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NO. 87906-1

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.

PETITIONER'S SUPPLEMENTAL BRIEF

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 ORIGINAL

TABLE OF CONTENTS

I. ISSUES PRESENTED 1

II. STATEMENT OF FACTS 2

 A. Underlying Facts 2

 B. This Litigation 4

 C. Court of Appeals Decision 6

III. ARGUMENT 8

 A. The Trial Court Fully Understood the “No Legal Duty”
 Grounds on Which the City of Federal Way Sought
 Dismissal 8

 B. Justice Is Not Served by the Court of Appeals’ Decision
 to Apply CR 51(f) More Strictly than It Had Previously
 Been Applied and to Adopt a New Procedural
 Waiver/Preservation Rule, and Thereby Avoid the
 Merits of the City’s Appeal 11

 1. The Court of Appeals’ reliance on the City’s failure
 to assign error to Instruction 12 was error 12

 2. The Court of Appeals’ tightening of the
 requirements for compliance with CR 51(f) is
 unprecedented 13

 3. The Court of Appeals’ holding that failure to
 formally renew a denied CR 50(a) motion in a CR
 50(b) motion waives appellate review of the legal
 issue on which the CR 50(a) motion was based is
 also unprecedented 15

4. The Court of Appeals' strict application of CR 51(f) and retroactive adoption and application of federal Rule 50 law unjustly deprived the City of review on the merits 16

IV. CONCLUSION 20

TABLE OF AUTHORITIES

	Page(s)
STATE CASES	
<i>Bailey v. Forks</i> , 108 Wn.2d 262, 737 P.2d 1257 (1987).....	11
<i>Beal v. City of Seattle</i> , 134 Wn.2d 769, 954 P.2d 237 (1998).....	18
<i>Burnet v. Spokane Ambulance</i> , 131 Wn.2d 484, 933 P.2d 1036 (1997).....	17
<i>Chambers-Castanes v. King County</i> , 100 Wn.2d 275, 669 P.2d 451 (1983).....	19
<i>Falk v. Keene Corp.</i> , 113 Wn.2d 645, 782 P.2d 974 (1989).....	13, 14
<i>Harvey v. Snohomish County</i> , 157 Wn.2d 33, 134 P.3d 216 (2006).....	19
<i>Haywood v. Aranda</i> , 143 Wn.2d 231, 19 P.3d 406 (2001).....	16
<i>In re Detention of Turay</i> , 139 Wn.2d 379, 986 P.2d 790 (1999).....	17
<i>Johnson v. State</i> , 164 Wn. App. 740, 265 P.3d 199 (2011), <i>rev. denied</i> , 173 Wn.2d 1027 (2012).....	19
<i>Kim v. Dean</i> , 133 Wn. App. 338, 135 P.3d 978 (2006).....	7, 13
<i>Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha</i> , 126 Wn.2d 50, 882 P.2d 703 (1994).....	7, 13, 14
<i>Rhoades v. DeRosier</i> , 14 Wn. App. 946, 546 P.2d 930 (1976).....	7, 13

<i>Robb v. City of Seattle</i> , No. 85658-3, 2013 Wash. Lexis 73 (Jan. 31, 2013)	9, 10, 19
<i>Stafne v. Snohomish County</i> , 174 Wn.2d 24, 271 P.3d 868 (2012).....	17
<i>Washburn v. City of Federal Way</i> , 169 Wn. App. 588, 283 P.3d 567 (2012)), <i>rev. granted</i> , 176 Wn.2d 1010 (2013).....	passim

FEDERAL CASES

<i>Ortiz v. Jordan</i> , ___ U.S. ___, 131 S. Ct. 884, 178 L. Ed. 2d 703 (2011).....	15
<i>Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.</i> , 546 U.S. 394, 126 S. Ct. 980, 163 L. Ed. 2d 974 (2006).....	15

STATE STATUTES

RCW Chapter 10.14	1, 2, 9, 20
RCW 10.14.080(6)	2
RCW Chapter 10.99	4
RCW 10.99.055	5
RCW Chapter 26.50	4, 20
RCW 26.50.080(1)	3

RULES

CR 50	1, 18
CR 50(a)	passim
CR 50(b)	passim
CR 51(f).....	11, 13, 14, 16
Fed. R. Civ. P. 50.....	15, 16

RAP 10.87

OTHER AUTHORITIES

4 Karl B. Tegland, *Washington Practice: Rules Practice CR 50*
author's cmt. 16 (5th ed. Supp. 2011)5

Washington Appellate Practice Deskbook, vol. I (3d ed. 2005 and
Supp. 2011), § 17.7(2)(a)(i), at p. 17-44.....7, 14

Washington Appellate Practice Deskbook, vol. I, § 17.7(2)(f), at
pp. 17-50 to 17-517, 13

WPI 10.026

I. ISSUES PRESENTED

1. How specific must the wording of an exception to a jury instruction be when the record demonstrates that the trial court clearly understood the legal basis for the exception?

