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**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

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, a Washington municipal corporation,
Appellant.

**BRIEF OF AMICI CURIAE
LEGAL VOICE AND
WASHINGTON WOMEN LAWYERS**

David Ward, WSBA #28707
Legal Voice
907 Pine Street, Suite 500
Seattle, Washington 98101
(206) 682-9552

Alison Bettles, WSBA #39215
President-Elect
Washington Women Lawyers
P.O. Box 2026
Seattle, Washington 98111-2026
(206) 303-2619

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INTRODUCTION

On May 3, 2008, Baerbel Roznowski was murdered by her partner Paul Kim. Ms. Roznowski was killed within hours after Officer Andrew Hensing of the Federal Way police came to Ms. Roznowski's home to serve Mr. Kim with a temporary anti-harassment protection order. By its explicit terms, the order required Mr. Kim to stay 500 feet away from Ms. Roznowski's home, where he was currently residing.

Ms. Roznowski obtained this order to protect herself from Mr. Kim. She completed a required Law Enforcement Information Sheet (LEIS) and explicitly indicated that Mr. Kim was likely to react violently when he was served with the order. Yet Officer Hensing did not even read the LEIS form before effecting service. Instead, Officer Hensing did little more than hand the order to Mr. Kim and walk away – leaving Mr. Kim alone in the home with Ms. Roznowski, in plain violation of the order. Instead of protecting Ms. Rosnowski, Officer Hensing's actions left Ms. Roznowksi in great danger that she would be harmed by Mr. Kim.

The order Ms. Roznowski obtained was a type of civil protection order. These orders can play a critical role in protecting victims of domestic violence, stalking, sexual assault, and harassment. But unless law enforcement officers exercise reasonable care in serving and enforcing

these orders, a protected party like Ms. Roznowski may be placed at even greater risk – particularly in cases where the protected party is separating from an intimate partner. Here, Officer Hensing did not exercise reasonable care in serving and enforcing the protection order. To prevent other needless deaths, the negligence verdict in this case must be affirmed.

I. IDENTITY AND INTEREST OF AMICUS

Legal Voice, formerly known as the Northwest Women’s Law Center, is a non-profit public interest organization dedicated to protecting the rights of women and their families through litigation, education, legislation, and the provision of legal information and referral services. Legal Voice has participated as counsel and as *amicus curiae* in cases throughout the Northwest and across the country, and is a leading regional expert on domestic violence issues. Since its founding in 1978, Legal Voice has worked on all fronts to improve Washington’s response to violence against women.

Washington Women Lawyers (“WWL”) is a non-profit organization whose purpose is to further the full integration of women in the legal profession, and to promote equal rights and opportunities for women and to prevent discrimination against them. In furtherance of that mission, WWL supports the application of Washington law to prevent

violence against women and to eliminate discrimination against women who have suffered from violence.

II. STATEMENT OF THE CASE

Amici adopt the Respondents' statement of the case.

III. ARGUMENT

Washington has a clear public policy of preventing domestic violence, an epidemic that disproportionately affects women in our state. However, if the City of Federal Way's arguments in this case are accepted, the state's strong public policy against domestic violence will be seriously undermined and more lives will be needlessly lost.

There is no dispute that Ms. Roznowski obtained a valid court order that explicitly required Mr. Kim to leave her house. Nonetheless, the City suggests that because she obtained a temporary anti-harassment protection order under RCW 10.14, rather than a temporary domestic violence protection order under RCW 26.50, the City owed her no duty of care in serving and enforcing the order. The City's position cannot be correct.

To obtain this order, Ms. Roznowski demonstrated in court that she needed the order to prevent irreparable harm. As permitted, she opted to have the Federal Way police serve the order, with her understanding that

the police would not leave Mr. Kim in her home after the order was served. As required, she completed a Law Enforcement Information Sheet (LEIS) in which she clearly indicated that Mr. Kim was likely to react violently when served with the order, along with other information indicating the risk posed by Mr. Kim.

