

**RECEIVED**  
MAY 11 2016  
Washington State  
Supreme Court

No. 93034-1

**SUPREME COURT OF THE STATE OF WASHINGTON**

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WASHINGTON COUNTIES RISK POOL, a public entity,

Respondent,

v.

TAMARA MARIE CORTER, a married individual, STEVE  
GROSECLOSE, an individual,

Appellants,

and

DOUGLAS COUNTY, a municipal corporation,

Respondent.

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**ANSWER TO PETITION FOR REVIEW BY DOUGLAS COUNTY**

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## I. COUNTER-STATEMENT OF THE CASE

### Statement of Procedure

On January 17, 2014, the Washington Counties Risk Pool (the Risk Pool) filed suit against Tamara Marie Corter, Steve Groseclose and Douglas County seeking declaratory relief that 1) the Risk Pool has no duty to indemnify Groseclose for the Judgment entered against him in *Corter v. Douglas County, et al.*, USDC EDW, No. CV-12-0173-EFS; and 2) the Risk Pool had not breached any duty owed to Corter and/or Groseclose. CP 93.

The County filed a Cross Claim against Corter and Groseclose requesting declaratory relief that Douglas County does not owe a duty to indemnify Groseclose for any Judgment entered against him in *Corter v. Douglas County, et al.*, USDC EDW, No. CV-12-0173-EFS. CP 53.

Corter and Groseclose filed a Cross Claim against the County seeking declaratory relief requiring the County to indemnify Groseclose from the Judgment entered against him. CP 58.

The Superior Court heard the County's Motions for Summary Judgment and entered an Order on August 22, 2014, granting Summary Judgment to the County declaring the County had no duty to indemnify Groseclose for the Judgment entered against him in

*Corter v. Douglas County, et al.*, USDC EDW, No. CV-12-0173-EFS, and had no duty to pay Corter in connection with the Assignment of Claims by Groseclose. CP 380.

Corter and Groseclose filed a timely Notice of Appeal to the Court of Appeals, Division III, No. 32769-8. CP 386. The Court of Appeals issued an opinion on March 15, 2016, affirming the decision of the trial court. Corter and Groseclose now seek review by this Court.

*Statement of Facts*

Steve Groseclose is employed by the Douglas County Sheriff's Office as law enforcement officer assigned as a detective. Tamara Marie Corter is the ex-wife of Groseclose. CP 94-95, CP 101-102.

In April 2009, Groseclose accessed the Spillman system, a regional records management system used by the Douglas County Sheriff's Office, to obtain constitutionally protected confidential information regarding Corter. The information was contained in the record of a Chelan County Sheriff's Office incident. Groseclose used Corter's confidential information against her in court proceedings relating to guardianship of their adult son. CP 95, 102.

On March 23, 2012, Corter filed suit against Douglas County and Steve Groseclose in the United States District Court for the Eastern District of Washington, Civil Action No. CV-12-173-EFS. CP 93. Corter's Complaint for Damages alleged that Groseclose was an agent of Douglas County and acted or purported to act in the performance of his duties as a law enforcement officer when he accessed Corter's information. CP 94, 96. Corter further alleged that (1) Douglas County and Groseclose deprived her of her constitutional rights under color of state law under 42 USC. §1983; (2) Douglas County and Groseclose violated Corter's rights under the First, Fourth and Fourteenth Amendments to the United States Constitution; and (3) Douglas County was liable for the actions of Groseclose based upon Douglas County's official policy, longstanding practice or custom, ratification and policy of inaction. CP 97.

Douglas County is a member of the Washington Counties Risk Pool (the Risk Pool) and thereby obtained liability coverage through the Joint Self-Insured Liability Policy issued by the Risk Pool. CP 162. Douglas County's liability coverage was subject to a \$25,000 deductible under the Joint Self-Insurance Liability Policy. CP 162.

