

W

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2012 SEP 25 PM 2:53

DYER, J. R. CANTRELL

NO. 87906-1

SUPREME COURT OF THE STATE OF WASHINGTON
[Court of Appeals No. 66534-1-I]

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.

PETITION FOR REVIEW

Mary H. Spillane, WSBA #11981
Daniel W. Ferm, WSBA #11466
WILLIAMS, KASTNER & GIBBS PLLC
Two Union Square
601 Union Street, Suite 4100
Seattle, WA 98101
(206) 628-6600

Attorneys for Petitioner

2012 AUG 22 PM 1:08

COURT OF APPEALS
STATE OF WASHINGTON

TABLE OF CONTENTS

I. IDENTITY OF PETITIONER1

II. COURT OF APPEALS DECISION1

III. ISSUES PRESENTED FOR REVIEW1

IV. STATEMENT OF THE CASE2

 A. Introduction2

 B. Underlying Facts3

 C. This Litigation6

 D. Court of Appeals Decision9

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.....10

 A. Summary10

 B. The Holding that Instruction No. 12 Is the Law of this
 Case Conflicts with Two Prior Decisions of the Court of
 Appeals.....12

 C. The “Law of the Case” Holding Is Inconsistent with
 Decisions of the Supreme Court.....13

 D. Civil Rule 50 Analysis Was Uncalled for Because the
 City’s Appeal Did Not Challenge the Sufficiency of the
 Evidence15

 E. Because the Court of Appeals’ “Mandatory Renewal”
 Interpretation of CR 50(b) Will Have Such Far-Reaching
 Effects on Washington Litigation, the Supreme Court
 Should Review the Decision Under RAP 13.4(b)(4)16

 F. The City of Federal Way’s Appeal Raised a Legal Duty
 Issue that the Supreme Court Should Decide on the
 Merits18

VI. CONCLUSION.....20

TABLE OF AUTHORITIES

	Page(s)
STATE CASES	
<i>Bailey v. Forks</i> , 108 Wn.2d 262, 737 P.2d 1257 (1987).....	19
<i>Beal v. City of Seattle</i> , 134 Wn.2d 769, 954 P.2d 237 (1998).....	19
<i>Chambers-Castanes v. King County</i> , 100 Wn.2d 275, 669 P.2d 451 (1983).....	19
<i>Cummins v. Lewis County</i> , 156 Wn.2d 844, 133 P.3d 459 (2006).....	19
<i>Falk v. Keene Corp.</i> , 113 Wn.2d 645, 782 P.2d 974 (1989).....	1, 14, 15
<i>Hadley v. Maxwell</i> , 144 Wn.2d 306, 27 P.3d 600 (2001).....	8
<i>Harvey v. Snohomish County</i> , 157 Wn.2d 33, 134 P.3.....	19
<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).....	1, 12-13
<i>Queen City Farms v. Central Nat'l Ins. Co. of Omaha</i> , 126 Wn.2d 50, 882 P.2d 703 (1994).....	1, 13, 14, 15, 17
<i>Rhoades v. DeRosier</i> , 14 Wn. App. 946, 546 P.2d 930 (1976).....	1, 12, 13
<i>Schmidt v. Cornerstone Invs., Inc.</i> , 115 Wn.2d 148, 795 P.2d 1143 (1990).....	13, 15

<i>Washburn v. City of Federal Way</i> , 167 Wn. App. 402, 273 P.3d 462 (Mar. 26, 2012), <i>opinion</i> <i>withdrawn by and reconsideration denied</i> , 2012 Wn. App. LEXIS 1820 (Wash. Ct. App. July 23, 2012)	1
---	---

FEDERAL CASES

<i>Coca Cola Bottling Co. of Black Hills v. Hubbard</i> , 203 F.2d 859 (8 th Cir. 1953)	13
<i>Hanson v. Ford Motor Co.</i> , 278 F.2d 586 (8 th Cir. 1960)	13
<i>Unitherm Food Sys.; Inc. v. Swift-Eckrich, Inc.</i> , 546 U.S. 394 (2006).....	17

FEDERAL STATUTES

42 U.S.C. § 1983.....	6
-----------------------	---

STATE STATUTES

RCW 10.14.080(6).....	4
RCW 10.99.055	7
RCW ch. 10.14.....	2, 3, 11, 20
RCW ch. 10.99.....	6
RCW ch. 26.50.....	4, 6, 11, 20

RULES

CR 12(b)(6).....	16
------------------	----

CR 12(h)(2).....	16
CR 50.....	1, 10, 15, 16, 17, 18
CR 50(a).....	2, 15, 16, 17
CR 50(b).....	2, 8, 11, 15, 16, 17
CR 51(f).....	1, 13, 14
FRCP 50.....	17
RAP 2.3(c).....	7
RAP 10.8.....	9
RAP 13.4(b)(1).....	10, 15, 20
RAP 13.4(b)(2).....	10, 13, 20
RAP 13.4(b)(4).....	11, 12, 17, 20
RAP 13.7(b).....	18

OTHER AUTHORITIES

WASHINGTON APPELLATE PRACTICE DESKBOOK, vol. I, § 17.7(2)(a)(i) (Wash. State Bar Assoc. 3rd ed. 2005 & Supp. 2011).....	17
WPI 10.02.....	8

I. IDENTITY OF PETITIONER

Petitioner City of Federal Way asks this Court to accept review of the Court of Appeals decision designated in Part II.

II. COURT OF APPEALS DECISION

Washburn v. City of Federal Way, 167 Wn. App. 402, 273 P.3d 462 (Mar. 26, 2012), *opinion withdrawn by and reconsideration denied*, 2012 Wn. App. LEXIS 1820 (Wash. Ct. App. July 23, 2012), *substituted opinion*, 2012 Wn. App. LEXIS 1736 (July 23, 2012). *See Apps. A & D.*

III. ISSUES PRESENTED FOR REVIEW

1. Was the trial court sufficiently apprised, in time to correct any legal error, of what the City contended was error in giving any “duty of care” jury instruction, such that the purpose of CR 51(f) was satisfied and Instruction No. 12 did not become “the law of” this case?

2. Is the Court of Appeals’ holding that Instruction No. 12 is “the law of” this case in conflict or inconsistent with *Queen City Farms v. Central Nat’l Ins. Co. of Omaha*, 126 Wn.2d 50, 63, 882 P.2d 703 (1994), *Falk v. Keene Corp.*, 113 Wn.2d 645, 657-58, 782 P.2d 974 (1989), *Kim v. Dean*, 133 Wn. App. 338, 349, 135 P.3d 978 (2006), and/or *Rhoades v. DeRosier*, 14 Wn. App. 946, 948 n.2, 546 P.2d 930 (1976)?

3. Did the Court of Appeals err by engaging in CR 50 analysis when the City’s appeal was not a sufficiency-of-the-evidence appeal?

4. Does the Court of Appeals' holding that a CR 50(b) motion must be made in order to preserve the denial of a CR 50(a) motion present an issue of substantial public importance that this Court should decide?

5. Should this Court accept review to address and decide what duty, if any, a police officer serving a RCW ch. 10.14 anti-harassment protection order owes to the person who obtained the order?

IV. STATEMENT OF THE CASE

A. Introduction.

Baerbel Roznowski obtained on May 1, 2008, an anti-harassment protection order that City of Federal Way Police Officer Andrew Hensing was tasked on May 3, 2008, with serving on Paul "Chan" Kim. At about 8:10 a.m., Officer Hensing served the order on Kim at Roznowski's house, where she lived with Kim. Officer Hensing then left. Kim left the house, too, at about 10 a.m., but returned at about 10:30 a.m. About an hour later, Kim killed Roznowski. Kim's adult daughters sued the City of Federal Way, alleging negligence by Officer Hensing for not protecting Roznowski while he was at her house to serve the order on Kim.

The City moved for dismissal on the ground that Officer Hensing owed no duty to Roznowski personally because no exception to the public duty doctrine applies. The trial court denied that motion and a motion for reconsideration. At trial the court instructed the jury that the City police

department owed Roznowski a duty of ordinary care. The jury found the City liable and awarded Roznowski's estate \$1.1 million. Without addressing the issue of whether a duty had been owed, the Court of Appeals affirmed and held that the City did not effectively preserve its "no legal duty" argument for review.

B. Underlying Facts.

On May 1, 2008, Baerbel Roznowski, age 66, obtained, *ex parte*, a temporary RCW ch. 10.14 Order for Protection Against Unlawful Harassment from King County Superior Court. The order prohibited her live-in intimate partner Paul Kim, age 68, from attempting to contact her or being within 500 feet of the house she owned where they lived. CP 883-84; Ex. 121. To obtain the order, Roznowski swore that Kim had made "verbal attacks" on April 29 and 30 after she moved a pile of wood to clean up the yard so she could put the house up for sale. CP 887; Ex. 122.¹

On May 1, Roznowski met with Lorinda Tsai, a King County (not City of Federal Way) Domestic Violence Victim Advocate, CP 1219-20, who explained to her 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.

¹ 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.

the residence immediately, but that an anti-harassment protection order is typically obtained in situations involving a general pattern of harassment and would not require the subject to vacate immediately. CP 1220.

Roznowski told Tsai that Kim was a hoarder and was refusing to move his belongings so she could put her house on the market to sell it and move to California to be nearer her daughters. CP 1221. In response to Tsai's specific inquiries, Roznowski stated that there had been no history, or verbal threat, of physical violence. CP 1221; 12/15 RP 9-10, 12 (Tsai). Roznowski chose to seek an anti-harassment protection order rather than a domestic violence protection order, and filled out and presented the paperwork to the court commissioner herself. Ex. 122; 12/15 RP 11-13 (Tsai). The order was issued that day. Ex. 121.²

Officer Hensing served Roznowski's anti-harassment order on Kim at Roznowski's house at about 8:08 a.m. on May 3. CP 891; Ex. 123; 12/9 RP 20 (Hensing). Hensing perceived another person in the house, but did not see, hear, or have contact with that person.³ 12/9 RP 39-40 (Hensing). Hensing left the house at about 8:13 a.m. *Id.* at 68; Ex. 123.

At 9:07 a.m., Roznowski, the person in the house with Kim, e-

² Unlike RCW ch. 26.50 domestic violence protection orders, the order Roznowski obtained did not include, and RCW 10.14.080(6) did not give the court the option of including, a provision requiring the respondent (Kim) to leave the premises immediately.

³ There is no evidence that Officer Hensing had had prior contact with Roznowski.

mailed her daughter Carola Washburn and reported that Kim had been served and that she had given him until 11 a.m. to move out his stuff. Roznowski told Washburn she was calm. CP 110; Ex. 116. Washburn has not claimed that Roznowski expressed surprise or concern that police were not standing by while Kim prepared to leave.⁴ Kim called a friend, who drove to the house, chatted with Roznowski, and then left with Kim at about 10:00 a.m. CP 69. They drove in separate vehicles to a bank 1.2 miles away. CP 69, 75, 114. Kim withdrew money, spoke with the friend about being evicted, and drove back to Roznowski's house. CP 70. Roznowski called her daughter Janet Loh at 10:12 a.m., while Kim was gone. During the call, which lasted for 14 minutes, CP 118; Ex. 36, Kim returned to the house, which Roznowski told Loh she had expected. 12/15 RP 21 (Loh). Roznowski did not call 911.

Roznowski then received a call from a friend, Inge Grayson. 12/8 RP 51 (Grayson); CP 133 (26). Roznowski told Grayson she was planning to accompany Kim to transfer title to a minivan. CP 134 (29-30); 12/8 RP 61 (Grayson). Sometime before noon Kim stabbed Roznowski with a kitchen knife, inflicting mortal wounds. CP 372.

⁴ There is no evidence that any police officer ever expressly 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).

C. This Litigation.

Loh and Washburn filed a wrongful death complaint against the City of Federal Way. CP 798-809. Plaintiffs alleged that Officer Hensing negligently failed to ensure that Kim left the house as required by the anti-harassment order. CP 804.⁵ Plaintiffs alleged that the officer breached duties under RCW ch. 10.99 and RCW ch. 26.50 to protect Roznowski and enforce the order by removing Kim from the house. CP 806-07.

In motions for dismissal before trial, CP 817-40; 1739-50, and during trial, CP 2049-59, the City argued that the only legal duty Officer Hensing owed on May 3, 2008 was to serve the anti-harassment order on Kim and complete a return of service form, that no recognized exception to the public duty doctrine applied to create a 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 Re: Public Duty Doctrine).⁶ The court also denied the City’s lack-of-causation summary

⁵ Plaintiffs also alleged that Deputy Chief Andy Hwang had negligently failed to call 911 or send a patrol car to the house after receiving a call on his personal phone from the friend of Kim’s who had spoken with Kim at the bank and was concerned about Kim’s state of mind. CP 805. Any claim based on acts or omissions of Deputy Chief Hwang was summarily dismissed before trial. CP 572. Plaintiffs did not cross-appeal from that dismissal. Plaintiffs asserted no claim under 42 U.S.C. § 1983.

⁶ The City also filed a motion for discretionary review before trial, CP 27-28, which was

judgment motion.⁷ CP 44-67; 571-73. The case proceeded to trial.

After presentation of all the evidence at trial, the trial court heard argument on jury instructions. In urging the court to give a “duty of ordinary care” instruction, plaintiffs’ counsel stated to the trial court:

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 Officer Hensing was required by statute – plaintiffs’ counsel cited RCW 10.99.055 – 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 119-21 (Argument/Ruling).⁸

denied, CP 585-95. Denial of such a motion “does not affect the right of a party to obtain later review of the trial court decision . . .” RAP 2.3(c).

⁷ That motion pointed out that all Officer Hensing could lawfully have done by way of protecting Roznowski after serving the anti-harassment order was to get Kim to leave the house, which Kim did on his own at about 10:00 a.m. CP 56.

⁸ The Commissioner, in denying the City’s Motion for Discretionary Review, *see* note 6, *supra*, 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 “legislative intent” exception might apply or 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

When it came time to take formal exception to the jury instructions the trial court was going to give, the City excepted to Instruction No. 12 “for the reasons set forth before.”⁹ In Instruction No. 12, the jury was told that “[a] city police department has a duty to exercise ordinary care in the service and enforcement of court orders.”¹⁰ CP 2179. The jury found the City liable and awarded \$1.1 million to Roznowski’s estate but zero dollars to Roznowski’s daughters. CP 2093-94. The City did not make a post-verdict CR 50(b) motion. The court granted plaintiffs’ motion for a new trial on damages for Washburn and Loh. CP 2146-50.