Despite these facts, the City suggests that no one could have foreseen the risk to Ms. Roznowski when Officer Hensing served the order on Mr. Kim and then walked away, leaving Mr. Kim in Ms. Roznowski's house in violation of the order. The City also maintains that it owed Ms. Roznowski no legal duty of care when Officer Hensing served the protection order on Mr. Kim, nor did the City have any legal duty to ensure that Mr. Kim complied with the order by leaving Ms. Roznowski's house. Instead, the City suggests that it at most may have owed a duty to *Mr. Kim* to ensure that he was not mistreated when the order was served. If accepted, the City's interpretation of its duties in serving and enforcing protection orders would place more lives in danger.

Simply put, Officer Hensing did not act with reasonable care in serving and enforcing the protection order against Mr. Kim. Instead, his affirmative acts placed Ms. Roznowski in an extremely dangerous situation which resulted in her death.

1. Washington Has A Strong Public Policy Of Preventing Domestic Violence

The City maintains that the central issue in this case is the question of duty. Reply at 2. “The existence of a duty is a question of law for the court, to be determined by reference to considerations of public policy.” *Parrilla v. King County*, 138 Wn. App. 427, 432, 157 P.3d 879 (2007). As a result, it is important at the outset to consider the public policy implications of this case.

Domestic violence remains a terrifying reality for women¹ in the State of Washington. Each year, thousands of women are subjected to physical, sexual, psychological, and other forms of abuse by their husbands or intimate partners.² Ms. Rosnowski was one of 566 Washingtonians who lost their lives in domestic violence homicides

¹ Women are the victims of intimate partner violence significantly more often than men. In 2001, women accounted for 85% of the victims of intimate partner violence and men accounted for approximately 15% of the victims nationally. U.S. Dept. of Justice, Bureau of Justice Statistics, Crime Data Brief, INTIMATE PARTNER VIOLENCE, 1993-2001 (Feb. 2003). *See also* Patricia Tjaden and Nancy Thoennes, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN at 25 (Nov. 2000) (finding that women are significantly more likely than men to report being victimized by an intimate partner than men).

² Washington Association of Sheriffs and Police Chiefs, CRIME IN WASHINGTON 2008 ANNUAL REPORT at 104 (Washington police departments responded to 34,148 domestic violence calls in 2008); Robert Thompson, Amy Bonomi, et al., “Intimate Partner Violence Prevalence, Types, and Chronicity in Adult Women,” 30 AM. JOURNAL OF PREVENTATIVE MEDICINE 6 (2006) (In a recent survey of women in Washington and Idaho, 44% of respondents reported having experienced intimate partner violence in their adult lifetime).

between 1997 and July of 2010. See Jake Fawcett for the Washington State Coalition Against Domestic Violence, *Up to Us: Lessons Learned & Goals for Change After Thirteen Years of the Washington State Domestic Violence Fatality Review*, at 11 (Dec. 2010).

In response, Washington has established a “clear public policy to prevent domestic violence.” *Danny v. Laidlaw*, 165 Wn.2d 200, 213, 183 P.3d 128 (2008). The state’s efforts to prevent domestic violence began in 1979, when the Legislature enacted legislation that stressed “the importance of domestic violence as a serious crime against society” and sought “to assure the victim of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide.” RCW 10.99.010. The Legislature further expressed its intent “that the official response to cases of domestic violence shall stress the enforcement of the laws to protect the victim.” *Id.*

Since 1979, the state has maintained and strengthened its commitment to preventing domestic violence. As the Washington Supreme Court has noted:

The legislature's consistent pronouncements over the last 30 years evince a clear public policy to prevent domestic violence – a policy the legislature has sought to further by taking clear, concrete actions to encourage domestic violence victims to end abuse, leave their abusers, protect their children, and cooperate

with law enforcement and prosecution efforts to hold the abuser accountable

Danny, 165 Wn.2d at 165. As a result, in considering the question of duty in this case, the Court must keep in mind the critical importance of upholding Washington's clear public policy of preventing domestic violence.

