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Court of Appeals No. 63299-0-I

**IN THE SUPREME COURT
OF THE 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; OFFICER PONHA LIM,

Petitioners,

FILED
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STATE OF WASHINGTON

**RESPONDENT ELSA ROBB'S RESPONSE TO BRIEF OF THE
WASHINGTON ATTORNEY GENERAL, AMICUS CURIAE**

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I. INTRODUCTION

As the Court of Appeals properly concluded, the duty of care at issue in this case is a common law duty based on affirmative acts, a recognizable high degree of risk of harm, and the general tort principles set forth in Restatement §302B cmt. e. Comment e provides, in part:

There are . . . situations in which the actor, as a reasonable man, is required to anticipate and guard against the intentional, or even criminal, misconduct of others. In general, these situations arise where . . . the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account.

Contrary to the argument of Amicus Washington Attorney General (AG), this case does not involve a “generalized common law duty to prevent crime.” Nor is it about a “negligent failure to identify a suspect, negligent failure to arrest a suspect, and negligent failure to prevent crime.”¹ This case involves the affirmative acts of police officers in stopping two young men and taking control of the investigation scene with knowledge of a recognizable high degree of risk of harm. During the investigative stop of the two burglary suspects, one of whom was Samson Berhe, the officers frisked the young men for weapons, saw yellow shotgun shells on the ground nearby, questioned the young men, released Berhe and, after 20 minutes of further investigation, decided to leave the scene of the stop and leave the visible shotgun shells still lying on the ground. At the time of the stop, the officers knew that Berhe was mentally disturbed, in possession of a

¹ AG Brief at 1.

stolen shotgun, and had threatened to harm his family and to kill. Within minutes of the officers' departure from the scene of the stop, Berhe returned to the scene, picked up the shotgun shells, loaded the stolen shotgun, and fatally shot Michael Robb with one of the shells the officers had left behind.

The Washington Supreme Court and Court of Appeals have applied Restatement (Second) of Torts §302B cmt. e to both private and public actors to determine whether negligence liability should attach under the particular facts of a case. Petitioners do not question the applicability of Restatement §302B cmt. e in an appropriate case.² The application of these common law tort principles to government actors will not restrain law enforcement or burden local government.

Imposing liability in an affirmative act case under Restatement §302B where justified, especially considering the limited circumstances required to find liability under that section, will appropriately promote careful work by police officers in the field and “may be the only way of assuring a certain standard of performance” from police officers when they engage in an investigatory stop. *Bender v. City of Seattle*, 99 Wn.2d 582, 590, 664 P.2d 492 (1983).

The appropriate context for determining tort liability for governmental law enforcement activity is the common law of torts and the Legislature's abolition of sovereign immunity, not the public duty doctrine. In 1967, the Legislature categorically waived sovereign immunity for local government entities such as the City of Seattle. In language that has remained the same for 45 years, the statute provides in pertinent part:

² Petitioners' Consolidated Response to Amici Briefs at 1.

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

RCW 4.96.010(1).

The public duty doctrine is not applicable in this case and cannot be interpreted to grant governmental law enforcement entities a new shield of sovereign immunity. As this Court made clear in *Osborn*:³

Because a public entity is liable in tort “to the same extent as if it were a private person or corporation . . .” the public duty doctrine does not — cannot — provide immunity from liability. . . The public duty doctrine simply reminds us that a public entity — like any other defendant — is liable for negligence only if it has a statutory or common law duty of care.

157 Wn. 2d at 27-28.

Imposing liability on the Petitioners in this affirmative acts case under Restatement §302B will not subject governmental law enforcement entities to unlimited liability. As the Court of Appeals observed:

Seattle raises the specter of unlimited governmental liability, but the limitations supplied by *Restatement (Second) of Torts* §302 and its comments provide focus to the duty of protection owed in connection with affirmative acts.

Robb, 159 Wn.App. at 145.

