second) of Torts, Sec. 211 that says enforcement officers can be privileged to trespass, "...if, but only if, all requirements of the enactment are fulfilled." was cited in PETERS vs VINATIERY, 102 Wn. App. 641, 655 (2000). If Section 211 is recognized in Washington as applicable to trespassing officers, then Section 214(2), which explains Section 211, should also be applicable.

Section 211 was not cited in Appellant's

initial brief, but Appellant did question the authority to use a swat team owing to Kent's failure to abide by the requirements of R.C.W. 39.34.030(2) and .040.

E. RCW 10.93.070(3) does not apply

1. The outside officers were not acting in response to a request for assistance, but had usurped control of the search

In order to fall within R.C.W. 10.73.070(3), the Respondent asserts:

There is no question that the Kent police 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.

BRIEF OF RESPONDENT/CROSS-APPELLANT CITY OF KENT, page 28. This statement directly contradicts the declaration of Lieutenant Mike Villa of the Tukwila police department who said:

While I never saw the Plaintiff at the scene while the search was going on, as the SRT commander I would not have permitted him access to the property until the search was complete.

Declaration of Lieutenant Mike Villa, CP page 49, lines 26 through page 50, line 1. In other words, Villa was not there "In response to a request for

assistance...", but to command the operation.

Without a mutual law enforcement assistance agreement, the only other way extra-jurisdictional officers could participate in the execution of the search warrant was as assistants to the Kent Police. R.C.W. 10.73.070(3)(2003). There was no authority for Lieutenant Villa to take command, just like there was no authority for the Seattle Police to take command of the Tacoma search described in STATE vs BARTHOLOMEW, 56 Wn. App. 617, (1990). Because Villa was from Tukwila, there was no way for the City of Kent to hold him accountable for the property destruction. The gravamen of the amended complaint is that the City of Kent needed to supervise and be in control of the raid it initiated, or else adopt a mutual law enforcement assistance agreement that would establish a command structure and

...require that officers from participating agencies meet reasonable training or certification standards or other reasonable standards.

R.C.W. 10.93.130(2003).

2. The City of Kent failed to adopt the mutual law enforcement assistance agreement and failed

to supervise its outside
"assistants"

The City of Kent does not try to argue that it had adopted the law enforcement assistance agreement nor does it argue that it supervised its officers or those from other jurisdictions. Instead, the City argues it had authority to request the swat team under R.C.W. 10.93.070(3). The issue of "authority" is important because authority is an essential element for any conditional immunity. *McKINNEY vs TUKWILA*, 103 Wn. App. 391, 407 (2000). The bigger picture is that Kent unleashed a military operation against its citizens without any safeguards.

F. The Delegation Doctrine prevents usurpation of the Kent's legislative authority by an unelected officer from Tukwila

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 inter-local 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 Inter-local 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. See Affidavit of Attestation..., C.P. 81. Furthermore, the agreement was not recorded until March 25, 2004, eight months after the raid. Id. C.P. 70. 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 Inter-local 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).

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 its 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 inter-jurisdictional 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. 135, 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. 81. 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).

G. No qualified immunity for City of Kent

The City of Kent is liable for the actions of officers acting under its authority or purporting to act under its authority. R.C.W. 10.93.040 (2003). As provided by statute:

Any liability or claims of liability which arises out of the exercise or alleged exercise of authority by an officer acting within the course and scope of the officer's duties as a peace officer under this chapter is the responsibility of the primary commissioning agency unless the officer acts under the direction and control of another agency or unless the liability is otherwise allocated under a written agreement between the primary commissioning agency and another agency.

R.C.W. 10.93.040 (2003). Thus, Kent is liable even though the officers were only purporting to be acting under its authority and may not have been fully aware of the absence of a inter-local mutual law enforcement assistance agreement.

R.C.W. 10.93.040 (2003).

Kent's liability also stems from its own negligence in allowing a swat team onto Mr. Brutsche's property without adequate supervision or provisions for training. A supervisor would have recognized the damage being done by the battering ram and required that the officers use

Mr. Brutsche's keys. See Certification of Leo Brutsche, C.P. 135, lines 18-22. Keys would have been quicker, quieter and therefore safer for the officers. Id. Kent did have authority to request assistance, either by mutual law enforcement assistance agreement or request by an officer with authority. R.C.W. 10.93.070(3)(2003). But this authority is limited to requesting "assistance", not abdicating supervision and control to officers from outside the City and outside Kent's command and discipline structure. STATE vs BARTHOLOMEW, 56 Wn. App. 617, 621 (Div.I, 2000).

H. The Trial Court did not abuse its discretion in fixing the amount of fees awarded to City of Kent, but the award should be vacated

1. Brutsche appealed the award of fees as the award should be vacated with the summary judgment

Brutsche filed an amended notice of appeal after entry of the trial courts award of attorneys fees to the City of Kent. See Amended Notice of Appeal, C.P. 454-462. The award of fees should be vacated for the same reasons the summary judgment should be vacated. The award of fees, is premised upon City of Kent being the prevailing

party under MAR 7.3. C.P. 461. Vacating the order granting summary judgment would mean the City of Kent was no longer the prevailing party and that the award of fees should be vacated as well.

2. The trial court did not abuse its discretion in setting the amount of fees awarded to City of Kent

Respondent has cross appealed alleging that the amount of fees awarded constituted an abuse of discretion. Whether attorneys fees are reasonable is a question of fact to be answered in light of the particular circumstances of each individual case, and in fixing fees the trial court is given broad discretion. SCHMIDT vs CORNERSTONE INVESTMENTS, 115 Wn.2d 148, 169 (1990). A trial court's award of fees and costs is reviewed for an abuse of discretion. BANK OF AMERICA vs HUBERT, 153 Wn.2d 102, 123 (2004).

The Supreme Court requires use of the "lodestar" method of calculating awards of attorneys fees. MAHLER vs SZUCS, 135 Wn.2d 398, 433 (1998). Under the load-star method, a court must first determine that counsel expended a

reasonable number of hours in securing a successful recovery. MAHLER, supra, at 434. "Necessarily, this decision requires the court to exclude from the requested hours any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims." MAHLER, at 434. In order for a court to make such a determination, counsel must provide contemporaneous records documenting the hours worked. Id. The party seeking an attorney fee award has the burden of proving the reasonableness of the fees requested. FETZER vs WEEKS, 122 Wn.2d 141, 151 (1993).

The primary factor in determining the reasonableness of a fees request is the amount in controversy and the amount of the recovery. Id. at 150. From the outset of this case, the amount in controversy was \$4,921.51. This was the invoice amount from the Plaintiff's carpenter for repairing the doors, doorjambs and windows destroyed by the Defendants. C.P. 133. This was the amount stated in the notice of claims filed with the City Clerk more than sixty days before

commencing this action. AFFIDAVIT OPPOSING REQUEST FOR EXCESSIVE FEES, Exhibit A. C.P. 391-394.

However, just prior to the mandatory arbitration hearing on March 23, 2005, Defendant King County settled by accepting Plaintiff's settlement offer and paying the sum of \$2,500.00. This lowered the amount in controversy for the City of Kent to a little under \$2,500.00 going into the mandatory arbitration hearing.

Although the Amended Complaint pled a Section 1983 cause of action that contemplated punitive and non-economic damages for the deprivation of Plaintiff's constitutional rights, the City of Kent knew that the amount in controversy was only \$2,500.00, because the arbitration award had made clear that the City would receive a credit for the \$2,500.00 paid by King County. See AFFIDAVIT OPPOSING REQUEST FOR FEES, Exhibit B. C.P. 396-7 Furthermore, the City had received notice of the reasonableness hearing regarding the County's settlement. Thus, the City knew from long before the filing of the request for trial de novo the amount in controversy.

The amount in controversy is a "vital" factor in determining the reasonableness of a fees request. FETZER vs WEEKS, 122 Wn.2d 141, 150 (1993). As observed by the Supreme Court:

While the amount in dispute does not create an absolute limit on fees, that figure's relationship to the fees requested or awarded is a vital consideration when assessing their reasonableness.

FETZER, supra, at 150. The Court went on to say:

As discussed above, a claim for over 10 times the amount in contention, in a run-of-the-mill commercial dispute, certainly gives rise to a suspicion of unreasonableness, and demonstrates little, if any billing judgment.

FETZER, supra, at 156. The City of Kent's request for fees is 10 times more than the economic damages in controversy and likewise gives rise to a suspicion of unreasonableness. In the FETZER case, the Supreme Court overturned the fee award of \$200,000.00 and instead granted fees in the amount of \$22,454.28 where the amount in controversy was \$19,000.00. FETZER, supra at 143-44.

The statute on mandatory arbitration defines costs and reasonable attorneys fees as those which the Court finds were "reasonably necessary" after

the request for trial de novo was filed. R.C.W. 7.06.060(2)(2005). Thus, the court must exclude any "...wasteful of duplicative hours and hours pertaining to unsuccessful theories or claims." MAHLER vs SZUCS, 135 Wn.2d 398, 434 (1998).

The lode-star method requires that the requesting party provide "contemporaneous records" to document its request for fees. MAHLER vs SZUCS, 135 Wn.2d 398, 434 (1998).

Contemporaneous means "originating during the same time". WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY, C 1987. Thus, contemporaneous records would be records such as billing records that itemize hourly efforts. The City of Kent did not provided the Court with contemporaneous records.

In the absence of contemporaneous records from the City on fees, Plaintiff's counsel submitted his own billing records which are attached to his affidavit as Exhibit C to the Affidavit Opposing Excessive Fees. C.P. 347-351. Plaintiff's counsel's records provided a more realistic account of reasonably necessary hours spent on this case by the city, especially where

the City was claiming fees for time spent interacting with the Plaintiff's counsel.

An example of this comparative approach of assessing the reasonableness of the City's request is the City's claim for 13.3 hours for Richard Jolley's responding to discovery requests. Plaintiff's contemporaneous records show that the deposition of Mr. Swanberg took one hour which was preceded by 2.5 hours of preparation. See Affidavit Opposing Excessive Fees, C.P. 336 DeWeese claims that Mr. Jolley took seven hours to prepare for and attend the same deposition at which he asked no questions. Id. Plaintiff went over the City's fees request and took out the unreasonable and excessive fees, which left a total of 22.5 hours. See Affidavit Opposing Excessive Fees, Summation of Hours, C.P. 338. The trial court multiplied Ms. DeWeese's hourly rate of \$180.00 per hour times the 22.5 reasonable hours for the award amount of \$4,050.00.

The City had the duty to segregate out its time between those activities and claims that were relevant and those that were not. LOEFFELHOLZ vs

C.L.E.A.N., 119 Wn. App. 665, 690 (2004).

Because the City refused to submit contemporaneous records, the Court could have refused any award.

Id. The burden of segregating fees and the burden of proving their reasonableness was on the City.

LOEFFELHOLZ, supra at 691.

I. The form of the trial court's fee award

1. The fee award indicates the amount of reasonable and necessary fees.

The trial court indicated its finding as to the amount of reasonable and necessary fees by lining out the \$27,124.00 figure proposed by the City and writing in the amount of \$4,050.00 See Findings of Fact, Conclusions of Law, and Order Awarding..., C.P. 461. On appeal, the City claims that the form it prepared for the trial court is deficient, however, a trial court's findings of fact need not cover all items of evidence, but are sufficient when they deal with the material issues and it is clear what questions were decided and the manner in which they were resolved. FORD vs BOARD OF HEALTH, 16 Wn. App. 709, 717 (1977).

The trial court did not have to itemize the

unnecessary and unreasonable portions of the City's request, provided there was a sufficient record. MAHLER vs SZUCS, 135 Wn.2d 398, 435 (1998). The record was sufficient and quite detailed regarding which items were unnecessary and/or unreasonable. See Affidavit Opposing Excessive Fees, C.P. 329-379. Even if the trial court had omitted some finding, the absence of a finding of fact on a disputed issue is the equivalent of a finding against the party who had the burden of proof as to that issue. CAR WASH ENTERP. vs KAMPANOS, 74 Wn. App. 537, 546 (1994).

2. The City waived any objections by preparing and proposing the form of the award.

Finally, it should be noted that the City prepared the findings it now complains about. Objections to the form were waived when the City proposed its form for entry. NORTHWEST INVEST. vs NEW WEST FED., 64 Wn. App. 938, 945 (1992). In response to the city's motion for reconsideration, Brutsche offered his proposed amended findings which detailed the reasonable and unreasonable hours. See attachment to Plaintiff's Response to

Defendant's motion to reconsider Fees. C.P.
495-501. The City could have signed Brutsche's
proposed order if it wanted more detail.

J. Attorneys fees on appeal

1. Fees should be awarded to Brutsche

As set forth in the initial Brief of
Appellant, Brutsche is entitled to his attorneys
fees for the Unconstitutional taking pursuant to
42 U.S.C. Sec. 1988, as he has made his claim for
compensation. ALLINGHAM vs SEATTLE, 109 Wn.2d 947,
953-4 (1988). The City and its swat team were
acting under color of law. See R.C.W. 10.93.070.
Thus, the prima facie case for a Sec 1983
claim has been met for the City's failure to
supervise and train. 42 U.S.C. Sec. 1983.

2. No fees should be awarded to
City of Kent

An appellant court generally will not grant a
request for attorneys fees absent an authorizing
statute or contract. McNEIL vs POWERS, 123 Wn.
App. 577, 592 (Div.III, 2004). The City has
cited no authority to support its request for fees
for its appeal of the attorneys fees award.
Furthermore, if there was any error, it was due to

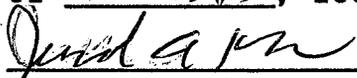
the City's preparation of the fee award.

As with the fees request at the trial court level, the burden of segregating fees between essential theories and unsuccessful claims and unsuccessful efforts to slander Jim Brutsche is on the City. LOEFFELHOLZ, supra at 601. Likewise the burden of showing reasonableness and necessity is on the City. Id. If the summary judgment is sustained, only reasonable fees essential to showing Brutsche had no cause of action can be compensable.

IV. CONCLUSION

Whether the City of Kent was reasonable in employing a swat team composed of outside officers it could not supervise nor discipline for their torts is a question of fact for the jury. This matter should be remanded.

Dated this 3rd day of February, 2006.


Gerald A. Klein, #9313
Attorney for Brutsche

RECEIVED
JUDGES MAIL ROOM

FILED

JD
JUL 22 2005
3:30 PM

2005 JUL -8 PM 3:28

2005 JUL -8 PM 4:59

KING COUNTY
SUPERIOR COURT

KING COUNTY
SUPERIOR COURT CLERK
HONORABLE BRIAN D. GAIN
July 22, 2005, 3:30 p.m.

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

LEO C. BRUTSCHE

Plaintiff.

NO. 04-2-12087-0
KNT

vs.

CITY OF KENT,
a Municipal Corporation; et. al.
Defendants.

AFFIDAVIT
OF ATTESTATION
OF DOCUMENTS

STATE OF WASHINGTON

COUNTY OF KING

I, Jerald A. Klein, certify as follows:

That I am the Attorney for the Plaintiff herein and
a Notary Public;

That attached hereto is a true and correct copy of
Interlocal Cooperative Agreement Between Auburn, Federal Way,
Kent, Renton, Tukwila and the Port of Seattle, for Cration
of the Valley special Response Team, the original of which
was recorded with the King County Recorder's Office and the
electonic image is scanned under Recorder's No.
20040325000463, as of this date.

Also attached hereto is a true and correct copy of

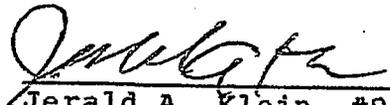
JERALD A. KLEIN
823 Joshua Green Bldg.
Seattle, WA 98101-2236
(206) 623-0630

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Inventory And Return of Search Warrant for the subject raid at Plaintiff's property, the originals of which are in the possession of the Court Clerk for the King County District Court at the Regional Justice Center as of this date.

I certify under penalty of perjury under the laws of the State of Washhington that the above is true and correct.

Dated: 7/6/05
Seattle, Washington


Jerald A. Klein, #9313

JERALD A. KLEIN
823 Joshua Green Bldg.
Seattle, WA 98101-2236
(206) 623-0630



20040325000463

FEDERAL WAY CI AG
PAGE 001 OF 014
03/25/2004 11 12
32 00
KING COUNTY, WA

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. | |
| 4. City of Kent | Port of Seattle |
| 5. 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 |
| 5. 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

VALLEY SPECIAL RESPONSE TEAM
OPERATIONAL AGREEMENT

1

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.

VALLEY SPECIAL RESPONSE TEAM
OPERATIONAL AGREEMENT

7

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

<u>[Signature]</u>	<u>9/17/03</u>
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
--	---------------

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

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.

_____ Mayor, City of Auburn Date	_____ City Attorney, City of Auburn Date
_____ City Clerk, City of Auburn Date	_____ City Attorney, City of Renton Date
_____ Mayor, City of Renton Date	_____ City Attorney, City of Tukwila Date
_____ City Clerk, City of Renton Date	_____ City Attorney, City of Kent Date
_____ Mayor, City of Tukwila Date	_____ City Attorney, City of Federal Way Date
_____ City Clerk, City of Tukwila Date	_____ City Attorney, City of Federal Way Date
_____ Mayor, City of Kent Date	_____ City Attorney, City of Federal Way Date
_____ City Clerk, City of Kent Date	_____ City Attorney, City of Federal Way Date
_____ City Manager, City of Federal Way Date	_____ City Attorney, City of Federal Way Date
_____ City Clerk, City of Federal Way Date	_____ City Attorney, City of Federal Way Date
_____ Executive Director, Port of Seattle Date	_____ 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 & Elections

By

[Handwritten Signature]
Deputy



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.

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 Jacobson 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

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.

Mayor, City of Auburn Date

City Attorney, City of Auburn Date

City Clerk, City of Auburn Date

Jesse Tanner 5-22-03

Mayor, City of Renton Date

Lawrence Warner 5-22-03

City Attorney, City of Renton Date

Bonnie J. Walton 5-22-03

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

Thomas P. Brennan for MRD 7-10-03

Executive Director, Port of Seattle Date

Linda J. Storch 7-11-03

Port Counsel, Port of Seattle Date

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.

