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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

Case 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.

REPLY BRIEF OF APPELLANT CITY OF FEDERAL WAY

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I. REPLY IN SUPPORT OF APPELLANT'S OPENING BRIEF

In order to establish a prima facie case of negligence, plaintiffs must show that the City of Federal Way owed Ms. Roznowski some actionable duty of care. The trial court considered this threshold legal issue and erroneously found that at least one exception to the public duty doctrine applied in this case. In response to the City's appeal, plaintiffs first question the validity of the City's appeal, then assert a number of tenuous theories in an attempt to establish this requisite duty – something they cannot do. The City did not owe plaintiffs any legal duty of care and their claims are barred by the public duty doctrine.

A. Statement of the Case.

Plaintiffs' Statement of the Case is flawed in many ways. It is most flawed in one fundamental respect: it focuses on the facts known to plaintiffs now, with the benefit of 20/20 hindsight, rather than those known to Officer Hensing at the time he served the anti-harassment protection order. Plaintiffs cannot establish a legal duty by imputing knowledge to Officer Hensing that he had no way of knowing at the time he served the order on Mr. Kim, who was then a law-abiding citizen.

Additionally, the only issue on appeal is whether the City owed plaintiffs a legal duty of care to take enforcement action after serving the anti-harassment protection order on Mr. Kim in accordance with RCW

10.14.100. Plaintiffs spend needless time discussing factual contentions relevant only to show breach of duty, i.e., whether Officer Hensing acted reasonably under the circumstances. For example, plaintiffs explain that Mr. Kim incurred a sports injury in Korea that caused him to act and speak slowly; he had a history of violent altercations with his son; he had outbursts of rage; he allegedly controlled Ms. Roznowski's life; he seriously encroached upon her living space; he controlled her finances; and he tried to cut her off from her family. These facts are not material to the issue of duty, and without a legal duty, there is no issue of whether an officer acted reasonably in carrying out that duty. This reply brief returns to the central issue in this appeal: duty.

B. The City of Federal Way's Appeal is Proper.

Plaintiffs make three meritless threshold arguments attacking the validity of appellant's appeal. This Court has authority to review the trial court's ruling on the City's Motion for Summary Judgment and the City's Rule 50(a) Motion.

1. The City Properly Appealed the Trial Court's Rulings Related to Duty.

On August 13, 2010, the trial court denied the City's motion for summary judgment and ruled that the City owed plaintiffs a duty of care to take some enforcement action after serving the anti-harassment order to

affirmatively protect Ms. Roznowski from harm. The City moved for reconsideration, but the trial court denied that motion too, holding that Officer Hensing owed Ms. Roznowski a duty under the “failure to enforce” exception to the public duty doctrine. The City petitioned this Court for discretionary review, and Commissioner Verellen, while recognizing the trial court’s flawed interpretation of the “failure to enforce” exception, denied that motion, questioning the possibility that the “special relationship” exception applied. At the close of plaintiffs’ evidence at trial, the City brought a CR 50(a) motion for judgment as a matter of law. The trial court denied that motion, recognizing that there was no evidence of a special relationship, but continuing its flawed analysis of the failure to enforce exception. After the jury returned its verdict, the trial court entered judgment in favor of plaintiffs.

A party seeking review of a trial court decision must file a notice of appeal with the trial court. RAP 5.1(a); RAP 5.2(a). The notice of appeal must designate the decision or part of decision that the party wants reviewed. RAP 5.3(a). The City met these requirements on January 7, 2011, by filing a notice of appeal designating the following decisions for review: (1) the trial court’s Order Denying Defendant’s Motion for Summary Judgment dated August 13, 2010; (2) the trial court’s Order Denying Defendant’s Motion for Reconsideration of Order Denying

Summary Judgment dated September 8, 2010; (3) the trial court's oral ruling denying defendant's CR 50(a) motion for judgment as a matter of law; and (4) the Judgment on Jury Verdict in favor of Ms. Roznowski's estate. This notice of appeal clearly identified the City's intention to appeal the trial court's rulings on the threshold issue of whether the City owed plaintiffs a legal duty of care.¹

