

FILED
FEB 24 PM 2:46

85658-3

No.

Court of Appeals No. 63299-0-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ELSA ROBB, personal representative of the ESTATE OF MICHAEL
ROBB,

Respondent

vs.

CITY OF SEATTLE, a municipal corporation; OFFICER KEVIN
MCDANIEL; OFFICER PONHA LIM,

Petitioners

FILED
FEB 28 2011
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

CITY OF SEATTLE'S PETITION FOR REVIEW

PETER S. HOLMES
Seattle City Attorney

REBECCA BOATRIGHT, WSBA #32767
Assistant City Attorney
Attorneys for Petitioners,
City of Seattle, Officers McDaniel and Lim

Seattle City Attorney's Office
600 Fourth Avenue, 4th Floor
PO Box 94769
Seattle, WA 98124-4769
(206) 684-8200

FILED
FEB 28 PM 2:17

ORIGINAL

TABLE OF CONTENTS

Page(s)

A. IDENTITY OF PETITIONER1

B. THE DECISION OF THE COURT OF APPEALS1

C. ISSUES PRESENTED FOR REVIEW2

 1. Should review be granted under RAP 13.4(b)(1) and (2) because Division I’s decision that the public duty doctrine does not apply conflicts with established Supreme Court and Court of Appeals decisions holding that, absent an exception to the public duty doctrine, there can be no liability in negligence for police activities?3

 2. Should review be granted under RAP 13.4(b)(1) because Decision I’s decision that, in this case, the issue of duty involves questions of fact conflicts with Supreme Court case law affirming that duty is a pure question of law?3

 3. Should review be granted under RAP 13.4(b)(1) because Decision I’s decision that Restatement (Second) of Torts § 302B can create a duty under the facts of this case is in conflict both (1) with Supreme Court decisions holding that there is no general duty to protect against the criminal acts of third parties, and (2) with the language of the Restatement itself and Supreme Court case law recognizing that § 302B does not independently establish a duty that does not otherwise exist in law?.....3

 4. Should review be granted under the public interest element of RAP 13.4(b)(1) because Division I’s published decision subjecting police officers to civil liability for failing to investigate more during a routine, narrowly-circumscribed *Terry* stop raises issues of substantial public interest that should be decided by the Supreme Court?3

D. STATEMENT OF THE CASE3

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.....6

1. Review is warranted under RAP 13.4(b)(1) and (2) because Division I’s decision that the public duty doctrine does not apply to these police negligence claims conflicts with Supreme Court and Court of Appeals decisions holding that, absent an exception to the public duty doctrine, there can be no liability for negligence in police activities.....7

2. Review is warranted under RAP 13.4(b)(1) and (2) because Decision I’s decision that the facts of this case give rise to a duty under Restatement (Second) of Torts § 302B to protect against criminal acts of a third party is in conflict (1) with Supreme Court case law affirming that duty is a question of law, not fact, and (2) with the language of the Restatement itself and Supreme Court case law recognizing that § 302B does not independently establish a duty that does not otherwise exist in law.13

 a) Whether Officers McDaniel and Lim owed Robb a duty in connection with their investigative stop does not involve questions of fact.14

 b) Section 302B does not independently create a duty not otherwise recognized in law.16

3. Division I’s published decision subjecting police officers to civil liability for failing to investigate more during a routine, narrowly-circumscribed *Terry* stop raises issues of substantial public interest that should be decided by the Supreme Court.....19

F. SUMMARY AND CONCLUSION20

APPENDIX.....23

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Aba Sheikh v. Choe</i> , 156 Wn.2d 441, 128 P.3d 574 (2006).....	12, 13, 17
<i>Babcock v. Mason Cy. Fire Dist. No. 6</i> , 144 Wn.2d 774, 30 P.3d 1261 (2001)	9
<i>Beal for Martinez v. City of Seattle</i> , 134 Wn.2d 769, 954 P.2d 237 (1998).....	10
<i>Brutsche v. City of Kent</i> , 164 Wn.2d 664, 193 P.3d 110 (2008).....	9
<i>Cameron v. Murray</i> , 151 Wn. App. 646, 214 P.3d 150 (2009).....	18
<i>Chambers-Castanes v. King Cy.</i> , 100 Wn.2d 275, 669 P.2d 451 (1983)	8, 10
<i>Cummins v. Lewis Cy.</i> , 156 Wn.2d 844, 133 P.3d 458 (2006) (quoting <i>Taylor v. Stevens Cy.</i> , 111 Wn.2d 159, 759 P.2d 447 (1988))	10
<i>Ducote v. Dep't of Soc. & Health Servs.</i> , 167 Wn.2d 697, 222 P.3d 785 (2009)	8
<i>Fondren v. Klickitat Cy.</i> , 79 Wn. App. 850, 905 P.2d 928 (1995).....	8
<i>Hutchins v. 1001 Fourth Ave. Assoc.</i> , 116 Wn.2d 217, 802 P.2d 1360 (1991).....	18
<i>J&B Dev. Co. v. King Cy.</i> , 100 Wn.2d 299, 669 P.2d 468 (1983), overruled on other grounds by <i>Taylor v. Stevens Cy.</i> , 111 Wn.2d 159, 759 P.2d 447 (1988)	7
<i>Jamison v. Storm</i> , 426 F. Supp. 2d 1144 (E.D. Wash. 2006).....	11
<i>Jimenez v. City of Olympia</i> , Slip Copy WL 3061799 (W.D. Wash. 2010).....	10

<i>Johnson v. City of Seattle</i> , 385 F. Supp. 2d 1091 (W.D. Wash. 2005).....	11, 12, 13
<i>Keates v. City of Vancouver</i> , 73 Wn. App. 257, 869 P.2d 88 (1994).....	20
<i>Kim v. Budget Rent a Car Systems, Inc.</i> , 143 Wn.2d 190, 15 P.3d 1283 (2001)	17, 18, 19
<i>Lambert v. Morehouse</i> , 68 Wn. App. 500, 843 P.2d 1116 (1993).....	8
<i>Meaney v. Dodd</i> , 111 Wn.2d 174, 759 P.2d 455 (1988)	7
<i>Moore v. Wayman</i> , 85 Wn. App. 710, 934 P.2d 707, rev. denied, 133 Wn.2d 1019, 948 P.2d 387 (1997)	8
<i>Osborn v. Mason Cy.</i> , 157 Wn.2d 18, 134 P.3d 197 (2006)	6, 10, 14, 15, 17
<i>Parrilla v. King Cy.</i> , 138 Wn. App. 427, 157 P.3d 879 (2007).....	11, 12, 18
<i>Richards v. Stanley</i> , 43 Cal.2d 60, 271 P.2d 23 (1954).....	18
<i>Rodriguez v. Perez</i> , 99 Wn. App. 439, 994 P.2d 874 (2000).....	10
<i>Taylor v. Stevens Cy.</i> , 111 Wn.2d 159, 759 P.2d 447 (1988)	7, 9
<i>Terry v. Ohio</i> , 392 U.S. 1, 88 S. Ct. 1868 (1968).....	1, 3, 4, 5, 8, 18, 19
<i>Timson v. Pierce Cy. Fire Dist. No. 15 and Washington State Patrol</i> , 136 Wn. App. 376, 149 P.3d 427 (2006).....	10
<i>Torres v. Anacortes</i> , 97 Wn. App. 64, 981 P.2d 891 (1999).....	10
<i>Vergeson v. Kitsap Cy.</i> , 145 Wn. App. 526, 186 P.3d 1140 (2008).....	10

STATUTES

42 U.S.C. § 1983..... 12, 20
RCW 35.22.280(35)..... 8
RCW 4.96.010..... 7, 8, 9
RCW 9A.60.045 8

CONSTITUTIONS

Wash. Const. Art. XI, § 11..... 8

COURT RULES

CR 12(b)(6) 11
RAP 13.4(b)..... 6
RAP 13.4(b)(1) 3, 6, 7, 13, 14, 19
RAP 13.4(b)(2) 3, 6, 7, 13
RAP 13.4(b)(4)..... 6, 7

MISCELLANEOUS

Restatement (Second) of Torts § 302B..... 1, 2, 3, 5, 6, 11, 13, 14, 15,
..... 16, 17, 18, 19
Restatement (Second) of Torts Topic 4, Types of Negligent Acts, Scope
Note..... 16

A. IDENTITY OF PETITIONER

The City of Seattle and Officers Kevin McDaniel and Pohna Lim ask this Court to accept review of the decision designated in Part B below.