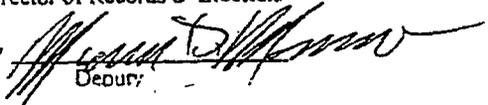
_____ Mayor, City of Auburn	_____ Date	_____ City Attorney, City of Auburn	_____ Date
_____ City Clerk, City of Auburn	_____ Date		
_____ Mayor, City of Renton	_____ Date	_____ City Attorney, City of Renton	_____ Date
_____ City Clerk, City of Renton	_____ Date		
_____ Mayor, City of Tukwila	_____ Date	_____ 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		
_____ City Manager, City of Federal Way	_____ Date	_____ City Attorney, City of Federal Way	_____ Date
_____ City Clerk, City of Federal Way	_____ Date		
<i>Louis Kean</i> _____ Executive Director, Port of Seattle	_____ Date	<i>Louis Kean</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 
Deputy



AUKEN DIV.

COURT FOR KING COUNTY

STATE OF WASHINGTON)

NO. RJC 011853

COUNTY OF KING)

INVENTORY AND RETURN
OF SEARCH WARRANT

1. I received a search warrant for the premises, vehicle or person specifically described as follows:

Buildings Located Inside Compound Located At
4212 S. MADON AVE Kent, WA. © James F Brutsche
DOB/6-26-58

2. On the 10 day of JULY, ~~19~~ 2003, I made a diligent search of the above-described premises, vehicle or person and found and seized the items listed below in Item 7.

3. Name(s) of person(s) present when the property was seized:

JAMES F BRUSCHÉ DOB/6-26-58

4. The inventory was made in the presence of:

() The person(s) named in (3) from whose possession the property was taken.

(X) Others: VNET DETECTIVES

5. Name of person served with a copy or description of place where copy is posted:

LEFT AT ABOVE ADDRESS.

6. Place where property is now stored: N/A

(Continued on next page)

Inventory and Return
Page 1 of 2

White Copy: Court File
Canary Copy: Police File
Goldenrod Copy: Left at Premises
searched

1
2 RECEIVED
JUDGES MAIL ROOM

FILED

3 2005 JUL -8 PM 3: 27 2005 JUL -8 PM 4: 59

4
5 KING COUNTY
SUPERIOR COURT

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA.

6
7
8
9 SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

10 LEO C. BRUTSCHE)
Plaintiff) NO.04-2-12087-0 KNT
11 vs)
CITY OF KENT, a Washington) DECLARATION OF
12 Municipal Corporation) JAMES WARNER
13 KING COUNTY, a political }
subdivision of the State of }
14 Washington)
Defendant)

15
16 I, James Warner, certify as follows:

17 That I make this affiavit based upon my personal
18 knowledge of the facts stated herein which are true:

19 During the months of July and August, 2003, I
20 was retained by Leo C. Brutsche to repair doors and door
21 jams at the properties of 806 Meeker and 426 Naden in
22 Kent, Washington. I did the necessary work to replace
23 the broken doors and door jams at these properties and
24 billed for my services at my normal and customary rate
25 which is normal and reasonable for this type of work in
26 the Puget Sound area. The total bill for this work was

27
28
JERALD A. KLEIN
823 Joshua Green Bldg.
Seattle, WA 98101-2236
(206) 623-0630

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

\$4,921.51 which sum Leo C. Brutsche paid shortly after
billing. A copy of my bill is attached.

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

Date:
Buckley, Washington



James Warner

JERALD A. KLEIN
823 Joshua Green Bldg.
Seattle, WA 98101-2236
(206) 623-0630

PROPOSAL NO.	N 2 3819-5
SHEET NO.	
DATE	9-5-03

PROPOSAL SUBMITTED TO:

NAME	PAT BOUTACHE
ADDRESS	1400 WEST MAIN ST Auburn WA 98001
PHONE NO.	253-833 6766

WORK TO BE PERFORMED AT:

ADDRESS	806 Meeker and 426 Naden Kent WA 98032
DATE OF PLANS	REPAIR WORK
ARCHITECT	

We hereby propose to furnish the materials and perform the labor necessary for the completion of Two Doors
 AT: 806 Meeker Kent WA 98032
 Replaced one glass sliding Door. Replaced one 36" main Door with new locks and paint. \$1556
 AT: 426 Naden Kent WA 98032
 Replaced Four 36" Doors with new locks and paint. Two Trailer Doors - Fixed Frames and replaced locks. Replace pulllocks. Three pulllocks that had been cut. \$3365

All material is guaranteed to be as specified, and the above work to be performed in accordance with the drawings and specifications submitted for above work and completed in a substantial workmanlike manner for the sum of 4921.51 +
when work is finished Dollars (\$ 4,921.51)

with payments to be made as follows.

Respectfully submitted JAMES S WARNER, C.
 Per 25416-166th St E Bunking WA 98327

Any alteration or deviation from above specifications involving extra costs will be executed only upon written order, and will become an extra charge over and above the estimate. All agreements contingent upon strikes, accidents, or delays beyond our control.

Note - This proposal may be withdrawn by us if not accepted within 30 day

ACCEPTANCE OF PROPOSAL

The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payments will be made as outlined above.

Signature _____
 Signature _____
 Date _____

FILED

05 JUL 11 2:29 PM 4:29
KING COUNTY
SUPERIOR COURT CLERK
KING COUNTY
SUPERIOR COURT CLERK
KENT, WA

FILED

05 JUL 11 PM 4:29
KING COUNTY
SUPERIOR COURT CLERK
KENT, WA

Hon. Brian D. Gain
July 22, 2005, 3:30 p.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

LEO C. BRUTSCHE,)	No. 04-2-12087-0 KNT
)	
Plaintiff,)	CERTIFICATION OF LEO C. BRUTSCHE
)	OPPOSING SUMMARY JUDGMENT
v.)	
)	
CITY OF KENT,)	
a municipal corporation, et al.,)	
)	
Defendants.)	
)	

I, LEO C. BRUTSCHE, certify as follows:

1. That I am the plaintiff herein and make this certification in that capacity.

CERTIFICATION OF LEO C. BRUTSCHE
OPPOSING SUMMARY JUDGMENT - 1

JERALD A. KLEIN
823 JOSHUA GREEN BUILDING
1425 FOURTH AVENUE
SEATTLE, WASHINGTON 98101-2236
(206)623-0630

1 2. That my claims against the City of Kent stem from a police raid on my
2 property on July 10, 2003. On information and belief, the police were looking for
3 evidence of drug law violations pursuant to a search warrant. On information and belief,
4 nothing was seized by the police as evidence during the raid.
5

6 3. During the raid, many of my doors and door jams were destroyed and some
7 windows broken. The damage was done by the police.
8

9 4. The use of a battering ram to enter the buildings on my property was
10 unnecessary.
11

12 5. At the time of the raid, I offered my keys to the officer in charge, Sergeant
13 Jaime Sidell. I offered to escort the officers around my property and open all doors for
14 them. Sergeant Sidell rejected my offer saying "... we have our own way of getting in...".
15

16 6. On information and belief, Sergeant Sidell is a commanding officer for
17 Valley Narcotics Enforcement Team ("VNET") which is a joint venture composed of the
18 defendant and other local governments.
19

20 7. I believe the custom or practice of using a battering ram to breach the doors
21 is unreasonable under the circumstances here. Use of my keys would be much quicker and
22 quieter, making the entry much safer for the officers. Also, keys would not damage the
23 doors and the door jams like the battering ram.
24

25 8. The defendants owed a particular duty to me not to destroy my property.
26 I bought the property in 1993 and have owned it exclusively ever since. My claims are not
27
28

1 based upon any "public duty", but upon my right to own, possess, use and enjoy my own
2 property without having it destroyed by the defendants.

3
4 9. Letting me open the doors before the raid or after the facility was "secured"
5 would have been safer and less destructive. I knew there were no illegal drugs nor
6 weapons on the property. I offered to escort the officers throughout my property at the
7 time of the raid because I knew there was no genuine officer safety concerns nor any illegal
8 activities.

9
10 10. The diminution in value of my property between the property with doors
11 and without doors could easily have exceeded thirty thousand dollars owing to vagrancy
12 and vermin infestation. However, I quickly mitigated my damages by boarding up the
13 property in the evening after the raid.

14
15 11. I then contacted Mr. Werner who I know to be a competent carpenter and
16 whose prices are reasonable and fair. Mr. Werner replaced the doors and door jams
17 destroyed by the police and billed me \$4,921.51, which I paid. This bill was fair and
18 reasonable for the work he did and only included the necessary repair of the destroyed
19 items.

20
21 12. I would also like the Court to know that the unsworn statements in the
22 City's motion about my son Jim are untrue. I visited Jim almost daily at the Naden
23 facility. In my visits, I saw no indication of drug manufacturing on the property. I also
24 believe that Jim did not have the knowledge to manufacture drugs.
25
26
27
28

1 FILED

2 05 JUL 19 PM 4:03

3 KING COUNTY
4 SUPERIOR COURT CLERK
KENT, WA

NOT RECEIVED
JUL 19 2005
Keating, Brocklin &
McDonnell, Inc., P.S.

5 HONORABLE BRIAN D. GAIN
6 July 22, 2005, 3:30 p.m.

7 SUPERIOR COURT OF WASHINGTON
8 FOR KING COUNTY

9 LEO C. BRUTSCHE)

Plaintiff.)

NO. 04-2-12087-0
KNT

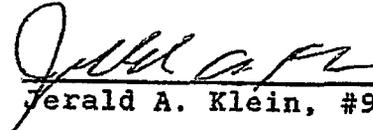
10 vs.)

11 CITY OF KENT,)
12 a Municipal Corporation; et. al.)
Defendants.)

MOTION & AFFIDAVIT
FOR PUBLICATION
OF DEPOSITION

13
14 Plaintiff moves for the publication of the deposition
15 of Brian Swanberg taken herein on June 27, 2005

16 Dated: July 19, 2005

17 
Jerald A. Klein, #9313

18
19 I, Jerald A. Klein, certify I am the Attorney for the
20 Plaintiff herein and make this affidavit from my personal
21 knowledge of the facts stated herein which are true;

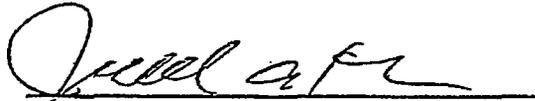
22 That attached hereto are true and correct copies of
23 portions of the deposition of Brian Swanberg, taken in this
24 matter on June 27, 2005 by reporter Susan Cookman which
25 truly and correctly relate the questions and answers given
26 at said deposition.

27
28 JERALD A. KLEIN
823 Joshua Green Bldg.
Seattle, WA 98101-2236
(206) 623-0630

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

Dated: 7/19/05
Seattle, Washington


Jerald A. Klein, #9313

JERALD A. KLEIN
823 Joshua Green Bldg.
Seattle, WA 98101-2236
(206) 623-0630

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

LEO BRUTSCHE,

Plaintiff,

vs.

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

Defendants.

NO. 04-2-12087-0 KNT

ORIGINAL

Deposition Upon Oral Examination

BRIAN SWANBERG

June 27, 2005
10:00 a.m. to 11:05 a.m.
400 W. Gowe Street
Kent, Washington

SUSAN COOKMAN, CSR - GROSHONG-QUAINTANCE
SEATTLE (253)838-1282 TACOMA (253)627-7129

APPEARANCES

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

For the Plaintiff:

JERALD A. KLEIN
 Attorney at Law
 1425 4th Avenue, #823
 Seattle, Washington 98191-2236

For the Defendant:

RICHARD JOLLEY
 KEATING, BUCKLIN & McCORMACK
 800 5th Avenue, #4141
 Seattle, Washington 98104-3175

Also Present:

LEO BRUTSCHE

SUSAN COOKMAN, CSR - GROSHONG-QUAINTANCE
 SEATTLE (253)838-1282 TACOMA (253)627-7129.

I N D E X

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

EXAMINATION BY:

PAGE

MR. KLEIN

4

EXHIBIT NO.:

MARKED

1. RFS ACTION FILE #02-0000785, 1/2/02

7

2. RFS ACTION FILE #02-0000799, 1/4/02

9

3. RFS ACTION FILE #04-0004292, 7/28/04

9

4. PHOTOS OF SCENE

33

SUSAN COOKMAN, CSR - GROSHONG-QUAINTANCE
SEATTLE (253)838-1282 TACOMA (253)627-7129

- 1 A I am the code enforcement officer for the city.
- 2 Q How long have you been a code enforcement officer?
- 3 A Eleven years.
- 4 Q What were you doing before code enforcement?
- 5 A I was managing a private investigative division of a
- 6 security company in Seattle.
- 7 Q What was the name of the security company?
- 8 A Northwest Protective Service.
- 9 Q I've heard of them. Prior to that?
- 10 A I was a felony investigator for the Associated Counsel
- 11 for the Accused doing investigative work for public
- 12 defenders.
- 13 Q And prior to that?
- 14 A Police officer, City of Renton.
- 15 Q For the City of Renton?
- 16 A Mm-hmm.
- 17 Q When were you a police officer?
- 18 A Retired in '89.
- 19 Q '89, okay. How long had you been a police officer for
- 20 the City of Renton?
- 21 A Six years.
- 22 Q Six years?
- 23 A Five or six.
- 24 Q What type of work were you doing?
- 25 A Patrol, mostly. Worked special operations for a year

SUSAN COOKMAN, CSR - GROSHONG-QUAINTANCE
SEATTLE (253)838-1282 TACOMA (253)627-7129

1 or two.

2 Q Did you ever serve a search warrant?

3 A Yes.

4 Q Okay. What are your duties as code enforcement
5 officer?

6 A Basically, to enforce the city's municipal codes, Kent
7 City Codes.

8 Q Are you in charge of enforcing all of the codes?
9 Everything from dog leash licensing --

10 A No.

11 Q -- to -- Which ones are you --

12 A Chapter 8, which is public nuisance, some noise.

13 (Break in proceedings.)

14 THE WITNESS: These are the files here.

15 A Junk vehicles, housing code, abatement of dangerous
16 building code, zoning codes, and then I assist other
17 departments with problems that they may have, from
18 wetland issues to garbage pick-up, things like that.

19 Q (By Mr. Klein) Would you assist like the zoning
20 department or land use department with enforcement
21 issues?

22 A Yes.

23 Q Would you assist public works if they ever came across
24 like a wetlands issue?

25 A If they asked me to, I get involved, yes.

SUSAN COOKMAN, CSR - GROSHONG-QUAINTANCE
SEATTLE (253)838-1282 TACOMA (253)627-7129

1 785, okay?

2 Q What does that correspond to?

3 A That just in '02, 2002, there was a complaint of
4 vehicles, junk vehicles on the property, and this just
5 notes that later on, they were removed at our request
6 by Mr. Brutsche. That's it.

7 MR. BRUTSCHE: Those were the ones outside the
8 fence; weren't they?

9 THE WITNESS: I don't recall.

10 MR. JOLLEY: Wait till Mr. Klein asks you the
11 questions.

12 THE WITNESS: Okay. All right.

13 Q (By Mr. Klein) Let me first make sure I understand.

14 Exhibit 1, is that all of the records?

15 A Of that file, yes.

16 Q Can we give the reporter -- I mean, does this Exhibit
17 1 have all your records, or is there another file that
18 she doesn't have yet?

19 A Well, okay, this is one file.

20 Q Okay.

21 A This is one file.

22 Q Okay.

23 A And this is one file.

24 Q Oh, okay, so can we have her make Exhibit No. 2 the
25 one that's in your right hand?

SUSAN COOKMAN, CSR - GROSHONG-QUAINTANCE
SEATTLE (253)838-1282 TACOMA (253)627-7129.

1 A Yes.

2 MR. KLEIN: Okay. Why don't you do that?

3 (Exhibits Nos. 2 & 3 marked.)

4 (REPORTER'S NOTE: Exhibit No. 3 starts with Page 2.)

5 Q (By Mr. Klein) But that's the extent of the file
6 that's marked Exhibit 1, Page 1, is just that some
7 cars were on the property and were removed?

8 A Correct.

9 Q All right. What about the file that corresponds to
10 Exhibit 2, Page 1?

11 A Well, it states here that there were three abandoned
12 vehicles on the property. A letter was mailed on
13 7/8/04, and when I went out on -- let's see here.
14 Well, what it looks like here -- or '02, I mean.
15 January 16, '02, a letter was mailed to Mr. Brutsche,
16 and he removed the vehicles.

17 Q So it was another vehicle deal?

18 A Yeah, yeah.

19 Q Okay.

20 MR. BRUTSCHE: Somebody else removed them.

21 THE WITNESS: Oh, okay.

22 MR. JOLLEY: Jerry, you are going to have to
23 tell Mr. Brutsche that he can't be talking on the
24 record.

25 MR. KLEIN: Yeah; that's right. That is

SUSAN COOKMAN, CSR - GROSHONG-QUAINTANCE
SEATTLE (253)838-1282 TACOMA (253)627-7129

1 right.

2 Q (By Mr. Klein) And then Exhibit No. 3, beginning on
3 Page 2, what is this about?

4 A Junk vehicles and garbage and debris on the property.

5 Q Okay. What is the date of that?

6 A Looks like July 8th of 2004, a letter went to Mr. and
7 Mrs. Brutsche for the address at 426 Naden Avenue S.
8 for junk inoperable vehicles parked on the property.

9 Q Okay. Do you have any records or any files that
10 correspond to any investigation you may have done on
11 July 10th of 2003?

