

64833-1

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NO. 64833-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

ESTATE OF HARB,

Appellant,

v.

KING COUNTY SHERIFF'S OFFICE, et al.,

Respondents.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFERY RAMSDELL

BRIEF OF RESPONDENT KING COUNTY

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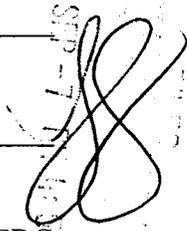


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RESTATEMENT OF THE CASE

This case arises from the summary dismissal of the Respondent's Estate of Harb (Harb) claims brought against King County in the aftermath of the intentional murder of Mohamad-Imad Nazir Harb by Christopher Bistryski on August 20, 2005. Mr. Harb was murdered when Mr. Bistryski walked into the Plaid Pantry in Kenmore, Washington and shot him with a handgun that was the personal weapon of Ferenc Zana. Mr. Bistryski was intoxicated at the time. Harb seeks to hold King County responsible for this intentional murder because Mr. Bistryski was the domestic partner of defendant Ferenc Zana. Mr. Zana was, at that time, employed as a King County Deputy Sheriff.¹

The facts that led up to this murder are as follows: Mr. Bistryski and Mr. Zana started an intimate relationship approximately three years prior to Mr. Harb's murder. They lived together and were domestic partners. *CP 4*. Mr. Bistryski had a history of mental illness for which he was taking medication. He also had a history of alcohol abuse and a felony conviction as a juvenile. *CP 3, 5*. There was no reason for Mr. Zana's supervisors to know these intimate details of Mr. Bistryski's personal life until an incident in December 2004 when Mr. Bistryski borrowed Mr. Zana's car and was stopped by a Seattle police officer.

After Mr. Bistryski told the officer of his relationship to Mr. Zana, the officer notified the King County Sheriff's Office and the incident was documented. Captain Rebecca Norton met with Mr. Zana and counseled him on lending out his vehicle. *CP 49-61.*

Mr. Bistryski next came to the attention of Mr. Zana's supervisors on March 23, 2005, when King County deputies were dispatched to Mr. Zana's residence in response to a 911 call from Mr. Bistryski's mother. When they arrived they learned that Mr. Bistryski had cut himself on both arms with a razor. He was taken to Harborview Medical Center for a mental health evaluation. Mr. Zana was out of the country at the time. When he returned, he attended a meeting with Major Robin Fenton and Captain Norton. He was cautioned about his association with Mr. Bistryski. This meeting took place on April 15, 2005. *Id.*

On April 23, 2005, King County deputies again responded to Mr. Zana's residence and learned that Mr. Bistryski had cut himself again. Mr. Zana was present on this occasion. Sgt. Steven Keeney was the supervisor on the scene. At that time he told Mr. Zana he would never tell anyone how to live their private life, but he strongly suggested that Mr. Zana might want to consider obtaining another roommate. Sgt. Kenney also suggested that Mr. Zana invest in a lock box to secure his weapons even

¹ Mr. Zana left the Sheriff's Office after the murder.

though he did not have any authority to order him to do so. *CP 46-48*. On April 29, 2005, Major Fenton again met with Mr. Zana and advised him that he was bordering on a policy violation as Mr. Bistryski's actions were making both he and the department look bad. Mr. Zana assured Major Fenton that he would tell Mr. Bistryski that he would be kicked out of the house if he ever drank again. *CP 49-61*.

There were no other issues between Mr. Zana and Mr. Bistryski that came to the attention of Mr. Zana's supervisors until August 20, 2005. *Id.* On that date, Mr. Bistryski went to the Empire Bar and Grill where it is alleged that he became severely intoxicated and had several altercations with other patrons. *CP 4*. One of the patrons called Mr. Zana at approximately 11:00 p.m. and asked him to come to the bar and drive Mr. Bistryski home because he was in no condition to drive his moped. Mr. Zana did so. Once they got home, Mr. Zana went to bed as he had to work the following morning. When he went to bed Mr. Zana left his personal firearm in a fanny pack on the kitchen counter. Mr. Zana later said he was not concerned about the weapon because Mr. Bistryski had never shown any interest in weapons before. Mr. Bistryski did not go to bed upon their return. *CP 65-91*. Instead, he took Mr. Zana's private gun out of the fanny pack (a felony), left the residence, went to the Plaid Pantry and

murdered Mr. Harb. The circumstances of the murder are documented in Detective Thien Do's Certification for Probable Cause. *CP 94-99.*

