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SUPREME COURT OF WASHINGTON

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STATE OF WASHINGTON

ELSA ROBB, Personal Representative of the ESTATE OF MICHAEL W. ROBB,

Respondent

vs.

CITY OF SEATTLE, a Municipal Corporation, OFFICER KEVIN McDANIEL and OFFICER PONHA LIM,

Petitioners.

AMICUS BRIEF OF FAMILIES AND FRIENDS OF VIOLENT CRIME VICTIMS

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I. Interest of Amicus

Families and Friends of Violent Crime Victims, first established in 1975, is the oldest crime victims' advocacy and assistance organization in Washington. Families and Friends provides crisis line assistance, information and referral services and advocacy services. Families and Friends' legislative advocacy program has helped establish victim advocacy units within prosecutors' offices throughout the State, restored crime victims' compensation funding, established the Office of Crime Victims Advocacy, assured victim representation on the Sentencing Guidelines Commission, and reformed legislation on homicide sentencing and bail. *See* www.fnfvcv.org .

Families and Friends has previously submitted an amicus brief to this Court. *Taggart v. State,* 118 Wn.2d 195, 822 P.2d 243 (1992).

II. Argument.

A. Summary of Argument.

Cases applying the *Restatement (Second) of Torts* §302B recognize that governmental actors, just like private individuals or corporations, have a duty "where the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through [intentional, or even criminal] misconduct of others, which a reasonable man would take into account." §302B, comment e. *See Parilla v. King County,* 138 Wn. App 427, 157 P.3d 879 (2007); *United States v. Stevens,* 994 So. 2d 1062 (Fla., 2008); *McIntyre v. United States*, 447 F. Supp. 2d 54 (2006), *aff'd.,* 545 F. 3d 27, 38 (1st Cir. 2008). *See* Section B, below.

This Court has consistently declined to apply the public duty doctrine to bar claims in cases even beyond the four specific exceptions emphasized by Petitioner City of Seattle and amici Association of Washington Cities, *et al.* *See Bailey v. Forks,* 108 Wn.2d 262, 267-268, 737 P.2d 1257 (1987), *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992) and other cases discussed in Section C. The Court of Appeals decision in *Robb v. Seattle,* 159 Wn. App. 133, 245 P.3d 242 (2010) should be affirmed.

B. The City Overlooks Important, Persuasive Decisions Holding That Governmental Actors Had Duties to Foreseeable Victims Based On The *Restatement (Second) of Torts* §302B.

Amicus Families and Friends of Victims of Violent Crimes will not re-visit points already well-stated by plaintiff and the Division One opinion on the application of *Restatement (Second) of Torts* §302B to the question of duty, especially with regard to Washington and *Restatement* authority. But the City incorrectly asserts that only two non-Washington cases have ever been decided on §302B duty of governmental defendants. Br. of Appellants at 21. We address below the two cases discussed by the City. First, we call the court's attention to two such cases not discussed, and apparently overlooked, by the City and its amici. The cases strongly support the opinion of Division One on the issue of duty under §302B.

1. Federal Liability for Death Where Government Laboratory Failed to Secure Anthrax

In the wake of the well-known 2001 anthrax murders, the personal

representative of a Florida victim brought suit in federal district court. She alleged that a government laboratory and a private laboratory had each failed to provide adequate security to safeguard its storage, use and possession of anthrax. Defendants moved to dismiss. The U.S. District Court denied the motion, analyzing the case under the "'unreasonable risk of harm by affirmative act' rule embodied in §§ 302, 302A and 302B of the Restatement and the special relationship requirement embodied in §315...." *United States v. Stevens,* 994 So. 2d 1062, 1065 (Fla. 2008). The trial court "relied on §302B to find that [plaintiff] stated a potential claim against the government" and Battelle.[1] *Id.* The Eleventh Circuit certified the question of duty to the Florida Supreme Court. *Stevens v. Battelle Memorial Institute and United States of America*, 488 F. 3d 896, 898-901, 904 (11th Cir. 2007).