12 A No. This is it here.

13 Q This is it here? Okay.

14 A Yeah.

15 Q All right. Do you have any assistants that help you
16 with your investigation, or are you it?

17 A I'm it.

18 Q You are it, okay. Are you ever involved in abating
19 nuisances either under --

20 A Meaning? In what way?

21 Q Well, under Chapter 8 of the code --

22 A Mm-hmm.

23 Q -- the city has abatement powers; isn't that correct?

24 A The city does; correct.

25 Q Would you be involved in enforcing or seeking

SUSAN COOKMAN, CSR - GROSHONG-QUAINANCE
SEATTLE (253)838-1282 TACOMA (253)627-7129

- 1 Q Okay. All right. At that point, would you be
2 handling that action, or would the city attorney be
3 handling that action?
- 4 A The city attorney would be handling it at that point.
- 5 Q I see. Okay. Who is the city attorney?
- 6 A Assistant City Attorney for code enforcement now is
7 Julie Storms.
- 8 Q And you would just turn the file over to Julie to
9 handle the code enforcement?
- 10 A Correct.
- 11 Q Okay. Who is the actual city attorney?
- 12 A Tom Brubaker.
- 13 Q Okay. Do you work with Tom on --
- 14 A No. He is too high up the food chain.
- 15 Q Okay. How do you hear of alleged code violations or
16 how do you discover alleged code violations?
- 17 A Generally, through our citizen complaint line.
- 18 Q I see. In the three that you have documented --
- 19 A Mm-hmm.
- 20 Q -- here, I take it Mr. Brutsche cooperated?
- 21 A Yes.
- 22 Q I mean, they didn't seem to go beyond your initial
23 letter.
- 24 A Right.
- 25 Q Okay. Roughly, how much of your day is involved in

SUSAN COOKMAN, CSR - GROSHONG-QUAINTANCE
SEATTLE (253)838-1282 TACOMA (253)627-7129

1 know. Different department, different . . .

2 Q Maybe it's VERT, Valley Emergency Response Team.

3 A I don't know.

4 Q Some SWAT team?

5 A Yeah. No, no.

6 Q Did you ever get any call from the SWAT team?

7 A Once.

8 Q What was that about?

9 A Mr. Brutsche's property.

10 Q Who called you?

11 A That, I couldn't tell you. Just an officer.

12 Q Was it a City of Kent officer?

13 A Yes, I believe it was.

14 Q Did you open a file on the call?

15 A No. They had told me that they might ask me to look
16 at something, and I told them to give me a call.

17 Q When did they call?

18 A I had spoken to some officer in the morning, and then
19 it was later in the day, around noon, that I received
20 a call stating, could you come down to, you know, the
21 property.

22 Q Would that have been on July 10th of 2003?

23 A I wouldn't know. It's not something that I was
24 actively involved in working, you know, a code
25 enforcement --

SUSAN COOKMAN, CSR - GROSHONG-QUAINTANCE
SEATTLE (253)838-1282 TACOMA (253)627-7129

1 A -- to make sure that the living quarters are not
2 slums.

3 Q Right.

4 A So that's it. You know, people have hot and cold
5 running water and proper, you know, safe sewage and
6 things along those lines, and so they asked me to take
7 a look at it.

8 Q Does that happen often? Do police officers ask you to
9 take a look at housing?

10 A Not often. Like I said, it's happened about a half a
11 dozen times.

12 Q So the officer, whoever called you, was concerned
13 about the living conditions?

14 A I guess so. That's what they specifically asked me to
15 look at.

16 Q Did they suggest anything to you?

17 A No, no, not that I recall.

18 Q Did they ask you to red tag the --

19 A I red tagged it.

20 Q You did red tag it?

21 A On my own, yeah. The condition of the structure was
22 not habitable at that time.

23 Q Right. Did you notice any doors that might have been
24 broken?

25 A Well, you are talking about a structure that had bare

SUSAN COOKMAN, CSR - GROSHONG-QUAINTANCE
SEATTLE (253) 838-1282 TACOMA (253) 627-7129

- 1 Q You are showing -- with your hands, you are showing
2 about a square foot?
- 3 A Okay, if that's a square foot. You know.
- 4 Q 12 by 12 inches?
- 5 A Well, maybe six by six.
- 6 Q Mm-hmm?
- 7 A I don't recall it being a great amount.
- 8 Q Right.
- 9 A I remember it being enough to catch my attention, but
10 not -- I could be wrong about that size. I don't
11 know.
- 12 Q Do you know whose blood it was?
- 13 A Don't have a clue.
- 14 Q Did anybody tell you?
- 15 A Nope. I didn't ask.
- 16 Q Where was the blood?
- 17 A I just recall it being somewhere in the center of the
18 trailer, what I believe would be the living room
19 section, on the floor.
- 20 Q Was there any blood near the door, the sliding glass
21 door that you have identified in Picture 1?
- 22 A Well, this wouldn't be that far from the sliding glass
23 door. I mean, that's part of that section.
- 24 Q Oh, okay.
- 25 A You know.

SUSAN COOKMAN, CSR - GROSHONG-QUAINTANCE
SEATTLE (253)838-1282 TACOMA (253)627-7129

- 1 A Yeah.
- 2 Q All right. I just wanted -- I mean, there is a lot of
3 doors that were damaged --
- 4 A Okay.
- 5 Q I just wanted to test your memory about what you saw,
6 and since you didn't go into the warehouse --
- 7 A Yeah.
- 8 Q -- you just saw doors, but do you recognize that as an
9 interior door?
- 10 A I don't know if it's an interior door. It appears to
11 be an interior door style.
- 12 Q Mm-hmm.
- 13 A But it very well could have been improperly installed
14 as an exterior door.
- 15 Q Mm-hmm.
- 16 A I don't know.
- 17 Q That's probably what caught your attention; isn't it?
- 18 A It might be.
- 19 Q Because you -- I mean, either the damage or the fact
20 that it was a door that -- an exterior door on an
21 interior place, or an interior door an exterior place,
22 that would have caught a carpenter's eye?
- 23 A As I stated earlier, there was an addition done to the
24 trailer, and I couldn't find any type of permit for
25 that. L & I will handle manufactured structures. The

SUSAN COOKMAN, CSR - GROSHONG-QUAINTANCE
SEATTLE (253)838-1282 TACOMA (253)627-7129

1 building department will handle any attachments to a
2 manufactured structure.

3 Q Okay, so it was pretty much outside of your
4 jurisdiction?

5 A Yeah.

6 Q Okay. All right. Were any of the glass windows
7 broken?

8 A I don't remember.

9 Q Did you see or smell any evidence of a stun grenade?

10 A A stun grenade?

11 Q (Nods head.)

12 A I wouldn't -- I've never tossed one so I wouldn't
13 know.

14 Q But you would recognize the sulfur smell, though;
15 wouldn't you?

16 A Sulfur or cordite? You know, no. I guess, no. I
17 didn't smell anything.

18 Q Okay, all right. So you didn't smell any illicit
19 chemicals or see any evidence of any illicit
20 chemicals?

21 A No. Chemicals, that type of thing, I wouldn't be
22 looking for. It would strictly be structural.

23 Q Right. Did the officers indicate that they had found
24 any illicit substance, any guns, anything illicit on
25 the property?

SUSAN COOKMAN, CSR - GROSHONG-QUAINTANCE
SEATTLE (253)838-1282 TACOMA (253)627-7129

- 1 A I purposely didn't ask.
- 2 Q Oh, all right. Why?
- 3 A Because my job is this (Indicating), and I don't want
4 to be here for this.
- 5 Q You held up your hands in the form of blinders?
- 6 A Mm-hmm.
- 7 Q Isn't that correct?
- 8 A Yeah.
- 9 Q What you are saying nonverbally is that you limited
10 your focus intentionally so as not to become a
11 witness?
- 12 A Yeah. I've got a job to do.
- 13 Q Sure.
- 14 A The police departments have their job to do, like fire
15 and -- you know.
- 16 Q Okay. Now, you mentioned that you red tagged the
17 property.
- 18 A I remember hanging a red tag on it.
- 19 Q What was that for?
- 20 A The actual living conditions of the structure at the
21 time.
- 22 Q Does it have to have a door?
- 23 A Yes.
- 24 Q So if the door's smashed to pieces, it's not livable?
- 25 A (Witness nods head.)

SUSAN COOKMAN, CSR - GROSHONG-QUAINTANCE
SEATTLE (253)838-1282 TACOMA (253)627-7129

- 1 Q Did you see an armored personnel carrier?
- 2 A Yes, I did.
- 3 Q Describe it.
- 4 A Looks like a dune buggy with multiple wheels that's
5 been armored, basically. Just a squat, long, tank,
6 you know.
- 7 Q Is it like the Humvees?
- 8 A No, its -- maybe it is, just elongated more, and if I
9 remember right, all the hatches on it were kind of at
10 an angle on the sides.
- 11 Q To deflect --
- 12 A I assume, you know.
- 13 Q -- ordinance attacks?
- 14 A (Witness nods head.)
- 15 Q Did you notice any other military style vehicles?
- 16 A No, no, not that I know of.
- 17 Q Any tanks?
- 18 A No tanks.
- 19 Q Okay. Were the hazmat folks called to the scene?
- 20 A If they were, it would have been long after I was
21 gone.
- 22 Q Okay. You mentioned you didn't notice any --
- 23 A Huh-uh. I wouldn't have been paying attention for
24 that.
- 25 Q -- hazmat personnel?

SUSAN COOKMAN, CSR - GROSHONG-QUAINTANCE
SEATTLE (253)838-1282 TACOMA (253)627-7129

1 MR. JOLLEY: I don't think he has.

2 A I don't know how the warrant was served. As I stated
3 earlier, I wasn't there so I don't know how they
4 served it. You are asking if a specific unit -- are
5 there other ways to serve a warrant other than by the
6 specific unit of a SWAT team?

7 Q (By Mr. Klein) Yes.

8 A Depending on the type of warrant, yes, there are other
9 types that you wouldn't use SWAT on.

10 Q What other ways would you execute a search warrant?

11 A Arrest warrants. Get a search warrant to get to the
12 arrest warrant, you know.

13 Q When you were a patrolman, did you ever execute a
14 search warrant?

15 A Yes.

16 Q Were you part of a SWAT team?

17 A No, no.

18 Q How many officers were with you?

19 A It depended. If it was empty, and it was just a
20 straight search, there might only be three or four of
21 us. If it was a situation where we knew that there
22 were guns, there could be, especially in a joint task
23 force, 16 or 20, depending on the logistics.

24 Q Okay. Do you know how often the SWAT team is called
25 to do search warrants in the City of Kent?

SUSAN COOKMAN, CSR - GROSHONG-QUAINTANCE
SEATTLE (253)838-1282 TACOMA (253)627-7129

C E R T I F I C A T E

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF WASHINGTON)
COUNTY OF KING)

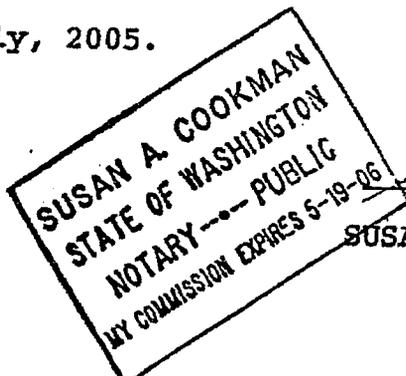
I, Susan Cookman, Notary Public,
do hereby certify:

That the foregoing deposition, transcription
of which is hereto attached, was given before me at the time
and place stated therein; that the witness, before
examination, was duly sworn to testify the truth, the whole
truth and nothing but the truth; that the testimony given by
the witness was by me stenographically recorded and later
transcribed under my personal supervision;

That the foregoing transcript contains a full
and accurate record of all the testimony and proceedings
given at the time and place of said testimony to
the best of my ability.

I do further testify that I am not related to
any party to the matter, nor to any of counsel, nor do I
have any interest in the matter.

WITNESS my hand and seal this 7th
day of July, 2005.



Susan Cookman

SUSAN COOKMAN, CSR #COOKMSA49504

SUSAN COOKMAN, CSR - GROSHONG-QUAINTANCE
SEATTLE (253)838-1282 TACOMA (253)627-7129

Envt	Action	Fee Calc	Payments	Summary	Code Enforcement	People	Reports	Related Docs				
Req #:	02-0000785	Date:	02 JAN 2002	01:46 PM	Need:	Prj:	By:	BBIL	Grade:			
Loc:	426 NADEN AVE S				Status:	DONE						
Regr:	ANONYMOUS				Phone:	Memo:						
Permit:	Permit Name:				Project:				Permit Detail			
Problem:	Description:				Insp:	Cont:	Status:	Insp:	Viol:			
VEHICLE	RELATED TO VEHICLES				BSWA	DONE	NONE	DONE	Inspection			
Violation												
Action Service	Date Required	Date Scheduled	By	Svc Empl	Id	C	Completed By	Date	Total Time	Code Time	Comm Code	A
02056	02 JAN 2002	04 JAN 2002	BBIL	BSWA	T	0	BSWA	05 FEB 2002				
Comments: vehicles removed.												
CNOTE	04 JAN 2002	BBIL	BSWA	T	0	C	BSWA	05 FEB 2002				
Comments: 1977 WA LIC 12C 850, vehicle # 8K94F120723; Yellow Dodge Van 1978 Vehicle # B21BEB-1B4933.												
Comments:												
Comments:												

BEST IMAGE POSSIBLE

EXHIBIT _____
 WITNESS SWANBERG
 DATE 6/27/05

SUSAN COOKMAN

GROSHONG-QUAINTANCE
 Susan Cookman, CSR
 1111 Fawcett Avenue, Suite 108
 Tacoma, WA 98402
 Tacoma 253-627-7129 • Seattle 253-838-1200

Enter	Action	Fee Calc	Payments	Summary	Code Enforcement	People	Reports	Related Docs									
Req #	02-0000799	Date	04-JAN-2002 04:53 PM	Need		By	CHOL	Grade									
Loc	426 NADEN AVE S			Phone		Status	DONE										
Request	ANONYMOUS			Memo	Three abandoned vehicles on property												
Permit	Permit Name			Project				Permit Detail									
Problem	Description			Insp	Cont	Status	Insp	Viol									
VEHICLE	RELATED TO VEHICLES				BSWA	DONE	NONE	DONE									
Action Service				Date Required	Date Scheduled	By	Svc Empl	Ld Dyr	C Dir	W A	By	Completed Date	Total Time	Code Time	Comm Code	A	
CLOSE					05-JAN-2002	AUTO	BSWA					BSWA	13-FEB-2002				R
Comments				vehicles have been removed.													
C-ADMONISH					16-JAN-2002	CHOL	CHOL	11	0	C	CHOL	16-JAN-2002					R
Comments				Three abandoned vehicles on property													
C-CODEINSP					30-JAN-2002	CHOL	BSWA	0	21	W	BSWA	13-FEB-2002					R
Comments				A letter was mailed on 7/8/04 requesting a junk vehicle to be removed.													
Comments																	

EXHIBIT 2
WITNESS SWANBERG
DATE 6/27/05
SUSAN COOKMAN



January 16, 2002

COMMUNITY DEVELOPMENT

Fred N. Satterstrom, AICP
Director

Mr. and Mrs. Leo Brutsche
PO Box 1203
Kent, WA 98035

PLANNING SERVICES

Charlene Anderson, AICP
Manager

Dear Mr. and Mrs. Brutsche:

Mailing Address:
220 Fourth Ave. S
Kent, WA 98032-5895

The City has received a report of conditions on your property at 426 Naden Avenue S, Kent, WA/Tax Parcel: #2422049057, Case #02-0000799 that may not comply with city codes. While we have not inspected to confirm this report, we want you to know about it. Listed below are the alleged violation(s) that may pertain to your situation. This will assist you in obtaining compliance if needed and prevent further code enforcement action. **The conditions reported are:**

Location Address:
400 West Gówe
Kent, WA 98032

Phone: 253-856-5454
Fax: 253-856-6454

Three abandoned vehicles are located on the property.

K.C.C. 15.08.090. Parking or storage of inoperable vehicles.
Permitting, allowing, and/or cause to allow more than one (1) vehicle of any kind in inoperable condition not licensed nor legally operable upon the roadway to be stored or parked outside an enclosed building or structure on any residentially zoned property for more than thirty (30) days in violation of Kent City Code 15.08.090.

We would appreciate your cooperation in doing a self-inspection and correcting any apparent problems, so that any follow-up inspection will verify code compliance.

Your cooperation and community spirit are deeply appreciated. Thank you for your help in keeping Kent a city to be proud of!

Brian Swanberg
Code Enforcement Officer
City of Kent
(253) 856-5425

ch:S:\Permit\Shared\codeviolations4101\02-0799admonishltr.doc

OWNER INFORMATION

APN: 242201905 426 NADEN AVE

Name:	BRUTSCHE MR & MRS LEO C			Address:	PO BOX 1200	
Deed:	Date:	Type:				
Occupy:	Equity:	Time Shr:	Phone:	SENT	WA	980357
Name:				Country:		
Deed:	Date:	Type:				
Occupy:	Equity:	Time Shr:	Phone:			
Name:				Country:		
Deed:	Date:	Type:				
Occupy:	Equity:	Time Shr:	Phone:			
				Country:		

Struct/Improv Val:	1000	Land Value:	462800	Total Owners:	1
Property Value:		Exempt Value:		Sale Date:	03-SEP-2000
Sale Amnt:	2000	Owner Occupy:			

Division of Air R:			

[Owner Contact](#)
[Owner History/Change Owners](#)
[Deed Genealogy](#)

Red	DAISEN 200 SX
1981	WAUC KNF 919 JNIRSOYS8CVS00310
WHT	Ford Sierra SW
1977	1ZC 850 VIN removed 8K94F120723
Yellow	Dodge VAN
1978	B21BE8X184933
	AT 426 NADLEN
	02-8785

CODE ENFORCEMENT
TELEPHONE IN-TAKE

Before starting when caller requests to speak to Brian – ask who it is and if not a city employee/council person – ask for a case number. If they don't have one – fill out the following:

COMPLAINANT: FILL OUT ONLY IF PERSON DOES NOT WANT TO REMAIN ANONYMOUS:

Complainant: _____

Day Phone: _____

Address: _____

City – State – zip: _____

COMPLAINT:

Problem address: 426 Naden
(make sure is in city limits)

Common Name (ie apartment name) _____

Intersection _____

Problem: Abandoned vehicles: Red Datsun 2005X

1987 WA LIC. KNF 919 Vehicle # JN1RS0458CU500310;

White Ford Squire S/W 1977 Lic # 12C 850 Vehicle # 8K94F120723

Yellow 1978 Dodge Van Vehicle # B21BER X184933

Intake by: Phone Mail _____ Person _____

Your initials BB Date 1/2/02

P:\ADMIN\FORMS\code enforcement intake.doc (05/15/01)

Req # 04-0004292 Date 28-JUL-2004 12:44 PM Need _____ Pre _____ By CHOL Grade _____
 Loc 426 NADEN AVE S Status DONE
 Reqs: SWANBERG, BRIAN Phone: _____ Memo: _____

Permit	Permit Name	Project	Permit Detail

Problem	Description	Insp	Cont	Status	Insp	Viol	Inspection
VEHICLE	REPEATED TO VEHICLES		BSWA	DONE	NONE	DONE	

Action Service	Date Required	Date Scheduled	By	Svc Empl	Ld Dye	C Dur	W A	By	Completed Date	Total Time	Code Time	Comm Code	A
OPEN		28-JUL-2004	AUTO	BSWA	D	I	W	CHOL	28-JUL-2004				P
Comments: Junk vehicles; garbage and debris on property, repeat offender													
CLOSE		28-JUL-2004	AUTO	BSWA	D	I	W	BSWA	04-OCT-2004				R
Comments: junk vehicles removed.													
Comments:													
Comments:													

EXHIBIT 3
 WITNESS SWANBERG
 DATE 6/27/05
 SUSAN COOKMAN



Chicago Title Insurance Company

FILED FOR RECORD AT REQUEST OF

Leo C. Brutsche and Norma J. Brutsche, Trustees of The Brutsche Family Revocable Trust dated June 14, 1995.