Mr. Bistrski was charged with the murder of Mr. Harb. On April 23, 2007, he pled guilty to murder in the second degree with a firearm enhancement. Prior to accepting the guilty plea, the court ordered that he be evaluated at Western State Hospital. He was found to be competent to stand trial and that he understood the nature and quality of his actions. He was sentenced to 290 months. *CP 101-111.*

Based on the above facts and others set forth below, Harb claims that Mr. Zana was acting within the scope and course of his employment such that King County is vicariously liable for his negligence. This argument is based on the faulty assertion that the King County Sheriff issues ammunition for use in "off-duty" weapons. The alleged basis for this assertion is a policy which was deleted years ago. There is no evidence in the record to even show that King County knew Mr. Zana was using Sheriff's Office issued ammunition. Moreover, there is no requirement whatsoever that deputies possess off-duty weapons at all. *CP 291-294.* While deputies *may* register a second weapon for *on duty* work, Mr. Zana did not do so. *CP 295-296.*

Alternatively, Harb claims that Mr. Zana was acting outside the scope of his employment but that *King County* had a separate duty of care

to Mr. Harb. Harb claims this duty was violated because King County: (1) failed to adopt policies; (2) failed to train and supervise Mr. Zana; (3) should have fired Mr. Zana; and (4) should have "intervened" in Mr. Zana's relationship with Mr. Bistrski "to the extent necessary to mitigate the dangers posed" *CP 114-117*. When asked in discovery to disclose the identity of all standards, guidelines, laws or rules that were violated by King County, Harb did not identify a single one. Instead, Harb answered "[t]he common law rule of negligence." *CP 116-117*.

ISSUES PRESENTED

A. Mr. Zana was off-duty and at home in bed when his domestic partner feloniously stole his personal handgun and murdered Mr. Harb. Should the trial court be affirmed for finding that Mr. Zana was not acting in the scope of his employment?

B. Under the public duty doctrine, a public entity performing governmental functions owes a duty to a particular person only if one of the four exceptions to the doctrine is present. None of the four exceptions are present in this case. Should the trial court be affirmed under the public duty doctrine?

C. Putting the public duty doctrine aside, King County can only be held liable for reasonably foreseeable acts. The murder of Mr.

Harb was not foreseeable to King County. Should the trial court be affirmed because the murder was not foreseeable?

D. A defendant can only be liable for the criminal acts of others if one of following three exceptions is met: (1) a special relationship with the victim; (2) a special relationship with the criminal; or (3) the person takes an affirmative act that exposes the victim to a foreseeable risk of harm. None of those exceptions apply here. Should the trial court be affirmed because the County cannot be held liable for the criminal acts of Mr. Bistryski?

E. In order to prove causation, plaintiff must show that the murder of Mr. Harb would not have occurred if the County had not been negligent. Even if the County had done every lawful act Harb says it should have, it still requires speculation to conclude that Mr. Bistryski would not have still murdered Mr. Harb. Should the trial court be affirmed because Harb cannot show causation without resorting to speculation?

F. Plaintiff claims that King County should have "intervened" in the relationship that Mr. Zana had with his domestic partner and that the County should have somehow forced Mr. Zana to store his personal handgun in some other manner. Plaintiff's theories ignore the Fourteenth Amendment right to freedom of association and the Second Amendment

right to bear arms. Should the trial court be affirmed where King County appropriately took these individual constitutional rights into consideration?

ARGUMENT

A. King County does not have respondeat superior liability because Ferenc Zana was not acting within the scope of his employment in any relevant sense.

Harb claims that Mr. Zana was acting within the scope of his employment when Mr. Bistrzski killed Mr. Harb. It is unclear how this could be so, given that Mr. Zana was off duty and in bed when Bistrzski feloniously stole Mr. Zana's personal handgun and then murdered Mr. Harb. In response to King County's inquiry as to the bases for this theory, Harb states simply that King County is responsible for Mr. Zana's actions because his "acts and omissions were, in whole or in part, within the scope of his job responsibilities as a Deputy Sheriff (*to own, maintain, and regularly carry a loaded personal firearm when off duty*)." CP 122. In other words, Harb's theory is that Mr. Zana was acting within the scope of his employment merely because Mr. Zana owned his own gun, which the Sheriff's Office did not require him to own, carried his own gun while off-duty, and that somehow these private actions are "within the scope of his job responsibilities as a Deputy Sheriff." These assertions are legally and factually flawed.