The Risk Pool's Claims Manager, Susan Looker, issued a letter to Groseclose on April 18, 2012. CP 174. The letter explained

the coverage and exclusions under the Risk Pool's Joint Self-Insurance Liability Policy issued to Douglas County. CP 175-177. The letter informed Groseclose the Risk Pool would, based upon the allegations in the Complaint, provide a defense to the lawsuit under a reservation of rights. CP 177. The letter advised Groseclose the Risk Pool reserved the right to decline to pay any judgment or settlement if, at the time of the alleged acts, Groseclose was not acting in good faith on behalf of Douglas County or if Corter's alleged damages were intentionally caused by Groseclose. CP 177. The Risk Pool also reserved the right to refuse to pay any punitive damage awarded against Groseclose. CP 177.

The Risk Pool retained separate attorneys for Douglas County and Groseclose. Douglas County was represented by attorney Stanley Bastian. Groseclose was represented by attorney Heather Yakely, at the expense of the Risk Pool. CP 200.

On September 20, 2013, the United States District Court entered an Order granting Douglas County's motion for summary judgment. The District Court held that Groseclose accessed the Spillman system in contravention of Douglas County policy,<sup>1</sup> that Groseclose had no legitimate law enforcement purpose to access the

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<sup>1</sup> CP 102; Order Granting Motion for Summary Judgment, ll. 11-13

Spillman system and obtain information regarding Corter,<sup>2</sup> that there was no evidence of an affirmative, conscious or deliberate choice by Douglas County to ratify Groseclose's improper access of Spillman for personal gain,<sup>3</sup> and that Groseclose's conduct "was not indicative of a deliberately-indifferent training/supervision program by the County, but rather 'rogue conduct' by a County detective."<sup>4</sup> Judgment was entered that same day, and Douglas County was dismissed as a party. CP 112.

Corter did not appeal the Order Granting Douglas County's Motion for Summary Judgment.

The case remaining between Corter and Groseclose proceeded to a jury trial on October 28, 2013. The jury was instructed:

Plaintiff claims . . . Defendant deprived her of her constitutional rights . . . by using his law enforcement status and credentials to access her private, personal medical information **for his own personal, and non-law enforcement related purposes.** CP 115.<sup>5</sup>

A person acts "under color of law" when the person acts **or purports to act** 1) in the performance of official duties under any state, county, or municipal law, ordinance, or regulation; 2) in some meaningful way either to his governmental status or to the

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<sup>2</sup> CP 106; Order Granting Motion for Summary Judgment, ll. 15-17

<sup>3</sup> CP 108, Order Granting Motion for Summary Judgment, ll. 19-22

<sup>4</sup> CP 110-111, Order Granting Motion for Summary Judgment, l. 25 – l. 2

<sup>5</sup> Preliminary Instruction No. 2.



performance of his duties; or 3) **under pretense of his governmental status**. CP 137.<sup>6</sup>

[T]he Plaintiff must establish by the preponderance of the evidence that: 1) the Defendant, **while acting under color of law**, accessed the March 30, 2009, law enforcement incident report pertaining to Plaintiff via Spillman; 2) the Defendant **had no legitimate law enforcement purpose to access this incident report** pertaining to the Plaintiff . . . . CP 138.<sup>7</sup>

(Emphasis added)

A jury verdict was entered on October 30, 2013, in favor of Corter. The jury found Groseclose acted “under color of law” and awarded Corter damages in the amount of \$60,000. CP 149-150. On February 18, 2014, Corter’s attorney was awarded \$61,025.50 in attorney’s fees and \$1,568.43 in taxable costs. CP 152-161.

On November 6, 2013, one week after the jury’s verdict, Ms. Looker issued a letter to Groseclose informing him the Risk Pool was enforcing its reservation of rights and declined to pay the Judgment entered against Groseclose because Groseclose was not acting in good faith on behalf of Douglas County when he accessed the Spillman system to obtain Corter’s constitutionally protected confidential information. CP 178. The letter also advised Groseclose

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<sup>6</sup> Final Jury Instruction No. 8.

<sup>7</sup> Final Jury Instruction No. 9A.

of his right and the process to appeal the Risk Pool's determination. Groseclose did not appeal the Risk Pool's determination. CP 178.

