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Court of Appeals No. 63299-0-I

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**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

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

Respondent,

vs.

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

Petitioners,

RESPONDENT ELSA ROBB'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

It is settled law in Washington that a duty to guard against third-party criminal misconduct may arise “where the actor’s own affirmative act has created or exposed the other to a *recognizable high degree of risk of harm* through such misconduct, which a reasonable person would take into account.” *Kim v. Budget Rent A Car Systems, Inc.*, 143 Wn.2d 190, 196, 15 P.3d 1283 (2001), *citing Restatement (Second) of Torts* § 302B comment e (1965) (emphasis in original). This rule applies to governmental actors, including police officers, as well as private parties. *See, Coffel v. Clallam County*, 47 Wn. App. 397, 403-5, 735 P.2d 686 (1987) (remanding to trial court for determination of whether police officers took affirmative action to prevent plaintiffs from protecting their property). As long as the governmental defendant’s affirmative acts expose another to “an unusual risk of harm, a ‘high degree risk of harm,’” the public duty doctrine and its four exceptions are irrelevant. *Kim*, 143 Wn.2d at 196; *Parrilla v. King County*, 138 Wn. App. 427, 435, 157 P.3d 879 (2007).

The City raises the specter of unlimited police liability, if this Court affirms the two lower court decisions in this case, which denied the City’s motion for summary judgment. But § 302B comment e’s restrictive standard precludes such unlimited liability. The standard applies only in the unusual case such as this one, where - - assuming the truth of Robb’s facts as the Court must do on

summary judgment¹ - - the City knew of the deranged, violent propensities of Samson Berhe in the days and hours before he shot Michael Robb; knew or should have known that Berhe, a minor, was in possession of a stolen shotgun; stopped Berhe for investigation of criminal activity two hours before the Robb shooting; and saw yellow shotgun shells on the ground next to Berhe, but left the scene without confiscating them. As the Court of Appeals held:

A jury could find that the affirmative acts of the officers in connection with the burglary stop created the risk of Berhe coming back for the shells and using them intentionally to harm someone, a risk that was recognizable and extremely high. Under these circumstances[,] the officers owed Robb a duty in tort to protect against Berhe's criminal misconduct.

Robb v. City of Seattle, 159 Wn. App. 133, 147, 245 P.3d 242 (2010).

This Court should affirm the Court of Appeals decision holding that a duty arose under § 302B comment e, and remand this case for trial.

II. STATEMENT OF THE CASE

As stated in the Court of Appeals opinion,² the reviewing court must accept the facts below for purposes of reviewing the trial court's summary judgment ruling.

In May 2004, officers in the Southwest Precinct of the Seattle Police Department³ twice arranged to have Berhe transported to Harborview Medical

¹ 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).

² *Robb*, 159 Wn. App. at 136.

³ This is the Precinct where officers Kevin McDaniel and Ponha Lim worked in June 2005. CP 189, 224.

Center (HMC) for mental health evaluations because of erratic and destructive behavior.⁴ In June 2005, the week that Berhe shot Robb, precinct officers learned that Berhe again was engaging in bizarre and aggressive behavior and that he possessed a stolen shotgun.⁵

On June 19, 2005, Officers McDaniel, Lim, and another officer responded to a call from Berhe's mother in which she told them about Berhe's history of mental illness. His mother reported that Berhe was listening to loud music and yelled, "One day I'm going to kill myself." The officers also learned that Berhe had stopped taking his mental health medication.⁶

On June 21, Bellevue Police relayed to Seattle Police information from Berhe's friend, Raymond Valencia (whom they had arrested for car theft), that Berhe had recently stolen a car and was keeping stolen shotguns under his bed at home.⁷

On June 22, Officers Lim and St. John responded to a 911 call about an assault by Berhe at his home. When the officers approached, Berhe "spoke in normal tones then switched to deep demonic tones," stating he "ruled the world," that "all confused people need to be killed and tortured," and "I'll kill the haters." The officers again arranged for Berhe to be taken to HMC for a mental health evaluation. HMC later released Berhe.⁸

⁴ CP 727-28, 734.