An appellant's brief must include an assignment of errors, which are separate, concise statements of each error the appellant contends the trial court made, together with the issues pertaining to those assignments. RAP 10.3(a)(4). The appellate court will review those errors claimed in the assignments of error *or those errors clearly disclosed in the associated issues pertaining to those errors*. RAP 10.3(g). The City's assignments of error and appellate briefing clearly demonstrate the City's intent to appeal the trial court's rulings on the threshold issue of whether the City owed plaintiffs a legal duty of care.²

¹ Plaintiffs falsely assert that the City did not designate the trial court's jury instructions or the City's objections thereto as part of the record. They can be found at CP 2165 through 2189. The City's objections to the trial court's jury instructions related to negligence and duty of care can be found in the December 20, 2010 Hearing on Jury Instructions transcript, p. 20, l. 4 – p. 22, l. 13 and p. 80, l. 16 – p. 81, l. 7. (See also the City's Supplemental Statement of Arrangements, filed February 22, 2011.)

² That the City did not designate Jury Instruction No. 12, instructing the jury that the City owed plaintiffs a legal duty of care, is immaterial. Because the trial court erred in ruling that the City owed 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,

Plaintiffs' claim that the City failed to preserve any error for review is a procedural red herring intended to distract the Court from the merits of the City's appeal. By plaintiffs' flawed reasoning, failure to assign error to the trial court's jury instruction on legal duty eliminates all other proper assignments of error, rendering the entire appeal moot. Plaintiffs completely ignore the body of case law preventing such an absurd result. *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 592 P.2d 631 (1979)³; *McGovern v. Smith*, 59 Wn. App. 721, 801 P.2d 250 (1990)⁴; *State v. Clark*, 53 Wn. App. 120, 765 P.2d 916 (1988), *review denied*, 112 Wn.2d 1018 (1989)⁵; *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 883 P.2d 1383 (1994)⁶; *Adams v. Jensen-Thomas*, 18 Wn. App. 757, 571 P.2d 958 (1977), *review denied*, 90 Wn.2d 1016 (1978).⁷

Plaintiffs' citations to *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d

the central argument made on summary judgment, on reconsideration, and at the close of plaintiffs' case in chief.

³Where assignment did not make specific reference to challenged finding, but the finding was cited and set out in brief so that there was no uncertainty, Supreme Court would consider merits of the challenge.

⁴Technical error in assigning error to denial of motion for summary judgment rather than a portion of final judgment did not prevent consideration of the merits of the challenge, since the nature of the challenge was perfectly clear.

⁵Failure to properly assign error was not prejudicial to appellate review where the manner in which the claimed errors were set forth and described in headings throughout the brief was adequate to inform the appellate court of what actions were asserted as error.

⁶Assignment of error to court of appeals order incorporated the trial court's interlocutory order and therefore failure to assign error to trial court's order did not waive right to appeal.

⁷Although party made no specific assignments of error in brief, court would consider appeal where it could easily determine the matters upon which she appealed.

907, 917, 32 P.3d 250 (2001) and *Chelan County Deputy Sheriffs' Ass'n v. Chelan County*, 109 Wn.2d 282, 300 n.10, 745 P.2d 1 (1982), are misleading and inapplicable. The *Guijosa* court considered whether a trial court properly entered judgment as a matter of law, when a jury found that the defendant did not discriminate against the plaintiff but did violate the Consumer Protection Act. *Guijosa*, 144 Wn.2d at 907. Neither party challenged the legal basis for the instructions on discrimination or the Consumer Protection Act. In *Chelan County*, a consolidated case, the issue was whether the plaintiffs were entitled to compensation under Washington's Minimum Wage Act for time spent on call. *Chelan County*, 109 Wn.2d at 289. By footnote, the Court acknowledged that one plaintiff did not assign error to a jury instruction related to sleeping time, and therefore it was the law of the case. *Id.* at 300, n.10. However, the plaintiff did not challenge the legal basis for that specific jury instruction, nor was the appeal based upon a legal issue at odds with that instruction.

By contrast, here the City properly assigned error to the trial court's rulings related to the imposition of a legal duty of care. It was not necessary for the City to assign error to jury instruction No. 12.

2. *The Court Has Authority to Review the Trial Court's Denial of Summary Judgment.*

While courts ordinarily do not review an order denying summary

judgment after a trial on the merits, review of a summary judgment denial is appropriate when the parties dispute no issue of fact and the decision turned solely on a substantive issue of law. *Univ. Vill. Partners v. King County*, 106 Wn. App. 321, 324, 23 P.3d 1090 (2001); *McGovern v. Smith*, 59 Wn. App. 721, 734-35, n.3, 801 P.2d 250 (1990).

