

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
Sep 13, 2012, 12:52 pm  
BY RONALD R. CARPENTER  
CLERK

No. 87906-1  
(Court of Appeals Cause No. 66534-1-I)

RECEIVED BY E-MAIL

---

SUPREME COURT  
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,

Petitioner.

---

ANSWER TO  
PETITION FOR REVIEW

---

Philip A. Talmadge, WSBA #6973  
Talmadge/Fitzpatrick  
18010 Southcenter Parkway  
Tukwila, WA 98188  
(206) 574-6661

John R. Connelly, Jr., WSBA #12183  
Nathan P. Roberts, WSBA #40457  
Connelly Law Offices  
2301 N. 30<sup>th</sup> Street  
Tacoma, WA 98403  
(253) 593-5100  
Attorneys for Respondents

**FILED**  
SEP 25 2012  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON  
*CRB*

**ORIGINAL**

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities .....	ii - iii
A. INTRODUCTION .....	1
B. RESPONSE TO STATEMENT OF THE CASE .....	1
C. ARGUMENT WHY REVIEW SHOULD BE DENIED.....	9
(1) <u>The City Failed to Preserve Any Instructional Error Regarding Instruction Number 12</u> .....	9
(a) <u>The City’s Objection to Instruction Number 12 Failed to Satisfy CR 51(f)</u> .....	10
(b) <u>The City’s Brief Waived Any Instructional Error</u> .....	12
(2) <u>The City’s Failure to File a CR 50(b) Motion Barred the City’s Appeal</u> .....	14
(3) <u>This Court Should Not Reach an Issue Not Decided by the Court of Appeals</u> .....	19
D. CONCLUSION.....	20
Appendix	

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Table of Cases</u>	
<u>Washington Cases</u>	
<i>Adcox v. Children's Orthopedic Hosp. &amp; Med. Ctr.</i> , 123 Wn.2d 15, 864 P.2d 921 (1993).....	15
<i>American Mobile Homes of Washington, Inc. v. Seattle-First Nat'l Bank</i> , 115 Wn.2d 307, 796 P.2d 1276 (1990).....	16
<i>Ang v. Martin</i> , 154 Wn.2d 477, 114 P.3d 637 (2005).....	13
<i>Bitzan v. Parisi</i> , 88 Wn.2d 116, 558 P.2d 775 (1977).....	10
<i>Chelan County Deputy Sheriffs' Ass'n v. Chelan County</i> , 109 Wn.2d 282, 745 P.2d 1 (1982).....	13
<i>Cummins v. Lewis County</i> , 156 Wn.2d 844, 133 P.3d 458 (2006).....	11
<i>Falk v. Keene Corp.</i> , 113 Wn.2d 645, 782 P.2d 974 (1989).....	11
<i>Garcia v. Brulotte</i> , 94 Wn.2d 794, 620 P.2d 99 (1980).....	13
<i>Goehle v. Fred Hutchinson Cancer Research Center</i> , 100 Wn. App. 609, 1 P.3d 579, review denied, 142 Wn.2d 1010 (2000).....	10
<i>Guijosa v. Wal-Mart Stores, Inc.</i> , 114 Wn.2d 907, 32 P.3d 250 (2001)....	13
<i>Hanks v. Grace</i> , 167 Wn. App. 542, 273 P.3d 1029 (2012).....	15
<i>Johnson v. Rothstein</i> , 52 Wn. App. 303, 759 P.2d 471 (1988).....	15
<i>Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha</i> , 126 Wn.2d 50, 882 P.2d 703 (1994).....	11
<i>Rhoades v. De Rosier</i> , 14 Wn. App. 946, 546 P.2d 930 (1976).....	14
<i>State v. Collins</i> , 121 Wn.2d 168, 847 P.2d 919 (1993).....	8
<i>State v. Harris</i> , 164 Wn. App. 377, 263 P.3d 1276 (2011).....	9
<i>State v. Hickman</i> , 135 Wn.2d 97, 954 P.2d 900 (1998).....	13
<i>State v. Johnson</i> , 69 Wn. App. 189, 847 P.2d 960 (1993).....	9
<i>Washburn v. Beatt Equipment Co.</i> , 120 Wn.2d 246, 840 P.2d 860 (1992).....	14
<u>Federal Cases</u>	
<i>Johnson v. New York, N.H. &amp; H.R. Co.</i> , 344 U.S. 48, 73 S. Ct. 125, 97 L.Ed. 77 (1952).....	19
<i>Ortiz v. Jordan</i> , ___ U.S. ___, 131 S. Ct. 884, 178 L.Ed.2d 703 (2011).....	16, 18, 19

<i>United States v. Dunkel</i> , 927 F.2d 955 (7 <sup>th</sup> Cir. 1991).....	13
<i>Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.</i> , 546 U.S. 394, 126 S. Ct. 980, 163 L.Ed.2d 974 (2006).....	16, 18