On appeal, the City renewed the public duty doctrine argument it made several times pre-verdict.¹¹ It argued, essentially, that the trial had been useless because Officer Hensing owed no legal duty to Roznowski.

that they had offered no evidence of such an assurance, 12/15 RP 16-17, 20 (Argument/Ruling), and continued to rely on the “failure to enforce” exception.

⁹ The City proposed instructions and a special verdict form framed in terms of exceptions to the public duty doctrine, CP 2066-70, and excepted to the court’s failure to give them. RP 12/20 (Argument/Exceptions) at 79-80.

¹⁰ Instruction No. 6 told the jury, per WPI 10.02, that “[o]rdinary care means the care a reasonably careful person would exercise under the same or similar circumstances.” CP 2173.

¹¹ The City’s opening brief did not formally assign error specifically to Instruction No. 12. However, the City’s Assignment of Error No. 1 clearly identified its objection to the trial court’s decision, notwithstanding the City’s summary judgment and “directed verdict” motions, 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. . . .” See *Hadley v. Maxwell*, 144 Wn.2d 306, 311 n.1, 27 P.3d 600 (2001) (failure to comply with the assignment-of-error requirement does not preclude appellate review where the issue is fully argued in briefing).

D. Court of Appeals Decision.

The Court of Appeals filed its original opinion on March 26, 2012, holding that the City did not effectively preserve for review its public duty doctrine argument (1) because the trial evidence was sufficient to support the jury's finding of liability under Instruction No. 12, which is "the law of" this case because the City's formal exception to it was not specific enough, and/or (2) because the City did not renew, post-verdict, its pre-verdict CR 50(a) motion based on the public duty doctrine.¹² The City moved for reconsideration, *App. B*, and submitted additional authorities pursuant to RAP 10.8, *App. C*. On July 23, 2012, the Court of Appeals withdrew its earlier opinion, filed a substituted opinion and denied the City's motion for reconsideration. *App. D*. The substituted opinion mostly reiterated the original decision, adding assertions that the City's only exception to Instruction No. 12 was to the instruction's "wording" and a caveat that the Court was not deciding whether Instruction No. 12 is a correct statement of the law that should be given in future cases, and addressing points made in the City's motion for reconsideration. The opinion does not acknowledge any of the City's additional authorities.

¹² The Court of Appeals also affirmed the grant of a new trial to Washburn and Loh on their personal damages claims.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Summary.

The City's appeal presented an important but simple question of law that the City had raised repeatedly in the trial court: did an exception to the public duty doctrine apply, such that Officer Hensing owed a legal duty to Roznowski when he served Mr. Kim with Ms. Roznowski's anti-harassment protection order at about 8:10 a.m. on May 3, 2008?

The record before the Court of Appeals demonstrated beyond question that the trial court, although keenly aware of the City's "no legal duty" position and objection, submitted the case to the jury under a "due care" instruction. Rather than answer the question the City's appeal presented, the Court of Appeals disposed of the case on preservation-of-error grounds. That was error. The error-preservation rules on which the decision is based do not apply when the issue of whether any legal duty existed has been litigated as exhaustively before trial as it was in this case. The Court of Appeals' holding that the City excepted only to the "wording" of the "due care" instruction is inconsistent with the record. The "law of the case" holding on which that characterization of the City's exception depends is error and conflicts with decisions of this Court and the Court of Appeals, warranting review under RAP 13.4(b)(1) and (2).

The Court of Appeals should not have engaged in a CR 50 analysis

because the City's appeal was not a sufficiency-of-the-evidence appeal. It was a "no duty" appeal, as the City had made clear in pretrial motions to dismiss and in its motion to dismiss after plaintiffs rested at trial. In any event, the Court of Appeals' mandatory-renewal interpretation of CR 50(b) is new to our state's jurisprudence. Because the interpretation will affect countless civil trials, its adoption presents an issue of substantial public importance that this Court should decide. RAP 13.4(b)(4).

The legal issue of whether a police officer serving an RCW ch. 10.14 anti-harassment order owes a duty of care to the person who obtained the order is at least as important as, but is independent of, the issue of whether the Court of Appeals correctly interpreted CR 50(b). The "police duty" issue requires careful consideration of the policy expressed in the public duty doctrine and of significant differences between statutes that pertain specifically to orders issued under RCW ch. 10.14 and RCW ch. 26.50 and that defendant briefed repeatedly to the trial court¹³ and the Court of Appeals. In avoiding the "police duty" issue while affirming – in a published decision – a judgment based on a jury finding of a police officer's ordinary negligence, the Court of Appeals' decision will spawn more "failure to protect" tort claims – essentially, police malpractice claims – against police officers. The issue of whether police officers have

¹³ CP 65, 580, 609-10, 830-35, 1619-23, 1740-46, 1772-75, 1798-99, and CP 2050-57.

such a duty at all is manifestly of such substantial public interest that this Court should grant review under RAP 13.4(b)(4) to decide it.

B. The Holding that Instruction No. 12 Is the Law of this Case Conflicts with Two Prior Decisions of the Court of Appeals.

The Court of Appeals held that the City's exception to the giving of Instruction No. 12 had not been specific enough, making that instruction "the law of" this case and limiting the issue for appeal to whether the evidence presented at trial was sufficient to support the verdict for the plaintiff under Instruction No. 12. That holding misapplied the "law of the case" doctrine as it applies to jury instructions. According to *Rhoades v. DeRosier*, 14 Wn. App. 946, 948 n.2, 546 P.2d 930 (1976), "[w]hile 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 [motion for] directed verdict," and "[w]hether a verdict should have been directed is a question of law, and its resolution is not controlled by the pronouncements of the [trial court's jury] instructions, but by the *applicable* law." *Id.* (italics by the court). In *Kim v. Dean*, 133 Wn. App. 338, 135 P.3d 978 (2006), the court, quoting *Rhoades* and two federal decisions, held that "in determining whether a trial court has erred in denying a motion for directed verdict made at the close of the evidence, it is the applicable law which is controlling, and not what the trial court announced the law to be

in [its] instructions.” *Kim*, 133 Wn. App. at 349 (quoting *Hanson v. Ford Motor Co.*, 278 F.2d 586, 593 (8th Cir. 1960) (quoting *Coca Cola Bottling Co. of Black Hills v. Hubbard*, 203 F.2d 859, 862 (8th Cir. 1953)).¹⁴

The Court of Appeals failed to heed that principle here. The City’s “no legal duty” argument presented a question of law that the City had raised repeatedly, in at least 47 pages of briefing, before the court settled on jury instructions. By holding that Instruction No. 12 controlled instead of the applicable law, the Court of Appeals issued a decision that conflicts with *Rhoades* and *Kim*, warranting review under RAP 13.4(b)(2).

C. The “Law of the Case” Holding Is Inconsistent with Decisions of the Supreme Court.

The Court of Appeals also erred in holding that Instruction No. 12 became “the law of” this case because the City did not except to it specifically enough. The purpose of CR 51(f)’s specificity requirement is not to set traps for trial counsel. Rather, it is to ensure that trial courts are apprised of what the excepting party contends is legal error to afford them an opportunity to correct any such error. *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 163, 795 P.2d 1143 (1990); *Queen City Farms v. Central Nat’l Ins. Co. of Omaha*, 126 Wn.2d 50, 63, 882 P.2d 703 (1994).

¹⁴ *Rhoades* and *Kim* were cited to the Court of Appeals on May 14, 2012, *App. C*, but neither was acknowledged in the court’s July 23, 2012 opinion.

In *Queen City Farms*, a plaintiff insured's basis for excepting to the framing of a legal issue on a special verdict form renewed an argument the plaintiff had made in a motion for summary judgment. The trial court understood the plaintiff's position but was unwilling to reconsider matters decided on summary judgment during discussion of jury instructions. The Supreme Court held in *Queen City Farms* that, under such circumstances, the purposes of CR 51(f) are satisfied and the plaintiff's legal-standard argument had not been waived for appeal even though the plaintiff's counsel had not objected at trial to the special verdict form. The Supreme Court went on to address the legal-standard issue on its merits and held in the insured's favor.¹⁵

Similarly, in *Falk v. Keene Corp.*, 113 Wn.2d 645, 657-58, 782 P.2d 974 (1989), the court held that it was reversible error for a trial court to give a standard-of-liability instruction to which the plaintiff had not excepted, holding that the court was sufficiently apprised of plaintiff's position as to the applicable law by the plaintiff's tender of a different instruction. Thus, preservation of error concerning the liability standard a trial court applies does not always depend on the formal exceptions taken; the proper inquiry is whether the trial court was apprised by the exceptions

¹⁵ *Queen City Farms* was cited to the Court of Appeals on May 14, 2012, *App. C*, but was not acknowledged in the court's July 23, 2012 opinion.

or by prior motion(s) of the appellant's contention that the wrong liability standard was being applied.

Here, the City excepted to the court's "ordinary care" instruction but the trial court adhered to its pretrial ruling mindful of the City's pretrial legal argument that a "due care" instruction would be error, and of the specificity with which the City raised the issue again in its written CR 50(a) motion, CP 2049-59. The Court of Appeals should have addressed the appeal on its merits, as this Court addressed the appeal in *Queen City Farms*. The Court of Appeals' decision conflicts with *Queen City Farms*, *Falk*, and *Schmidt*. Review thus is warranted under RAP 13.4(b)(1).

D. Civil Rule 50 Analysis Was Uncalled for Because the City's Appeal Did Not Challenge the Sufficiency of the Evidence.

The City accepts that, if Instruction No. 12 correctly stated the law or became "the law of" this case, plaintiffs presented evidence sufficient to support the jury's finding of liability under Instruction No. 12. For reasons explained above, Instruction No. 12 stated the law *incorrectly* and did *not* become the law of this case. The Court of Appeals' alternative reason for affirming – that the City, to preserve its CR 50(a) motion argument, was required, but failed, to make a CR 50(b) motion post-verdict – is error as well. CR 50 implicates the sufficiency of the evidence (assuming correct instructions on the law), but this was not a sufficiency-

of-the-evidence appeal; it was a “no duty in the first place” appeal.

Thus, it does not matter whether the City made either a CR 50(a) motion or a CR 50(b) motion or both. What matters is that the City apprised the trial court with sufficient clarity of the City’s “no legal duty” position before the jury was instructed. It made its “no legal duty” position clear through no fewer than three pre-verdict motions. The City’s CR 50(a) motion, CP 2049-59, challenged the sufficiency of plaintiffs’ evidence not under Instruction No. 12 but under what the City has maintained throughout this litigation is the applicable law.¹⁶ The City characterized the motion as a CR 50(a) motion, but it amounted to a CR 12(b)(6) motion (which was timely under CR 12(h)(2)).

E. Because the Court of Appeals’ “Mandatory Renewal” Interpretation of CR 50(b) Will Have Such Far-Reaching Effects on Washington Litigation, the Supreme Court Should Review the Decision Under RAP 13.4(b)(4).

The Court of Appeals’ decision implicitly recognizes that Washington decisions, as of December 2010 had never required post-verdict CR 50(b) motions in order to preserve objections to the sufficiency of the evidence made in pre-verdict CR 50(a) motions. Even after amendments in 2005, CR 50 makes post-verdict motions permissive (“[t]he

¹⁶ The Court of Appeals’ decision fallaciously justifies pretrial rulings denying the City’s motion to dismiss based on the public duty doctrine on a need to determine facts in order to establish the applicable legal duty. As the trial court and plaintiffs’ counsel acknowledged at trial, the evidence bearing on the issue of legal duty remained unchanged since the summary judgment stage of the case. 12/15 RP 14, 20 (Argument/Ruling).

movant *may* renew . . .”), not mandatory.¹⁷ Nothing in the commentary to the 2005 amendments states or implies that CR 50 was amended to put Washington lawyers on notice that failure to bring a CR 50(b) motion waives any appeal of the denial of a CR 50(a) motion.¹⁸ Whether Washington *should* follow federal practice in every civil case and require both types of CR 50 motions in order to preserve sufficiency-of-the-evidence arguments for appeal is an issue of substantial public importance that the Supreme Court should decide with the benefit of full briefing by the parties and *amici curiae* for all points of view. RAP 13.4(b)(4). If the Supreme Court decides that a “renew or waive” policy is appropriate for

¹⁷ Even if a CR 50(b) motion may not be made unless a CR 50(a) motion was made, it does not follow that the converse is true. For example, when no new evidence germane to a legal issue being raised on appeal was admitted following a pre-verdict motion under CR 50(a), a post-verdict motion to test the sufficiency of the same evidence serves no obviously useful purpose.

¹⁸ The Court of Appeals held that the City’s counsel had been put on notice of such an interpretation before December 2010, because of close similarities between CR 50 (as amended in 2005) and FRCP 50. The Court of Appeals also inexplicably relied on the plurality decision in *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006), and an author’s comment at page 36 in the supplement to volume 4 of *Washington Practice*. *Unitherm*, however, had not been decided when CR 50 was amended, and thus could not have prompted the amendment. And, Washington courts do not slavishly follow practice under the federal rules of civil procedure. *Washington Practice* is widely cited and respected, of course, but it is not *so* authoritative that a litigant at a 2010 trial could have been expected to anticipate author comments that did not exist until that treatise’s 2011 supplement was published. Another respectable secondary authority, the WASHINGTON APPELLATE PRACTICE DESKBOOK, Vol. I, § 17.7(2)(a)(i), p. 17-44 (Wash. State Bar Assoc. 3rd ed. 2005 & Supp. 2011), provided in 2010-11 (and still provides):

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. [Citing *Queen City Farms*, 126 Wn.2d at 64].

This statement from the DESKBOOK was cited to the Court of Appeals on May 14, 2012, *App. C*, but was not acknowledged in the court’s July 23, 2012 opinion.

CR 50 motions, it should decide whether the fair way to adopt it is through amendment of the rule or a decision with prospective-only effect.

