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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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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.

2011/03/11  
JL

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**BRIEF OF APPELLANT CITY OF FEDERAL WAY**

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## I. INTRODUCTION

This lawsuit arises out of the murder of Baerbel Roznowski by her long-time, live-in boyfriend, Paul Kim. On the morning of May 3, 2008, Federal Way Police Officer Andrew Hensing personally served Mr. Kim with a temporary anti-harassment protection order issued under RCW 10.14 and procured ex parte by Ms. Roznowski based on a petition that would not have supported a temporary domestic violence protection order issued under RCW 26.50. Officer Hensing told Mr. Kim that he had to comply with the order and leave. The officer then departed the residence, documented the service in accordance with RCW 10.14.100, and delivered proof of service to the department so that the order could be placed in the computer system as served. Shortly thereafter, Mr. Kim complied with the order and left Ms. Roznowski's residence. Mr. Kim returned later that morning and stabbed Ms. Roznowski to death. Federal Way was never notified of Mr. Kim's return to the residence.

Plaintiffs sued the City alleging negligence, contending that Officer Hensing had a legal duty to "enforce" the order by waiting until Mr. Kim left the premises, arresting him if he refused to leave, speaking with Ms. Roznowski to see if she had any concerns, and/or taking some other "enforcement" action. The City moved for summary judgment dismissal

because it did not owe Ms. Roznowski any duty of care under the public duty doctrine beyond, at most, a duty to serve the order and document service in accordance with RCW 10.14.100. King County Superior Court Judge Darvas denied the motion. On September 8, 2010, Judge Darvas denied the City's motion for reconsideration, holding that Officer Hensing had a duty under the "failure to enforce" exception to "enforce the [temporary anti-harassment] order and make sure that Kim left Roznowski's home." (CP 24.)

The City petitioned this Court for discretionary review on the grounds that Judge Darvas committed an obvious error (RAP 2.3 (b)(1)) by applying the "failure to enforce" exception to the facts of this case. On October 22, 2010, Commissioner Verellen issued his Order denying discretionary review. (Appx. B.) In his order, the Commissioner held that the failure to enforce exception to the public duty doctrine does not apply. (Appx. B, pp. 5-7.)

The case proceeded to jury trial on December 6, 2010 under the trial court's errant ruling that the City owed plaintiffs a duty to take enforcement action beyond that directed by chapter 10.14 RCW. Judge Darvas denied the City's CR 50(a) motion to dismiss the case at the close of plaintiffs' evidence, and over the City's objection, instead issued the instruction that "[a] city police department has a duty to exercise ordinary care in the service

and enforcement of court orders.” (CP not yet issued; Instruction No. 12.) The jury found that the City breached the duty of care it owed to Ms. Roznowski and awarded her estate \$1.1 million in general damages. (Appx. A.) The jury did not award any damages to Ms. Roznowski’s daughters, Carola Washburn and Janet Loh, on their loss of consortium claims. (*Id.*) Judge Darvas subsequently granted plaintiffs’ CR 59(a)(7) motion for a new trial on the issue of Ms. Washburn’s and Ms. Loh’s damages.

The City now appeals the denial of its motion for summary judgment and the denial of its CR 50 motion. If this Court gets beyond the issue of duty, the City has separately appealed from Judge Darvas’ order granting a new trial on damages.

## **II. ASSIGNMENTS OF ERROR**

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

2. The trial court erred by granting plaintiffs a new trial under CR 59(a)(7) with respect to the damages awarded to Ms. Loh and Ms. Washburn. The second issue for this Court to decide is whether the trial court abused its discretion by granting plaintiffs' motion for a new trial under CR 59(a)(7) on damages to Ms. Washburn and Ms. Loh (the jury having awarded zero damages to each), where plaintiffs failed to prove that there was no evidence or reasonable inference from the evidence to justify the verdict, or that the verdict was contrary to law.

### III. STATEMENT OF THE CASE

#### A. Facts Regarding Service of the Order and Events of May 3, 2008.

By May 2008, Baerbel Roznowski had been living with her Korean boyfriend, Paul Kim, for several years. (CP 989.) Though he kept a separate residence, Mr. Kim lived with Ms. Roznowski. (CP 881.) Mr. Kim and Ms. Roznowski conversed in English. (CP 83-84; Grayson RP<sup>1</sup>, p. 57, l. 15 – p. 58, l. 12.) Ms. Roznowski did not speak Korean. (Loh RP Vol. II, p. 29, ll. 11-17; Grayson RP, p. 58, ll. 4-12.)

Ms. Roznowski was planning to move to California to be near her daughters, and she was having difficulty dealing with Mr. Kim and getting him out of her house. (CP 988; Loh RP Vol. II, p. 10, l. 19 - p.11, l. 8.)

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<sup>1</sup> Consistent with RAP 10.4(f), the verbatim report of proceedings of trial testimony will be cited using the witness's last name and the abbreviation "RP," plus volume number, if applicable.

Ms. Roznowski's primary problem was that Mr. Kim refused to remove his belongings and a large pile of wood from her house, and was thereby preventing her from fixing her house up to sell it. (CP 887-88; Loh RP Vol. II, p. p. 39, ll. 4-20; Washburn RP, p. 56, l. 11 – p. 57, l. 10.) From Ms. Loh's perspective, Mr. Kim was just dragging his feet. (Loh RP Vol. II, p. 36, ll. 5-19.)

On April 30, 2008, at 3:36 p.m., Federal Way Police Officers Steve Blalock and Scott Parker responded to a reported verbal domestic situation at Ms. Roznowski's residence. (CP 841-42, 845, 958-59.) Ms. Roznowski called 911 after arguing with Mr. Kim over money and house repairs. (CP 842, 849.) When the officers arrived on scene, Ms. Roznowski and Mr. Kim were calm. (*Id.*; CP 959.) There were no signs that either had sustained injury. (*Id.*; *Id.*) Officer Blalock spoke with Mr. Kim, and Officer Parker spoke with Ms. Roznowski. (*Id.*; *Id.*) Neither party expressed fear or apprehension. (*Id.*; *Id.*) The officers each provided the person with whom they spoke a domestic violence information booklet furnished by the Federal Way Police Department. (CP 842, 849.) Federal Way police officers routinely hand out these booklets on domestic disturbance calls. (*Id.*) The booklets contained information about domestic violence protection orders. (*Id.*; CP 852-75.) Officer Blalock also recommended that Mr. Kim take a walk to collect his

thoughts. (CP 842.) Mr. Kim appeared to understand Officer Blalock and communicated with him well. (*Id.*)

Ms. Roznowski complained to Officer Parker that Mr. Kim continued to bring lumber to her house. (CP 959, 1627.) Officer Parker asked her whether Mr. Kim posed any threat to her, and she replied, “No.” (*Id.*) She said she was not worried that anything would happen, she did not feel threatened by Mr. Kim in any way, and she just wanted Mr. Kim to stop bringing lumber to her home because she was getting ready to market it for sale. (*Id.*) Ms. Roznowski did not appear upset. (*Id.*) Instead, she appeared embarrassed and irritated. (*Id.*) Because the incident was initially reported as a “physical domestic” incident, Officer Parker examined Ms. Roznowski closely for signs of physical assault. (*Id.*) Officer Parker did not observe any signs that a physical assault had occurred. (*Id.*)

Neither Officer Blalock nor Officer Parker gave either Mr. Kim or Ms. Roznowski any assurances that they would keep them safe from harm or otherwise protect them. (CP 842-43, 959.) Ms. Roznowski never gave either officer any indication that she was fearful for her safety or felt threatened by Mr. Kim. (*Id.*) After the officers left on April 30, 2008, Ms. Roznowski wrote an email to her daughter, Janet Loh, stating that she called 911 in response to her latest argument with Mr. Kim, and the police

suggested she get a “Domestic Violence Protection Order.” (CP 981, 991.)

On May 1, 2008, Ms. Roznowski met with King County Domestic Violence Victim’s Advocate Lorinda Tsai.<sup>2</sup> (CP 1220; Tsai RP, p. 6, ll. 5-23.) Ms. Roznowski explained to Ms. Tsai that she was having trouble getting Mr. Kim to move out of her house and wanted a protective order against him. (CP 1220-21.) Ms. Tsai explained the different types of orders available to Ms. Roznowski. (CP 1220; Tsai RP, p. 7, l. 16 – p. 8, l. 3.) After explaining that a chapter 26.50 RCW domestic violence protection order required there be some history or threat of physical violence, Ms. Roznowski stated that Mr. Kim had not threatened her in any way and there was no history of physical violence. (CP 1221; Tsai RP, p. 8, l. 14 – p. 9, l. 24.) Ms. Roznowski also relayed that Mr. Kim had not verbally threatened to use violence against her. (CP 1221.) Based upon the information Ms. Roznowski relayed to her about the nature of her problems with Mr. Kim, Ms. Tsai advised Ms. Roznowski that an anti-harassment order would be her next step. (Tsai RP, p. 9, ll. 20-22; CP 1221.)

Ms. Roznowski assessed her legal options and made an informed decision to obtain an anti-harassment protection order. (CP 1221.) She

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<sup>2</sup> Ms. Tsai is not employed by or affiliated with the City of Federal Way. (Tsai RP, p. 3, ll. 2-7.)

completed a form “Petition for an Order for Protection – AH.” (CP 886-89.) Nothing in her petition supported the issuance of a domestic violence protection order. (CP 886-89; Trial Exhibit 2.) She presented her petition ex parte and obtained a “Temporary Protection Order and Notice of Hearing – AH.”<sup>3</sup> (CP 883-84; Loh RP Vol. II, p. 15, l. 22- p. 16, l. 12; Ex. 50, p. 494.) The temporary anti-harassment protection order set a hearing for the matter on May 14, 2008, and restrained Mr. Kim from contacting Ms. Roznowski or entering or being within 500 feet of her residence. (CP 883-84.)

The temporary anti-harassment order did *not* contain any directives to law enforcement to take any enforcement action. (CP 883-84.) Unlike chapter 26.50 RCW domestic violence protection orders, chapter 10.14 RCW orders do not have mandatory vacate provisions that require the respondent to immediately leave the premises.<sup>4</sup> (Trial Ex. 150a.) Similarly, unlike an order issued under chapter 26.50 RCW, the temporary anti-harassment order Ms. Roznowski obtained did not contain any provision requiring law enforcement to assist the petitioner in recovering her residence or belongings or requiring Officer Hensing to stand by after

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<sup>3</sup> King County Commissioner Carlos Vilategui reviewed Ms. Roznowski’s petition. (CP 884.) Had he determined the contents of Ms. Roznowski’s petition warranted a domestic violence protection order, the Commissioner had the discretion and authority to issue one. The presumption is that he would have done so had he believed it was warranted.