On December 4, 2013, Corter and Groseclose entered into a written Assignment of Claims. CP 180. Corter agreed not to execute her Judgment against Groseclose in consideration of Groseclose assigning to Corter all his "rights, privileges, claims and causes of action that he may have against Douglas County and/or the Risk Pool/Insurers affiliated with Douglas County and its agents." The assignment included "claims or actions for insurance protection, indemnification, breach of contract, negligence, fiduciary breach, Consumer Protection Act, bad faith, punitive damages and/or the insurer's acting as a lawyer."

This subsequent litigation seeking declaratory relief was commenced by the Risk Pool.

### III. ARGUMENT

#### A. Summary of Argument

Groseclose never made a request to Douglas County for a defense to the §1983 lawsuit filed by Corter. Douglas County did not provide a defense to Groseclose. Groseclose was defended by separate counsel retained by the Risk Pool. Groseclose was not acting or in good faith purporting to act within the scope of his

official duties as a law enforcement officer when he accessed  
Corter's constitutionally protected confidential information for his  
personal use in his son's guardianship proceedings.

Based upon these clearly demonstrated facts in the record,  
the Court of Appeals properly held that Douglas County was not  
liable for indemnity under RCW 4.96.041 and/or DCC Chapter 2.90  
with respect to the Judgment entered against Groseclose, and the  
Risk Pool contractually liable for indemnify.

The Court of Appeals decision is not in conflict with state or  
federal case law, and is consistent with the policy considerations  
underlying 42 U.S.C. §1983.

B. *The Application of RCW 4.96.041 and DCC Chapter 2.90*

Under RCW 4.96.041, a county employee *may request* the  
County provide a defense to a lawsuit that is based upon the  
employee's performance of official duties. The County provides the  
defense *if the County finds* "the acts or omissions . . . were, or in  
good faith purported to be, within the scope of his or her official  
duties."

(1) Whenever an action or proceeding for damages is  
brought against any past or present officer, employee,  
or volunteer of a local governmental entity of this  
state, **arising from acts or omissions while  
performing or in good faith purporting to perform**

**his or her official duties**, such officer, employee, or volunteer **may request** the local governmental entity to authorize the defense of the action or proceeding at the expense of the local governmental entity.

(2) If the legislative authority of the local governmental entity, or the local governmental entity using a procedure created by ordinance or resolution, **finds that the acts or omissions of the officer, employee, or volunteer were, or in good faith purported to be, within the scope of his or her official duties**, the request shall be granted. If the request is granted, the necessary expenses of defending the action or proceeding shall be paid by the local governmental entity. Any monetary judgment against the officer, employee, or volunteer shall be paid on approval of the legislative authority of the local governmental entity or by a procedure for approval created by ordinance or resolution.

RCW 4.96.041(1) and (2). (Emphasis added)

Douglas County has implemented RCW 4.96.041 through

Chapter 2.90 of the Douglas County Code:

2.90.020 Request for defense of claim.

An officer, employee or volunteer **may request** that Douglas County defend and pay the necessary expenses of defending any claim arising from acts or omissions **while performing or in good faith purporting to perform his or her official duties**. **Such request shall be in writing and signed by the person or his or her attorney, shall be filed with the board of county commissioners**, and shall include a summary of the claim. If the claim is pending, then a copy of the written claim, demand or lawsuit shall be attached to the request.

2.90.030 Authorizing defense of claim.

A. Douglas County shall grant the request to defend a claim and pay the necessary expenses of defense **upon a determination that the claim is based upon an alleged act or omission of the officer, employee or volunteer which was, or in good faith purported to be, within the scope of his or her official duties.** Such determination shall be made as follows:

1. By a majority vote of a quorum of the board of county commissioners consisting of members not named as a party to such claim; or
2. If a quorum of unnamed members of the board is not possible, then by a written opinion of legal counsel, other than the prosecuting attorney, as selected by the board. Such legal counsel shall not be an attorney or member of a law firm who has performed services within the past three years for Douglas County.

B. Douglas County shall not defend or pay for the expense of defending a claim against an officer, employee or volunteer based upon or which alleges unlawfully obtaining personal benefits while acting in his or her official capacity.