⁵ CP 122-24, 170-71, 173, 175-76, 192, 196, 225, 228-29, 233, 249-50, 253-59, 265-66, 268-69, 271-73, 276-82, 772-73, 776-84, 796.

⁶ CP 173, 175-76, 233-34.

⁷ CP 796.

⁸ CP 173, 265-66, 268-69, 736-40, 810.

On June 24, Berhe's father called police to report that Berhe and Valencia were in the backyard fighting and they both had shotguns.⁹

On June 26, Officer McDaniel responded to a report of a burglary near Berhe's home, and learned from a witness that Berhe and Valencia were "bragging about knowing where stolen items were being kept." Officers McDaniel and Lim located the two young men walking on the street and stopped them on suspicion of burglary. Berhe was "very agitated." Upon finding a stolen watch in Valencia's pocket, they took Valencia into custody.¹⁰ The Court of Appeals stated:

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."

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."

⁹ CP 271-73, 276-82.

¹⁰ CP 170-71, 173, 826-28, 831, 833.

Berhe fatally shot Michael Robb about two hours later.

159 Wn. App. at 137-38.

III. ARGUMENT

A. Settled Washington Law Provides for a Tort Duty under the Circumstances of this Case.

The duty element of Robb's negligence claim in this affirmative act case is based on *Restatement (Second) of Torts* § 302B comment e. Section 302B states:

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.

Comment e to this section explains:

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

This Court applied § 302B comment e as a potential source of duty in *Kim*, 143 Wn.2d at 196.¹¹ While the Court concluded that no duty existed in *Kim* because the record showed no facts that put Budget on notice of any recognizable risk of harm (much less a high degree of risk of harm) the Court approved and applied *Restatement (Second) of Torts* § 302B comment e.

¹¹ In *Kim*, plaintiff brought claims against a rental car company for injuries in an accident involving a minivan stolen from the company's administrative facility. The Court held that § 302B comment e did not support imposing a duty where there was "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." 143 Wn.2d at 196 (emphasis in original).

The Court of Appeals in *Parrilla v. King County*, relying on *Kim*, found that defendant owed plaintiff a duty under § 302B comment e. 138 Wn. App. at 430. *Parrilla* involved King County's negligent tort duty to an injured person whose car had been struck by a bus driven by a mentally-impaired bus passenger ("Carpenter"). The bus driver had asked Carpenter to disembark, to no avail.

Carpenter began exhibiting bizarre behavior, including acting as if he were talking to somebody outside of the vehicle although nobody was there, yelling unintelligibly, and striking the windows of the bus with his fists. After observing Carpenter's behavior for several minutes, the driver exited the bus . . . leaving the engine running with Carpenter on board.

Carpenter then moved into the driver's seat of the idling 14-ton bus and drove it down [the street] before crashing into several vehicles, including that of the Parrillas.

Id. at 431.

The court held that King County owed the Parrillas a duty of reasonable care under § 302B comment e because its "driver's actions exposed the Parrillas to a recognizable high degree of risk of harm from Carpenter's conduct, which a reasonable person would have taken into account." *Id.* at 433. The court concluded that the bus driver "affirmatively acted by leaving Carpenter alone on board the bus with its engine running," thereby exposing third parties to a "high degree of risk of harm" from Carpenter's recognizable misconduct. *Id.* at 438-39.

The *Parrilla* court, comparing the facts of *Kim* with those before it, concluded that liability would attach under § 302B comment e only in the unusual

situation where the actor clearly knew of a high risk of recognizable harm. This should obviate the City's and Amici's concern about "unlimited tort liability."

Unlike the situation in *Kim*, the driver here acted with knowledge of peculiar conditions which created a high degree of risk of intentional misconduct. In *Kim*, the defendant merely left an empty vehicle, keys in the ignition, in a private parking lot. Here, the bus driver left the bus with the engine running next to the curb of a public street, with Carpenter on board. Significantly, the bus driver was fully aware that Carpenter was acting in a highly volatile manner. Indeed, Carpenter had displayed a tendency toward criminal conduct by refusing the driver's requests that he leave the bus and hitting the windows of the bus with his fists. Furthermore, unlike the ordinary minivan stolen in *Kim*, the 14-ton bus here was a vehicle uniquely capable of inflicting severe damage. The risk of harm arising from the criminal operation of such a vehicle was recognizably high.