<sup>4</sup> In fact, in the list of provisions the court may include in an RCW 10.14 order, a mandatory vacate provision is not included. RCW 10.14.080(6).

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serving it to ensure Mr. Kim complied with the restraint provision. (CP 883-84.)

In her petition, Ms. Roznowski set forth the basis for her requested anti-harassment protection order. (CP 887-88.) She stated that on April 29 and 30, 2008, Mr. Kim verbally attacked her over a pile of wood and other personal items that she had asked him to remove from her house. (*Id.*) Ms. Roznowski told Mr. Kim she could not move until he removed them. (*Id.*) She went on to state: “[Mr. Kim] has violent verbal, insulting outbursts ... Last year his outburst frightened me, I called 911, he came close to hitting me ... 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 me.” (*Id.*)

Despite her reference to verbal outbursts, Ms. Roznowski sent an email to Ms. Loh at 3:19 p.m. on May 1, 2008 (after she obtained the order), in which she confirmed that her relationship with Mr. Kim was not a violent one: “In this case, no children, alcoho. [sic], drugs, violence (thank goodness) so he is ‘restrained’ from coming her [sic], period .....” (CP 995; Loh RP Vol. II, p. 17, ll. 1-25, Ex. 50, p. 496.)

On May 1, 2008, Ms. Roznowski took the petition and temporary protection order to the Federal Way Police Department and gave it to Federal Way Public Information Officer Gretchen Sund to be put in line

for service on Mr. Kim. (CP 997, 1292.)<sup>5</sup> Ms. Roznowski understood that an officer would serve Mr. Kim within the next few days. (CP 997.) She knew that Mr. Kim would be surprised by the order, and that the surprise may cause some commotion. (CP 999.) She also knew that her only recourse for any non-compliance by Mr. Kim was to call 911. (*Id.*) Critically, there is no evidence that any Federal Way employee told Ms. Roznowski the serving officer would remain on the premises while Mr. Kim packed his belongings, escort Mr. Kim off her property, or otherwise ensure that Mr. Kim would not return to her residence after he left that day. The only Federal Way employees with whom Ms. Roznowski had contact in the two weeks before May 3, 2008 were Ms. Sund, Officer Parker and Officer Blalock.

On the morning of Saturday, May 3, 2008, Federal Way Police Officer Andrew Hensing picked up the temporary anti-harassment order for service on Mr. Kim. (CP 877.) Officer Hensing arrived at 2012 SW

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<sup>5</sup> At summary judgment and in their response to defendant's motion for discretionary review, plaintiffs argued that Ms. Roznowski's contact with Ms. Sund potentially created a "special relationship" allegedly based on the possibility that Ms. Sund had made direct promises regarding how the officer would serve the temporary anti-harassment order. The evidence at summary judgment was that Ms. Roznowski told Ms. Sund she wanted the order served and Mr. Kim moved out. (CP 1292.) Ms. Sund cannot recall what she said in response to Ms. Roznowski. (*Id.*) However, Ms. Sund does not give any advice to people who drop their orders off for service. (CP 1633.) There is no evidence to the contrary. Commissioner Verellan, in his order denying defendant's motion for discretionary review, noted the possibility that evidence may be adduced at trial to support this "special relationship" claim. However, plaintiffs, for obvious lack of proof reasons, abandoned that theory at trial and did not call Ms. Sund as a witness.

353 Place in Federal Way at approximately 8:08 a.m. (CP 887-88, 891-92; Hensing RP, p. 6, ll. 2-6.) He had a packet containing a Law Enforcement Information Sheet (“LEIS”) (CP 881) filled out by Ms. Roznowski, the petition (CP 886-89), a temporary order (CP 883-84), and a Return of Service form. (CP 877; Hensing RP, p. 6, l. 22 – p. 8, l. 10; Trial Exhibit 2.) Prior to serving the order on Mr. Kim, Officer Hensing glanced over the LEIS, but did not read it word-for-word. (CP 1303; Hensing RP, p. 13, l. 8-p. 14, l. 7.) Officer Hensing did not read the petition Ms. Roznowski completed prior to serving Mr. Kim. (CP 1308-09.) Officer Hensing glanced through the temporary anti-harassment order before serving it to see if there were any special handwritten provisions from the judge. (Hensing RP, p. 69, l. 21 – p. 70, l. 21.) There were none.

Officer Hensing parked his patrol car in front of Ms. Roznowski’s neighbor’s house, approached the residence and knocked on the door. (CP 1304.) Mr. Kim answered the door wearing a neck brace and identified himself. (CP 877-78.) Officer Hensing then personally served Mr. Kim with a copy of the temporary anti-harassment protection order and petition. (*Id.*; CP 1304-05.) Mr. Kim appeared fine and pleasant. (Hensing RP, p. 69, ll. 6-20.) After receiving the order, Mr. Kim asked, “Where do I go for this?” and Officer Hensing explained that he needed to

be present in court for a hearing and needed to comply fully with the order and leave the premises. (CP 878, 894; Hensing RP, p. 39, ll. 7-11.) Officer Hensing stood by as Mr. Kim read through the petition and order. (Hensing RP, p. 71, l. 13 – p. 72, l. 16.) Mr. Kim stated that he understood and had no further questions. (*Id.*) Officer Hensing noticed another person in the background, but could not discern if it was even a male or female. (*Id.*) Mr. Kim did not appear agitated, angry or disturbed during Officer Hensing’s interaction with him. (CP 878; Hensing RP, p. 72, ll. 4-16.)

While Ms. Roznowski had checked the box on the LEIS indicating that a Korean interpreter was needed, Officer Hensing had no difficulty communicating with Mr. Kim in English. (CP 878; Hensing RP, p. 70, l. 22 – p. 71, l. 12.)

The reason Officer Hensing did not remove Mr. Kim from the household was because, unlike a domestic violence protection order issued under chapter 26.50 RCW, the temporary anti-harassment order did not contain a mandatory vacate provision commanding him to remove Mr. Kim from the home. (Hensing RP, p. 56, l. 12 – p. 58, l. 6.) Further, the anti-harassment order did not contain the provision found in all temporary domestic violence protection orders that states: “Law enforcement shall assist petitioner in obtaining . . . possession of petitioner’s residence.”

(Trial Ex. 150(a).) As of May 2008, Officer Hensing had served more than 50 chapter 26.50 RCW domestic violence protection orders and more than 20 anti-harassment protection orders. (*Id.*, p. 59, l. 11 – p. 61, l. 7.)

Officer Hensing returned to his patrol car and completed the Return of Service at approximately 8:13 a.m. (CP 878-79, 891-92, 897.) In so doing, Officer Hensing complied with RCW 10.14.100(4), which states: “Returns of Service under this chapter shall be made in accordance with the applicable court rules.” RCW 10.14.100(4). He immediately drove to the station so that the order could be entered into the computer system and be available to any officer in the event of a future contact. (CP 878.)

Mr. Kim never stepped beyond the threshold of the doorway of the residence when Officer Hensing served him with the temporary anti-harassment order. (CP 72-73.) Once Officer Hensing finished serving him, Mr. Kim retreated back inside the residence and closed the door. (*Id.*) Once Mr. Kim closed the door, Ms. Roznowski explained the order to him. (CP 83.) Ms. Roznowski told Mr. Kim he had to be out of the house by 11:00 a.m. (CP 84.)

At 9:07 a.m., after Officer Hensing served Mr. Kim, Ms. Roznowski wrote an email to her daughter, Carola Washburn, detailing Mr. Kim’s reaction. (CP 110.) She stated that Mr. Kim “keeps dragging

his feet and doesn't understand a thing.” (*Id.*) Ms. Roznowski also gave Mr. Kim “until 11 to gather some things and go.” (*Id.*) Ms. Roznowski told Ms. Washburn that she was remaining calm. (*Id.*) At 9:16 a.m. Ms. Roznowski sent an email to her friend, Inge Grayson, stating that Mr. Kim had been served that morning and asked if Ms. Grayson “had any time to be around with [her].” (CP 111.)

Around 9:45 a.m., Mr. Kim called his friend, Chong Ko. (CP 1009; Ko RP, p. 7, l. 19 – p. 8, l. 4.) Mr. Kim told Mr. Ko that that he had an emergency. (CP 69, 1003.) Mr. Kim's voice was low, and Mr. Ko suspected something was wrong. (*Id.*) He agreed to meet Mr. Kim. (*Id.*)

Mr. Ko arrived at Ms. Roznowski's house, and Mr. Kim met him in the driveway. (CP 69, 1010.) Mr. Kim handed Mr. Ko a plastic bag containing personal items, asking him to give them to Mr. Kim's son. (*Id.*; CP 1003.) Ms. Roznowski invited Mr. Ko inside. (*Id.*) She asked if he would like a beverage, but Mr. Ko refused, saying he was on his way to the airport. (CP 69, 1003-04.) Ms. Roznowski seemed calm. (CP 69.) Ms. Roznowski then went into the downstairs of the house. (*Id.*) Mr. Kim gave Mr. Ko \$1,000 in cash and asked Mr. Ko to deliver the money to his niece, who lives in Korea. (*Id.*; CP 1011-12.) Mr. Kim also told Mr. Ko that he was “tired of being a slave” and “he wanted to be free.” (CP 1014.) He asked Mr. Ko if he would go with him to the bank to get more

money. (CP 69, 1012.) Mr. Kim went down into the basement and told Ms. Roznowski that he would be back soon. (CP 1006; 1012.) She asked him to repeat himself, and he told her again that he would be back soon. (*Id.*) Ms. Roznowski peeked out from the basement and told Mr. Ko to have a nice trip. (CP 69, 1013.) Mr. Kim and Mr. Ko drove separately to the local Key Bank. (CP 69, 1005.) The Key Bank was more than 500 feet from Ms. Roznowski's residence. (CP 69; 75, 114.) There is no dispute that by leaving the residence and traveling more than 500 feet away, Mr. Kim was in full compliance with the terms of the order.

Key Bank's surveillance video shows Mr. Kim at the teller's window at 10:10 a.m. and 10:12 a.m. (CP 1023-24; Trial Ex. 126.) In the parking lot, Mr. Kim told Mr. Ko that he and Ms. Roznowski had been arguing. (CP 70.) Mr. Kim told Mr. Ko that Ms. Roznowski obtained a restraining order requiring him to move out of the home and the police served him with the order that morning. (*Id.*; CP 1012.) Mr. Kim also told Mr. Ko, "today is my last day." (CP 1005.) Mr. Ko asked Mr. Kim what he was talking about, and Mr. Kim replied: "I've been living like a slave all this time and no more of that, it needs to end. I want to be free." (*Id.*) In Korean, Mr. Kim said something to the effect of: "I'll see you 20 years later." (CP 1014-15.) Mr. Kim never told Mr. Ko he planned to kill himself or Ms. Roznowski. (CP 70-71, 90-91.) Mr. Kim drove back to

Ms. Roznowski's house, and Mr. Ko drove himself home. (CP 70.)

