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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington Defense Trial Lawyers Association (WDTL), established in 1962, includes more than 750 Washington attorneys engaged in civil defense litigation and trial work. The purpose of WDTL is to promote the highest professional and ethical standards for Washington civil defense attorneys and to serve our members through education, recognition, collegiality, professional development and advocacy. One important way in which WDTL represents its member is through amicus curiae submissions in cases that present issues of statewide concern to Washington civil defense attorneys and their clients.

The Court of Appeals' decision implicates such concerns, bearing directly on what a reasonably prudent defense attorney must do in order to preserve error. The Court of Appeals' decision misapplies the law of the case doctrine, and adopts a hyper-technical requirement under CR 50 practice that a party make two motions for judgment as a matter of law (one during the course of trial, and a second after an adverse verdict) in order to preserve the issue of insufficiency of the evidence for appeal. For the reasons set forth below, WDTL respectfully requests that this Court accept review of the Court of Appeals decision.

II. STATEMENT OF THE CASE

WDTL relies upon the facts set forth by the City of Federal Way in its Motion for Reconsideration.

III. ARGUMENT

A. The Court of Appeals' Misapplication of the Law of the Case Doctrine Warrants Review Under RAP 13.4(b)(1) and (4).

Plaintiff asserted that the City's police officer breached a duty of care owed to the victim when he served a domestic restraining order on her boyfriend. Throughout the case, including after the plaintiff rested, the City vigorously argued that it owed no duty to the victim under the public duty doctrine. The City made this argument numerous times and in multiple ways, including: (a) filing a motion for summary judgment before trial (CP 817-40; 1739-50); (b) seeking discretionary review of the denial of that motion (CP 27-28); (c) filing a CR 50(a) motion at the close of plaintiff's case (CP 2049-59); and (d) during the discussion on jury instructions. Report of Proceedings (Dec. 20, 2010) at 5; 73-75. While the City was unable to expressly reassert its "no legal duty" argument in its second motion for summary judgment or its trial brief—coming in the wake of the trial court's ruling that the City *did* owe a duty under the failure to enforce exception to the public duty doctrine (CP 23-25)—both documents nevertheless served as a reminder to the trial court of the City's original position. (CP 45, 53-54) (Second Motion for Summary Judgment); (CP 605-06) (Defendant's Trial Brief).

The colloquy on jury instructions establishes that the City's position (that it owed no legal duty based on the public duty doctrine) was readily understood by plaintiff's counsel and the trial court. At one point, plaintiff's counsel expressly mentioned the City's objection to the

proposed jury instructions on duty—an objection based on its argument that no duty applied in the first place. The trial court responded: “I know.” Report of Proceedings (Dec. 20, 2010) at 5. Later, the trial court noted: “I understand the defendant’s objection to [the duty of care instruction], why it is being made, but I think the duty of care instruction is implicit in my allowing the case to go forward.” Report of Proceedings (Dec. 20, 2010) at 73. The City’s counsel also stated: “For the way you are presenting the case, I think that’s appropriate. I will take exception [to Instruction 12] for other reasons.” Report of Proceedings (Dec. 20, 2010) at 75. The trial court’s statements during this colloquy plainly reflect its understanding of the City’s oft-asserted “no legal duty” argument, and reflect the City’s reassertion of that argument and objection. Similarly, the statements of counsel for the plaintiff and for the City demonstrate that the City did not at any time waive its legal argument that it owed no duty to the victim.

The Court of Appeals’ decision must be assessed against this factual backdrop. Quite apart from its adoption of the federal “dual motion” rule expressed in *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 126 S. Ct. 90, 163 L. Ed. 2d 974 (2006), and earlier cases, the Court of Appeals misapplied the law of the case doctrine in order to reach the conclusion that the City waived the core legal argument it had been asserting repeatedly and strenuously throughout the proceedings. All who were present during the colloquy understood very well (and manifested their understanding) that the City did not object to the specific wording of the duty instruction, Instruction 12; it objected to

giving any general duty instruction *at all*, as it had since the earliest days of the case.