2. Should use of “may” in CR 50(b) be construed to mean that a party “must” renew in a post-verdict motion any legal argument made in a CR 50(a) motion in order to appeal the denial of the CR 50(a) motion?

3. If it is to be the rule that the failure to renew in a post-trial CR 50(b) motion a legal argument that was made in a CR 50(a) motion during trial constitutes a waiver of the argument for appeal, should such a rule be applied retroactively, or prospectively by amendment to CR 50 or by a decision applicable to cases that have not yet been tried?

4. When, because the plaintiff and the defendant both live there, a police officer goes to the plaintiff’s house to serve an RCW ch. 10.14 anti-harassment order on the defendant that requires the defendant to stay away from the plaintiff’s house, does the officer owe a duty to the plaintiff, personally, to ensure that the defendant leaves the house, such that, even if the defendant *does* leave on his own, a jury may find the officer negligent and liable if the defendant later returns to the house unarmed, is permitted by the plaintiff to enter the house so they can run a planned errand together, and kills the plaintiff with a kitchen knife?

II. STATEMENT OF FACTS

A. Underlying Facts.

On May 1, 2008, Baerbel Roznowski obtained, *ex parte*, a temporary anti-harassment protection order under RCW ch. 10.14 from King County Superior Court against her intimate partner, Paul Kim. CP 883-84; Ex. 121. After speaking with a King County Domestic Violence Victim Advocate who explained the differences as to when a domestic violence order, as opposed to an anti-harassment order, typically is obtained,¹ Roznowski chose to obtain the anti-harassment order rather than a domestic violence protection order. Ex. 122; CP 1219-21; 12/15 RP 9-12 (Tsai). The order prohibited Kim from attempting to contact Roznowski or being within 500 feet of the house where they were living together and which Roznowski owned. CP 883-84; Ex. 121. The order did not include, and RCW 10.14.080(6) did not give the issuing court the option of including, any provision for a police officer to assist in the order's execution, which is a type of provision a court may include in a

¹ CP 1219-20. The King County Domestic Violence Victim Advocate explained to Roznowski that a domestic violence protection order typically is obtained if there is a history of physical harm or threat of imminent physical harm and would require the person subject to the order to vacate the residence immediately, but an anti-harassment protection order typically is obtained in situations involving a general pattern of harassment and would not require the subject to vacate immediately. CP 1220. Roznowski told the Advocate that Kim was a hoarder and was refusing to move his belongings so that she could put her house on the market and move to California to be nearer her daughters. CP 1221. Roznowski also told the Advocate that there had been no history or verbal threat of physical violence. CP 1221; 12/15 RP 9-10.

domestic violence protection order under RCW 26.50.080(1).²

About 8:00 a.m. on May 3, 2010, City of Federal Way Police Officer Andrew Hensing took the order to Roznowski's house to serve on Kim. CP 891; Ex. 123; 12/9 RP 20 (Hensing).³ Officer Hensing perceived another person in the house, but did not see, hear, or have contact with that person.⁴ 12/9 RP 39-40 (Hensing). Hensing left the home about 8:13 a.m. *Id.* at 68; Ex. 123. There is no evidence that anyone had assured Roznowski that police would escort Kim from the house or stand by until he did. *See* 12/15 RP at 16-17 and 20 (Argument/Ruling). At 9:07 a.m., Roznowski e-mailed her daughter Carola Washburn, reporting that Kim had been served and that she had given him until 11 a.m. to move his belongings out. CP 110; Ex. 116.

Kim called a friend, who came over, chatted with Roznowski, and left with Kim about 10:00 a.m. CP 69. Kim and the friend drove separately to a bank 1.2 miles away. CP 69, 75, 114. Kim withdrew cash, spoke about being evicted, and drove back to the house. CP 70.