B. THE DECISION OF THE COURT OF APPEALS

This wrongful death case arises out of the murder of Michael Robb by non-party Samson Berhe. Respondent (“plaintiff”) sued Seattle Police Officers McDaniel and Lim, alleging police negligence in the course of a brief *Terry* stop of Berhe and a companion in connection with a burglary investigation earlier that day. She alleged specifically that the officers acted negligently by not taking possession of shotgun shells the officers observed on the ground during the stop, which Berhe may have later retrieved and loaded into a shotgun stashed elsewhere.

On a motion for summary judgment, the City argued that, absent an exception to the public duty doctrine, Officers McDaniel and Lim could not be liable to Robb in connection with acts or omissions in the course of their earlier investigative stop of Berhe. The trial court recognized that no exception to the public duty doctrine applied, but ruled that there was a question of fact as to whether the officers owed Robb a separate duty under Restatement (Second) of Torts § 302B that depended on whether the officers’ failure to take possession of the shells during the investigative stop was an “affirmative act” or an “omission.” The trial court denied summary judgment but certified the case for review. The Court of Appeals, Division I, held that under the state waiver of sovereign immunity the public duty doctrine did not apply to these police negligence

claims, resolved factually that the officers' inaction as to the shells was an "affirmative act," not an "omission," and held therefore that Restatement (Second) of Torts § 302B imposed on the officers a separate duty to protect Robb from Berhe's criminal act.

C. ISSUES PRESENTED FOR REVIEW

In holding that the state's waiver of sovereign immunity eviscerates the public duty doctrine as to claims of police negligence, Division I's decision advances a ruling that this Court has never accepted and upends the legal framework this Court has long required when analyzing claims of police negligence. This decision imposes upon police officers across the state new duties that, as to public and private actors, Washington courts have heretofore soundly rejected. Imposing tort liability on police officers for criminal acts of others will force officers into untenable ground where they will be required to presume, in the thousands of citizen contacts they make daily, that the worst possible outcome will unfold. This decision will force officers to arrest more people, confiscate or appropriate more property, and potentially infringe upon the individual rights the Constitution secures in order to protect against multimillion dollar claims for not taking more action during routine, narrowly-circumscribed investigative stops to insure against possible future criminal acts of others – or choose to disengage from proactive policing altogether. The Court must review this case in light of the legal error and far-reaching policy implications of Division I's unprecedented decision. The City submits for review the following issues:

1. Should review be granted under RAP 13.4(b)(1) and (2) because Division I's decision that the public duty doctrine does not apply conflicts with established Supreme Court and Court of Appeals decisions holding that, absent an exception to the public duty doctrine, there can be no liability in negligence for police activities?
2. Should review be granted under RAP 13.4(b)(1) because Decision I's decision that, in this case, the issue of duty involves questions of fact conflicts with Supreme Court case law affirming that duty is a pure question of law?
3. Should review be granted under RAP 13.4(b)(1) because Decision I's decision that Restatement (Second) of Torts § 302B can create a duty under the facts of this case is in conflict both (1) with Supreme Court decisions holding that there is no general duty to protect against the criminal acts of third parties, and (2) with the language of the Restatement itself and Supreme Court case law recognizing that § 302B does not independently establish a duty that does not otherwise exist in law?
4. Should review be granted under the public interest element of RAP 13.4(b)(1) because Division I's published decision subjecting police officers to civil liability for failing to investigate more during a routine, narrowly-circumscribed *Terry* stop raises issues of substantial public interest that should be decided by the Supreme Court?

D. STATEMENT OF THE CASE

Samson Berhe shot and killed Michael Robb using a stolen shotgun loaded with two shells. CP 15-16. Earlier that day, Officers McDaniel and Lim had stopped Berhe and a companion, Raymond Valencia, in connection with a residential burglary investigation. CP 14-15. During the stop, the officers observed three to five shotgun shells

on the ground, but took no action with respect to the shells. CP 14, 93, 126, 240. There was no connection between the shells, the limited purpose of the *Terry* stop, or any reported crime. No weapons or ammunition were reported missing in connection with the burglary, and no weapons were found during pat-downs of Berhe and Valencia. CP 93, 126-27, 239, 541. After Robb's murder, a neighbor reported that he had seen Valencia throw the shells to the ground – prior to the investigative stop, before the officers arrived. CP 781.

During the stop, the officers found Valencia in possession of a stolen item and placed him under arrest. CP 833. Determining they had no probable cause to arrest Berhe in connection with this burglary or any other crime, the officers released Berhe from the scene, and he walked away, mumbling.¹ *Id.* A neighbor later reported that Berhe returned to the scene – after the officers had left with Valencia – and retrieved something (perhaps the shells) from the ground. CP 317, 781.

There is no evidence in the record as to whether the shells observed during the stop were live or spent, or whether any of those few

¹ Division I cites Berhe's mental health history in finding a question of fact as to whether the officers knew or should have known that Berhe posed a criminal threat when they released him from the scene of the investigative stop. On two occasions in May 2004, and again four days before the shooting, other Seattle police officers (not Officers McDaniel or Lim) had taken Berhe to Harborview Medical Center for involuntary mental assessments due to bizarre and violent behaviors, but on each occasion, Harborview released Berhe, finding insufficient basis for commitment. CP 727-28, 734-41, 801-09; *Slip Op.* at 2-3. The City submits that any questions of fact as to what the officers knew or should have known about Berhe are immaterial to the legal question as to whether the officers owed Robb a duty in connection with their interactions with Berhe.

shells were used in Robb's murder. It is clear that Berhe had access to ammunition well in excess of the few shells observed during the stop; after the shooting, sixteen spent shells and one live shell were recovered at a makeshift shooting range that Berhe and Valencia had set up in the woods near Berhe's house. CP 780-81. After the stop, a witness heard what she believed to be "M-80's" going off in the area of the woods. CP 780. She yelled for the person to stop setting off fireworks; someone responded that "they're not fireworks," and another explosion followed. *Id.*

Plaintiff sued Officers McDaniel and Lim in negligence for "fail[ing] to retrieve the shotgun shells" they observed on the ground during the *Terry* stop. CP 17-18. On the City's motion for summary judgment, the trial court ruled that there was no recognized exception to the public duty doctrine but that the public duty doctrine does not apply to "affirmative acts negligently performed" by law enforcement officers, found questions of fact as to whether the officers "affirmatively acted" unreasonably by not taking action to remove the shells, and found therefore a question of fact as to whether the officers owed a duty to Robb under Restatement (Second) of Torts § 302B ("302B"). CP 401:19-402:7.