F. The City of Federal Way's Appeal Raised a Legal Duty Issue that the Supreme Court Should Decide on the Merits.

RAP 13.7(b) allows the Supreme Court to decide issues that the Court of Appeals did not. In this case, the Court of Appeals did not decide whether the City of Federal Way, through Officer Hensing, owed a legal duty of care to Roznowski, personally, on the morning of May 3, 2008. That issue is an important one. The City's position was hardly frivolous. Unless an exception to the public duty doctrine applied, Officer Hensley owed no duty to Roznowski, and the plaintiffs had no tort cause of action.

[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). In this case, the trial court decided that the anti-harassment order triggered a duty to enforce within the meaning of the Exception 2. 12/15 RP 20-21 (Argument/Ruling); 12/20 RP (Argument/Exceptions) 26-28, 41-43. The City contends that none of the exceptions applies for reasons it explained painstakingly below. The trial court was unwilling to apply the law; the Court of Appeals avoided the issue.

The public duty doctrine serves “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) (Talmadge, J., dissenting). No decision holds that tort liability attaches because of a police officer’s “failure to protect” an individual under circumstances similar to those presented here.¹⁹ Officer Hensley

¹⁹ Compare, e.g., *Chambers-Castanes v. King County*, 100 Wn.2d 275, 284, 669 P.2d 451 (1983) (while in a broad sense it may be true that police officers and municipalities have duties to provide police protection, “we have consistently held that absent a clear legislative intent or clearly enunciated policy to the contrary, these duties are owed to the public at large and are unenforceable as to individual members of the public”); *Cummins v. Lewis County*, 156 Wn.2d 844, 855, 133 P.3d 459 (2006) (“the government must have unequivocally given” an assurance of assistance; a duty cannot arise from implied assurances); *Harvey v. Snohomish County*, 157 Wn.2d 33, 41, 134 P.3d 216 (2006) (“[i]n order to demonstrate that a duty has been created to respond to a 911 call for police assistance, a claimant must show that assurances were 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

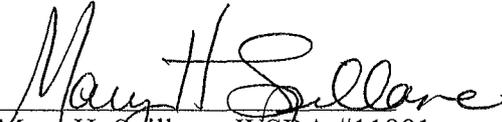
was serving an order, not rescuing or guarding Roznowski, who stayed in the house with Kim after Officer Hensley left, e-mailing or chatting by phone with her daughters and a friend. All Officer Hensley could have done after serving the order was make Kim leave the house. But Kim *did* leave the house, and Roznowski did not call 911 when he returned. The Court of Appeals decision leaves unanswered the question that the City's several pre-verdict motions and appeal raised. Government agencies, police officers, municipal liability insurers, and those who advise persons choosing between RCW ch. 10.14 orders and RCW ch. 26.50 orders deserve to have the question answered.

VI. CONCLUSION

For the foregoing reasons, this Court should grant review pursuant to RAP 13.4(b)(1), (2) and (4) and reverse the Court of Appeals' decision.

RESPECTFULLY SUBMITTED this 22nd day of August, 2012.

WILLIAMS, KASTNER & GIBBS PLLC

By 
Mary H. Spillane, WSBA #11981
Daniel W. Ferm, WSBA #11466
Attorneys for Petitioner

person, who was later found dead, driving erratically, because no exception to the public duty doctrine applied).

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 22nd day of August, 2012, I caused a true and correct copy of the foregoing document, "Petition for Review," to be delivered in the manner indicated below to the following counsel of record:

Counsel for Petitioner City of Federal Way:

Robert L. Christie, WSBA #10895
Thomas P. Miller, WSBA #34473
CHRISTIE LAW GROUP, PLLC
2100 Westlake Ave N Ste 206
Seattle WA 98109-5802
Ph: (206) 957-9669
Email: bob@christielawgroup.com
tom@christielawgroup.com

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

Counsel for Respondents Loh, Roznowski
and Washburn:

Nathan P. Roberts, WSBA #40457
John R. Connelly, Jr., WSBA #12183
CONNELLY LAW OFFICES
2301 N 30th St
Tacoma WA 98403-3322
Ph: (253) 593-5100
Email: nroberts@connelly-law.com
jconnelly@connelly-law.com

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

Counsel for Respondent Washburn:

Philip A. Talmadge, WSBA #06973
TALMADGE/FITZPATRICK
18010 Southcenter Pkwy
Tukwila WA 98188-4630
Ph: (206) 574-6661
Email: phil@tal-fitzlaw.com

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

Counsel for Amicus Curiae Legal Voice:

David J. Ward, WSBA #28707

LEGAL VOICE

907 Pine St Ste 500

Seattle WA 98101-1818

Ph: (206) 682-9552 Ext. 112

Email: dward@LegalVoice.org

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

Counsel for Amicus Curiae WDTL:

Michael B. King, WSBA #14405

CARNEY BADLEY SPELLMAN PS

701 5th Ave Ste 3600

Seattle WA 98104-7010

Ph: (206) 622-8020 Ext. 142

Email: king@carneylaw.com

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

Counsel for Amicus Curiae WDTL:

Stewart A. Estes, WSBA # 15535

KEATING, BUCKLIN & MCCORMACK,
INC., P.S.

800 Fifth Ave Ste 4141

Seattle WA 98104-3175

Ph: (206) 623-8861

Email: sestes@kbmlawyers.com

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

Counsel for Amicus Curiae WDTL:

Christopher W. Nicoll, WSBA # 20771

NICOLL BLACK AND FEIG PLLC

1325 4th Ave Ste 1650

Seattle WA 98101-2573

Ph: (206) 838-7546

Email: cnicoll@nicollblack.com

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

Counsel for Amicus Curiae WWA:

Alison M. Romano Bettles, WSBA # 39215

NORDSTROM INC.

PO Box 21865

Seattle WA 98111-3865

Ph: (206) 454-6777

Email: alison.bettles@nordstrom.com

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

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

Carrie A. Custer

Carrie A. Custer, Legal Assistant

NO. _____

SUPREME COURT OF THE STATE OF WASHINGTON
[Court of Appeals No. 66534-1-I]

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.

APPENDIX TO PETITION FOR REVIEW

Mary H. Spillane, WSBA #11981
Daniel W. Ferm, WSBA #11466
WILLIAMS, KASTNER & GIBBS PLLC
Two Union Square
601 Union Street, Suite 4100
Seattle, WA 98101
(206) 628-6600

Attorneys for Petitioner

INDEX TO APPENDIX

<u>Document Description</u>	<u>App. No.</u>
July 23, 2012 Court of Appeals Published Opinion	1 – 33
Appellant City of Federal Way's Motion for Reconsideration	34 - 57
Appellant's Statement of Additional Authority in Support of Motion for Reconsideration	58 - 61
Order Denying Motion for Reconsideration, Withdrawing Opinion and Substituting Opinion	62

IN THE COURT OF APPEALS 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 corporation,

Appellant.

No. 66534-1-1

DIVISION ONE

PUBLISHED

FILED: July 23, 2012

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 JUL 23 AM 10:11

Cox, J. — This is a wrongful death action arising from an act of domestic violence in which Paul Kim stabbed to death Baerbel Roznowski, his intimate partner, in her home. Kim murdered Roznowski shortly after a City of Federal Way police officer served Kim with a temporary protection order restraining him from either contacting Roznowski or being within 500 feet of her residence.

Unchallenged jury instructions become the law of the case.¹ Here, the City did not appeal the trial court's instruction regarding its police department's duty to exercise ordinary care in the service and enforcement of court orders.

¹ State v. Hickman, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998); Garcia v. Brulotte, 94 Wn.2d 794, 797, 620 P.2d 99 (1980); Chelan County Deputy Sheriffs' Ass'n v. Chelan County, 109 Wn.2d 282, 300 n.10, 745 P.2d 1 (1987); State v. Lake, 7 Wn. App. 322, 327, 499 P.2d 219, review denied, 81 Wn2d 1006 (1972).

Likewise, there is a debate that we need not resolve whether the City properly excepted below to the instruction it did not appeal. A jury could rationally find from the evidence in this record that the City breached its duty to Roznowski to enforce the protection order. Thus, the jury verdict stands to the extent of liability and damages in favor of Roznowski's estate.

The City claims that the trial court erroneously denied its first summary judgment motion. We do not generally review an order denying summary judgment after a case goes to trial.² Here, there were material factual issues prior to trial, and the denial of the City's first motion for summary judgment did not turn solely on a substantive issue of law. Accordingly, we do not review the denial of this summary judgment motion.

The City also claims that the court erroneously denied its Civil Rule 50(a) motion for judgment as a matter of law at the end of the plaintiff's case in-chief.³ In order to lay a foundation for appeal, the City was required to either renew its motion pursuant to CR 50(b) or move for a new trial, claiming insufficiency of evidence to support the verdict.⁴ Here, the City did neither. Accordingly, we do not review the trial court's denial of the CR 50(a) motion at the close of the plaintiff's case-in-chief.

² Kaplan v. Nw. Mut. Life Ins. Co., 115 Wn. App. 791, 799-800, 65 P.3d 16 (2003), review denied, 151 Wn.2d 1037 (2004); see also Univ. Vill. Ltd. Partners v. King County, 106 Wn. App. 321, 324, 23 P.3d 1090 (2001).

³ Brief of Appellant City of Federal Way at 24-25.

⁴ Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 546 U.S. 394, 399-401, 126 S. Ct. 980, 163 L. Ed. 2d 974 (2006).

Finally, the trial court properly exercised its discretion by granting the motion for a new trial on damages to Roznowski's daughters, Carola Washburn and Janet Loh (collectively "Washburn"). We affirm the judgment on the verdict to the extent of liability and damages to Roznowski's estate and also affirm the grant of a new trial on Washburn's damages.⁵

Kim and Roznowski were intimate partners. Each had a separate residence, but Kim spent most of his time living at Roznowski's home in Federal Way.

The relationship between the two grew increasingly troubled. Several days before the events that gave rise to this action, Roznowski called 911 to report a verbal domestic situation. The police reported that Roznowski and Kim had calmed down prior to their arrival and neither of them showed any signs of injury. Nevertheless, in accordance with the City police's protocol for domestic disturbance calls, an officer left a domestic violence booklet with Roznowski. The officer also explained to Roznowski that she could obtain an anti-harassment order.

Days after this incident, Roznowski contacted a domestic violence advocate working at the King County Prosecutor's Office located in the Norm Maleng Regional Justice Center. After consultation with the advocate, Roznowski sought a protection order from the superior court to restrain Kim from being in her home or near her. She completed the paperwork herself and presented it for consideration by a court commissioner on May 1, 2008. The

⁵ Washburn moved to strike the City's late filing of its Amended Response to Brief of Amici Curiae Legal Voice and Washington Women Lawyers. We grant the motion in part and do not consider any new material in the City's amended brief.

paperwork included a Petition for an Order for Protection-AH and a proposed Temporary Protection Order and Notice of Hearing-AH.⁶

Roznowski's affidavit supporting her petition for the protection order identified Kim as the person from whom she sought protection and identified him as her "boyfriend." The affidavit also stated, among other things, that his most recent acts included:

4/30 verbal attacks by Paul Kim because I moved wood to clean yard. He is vehement about owning this pile of wood along with a stack, 10' W x 6' H along the fence, as well as misc. supplies on side of fence. I gave him notice that I'll [sic] plan to move 2 years ago. Nothing was done.

4/29 verbal attacks about same subject. He won't commit when he'll remove items and personal belongings in crawl space. I can't put house on market for sale until done. He deliberately stalls, and the repeated answer is it takes time. . . . Paul Kim's residence is at 331 S 1st ...Federal Way but stays at [Roznowski's] home. He has violent, verbal, insulting outbursts.

[I]last year [Kim's] outburst frightened me, I called 911, he came close to hitting me. He left my place as promised. Within 15 min. 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 of mind he can easily retaliate with [sic] me.^[7]

A court commissioner entered Roznowski's proposed temporary protection order. By its plain terms, it restrained Kim "from making any attempts to contact" Roznowski.⁸ It also restrained him "from entering or being within 500

⁶ Plaintiff's Trial Exhibit 2.

⁷ Id. at 7.

⁸ Id. at 4.

feet” of her residence.⁹ The order also stated a return date of May 14, 2008, at 8:30 a.m. for a hearing on the issuance of a permanent protection order.

Roznowski then delivered copies of her petition and the temporary protection order to the City's police department for service on Kim.¹⁰ At the police department, she completed and submitted an additional document called a Law Enforcement Information Sheet (LEIS).¹¹

The LEIS states at the top of the form:

Do NOT serve or show this sheet to the restrained person! Do NOT FILE in the court file. Give this form to law enforcement.^[12]

Below the above directives in the LEIS, Roznowski provided additional information about Kim to the police. She stated that an interpreter who spoke Korean would be needed to serve Kim.¹³ She provided his residence address, but further specified that he could be served at her residence address.¹⁴

Under the portion of the LEIS seeking “Hazard Information” about Kim, Roznowski checked the box marked “Assault.”¹⁵ The LEIS also states that Kim is a “current or former cohabitant as an intimate partner” and that Roznowski and

⁹ Id.

¹⁰ RCW 10.14.100(2) provides: “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.”

¹¹ Plaintiff's Trial Exhibit at 4.

¹² Id. at 2 (emphasis added).

¹³ Id.

¹⁴ Id.

¹⁵ Id.

No. 66534-1-I/6

Kim are "living together now."¹⁶ The LEIS states further that Kim did not know that he would be "moved out of the home."¹⁷ The LEIS also states that Kim did not know that she was obtaining the protection order.¹⁸

Significantly, Roznowski also stated in the LEIS that Kim was "likely to react violently when served."¹⁹

Early in the morning of May 3, 2008, Officer Andrew Hensing of the City's police department picked up a folder at police headquarters in order to perform the service of the protection order on Kim that Roznowski sought. The folder included Roznowski's affidavit and petition for a protection order, the temporary protection order entered by the commissioner, and the LEIS that we described earlier in this opinion.²⁰

Around 8:00 a.m. that morning, Officer Hensing arrived near Roznowski's residence and parked his vehicle. He testified at trial that he did not completely read the papers in the folder prior to serving Kim.²¹ Thus, he was then unaware of the information about Kim contained in the LEIS and in Roznowski's affidavit supporting her petition for a protection order. It appears that he did not read the

¹⁶ Id.

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

²⁰ Report of Proceedings (Dec. 9, 2010) at 6-7.