Statutes

42 U.S.C. § 1983 .....	16
------------------------	----

Rules and Regulations

CR 50 .....	14, 15, 18
CR 50(a) .....	<i>passim</i>
CR 50(b) .....	<i>passim</i>
CR 50(e) .....	15
CR 51(f) .....	10, 11, 12
CR 59 .....	8
Fed. R. Civ. Pro. 50 .....	15
Fed. R. Civ. Pro. 50(b).....	16
RAP 1.2(a) .....	12
RAP 10.3(g) .....	12, 13
RAP 13.4(b) .....	1, 9
RAP 13.4(c)(6) .....	1
RAP 13.4(c)(9) .....	9
RAP 13.4(f) .....	9
RAP 13.7(b) .....	8, 20

Other Authorities

4 Karl B. Tegland, <i>Wash. Practice: Rules Practice</i> (5th ed. 2006, pocket part).....	15, 17
4 Karl B. Tegland, <i>Wash. Practice: Rules Practice CR 50</i> (5th ed. 2006) .....	15
WSBA <i>Appellate Practice Deskbook</i> .....	17

A. INTRODUCTION

This case arises from the tragic, preventable murder of Baerbel Roznowski at the hands of her estranged ex-boyfriend, Chan Kim. The City of Federal Way ("City") chooses not to advise this Court of the real facts of its negligence, and instead tries to hide the fact that its officers had not read the contents of the pleadings they were serving on a person who had a history of being unstable, violent, and likely to retaliate upon Roznowski upon being told to leave her home.

The City's petition for review is disturbing for its studied indifference to the facts, its continued insensitivity to the importance of civil anti-harassment orders, and its mischaracterization of the procedure below both at trial and in the Court of Appeals. The City does not meet any of the criteria of RAP 13.4(b). This Court should deny review of the core issue in the case -- the failure of the City's trial counsel to properly preserve duty issues for review.

B. RESPONSE TO STATEMENT OF THE CASE

The City offers a one-sided, sanitized description of the facts. Pet. at 2-10. It is far from a fair recitation of the facts and procedure below. RAP 13.4(c)(6). The City's implication is that Roznowski's killer was nonviolent, that he understood his interaction with the City's officers, and

that its officers properly did their job is so far from the truth that a refutation of those facts is necessary.

After a divorce, (Loh 12/14/10): 16-17, Roznowski met Chan Kim. RP (Loh 12/15/10): 3-4. Kim spoke Korean as his primary language; his capacity in English was rudimentary, described as being no better than that of a child. RP (Loh 12/15/10): 11, 52; (Washburn): 28-29; RP (Ganley): 18. Kim could not read English; Roznowski translated documents for him. RP (Loh 12/15/10): 12. Kim had serious mental health issues occasioned by a sports injury in Korea that caused him to act and speak slowly. RP (Ko): 14-15. He had outbursts of rage. Ex. 1; RP (Ganley): 21. Roznowski called 911 in 2006 because he came close to hitting her. Ex. 1; RP (Loh 12/15/10): 6; RP (Washburn): 34. He had a history of violent altercations with his son, Ex. 1, which even the City's police expert conceded was a domestic violence episode. RP (Ovens): 82. Roznowski was afraid of Kim. Ex. 1; RP (Washburn): 63. Kim was far more than merely a "hoarder." Pet. at 4. He was a dangerous, controlling individual. Br. of Resp'ts at 5-6.

Not discussed by the City in its petition, Roznowski had an altercation with Kim on April 30, 2008 and she was compelled to call 911. CP 842. The call related that a physical DV (domestic violence) was in progress, *id.*, and City officers responded. CP 841-42. An officer advised

Roznowski that she could obtain an anti-harassment order and also obtain a court-ordered eviction of Kim from the house. *Id.* An officer told Kim to “take a walk,” and he left the home. CP 842, 959.<sup>1</sup> The officers gave Roznowski a copy of a DV booklet. CP 842, 851-75.

Roznowski thereafter went to the Kent Regional Justice Center to obtain an order. In her supporting affidavit, Roznowski explained that Kim was her estranged boyfriend and that he was living with her in her home. Ex. 1. She did more than merely assert Kim made verbal attacks on her after she moved to clean up a wood pile, as the City claims in its petition at 3. She had good reason to be afraid of him:

Last year his outburst frightened me, I called 911, he came close to hitting me. He left my place as promised. Within 15 min[utes] I received several calls from him. I changed the locks except for one door. He is capable of physical violence. I witnessed him beating his oldest son in the past. In his present state he can easily retaliate with me.

Ex. 1.<sup>2</sup> Commissioner Carlos Vilategui of the King County Superior Court heard Roznowski’s petition and found that a protection order should be entered so as to “avoid irreparable harm” to her. Ex. 1. The order was

---

<sup>1</sup> That Kim immediately obeyed Parker’s direction strongly implies he would have complied with directions from Officer Hensing, had they been given. CP 418-19, 426-27.

<sup>2</sup> The City’s extensive treatment of Roznowski’s interaction with Lorinda Tsai, pet. at 3-4, is belied by Roznowski’s specific description of Kim under oath in her affidavit. Ex. 1.

explicit. Kim was restrained from keeping Roznowski under surveillance, from contacting her, or being within 500 feet of her residence. *Id.*

Roznowski also completed an LEIS, checking various boxes on the sheet that set forth the following information: (1) Kim had a history of assault; (2) he was living in Roznowski's home; (3) he did not know that Roznowski was going to be forcing him out of her home; (4) he was likely to react violently when served; and (5) a Korean interpreter would be required. Ex. 1.