Division I affirmed the denial of summary judgment, holding (1) that there was no recognized exception to the public duty doctrine but that nevertheless the public duty doctrine does not apply to "affirmative acts" of negligence, (2) that the officers had "affirmatively acted" by not taking possession of the shells, and (3) that § 302B therefore imposed a duty on the officers to protect Robb from Berhe's later criminal conduct.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

RAP 13.4(b) provides that review will be accepted where the decision of the Court of Appeals is in conflict with a decision of the Supreme Court (RAP 13.4(b)(1)) or the Court of Appeals (RAP 13.4(b)(2)). In circumventing the public duty doctrine, Division I's published decision conflicts with established Supreme Court and Court of Appeals decisions affirming that the police cannot be sued in negligence absent an exception to the public duty doctrine. In deciding that whether the officers owed a duty to Robb hinges on questions of fact, Division I's decision conflicts with Supreme Court decisions, recently affirmed in *Osborn v. Mason Cy.*, 157 Wn.2d 18, 134 P.3d 197 (2006), reminding courts that duty is a pure question of law. In deciding that § 302B imposes a duty to protect against the criminal acts of another, Division I's decision conflicts (1) with Supreme Court decisions holding that, absent a special relationship that does not exist (and was never alleged) here, there is no general duty to protect against criminal acts of another, and (2) with language of the Restatement itself and with Supreme Court precedent recognizing that § 302B does not establish a duty that does not otherwise exist in law. As to each of these points, Decision I's decision warrants review under RAP 13.4(b)(1) and (2).

RAP 13.4(b)(4) provides that review will be accepted if the petition involves an issue of substantial public interest that should be determined by the Supreme Court. In creating duties that have heretofore been expressly rejected by this Court, Division I's published decision exposes law enforcement agencies across the state to unprecedented and potentially

limitless liability, thus promoting the recognized “chilling effect” on law enforcement that courts have consistently sought to avoid. Review is thus warranted under the public interest prong of RAP 13.4(b)(4).

1. **Review is warranted under RAP 13.4(b)(1) and (2) because Division I’s decision that the public duty doctrine does not apply to these police negligence claims conflicts with Supreme Court and Court of Appeals decisions holding that, absent an exception to the public duty doctrine, there can be no liability for negligence in police activities.**

Division I’s decision that the statutory waiver of sovereign immunity eviscerates the public duty doctrine advances a theory that has never been accepted by this Court. Expressly to the contrary, this Court has repeatedly affirmed the continuing viability of the public duty doctrine post-sovereign immunity. Division I overlooks established law that explains why RCW 4.96.010 is superfluous when analyzing the liability in negligence of public actors in performing exclusively public functions:

*Although the Legislature abolished sovereign immunity for municipal corporations in 1967, it did not thereby create any new causes of action or liability **The public duty doctrine recognizes that a fundamental element of any negligence action is a duty owed by the defendant to the plaintiff.***

Meaney v. Dodd, 111 Wn.2d 174, 178, 759 P.2d 455 (1988) (citations omitted) [emphasis supplied]; *J&B Dev. Co. v. King Cy.*, 100 Wn.2d 299, 304-05, 669 P.2d 468 (1983), *overruled on other grounds by Taylor v. Stevens Cy.*, 111 Wn.2d 159, 759 P.2d 447 (1988) (the enactment of RCW 4.96.010 merely removed the barrier of sovereign immunity to permit a tort

suit against a governmental entity; it did not create any new causes of action, duties, or liability where none existed before); *see also Chambers-Castanes v. King Cy.*, 100 Wn.2d 275, 288, 669 P.2d 451 (1983); *Moore v. Wayman*, 85 Wn. App. 710, 717, 934 P.2d 707, *rev. denied*, 133 Wn.2d 1019, 948 P.2d 387 (1997).

Division I's decision that the public duty doctrine does not apply here because RCW 4.96.010 renders public actors liable to the same extent as a private actor contradicts multiple key points of law, including (1) that there is no cause of action, against a public or private actor, for negligence in the course of an investigation;² (2) that, absent a special relationship that does not exist (and was not alleged) here, there is no duty on the part of a public or private actor to protect against the criminal acts of another, *see* Section E(2), *below*; and (3) that because the law reserves to public actors exclusively³ the limited authority to stop and detain another (subject to the Constitutional parameters set forth in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968)), no private actor could even be in the position of the

² *See, e.g., Ducote v. Dep't of Soc. & Health Servs.*, 167 Wn.2d 697, 222 P.3d 785 (2009) (claims for negligent investigation do not exist under common law); *Fondren v. Klickitat Cy.*, 79 Wn. App. 850, 862, 905 P.2d 928 (1995) ("a claim for negligent investigation is not cognizable under Washington law"); *Lambert v. Morehouse*, 68 Wn. App. 500, 504, 843 P.2d 1116 (1993) ("Confronted squarely with the issue in this case, we conclude that Washington courts have not and should not recognize a cause of action for negligent investigation.").

³ *See generally* Wash. Const. Art. XI, § 11(reserving police powers to state and local government); RCW 35.22.280(35) (general police powers of first class cities); RCW 9A.60.045 (criminalizing the impersonation of a police officer).

police officers here, let alone subject to liability for the acts or omissions alleged here, in the first place.⁴

Whether the defendant is a public or private actor, the threshold determination in any negligence action is whether a duty of care is owed by the defendant to the plaintiff individually. *Taylor*, 111 Wn.2d at 163; *accord Babcock v. Mason Cy. Fire Dist. No. 6*, 144 Wn.2d 774, 784-85, 30 P.3d 1261 (2001). Post-RCW 4.96.010, the necessary inquiry accordingly turns not on whether the defendant is an agent of the government (and thus, formerly immune from suit altogether), but rather, consistent with principles of negligence generally, whether the plaintiff can show that the duty alleged was owed to him individually, not to the public generally.⁵ *Cummins v. Lewis Cy.*, 156 Wn.2d 844, 852, 133 P.3d 458 (2006) (*quoting Taylor v.*

⁴The City assumes that Division I is not suggesting that either civilian witness who actually saw Valencia in possession of the shells *before* the officers arrived or saw Berhe retrieve what might have been the shells *after* the officers left could be liable to Robb for any failure to remove the shells in the interim.

⁵*Brutsche v. City of Kent*, 164 Wn.2d 664, 193 P.3d 110 (2008), illustrates the practical effect of the waiver of sovereign immunity. In *Brutsche*, officers damaged private property while executing a search warrant. The Court affirmed that such affirmative acts properly gave rise to a cause of action in trespass – *not negligence* – against the officers. Prior to RCW 4.96.010, a private actor could have been sued in trespass, but the City of Kent would have been immune from suit because it was a governmental entity. Now, post-RCW 4.96.010, because there is a recognized cause of action for trespass, Kent can be sued in trespass to the same extent as could be a private person. In contrast, there is no recognized cause of action against a private actor for failing to appropriate items from a public right-of-way that may have been subsequently used by a third party to commit a crime (*see fn. 4*); accordingly, there is no cause of action against Officers McDaniel and Lim either, absent an exception to the public duty doctrine. The City never argued here that it is “immune” from suit because it is a municipality; the City argues only that because there is no cause of action that could be sustained against a private actor here, RCW 4.96.010 has no bearing whatsoever on the analysis as to whether plaintiff can sustain a cause of action in negligence against the public actors in this case.

Stevens Cy., 111 Wn.2d 159, 163, 759 P.2d 447 (1988)) (“Under the public duty doctrine, no liability may be imposed for a public official’s negligent conduct unless it is 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.’”); *see also Beal for Martinez v. City of Seattle*, 134 Wn.2d 769, 954 P.2d 237 (1998) (public duty doctrine bars negligence action against government agency absent a recognized exception to the doctrine).