At 10:12 a.m., while Kim was away, Roznowski called her

² In an April 30 e-mail, Roznowski told her daughter Janet Loh that she had called 911 and that "they" had "suggested [she] get a Domestic Violence Protection order" that would "allow the police to evict [Kim] and his stuff." CP 991. There is no evidence that the 911 operator to whom Roznowski spoke was a City employee.

³ Roznowski's petition for the antiharassment order advised that "Paul Kim's residence is at 331 S. 1st Pl. # 211, Federal Way but [he] stays at petitioner's home." CP 888.

⁴ There is no evidence that Officer Hensing had had prior contact with Roznowski.

daughter Janet Loh. While they were talking Kim returned to the house, which Roznowski told Loh she had expected. 12/15 RP 21 (Loh). Roznowski did not call, or ask Loh to call, 911. Roznowski then received a call from a friend, Inge Grayson, and told Grayson that she was planning to accompany Kim to transfer title to a minivan. CP 133 (26), 134 (29-30); 12/8 RP 51, 61 (Grayson).

Sometime before noon, Kim stabbed Roznowski with a kitchen knife, inflicting mortal wounds. CP 372.

B. This Litigation.

Roznowski's daughters, Loh and Washburn, filed a wrongful death complaint against the City of Federal Way, CP 798-809, alleging that the City and Officer Hensing breached duties under RCW ch. 10.99 and RCW ch. 26.50 to protect Roznowski and to enforce the anti-harassment order by removing Kim. CP 806-07.

In motions for dismissal both before trial, CP 817-40, 1739-50, and during trial, CP 2049-59, the City argued that the only legal duties Officer Hensing owed on May 3, 2008, were to serve the anti-harassment order on Kim and complete a return of service form; that he owed no legal duty to Roznowski personally; and that plaintiffs therefore had no tort cause of action against the City. Reasoning that the "failure to enforce" exception to the public duty doctrine applied, CP 23-25, the trial court denied all

three motions. CP 1736-38; 17-26; 12/15 RP 20-21 (Argument/Ruling). The court also denied the City's lack-of-causation summary judgment motion, in which the City pointed out, CP 56, that all Officer Hensing could lawfully have done by way of protecting Roznowski after serving the anti-harassment order at 8:08 a.m. was to get Kim to leave the house, which Kim did on his own at about 10:00 a.m. CP 44-67; 571-73.

The case proceeded to trial. In urging the court to give a "duty of ordinary care" instruction, Washburn and Loh's counsel stated:

A duty instruction is always included as in an ordinary negligence case, and [the City's counsel's] objection to that instruction was not based on the words, it is based on his public duty argument.

The court responded: "I know." 12/20 RP 5 (Argument/Exceptions). Plaintiffs' counsel argued, and the trial court agreed, that Kim, upon being served with the order at Roznowski's house, was violating an order that RCW 10.99.055 required Officer Hensing to enforce, such that the "failure to enforce/mandatory statutory duty to act" exception to the public duty doctrine applied. 12/20 RP 26 (Argument/Exceptions), 29-30, 32, 42-43; *see also* 12/15 RP 19-21 (Argument/Ruling).⁵

⁵ The Court of Appeals Commissioner, in denying the City's Motion for Discretionary Review, reasoned that, although the "failure to enforce/mandatory statutory duty to act" exception to the public duty doctrine does *not* apply because no mandatory *statutory* duty to enforce anti-harassment orders exists, CP 589-91, the "special relationship" exception might apply if a police department employee assured Roznowski that police would escort Kim from her property when the order was served, CP 592-94. The trial court recognized after the close of plaintiffs' case that there was no evidence of such an assurance, 12/15

When it came time to take formal exceptions to the jury instructions the trial court was going to give, the City excepted to Instruction No. 12 “for the reasons set forth before.” 12/20 RP 80 (Argument/Exceptions). Instruction No. 12 told the jury that “[a] city police department has a duty to exercise ordinary care in the service and enforcement of court orders.”⁶ CP 2179. The jury found the City liable and awarded \$1.1 million to Roznowski’s estate but zero dollars to Washburn and Loh. CP 2093-94. The City did not make a post-verdict CR 50(b) motion. The court granted Washburn and Loh a new trial on their damages. CP 2146-50. On appeal from the denial of its CR 50(a) motion to dismiss, the City renewed the “no duty” argument it made pre-verdict: that the case should be dismissed because Officer Hensing owed no legal duty to Roznowski.⁷

C. Court of Appeals Decision.

The Court of Appeals initially held that: (1) Instruction No. 12 was “the law of” this case because the City had not formally assigned error to it on appeal and had not excepted to it specifically enough in the trial

RP 16-17, 20 (Argument/ Ruling), and continued to rely on the “failure to enforce” exception that the Commissioner thought inapplicable.