Roznowski took the order to the City Police that day for service. CP 1292. She told officers that she wanted Kim served and removed from her house. *Id.* Roznowski left with the distinct impression that the order would be served and enforced by City police officers. CP 1298. She returned home and wrote an email to her daughters: "I did it. Now to sort it out. They will actually stay here while he gets his stuff out." Ex. 8. Later that day, she told her daughters that "once served the temp order he'll be escorted out and can't call, visit, come near here within 500 feet." Ex. 9.

The City's description of its officers' service on Kim is remarkably silent on their negligence. Pet. at 4. Officer Andrew Hensing arrived unannounced at Roznowski's residence on May 3, 2008. Ex. 1. Officer Hensing admitted at trial that *he had not read the petition and order he*

was about to serve, and he had also failed to read the LEIS that would have alerted him to the volatile nature of the situation and the fact that Kim would likely react violently to being served. RP (Hensing): 8-10. Because he had not read these key documents, Hensing was unaware of Kim's past violent acts, *id.* at 10, the 911 call by Roznowski, *id.* at 11, that Kim might react violently or retaliate against Roznowski, *id.* at 23, 34, or that Kim spoke little English and required a Korean interpreter. *Id.* at 15. Hensing never asked Kim if he understood English. *Id.* at 36. Instead, Hensing merely handed the order to Kim, told him he had been served, asked him if he had any questions, went back to his car, and drove away. CP 877-78, 1305.<sup>3</sup> This entire transaction took five minutes or less. RP (Hensing): 20-21. Nothing prevented Hensing from staying at the house, *id.* at 32, or escorting Kim from it. *Id.* at 30.

During his interaction with Kim, Hensing did not explain the order, he did not tell Kim to leave, nor did he wait to see if Kim was planning to leave. *Id.* at 45. He acknowledged that Kim had no idea he was to leave the house. *Id.* at 22. Hensing was aware generally that the court order barred Kim from being within 500 feet of Roznowski's home, but he did

---

<sup>3</sup> Kim was unaware that with the service of the order, he had to move from Roznowski's house, an important point for a law enforcement officer. *Id.* at 22. In fact, upon service of the order, Kim turned to Roznowski and asked her: "What is this?" *Id.* at 41; RP (Ganley): 123.

not know the house at which he served Kim was Roznowski's. *Id.* at 24-25. Having not read the materials, Hensing did not read a sticky note that referenced Roznowski's address where service occurred; he was unaware Kim and Roznowski were cohabitants. *Id.* at 25-26.<sup>4</sup>

Hensing saw a female "in the background" at the house while he was serving Kim. *Id.* at 39. He did not know if it was Roznowski, *id.* at 40, but he had no contact with her and made no effort to contact her or ascertain her identity. *Id.* at 40, 46. Hensing made no efforts after Kim's service to contact Roznowski. *Id.* at 24.

Contrary to the City's description of Kim's post-service interaction with the officers in its petition at 5, Kim was *extremely upset* upon being served, realizing that the relationship was over, CP 322-23. He asked Roznowski for additional time to move his belongings; Roznowski agreed. CP 323; Ex. 50 at 243.

Kim called his friend, Chong Ko, who subsequently met with Kim at Roznowski's home. RP (Ko): 5. The City's discussion of Kim's interaction with Ko in the petition at 5 is particularly disingenuous. Kim

---

<sup>4</sup> At trial, Hensing acknowledged that he had a duty to enforce a court order, *id.* at 47, 83-84, but took no steps to enforce it. *Id.* at 43. When he left the house, Kim was in violation of the order. *Id.* at 43-44. The City's assertion in its petition at 5 and footnote 4 that Roznowski was somehow "unconcerned" by the officers' failure to enforce the order is yet another example of the City's effort to suggest this whole situation was benign, and to, in effect, "blame the victim."

handed Ko a plastic bag containing personal items that Kim asked Ko to give to his nephew. CP 69, 313-14, 1003-04. Ko accompanied Kim to a local bank where he withdrew money, and Kim asked Ko to deliver the money to that nephew. RP (Ko): 10-11; CP 69-70, 312-13. Kim also made statements that indicated he was about to kill Roznowski and commit suicide. CP 70, 321. Concerned by these interactions with Kim, Ko called the police.<sup>5</sup>

Kim returned to Roznowski's home where they argued about money. CP 315-19. She told him to leave. CP 341. Kim snapped and stabbed Roznowski. CP 324.<sup>6</sup>

The City moved for summary judgment on the public duty doctrine; the trial court denied the motion and the Court of Appeals denied discretionary review. In the course of trial, the City filed a motion under CR 50(a) for judgment as a matter of law, CP 2049-59, which the trial court denied. CP 2096. After a lengthy trial, the jury returned a \$1.1

---

<sup>5</sup> Although the trial court excluded evidence of Mr. Ko's call to Federal Way Assistant Police Chief Andy Hwang, CP 572, that evidence belies the City's effort in its petition to portray Ko as unconcerned about Kim's possible actions. In fact, Ko called Hwang to relay his concerns about Kim. CP 1017-18. Hwang received the call and quickly ascertained that the Kos were calling to report a DV murder-suicide in progress. CP 902. Hwang was on his way to a lunch with his wife and testified he was not "in a police mood." CP 934. Instead of responding, Hwang actually downplayed the situation by telling Mrs. Ko that "you know people make statements like this." CP 930.