2. The Fact That Ms. Roznowski Obtained An Anti-Harassment Protection Order Rather Than A Domestic Violence Protection Order Should Not Excuse The City From Exercising Reasonable Care In Serving And Enforcing The Order

To be sure, in this case Ms. Roznowski obtained a temporary anti-harassment protection order against Mr. Kim, rather than a domestic violence protection order. But this distinction should make no difference in finding that the City owed Ms. Roznowski a duty of reasonable care in serving and enforcing the order.

An anti-harassment protection order (AHO) is one of several different types of civil protection orders authorized under Washington law. Other types of civil protection orders include domestic violence protection orders issued under RCW 26.50 and sexual assault protection orders issued under RCW 7.90. Recognizing the dangers inherent in serving a civil protection order, the Legislature has provided that each type of protection order must be served by law enforcement officers, unless the

petitioner chooses to have the order served by a private party. *See* RCW 7.90.140(2); RCW 10.14.100(2); RCW 26.50.090(2).

AHOs may be issued in a wide variety of situations, all of which recognize that the restrained party poses a threat to the protected party. Perhaps most commonly, AHOs are often issued in disputes between neighbors. AHOs may also be issued when a person is being stalked by a stranger. They also may be issued in situations where, as here, a person is being harassed by another family or household member.

Harassment is a form of abuse. When unlawful harassment occurs between family or household members, it is not easy to determine whether a victim should seek an AHO under RCW 10.14 or a DVPO under RCW 26.50. Although the City suggests that “nothing” in Ms. Roznowski’s petition for an AHO would have supported a DVPO under RCW 26.50, the issue is hardly clear cut.

Under RCW 26.50, domestic violence includes “stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.” RCW 26.50.010(1)(c). “Family or household members” includes adults living together, as well as persons in dating relationships. RCW 26.50.010(2). In turn, “stalking” occurs when a person:

- (1) Intentionally and repeatedly harasses another person;
- (2) The person being harassed is placed in reasonable fear that the stalker intends to injure the person, another person, or the property of the person or another person; and
- (3) The stalker either intends to frighten, harass, or intimidate the other person, or reasonably should know that the other person is afraid, intimidated, or harassed.

RCW 9A.46.110(1). As a result, a person who is harassed by a family or household member may well be able to obtain a DVPO under RCW 26.50, provided that she is placed in reasonable fear of injury to her person or property.

Here, the facts alleged in Ms. Roznowski's anti-harassment petition suggest a reasonable fear that Mr. Kim would injure her or her property. *See, e.g.*, CP 888 (noting "[i]n his present state of mind he can easily retaliate with me."). She also indicated in her petition that she had been "physically or sexually assaulted, threatened with physical harm, or stalked" by Mr. Kim, and that he was her partner. (CP 886). As such, she might have qualified for a DVPO.

The fact that she chose (on a pro se basis) to seek an AHO rather than a DVPO does not diminish the risk she faced, her need for protection from Mr. Kim, or her need for the police to exercise reasonable care in serving and enforcing the order. Regardless of whether a person obtains an AHO or a DVPO, a protected party should be able to expect that when

the police carry out their duty of serving a protection order, they will not leave the scene with the restrained party in violation of the order.

3. The Public Duty Doctrine Does Not Shield The City From Liability

The City's argues that the public duty doctrine shields it from liability. But as Respondents have explained, Washington courts have held that the public duty doctrine is not implicated when a negligence case is based on the affirmative acts of a government official, rather than on a failure to act. *See, e.g., Coffel v. Clallam County*, 47 Wn. App. 397, 403, 735 P.2d 686 (1987) (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.").