²¹ Id. at 13-14.

information in the LEIS stating that a Korean interpreter would be needed because there was no interpreter with the officer.

Officer Hensing testified at trial that he knocked at the front door of Roznowski's home, and Kim answered.²² Officer Hensing asked Kim to identify himself.²³ The officer then served the order on Kim. According to the officer, a brief conversation between the two followed.

Officer Hensing testified that he told Kim that he had been served with an anti-harassment order and that there was a hearing date stated in the order.²⁴ He asked Kim if he could read English and told Kim to read the order, which he testified that Kim then did.²⁵ Officer Hensing also testified that he asked Kim if he had any questions.²⁶

Officer Hensing testified that he "saw someone in the background" during the exchange with Kim at the door of Roznowski's home, but did not know whether the person "was male or female."²⁷ He did not inquire further and returned to his parked vehicle. There, he completed the return of service form. The entire interaction with Kim took about five minutes and was completed by

²² Id. at 36.

²³ Id. at 37-38.

²⁴ Id. at 38-39.

²⁵ Id. at 36, 39.

²⁶ Id. at 38-39.

²⁷ Id. at 39.

8:13 a.m.²⁸ Officer Hensing left the scene without taking any further action.

The evidence at trial showed that Kim remained at Roznowski's residence after Officer Hensing departed. This was notwithstanding the protection order's direction that Kim was restrained from either entering or being within 500 feet of the residence or from contacting Roznowski.

Less than an hour after Officer Hensing served Kim, Roznowski sent an e-mail message to her daughter, Carola Washburn. She wrote:

Well—[Kim] was served this morning. He doesn't understand a thing and right away the blame came I am making trouble. . . . I gave him until 11 to move stuff, then I'll get the key and garage door opener.^[29]

Kim called a friend and asked him to come over. Kim left the house with his friend for a brief period to go to a bank. He withdrew funds, gave them to the friend, and asked that the friend give the funds to his nephew. The friend then drove Kim back to Roznowski's residence.

The friend became concerned about Kim based on his actions and statements during the trip to the bank. The friend contacted police with these concerns. Police responded by going to Roznowski's house. They arrived at 11:55 a.m.³⁰

Police discovered that Kim, in the ultimate act of domestic violence, had stabbed Roznowski 18 times with a knife. She died of her wounds at the scene of the crime.

²⁸ Id. at 21; Plaintiff's Trial Exhibit 2 at 9.

²⁹ Plaintiff's Exhibit 50.

³⁰ Report of Proceedings (Dec. 8, 2010) at 8.

Washburn, individually and on behalf of Roznowski's estate, commenced this wrongful death action against the City. The two daughters alleged negligence, negligent infliction of emotional distress, and negligent supervision and training on the part of the City. The City denied liability, asserting that the public duty doctrine was a bar to all claims.

The City's first motion for summary judgment was based solely on the defense that the public duty doctrine barred all claims. The trial court denied the motion and the motion to reconsider.

The City sought discretionary review of the denial of its summary judgment motion. A commissioner of this court denied review, and a panel of judges denied the City's motion to revise that ruling.

The City's theory of the case at trial was that the public duty doctrine was a bar to all claims. The City took the position that Roznowski's choice to seek protection from Kim by way of an anti-harassment protection order pursuant to chapter 10.14 RCW rather than a protection order under chapter 26.50 RCW relieved the City of any duty to her other than to serve the order and complete and file the return of service.

In Donaldson v. City of Seattle,³¹ this court held that police officers have a mandatory duty to arrest alleged abusers if there are legal grounds to do so under the Domestic Violence Prevention Act, chapter 10.99 RCW.³² Thus, here the City implicitly concedes that this case should have gone to trial if Roznowski had obtained the "right" form or order, rather than the "wrong" one.

³¹ 65 Wn. App. 661, 831 P.2d 1098 (1992).

³² Id. at 669-71.

Washburn disagreed with the City's contentions at trial. She argued that the City had a duty to enforce the protection order entered by the court on May 1, 2008. For various reasons, Washburn claimed that the public duty doctrine did not bar the claims.

At the close of Washburn's case in chief and prior to presenting its own case, the City moved for judgment as a matter of law, as provided for by Superior Court Rule (CR) 50(a).³³ The trial court denied this motion.

The jury returned a \$1.1 million verdict solely in the estate's favor. It did not award any damages to either of Roznowski's daughters, individually. The court entered judgment on the verdict.

The City neither renewed its CR 50(a) motion pursuant to CR 50(b) nor moved for a new trial pursuant to CR 59. Washburn moved for a new trial solely on damages. The trial court granted Washburn's motion.

The City appeals.

LAW OF THE CASE

A primary issue on appeal centers on the effect of the City's alleged failure to object to the substance of the trial court's Instruction 12, and its failure either to assign error to the instruction or to argue on appeal that its giving was improper. This instruction states the City's duty to exercise ordinary care in the service and enforcement of protection orders. As Washburn correctly argues, this instruction

³³ Clerk's Papers at 2049-59.

constitutes the law of the case. Thus, the only question on appeal is whether there is sufficient evidence to sustain the verdict under the instructions given.³⁴

We hold that Instruction 12 is the law of the case. Additionally, there was sufficient evidence for the jury to find that the City breached its duty to Roznowski, as defined by the instruction.

Under the law of the case doctrine, instructions given to the jury by the trial court, if not objected to, shall be treated as the properly applicable law.³⁵ State v. Hickman,³⁶ is particularly instructive in the application of that doctrine to this case.

There, the defendant was tried for insurance fraud in Snohomish County Superior Court.³⁷ The information charged him with presenting, or causing to be presented, in Snohomish County, a false or fraudulent insurance claim.³⁸ The to-convict instruction at trial specified the elements of the crime of insurance fraud, but added an additional element: that the act occurred in Snohomish County,

³⁴ Hickman, 135 Wn.2d at 101-03 (citing Tonkovich v. Dep't of Labor & Indus., 31 Wn.2d 220, 225, 195 P.2d 638 (1948)); see also Noland v. Dep't of Labor & Indus., 43 Wn.2d 588, 590, 262 P.2d 765 (1953) ("No assignments of error being directed to any of the instructions, they became the law of the case on this appeal, and the sufficiency of the evidence to sustain the verdict is to be determined by the application of the instructions and rules of law laid down in the charge."); Gujjosa v. Wal-Mart Stores, Inc., 144 Wn.2d 907, 917, 32 P.3d 250 (2001) (citing Ralls v. Bonney, 56 Wn.2d 342, 343, 353 P.2d 158 (1960) ("Instructions to which no exceptions are taken become the law of the case."); Chelan County Deputy Sheriffs' Ass'n v. Chelan County, 109 Wn.2d 282, 300 n.10, 745 P.2d 1 (1987).

³⁵ Hickman, 135 Wn.2d at 102-03 (internal citations omitted); Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 113, 829 P.2d 746 (1992) (internal citations omitted).

³⁶ 135 Wn.2d 97, 954 P.2d 900 (1998).

³⁷ Id. at 99.

³⁸ Id. at 100-101.

Washington.³⁹ The State did not object to this added element.⁴⁰ The jury returned a guilty verdict.⁴¹

Hickman appealed, arguing that the State assumed the burden to prove that the act occurred in Snohomish County and failed to do so.⁴² This court rejected Hickman's argument and affirmed.⁴³ The supreme court granted review and reversed.

In discussing the law of the case doctrine, the supreme court stated that it is "an established doctrine with roots reaching back to the earliest days of statehood."⁴⁴ The court cited an 1896 decision in which it held that "whether the instruction in question was rightfully or wrongfully given, it was binding and conclusive upon the jury, and constitutes upon this hearing the law of the case"⁴⁵ Accordingly, the Hickman court observed that the question is whether there is "sufficient evidence to sustain the verdict under the instructions of the court?"⁴⁶

³⁹ Id. at 101.

⁴⁰ Id. at 100-101.

⁴¹ Id. at 101.

⁴² Id.

⁴³ State v. Hickman, 84 Wn. App. 646, 929 P.2d 1155 (1997).

⁴⁴ Hickman, 135 Wn.2d at 101.

⁴⁵ Id. at 102 n.2.

⁴⁶ Id. at 103.

Applying these principles, the Hickman court examined the sufficiency of the evidence of the additional element—“[t]hat the act occurred in Snohomish County, Washington”—and determined the evidence was insufficient.⁴⁷ Despite the fact that venue is not an element of the crime of insurance fraud that the State must generally prove, Hickman held that venue became the law of the case that the State was required to prove because it failed to object to the instruction.⁴⁸ Because there was insufficient evidence of the added element, the court reversed and dismissed Hickman’s conviction.⁴⁹

The holding of Garcia v. Brulotte⁵⁰ demonstrates that the law of the case doctrine is not limited to criminal cases. In Garcia, there was a lack of agreement among the jurors on the amount of damages and percentage of plaintiff’s negligence.⁵¹ “[Ten] jurors agreed on the amount of damages, and 10 jurors agreed on the percentage of plaintiff’s negligence, but each was a different set of 10.”⁵² Nevertheless, because the verdict was consistent with the court’s jury instructions, the supreme court held that the verdict was consistent with the law of the case.⁵³ In doing so, the supreme court acknowledged that the trial court’s verdict instruction might be improper, stating that “[i]n the appropriate case the

⁴⁷ Id. at 105-06.

⁴⁸ Id. at 102 (citing State v. Lee, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995)).

⁴⁹ Id. at 106.

⁵⁰ 94 Wn.2d 794, 620 P.2d 99 (1980).

⁵¹ Id. at 796.

⁵² Id.

⁵³ Id. at 797.

issues raised by an interpretation of the statute, court rules, and Washington precedent will be necessary to determine if the court's verdict instruction here was correct⁵⁴ But in Garcia, the law of the case prevented review of that legal question.

Here, the court and counsel for the parties extensively discussed whether a duty of care instruction should be given to the jury. Near the end of this discussion, and prior to counsel stating their exceptions, the following exchange occurred:

COURT: So the way I'm going to word it, unless someone has anything you want to say is, "**A city police department has to exercise ordinary care . . . in the service and enforcement of court orders,**" period, because that's really all we are talking about.

MR. CHRISTIE: For the way you are presenting the case, I think that's appropriate. **I will take exception for other reasons.**^[55]

Following this exchange, the court assembled its final set of instructions.

Instruction No. 12 stated:

A city police department has a duty to exercise ordinary care in the service and enforcement of court orders.^[56]

The parties then stated their respective exceptions to the court's instructions to the jury:

MR. CHRISTIE: . . . [W]e would take exception to the Court giving . . . instruction 12. . . . [I]nstruction 12 is a statement of the City's duty to exercise ordinary care for the reasons set forth

⁵⁴ Id.

⁵⁵ Report of Proceedings (Dec. 20, 2010) at 73-74 (emphasis added).

⁵⁶ Clerk's Papers at 2179.

before. Given that we are talking about a failure to enforce exception, we think it should be done in the manner that we have proposed by instructing on the elements and then asking specific questions.^[67]

Whether the City's exception to Instruction 12 complies with the requirements of CR 51(f) is debatable. That court rule states:

Objections to Instruction. Before instructing the jury, the court shall supply counsel with copies of its proposed instructions which shall be numbered. Counsel shall then be afforded an opportunity in the absence of the jury to make objections to the giving of any instruction and to the refusal to give a requested instruction. ***The objector shall state distinctly the matter to which he objects and the grounds of his objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made.***

It is unclear from this record whether the City's objection is anything more than an objection to the wording of the instruction, as there is no further specific explanation here of the basis of any substantive concerns of the City.

We acknowledge that the City's position below and on appeal has been that this case should have been dismissed without reaching the stages of crafting and giving instructions to the jury. But the case did result in a trial, and in instructions to the jury. Our reading of the City's only exception to Instruction 12 is that it objected to the wording only, and not to its substance.

In its motion for reconsideration of our original decision in this case, the City essentially argues that it is not debatable whether it properly excepted to Instruction 12, as CR 51(f) requires.⁵⁸ The City points to portions of the record

⁵⁷ Report of Proceedings (Dec. 20, 2010) at 80-81.

⁵⁸ Appellant City of Federal Way's Motion for Reconsideration at 7-11.

other than what we cited above to show that Instruction 12 is not the law of the case.⁵⁹

We duly considered these additional citations to the record that the City provides and the authorities that both sides cite on the question. We adhere to our original conclusion that Instruction 12 is the law of the case.

Relying chiefly on Falk v. Keene Corp.,⁶⁰ the City argues that its exception to the court's failure to give the City's proposed Instruction 18 as well as other of its proposals were sufficient to apprise the court of its concerns. Washburn does not challenge the rule stated in Falk, but argues that the rule does not control in this case. We agree with Falk, but need not resolve the debate between the parties whether the City properly excepted to Instruction 12 in this case.

As we stated in our original decision, the City neither assigned error to this instruction on appeal nor otherwise argues on appeal that giving it was improper. In fact, the City states in its Reply Brief that its failure to designate:

Jury Instruction 12 . . . is immaterial. Because the trial court erred in ruling that the City owed [the] plaintiffs a duty of care to take enforcement action and protect Ms. Roznowski from harm, it was erroneous to give any instructions to a jury. The case should have been dismissed as a matter of law and never reached the instruction stage, the central argument made on summary judgment, on reconsideration, and at the close of plaintiffs' case in chief.⁶¹

⁵⁹ Clerk's Papers at 606, 1981, 2070; Report of Proceedings (Dec. 20, 2010) at 79-80.

⁶⁰ 113 Wn.2d 645, 782 P.2d 974 (1989).

⁶¹ Reply Brief of Appellant City of Federal Way at 4 n.2.

We disagree with the City's view, as expressed in this briefing. On appeal, the City does not challenge either the substance or the wording of the instruction in any way. It plainly states that it is unnecessary to do so.

The reason that we need not decide whether the City properly excepted below to Instruction 12 is that the City does not challenge this instruction on appeal. There is no dispute on this point.

Both the supreme court and this court have consistently held that under these circumstances the failure to appeal an allegedly erroneous instruction makes that instruction the law of the case.⁶² Application of that well-settled principle to this case makes clear that Instruction 12 is now the law of the case for the City's duty to exercise ordinary care in the service and enforcement of the protection order that is at issue in this case. Assuming without deciding that the City properly excepted to Instruction 12 below, its failure to challenge the instruction on appeal makes the instruction the law of the case.