<sup>6</sup> As Dr. Donald Reay, King County's former medical examiner, testified, Kim's crime was particularly brutal. Kim stabbed Roznowski 18 times. RP (Reay): 9. Roznowski tried to defend herself. *Id.* at 10. The crime scene was bloody. *Id.* at 15-17.

million verdict in Washburn's favor, on which the trial court entered a judgment. CP 728-29, 2089-94.<sup>7</sup> The City did not renew its motion for judgment as a matter of law post-trial under CR 50(b).

The Court of Appeals initially affirmed the trial court's judgment, holding that the City failed to preserve any error associated with the duty instruction, Instruction Number 12, and ample evidence supported the jury's verdict.<sup>8</sup> The City moved for reconsideration. The Court of Appeals withdrew its earlier opinion and filed a new opinion specifically *adding* to its analysis that the City failed to preserve the instructional error by not even assigning error to Instruction Number 12 in its brief, or arguing that the instruction was erroneous, and also making clear that there were evidentiary issues that formed the basis for the trial court's denial of its CR 50(a) motion, contrary to the City's *repeated* assertions in its petition that no evidentiary issues were present.

---

She was conscious for five to ten minutes and she likely lived up to twenty minutes after the assault commenced and was fully aware of the events. *Id.* at 20, 26; CP 332.

<sup>7</sup> Washburn filed a CR 59 motion for additur or a new trial because, although the jury found the City liable as to Roznowski's two daughters, the jury awarded zero non-economic damages to them. The trial court granted the daughters a new trial on damages. CP 2146-50. The City's petition does not address this issue, thereby waiving it. RAP 13.7(b) (Court only reviews these issues raised in petition for review); *State v. Collins*, 121 Wn.2d 168, 178-79, 847 P.2d 919 (1993).

<sup>8</sup> The City chose not to include the Court of Appeals' original opinion in the Appendix to its petition to show how that Court initially addressed the issues. A copy is in the Appendix.

C. ARGUMENT WHY REVIEW SHOULD BE DENIED<sup>9</sup>

The City fails to establish that any of the criteria governing review in RAP 13.4(b) are met here. The Court of Appeals determination that the City failed to preserve any alleged instructional error in Instruction Number 12, the general duty instruction, is consistent with a long line of Washington cases, and that court's determination that the City waived any argument on the public duty doctrine by not filing a CR 50(b) motion is consistent with that rule's purpose and a long line of analogous federal authorities. Review is not merited here. The City's counsel simply failed to preserve any alleged error on the City's duty to Roznowski.

(1) The City Failed to Preserve Any Instructional Error Regarding Instruction Number 12

The City failed to preserve any instructional error for *two distinct reasons*. It did not object to Instruction Number 12,<sup>10</sup> *and* it did not assign

---

<sup>9</sup> Responding to the City's petition is made difficult by its decision to ignore the rules for submission of a petition. The petition is replete with arguments made in footnotes. It has long been an appellate court rule that substantive arguments advanced in footnotes may be disregarded. *State v. Johnson*, 69 Wn. App. 189, 194 n.4, 847 P.2d 960 (1993); *State v. Harris*, 164 Wn. App. 377, 389, 263 P.3d 1276 (2011). Similarly, to avoid the 20-page limit in a petition, RAP 13.4(f), the City appends its motion for reconsideration to the petition in the Appendix. This action violates RAP 13.4(c)(9).

<sup>10</sup> Instruction Number 12, the trial court's general instruction on duty which stated: "A city police department has a duty to exercise ordinary care in the service and enforcement of court orders." CP 2179. Instruction Number 12 was based on the general principles of RCW 4.96.010 that make a local government liable for its ordinary negligence as other persons and entities in Washington. CP 2079.

error to the giving of that instruction in its brief.<sup>11</sup>

(a) The City's Objection to Instruction Number 12 Failed to Satisfy CR 51(f)

The City's counsel *never* claimed the specific duty language of Instruction Number 12 somehow misstated the law. As the Court of Appeals correctly noted, the actual objection merely related to the instruction's *wording*. Op. at 15. The City's counsel actually *conceded* that Instruction Number 12 was "appropriate" in light of the trial court's handling of the public duty doctrine issue. RP (12/10/10): 73-74.