It is soundly established in Washington law that the duty owed by police officers “is a duty owed to the public at large and is therefore not a proper basis for an individual’s negligence claim.” *Rodriguez v. Perez*, 99 Wn. App. 439, 994 P.2d 874 (2000); *Torres v. Anacortes*, 97 Wn. App. 64, 981 P.2d 891 (1999) (if no exception to public duty doctrine, no liability for police conduct). Division I’s decision that the public duty doctrine does not apply here is in irreconcilable conflict with decisions that affirm the continuing viability of the public duty doctrine as to law enforcement activities specifically. *Osborn, supra*; *Chambers-Castanes, supra*; *Vergeson v. Kitsap Cy.*, 145 Wn. App. 526, 536, 186 P.3d 1140 (2008); *Timson v. Pierce Cy. Fire Dist. No. 15 and Washington State Patrol*, 136 Wn. App. 376, 149 P.3d 427 (2006).

Federal courts applying Washington law in cases alleging police negligence likewise recognize and adhere to this established rule. *See, e.g., Jimenez v. City of Olympia*, Slip Copy WL 3061799 (W.D. Wash. 2010) (in negligence actions against law enforcement agencies,

Washington courts follow the public duty doctrine); *Jamison v. Storm*, 426 F. Supp. 2d 1144, 1158 (E.D. Wash. 2006) [emphasis supplied] (“As a general rule, the common law imposes no duty to prevent a third person from causing physical injury to another. Additionally, under the public duty doctrine, the State is not liable for its negligent conduct even where a duty does exist unless the duty was owed to the injured person and not merely the public in general.”); *Johnson v. City of Seattle*, 385 F. Supp. 2d 1091, 1100 (W.D. Wash. 2005) (“Under the public duty doctrine, there is no liability for a public official’s negligent conduct unless it is shown that the duty breached was owed to the injured person as an individual and not merely the breach of an obligation owed to the public in general.”).

Division I cites as “factually analogous” and controlling here its decision in *Parrilla v. King Cy.*, 138 Wn. App. 427, 157 P.3d 879 (2007). *Parilla* is strikingly off-point, both factually and analytically. *Parrilla* involves a defendant owner/operator of a common carrier who transferred possession of a running bus into the hands of a crazed passenger. The *Parrilla* court held narrowly, citing § 302B, that the plaintiff had alleged sufficient facts to withstand CR 12(b)(6) judgment on the pleadings as to whether, in the context of King County’s duty as the proprietary owner of a vehicle, the County’s conduct in transferring control of the bus facilitated the passenger’s criminal misuse of the bus such that liability could arise under § 302B. *Parrilla*, 138 Wn. App. 441. The public duty doctrine did not apply in *Parilla* because the claims in *Parilla* simply did not trigger the public duty doctrine.

In contrast, Washington law is clear that claims of police negligence require courts to apply the public duty doctrine, and far more factually analogous cases make clear Division I's error in citing *Parilla* to circumvent the public duty doctrine in this case. In *Johnson*, crowd members who were assaulted during the Mardi Gras riots of 2001 brought 42 U.S.C. § 1983 claims, along with state negligence claims, against City police defendants, alleging City liability for the criminal acts of other crowd members. Retaining supplemental jurisdiction over the state negligence claims, the District Court (the Honorable Robert Lasnik) affirmed that state claims arising out of police negligence can only be analyzed within the framework set forth by the public duty doctrine; noting that the plaintiffs failed to produce evidence to support an articulated exception to the public duty doctrine, the Court dismissed the state claims. *Johnson*, 385 F. Supp. 2d at 1101.

In *Aba Sheikh v. Choe*, 156 Wn.2d 441, 128 P.3d 574 (2006), the victim of an assault by individuals who had been under State supervision brought suit against the State, arguing a special relationship between the State and the assailants that could thus impose liability on the State for the assailants' criminal acts. This Court rejected the plaintiffs' argument, noting first the general rule that the common law imposes no duty to prevent a third person from causing physical injury to another and, second, the specific rule that, absent an exception, the public duty doctrine bars state liability for negligence even where a general duty does exist.

As in *Johnson* and *Aba Sheikh*, plaintiff urges government liability for the criminal acts of others. As the District Court recognized in *Johnson*, and as this Court recently affirmed in *Aba Sheikh*, there is no duty to protect against another's criminal acts generally, but even were there a recognized general duty, such duty would not be actionable against an officer absent a showing, consistent with general principles of negligence law, that the duty was owed to the injured plaintiff specifically. The only way to do so in a case alleging police negligence is by way of an exception to the public duty doctrine – none of which, Division I acknowledged, are met. Consistent Supreme Court precedent affirms that the public duty doctrine remains the legal framework within which claims of police negligence must be analyzed. Division I's published decision that the public duty doctrine itself simply does not apply is unprecedented and is squarely at odds with fundamental principles of Washington law. The Court should accept review under RAP 13.4(b)(1) and (2).

2. **Review is warranted under RAP 13.4(b)(1) and (2) because Decision I's decision that the facts of this case give rise to a duty under Restatement (Second) of Torts § 302B to protect against criminal acts of a third party is in conflict (1) with Supreme Court case law affirming that duty is a question of law, not fact, and (2) with the language of the Restatement itself and Supreme Court case law recognizing that § 302B does not independently establish a duty that does not otherwise exist in law.**

The trial court ruled there was a question of fact as to whether the officers owed Robb a duty that hinged on whether the officers' failure to take possession of the shells was an "affirmative act" as opposed to an

“omission.” CP 401-02. Division I resolved this semantic inquiry by deciding that the officers’ *failure* to act was itself an “affirmative act” and concluded, therefore, that the officers owed Robb, individually, a duty under § 302B to protect him against Berhe’s subsequent criminal conduct. Division I’s decision in this regard warrants review under RAP 13.4(b)(1) on two separate and purely legal grounds. First, whether the officers owed Robb a duty can only be a question of law that does not turn on issues of fact. Second, as the Restatement by its own terms makes clear, and as the two Supreme Court decisions that discuss (but do not adopt) § 302B recognize, § 302B does not separately give rise to a duty that is not otherwise recognized in law. Where there is no duty to protect against the criminal acts of third parties absent a “special relationship” that does not exist here, § 302B cannot independently create such a duty.

a) Whether Officers McDaniel and Lim owed Robb a duty in connection with their investigative stop does not involve questions of fact.

The trial court’s deference to questions of fact to determine whether a duty existed and Division I’s conclusion of fact to resolve the inquiry are clear errors of law. *Osborn v. Mason Cy., supra*, is directly on point. In *Osborn*, the parents of a girl who was raped and murdered by a sex offender brought suit against Mason County for failing to warn them of the offender’s presence. They argued that a detective’s affirmative act of stating that he would post flyers around the neighborhood and otherwise notify the community of the offender’s presence gave rise to a duty to warn or

otherwise protect foreseeable victims. They produced evidence that despite knowing that the offender had followed two minor children, the detective not only failed to take protective measures but affirmatively discouraged others from taking action. *Id.* at 20-22. The Supreme Court reversed the Court of Appeals' decision that Mason County's affirmative acts had created a separate duty actionable in tort:

Puzzlingly, the Court of Appeals denied summary judgment because "the Osborns could have asserted facts from which a trier of fact could find that Mason County's actions affirmatively created a separate duty under the rescue doctrine." *Osborn*, 122 Wn. App. at 837, 95 P.3d 1257. ***But, of course, the existence of a duty is a question of law," not a question of fact.*** *Tae Kim v. Budget Rent A Car Sys. Inc.*, 143 Wn.2d 190, 195, 15 P.3d 1283 (2001).

