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Court of Appeals No. 63299-0-I

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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

Respondent —

vs.

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

Petitioner .

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**SUPPLEMENTAL BRIEF OF PETITIONERS CITY OF SEATTLE  
AND OFFICERS MCDANIEL AND LIM**

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PETER S. HOLMES  
Seattle City Attorney

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

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

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## A. INTRODUCTION

Where one owes no duty to another to act – or not to act – in the manner alleged, Restatement (Second) of Torts § 302B is superfluous.<sup>1</sup> In sidestepping the threshold question of duty, prerequisite in any negligence analysis, Division I's published decision subjecting Officers McDaniel and Lim to liability for Samson Berhe's criminal act under § 302B ignores elementary principles of tort law. Division I's decision is contrary to established precedent limiting the circumstances in which courts recognize a duty – as to public and private actors alike – to protect against the criminal acts of others. The decision ignores established precedent requiring that allegations of police negligence be analyzed within the framework of the public duty doctrine. The decision premises a novel theory of tort liability upon a Restatement provision that by its terms does not apply unless and until a duty is established. The decision effectively renders meaningless subsequent sections of the Restatement upon which a duty to act, or not act, in accordance with § 302B can be predicated.

The City relies on briefing already before this Court with respect to the established rules of law (1) that there is no cause of action for negligent investigation generally; and (2) that the public duty doctrine

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<sup>1</sup> For purposes of quick reference, § 302B provides in full:

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.

controls as to allegations of negligence in police conduct specifically. The City submits this supplemental brief for two purposes: (1) to provide additional analysis as to Division I's error in reading § 302B as independently imposing on Officers McDaniel and Lim a duty to Michael Robb where no special relationship existed or was even alleged, and (2) to further highlight the Fourth Amendment conflicts implicit in Division I's decision.

#### **B. ASSIGNMENTS OF ERROR**

The City's Petition for Review outlines the City's assignments of error to Division I's published decision. As relates to this supplemental brief, the City focuses on two specific points. First, in reading § 302B to independently impose upon police officers an actionable duty to prevent criminal acts of others, Division I committed error of law that disregards established precedent and the language of the Restatement itself. Second, in deciding that an officer can subject himself to civil liability by not encroaching *more* into the civil liberties of another during the course and scope of a routine *Terry* stop, Division I creates new law that flies in the face of the Constitutional limits prescribed by federal law which serve to guide law enforcement agencies across this State in the training of officers with respect to warrantless, investigative encounters. This decision creates an untenable bind where the only practical recourse for officers, now forced to court civil liability under 42 U.S.C. § 1983 in order to avoid liability under § 302B, is to effectively disengage from proactive investigation altogether – the precise, and recognized, “chilling effect”

upon law enforcement generally that courts consistently strive to avoid. Legal errors aside, the practical implications of this decision simply cannot be understated.

### C. STATEMENT OF THE CASE

The City incorporates by reference its Statement of the Case as presented in its opening brief and as summarized in its Petition for Review.

### D. ARGUMENT

#### 1. Division I erred in deciding that § 302B independently establishes a duty owed by Officers McDaniel and Lim to Robb to protect against Berhe's criminal act.

“It is an elementary principle that an indispensable factor to liability founded upon negligence is the existence of a duty of care owed by the alleged wrongdoer to the person injured.” *Kim v. Budget Rent A Car Sys., Inc.*, 143 Wn.2d 190, 194-95, 15 P.3d 1283 (2001) (quoting *Routh v. Quinn*, 20 Cal.2d 488, 491, 127 P.2d 1, 3 (1942)) [emphasis supplied]. Duty, as an element of a negligence action, has three independent facets, each of which must be separately proven: *by whom* is the duty owed, *to whom* is the duty owed, and *what* standard of care is owed. *Nivens v. 7-11 Hoagy's Corner*, 83 Wn. App. 33, 41, 920 P.2d 241 (1996).