Nor will the recognition of a duty here adversely impact the procedures employed by the police when conducting investigatory stops. Indeed the SPD’s

³ *Osborn v. Mason Cty.*, 157 Wn.App.18, 134 P.3d 197 (2006).

own policies, applicable at the time of the conduct at issue here, authorized the police to confiscate dangerous items, like the explosive shotgun shells the officers here decided to leave on the ground.⁴

In only a narrow range of cases will the foreseeable risk of harm rise to the level required under §302B cmt. e. *See Taggart*, 118 Wn.2d at 218-19.⁵ The fact-based policy considerations at play in deciding proximate cause provide further reasonable limits on liability. *See Chambers-Castanes*, 100 Wn.2d at 292.⁶ These traditional tort principles encourage police accountability while protecting against unlimited liability.

II. ARGUMENT

A. RCW 9.41.0975 Is Irrelevant To This Court's Tort Law Duty Analysis Under §302B Cmt. e Involving The Officers' Affirmative Acts During The Investigative Stop.

The AG points to RCW 9.41.0975 and contends that “[i]t is illogical for the law to provide the officers statutory immunity for the failure to prevent the unlawful sale or transfer of the shotgun to Berhe while, at the same time imposing liability for failure to prevent Berhe from lawfully possessing shotgun ammunition.”⁷ That argument is misguided, since this case does not involve liability for the sale or transfer of a firearm.

⁴ SPD Policy and Procedure Manual provides that officers have “legal authority to take certain types of property into possession . . . [including] [a]ny item that is dangerous or illegal to possess or presents a danger to the public.” *Section 2.049, Evidence, Private Property Collection & Release, I.D.2. CP 852.*

⁵ *Taggart v. State*, 111 Wn.2d 195, 822 P.2d 243 (1992).

⁶ *Chambers-Castanes v. King Cty.*, 100 Wn.2d 275, 669 P.2d 451(1983).

⁷ AG Brief at 10.

RCW 9.41.0975 is part of the Washington Uniform Firearm Act enacted in 1994. The statute, in effect, immunizes law enforcement when acting in good faith, from liability for failing to prevent the unlawful sale or transfer of a firearm. Preventing the sale or transfer of a firearm is not at issue in this case.⁸

It is common knowledge that officers when they are sworn in take an oath to uphold the law. If when the officers stopped Berhe on June 26, 2005, a shotgun was clearly visible on the ground nearby Berhe instead of shotgun ammunition, the officers would have known that Berhe could not legally possess a shotgun. CP 214-15, 260. Assume further that the officers also knew or should have known (as they actually did here) that shotguns and ammunition were stolen from a residence in their Precinct area earlier in the week. If the officers had departed the scene of the stop and left the shotgun on the ground, it is doubtful that they would raise the immunity of RCW 9.41.0975 if Berhe had returned, picked up the shotgun and shot someone. And if they did raise such a defense, it would be unsuccessful because leaving a dangerous item in the hands of a deranged youth is not the same as the failure to prevent the sale or transfer of a firearm. Likewise, leaving explosive shotgun shells with Berhe under the circumstances of this case is not the same as failure to prevent the sale or transfer of a firearm.

⁸ The Uniform Firearm Act also provides that possession of a firearm (which includes a shotgun) by a juvenile under 18 is a class C felony. RCW 9.41.040(2)(a)(iii). It is also illegal for a dealer to sell ammunition to a minor. 18 U.S.C. §922(b)(1). "Police officers are presumed to know the penal laws." *Coffel v. Clallam Cty.*, 58 Wn.App. 517, 523, 794 P.2d 513 (1990).