Osborn, 157 Wn.2d at 22-23 [emphasis supplied]. The Court went on to note that neither party disputed any fact relevant to the existence of a duty, but only whether Mason County's actions "negligently increased the risk of harm to [the offender's] potential victims." *Id.* at 23.

As in *Osborn*, Division I notes Berhe's criminal history and the police department's prior knowledge of Berhe's mental instability and violent propensities. Division I suggests questions of fact as to whether Officers McDaniel and Lim should have known that Berhe had a shotgun stashed elsewhere that he might use in the commission of a criminal act, such that a duty to protect against Berhe's foreseeable criminal conduct might arise under § 302B. *Slip Op.* at 15. *Osborn* makes clear that any such inquiry is irrelevant to the existence of a duty. As in *Osborn*, any inquiry as to whether the officers' conduct created an unreasonable risk of

harm under a § 302B analysis is completely irrelevant unless it is first shown that the officers owed Robb a duty in connection with their investigative stop. Whether the officers owed Robb a duty to protect him from Berhe's criminal act is a pure question of law that does not hinge on any factual inquiry regarding the officers' conduct or prior knowledge.

b) Section 302B does not independently create a duty not otherwise recognized in law.

Section 302B provides in full as follows:

An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.

Division I's decision that § 302B independently establishes a duty to protect against the criminal acts of third parties is in conflict with the language of the Restatement itself and with the only Supreme Court decision to discuss (yet not apply) § 302. Section 302B discusses circumstances in which an act or omission that gives rise to a third party's criminal conduct may be unreasonable, but the Restatement is clear that *"unless there is a duty owed by the actor to the other not to be negligent"* § 302B cannot be a basis for liability. Restatement (Second) of Torts Topic 4, Types of Negligent Acts, Scope Note [emphasis supplied]. Comment (a) to § 302 reiterates the same: "[T]his section is concerned only with the negligent character of the actor's conduct, and not with his duty to avoid the unreasonable risk." [Emphasis supplied.] In other words, if there is no duty to act (or not act), § 302B, by

its own terms, does not apply. *Accord Osborn, supra* (absent a duty, conduct, even if unreasonable, cannot give rise to liability).

As a general principle, there is no duty to prevent the criminal acts of a third party. *Aba Shiekh, supra*. This Court has made explicitly clear the limited circumstances in which a duty to protect against the criminal acts of a third party will arise – none of which derive from § 302B:

Generally, our cases, involving a duty to protect a party from the criminal conduct of another, have fallen into one of two categories. We have found a duty where there is a “special relationship” with the victim. *See, e.g., Nivens [v. 7-11 Hoagy’s Corner]*, 133 Wn.2d 192, 943 P.2d 286 (business to business invitee); *Niece v. Elmview Group Home*, 131 Wn.2d 39, 929 P.2d 420 (1997) (party entrusted with the care of a dependent); *Gurren v. Casperson*, 147 Wash. 257, 265 P. 472 (1928) (innkeeper to guest). And second, we have imposed a duty where there is a “special relationship” with the criminal. *See, e.g., Hertog v. City of Seattle*, 138 Wn.2d 265, 979 P.2d 400 (1999) (state-probationer); *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983) (psychotherapist-patient); *Bernethy v. Walt Failor’s, Inc.*, 97 Wn.2d 929, 934, 653 P.2d 280 (1982) (customer-store owner).

Kim v. Budget Rent a Car Systems, Inc., 143 Wn.2d 190, 196-97, 15 P.3d 1283 (2001) (declining to adopt § 302B).

Osborn cites *Kim* for the principle that the legal question of duty does not involve questions of fact. *Osborn, supra* at 22-23. Division I ignores the “special relationship” requirement that *Kim* emphasizes in articulating the situations where courts will find a duty to protect against the criminal acts of another. Instead, Division I focuses on dicta in *Kim* for the proposition that the Supreme Court has discussed § 302(B) as “a permissible basis for liability in certain situations where a defendant’s

property creates an especial temptation and opportunity for criminal misconduct.” *Slip Op.* at 6 [emphases supplied]. *Kim* has nothing to do with claims of police negligence, let alone whether § 302B can impose upon police officers a duty with respect to conduct in the course and scope of a narrowly-circumscribed *Terry* stop. *Kim* neither purports to adopt § 302B as law in Washington, nor, importantly, suggests that § 302B can independently create a duty that does not otherwise exist. Division I overlooks that *Kim* specifically notes as the starting point of its analysis “the duty of the owner of an automobile to manage it as not to create an unreasonable risk of harm to others[.]” *Kim*, 143 Wn.2d at 195 (quoting *Richards v. Stanley*, 43 Cal.2d 60, 65, 271 P.2d 23 (1954), and that it was in the context of this overarching duty (the same duty at issue in *Parilla*) that *Kim* considered whether the conduct alleged was sufficiently unreasonable to show breach of duty under § 302B (it was not).

Likewise, in every Washington case to address § 302B, the court’s analysis derives specifically from a property owner’s common law duty to manage his/her own property so as not to facilitate the property’s misuse. *Kim, supra*; *Hutchins v. 1001 Fourth Ave. Assoc.*, 116 Wn.2d 217, 802 P.2d 1360 (1991) (defendant owned premises on which crime occurred; no liability under § 302B); *Cameron v. Murray*, 151 Wn. App. 646, 214 P.3d 150 (2009) (defendant provided keg that facilitated alcohol-fueled assault; no liability under § 302B). Section 302B is not only completely inapposite to the proper analysis as to the duty of a public actor performing a public function (here, police investigation), but Division I’s emphasis on § 302B in

this case is defeated by its own reasoning. Division I overlooks that in this case, undisputedly, it was not the “defendant’s property” that created any “especial temptation and opportunity for [Berhe’s] criminal misconduct.” The officers did not provide the shells, at no point were the officers in possession of the shells, and the record is clear that Berhe had access to ammunition well in excess of the few shells observed during the investigative stop. As to a private or public actor, there is no duty to confiscate abandoned property or the property of another so as to prevent its possible future misuse; as to a private or public actor, there is no duty protect against the criminal acts of a third party absent a special relationship with either victim or assailant. Consistent with the language of the Restatement itself, *Kim* does not stand for the proposition that, absent a recognized duty, § 302B can independently establish liability; absent a recognized duty, there is no authority for Division I’s decision that § 302B can independently subject the officers here to liability for Berhe’s criminal act involving “property” that was never in the officers’ possession or control. Division I’s decision warrants review under RAP 13.4(b)(1).

3. Division I’s published decision subjecting police officers to civil liability for failing to investigate more during a routine, narrowly-circumscribed *Terry* stop raises issues of substantial public interest that should be decided by the Supreme Court.

In the thousands of citizen stops police officers engage in daily, they are guided by *Terry, supra*, and the minimal intrusiveness that *Terry* prescribes. Where Division I now paradoxically subjects officers to liability

for failing to be more intrusive in their citizen encounters, there can be little argument regarding the substantial public interest in Division I's decision as it now fosters the judicial second-guessing of the mechanics of daily policing and officer inaction that courts have heretofore rejected. As a matter of policy, Washington courts have repeatedly refused to subject officers to liability for negligence in the course of police investigations, noting that to allow such a cause of action "would have a chilling effect upon law enforcement and would give rise to potentially unlimited liability for any type of police activity." *Keates v. City of Vancouver*, 73 Wn. App. 257, 269, 869 P.2d 88 (1994). This decision now pins officers between the threat of liability under 42 U.S.C. § 1983 should they stray too far into the Constitutional rights of others and the threat of liability that Division I has newly crafted here should they fail to stray far enough and thus promotes precisely the chilling effect that Washington courts consistently seek to avoid. Proactive law enforcement within the circumscribed limits of the Fourth Amendment being vitally important to the safety and well-being of the law-abiding public and police officers alike, Division I's decision here raises grave issues of substantial public interest that should be decided by this Court.