WHEN RECORDED RETURN TO

Name: Leo C. Brutsche
Address: P. O. Box 1203
City, State, Zip: Kent, Wa. 98035-1203

THIS SPACE PROVIDED FOR RECORDER'S USE.

RECEIVED
MAR 18 1996
KING COUNTY RECORDER

Quit Claim Deed

THE GRANTORS: LEO C. BRUSCHÉ and NORMA J. BRUSCHÉ

for and in consideration of none

conveys and quit claims to LEO C. BRUSCHÉ and NORMA J. BRUSCHÉ, Trustees of THE BRUSCHÉ FAMILY REVOCABLE TRUST dated June 14, 1995 State of Washington the following described real estate, situated in the County of King together with all after acquired title of the grantor(s) therein:

See property description attached as Exhibit A and incorporated herein by reference.

Commonly known as: 425 So. Neshan Avenue (also: 800 W. Meeker St.) Kent, Wa. 98032

Assessor's Parcel No.: 242204-9057-05

9803270820

Dated June 13 19 95

Leo C. Brutsche (Individual)
Norma J. Brutsche (Individual) By _____ (President)
By _____ (Secretary)

STATE OF WASHINGTON
COUNTY OF King
On this day of 1995 before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared Leo C. & Norma J. Brutsche, to me known to be the individuals described in and who executed the within and foregoing instrument, and acknowledged that they signed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

STATE OF WASHINGTON
COUNTY OF _____
On this day of 1995 before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared _____ and _____ to me known to be the _____ President and _____ Secretary, respectively, of _____ and acknowledged the execution that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that _____ authorized to execute the said instrument and that the seal hereon is the corporate seal of said corporation.

GIVEN under my hand and official seal this _____ day of _____ 1995
Wendy K. O'Brien
Notary Public in and for the State of Washington
King County
My commission expires: _____



9803270820 KING COUNTY RECORDS 002 30

1476029 03/27/96

EXHIBIT "A"

BEING IN LOT 7 AND IN THE SOUTHEAST QUARTER OF THE NORTHWEST QUARTER OF SECTION 24, TOWNSHIP 22 NORTH, RANGE 4 EAST W.M., KING COUNTY, WASHINGTON MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT WHICH IS 340 FEET WEST OF THE SOUTHWEST CORNER OF BLOCK 21 OF YESLER'S FIRST ADDITION TO KENT, AND ALONG THE NORTH BOUNDARY LINE OF WILLIS STREET;
THENCE NORTH AND PARALLEL TO AT A DISTANCE OF 10 FEET FROM THE GRANTOR'S EAST BOUNDARY LINE A DISTANCE OF 842.0 FEET;
THENCE WEST A DISTANCE OF 146.89 FEET;
THENCE SOUTH $5^{\circ}53'$ EAST A DISTANCE OF 846.5 FEET TO A POINT ON THE NORTH BOUNDARY LINE OF WILLIS STREET;
THENCE EAST ALONG THE NORTH BOUNDARY LINE OF WILLIS STREET, A DISTANCE OF 60.13 FEET TO THE POINT OF BEGINNING;
AND EXCEPT THAT PORTION CONDEMNED FOR HIGHWAY PURPOSES UNDER KING COUNTY SUPERIOR COURT CAUSE NO. 687500.

SITUATE IN THE COUNTY OF KING, STATE OF WASHINGTON.

9603270820

METROSCAN
PROPERTY PROFILE

Parcel ID	:242204 9057	Bldg	:1	Total	:\$540,900
Owner	:Brutsche Leo C & Norma J	Land	:\$539,900	Struct	:\$1,000
CoOwner	:	%Imprvd	:	Levy Cd	:1525
Site Addr	:426 Naden Ave S Kent 98032	2004 Tax	:\$6,970.54	Phone	:
Mail Addr	:PO Box 1738 Auburn Wa 98071	Deed	:Quit Claim	Vol	:Pg
Sale Date	:03/27/1996	Doc#	:820	MapGrid	:715 H2
SalePrice	:	Type	:	NbrhdCd	:065030
Loan Amt	:			- CENSUS -	
Use Code	:195 IND,WAREHOUSE			Tract	:297.00
Zoning	:MR-M			Block	:3
Prop Desc	:Blue Banner Foods			QSTR	:SW 24 22N 04E
Legal	:STR 242204 TAXLOT 57 S 842 FT OF :THAT POR OF GL 7 & SE 1/4 OF NW :1/4 N OF WILLIS ST & E OF ST I RY				

PROPERTY CHARACTERISTICS

Bedrooms	: 1st Floor SF	Year Built	:1939
Bath Full	: 2nd Floor SF	Eff Year	:1950
Bath 3/4	: Half Floor SF	Bldg Matl	:Wood Frame
Bath 1/2	: AboveGrnd SF	Bldg Cond	:
Fireplace	: Bsmnt Finished	Bldg Grade	:Low
Laundry	: Bsmnt Total SF	Interior	:
Porch	: Building SqFt	Insulation	:
Deck	: DeckSqFt	HeatSource	:
Stories	:1	Heat Type	:Space Heater
Units	: Attached GrgSF	Air Method	:
Easements	: Bsmnt ParkingSF	Wtr Source	:Water District
Nuisance	: Basement Type	Sewer Type	:Public
	: Basement Grade	Purpose	:

LAND INFORMATION

St Access	:Public	Lot SqFt	:77,136
Beach Acc	:	Lot Acres	:1.77
WtrFront	:	Lot Shape	:Restricted
WtrFntLoc	:	Tde/Upind	:
WtrFntFT	:	TopoProbd	:

OTHER INFORMATION

St Surface	:Paved	Soundproof	:
Elevator	:	Storage	:
Sprinklers	:No	Security	:
Golf Adj	:No		

TRANSFER HISTORY

OWNERS	DATE	/ DOC #	PRICE	DEED	TYPE
:Brutsche Leo C/Norma J	:06/18/1993	1217	:\$130,000	:Quit Ci	:Conv
:	:	:	:	:LOAN	:
:	:	:	:	:	:
:	:	:	:	:	:
:	:	:	:	:	:
:	:	:	:	:	:
:	:	:	:	:	:
:	:	:	:	:	:

Information compiled from various sources. Real Estate Solutions makes no representations or warranties as to the accuracy or completeness of information contained in this report.

**METROSCAN
PROPERTY PROFILE**

Parcel ID	:242204 9057	Bldg	:2	Total	:\$540,900
Owner	:Brutsche Leo C & Norma J			Land	:\$539,900
CoOwner	:			Struct	:\$1,000
Site Addr	:426 Naden Ave S Kent 98032			%Imprvd	:
Mail Addr	:PO Box 1738 Auburn Wa 98071			Levy Cd	:1525
Sale Date	:03/27/1996	Doc#	:820	2004 Tax	:\$6,970.54
SalePrice	:	Deed	:Quit Claim	Phone	:
Loan Amt	:	Type	:	Vol	: Pg :
Use Code	:195 IND, WAREHOUSE			MapGrid	:715 H2
Zoning	:MR-M			NbrhdCd	:065030
Prop Desc	:Blue Banner Foods			-- CENSUS --	
Legal	:STR 242204 TAXLOT 57 S 842 FT OF :THAT POR OF GL 7 & SE 1/4 OF NW :1/4 N OF WILLIS ST & E OF S T I R Y			Tract	:297.00
				Block	:3
				QSTR	:SW 24 22N 04E

PROPERTY CHARACTERISTICS

Bedrooms	: 1st Floor SF	Year Built	:1957
Bath Full	: 2nd Floor SF	Eff Year	:1960
Bath 3/4	: Half Floor SF	Bldg Matl	:Masonry
Bath 1/2	: AboveGmd SF	Bldg Cond	:
Fireplace	: Bsmnt Finished	Bldg Grade	:Low
Laundry	: Bsmnt Total SF	Interior	:
Porch	: Building SqFt :1,333	Insulation	:
Deck	: DeckSqFt	HeatSource	:
Stories	:1 Garage Type	Heat Type	:No
Units	: Attached GrgSF	Air Method	:
Easements	: Bsmnt ParkingSF	Wtr Source	:Water District
Nuisance	: Basement Type	Sewer Type	:Public
	: Basement Grade	Purpose	:

LAND INFORMATION

St Access	:Public	Lot SqFt	:77,136
Beach Acc	:	Lot Acres	:1.77
WtrFront	:	Lot Shape	:Restricted
WtrFntLoc	:	Tde/Uplnd	:
WtrFntFT	:	TopoProbd	:

OTHER INFORMATION

St Surface	:Paved	Soundproof	:
Elevator	:Yes	Storage	:
Sprinklers	:No	Security	:
Golf Adj	:No		

TRANSFER HISTORY

OWNERS	DATE	I DOC #	PRICE	DEED		TYPE
:Brutsche Leo C/Norma J	:06/18/1993	1217	:\$130,000	:Quit Cl	:\$97,500 LOAN	:Conv
:	:	:	:	:	:	:
:	:	:	:	:	:	:
:	:	:	:	:	:	:
:	:	:	:	:	:	:
:	:	:	:	:	:	:
:	:	:	:	:	:	:
:	:	:	:	:	:	:

Information compiled from various sources. Real Estate Solutions makes no representations or warranties as to the accuracy or completeness of information contained in this report.

6

APN: 2422049057 | 426 NADEN AVE S

Name:	BRUTSCHE LEO C & NORMA J			Address:	PO BOX 1738	
Deed:	Date:	Type:				
Occupy:	Equity:	Time Shr:	Phone:	AUBURN WA		98071
				Country:		
Name:				Address:		
Deed:	Date:	Type:				
Occupy:	Equity:	Time Shr:	Phone:			
				Country:		
Name:				Address:		
Deed:	Date:	Type:				
Occupy:	Equity:	Time Shr:	Phone:			
				Country:		

Struct/Improv Val:	1000	Land Value:	539900	Total Owners:	1
Property Value:		Exempt Value:		Sale Date:	03-SEP-2000
Sale Amt:	2000	Owner Occupy:			

Division of Air #:

04-4292

7

July 8, 2004

Leo and Norma Brutsche
PO Box 1738
Auburn, WA 98071

Dear Mr. and Ms. Brutsche:

The City has received a report of a condition on your property located at **426 Naden Avenue S, Kent, WA/Tax Parcel #2422049057, Case #02-799** that does not comply with city codes. Listed below is the violation that pertains to your situation. This will assist you in obtaining compliance and prevent further code enforcement action. **The condition reported is:**

A junk vehicle has been dumped on the outside of the fence, near the entrance and needs to be removed immediately.

The following excerpts from the Kent City Code relate to the above-listed violations:

8.08 Junk vehicles

Permitting, allowing, and/or cause to allow or place a junk vehicle on the subject property, in violation of Kent City Code 8.08.010 and 8.08.030.

15.08.090. Parking or storage of inoperable vehicles.

Permitting, allowing, and/or cause to allow more than one (1) vehicle of any kind in inoperable condition not licensed nor legally operable upon the roadway to be stored or parked outside an enclosed building or structure on any residentially zoned property for more than thirty (30) days in violation of Kent City Code 15.08.090.

These vehicles will need to be removed prior to my investigation on or after **July 22, 2004**. In the meanwhile, I would appreciate your cooperation in doing a self-inspection and correcting the problem, so that my scheduled inspection will verify code compliance. Contact this office at 253-856-5409 or email me at bswanberg@ci.kent.wa.us if the violations have been abated prior to the above date. Non-compliance of the above-listed violations may result in further code enforcement action

Brian Swanberg
Code Enforcement Officer
(253) 856-5409
e-mail: bswanberg@ci.kent.wa.us

ch:S:\Permit\Shared\codeviolations4101\2002\02-799admonishlfrb.doc

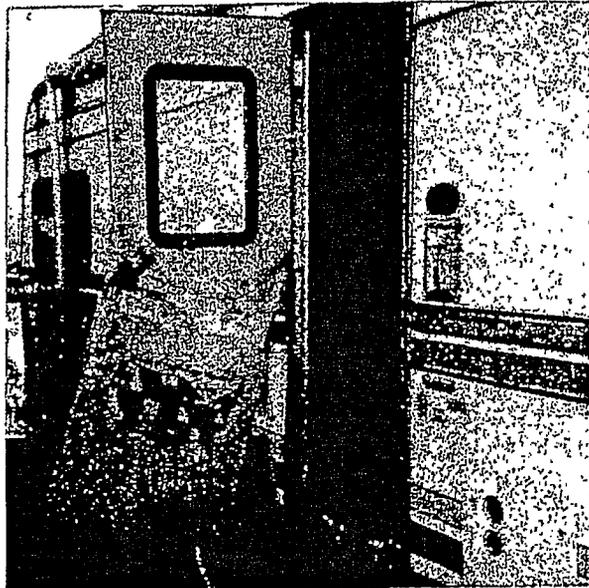
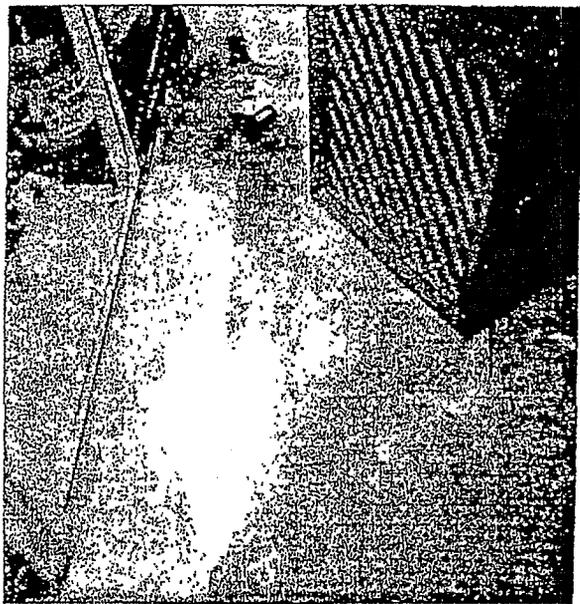


EXHIBIT 4
 WITNESS SWAN BERG
 DATE 6/27/05
 SUSAN COOKMAN

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

RECEIVED

2005 SEP 13 PM 3:35

SEP 13 2005
Kanting, Franklin &
McQuinn, Inc., P.S.

HONORABLE BRIAN D. GAIN
September 16, 2005

Defendants request for fees
Cross-motion to apportion fees

FILED
05 SEP 13 PM 4:00
KING COUNTY
SUPERIOR COURT CLERK
KENT, WA

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

LEO C. BRUTSCHE)	
Plaintiff.)	NO.04-2-12087-0
)	KNT
vs.)	
)	AFFIDAVIT OPPOSING
CITY OF KENT,)	REQUEST FOR
a Municipal Corporation; et. al.)	EXCESSIVE FEES
Defendants.)	

I, Jerald A. Klein, certify as follows:

That I am the attorney for the Plaintiff herein and make this affidavit based upon my personal knowledge of the facts stated herein which are true;

Attached hereto at Exhibit A is a true and correct copy of the claim form filed with the City of Kent Clerk more than sixty days before commencing this lawsuit. The amount claimed is \$4,921.51. Also included as Exhibit A is a true and correct copy of the bill from Plaintiff's carpenter for repairs to the doors and door jams at his properties that were the subject of this lawsuit. The bill is for a total of \$4,932.51.

Attached as Exhibit B is a true and correct copy of the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

arbitrator's award.

Attached as Exhibit C is a true and correct copy of my billing statement for this case. This statement reflects actual billings to the Plaintiff and payments from the Plaintiff. These records were made from postings at, or shortly after, the time of the indicated service.

Attached as Exhibit D is a true and correct copy of the City of Kent's arbitration brief.

Attached as Exhibit E is a true and correct copy of the City of Kent's motion for summary judgment.

ANALYSIS OF MAY 31, 2005 BILING PERIOD

I have reviewed the affidavit supporting the city of Kent's request for fees and would like to share the following observations.

Beginning on page 2 of the Declaration of Chloethiel W. DeWeese In Support of Defendant's Motion for Attorneys Fees (hereinafter "Declaration"), Ms. DeWeese identifies work done by Mr. Jolley and herself. First, she indicates that Mr. Jolley "...spent 7.8 hours of attorney time reviewing pleadings, preparing and filing a jury demand, analyzing a summary judgment motion, reporting to the client, contacting

1
2
3
4 Lt. Mike Villa and Officer Darin Majack regarding..." their
5 declarations. These items could not have taken more than
6 two hours at the most. Mr. Jolley was already familiar
7 with both officers having taken their testimony at the
8 arbitration hearing two months prior. Reporting to the
9 client may have taken ten minutes. The jury demand is a
10 one page document that would have taken another ten minutes
11 to prepare. Thus, a realistic sum of hours for Mr. Jolley
12 for the May 31, 2005 billing period would have been 2 hours.

