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No. 63299-0-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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

Respondent,

vs.

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

Appellants

**RESPONDENT'S RESPONSE BRIEF**

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## I. RESTATEMENT OF THE ISSUES

A. Whether viewing all facts and reasonable inferences from the facts in favor of Respondent, the trial court correctly denied Appellants' motion for summary judgment, finding that Respondent had presented sufficient evidence to establish that Appellants owed Robb a duty to exercise reasonable care to guard against the criminal activity of Berhe under Restatement (Second) of Torts § 302B?

B. Whether the public duty doctrine is inapplicable to Respondent's negligence claim when the evidence shows that Appellants' own affirmative acts exposed Robb to a recognizable high degree of risk of criminal misconduct by Berhe which the Appellants, as reasonable police officers, should have recognized and reasonably prevented?

## II. RESTATEMENT OF CASE

### A. Introduction.

On June 26, 2005, Samson Berhe (Berhe) murdered Michael Robb (Robb), using a shotgun and ammunition he had stolen earlier in the week.<sup>1</sup> The evidence shows that the Appellant police officers (the officers) should have known Berhe possessed a stolen shotgun.

Less than two hours before the murder, the officers stopped Berhe and his companion, Raymond Valencia, on suspicion of burglary. After taking control of the scene of the stop, including control of Berhe and his companion, the officers patted down both suspects for weapons. The officers admittedly saw yellow shotgun shells on the ground near where the suspects were standing. After about

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<sup>1</sup> Berhe was charged with Murder 1 and pled not guilty by reason of insanity. On May 5, 2008, Superior Court Judge Dean Lum accepted his not guilty plea and Berhe was committed to Western State Hospital, where he remains. Appendix A (Findings of Fact, Conclusions of Law, Order of Acquittal by Reason of Insanity, and Order Committing Defendant for Treatment).

twenty minutes of investigation, the officers released Berhe from their control, departed from the scene of the stop, and left the visible shotgun shells on the ground. Minutes later, Berhe returned to the scene, picked up the shotgun shells, loaded a stolen shotgun with two of the shells and fatally shot Robb.

The duty of care element of Robb's negligence claim is based on Restatement (Second) of Torts § 302B and cmt. e. In *Parrilla v. King County*, 138 Wn. App. 427, 157 P.3d 879 (2007) the court relied upon § 302B and cmt. e to impose a duty on King County. Section 302B provides the circumstances when a defendant may be found liable for negligence involving third party criminal conduct. Comment e articulates the situations where the defendant owes a duty to anticipate and exercise reasonable care to guard against third party criminal conduct.

As recognized in *Parrilla*, comment e states that the duty arises where the defendant/actor's own affirmative act has exposed the innocent victim to a recognizable high degree of risk of harm through third party criminal conduct, which a reasonable person should have taken into account. As explained in the Facts and Argument sections of this brief, the officers affirmatively acted when they stopped Berhe and took control of the burglary stop investigation, and then released Berhe. As a result of such affirmative acts, the officers owed a duty to protect Robb from the foreseeable risk of harm from Berhe's criminal activity. The officers knew or reasonably should have known that Berhe presented a

foreseeable and high degree of risk of harming another through criminal misconduct. The affirmative acts of conducting and controlling the stop, and releasing Berhe, combined with the recognizable risk of harm through criminal conduct, gave rise to the officers' duty under Restatement § 302B and Washington law to exercise reasonable care to guard against harm to Robb.

The officers breached their duty to exercise reasonable care at the stop scene and pick up the shotgun shells. Instead they departed from the scene of the investigative stop (which they controlled), and left the yellow shotgun shells behind for Berhe to retrieve.

Since the officers owed a specific duty of care to anticipate and guard against the criminal misconduct of Berhe based on their affirmative acts and the recognizable risk of harm Berhe posed, the public duty doctrine does not bar Respondent's negligence claim.

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 v. Clallam County*, 47 Wn. App. 397, 403, 735 P.2d 686 (1987). The public duty doctrine does not bar police negligence flowing from actions as opposed to inactions.<sup>2</sup>

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<sup>2</sup> *Logan v. Weatherly*, 2006 U.S. Dist. LEXIS 37258, at \* 10-12 (E.D. Wa. June 6, 2006). Appendix B.

Here, under Restatement § 302B and cmt. e, the officers owed a specific duty of care to Robb, and not a general duty to the public. Evidence of an affirmative act which is required to prove actionable negligence in this case under Restatement § 302B cmt. e (“affirmative act” exposing another to a “recognizable high degree of risk of harm”) distinguishes this specific duty of care from the duty of care police officers owe to the public in general.

Resolving all facts and inferences in the light most favorable to Respondent, the trial court properly denied Appellants’ motion for summary judgment when it held that Respondent had established sufficient issues of material fact regarding the existence of a duty under Restatement § 302B and cmt. e.<sup>3</sup>

**B. The Facts.**

Before, during and after undertaking and controlling the investigative stop on June 26, Officers McDaniel and Lim knew or reasonably should have known that Samson Berhe presented an extreme risk of harm. On June 19, officers from the Southwest Precinct investigated the theft of shotguns, ammunition and other property from a residence approximately one mile from where Berhe lived. CP 311-14.<sup>4</sup> That same day, Officers McDaniel, Lim and Hairston were dispatched

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<sup>3</sup> 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.2d 267, 279, 937 P.2d 1082 (1997).

<sup>4</sup> Southwest Precinct is located about one mile from 1810 SW Dawson St., where Berhe lived with his family. CP 235-36.

to Berhe's home because his mother reported that Berhe was threatening suicide. CP 175-76, 173. Berhe's mother told the officers that he had threatened suicide before and was not taking prescribed medicine for his mental health problems. CP 176. Officer Lim described Berhe as "acting strange" and being "unresponsive", telling the officers, "Someday, you'll see" and "Fuck all the haters in the world." CP 173. Officer McDaniel acknowledged that Berhe was "out of touch with reality most of the time." CP 228. Officer McDaniel testified that, as a police officer, he takes "threats of suicide very seriously." CP 232-33. During the visit, Berhe told the officers that he was addicted to smoking marijuana, a disclosure that Officer McDaniel said he found very alarming. CP 176, 230.

On June 22, Officers Lim and St. John investigated an assault and mental disturbance incident at Berhe's home. CP 265-69, 173. Berhe had assaulted a friend of his brother with a closed fist. CP 265. Officer St. John noted in his incident report that he knew Berhe from numerous previous contacts and that Berhe had mental health problems. CP 266. When the officers approached, Berhe "spoke in normal tones then switched to deep demonic tones." *Id.* Berhe then "stated he ruled the world and that all confused people need to be killed & tortured." *Id.* Officer Lim recalls Berhe's rantings as, "You'll see, when I rule the world," "I control all the money," and "I'll kill all the haters." CP 173. Officer Lim acknowledged that he took Berhe's threat to "kill all haters" seriously

because Berhe might be a threat to his safety and that of his fellow officers. CP 197. Berhe again admitted to smoking marijuana and said that he was going to move out of his parent's house. CP 173.

Officer St. John stated in his incident report that "Berhe's father is concerned for his families [sic] safety due to Samson's mental state" and he recorded that "[b]ased upon the assault today and the additional fear the family is in," Berhe "was taken to HMC for an involuntary mental health evaluation." CP 266. In his Mental Health Contact Report, Officer St. John reiterated Berhe's father's belief that "his son is crazy and fears for his families [sic] safety due to Samson's irrational/mental behavior." CP 269. The mental health professional released Berhe because the boy Berhe assaulted declined to testify at a commitment hearing, and the mental health professional was unable to contact Berhe's parents. CP 806-7.

When Berhe's parents finally answered their phone, they refused to pick their son up at the hospital because they were afraid of him. CP 810. After pressure from the Seattle Police Department (SPD), Berhe's parents finally arrived and picked him up on June 23. *Id.*

The next morning, June 24, Berhe's father called 911 to report that Samson and Valencia were having a fight in the backyard and they both had shotguns. CP 271-282. Valencia threatened to shoot Berhe's father. CP 272. Seven officers from the Southwest Precinct investigated. CP 277-82.

In a related incident, the Bellevue police arrested Valencia for auto theft. Valencia told Bellevue Detective Hoover that Berhe had stolen a car and that Berhe had shotguns under his bed at home. CP 796. On June 23, Hoover called Detective Yamashita of SPD Auto Theft Section and advised him of the auto theft and the shotguns under Berhe's bed. *Id.* Thus, the officers knew or reasonably should have known what the Bellevue detective communicated regarding Berhe's possession of a shotgun. *Id.*

It is a question for the jury whether the SPD and Officers McDaniel and Lim knew or should have known that Berhe was in possession of a shotgun and that shotguns and ammunition had been stolen from a residence in the patrol area of the Southwest Precinct. CP 311-14, 271-82, 277-82, 796. Officers McDaniel and Lim acknowledged that a threatening juvenile with a shotgun was a very serious matter for police officers and the community at large. CP 255-60, 214-15. 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 Southwest Precinct (advising of recent dangerous police incidents) and discussed by the acting sergeant at the beginning of roll call. CP 255-57.