F. SUMMARY AND CONCLUSION

For the reasons stated above, the City respectfully requests that the Court grant the City's Petition for Review.

//

//

DATED this 24th day of February, 2011.

PETER S. HOLMES
Seattle City Attorney

By:



REBECCA BOATRIGHT, WSBA #32767
Assistant City Attorney

Attorneys for Petitioner, City of Seattle

Donna M. Robinson certifies under penalty of perjury under the laws of the State of Washington that the following is true and correct.

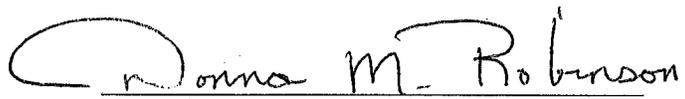
I am employed as a Legal Assistant with the Seattle City Attorney's office.

On February 24, 2011, I requested ABC-Legal Messengers, Inc., to deliver, by February 26, 2011, a copy of the foregoing Petition for Review upon the following counsel:

Attorneys for Respondent:
Timothy G. Leyh, WSBA #14853
Matthew R. Kenney, WSBA #1420
Danielson Harrigan Leyh & Tollefson
999 Third Ave., Suite 4400
Seattle, WA 98104
(206) 623-1700

and to file the original and one copy of said document with the Court of Appeals and to provide a courtesy copy to the Washington State Supreme Court.

DATED this 24th day of February, 2011.


DONNA M. ROBINSON

APPENDIX

Decision and Order Denying Reconsideration

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

ELSA ROBB, personal representative)
of the ESTATE OF MICHAEL W. ROBB,)

Respondent,)

v.)

CITY OF SEATTLE, a municipal)
corporation; OFFICER KEVIN)
MCDANIEL; OFFICER PONHA LIM;)

Appellants,)

and)

UNKNOWN JOHN DOES,)

Defendants.)

No. 63299-0-1

ORDER DENYING MOTION
FOR RECONSIDERATION

Appellant City of Seattle having filed a motion for reconsideration of the opinion filed December 27, 2010, and the court having determined that said motion should be denied; Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

DONE this 28th day of January, 2011.

FOR THE COURT:

Becker, J.
Judge

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ELSA ROBB, personal representative
of the ESTATE OF MICHAEL W. ROBB,)

Respondent,)

v.)

CITY OF SEATTLE, a municipal
corporation; OFFICER KEVIN
MCDANIEL; OFFICER PONHA LIM;)

Appellants,)

and)

UNKNOWN JOHN DOES,)

Defendants.)

No. 63299-0-1

DIVISION ONE

PUBLISHED OPINION

FILED: December 27, 2010

2010 DEC 27 AM 9:37

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

BECKER, J. — A little after 7:30 p.m. on June 26, 2005, 17 year old Samson Berhe was walking down Southwest Marginal Way in Seattle, carrying a long gun case. He flagged down a car, put a shotgun in the window, and shot the driver, Michael Robb, in the face. Charged with first degree murder, Berhe was later committed to Western State Hospital as not guilty by reason of insanity. This appeal concerns the wrongful death action brought by Robb's mother against the city of Seattle and two Seattle police officers, Kevin McDaniel and Ponha Lim. Seattle unsuccessfully moved for summary judgment based on the public duty

doctrine. The trial court concluded that even though none of the recognized exceptions to the public duty doctrine were applicable, the evidence would support an instruction based on *Restatement (Second) of Torts* 302B (1965).

We affirm.

Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The court considers the evidence in the light most favorable to the nonmoving party. Osborn v. Mason County, 157 Wn.2d 18, 22, 134 P.3d 197 (2006).

Viewed in the light most favorable to Robb, the record shows that in May 2004, officers in the Southwest Precinct of the Seattle Police Department twice took Berhe to Harborview Hospital for a mental evaluation at the request of his parents who were afraid for the family's safety because of Berhe's erratic and destructive behavior. In June 2005, during the week before Berhe randomly selected Michael Robb as the target of his shotgun blast, precinct officers learned that Berhe was again engaging in bizarre and aggressive behavior and that he possessed a shotgun.

On June 19, 2005, Officers McDaniel, Lim, and another officer responded to a call from Berhe's mother. According to his mother, Berhe had a history of mental illness and was making suicide threats. The officers described Berhe as unresponsive and "acting strange." Berhe was taken to Harborview Hospital.

On June 22, Officer Lim and another officer responded to a 911 call about an assault at Berhe's home. Berhe had been punching one of his brother's

friends. When the officer approached, Berhe "spoke in normal tones then switched to deep demonic tones." He stated that he "ruled the world," that "all confused people need to be killed and tortured," and that "I control all the money" and "I'll kill all the haters." The officers took Berhe to Harborview Hospital for an involuntary mental health evaluation. The mental health professional released Berhe because the boy he assaulted declined to testify at a hearing. Berhe's parents were afraid of him and refused, at least initially, to let him come home.

On June 21, the auto theft division of Seattle police received information from Bellevue police that Berhe had recently stolen a car and was keeping shotguns under his bed at home. The Bellevue police had been informed of this by Berhe's friend, Raymond Valencia, who they had recently arrested for car theft.

On June 24, Berhe's father called police to report that Berhe and Valencia were in the backyard fighting and they both had shotguns. Numerous officers from the Southwest Precinct responded. By the time they arrived, the two boys and the shotguns were gone.

On June 26, in the morning, two officers questioned and released Berhe and Valencia at a vacant rental home on Berhe's street where they had spent the night sleeping and drinking beer until being discovered by the owner.

On June 26, late in the afternoon, Officer McDaniel responded to a report of a burglary about three miles from Berhe's home. He learned from a witness that Berhe and Valencia were "bragging about knowing where stolen items were being kept." Officer McDaniel and Officer Lim located Valencia and Berhe on a

street near Berhe's home and stopped them on suspicion of the burglary. Berhe was "very agitated." The officers patted down the two youths to check for weapons but found none. Upon finding a stolen watch in Valencia's pocket, they took him into custody and put him in a police car.

The officers noticed yellow shotgun shells on the curb next to where Berhe was standing. It is a disputed issue of fact whether McDaniel and Lim personally knew or should have known that Berhe possessed a shotgun. For purposes of summary judgment, we assume they were aware of the information about Berhe gathered by fellow officers during the three days preceding this burglary stop. The officers did not ask any questions about the shotgun shells they saw lying on the ground, and they did not confiscate the shells. They released Berhe and told him to go home. Berhe walked away, making "incoherent comments." The officers drove away with Valencia.

A neighbor who was watching these events saw Valencia throw down some shotgun shells before being stopped. After the police left with Valencia, another witness saw Berhe come back, bend down, pick something up, and walk away. A short time later, Berhe stopped to see his neighbors and showed them a handful of yellow shotgun shells. He said he had a shotgun and was bragging about "popping off rounds all night."

Berhe fatally shot Michael Robb about two hours later at a location reachable by walking a short distance along a trail through a wooded area just to the north of Berhe's home.

After the murder, Valencia took investigating officers to a place in the woods where Berhe had set up a makeshift shooting range. Searching the area, officers found 11 empty shell casings, 1 unused shotgun shell, and an empty 20 shell box. Valencia also made a statement admitting that he and Berhe committed a burglary investigated by officers from Seattle's Southwest Precinct on June 19, in which guns and ammunition were stolen. He said they sold most of the stolen property, but Berhe insisted on keeping one of the shotguns.