Citing its decision in *Parilla v. King Cy.*, 138 Wn. App. 427, 157 P.3d 879 (2007), Division I held that § 302B independently establishes a general duty to “protect another against third party conduct intended to

cause harm” arising from one’s own affirmative act<sup>2</sup> where the risk of third party harm is foreseeable to a reasonable person. *Robb v. City of Seattle*, 159 Wn. App. 133, 146, 245 P.3d 242 (2010). Division I’s reasoning is wrong because while § 302B may support an inquiry into the reasonableness of one’s conduct (*i.e.*, the standard of care facet of the duty element) where one owes another a duty not to act unreasonably, § 302B has nothing to do with establishing the element as to *whether* any duty to act reasonably, or, as plead here, not act *unreasonably*, might be owed.<sup>3</sup> Division I’s decision predicating duty on the foreseeability of harm alone (a question of fact) ignores Restatement § 314 (“[t]he fact that the actor realizes or should realize that action on his part is necessary for another’s aid or protection does not itself impose upon him a duty to take such action.”). Division I’s decision ignores the Comments to Restatement § 302 (generally) and § 302B (specifically) that make clear that, *absent a duty that flows from the actor to the other* (*i.e.*, the “by whom” and “to whom” facets of a duty analysis), the fact that an actor should realize that an act or omission may expose another to a risk of harm through the

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<sup>2</sup> As a minor but potentially significant point, the City remains puzzled by Division I’s blanket characterization of the officers’ alleged *failure* to pick up abandoned property, as Respondent alleges their duty required, as an “affirmative act” rather than “omission” so as to fall within a § 302B analysis. Restatement § 2 defines “act” as “an external manifestation of the actor’s will” such as pulling a trigger or moving one’s body. In contrast, Black’s Law Dictionary, 6<sup>th</sup> Ed., defines “omission” as “the neglect to perform what the law requires” (*i.e.*, a *failure* to “act”). Absent any explanation, Division I’s semantic classification seems contrary to both dictionary and Restatement definition.

<sup>3</sup> On this point, as to whether the officers owed *Robb* a duty, the public duty doctrine (briefed exhaustively in the record already before the Court) is controlling.

conduct of another is insufficient to establish liability. Washington authority emphasizing this point is cited in the City's appellate Reply brief, already before the Court; other jurisdictions as well have emphasized that these facets of duty are a necessary prerequisite to any § 302B inquiry. See, e.g., *Cross v. Chicago Housing Authority*, 74 Ill.App.3d 921, 393 N.E.2d 580 (1979) (if the actor is under no duty to the other to act, his failure to do so may be negligent under § 302B but does not subject him to liability); *McKenzie v. Hawaii Permanente Medical Group, Inc.*, 98 Hawai'i 296, 300, 47 P.3d 1209 (Haw. 2002) ("Restatement (Second) § 302 by itself does not create or establish a legal duty; it merely *describes* a type of negligent act.") [Emphasis in original.]

In addition to § 314, other sections of the Restatement provide further context for a § 302B analysis. Restatement § 315 sets forth the general rule that there is no duty to control the conduct of a third person to prevent physical harm to another *absent a special relationship either between the defendant and the other or the defendant and the third person*. Restatement (Second) of Torts §§ 316-20 set forth examples of special relationships that can give rise to a duty to control the acts of a third person, such that an inquiry under § 302B into the reasonableness of the actor's conduct might ripen. See § 316 (duty of parent to control conduct of child); § 317 (duty of master to control conduct of servant); § 318 (duty of possessor of land or chattels to control conduct of licensee); § 319 (duty of those in charge of persons having dangerous propensities); § 320 (duty of person having custody of another to control conduct of third persons).

These relationships are in turn reflected in the illustrations to § 302B, comment *e*, all of which predicate a § 302B analysis upon on a finding of a special relationship either between the actor and person or property of the other (*e.g.*, illustrations 3, 4, 5, 6, 7 and 8), between the actor and third person (*e.g.*, illustrations 9, 10, and 12), or the actor and the instrumentality (or chattel) at issue (*e.g.*, illustrations 1, 2, 11, 13, 14, 15).