Here, Officer Hensing took affirmative acts when he: (1) served the protection order on Mr. Kim at Ms. Roznowski's residence; and then (2) left the scene while Mr. Kim remained in Ms. Roznowski's home in violation of the order. These affirmative acts were not performed with reasonable care and left Ms. Roznowski in grave danger.

Officer Hensing's affirmative acts are analogous to those described in *Parrilla v. King County*, 138 Wn. App. 427, 157 P.3d 879 (2007). In

Parrilla, this Court held that King County could be sued for negligence when a Metro bus driver left a bus with the engine running, leaving a disturbed individual alone on board who then drove the bus into the plaintiffs' vehicle. This Court agreed with the plaintiffs that "the bus driver should have known that *his affirmative act of exiting the bus* while the engine was running, leaving the visibly erratic Carpenter alone on board, exposed the Parrillas to a recognizable high degree of risk of harm from misconduct by Carpenter, which a reasonable person would have taken into account." *Id.* at 433 (emphasis added).

Similarly, in this case Officer Hensing took the affirmative act of leaving Ms. Roznowski's residence while Mr. Kim remained there in violation of a court order. This action exposed Ms. Roznowski to a high degree of risk of harm by Mr. Kim, which a reasonable person would have taken into account.

This case is also analogous to *Robb v. City of Seattle*, 159 Wn. App. 133, 147, 245 P.3d 242 (2010), in which this Court noted that "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." Here, Officer Hensing "took control" of

a situation by serving Mr. Kim with a protection order, but then departed the scene with Mr. Kim in violation of the order – despite having clear and ample information that Mr. Kim posed a serious threat to Ms. Roznowski.

The City also suggests that it had no duty of care to Ms. Roznowski because Officer Hensing had no “direct contact or privity” with her. Reply at 12-13. However, the City cites no persuasive authority to suggest that a duty of care only arises when a government official has direct contact or privity with the injured party. For example, in both *Parrilla* and *Robb*, liability arose in situations where government officials had no direct contact or privity with the injured parties.

In any event, Ms. Roznowski did have direct contact with the City of Federal Way when she took her protection order to the City police station and asked to have it served by the City’s law enforcement officers. Under the law, the City was required to comply with Ms. Roznowski’s choice to have its police officers serve the order. *See* RCW 10.14.100(2) (“The sheriff of the county or the peace officers of the municipality in which the respondent resides shall serve the respondent personally unless the petitioner elects to have the respondent served by a private party.”).

Having elected service by the Federal Way police, Ms. Roznowski was entitled to expect that the City’s police officers would exercise

reasonable care in serving and enforcing the order. Clearly, Ms. Roznowski had been given the impression that the police would not leave her alone with Mr. Kim but would stay with her until he complied with the order by leaving her home. *See* Exs. 8 & 9. If she had known the police would simply hand the order to Mr. Kim and walk away – without even bothering to read the information she had provided about the risks posed by Mr. Kim – she could have protected herself by electing another method of service. For example, she could have arranged to have a friend or process server serve Mr. Kim at a time when she had other people in her home, with the instructions that she was not to be left alone with Mr. Kim after service.

The Legislature has entrusted law enforcement to serve and enforce civil protection orders. In turn, law enforcement officers must exercise reasonable care in serving and enforcing these orders. Otherwise, the basic purpose of civil protection orders – to separate the restrained person from the protected party – will be significantly undermined.

4. The Risk To Ms. Roznowski Was Foreseeable And Preventable

In its reply brief, the City suggests that Officer Hensing had no way of knowing the risk that Mr. Kim posed to Ms. Rosnowski, arguing that Plaintiffs' statement of the case:

[F]ocuses on the facts known to plaintiffs now, with the benefit of 20/20 hindsight, rather than those known to Officer Hensing at the time he served the anti-harassment protection order. Plaintiffs cannot establish a legal duty by imputing knowledge to Officer Hensing that he had *no way of knowing at the time he served the order on Mr. Kim, who was then a law-abiding citizen.*

Reply at 1 (emphasis added). This assertion ignores the fact that Officer Hensing had multiple documents in his possession that informed him that Mr. Kim posed a threat to Ms. Roznowski.