C. Douglas County shall not pay any expenses of defending a claim which are paid or incurred by an officer, employee or volunteer prior to receipt of a proper written request by the board of county commissioners. Douglas County shall not pay any expenses of defending a claim in advance of services being rendered or costs being incurred.

2.90.050 Payment of nonpunitive monetary judgment.

When Douglas County **has defended a claim** against an officer, employee or volunteer pursuant to this chapter **and the court hearing the action has found that the officer, employee or volunteer was acting**

**within the scope of his or her official duties,** Douglas County shall pay any final nonpunitive monetary judgment entered on such claim, after termination of all appellate review, if any. Pursuant to RCW 4.96.041, a judgment creditor shall seek satisfaction for a nonpunitive monetary judgment only from Douglas County and a judgment for nonpunitive damages shall not become a lien upon any property of the officer, employee or volunteer.

(Emphasis added)

Therefore, under RCW 4.96.041(1) and DCC 2.90.020, an employee must (1) request the County to authorize the defense of a lawsuit at the expense of the County, and (2) the County must find the lawsuit is arising from acts or omissions of the employee while performing or in good faith purporting to perform his or her official duties.

Under RCW 4.96.041 and DCC 2.90.050 the County is authorized to pay a final, non-punitive monetary judgment against an employee so long as the lawsuit has been defended pursuant to the statute/ordinance and the court entering the judgment found the employee was acting within the scope of his or her official duties.

The decision of the Court of Appeals is based upon application of RCW 4.96.041 and DCC 2.90.050 to the facts of this case.

C. Acting Under Color of Law is Not Synonymous With Performing Within the Scope of Official Duties

As part of the Verdict issued in the *Cortez v. Groseclose* litigation, the jury found that Groseclose acted “under color of law when he accessed the March 30, 2009, law enforcement incident report via Spillman.” CP 149. Groseclose and Cortez contend that “acting within the scope of his or her official duties” as used in RCW 4.96.041 and DCC Chapter 2.90 is synonymous with “under color of law” under 42 U.S.C. §1983.

The Court of Appeals rejected this argument and held the underlying federal action between Cortez and Groseclose did not find that Groseclose was acting within the scope of his official duties. The Court of Appeals examined Washington cases on “scope of employment” and cases interpreting RCW Chapters 4.92 and 4.96.

The Court of Appeals analysis is consistent with §1983 case law. An employee or official acting “within the scope of his or her official duties” is also acting “under color of law.” Conversely, an employee *not* acting within the scope of his or her official duties may still be acting “under color of law” and held liable under §1983.

*D. The Court of Appeals Decision is not Contrary to Public Policy*

Corter and Groseclose contend the decision of the Court of Appeals is contrary to the public policy underlying §1983, by defeating its remedial purposes and deterrent effect. There are four basic arguments presented:

1. The Court of Appeals decision “essentially eliminated all insurance coverage for §1983 suits;”<sup>8</sup>
2. “[M]unicipalities would never be obligated to provide restitution to the citizens whose constitutional rights are violated” under reasoning of the Court of Appeals decision;<sup>9</sup>
3. The Court of Appeals decision eliminates protection of government employees from exposure to personal liability for §1983 suits;<sup>10</sup> and
4. The Court of Appeals decision eliminates §1983 deterrent effects on municipalities and their incentive to train and supervise employees.<sup>11</sup>

As to the first contention, the Court of Appeals decision was based upon the specific language of the Joint Self-Insured Liability Policy issued by the Risk Pool to Douglas County. The language

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<sup>8</sup> Petition for Review, p. 13.

<sup>9</sup> Petition for Review, p. 14

<sup>10</sup> Petition for Review, pp. 14-18

<sup>11</sup> Petition for Review, pp. 18-19



conditioned employee coverage upon employees acting “within the scope of their official duties for the member county or on its behalf.”<sup>12</sup> The Pool’s indemnity obligations are contractual and independent of application of §1983. The Court of Appeals decision has no “global” application to risk pools or to insurance companies.