These exceptions to the general rule set forth under § 315 are reflected in Washington cases that describe those relationships that can give rise to a limited duty to protect against the acts of a third person. *See, e.g., Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 943 P.2d 286 (1997) (business and business invitee); *Niece v. Elmview Group Home*, 131 Wn.2d 39, 929 P.2d 420 (1997) (party entrusted with the care of a dependent); *Gurren v. Casperson*, 147 Wash. 257, 265 P. 472 (1928) (innkeeper and guest); *Hertog v. City of Seattle*, 138 Wn.2d 265, 979 P.2d 400 (1999) (state and probationer); *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983) (psychotherapist and patient); *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 934, 653 P.2d 280 (1982) (customer and store owner). In *C.J.C. v. Corporation of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 725, 985 P.2d 262 (1999), this Court affirmed the general rule articulated in § 315 before recognizing as an exception to the general rule a duty “to prevent intentionally inflicted harm *where the defendant is in a special relationship with either the tortfeasor or the victim, and* where the defendant is or should be aware of the risk.”) [Emphases supplied]. It was specifically in the context of the special relationship between a church and its parishioner that

the Court in *C.J.C.* undertook its analysis of liability under § 302: “We do hold that *where a special protective relationship* exists a principal may not turn a blind eye to a known or reasonably foreseeable risk of harm posed by its agents toward those it would otherwise be required to protect[.]” *Id.* at 728 [emphasis supplied].

Importantly, in issuing its “limited” holding in *C.J.C.*, the Court explicitly declined to “adopt wholesale the duty described in § 302B”. *Id.* at 727 and fn. 17. The Court dismissed as “simply not on point” any discussion of *Hutchins v. 1001 Fourth Ave. Assocs.*, 166 Wn.2d 217, 802 P.2d 1360 (1991) (a case on which Respondent here relies) because, in *Hutchins*, no special relationship existed. *Id.* at fn. 13. Likewise, here, and in distinguishing contrast to *C.J.C.*, *Parilla*, comment *e* to § 302B, and all Washington case law analyzing the duty of one to protect against the criminal acts of another (whether under § 302B, § 315, or any other theory), there was no special relationship, at any point, between the officers and Robb, between the officers and Berhe,<sup>4</sup> or between the officers and the alleged instrumentality (chattel) at issue.<sup>5</sup> In point of fact, there was not even any connection between *Berhe* and the instrumentality at issue, the shells having been allegedly thrown down by *Valencia* before the officers

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<sup>4</sup> An investigatory stop is not a custodial relationship. *See State v. Rice*, 59 Wn. App. 23, 795 P.2d 739 (1990); *compare Hertog, supra* (special relationship based on definite, established, and continuing relationship between parole officer and parolee).

<sup>5</sup> *Compare Parilla, supra* (proprietary ownership of bus).

arrived, at the time that the officers released Berhe and removed Valencia from the scene. Division I's myopic reading of § 302B to create a duty actionable here is not only contrary to logic, it is contrary to both Washington law and the language of the Restatement itself. It should not be allowed to stand.

**2. Division I's decision that Officers McDaniel and Lim can be subject to liability to Robb for failing to expand the scope and duration of a *Terry* stop is clear error of law in irreconcilable conflict with Fourth Amendment limits on such stops.**

In her Answer to the City's Petition for Review, Respondent clarifies the basis of her claim: "The Officers' duty of care in this case is based on their affirmative acts of making a stop, controlling the scene of the stop, and then releasing Berhe and leaving the scene with the shotgun shells still on the ground." *Respondent's Answer to the Petition for Review* at p. 7. Setting aside the paramount question of duty, no § 302B inquiry into the reasonableness of the officers' acts or omissions as alleged can be undertaken without also carefully considering the Constitutional parameters that paradoxically *limit* officers in the course of such stops – an inquiry that highlights not only the conflict between federal law and the duty Division I has newly crafted here but also, practically, the significant legal ramifications of Division I's unprecedented ruling on police training procedures around the State.

The Fourth Amendment to the U.S. Constitution protects the privacy and security of persons by guaranteeing the right of the people

against unreasonable searches and seizures. *Mincey v. Arizona*, 437 U.S. 385, 390, 98 S. Ct. 2408, 2412, 57 L. Ed. 2d 290 (1978); *United States v. Chadwick*, 433 U.S. 1, 9, 97 S. Ct. 2476, 2482, 53 L. Ed. 2d 538 (1977). As a general rule, searches and seizures conducted without a warrant are per se unreasonable. *State v. Ladson*, 138 Wn.2d 343, 350-51, 979 P.2d 833 (1999). One narrow exception to the Fourth Amendment's warrant requirement allows officers to briefly detain a person when, as here, they have a reasonable suspicion that the person has committed or is about to commit a crime or is a safety threat. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Such a detention, however, must be justified by "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* A mere generalized suspicion (such as, Division I implies, might be derived from Berhe's prior behavior) that the person detained may be up to no good is insufficient. *State v. Bliss*, 153 Wn. App. 197, 204, 222 P.3d 107 (2009).