Plaintiffs asserted one cause of action for negligence. In order to establish negligence, plaintiffs were required to prove that the City owed them a legal duty of care. *Musci v. Graoch Assocs. P'ship #12*, 144 Wn.2d 847, 854, 31 P.3d 684 (2001). The primary determination of whether a duty of care exists is a pure legal issue for the court. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

The material facts at issue in the City's summary judgment motion are undisputed, and the trial court's decision whether any exception to the public duty doctrine applied was (and remains) a pure issue of law. *See Univ. Vill. Partners*, 106 Wn. App. at 324.⁸ This Court's *de novo* review of the trial court's denial of summary judgment is appropriate.

3. *The Court May Consider an Appeal of the Trial Court's Denial of the City's Rule 50(a) Motion, Even Though the City Did Not File a Rule 50(b) Motion.*

The Court has authority to review the trial court's denial of the

⁸ The court held that because the parties in the case agreed as to all material facts and the summary judgment was based on a legal conclusion, it would review the trial court's order.

City's CR 50(a) motion. At the close of plaintiffs' case-in-chief, there was *no* evidence to support any of the exceptions to the public duty doctrine. Therefore, the trial court erred by allowing the case to go forward.

Plaintiffs' contention that the City was required to file a Rule 50(b) motion to preserve its appeal of the trial court's denial of its Rule 50(a) motion is meritless. While the U.S. Supreme Court has ruled that a Fed. R. Civ. P. 50(b) motion must be filed post-verdict to preserve an appeal on a Fed. R. Civ. P. 50(a) motion, no Washington Court has adopted that rule or otherwise required this additional procedural step. *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 126 S. Ct. 980 (2006), is not controlling, and it would be an extremely harsh penalty to now adopt a new procedural rule, never before imposed in Washington State, and deny the City its right to pursue its Rule 50(a) appeal.

Moreover, the Rule 50(a) motion in this case is unique. Instead of addressing the sufficiency of the evidence with respect to a jury issue, it addressed the sufficiency of the evidence with respect to a legal issue: whether the City owed the plaintiffs any duty of care.

The purpose and scope the City's Rule 50(a) motion was the same as the City's summary judgment motion: requesting the Court to rule that the exceptions to the public duty doctrine did not apply under the evidence presented in plaintiffs' case-in-chief. The Rule 50(a) motion provided the

trial court with one last opportunity to correct its flawed analysis – that an ex-parte anti-harassment order containing no directive to law enforcement was the legal equivalent of a mandatory statute directing police action for purposes of the failure to enforce exception (in the face of Judge Verellen’s clear analysis on this point) – and dismiss the case rather than send it to the jury where no legal duty existed. The trial court acknowledged there was no evidence to support the special relationship exception. Indeed, there was no evidence to support any of the exceptions to the public duty doctrine.

A Rule 50(b) motion was not unnecessary, because the issue for appeal is not whether there was sufficient evidence to support the jury’s verdict; it was whether the evidence plaintiffs presented at trial supported a finding that the City owed the plaintiffs a duty of care in the first place – a pure legal issue for the court to decide.

C. The Public Duty Doctrine Controls.

In 1963, and again in 1967, the Washington Legislature enacted legislation decreeing municipal corporations liable for damages arising out of their tortious conduct to the same extent as if they were a private person or corporation. *Evangelical United Brethren Church v. State*, 67 Wn.2d 246, 253, 407 P.2d 440 (1965), citing former RCW 4.92.090; *Bailey v. Forks*, 108 Wn.2d 262, 265, 737 P.2d 1257 (1987); RCW 4.96.010.

Governmental entities are not liable for all official misconduct. The Washington Supreme Court has long recognized the public duty doctrine, requiring an injured plaintiff to show that the government owed him a specific duty of care, as opposed to a duty owed to the public in general.⁹ The purpose of the doctrine is both to help focus attention on whether the governmental agency owed a duty of care to the particular plaintiff and to encourage legislation for the public benefit without the risk of excessive governmental liability. *Bailey*, 108 Wn.2d 267; *Donohoe v. State*, 135 Wn. App. 824, 834, 142 P.3d 654 (2006). “At some point, tort liability ends and governing begins.” *Bailey*, 108 Wn.2d at 265.