Under the doctrine of respondeat superior, "an employer may be liable for its employee's negligence in causing injuries to third persons if the employee was acting within the 'scope of employment' at the time of the occurrence." *Rahman v. State*, 150 Wn. App. 345, 350, 208 P.2d 566 (2009) (citation omitted). "The test for determining if a person is acting within the scope of employment is 'whether the employee was, at the time, engaged in the performance of the duties required of him by his contract of employment, or by specific direction of his employer.'" *Rahman v. State*, 150 Wn. App. at 350-51 (citation omitted). "[W]here there can be only one reasonable inference from the undisputed facts, the issue may be resolved at summary judgment." *Id.* at 351 (citations omitted).

Mr. Zana was not acting in the scope of his employment when Mr. Bistryski murdered Mr. Harb. Mr. Zana was off-duty and in bed when the murder occurred. Nor was Mr. Zana "engaged in the performance of his duties" to King County in any other relevant sense. Nevertheless, plaintiff asserts that Mr. Zana was in the scope of his employment in regards to this murder because his "responsibilities" as a deputy included a requirement "*to own, maintain, and regularly carry a loaded personal firearm when off duty.*" This statement is pure fiction -- there is no such requirement. *CP* 52 ("That is not true. There is no such requirement.").

Harb's claim that it is expected of police officers to be on duty 24 hours a day is vastly overstated. Mr. Zana was outside of work hours and not performing any duties for King County when the murder occurred. He was therefore out of scope. *See Melin-Schilling v. Imm*, 149 Wn. App. 588, 591, 205 P.3d 905 (2009) (conduct is out of scope if it is different from kind authorized, far beyond time or space limits, or too little actuated by a purpose to serve the master). Also, unless people or property are at risk, the manual prohibits deputies from getting involved in incidents while off duty, particularly in their own neighborhoods. *CP 291-294*. When incidents do arise, they are normally required to call the police. *Id.* While police officers are *authorized* to respond 24 hours a day under state law, they are not required to. If Mr. Zana had been exercising the powers of his police commission, this would be a different case. He was not, however, exercising those powers and so was not in the scope and course of his employment.

Even if there were a requirement to carry an off-duty weapon, the fact that an employee's spouse or domestic partner steals the employee's personal handgun and then intentionally murders someone while the employee is off-duty and in bed means that the employee was *not* "engaged in the performance of his duties" to his employer. Mr. Zana was

simply not performing any duties for King County as he lay in bed off-duty while Mr. Bistrski stole his gun and went and murdered Mr. Harb.²

Harb's reliance on *Vollendorff v. United States*, 951 F.2d 215 (9th Cir. 1991) is also misplaced. In that case the army officer was specifically *required* by his employer to take a specific medication as part of his duties in the army. Again, Mr. Zana was not required to carry an off-duty weapon.

Mr. Zana was not acting within the scope of his employment in regards to Mr. Bistrski's intentional murder of Mr. Harb. The trial court's decision to dismiss Harb's claim for respondeat superior liability should be affirmed.

B. Harb's claims against the King County Sheriff's Office were properly dismissed.

The King County Sheriff's Office is a department of King County that cannot be sued. *See Nolan v. Snohomish County*, 59 Wn. App. 876, 883, 802 P.2d 792 (1990) ("[I]n a legal action involving a county, the

² If a police officer commits a murder, he is acting outside the scope of his employment as a matter of law. *Kyreacos v. Smith*, 89 Wn.2d 425, 430, 572 P.2d 723 (1977) ("Commission of premeditated murder by a policeman simply precludes any possibility that he was acting within the course and scope of his employment.") Given this rule, it does not make any sense that the officer could be found in the scope of employment where his spouse or domestic committed a murder while the officer was off-duty.

county itself is the only legal entity capable of suing and being sued.")

The King County Sheriff's Office was therefore properly dismissed.