Elsa Robb filed this lawsuit in January 2008. Seattle moved for summary judgment. The trial court denied the motion:

The question presented by the defendants' Motion for Summary Judgment is whether the allegedly negligent actions of the officers who contacted Samson Berhe and Raymond Valencia on 6/26/05 were affirmative acts negligently performed or more appropriately considered as failures to act. If the latter, then the public duty doctrine bars this action. *Coffel v. Clallam County*, 47 Wn. App. 397, 403[, 735 P.2d 686] (1987). If the former, then Restatement (Second) of Torts § 302B (1965) and comment "a" thereto is applicable and may provide a remedy. It is undisputed that none of the recognized exceptions to the public duty doctrine apply here to allow its use in this negligence action. *Cummins v. Lewis County*, 156 Wn.2d 844, 852-53[, 133 P.3d 458] (2006).

Applying the summary judgment standard, the plaintiff has produced sufficient evidence of affirmative acts negligently performed by defendants that a duty may be found to exist as a matter of law pursuant to Restatement (Second) of Torts § 302B.

The trial court certified its order for discretionary review under RAP 2.3(b)(4), and we accepted the certification. The main thrust of Seattle's argument on discretionary review is that as a matter of law, a police officer owes no duty actionable in tort unless one of the four recognized exceptions to the

public duty doctrine is present. Seattle also contends that *Restatement (Second) of Torts* § 302B does not state a duty.

"The essential elements of a negligence action are (1) the existence of a duty to plaintiff; (2) breach of that duty; (3) resulting injury; and (4) proximate cause between the breach and the injury." Hutchins v. 1001 Fourth Ave. Assocs., 116 Wn.2d 217, 220, 802 P.2d 1360 (1991). "The threshold determination in a negligence action is whether a duty of care is owed by the defendant to the plaintiff." Taylor v. Stevens County, 111 Wn.2d 159, 163, 759 P.2d 447 (1988). The existence of a duty is a question of law for the court. Hutchins, 116 Wn.2d at 220.

Seattle's argument that section 302B "does not itself create a duty" is inconsistent with Hutchins. There, our Supreme Court discussed section 302B comment e(G) as a permissible basis for liability in certain situations where a defendant's property creates an especial temptation and opportunity for criminal misconduct. Hutchins, 116 Wn.2d at 230.

As a beginning point, section 302 recognizes the possibility of a duty to guard another person against a foreseeable risk of harm caused by a third person:

Risk of Direct or Indirect Harm

A negligent act or omission may be one which involves an unreasonable risk of harm to another through either

- (a) the continuous operation of a force started or continued by the act or omission, or
- (b) the foreseeable action of the other, a third person, an animal, or a force of nature.

RESTATEMENT (SECOND) OF TORTS § 302. Sections 302A and 302B go on to refine the parameters of the duty depending on whether the actor's conduct involves a risk that another person will act with negligence or recklessness (section 302A) or the risk that another person will engage in intentional or criminal conduct (section 302B). Robb's theory of negligence is based on section 302B comment e:

Risk of Intentional or Criminal Conduct

An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.

d. Normally the actor has much less reason to anticipate intentional misconduct than he has to anticipate negligence. In the ordinary case he may reasonably proceed upon the assumption that others will not interfere in a manner intended to cause harm to anyone. . . .

e. There are, however, 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 is under a special responsibility toward the one who suffers the harm, which includes the duty to protect him against such intentional misconduct; or 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.

RESTATEMENT (SECOND) OF TORTS § 302B cmts. d, e (emphasis added).

Our Supreme Court discussed section 302B comment e as a possible source of duty in Kim v. Budget Rent A Car Sys., Inc., 143 Wn.2d 190, 15 P.3d 1283 (2001). The plaintiff was a victim of vehicular assault committed by a third party with a car stolen from the parking lot of an administrative facility belonging to Budget Rent A Car. The keys had been left in the ignition. The court

concluded that the recognizable degree of risk of harm created by leaving the keys in the ignition in this particular area was not high enough to justify imposition of a duty under section 302B:

As comment e to the section explains, a duty to guard against third party conduct may exist where there is a special relationship to the one suffering the harm, or "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 [person] would take into account." RESTATEMENT (SECOND) OF TORTS § 302B cmt. e (1965). This does not mean that any risk of harm gives rise to a duty. Instead, an unusual risk of harm, a "high degree of risk of harm," is required. *Id.* There is nothing in the facts of this case indicating that a *high degree* of risk of harm to plaintiff was created by Budget's conduct of leaving the keys in the ignition of an automobile in an area where Budget had never had a prior vehicle theft.

Kim, 143 Wn.2d at 196 (emphasis in original).

After Kim, this court reinstated a case based on section 302B comment e in Parrilla v. King County, 138 Wn. App. 427, 436, 157 P.3d 879 (2007). In Parrilla, two passengers were fighting on a Metro bus in Seattle. The driver pulled over and directed all passengers to disembark. Eventually all passengers left the bus except one. The driver observed the final passenger, Carpenter, acting erratically. The driver got out of the bus and left the engine running with Carpenter still on board. Carpenter drove the bus away and crashed into and injured the Parrillas. Their negligence suit against King County was dismissed in the trial court for lack of duty. In defending the appeal by the Parrillas, the county argued that section 302B was not intended to give rise to a duty of care—the same argument that Seattle makes in this case. We rejected that argument:

King County initially argues that the only circumstances that may give rise to a duty to guard against the criminal conduct of a third party, pursuant to Washington case law, are those in which the actor has a "special relationship" with either the criminal third party or with the party exposed to that criminal conduct. This is not the law.

As a general rule, "every actor whose conduct involves an unreasonable risk of harm to another 'is under a duty to exercise reasonable care to prevent the risk from taking effect.'" *Minahan v. W. Wash. Fair Ass'n*, 117 Wn. App. 881, 897, 73 P.3d 1019 (2003) (quoting RESTATEMENT (SECOND) OF TORTS § 321 (1965)). A risk is "unreasonable" pursuant to that principle only if a reasonable person would have foreseen it. *Minahan*, 117 Wn. App. at 897. Accordingly, the existence of a duty turns on the foreseeability of the risk created. *Higgins v. Intex Recreation Corp.*, 123 Wn. App. 821, 837, 99 P.3d 421 (2004) (quoting *Rasmussen v. Bendotti*, 107 Wn. App. 947, 956, 29 P.3d 56 (2001)). If a risk is foreseeable, an individual generally has a duty to exercise reasonable care to prevent it. *Minahan*, 117 Wn. App. at 897. If a risk is not foreseeable, an actor generally has no duty to prevent it. *Rikstad v. Holmberg*, 76 Wn.2d 265, 456 P.2d 355 (1969); *Higgins*, 123 Wn. App. at 837 (quoting *Rasmussen*, 107 Wn. App. at 956).

It is true that an actor ordinarily owes no duty to protect an injured party from harm caused by the criminal acts of third parties; see, e.g., *Morehouse v. Goodnight Bros. Constr.*, 77 Wn. App. 568, 571, 892 P.2d 1112 (1995); *Kim*, 143 Wn.2d at 194-95; see also *Tortes v. King County*, 119 Wn. App. 1, 7, 84 P.3d 252 (2003) ("[A] person is normally allowed to proceed on the basis that others will obey the law."). The rationale for this rule is that criminal conduct is usually not reasonably foreseeable. *Bernethy[v. Walt Failor's, Inc.]*, 97 Wn.2d [929,] 934[, 653 P.2d 280 (1982)]; RESTATEMENT (SECOND) OF TORTS § 302 B cmt. d.