The Florida Supreme Court held that the district court's analysis had been correct. It rejected the defendants' contention that they owed no legal duty to the victim. Reiterating Florida precedent on "'foreseeable zone of risk'" and the "guidance in sections 302, 302A, and 302B of the Restatement (Second) of Torts (1965)" which "largely mirror our 'foreseeable zone of risk' analysis," the court noted that the duties described in those *Restatement* sections "attach to acts of *commission*, which historically generate a broader umbrella of tort liability than acts of

[1] The U.S District Court also denied the motion on the basis of the "special relationship" doctrine articulated at *Restatement*, §315.

omission" under §§315 and 314A. *United States v. Stevens,* 994 So. 2d at 1068 (Fla., 2008) (original emphasis).

Responding to defendants' argument that plaintiff had in reality alleged omissions to act and not affirmative acts, the Florida Supreme Court noted:

> The plaintiffs have alleged that the defendants created a new and expansive risk of harm by failing to secure the anthrax. The allegations, if true, assert that Mr. Stevens' position was actually made worse by the failure to secure the anthrax. These are allegations of misfeasance, not nonfeasance.

Id. at 1070, n. 4.[2] Notably, Florida courts have long adopted a version of the public duty doctrine. *See*, *Wallace v. Dean*, 3 So.3d 1035, 1045-49 (2009).

The Eleventh Circuit then adopted the Florida Supreme Court's interpretation of Florida law and affirmed the trial court. *Stevens v. Battelle Memorial Institute*, 561 F. 3d 1200 (11th Cir. 2009). Plaintiff had identified the Ft. Detrick laboratory as a likely source of the anthrax. 488 F. 3d at 898. Ultimately, the anthrax killer proved to be a government scientist, Bruce Ivins, employed at Fort Detrick. The U.S. government recently settled the case for $2.5 million. Scott Shane, "U.S. Settles Suit Over Anthrax Attacks," *New York Times*, November 30, 2011 at A19.

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[2] Likewise, *Robb* also involves claims of affirmative acts by the officers in connection with the stop of Berhe and the high risk that he would return to the location of the stop to retrieve the abandoned shotgun shells that the officers left behind. *Robb v. Seattle,* 159 Wn. App. 133, 137 and 147, 245 P.2d 242 (2010); *See also* Respondent's Consolidated Answer to Amicus Briefs at 7-9.

2. FBI Agents' Liability for Leak of Information Leading to Murder of Informant by "Whitey" Bulger.

McIntyre v. United States, 447 F. Supp. 2d 54 (2006) provides a second example of government §302B liability overlooked by the City. In a real-life gangster drama that could have been and was ultimately adapted for the cinema, *McIntyre* concerns the FBI's "handling" of Boston gangster "Whitey" Bulger as a confidential informant – although one is bound to conclude after reading the colorful facts that Bulger "handled" the FBI. The suit alleged--and the trial court concluded in an extensive factual recitation--that Bulger's FBI "handler" negligently tipped Bulger off to a fact that enabled Bulger to identify another man who was informing on Bulger's activities to another FBI agent. Bulger took his revenge and killed the other informant, the gruesome scene being set forth in detail by the court. 447 F. Supp. 2d at 103-104.

Relying on Massachusetts law that in turn relied on *Restatement* §302B for its source of duty, *Id.* at 106-107, the trial court awarded the dead informant's personal representative $3,101,876 under the Federal Tort Claims Act. *Id.* at 119-20. On appeal, the federal government did not challenge the court's holding on duty, but only took issue with its finding that the FBI agent had acted within the scope of employment. The First Circuit affirmed the trial court's decision that he had. *McIntyre v. United States*, 545 F. 3d 27, 38 (1st Cir. 2008).