The scope of a *Terry* stop must be reasonably tailored to its initial purpose, the stop may last only so long as is necessary to carry out its initial purpose, and the investigative methods used should be the least intrusive means reasonably available to confirm or dispel the officer's suspicion. *Florida v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983) ("[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least

intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time."'). For Fourth Amendment purposes, the stop becomes unlawful when the detention goes beyond, in scope or duration, the underlying justification for the stop. *Pierce v. Multnomah Cy.*, 76 F.3d 1032 (C.A.9 1996); *see also U.S. v. Miles*, 247 F.3d 1009 (C.A.9 2001) (a *Terry* stop involves no more than a brief stop, interrogation, and, under proper circumstances, a brief check for weapons; if the stop proceeds beyond these limits, an arrest occurs and probable cause is required under the Fourth Amendment).

In this case, the officers stopped Berhe and Valencia for the specific, articulable purpose of determining whether either was involved in the residential burglary that the officers were investigating.<sup>6</sup> CP 14-15. The officers conducted a protective frisk for weapons incident to the stop, and found none. No weapons were reported stolen in connection with the burglary the officers were investigating, nor was any ammunition. CP 93, 126-27, 239, 541. The officers located stolen property on Valencia and determined they had probable cause to arrest him; the officers did not locate any stolen property on Berhe, determined they did not have probable cause to arrest him, and accordingly released him from the scene.

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<sup>6</sup> Respondent, and Division I, emphasize prior contacts between Berhe and other Seattle police officers for the purpose of attempting to establish that Officers McDaniel and Lim knew, or should have known, that Berhe posed a criminal threat to others on that particular day. This is an immaterial inquiry as to the officers' duty and, notably, absent any connection to the burglary the officers were investigating, would probably not have justified a prolonged detention under *Terry*.

CP 833. This they were required to do under Terry. Indeed, had Officers McDaniel and Lim taken action beyond this point to further detain Berhe for purposes unrelated to the initial purpose of the stop, it very well may be different claims, under a federal cause of action, against which the officers would now be defending. Division I's decision subjecting Officers McDaniel and Lim to liability to Robb for their "affirmative act" of failing to prolong or expand their investigative encounter with Berhe simply cannot be reconciled with the officers' Constitutional obligations not to further detain Berhe upon non-specific and non-articulable suspicion that he may be "up to no good." *Accord Bliss, supra.*

The potential impact this decision brings to bear on officer training around the State is, simply put, staggering. While Respondent can glibly suggest that agencies should simply "have every officer read the *Robb* decision," this decision does nothing to guide an officer should he or she happen to observe other instrumentalities (*e.g.*, a bat, a tire iron, a broken bottle, *etc.*) that, in the wrong hands, or (as here) in conjunction with a weapon or other unknown instrumentality located elsewhere, could potentially be used to cause harm.<sup>7</sup> This decision does nothing to guide an

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<sup>7</sup> In this regard, and without dwelling on whether shells alone are "dangerous instrumentalities," two points are worth noting. First, even assuming the officers had located shells on Berhe himself, rather than merely observed shells on the ground tangential to the stop (and thus had reason to connect the shells with Berhe), a question may very well then arise as to whether such search was lawful within the context of this stop. *See U.S. v. Miles*, 247 F.3d 1009 (C.A. 9 2001) (officers exceeded permissible scope of *Terry* pat-down by manipulating object clearly not a weapon). Second, while it is illegal in Washington to *sell* ammunition to a minor, *see* 18 U.S.C.A. 922(9)(b)(1), it is not illegal for a minor to be in possession of ammunition. Even had the officers had

officer as to just how much of an area search for potentially dangerous instrumentalities unrelated to the purpose of the stop he or she will be required to undertake before releasing a person whom they have already frisked, is unarmed, and whom they have no reason to further detain in connection with the purpose of the stop. Under *Terry* and its progeny, agencies can articulate to their officers the permissible bounds of an investigative stop. Under Division I's published decision, *Terry* is rendered meaningless. Under this decision, officers will now be required to expand the scope of a *Terry* stop beyond its initial purpose, prolong the detention beyond the point necessary to carry out the initial purpose of the stop, and employ more intrusive investigative measures to determine whether individuals they stop may ultimately be "up to no good." Under *Terry*, this would be unlawful.