⁶ Instruction No. 6 was WPI 10.02 (“Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances”). CP 2173.

⁷ In its opening brief, the City did not formally assign error to Instruction No. 12. The City’s first assignment of error identified its objection to the trial court’s decision to “allow[] plaintiffs’ claims (based solely on a theory of negligence) to proceed to verdict, where all such claims are barred by the public duty doctrine...”

court; (2) the evidence was sufficient to support the jury's liability finding under Instruction 12; and (3) the City had waived review of the denial of its pre-verdict CR 50(a) motion for judgment as a matter of law by not renewing its "no duty" argument in a post-verdict CR 50(b) motion.⁸

The City moved for reconsideration and submitted additional authorities pursuant to RAP 10.8, consisting of *Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 63, 882 P.2d 703 (1994), and *Washington Appellate Practice Deskbook*, Vol. I (3d ed. 2005 and Supp. 2011), § 17.7(2)(a)(i), at p. 17-44, on the issue of whether the City had adequately apprised the trial court of the basis for its exception to the giving of Instruction No. 12, and *Rhoades v. DeRosier*, 14 Wn. App. 946, 948 n.2, 546 P.2d 930 (1976), *Kim v. Dean*, 133 Wn. App. 338, 349, 135 P.3d 978 (2006), and *Washington Appellate Practice Deskbook*, Vol. I, § 17.7(2)(f), at pp. 17-50 to 17-51, with respect to the issue of whether Instruction No. 12, CP 2179, is "the law of the case."

The Court of Appeals filed a substituted opinion, *Washburn v. City of Federal Way*, 169 Wn. App. 588, 283 P.3d 567 (2012), *rev. granted*, 176 Wn.2d 1010 (2013), denying reconsideration, mostly reiterating its initial decision but also addressing certain points made in the City's

⁸ The Court of Appeals also affirmed the grant of a new trial to Washburn and Loh on their personal damages claims.

motion for reconsideration and adding that the Court was not deciding whether that instruction had been a correct statement of the law for future cases. The court did not acknowledge any of the City's additional authorities. This Court granted review.

III. ARGUMENT

A. The Trial Court Fully Understood the "No Legal Duty" Grounds on Which the City of Federal Way Sought Dismissal.

The Court of Appeals affirmed a judgment against the City of Federal Way based on a jury verdict finding the City causally negligent for not taking reasonable steps to protect Roznowski from harm at the hand of Kim. A duty to keep one person from harming another exists only in limited circumstances. As this Court recently summarized the law:

As a general rule, "in the absence of a special relationship between the parties, there is no duty to control the conduct of a third person so as to prevent him from causing harm to another." *Tae Kim v. Budget Rent A Car Sys., Inc.*, 143 Wn.2d 190, 195, 15 P.3d 1283 (2001) (quoting *Richards v. Stanley*, 43 Cal. 2d 60, 65, 271 P.2d 23 (1954)). Until now, our cases involving a duty to protect a party from the criminal conduct of a third party have fallen into one of two categories: where there is a special relationship with the victim or where there is a special relationship with the criminal. *Id.* at 196-97. For example, we have found liability for the criminal acts of third parties in cases involving the relationship between a business and a business invitee, innkeeper and guest, state and probationer, and psychotherapist and patient. *Id.*

However, we have also recognized under Restatement §302B that a duty to third parties may arise in the limited circumstances that the actor's own affirmative act creates a

recognizable high degree of risk of harm. *See, e.g., Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 230, 802 P.2d 1360 (1991); *Kim*, 143 Wn.2d at 196-98.

Robb v. City of Seattle, No. 85658-3, 2013 Wash. Lexis 73, at *7-*8 (Jan. 31, 2013). Plaintiffs never alleged that the City affirmatively created the risk that Kim would murder Roznowski. Their theory was *nonfeasance*, not *misfeasance*: failure to properly train Officer Hensing to “enforce,” or failure on his part to “enforce,” the *ex parte* RCW ch. 10.14 anti-harassment order and keep Kim away from Roznowski’s house.