The *McIntyre* court's source for Massachusetts precedent was laden with irony. The principal precedent it cited, *Jupin v. Kask*, 447 Mass. 141, 849 N.E. 2d 829 (2006), concerned the murder of a

Massachusetts police officer. In *Jupin*, the father of an unstable adult son moved into a home owned by the father's girlfriend, and with the father came the father's sizeable gun collection. The son, known to have a history of violence and mental instability, was nevertheless allowed by the father's girlfriend to have unsupervised access to the home. The girlfriend/homeowner allowed storage of the guns in a cabinet in an apparently easily-burglarized cabinet in the basement and the son stole a .357 magnum which he used to shoot a police officer after the officer stopped him and performed a warrant check. Officer Jupin died of his wounds three years later. In 2009, Officer Jupin's killer was found not guilty by reason of insanity. *See*, www.odmp.org/officer/16469-patrolman-lawrence-michael-jupin .

The Massachusetts Supreme Judicial Court held that the homeowner had a duty of reasonable care under these circumstances to ensure that the guns were properly secured. First citing §302, the court reiterated as a general principle that every actor has a duty to exercise reasonable care to avoid physical harm to others but acknowledged that the duty was bounded by the principle that the risk of harm extend only to those foreseeably endangered by his or her conduct with respect to all risks which make the conduct unreasonably dangerous. Although there was normally no duty to protect others from the crimes of third persons, the court found in *Restatement (Second) of Torts* §302B an important exception to that general rule. *Jupin*, *supra*, 849 N.E. 2d at 834-38.

3. The Two Cases Cited by the City are Inapposite.

The City briefly quotes from *Webb v. University of Utah*, 123 P. 2d 906 (Ut., 2005) as one of two non-Washington cases involving application of §302B to governmental defendants. But *Webb* is a poor choice. For nowhere in the Utah Supreme Court opinion, or in the Utah Court of Appeals that it reversed – 88 P. 3d 364 (1994) – is there any citation, much less a discussion, of *Restatement* §302B.

To be sure, the Utah Court of Appeals mentions §302 –not §302B– in a footnote that speaks only of the "distinction between act and omission" that "determines whether plaintiff must demonstrate a special relationship." 88 P. 3d at 366, n. 3. The Utah Supreme Court neither discusses nor cites §302 or §302B. Rather, its holdings focus on whether a college instructor's direction to traverse an icy sidewalk created some sort of duty under Utah's version of tort law which, unlike §302B, makes a policy distinction between a private party's affirmative act and that of a governmental actor. 125 P. 3d at 909, The City does not attempt–indeed, it cannot–show that such a distinction is the law of Washington.[3]

Finally, the City inaccurately cites *Poliny v. Soto*, 178 Ill. App. 3d 203, 533 N.E. 2d 15 (1988) as the only other case on governmental §302B liability–and in support of its contrived policy argument against making

[3] What is more, the City does not show - cannot show - that §302B has ever been discussed by a Utah court of record in the context of duty or negligence. The only opinions even mentioning §302B are both about proximate cause. *See, Mitchell v. Pearson Enterprises*, 697 P. 2d 240, 246 (Ut., 1985); *Cruz v. Middlekauf Lincoln-Mercury, Inc.*, 909 P. 2d 1252, 1257 (1996).

police liable for failure to "protect future victims." Br. of Appellant at 22. What the City fails to state is that *Poliny* was controlled by a statute– section 4-102 of Illinois' Tort Immunity Act:

> [N]either a local public entity nor a public employee is liable ... for failure to provide adequate police protection or service, failure to prevent the commission of crimes and failure to apprehend criminals. (Ill. Rev.Stat.1985, ch. 85, par. 4-102.)

Poliny, *supra* at 17. No such statute appears in the Revised Code of Washington. [4] The only relevant exception under Illinois law to the *Poliny* decision was whether a special relationship had been created by the witness' identification of the suspect to police; the court held that no such relationship, imposing a "special duty" had been shown. *Id.* at 317-319.

In *Poliny,* the Illinois Court of Appeals examined plaintiff's rather ill-defined public policy argument that sought to impose another exception to the statute immunizing the government for inadequate police protection. This argument rested on the foreseeability doctrine contained in §§302B and 448. The court declined to accept plaintiff's policy argument citing, as quoted by the City, the burden such a rule would cause the police.