On the morning of June 26, Officers Stevens and Bailey were dispatched to investigate a 911 call that two youth were trespassing in the vacant home of

Brad Rogers. CP 720, 838-842. Berhe and Valencia were the trespassers. *Id.*

The officers released both suspects. *Id.*

That afternoon, two hours before Berhe fatally shot Robb with a stolen shotgun, Officer McDaniel stopped Berhe and Valencia on suspicion of burglary. A neighbor of the victim told Officer McDaniel that "Samson and Raymond Valencia were bragging about knowing where stolen items were being kept." CP 170.

After taking control of the investigation scene and patting down Berhe and Valencia for weapons,<sup>5</sup> Officers McDaniel and Lim stated that they saw the yellow shotgun shells.<sup>6</sup> CP 170, 173. In Officer Lim's words,

I turned around to face Samson and immediately recognized 4-5 yellow colored shotgun shells lying on the curb next to where Samson was standing. Because our focus was the burglary investigation, I did not retrieve the shotgun shells . . . As he was walking away, Samson kept saying incoherent comments . . .

CP 173. Officer McDaniel said, "At the location where I stopped Samson and Raymond, I noticed approximately 3-4 yellow shotgun shells on the curb in front of 1928 SW Brandon St." CP 170. Later, he modified that testimony,

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<sup>5</sup> CP 173, 204-05. SPD Policies and Procedures Manual provides that "Officers may frisk or pat-down the stopped individual for dangerous weapons if the officer reasonably believe the suspect may have a weapon ." *Section 2.010 III. Terry Stops* C. 2. Appendix C.

<sup>6</sup> The evidence will show that Berhe sloughed the shotgun shells on the ground before Officer McDaniel stopped his patrol car.

I observed yellow shotgun shells under some bushes in a planting strip, perhaps 10 to 12 feet from where I originally encountered Mr. Berhe and Mr. Valencia in the middle of the street.<sup>7</sup>

CP 126. In either event, the officers saw clearly-visible shotgun shells in the immediate area which they controlled and have admitted that fact.

The officers questioned the suspects about the burglary. While they took Valencia into custody because he had a stolen watch in his pocket (CP 239, 827), the officers released the "agitated" and threatening Berhe, merely because he did not possess any stolen property. CP 170, 173. They released Berhe even though they knew he was violent (CP 173, 196-97, 265-69, 296, 301, 304); they knew or reasonably should have known he had a stolen shotgun in his possession (CP 173, 204-05, 271-73, 277-82, 288-89, 311-12); and they saw yellow shotgun shells in the area which they controlled (CP 205, 240-44).

Officer McDaniel testified that the yellow shotgun shells he saw looked like the shotgun shells that police officers used. CP 244. He did not examine or touch them, nor did he ask Berhe or Valencia about them. *Id.* Despite stopping the boys, taking control of the scene, and having information indicating that the boys had possession of a stolen shotgun, the officers did not confiscate the shells, complete a property slip and deposit the shells in the Southwest Precinct property room. CP 248. That process would have been a simple task for the officers. *Id.*

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<sup>7</sup> McDaniel testified that he stopped Berhe and Valencia on the edge of the road and not in the middle of the street. CP 239-40.

When the officers departed from the area of the stop they left the clearly-visible shells on the ground (CP 170), in the vicinity of the dangerous, aggressive, disturbed Berhe, whom they should have known had possession of a stolen shotgun. CP 311-14, 235-36, 271-82, 796.

Shortly after Officers McDaniel and Lim released control of the stop and left, Berhe returned and picked up the shotgun shells. CP 317-18. The evidence will show that Berhe put two of these shells in a stolen shotgun, which the officers either knew or reasonably should have known that he possessed, in light of their previous contacts with Berhe and his family, and their dealings with other Southwest Precinct police officers. Tragically, less than two hours after Berhe retrieved the shells, Berhe murdered Robb using those shotgun shells. CP 776-84.

The day after the shooting, Officer McDaniel talked to the occupants of 1928 SW Brandon, the location of the stop. CP 170-71. The son of the owner told Officer McDaniel that "Samson Berhe came to his house [the night of the shooting] and showed him a handful of yellow shotgun shells."<sup>8</sup> CP 171.

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<sup>8</sup> When the trial court stayed proceedings in this case pending appeal, fact discovery had not been completed. If the Court of Appeals remands the case to the trial court for further proceedings, Robb intends to pursue further depositions of the pertinent witnesses and conclude document and expert discovery.

### III. ARGUMENT

#### A. Standard of Review.

On review of a summary judgment order, the court of appeals engages in the same inquiry as the trial court.<sup>9</sup> Summary judgment is appropriate when “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.”<sup>10</sup> “A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation.”<sup>11</sup> “[A] dispute about a material fact is ‘genuine’ . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.”<sup>12</sup> A summary judgment “motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.”<sup>13</sup> “[T]he court must consider the evidence and all reasonable inferences therefrom in favor of the nonmoving party. If reasonable persons might reach different conclusions, the motion should be denied.”<sup>14</sup>

On summary judgment, the court does not assume “the function of a jury by weighing the facts as presented in documents prior to trial.”<sup>15</sup> “Summary judgment exists to examine the sufficiency of legal claims and narrow issues, not

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<sup>9</sup> *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

<sup>10</sup> CR 56(c).

<sup>11</sup> *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

<sup>12</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

<sup>13</sup> *Wilson*, 98 Wn.2d at 437.

<sup>14</sup> *Klinke v. Famous Recipe Fried Chicken*, 94 Wn.2d 255, 256-57, 616 P.2d 644 (1980).

<sup>15</sup> *Babcock v. State*, 116 Wn.2d 596, 598, 809 P.2d 143 (1991).

as an unfair substitute for trial.”<sup>16</sup> If “at the hearing on a motion for summary judgment, there is contradictory evidence, or the movant’s evidence is impeached, an issue of credibility is present” and the motion should be denied.<sup>17</sup> The standard rule is that “[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.”<sup>18</sup> In the trial court, Respondent submitted sufficient evidence to raise issues of material fact regarding the existence of a duty under Restatement § 302B. *See* CP 449-51.

A reasonable juror certainly could conclude that in light of all the circumstances, Officers McDaniel and Lim, when they encountered Berhe on June 26, knew or reasonably should have known that Berhe was a mentally unstable, threatening and extremely dangerous youth who had access to a stolen shotgun and, if given the opportunity, would use the shotgun and the shells to kill someone, which is exactly what he did. The officers demonstrated their suspicion that Berhe might possess a shotgun when immediately after they stopped him, they frisked him for weapons. Such a search is justified only when “the officer has reasonable grounds to believe that [the suspect] is armed and dangerous.” *State v. Hobart*, 94 Wn.2d 437, 441, 617 P.2d 429 (1980).

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<sup>16</sup> *Id.*

<sup>17</sup> *Balise v. Underwood*, 62 Wn.2d 195, 200, 381 P.2d 966 (1963).

<sup>18</sup> *Anderson*, 477 U.S. at 255.

The fact that nine Southwest Precinct police officers<sup>19</sup> knew that shotguns and ammunition had been stolen from a home in the area, and that Berhe had been reported to be in possession of a stolen shotgun,<sup>20</sup> is further evidence from which a reasonable fact finder could conclude that when Officers McDaniel and Lim stopped Berhe on June 26, they either knew or reasonably should have known that Berhe possessed a shotgun. Clearly other Southwest Precinct police officers knew that, and it bears emphasis that the officers do not dispute this fact. Berhe's possession of a shotgun was, or should have been, apparent at the Southwest Precinct. It would have been posted on the wall board; commented on by the officer supervising the daily roll call; and generally discussed by the patrol officers concerned about their safety and the safety of others in the community. CP 255-57.

Here, there is sufficient direct and circumstantial evidence to create a genuine issue of material fact regarding the officers' knowledge of Berhe's possession of a shotgun and the gravity of risk presented to individuals such as Robb if they did not confiscate the shotgun shells. "Questions involving a persons' state of mind, e.g., whether a party knew or should have known of a particular condition, are generally factual issues inappropriate for resolution by

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<sup>19</sup> CP 311-12 (shows two officers responding); CP 277-82 (shows seven officers responding)

<sup>20</sup> Possession of a shotgun by a juvenile under 18 is a class C felony in Washington. RCW 9.41.040(2)(a)(iii). It is illegal for a dealer to sell ammunition to a minor. 18 U.S.C. § 922(b)(1). Officer McDaniel knew that possession of a firearm by a minor was illegal and he acknowledged that there is no place where Berhe could have legitimately purchased shotgun ammunition. CP 260.

summary judgment.” *Braxton-Secret v. Robins Co.*, 769 F.2d 528, 531 (9<sup>th</sup> Cir. 1985).

Clearly, the stop, the ensuing investigation and the release of Berhe were affirmative acts by the officers. If the jury then found actual or constructive knowledge of the risk as they reasonably could under the facts offered and the applicable summary judgment standard, then the unstable Berhe in possession of a shotgun and access to shotgun shells would have presented a recognizable risk of harm. Consequently, given the existence of affirmative acts and a recognizable risk of harm, the officers owed a duty to protect Robb against the happening of that risk of harm. And, they breached that duty when they did not exercise reasonable care to pick up the shells.