Accordingly, Washington cases finding the existence of a duty to guard against the criminal conduct of a third party have generally been based on reasons other than the foreseeability of such conduct. As the court in *Kim* explained, such cases have, instead, justified the imposition of such a duty based on the existence of a "special relationship" between either the actor and the victim, or between the actor and the criminal third party. *Kim*, 143 Wn.2d at 196-97; see, e.g., *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 943 P.2d 286 (1997) (business owed duty to invitee to protect against criminal conduct of third party); *Hertog v. City of Seattle*, 138 Wn.2d 265, 979 P.2d 400 (1999) (state owed duty to individual harmed by the criminal conduct of probationer under state's supervision).

However, criminal conduct is not unforeseeable as a matter of law. *Bernethy*, 97 Wn.2d at 934. Thus, in keeping with the general rule that an individual has a duty to avoid reasonably foreseeable risks, if a third party's criminal conduct is reasonably foreseeable, an actor may have a duty to avoid actions that expose another to that misconduct. *Bernethy*, 97 Wn.2d at 934 (citing *McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn.2d 316, 321, 255 P.2d 360 (1953)). As our Supreme Court explained:

Whether or not an intervening act is criminal in nature, is a fact to be considered in determining whether such act was reasonably foreseeable. But intervening criminal acts may be found to be foreseeable, and if so found, actionable negligence may be predicated thereon.

McLeod, 42 Wn.2d at 321. The rule articulated by section 302 B and adopted by the court in *Kim* is consistent with that principle. It allows the imposition of a duty only when the risk of harm is recognizable, and only when a reasonable person would have taken the risk into account.

Thus, King County's contention that a duty to guard against the criminal conduct of a third party may only arise when there exists a special relationship between either the actor and the criminal third party, or between the actor and the victim of that criminal conduct, fails.

King County next asserts, referencing *Restatement (Second) of Torts* section 302 comment a, that section 302 B was not intended to give rise to a duty of care, but only to explain when an already-existing duty has been breached. That comment provides:

This Section is concerned only with the negligent character of the actor's conduct, and not with his duty to avoid the unreasonable risk. In general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act. The duties of one who merely omits to act are more restricted, and in general are confined to situations where there is a special relation between the actor and the other which gives rise to the duty. . . . If the actor is under no duty to the other to act, his failure to do so may be negligent conduct within the rule stated in this Section, but it does not subject him to liability, because of the absence of duty.

RESTATEMENT (SECOND) OF TORTS § 302 cmt. a. However, the quoted comment cautions only that the section does not describe a

rule giving rise to a duty on the part of an individual whose *failure* to act exposes another to harm. In regard to the duties of one who undertakes an *affirmative act*, the comment merely restates the general rule that actors are "under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act." RESTATEMENT (SECOND) OF TORTS § 302 cmt. a. The interpretation of section 302 B advanced by the Parrillas, that a duty of care may arise pursuant to that section where an actor's affirmative act has created or exposed another to a recognizable high degree risk of harm, is entirely consistent with that general principle.

In the present case, it is an affirmative act, rather than a failure to act, that is at issue. The bus driver affirmatively acted by leaving Carpenter alone on board the bus with its engine running.

Parrilla, 138 Wn. App. at 435-39 (footnotes omitted).

Consistent with Hutchins, Kim, and Parrilla, we conclude that *Restatement (Second) of Torts* § 302B comment e is recognized in Washington as a source of duty. It is not merely an overlay explaining how an actor can breach a duty defined elsewhere.

Seattle contends, however, that even if section 302B gives rise to a duty of care owed by a private actor, it does not apply to conduct of a governmental actor because of the "immunity" conferred by the public duty doctrine.

To say that the public duty doctrine confers "immunity" fundamentally misstates the law. The Washington legislature has abolished sovereign immunity. Municipalities, "whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, . . . to the same extent as if they were a private person or corporation." RCW 4.96.010. 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 163; Osborn, 144 Wn.2d at 27-28.

Over time, our courts have identified four “exceptions” to the public duty doctrine—legislative intent, failure to enforce, rescue, and special relationship. Bailey v. Town of Forks, 108 Wn.2d 262, 268, 737 P.2d 1257, 753 P.2d 523 (1987). Robb does not contend that her case fits any of these exceptions and instead bases her theory of negligence entirely on *Restatement (Second) of Torts* § 302B comment e. Seattle maintains that the public duty doctrine bars Robb’s negligence action because none of the four exceptions to the doctrine are present. Seattle cites no authority to support this categorical statement. If a private actor can owe a duty under section 302B, as a consequence of the abolition of sovereign immunity the same must be true of a governmental actor. Seattle raises the spectre 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.

When governmental actors are defendants, courts must take care to ensure that the duty allegedly breached was actually owed to the injured person as an individual. Drawing that line can be difficult, especially where the defendants are police officers whose everyday mission is to protect the public from the criminal acts of others—a mission that routinely brings them into contact with severely impaired and dangerous individuals. Drawing the line accurately,

however, would be impeded by accepting Seattle's rigid framework wherein the duty of a governmental actor is determined solely by resort to the public duty doctrine and the four recognized exceptions.

Exceptions to the public duty doctrine "generally embody traditional negligence principles." Osborn, 157 Wn.2d at 28, quoting Bishop v. Miche, 137 Wn.2d 518, 530, 973 P.2d 465 (1999). Used as focusing tools, they help to ensure that courts do not inadvertently assume that an obligation inherent in the job description of a governmental actor is the same as an actionable duty in tort. The public duty doctrine thus reminds us that municipalities are not to become liable for damages to a greater extent than if they were a private person or corporation.

Restatement (Second) of Torts § 302B also embodies traditional negligence principles. It describes limited circumstances in which an actor has a duty to protect another against third party conduct intended to cause harm. There must be a "recognizable high degree of risk of harm," evidence of which was found lacking in Kim and in Hutchins but present in Parrilla. The risk must be one that a reasonable person would take into account. And as comment e explains, these situations arise where the actor has a special relationship to the one suffering the harm or "where the actor's own affirmative act has created or exposed the other" to the high degree of risk of harm.

This is an affirmative acts case. Precedent for analyzing a claim involving affirmative acts by police officers without considering the four exceptions of the public duty doctrine is found in Coffel v. Clallam County, 47 Wn. App. 397, 403,

735 P.2d 686 (1987). In Coffel, there was a dispute about ownership of a building. Officers were called when one of the disputants took a sledge hammer to the building, in which a tenant was operating a business. In the resulting lawsuit for destruction of property, this court determined the officers would face no liability to the extent the suit was based on their failure to protect the property. This was because the statutory and common law duties to provide police protection are "owed to the public at large and [are] unenforceable as to individual members of the public." Coffel, 47 Wn. App. at 402. But some of the officers "took affirmative action" to prevent the tenant from protecting his own property. We allowed the negligence suit to proceed against those officers, reasoning that the 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." Coffel, 47 Wn. App. at 403; cf. RESTATEMENT (SECOND) OF TORTS § 302B cmt. a: "In general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act. The duties of one who merely omits to act are more restricted."

The closest precedent supporting Robb's theory of negligence is Parrilla, which Robb contends is analogous to her case. We agree. In Parrilla, the defendant bus driver was aware that "an instrumentality uniquely capable of causing severe injuries was left idling and unguarded within easy reach of a severely impaired individual." Parrilla, 138 Wn. App. at 440-41. It should not be

surprising that tort liability can be imposed for such conduct. Similarly, it 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.

Affirmed.

Becker, J.

WE CONCUR:

Dunn, C.J.

Appelwhite, J.