Because Officer Hensing had gone to Roznowski’s house to serve Kim with the order, not to execute a search or arrest warrant or investigate a domestic violence complaint, the legal issues were framed in the terminology of the so-called “public duty doctrine.” The City of Federal Way sought dismissal of the complaint on the ground that, because no recognized *exception* to the public duty doctrine applied, it and Officer Hensing had owed no duty of care to Roznowski, personally, when he served Kim with Roznowski’s *ex parte* RCW ch. 10.14 anti-harassment order. The City sought such relief repeatedly: twice before trial, CP 817-40, 1739-50, during trial, CP 2049-59, and when jury instructions were being prepared, CP 2066-70, and exceptions were being taken, RP 12/20 (Argument/Exceptions) at 79-80. The trial court repeatedly rejected the

City's "no legal duty" arguments. Ultimately, the court gave an "ordinary care" instruction. CP 2179.

This Court's recent decision in *Robb v. City of Seattle*, No. 85658-3, 2013 Wash. Lexis 73 (Jan. 31, 2013), implicitly vindicates the position the City of Federal Way took. It confirms that a police officer acting as such owes a duty to protect a person from criminal conduct of a third person only (a) for *nonfeasance* where a "special relationship" exists, or (b) for *misfeasance* if -- but only if -- the officer's affirmative act exposes the victim to a "recognizable high degree of risk of harm." *Robb*, 2013 Wash. Lexis 73 at *8.

The public duty doctrine, which was not directly at issue in *Robb*, similarly limits the situations in which a public officer undertakes a legal duty of care to an individual:

[There are] four situations in which a governmental agency acquires a special duty of care owed to a particular plaintiff or a limited class of potential plaintiffs, rather than the general duty of care owed to the public at large. These exceptions include: (1) when the terms of a *legislative* enactment evidence an *intent* to identify and protect a particular and circumscribed class of persons (legislative intent), [citation omitted]; (2) where governmental agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation, fail to take corrective action despite a *statutory duty* to do so, and the plaintiff is within the class the statute intended to protect (failure to enforce), [citations omitted]; (3) when governmental agents fail to exercise reasonable care after assuming a duty to warn or come to the aid of a particular

plaintiff (*rescue doctrine*), [citations omitted]; or (4) where a *[special] relationship* exists between the governmental agent and any reasonably foreseeable plaintiff, setting the injured plaintiff off from the general public *and the plaintiff relies on explicit assurances* given by the agent or assurances inherent in a duty vested in a governmental entity (special relationship), [citations omitted].

Bailey v. Forks, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987) (emphases added). The City of Federal Way repeatedly explained to the trial court that none of the four public duty doctrine exceptions applied. CP 817-40, 1739-50, 2024-59. The trial court disagreed, reasoning that the anti-harassment order triggered a duty to enforce within the meaning of Exception 2. 12/15 RP 20-21 (Arg./Ruling); 12/20 RP (Arg./Exceptions) 26-28, 41-43. In so doing, the trial court incorrectly applied the law. The City's motions to dismiss should have been granted.

B. Justice Is Not Served by the Court of Appeals' Decision to Apply CR 51(f) More Strictly than It Had Previously Been Applied and to Adopt a New Procedural Waiver/Preservation Rule, and Thereby Avoid the Merits of the City's Appeal.

The trial court clearly knew exactly what the City's legal position was but disagreed with it. Before the Court of Appeals' decision in this case, this Court's jurisprudence favored, if not required, review on the merits over waiver-based decisions where it is clear that the issue is a legal one of which the trial court was fully aware. That principle of merits-based decisions applied equally to plaintiffs and defendants, and to CR 50(a) motions seeking dismissal of claims, counterclaims, and affirmative

defenses. Because the Court of Appeals decision implicitly questions the legitimacy and continuing vitality of that principle, this Court should either re-confirm the principle or repudiate it.

1. The Court of Appeals' reliance on the City's failure to assign error to Instruction 12 was error.

The Court of Appeals affirmed in part because, although the City assigned error to the denial of its CR 50(a) motion,⁹ it did not assign error to or challenge the wording of Instruction 12, the trial court's "duty of ordinary care" instruction. *Washburn*, 169 Wn.2d at 604-05. In that respect, the Court of Appeals erred, because, as the Washington Appellate Practice Deskbook, advises trial practitioners:

While instructions to which no exception is taken become the law of the case, the doctrine does not bar review of the granting or denial of a directed verdict. Whether a verdict should have been directed is a question of law, and its resolution is not controlled by the pronouncements of the instructions, but by the applicable law. The standard to be applied is the same whether the issue is raised by way of a motion for a directed verdict or a motion for judgment notwithstanding the verdict. A timely motion for a directed verdict and its subsequent denial preserves the issue for review. The standard is the same for the trial court and the appellate court. The failure to object to instructions does

⁹ The City's first assignment of error and issue statement was: "The trial court erred by denying the City's motion for summary judgment and by denying the City's CR 50(a) motion for directed verdict at the close of plaintiffs' evidence. The first issue presented on appeal is whether the trial court erred by denying those motions and allowing plaintiffs' claims (based solely on a theory of negligence) to proceed to verdict, where all such claims are barred by the public duty doctrine, there being no evidence of a special relationship, no evidence of legislative intent, and no evidence to satisfy the elements of the failure to enforce exception." *Brief of Appellant at 3.*

not, therefore, preclude an appellate consideration of a trial court's denial of a motion for a directed verdict.

Deskbook, Vol. I, §17.7(2), pp. 17-50 to 17-51 (quoting *Rhoades*, 14 Wn. App. at 948 n.2). Prior to the Court of Appeals decision in this case, *Kim*, 133 Wn. App. at 349, a decision even more recent than *Rhoades*, confirmed that same principle.

2. The Court of Appeals' tightening of the requirements for compliance with CR 51(f) is unprecedented.

The Court of Appeals rejected the City's appeal for the additional and alternative reason that the exception the City took to Instruction No. 12 was not specific enough. *Washburn*, 169 Wn. App. at 603-04. CR 51(f) requires a party excepting to a trial court's jury instruction to "state distinctly the matter to which he objects and the grounds of his objection." But, before the Court of Appeals decision in this case, no Washington decision had held that an exception to an instruction "for the reasons set forth before" is *ipso facto* inadequate to satisfy CR 51(f)'s "state distinctly" requirement regardless of how clear it is from the record that the trial court understood what the "reasons set forth before" were. To the contrary, *Queen City Farms*, 126 Wn.2d at 63, and *Falk v. Keene Corp.*, 113 Wn.2d 645, 658, 782 P.2d 974 (1989), stand as prominent examples of decisions in which jury instruction challenges were addressed on the merits despite lack of specificity in the challenging party's exceptions

because – as was true here – it was clear from the record that the trial court understood the party’s legal position. Accordingly, when this case was tried in 2010, the Washington Appellate Practice Deskbook advised civil trial practitioners that:

A party may question the propriety of an instruction on appeal even in the absence of an objection to the instruction if the party’s objection to a pretrial ruling clearly informed the trial court of the party’s position and the instruction embodies the same matter as that which was decided in the pretrial ruling. *Queen City Farms*[, 126 Wn.2d at 64].

Deskbook, Vol. I, §17.7(2)(a)(i), p. 17-44.

The Deskbook represented a consensus understanding of what Washington appellate decisions actually required (and did not require) at the time this case was tried. The Deskbook had been comprehensively revised in 2005 with 26 experienced appellate practitioners – including three who now sit on this Court – contributing as authors. Ignoring *Queen City Farms* and presuming to distinguish *Falk*, see *Washburn*, 169 Wn. App. at 604, the Court of Appeals has drastically tightened the standard for compliance with CR 51(f) from that which was understood by the Deskbook’s authors.

3. The Court of Appeals' holding that failure to formally renew a denied CR 50(a) motion in a CR 50(b) motion waives appellate review of the legal issue on which the CR 50(a) motion was based is also unprecedented.

CR 50(b) provides that a party “may renew” after verdict a motion for judgment as a matter of law previously made and denied under CR 50(a). When this case was tried in 2010, there was no Washington appellate decision holding that a defendant whose CR 50(a) motion is denied *must* renew the motion under CR 50(b) or waive the right to challenge the denial of the CR 50(a) motion on appeal. The Court of Appeals reasoned that denial of what used to be called a motion for directed verdict can be challenged on appeal only if the same motion was renewed post-verdict based on U.S. Supreme Court decisions in 2006 and 2011 that so hold under Fed. R. Civ. P. 50,¹⁰ and because the 2011 (not 2010) pocket part to the Tegland treatise expressed the view that the same rule would apply in Washington. *Washburn*, 169 Wn. App. at 612-14 (citing 4 Karl B. Tegland, *Washington Practice: Rules Practice CR 50* author’s cmt. 16, at 36 (5th ed. Supp. 2011)).