**B. Restatement (Second) of Torts § 302B and Cmt. e Establishes a Duty of Care.<sup>21</sup>**

*Parrilla v. King County*, 138 Wn. App. 427, 157 P.3d 879 (2007) is dispositive of this appeal. In *Parrilla*, the driver of a Metro bus exited his bus, leaving the engine running, and leaving a visibly erratic passenger, Carpenter, on board. *Id.* at 431. Once the bus driver disembarked, Carpenter moved into the

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<sup>21</sup> Restatement (Second) of Torts § 302B cmt. e provides:

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.

driver's seat, drove the bus and collided with the Parrillas' vehicle causing injury.

*Id.* Despite the fact that the Parrillas were unknown to the bus driver or King County, the court found that "King County owed a duty of care to the Parrillas because the bus driver's affirmative act exposed the Parrillas to a recognizable high degree of risk of harm through the passenger's criminal conduct, which a reasonable person would have foreseen." *Id.* at 430.

The *Parrilla* court began its analysis by paraphrasing the Restatement rule that guided its conclusion that a duty of care existed:

An actor owes another a duty to guard against the foreseeable criminal conduct of a third party where the actor's affirmative act has exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable person would have taken into account.

*Id.* at 430 (citing Restatement (Second) of Torts § 302B cmt. e). *Parrilla* held that a duty of care existed under the circumstances of the case, Restatement § 302B and *Kim v. Budget Rent A Car Systems, Inc.*, 143 Wn.2d 190, 196-98, 15 P.3d 1283 (2001). *Id.* at 433.

Here, the officers' affirmative acts of making the stop, conducting the investigation, and releasing Berhe are sufficient evidence from which a reasonable fact-finder could infer a duty to prevent a recognizable risk of harm to Robb. Like the driver in *Parrilla* who left the bus he controlled with an erratic passenger on board, here the officers left the stop scene they controlled, with

visible shotgun shells on the ground within reach of a mentally unstable, dangerous youth whom they knew or should have known possessed a shotgun.

Restatement (Second) of Torts § 302B and cmt. e establishes a duty in this case. Appellants deny the applicability of Section 302B to impose a duty,<sup>22</sup> but the *Parrilla* court rejected a similar argument. In *Parrilla*, King County argued that the language of § 302 cmt. a, shows that “section 302B was not intended to give rise to a duty of care, but only to explain when an already-existing duty has been breached.” 138 Wn. App. at 437-38. The *Parrilla* court disagreed:

[T]he 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 302B 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.

138 Wn. App. at 438 (italics in original; additional emphasis added). The *Parrilla* court elaborated:

Section 302 comment a does not foreclose the imposition of a duty of care in such a situation. Moreover, regardless of whether a particular intent is evidenced by section 302 comment a, our Supreme Court acknowledged in *Kim* that section 302B may support a finding that a duty of care exists under such circumstances. *Kim*, 133 Wn.2d at 196-98.

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<sup>22</sup> Appellants’ Brief at 1, 18-19.

138 Wn. App. at 438-39.

The *Parrilla* court also rejected King County's argument that the only circumstances that may give rise to a duty to guard against the criminal conduct of a third party under Washington law are those in which the actor has a special relationship with either the criminal third party or the victim. "This is not the law [in Washington]." 138 Wn. App. at 435.<sup>23</sup>

Appellants, besides misstating the legal rulings in *Parrilla* as to duty of care under § 302B and the purported necessity for a "special relationship" to impose a duty of care, attempt to distinguish *Parrilla* by contending that Respondent has presented no evidence of the officers' affirmative acts which would trigger a duty of care under § 302B. For this proof, Appellants rely on the allegations of the Complaint Respondent filed in January 2008. The Complaint alone is not dispositive; this Court considers the trial court's denial of Appellants' motion for summary judgment, not the denial of a motion to dismiss. The trial court denied summary judgment in this case based upon the evidence Respondent submitted along with the summary judgment briefing, not on the facts Respondent alleged in her Complaint.<sup>24</sup>

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<sup>23</sup> Appellants cite *Webb v. University of Utah*, 125 P.3d 906 (Utah 2005) for the proposition that an affirmative duty of care is only imposed where a "special relationship" exists between the plaintiff and the defendant. Appellants' Brief at 21. *Webb* is not controlling here and is contrary to Washington law.

<sup>24</sup> Appellants did not include the Complaint as evidence they submitted in support of summary judgment; therefore, it is not part of the summary judgment review record. "In summary judgment proceedings, this court may review only 'the precise record . . . no more and no less . . . considered

In *Parrilla*, Carpenter took advantage of the bus driver's actions in departing from the bus he controlled, by driving away with the bus. Here, Berhe took advantage of the officers' actions in releasing him from their control with shotgun shells at his feet, by departing the stop scene, free to return for the shells and to murder Robb. After having undertaken the stop and investigation, a reasonable police officer should have known that if he released Berhe and left the scene with the shotgun shells on the ground, Berhe would return and retrieve them—which is what he did.

When the officers released Berhe and left the scene of the stop, they knew that Berhe was mentally unstable, dangerous and threatening (CP 173, 175-76, 228), and that earlier that week Berhe had made suicidal and homicidal threats (CP 265-69, 173); they knew that Berhe's family feared for its safety because of Berhe's mental state (CP 266, 269); and the officers knew that he was addicted to marijuana and was living on the streets (CP 173, 176, 230). Indeed, the officers here had much more knowledge regarding the risk Berhe posed than the bus driver in *Parrilla* had of the risk posed by the deranged passenger. Just as the bus driver breached his duty when he left his bus to the deranged passenger, the officers here breached their duty when they did not pick up the shotgun shells and left them for Berhe. The injuries in *Parrilla* happened because the bus driver

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by the trial court.' *American Universal Ins. Co. v. Ranson*, 59 Wn.2d 811, 816, 370 P.2d 867 (1962). We, therefore, have confined our review to those documents which the court stated were actually considered." *Grange Ins. Assoc. v. Ochoa*, 39 Wn. App. 90, 93, 691 P.2d 248 (1984). See also RAP 9.12. Because the precise record here does not include the Complaint, it should not be considered by the Court.

failed to exercise reasonable care by leaving the bus he controlled to Carpenter. Here, Berhe positioned himself to shoot Robb because the officers failed to exercise reasonable care by leaving the stop scene they had controlled with clearly-visible shotgun shells on the ground.

In analyzing whether a duty to take precautions against intentional or criminal misconduct exists, the *Parrilla* court referred to official comment f to §302B which describes the factors the court should consider to balance the magnitude of the risk against the utility of the actor's conduct. 138 Wn. App. at 434.<sup>25</sup> Applying the comment f factors to the circumstances of this case supports the imposition of a duty here.<sup>26</sup>

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<sup>25</sup> Restatement (Second) of Torts § 302B cmt. f states:

It is not possible to state definite rules as to when the actor is required to take precautions against intentional or criminal misconduct. As in other cases of negligence (see §§ 291-293), it is a matter of balancing the magnitude of the risk against the utility of the actor's conduct. Factors to be considered are the known character, past conduct, and tendencies of the person whose intentional conduct causes the harm, the temptation or opportunity which the situation may afford him for such misconduct, the gravity of the harm which may result, and the possibility that some other person will assume the responsibility for preventing the conduct or the harm, together with the burden of the precautions which the actor would be required to take. Where the risk is relatively slight in comparison with the utility of the actor's conduct, he may be under no obligation to protect the other against it.

<sup>26</sup> Appellants' reference to the Illinois Court of Appeals decision in *Poliny v. Soto*, 533 N.E.2d 15 (1988) is misplaced. Appellants' Brief at pp. 22-23. In *Poliny*, the court dismissed a negligence action against police officers for leaving plaintiff unprotected at an arrest scene where the special duty exception to the Illinois Tort Immunity Act was not met. Plaintiff had failed to allege facts which showed that plaintiff had been under the officer's control at the time of the injury. The *Poliny* court refused to discard the "control" element from the special duty analysis. Here, under Washington law, the § 302B duty of care can be imposed absent a special relationship. Further, under the circumstances of this case, the appellant officers were required to take precautions to guard against the criminal misconduct of Berhe.

Berhe's "known character" as mentally ill, threatening, assaultive, suicidal and homicidal, and his "recent conduct" and "tendencies" support the imposition of a duty.

At the time of Robb's murder, the SPD and the officers knew of Berhe's character, past conduct, and tendencies. Although the bus driver in *Parrilla* observed Carpenter's actions only during the limited duration of the bus ride, the court held that the imposition of a duty of care was proper. 138 Wn. App. at 433. Here, the SPD and Officers McDaniel and Lim knew from "numerous previous contacts" that Berhe had mental health problems and that he was "out of touch with reality most of the time." Moreover, the officers knew that Berhe's recent conduct and tendencies were assaultive, threatening, suicidal and homicidal. It is a jury question whether Berhe's known character, recent conduct, and tendencies show that the SPD and the officers knew or should have known Berhe presented a recognizable risk of harm.

The shotgun shells provided the "opportunity" for a mentally disturbed Berhe, who had made suicidal and homicidal threats and who was in possession of a stolen shotgun, to engage in criminal misconduct.