In *Bailey v. Forks*, the Washington Supreme Court first articulated the four exceptions to the public duty doctrine, under which a governmental agency acquires a special duty of care owed to a particular plaintiff or to a limited class of potential plaintiffs. *Bailey*, 108 Wn.2d 268. The Washington Supreme Court has continued to develop these four exceptions to the public duty doctrine, but has not otherwise expanded or limited the public duty doctrine.¹⁰

⁹ *Evangelical United Brethren Church*, 67 Wn.2d at 253; *King v. Seattle*, 84 Wn.2d 239, 243, 525 P.2d 228 (1974); *Chambers-Castanes v. King County*, 100 Wn.2d 275, 284, 669 P.2d 451 (1983); *J & B Dev. Co. v. King County*, 100 Wn.2d 299, 303, 669 P.2d 468 (1983).

¹⁰ *See, e.g., Babcock v. Mason County*, 144 Wn.2d 774, 785-86, 30 P.3d 1261 (2001) (there are four exceptions to the public duty doctrine); *Cummins v. Lewis County*, 156 Wn.2d 844, 853-54, (2006) (if one of the four common law exceptions to the public duty doctrine applies, the government will be held to owe a duty to the individual plaintiff).

Plaintiffs attempt to create a new legal framework under which a governmental entity may be liable to a plaintiff for negligence by arguing that the public duty doctrine *only* applies when a plaintiff is claiming that law enforcement officers failed to take some particular action. This purported “affirmative acts” loophole, whether described as a fifth exception to the public duty doctrine or an entirely new avenue to assert governmental liability, has never been recognized by the Washington Supreme Court. Instead, plaintiffs rely upon three unique appellate court decisions to construct an unpersuasive theory of liability as applied to this case: *Coffel v. Clallam County*, 47 Wn. App. 397, 735 P.2d 686 (Div. II 1987); *Parrilla v. King County*, 138 Wn. App. 427, 157 P.3d 879 (Div. I 2007); and *Robb v. City of Seattle*, 159 Wn. App. 133, 245 P.3d 242 (Div. I 2010). The *Robb* case was decided after this trial. Before filing their response brief in this appeal, plaintiffs have never before mentioned *Coffel* or *Parrilla* in any brief – and for obvious reasons. They do not apply.

Plaintiffs’ attempt to circumnavigate the public duty doctrine fails for three primary reasons: (1) the public duty doctrine is controlling authority; (2) the appellate decisions cited by plaintiffs are inapplicable to this case; and (3) this is not an affirmative acts case.

1. *The Public Duty Doctrine is Controlling Authority.*

Bailey v. Forks and its progeny are controlling. Unless one of the

decisions cited by plaintiffs, there is no common law “affirmative acts” doctrine under which an individual plaintiff can sue a governmental entity for negligence.

2. *The Three Appellate Decisions Are Inapplicable.*

The three appellate decisions plaintiffs cite do not compel a finding of duty in this case. They are factually unique and distinguishable.

a. *Coffel Is Inapplicable.*

In *Coffel*, there was a genuine issue of fact whether individual sheriff’s deputies took some kind of affirmative action to prevent the two plaintiffs from stopping third parties from destroying their property. *Coffel*, 47 Wn. App. at 400-01, 403. Finding that the trial court improperly dismissed the plaintiffs’ negligence claims against the deputies on summary judgment, Division II stated: “The [public duty] doctrine provides only that an individual has no cause of action against law enforcement officials for failure to act. Certainly, if the officers do act, they have a duty to act with reasonable care.” *Id.*, at 403.

When a law enforcement officer has *direct* contact with a member of the public, that officer may owe that individual a duty to act reasonably during the course of some specific contact. For example, when an officer handcuffs a suspect, the officer may owe the suspect a duty to use reasonable care in applying those handcuffs. Similarly, in *Coffel*, when the deputies

handcuffs a suspect, the officer may owe the suspect a duty to use reasonable care in applying those handcuffs. Similarly, in *Coffel*, when the deputies allegedly took affirmative action to prevent the plaintiffs from interacting with third parties to protect property damage, the officers should have used reasonable care in taking that affirmative action with respect to the plaintiffs.