B. Alleged Impact On Terry Stop Protocol Is Also Not An Issue In This Case.

Amici also attempt to invoke public policy to defeat Robb's common law tort claim on the basis that the investigative stop during which the officers failed to exercise reasonable care was a *Terry* stop. They contend that recognizing a duty in this case will have ramifications for all future *Terry* stops in Washington. This is simply not true, for at least two reasons: (1) this is a tort case, not a constitutional law case; and (2) recognizing a duty in this case not to leave explosive shotgun shells with a mentally disturbed young man would not have violated any *Terry* stop protocol nor would it affect any *Terry* stop protocol in the future.

First, *Terry* doctrinally relates only to the rights of the person stopped [here Berhe] under the Fourth Amendment to the U.S. Constitution and article I, section 7, of the Washington State Constitution. Here, the Court is solely concerned with the existence of a common law tort duty, not Berhe's constitutional rights. This case does not involve the rights of a criminal suspect under the federal or state constitutions.

Second, the duty not to leave shotgun shells with a mentally unstable young man who posed a known, highly recognizable risk of grave harm, would not implicate *Terry* or Washington public policy. Significantly, the SPD's own policy and procedure manual authorized the officers to confiscate the dangerous shells.⁹ All they needed to do was bend down, pick up the shotgun shells,

⁹ See n.4, *supra* at 4.

transport them to the station house and complete a property report. The Court's recognition of the officers' duty to do so would not affect SPD policies or procedures during a *Terry* stop.

This is a simple tort case. Upholding a common law tort duty here would cause no confusion about the scope of a *Terry* stop in Washington. Existing SPD policies and procedures, if they had been properly applied here, would have satisfied the officers' duty to exercise reasonable care and Michael Robb's death would not have occurred. But the officers did not satisfy their duty to exercise reasonable care and not leave the shotgun shells with Berhe. As the Court of Appeals stated:

[I]t should not be surprising that tort liability can be imposed if officers take control of a situation and then depart from it, leaving shotgun shells lying around within easy reach of a young man known to be mentally disturbed and in possession of a shotgun. A jury could find that the affirmative acts of the officers in connection with the burglary stop created the risk of Berhe coming back for the shells and using them intentionally to harm someone, a risk that was recognizable and extremely high. Under these circumstances, the officers owed Robb a duty in tort to protect against Berhe's criminal misconduct.

Robb, 157 Wn.2d at 147.

C. **Restatement §302B Cmt. e Liability Does Not Require The Officers To Furnish The Shotgun Shells, Nor Must *Robb* Fall Within The Illustrations Accompanying Comment e.**

The AG's argument that §302B cmt. e liability can be applied only against an actor who furnishes property that exposes another to a recognizable high degree of risk of harm is unsupported and incorrect. Nothing in Washington law,

or in the words of §302B cmt. e, or in the other related §302 provisions and comments, states a requirement that the actor furnish the instrumentality involved in the case.

Nor is the scope of the §302B cmt. e tort rule narrowly limited to the precise factual situations described in the illustrations following the comment.

Comment e's preface to the illustrations makes this clear:

The following are examples of such situations. The list is not an exclusive one, and there may be other situations in which the actor is required to take precautions.

Negligence law is rooted in the common law, which develops through the case law decisions of the courts. *See Black's Law Dictionary* 144 (5th ed. 1983). The case-specific application and development of negligence principles through court decisions is neither constrained by nor limited to the illustrations in the comments to particular Restatement sections. The AG's attempt to limit the scope of a duty under §302B cmt. e to the situations set forth in the accompanying illustrations is contrary to the common law nature of negligence and to the express non-exclusive qualification introducing the illustrations.

The AG misses the point in arguing that the bus driver in *Parrilla*, by leaving the bus with its engine running, *gave* the passenger the bus, whereas in *Robb* the officers did not give the shells to Berhe. The officers left the shells on the ground (despite police policy authorizing them to confiscate such dangerous property), knowing that Berhe had a shotgun, was mentally unstable, and had threatened to kill. In light of this knowledge, the officers effectively gave Berhe

access to the shells just as the *Parrilla* bus driver provided access to the bus to the disturbed passenger.