It has long been required under CR 51(f) that objections to instructions must be *explicit* in order to apprise the trial court of any alleged error and to afford that court a full opportunity to correct any problems with the instructions. *Bitzan v. Parisi*, 88 Wn.2d 116, 124-25, 558 P.2d 775 (1977) (where the defendant failed to reference the paragraph or general part of an instruction that was erroneous and merely made a general exception to its contents, the objection was insufficient); *Goehle v. Fred Hutchinson Cancer Research Center*, 100 Wn. App. 609, 615, 1 P.3d 579, *review denied*, 142 Wn.2d 1010 (2000). The City ignores *Bitzan* and *Goehle*, not even citing them. Instead, it argues that two

---

<sup>11</sup> The City *admitted* in its reply brief that because it assigned error to the denial of its instruction on the public duty doctrine, "[i]t was not necessary for the City to assign error to jury instruction no. 12." Reply br. at 6; Op. at 16.

factually unique cases constitute authority for the view that its objection to Instruction Number 12 was adequate. Pet. at 14-15. Neither departs from the rule of *specificity* under CR 51(f), and, in fact, both decisions acknowledge the general specificity rule. *Falk v. Keene Corp.*, 113 Wn.2d 645, 657-58, 782 P.2d 974 (1989); *Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 63-64, 882 P.2d 703 (1994).

The unique circumstances of those cases were not present here where the City did object to Instruction Number 12, did not assign error to it in its brief, or argue it in its Court of Appeals briefing. It effectively conceded that the instruction was "appropriate."

Additionally, the City cannot argue that its objection to the failure to give its proposed instruction on the public duty doctrine, CP 2070, preserved any error as to Instruction Number 12 for review. The City's counsel insisted that any duty instruction had to include the wording of an exception to the public duty doctrine. RP 12/20/10: 80-81. As such, its proposed instruction over reached. In effect, the City sought an instruction asking the jury to decide *a question of law*, for the court. *Cummins v. Lewis County*, 156 Wn.2d 844, 853, 133 P.3d 458 (2006).<sup>12</sup>

---

<sup>12</sup> The public duty doctrine is "a focusing tool that helped determine to whom a governmental duty was owed. It was not designed to be the tool that determined the actual duty. Properly, the public duty doctrine is neither a court created general grant of immunity nor a set of specific exceptions to some other existing immunity." *Id.* at 861-62 (citations omitted) (Chambers, J. concurring).

The City *knew* this was a *legal* issue. Reply Br. at 4 n.2. Its proposed instruction was no substitute for properly addressing Instruction Number 12.

In sum, the City's objection to Instruction Number 12 was imprecise, relating only to its wording, and did not satisfy CR 51(f), as the Court of Appeals properly concluded. Op. at 14-15.

(b) The City's Brief Waived Any Instructional Error

Left largely unaddressed in the City's petition is its failure to expressly assign error in its brief to Instruction Number 12. Op. at 17-18.<sup>13</sup> The City relegates its argument on this important point to yet another footnote. Pet. at 8 n.11. The City not only failed to object below, *it also failed to assign error to the instruction on appeal or to offer any argument on the alleged instructional error in its briefing.*<sup>14</sup> The City essentially contends that the Court of Appeals could have somehow discovered its non-existent argument on instructional error. But "[j]udges

---

<sup>13</sup> The City never argued to the Court of Appeals that it should exercise its inherent authority under RAP 1.2(a) when it failed to properly preserve the error. That issue, too, is waived.

<sup>14</sup> It spent *no time* in its opening brief discussing how the actual language of Instruction Number 12 was erroneous and apart from a terse mention of the instruction and why it did not need to assign error to it, the reply brief is equally silent on Instruction Number 12. Obviously, the City did not set forth Instruction Number 12 in the Appendix to its brief, as required by RAP 10.3(g). The City's notice of appeal detailed alleged erroneous acts of the trial court at length. It nowhere mentions instructional error. CP 2095-96. These facts lend further credence to the fact that the City ignored any instructional error as to Instruction Number 12.

are not like pigs, hunting for the truffles buried in briefs.” *United States v. Dunkel*, 927 F.2d 955, 956 (7<sup>th</sup> Cir. 1991).

The Court of Appeals determination that Instruction Number 12 is the law of the case is amply supported. The City does not address *State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900 (1998) and *Garcia v. Brulotte*, 94 Wn.2d 794, 620 P.2d 99 (1980), relied upon by the Court of Appeals. Op. at 11-14. Moreover, it has *long* been the rule in Washington that the failure to assign error to an instruction in a brief waives any instructional error, rendering the instruction the law of the case. RAP 10.3(g); *Guijosa v. Wal-Mart Stores, Inc.*, 114 Wn.2d 907, 917, 32 P.3d 250 (2001) (failure to object to instruction); *Chelan County Deputy Sheriffs' Ass'n v. Chelan County*, 109 Wn.2d 282, 300 n.10, 745 P.2d 1 (1982) (failure to assign error to instruction). Further, the failure to offer argument on an alleged error *waives* any error. *Ang v. Martin*, 154 Wn.2d 477, 486-87, 114 P.3d 637 (2005).

Ignoring this Court's controlling authority on the law of the case doctrine, the City's only response is two Court of Appeals decision, pet. at 13-14, neither of which contradicts the unambiguous policy recited above

regarding the need to object to an allegedly erroneous instruction, to assign error to it in the opening brief, and to argue it in the brief.<sup>15</sup>

The City failed to preserve any error associated with Instruction Number 12 in *two respects* and the Court of Appeals correctly stated that any error was thus waived, rendering Instruction Number 12 the law of the case. The City *concedes* that substantial evidence supports the jury's finding if Instruction Number 12 controls. Pet. at 15.