13 Ms. DeWeese indicates that she reported 19.5 hours for
14 the May 31, 2005 billing cycle. Having two attorneys
15 working on the case resulted in duplicated effort, which is
16 to be excluded from a fees request. YOUSOUFIAN vs KING
17 COUNTY EXECUTIVE, 114 Wn. App. 836, 856 (Div.I, 2003).
18 Attached as Exhibit D is the City's arbitration brief which
19 discusses all of the issues which Ms. DeWeese claims to have
20 spent 19.5 hours researching during the month of May. (See
21 Exhibit D). Mr. Jolley had already done the research in
22 March, 2005. Furthermore, most of the topics Ms. DeWeese
23 researched did not have any relevancy to this case. For an
24 example, she studied the "...discretionary act exception to
25 sovereign immunity..." however, the breaking down of doors is
26 not the type of discretionary act by top brass to which the
27
28

1
2
3
4 exception applies. Ms. DeWeese studied the issue about
5 whether this case involved a public or private duty which
6 was irrelevant to the Court's finding that the officers had
7 not breached their duty of care to the Plaintiff. Ms.
8 DeWeese studied sovereign immunity issues which has not been
9 a legal issue since immunity was waived in 1967. Ms.
10 DeWeese research into the duty owed to Plaintiff was
11 relevant, but the City's position from the arbitration
12 hearing to the summary judgment motion only varied in that
13 the City dropped Mr. Jolley's claim that the police had an
14 absolute immunity. Thus, issues (4) through (8) of Ms.
15 DeWeese's research during the May 31 billing cycle were
16 duplicative of the work already prepared by Mr. Jolley
17 before the filing of the request for trial de novo, and
18 these five issues all involved the same issue of the duty
19 owed to Plaintiff.

20 Ms. DeWeese studied the "applicable criminal code"
21 which was never mentioned in the brief or oral argument and
22 irrelevant to the uses in this case. Even the reserch
23 leading Ms. DeWeese to the EGGLESTON case which was the
24 deciding factor in the Court's decision to dismiss
25 Plaintiff's taking claim was already cited by Mr. Jolley in
26 his arbitration brief. See Exhibit D, page 7, lines 13-15,
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

In sum, only two hours for Mr. Jolley and no hours for Ms. DeWeese can pass the reasonably necessary test for the request pertaining to the May 31, 2005 billing period.

ANALYSIS OF JUNE 15, 2005 BILLING PERIOD

In her Declaration, Mr. DeWeese claims to have incurred another 42 hours researching the issues that Mr. Jolley had already briefed for the arbitration. Ms. DeWeese also identifies some new issues of study but these new issues were completely irrelevant to the issues in this case. For an example, "(2) quasi-judicial immunity" was researched, however, this case does not involve any tribunals whose immunity is being challenged. Another deviation from relevancy was with "(5) potential application of Fourth Amendment issues and case law;". This case never involved the Fourth Amendment. Another was "(6) substantive due process under both the State and Federal Constitutions." The only constitutional issue was the "takings" issue and it was decided using the same case (EGGLESTON) that Mr. Jolley had cited in March. Ms. DeWeese claims to have prepared a section addressing the difference between the police power and eminent domain which is identified as paragraph B.1. in the motion, but this section had no relationship to the issue of whether a "taking" could occur during the execution

1
2
3
4 of a search warrant. The EGGLESTON case made clear that
5 the issue did not turn on which governmental power was used,
6 but on whether the taking of evidence could constitute a
7 "taking" under Article I, Section 16 of Washington's
8 Constitution.

9 All of Ms DeWeese's work in the June 15, 2005 billing
10 cycle was on the summary judgment motion. Only the first
11 two sections of the summary judgment brief had any relevancy
12 to the case. The rest of the legal briefing is
13 devoted to immaterial and irrelevant arguments that
14 were not necessary nor reasonable.

15 Section "C" of the motion for summary judgment talks
16 about "substantive due process" and I think provided a
17 GUNWALL analysis. This was unnecessary because plaintiff's
18 Constitutional claim was for the "taking". Section D was
19 an argument that there was no "duty" to support a negligence
20 claim, citing the irrelevant "public duty" cases. The
21 court ignored this argument and there never was any serious
22 consideration of this case involving any public duty.
23 Section D.2. discusses why a new cause of action was not
24 created when the State abolished sovereign immunity in 1967.
25 Section D.2. just made no sense. Both negligence and
26 trespass have been around for hundreds of years. Section
27
28

1
2
3
4 D.3. contains the "public duty" doctrine cases which were
5 irrelevant to this case involving a private individual's
6 private property. Finally, section E. of the motion for
7 summary judgment argued that no city policy or custom caused
8 Plaintiff's deprivation of rights. This argument was
9 relevant. Thus, the work on the motion for summary
10 judgment was little more than a rehash of the arguments
11 presented by the City in the arbitration brief, and thus,
12 duplicative.

13 Plaintiff's counsel's contemporaneous records show that
14 16.5 hours of time was spent in the response which evenly
15 matched the relevant issues presented in the motion for
16 summary judgment and the affidavits of Officers Villa and
17 Majack could not have taken more time than the affidavits of
18 Plaintiff and his carpenter. Four of these 16.5 hours were
19 spent in obtaining a certified copy of the interlocal
20 agreement which had been indexed under "Agreements" rather
21 than "Interlocal Agreements" by the Recorder's Office.
22 Thus, 12.5 hours is a more realistic figure for time spent
23 on the motion with its supporting declarations.

24 Plaintiff's counsel did not waste time with GUNWALL analysis
25 nor discussing substantive due process. Thus, using a 12.5
26 hour figure for DeWeese's efforts for the May, 31, June 15
27
28

1
2
3
4 and July 15 billing cycles safety excludes the duplicative
5 and unnecessary work.

6 REMAINDER OF JULY 15, 2005 BILLING

7 Assuming Ms. DeWeese's efforts on the brief for May,
8 June and through June 29, 2005 were 12.5 hours, that still
9 leaves the question about Mr. Jolley's efforts reflected in
10 the July 15th billing cycle. Ms DeWeese indicates Mr.
11 Jolley incurred 13.3 hours preparing for and attending the
12 deposition of Brian Swanberg. However the June 27th
13 deposition lasted for one hour and I needed 2.5 hours to
14 prepare for the deposition. Since this was Plaintiff's
15 deposition and Mr. Jolley asked no questions, it is
16 reasonable that his preparation and attendance took no more
17 than 2 hours.

18 ANALYSIS OF AUGUST 15, 2005 BILLING PERIOD

19 Ms DeWeese identifies the August 15, 2005 billing cycle
20 as composed of 34.3 hours of her time replying to the
21 Plaintiff's response and 14.7 hours of Mr. Jolley talking to
22 Plaintiff's counsel. These fees are not reasonable.
23 The reply brief from the City of Kent did respond to the
24 issue regarding whether the City had waived its immunity
25 by failing to adopt the swat teams enabling interlocal
26 agreement before unleashing the team upon Plaintiff.

1
2
3
4 However, the rest of the Reply was a
5 rehash of arguments made in the initial brief. Thus
6 the most time that could reasonably be allocated to the
7 reply would be two hours. Ms. DeWeese claims to have spent
8 3.5 hours driving to the RJC, but driving time is not a
9 necessary or reasonable legal fee. A reasonable time would
10 be three hours of preparation plus the one hour that the
11 hearing actual took. Thus, Ms. DeWeese time for the August
12 15, 2005 billing cycle should be 6 hours. Mr. Jolley's
13 attending the hearing was duplicative and unnecessary.
14 The alleged discovery requests amounted to 2 or 3 calls
15 informing Mr. Jolley of the deposition of Detective McKenzie
16 who was not his client but a King County employee. These
17 calls never lasted long enough to warrant an entry on
18 my on billing records as they were less than six minutes.
19 The deposition was never held owing to the dismissal.

20 Most of Mr. Jolley's and Ms DeWeese's time during the
21 month of July was spent in trying to substantiate Mr.
22 Jolley's claim that Plaintiff's son, Jim Brutsche, had died
23 in a meth lab explosion in the summer of 2004. Plaintiff
24 took the position that this slander was irrelevant because
25 it occurred one year after the raid. Nevertheless,
26 Defendant's reply included objections and praecipes to their
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

own objections trying to prove the existence of a meth lab in 2004. No time should be allowed for these pointlessly cruel pleadings.

SUMMATION OF HOURS

Based upon the contemporaneous records of affiant and the actual work product of the City's attorneys as discussed above, the reasonable and necessary hours were:

	<u>Jolley</u>	<u>DeWeese</u>
5/31	2	0
6/15	0	12.5
7/15	2	included above
8/14	<u>0</u>	<u>6</u>
TOTAL	4	18.5

HOURLY RATE

My actual hourly rate for this case was and is \$85.00 per hour which is a fair and reasonable rate for the type of work involved herein. I charge this rate for similar type of work that I performed here in King County throughout 2004 and 2005. I have practiced law in King County for over twenty-five years. The issues presented in this case do not involve novelty nor complexity.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

REASONABLE AND NECESSARY FEES

Multiplying the total of reasonable and necessary hours of 22.5 times the reasonable rate of \$85.00 per hour results in a total sum of \$1,912.50.

$$22.5 \times \$85.00 = \$1,912.50$$

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

Dated: 9/13/05
Seattle, Washington


Jerald A. Klein, #9313
Attorney for Plaintiff

EXHIBIT A



File with City Clerk's office
220 Fourth Avenue South
Kent, WA 98032-5895

RECEIVED

OCT 20 2003

CITY OF KENT
CITY CLERK

Vireth
Hutchinson
Crawford
Burba
Clerk

Claim Form

Page 1 of 2

NOTICE: No damages can be paid by the City of Kent unless a claim complying with Washington State Law is presented to the Kent City Clerk. After filing a claim, please direct all questions to the office of Risk Management at (253) 856-5285.

INSTRUCTIONS: (1) Complete form giving specific details about your damage or loss. Include date, time and witnesses. (2) Sign the form. (3) Have the form notarized (see back of form). (4) Return completed form to the City of Kent, City Clerk's office, 220 Fourth Avenue South, Kent, WA 98032-5895.

RECEIVED
OCT 20 2003
KENT LEGAL DEPT.

NAME: Leo C Brutsche
First, Middle, Last (or business name)

ADDRESS: P.O. Box 1738 Arbourn WA 98071-1738
(Home or business) City State Zip

BUSINESS PHONE: 253 833-6149 HOME PHONE: _____ MESSAGE PHONE: _____

DATE OF INCIDENT: 7/10/03 TIME OF INCIDENT: 7:00am AMOUNT CLAIMED: \$4921.51

LOCATION OF LOSS/INCIDENT: 306 Meeker St and 426 S. Narden
DETAILS (describe how the loss/incident occurred): Broken Swabbers at the

City's Code Enforcement Division and colleagues
from other City and County Departments
smashed and broke numerous doors and
windows while looking for drugs and code
violations. No drugs nor code violations were
found. Claimant was not permitted to assist
the City by opening all doors with his keys.
(Attach an extra sheet for additional information, if needed.)

WITNESSES (please provide addresses and phone numbers):

- (1) Leo C Brutsche P.O. Box 1738 Arbourn, WA 98071-1738 253-833-6149
- (2) James Warner 25416-166^{1/2} St. E. Buckley, WA 98321
- (3) Jerald A Klein 833 Joshua Green Bldg. Sec, WA 98104 206 623-0632

Attach copies of all documentation relating to expenses, injuries, losses, and/or estimates for repair. Yes _____ No X

Have you submitted a claim for damages to your insurance company? Yes _____ No _____

If so, please provide the name of the insurance company: _____ and the policy #: _____

NOTICE: THIS FORM MUST BE SIGNED AND NOTARIZED. (See Page 2)

RECEIVED
JUN - 3 2004
WCA



File with City Clerk's office
220 Fourth Avenue South
Kent, WA 98032-5895

Claim Form Page 2 of 2

I, Leo C. Brutsche, being first duly sworn, depose and say that I am the claimant for the information described on page 1 of this Liability Claim Form; that I have read the claim, know the contents thereof and believe the same to be true, and that I ~~do~~ reside, and have resided, at 13002 SE 2592 Pl., Kent, WA. for at the time of presenting this claim and for six months before the claim arose. X Leo C. Brutsche

X _____
Signature of Claimant(s)

State of Washington

County of King

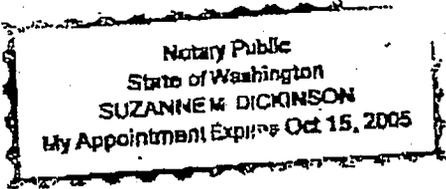
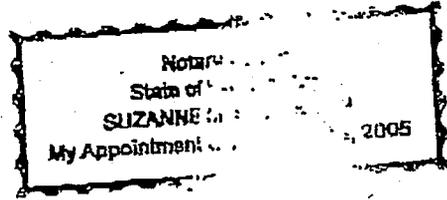
I certify that I know or have satisfactory evidence that Leo C. Brutsche is the person who appeared before me, and said person acknowledged that (he/she) signed this instrument and acknowledged it to be (his/her) free and voluntary act for the uses and purposes mentioned in this instrument.

Dated: October 15, 2003

Signature: Suzanne M. Dickinson

Title: Notary Public

My appointment expires: 10-15-05



PROPOSAL NO.	NC 3818-50
SHEET NO.	
DATE	9-5-03

PROPOSAL SUBMITTED TO:

NAME	PAT BRUTCHER
ADDRESS	1400 WEST MAIN ST AUBURN WA 98001
PHONE NO.	253-8336766

WORK TO BE PERFORMED AT:

ADDRESS	806 MCKER AND 426 NADEN KENT WA 98032
DATE OF PLANS	REPAIR WORK
ARCHITECT	

We hereby propose to furnish the materials and perform the labor necessary for the completion of Two Doors
 AT: 806 MCKER KENT WA 98032
 Replaced one glass sliding Door. Replaced one 36" main Door with new locks and paint. \$1556.00

AT: 426 NADEN KENT WA 98032
 Replaced Four 36" Doors with new locks and paint. Two Trailer Doors - Fixed hinges and replaced locks. Replaced pulllocks. Three pulllocks that had been cut. \$3365.00

All material is guaranteed to be as specified, and the above work to be performed in accordance with the drawings and specifications submitted for above work and completed in a substantial workmanlike manner for the sum of 4921.51 + T.
 where work is Fixed. Dollars (\$ 4,921.51)
 with payments to be made as follows.

Respectfully submitted JAMES S WARNER CC

*Any alteration or deviation from above specifications involving extra costs will be executed only upon written order, and will become an extra charge over and above the estimate. All agreements contingent upon strikes, accidents, or delays beyond our control.

Per 25416-166 West E BUCKLEY WA 98321

Note — This proposal may be withdrawn by us if not accepted within 30 days.

ACCEPTANCE OF PROPOSAL

The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payments will be made as outlined above.

Signature _____
 Signature _____
 Date _____

EXHIBIT B

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

LEO C. BRUTSCHE,

PLAINTIFF,

vs.

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

DEFENDANT(S).

NO. 04-2-12087-0KNT

**ARBITRATION AWARD
(Clerk's Action Required - ARBA)**

The issues in arbitration have been heard on March 23, 2005, I make the following award:

Settlement: Defendant King County settled with plaintiff for \$2,500.00, which was found by the undersigned to be reasonable following a hearing on March 21, 2005. The defendants are jointly liable for the damages to plaintiff's property, excluding the mobile home. Defendant City of Kent shall have a credit for the amount of the settlement, \$2,500.00. Defendant King County did not participate in the arbitration and will not receive notice of this Award from the undersigned arbitrator.

Negligence: Defendant City of Kent was not negligent, having acted reasonably under the circumstances.

Intentional Tort: Defendant City of Kent did not intend to damage plaintiff's property, which occurred incidentally when Defendant lawfully executed a lawful search warrant.

Federal Claim for Damages pursuant to 42 U.S.C. SS 1983. The conduct complained of was committed under color of law, execution of a lawful search warrant, but the plaintiff was *not* deprived of rights, privileges or immunities secured by the Constitution or laws of the United States; Parratt v. Taylor, 451 U.S. 527, 536-37, 68 L.Ed. 420, 101 S.Ct. 1908 (1981), cited, Estate of Kepl v. State, 34 Wn. App. 5, 659 P.2d 1108; for the reason that Plaintiff may and has fully litigated his claims arising out of the conduct complained of in the present litigation.

Constitution Claims: Defendants damaged plaintiff's property in the course of a legitimate public purpose, executing a lawful search warrant. Takings jurisprudence involves a balancing of whether the public or a citizen should fairly bear the burden when private property is taken for a necessary and proper public purpose. The damage to the mobile home owned/occupied by James Brutsche is fairly born by him because he actively resisted the officers executing the warrant, which caused the officers to follow normal procedures for a execution of a compromised warrant. Damage to other buildings where plaintiff was owner/occupier is more fairly borne by the public as he was not present during service of the warrant, and

COPY

had offered to assist the police in their duties.

Damages: The reasonable cost of repair was \$4,900.00 to all the property, and \$2,500.00 of that is attributable to replacement of a broken sliding glass door, window, and other repairs to the mobile home occupied by James Brutsche. The difference, cost of repair to other property is \$2,400.00.

Attorney Fees: Plaintiff has not sustained a claim pursuant to 42 U.S.C. SS 1983 and there is no other basis in contract or law for an award of reasonable attorney fees.

Award: Plaintiff shall have the sum of \$2,400.00 from the City of Kent, less the credit for the amount of the settlement paid by Defendant King County. Pursuant to RCW 4.84.010, statutory costs "shall be allowed." Plaintiff prepared a sworn cost bill, Defendant City of Kent concurred without objection, and \$235.00 is allowed as Statutory Costs. The net Award is therefore: \$2,400.00 less credit of \$2,500.00 plus \$235.00 equals \$135.00.

Twenty days after the award has been filed with the clerk, if no party has sought a trial de novo under MAR 7.1, any party on notice to all parties may present a judgment on the Arbitration Award for entry as final judgment in this case to the Ex Parte Department.

Was any part of this award based on the failure of a party to participate at the hearing?
Yes _____ (PLEASE EXPLAIN) No XX (MAR 5.4)

DATED: April 6, 2005


William G. Simmons, WSBA 19071

FILE THE ORIGINAL WITH THE CLERK'S OFFICE, KING COUNTY COURTHOUSE, TOGETHER WITH PROOF OF SERVICE ON THE PARTIES. SEND A COPY TO:

**KING COUNTY SUPERIOR COURT
ARBITRATION DEPARTMENT
516 THIRD AVENUE - E219
SEATTLE WA 98104**

NOTICE: If no Request for Trial De Novo has been filed and Judgment has not been entered within 45 days after this award is filed, the Clerk will notify the parties by mail that the case will be dismissed for want of prosecution.