The Court of Appeals correctly concluded that based on the officers' affirmative acts and §302B cmt. e, Robb established that defendants owed him a duty of care. *Robb*, 159 Wn.App. at 147. By so holding, the court did not blur the doctrinally critical, classic tort line between affirmative acts and omissions. In determining what constitutes an affirmative act, one must consider the actor's entire course of conduct in increasing a risk of harm. An illustration of this point is the example of a driver who fails to apply his or her brakes to avoid hitting a pedestrian walking in a crosswalk. Even though the driver's negligent act- failing to apply the brakes - is a failure to do something, the driver's careless failure to apply the brakes is negligent driving, not negligent failure to apply the brakes. To hold that the failure to apply the brakes in the course of driving is an omission, relieving the driver of a duty of care to the pedestrian, would be twisted logic and no court would so hold.

In this case, the officers' duty of care is based on their engaging in an investigative stop which consisted of many affirmative acts including stopping Berhe and Valencia, frisking them for weapons, seeing the visible yellow shotgun shells, questioning Berhe, releasing him, and after 20 minutes departing from the scene of the stop and leaving the shotgun shells on the ground, with knowledge all during this time that Berhe had a shotgun and was threatening to kill. This is the evidence from which the Court of Appeals determined there was a duty of care.

The officers' act in leaving the shells with Berhe is the breach of that duty of care, an issue that will be determined by the jury.

D. To The Extent A Private Sector Analogue Is Required For Waiver of Sovereign Immunity, Robb Has Provided It.

The Legislature has in broad terms abolished sovereign immunity for municipal entities such as the City of Seattle.¹⁰ The Washington Supreme Court has characterized the waiver as one of the broadest in the country. *See Savage v. State*, 127 Wn.2d 434, 444, 899 P.2d 1270 (1995). The AG contends that in order to find a governmental actor liable in tort there must be a private sector analogue. The AG then argues that there is no private sector analogue here and that liability would improperly subject a private actor to tort liability for negligent law enforcement.

This argument is incorrect because Washington courts have found governmental tort liability for conduct having no private analogue, such as the negligent supervision of parolees (*Taggart*, 118 Wn.2d at 216-25) and the failure to dispatch law enforcement to the scene of a crime (*Chambers-Castanes*, 100 Wn.2d at 286).

Furthermore, the AG's argument is erroneous because, as amicus WSAJF points out:

[T]here is a private analogue to a Terry stop embodied in a shopkeeper's privilege to detain suspected shoplifters. RCW 4.24.220. In any event the duty imposed by Restatement §302B &

¹⁰ RCW 4.96.010(1)

cmt. e does not make a distinction between public and private actors, let alone impose a more expansive duty on public actors.¹¹

The conduct of police officers involved in a *Terry* stop is analogous to the conduct of security guards at a Shopping Mall or a private security firm at a housing development when they take control of an investigation scene. In *J & B Dev. Co. v. King Cty*, 100 Wn.2d 299, 311, 669 P.2d 468 (1983), Justice Utter concurring in the result, noted that “[i]n a case involving the negligence of law enforcement personnel, such as in *Chambers-Castanes v. King Cy, supra*, we might analogize to the negligence of a private security firm hired by a large condominium association.”

E. Washington Law Establishes That The Four Traditional Exceptions To The Public Duty Doctrine Are Not Exclusive.

The Court of Appeals correctly rejected the Petitioners’ contention that “the public duty doctrine bars Robb’s negligence action because none of the four exceptions to the doctrine are present.” *Robb*, 159 Wn.App. at 247-48. The Court of Appeals noted that “Seattle cites no authority to support this categorical statement.” *Id.* The Petitioners and Amici continue to fail to cite any authority to support their erroneous categorical statement.¹²

With the abolition of sovereign immunity, government actors like private actors are liable for negligence if they owe a statutory or common law duty of care. *See Osborn*, 157 Wn.2d at 28. The common law negligence duty recognized

¹¹ WSAJF Amicus Brief at 13, n.10.