(2) The City's Failure to File a CR 50(b) Motion Barred the City's Appeal

The City could have preserved its public duty doctrine argument by filing proper CR 50 motions, *but it failed to do so*. It tries to persuade this Court that its failure to file a CR 50(b) was understandable because it was a surprise that such a motion was mandatory. It also argues that such a motion only was necessary if sufficiency of the evidence was implicated.

First, the City asserts that no case law existed prior to the Court of Appeals opinion that a CR 50(b) motion was mandatory. Pet. at 16-17. That argument is fundamentally disingenuous. CR 50 was amended in 2005, making a CR 50(a) motion is mandatory pre-condition to a CR

---

<sup>15</sup> This Court called *Rhoades v. De Rosier*, 14 Wn. App. 946, 546 P.2d 930 (1976) into question in its decision in *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 255-57, 840 P.2d 860 (1992). In any event, even if an appeal could be taken from the trial court's decision on post-trial motions, regardless of any instructional error, that does alter the fact that Instruction Number 12 is the law of the case and the City failed to

50(b) motion: "... a party who fails to make a CR 50 motion before the case is submitted to the jury may not make a similar motion after the jury reaches its verdict." 4 Karl B. Tegland, *Wash. Practice: Rules Practice* (5th ed. 2006) at 210. See *Hanks v. Grace*, 167 Wn. App. 542, 552 n.23, 273 P.3d 1029 (2012).<sup>16</sup>

Second, Washington's CR 50 finds its direct counterpart in Fed. R. Civ. Pro. 50. The text of those rules, if examined carefully, are *virtually identical*. The rules so closely mirror each other that CR 50(e) actually utilizes the federal terminology for appeals referencing an "appellee." See Appendix. The drafters' comments to those 2005 amendments articulated a *specific intent* to bring CR 50 more closely into conformity with Fed. R. Civ. Pro. 50. 4 Karl B. Tegland, *Wash. Practice: Rules Practice* (5th ed.

---

preserve any errors as to the post-trial motions by neglecting to file a CR 50(b) motion here.

<sup>16</sup> Washington law has long recognized that there is a difference between motions for judgment as a matter of law pretrial and posttrial. Where a trial court denies summary judgment due to factual disputes, and a trial ensues, the losing party, like the City here, must appeal from the sufficiency of the evidence *at trial*, and not from denial of the motion for summary judgment. *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 35 n.9, 864 P.2d 921 (1993); *Johnson v. Rothstein*, 52 Wn. App. 303, 759 P.2d 471 (1988). In *Johnson*, the court dismissed an appeal that only raised the denial of summary judgment where the denial was based on questions of fact resolved at trial. In effect, the denial of summary judgment merges into the judgment on the verdict of the jury.

2006) at 211. The Court of Appeals properly looked to federal authority for guidance. Op. at 24-28.<sup>17</sup>

Federal cases make clear that a CR 50(b) motion is *mandatory* to preserve any alleged error. In *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 126 S. Ct. 980, 163 L.Ed.2d 974 (2006), the United States Supreme Court held that the failure of a party to file a post-trial motion for judgment as a matter of law under Fed. R. Civ. Pro. 50(b) to challenge the sufficiency of the evidence supporting the jury's verdict foreclosed appellate review even though the party had filed a prejudgment motion for judgment as a matter under Rule 50(a). The Court extended that rule in *Ortiz v. Jordan*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 884, 178 L.Ed.2d 703 (2011) where defendants in a civil right case under 42 U.S.C. § 1983 contended they were entitled to qualified immunity on summary judgment, but the district court denied their motion. They did not renew their motion under Fed. R. Civ. Pro. 50(b) post-trial. The Court held that the defense did not vanish, but it had to be evaluated in light of the character and quality of the evidence received at trial; the trial record, in effect,

---

<sup>17</sup> The City has seemingly abandoned its ill-conceived argument made on reconsideration that unless the federal rule "mirrors" its state counterpart, federal case law on the rule can be disregarded. Mot. for Recons. at 11. The state and federal rules need only be parallel. *American Mobile Homes of Washington, Inc. v. Seattle-First Nat'l Bank*, 115 Wn.2d 307, 313, 796 P.2d 1276 (1990); ("When a state rule is similar to a parallel federal rule we sometimes look to the analysis of the federal rule for guidance."). Op. at 26 n.94.

supersedes the summary judgment record. *Id.* at 889. The Court ruled that because qualified immunity of officials was not a “neat abstract issue of law,” the jury’s verdict had to stand, notwithstanding the qualified immunity defense. *Id.* at 893. The City *admitted* below that federal law predating the two U.S. Supreme Court cases mandated the filing of a 50(b) motion. Motion for Recons. at 13-14.

This was the genesis for the specific warning to practitioners in *Washington Practice* by Professor Tegland that in

order to lay a foundation for appeal, the party must first renew its motion for judgment as a matter of law pursuant to CR 50(b) or, in the alternative, move for a new trial based upon insufficient evidence. This requirement is based upon the belief that in the post-verdict context (CR 50(b)), the trial court should make the initial determination of whether the evidence was sufficient to support the verdict. The determination should not be made in the first instance by an appellate court.