The yellow shotgun shells that Officers McDaniel and Lim saw during their burglary stop and investigation on June 26 presented an obvious opportunity for violence to an unbalanced, homicidal, mentally disturbed juvenile like Berhe - - who earlier in the week had stolen a shotgun and ammunition. CP 776-84. The officers knew or reasonably should have known that Berhe possessed a shotgun. The evidence will show that the shotgun shells lying on the ground were part of

the box of ammunition that Berhe stole. As police officers know, shotgun shells present an abnormally high degree of risk of harm especially here, where the officers knew the deranged young man they released from the scene of the stop had a shotgun. Because Berhe possessed a shotgun - - which the officers knew or reasonably should have known - - the opportunity to misuse the ammunition was particularly great. Furthermore, it is a jury question whether the officers should have recognized that Berhe would return and pick up the yellow shotgun shells they left on the ground when they drove away from the scene of the stop.

The "gravity of harm which may result from" explosive shotgun shells being left by the officers on the ground in these circumstances is substantial.

The gravity of the officers' release of Berhe and leaving the shotgun shells in plain and open view was obvious from the potential for serious injury or death, given the circumstances of Berhe's mentally unstable behavior and his suicidal and homicidal ideations. The officers knew or should have known that guns and ammunition had recently been stolen in the neighborhood and that Berhe was in possession of a shotgun. The recognizable high degree of risk of harm within the general field of danger, which a reasonable police officer should have anticipated, was death. And that is exactly what occurred shortly after Berhe returned to the scene of the burglary stop and picked up the shotgun shells.

The officers could have confiscated the shotgun shells which they saw laying on the ground near where Berhe was standing without any burden.

During the course of the burglary stop and investigation, the officers easily could have confiscated the shotgun shells. It would not have been a burden for either officer to confiscate the shells, deposit them in the property room at the Southwest Precinct, and complete a property report. The stop lasted about twenty minutes and neither officer had to leave the scene because of another police emergency.

The fact that the officers were investigating a burglary did not excuse them from their duty to exercise reasonable care to guard against a recognizable and unreasonable risk of harm to another person from the criminal misconduct of a third party. The officers had the duty and right to pick up the shells. *See State v. Sullivan*, 65 Wn.2d 47, 52, 395 P.2d 745 (1964) (“Aside from the arrest for speeding, the officer had the right *and the duty* to seize what reasonably appeared to him to be contraband”) (Emphasis in original).

As *Parrilla* notes, “[i]f a risk is foreseeable, an individual generally has a duty to exercise reasonable care to prevent it.” 138 Wn. App. at 436. Here, Berhe’s mentally unstable, dangerous behavior, well known to the appellant officers, and their constructive knowledge that he was in possession of a shotgun and ammunition, created a duty of care not to expose Robb to a recognizable high degree of risk of harm from the criminal activity of Berhe.

**C. The Public Duty Doctrine Does Not Apply to Bar Robb's Negligence Claim under Restatement § 302B.**

Washington has abolished sovereign immunity and enacted one of the broadest waivers of sovereign immunity in the nation for state and municipal organizations like appellant City.<sup>27</sup> Prior to the waiver of sovereign immunity, a municipality was liable in tort if the tortious act was committed in the municipality's proprietary capacity. *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732 n.1, 927 P.2d 240 (1996). If the municipality acted in a governmental capacity, it was immune from a tort suit. To distinguish a municipality's governmental function from its proprietary operation, courts had to decide whether the particular act in question was done for the benefit of all, rather than for the advantage of the municipal entity itself.<sup>28</sup> If the act was done for the benefit of all there was no liability; if the act was done for the advantage of the municipal entity itself there was liability.

After the Washington legislature abolished sovereign immunity, the common law distinction between governmental and proprietary functions became obsolete. Now, if a private actor would be liable under any given circumstances, then the public actor is likewise liable.

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<sup>27</sup> Regarding the statutory waiver of sovereign immunity as to local governmental entities, RCW 4.96.010 states in part: all 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. . . ." The Washington legislature's waiver of sovereign immunity is "one of the broadest waivers of sovereign immunity in the country." *Savage v. State*, 127 Wn.2d 434, 444, 899 P.2d 1270 (1995).

<sup>28</sup> See Charles F. Abbott, Jr., Comment, *Abolition of Sovereign Immunity in Washington*, 36 Wash. L. Rev. 312, 316-18 (1961).

In general, for an injured party to recover from a governmental agency, he must show that a duty breached was owed to him as an individual and not merely to the public in general. *Bailey v. Town of Forks*, 108 Wn.2d 262, 265, 737 P.2d 1257 (1987).

Absent a showing of a duty running to the injured plaintiff from agents of the municipality, no liability may be imposed for a municipality's failure to provide protection or services to a particular individual.

*Bailey*, 108 Wn.2d at 266. This basic principle is known as the "public duty doctrine." *Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1998).

In the circumstances of this case, the public duty doctrine is inapplicable because the officers' affirmative acts exposed Robb, an innocent victim, to a recognizable high degree of risk of harm from the criminal misconduct of Berhe, which the officers, as reasonable persons, should have recognized.

Under Washington law, the public duty doctrine does not apply where affirmative acts of police officers create an unreasonable risk of harm. "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 v. Clallam County*, 47 Wn. App. 397, 403, 735 P.2d 686 (1986). Thus, when police officers act, they expose themselves to potential liability for negligence and may not avoid that responsibility to exercise reasonable care by claiming that they merely owe a duty to all.

In *Coffel*, law enforcement officers stood by and watched a third party destroy a building and its contents, preventing plaintiffs from doing anything about the destruction even though the officers knew of plaintiffs' ownership rights. 47 Wn. App. at 399-400. Because there was no special relationship between plaintiffs and some of the officers, the Court of Appeals affirmed summary judgment in favor of officers who were not at the scene of the destruction of property, based on the public duty doctrine. *Id.* at 402-03.

However, as to the officers who were at the scene, the court reversed, holding that summary judgment should not have been granted. Plaintiff raised a genuine issue of material fact when he stated in his affidavit "that the officers took affirmative action to prevent him from protecting his property against Caldwell's destruction." *Id.* at 403. Finding a duty of care, the court remanded "for trial the determination whether affirmative action was taken by these officers, and whether any action taken was below the standard of reasonable care and whether such action proximately resulted in damage to plaintiffs for which defendants are liable." *Id.* at 405.

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 claim 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 plaintiff's negligence claim where the negligence resulted from actions as opposed to inactions. *Id.* at \*10-12.<sup>29</sup>

*Parrilla* is another example of a case involving affirmative acts, to which the public duty doctrine did not apply. In finding a duty under Restatement § 302B and cmt. e, the *Parrilla* court followed the general rule that where the existence of a specific duty may be determined by applying common law principles, the court need not inquire into the exceptions to the public duty doctrine. 138 Wn. App. at 436-41. The court's sole inquiry was whether King County's actions, through the driver's affirmative acts, exposed the injured parties to a recognizable high degree of risk of harm from the criminal misconduct of another. Likewise here, because the duty flows from the officers' affirmative acts in taking control of the stop scene and releasing Berhe, the public duty doctrine is inapplicable.

City has failed to cite any case or other authority applying the public duty doctrine to a factual situation similar to this one. Nor can it, because that is not the law of Washington. When a municipality acts, a duty arises under the common law.

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<sup>29</sup> 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 officers] was the result of direct contact with the plaintiff, not the performance of a general public duty."); *Dauffenbach v. City of Wichita*, 667 P.2d 380, 385 (Kan. 1983) (the public duty rule does not apply "where there is an affirmative act by the officer causing injury").

#### IV. CONCLUSION

In order to impose a duty here Respondent must, and has shown, that Berhe posed a recognizable high degree of risk of harm and that the officers' affirmative acts exposed Robb to that foreseeable risk. As to whether Berhe posed a recognizable high degree of risk of harm, a reasonable jury could find that the officers were sufficiently warned that Berhe had access to a shotgun and was a violent, dangerous, erratic person who had possession of a shotgun. The officers knew or should have known that he presented a high risk of harm to third parties and himself. As to the affirmative act requirement, there is no question that the officers affirmatively acted when they stopped Berhe and Valencia. It is undisputed that in stopping the young men, they took control of the stop scene. It is undisputed that the officers saw shotgun shells on the ground at the stop scene. It is undisputed that the officers released Berhe at the stop scene. It is undisputed that they left the shells at the stop scene they controlled. And, it is undisputed that the officers departed from the scene with Berhe free and the shotgun shells on the ground. Berhe returned, picked up the shells, loaded them into a stolen shotgun and within two hours used the shells and shotgun to kill Robb. Under these facts, the trial court did not err in concluding that Robb has presented sufficient facts from which a duty may be found to exist.

It has long been recognized that tort liability is a powerful tool for encouraging responsible conduct.<sup>30</sup> Indeed, a primary purpose of tort law is to provide for civil enforcement of social norms.<sup>31</sup> As Justice Utter observed in *King v. Seattle*, “[t]he most promising way to correct the abuses, if the community has the political will to correct them, is to provide incentives to the highest officials by imposing liability on the governmental unit.”<sup>32</sup>

Respondent Elsa Robb respectfully requests the Court of Appeals to affirm the trial court’s ruling denying Appellants’ motion for summary judgment and to remand this case to the trial court for further proceedings.

DATED this 18<sup>th</sup> day of November, 2009.

DANIELSON HARRIGAN LEYH & TOLLEFSON LLP

By

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

<sup>30</sup> W. Page Keeton, et al, *Prosser & Keeton on The Law of Torts* § 4, at 25-26 (5<sup>th</sup> ed. 1984).