These types of situations are directly analogous to those falling under the special relationship exception to the public duty doctrine, because they involve *direct contact or privity* between the law enforcement officer and the injured plaintiff, setting that plaintiff apart from the general public. See *Vergeson v. Kitsap County*, 145 Wn. App. 526, 539, 186 P.3d 1140 (2008). Potential liability in such situations strikes the right balance between holding law enforcement officers accountable for their affirmative actions, while still limiting exposure in a way that will not deter officers from taking any affirmative action at all.

By contrast, Ms. Roznowski did not have *any* direct contact or privity with Officer Hensing. Serving an anti-harassment order upon Mr. Kim does not fulfill this requirement. If so, police would owe every petitioner an indefinite duty of care upon serving every temporary anti-harassment order, and such an onerous, unworkable duty is contrary to the public duty doctrine. For how long would the duty to each petitioner be owed? For how long must the serving officer enforce the anti-harassment

Donaldson court when it rejected the notion that police had a similar duty to investigate. *Donaldson v. City of Seattle*, 65 Wn. App 661, 671-72, 831 P.2d 1098 (1992). A duty of care under *Coffel* can only apply during the contact or privity in question, thus reasonably limiting such a duty in duration and in scope.

The duty of care in *Coffel* is analogous to the duty of care Officer Hensing may have owed Mr. Kim, with whom he had direct contact at the time of service. Arguably, Officer Hensing may have owed Mr. Kim a duty to use reasonable care upon effecting that service, *i.e.*, not to unreasonably cause Mr. Kim harm during their contact. *Coffel* does not support the finding of an actionable duty between Officer Hensing and Ms. Roznowski, with whom he had no direct contact or privity.

b. *Parilla and Robb Are Inapplicable.*

In *Robb*, this Court rejected the City of Seattle's public duty doctrine argument and instead applied the Restatement (Second) of Torts §302B, holding that the City owed the plaintiff a duty of care to prevent the foreseeable criminal conduct of a third person. The factual scenario in *Robb* was extremely unique, given that the officers had an extensive and continuous relationship with the assailant over the course of seven days, and given the exceedingly foreseeable outcome of leaving shotgun shells with a violently imbalanced person when the officers knew he possessed a shotgun.

The same is true for the *Parilla* decision, in which a bus driver walked off a running bus, leaving a bizarrely behaving, deranged passenger still on board with other passengers. These cases employ analysis similar to the state-created danger doctrine under the Fourteenth Amendment. Under this federal theory, plaintiffs can recover when a state actor takes affirmative steps that place that plaintiff in peril and is deliberately indifferent to plaintiff's safety. See *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989).

To the extent that the *Robb* court intended to identify a means separate from the public duty doctrine under which a plaintiff can assert a negligence claim against a governmental entity, the *Robb* decision is directly in conflict with the Washington Supreme Court's controlling authority. To the extent *Robb* and *Parilla* are still good law, they are based upon factually specific scenarios not analogous to this case. While plaintiffs may wish to extend the holdings in *Robb* and *Parilla*, to do so here would be to create a new exception to the public duty doctrine that completely swallows the rule.

3. *This is Not an "Affirmative Acts" Case.*

By plaintiffs' own allegations, this is not an affirmative acts case.

The first paragraph of plaintiffs' Complaint states:

This is a claim for wrongful death brought by the estate and daughters of Baerbel K. Roznowski ..., due to the *failure* of City of Federal Way (COFW) police officers to properly serve and enforce a domestic

violence protective order on ... Paul Kim;
for *failing* to take action to protect Ms.
Roznowski from the known dangerous
propensities of this violent individual ...;
and for *failing* to follow proper police
practices standards and protocols to ensure
that Kim was removed from her home ...

CP 798-799 (emphasis added). The Complaint goes on to allege that the City negligently *failed* to train its officers on proper service and enforcement of protection orders, and that Officer Hensing *failed* to coordinate service of the order, *failed* to adequately explain the order, *failed* to use an interpreter, *failed to take any action* or offer assistance upon seeing Ms. Roznowski, *failed* to ensure that Mr. Kim depart the residence, and *failed* to otherwise act appropriately to prevent Ms. Roznowski's death. CP 807-08. In other words, plaintiffs allege the City failed to act to prevent Ms. Roznowski's death. By plaintiff's own theory, this is *not* an affirmative acts case. Plaintiffs cannot have it both ways.