¹² To this end, “the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.” *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122,126, 372 P.2d 193 (1962).

and confirmed by the Court of Appeals in this affirmative act case is based on the negligence principles embodied in Restatement §302B cmt. e. Comment e describes some of the limited circumstances under which: (1) an actor who affirmatively acts has a duty to protect another against third party conduct where there is a recognizable high degree of risk of harm, and (2) when someone with knowledge there is a recognizable high degree of risk of harm fails to act despite a duty to protect another against third party conduct intended to cause harm. This case does not involve a failure to act. As the Court of Appeals found, *Robb* “is an affirmative acts case” under Restatement §302B cmt. e.¹³ Here, it was the officers’ acts in taking control of the investigation scene and conducting the investigation, coupled with their knowledge about Berhe threatening to kill and his possession of the shotgun which triggered the officers’ duty to exercise reasonable care and pick up the explosive shells (as authorized by SPD policies).

It is sound tort law and sound public policy for the Court to recognize a duty in an affirmative acts case under this established Restatement common law tort principle. This case should proceed to trial because the evidence shows that the officers, when they acted, knew that Berhe was mentally unbalanced; knew he was threatening his family and threatening to kill others; knew or should have known that Berhe possessed a shotgun; and knew that there were explosive shotgun shells nearby at the scene of their investigatory stop. As a result of their affirmative acts in taking control of the stop scene, and their knowledge of the dangers Berhe posed, the officers had an obligation to exercise reasonable care

¹³ *Robb*, 159 Wn.App. at 146-47.

and take a few seconds to bend down and pick up the explosive shotgun shells before they left the scene of the stop in light of the high degree of risk of harm that Berhe posed.

Allowing this affirmative acts negligence case to proceed to trial under the common law negligence principles set forth in §302B cmt. e will not affect the failure to enforce exception to the public duty doctrine as the AG seems to argue. The officers' failure to take Berhe into custody or to arrest him is not an issue in this case. Robb does not claim that the officers had a duty to detain Berhe at the scene of the investigative stop.

In *Coffel v. Clallam Cty.*, 47 Wn.App. 397, 735 P.2d 686 (1987), *rev. denied*, 108 Wn.2d 1024 (1987), the Court of Appeals held that police officers could be held liable in negligence for affirmative acts to prevent plaintiffs from protecting their property. The court thus reversed a CR 12(b)(6) dismissal of those negligence claims, holding that “[t]his [public duty] doctrine provides only that an individual has no cause of action against law enforcement officials for failure to act. Certainly if the officers do act, they have a duty to act with reasonable care.” *Id.* at 403.

The *Coffel* holding that police officers engaging in affirmative acts have “a duty to act with reasonable care” was quoted with approval and followed by the federal district court in *Logan v. Weatherly*, 2006 U.S. Dist. LEXIS 37258 (E.D. Wa. June 6, 2006). The *Logan* court held that the public duty doctrine did not apply to plaintiffs' negligence claims arising from the defendant police officers dispersing pepper spray into a building occupied by a crowd of people.

The court refused to apply the public duty doctrine to bar plaintiffs' claims where the negligence resulted from actions as opposed to inactions. *Id.* at ** 10-12. *See also Garnett v. City of Bellevue*, 59 Wn.App. 281, 286, 796 P.2d 782 (1990) (finding public duty doctrine inapplicable when the "infliction of emotional distress [by the police officer] was the result of direct contact with the plaintiff, not the performance of a general public duty.")¹⁴ The courts' distinction between actions and omissions is in line with years of common law tort doctrine.