Id. at 440.

In this case, the Court of Appeals expressly noted the similarities between the facts of *Parrilla* and *Robb*:

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.

159 Wn. App. at 147.

The City, in its Petition for Review, attempts to distinguish *Parrilla* by arguing that its outcome was dictated “in the context of King County’s duty as the proprietary owner of a vehicle.”¹² The result in *Parrilla* did not depend upon King County’s operation of a bus company; the court did not even hint that the existence of duty depends on proprietary interest or character of the relevant activity. Furthermore, the Legislature waived immunity for governmental actors regardless of the capacity in which they act. *See* RCW 4.96.010(1) (“whether acting in a governmental or proprietary capacity,” municipalities are liable in tort to the same extent as a private person).¹³

The City, relying on comment a to § 302, argues that section does not give rise to a duty in this affirmative act case but merely explains when a defendant has breached an existing duty. In *Parrilla*,¹⁴ the defendant (King County) lost that argument, as did the City here, both in the trial court and in the Court of Appeals. The *Robb* Court of Appeals noted that comment a governs only individuals whose failure to act exposes another to harm - - it does not govern

¹² City of Seattle’s Petition for Review at 11.

¹³ In abrogating sovereign immunity, the Washington Legislature encouraged government actors to act responsibly, by (1) “holding governmental entities accountable for tortious acts” and (2) allowing citizens injured by governmental acts to seek compensation. *See*, Commentator (now Justice) Debra L. Stephens and Bryan P. Harnetiaux, *The Value of Government Tort Liability: Washington State’s Journey from Immunity to Accountability*, 30 Seattle Univ. L. Rev. 35, 59 (2006).

¹⁴ As the *Parrilla* court confirmed, “[i]n regard to the duties of one who undertakes an *affirmative act*, the comment [§ 302 comment a] 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.’” 138 Wn. App. at 438 (emphasis in original).

situations where, like here, a high risk of harm is created by affirmative acts. 158 Wn. App. at 144. In contrast, in an affirmative act case like this one, § 302B comment e is the source of a duty, as long as the “recognizable high degree of risk of harm” requirement is satisfied. *Kim*, 143 Wn.2d 146; *see, Coffel*, 47 Wn. App. 403-05.

B. The Public Duty Doctrine and its Exceptions Do Not Govern This Negligence Action.

The City argues that even if § 302B comment e creates a duty by a private actor, it does not apply to conduct of a government actor because of the “immunity” conferred by the public duty doctrine. The City insists that the four exceptions to the public duty doctrine are the exclusive source of a police officer’s duty to a third party. They are wrong, as recognized by the Court of Appeals.¹⁵ The City’s claim that the Court of Appeals decision “eviscerates the public duty doctrine” is completely without merit in this affirmative act case.¹⁶

When police officers commit affirmative acts negligently, thereby creating or exposing another to a recognizable high degree of risk of harm, § 302B comment e gives rise to a duty *independent* of the four exceptions to the public duty doctrine. To bar a negligence claim in the circumstances of this case would be to reinstate sovereign immunity, contrary to RCW 4.96.010(1).

¹⁵ *Robb*, 159 Wn. App. at 144-45.

¹⁶ *City of Seattle’s Petition for Review* at 7.

In *Coffel*, the Court of Appeals held 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.

47 Wn. App. at 403. Other courts have acknowledged this established principle.

See, e.g., Logan v. Weatherly, No. CV-04-214-FVS, 2006 U.S. Dist. LEXIS 37258, at **6-13 (E.D. Wash. June 6, 2006) (under Washington law, a police negligence claim arising from an affirmative act is not barred by the public duty doctrine and the four exceptions); *see also, Turner v. City of Port Angeles*, No. CO9-5317RBL, 2010 U.S. Dist. LEXIS 114447, at *11 (W.D. Wash. Oct. 26, 2010) (“Defendant incorrectly infers that police officers are never liable for their negligent conduct” under Washington law, citing *Garnett v. City of Bellevue*, 59 Wn. App. 281, 287, 796 P.2d 782 (1990) (affirming jury verdict holding police officer liable for negligent infliction of emotional distress)); *Boyles v. City of Kennewick*, 62 Wn. App. 174, 178, 813 P.2d 178 (1991) (“a claim for negligence against a police officer is possible . . .”).