EXHIBIT C

ASSAULT.XLS

ASSAULT AT NADEN ST.

DATE	ACTIVITY	TIME	COST	AMOUNT	CREDITS	BALANCE
7/10/03	t/c w/ Jim	0		\$0.00		
	t/c w/ Clerk	0.2		\$17.00		
	t/c w/ Dist. Ct Jail	0.4		\$34.00		
	t/c w/ Kent Atty	0.3		\$25.50		
7/11/03	t/c w/ Siddell (VNET)	0.5		\$42.50		
7/14/03	t/c to Clemons	0.1		\$8.50		
7/15/03	t/c to Clemons	0.1		\$8.50		
7/16/03	t/c w/ Pat	0		\$0.00		
	t/c w/ Steve Frost	0.2		\$17.00		
	t/c w/ Terry Clemons	0.3		\$25.50		
7/18/03	t/c w/ Brian Swanberg	0.7		\$59.50		
7/23/03	t/c w/ Swanberg	0.1		\$8.50		
	research Kemnt Code	0.5		\$42.50		
	t/c to Swanberg	0.1		\$8.50		
	t/c w/ Pat	0		\$0.00		
	letter to Swanberg	0.4		\$34.00		
	memo to Pat	0.1		\$8.50		\$340.00
8/1/03	paid				\$340.00	\$0.00
8/13/03	p.u. & review aff. p.c.	0.5		\$42.50		
	check Clerk's fro filing	0.2		\$17.00		
	meet w/ pat	0		\$0.00		\$59.50
9/9/03	paid				\$59.50	\$0.00
9/23/03	t/c w/ Sgt. Siddeil	0.3		\$25.50		
	t/c w/ pat	0		\$0.00		
9/24/03	Ltd. POA	0.4		\$34.00		\$59.50
10/6/03	paid				\$59.50	\$0.00
10/8/03	t/c w/ Pat	0		\$0.00		
10/9/03	t/c w/ Brian Swanberg	0.4		\$34.00		
	t/c w/ Pat	0		\$0.00		
10/14/03	research Kent proced	0.2		\$17.00		
	t/c w/ City clerk	0.2		\$17.00		
	prep claim for damage	0.6		\$51.00		\$119.00
	paid				\$119.00	\$0.00
5/21/04	research	0.6		\$51.00		
5/23/04	t/c w/ Suzie	0		\$0.00		
	work on complaint	1.3		\$110.50		
5/24/04	t/c w/ pat	0		\$0.00		
	finish complaint	0.4		\$34.00		
	filing fee		110	\$110.00		
	filing	0.2		\$17.00		
	arrange service	0.3		\$25.50		\$348.00
5/29/04	paid				\$348.00	\$0.00
6/11/04	prep claim	0.3		\$25.50		

ASSAULT.XLS

6/16/04	filed claim w/ King Co	0.4	\$34.00		
7/8/04	t/c w/ Jolley	0.2	\$17.00		
	letter to Jolley	0.8	\$68.00		
7/26/04	letter to Hansen	0.4	\$34.00		\$178.50
7/30/04	paid			\$178.50	\$0.00
8/12/04	t/con to Hansewmm	0.1	\$8.50		
9/27/04	t/c w/ Robert hansen	0.3	\$25.50		
	t/c w/ Pat	0	\$0.00		
	amend S & C	0.9	\$76.50		
10/14/04	t/c to Clerk	0.1	\$8.50		
	t/c Robert hansen	0.1	\$8.50		
10/15/04	talk w/ clerk	0.1	\$8.50		
	file amended S & C	0.1	\$8.50		
	serve King County	0.5	\$42.50		
	serve (CR5) Kent	0.4	\$34.00		
11/1/04	default motions	1.3	\$110.50		\$331.50
3/7/05	paid			\$331.50	\$0.00
2/19/05	arbitration brief	8.5	\$722.50		
2/20/05	subpoena	0.7	\$59.50		
	prehearing statement	1.2	\$102.00		
	ER904 notice -	0.9	\$76.50		
3/4/05	12(b)(6) response	4.6	\$391.00		
3/5/05	12(b)(6) response	5	\$425.00		
3/6/05	affidavit for 12(b)(6)	1.6	\$136.00		
	prep for arbitration	3.5	\$297.50		
3/10/05	12(b)(6) hearing	1	\$85.00		
	deposition	1.5	\$127.50		
	reasonableness motic	1	\$85.00		
	serve King & kent	0.5	\$42.50		
3/19/05	reply brief	5	\$425.00		
3/21/05	serve reply brief	0.4	\$34.00		
	reasonableness heari	0.4	\$34.00		
	prep for arbitration	2.5	\$212.50		
3/22/05	prep for arbitration	2	\$170.00		
3/23/05	pick up pat & Jim	0	\$0.00		
	arbitration 1-4	3	\$255.00		\$3,680.50
3/24/05	discount		(\$3,000.00)		\$680.50
3/28/05	paid			\$680.00	\$0.00
3/31/05	letter to Parker w/ W-ε	0.1	\$8.50		
	deliver	0.1	\$8.50		
4/2/05	review arbitration awa	0.2	\$17.00		
4/3/05	research at law library	0.5	\$42.50		
	t/c w/ Pat	0	\$0.00		
	cost bill & fee reques	1.7	\$144.50		
4/7/05	review final award	0.2	\$17.00		
	t/c w/ Pat, fax	0	\$0.00		

ASSAULT.XLS

4/11/05	meet w/ Pat	0		\$0.00		
	prep NOA de novo	0.5		\$42.50		
4/12/05	service fee		100	\$100.00		
4/13/05	p.u. chk & deliver	0.3		\$25.50		
	t/c to Joppley	0.1		\$8.50		
4/16/05	chk w/ Key	0.1		\$8.50		
4/18/05	p.u. dismissal from Jo	0.2		\$17.00		
	enter dis of King	0.4		\$34.00		
	deliver copies	0.2		\$17.00		
4/19/05	serve Request for Tr	0.6		\$51.00		
	Clerk fee (de novo)		250	\$250.00		\$792.00
4/26/05	paid				\$792.00	\$0.00
6/17/05	prep subpoena	0.4		\$34.00		
	serve Swanberg	0.6		\$51.00		
	serve Jolley	0.3		\$25.50		
6/26/05	prep for depo	2.5		\$212.50		
6/27/05	depo	1		\$85.00		
6/28/05	research SWAT team	1.1		\$93.50		
	memo to Pat	0.2		\$17.00		
	research	0.8		\$68.00		
7/1/05	t/c w/ Muenster	0.2		\$17.00		
7/2/05	work on brief for S/J	2.5		\$212.50		
7/3/05	work on brief	5		\$425.00		
7/4/05	work on brief	9		\$765.00		
	copy of transcript		104.85	\$104.85		
	copy medical records		109.46	\$109.46		\$2,220.31
	discount				\$1,000.00	\$1,220.31
7/9/05	paid				\$1,220.31	\$0.00
7/8/05	amend aff & mem	1.2		\$102.00		
	serve & file	0.5		\$42.50		
	cert. copy of Interlocal		16	\$16.00		
	depo copy (Brutsche)		104.85	\$104.85		
7/18/05	review reply etc.	1.2		\$102.00		
	response to objection	0.6		\$51.00		
7/19/05	motion for publication	2.2		\$187.00		
	review preceipe	0.2		\$17.00		
	review fire report(04)	0.6		\$51.00		
7/20/05	t/c w/ Jill (@Heavey's)	0.3		\$25.50		
	T/c w/ JoAnne	0.3		\$25.50		
7/21/05	t/c w/ Jill	0.3		\$25.50		
	prep for motion	3		\$255.00		
7/21/05	depo of Swanberg		270.3	\$270.30		
7/22/05	prep for S/J (library)	3		\$255.00		
	S/J hearing	1		\$85.00		
	t/c w/ Pat	0		\$0.00		
7/26/05	t/c w/ John	0.4		\$34.00		

ASSAULT.XLS

meet w/ Pat	0.		\$0.00		
7/26/05 prep notice of appeal	0.9		\$76.50		
file NOA	0.2		\$17.00		
filing fee		250	\$250.00		
serve NOA & mail	0.4		\$34.00		
file copy w/ COA	0.2		\$17.00		
file aff w/ Clerk	0.2		\$17.00		\$2,060.65
7/27/05 discount				\$400.00	\$1,660.65
8/1/05 paid				\$1,660.65	\$0.00

Exhibit D

JUDGE BRIAN D. GAIN

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

LEO C. BRUTSCHE,

Plaintiff,

v.

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

Defendant.

No. 04-2-12087-0KNT

DEFENDANT CITY OF KENT'S
ARBITRATION BRIEF AND
PREHEARING STATEMENT

ARBITRATION DATE: MARCH 23,
2005 AT 1:00 P.M.

I. INTRODUCTION

Plaintiff's lawsuit arises out of execution of a valid search warrant on a variety of ramshackle buildings and trailers owned by Plaintiff at 806 Meeker and 426 Naden in the City of Kent. The warrant, which was specifically to search for evidence of methamphetamine production and use, was served by a multi-jurisdiction entity known as VNET. A VNET team, utilizing officers from a variety of jurisdictions in the south King County area, was employed because of the high risk nature of executing warrants on methamphetamine labs. When the VNET team arrived to execute the warrant, Plaintiff's son, James Brutsche and another person at the scene ran into a building and locked the door. Because the door was locked, and because other doors around the search area were also locked, and Plaintiff's son and the other person were totally uncooperative, breaching devices were used to gain entrance into the various

DEF CITY OF KENT'S ARBITRATION BRIEF AND
PREHEARING STATEMENT- 1

U:\BEberhard\bjw\c1a0409\p-030705-def arbitration brief.doc

KEATING, BUCKLIN & MCCORMACK, INC., P.S.

ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8881
FAX: (206) 223-9423

1 buildings.¹ Plaintiff did not arrive on the scene until the search of the buildings was already
2 occurring. Doors had already been breached by this time, and it violated standard operating
3 procedure and compromised officer safety to allow Plaintiff into the potential crime scene area
4 to unlock any doors. Plaintiff's property destruction claims are without merit as the execution
5 of a search warrant is conducted under the cloak of judicial immunity. Further, Plaintiff can
6 present no admissible evidence regarding what occurred at the scene because his son, who is
7 now deceased because of the later methamphetamine lab explosion, is the only witness who
8 could possibly counter the evidence regarding why the police officers had to breach various
9 doors to execute the search warrant.
10

11
12 II. FACTS

13 On July 8, 2003, Judge Linda Thompson of the King County District Court, Renton
14 Division, signed a search warrant authorizing the search of an abandoned warehouse, out
15 buildings, eight semi-trailers and a white and pink mobile home located at 426 Maiden Avenue
16 in Kent. The Search Warrant specifically authorized the search of James F. Brutsche,
17 Plaintiff's now deceased son, as well as locked containers and numerous abandoned or
18 disabled vehicles parked within the fenced compound at the Maiden Avenue address. The
19 Valley Narcotics Enforcement Team (VNET) was called out to serve the warrant. As the
20 VNET team, consisting of multiple officers from a variety of South King County law
21 enforcement jurisdictions, arrived to execute the warrant, the police officers were spotted by
22 James Brutsche and another suspect. When Brutsche and the other suspect saw the police
23 from their vantage point on the porch of the main residence, they ran inside the residence,
24 slamming the sliding glass door shut and locking the door. Because they were uncooperative,
25
26

27 ¹ Although Plaintiff places much significance that no methamphetamine was found during execution of this warrant, Plaintiff's son later blew himself up and burned down one of the structures in question due to a methamphetamine explosion.

1 and locked the doors, not only endangering officer safety but potentially compromising the
2 effectiveness of the search, a breaching device was used on the door so the police could gain
3 entry. Even after the police gained entry to the main residence, suspect Brutsche resisted arrest
4 by fighting with multiple officers on the glass covered floor. The officers eventually had to
5 taser Mr. Brutsche to gain compliance.

6 The Plaintiff, Leo Brutsche, was not present at the start of the search. Once the search
7 began, a secure perimeter was set up surrounding the compound to preserve the integrity of the
8 potential crime scene, to ensure officer safety and to prevent any fleeing subjects from
9 escaping. Assuming Mr. Leo Brutsche did arrive at the scene², sound police practice
10 precluded allowing Mr. Brutsche into the compound to unlock doors.

11 III. APPLICABLE LAW

12 A. ACTIONS TAKEN PURSUANT TO EXECUTION OF A JUDICIALLY 13 ISSUED, VALID SEARCH WARRANT ARE IMMUNE FROM SUIT

14 It is well-settled under both State and Federal law that execution of a judicially issued
15 order such as a valid search warrant is protected by absolute immunity from civil liability.
16

17 When addressing claims pursuant to 42 U.S.C. §1983, federal courts have provided
18 “insulation” for law enforcement officers and other officials executing Court Orders. The
19 federal courts have described that insulation as “absolute, quasi-judicial immunity”.
20

21 [P]olice officers, sheriffs, and other court officers who act in
22 reliance on a facially valid court order are entitled to quasi-
judicial immunity from suit under §1983 for damages.

23 *Henry v. Farmers' City Bank*, 808 F.2d 1228, 1239 (7th Cir. 1986).

24
25
26
27 ² Several officers who will testify either through declaration or live testimony will assert they do not recall
seeing Mr. Brutsche at the scene.

1 The 9th Circuit Court of Appeals has clearly articulated the public policy reasons for
2 extending absolute, quasi-judicial immunity to law enforcement officers executing Court
3 Orders.

4 The fearless and unhesitating execution of court orders is
5 essential if the court's authority and ability to function are to
6 remain uncompromised. As the 1st Circuit has explained with
7 respect to a receiver who acted pursuant to court directives: to
8 deny him this [absolute] immunity would seriously encroach
9 on the judicial immunity already recognized by the supreme
10 court...it would make the receiver a lightning rod for
11 harassing litigation aimed at judicial orders. In addition to
12 the unfairness of sparing the judge who gives an order while
13 punishing the receiver who obeys it, a fear of bringing down
14 litigation on the receiver might color a court's judgment in
15 some cases...

16 *Coverdell v. DSHS*, 834 F.2d 758 (9th Cir. 1987).

17 Likewise, the Washington Supreme Court has ruled that an officer is not liable
18 under state law when acting pursuant to a facially invalid warrant. *See Bender v. Seattle*, 99
19 Wn.2d 582, 591 - 592 (1983).

20 Further, execution of a search warrant does not become unreasonable solely because
21 the search could have been accomplished by less intrusive means. *Duran v. City of*
22 *Douglas*, 904 F.2d 1372 (9th Cir. 1990), *Torrey v. Tukwila*, 76 Wn. App. 32, 44 (1994). It
23 is not uncommon for officers to find it necessary to interfere with privacy or property rights
24 not expressly considered by the judge, including possibly damaging property and impinging
25 on privacy and freedom of movement. *Dalia v. United States*, 441 U.S. 238, 257, 99 S.Ct.
26 1682, 1693, 60 L.Ed.2d 177 (1979).

27 Here, Plaintiff's attempt to impute liability upon the City of Kent for property
damage which occurred during the execution of a valid search warrant is in direct
contradiction with the clearly established principle that police officers executing valid

DEF CITY OF KENT'S ARBITRATION BRIEF AND
PREHEARING STATEMENT- 4

U:\BEberhardt\rbj\wcla04091\p-030705-def arbitration brief.doc

KEATING, BUCKLIN & McCORMACK, INC., P.S.

ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8881
FAX: (206) 223-9423

1 warrants are afforded absolute immunity. While there may possibly be very specific,
2 narrowly tailored exceptions to this principle of absolute immunity, Plaintiff can present no
3 authority that any of his claims in this action fall within articulated exceptions to this
4 governing principle. Accordingly, Plaintiff should be awarded nothing at the arbitration.

5 **B. POLICE ACTIVITY IS NOT REACHABLE IN NEGLIGENCE.**

6 Plaintiff is apparently claiming that the Defendants negligently caused damage to
7 Plaintiff's property. It is well-settled that police activities are not generally reachable in
8 negligence. *See Dever v. Fowler*, 63 Wn.App. 35, 45 – 46 (1991).

9
10 As a general rule, law enforcement activities are not
11 reachable in negligence. *Keats v. City of Vancouver*, 73 Wn.
12 App. 257, 267 (1994) citing *Dever v. Fowler*, *supra* at 44.

13 While there are exceptions to this general rule, those exceptions are narrowly
14 tailored. *See Dever, supra* at 44-45. Absent the establishment of a "special relationship" a
15 general negligence claim for police action is meritless. *Dever, supra, Keats, supra* at 269.

16 To qualify under this "special relationship" exception, Plaintiff must show:

- 17 1) There is direct contact or privity between the public
18 official and the injured plaintiff which sets the latter apart
19 from the general public, and 2) There are express
20 assurances given by a public official which 3) Give rise to
21 justifiable reliance on the part of the plaintiff.

22 *Keats* at 270, citing *Honcoop v. State*, 111 Wn.2d 182, 192 (1988).

23 Here there is no allegation, and the facts obviously do not support, that any special
24 relationship existed between Plaintiff and the City. Accordingly, Plaintiff cannot recover
25 on his negligence claim.

26 Plaintiff's arbitration brief mistakenly refers to three cases which supposedly
27 support Plaintiff's negligence action here. *See Plaintiff's Arbitration Brief* at page 3, lines

1 17 - 25. Those cases actually bolster the general principle that *police activities* are not
2 reachable in negligence absent narrowly tailored, specific exceptions.