4 Karl B. Tegland, *Wash. Practice: Rules Practice* (5th ed. 2006, pocket part) at 36.<sup>18</sup> The City cannot legitimately contend that practitioners like its trial counsel were not, or should not have been, aware that a CR 50(b) motion was mandatory.

---

<sup>18</sup> In yet another footnote, the City argues that federal authorities need not be “slavishly” followed and that Professor Tegland’s warning to practitioners could be ignored. Pet. at 17 n.18. Its argument fails for the reasons set forth herein. Its citation to the WSBA *Appellate Practice Deskbook* does not address CR 50(b) and constitutes more of its strained excuse for its trial counsel’s failure.

Third, the City argued on reconsideration that it did not need to file a CR 50(b) motion because CR 50 only implicates the sufficiency of the evidence and there were no factual issues about the application of the public duty doctrine. Washburn provided the Court of Appeals with those factual issues in response to the City's motion, response to motion for reconsideration at 17-18, and the Court of Appeals agreed in its new opinion. Op. at 18-20, 29.<sup>19</sup>

Here, as in *Ortiz*, the public duty doctrine or its exceptions do not constitute a "neat abstract issue of law." The trial court wanted to hear evidence when the City moved for summary judgment on the public duty doctrine and reconsideration of the order denying it. CP 25. The court also wanted a full record on the issue when it denied the City's CR 50(a) motion. CP 2114-36. The importance of the trial court's desire to have more evidence on the public duty doctrine in making its decision on summary judgment and CR 50(a) cannot be understated. The court took into consideration the evidence adduced at trial to conclude that *the public duty doctrine did not apply given the facts*. This is precisely why *Unitherm* and *Ortiz* control. The application of the public duty doctrine

---

<sup>19</sup> The City now sneers that the Court's recitation is a "fallacious" justification in yet another footnote. Pet. at 16 n.16.

and its exceptions, like qualified immunity in *Ortiz*, was not a “neat abstract issue of law.”

In sum, the City did not properly preserve any alleged error for review when it failed to file a CR 50(b) motion.<sup>20</sup> The City offers no basis for review on that issue.

(3) This Court Should Not Reach an Issue Not Decided by the Court of Appeals

The City contends in its petition at 18-20 that this Court should decide the public duty doctrine issue not addressed by the Court of Appeals despite the City's failure to properly preserve that issue for review. Despite the City's citation of a few selected cases, on the doctrine, the trial court did not err in treatment of that issue. Br. of Resp'ts at 20-44. But this Court should not reach the issue in any event.

---

<sup>20</sup> The City complains about the Court's decision on policy grounds indirectly in its petition in yet another footnote. Pet at 17 n.17. A requirement that a party that wishes to preserve a legal error raised on summary judgment or in a CR 50(a) motion must take the added step of renewing that motion under CR 50(b) is a wise course, requiring parties to be focused on legal issues, and preserving scarce judicial resources. “Rule 50(b) was designed to provide a precise plan to end the prevailing confusion about directed verdicts and motions for judgments notwithstanding verdicts.” *Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48, 52, 73 S. Ct. 125, 97 L.Ed. 77 (1952). The Court noted the rule was “not difficult to understand or to observe.” *Id.*

Critically, there is a difference between motions for judgment as a matter of law pre and post-verdict particularly where, as here, there are facts that bear on the legal question. A trial has occurred. The actual presentation of evidence on the public duty doctrine issues assisted Judge Darvas in making her decision on how to instruct the jury on the duty issue. Those facts appropriately become a part of any record in deciding a CR 50(b) motion. The City should have renewed its motion accordingly. When it did not, it failed to preserve any alleged error for review.

RAP 13.7(b) provides that if this Court reserves a Court of Appeals decision that did not consider all of the issues raised that support such a decision, this Court may remand the case to the Court of Appeals to decide them or consider and decide them itself. Were the Court to grant review, it should be confined to the City's failure to preserve error. The better course here is to allow the Court of Appeals to address the public duty issues. This Court has made its views on the public duty doctrine more than clear in a series of cases. The Court of Appeals can appropriately apply the principles set forth in those cases.

D. CONCLUSION

The City owed Roznowski a duty of care, but breached that duty by the cavalier attitude of its police officers toward a harassment victim. The City's officers were ill-trained on harassment and acted negligently in failing to properly protect Roznowski from Kim. Hensing had not read Roznowski's petition, the court order, or the LEIS designed to afford Roznowski protection. The City's trial counsel simply failed to preserve for review any errors relating to the City's duty to Roznowski.

This Court should deny review and affirm the decision of the Court of Appeals and the judgment on the verdict of the jury and the trial court's decision to allow a new trial to the daughters on damages.