At 10:12 a.m., while Mr. Kim and Mr. Ko were at the bank, Ms. Roznowski called Ms. Loh on the telephone. (CP 83, 118, 123.) Ms. Roznowski told Ms. Loh that Mr. Kim had been served, she talked with him a little bit about it, and he was "surprised and confused," but not angry. (CP 83, 123-24.) Ms. Loh could not understand from the conversation whether Mr. Kim truly did not understand the situation or whether he was playing dumb and stalling. (CP 84.) Ms. Roznowski also told Ms. Loh that Mr. Kim had called a friend and they had left the house to run errands. (*Id.*) Ms. Roznowski was staying at the house, putting Mr. Kim's things together. (*Id.*)

As Ms. Roznowski was speaking with Ms. Loh, Mr. Kim arrived back at the house. (Loh RP, p. 43, ll. 2-7.) Ms. Roznowski had been expecting Mr. Kim to come back to the house after his trip to the bank. (*Id.* at p. 43, ll. 8-11.) Ms. Loh ended the conversation, because she figured her mother would have a lot of things to do around the house that morning. (CP 84.) Ms. Loh told Ms. Roznowski to call a locksmith to change the locks. (*Id.*) She had no concern for her mother's personal safety. (*Id.*; Loh RP, p. 50, ll. 9-21.) Ms. Loh never expected that Mr. Kim would hurt her mother. (*Id.*) She would otherwise have told her mother to call the police or leave the residence. (CP 85.)

By returning to the home, Mr. Kim was now in violation of the order. Ms. Roznowski did not report this to Federal Way. At approximately 10:30 a.m., Ms. Roznowski's friend, Inge Grayson, called and spoke with Ms. Roznowski. (CP 132-134.) Mr. Kim was back at the house, and Ms. Roznowski was planning to go with him to sign some documents to transfer the title of a minivan she had previously given him. (CP 134.) Ms. Roznowski sounded surprisingly fine to Ms. Grayson and told her that Mr. Kim would be out of the house by 11:00 a.m. (*Id.*) Ms. Roznowski also whispered to Ms. Grayson that she can always call "three little numbers," which Ms. Grayson interpreted as 911.<sup>6</sup> (*Id.*) At 10:37 a.m., Ms. Grayson sent an email to her son describing the conversation. (CP 128-29, 135.) She reported that Ms. Roznowski was calm and laughing, and Mr. Kim was also calm. (*Id.*) Ms. Roznowski told Ms. Grayson that she and Mr. Kim had been screaming earlier that morning, but it was nothing atypical for the couple. (*Id.*)

Mr. Kim was mad at Ms. Roznowski for giving him two hours to move out of the house. (CP 94-97, 102, 1012.) At 10:40 a.m., after Mr. Kim returned from Key Bank, Ms. Roznowski told Mr. Kim he had to be gone in 20 minutes. (CP 1003-06.) Mr. Kim lost control and began stabbing Ms. Roznowski. (CP 1003-05.) At approximately 11:15 a.m.,

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<sup>6</sup> Ms. Roznowski knew that "her only recourse is to call 911 if [Kim] comes near or calls, etc." (CP 999.) She never did make such a call.

Ms. Washburn called Ms. Roznowski's home, but there was no answer. (CP 139.)

Meanwhile, Mr. Ko returned home and felt suspicious about Mr. Kim's statements. (CP 1005.) He asked his wife to call Ms. Roznowski, which she did at about 10:30 a.m.; there was no answer. (CP 1005, 1016, 1040-42.) She called again a few minutes later and left a message. (CP 1029, 1041-42.) Mr. Ko also called Mr. Kim at Ms. Roznowski's house at 10:44 a.m. and left him a message in Korean, saying not to do anything stupid and that he already called the police. (CP 1016.) Mr. Ko interpreted Mr. Kim's statement that today would be his last day to him as a threat of possible suicide. (CP 70.) His primary concern was that Mr. Kim might kill himself. (*Id.*)

At 11:08 a.m., concerned about Mr. Kim's statements, Mr. Ko called the cell phone of the wife of Federal Way Assistant Chief Andy Hwang, who was off duty and driving together with his wife. (CP 899, 1019, 1033.) After a brief conversation through broken English with each of the Kos, AC Hwang advised them to call 911, which they did at 11:26 a.m.<sup>7</sup> (CP 983, 1053.)

The first officer arrived on scene at 11:39 a.m., followed by other

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<sup>7</sup> Plaintiffs' claims with respect to AC Hwang's response to the call from the Kos were dismissed by Judge Darvas on the City's second motion for summary judgment and this order has not been appealed. (CP 571-73.) His conduct is not at issue and cannot form the basis for any claims.

assisting officers. (CP 983, 1053.) The officers entered the house and rendered medical assistance to Ms. Roznowski and Mr. Kim. (CP 955-56.) Ms. Roznowski did not have a pulse; she was pale and not breathing. (*Id.*) Fire and rescue units arrived and took over administering medical aid. (CP 945; Lowen RP, p. 8, ll. 1-22.) Ms. Roznowski was pronounced dead at the scene. (CP 945; Trial Ex. 48.) Her death was caused by blood loss from the multiple stab wounds to her body. (CP 1060.)

Plaintiffs Washburn and Loh, individually and on behalf of Ms. Roznowski's estate, now bring this wrongful death action against the City of Federal Way. (CP 796-809.) They assert multiple causes of action, all sounding in negligence. (CP 806-08.) To support their claims, plaintiffs allege the City of Federal Way Police Department had a special relationship with Ms. Roznowski and assured her of her protection. (CP 800.) They further allege the City of Federal Way violated a statutory duty to protect Ms. Roznowski. (CP 802.) Plaintiffs articulate the factual basis for this alleged special relationship and the alleged violations of statutory duties in response to the City's Second Interrogatories and Requests for Production of Documents. (CP 965-76.)

**B. The City's Motion for Summary Judgment.**

On March 12, 2010, the City moved for summary judgment, arguing it owed no duty to Ms. Roznowski under the public duty doctrine.

(CP 817-40.) After granting plaintiffs' CR 56(f) continuance, the Court heard argument and denied the motion on August 13, 2010. (CP 1736-38.) The City moved for reconsideration and Judge Darvas denied that motion in a letter opinion, holding that Officer Hensing had a duty under the "failure to enforce" exception to "enforce the [temporary anti-harassment] order and make sure that Kim left Roznowski's home." (CP 24.) Given the obvious absence of a "mandatory statutory duty to take corrective action," a cornerstone to the "failure to enforce" exception, Judge Darvas reasoned out of whole cloth that an ex parte temporary anti-harassment order issued under RCW 10.14 was the legal equivalent of a mandatory statute. (CP 24.) She went further and reasons that even though the temporary order did not mandate the officer to take any action, the order should still be deemed the legal equivalent of a statute directing an officer to take **mandatory corrective action**. She did not address the legislative intent or special relationship exceptions, having found a duty under the failure to enforce exception. (CP 19, n. 2.)<sup>8</sup>

The City petitioned this Court for discretionary review of Judge Darvas' September 8, 2010 order, but Commissioner Verellen denied that motion on October 22, 2010. (Appx. B.) However, in his order, he

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<sup>8</sup> On September 17, 2010, the City filed a second motion for summary judgment. (CP 44-67.) On October 15, 2010, Judge Darvas denied that motion in part and granted it in part, ruling that plaintiffs' claims based on AC Hwang's conduct are dismissed under the public duty doctrine. (CP 571-73.)

explicitly held that Judge Darvas had misapplied the failure to enforce exception to the public duty doctrine. (*Id.*, p. 7.) Commissioner Verellen left open the question of whether the legislative intent and special relationship exceptions applied. (*Id.* at 7-11.) The case proceeded to jury trial on December 6, 2010. Plaintiffs did not call Gretchen Sund, Officer Parker or Officer Blalock to testify. On December 15, 2010, the City brought a CR 50(a) motion for judgment as a matter of law at the close of plaintiffs' evidence. (CR 50(a) RP, pp. 1-24.) Judge Darvas denied that motion and allowed the case to go forward and refusing to dismiss any claims premised upon the special relationship exception, the failure to enforce exception or legislative intent exception. (*Id.*, pp. 19-24.)<sup>9</sup> On December 22, 2010, the jury returned its verdict awarding \$1.1 million in general damages to Ms. Roznowski and no damages to Ms. Loh and Ms. Washburn. (CP 2093-94.) Judge Darvas entered judgment in favor of plaintiffs that same day. (CP 2089-90.)

**C. Facts Regarding New Trial On Damages.**

At trial, Ms. Loh and Ms. Washburn testified regarding the emotional loss they suffered as a result of their mother's death. (Washburn RP, pp. 22-27; Loh RP Vol. I, pp. 7-8, 13-14; Loh RP Vol. II,

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<sup>9</sup> In denying the motion, Judge Darvas repeated her novel determination that an ex parte order containing no mandatory directives to the officer is the legal equivalent of a mandatory statute directing the officer to take corrective action. (CR 50 RP, p. 19-21.)

pp. 2-3; 24-26.) Their testimony in this regard was not challenged on cross-examination for obvious reasons. They were not present to witness Kim's assault of their mother and thus this was not an element of their damage claims. On the contrary, the estate's damages were based entirely on Ms. Roznowski's experience in being attacked, there being no claim for damages as a result of her actual death (the death having cut off any further general damage claims on her part and there being no evidence of special damages to the estate.) (See Damages Instruction No. 18; CP not assigned).

The jury found that the City's negligence proximately caused damages to "plaintiffs."<sup>10</sup> (CP 728-29.) The jury awarded \$1.1 million to the estate of Baerbel Roznowski, \$0 to Ms. Loh and \$0 to Ms. Washburn. (*Id.*) On January 3, 2011, plaintiffs filed a motion for additur, or, in the alternative, a new trial, arguing that the jury's verdict of \$0 to Ms. Loh and Ms. Washburn was not justified by the evidence and that such a verdict was so inadequate as to unmistakably indicate it was the result of passion or prejudice. (CP 729-35.) The City opposed the motion, arguing

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<sup>10</sup> Prior to trial, Judge Darvas refused to use the City's proposed special verdict forms, which would have required the jury to separately list those damages proximately caused by the City's negligence and those damages caused by Mr. Kim's intentional conduct. (CP 1993-95; 2066-69.) Plaintiffs opposed both verdict forms and proposed the one that Judge Darvas used. (CP 1997-98.) That verdict form does not break out the damages in any meaningful way, and instead lumps them into one. (*Id.*) The City took exception to the trial court's use of that verdict form. (RP, Exceptions to Jury Instructions, p. 79, l. 10 – p. 80, l. 9.)

that the jury's verdict could be reconciled with the evidence and the trial court's instructions. (CP 736-42.) Specifically, the evidence presented at trial could support a finding that the attack on Ms. Roznowski was the foreseeable consequence of the City's failure to remove Kim, but that Mr. Kim's act of murdering Ms. Roznowski was either an intervening cause of Ms. Loh's and Ms. Washburn's damages (Instruction No. 11) or that all damages to them had to be segregated to Kim's murderous act. (Instruction No. 19.)