Tonkovich, the other primary case on which the City relies, does not require a different result. That was a case in which the supreme court addressed whether there was sufficient evidence to support the granting of a motion for judgment notwithstanding the verdict.⁶³ The City chiefly relies on the following

⁶² Chelan, 109 Wn.2d at 300 n.10 (failure to assign error to an instruction makes the instruction the law of the case); Lake, 7 Wn. App. at 327 (failure to assign error on appeal to an instruction challenged below makes that instruction the law of the case); see Detonics ".45" Assocs. v. Bank of Cal., 97 Wn.2d 351, 353, 644 P.2d 1170 (1982) (failure to appeal the trial court's legal ruling on preemption makes that ruling the law of the case).

⁶³ Tonkovich, 31 Wn.2d at 223.

quotation from that case to argue that the law of the case doctrine does not control here:

[The law of the case rule] does not apply if the record or evidence conclusively shows that the party in whose favor the verdict is rendered is not entitled to recover. No man should be allowed to recover in any case unless there is evidence to support his contention.^[64]

We are not persuaded by this quotation that we should refrain from applying the well-settled rule of the law of the case here. First, the quotation is not supported by any citation to authority. Second, the case does not discuss any of the many cases that do apply the law of the case doctrine to cases that are undistinguishable from this one.

Because this instruction is now the law of the case, the only remaining question is whether there was sufficient evidence to support the jury verdict. We hold that there was sufficient evidence for a jury to find that the City breached the duty stated in this instruction. Whether Instruction 12 is a legally correct statement of the duty owed by a City police department, an instruction that can or should be given in future cases, is a question that we do not decide in this case.

We review jury verdicts under a sufficiency of the evidence standard.⁶⁵ "The record must contain a sufficient quantity of evidence to persuade a rational, fair-minded person of the truth of the premise in question."⁶⁶ A party challenging the sufficiency of the evidence admits the truth of the opposing party's evidence

⁶⁴ Id. at 225.

⁶⁵ Winbun v. Moore, 143 Wn.2d 206, 213, 18 P.3d 576 (2001).

⁶⁶ Canron, Inc. v. Fed. Ins. Co., 82 Wn. App. 480, 486, 918 P.2d 937 (1996) (citing Bering v. Share, 106 Wn.2d 212, 220, 721 P.2d 918 (1986)).

and all inferences that can be reasonably drawn therefrom.⁶⁷ Such a challenge requires that the “evidence be interpreted most strongly against the moving party and in the light most favorable to the party against whom the motion is made.”⁶⁸

Here, there was sufficient evidence for the jury to find that Officer Hensing, as an agent of the City, breached a duty by failing to exercise ordinary care in the **enforcement** of the court order he served on Kim. He failed to read the LEIS Roznowski provided that was designed to alert law enforcement of the situation to be faced when serving Kim with the protection order. That information included the fact that Kim was to be served at Roznowski’s residence. Moreover, it expressly stated that an interpreter who spoke Korean would be needed to ensure Kim understood the provisions of the protection order. The LEIS clearly stated under its “Hazard Information” section that Kim’s history included assault. Finally, the LEIS also provided additional information that indicated the domestic relationship of Kim and Roznowski and that he was “likely to react violently when served.”

The temporary protection order also contained additional information that Officer Hensing failed to read. Specifically, the order restrained Kim “from making any attempts to contact [Roznowski]” and further restrained him from “entering or being within 500 feet of [Roznowski’s] residence.” Despite these express directives, both of which Kim violated upon being served, Officer Hensing did nothing to enforce them. Regardless of whether enforcement would

⁶⁷ Holland v. Columbia Irr. Dist., 75 Wn.2d 302, 304, 450 P.2d 488 (1969).

⁶⁸ Id. (citations omitted).

have entailed either staying until Kim left Roznowski's residence or arresting him if he failed to do so, Officer Hensing failed to enforce the express provisions of the superior court's order that were intended to protect Roznowski from harm.

There was also expert testimony that the point of separation in a domestic situation could escalate to violence where an alleged abuser is separated from an alleged victim by way of a court order. That evidence supports what happened in this case: Once Kim understood that he was to leave Roznowski's residence and have no further contact with her, his behavior escalated into deadly violence.

We conclude that this evidence was sufficient to persuade a rational, fair-minded juror that the City breached its duty to Roznowski by failing to enforce the order that Officer Hensing served on Kim. This supports the jury verdict to the extent of liability and damages in favor of Roznowski's estate.

The City maintains that it did not owe any legal duty of care and all claims are barred by the public duty doctrine.⁶⁹ It characterizes Washburn's law of the case argument as a procedural red herring that is intended to distract this court from the merits of its appeal.⁷⁰ We must disagree.

As we have explained, the law of the case doctrine is well-established. The City cites to a number of cases that hold that "technical violation of the rules will not ordinarily bar appellate review," where the nature of the challenge is

⁶⁹ Reply Brief of Appellant City of Federal Way at 9-12.

⁷⁰ Id. at 5-6.

clear.⁷¹ But none of the cases the City cites address the failure of a party to object substantively to or appeal a trial court's jury instruction. Thus, the City fails to advance any argument why we should not apply the law of the case doctrine here. Moreover, it fails to explain why the evidence is insufficient to support the jury verdict on the basis of Instruction 12, which is the law of the case. Accordingly, we are unpersuaded by the City's arguments to the contrary.

DENIAL OF SUMMARY JUDGMENT MOTION

The City primarily argues that the trial court erroneously denied its first motion for summary judgment, which it based on the public duty doctrine. At the time of this motion, exceptions to the public duty doctrine were available theories of the plaintiffs. There were then genuine issues of material fact whether such exceptions applied. Because such genuine issues of material fact existed at the time of the City's motion for summary judgment, and because the matter proceeded to trial, we decline to review the denial of the motion.

Summary judgment shall be granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.⁷² An appellate court reviews de novo a grant or

⁷¹ Daughtry v. Jet Aeration Co., 91 Wn.2d 704, 710, 592 P.2d 631 (1979); see also State v. Clark, 53 Wn. App. 120, 123, 765 P.2d 916 (1988) (where Rules on Appeal not strictly followed regarding assignments of error, if claimed errors are clear then review is proper); McGovern v. Smith, 59 Wn. App. 721, 734, 801 P.2d 250 (1990) (where party fails to make proper assignment of error, court may still consider the merits of the challenge where its nature is clear).

⁷² CR 56(c).

denial of summary judgment.⁷³ Such an order is subject to review “if the parties dispute no issues of fact and the decision on summary judgment turned solely on a substantive issue of law.”⁷⁴ But as we noted in Kaplan v. Northwestern Mutual Life Insurance Co.,⁷⁵ “[a] summary judgment denial cannot be appealed following a trial if the denial was based upon a determination that material facts are disputed and must be resolved by the factfinder.”⁷⁶

Here, the City's first motion for summary judgment was based solely on the theory that the public duty doctrine barred all claims in this wrongful death action. The trial court denied the motion on the basis that there were genuine issues of material fact for trial.

The City sought discretionary review of the denial of summary judgment. A commissioner of this court denied discretionary review, stating that “the legislative intent and special relationship exceptions arguably apply.”⁷⁷ The ruling went on to explain why the then existing record arguably supported these alternative arguments.⁷⁸ A panel of judges of this court denied the City's motion to revise that ruling.

⁷³ Green v. Am. Pharm. Co., 136 Wn.2d 87, 94, 960 P.2d 912 (1998) (internal citations omitted).

⁷⁴ Univ. Vill., 106 Wn. App. at 324; Kaplan, 115 Wn. App. at 799-800.

⁷⁵ 115 Wn. App. 791, 65 P.3d 16 (2003).

⁷⁶ Id. at 799-800 (quoting Brothers v. Pub. Sch. Emps. of Wash., 88 Wn. App. 398, 409, 945 P.2d 208 (1997) (citing Johnson v. Rothstein, 52 Wn. App. 303, 304, 759 P.2d 471 (1988))).

⁷⁷ Commissioner's Ruling Denying Discretionary Review, Clerk's Papers at 751.

⁷⁸ Id. at 758-60.

We may not review a denial of summary judgment following a trial if the denial was based upon a determination that material facts were in dispute and had to be resolved by the fact finder. The rule stated in Kaplan bars review of the denial of the City's first motion for summary judgment following the trial in this case. There were material factual issues that existed at the time of the first motion for summary judgment. Specifically, there were material factual issues whether the special relationship exception to the public duty doctrine applied to this case. This is so even if we concluded that the legislative intent exception to this doctrine did not involve material factual issues. There were material facts in dispute at the time of the first motion, facts that only a trial could resolve after further development of the record.

The City argues that because its negligence was Washburn's sole contention, the only question before the lower court at the time of the first summary judgment motion was legal: whether the City owed Roznowski a duty of care.⁷⁹

"In all negligence actions the plaintiff must prove the defendant owed the plaintiff a duty of care."⁸⁰ Whether a duty is owed is a question of law.⁸¹ But duty arises from the facts presented.⁸² To determine whether a defendant owes a duty to the plaintiff, appellate courts have frequently reviewed whether sufficient

⁷⁹ Reply Brief of Appellant City of Federal Way at 7.

⁸⁰ Donaldson, 65 Wn. App. at 666.

⁸¹ Munich v. Skagit Emergency Commc'ns Ctr., 161 Wn. App. 116, 121, 250 P.3d 491, review granted, 172 Wn.2d 1026 (2011).

⁸² Torres v. City of Anacortes, 97 Wn. App. 64, 75, 981 P.2d 891 (1999).

evidence supports a finding that the alleged duty was owed in the particular circumstances of the case.⁸³ Thus, a challenge to whether the defendant owes a duty to a plaintiff sometimes requires a determination whether facts can be proved that give rise to the alleged duty. In such cases, the issue of duty does not present a pure question of law.

Here, whether the City owed Roznowski a particularized duty as opposed to a general duty of care could not have been determined at the time of the first motion for summary judgment because the material facts were disputed. We reject the City's overly simplistic characterization that only a legal question existed.

For these reasons, we do not review the denial of the City's first summary judgment motion.

DENIAL OF MOTION FOR JUDGMENT AS A MATTER OF LAW

The City also argues that the trial court erroneously denied its CR 50(a) motion at the close of Washburn's case-in-chief. Washburn responds that we may not review that denial because the City failed to renew its motion, as provided under CR 50(b). Nor did the City move for a new trial based on insufficient evidence. We agree with Washburn.

⁸³ Yankee v. APV North America, Inc., 164 Wn. App. 1, 3-10, 262 P.3d 515 (2011) ("there is insufficient evidence to create a material issue of fact that APV had a duty to warn of asbestos exposure"); Borden v. City of Olympia, 113 Wn. App. 359, 370, 53 P.3d 1020 (2002) ("These facts are sufficient to support a finding that the City actively participated in the 1995 project, and, if such a finding is made, that the City owed a duty of due care."); Moore v. Wayman, 85 Wn. App. 710, 720-21, 723, 725-26, 934 P.2d 707 (1997) (reversing plaintiff's negligence verdict because evidence was insufficient to support applicability of special relationship, failure to enforce, and legislative intent exceptions to the public duty doctrine).

The Federal Rules of Civil Procedure (FRCP), on which the state Superior Court Civil Rules are modeled, allow a party to challenge the sufficiency of the evidence prior to the submission of the case to the jury under FRCP 50(a). Such a motion may be renewed after the verdict and entry of judgment under FRCP 50(b).⁸⁴

In Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.,⁸⁵ the United States Supreme Court addressed the implications of a party's failure to move postverdict under FRCP 50(b) after denial of an initial FRCP 50(a) motion. The Court noted that "[i]n the absence of such a motion," an "appellate court [is] without power to direct the District Court to enter a judgment contrary to the one it had permitted to stand."⁸⁶ The Court cited a 1947 case in support of this proposition.⁸⁷ According to the Court, a postverdict motion is necessary because:

[d]etermination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart. Moreover, the requirement of a timely application for judgment after verdict is not an idle motion because it is . . . an essential part of the rule, firmly grounded in principles of fairness.⁸⁸

⁸⁴ FRCP 50(a) and (b).

⁸⁵ 546 U.S. 394, 126 S. Ct. 980, 163 L. Ed. 2d 974 (2006).

⁸⁶ Id. at 400-01 (quoting Cone v. W. Va. Pulp & Paper Co., 330 U.S. 212, 218, 67 S. Ct. 752, 91 L. Ed. 849 (1947); Globe Liquor Co. v. San Roman, 332 U.S. 571, 68 S. Ct. 246, 92 L. Ed. 177 (1948)).

⁸⁷ Id.

⁸⁸ Id. at 401 (internal quotation marks and citations omitted) (alteration in original).

In Ortiz v. Jordan,⁸⁹ the United States Supreme Court recently reiterated its holding in Unitherm.⁹⁰ There, the Court noted that “although purporting to review the District Court’s denial of the . . . pretrial summary-judgment motion, several times [the Court of Appeals] pointed to evidence presented only at the trial stage of the proceedings.”⁹¹ According to the Supreme Court, “[o]nce the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary judgment motion.”⁹²

But the fatal flaw, according to the Supreme Court, was that the Ortiz appellants failed to renew their motion, as FRCP 50(b) specifies. This failure “left the appellate forum with no warrant to reject the appraisal of the evidence by ‘the judge who saw and heard the witnesses and ha[d] the feel of the case which no appellate printed transcript can impart.’”⁹³

When a Washington Court Rule is substantially similar to a present Federal Rule of Civil Procedure, we may look to federal decisions interpreting this rule for guidance.⁹⁴ We do so here.

⁸⁹ __ U.S. __, 131 S. Ct. 884, 178 L. Ed. 2d 703 (2011).

⁹⁰ Id. at 892.

⁹¹ Id. at 889.

⁹² Id.

⁹³ Id. (quoting Cone, 330 U.S. at 216) (alteration in the original).

⁹⁴ Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 218-19, 829 P.2d 1099 (1992) (citing In re Lasky, 54 Wn. App. 841, 851, 776 P.2d 695 (1989); American Discount Corp. v. Saratoga West, Inc., 81 Wn.2d 34, 37, 499 P.2d 869 (1972)).