The Court of Appeals' "law of the case" decision amounted to an extremely technical application of CR 51(f),¹ which ultimately disregarded that rule's very purpose: to "sufficiently apprise the trial court of any alleged error in order to afford it the opportunity to correct the matter if necessary." *Schmidt v. Cornerstone Investments, Inc.*, 115 Wn.2d 148, 163, 795 P.2d 1143 (1990). This Court explicitly considered the application of that rule in similar circumstances, in *Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha*, 126 Wn.2d 50, 63-64, 882 P.2d 703, 711 (1994). In *Queen City*, the plaintiff raised an argument about the applicable standard in an unsuccessful motion for summary judgment before trial, and reiterated that argument during discussion of jury instructions. *Id.* at 64. This Court held that, because the trial judge understood the argument and because Queen City Farms had sufficiently apprised the trial court of its objection, the issue was preserved for appeal. *Id.* That precise reasoning applies in the present case, where the City's argument was clearly presented through multiple vehicles and the trial

¹ CR 51(f) provides, in relevant part: "Counsel shall then be afforded an opportunity in the absence of the jury to make objections to the giving of any instruction and to the refusal to give a requested instruction. The objector shall state distinctly the matter to which he objects and the grounds of his objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made."

court was apprised of it. The Court of Appeals' decision is contrary to the holding in *Queen City*, and contrary to the underlying purpose of the law of the case doctrine.

Despite the clarity and frequency with which its "no duty" argument was presented, and the fact that the trial court plainly understood the argument, the Court of Appeals declined to address the merits of the City's appeal, concluding instead that the City failed to properly object or preserve error. Resting as it does on a misapplication of the law of the case doctrine, this Court should grant review of the lower court's decision under RAP 13.4(b)(1). Because the decision, if unaltered, will impact what all litigators, but particularly defense counsel, must do in the future to preserve error, this Court should also accept review under RAP 13.4(b)(4), and rectify the Court of Appeals' incorrect application of the law of the case doctrine.

B. Because Washington, Both as a Matter of Case Law and Well-Established Practice Based on That Case Law, Has *Not* Adhered to the Federal Practice of Requiring *Both* a Motion for Judgment as a Matter of Law During Trial *and* a Second Motion for Judgment as a Matter of Law After an Adverse Verdict in Order to Preserve the Issue of Insufficiency of the Evidence for Appeal, this Court Should Grant Review under RAP 13.4(b)(4)

The Court of Appeals held that it could not review the City's CR 50(a) motion for judgment as a matter of law because the City did not renew that motion after trial under CR 50(b). This holding erroneously promotes a formalistic requirement that heretofore has not actually existed in Washington CR 50 practice. It requires a party to renew and reiterate

an objection the trial court has already ruled on and rejected. As such, this case raises an issue of substantial public importance, namely, what a party must do to effectively preserve error for appellate review. Review is therefore also warranted under RAP 13.4(b)(4).

The Court of Appeals' decision relies in large part on *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 126 S. Ct. 90, 163 L. Ed. 2d 974 (2006). *Unitherm* is one of several Supreme Court decisions dating back to 1947 to express this heretofore unique federal procedural requirement. See, e.g., *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 67 S. Ct. 752, 91 L. Ed 849 (1947). But the federal requirement was never previously part of Washington CR 50 practice.

Even well after the federal requirement was established, the Washington Supreme Court chose to adhere to the long-established and more permissive approach that post-verdict CR 50(b) motions were *not* required in order to preserve objections to the sufficiency of the evidence for appeal. See, e.g., *Barker v. Waltz*, 40 Wn.2d 866, 867-68, 246 P.2d 846 (1952). The Court of Appeals' decision seems implicitly to recognize this fact, acknowledging that a party is "allowed" to challenge the sufficiency of the evidence under CR 50(a), and "may" renew such a motion after the verdict and judgment under CR 50(b). *Washburn v. City of Federal Way*, 283 P.3d 567, 579-80 (2012); Petition for Review, 16-17. While courts "may" look to federal cases for guidance in interpreting Washington Court Rules when those rules are substantially similar to the Federal Rules of Civil Procedure, they are not required to do so,

particularly against the backdrop of Washington Supreme Court case law to the contrary. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 218-19, 829 P.2d 1099 (1992).