<sup>31</sup> *Id.*

<sup>32</sup> 84 Wn.2d 239, 244, 525 P.2d 228, 232 (1974).

# **APPENDIX A**

FILED

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KING COUNTY  
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CERTIFIED COPY TO WARRANTS ~~MAY 5 2008~~

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

SAMSON Y. BERHE

Defendant,

No. 05-1-08699-4 SEA

FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
JUDGMENT, ORDER OF  
ACQUITTAL BY REASON OF  
INSANITY, AND  
ORDER COMMITTING DEFENDANT  
FOR TREATMENT

THIS MATTER came on before the undersigned judge of the above-entitled court, on the defendant's motion to acquit by reason of insanity pursuant to RCW 10.77.080. The defendant appeared in court and was represented by his attorney, Byron Ward, the State of Washington was represented by Daniel Satterberg, by and through Senior Deputy Prosecuting Attorney, Mary H. Barbosa. The court, by stipulation of the parties, considered the written reports of the staff of Western State Hospital dated November 15, 2007, September 24, 2007, September 21, 2007, June 15, 2007, March 28, 2007, May 1, 2006, April 26, 2006, January 6, 2006 and October 4, 2005. The court also considered the Certification for Determination of Probable Cause prepared by Detective Rolf Norton of the Seattle Police Department; Report of Forensic Evaluation by Dr.

FINDINGS OF FACT, CONCLUSIONS OF LAW,  
JUDGMENT, ORDER OF ACQUITTAL BY REASON  
OF INSANITY, AND ORDER COMMITTING  
DEFENDANT FOR TREATMENT - 1  
Revised 1-15-03

Norm Maleng, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000  
FAX (206) 296-0955



1 Christian Harris dated January 17, 2008, Forensic Psychological Report of Dr. Kenneth Muscatel  
2 dated April 18, 2008, and mental health and treatment records from Harborview Medical Center  
3 and Fairfax Hospital. Finally, the court considered the record to date and arguments of counsel.

4  
5 **FINDINGS OF FACT**

- 6 1. The defendant is competent to enter a plea to the charge and to stand trial.
- 7 2. The defendant committed the charged crime of Murder in the First Degree with a firearm  
8 enhancement.
- 9 3. At the time of the act charged, the defendant was suffering from a mental disease or  
10 defect affecting the defendant's mind to the extent that either the defendant was unable to  
11 perceive the nature and quality of the act with which he is charged; or the defendant was unable  
12 to tell right from wrong with reference to the particular act charged.
- 13 4. The defendant is a substantial danger to other persons and presents a substantial  
14 likelihood of committing criminal acts jeopardizing the public safety or security unless kept  
15 under further control by the court.
- 16 5. It is not in the best interests of the defendant and others that the defendant be placed in  
17 treatment that is less restrictive than detention in a state mental hospital.

18 **CONCLUSIONS OF LAW**

- 19 1. The defendant committed the act charged in the information.
- 20 2. The defendant was insane at the time of the commission of the act charged.
- 21  
22

23 FINDINGS OF FACT, CONCLUSIONS OF LAW,  
JUDGMENT, ORDER OF ACQUITTAL BY REASON  
OF INSANITY, AND ORDER COMMITTING  
DEFENDANT FOR TREATMENT - 2  
Revised 1-15-03

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1 3. The defendant is a substantial danger to other persons and presents a substantial  
2 likelihood of committing criminal acts jeopardizing the public safety or security unless kept  
3 under further control by the court.

4 4. It is not in the best interests of the defendant and others that the defendant be placed in  
5 treatment that is less restrictive than detention in a state mental hospital.

6  
7 **JUDGMENT AND ORDER**

8 The Court acquits the defendant of the act charged because of insanity existing at the  
9 time of the act charged.

10 IT IS HEREBY ORDERED that the defendant is committed to the custody of the  
11 Secretary of the Department of Social and Health Services for hospitalization at such place as  
12 shall be designated for the care and treatment of the criminally insane.

13 THEREFORE, IT IS ORDERED, ADJUDGED and DECREED that the above-named  
14 defendant be transported by the King County Sheriff's Office to Western State Hospital

15 DONE IN OPEN COURT this 5<sup>th</sup> day of May, 2008.

16  
17   
18 KING COUNTY SUPERIOR COURT JUDGE

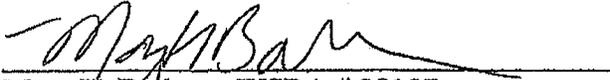
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23 FINDINGS OF FACT, CONCLUSIONS OF LAW,  
JUDGMENT, ORDER OF ACQUITTAL BY REASON  
OF INSANITY, AND ORDER COMMITTING  
DEFENDANT FOR TREATMENT - 3  
Revised 1-15-03

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1 Presented by:

2

3



Mary H. Barbosa, WSBA # 28187  
Senior Deputy Prosecuting Attorney

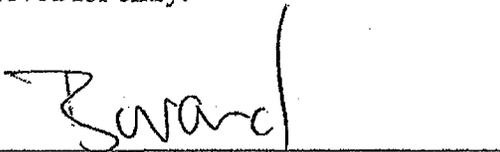
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Approved for entry:

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Byron Ward, WSBA # 2339  
Attorney for Defendant

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FINDINGS OF FACT, CONCLUSIONS OF LAW,  
JUDGMENT, ORDER OF ACQUITTAL BY REASON  
OF INSANITY, AND ORDER COMMITTING  
DEFENDANT FOR TREATMENT - 4  
Revised 1-15-03

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# **APPENDIX B**

Service: Get by LEXSEE®  
Citation: 2006 u.s. dist. lexis 37258

2006 U.S. Dist. LEXIS 37258, \*

NICOLE LOGAN, et al., Plaintiffs, v. WILLIAM WEATHERLY, DAN HARGRAVES; RUBEN HARRIS; DON HERROF; and ANDREW WILSON, et al., Defendants.

No. CV-04-214-FVS

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

2006 U.S. Dist. LEXIS 37258

June 6, 2006, Decided

June 6, 2006, Filed

**SUBSEQUENT HISTORY:** Motion denied by Logan v. Weatherly, 2006 U.S. Dist. LEXIS 36582 (E.D. Wash., June 6, 2006)

**PRIOR HISTORY:** Logan v. City of Pullman Police Dep't, 2006 U.S. Dist. LEXIS 25660 (E.D. Wash., Apr. 10, 2006)

#### CASE SUMMARY

**PROCEDURAL POSTURE:** Defendants, city police officers, filed a Fed. R. Civ. P. 59(e) motion for reconsideration of the court's order denying their motion for summary judgment on negligence and assault claims in a class action filed by plaintiffs, patrons of a restaurant who were present when the officers broke up an altercation at the restaurant by discharging oleoresin capsicum (OC) spray.

**OVERVIEW:** Defendants argued that plaintiffs' negligence claims were barred by the public duty doctrine because plaintiffs failed to establish whether defendants owed any duty of care to each of the individual plaintiffs under their multiple negligence theories. The court agreed with plaintiffs that the public duty doctrine was inapplicable to cases where the negligence flowed from actions as opposed to inactions. The court, however, determined that only one of plaintiffs' negligence claims involved defendants' action--the claim that defendants were negligent in dispersing OC spray inside the restaurant. The public duty doctrine was applicable to the remainder of plaintiffs' negligence theories, which were based on allegations that defendants failed to act in some way. Although defendants argued that the doctrine of transferred intent was inapplicable to plaintiffs' assault claims, the court found that the doctrine was unnecessary to find that defendants assaulted those plaintiffs who were directly sprayed with OC and those plaintiffs who suffered only secondary effects because plaintiffs relied on assault by attempt to cause fear and apprehension of injury, which required specific intent.

**OUTCOME:** The court denied the motion insofar as it sought a ruling that the negligence claims related to defendants' actions were barred by the public duty doctrine. The court granted the motion insofar as it sought a ruling that the negligence claims related to defendants' inaction were barred by the public duty doctrine. The court ruled that the doctrine of transferred intent was unnecessary to a determination of plaintiffs' assault claims.