Corter’s second contention is lacking any merit. The Court of Appeals did not make a decision regarding Douglas County’s liability under §1983. Liability was decided in the underlying federal case. Corter’s lawsuit naming the County as an additional defendant could not survive the County’s motion for summary judgment. The District Court dismissed the County from the lawsuit, with prejudice. This contention is also inconsistent with Corter’s acknowledgement that municipalities are not liable, under the doctrine of *respondeat superior*, for their employees’ violations of §1983.<sup>13</sup>

The third contention by Corter is puzzling, since Corter acknowledges the doctrine of *respondeat superior* is not applicable to suits against municipal employees. Municipal employees acting or purporting to act within the scope of their official duties have protection available through RCW 4.96.041 and local implementing

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<sup>12</sup> Slip Opinion, pp. 3, 22

<sup>13</sup> Petition for Review, p. 16.

ordinances. Corter fails to cite any legal authority for its proposition that the county has an absolute obligation to indemnify employees for all acts or omissions, regardless of whether such act or omission occurs within the scope of the employee's official duties. Public policy does not support Corter's contention.

Finally, Corter's fourth contention is without merit. The Court of Appeals did not make a decision regarding Douglas County's liability under §1983. Liability was decided in the underlying federal case. Corter alleged in that lawsuit the Douglas County was liable for the acts of Groseclose based upon violations of official policy, longstanding practice or custom, ratification and policy of inaction. The Order granting Douglas County's motion for summary judgment held the Corter presented no evidence of an affirmative, conscious or deliberate choice by Douglas County to ratify Groseclose's improper access of Spillman for personal gain,<sup>14</sup> and that Groseclose's conduct "was not indicative of a deliberately-indifferent training/supervision program by the County, but rather 'rogue conduct' by a County detective."<sup>15</sup>

The decision of the Court of Appeals is consistent with and furthers the policies of §1983. The Court of Appeals did not

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<sup>14</sup> CP 108, Order Granting Motion for Summary Judgment, II. 19-22

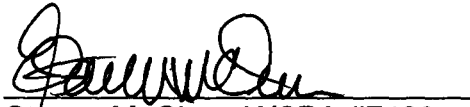
<sup>15</sup> CP 110-111, Order Granting Motion for Summary Judgment, I. 25 – I. 2

eliminate the remedy afforded to Corter under §1983. Corter's judgment against Groseclose for \$60,000, plus \$61,025.50 in attorney's fees and \$1,568.43 in taxable costs, remains intact.

### III. CONCLUSION

The Court of Appeals correctly decided this case. This case does not present any meritorious issues that meet the criteria for accepting review under RAP 13.4(b). The petition for review should be denied.

Respectfully submitted this 9<sup>th</sup> day of May, 2016.

  
Steven M. Clem, WSBA #7466  
Prosecuting Attorney  
For Respondent Douglas County

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON COUNTIES RISK	)	
POOL, a public entity,	)	
	)	
Respondent,	)	
	)	DECLARATION OF
v.	)	SERVICE BY MAIL
	)	
TAMARA MARIE CORTER, a	)	
married individual, STEVE	)	
GROSECLOSE, an individual,	)	
	)	
Appellants, et al.	)	

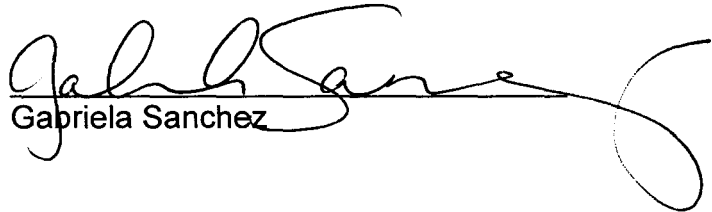
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I declare, under penalty of perjury under the laws of Washington, that I served a copy of:

1. Answer to Petition for Review by Douglas County; and
2. Declaration of Service By Mail;

on each of the persons set forth below, by depositing the same in separate pre-addressed envelopes, postage prepaid, with the U.S. Postal Service at Waterville, Washington, on this 9<sup>th</sup> day of May, 2016.

Signed this same day at Waterville, Washington.

  
 Gabriela Sanchez

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