But here, Respondent Robb and Division One would impose no comparable burden. Reasonable care would have merely meant, under these narrow circumstances, picking up the apparently abandoned shotgun

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[4] The Washington Legislature has declined Attorney General McKenna's invitation to adopt legislation to narrow Washington's "open-ended" waiver of sovereign immunity by adopting specific statutes to "precisely define the extent of liability for state and local government functions." Tardiff & McKenna, "Washington State's 45-Year Experiment in Governmental Liability," 29 Seattle U Law Rev. 1, 50 (2005).

shells ten feet away and specifically noticed by the police when they stopped Berhe and his companion. Abandoned shotgun shells on a public street do not enjoy a constitutional liberty interest, although one would never know this from the overheated arguments of the City and its amici. Given these officers' knowledge of Berhe's mental instability and the dangerous nature of these shotgun shells, the risk to a future victim was certainly foreseeable -- the type of risk identified in comment e to §302B.

At heart, this case is best understood in the light of Benjamin Cardozo's oft-cited observation:

> It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all.

Glanzer v. Shepard, 233 N.Y. 236, 239, 135 N.E. 2d 275, 276 (1922).

Having undertaken to stop Berhe and his companion, and having taken control of the scene, reasonable care required the officers to merely pick up the shotgun shells, for it was foreseeable to anyone with a modicum of common sense that those shells presented a "recognizable high degree of risk of harm" to those foreseeably endangered by their misuse. *Restatement* §302B *supra* at comment e.

C. The Public Duty Doctrine Does Not Bar A Claim Based On §302b of the *Restatement.*

1. Introduction.

Petitioner City of Seattle and Amici Association of Washington Cities, et al., essentially argue that the public duty doctrine with its "four exceptions" is the *sine qua non* in all cases involving police liability for

negligence and that where the four defined exceptions to the public duty doctrine do not apply, a governmental actor can never be liable.[5] (Supp. Brief of Petitioners at 1-2 and Brief of Amici at 5.) That analysis ignores additional, recognized exceptions to the doctrine established by this Court in cases such as *Petersen vs. State*, 100 Wn.2d 421, 671 P.2d 230 (1983) and *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992) , in accordance with the *Restatement (Second) of Torts* §§ 315 and 319. That analysis also fails to analyze this Court's decision in *Mason v. Bitton,* 85 Wn.2d 321, 534 P.2d 1360 (1975) (innocent victim injured by motorist being pursued by police in a high speed chase), as well as other cases where duties have been recognized to tort victims, irrespective of the public duty doctrine.

2. The History of the Public Duty Doctrine in Washington.

In 1961, the Washington Legislature abolished sovereign immunity. RCW 4.92.090. That abolition was extended to apply to local government liability in 1967. RCW 4.96.010. Early cases "recognized a narrowly circumscribed exception" to the abolition of sovereign immunity in cases involving discretionary acts at a truly executive level. *Chambers-Castanes v. King County,* 100 Wn.2d 275, 281, 669 P.2d 451 (1983), citing *Evangelical United Brethren Church of Adna v. State,* 67 Wn.2d 246, 407 P.2d 440 (1965); *Mason v. Bitton,* 85 Wn.2d 321, 534 P.2d 1360 (1975) and *King v. Seattle* 84 Wn.2d 239, 525 P.2d 228 (1974).

[5] (1) Legislative Intent, (2) Failure to Enforce, (3) Rescue Doctrine and (4) "Special Relationship"

The first Washington cases to consider the public duty doctrine were *Chambers-Castanes, supra,* and *J & B Development Company v. King County,* 100 Wn.2d 299, 669 P.2d 468 (1983). This court, in *J&B* summarized the thrust of the doctrine:

> ...the "public duty doctrine" provides generally that for one to recover from a municipal corporation in tort it must be shown that the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general...