First, Officer Hensing presumably knew that he was serving a temporary anti-harassment protection order on Mr. Kim. To obtain this order, Ms. Roznowski had to demonstrate in court “that great or irreparable harm will result to the petitioner if the temporary protection order is not granted.” RCW 10.14.080(1). Consistent with this statutory requirement, the order explicitly stated that “[b]ased upon the petition, testimony, and case record, the court finds that an emergency exists and that a Temporary Order for Protection should be issued without notice to the respondent *to avoid irreparable harm.*” (CP 884) (emphasis added). The order also specifically restrained Mr. Kim from coming within 500 feet of Ms. Roznowski’s residence, or from attempting to contact her. *Id.*

Second, Officer Hensing had in his possession a copy of Ms. Roznowski’s petition for her temporary order, which stated:

- Mr. Kim “has violent verbal insulting outbursts”

- Last year, Mr. Kim’s outburst frightened her, she called 911, and he “came close to hitting me.”
- Mr. Kim “is capable of physical violence,” and Ms. Roznowski “witnessed him beating his oldest son in the past.”
- “In his present state of mind he can easily retaliate with me.”

(CP 886-89). These statements by Ms. Rosnowski clearly described Mr. Kim’s violent tendencies and her fear of how he would react.

Third, Officer Hensing had in his possession a Law Enforcement Information Sheet (LEIS), which Ms. Roznowski was required to complete as a necessary step in assisting law enforcement in serving and enforcing the protection order. In the LEIS, Ms. Roznowski indicated:

- Mr. Kim was “likely to react violently when served.”
- Mr. Kim’s history included assault.
- He was a current or former cohabitant as an intimate partner.
- She and Mr. Kim were currently living together.
- Mr. Kim did not know he may be moved out of the house.
- Mr. Kim did not know Ms. Roznowski was trying to get the order.
- Mr. Kim needed a Korean interpreter.

(Ex. 1). Obviously, her assessment that he was likely to react violently when served was a clear warning of danger – a risk that Ms. Rosnowski

was in the best position to assess, given her relationship with Mr. Kim. In addition, Ms. Roznowski made it clear that this was a case in which intimate partners would be separating, which as discussed below is a uniquely dangerous situation for women.

All of this information was in Officer Hensing's possession when he served the order. All of this information provided clear notice that Mr. Kim was a threat to Ms. Roznowski. To argue that Officer Hensing had no way of knowing the threat posed by Mr. Kim is simply wrong. All Officer Hensing had to do was to read the paperwork in his possession.

5. Women Face A High Risk Of Separation Assault When They End Abusive Relationships

In addition to all the information that Officer Hensing had in his possession showing the specific risk posed by Mr. Kim, it is well-recognized that women face serious danger when they attempt to separate from an abusive intimate partner. "Women are most at risk after ending, or while trying to end, an abusive relationship." Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 Cardozo L. Rev. 1487, 1520 (2008).

As one commentator recently noted:

The disturbing phenomenon of separation assault exacerbates the difficulty of safe separation. Victims are at their greatest risk when they separate from their abusers. In over 70% of domestic violence injuries, the homicide or injury occurred after the victim had left, divorced, separated from, or attempted to leave the abuser. The most extreme violence and the most severe injuries often occur at separation. Moreover, the majority of domestic violence fatalities happen shortly after separation.

Patricia Sully, *Taking It Seriously: Repairing Domestic Violence*

Sentencing in Washington State, 34 Seattle Univ. L.R. 963, 985 (2011).

The risk of separation assault has long been recognized. *See, e.g.*, Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 U. Mich. L. Rev. 1, 65 (1991) (noting “[s]eparation assault is the attack on the woman’s body and volition in which her partner seeks to prevent her from leaving, retaliate for the separation, or force her to return.”).