When a governmental entity owes a duty of reasonable care under the common law and acts negligently, the public duty doctrine does not apply. As the Court of Appeals correctly reasoned:

Just as if Seattle were a private person or corporation, its liability to Robb depends upon whether the duty of the officers to protect Robb from the criminal acts of Berhe was distinct from their general responsibility to protect the public from the criminal acts of others. Far from carving out a special immunity for municipalities, the public duty doctrine expresses and affirms this overarching principle of tort law. *Taylor*, 111 Wn.2d at 168; *Osborn*, 157 Wn.2d at 27-28.

159 Wn.App. at 145.

¹⁴ Other courts have held that police officers are liable for their negligent conduct without requiring that a plaintiff demonstrate the inapplicability of the public duty doctrine. *See Turner v. City of Port Angeles*, 2010 U.S. Dist. LEXIS 11447, at *11 (W.D. Wash. Oct. 26, 2010) ("Defendant incorrectly infers that police officers are never liable for their negligent conduct" under Washington law); *Boyles v. City of Kennewick*, 62 Wn.App. 174,178, 813 P.2d 178 (1991) ("a claim for negligence against a police officer is possible . . .").

F. The Morgan And Poliny Cases Which The AG Relies On Are Distinguishable And Do Not State Washington Law.

In *Morgan*,¹⁵ a police officer shot and wounded his alienated wife and son, then shot and killed his wife's father. The officer had a prior history of violent behavior toward his wife which was known to his superiors in the police department. Notwithstanding, the court, relying in part on the decision in *Warren v. District of Columbia*, 444 A.2d 1 (D.C. 1981), concluded that the District of Columbia could not be held liable for damages resulting from the officer's conduct. In so holding, the court applied the District's version of the public duty doctrine, reasoning that the District could be liable only where there was a "special relationship" between the District and the injured party coupled with reliance by the injured party on that relationship. 468 A.2d at 23-27. This holding does not represent Washington law.

In *Chambers-Castanes*, *supra*, the Washington Supreme Court, while recognizing the public duty doctrine in principle, strongly criticized the District of Columbia case law applying the doctrine. The *Chambers-Castanes* Court specifically mentioned the *Warren* decision, which *Morgan* cites as a leading authority for its result, and criticized *Warren* for applying the doctrine so inflexibly. The Washington Court clearly distinguished the District's legal authority on the public duty doctrine:

Clearly *Warren* reached its unfortunate result with a view wholly at odds with this court in the area of privity, actionable duty, the existence of a special relationship between the victim and the

¹⁵ *Morgan v. District of Columbia*, 468 A.2d 1306 (D.C. 1983).

police, the rescue doctrine, as well as the abolition of sovereign immunity and the very limited exceptions thereto.

Chambers-Castanes v. King Cty., *supra*, 100 Wn.2d at 287, n.5. *Morgan* should not be followed in Washington.

The *Poliny* case¹⁶ is distinguishable. In *Poliny*, the court dismissed a negligence action against policy officers for leaving plaintiff unprotected at an arrest scene; on the basis that plaintiff had not proven the applicability of the special duty exception to the Illinois Immunity Act. In particular, plaintiff had failed to allege facts which showed he had been under the officer's control at the time of his injury. In contrast, under Washington law, the §302B cmt. e duty of care can be imposed absent a special relationship. Under the circumstances of this case, the officers were required to take precautions to guard against the foreseeable criminal misconduct of Berhe.

G. The Attorney General's Supplemental Statement Of Facts Is Misleading And Wrong.

On summary judgment," [t]his court must consider all facts and inferences in the light most favorable to the nonmoving party, and the motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion." *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2ds 267, 279, 937 P.2d 1082 (1997). Given the substantial evidence in the record showing that the officers knew of Berhe's dangerous and unstable propensities, and knew or should have known that Berhe possessed a shotgun, the Court of Appeals was correct in affirming the trial court's denial of the City's motion for summary judgment.

¹⁶ *Poliny v. Soto*, 533 N.E.2d 15 (Ill. App. 1988).

Robb, 159 Wn.App. at 243-44. *See also City of University Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001) (witness credibility and proximate cause are issues of material fact to be determined by the trier of fact).