100 Wn. 2d at 303. As this court recognized in both *J & B* [6] and in *Chamber-Castanes,* there are exceptions to the public duty doctrine, including a "special relationship" exception, and exception for the "rescue doctrine" and an exception for "failure to enforce." *J & B,* 100 Wn.2d at 305 (special relationship); *Chambers-Castanes,* (citing *Mason v. Bitton, supra*, re: legislative intent); *Campbell v. Bellevue*, 85 Wn.2d 1, 530 P.2d 234 (1975), (special relationship). As the case law later developed, the four often cited exceptions to the public duty doctrine were articulated. *Bailey v. Forks,* 108 Wn.2d 262, 267-268, 737 P.2d 1257 (1987).

In *Bailey* this Court recognized that the continued reiteration of the public duty doctrine has been attacked as "...perpetuating sovereign immunity in the guise of the public duty doctrine." 108 Wn. 2d at 267, citing Justice Utter's concurrence in *Chambers-Castanes, supra*, 100

[6] Later abrogated in *Taylor v. Stevens County,* 111 Wn. 2d. 159, 759 P.2d 447 (1988).

Wn.2d at 291.[7] Justices Chambers, Ireland and Sanders expressed the opinion that government liability cases should be based on a traditional tort law analysis and without reference to the public duty doctrine which has added confusion, rather than clarity to the law. *Babcock v. Mason County Fire District,* 144 Wn.2d 774, 799-802, 30 P.3d 1261 (2001) (Chambers, concurring; see also Justice Sanders dissent, 144 Wn.2d at 806) More recently, in *Cummins v. Lewis County,* 156 Wn.2d 844, 861, 133 P.3d 458 (2006), Justice Chambers examined the history of the public duty doctrine. That opinion observes that the doctrine, in its early

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[7] Whether the public duty doctrine should be abolished in Washington is a question that Justices Utter and Chambers have posed on a number of occasions. Justices Ireland and Sanders have joined opinions raising that question. *See also, for example,* Dobbs, *The Law of Torts* at §271, 275-277 (2000); *Natrona County v. Blake* 81 P.3d 948 (Wy., 2003) (abrogating public duty rule in a case involving section 319 of the Restatement of Torts); *Ficek v. Morken*, 685 NW.2d 98, at 104 (N.D. 2004) (refusing to adopt public duty doctrine under North Dakota law). There, the Court recognized:

> "While a sizeable number of jurisdictions still adhere to the public duty rule, ... the trend has been to abolish the rule." *Jean W. v. Commonwealth*, 414 Mass. 496, 610 N.E.2d 305, 312 (1993) (Liacos, C.J. concurring) ... *See e.g. Adams v. State,* 555 P.2d 235, 241 (Alaska 1976); *Ryan v. State*, 134 Ariz. 308 , 656 P.2d 597, 599 (1982); *Leake [v. Cain],* 720 P.2d [152,] at 160 [(Colo. 1986)]; *Martinez v. City of Lakewood*, 655 P.2d 1388, 1390 (Colo. App. 1982); *Commercial Carrier Corp. v. Indian River County,* 371 So. 2d 1010, 1015 (Fla. 1979); *Wilson v. Nepstad,* 282 N.W.2d 664, 674 (Iowa 1979); *Maple v. City of Omaha*, 222 Neb. 293, 384 N.W. 2d 254, 260 (1986), *Schear v. Board of County Comm'rs.,* 101 N.M. 671, 687 P.2d 728, 731 (1984); *Thompson v. Waters*, 351 N.C. 462, 526 S.E.2d 650, 652 (2000); *Wallace v. Ohio Dept of Commerce,* 96 Ohio St. 3d 266, 773 N.E.2d 1018, 1032 (2002) [in cases in the Court of Claims]; *Brennen v. City of Eugene,* 285 Or. 401, 591 P.2d 719, 725 (1979); *Hudson v. Town of East Montpelier,* 161 Vt. 168, 638 A.2d 561, 566 (1993), *Coffey v. City of Milwaukee*, 74 Wis. 2d 526, 247 N.W.2d 132, 139 (1976) ...

incarnation, "served as a focusing tool for the Court in narrow circumstances." 156 Wn.2d at 866. Justice Chambers' opinion goes on to note some of the confusion in the opinions with respect to the "special relationship" concept, as well as the ad-hoc development of the public duty doctrine under Washington law.