**CORE TERMS:** assault, public duty, transferred intent, summary judgment, reconsideration, negligence claims, apprehension, unintended victims, sprayed, owed, common law, battery, specific intent, bodily injury, spray, LAW CLAIMS, public official's, reasonable care, assess, scene, hit, negligence theories, intent to inflict, civil cases, bodily harm, transferred, discharging, destruction, perpetrator, reconsider

## LEXISNEXIS® HEADNOTES

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**HN1**  The Federal Rules of Civil Procedure do not mention a "motion for reconsideration." Even so, a motion for reconsideration is treated as a motion to alter or amend judgment under Fed. R. Civ. P. 59(e) if it is filed within 10 days of entry of judgment. [More Like This Headnote](#)

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**HN2**  An amended complaint supersedes the original, the latter being treated thereafter as being non-existent. [More Like This Headnote](#)

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[Torts](#) > [Negligence](#) > [Duty](#) > [Affirmative Duty to Act](#) > [Special Relationships](#) > [Government Officials](#) 

[Torts](#) > [Negligence](#) > [Proof](#) > [Evidence](#) > [Province of Court & Jury](#) 

[Torts](#) > [Public Entity Liability](#) > [Liability](#) > [General Overview](#) 

**HN3**  The existence of a duty is a question of law, not fact. A duty can arise either from common law principles or from a statute or regulation. The public duty doctrine serves as a framework for courts to use when determining when a public official owes a specific statutory or common law duty to a plaintiff suing in negligence. 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 (that is, a duty to all is a duty to no one). There are four common law exceptions to the public duty doctrine. If one of these exceptions applies, the public official will be held as a matter of law to owe a duty to the individual plaintiff or to a limited class of plaintiffs. The exceptions are: (1) legislative intent; (2) failure to enforce; (3) the rescue doctrine; and (4) a special relationship. [More Like This Headnote](#)

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[Torts](#) > [Negligence](#) > [Standards of Care](#) > [Reasonable Care](#) > [General Overview](#) 

[Torts](#) > [Public Entity Liability](#) > [Liability](#) > [General Overview](#) 

**HN4**  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. [More Like This Headnote](#)

[Torts](#) > [Intentional Torts](#) > [General Overview](#) 

[Torts](#) > [Intentional Torts](#) > [Assault & Battery](#) > [Elements of Assault](#) 

[Torts](#) > [Intentional Torts](#) > [Assault & Battery](#) > [Elements of Battery](#) 

**HN5**  Three definitions of assault are recognized in Washington: (1) an attempt, with unlawful force, to inflict bodily injury upon another (attempted battery); (2) an unlawful touching with criminal intent (actual battery); and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting the harm (common law assault). Assault by battery does not require specific intent to inflict harm or cause apprehension; rather battery requires intent to do the physical act constituting assault. The other two forms of assault, however, require specific intent that the defendant intended to inflict harm or cause reasonable apprehension of bodily harm. Assault by attempt to cause fear and apprehension of injury requires specific intent to create

reasonable fear and apprehension of bodily injury. [More Like This Headnote](#)

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[Torts](#) > [Intentional Torts](#) > [Assault & Battery](#) > [Elements of Assault](#)

[Torts](#) > [Intentional Torts](#) > [Defenses](#) > [Intent](#)

**HN6** Transferred intent is only required when a criminal statute matches specific intent with a specific victim. For example, the doctrine of transferred intent is unnecessary to convict a defendant of assaulting both his intended victim and his unintended victim in the first degree because once intent to inflict great bodily harm is established, the mens rea is transferred to any unintended victim. [Wash. Rev. Code § 9A.36.011](#). Assault in the first degree, which involves assault by battery, requires a specific intent to inflict great bodily harm, but it does not, under all circumstances, require that the specific intent match a specific victim. Similarly, the doctrine of transferred intent is unnecessary to convict a perpetrator of assaulting an unintended victim in the second-degree because [Wash. Rev. Code § 9A.36.021\(1\)](#) does not match specific intent with a specific victim. The second degree assault statute, which includes the common law definition of assault, requires that the perpetrator have the intent to create "in another" apprehension and fear of bodily injury. [Wash. Rev. Code § 9A.36.021\(1\)](#). It also requires that the perpetrator create "in another" a reasonable apprehension and imminent fear of bodily injury. However, this offense does not require that the intended person and the person who suffered the assault be the same person. [More Like This Headnote](#)

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[Torts](#) > [Intentional Torts](#) > [Defenses](#) > [Intent](#)

**HN7** The statutory definitions for criminal assault under [Wash. Rev. Code §§ 9A.36.011, 9A.36.021\(1\)](#), which rely on the common law definitions of assault, do not require proof of a specific intent to assault the named victim. In other words, once intent to assault another is established, the mens rea is transferred to any unintended victim. [More Like This Headnote](#)

**JUDGES:** [\*1] Fred Van Sickle, United States District Judge.

**OPINION BY:** Fred Van Sickle

## OPINION

ORDER RE: DEFENDANTS' MOTION FOR RECONSIDERATION RE: COURT'S ORDER DENYING IN PART AND GRANTING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT RE: PLAINTIFFS' STATE LAW CLAIMS

**BEFORE THE COURT** is Defendants' Motion for Reconsideration Re: Court's Order Denying in Part and Granting in Part Defendants' Motion for Summary Judgment Re: Plaintiffs' State Law Claims. (Ct. Rec. 395). Plaintiffs are represented by Darrell Cochran and Thaddeus Martin. Defendants are represented by Andrew Cooley, Stewart Estes, Kim Waldbaum and Richard Jolley.

## I. BACKGROUND

This is a class action arising from the response of the City of Pullman Police Department to an altercation at the Top of China Restaurant and Attic Nightclub on September 8, 2002. The alleged facts are set forth in detail in the Court's Order Granting in Part and Denying in Part Defendants' Motion for Partial Summary Judgment Re: Qualified Immunity. (Ct. Rec. 240). Plaintiffs' Amended Complaint asserts claims against the individual Defendant Officers under Washington state law for assault (Complaint, P 6.2), intentional infliction of emotional distress [\*2] or the tort of outrage (Complaint, P 6.3), and negligence (Complaint, P 6.4), as well as claims against the City of Pullman Police Department for negligence under a theory of respondeat superior (Complaint, P 6.4) and negligent training, hiring, and supervision (Complaint, P 6.5). See Ct. Rec. 137. Defendants moved for summary judgment dismissal of these claims under Washington state law. The Court entered an Order Denying in Part and Granting in Part Defendants' Motion for Summary Judgment ("Order"). (Ct. Rec. 391). Specifically, the Court granted Defendants' motion for summary judgment dismissal of Plaintiffs' claims for negligent supervision, training and hiring. With respect to Plaintiffs' assault claims that were not barred by the applicable statute of limitations, the Court denied Defendants' motion for summary judgment. Further, the Court denied Defendants' motion for summary judgment to the extent it sought dismissal of Plaintiffs' claims for outrage and negligence. Defendants now move for reconsideration of the Court's Order as it pertains to Plaintiffs' assault claims and negligence claims.

## II. DISCUSSION

Defendants seek reconsideration of the Court's Order on [\*3] two specific grounds: (1) whether Plaintiffs' negligence claims are barred by the public duty doctrine; and (2) whether the doctrine of transferred intent is applicable to Plaintiffs' assault claims.

### A. Standard of Review

*HN1* The Federal Rules of Civil Procedure do not mention a "motion for reconsideration." Even so, a motion for reconsideration is treated as a motion to alter or amend judgment under Rule 59(e) if it is filed within ten days of entry of judgment. *United States v. Nutri-Cology, Inc.*, 982 F.2d 394, 397 (9th Cir.1992). Here, Defendants timely filed their motion for reconsideration. Thus, it is within the Court's discretion to reconsider its Order. See *School Dist. No. 1J, Multnomah County, OR v. AC&S, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993). Accordingly, the Court exercises its discretion and will reconsider its Order Denying in Part and Granting in Part Defendants' Motion for Summary Judgment Re: Plaintiffs' State Law Claims ("Order").

### B. Negligence

Plaintiffs' Amended Complaint alleges the individual Defendant Officers were negligent because they: "(1) failed to communicate knowledge of the social function at the [\*4] Top of China between changing shifts and plan for a controlled response to situations at the function; (2) failed to plan and assess their response to the call for assistance; (3) failed to establish physical presence at the scene, verbalize a cease and desist order, and control the isolated disturbance with as little force as possible; (4) failed to assess the environmental conditions of the confined building before discharging oleoresin capsicum; (5) discharged O.C. into a confined building occupied by several hundred innocent persons; (6) failed to provide for safe crowd control following intentional use of gas in the building; and (7) failed to administer medical attention to or call for a medical response on behalf of the victims." Court's Order, at 16 (internal quotations omitted) (citing Plaintiffs' Amended Complaint, PP 6.4.1 -- 6.4.7.). The Court concluded that whether "the Officers exercised the ordinary care or such care as a reasonable person would have exercised under the same or similar circumstances . . . raised issues of material fact with respect to whether the Officers were negligent." Court's Order, at 16. On that basis, the Court denied Defendants' motion for summary [\*5] judgment on Plaintiffs' negligence claims.

Defendants move for reconsideration, arguing Plaintiffs' negligence claims against the individual Officers are barred by the public duty doctrine. Additionally, now that the City of Pullman Police Department has been dismissed from this action, Defendants request the Court dismiss the negligence claims against the Pullman Police Department, which are based on the doctrine of respondeat superior. See Amended Complaint, P 6.4.

## 1. City of Pullman Police Department

Plaintiffs argue the City of Pullman is still a proper defendant for Plaintiffs' state law causes of action because the Court's Order Granting Defendants' Motion for Judgment on the Pleadings (Ct. Rec. 426) only dismissed the City of Pullman Police Department, not the City of Pullman. However, the City of Pullman is not a named party in this action. Plaintiffs correctly note that when the *Logan* and *Arnold* cases were consolidated, the Court's Order indicated that the City of Pullman was a proper remaining defendant. At that time, the Court's statement was true because although the *Arnold* complaint did not name the City of Pullman as a defendant, the *Logan* [\*6] complaint did name both the City of Pullman and the City of Pullman Police Department as defendants. However, Plaintiffs later sought and obtained permission to file an Amended Complaint in this consolidated action. Plaintiffs' Amended Complaint (Ct. Rec. 137) does not name the City of Pullman. Rather, the Amended Complaint only names the "City of Pullman Police Department; William T. Weatherly; Dan Hargraves; Ruben Harris; Don Heroff; and Andrew Wilson." Consequently, the City of Pullman was terminated as a party defendant in this case.