In anticipation of the hearing on plaintiffs' motion, Judge Darvas submitted questions to counsel for both sides, and both sides responded. (CP 762-81.) On February 7, 2011, Judge Darvas held that a new trial on damages was warranted under CR 59(a)(7), because, from her perspective, there was no reasonable inference from the evidence to justify the verdict. (CP 2146-2150.) In her order, Judge Darvas held: "There was neither evidence nor argument at trial from which the jury could have concluded that Ms. Roznowski's death was due to some other cause [than the City's negligence]." (CP 2148.) Tacitly acknowledging the insufficiency of the special verdict form she used at trial, Judge Darvas went on to hold, "On retrial, the jury will need to segregate damages it finds were caused by the negligence of the defendant from any damages solely caused by the intentional acts of Paul Kim." (CP 2149.) In other words, the special

verdict form to be used should break out the damages the way the City had initially proposed. (CP 1993-95, 2066-69.) Judge Darvas' own statement perfectly highlights the City's argument and demonstrates why it was an abuse of discretion to grant a new trial: based on the verdict form she used, there is no possible way to determine how the jury reached its \$0 award, and therefore, plaintiffs cannot show that there is no rationale for the award.

#### **IV. ARGUMENT**

##### **A. Standards of Review.**

###### ***1. Denial of Summary Judgment.***

While courts ordinarily do not review an order denying summary judgment after a trial on the merits, review is appropriate when the decision on summary judgment 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). In a negligence action such as this, the primary determination of whether a duty of care exists is a question of law. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). Summary judgment is reviewed *de novo*. *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 383, 198 P.3d 493 (2008); *Osborn v. Mason County*, 157 Wn.2d 18, 22, 134 P.3d 197 (2006).

**2. Denial of CR 50(a) Motion for Directed Verdict.**

A motion for judgment as a matter of law under CR 50(a) is properly granted when, viewing the evidence in the light most favorable to the nonmoving party, the court can say there is no substantial evidence or reasonable inference to support a verdict for the nonmoving party. *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wn. App. 722, 731, 959 P.2d 1158 (1998). A trial court's order denying a CR 50 motion for judgment as a matter of law is likewise reviewed *de novo*. *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997). Here, the undisputed material facts demonstrate that summary judgment and/or judgment as a matter of law in favor of the City is warranted.

**3. Grant of New Trial Under CR 59(a)(7).**

Denial of a new trial on grounds of inadequate damages will be reversed where the trial court abuses its discretion. "Where the proponent of a new trial argues the verdict was not based upon the evidence, appellate courts will look to the record to determine whether there was sufficient evidence to support the verdict." *Palmer v. Jensen*, 132 Wn.2d 193, 197, 937 P.2d 597 (1997). Where sufficient evidence exists to support the verdict, it is an abuse of discretion to grant a new trial. *Id.* at 158.

**B. The Public Duty Doctrine Bars Plaintiffs' Claims.**

The trial court erred by denying the City's motion for summary judgment, and, later, its CR 50(a) motion for a directed verdict at the close of plaintiffs' evidence. The City did not owe plaintiffs any duty of care, as none of the exceptions to the public duty doctrine applies.

“Under the public duty doctrine, no liability may be imposed for a public official's negligent conduct unless it is shown that the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general.” *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 785, 30 P.3d 1261, 1267 (2001). In other words, absent a showing of a duty running to the injured plaintiff from municipal agents, no liability may be imposed for a municipality's failure to provide protection or services to a particular individual. *Bailey v. Town of Forks*, 108 Wn.2d 262, 265, 737 P.2d 1257 (1987).

There are four exceptions to the public duty doctrine, under which governmental agencies may acquire a special duty of care owed to a particular plaintiff or a limited class of potential plaintiffs. *Babcock*, 144 Wn.2d at 785-86. These exceptions are: (1) legislative intent, (2) failure to

enforce, (3) the rescue doctrine<sup>11</sup>, and (4) a special relationship. *Id.* Plaintiffs cannot satisfy any of these exceptions. All plaintiffs' negligence claims are therefore barred by the public duty doctrine.

***1. The Failure to Enforce Exception Does Not Apply.***

The failure to enforce exception recognizes that: a general duty of care owed to the public can be owed to an individual where [1] governmental agents responsible for enforcing statutory requirements [2] possess actual knowledge of a ***statutory violation***, fail to take corrective action ***despite a statutory duty to do so***, and [3] the plaintiff is within the class the statute intended to protect. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 531 (1990) (emphasis added). “This exception applies only where there is a mandatory [statutory] duty to take a specific action to correct a known statutory violation.” *Halleran v. Nu W., Inc.*, 123 Wn. App. 701, 714, 98 P.3d 52 (2004), *review denied*, 154 Wn.2d 1005 (2005). *Donohoe v. State*, 135 Wn. App. 824, 849 (2006). Courts construe the failure to enforce exception narrowly. *Ravenscroft v. Wash. Water Power Co.*, 87 Wn. App. 402, 415 (1997), *aff'd in part, rev'd in part on other grounds*, 136 Wn.2d 911, 969 P.2d 75 (1998). “Statutes generally indicating the agency ‘may’ take corrective action or investing broad discretion in the

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<sup>11</sup> There has never been any evidence or argument in this case that the rescue exception applies, and it is not addressed in this opening brief.

agency will not meet this requirement.” *Id.*<sup>12</sup>

Here, there is no statute that sets forth a mandatory duty that would have required Officer Hensing to “enforce” the anti-harassment order or arrest Mr. Kim for violating it. Plaintiffs contend that because Mr. Kim continued to remain on the premises after service, he was committing second-degree criminal trespass, which is classified as an act of domestic violence under RCW 10.99.020 and therefore triggers RCW 10.99.030’s mandatory arrest provision. This argument is flawed for several reasons. First, RCW 10.99.030 speaks only to a situation in which an officer “responds to a domestic violence call and has probable cause to believe that a crime has been committed.” Officer Hensing was serving a temporary anti-harassment order; he was *not* responding to a domestic violence call. Second, Officer Hensing was not under any statutory duty to remain on the premises and ensure that Mr. Kim complied with the

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<sup>12</sup> In *Halleran*, this Court held that the Securities Act of Washington does not create a duty to protect individual investors from losses, stating: “For the failure to enforce exception to apply, **government agents must have a mandatory duty to take specific action to correct a statutory violation.** Such a duty does not exist if the government agent has broad discretion about whether and how to act.” *Halleran*, 123 Wn. App. at 714. (Emphasis added.) The *Halleran* court cited to *McKasson v. State*, 55 Wn. App. 18, 776 P.2d 971 (1989), which articulated that requirement as follows: “In each of these ‘failure to enforce’ cases, there was a specific directive to the governmental employee as to what should be done. . . . [T]here is no such directive in the securities act statutes or the associated regulations. Instead, the statutes and the regulations are replete with ‘mays’, and throughout the statutes, broad discretion is vested in the director.” *McKasson*, 55 Wn. App. at 25.

order.<sup>13</sup> Third, even assuming Mr. Kim’s presence could be deemed a criminal trespass, the language of RCW 10.99.030 does not mandate arrest. That statute only mandates that the officer “exercise arrest powers with reference to the criteria in RCW 10.31.100.” RCW 10.99.030(6)(a). In turn, RCW 10.31.100 does not require warrantless arrest for first or second-degree trespass, which are both misdemeanors. RCW 9A.52.070, RCW 9A.52.080; RCW 10.31.100. Simply put, even accepting plaintiffs’ argument that Mr. Kim was trespassing, Officer Hensing was not under a mandatory statutory duty to arrest him for it.<sup>14</sup>

RCW 10.14 *et seq.* only required Officer Hensing to (1) serve Mr. Kim personally; and (2) complete a return of service. RCW 10.14.100. He performed both tasks. An anti-harassment order can be served by

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<sup>13</sup> As repeatedly pointed out to the trial judge, the anti-harassment order at issue **did not** contain the form provision found in every temporary domestic violence order mandating that the “respondent shall immediately **Vacate** the residence” [emphasis original] and mandating that the officer “shall assist petitioner in obtaining . . . possession of petitioner’s residence.” (Trial Ex. 150 (a).) Under RCW 10.99.030 (6)(a), an officer serving this kind of order would be statutorily mandated to arrest a respondent who would be deemed to have committed a crime if he didn’t did not immediately leave while the officer was still present. This critical distinction between the two types of orders cannot be ignored.

<sup>14</sup> Any argument that Officer Hensing had a mandatory statutory duty to arrest Mr. Kim for violation of the temporary anti-harassment order itself is equally flawed. RCW 10.31.100(2)(a) enumerates an exhaustive list of protection orders, the violation of which triggers a mandatory duty on the part of an officer to make a warrantless arrest. Notably absent from that list are protection orders issued under chapter 10.14 RCW. RCW 10.14 orders are also not listed in RCW 10.99.020(5)(r), which lists the types of orders that trigger a mandatory duty to arrest if an officer has probable cause to believe a suspect is violating them. Officers have discretion to arrest a person for violation of a temporary anti-harassment order. RCW 10.31.100(8). There is no Washington statute that mandates arrest for violation of a chapter 10.14 RCW anti-harassment order.

anyone over the age of eighteen years. RCW 10.14.100. There is no “directive” in any Washington statute that imposes a mandatory duty to “enforce” the terms of an anti-harassment order. *McKasson*, 55 Wn. App. at 25.

*Vergeson v. Kitsap County*, 145 Wn. App. 526, 186 P.3d 1140 (2008) is instructive. There, the plaintiff sued Kitsap County alleging that its employees negligently failed to remove all records of her quashed warrant from state and national databases. *Id.*, at 533-34. The court’s holding that plaintiffs’ claims were barred by the public duty doctrine, while in the context of the “special relationship” exception, recognizes that a court order directing a *respondent* to act (in this case directing that Kim stay 500 feet from the residence and from Ms. Roznowski) is not the same as a *statute* directing an *officer* to act. The Court held:

Although a court order *may* create a legal obligation with its own legal consequences to the person to whom the order is addressed, a court order does not automatically create a duty on the part of an unnamed person, such as county employee Morris, giving rise to a civil negligence claim against that unnamed person’s employer based on an alleged breach of duty. Thus, we hold that the mere existence of a court order, without express assurances by the County to a potential plaintiff such as Vergeson, does not create an actionable civil negligence duty either on its own or as a special relationship exception to the public

duty doctrine.