¹⁰ *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 126 S. Ct. 980, 163 L. Ed. 2d 974 (2006), and *Ortiz v. Jordan*, ___ U.S. ___, 131 S. Ct. 884, 892, 178 L. Ed. 2d 703 (2011).

4. The Court of Appeals' strict application of CR 51(f) and retroactive adoption and application of federal Rule 50 law unjustly deprived the City of review on the merits.

The Court of Appeals did the City an injustice by deciding the City's appeal based on procedural waiver grounds and avoiding the merits. Avoidance of the merits is inconsistent with this Court's stated preference for deciding appeals on their merits. *Haywood v. Aranda*, 143 Wn.2d 231, 238, 19 P.3d 406 (2001) ("procedural rules should be interpreted to eliminate procedural traps and to allow cases to be decided on their merits"). As the Court took pains to explain in 1999, procedural traps were something the Civil Rules were meant to *eliminate*, not set:

When this court made major revisions to the rules of civil procedure in 1967, it had as a goal the elimination of "many procedural traps now existing in Washington practice" and minimization of "technical miscarriages of justice inherent in archaic procedural concepts once characterized by Vanderbilt as 'the sporting theory of justice.'" *Curtis Lumber Co. v. Sortor*, 83 Wn.2d 764, 766, 767, 522 P.2d 822 (1974) (quoting in part Foreword to Civil Rules for Superior Court, 71 Wn.2d xxiii, xxiv (1967)). In keeping with this mandate, Washington's appellate courts have strived to elevate substance over form, and decide cases on their merits. *See Vaughn v. Chung*, 119 Wn.2d 273, 280, 830 P.2d 668 (1992) (holding "that the civil rules contain a preference for deciding cases on their merits rather than on procedural technicalities"); *Weeks v. Chief of State Patrol*, 96 Wn.2d 893, 895, 639 P.2d 732 (1982) (stating the "present rules were designed to allow some flexibility in order to avoid harsh results"); *First Fed. Sav. & Loan Ass'n v. Ekanger*, 93 Wn.2d 777, 781, 613 P.2d 129 (1980) (holding that "whenever possible, the rules of civil procedure should be applied in such a way

that substance will prevail over form”). Furthermore, in *In re Saltis*, 94 Wn.2d 889, 896, 621 P.2d 716 (1980), we held that substantial compliance with procedural rules is sufficient because “delay and even the loss of lawsuits [should not be] occasioned by unnecessarily complex and vagrant procedural technicalities.” (alteration in original) (quoting *Curtis Lumber*, 83 Wn.2d at 767).

In re Detention of Turay, 139 Wn.2d 379, 390-91, 986 P.2d 790 (1999).

When it is clear from the record that the trial court fully understood a litigant’s legal position, it serves no just purpose to require formal renewal of a CR 50(a) motion through a CR 50(b) motion. Courts do not require litigants to engage in “useless acts.” *Stafne v. Snohomish County*, 174 Wn.2d 24, 34, 271 P.3d 868 (2012). As the Court put it in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 498-99, 933 P.2d 1036 (1997):

Where, as here, the issue was clearly before the trial court, and its prior rulings demonstrated that a motion to modify the order would not have been granted, a party cannot be reasonably held to have waived the right to assert the error on appeal merely by declining to engage in the useless act of repeating their arguments in a motion to amend the trial court’s order. [Citation omitted.]

To be sure, litigators must be mindful of procedural pitfalls that can cost an appellant the right to review on the merits. But, as of the time this case was tried, it had not been clearly stated that renewal of a CR 50(a) motion through a CR 50(b) motion was required in order to preserve a claim of error in the denial of a CR 50(a) motion for judgment as a matter of law, much less when the court indisputably understood exactly

why it had been asked to dismiss the case without submitting it to a jury.

It is one thing to say a litigator failed to follow a clearly stated rule, but quite another to avoid the merits of an appeal based upon a procedural rule found neither in the rule itself nor in an applicable court decision at the time. If this Court determines, as the Court of Appeals did, that appellate challenge to the denial of CR 50(a) motion should now be considered waived by failure to renew the motion post-verdict under CR 50(b), then at most this Court should say so prospectively by decision, or by a clearly worded amendment to CR 50.