The language of FRCP 50(b) is virtually identical to CR 50(b).⁹⁵ Karl Tegland states the necessity for either renewing a CR 50(a) motion or moving for a new trial as a foundation for an appeal:

Foundation for appeal. A party may not simply move for judgment as a matter of law before the case is submitted to the jury pursuant to CR 50(a), and then (if the motion is denied) appeal

⁹⁵ FRCP 50(b) states:

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 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:

- (1) allow judgment on the verdict, if the jury returned a verdict;
- (2) order a new trial; or
- (3) direct the entry of judgment as a matter of law.

CR 50(b) states:

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 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:

- (1) If a verdict was returned:
 - (A) allow the judgment to stand.
 - (B) order a new trial, or
 - (C) direct entry of judgment as a matter of law

from the final judgment on the basis of insufficient evidence. 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.^[96]

Tegland also cites to Unitherm and notes that, in its analysis of FRCP 50, the Supreme Court had interpreted language virtually identical to the language of CR 50. Thus, because of the similarity of CR 50(b) and FRCP 50(b), the rationale of the Supreme Court's holding in Unitherm also applies to CR 50.

Here, the City neither renewed its CR 50(a) motion pursuant to CR 50(b) nor moved for a new trial based on insufficient evidence. The failure to do so is fatal to its request that we review the trial court's denial of the City's CR 50(a) motion at the close of Washburn's case-in-chief.

The City makes several arguments why we should not apply the federal construction of FRCP 50 to CR 50. They are not persuasive.

First, the City argues that adoption of the Unitherm rule would be an extremely harsh penalty because it has never before been applied in Washington. But the Supreme Court's Unitherm decision was issued in 2006, prior to the incidents at issue here. Given the accepted principle that we may look to federal decisions interpreting federal rules that are substantially similar to our state's rules,⁹⁷ the City's argument is not persuasive. Additionally, that same

⁹⁶ 14A KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE CR 50 author's cmts. at 36 (5th ed. 2011).

⁹⁷ Bryant, 119 Wn.2d at 218-19 (internal citations omitted).

argument would apply equally to any adoption of a construction of a similarly worded federal rule when construing our state rules of civil procedure. We are unaware of any case that has taken that position, and the City fails to cite any authority in support of this argument.⁹⁸

Second, the City attempts to distinguish the federal rule on the basis that, in contrast to Unitherm, sufficiency of factual evidence is not at issue here.⁹⁹ Rather, the City claims the question before us is "the sufficiency of the evidence with respect to a legal issue: whether the City owed the plaintiffs any duty of care."¹⁰⁰ This claimed distinction is not material.

We explained earlier in this opinion that Instruction 12 established the law of the case regarding the City's duty. Thus, the question is whether there was sufficient evidence given the duty definition established by Instruction 12. Here, as we also explained earlier in this opinion, the evidence is sufficient to support the verdict. Accordingly, we reject this argument.

The City also moved for reconsideration of this portion of our original decision. In addition, we granted Washington Defense Trial Lawyers leave to file its amicus memorandum in support of the City's position. Having reviewed the authorities submitted by the parties and amicus, we adhere to our original decision that the City failed to lay a proper foundation for appeal.

⁹⁸ See State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) (holding that appellate courts will not review an issue unsupported by authority or persuasive argument).

⁹⁹ Unitherm, 546 U.S. at 403.

¹⁰⁰ Reply Brief of Appellant City of Federal Way at 8.

The one point that requires additional discussion is the assertion by the City and Amicus Defense Trial Lawyers that a CR 50(b) motion was not required because all that was at issue post-trial was an alleged error of law. This assertion ignores the record in this case.

This matter went to trial because the trial court properly denied both motions for summary judgment by the City. Moreover, at trial, the court gave Instruction 12 and other instructions that are now the law of the case. Given this record, the issue post-trial was whether the evidence adduced at trial supported the verdict, given Instruction 12 and the other instructions given to the jury. In sum, the question then before the court was not merely a legal issue. Rather, it involved the sufficiency of evidence as well. Accordingly, we reject this attempt to recharacterize what was at issue in an attempt to persuade us that the City properly laid a foundation for appeal.

NEW TRIAL

Finally, the City argues that the trial court abused its discretion when it granted Washburn's motion for a new trial on damages. We disagree.

Determination of the amount of damages is within the province of the jury.¹⁰¹ But on review of a trial court's grant of a motion for a new trial based on inadequate damages, reversal is only warranted "where the trial court abuses its discretion."¹⁰² Further "[a] much stronger showing of abuse of discretion will be

¹⁰¹ Palmer v. Jensen, 132 Wn.2d 193, 197, 937 P.2d 597 (1997).

¹⁰² Id. (citing Wooldridge v. Woolett, 96 Wn.2d 659, 668, 638 P.2d 566 (1981)).

required to set aside an order granting a new trial than an order denying one because the denial of a new trial 'concludes [the parties'] rights.'"¹⁰³

The supreme court's analysis in Palmer v. Jensen¹⁰⁴ controls here. There, Jensen argued that Palmer's special damages were still a matter of legitimate dispute because the jury could have concluded some of Palmer's treatment was unnecessary.¹⁰⁵ But the defense presented no evidence to call the treatment into question.¹⁰⁶ The supreme court held that, because the "uncontroverted evidence at trial established that all of Palmer's medical treatment was related to the accident, was necessary, and was reasonable," a new trial should be granted on the issue of damages only.¹⁰⁷

Here, the City did not dispute the evidence supporting the close relationship between Roznowski and her daughters that constitutes the underpinning of their claims as individuals. Likewise, the City did not dispute that they suffered pain and suffering as a result of her death.

Furthermore, the special verdict form read "Was Defendant City of Federal Way's negligence a **proximate cause** of injury and damage to the **plaintiffs**?" The jury responded "yes."¹⁰⁸ Thus, the jury determined that the City's negligence

¹⁰³ Id. at 197 (quoting Baxter v. Greyhound Corp., 65 Wn.2d 421, 437, 397 P.2d 857 (1964)).

¹⁰⁴ 132 Wn.2d 193, 937 P.2d 597 (1997).

¹⁰⁵ Id. at 199.

¹⁰⁶ Id.

¹⁰⁷ Id.

¹⁰⁸ Clerk's Papers at 2093 (emphasis added).

was a proximate cause of injury and damages to all three plaintiffs, not just the estate.

The City argues that the jury's decision to award nothing to Roznowski's daughters merely indicates that the jury "determined that Ms. Loh and Ms. Washburn suffered general damages all caused by Paul Kim murdering their mother, distinct from Ms. Roznowski's damages flowing from the 'foreseeable' assault."¹⁰⁹ However, the supreme court dismissed a similar argument in Palmer. The difficulty where a defendant argues that the jury "could have concluded" that some damages were not warranted, "is that, carried to its logical conclusion, there never could be an inadequate verdict, because the conclusive answer would always be that the jury did not have to believe the witnesses who testified as to damages, even though there was no contradiction or dispute."¹¹⁰ The undisputed evidence in this case of the daughters' relationship with their mother, and the determination that the City's negligence was a proximate cause of injury and damages to all plaintiffs, together support the trial court's decision to grant a new trial for damages.

The trial court did not abuse its discretion by granting a new trial on damages for Washburn.

OTHER CLAIMS AND DEFENSES

Washburn argues that we should affirm the judgment on the jury verdict in favor of Roznowski on the basis of the duty articulated in Restatement (Second)

¹⁰⁹ Brief of Appellants at 49.

¹¹⁰ Palmer, 132 Wn.2d at 200 (quoting Ide v. Stoltenow, 47 Wn.2d 847, 851, 289 P.2d 1007 (1955)).

of Torts § 302B that this court applied in Robb v. City of Seattle¹¹¹ and other cases.¹¹² Washburn also argues that the public duty doctrine does not bar the claims in this action because the case law's failure to enforce, legislative intent, and special relationship exceptions to that doctrine apply to this case.

The City claims that Robb is inapplicable here. The City also claims that none of the case law exceptions to the public duty doctrine apply to this case.

Because we affirm on the basis of the law of the case doctrine and decline to review the denials of the City's first motion for summary judgment and the CR 50(a) motion, we decline to reach these respective arguments of the parties.

We affirm the judgment on the jury verdict, subject to the trial court's grant of a new trial on damages for Roznowski's daughters, which we also affirm.

Cox, J.

WE CONCUR:

Jau, J.

Becker, J.

¹¹¹ 159 Wn. App. 133, 144, 245 P.3d 242 (2010).

¹¹² Tae Kim v. Budget Rent A Car Sys., Inc., 143 Wn.2d 190, 197-99, 15 P.3d 1283 (2001); Parrilla v. King County, 138 Wn. App. 427, 435-39, 157 P.3d 879 (2007).

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

NO. 66534-1-I

CAROLA WASHBURN and JANET LOH,
individually and on behalf of the
ESTATE OF BAERBEL K. ROZNOWSKI,
a deceased person,

Plaintiffs/Respondents,

v.

CITY OF FEDERAL WAY, a Washington
municipal corporation,

Defendant/Appellant.

**APPELLANT CITY OF FEDERAL WAY'S
MOTION FOR RECONSIDERATION**

Robert L. Christie, WSBA #10895
Thomas P. Miller, WSBA #34473
Attorneys for Appellant City of
Federal Way

CHRISTIE LAW GROUP, PLLC
2100 Westlake Avenue N., Suite 206
Seattle, WA 98109
Telephone: (206) 957-9669
Facsimile: (206) 352-7875

I. IDENTITY OF MOVING PARTY

Appellant City of Federal Way (herein "the City") is the moving party.

II. RELIEF REQUESTED

Pursuant to RAP 12.4, the City respectfully requests that this Court reconsider its March 26, 2012 decision. The Court erroneously held that the City did not take exception to the trial court's giving of Instruction No. 12 and in so doing, conceded that it owed a duty of care, which is now the law of the case. However, the City did take exception to Instruction No. 12 and thereby preserved its right to challenge the trial court's ruling that the City owed plaintiffs a duty of care.

The Court went on to hold that the City's failure to renew its CR 50(a) motion at the close of evidence and post-trial prevents this Court from reviewing the trial court's denial of that motion under *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 126 S. Ct. 980 (2006). Washington courts have never required a party to renew a CR 50(a) motion at the close of evidence and then post-verdict under CR 50(b) in order to preserve an issue for appeal. In fact, Washington Supreme Court precedent holds that a CR 50(b) motion is *not* required in order to appeal the denial of a CR 50(a) motion. Further, the holding in *Unitherm* pertains only to appeals based on sufficiency of the evidence, not the threshold

issue of legal duty. Therefore, this Court's decision is contrary to well-settled law.

III. STATEMENT OF FACTS

In its March 26, 2012 decision, this Court stated,

We hold that Instruction 12, to which the City did not object in substance, is the law of the case. Additionally, there was sufficient evidence for the jury to find that the City breached its duty to Roznowski, as defined by the instruction.

Opinion, p. 11.

The Court acknowledged that counsel for the City took exception to Instruction No. 12 "for other reasons" aside from the wording. (*Id.*) However, the Court went on to hold, "[it] is unclear from this record whether the City's objection is anything more than an objection to the wording of the instruction, as there is no further specific explanation here of the basis of any substantive concerns of the City." (*Id.* at p. 15.)

Respectfully, the Court's summation of the City's objection to Instruction No. 12 is incorrect and ignores the record. The City took exception to the instruction for reasons *other than* the wording. In the portion of the City's exception to which the Court cites on page 15, counsel makes it clear that he takes exception to Instruction No. 12 "for the reasons set forth before." The transcript of the hearing on the jury

instructions centers on the City taking exception to the Court's giving any duty of ordinary care instruction, because no actionable duty exists.

In its decision, the Court focused solely on the one sentence exception to Instruction No. 12 by defense counsel, which incorporated the "reasons set forth before." By focusing solely on that snippet of the proceedings and disregarding the context of the entire record regarding jury instructions, the Court has put attorneys in an impossible position. Attorneys are now required to repeat in one place all that has been previously argued on that same substantive point, for fear that failure to do so will put them at risk that a reviewing court will look for key words, rather than the full discussion.

From the outset of the discussion, plaintiffs' counsel and Judge Darvas both recognized that the City objected to any instruction that set forth a general duty of ordinary care, not because of its wording, but because giving such an instruction was contrary to the public duty doctrine.

MR. ROBERTS: ...A duty instruction is always included as in an ordinary negligence case, and Mr. Christie's objection to that instruction *was not based on the words, it is based on his public duty argument.*

THE COURT: I know.

(RP 12/20/10, 5:6-10) (emphasis added).

Judge Darvas again acknowledged that the City took exception to Instruction No. 12, stating to plaintiffs' counsel,

I know Mr. Christie disagrees with this, but assuming that the Federal Way Police Department had a duty of ordinary care in service and enforcement of court orders, which is the construction of your case, and that's a duty that they may owe certain [sic] circumstances to certain people.

(RP 12/20/10, 24:8-14.)

That the City took exception to Instruction No. 12 is also made clear by the fact that the City proposed a duty instruction that encompassed the elements of the failure to enforce exception to the public duty doctrine. (CP 1981.) The City also proposed a supplemental instruction on the special relationship exception to the public duty doctrine. (CP 2070.) The City proposed both of these instructions as alternatives to plaintiffs' proposed ordinary care instructions. (CP 2079, 2087-2088.)

The City also objected to giving an ordinary care instruction in its trial brief. (CP 605-606.) The City wrote, "[p]laintiffs' assertion that the Court need only instruct the jury that the City owed them a general duty to use reasonable care is erroneous – a clearly incorrect statement of the law." (CP 605.) Consistent with that argument, which it made throughout

trial, the City urged the Court to instruct on the other applicable exceptions to the public duty doctrine as well. (CP 606-608.)

In addition to taking exception to Instruction No. 12, the City also took exception to the trial court's *failure to give* its proposed instructions on duty, which were based on the failure to enforce (CP 1981) and special relationship (CP 2070) exceptions to the public duty doctrine. The City's counsel clearly took exception to that failure:

MR. CHRISTIE: ...We also give exception to the Court's failure to give our instruction No. 18, which is the elements of the failure to enforce exception, and absent a ruling that it is not part of the case, the failure to give our supplemental instruction on the element [sic] of a special relationship, which was a supplemental instruction. And then, we except to the Court's failure to use our supplemental special verdict form that includes specific questions on the elements of the failure to enforce, and depending on the Court's ruling, the special relationship exception... Those are our exceptions on the failure to give.