*Id.*, at 541-42 (footnote omitted).

While Ms. Roznowski is in the class RCW 10.14 intends to protect, that statutory scheme does not mandate enforcement, it only contains mandatory directives relating to service. In fact, RCW 10.14.130 specifically distinguishes chapter 10.14 from chapters 10.99 and 26.50. It holds, “[p]rotection orders authorized under this chapter shall not be issued for any action specifically covered by chapter 7.90, 10.99, or 26.50 RCW.”<sup>15</sup> Because there is no statutory directive that required Officer Hensing to take any enforcement action with respect to the anti-harassment order after serving it, the failure to enforce exception to the public duty doctrine does not apply.

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

The legislative intent exception to the public duty doctrine applies when a statute or regulation establishes a governmental duty and expressly identifies and protects a particular and defined class of persons. *Ravenscroft*, 136 Wn.2d at 930. To ascertain the legislative intent, courts look to the statute’s declaration of purpose. *Donohoe v. State*, 135 Wn.

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<sup>15</sup> Further, with domestic violence protection orders issued under chapter 26.50 RCW, the Legislature mandates an officer to “arrest without a warrant and take into custody a person whom the peace officer has probable cause to believe has violated an order issued under this chapter, chapter 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW . . .” RCW 26.50.110(2). Absent from this list is any reference to RCW 10.14.

App. 824, 844, 142 P.3d 654 (2006). “This legislative intent must be clearly expressed, not implied.” *Id.*

In *Donohoe*, the court held that chapter 18.52 RCW was enacted to “provide for the development, establishment, and enforcement of standards for the maintenance and operation of nursing homes” and to “promote safe and adequate care and treatment of individuals therein.” *Donohoe*, 135 Wn. App. at 846. This legislative intent did not create a governmental duty to protect individual nursing home residents from inadequate care, because it only promotes resident safety; it does *not* guarantee it. *Id.*

The same is true with chapter 10.14 RCW. The statute does not impose a mandatory *duty* to *guarantee* the safety of citizens who obtain anti-harassment orders. Instead, chapter 10.14 RCW provides victims with a process of obtaining civil anti-harassment protection.

The Legislature finds that serious, personal harassment through repeated invasions of a person’s privacy by acts and words showing a pattern of harassment designed to coerce, intimidate, or humiliate the victim is increasing. The legislature further finds that the prevention of such harassment is an important governmental objective. This chapter is intended to provide victims with a speedy and inexpensive method of obtaining civil antiharassment protection orders preventing all further unwanted contact between the victim and the perpetrator.

RCW 10.14.010. Nothing in the statute establishes an actionable governmental *duty* on the part of law enforcement with a remedy in tort to protect individuals from harassment or any other harm resulting from anti-harassment protection orders. The legislative intent exception to the public duty doctrine does not apply.

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

Under the special relationship exception, a governmental entity is liable for negligence where there is (1) direct contact or privity between the public official and injured plaintiff, (2) express assurance given by the public official to the injured plaintiff, and (3) justifiable reliance by the plaintiff on such express governmental assurance. *Vergeson*, 145 Wn. App. at 539; *Chambers-Castanes v. King County*, 100 Wn.2d 275, 285-86, 669 P.2d 451 (1983). Further, the information provided by the government official must be incorrect and relied upon by the plaintiff to his or her detriment. *Babcock*, 144 Wn.2d at 789.

In denying discretionary review, Commissioner Verellen left open the possibility that plaintiffs may develop some evidence at trial of contact with the City that could support a finding that the special relationship exception applies to Ms. Roznowski. (Appx. B, pp. 9-10.) Knowing there was no such evidence, plaintiffs never pursued this theory at trial and did

not even call Officer Parker, Officer Blalock or Gretchen Sund to testify. Ms. Roznowski did not have a “special relationship” with the City.

**a. Ms. Roznowski Did Not Have Privity With The City.**

“The term privity is used in the broad sense of the word and refers to the relationship between the police department and any ‘reasonably foreseeable plaintiff.’” *Chambers-Castanes*, 100 Wn.2d at 286. However, the contact or privity must relate to whatever express assurance a plaintiff claims the defendant made. *See Id.*, at 287 (privity existed between King County and the plaintiff when King County 911 dispatcher told the plaintiff that help was on the way); *see also Babcock*, 114 Wn.2d at 788 (privity established when firefighter told plaintiff the fire department would protect his belongings); *Cummins v. Lewis County*, 156 Wn.2d 844, 854-55, 133 P.3d 458 (2006) (privity element is not satisfied merely by the act of placing a call to 911; a plaintiff is set apart from the public when she can show that there was a telephone conversation with 911 and that the dispatcher made an affirmative promise or agreement to provide assistance).

Ms. Roznowski did not have privity with the City to create a special relationship. Her brief contact with Officers Blalock and Parker on April 30, 2008 did not create a special relationship, because Mr. Kim’s

actions on May 3, 2008, were too remote in time and neither officer gave her any express assurance. Ms. Roznowski's only other contact with the City, via Ms. Sund, also did not create privity. Therefore, plaintiffs cannot satisfy the special relationship exception.

***b. The City Did Not Give Ms. Roznowski Express Assurances.***

Further, the special relationship exception does not apply because no Federal Way employee made an express assurance regarding Ms. Roznowski. "A government duty cannot arise from an implied assurance." *Babcock*, 144 Wn.2d at 789. "It is only where a direct inquiry is made by an individual and incorrect information is clearly set forth by the government, the government intends that it be relied upon and it is relied upon by the individual to his detriment, that the government may be bound." *Meaney v. Dodd*, 111 Wn.2d 174, 180, 759 P.2d 455 (1988).

Ms. Roznowski's two brief contacts with the City of Federal Way did not create a special relationship. While Ms. Roznowski may have *believed* that an officer would stand by while Mr. Kim vacated the residence, there is no evidence that she derived that belief from anyone at the City.

At trial, plaintiffs did not pursue the special relationship exception and no evidence of "express assurances" was introduced in that respect.

In ruling on the City’s CR 50(a) motion, Judge Darvas acknowledged this fact, holding, “I don’t think we have any express assurances in this case, unfortunately, but – well, I mean, unfortunately for the plaintiff’s [sic] position.” (CR 50 RP, p. 19, ll. 2-7.) As Judge Darvas observed, there is no evidence of any express assurances that would satisfy this requisite element of the special relationship exception. Accordingly, the public duty doctrine bars plaintiffs’ negligence claims.

**C. The City Did Not Owe Plaintiffs a Duty to Investigate.**

Prior to trial, plaintiffs also attempted to frame a negligence claim against the City for failure to investigate. There is no such cause of action under Washington law. *Donaldson v. City of Seattle*, 65 Wn. App. 661, 675, 831 P.2d 1098 (1992).

In *Donaldson*, the plaintiff brought a wrongful death suit against the City of Seattle, alleging the City was negligent because it failed to continue investigating allegations of possible domestic violence. *Donaldson*, 65 Wn. App. at 666, 671. While the court found the Domestic Violence Protection Act (DVPA) established a mandatory duty for police officers to arrest in certain domestic violence situations, it refused to extend a police officer’s duty of care to include a mandatory duty to conduct a follow-up investigation:

A mandatory duty to investigate ... would be completely open ended as to priority, duration and intensity. Would it entail ignoring other calls for a domestic violence response, ignoring other reported crimes, ignoring response to a report of an injury traffic accident? How long does such duty continue? To the end of the officer's shift? Or is the department obligated to detail another officer to take over? Merely to state such obvious practical problems is to demonstrate the extraordinary difficulty that would follow in attempting to implement any such mandatory duty of investigation. Law enforcement must be vested with broad discretion to allocate limited resources among the competing demands.

*Id.* at 671-72. Finally, the court held: "Police responsibility in regard to any further investigation becomes part of their overall law enforcement function and does not generate a right to sue for negligence." *Id.* at 675.

Despite the *Donaldson* court's holding that the Legislature intended to create a mandatory duty to arrest under the DVPA, that legislative intent did not justify a broader exception under the public duty doctrine for a failure to investigate. Similarly, chapter 10.14 RCW does not express a legislative intent to create a mandatory duty to investigate, and this Court should therefore dismiss this claim as a matter of law.

**D. Restatement (Second) of Torts § 302B Does Not Apply.**

Plaintiffs may posit (for the first time on appeal) that the Restatement (Second) of Torts § 302B applies to this case and thereby

creates a duty of care owed to plaintiffs. A limited number of Washington cases cite to §302B as a basis for creating a duty to prevent the foreseeable criminal conduct of third persons in limited situations. Only one case applies § 302B in a police context, this Court's recent decision in *Robb v. City of Seattle*, 159 Wn. App. 133, 245 P.3d 242 (2010). The facts of *Robb* are readily distinguishable and Restatement (Second) of Torts § 302B does not apply in this case.

The Washington Supreme Court first adopted § 302B in *Hutchins v. 1001 Fourth Avenue Assoc.*, 116 Wn.2d 217, 802 P.2d 1360 (1991). There, a victim of a criminal assault claimed that the possessors of the land where the crime took place were negligent in not providing adequate security measures to protect him. *Id.* at 220-221. Plaintiff was walking up Fourth Avenue when a robber and an accomplice shoved him into the armored car bay of the 1001 Fourth Avenue building and robbed him. *Id.* Plaintiff asked the Court to expand tort liability to a landowner for crimes committed against passersby on adjacent public sidewalk. *Id.* The court noted that the "special relationship" usually required to trigger a duty of care under the Restatement was absent.

As defendant maintains, this court has recognized the general rule that there is usually no duty to prevent a third party from causing physical injury to another, unless "a special relationship exists between the

defendant and either the third party or the foreseeable victim of the third party's conduct.”

*Id.* at 227 (internal cites omitted).

However, the court also observed that § 302B can impose a duty even where there is no special relationship in circumstances, “where the defendant’s affirmative act is intended to or likely to defeat some protection plaintiff has set in place,” or, “where defendant affirmatively brings about ‘an especial temptation and opportunity for criminal misconduct’ which will give rise to a duty on defendant’s part to take precautions against it.” *Hutchins*, 116 Wn.2d at 230 (cites omitted).

The court did not find such a duty in *Hutchins*, but it did highlight that §302B is typically applied in the premises liability arena.