The Court of Appeals' decision, if allowed to stand, will have negative and far reaching implications for CR 50 practice in Washington. As the facts of this case make plain, the adoption of such a requirement is unnecessary, serving no useful purpose that a single motion made during trial could not serve on its own. Other states have considered and rejected the application of the federal rule explicitly. *See, e.g., Skaling v. Aetna Ins. Co.*, 742 A.2d 282, 287 (R.I. 1999) ("After careful consideration, we have concluded that we shall not apply this interpretation [requiring renewal of a CR 50(a) motion to preserve an issue for appeal] to the Rhode Island rule"); *Fulton County Adm'r v. Sullivan*, 753 So.2d 549, 553 (Fla. 1999) (holding that requiring parties to renew such motions after judgment "does not facilitate the proper administration of justice.") Washington should follow suit.

Justice Frankfurter's dissent in *Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48, 73 S. Ct. 125, 97 L. Ed. 77 (1952), pointedly criticizes the formalistic requirement adopted by federal courts:

[U]nder the Court's holding it is no longer sufficient to move for a directed verdict and then, within the time provided by the Rule, ask the trial judge either to grant judgment or a new trial. The Court so holds even though the trial judge already has expressly stated he has reserved for his consideration at that time (after verdict) the very issue which a motion for judgment n.o.v. would repeat. The obvious, which is left unsaid in colloquies between counsel and the court, must now be spoken. The redundant, omitted out of respect for a judge's intelligence and professional competence, must

always be spelled out. The parties must be sure to indulge the ancient weakness of the law for stylized repetition, and it is necessary that the judge answer the same question twice before his answer is to be recognized.

...
It has been said of the great Baron Parke: "His fault was an almost superstitious reverence for the dark technicalities of special pleading, and the reforms introduced by the Common Law Procedure Acts of 1854 and 1855 occasioned his resignation." Sir James Parke, 15 D.N.B. 226. Baron Parke despaired prematurely. If he had waited another hundred years this Court today would have vindicated his belief that judges must be imprisoned in technicalities of their own devising, that obedience to lifeless formality is the way to justice.

344 U.S. 61-62 (cited and quoted in part and with approval by the Florida Supreme Court in *Fulton County Adm'r v. Sullivan, supra*). Justice Frankfurter's concerns are as applicable to this case and this era as they were in 1952. Requiring practitioners to renew CR 50 objections after trial not only contravenes the law as it had been previously applied in Washington, but also undermines the average practitioner's understanding of what is required to preserve an objection for appeal. The Court of Appeals' interpretation of CR 50 serves little purpose aside from creating a trap for the unwary, prizing formality and "stylized repetition" over a trial court's actual understanding of a party's arguments (and a party's stated intentions at trial to preserve those arguments for appeal).

IV. CONCLUSION

The Court of Appeals improperly applied the law of the case doctrine to avoid reviewing the central issue of this litigation, namely whether the City owed a duty. The Court of Appeals' conclusion that defendants must renew a CR 50(a) motion or else forever waive the

arguments previously asserted creates exactly the kind of peril and inefficiency that Justice Frankfurter feared. Those holdings ultimately undermine the interests of justice. This Court should grant review, under RAP 13.4(b)(1) and (4).

RESPECTFULLY SUBMITTED this 22nd day of October, 2011.

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DECLARATION OF SERVICE

I certify that I served a copy of the foregoing Washington Defense Trial Lawyers' Memorandum in Support of Petition for Review on the date set forth below via U.S. Mail, postage prepaid, on the Respondent's counsel of record, as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 22nd day of October, 2012 at Seattle, Washington.


 Patti Saiden, Legal Assistant

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Dear Clerk:

Attached please find :

- *Washington Defense Trial Lawyers' Memorandum in Support of Petition for Review, Certificate of Service attached..*

Case Name: Carola Washburn and Janet Loh, individually and on behalf of the Estate of Baerbel K. Roznowski, a deceased person, Respondents v. City of Federal Way, Petitioner

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