As a result, Ms. Roznowski faced a particularly dangerous situation when Officer Hensing arrived to serve the protection order: He would be serving an order that required Mr. Kim to separate from Ms. Roznowski. Ms. Roznowski provided clear notice on the LEIS form that this would be a situation involving separation of intimate partners and that Mr. Kim did not know he would be required to leave her home. Under these circumstances, Officer Hensing created an especially high risk to

Ms. Roznowski when he left Mr. Kim alone with Ms. Roznowski in her home, leaving it to her to explain to Mr. Kim what the order meant.

6. Even If The Public Duty Doctrine Applied In This Case, Exceptions To The Rule Would Control

As Respondents have noted, even if the public duty doctrine were to apply in this case, the doctrine is subject to several exceptions. While Respondents have discussed how some exceptions would control in this case even if the public duty doctrine applied, there is an additional basis to find that this case falls within the legislative intent exception to the public duty doctrine.

The legislative intent exception applies when “the terms of a legislative enactment evidence an intent to identify and protect a particular and circumscribed class of persons.” *Bailey v. Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987). Here, the Legislature has made its intent to protect victims of domestic violence absolutely clear, stating in RCW 10.99.010:

The purpose of this chapter is to recognize the importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide. . . . It is the intent of the legislature that the official response to cases of domestic violence shall stress the enforcement of the laws to protect the victim and

shall communicate the attitude that violent behavior is not excused or tolerated. Furthermore, it is the intent of the legislature that criminal laws be enforced without regard to whether the persons involved are or were married, cohabiting, or involved in a relationship.

In this case, Mr. Kim was in violation of the anti-harassment order the moment he was served by Officer Hensing. By remaining in Ms. Rozkowski's house in violation of the order, he was a trespasser in her home and was committing an act of domestic violence against Ms. Rosnowski. This is because under RCW 10.99.020(5)(j) and (k), the definition of domestic violence includes committing first or second degree criminal trespass against a family or household member. A "family or household member" includes adults who share a common residence, or who have or have had a dating relationship. RCW 10.99.020(3).

Of course, this does not mean that Officer Hensing was obliged to arrest Mr. Kim the moment the order was served. But RCW 10.99.010 makes it clear that the Legislature did not intend that Officer Hensing could simply walk away from Ms. Roznowski's house while Mr. Kim was in violation of the order. Instead, he had a duty to enforce the law to ensure that Mr. Kim did not remain in Ms. Roznowski's home. To hold otherwise would ignore the Legislature's clear intent under RCW 10.99.010 "to assure the victim of domestic violence the maximum

protection from abuse which the law and those who enforce the law can provide” and to “stress the enforcement of the laws to protect the victim.”

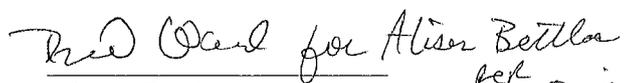
The City suggests that finding a duty to enforce the order in this case would create a indefinite duty on police officers. However, it would hardly create an indefinite duty to find that when police serve a protection order, they may not depart the scene while the restrained party is in violation of the order or is committing an act of domestic violence.

IV. CONCLUSION

Like thousands of other Washington women, Ms. Roznowski obtained a civil protection order to protect herself from an abusive intimate partner. But instead of protection, Officer Hensing’s affirmative acts in this case placed her in even greater peril. To uphold Washington’s strong public policy against domestic violence and to prevent other women and men from needless deaths in our state, the negligence verdict in this case must be affirmed.

Respectfully submitted this 11th day of October, 2011.

By: 
David Ward
WSBA #28707
Legal Voice
907 Pine Street, Suite 500
Seattle, WA 98101

 for Alison Bettles
Alison Bettles
WSBA #39215
President-Elect
Washington Women Lawyers
P.O. Box 2026
Seattle, WA 98111-2026
per supervision