There may be a further exception which will apply where defendant's construction or maintenance of the premises brings about a special or peculiar temptation or opportunity for criminal misconduct affecting those off the premises. Again, we do not conclusively define the parameters of any such duty.

*Hutchins*, 116 Wn.2d at 233. The *Hutchins* court also stressed that Comment d to §302B explains that a defendant may “proceed upon the assumption that others will obey the law.” *Hutchins*, at 230.

This Court analyzed the *Robb* case under the framework set forth in *Hutchins*. In *Robb*, a 17 year-old boy, whom Seattle police knew to be

mentally disturbed and in possession of a shotgun and shells, flagged down a car and shot the driver, thus concluding a one-week series of contacts with Seattle police officers. *Robb*, 159 Wn. App. at 136. In May 2004, Seattle officers twice took the shooter, Berhe, to the hospital for mental evaluations at his parents' behest. *Id.* Then, in June 2005, Seattle police had a series of contacts with Berhe after learning that he was again engaging in "bizarre and aggressive behavior" and possessed a shotgun. *Id.* In the seven days preceding the shooting, Seattle officers had five separate contacts with Berhe. *Id.*, at 136-137. During the first contact with him, Berhe's mother reported to officers he had a history of mental illness and was making suicide threats. *Id.*, at 136. Officers transported him to the hospital. *Id.* On the second occasion, officers responded to a 911 call that Berhe assaulted his brother's friend. *Id.* Berhe was speaking in demonic tones and threatening to kill people, so he was involuntarily committed to Harborview, until the victim refused to testify and Berhe was released. *Id.*

On the third occasion, officers responded to a report from Berhe's father that Berhe and a friend were fighting and both had shotguns. *Robb*, 159 Wn. App. at 137. When officers arrived, the boys had left. *Id.* On the fourth occasion on the morning of the day of the shooting, two officers questioned and released Berhe in response to a complaint that he had

trespassed at a neighbor's house and spent the night drinking beer. *Id.* Later that same day, officers received a report that Berhe had committed a burglary and was bragging about it. *Id.* Officers questioned Berhe, who was acting agitated, and briefly took him into custody, at which point they noticed shotgun shells on the ground where he had been standing. *Id.* The officers asked no questions and did not confiscate the shells. *Id.* The officers released Berhe, who walked away making "incoherent comments." *Id.* Just two hours later, Berhe fatally shot Michael Robb with the shells left on the ground. *Id.*, at 137-38.

The victim's family sued and the City of Seattle argued that the public duty doctrine barred plaintiff's claims. *Robb*, 159 Wn. App. at 146. This Court rejected that argument, citing to Restatement (Second) § 302B's affirmative act provision. *Id.* However, this Court noted that risk created by the affirmative act must be foreseeable:

The risk must be one that a reasonable person would take into account. And as comment e explains, these situations arise where the actor has a special relationship to the one suffering the harm *or* "where the actor's own affirmative act has created or exposed the other" to the high degree of risk of harm.

*Id.* at 146.

In ruling that the public duty did not bar the plaintiff's wrongful

death claim, this Court cited to *Coffel v. Clallam County*, 47 Wn. App. 397, 403, 735 P.2d 686 (1987) and ruled that it was an “affirmative acts” case that removed it from the umbrella of the public duty doctrine. *Id.* at 146-47. The court observed that to the extent the claims in *Coffel* were based on the officers’ failure to act, they were properly dismissed on summary judgment. *Id.* (citing *Coffel*, 47 Wn. App. at 402). But, this Court also held that to the extent officers do act, they have a duty to act with reasonable care. *Id.*, at 147.

Here, plaintiffs’ claims dwell on Officer Hensing’s purported failure to act. Their entire theory is that he did not take any enforcement or other type of action with respect to Mr. Kim.<sup>16</sup> This is not an affirmative acts case. *See e.g., Parilla v. King County*, 138 Wn. App. 427, 157 P.3d 879 (2007) (King County owed a duty of care because bus driver’s affirmative act of walking off running bus and leaving a bizarrely behaving, deranged individual on it exposed plaintiffs to a recognizable high degree of risk of harm, which a reasonable person would have foreseen).<sup>17</sup>

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<sup>16</sup> Instruction No. 5 (no CP yet assigned) is a summary of plaintiffs’ claims, all framed as omissions on the part of the defendant: “(1) failing to properly train its police; (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 (f) failing to take other reasonable steps to protect Ms. Roznowski.”

<sup>17</sup> In *Parilla*, the bus driver had observed the intentional tortfeasor acting in a deranged manner, yelling at non-existent people and striking the windows with his fists. *Parilla*,

Regardless, plaintiffs may argue that this case is analogous to *Robb* and Officer Hensing should have predicted that Mr. Kim would violently attack Ms. Roznowski. This argument is flawed and based solely on 20/20 hindsight. Given the information known to Officer Hensing at the time he served the order, it was not reasonably foreseeable that serving her with a protective order would expose Ms. Roznowski to a high degree of risk of harm.

Furthermore, the officers in *Robb* had repeated contacts with Berhe and knew he was mentally unstable, threatening to kill others, possessed the weapon he used to kill Robb, and they had multiple opportunities to confiscate the weapon and/or take Berhe into custody. Yet, despite all of this information, they knowingly permitted Berhe to leave with shotgun shells at his feet. By contrast, all Officer Hensing had was the LEIS and petition filled out by Ms. Roznowski that stated, in *her opinion*, Mr. Kim may react violently when served. When Officer Hensing served the order, Mr. Kim did not react violently; he was calm and pleasant and did not commit any criminal acts in Hensing's presence. To say that based on these facts, Officer Hensing should have foreseen and somehow prevented the eventual murder of Ms. Roznowski would be to stretch the *Robb* holding to untenable grounds. Such a holding would impose on every

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138 Wn. App. at 431. By contrast, Mr. Kim was calm and polite, and did not display any curious behavior to Officer Hensing.

officer who serves an anti-harassment order an infinite and ongoing duty to prevent harm to the respondent, an unworkable standard that would completely consume law enforcement discretion and resources.

Plaintiffs' counsel on appeal, then Justice Philip A. Talmadge, previously acknowledged the strong policy implications of extending the exceptions to the public duty doctrine. *Beal v. Seattle*, 134 Wn.2d 769, 793, 954 P.2d 237 (1998) (Justice Talmadge, dissenting). In the *Beal* case, Melissa Fernandez was killed by her estranged husband when she went to his apartment to collect her belongings. *Id.* at 773. Ms. Fernandez had a domestic violence protective order against her husband. *Id.* When her husband would not let her get her belongings, she called 911, and the operator told her she would dispatch police. *Id.* at 773-74. Approximately 20 minutes later, before officers arrived, Mr. Fernando approached Ms. Fernandez in the parking lot and shot and killed her. Ms. Fernandez's estate sued the City of Seattle for negligent failure to promptly dispatch a police officer to provide standby assistance. *Id.* at 774. The Supreme Court held that the trial court properly denied the City of Seattle's motion for summary judgment dismissal, in part because there was evidence that the City established a special relationship with the plaintiff when the 911 operator assured Ms. Fernando that police would be dispatched to assist. *Beal*, 134 Wn.2d at 785; 788.

Despite the application of the special relationship exception to the public duty doctrine, which does not exist here, Justice Talmadge warned the Court about overly extending this doctrine's application:

The general purpose of the public duty doctrine, as articulated in *Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988), is to avoid making municipalities insurers for every harm that might befall members of the public interacting with such municipalities ... The majority's decision in this case makes a municipality operating a 911 telephone system an insurer of individuals who call 911 when serious harm follows making such a call. There is no principled limit to a municipality's liability if a third party does harm to an individual who makes a call to 911 operators and asks for assistance.

*Beal*, 134 Wn.2d at 793-94 (Justice Talmadge, dissenting). He further criticized the majority's decision by stating:

In effect, the majority determines a special relationship exception arises between a municipality and a member of the public calling for virtually *any* interaction between that individual and the municipality's staff. The majority simply goes too far in permitting the special relationship exception to swallow up the rule of the public duty doctrine.

*Id.* at 794.

Similarly, any ruling that police officers who serve anti-harassment protection orders on respondents owe the petitioners a duty of care to

protect those petitioners from future harm caused by the respondents creates an unworkable rule. Assuming plaintiffs put forth an argument under §302B, there are no limiting parameters to a law enforcement officer's duty to protect anti-harassment protection order petitioners, and such an extension of *Robb* would certainly swallow the public duty doctrine whole. Such an argument is analogous to that rejected in *Donaldson*, holding that an open-ended duty to investigate would be impossible to implement and define. *Donaldson*, 65 Wn. App. at 671-72. The *Robb* holding does not apply here and the City did not owe plaintiffs a duty. This Court should vacate the jury's verdict and dismiss all claims with prejudice as a matter of law.

**E. Assignment of Error #2: Judge Darvas Abused Her Discretion By Awarding a New Trial on Damages.<sup>18</sup>**

This Court should reverse Judge Darvas' erroneous decision to award plaintiffs a new trial on damages for Ms. Loh's and Ms. Washburn's loss of consortium claims. CR 59(a)(7) requires a **moving party** to demonstrate "[t]hat there is **no** evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it [the jury's verdict – their decision] is contrary to law." CR 59(a)(7) (emphasis added.) "When sufficient evidence exists to support the verdict, it is an

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<sup>18</sup> The Court need not reach this issue if it decides that there is no duty in the first place.

abuse of discretion to grant a new trial.” *Palmer v. Jensen*, 132 Wn.2d 193, 198, 937 P.2d 597 (1997) (citing *McUne v. Fuqua*, 45 Wn.2d 650, 653, 277 P.2d 324 (1954)).<sup>19</sup>

The Court properly instructed the jury on segregation of damages consistent with *Rollins v. King County Metro Transit*, 148 Wn. App. 370, 379, 199 P.3d 499 (2009), *review denied*, 166 Wn.2d 1025, 217 P.3d 336 (2009). (Instruction No. 19.) The trial court also properly instructed the jury on superseding cause. (Instruction No. 11.)

Judge Darvas abused her discretion by ruling that there was no possible way to reconcile the jury’s verdict with the uncontroverted evidence. Her order demonstrates the fundamental flaw in her thinking.<sup>20</sup>

Undisputedly, **all** of Ms. Roznowski’s damages were for the **events that**

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<sup>19</sup> The well-settled law in Washington dictates:

The mental processes by which individual jurors reached their respective conclusions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, or the jurors’ intentions and beliefs, are all factors inhering in the jury’s processes in arriving at its verdict, and, therefore, inhere in the verdict itself, and averments concerning them are inadmissible to impeach the verdict.