Jury Instruction No. 5, proposed by plaintiffs, also described their negligence claim in terms of Officer Hensing's failures to act:

The plaintiffs claim that the defendant was negligent in one or more of the following respects:

- (1) *failing* to properly train its police officers;
- (2) *failing* to have and follow adequate policies and procedures for the enforcement of civil anti-harassment protection orders under the circumstances present in this case;
- (3) *failing* to enforce the anti-harassment protection order after serving it on Paul Kim; and

- (4) *failing* to take other reasonable steps to protect Ms. Roznowski.

CP 2172 (emphasis added). Plaintiffs have not identified any affirmative act that Officer Hensing *did* take that allegedly was negligent. No amount of verbal gymnastics can convert a “failure to act” (failure to enforce) into an affirmative act establishing privity with Ms. Roznowski.¹¹

Furthermore, the public duty doctrine does not draw a distinction between affirmative act and failure to act cases. Nor should it. Many traditional failure to act/failure to enforce claims can be traced back to some initial affirmative action on the part of a law enforcement officer.¹² And certainly many negligence claims can be described either in terms of what a law enforcement officer should have done (failure to act) or should not have done (affirmative act) in a situation. They are two sides of the very same coin, and courts cannot be expected to draw a bright line between the two. This is not an “affirmative acts” case, and *Robb* and *Parilla* do not apply.

¹¹ Plaintiffs disingenuously contend that this is an “affirmative act” case because Officer Hensing affirmatively undertook to serve Mr. Kim with the anti-harassment protection order. All of plaintiffs’ allegations center on their contention, with the clarity of perfect hindsight, that Officer Hensing could have done more – he could have prevented Ms. Roznowski’s death by taking some affirmative action. This argument necessarily concedes that their theory of liability rests on Officer Hensing’s “failure to act.”

¹² *Bailey* demonstrates just this point. The officer there stopped the intoxicated driver – an affirmative act. The claim was that he failed to act – failed to enforce the mandatory statutory directive to take the intoxicated person into custody.

D. The Public Duty Doctrine Bars Plaintiffs' Claims.

The public duty doctrine is controlling law in Washington, and plaintiffs are unable to establish that any of the four exceptions apply.¹³

1. The Failure to Enforce Exception Does Not Apply.

Plaintiffs acknowledge that the failure to enforce exception to the public duty doctrine does not apply, unless Officer Hensing failed to take corrective action *despite a statutory duty to do so*. Brief of Respondents, p. 27-28, *citing Bailey*, 108 Wn.2d at 268. However, plaintiffs cannot point to any statute requiring Officer Hensing to do anything more than he did. The reason is simple: there is no such statute.

Failing that, plaintiffs offer two unpersuasive arguments. The first is that a temporary anti-harassment protection order issued under RCW 10.14 is a type of domestic violence protection order issued under RCW 10.99, and therefore the statutory requirements found in RCW 10.99 must apply to officers serving those anti-harassment orders. There is absolutely no authority to support this argument, and the testimony of plaintiffs' "experts" is immaterial to this issue of law. Indeed, RCW 10.14.103 explicitly states that orders issued under RCW 10.14 shall *not* be issued for any action specifically covered by RCW 10.99. Plaintiffs invent the emotional characterization that an anti-harassment protection order is

¹³ Plaintiffs concede that the rescue exception does not apply in this case.

“second class;” they seek to ignore that, by clear and explicit statutory language, such protection orders are distinct with a separate set of applicable legal obligations.

In plaintiffs’ second argument, they ask the Court to abandon the statutory duty requirement, and find instead that a court order is sufficient for the failure to enforce exception to apply. In other words, they ask this Court to abandon the twenty-plus years of controlling legal authority that requires a statutory mandate, and instead follow the trial court’s whole-cloth ruling. The only opinion addressing this argument reached the opposite conclusion. *See Vergeson v. Kitsap County*, 145 Wn. App. 526, 541-42 186 P.3d 1140 (2008) (a court order directing a respondent to act is not the same as a statute directing an officer to act). Plaintiffs take this one step further, asking the Court to find a *legal duty* for officers to read every anti-harassment order and the accompanying information sheet. There is absolutely *no* statutory authority requiring Officer Hensing to do so. Accordingly, there is no actionable duty to that effect. It is undisputed that Officer Hensing had no statutory directive to take corrective action. Therefore, the failure to enforce exception does not apply.