When a governmental entity owes a duty of reasonable care under the common law and acts negligently, the public duty doctrine does not even apply. This Court noted in *Osborn v. Mason County*, 157 Wn. 2d 18, 134 P.3d 197 (2006):

Because a public entity is liable in tort ‘to the same extent as if it were a private person or corporation,’ . . . the public duty doctrine does not - - cannot - - provide immunity from liability.

Id. at 27 (citations omitted). *Osborn*, involving the common law rescue doctrine, established that the public duty doctrine *does not apply* where a common law duty exists. *Id.* at 27-28. The existence of the common law duty serves the same purpose as the public duty doctrine: assuring that a claim is not based on a duty owed to the public in general, in contrast to a duty owed to a specific individual under the facts of a particular case. In the “special” or “out of the ordinary” case such as this one, where the rigorous requirements of § 302B comment e are satisfied, the public duty doctrine is irrelevant.

The Court of Appeals correctly rejected the City’s contention that even if § 302B comment e gives rise to a duty of care owed by a government actor, that duty is trumped by an “immunity” conferred by the public duty doctrine. The Court of Appeals noted that “Seattle cites no authority to support this categorical statement.” 159 Wn. App. at 145. The City cited no such authority because there is none; the case law is to the contrary.

In sum, the Court of Appeals correctly reasoned:

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

159 Wn. App. at 145.

C. The *Robb* Decision Does Not Create Unlimited Liability for Police Officers.

The “parade of horrors” in the City’s Petition for Review is vastly overstated. The City claims:

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.¹⁷

Robb does not create new law, nor will it deter the proper performance of police duties. The case merely confirms the principle already established and applied in Washington, that where government employees act affirmatively in the course of their duties, they should avoid exposing others to a recognizable high degree of risk of harm. In this case, the police knew or should have known (from multiple encounters) of the deranged and violent propensities of Berhe, his instability, his threats to kill people, and his possession of a shotgun. It would have been no burden for officers McDaniel and Lim to simply pick up the shotgun shells they saw at Berhe’s feet and bring them back to the station house.¹⁸ Reasonable prudence would dictate that they do so, given their knowledge.

Public policy requires that police officers use common sense and take precautions where reasonably necessary for the safety of third parties. *Robb*, *Parrilla*, and *Coffel* are useful examples of the types of circumstances that may

¹⁷ City of Seattle’s Petition for Review at 2 (emphasis in original).

¹⁸ CP 248.

lead to liability, and that the exercise of reasonable cause would avoid. Instead of objecting to *Robb* and the cases on which it is based, the City should use them as a training tool.

As shown above, any plaintiff asserting a claim against a private or public actor based on § 302B comment e bears a heavy burden of proof. A plaintiff must demonstrate an affirmative act that creates or exposes another to a recognizable high degree of risk of harm from the intentional or criminal acts of a third party. Plaintiff must further prove that the risk is "one that a reasonable person would take into account." *Robb*, 159 Wn. App. at 146. In addition, in a negligence case, plaintiff has the burden of showing breach, proximate cause and damages. Defendant can present evidence to the jury relating to breach, proximate cause, superseding intervening cause, and foreseeability, and the jury will decide those issues based on the record before it. The "unlimited police liability" that the City fears is an illusion.

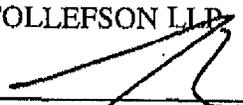
IV. CONCLUSION

Under the facts here, the courts below properly concluded that the officers acted affirmatively in investigating Berhe's conduct and behavior, stopping him on the street, and taking control of the stop scene. The courts below also properly concluded that under the facts presented, there was a recognizable high risk of Berhe causing injury to another through his misconduct. The lower courts correctly concluded, in this affirmative act case, that the officers owed Robb a duty to exercise reasonable care to protect against the wrongful act that killed

Michael Robb and that the public duty doctrine is inapplicable. The lower courts' conclusions are consistent with Washington jurisprudence. This Court should affirm the Court of Appeals' decision and remand this case for trial.

RESPECTFULLY SUBMITTED this 8th day of July, 2011.

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