3 Plaintiff cites to *Mason v. Bitton*, 854 Wn.2d 321 (1975) for the proposition that
4 because execution of a search warrant is "operational" in nature, Defendants' actions can be
5 reached in negligence. In *Mason, supra*, the issue was not whether police activities are
6 reachable under a general negligence theory. Instead, the case discussed how to interpret a
7 specific statute, RCW 46.61.035, which imposed a duty on police officers for damages
8 caused by a third party during a high speed pursuit. In that case, because a *specific*
9 *statutory scheme* imposed a duty, police activity in a specific circumstance could be
10 reached in negligence. See *Mason, supra* at 325. Here, no such specific statutorily
11 imposed duty exists to contradict the general rule that negligence claims against the police
12 are not viable.
13

14 In *Bender v. Seattle*, also cited by Plaintiff, the case did not involve negligence but
15 instead was an action for malicious prosecution. In *King v. Seattle*, also offered by
16 Plaintiff, the case had nothing to do with police activity at all.
17

18 Plaintiff cannot provide a single case which supports that police can be held liable in
19 negligence for damaging property during execution of a search warrant. Absent specific
20 examples, the principle that police activities are not reachable in negligence carries the day.
21 Accordingly, Plaintiff cannot recover at arbitration on a negligence claim.
22

23 **C. PROPERTY DAMAGE INCURRED DURING EXECUTION OF A VALID**
24 **SEARCH WARRANT IS NOT PROPERLY ADDRESSED BY PLAINTIFF'S**
25 **SUBSTANTIVE DUE PROCESS OR STATE LAW TAKINGS CLAIMS.**

26 Plaintiff has brought a substantive due process claim for damages incurred to his
27 buildings during execution of the search warrant. Plaintiff cannot recover on a substantive

1 due process claim as only the most intimate aspects of life are governed by substantive due
2 process.

3 As a general matter, the court has always been reluctant to
4 expand the concept of substantive due process because the
5 guideposts for responsible decision making in this uncharted
6 area are scarce and open ended. The protection of substantive
7 due process have for the most part been accorded to matters
8 related to **marriage, family, procreation and the right to
9 bodily integrity.**

10 *Albright v. Oliver*, 510 U.S. 266, 271 -72, 114 S.Ct. 807, 127 L.Ed.2d, 114 (1994).

11 Obviously, damage to door jams and trailer doors do not rise to the level of matters
12 properly addressed through a substantive due process action.

13 Likewise, any effort by Plaintiff to claim that a state law takings or state law
14 constitutional violation occurred under Article I, §16 of the Washington State Constitution
15 is unsupported. It is well settled that a takings or imminent domain claim does not arise
16 under the state constitution in the context of property damaged during execution of a valid
17 search warrant. *Eggleston v. Pierce County*, 148 Wn.2d 760 (2003).

18 Clearly, not every government action that takes, damages, or
19 destroys property is a taking. Imminent domain takes private
20 property for a public use, while the police power regulates its
21 use and enjoyment, or if it takes or damages it, it is not taking
22 or damaging for the public use, but to conserve the safety,
23 morals, health and general welfare of the public.

24 *Eggleston, supra* at 768, citing *Conger v. Pierce County*, 116 Wn. at 36 (1921).

25 Because the legislature has not provided a specific statutory remedy to address
26 property damaged during execution of a search warrant, courts here have refused to
27 characterize such damage as a takings under Article I, §16 of the state constitution. See
Eggleston, supra, at 774.

1 **D. PLAINTIFF'S §1983 CLAIMS AGAINST THE CITY OF KENT SHOULD**
2 **BE DISMISSED AS §1983 DOES NOT PROVIDE FOR RESPONDEAT**
3 **SUPERIOR LIABILITY.**

4 Plaintiff has sued the City of Kent and King County only. A municipality cannot be
5 held liable for damages under 42 U.S.C. §1983 under the theory of *respondeat superior*.
6 *Monnell v. Dept. of Soc. Serv.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed.2d 611 (1978). A
7 local government cannot be liable under §1983 for an injury inflicted solely by its
8 employees or agents, but only when execution of the government's policy or custom,
9 whether made by lawmakers or by those whose edicts or acts may be fairly said to represent
10 official policy, inflicts the injury. *Id.*

11 Further, allegation of a single incident is insufficient to impose municipal liability
12 under §1983 unless that incident was "caused by an existing unconstitutional municipal
13 policy, which policy can be attributed to a municipal policy maker." *Oklahoma City v.*
14 *Tuttle*, 471 U.S. 808, 824, 105 S. Ct. 2427, 85 L. Ed.2d 791 (1985). Accordingly, Plaintiff
15 cannot prevail on his constitutional claims at this arbitration.

16 **E. PLAINTIFF WILL BE ABLE TO OFFER NO ADMISSIBLE EVIDENCE TO**
17 **CONTRADICT THE REASONING BEHIND BREAKING VARIOUS**
18 **LOCKS AND DOORS.**

19 Plaintiff did not arrive at the scene where the search warrant was being executed
20 until a perimeter had been established and the search was well under way. Defendant City
21 of Kent's witnesses, through live testimony and/or declarations, will establish that the
22 search warrant team was compromised as they approached the property. Plaintiff's son and
23 another suspect saw the approaching police officers, and responded by running into one of
24 the buildings and locking the doors. The police had to use a breaching device to enter that
25 building and once inside, were met with further non-compliance and resistance by
26 Plaintiff's now deceased son, James Brutsche.

27 DEF CITY OF KENT'S ARBITRATION BRIEF AND
PREHEARING STATEMENT- 8

U:\B\berhard\rbj\wcl\04091p-030705-def arbitration brief.doc

KEATING, BUCKLIN & MCCORMACK, INC., P.S.

ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-5175
PHONE: (206) 623-8881
FAX: (206) 223-6423

1 Because the search warrant specifically authorized the police to enter locked;
2 containers and the surrounding buildings on the property, the police had authority to do so
3 even though the doors were locked. Further, because of James Brutsche's non-compliance,
4 and for tactical and evidentiary reasons that will be discussed below, the police had an
5 exigent need to gain entry to these various locked buildings immediately.

6 During the execution of the warrant, the police encountered a number of subjects in
7 the area. As they were executing the search, they did not know how many subjects were
8 still unaccounted for as they conducted the search. The officers will testify that searching a
9 methamphetamine lab is always dangerous, and waiting around to hopefully obtain keys to
10 various doors from a source provides a strategic advantage to any unaccounted disregard
11 for subjects who could be arming themselves or attempting to destroy the very evidence the
12 search warrant seeks.

13
14 The testimony of the officers explaining the circumstances during the execution of
15 the search warrant will be uncontroverted. Plaintiff did not arrive at the scene until much
16 later. Even if there were locked doors that had not yet been breached, the police witnesses
17 will explain that allowing the Plaintiff inside the secure perimeter of the crime scene would
18 compromise officer safety as well as evidence integrity. Because Plaintiff's son is deceased
19 due to a methamphetamine lab explosion at the very property in question here, Plaintiff can
20 only offer speculation and inadmissible hearsay to contradict the officers' version of events.

21 22 IV. WITNESSES

23 The below listed witnesses will be called to testify either through Declaration or live
24 testimony:
25
26
27

1 1. Lt. Mike Villa, Tukwila Police Department

2 Lt. Villa was the on scene VNET commander. He may testify regarding the
3 execution of the search warrant, the dangers associated with search warrants executed at
4 alleged methamphetamine labs, how allowing Plaintiff into the search area after the
5 perimeter was secured compromises evidence integrity and officer safety and will relate
6 other testimony regarding what transpired on the day in issue.

7 2. Officer Scott Rankin, Kent Police Department

8 Officer Rankin participated in the execution of the search warrant at the scene. He
9 may testify regarding the execution of the search warrant, the dangers associated with
10 search warrants executed at alleged methamphetamine labs, how allowing Plaintiff into the
11 search area after the perimeter was secured compromises evidence integrity and officer
12 safety and will relate other testimony regarding what transpired on the day in issue.

13 3. City of Kent Police Officer Blowers

14 Officer Blowers participated in the execution of the search warrant at the scene. He
15 may testify regarding the execution of the search warrant, the dangers associated with
16 search warrants executed at alleged methamphetamine labs, how allowing Plaintiff into the
17 search area after the perimeter was secured compromises evidence integrity and officer
18 safety and will relate other testimony regarding what transpired on the day in issue.

19 4. City of Kent Police Officer Majack

20 Officer Majack participated in the execution of the search warrant at the scene. He
21 may testify regarding the execution of the search warrant, the dangers associated with
22 search warrants executed at alleged methamphetamine labs, how allowing Plaintiff into the
23 search area after the perimeter was secured compromises evidence integrity and officer
24 safety and will relate other testimony regarding what transpired on the day in issue.
25
26
27

DEF CITY OF KENT'S ARBITRATION BRIEF AND
PREHEARING STATEMENT- 10

UABEberhardfvb\wclia04091p-030705-def arbitration brief.doc

KEATING, BUCKLIN & MCCORMACK, INC., P.S.

ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8801
FAX: (206) 223-0423

V. EXHIBITS

1. Search warrant signed by Judge Linda Thompson of King County District Court authorizing search of Plaintiff's property and locked containers on property.
2. Valley SRT after action report regarding incident.
3. Photographs of Plaintiff's property following methamphetamine explosion.
4. Kent Fire Department Report regarding explosion at Plaintiff's property.

RESPECTFULLY SUBMITTED this 8th day of March, 2005.

KEATING, BUCKLIN & McCORMACK, INC., P.S.


Richard B. Jolley, WSBA # 5257
Attorney for Defendant Kent

EXHIBIT E

FILED

05 JUN 24 PM 3:09

KING COUNTY
SUPERIOR COURT CLERK
KENT, WA

JUDGE BRIAN D. GAIN
Hearing Date: July 22, 2005
Time: 3:30 p.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

LEO C. BRUTSCHE,

Plaintiff,

v.

CITY OF KENT, A Washington municipal
corporation,

Defendant.

No. 04-2-12087-0KNT

DEFENDANT CITY OF KENT'S
MOTION FOR SUMMARY
JUDGMENT OF DISMISSAL

I. RELIEF REQUESTED

Defendant City of Kent, by and through its attorneys of record, Chloethiel W. DeWeese and Keating, Bucklin & McCormack, Inc., P.S., hereby requests that the Court grant its motion for summary judgment and dismiss all of plaintiff's claims against the City with prejudice.

II. STATEMENT OF FACTS

Plaintiff claims that the City of Kent is liable for physical damage to various doors and door jambs caused by the Special Response Team (SRT) during the execution of a search warrant for a suspected methamphetamine lab located on plaintiff's property. 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. The search warrant specifically authorized the

DEFENDANT CITY OF KENT'S MOTION FOR
SUMMARY JUDGMENT OF DISMISSAL - 1
U:\B\berhardt\rbj\wcta04081p-052305-mkn for sj dismissal.doc

KEATING, BUCKLIN & MCCORMACK, INC., P.S.

ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 822-8961
FAX: (206) 223-6423

ORIGINAL

1 police to search James F. Brutsche, plaintiff's now deceased son, as well as any locked
2 containers and numerous abandoned or disabled vehicles parked within the fenced
3 boundary at the Naden Avenue address. Plaintiff Leo C. Brutsche has at all relevant times
4 owned the property subject to the search warrant.

5 The Special Response Team, which consists of specially trained officers from a
6 variety of south King County jurisdictions, was called out to execute the search warrant
7 because of the high risk nature of executing warrants on methamphetamine labs.
8 Unfortunately, as discussed below, this particular search (which took place on July 10,
9 2003) was "compromised" when James Brutsche and another suspect saw the police from
10 their vantage point on the porch of the mobile home where James Brutsche resided. As the
11 SRT arrived in several fully marked police vehicles, and with officers in clearly marked
12 police uniforms, an announcement was made three times over a police vehicle loud speaker
13 that the police had arrived with a search warrant for 426 Naden Avenue. As soon as James
14 Brutsche saw the police approaching the main residence, he ran inside the trailer home,
15 slammed the sliding glass door shut, and attempted to barricade himself inside by placing a
16 dowel at the bottom of the sliding door. For this reason, it was necessary to use a breaching
17 device to gain access to the mobile home. Once the glass door was breached, Brutsche
18 remained combative and uncooperative, and physically fought with the police officers
19 trying to arrest him. It was necessary to use a taser against Mr. Brutsche so that he could be
20 taken into custody.

21 After James Brutsche was apprehended and placed in custody, the police proceeded
22 to search the remaining areas subject to the search warrant, including the abandoned
23 warehouse, several open outbuildings, eight semi-trailers and the various abandoned or
24 disabled vehicles located within the fenced compound. It was necessary to breach several
25 interior warehouse doors, and cut multiple padlocks from containers located throughout the
26 property, to effectuate the search warrant. The SRT needed to gain access to the remaining
27 buildings as quickly as possible because of obvious safety concerns for the police officers.

1 It was unknown whether other people on the premises might also be dangerous or non-
2 compliant, or attempting to destroy evidence of methamphetamines on the premises. While
3 the various buildings were being searched, a secure perimeter was also set up by the police
4 to prevent any unaccounted for suspects from escaping, and to avoid possible
5 contamination of the crime scene.

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

12 While the above described search was "compromised," as described above, this
13 does not change the fact that the police had probable cause to obtain this search warrant,
14 specifically information causing them to believe that James F. Brutsche was involved in the
15 illegal manufacture of methamphetamines. While plaintiff will no doubt stress that the
16 police found "no drugs or code violations" during this search (see ¶3.1 of plaintiff's
17 amended complaint), plaintiff's son (James Brutsche) died in a methamphetamine lab
18 explosion that occurred on the same premises approximately one year later.

19 III. EVIDENCE RELIED UPON

20 This motion is based on the records and files herein, as well as the following:

- 21 1. The Declaration of Lt. Mike Villa of the Tukwila Police Department;
- 22 2. The Declaration of Darin Majack of the Kent Police Department; and
- 23 3. The attached copy of the search warrant signed by King County District
24 Court Judge Linda G. Thompson on July 8, 2003, authorizing a search on plaintiff's
25 premises at 426 Naden Avenue in Kent for a suspected methamphetamine lab.

1 **IV. STATEMENT OF ISSUES**

2 Whether the City of Kent is entitled to summary judgment dismissing plaintiff's
3 lawsuit against it where:

- 4 A. Prior to the July 10, 2003 search of plaintiff's property, the police had
5 probable cause to believe that plaintiff's son, James F. Brutsche, was
6 manufacturing methamphetamines on the premises, and obtained a valid
7 search warrant signed by King County District Court Judge Linda G.
8 Thompson;
- 9 B. The steps taken by the Special Response Team to execute this search warrant
10 were reasonably necessary and constituted a valid exercise of police power;
- 11 C. Plaintiff is not entitled to compensation for any property damage to his doors
12 and door jambs resulting from the proper exercise of police power pursuant
13 to a valid search warrant;
- 14 D. No substantive due process claim exists for the type of property damage at
15 issue in this suit;
- 16 E. Plaintiff's negligence claim against the City fails as a matter of law, since
17 plaintiff has no cause of action for "negligent infliction of property damage"
18 in connection with the execution of this search warrant; and
- 19 F. Plaintiff has no viable basis for asserting a §1983 claim since plaintiff
20 sustained no constitutional deprivation resulting from a City policy or
21 custom.

22 **V. LEGAL AUTHORITY**

23 **A. THE SPECIAL RESPONSE TEAM'S ACTIONS WERE BOTH**
24 **REASONABLE AND NECESSARY AND CONSTITUTED A VALID**
25 **EXERCISE OF POLICE POWER.**

26 It is undisputed that the Special Response Team's search of plaintiff's property on
27 July 10, 2003 was authorized by a valid search warrant signed by King County District
Court Judge Linda G. Thompson. As required by law, issuance of the search warrant was

1 based on a specific finding that there was probable cause to believe that James F. Brutsche
2 was involved in the illegal manufacture of methamphetamines on the premises. The
3 manufacture, delivery or possession with intent to manufacture methamphetamines is a
4 serious offense under Washington's Controlled Substances Uniform Act, punishable by up
5 to ten years in prison and a fine of between \$25,000 and \$100,000 depending on the
6 quantity of drugs involved. RCW 69.50.401(a) (ii). As set forth in the declarations of both
7 Lt. Mike Villa and Officer Darin Majack, the execution of a search warrant on a suspected
8 methamphetamine lab is a high risk endeavor that is not appropriate for regular police
9 officers, and requires the expertise of the Special Response Team. There was a distinct
10 potential for violence in executing this warrant, which was born out by James F. Brutsche's
11 violent response to the police officers' efforts to arrest him. As reflected in the attached
12 declarations of the officers, people involved in the methamphetamine trade are typically
13 paranoid, irrational, and often armed and dangerous.

14 The search warrant specifically authorized the Special Response Team to search the
15 following:

- 16 • An old abandoned, non-operational manufacturing warehouse with an
17 unknown number of office units inside, and several open outbuildings,
18 about eight semi trailers and a white and pink mobile home located at
19 the address of 426 Naden Ave, Kent, County of King, State of
20 Washington.
- 21 • Numerous abandoned or disabled vehicles parked within the fenced
22 compound of the previously stated warehouse/residence.
- 23 • Any locked containers: such as filing cabinets, safes, and storage
24 containers at the previously stated warehouse/residence ...
- 25 • And person of James F. Brutsche, white male, born on 06/26/1958, 5'-
26 11" tall, and about 160 with brown hair and brown eyes.

27 As reflected in Lt. Villa's declaration, VNET detectives had reported that the
property owner allowed multiple suspected drug users to sleep/live throughout the property.
In short, the Special Response Team was confronted with a volatile, dangerous situation
when the officers involved executed this search warrant. As reflected in the attached
officers' declarations, it was necessary to breach the sliding glass door that James Brutsche

DEFENDANT CITY OF KENT'S MOTION FOR
SUMMARY JUDGMENT OF DISMISSAL - 5

U:\ABE\berndt\rbj\wcla04091p-052305-mtn for sj dismissal.doc

KEATING, BUCKLIN & MCCORMACK, INC., P.S.

ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861
FAX: (206) 223-9423

1 locked and barricaded in order to apprehend Brutsche. In addition, it was necessary to
2 breach various other warehouse interior doors to avoid seriously compromising police
3 safety, and to minimize the likelihood that evidence of methamphetamines would be
4 destroyed.