2. *The Legislative Intent Exception Does Not Apply.*

The legislative intent of RCW 10.14 is not analogous to the one in

Halvorson v. Dahl, 89 Wn.2d 673, 574 P.2d 1190 (1978).¹⁴ As plaintiffs note, the legislative intent exception provides a remedy in tort when a government actor violates a statute designed to protect a circumscribed class of persons. *Donaldson*, 65 Wn. App. at 667-68. Here, Officer Hensing served Mr. Kim with the order in accordance with RCW 10.14.100 and documented that service, thus fulfilling all obligations under RCW 10.14.

Recognizing that Officer Hensing satisfied all statutory requirements under chapter 10.14 RCW, plaintiffs desperately attempt to satisfy the legislative intent exception by citing to the intent behind criminal domestic violence statutes. Plaintiffs append numerous legislative materials that pertain to chapter 10.99 RCW, which have no applicability here. When enacting RCW 10.14.130, the Legislature did not mandate enforcement of anti-harassment protection orders the way it mandated specific government action in response to situations involving domestic violence under RCW 10.99.¹⁵ Again, plaintiffs are trying to bootstrap the statutory language of RCW 10.99 onto the statutory language of RCW 10.14, because chapter 10.14 RCW alone is insufficient to satisfy the requirements of the legislative intent exception.

¹⁴ The legislative intent behind enacting the housing codes was to specifically provide “effective means for enforcement” of minimum standards. *Id.*, at 677.

¹⁵ Even plaintiffs acknowledge that “[t]he duty owed by the government is circumscribed by the specific language of the statutes at issue.” Brief of Respondent, p. 34.

3. ***The Special Relationship Exception Does Not Apply.***

Plaintiffs' citation to *Beal for Martinez v. City of Seattle*, 134 Wn.2d 769, 785, 954 P.2d 237 (1998), is intentionally incomplete. The *Beal* opinion clearly states that a special relationship arises when: "(1) there is direct contact or privity between the public official and the injured plaintiff which sets the latter apart from the general public, and (2) there are **express** assurances given by a public official, which (3) give a rise to justifiable reliance on the part of the plaintiff." *Id.*, citing *Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988). Since *Chambers-Castanes*, our Supreme Court has continually held that a government duty cannot arise from implied assurances. *Honcoop v. State*, 111 Wn.2d 182, 192-93, 759 P.2d 1188 (1988); *Taylor*, 111 Wn.2d at 167 (1988); *Beal*, 134 Wn.2d at 785 (1998); *Babcock*, 144 Wn.2d at 789 (2001). In citing to *Beal*, plaintiffs deliberately omitted the adjective "express" before "assurances," a tactic not to be lost on this Court, and further highlighting the inapplicability of the special relationship exception.

The glaring weakness in plaintiffs' theory rests upon the absence of *any* express assurances. While Ms. Roznowski may have spoken to Officer Parker on April 30, 2008, he did not give Ms. Roznowski any **express** assurances about the nature or scope of police enforcement of anti-harassment protection orders. Similarly, Ms. Sund did not give Ms.

Roznowski any **express** assurances. Plaintiffs' contention otherwise is complete conjecture, which cannot create a genuine issue of material fact. While the trial court may have considered this possibility at summary judgment, despite the lack of evidence to support it, plaintiffs did not even call Ms. Sund to testify at trial.¹⁶

Plaintiffs' invocation of the "take-charge" line of cases is flawed because the Federal Way Police Department never "took charge" of Mr. Kim.¹⁷ This type of special relationship is described in Restatement (Second) of Torts, §315. At the time he was served, Mr. Kim was not under any type of government care or supervision. Further, that Mr. Kim was the subject of a temporary anti-harassment protection order is insufficient to create any type of take-charge relationship.¹⁸ The City had no relationship with Mr. Kim prior to May 3, 2008, much less a "take-charge" relationship as contemplated in *Taggart* and its progeny.

¹⁶ Plaintiffs' assumption that it was Ms. Sund who provided Ms. Roznowski with express assurances is complete speculation unsupported by the evidence. No one but Ms. Roznowski knew where she got the notion that an officer would stand by. What we do know is that such an assurance was not given by anyone at the City of Federal Way. Furthermore, because Ms. Sund did not testify at trial, plaintiffs did not present any evidence upon which a jury could have possibly concluded that Ms. Sund gave Ms. Roznowski express assurances of any kind. Judge Darvas acknowledged this fact.