A defendant that owed no legal duty and repeatedly so argued in the trial court ought not to find itself held liable based on newly tightened or newly adopted procedural waiver rules. The public duty doctrine is not a tool for holding public employees and the agencies that employ them liable in tort. A former justice of this Court once characterized its purpose as “to avoid making municipalities insurers for every harm that might befall members of the public interacting with [them].” *Beal v. City of Seattle*, 134 Wn.2d 769, 793, 954 P.2d 237 (1998) (dissenting opinion by Justice Talmadge). Tort liability has never been imposed under Washington law because of a police officer’s “failure to protect” an individual from criminal violence under circumstances like those presented here. Police officers, broadly speaking, do have duties to protect but, “absent a clear

legislative intent or clearly enunciated policy to the contrary, these duties are owed to the public at large and are unenforceable [by] individual members of the public.” *Chambers-Castanes v. King County*, 100 Wn.2d 275, 284, 669 P.2d 451 (1983).¹¹

Officer Hensing was dispatched on May 3, 2008 to do nothing more than serve an anti-harassment order on Kim where Roznowski’s petition stated Kim lived. He was not sent to Roznowski’s house to rescue or guard her, or to interrogate or arrest Kim.¹² Yet the trial court allowed a jury to find, in effect, that a plaintiff who obtains *ex parte* an anti-harassment order that identifies as the place to effect service on the respondent the same place where the order prohibits the respondent from being or going, effectively issues what amounts to an arrest warrant. Allowing this case to remain decided on procedural waiver grounds leaves unanswered the important question of police officer duty that the City

¹¹ See also, e.g., *Harvey v. Snohomish County*, 157 Wn.2d 33, 41, 134 P.3d 216 (2006) (for a duty to be created based on a 911 call for police assistance, assurances must have been made to the detriment of the caller); *Johnson v. State*, 164 Wn. App. 740, 265 P.3d 199 (2011), *rev. denied*, 173 Wn.2d 1027 (2012) (affirming dismissal of wrongful death claim based on failure of State Patrol to act protectively after receiving report of vehicle associated with a missing person, who was later found dead, driving erratically, because no exception to the public duty doctrine applied).

¹² Officer Hensing theoretically could, after serving Kim, have told Kim he had to leave the house and could have stood by until Kim had left, but it is undisputed that Kim *did* leave the house, and it is undisputed that, when Kim returned Roznowski did not flee or call 911 because she was planning to go with him to have title to a minivan transferred. Holding Officer Hensing causally responsible for Roznowski’s murder does not comport with common sense any more than it made sense in *Robb* to hold the police officers responsible for a murder committed using shotgun shells that they saw during an earlier encounter with the murderer and that they could have picked up but did not pick up.

raised repeatedly. Although the Court of Appeals decision seeks to disclaim the intention to set a precedent,¹³ it will do so as a practical matter unless this Court overrules the Court of Appeals. Police departments and officers, municipal liability insurers, and those who advise persons choosing between RCW ch. 10.14 orders and RCW ch. 26.50 orders need and deserve to have the legal duty question answered.

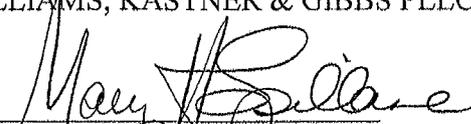
IV. CONCLUSION

For the reasons explained above, the courts below wrongly decided or ignored the central issue of legal duty and should be reversed. The City of Federal Way and Officer Hensing did not owe a duty of protection to Roznowski, personally, in serving her anti-harassment order on Kim. The case should be remanded to the trial court for dismissal of the complaint with prejudice and entry of judgment in the City's favor.

RESPECTFULLY SUBMITTED this 8th day of March, 2013.

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By


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¹³ *Washburn*, 169 Wn.2d at 606 (“Whether instruction 12 is a legally correct statement of the duty owed by a City police department... that can or should be given in future cases, is a question that we do not decide in this case”).

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 8th day of March, 2013, I caused a true and correct copy of the foregoing document, "Petitioner's Supplemental Brief," to be delivered in the manner indicated below to the following counsel of record:

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DATED this 8th day of March, 2013, at Seattle, Washington.



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Dear Clerk of Court.

Attached for filing in .pdf format is Petitioner's Supplemental Brief in *Washburn v. City of Federal Way*, Supreme Court Cause No. 87906-1. The attorneys filing this Supplemental Brief are Mary Spillane, WSBA No. 11981, (206) 628-6656, e-mail: mspillane@williamskastner.com and Dan Ferm, WSBA No. 11466, (206) 233-2908, e-mail: dferm@williamskastner.com.

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