(RP 12/20/2010, p. 79, l. 16 – p. 80, l. 9.)

The trial record clearly shows that the City took exception to Instruction No. 12, both directly by stating an exception to it, and indirectly, by taking exception to the failure to give the City's proposed instructions on duty. The Court's determination that the City failed to adequately take exception to Instruction No. 12 is not supported by the

record. The City took exception repeatedly throughout trial, in the following ways:

(1) By stating its opposition to plaintiffs' proposed duty of care instruction in its trial brief and urging the trial court to use duty instructions drawn from the exceptions to the public duty doctrine; and

(2) By moving in writing and orally to dismiss the case at the close of plaintiffs' case on the basis that the anti-harassment order was not the equivalent of a statute requiring corrective action as required by the failure to enforce exception; and

(3) By proposing jury instructions framing duty in terms of the exceptions to the public duty doctrine; and

(4) By proposing a special verdict form that posed specific questions framed in terms of the elements of the failure to enforce exception and special relationship exception; and

(5) By taking formal exception to the trial court's failure to give the City's proposed instructions on duty and the City's proposed special verdict form; and

(6) By obtaining an acknowledgement on the record from Judge Darvas in which she stated she knew that the City objected to her duty of care instruction; and

(7) By taking formal exception to Instruction No. 12, referencing arguments set forth in the record in the pages before the snippet referenced in this Court's decision.

The City fully informed the trial court that (1) there was no applicable exception to the public duty doctrine that would permit the trial court to send the case to the jury; (2) if the trial court was going to instruct the jury on duty of care, it should do so by giving the City's proposed instructions framing the issue in terms of the failure to enforce and special relationship exceptions to the public duty doctrine, even though the trial court acknowledged that there was no evidence to support the special relationship exception (RP 12/15/10, pp. 19-22); and (3) it was error to instruct the jury on a theory of a general duty of ordinary care in service and enforcement of court orders.

IV. ARGUMENT AND AUTHORITIES

A. The City Took Exception to Instruction No. 12.

This Court reasoned that the City's failure to object to Instruction No. 12 made it the law of the case. Therefore, the Court examined the sufficiency of the evidence under Instruction No. 12 and affirmed the verdict on that basis. In its decision, this Court held, "[o]n appeal, the City does not challenge either the substance or the wording of [Instruction No. 12] in any way. It plainly states that it is unnecessary to do so. Had the

City made a substantive objection to Instruction 12 at trial, it could have said so on appeal. It did not.” (Opinion, p. 16.) This finding is not supported by the record or Washington law. While it is true that the City did not identify Instruction No. 12 on its notice of appeal, the City did appeal the Court’s finding that the City owed plaintiffs a duty of care.

1) *The City Took Formal Exception to the Substance of Instruction No. 12.*

In *Falk v. Keene Corp.*, 113 Wn.2d 645, 782 P.2d 974 (1989), the Court examined whether a party’s failure to take exception to the giving of a jury instruction precludes an appellate court from reviewing the giving of the instruction. *Id.* at 657-58. There, Falk failed to take exception to a design defect instruction the court gave, but he *did* take exception to the court’s failure to give his proposed instruction. *Id.* at 658. In *Falk*, as here, the instruction in question misstated the law. *Id.* The Washington Supreme Court held, “[i]t was clear that Falk’s position was that his proposed instruction correctly stated the law in terms of strict liability, and that an instruction in the terms of the statute did not. This issue is properly before us.” *Id.*

Similarly, the City took exception to Instruction No. 12. The City formally excepted to it at the conclusion of the hearing for reasons other than its wording. In addition to taking exception to Instruction No. 12, the

City also took exception to the Court's *failure to give* the City's proposed Instruction No. 18 (CP 1981) and its proposed special relationship exception instruction (CP 2070). (RP 12/20/2010 at pp. 79-80.) The City also took exception to the trial court's failure to use the City's proposed special verdict form (CP 2066-69), which set forth the duty elements of the exceptions to the public duty doctrine.

The City also made its objection to a general duty of care instruction known to the trial court in its trial brief. During that hearing, Judge Darvas and plaintiffs' counsel each acknowledged that the City excepted to the Court giving an instruction that sets forth any general duty of ordinary care. Consistent with *Falk*, the City properly put the trial court on notice of its objection to Instruction No. 12. Given the City's numerous exceptions and objections to the trial court's decision to give an instruction that set forth a general duty of care, this Court erred by holding that Instruction No. 12 is the law of the case.

2) ***Leaving The Formal Exceptions Aside, This Court Has Inherent Authority to Address the Issue of Whether the City Owed a Duty to Enforce the Order.***

Moreover, even if this Court were to maintain its position that the City did not sufficiently take exception to Instruction No. 12, that does not necessarily preclude this Court from examining whether the City owed plaintiffs a duty of care in the first instance. Washington courts have long

recognized that an appellate court has inherent authority to consider issues that were not raised on appeal, or even at trial, if necessary for a proper decision. *Falk*, 113 Wn.2d at 659; *see also Postema v. Postema Enters., Inc.*, 118 Wn. App. 185, 195, 72 P.3d 1122 (2003); RAP 1.2(c) (the appellate court may waive or alter the provisions of appellate rules in order to serve the ends of justice). In *Tonkovich v. Dept. of Labor & Indus.*, 31 Wn.2d 220, 195 P.2d 638 (1948), the Washington Supreme Court made clear that the rule that unchallenged instructions become the law of the case “does *not apply* if the record or evidence conclusively shows that the party in whose favor the verdict is rendered is not entitled to recover.” *Id.* at 225 (emphasis added). “No man should be allowed to recover in any case unless there is evidence to support his contention.” *Id.*

Tonkovich and *Falk* are controlling authority and stand in contrast to this Court’s ruling that Instruction No. 12, which is clearly an erroneous statement of the law in light of the public duty doctrine, is the law of the case. This Court has authority to address the issue raised in the City’s appellate brief: whether it owed plaintiffs any duty of care under one of the exceptions to the public duty doctrine.

Because the City took exception to Instruction No. 12 and took exception to the trial court’s failure to give its proposed instructions on duty, Instruction No. 12 is not the law of the case. This Court has the

inherent authority to decide the issue of whether the City owed plaintiffs any duty of care. The Court should reconsider its ruling that Instruction No. 12 is the law of the case.

B. Washington Law Does Not Require the City to Renew its CR 50(a) Motion or File a CR 50(b) Motion in Order to Preserve the Denial of the CR 50(a) Motion for Appeal.

The City also respectfully requests that this Court reconsider its ruling that the City's failure to renew its CR 50(a) motion at the close of evidence and failure to file a CR 50(b) motion post-verdict precludes appellate review of the denial of the City's CR 50(a) motion.

1) *Washington Law Does Not Mirror Federal Law.*

Beginning with the 1915 Washington Supreme Court case *Kieburtz v. Seattle*, 84 Wn. 196, 146 P. 400 (1915), Washington courts have reiterated the general rule that if a judgment notwithstanding the verdict may be entered at all by a trial court, "no substantial reason exists why it should be preceded by a preliminary challenge." *Id.* at 213.

In many if not in a minority of instances, it is the better practice for the trial court to take the verdict of the jury before sustaining a motion for nonsuit or challenge to the sufficiency of the evidence, as in such instances a new trial may be avoided, ***should the appellate court on appeal disagree with the trial court*** as to the effect of the evidence. It is our opinion, therefore, that a party is not precluded from seasonably interposing a motion for a judgment

notwithstanding the verdict by suffering the case to go to the jury on the facts without interposing a motion for nonsuit, a motion for a directed verdict, or a challenge to the sufficiency of the evidence.

Kiebertz, 84 Wn. at 213 (emphasis added).

The rule of law established in *Kiebertz* was quoted with approval in *Tonkovich*, 31 Wn.2d at 223-224, as well as *Barker v. Waltz*, 40 Wn.2d 866, 867-68, 246 P.2d 846 (1952). In *Barker*, the plaintiff obtained a verdict against defendants for malicious prosecution. *Id.* at 867. After the verdict, the court granted defendants' motion for judgment notwithstanding the verdict. *Id.* The plaintiff appealed, arguing that defendants waived their right to bring such a post-verdict motion, because they did not move for a directed verdict or dismissal of the action at the close of plaintiff's case. *Id.* Relying on *Kiebertz*, the *Barker* court rejected plaintiff's argument and held that the defendants had a right to make a motion for judgment notwithstanding the verdict. *Id.* at 868.

Kiebertz, *Tonkovich* and *Barker* are still good law, and therefore controlling authority in the state of Washington. This Court's ruling that the City's failure to renew its CR 50(a) motion before the trial court submitted the case to the jury or to bring a CR 50(b) motion for judgment notwithstanding the verdict precludes appellate review runs afoul of this well-settled law.

2) ***Federal Law Required a CR 50(b) Motion Decades Before Unitherm Was Decided, and Has Therefore Been in Longstanding Conflict With Washington Law.***

The Court's assertion that the *Unitherm* case implemented the federal rule that a party must move for a directed verdict and then follow it with a motion for judgment notwithstanding the verdict in order to preserve an issue for appeal is also incorrect. Federal courts have enforced that requirement long before the Supreme Court decided *Unitherm*. See, e.g., *Velazquez v. Figueroa-Gomez*, 996 F.2d 425, 426-27 (1st Cir. 1993) (to challenge sufficiency of evidence on appeal, a party must move for a directed verdict at the close of all the evidence and follow it by a motion for judgment notwithstanding the verdict); *Wellborn v. Sears, Roebuck & Co.*, 970 F.2d 1420, 1424 (5th Cir. 1992) (appellate court foreclosed from reviewing sufficiency of evidence because defendant failed to move for directed verdict). These cases demonstrate that federal law has long been in conflict with Washington law with respect to this issue. While the *Unitherm* court settled the issue under Fed. R. Civ. P. 50(b), its ruling was not new. Indeed, as the *Unitherm* Court noted, as far back as 1947, the U.S. Supreme Court upheld the rule that an "appellate court [is] without power to direct the District Court to enter judgment contrary to the one it had permitted to stand." *Unitherm Food*

Sys., 546 U.S. at 400-401, quoting *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 218, 67 S. Ct. 752 (1947).

This Court has similarly concluded that a party's failure to file a Rule 50(b) motion deprives the appellate court of the power to order the entry of judgment in favor of that party where the district court directed the jury's verdict, *Globe Liquor Co. v. San Roman*, 332 U.S. 571, 68 S. Ct. 246, 92 L. Ed. 177 (1948), and where the district court expressly reserved a party's preverdict motion for a directed verdict and then denied that motion after the verdict was returned. *Johnson v. New York, N. H. & H. R. Co.*, 344 U.S. 48, 73 S. Ct. 125, 97 L. Ed. 77 (1952).

Unitherm Food Sys., 546 U.S. at 401.

Kieburz, *Tonkovich* and *Barker* have stood in contrast to U.S. Supreme Court precedent for decades. The *Unitherm* decision observed the historical rule and reiterated it. Similarly, the 2005 amendment to CR 50(b), which contains permissive, not mandatory language, does not, on its face, require a post-trial motion. CR 50(b) states that a movant *may* renew its request for judgment as a matter of law by filing a motion. It does not state that a movant "must" file such a motion. In addition to the language of the rule, to ignore the distinction of the *Unitherm* holding and the history of Washington cases that do not require a post-trial motion is fundamentally unfair.

Amended CR 50 did not create new law such that it had the effect of putting Washington litigants on notice that a new procedural requirement had taken effect. Further, prior to this Court's decision, no Washington court had ever adopted the federal rule. The amendment to CR 50(b) did not change Washington law, which does *not* require that an appellant must preserve an issue by renewing a CR 50(a) motion at the close of evidence and then moving for judgment notwithstanding the verdict post-trial. Indeed, a plain reading of the rule only suggests that a movant is permitted to bring a post-verdict motion. This Court's ruling is not in line with Washington Supreme Court precedent and retroactively punishes the City for an interpretation of CR 50 that has never before been implemented, let alone articulated, by a Washington court. To retrospectively apply a new rule that contravenes well-settled Washington law works a substantial injustice on the City.

3) *The Unitherm Holding Only Applies to Appeals Based on Insufficiency of the Evidence, Which is Not the Basis for This Appeal.*

Furthermore, the Rule 50(b) requirement of *Unitherm* only pertains to an appeal based upon sufficiency of the evidence, not all appeals in general. *See, Nitco Holding Corp. v. Boujikian*, 491 F.3d 1086, 1089 (9th Cir. 2007) ("In *Unitherm*, the Supreme Court held that a post-verdict motion under Rule 50(b) is an absolute prerequisite to any appeal based on

insufficiency of the evidence.”); *Metcalf v. Bochco*, 200 Fed. Appx. 635, 637 (9th Cir. 2006) (“*Unitherm*, however, deals with the specific situation of a party’s failure to renew, post-verdict, a Rule 50 motion challenging the sufficiency of the evidence in a civil jury trial.”) Here, as in *Metcalf*, the City is not challenging the sufficiency of the evidence.

The limited applicability of the *Unitherm* rule was observed in *Van Alstyne v. Elec. Scriptorium, Ltd.*, 560 F.3d 199 (4th Cir. 2009), where the Fourth Circuit rejected the argument that the appellant had failed to preserve an issue for appeal because they did not file a Rule 50(b) motion. *Id.* at 203-204. In that case, the appellants challenged the trial court’s ruling that the plaintiff was able to recover statutory damages without a showing that the plaintiff suffered actual damages. *Id.* at 203. The trial court denied appellants’ summary judgment motion and CR 50(a) motion and allowed the jury to award statutory damages. *Id.* The Fourth Circuit held that the appellants properly preserved the issue for appeal by filing a motion for summary judgment and then filing a Rule 50(a) motion for judgment as a matter of law. *Id.* at 204. A Rule 50(b) motion was not necessary in order to preserve the issue. *Id.* In so holding, the court cited to the following treatise:

If there have been errors at the trial, duly objected to, dealing with matters other than the sufficiency of the evidence, they may be

raised on appeal from the judgment even though there has not been either a renewed motion for judgment as a matter of law or a motion for a new trial

Van Alstyne, 560 F.3d at 204 (quoting 9A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2540 (2d ed. 1995)). The *Van Alstyne* court then addressed *Unitherm's* impact on its decision and properly held,

Unitherm is not applicable to this case, in which Leonard and ESL are not challenging the sufficiency of the evidence supporting the jury's verdict. *Fuesting*, 448 F.3d at 941 (noting "without an explicit declaration from the Supreme Court, we will not strain to read [*Unitherm*] as overturning a right of appellate review that is stated in the Federal Rules of Evidence, manifested in the precedents of numerous court of appeals decisions, and observed in the leading treatises").