*State v. Jackman*, 113 Wn.2d, 772, 777-78, 783 P.2d 772 (1989)

<sup>20</sup> She states: “As plaintiffs’ memorandum points out, there was only *one* death at issue in this case, and it is beyond dispute that Ms. Roznowski’s death was directly caused by the attack and stabbing that the jury specifically awarded damages for [sic]. Thus the jury specifically found that the defendant’s negligence was a proximate cause of injury or damage to more than one of the three plaintiffs (the Roznowski Estate, Ms. Washburn, and Ms. Loh).” (CP 2148.)

**preceded her death** – i.e., the experience of being attacked and stabbed, not from her death itself.<sup>21</sup> This is in complete contrast to the claims of the daughters – **all** of their damages flowed from **the fact of their mother’s death**, not having witnessed Kim’s attack on their mother. The evidence at trial conclusively showed that Paul Kim, who is a non-party intentional tortfeasor, murdered Ms. Roznowski. The jury could well have decided that but-for the City’s negligence, Ms. Roznowski would not have been attacked on May 3, 2008, and therefore answered “Yes” to Question No. 2 on the verdict form. Yet, the jury also could have decided that it was inevitable that Mr. Kim would murder Ms. Roznowski, if not on May 3, 2008, then at some other point in the future, and that this independent decision by Mr. Kim to go so far as to murder their mother was the sole proximate cause of Ms. Loh’s and Ms. Washburn’s damages for the loss of their relationship. They may well have concluded under Instruction No. 11 that the defendant, “in the exercise of ordinary care, could not reasonably have anticipated” that Kim would **murder** Ms. Rosnowski, (the sole causal event of damages to the daughters) even if they did determine that it was foreseeable that he may return to the home and harass or even assault her 9 (the sole causal event of her damages).

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<sup>21</sup> There was no evidence of wage loss or other special damages on the part of the estate. See Instruction No. 18, which outlined the categories of damages at issue.

Separately, the court gave an unchallenged damage segregation instruction that properly prohibited the jury from awarding “[a]ny damages caused solely by Paul Kim and not proximately caused by negligence of defendant . . .” (Instruction No. 19.) Combined with the Instruction No. 11, the jury could have concluded that because all of Ms. Loh’s and Ms. Washburn’s loss followed from the fact of their mother’s death, not the attack itself, all damages flowing therefrom, “damaged that were caused by acts of Paul Kim and not proximately caused by negligence of the defendant”, had to be segregated from the award to the estate. This is a reasonable inference consistent with the evidence.

Plaintiffs cannot have it both ways. They proposed the special verdict form used by the trial court and it provided no way of determining the exact method by which the jury computed its damages. The jury very well could have 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. Because the verdict form is so generic and non-specific, there is no way to disprove that this was precisely what occurred in the deliberation room. Judge Darvas abused her discretion by finding that there was no reasonable inference from the evidence to support the verdict. This Court should rectify that error and reverse her decision.

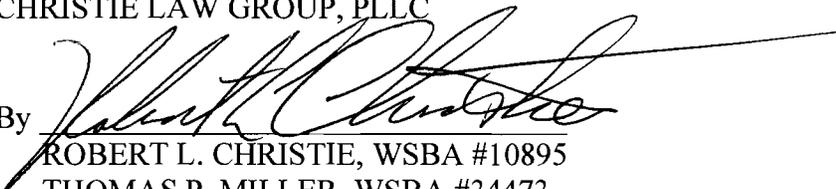
## V. CONCLUSION

The City did not owe plaintiffs any duty of care. None of the exceptions to the public duty doctrine applies to the undisputed facts of this case. Similarly, Restatement (Second) of Torts § 302B does not apply, as Officer Hensing did not take any affirmative action that exposed Ms. Roznowski to a foreseeable risk of harm from Mr. Kim. The Court should vacate the jury's verdict and dismiss all claims with prejudice.

Should the Court reach the issue, the trial court abused its discretion by ordering a new trial on Ms. Loh's and Ms. Washburn's damages. There was a reasonable inference that the jury concluded that Mr. Kim caused all of their damages by killing their mother, while the City proximately caused all of Ms. Roznowski's damages. Accordingly, this Court should reverse Judge Darvas' errant decision.

Respectfully submitted this 23<sup>rd</sup> day of May, 2011.

CHRISTIE LAW GROUP, PLLC

By 

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## **APPENDIX A**

**FILED**  
KING COUNTY, WASHINGTON  
DEC 22 2010  
DEC 22 2010  
SUPERIOR COURT CLERK  
BY DONNALEE PICKREL  
DEPUTY

SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR KING COUNTY

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

Plaintiff,

v.

CITY OF FEDERAL WAY, a Washington  
municipal corporation,

Defendant.

NO. 09-2-19157-3KNT

**SPECIAL VERDICT FORM**

WE, THE JURY, make the following answers to the questions submitted by the court:

**QUESTION NO. 1: Was the Defendant City of Federal Way negligent?**

ANSWER: Yes ("yes" or "no")

*If you answer Question No. 1 "no", sign and return this verdict. If you answer Question No. 1, "yes", then answer Question No. 2.*

**QUESTION NO. 2: Was Defendant City of Federal Way's negligence a proximate cause of injury and damage to the plaintiffs?**

ANSWER: Yes ("yes" or "no")

*If you answer Question No. 2, "no", sign and return this verdict. If you answer Question No. 2 "yes", then answer Question No. 3.*

**ORIGINAL**

**QUESTION 3: What do you find to be the amount of damages proximately caused by the negligence of defendant City of Federal Way?**

A. Plaintiff Estate of Baerbel Roznowski: \$ 1,100,000.00

B. Plaintiff Carola Washburn: \$ 0

C. Plaintiff Janet Loh: \$ 0

*Please sign and return this verdict form.*

Date: 22 Dec  
2010

Andrea Gray  
Presiding Juror

## **APPENDIX B**

RICHARD D. JOHNSON,  
*Court Administrator/Clerk*

*The Court of Appeals  
of the  
State of Washington*

DIVISION I  
One Union Square  
600 University Street  
Seattle, WA  
98101-4170  
(206) 464-7750  
TDD: (206) 587-5505

**VIA E-MAIL**

October 22, 2010

Robert L. Christie  
Thomas P Miller  
Christie Law Group, PLLC  
2100 Westlake Ave N Ste 206  
Seattle, WA, 98109-5802

John Robert Connelly, JR  
James Lovejoy  
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Tacoma, WA, 98403-3322

CASE #: 65957-0-1  
Carola Washburn, Respondent v. City of Federal Way, Petitioner

Counsel:

Enclosed is the ruling of the Commissioner entered today in the above case.

In the event counsel wishes to object, RAP 17.7 provides for review of a ruling of the Commissioner. Please note that a "motion to modify the ruling must be served . . . and filed in the appellate court not later than 30 days after the ruling is filed."

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

emp

c: The Honorable Andrea A. Darvas – **VIA US MAIL**

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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.

No. 65957-0-1

**COMMISSIONER'S RULING  
DENYING DISCRETIONARY  
REVIEW**

Baerbel Roznowski was murdered by her long-time boyfriend after a Federal Way police officer served him with a temporary antiharassment protection order at Ms. Roznowski's residence. The city of Federal Way (City) seeks discretionary review of the denial of its motion for summary judgment, arguing that the public duty doctrine precludes any liability. Because the legislative intent and special relationship exceptions arguably apply, the City fails to establish obvious error. Discretionary review is denied.

**FACTS**

Paul Kim was the long-term boyfriend of Ms. Roznowski. Kim had his own residence, but was living with Roznowski at her residence. Because of several past confrontations, Ms. Roznowski sought a temporary no-contact order, requiring Kim to stay at least 500 feet away from her and her residence. On May 1, 2008, Ms. Roznowski met with the domestic violence advocate employed by the courts, who told her that a domestic violence protection order based on incidents of domestic violence

No. 65957-0-1/ 2

would require Kim to immediately move out, but an antiharassment order would not. Ms. Roznowski then filled out a petition for a temporary antiharassment order and the court issued the order precluding Kim from being within 500 feet of Ms. Roznowski or her residence.

That same day, Ms. Roznowski arranged for police to serve Kim with the order. She filled out a law enforcement information form that recites that "[t]his completed form is required by law enforcement. This information is necessary to serve, enforce and enter your order into the state wide law enforcement computer. Fill in the following information as completely as possible." In that form, Ms. Roznowski provided her current address and listed that same residence as the location where Kim should be served. She checked the box in the "Hazard Information" section of the form, indicating that Kim's history includes "Assault." Under current status, Ms. Roznowski indicated that Kim was "a current or former cohabitant as an intimate partner," she and Kim were "living together now," Kim did not know he "may be moved out of the home", did not "know you're trying to get this order," and was "likely to react violently when served."

She met with Gretchen Sund, an employee of the police department who receives requests for service of protection orders. Sund recalls that Ms. Roznowski asked to have police serve the protection order and that she wanted Kim to move out of her residence. Sund does not recall what she said to Ms. Roznowski. She made a note that Kim would likely be at Ms. Roznowski's residence in the mornings and that would be the best time to serve him. Sund does not read the orders provided for service, makes no distinction between antiharassment and domestic violence protection orders, and does not give legal advice.

On May 1, 2010, Ms. Roznowski also sent two e-mails to her adult daughter. At 3:08 p.m. she e-mailed her daughter that "I did it. Now to sort it out. They will actually stay here while he gets his stuff out. Don't know how that will pan out." Her daughter asked when that would happen and at 3:19 p.m. Ms. Roznowski replied, "[H]aven't read the order, just got back. [B]asically, once served the temp order he'll be escorted out and can't call, visit, come near here within 500 feet. . . . He will get served the package for 5/14 and can show or not. I believe they'll order him to move his junk at that time."

On May 3, 2008, Officer Andrew Hensing personally served Kim with the protection order at Ms. Roznowski's residence. In addition to the temporary protection order, Officer Hensing had the law enforcement information sheet as well as Ms. Roznowski's petition for the temporary order. Officer Hensing did not read either of those documents.

Officer Hensing confirmed Kim's identity, explained to Kim he was being served with an antiharassment order, and told him there was a hearing date on the order. Officer Hensing told Kim to read the order while he waited and asked Kim if he had any questions. When Kim said he did not have any questions, Officer Hensing told Kim he had to comply with the order fully, but he did not ask to speak with Ms. Roznowski, escort Kim from the residence, or wait to see if he complied with the order by leaving the residence. Officer Hensing saw another adult in the residence, but could not tell if the adult was male or female.

Kim left the residence but returned later that same morning and fatally stabbed Ms. Roznowski.