> The doctrine was a judicial creation and has evolved on a case-by-case basis with this court looking only backward, seizing the doctrine and molding it the facts of whatever case is currently before it. This court has never once laid out an analytical basis for the doctrine, nor ever meaningfully why it is applied to some tort actions and not others. This court has never looked with foresight to consider the potential ramifications of its judicial interference with the legislative waiver of sovereign immunity.

156 Wn.2d at 862.

3. This Court Recognizes Governmental Tort Liability is Not Restricted to the Four Articulated Exceptions to the Public Duty Doctrine.

In *Bailey* this Court recognized other circumstances beyond the four articulated exceptions where the public duty doctrine was inapplicable. In *Bailey*, at 268, this Court recognized that it has "...not applied the public duty doctrine where the State engages in a proprietary function such as providing medical or psychiatric care," citing *Petersen v. State,* 100 Wn.2d 421, 671 P.2d 230 (1983) (negligent release of mentally disturbed patient). As this Court subsequently explained in *Taggart v. State,* 118 Wn.2d 195, 218, n.4, 822 P.2d 243 (1992), "*Petersen*'s adoption of § 315 effectively created another exception to the public duty doctrine, and it has been so regarded in later cases," citing *Bailey*, *inter alia.* In other words, as recognized by *Taggart* and *Bailey,* this Court

recognized that the "special relationship" to control the conduct of a dangerous third party, whether under §315 or §319 of the *Restatement (Second) of Torts*, is a different type of a "special relationship" than the exception to the public duty doctrine where the government has established a "special relationship" through expressed assurances made directly to the tort victim, as in *Chambers-Castanes.* [8]

Liability under §302B of the *Restatement*, which imposes a "duty" in relation to affirmative acts that result in harm to a foreseeable victim, is analogous to liability under §315 and §319 of the *Restatement* and this "fifth" exception to the doctrine. In *Taggart,* this Court found that the relationship between a parole officer and a parolee was sufficient to establish liability under §319 of the *Restatement (Second) of Torts*, just as this Court had earlier found that the psychiatrist's obligations to control the conduct of the dangerous patient established a duty under Section 315. *See also, Parrilla v. King County,* 138 Wn. App.427, 433-437, finding King County liable under §302B, citing *McLeod v. Grant County School District No. 128,* 42 Wn. 2d 316, 321, 255 P.2d 360 (1953) (school district liable for attack against student). In *Parrilla,* a bus driver who left the keys in a bus when he left the coach, due to the assaultive behavior by one

[8] Whether specific provisions of the *Restatement* render the public duty doctrine inapplicable, as Respondent's Consolidated Answer to the Briefs of Amici Association of Washington Cities, et al argues at 7-8, or whether the specific duties set forth in the *Restatement* constitute additional exceptions to the doctrine, as articulated in *Taggart*, the result is the same: the public duty doctrine does not bar a claim by a foreseeably harmed individual whose injuries result from the failure of the actor to control a scene, a dangerous instrumentality or a dangerous person, whether the source of that duty is §302B, §315 or §319.

of the passengers, created an unreasonable risk to the other passengers who were still on board. Sections 302B, 315 and 319 all concern the duty of individuals to anticipate those circumstances where the risk of harm by criminal conduct of a third party is foreseeable. The abolition of sovereign immunity in 1961 (state) and 1967 (subdivisions) requires that private and governmental actors be held to the same standard, except insofar as recognized immunity doctrines and statutes provide defenses.

> (1) All local governmental entities, whether acting in their governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their ... employees ... to the same extent as if they were a private person or corporation.

RCW 4.96.010.

4. Washington Law Recognizes Other Circumstances Where Governmental Liability Is Established, Irrespective of the Public Duty Doctrine.