**HN2** An "amended complaint supersedes the original, the latter being treated thereafter as being non-existent." *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997). Because the City of Pullman was not named in Plaintiffs' Amended Complaint, the City of Pullman is not a party in this action. Accordingly, since the Pullman Police Department has been dismissed from this action, the only remaining negligence claims include Plaintiffs' claims against the individual Defendant Officers.

## 2. Public Duty Doctrine

"Under the public duty doctrine, no liability may be imposed for a public official's negligent conduct unless it [\*7] 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 (i.e., a duty to all is a duty to no one)." *Taylor v. Stevens County*, 111 Wash.2d 159, 163, 759 P.2d 447 (1988). Defendants argue summary judgment should be granted on Plaintiffs' negligence claims because Plaintiffs failed to establish whether the Officers owed any duty of care to each of the individual Plaintiffs under their multiple negligence theories. In response, Plaintiffs argue Defendants should be prohibited from seeking summary judgment under the public duty doctrine because Defendants never specifically raised this issue in their original motion for summary judgment. Alternatively, Plaintiffs argue the public duty doctrine is not applicable to the facts of this case.

Although Defendants did not specifically address the issue of the public duty doctrine in their original motion for summary judgment, they did argue Plaintiffs had failed to establish that the Defendant Officers owed any specific duty to Plaintiffs. In its Order, the Court concluded the Defendants had withdrawn their motion for summary [\*8] judgment with respect to Plaintiffs' negligence claims because Defendants did not mention it in their reply brief. However, Defendants contend they didn't address the issue in their reply brief because Plaintiffs failed to meet their burden of proving the existence of a duty. Defendants now state they "regret not better explaining this position" but urge the Court to consider the issue now on Defendants' motion for reconsideration.

The Court recognizes that its Order never specifically addressed what "duty" the Officers owed the Plaintiffs. Since the first hurdle in any negligence action is establishing a duty[,]" *Bratton v. Welp*, 145 Wash.2d 572, 576, 39 P.3d 959 (2002), prior to trial the Court will necessarily have to make a determination as to the applicability of the public duty doctrine. Therefore, the Court concludes it is appropriate and necessary to reconsider its Order and determine to what extent Plaintiffs' negligence claims are affected by the public duty doctrine.

**HN3** "The existence of a duty is a question of law, not fact. *Minahan v. W. Wash. Fair. Ass'n*, 117 Wash.App. 881, 890, 73 P.3d 1019, 1024 (Div. 2, 2003); *Pedroza v. Bryant*, 101 Wash.2d 226, 228, 677 P.2d 166 (1984). [\*9] A duty can arise either from common law principles or from a statute or regulation. *Doss v. ITT Rayonier, Inc.*, 60 Wash.App. 125, 129, 803 P.2d 4, rev. denied, 116 Wash.2d 1034, 813 P.2d 583 (1991). The public duty doctrine serves as a "framework" for courts to use when determining when a public official owes a specific statutory or common law duty to a plaintiff suing in negligence. *Cummins v. Lewis County*, 156 Wn.2d 844, 133 P.3d 458, 462 (2006). "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 (i.e., a duty to all is a duty to no one)." Taylor v. Stevens County, 111 Wash.2d 159, 163, 759 P.2d 447, 449-450 (1988)(citation and internal quotations omitted). "There are four common law exceptions to the public duty doctrine. If one of these exceptions applies, the [public official] will be held as a matter of law to owe a duty to the individual plaintiff or to a limited class of plaintiffs." Cummins, 133 P.3d at 462 [\*10] (internal quotations and citations omitted). "The exceptions are (1) legislative intent, (2) failure to enforce, (3) the rescue doctrine, and (4) a special relationship." Id. at n. 7.

Here, Plaintiffs do not argue that an exception to the public doctrine applies. Rather, Plaintiffs argue the public duty doctrine is inapplicable to cases, such as this, where the negligence flows from "actions as opposed to inactions." See Coffel v. Clallam, 47 Wash. App. 397, 403, 735 P.2d 686, 690 (Div. 2, 1987). <sup>HN4</sup> ("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."). Thus, Plaintiffs argue that once the Officers decided to break up the altercation at the Top of China Restaurant and The Attic nightclub by taking affirmative action and discharging O.C. spray, the Defendant Officers had a duty to act with reasonable care.

In Coffel, the owner (Mr. Coffel) and the tenant (Mr. Knodel) of a commercial building brought suit against various county police officers for failure of law enforcement to take action to prevent [\*11] the destruction of the building by Clinton Caldwell, a former owner of a one-half interest in the building. Coffel, 47 Wash.App. at 398, 735 P.2d 686. The gist of the plaintiffs' claims was that the defendant officers stood by while the plaintiffs' building and contents were being destroyed by Mr. Caldwell and prevented plaintiffs from doing anything about the destruction even though the officers knew of plaintiff Coffel's claim of ownership and plaintiff Knodel's claim of possession. Coffel v. Clallam County, 58 Wash.App. 517, 519, 794 P.2d 513 (Div. 2, 1990). The gist of the defense was that since there was a civil dispute over ownership of the building, the officers were under no duty to intervene and that, in any event, the public duty doctrine shielded them from liability for their actions or failure to act. Id. The court of appeals held that plaintiffs had stated a cause of action for negligence by alleging the officers at the scene acted affirmatively in preventing plaintiffs from protecting their property against destruction. Coffel, 47 Wash.App. at 403-04, 735 P.2d 686. However, the court of appeals dismissed the negligence [\*12] claims against the officers who were present at the scene insofar as they were based on "inaction" of the officers. Id. The court remanded to the trial court for a determination of "whether affirmative action was taken by [the] officers, and whether any action taken was below the standard of reasonable care and whether such action proximately resulted in damage to plaintiffs for which defendants are liable." Id. at 405, 735 P.2d 686.

Under Coffel, Plaintiffs' claim that the Individual Defendant Officers were negligent in dispersing O.C. spray inside the building is not precluded by the public duty doctrine. However, the public duty doctrine is still applicable to the remainder of Plaintiffs' negligence theories which are based on allegations that the Officers "failed" to act in some way. See Plaintiffs' Amended Complaint, at PP 6.4.1-.4 (Plaintiffs "failed to communicate knowledge of the social function", "failed to plan and assess their response", "failed to establish physical presence at the scene", "failed to assess the environmental conditions of the confined building before discharging" O.C. spray) and PP 6.4.6 and 6.4.7. ("failed to provide for safe crowd [\*13] control following use of" O.C. and "failed to administer medical attention to or call for medical response" for Plaintiffs). Thus, these theories of negligence are not actionable because Plaintiffs have failed to show any exception to the public duty applies.

### **B. Doctrine of Transferred Intent**

Defendants also move for reconsideration of the Court's Order, to the extent it holds that the doctrine of transferred intent is applicable to Plaintiffs' assault claims. In its Order, the Court held that under the doctrine of transferred intent, "the officers' intent with respect to those individuals who were directly sprayed by O.C. transfers to all of the plaintiffs who were inside the building when O.C. was sprayed." Order, at 8. Defendants argue the doctrine of transferred intent has not been specifically adopted in civil cases in Washington. In the alternative, Defendants argue that even if the Court

concludes the doctrine has been adopted in civil cases in Washington, the doctrine is not applicable the facts in this case.

In holding that the doctrine was applicable to this civil case, the Court's Order cited to State v. Clinton, 25 Wash.App. 400, 606 P.2d 1240 (1980), [\*14] a criminal case wherein the defendant was convicted of second-degree assault. The defendant taunted a husband to fight with him and began swinging a piece of pipe so violently that the pipe left his hand, sailed past the husband and struck the wife. The court held that an instruction on the doctrine of transferred intent was appropriate and affirmed the defendant's conviction for second-degree assault against the wife.

In contrast to the facts in Clinton, Defendants argue the doctrine of transferred intent is not applicable to this case because it is not a "shoot and miss" case. Instead, this is a case where the Officers' alleged intended victims of the O.C. were actually sprayed with O.C. In support of their argument, Defendants cite several cases from other jurisdictions wherein courts that have adopted the doctrine of transferred intent have specifically held that it does not apply to the "shoot and hit" scenario. See e.g., State v. Ford, 330 Md. 682, 625 A.2d 984, 997-998 (Md. 1993) (holding that where the crime intended has actually been committed against the intended victim, transferred intent is unnecessary and should not be applied to acts against unintended victims). [\*15] In response, Plaintiffs point to decisions from other jurisdictions wherein courts have held that the doctrine of transferred intent is applicable when a defendant kills an intended victim as well as an unintended victim. See e.g., Harvey v. State, 111 Md.App. 401, 681 A.2d 628 (1996) (the doctrine of transferred intent operates with full force whenever the unintended victim is hit and killed; it makes no difference whether the intended victim is missed; hit and killed; or hit and only wounded); State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000); Ochoa v. State, 115 Nev. 194, 981 P.2d 1201, 1205 (1999); Mordica v. State, 618 So.2d 301, 303 (Fla. Dist. Ct. App. 1993); and State v. Worlock, 117 N.J. 596, 569 A.2d 1314, 1325 (1990).