5 It is well established that "the police may take whatever steps are reasonably
6 necessary in executing duly authorized warrants." *Duran v. City of Douglas, Arizona*, 904
7 F.2d 1372, 1376 (9th Cir. 1989), citing *Dalia v. United States*, 441 U.S. 238, 257-58, 60
8 L.Ed.2d 177, 99 S.Ct. 1682 (1979). In *Dalia*, the U.S. Supreme Court specifically noted
9 that officers executing search warrants on occasion must damage property in order to
10 perform their duty, and this is permissible under the Fourth Amendment. *Dalia*, 441 U.S. at
11 258. Furthermore, execution of a search warrant does not become unreasonable solely
12 because the search could have been accomplished by less intrusive means. *Torrey v.*
13 *Tukwila*, 76 Wn.App. 32, 44, 882 P.2d 799 (1994).¹

14 **B. PLAINTIFF IS NOT ENTITLED TO COMPENSATION FOR PROPERTY**
15 **DAMAGE RESULTING FROM THE PROPER EXERCISE OF POLICE**
16 **POWER PURSUANT TO A VALID SEARCH WARRANT.**

17 **1. Police power and the power of eminent domain are two distinct and**
18 **separate powers of government.**

19 Paragraph 4.3 of plaintiff's amended complaint claims that defendants, in the
20 process of executing the search warrant on July 10, 2003, "destroyed Plaintiff's property for
21 a public purpose, thereby permanently depriving Plaintiff of its use and enjoyment.
22 Defendants have not afforded just compensation to Plaintiff for said property." In asserting
23 this claim, plaintiff is improperly relying on the doctrine of eminent domain, which has no
24 relevance to this case. Pursuant to eminent domain, the State is empowered to take real
25 property for public use, but must compensate the owner appropriately. Washington

26 ¹ While plaintiff's amended complaint alleges that Leo Brutsche offered his keys to Special Response Team
27 officers, so that they would not have to damage various "doors, windows and other property," the police were
certainly not required to jeopardize either their safety or the safety of other people to protect plaintiff's
personal property. As reflected in Lt. Mike Villa's declaration, not allowing Mr. Brutsche access to the
property during the execution of this search warrant not only ensured the safety of innocent bystanders in
what was a very high risk endeavor, but also maintained the integrity of the potential crime scene.

1 Constitution Article I, §16. Plaintiff's attempt to merge the power of eminent domain with
2 the police power exercised in this case is improper, since these constitute completely
3 separate powers of government. *Eggleston v. Pierce Co.*, 148 Wn.2d 760, 767, 64 P.3d 618
4 (2003). This distinction was clearly articulated by the court in *Eggleston*:

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

14 148 Wn.2d at 767-768 (emphasis in original, citing *Conger v. Pierce County*, 116 Wash.
15 27, 36, 198 P. 377 (1921), additional citations omitted).

16 2. Damage to private property pursuant to the State's police power is not a
17 compensable taking under Washington Constitutional Article I, §16,
18 which governs the State's power of eminent domain.

19 In the *Eggleston* case, the Supreme Court specifically held that property damage to a
20 house, sustained during the execution of a search warrant by police, was not a compensable
21 taking because it was the result of the valid exercise of police power and not the exercise of
22 the State's power of eminent domain. In doing so, the court specifically analyzed
23 Washington constitutional history, "the continuing vitality of the separate doctrines of
24 eminent domain and police power," and concluded that "extending takings to cover this
25 alleged deprivation of rights would do significant injury to our constitutional system."
26 *Eggleston*, 148 Wn.2d at 773, 775.

27 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 jurisdiction, 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.

1 148 Wn.2d at 770.

2 The court adopted the reasoning of *Emery v. Oregon*, 297 OR 755, 688 P.2d 72
3 (1984), and noted that, under the Oregon approach, no taking could arise from the
4 execution of a search warrant, nor could a taking be found in property damage caused by a
5 criminal investigation. *Eggleston*, 148 Wn.2d at 771.

6 The court in *Eggleston* specifically cited *Kelly v. Storey Co. Sheriff*, 611 N.W.2d
7 475, 477 (Iowa 2000), in which the Supreme Court of Iowa held that damage to the front
8 doors of plaintiff's residence caused by law enforcement officers executing a warrant
9 resulted from the valid exercise of police power and was not a compensable taking pursuant
10 to eminent domain. The court succinctly defined eminent domain as "the taking of private
11 property for a public use for which compensation must be given." Conversely, the court
12 stated that police power "controls and regulates the use of property for the public good for
13 which no compensation need be made." 611 N.W.2d at 479. The court concluded:

14 . . . the county's right to provide for the safety and welfare of its citizens in
15 enforcing the state's criminal laws and procedures outweighs any
16 interference or economic impact of the officer's action on plaintiff's property
17 as presented in this case. The damage caused to plaintiff's property in this
18 case would seem to be more in line with those cases where property owners
19 have been forced to bear some burden for the public good, but where no
20 taking of private property was found.

21 6 *Kelley*, 611 N.W.2d at 481.

22 Both *Eggleston* and *Kelly* are directly on point, and negate any claim by plaintiff
23 that he is entitled to compensation for any property damage he sustained in connection with
24 the execution of the search warrant in this case. Plaintiff's attempt to invoke the doctrine of
25 eminent domain is misplaced and should be summarily rejected. The actions of the Special
26 Response Team had nothing to do with eminent domain, but rather were undertaken
27 pursuant to the State's police power. Furthermore, the above analysis applies equally to the
takings clause of the Fifth Amendment to the U.S. Constitution. *Hurtado v. U.S.*, 410 U.S.
578, 93 S.Ct. 1157, 35 L.Ed. 2d 508 (1973). Thus, any attempt by plaintiff to premise his
takings claim on federal constitutional law is also without merit.

1 C. PLAINTIFF'S SUBSTANTIVE DUE PROCESS CLAIM FAILS AS A
2 MATTER OF LAW.

3 1. The analysis of plaintiff's substantive due process claim is identical
4 under both the state and federal constitutions.

5 Although ¶ 4 of plaintiff's amended complaint (entitled "Deprivation of Substantive
6 Due Process") is unclear, it appears that plaintiff is alleging that a taking of his property
7 under the Fifth Amendment of the U.S. Constitution also constituted a violation of his
8 substantive due process rights pursuant to that amendment. Plaintiff's substantive due
9 process claim is not, however, clearly articulated, and plaintiff may attempt to argue a
10 substantive due process violation on the basis of the Washington Constitution, Article 1, §3,
11 as well as the Fifth and Fourteenth Amendments to the U.S. Constitution.²

12 For purposes of analyzing plaintiff's substantive due process claim, Washington
13 Constitution Article I, §3 provides the same scope of due process protection as the Fifth and
14 Fourteenth Amendments, and they are all interpreted identically to each other. *State v.*
15 *Manussier*, 129 Wn.2d 652, 921 P.2d 473 (1996). In *Manussier* the court held that an
16 independent interpretation of Article I, §3, was not appropriate after analyzing the six
17 factors set forth in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). *See also,*
18 *Personal Restraint of Dyer*, 143 Wn.2d 384, 394, 20 P.3d 907 (2001) (court specifically
19 noted that "Washington's due process clause does not afford a broader due process
20 protection than the Fourteenth Amendment," and that when *Gunwall* factors not met "this
21 Court will interpret the Washington Constitution co-extensively with its parallel federal
22 counterpart," quoting *State v. Lee*, 135 Wn.2d 369, 387, 957 P.2d 741 (1998)).

23
24
25 ² Washington Constitution Article I, §3 provides: "No person shall be deprived of life, liberty, or property,
26 without due process of law." This language is virtually identical to language found in the Fifth and
27 Fourteenth Amendments to the U.S. Constitution. The Fifth Amendment states: "... Nor shall any person ...
be deprived of life, liberty, or property, without due process of law..." The Fourteenth Amendment provides:
"... Nor shall any State deprive any person of life, liberty, or property, without due process of law..."

2. Plaintiff's alleged property damage does not rise to the level of a substantive due process claim.

Damage to plaintiff's "property" in this case (i.e., damaged doors and door jambs) does not constitute the type of property interest encompassed within the concept of substantive due process. In *Albright v. Oliver*, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed. 2d 114 (1994), the U.S. Supreme Court explicitly stated:

"As a general matter, the Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity.

Albright, 510 U.S. at 271-272 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125, 117 L.Ed. 2d 261, 112 S.Ct. 1061 (1992)).

Plaintiff's substantive due process claim is premised upon the alleged destruction of various doors, door jambs and windows during the execution of a search warrant. Damage or destruction to property of this nature fails to implicate fundamental constitutional rights such as those "relating to marriage, family, procreation, and the right to bodily integrity." Plaintiff's attempt to trivialize constitutional law by asserting a substantive due process claim in this context should be summarily rejected.

D. PLAINTIFF'S NEGLIGENCE ALLEGATION FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

1. No Cause of Action Exists for the Negligent Infliction of Property Damage During the Execution of a Search Warrant.

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). It is well established that, under traditional negligence principles, 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

1 precedent." *Keates*, 73 Wn. App. at 265, quoting *King v. Seattle*, 84 Wn.2d 239, 250, 525
2 P.2d 228 (1974).

3 In *Keates*, the court held that police officers do not owe any duty to use reasonable
4 care to avoid inadvertent infliction of emotional distress on criminal investigation subjects.
5 *Keates*, who was a suspect in his wife's murder, sought damages against the police on the
6 basis of outrage and negligent infliction of emotional distress. In affirming the dismissal of
7 *Keates*' lawsuit, the court noted that it is in society's best interest that criminals be promptly
8 apprehended and punished, and concluded:

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

14 73 Wn. App. at 267 (citations omitted).

15 The court further noted that Washington State "recognizes the central roles which
16 police and prosecutors play in maintaining order in our society and the burdens imposed on
17 each of us as citizens as part of the price for that order." *Keates*, 73 Wn. App. at 268,
18 quoting *Hanson v. Snohomish*, 121 Wn.2d 552, 568, 852 P.2d 295 (1993). Citing
19 Washington state's recognition that lawsuits against police officers tend to obstruct justice,
20 the court held that allowing a cause of action for negligent infliction of emotional distress
21 "would have a chilling effect on police investigation and would give rise to potentially
22 unlimited liability for any type of police activity." *Keates*, 73 Wn. App. at 269. *See also*,
23 *Dever v. Fowler*, 63 Wn. App. 35, 816 P.2d 1237 (1991), where the court, on virtually
24 identical policy grounds, held that no cause of action for negligent governmental
25 investigation exists in this state.

26 The above-quoted policy considerations are directly applicable to the case at bar,
27 and negate any claim by plaintiff that the police officers involved owed a duty to avoid
negligent damage to his property while in the process of executing a facially valid search
warrant. It is undisputed that the police had probable cause to believe that criminal activity

1 was taking place on plaintiff's property. It would unquestionably impair vigorous
2 prosecution of criminals, and have a chilling effect on law enforcement, if police who
3 execute search warrants were subject to civil liability for reasonably necessary damage
4 caused to someone's property in the process of executing their duties. When weighing the
5 interest of society in eradicating criminal drug activity, versus Mr. Brutsche's interest in
6 protection of his property, governing Washington case law mandates that society's interest
7 in this context must prevail.

8 Based on the foregoing, any negligence claim by plaintiff should be dismissed as a
9 matter of law.

10 2. The Abolition of Sovereign Immunity Does Not Create a New Cause of
11 Action Where None Otherwise Exists.

12 Despite plaintiff's anticipated argument to the contrary, the Washington State
13 Legislature's 1967 abolition of sovereign immunity for municipal corporations did not
14 create any new duties or causes of action against cities. RCW 4.96.010 declared that
15 municipal corporations "shall be liable for damages arising out of their tortious conduct, or
16 the tortious conduct of their officers ... to the same extent as if they were a private person
17 or corporation..." However, as the court specifically stated in *Garnett v. Bellevue*, 59 Wn.
18 App. 281, 796 P.2d 782:

19 ... RCW 4.96.010 does not create any new causes of action, imposes no new
20 duties, and brings into being no new liability; it merely removes the defense
21 of sovereign immunity, *J&B Dev. Co. v. King Cy.*, 100 Wn.2d 299, 304, 669
22 P.2d 468 (1983), *overruled on other grounds in Honcoop v. State*, 111
23 Wn.2d 182, 759 P.2d 1188 (1988). The intent of RCW 4.96.010 was to
24 permit a cause of action in tort *if a duty could be established*, just the same as
25 with a private person. *J&B Dev. Co.*, 100 Wn.2d at 305. In sum, one must
26 first establish the existence of a duty and then apply RCW 4.96.010 to insure
27 that, having established the duty, claimants may proceed in tort against
municipalities to the same extent as if the municipality were a private person.

59 Wn. App. at 285.

In *Bender v. Seattle*, 99 Wn.2d 582, 664 P.2d 492 (1983), the Washington Supreme
Court held that discretionary governmental immunity, a court created exception to the
general rule of governmental tort liability, did not apply to the operational decisions of

1 police officers, prosecutors and their employers in the context of criminal investigations
2 and the filing of criminal charges. While the court in *Bender* limited the scope of the
3 discretionary act exception, it did not create any new cause of action in negligence against
4 either the police or against the municipalities that employ them. This point was clearly
5 articulated in *Dever v. Fowler*, 63 Wn. App. 35, 816 P.2d 1237 (1991). In *Dever*, the
6 plaintiff brought suit against the City of Seattle, the Seattle Fire Department and its
7 investigator after arson charges were brought against him and then later dismissed. The
8 appellate court affirmed the trial court's summary dismissal of *Dever's* negligent
9 investigation claim. While *Dever* had argued that the holding in *Bender* created a cause of
10 action for negligent investigation, the court dismissed this claim as "meritless," and noted
11 that *Dever* failed to identify any particular duty owed by defendants to him. *Dever*, 63 Wn.
12 App. at 45-46.

13 Thus, any claim by plaintiff that the holding in *Bender* creates a negligence cause of
14 action against the City in this case is without merit and should be rejected. The police
15 officers executing this search warrant owed no duty of care to plaintiff to avoid the
16 incidental damage to his property that occurred.

17 **3. The Public Duty Doctrine Also Precludes Liability in this Case.**

18 It is important to distinguish situations in which the court has, on policy grounds,
19 held that the police owed no duty of care, to situations where the police are not liable under
20 the public duty doctrine because the duty owed is to the public at large versus an individual
21 plaintiff. In cases such as *Dever* and *Keates, supra*, the court ruled that no duty of care, the
22 basis for any negligence claim, existed against police involved in criminal investigations.
23 The analysis in those cases applies directly to the case at bar, since a search warrant is a
24 necessary tool used by the police to investigate suspected criminal activity, and is an
25 integral part of criminal investigations. Since the police owed no duty of care to the
26 plaintiff in this context, no cause of action in negligence exists.

1 In this case the only duty owed by the police was a duty to protect public safety, and
2 to arrest those engaged in criminal conduct that threatened that safety. This constitutes a
3 public duty of the highest order, and a primary purpose that police exist in any community.
4 To recover against a municipal corporation in tort, a plaintiff has the burden of establishing
5 that the duty breached was owed to the injured person individually, and was not merely the
6 breach of a duty owed to the public in general (i.e., a duty to all is a duty to no one). *Meany*
7 *v. Dodd*, 111 Wn.2d 174, 759 P.2d 455 (1988). While there are limited exceptions to the
8 public duty doctrine (see, e.g., *Honcoop v. State*, 111 Wn.2d 182, 759 P.2d 1188 (1988),
9 none of them applies in this case.

10 Thus, if this case is viewed from a public duty perspective, the public duty doctrine
11 further precludes any negligence claim by plaintiff against the City of Kent. Even if
12 plaintiff could establish that the Special Response Team breached its duty of care when
13 executing this search warrant, this would not provide plaintiff with any cause of action
14 because the only duty owed was to the public at large, not Leo Brutsche individually.

15 **E. PLAINTIFF HAS NO GROUNDS FOR ASSERTING A §1983 CLAIM**
16 **BECAUSE HE SUSTAINED NO CONSTITUTIONAL DEPRIVATION**
17 **RESULTING FROM ANY CITY POLICY OR CUSTOM.**

18 Plaintiff has sued only the City of Kent, not any of the individual police officers
19 involved in executing the subject search warrant. It is axiomatic that a municipality cannot
20 be held liable for damages under 42 U.S.C. §1983 under the theory of *respondeat superior*.
21 *Monell v Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). A
22 local government cannot be liable under §1983 for an injury inflicted solely by its
23 employees or agents, but only when execution of a government's policy or custom, whether
24 made by lawmakers or by those whose edicts or acts may be fairly said to represent official
25 policy, inflicts the injury. *Id.*

26 Furthermore, allegation of a single incident is insufficient to impose municipal
27 liability under §1983 unless that incident was "caused by an existing unconstitutional

1 municipal policy, which policy can be attributed to a municipal policy maker." *Oklahoma*
2 *City v. Tuttle*, 471 U.S. 808, 824, 105 S. Ct. 2427, 85 L. Ed.2d 791 (1985).

3 Here, plaintiff's §1983 Complaint against the City fails on several grounds. First,
4 plaintiff is attempting to hold the City of Kent liable under a theory of *respondeat superior*
5 for the actions of its officers. As noted above, *respondeat superior* is insufficient to
6 establish municipal liability under §1983. In addition, because the alleged violation of
7 plaintiff's rights is premised on a single incident, such an allegation fails on its face to
8 establish municipal liability under §1983. Plaintiff makes no claim that there was any type
9 of existing, unconstitutional policy which caused his alleged constitutional deprivation. As
10 a result, plaintiff's §1983 claims are without merit and should be dismissed as a matter of
11 law.

12 VI. CONCLUSION

13 The search warrant in this case was obtained based on probable cause to believe that
14 plaintiff's son, who resided in a mobile home on plaintiff's property, was involved in the
15 illegal manufacture of methamphetamines. As set forth above, plaintiff can assert no viable
16 legal basis supporting his claim that the City of Kent should be liable for the physical
17 damage to various doors and door jams caused by the Special Response Team during the
18 execution of this search warrant.

19 Based on the foregoing, defendant respectfully requests that the Court grant its
20 motion for summary judgment and dismiss all of plaintiff's claims against the City with
21 prejudice.

22 RESPECTFULLY SUBMITTED this 23rd day of June, 2005.

23 KEATING, BUCKLIN & McCORMACK, INC., P.S.

24 Chloethiel W. DeWeese
25 Chloethiel W. DeWeese, WSBA #9243
26 Attorneys for Defendants
27