DATED this 13<sup>th</sup> day of September, 2012.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973  
Talmadge/Fitzpatrick  
18010 Southcenter Parkway  
Tukwila, WA 98188  
(206) 574-6661

John R. Connelly, Jr., WSBA #12183  
Nathan P. Roberts, WSBA #40457  
Connelly Law Offices  
2301 N. 30<sup>th</sup> Street  
Tacoma, WA 98403  
(253) 593-5100  
Attorneys for Respondents

# APPENDIX

From Washburn's Response to City's Motion for Reconsideration  
at 10-12:

CR 50:

(a) Judgment as a Matter of Law.

(1) *Nature and Effect of Motion.* If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim, counterclaim, cross claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment. A motion for judgment as a matter of law which is not granted is not a waiver of trial by jury even though all parties to the action have moved for judgment as a matter of law.

(2) *When Made.* A motion for judgment as a matter of law may be made at any time before submission of the case to the jury.

(b) *Renewing Motion for Judgment After Trial; Alternative Motion for New Trial.* If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to

Fed. R. Civ. Pro. 50:

(a) Judgment as a Matter of Law.

(1) *In General.* If party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) *Motion.* A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) *Renewing the Motion After Trial; Alternative Motion for a New Trial.* If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment – or if the motion addresses a jury issue not

<p>have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment – and may alternatively request a new trial or join a motion for a new trial under rule 59. In ruling on a renewed motion, the court may:</p> <ul style="list-style-type: none"><li>(1) If a verdict was returned:<ul style="list-style-type: none"><li>(A) allow the judgment to stand,</li><li>(B) order a new trial, or</li><li>(C) direct entry of judgment as a matter of law; or</li></ul></li><li>(2) if no verdict was returned:<ul style="list-style-type: none"><li>(A) order a new trial, or</li><li>(B) direct entry of judgment as matter of law.</li></ul></li></ul>	<p>decided by a verdict, no later than 28 days after the jury was discharged – the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:</p> <ul style="list-style-type: none"><li>(1) allow judgment on the verdict, if the jury returned a verdict;</li><li>(2) order a new trial; or</li><li>(3) direct the entry of judgment as a matter of law.</li></ul>
---	--

DECLARATION OF SERVICE

On said day stated below, I emailed a courtesy copy and deposited into the U.S. Mail for service a true and accurate copy of the Answer to Petition for Review in Supreme Court Cause No. \_\_\_\_\_ (Court of Appeals Cause No. 66534-1-I) to the following parties:

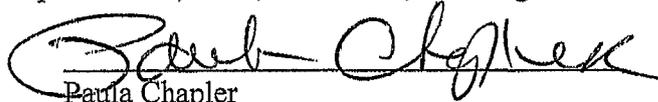
Robert L. Christie Thomas P. Miller Christie Law Group, PLLC 2100 Westlake Ave. N., Suite 206 Seattle, WA 98109	John R. Connelly, Jr. Nathan P. Roberts Connelly Law Offices 2301 N. 30 <sup>th</sup> Street Tacoma, WA 98403
David J. Ward Legal Voice 907 Pine Street, Suite 500 Seattle, WA 98101-1818	Alison Maria Romano Bettles Nordstrom, Inc. 1700 7 <sup>th</sup> Avenue, Suite 1000 Seattle, WA 98101-4407
Stewart E. Estes Keating Bucklin & McCormack 800 5 <sup>th</sup> Avenue, Suite 4141 Seattle, WA 98104-3175	Mike King Carney Badley Spellman 701 5 <sup>th</sup> Avenue, Suite 3600 Seattle, WA 98104-7010
Christopher W. Nicholl Nicholl Black & Feig PLLC 1325 4 <sup>th</sup> Avenue, Suite 1650 Seattle, WA 98101	Mary H. Spillane Daniel W. Ferm Williams, Kastner & Gibbs PLLC 601 Union Street, Suite 4100 Seattle, WA 98101

Original efiled with:

Washington Supreme Court  
Clerk's Office  
415 12<sup>th</sup> Street West  
Olympia, WA 98504-0929

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: September 13, 2012, at Tukwila, Washington.

  
Paula Chapler  
Talmadge/Fitzpatrick



## OFFICE RECEPTIONIST, CLERK

---

**To:** Paula Chapler  
**Subject:** RE: Carola Washburn, et al. v. City of Federal Way, Supreme Court Cause No. \_\_\_\_ (Court of Appeals No. 66534-1-I)

Rec. 9-13-12

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

---

**From:** Paula Chapler [<mailto:paula@tal-fitzlaw.com>]

**Sent:** Thursday, September 13, 2012 12:51 PM

**To:** OFFICE RECEPTIONIST, CLERK

**Subject:** Carola Washburn, et al. v. City of Federal Way, Supreme Court Cause No. \_\_\_\_ (Court of Appeals No. 66534-1-I)

Per Mr. Talmadge's request, attached please find the Answer to the Petition for Review for filing in the following case:

Case Name: Carola Washburn, et al. v. City of Federal Way

Cause No: Not Assigned yet

Court of Appeals Cause No. 66534-1-I

Attorney: Philip A. Talmadge, WSBA #6973

Talmadge/Fitzpatrick

18010 Southcenter Parkway

Tukwila, WA 98188

Sincerely,

Paula Chapler

Legal Assistant

Talmadge/Fitzpatrick

(206) 574-6661