Van Alstyne, 560 F.3d at 204 (emphasis added).

The basis for the City's CR 50(a) motion was not one of sufficiency of the evidence, but rather one of duty. Even if this Court looks to Fed. R. Civ. P. 50 for guidance, it misapplied it in this case. As in *Van Alstyne*, the City was not required to renew its CR 50(a) motion for judgment as a matter of law at the close of evidence and then move for judgment notwithstanding the verdict under CR 50(b). The issue the City

raised at summary judgment and at the close of plaintiffs' evidence was one of legal duty, not sufficiency of the evidence.

Judge Darvas repeatedly articulated that her view of the case was one in which the City had a duty to enforce the temporary antiharassment order. She wrote, "it is axiomatic that police have a duty to enforce court orders." (CP 23.) She then framed the issue for trial, as she saw it: "What Officer Hensing should have done to enforce the court order, and whether his failure to take any step to enforce the court order was a proximate cause of Roznowski's death, are issues that the trier of fact will need to decide based on the evidence that will be presented at trial." (CP 25.) The evidence at trial was no different than the evidence at summary judgment. There was never any dispute about the existence of the order or Officer Hensing's actions of serving the order and then leaving the scene. The issue throughout was whether Officer Hensing, as the City's agent, had a legal duty to take enforcement action with respect to this order. That is why the act of giving a general duty of ordinary care instruction (Instruction No. 12), to which the City took exception, was erroneous because no such duty exists. Rather, a duty of care only exists if framed in terms of the failure to enforce exception to the public duty doctrine as set forth in the City's proposed instruction (CP 1981), the City having also taken exception to the trial court's failure to give this. The City does not

appeal based on a theory that there was insufficient evidence to show a breach of duty; the City appeals based on Judge Darvas' errant holding that a duty to enforce a temporary anti-harassment order can be derived from the failure to enforce exception to the public duty doctrine.

Counsel for the City made it explicitly clear at the outset of oral argument that the City's CR 50(a) "is focused on the issue of duty." (RP 12/15/10, p. 2, ll. 10-12.) The City asked the trial court "to step back and look again at the elements of the failure to enforce exception." (*Id.*, p. 2, ll. 20-25.) Plaintiffs' counsel even acknowledged the fact that the evidence at summary judgment was virtually the same as the evidence at trial for purposes of analyzing the duty issue. "Nothing whatsoever has changed since summary judgment with regard to at least two of the three exceptions to the public duty doctrine..." (*Id.*, p. 14, ll. 20-22.) Judge Darvas also acknowledged that fact, stating, "[b]ut given where we are and given that I don't think anything has specifically changed...[a]nd at the original motion for summary judgment, I don't think anything has really changed since then with respect to the failure to enforce argument." (*Id.*, p. 20, ll. 6-17.)

The City appeals the trial court's erroneous decision holding that a temporary antiharassment order is the functional equivalent of a statutory mandate to take corrective action. At the CR 50(a) hearing, Judge Darvas

articulated her flawed interpretation of the law upon which the City bases its appeal:

I am not saying that he [Officer Hensing] is liable, what I was saying was the plaintiff should be allowed to present that case to the jury because the development of the law under the public duty doctrine has never specifically stated that a mandatory statutory duty to act cannot be created by a court order.

(RP 12/15/10, p. 20, l. 25 – p. 21, l. 6.)

Judge Darvas fabricated this holding from thin air. It is not found in any Washington case law or statute. It is a judicial construction by the trial court that lacks any legal support. Judge Darvas acknowledged that fact, and justified her decision to allow the case to go forward because there was, in her view, no case that specifically told her she could not. The City appeals that decision. It does not appeal whether there was sufficient evidence to show that Officer Hensing did, in fact, “enforce” the temporary anti-harassment order. The facts in that regard never changed from summary judgment through trial, and certainly never changed from the close of plaintiff’s case until the close of the evidence presented in the City’s case.

The City’s appeal turns solely on an issue of law: whether a temporary anti-harassment order is the functional equivalent of a statutory

mandate to take corrective action. The trial court acknowledged that the answer to that question is, “nothing that the jury would be deciding, *whether there was a statutory duty*, and what any statutory duty mandated is a question of law wouldn’t be appropriate for the jury to be asked to decide that.” (RP 12/15/10, p. 23, ll. 17-21) (emphasis added). As such, this Court has jurisdiction to review the issue. This appeal is not one based on a sufficiency of the evidence. It is based on the existence of a statutory duty. Therefore, the *Unitherm* CR 50(b) rule is not invoked.

Furthermore, as set forth in the City’s reply brief, this Court can review this issue, because it is a substantive issue of law. Under *Univ. Village Partners v. King County*, 106 Wn. App. 321, 324, 23 P.3d 1090 (2001), this Court can review this issue, which turns solely on a substantive issue of law. In that case, the Court of Appeals agreed to review the denial of a motion for summary judgment after a verdict at bench trial. *Id.* As in this case, there was evidence presented at trial, and the evidence was the same as the evidence at summary judgment. *Id.* at 323-324. Therefore, the court had the ability to review the denial of summary judgment, despite the fact that the case went to trial. *Id.* See also, *Bulman v. Safeway, Inc.*, 96 Wn. App. 194, 197-98, 978 P.2d 568 (2000), *reversed on other grounds*, 144 Wn.2d 335, 27 P.3d 1171 (2001)

(summary judgment denied on a substantive legal issue can be reviewed on appeal).

In the interest of justice, this Court should examine the core issue on the City's appeal and decide whether the trial court erroneously allowed this case to go to the jury absent a showing that any of the exceptions to the public duty doctrine had been met.

V. CONCLUSION

The City took exception to Instruction No. 12. The City formally excepted to it on the record, and also took exception to the trial court's failure to give its proposed duty instructions and its special verdict form posing questions consistent with the required elements of proof for the failure to enforce exception to the public duty doctrine. Therefore, the instruction stating that the City owed a duty to use ordinary care in the service and enforcement of court orders is not the law of the case. The City properly preserved the issue of whether the trial court's interpretation of the failure to enforce exception is reversible error.

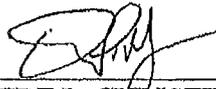
Because Instruction No. 12 is not the law of the case, the City's appeal is not one based upon insufficient evidence. Rather, the City's appeal is based upon the trial court's erroneous act of permitting this case to proceed to a jury verdict, even though none of the exceptions to the public duty doctrine applied. The City appeals the trial court's holding

that a court order – in this case an ex-parte temporary anti-harassment protection order – is the equivalent of a statutory mandate to take corrective action for purposes of meeting the failure to enforce exception. Whether that decision was plain error is an issue of law that this Court should decide. Because the appeal is based upon this error of law, the City's decision not to file a CR 50(b) motion does not preclude appellate review. This Court should reconsider its March 26, 2012 decision.

Respectfully submitted this 13th day of April, 2012.

CHRISTIE LAW GROUP, PLLC

By



ROBERT L. CHRISTIE, WSBA #10895
THOMAS P. MILLER, WSBA #34473
Attorneys for Appellant City of Federal
Way

2100 Westlake Avenue N., Suite 206
Seattle, WA 98109
Telephone: (206) 957-9669
Facsimile: (206) 352-7875

NO. 66534-1-I

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,

Plaintiffs/Respondents,

v.

CITY OF FEDERAL WAY,
a Washington municipal corporation,

Defendant/Appellant.

APPELLANT'S STATEMENT OF ADDITIONAL AUTHORITY IN
SUPPORT OF MOTION FOR RECONSIDERATION

Robert L. Christie, WSBA #10895
Thomas P. Miller, WSBA #34473
CHRISTIE LAW GROUP, PLLC
Attorneys for Appellant

2100 Westlake Avenue N., Suite 206
Seattle, W A 98109
Ph: (206) 957-9669

Pursuant to RAP 10.8, Appellant City of Federal Way submits the following Additional Authorities.

A. With respect to the issue, addressed in Part A of the Motion for Reconsideration, of whether the City adequately apprised the trial court of the basis for its exception to the giving of Instruction No. 12:

1. *Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 63, 882 P.2d 703 (1994).

2. *Washington Appellate Practice Deskbook*, Vol. I (2005 and rev. 2011), § 17.7(2)(a)(i), at p. 17-44 (first full paragraph, ending with citation to *Queen City Farms*).

B. With respect to the issue, also addressed in Part A of the Motion for Reconsideration, of whether Instruction No. 12 is the law of the case:

1. *Rhoades v. DeRosier*, 14 Wn. App. 946, 948 n.2, 546 P.2d 930 (1976).

2. *Kim v. Dean*, 133 Wn. App. 338, 349, 135 P.3d 978 (2006).

3. *Washington Appellate Practice Deskbook*, Vol. I (2005 and rev. 2011), § 17.7(2)(f), at pp. 17-50 – 17-51.

RESPECTFULLY SUBMITTED this 10th day of May, 2012.

CHRISTIE LAW GROUP, PLLC

By 
Robert L. Christie, WSBA #10895
Thomas P. Miller, WSBA #34473

Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 14th day of May, 2012, I caused a true and correct copy of the foregoing document, "Appellant's Statement of Additional Authority," to be delivered in the manner indicated below to the following counsel of record:

Counsel for Respondents:

John R. Connelly, Jr., WSBA #12183
CONNELLY LAW OFFICES
2301 North 30th Street
Tacoma, WA 98403
Ph: (253) 593-5100
Fx: (253) 593-0380
Email: jconnelly@connelly-law.com

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

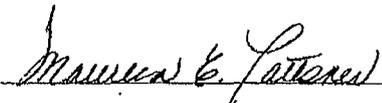
Counsel for Respondents:

Philip A. Talmadge, WSBA #6973
TALMADGE / FITZPATRICK
18010 Southcenter Parkway
Tukwila, WA 98188
Ph: (206) 574-6661
Fx: (206) 575-1397
Email: phi@talmadgelg.com

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

DATED this 14th day of May, 2012, at Seattle, Washington.



IN THE COURT OF APPEALS 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 corporation,

Appellant.

No. 66534-1-I

ORDER DENYING MOTION FOR RECONSIDERATION, WITHDRAWING OPINION AND SUBSTITUTING OPINION

FILED COURT OF APPEALS DIV I STATE OF WASHINGTON JUL 23 AM 10:11

Appellant, City of Federal Way, moved for reconsideration of this court's decision filed on March 26, 2012. We considered Appellant City of Federal Way's Motion for Reconsideration, the Washington Defense Trial Lawyers' Amicus Curiae Memorandum, Respondent's Response to City's Motion for Reconsideration, and Appellant's Statement of Additional Authority in Support of Motion for Reconsideration. The court has determined that the opinion filed on March 26, 2012, shall be withdrawn and a substitute published opinion be filed. Now, therefore, it is hereby

ORDERED that the opinion filed in the court on March 26, 2012, shall be withdrawn and a substitute published opinion shall be filed. It is further

ORDERED that Appellant City of Federal Way's Motion for Reconsideration is denied.

Dated this 23rd day of July 2012.

Cox, J.

Jan, J.

Becker, J.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 22nd day of August, 2012, I caused a true and correct copy of the "Appendix to Petition for Review," to be delivered in the manner indicated below to the following counsel of record:

Counsel for Petitioner City of Federal Way:

Robert L. Christie, WSBA #10895
Thomas P. Miller, WSBA #34473
CHRISTIE LAW GROUP, PLLC
2100 Westlake Ave N Ste 206
Seattle WA 98109-5802
Ph: (206) 957-9669
Email: bob@christielawgroup.com
tom@christielawgroup.com

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

Counsel for Respondents Loh, Roznowski
and Washburn:

Nathan P. Roberts, WSBA #40457
John R. Connelly, Jr., WSBA #12183
CONNELLY LAW OFFICES
2301 N 30th St
Tacoma WA 98403-3322
Ph: (253) 593-5100
Email: nroberts@connelly-law.com
jconnelly@connelly-law.com

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

Counsel for Respondent Washburn:

Philip A. Talmadge, WSBA #06973
TALMADGE/FITZPATRICK
18010 Southcenter Pkwy
Tukwila WA 98188-4630
Ph: (206) 574-6661
Email: phil@tal-fitzlaw.com

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

Counsel for Amicus Curiae Legal Voice:

David J. Ward, WSBA #28707

LEGAL VOICE

907 Pine St Ste 500

Seattle WA 98101-1818

Ph: (206) 682-9552 Ext. 112

Email: dward@LegalVoice.org

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

Counsel for Amicus Curiae WDTL:

Michael B. King, WSBA #14405

CARNEY BADLEY SPELLMAN PS

701 5th Ave Ste 3600

Seattle WA 98104-7010

Ph: (206) 622-8020 Ext. 142

Email: king@carneylaw.com

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

Counsel for Amicus Curiae WDTL:

Stewart A. Estes, WSBA # 15535

KEATING, BUCKLIN & MCCORMACK,
INC., P.S.

800 Fifth Ave Ste 4141

Seattle WA 98104-3175

Ph: (206) 623-8861

Email: sestes@kbmlawyers.com

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

Counsel for Amicus Curiae WDTL:

Christopher W. Nicoll, WSBA # 20771

NICOLL BLACK AND FEIG PLLC

1325 4th Ave Ste 1650

Seattle WA 98101-2573

Ph: (206) 838-7546

Email: cnicoll@nicollblack.com

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

Counsel for Amicus Curiae WWA:

Alison M. Romano Bettles, WSBA # 39215

NORDSTROM INC.

PO Box 21865

Seattle WA 98111-3865

Ph: (206) 454-6777

Email: alison.bettles@nordstrom.com

SENT VIA:

- Fax
- ABC Legal Services
- Express Mail
- Regular U.S. Mail
- E-file / E-mail

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

Carrie A. Custer

Carrie A. Custer, Legal Assistant