Apart from the cases where governmental actors have the responsibility to control the conduct of third parties, such as *Taggart* and *Petersen,* there are a myriad of other circumstances where governmental liability is indisputable and where the public duty doctrine has never been discussed. In *Mason v. Bitton, supra,* 85 Wn.2d 321, 325, 534 P.2d 1360 (1975), Seattle Police and Washington State Patrol defendants argued that their obligations under the vehicle code to "...act with due regard for the safety of others..." in accordance with RCW 46.61.035 was limited and did not apply to instances where a police vehicle was not itself involved in an accident, but where, instead, the motorist who was being pursued at a high rate of speed caused the collision. The law enforcement defendants

claimed to have no duty to the third party who was involved in the collision with the subject being pursued. In rejecting the law enforcement defendants' arguments, this Court reasoned:

> ...the statutory construction urged by the defendants would impose only half a duty and would disregard the intended purpose underlying the statute; *i.e.*, to provide for the safety of all persons and property from *all consequences* resulting from the negligent behavior of the enforcement officers. The safety of those individuals within the intended class of persons protected by RCW 46.61.035 can be jeopardized just as much by the negligence of the pursuer as it can by the negligence of the party being pursued. The defendants' own policy statements recognize that at times it would be more prudent to cease a pursuit in order to protect the public. This clearly evidences that the defendants are aware that innocent third parties may be injured by the individual being pursued, and that it is their responsibility to determine whether the purpose of the pursuit warrants the risk.

85 Wn.2d at 325-36.

Similarly, governments have duties to provide for reasonably safe roadways, bridges and sidewalks. *Albin v. National Bank of Commerce,* 60 Wn.2d 745, 747-48, 375 P.2d 487 (1962) (obligation to keep roads in reasonably safe condition for ordinary travel); *Kurtly v. Spokane County,* 20 Wn. 111, 54 P. 936 (1898) (bridge maintenance). Since the development of the public duty doctrine, this Court continues to find that municipalities have the duty to maintain roads that are reasonably safe for ordinary travel, irrespective of the public duty doctrine. This Court held that "...a municipality owes a duty to all persons, whether negligent or fault free, to build and maintain its roadways in a condition that is reasonably safe for ordinary travel..." *Keller v. City of Spokane,* 146

Wn.2d 237, 249, 44 P.3d 845 (2002). *See also, McCluskey v. Handorff-Sherman,* 125 Wn.2d 1, 882 P.2d 157 (1994). There, the State was found liable on a common law claim for negligent maintenance of an unsafe highway, notwithstanding arguments by the State that it was immune for fiscal decisions based on RCW 47.01.071, the priority array statute. That statute establishes a priority process to determine highway improvements, based on funding. Due to the waiver of sovereign immunity in 1961 with the adoption of RCW 4.92.090, this Court recognized that the State could be liable, though it was entitled to present evidence on funding limitations as a defense, to establish that its actions were reasonable due to financial considerations addressed in the priority array statute. 125 Wn.2d at 9-10. Hence, with respect to the governmental obligation of maintaining highways that duty owed to the traveling public is not limited by the public duty doctrine.

Municipal liability for ill-maintained sidewalks and parking strips has been well established, even prior to the abolition of sovereign immunity in the 1960s. *See*, e.g., *Wilson vs. Seattle,* 146 Wn. App. 737, 741, 134 P. 3d 997 (2008), citing *Fletcher v. City of Aberdeen*, 54 Wn.2d 174, 338 P.2d 743 (1959) and *Hunt v. City of Bellingham,* 171 Wash. 174, 17 P.2d 870 (1933). Nor is the public duty doctrine applicable to governmental functions of providing water or sewer service. *Borden v. City of Olympia,* 113 Wn. App. 359, 371, 53 P.3d 1020 (2002).

5. A Framework to Approach the Public Duty Doctrine.

A consistent approach to the public duty doctrine necessarily

harmonizes basic principles.