#### E. CONCLUSION

The City is sympathetic to Respondent's grief. But Division I's decision subjecting Officers McDaniel and Lim to liability for Berhe's senseless criminal act is contrary to all precedent in this state and gives rise to alarming implications, both in law and public policy, as to how far police will now be required to encroach upon a citizen's Fourth Amendment rights in order to protect against the civil liability that Division I has newly crafted here. For the reasons detailed in the record

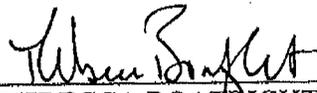
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reason to connect the shells with Berhe, a question may very well arise as to the lawfulness of any effort to confiscate the shells in the course of the *Terry* stop.

on appeal and as supplemented herein, the City respectfully requests that this Court reverse the published decision of the Court of Appeals and remand this case for dismissal.

DATED this 7<sup>th</sup> day of July, 2011.

PETER S. HOLMES  
Seattle City Attorney

By:   
REBECCA BOATRIGHT, WSBA #32767  
Assistant City Attorney  
Attorneys for Petitioner, City of Seattle

CERTIFICATE OF SERVICE/FILING

Susan Williams certifies under penalty of perjury under the laws of the State of Washington that the following is true and correct.

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

On July 7, 2011, I caused to be served by July 8, 2011, via ABC Messengers, a copy of this document upon the following counsel:

Attorneys for Respondent Elsa Robb:

Timothy G. Leyh, WSBA #14853  
Matthew R. Kenney, WSBA #4420  
Danielson Harrigan Leyh & Tollefson, LLP  
999 Third Ave., Suite 4400  
Seattle, WA 98104  
(206) 623-1700  
Emails: timl@dhl.com; mattk@dhl.com

Attorneys for Washington Association of Sheriffs and Police Chiefs:

Zanetta L. Fontes, WSBA #9604  
City of Renton  
100 South 2<sup>nd</sup> Street  
Renton, WA 98057  
Telephone: (425) 430-6486  
Email: zfontes@rentonwa.gov

Attorneys for Association of Washington Cities and the Washington State Association of Municipal Attorneys:

Daniel B. Heid, WSBA #8217  
Auburn City Attorney  
25 West Main Street  
Auburn, WA 98001  
Telephone: (253) 931-3030  
Email: dheid@auburnwa.gov

On July 7, 2011, I caused to be mailed, via Federal Express, a copy of this document to the following counsel:

Attorneys for Association of Washington Cities-Risk Management Services Agency:

Patrick McMahon, WSBA #18809  
Carlson, McMahon & Selby, PLLC  
37 South Wenatchee Ave., Suite F  
PO Box 2965  
Wenatchee, WA 98807-2965  
Telephone: (509) 622-6131  
Email: patm@carlson-mcmahon.org

Attorneys for Association of Washington Cities and the Washington State Association of Municipal Attorneys:

Milton G. Rowland, WSBA #15625  
Foster Pepper PLLC  
422 West Riverside Ave., Suite 1310  
Spokane, WA 99201  
Telephone: (509) 777-1610  
Email: rowlm@foster.com

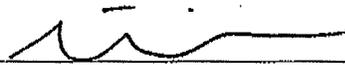
Attorneys for Washington Association of Sheriffs and Police Chiefs:

Deborah A. Boe, WSBA #39365  
614 Division Street  
Port Orchard, WA 98366  
Telephone: (360) 337-4871  
Email: dboe@co.kitsap.wa.us

Leo E. Poort, WSBA #5320  
3060 Willamette Drive NE  
Lacey, WA 98516  
Telephone: 885-7388  
Email: Unknown

I further declare that on July 8, 2011, I emailed this document to the Clerk of the Supreme Court (Supreme@courts.wa.gov) for filing with the Court.

DATED this 11 day of July, 2011, at Seattle, King County, Washington.

  
\_\_\_\_\_  
SUSAN WILLIAMS