The evidence in the summary judgment record, derived exclusively from police department records, shows the following:

On June 19, 2005, Berhe and his companion, Valencia, stole shotguns and ammunition from a residence approximately one mile from where Berhe lived. Officers from the Southwest Precinct investigated the theft. CP 311-14. Officers McDaniel and Lim are assigned to the same Precinct.

On June 22, Officer Lim and another officer investigated an assault incident at Berhe's home. When the officers approached Berhe, he ranted that he "ruled the world and that all confused people need to be killed & tortured . . . [and] when I rule the world, . . . I'll kill all the haters." Berhe's father told the officers that Berhe had threatened him, and his family was afraid for its safety because of Berhe's mental state. CP 173, 265-69.

On June 23, a Bellevue detective called an officer in the SPD Auto Theft Section and reported that Valencia had told them that Berhe had stolen an automobile and that he had guns under his bed at home. CP 796. The officers knew or reasonably should have known what the Bellevue detective communicated regarding Berhe's possession of a shotgun. *Id.*

On June 24, Berhe's father called 911 to report that Berhe and Valencia were having a fight in the backyard and they both had shotguns. Seven officers from the Southwest Precinct investigated but they did not find the shotguns.

CP 271-82. Berhe had hidden the shotgun in his makeshift shooting range which was in a wooded area near his home and up the hillside from the street where he shot Robb. CP 780.

Officer McDaniel acknowledged that a threatening juvenile with a shotgun was a very serious matter for police officers and the community at large. CP 255-60. Officer McDaniel also stated that Berhe walking around with a shotgun and the theft of guns and ammunition would be the types of incidents that would be posted on the "72-hour wall board" at the Precinct (advising of recent dangerous police incidents) and discussed by the acting sergeant at the beginning of roll call. CP 255-57.

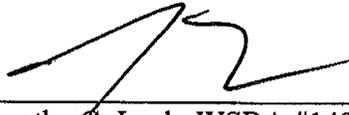
III. CONCLUSION

The Supreme Court should affirm the Court of Appeals decision and remand this case to the Superior Court for trial.

RESPECTFULLY SUBMITTED this 6th day of January, 2012.

DANIELSON HARRIGAN LEYH
& TOLLEFSON LLP

By



Timothy G. Leyh, WSBA #14853
Matthew R. Kenney, WSBA #1420
Attorneys for Respondent Elsa Robb as
Personal Representative of the Estate of
Michael W. Robb

CERTIFICATE OF SERVICE

I, SUSIE CLIFFORD, certify and state as follows:

1. I am a citizen of the United States and a resident of the State of Washington; I am over the age of 18 years and not a party of the within entitled cause. I am employed by the law firm of Danielson Harrigan Leyh & Tollefson, LLP, whose address is 999 Third Avenue, Suite 4400, Seattle, WA 98104.

2. I caused to be served via email upon counsel of record on January 6, 2012, the following documents:

- RESPONDENT ELSA ROBB'S RESPONSE TO BRIEF OF THE WASHINGTON ATTORNEY GENERAL, AMICUS CURIAE
- CERTIFICATE OF SERVICE

Catherine Hendricks cathh@atg.wa.gov

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

DATED at Seattle, Washington, this 6th day of January, 2012.



Susie Clifford

OFFICE RECEPTIONIST, CLERK

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Subject: No. 85658-3; Robb v. City of Seattle, et al.
Importance: High

Elsa Robb, personal Representative of the Estate of Michael W. Robb v. City of Seattle, et al.
Washington Supreme Court No.: 85658-3

Dear Clerk of the Court:

Attached please find the following document for filing in regard to the above matter:

**RESPONDENT ELSA ROBB'S RESPONSE TO BRIEF OF THE WASHINGTON ATTORNEY GENERAL,
AMICUS CURIAE**

Thank you
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