Ms. Roznowski's daughters and her estate sued the City. The City sought summary judgment based on the public duty doctrine. The trial court denied summary judgment, relying on the failure to enforce exception without reaching the legislative intent or special relationship exceptions. The City seeks discretionary review. After argument of the motion for discretionary review, the trial court denied a motion for summary judgment on proximate cause, and the case is set to go to trial on December 6, 2010.

### **CRITERIA FOR DISCRETIONARY REVIEW**

Discretionary review is available only if:

- (1) The superior court has committed an obvious error which would render further proceedings useless;
- (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
- (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or
- (4) The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b).

### **DECISION**

Failure to Enforce Exception. Generally, a governmental agency is not responsible in tort for failure to comply with a duty owed only to the public. Here the trial court relied on the failure to enforce exception to the public duty doctrine. The failure to enforce exception to the public duty doctrine applies where (1) governmental

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agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation, (2) the agents fail to take corrective action despite a mandatory statutory duty to do so, and (3) the plaintiff is within the class of persons the statute intended to protect. Honcoop v. State, 111 Wn.2d 182, 190, 759 P.2d 1188 (1988) (citing Bailey v. Forks, 108 Wn.2d 262, 268, 737 P.2d 1257, 753 P.2d 523 (1987)). The trial court concluded that although there is no mandatory duty to arrest for a violation of an antiharassment protection order issued under chapter 10.14 RCW, "it is axiomatic that police have a duty to enforce court orders." Therefore, the trial court concluded that the failure to enforce exception applied.

The City is correct that the duty to take corrective action must be found in a statute. There is no provision in chapter 10.14 RCW that mandates corrective action in this setting. A violation of an antiharassment order does not mandate, but only allows an arrest. RCW 10.31.100(8). The only express duty of police under chapter 10.14 RCW is to serve an antiharassment order when requested. RCW 10.14.100(2).

The plaintiffs argue that duties under the domestic violence statute chapter 10.99 RCW are implicated because the information provided to Officer Hensing in the law enforcement cover sheet and the petition for the temporary antiharassment protective order should be considered the same as if Ms. Roznowski made those same statements in person when Officer Hensing arrived on May 3 to serve the protection order. But it is not clear that those facts trigger a mandatory statutory duty to take corrective action.

"The primary duty of peace officers, when responding to a domestic violence situation, is to enforce the laws allegedly violated and to protect the complaining party."

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RCW 10.99.030(5). But as recognized in RCW 10.31.100, the mandatory duty to arrest for an act of domestic violence is triggered in only two situations: (1) there has been a violation of an order restraining a person issued under RCW 7.90, 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34; or (2) within the preceding four hours, a person has assaulted a family of household member and the officer believes (i) a felonious assault has occurred, (ii) an assault has resulted in bodily injury; or (iii) physical action has occurred which was intended to cause another person to reasonably fear imminent serious bodily injury or death. RCW 10.31.100(2)(a), (c). Neither of those mandatory arrest sections applies here.

The plaintiffs note that for purposes of the domestic violence provisions of chapter 10.99 RCW, domestic violence is defined to include first degree and second degree trespass when committed by a household member against another. RCW 10.99.020(5)(j), (k). A person "enters or remains unlawfully" in or upon premises when he is not then licensed, invited, or otherwise privileged to so enter or remain. RCW 9A.52.010(3).

If the owner of a residence revokes the license of another member of the household to remain at that residence, then that person commits trespass by remaining at the residence. See State v. Kilponen, 47 Wn. App. 912, 918-19, 737 P.2d 1024 (1987) (restraining order terminated husband's right to enter home occupied by wife despite the fact that he owned home); State v. Howe, 116 Wn.2d 466, 468-69, 805 P.2d 806 (1991) (children can be convicted of burglary, notwithstanding their statutory right to enter family home, if parent revokes privilege to enter home). But even if Ms. Roznowski revoked any license to remain by means of obtaining and serving the

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antiharassment order requiring Kim to remain 500 feet from her residence, there still is no showing of a mandatory statutory duty to take corrective action. The failure to enforce exception does not appear to extend to a nonviolent act of domestic violence, such as trespass.

A police officer arriving at Ms. Roznowski's residence with knowledge that Kim was living with her at that address, that he has a history of assault and is capable of physical violence, that in a prior incident Kim came close to hitting her, that she feared retaliation by Kim and that Kim is likely to react violently, could have inquired whether she was present and, if so, whether she wanted police to standby until Kim removed his property from her residence or wanted police to escort her if she left while Kim removed his property from her residence. But there is no mandatory statutory duty under chapter 10.14 RCW to do so, and the failure to do so is not a violation of mandatory statutory duty under chapter 10.99 RCW.

Legislative Intent Exception. In the alternative, the plaintiffs argue the legislative intent exception. That exception to the public duty doctrine applies when the statute or regulation that establishes a governmental duty expressly identifies and protects a particular and defined class of persons. Ravenscroft v. Wash. Water Power Co., 136 Wn.2d 911, 930, 969 P.2d 75 (1998). Absent such express identification, the court will not imply such legislative intent. Ravenscroft, 136 Wn.2d at 930. There have been many attempts to invoke this exception under various statutes, but only a handful of cases holding this exception applies.

Chapter 10.14 RCW covers a wide range of conduct ranging from irritating behavior to more serious acts of harassment. That statute recognizes that the

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prevention of harassment is an important governmental objective, and the statute “is intended to provide victims with a speedy and inexpensive method of obtaining civil antiharassment protection orders preventing all further unwanted contact between the victim and the perpetrator.” RCW 10.14.010. The statute does not identify a governmental duty to protect victims against all violations of civil antiharassment orders issued under Chapter 10.14 RCW.

But chapter 10.99 RCW does set out a broad public policy that police should enforce existing laws to protect victims of domestic violence. There is some room to debate how broadly the legislative intent exception applies in the application of chapter 10.99 RCW. In Donaldson v. City of Seattle, 65 Wn. App. 661, 667-78, 831 P.2d 1098 (1992), a boyfriend physically attacked the victim within the prior four hours, but he was not present at the residence when police arrived. The majority held that there was no duty to investigate. In analyzing the public duty doctrine, the majority recited the standards for the legislative intent exception, noted that chapter 10.99 RCW requires the police to better enforce the current laws in order to protect the victims of domestic violence, and concluded that the statute “identifies the particular class of individuals to be protected and defines the specific duties of the police in this regard.” Although Donaldson found no duty to investigate and could be read to limit the legislative intent exception to situations involving a recent physical attack by a boyfriend, the holding might be read more broadly to support the legislative intent exception to any act of domestic violence occurring in the presence of the officer. Arguably a criminal trespass occurring in the presence of a police officer who has just served an order requiring that

the restrained person not be within 500 feet of the residence where he has been served, is an act of domestic violence that falls within the legislative intent exception.

Special Relationship. The third exception argued by the plaintiffs is the special relationship exception. Under the special relationship exception, a governmental entity is liable for negligence where there is (1) direct contact between the public official and injured plaintiff, (2) express assurance given by the public official to the injured plaintiff, and (3) justifiable reliance by the plaintiff on such express governmental assurance. Babcock v. Mason County Fire Dist. No. 6, 144 Wn.2d 774, 786, 30 P.3d 1261 (2001). To establish a special relationship exception, Ms. Roznowski must have sought an express assurance and the City must have unequivocally given assurances. Babcock, 144 Wash.2d at 789.

Here, there is very limited evidence consistent with any assurance by the police. It is routine police work and not an express assurance to instruct a victim of domestic violence to obtain a no-contact order. Torres v. City of Anacortes, 97 Wn. App. 64, 75-76, 981 P.2d 891 (1999). There is circumstantial evidence in the form of Ms. Roznowski's May 1 e-mails to her daughter that "[t]hey will actually stay here while he gets his stuff out" and "basically, once served the temp order he'll be escorted out and can't call, visit, come near here within 500 fee" The domestic violence advocate was not the source of Ms. Roznowski's belief that police would stay and escort Kim out because she told Ms. Roznowski that Kim would not be required to leave immediately if served with an antiharassment protection order. Ms. Roznowski met with Sund soon after she obtained the protection order. Sund recalls Ms. Roznowski saying that she

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wanted the order served and Kim to move out of her residence. Sund does not recall what she said to Ms. Roznowski.

The May 1 e-mails support a reasonable inference that someone told Ms. Roznowski that the police would remain and escort Kim from the property. Although thin, there arguably is circumstantial evidence that Sund was the source of that assurance.

#### Conclusion

It is challenging to apply the standards for public duty doctrine exceptions to these facts. The obvious error standard is a high threshold. For purposes of RAP 2.3(b)(1), I cannot conclude it would be an obvious error to send this case to trial based upon the legislative intent or special relationship exceptions.

For purposes of RAP 2.3(b)(2), the City does not establish that the ruling substantially alters the status quo because that prong requires a ruling that has an impact external to the litigation.<sup>1</sup>

Importantly, as confirmed by the plaintiffs in their response to the City's supplemental submissions to me, "[t]he trial of this case will allow the parties to present evidence regarding the various exceptions to the doctrine so that this Court will have a fully-developed record when the matter is appealed as a matter of right." Presumably, the parties will request and the trial court will craft a special verdict form and instructions

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<sup>1</sup> In his authoritative law review article on discretionary review, Supreme Court Commissioner Geoffrey Crooks recognizes that the Taskforce comments can be read as drawing a line between rulings that only impact the internal workings of a lawsuit versus rulings that have an impact external to the litigation. Geoffrey Crooks, Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure, 61 Wash. L. Rev. 1541, 1546 (1986).

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to accurately frame and answer the troublesome questions regarding the public duty doctrine in this case.

Therefore, I deny discretionary review.

Now, therefore, it is hereby

ORDERED that discretionary review is denied.

Done this 22<sup>nd</sup> day of October, 2010.

  
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Court Commissioner

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COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION 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/Petitioner.

NO. 65957-0-I

Superior Court No.  
09-2-19157-3 KNT

DECLARATION OF  
SERVICE

2011 MAY 23 PM 4:11  
COURT OF APPEALS  
DIVISION I

MAUREEN E. PATTSNER hereby declares:

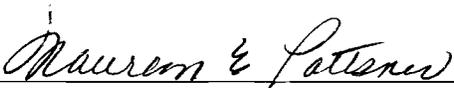
That she is a citizen of the United States and the State of Washington, living and residing in King County in said State; that she is over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness therein; that she caused a copy of the BRIEF OF APPELLANT CITY OF FEDERAL WAY to be delivered to the following in the manner described:

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*Via Electronic Mail and U.S. Mail*

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

DATED at Seattle, Washington this 23<sup>rd</sup> day of May, 2011.

  
\_\_\_\_\_  
MAUREEN E. PATTSNER

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