First, abrogation of sovereign immunity by the legislature in accordance with RCW 4.92.090 and 4.96.010 means that governmental defendants should be entitled to no special treatment with respect to duty under generally recognized tort principles. [9]

Second, it is essential to recognize those cases to which the public duty doctrine has no application, *e.g.,* those cases where the statutory or common law basis for governmental liability is well established. This includes such cases as *Mason v. Bitton, supra, Petersen v. State, supra* and *Taggart v. State, supra,* as well as cases where governmental liability was well established prior to the abrogation of sovereign immunity.

Third, the purpose of the public duty doctrine, to protect the government from an excessive exposure of liability for that conduct which is exclusively governmental in nature must be balanced against the harm to innocent parties that results from governmental negligence. The four well identified exceptions to the Public Duty Doctrine, plus the fifth exception with respect to the duty to control the tortious conduct of third parties (as in *Petersen* and *Taggart)* have been developed in recognition of that obligation to protect the innocent. To the extent that §302B of the *Restatement (Second) of Torts* recognizes a duty with respect to dangerous instrumentalities within the control of a party, application of §302B to the question of duty does not represent any principled change or expansion to

[9] As discussed above, many Justices have questioned whether the doctrine is even consistent with the abrogation of sovereign immunity.

the recognized exceptions to the public duty doctrine any more than §§ 315 and 319 of the *Restatement.*

Fourth, the limitation of the public duty doctrine to cases of negligence, and the inapplicability of the doctrine to cases involving intentional torts, must be maintained. *Vergeson v. Kitsap County,* 145 Wn. App 526,543-44, 186 P.3d 1140 (2008) (distinguishing application of public duty doctrine between negligent and intentional tort claims, such as false arrest); *Babcock v. Mason County Fire District Number 6,* 144 Wn.2d 774, 785, 30 P.3d 1261 (2001) (articulating public duty doctrine as applying to negligent conduct cases).

Fifth, any framework for continued use of the public duty doctrine, as a "focusing tool," should also take into account the range of governmental immunity doctrines that also serve to protect government from excessive financial risk. Those immunity doctrines include qualified immunity, absolute immunity for prosecutorial or judicial functions, and discretionary function immunity for policy decisions, to name a few. *See, e.g. Taggart v. State,* 118 Wn.2d 195, 203-209, 822 P.2d 243 (1992) (extending judicial immunity and providing a qualified absolute immunity to the parole board); *Evangelical Church, supra,* 67 Wn.2d at 254-55 (immunity for discretionary, as apposed to ministerial acts); *Chambers-Castanes v. King County, supra,* 100 Wn.2d at 282 (discretionary immunity for basic policy decisions by executive officials); *Guffey v. State,* 103 Wn.2d 144, 690 P.2d 1163(1984) (police officers entitled to qualified immunity under State law for good faith actions); *Babcock v.*

State, 116 Wn.2d 596, 618, 809 P.2d 143 (1991) (qualified immunity for case workers carrying out statutory duties, according to procedures set forth by regulations and their superiors, where case workers act reasonably). *Creelman v. Svenning,* 67 Wn.2d 882, 883, 410, P.2d 606 (1966) (prosecutorial immunity).

In the end, any analysis of the public duty doctrine in relation to governmental tort liability should adhere to the general principle that:

> Parties who suffer personal injury or property damage due to the negligence of employees of the State are able to bring suite for damages subject to procedural rules. *See, e.g., Medina v. Pub. Util. Dist. No. 1 of Benton County,* 147 Wn.2d 303, 53 P.3d 993 (2002)...

M.W. v. DSHS, 149 Wn.2d 589, 601, 70 P.3d 954 (2003).

III. Conclusion.

§302B properly served as a source of duty in Division One's analysis. The public duty doctrine does not alter the scope or bar the application of §302B to the officers' affirmative acts, here. The Superior Court and the Court of Appeals decisions should be affirmed.

RESPECTFULY SUBMITTED this 8th day of December, 2011.

FAMILIES AND FRIENDS
OF VIOLENT CRIME VICTIMS

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