¹⁷ The Court acknowledged this type of special relationship in *Petersen v. State*, 100 Wn.2d 421, 428, 671 P.2d 230 (1983), and *Taggart v. State*, 118 Wn.2d 195, 217, 822 P.2d 243 (1992), when it held that the State has a duty to take reasonable precautions to protect against reasonably foreseeable dangers posed by the dangerous propensities of state psychiatric patients and parolees, respectively.

¹⁸ If that were true, every governmental agency that has ever served a temporary anti-harassment protection order would owe an indefinite and actionable duty to protect every petitioner from any future harm from the respondent.

E. The Trial Court Abused Its Discretion By Awarding a New Trial on Damages.

Plaintiffs have the burden to prove either that there is no evidence or reasonable inference from the evidence to justify the jury's verdict **or** that the jury's verdict is contrary to law. "When sufficient evidence exists to support the verdict, it is an abuse of discretion to grant a new trial." *Palmer v. Jensen*, 132 Wn.2d 193, 98, 937 P.2d 597 (1997).

There are two primary explanations why the jury did not award Ms. Loh or Ms. Washburn any monetary damages: (1) the jury did not find that the City proximately caused their damages; or (2) the jury did find that the City proximately caused their damages, but then failed to distribute a total of \$1.1 million in damages among the plaintiffs, callously refused to award Ms. Washburn or Ms. Loh any monetary award, or otherwise failed to follow the jury instructions. While any of these explanations could be true, because it is possible that the jury did not find that the City proximately caused Ms. Loh's or Ms. Washburn's damages, the trial court abused its discretion in granting a new trial.

A close reading of the Special Verdict Form Question No. 2 explains how the jury could have reached this conclusion. As a preliminary matter, Question No. 2 does not ask the jury whether the City proximately caused Ms. Roznowski's death. Otherwise, Ms. Loh and Ms. Washburn would be

entitled to damages. Instead, Question No. 2 asks whether the City's negligence proximately caused "injury and damage to the plaintiffs." It is possible that the jury found that Officer Hensing's actions caused Ms. Roznowski to suffer damages as a result of the events *preceding* her death, because those experiences were directly related to and caused by Officer Hensing's alleged failure to "do more" when serving the anti-harassment protection order. The jury could consistently have found that Mr. Kim's decision to kill Ms. Roznowski caused Ms. Loh's and Ms. Washburn's damages, all of which flowed from the fact of their mother's death. This distinction is supported by Jury Instruction Nos. 11 and 19, instructing the jury to segregate damages caused by Mr. Kim if his decision to kill Ms. Roznowski was an independent, intervening act defeating proximate cause.

Additionally, Question No. 2 asks the jury whether the City's negligence proximately caused injury and damage to the "plaintiffs" – plural. The verdict form does not offer the jury an opportunity to answer the question of proximate cause independently with respect to each of the three plaintiffs. The City requested such a segregation, but plaintiffs objected and instead insisted on the Special Verdict Form. Therefore, we cannot assume that because the jury answered "yes" to Question No. 2, they necessarily intended to find that the City's alleged negligence proximately caused Ms. Loh's and Ms. Washburn's damages. Certainly, the fact that the jury did not

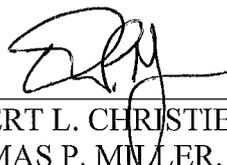
award them any damages evidences their opposite finding: Mr. Kim proximately caused their damages.

II. CONCLUSION

Despite plaintiffs' attempts to create new law, the public duty doctrine controls this case and bars plaintiffs' claims. There is no affirmative act exception to the public duty doctrine, this is not an affirmative acts case, and plaintiffs are unable to establish any exception to the public duty doctrine. The City did not owe plaintiffs any legal duty of care, and the trial court erred in denying the City's motion for summary judgment and Rule 50(a) motion. Accordingly, this Court should reverse the trial court's rulings and grant summary judgment as a matter of law.

Respectfully submitted this 21st day of September, 2011.

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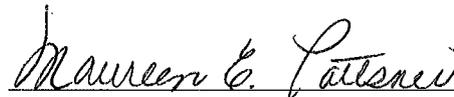
CERTIFICATE OF SERVICE

I hereby certify that on September 21st, 2011, I caused the REPLY BRIEF OF APPELLANT CITY OF FEDERAL WAY to be filed with the Clerk of the Court and delivered to the following in the manner described:

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