The Court determines the doctrine of transferred intent is unnecessary to find the Officers assaulted those Plaintiffs who were directly sprayed with O.C. and those Plaintiffs who suffered only secondary effects. The Washington legislature has not defined "assault" and thus Washington courts have turned to the common law for its definition. State v. Wilson, 125 Wash.2d 212, 217, 883 P.2d 320, 323 (1994). [\*16] HN5 "Three definitions of assault are recognized in Washington: (1) an attempt, with unlawful force, to inflict bodily injury upon another [attempted battery]; (2) an unlawful touching with criminal intent [actual battery]; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting the harm [common law assault]. Id. (citing State v. Bland, 71 Wash.App. 345, 353, 860 P.2d 1046 (1993)). "Assault by battery does not require specific intent to inflict harm or cause apprehension; rather battery requires intent to do the physical act constituting assault. The other two forms of assault, however, require specific intent that the defendant intended to inflict harm or cause reasonable apprehension of bodily harm." State v. Hall, 104 Wash.App. 56, 62, 14 P.3d 884, 887 (Div. 3, 2000) (internal citation omitted). Here, Plaintiffs don't rely on the assault by battery definitions. Rather, Plaintiffs appear to rely on the third common law definition of assault: assault by attempt to cause fear and apprehension of injury. "Assault by attempt to cause fear and apprehension of injury requires specific [\*17] intent to create reasonable fear and apprehension of bodily injury." State v. Eastmond, 129 Wash.2d 497, 500, 919 P.2d 577, 578 (1996).

HN6 "Transferred intent is only required when a criminal statute matches specific intent with a specific victim." Wilson, 125 Wash.2d at 219, 883 P.2d at 324. For example, the doctrine of transferred intent is unnecessary to convict a defendant of assaulting both his intended victim and his unintended victim in the first degree because once intent to inflict great bodily harm is established, the mens rea is transferred to any unintended victim. See RCW 9A.36.011; see e.g., Wilson, 125 Wash.2d at 218, 883 P.2d at 323 ("Assault in the first degree [which involves assault by battery] requires a specific intent [to inflict great bodily harm]; but it does not, under all circumstances, require that the specific intent match a specific victim."). Similarly, the doctrine of transferred intent is unnecessary to convict a perpetrator of assaulting an unintended victim in the second-degree because that statute, RCW 9A.36.021(1), does not match specific [\*18] intent with a specific victim. See RCW 9A.36.021; see e.g., State v. Allen, 105 Wash.App. 1040, 2001 WL 316177 (Div. 1). The second degree assault statute, which includes the common law definition of assault, requires that the perpetrator have the intent to create "in another" "apprehension and fear of bodily injury." RCW

9A.36.021(1). It also requires that the perpetrator create "in another" a "reasonable apprehension and imminent fear of bodily injury." *Id.* However, this offense does not require that the intended person and the person who suffered the assault be the same person. *Id.*

**HN7** The statutory definitions for criminal assault, which rely on the common law definitions of assault, do not require proof of a specific intent to assault the named victim. See *Wilson*, 125 Wash.2d 212, 883 P.2d 320. In other words, once intent to assault another is established, the *mens rea* is transferred to any unintended victim. See *supra*. Thus, if Plaintiffs prove the Officers intended to assault (i.e., intended to create apprehension and fear of bodily injury) those Plaintiffs who were directly [\*19] sprayed with O.C., the intent transfers to all Plaintiffs who were assaulted (i.e., intended and unintended victims), even though the Officers may not have intended to assault those Plaintiffs who were not directly sprayed with O.C.

## CONCLUSION

Upon reconsideration of its Order, the Court determines that the only remaining negligence claims at this stage of the proceedings include Plaintiffs' claims against the individual Defendant Officers. Further, the Court concludes that Plaintiffs' claim that the Officers were negligent in dispersing O.C. spray inside the building is not precluded by the public duty doctrine. Whether the Officers' use of O.C. spray was below the standard of reasonable care and whether such action proximately resulted in damage to Plaintiffs is a question for the jury. However, Plaintiffs' remaining negligence theories are precluded by the public duty doctrine. With respect to Plaintiffs' assault claims that are not barred by the statute of limitations, the Court concludes the doctrine of transferred intent is unnecessary to find the Officers intended to assault those Plaintiffs who were directly sprayed with O.C., as well as those Plaintiffs who were not [\*20] directly sprayed but suffered secondary effects.

**IT IS HEREBY ORDERED** that Defendants' Motion for Reconsideration Re: Court's Order Denying in Part and Granting in Part Defendants' Motion for Summary Judgment Re: Plaintiffs' State Law Claims (Ct. Rec. 395) is **DENIED IN PART AND GRANTED IN PART**.

**IT IS SO ORDERED.** The District Court Executive is hereby directed to enter this order and furnish copies to counsel.

**DATED** this 6th day of June, 2006.

s/ Fred Van Sickle

United States District Judge

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# APPENDIX C

# Seattle Police Department

## Policy and Procedure Manual



Seattle Police Department  
Audit, Accreditation and Policy Section  
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- C. To the extent that safety considerations and confidentiality requirements allow, employees will answer questions posed by the persons that they are contacting and will comply with the provisions of Section 1.003 (VII-5) should the citizen request the identification of the employee.
- D. Closing Contacts
  - 1. Once the contact is completed, employees should make every attempt to provide a professional closing. This is an opportunity to ensure that the citizen leaves the contact with the best possible view of the employee, the department and the profession. In closing a contact, employees will :
    - a. Return any identification, paper work and property obtained from the citizen
    - b. Ensure that the person understands when they are free to leave
    - c. Thank the person for their cooperation and understanding, as appropriate
    - d. Explain the results of the contact especially if the contact results in the reasons for the stop being dispelled or the person being cleared of suspicion.
    - e. If the contact results in the issuance of a notice of infraction or a citation, the officer will explain the options available to the person for disposing of the case and should identify the phone number that persons may call to have any additional questions or concerns.
    - f. Express regret for any inconvenience that may have been caused to the person being contacted, if appropriate.

## II. Social Contact

- A. A contact with a citizen for the purpose of asking questions and gathering information.
  - 1. Reasonable suspicion and probable cause are not required to initiate a social contact.
  - 2. The contact is voluntary or "consensual". The citizen is under no obligation to answer any questions and is free to leave at any point.
    - a. As in all encounters with the public, officers shall treat citizens in a professional, dignified, and unbiased manner.
    - b. Officers should safeguard their actions and requests so that a reasonable citizen does not perceive the contact as a restraint on their freedom. They should act respectfully, attempt to build rapport, and keep the contact as brief as possible

## III. Terry Stops

- A. Terry v. Ohio is the landmark case on investigatory stops, which declares:
  - 1. That a police officer may stop a person for questioning, if the officer reasonably suspects that the person has committed, is committing, or is about to commit a crime.
  - 2. The officer is not required to have probable cause to arrest the individual at the time of contact, but must have reasonable suspicion that the individual is involved in criminal activity.
  - 3. Reasonable suspicion must be based on objective or specific facts known or observed by the officer prior to the contact and that the officer can later articulate in detail.
- B. Factors considered in determining reasonable suspicion for a Terry Stop:
  - 1. The officer's experience and specialized training.
  - 2. The individual is located in proximate time and place to an alleged crime.

3. The individual is in a location at a time of day or night that appears unusual for the norm.
  4. The individual flees upon seeing an officer.
  5. The individual is carrying a suspicious object, etc.
- C. The contact should be limited in duration, detaining the individual only long enough to confirm or dispel the officer's original suspicion.
1. The detention and questioning shall be done in the general area of the original contact.
  2. If the individual being questioned fails to accurately identify themselves or if information is gathered to further validate the officer's suspicion, the detention may be extended. Officers may frisk or pat-down the stopped individual for dangerous weapons if the officer reasonably believes the suspect may have a weapon.
    - a. The officer must have a separate, reasonable basis for this suspicion. Some factors considered by officers may include:
      - (1) Crime involving weapon.
      - (2) Time of day and location of stop.
      - (3) Prior knowledge that the individual is known to carry weapons.
      - (4) Furtive movements.
      - (5) Suspicious bulges, consistent with carrying a concealed weapon.
- D. Officers should always consider officer safety measures while conducting contacts and Terry Stops.
1. Advise radio.
  2. Choose safe locations.
  3. Request back up units if needed.

#### IV. Field Interview Reports

- A. The field interview still remains an important point of contact for officers in preventing and investigating criminal activity. Field interview contacts should be documented to provide other officers, detectives, and crime analysts with information concerning suspicious activity.
1. The Seattle Police Department's Field Interview Report, form 7.9, will be used.
  2. A Field Interview Report can be completed even if contact was not initiated.
  3. Officers completing Field Interview Reports shall submit them to a supervisor for approval.

#### V. Terry Stops of Vehicles

- A. Police may stop vehicles based on the same standard for stopping people. One practice to avoid is stopping vehicles for minor traffic infractions as a pretext to investigate unrelated crimes for which the officer lacks reasonable suspicion. If the stop turns into an arrest, and the search reveals incriminating evidence, the defense may claim the original stop was pretextual. Successful claims may result in suppressed evidence and the case may not go forward (See State V. Ladson).
- B. Evidence obtained through a Terry Stop of a vehicle is acceptable as long as it was a result of reasonable suspicion that a crime occurred.