C. Harb's claims against King County are barred by the public duty doctrine.

Whether a defendant owes a duty to any particular plaintiff in a given case is a question of law. *Johnson v. State*, 77 Wn. App 934, 894 P.2d 1366 (1995). "In determining whether the County owed [plaintiff] a duty, we look to the public duty doctrine." *Vergeson v. Kitsap County*, 145 Wn. App. 526, 535, 186 P.3d 1140 (2008). "[U]nder the public duty doctrine, a government entity is not liable for a public official's negligence unless the plaintiff shows that the government breached a duty to her individually rather than to the public in general." *Vergeson v. State*, 145 Wn. App. at 535 (citation omitted). In *Haberman v. WPPSS*, 109 Wn.2d 107, 158, 750 P.2d 254 (1988) (citations omitted) (emphasis added), the Supreme Court stated:

The public duty doctrine determines the scope of duty involved where public services are provided. *The doctrine limits governmental liability arising out of its provision of public services to breach of a duty owed specifically to one plaintiff, rather than the public generally.*

Accordingly, the public duty doctrine requires that

[F]or one to recover from a municipal corporation in tort it must be 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 (that is, a duty to all is a duty to no one).

Taylor v. Stevens Cy., 111 Wn.2d 159, 759 P.2d 447 (1988); *Bailey v.*

Town of Forks, 108 Wn.2d 262, 265, 737 P.2d 1257 (1987); *see also*

Southers v. City of Farmington, 263 S.W.3d 603, 621 (Mo., 2008)

(holding that the public duty doctrine bars claims of negligent supervision of a police officer and negligent failure to adopt police policies).³

There are four exceptions to the public duty doctrine: "(1) legislative intent, (2) failure to enforce, (3) the rescue doctrine; and (4) a special relationship." *Vergeson*, 145 Wn. App. at 537 (holding that plaintiff's claim against the County for negligently failing to quash a warrant was barred by the public duty doctrine).

These four exceptions were again examined by the Court of Appeals in *Vergeson* in 2008. First, "[t]he legislative intent exception to the public duty doctrine applies when the statute or regulation that establishes a governmental duty expressly identifies and protects a particular and

³ In this case alleging negligent supervision of a police officer and negligent policy implementation, the Missouri Supreme Court in 2008 held that "[t]he public duty doctrine also applies to the allegations against Officer Lacey and Chief Baker. Officer Lacey's conduct falls under the protections of the public duty doctrine because a *supervising police officer's duty to supervise officers in his command is a duty owed to the general public*. Likewise, the public duty doctrine applies to the allegations against Chief Baker because his *duties to create and implement police procedures and policies and to train police officers are duties owed to the general public* that are intended to be protected from second-guessing by immunity protections." (Emphasis added.)

defined class of persons. Absent such express identification, we will not imply such legislative intent." *Id.* (Citations omitted.)

Second, "[t]he failure-to-enforce exception to the public duty doctrine applies where (1) governmental agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation, (2) these agents fail to take corrective action despite a statutory duty to do so, and (3) the plaintiff is within the class of persons the statute is intended to protect." *Id.* (Citations omitted.)

Third, "[t]he rescue exception to the public duty doctrine applies where a governmental entity or its agent (1) undertakes a duty to aid or warn a person in danger; (2) fails to exercise reasonable care; and (3) offers to render aid and, as a result of the offer of aid, either the person to whom the aid is to be rendered, or another acting on that person's behalf, relies on this governmental offer and consequently refrains from acting on the victim's behalf." *Id.* (Citation omitted.)

Finally, there are two ways to establish the special relationship exception. First, "[u]nder 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. Thus, to establish a special relationship exception, [a plaintiff] must have sought an express assurance and the County must have unequivocally given assurances." *Id.* (Citation omitted.) Second, "[o]ne who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." *Taggart v. State*, 118 Wn.2d 195, 199, 822 P.2d 243 (1992) (holding that when an injury to a plaintiff was a reasonably foreseeable consequence of paroling a prisoner, the parole board and its field officers who supervised the parolee owed a duty to the injured plaintiff).

None of the four exceptions to the general rule of no duty apply to this case. Harb claims that King County was negligent in four ways: (1) the County failed to adopt policies; (2) the County failed to train and supervise Mr. Zana; (3) the County should have fired Mr. Zana; and (4) the County should have intervened in Mr. Zana's relationship with Mr. Bistryski "to the extent necessary to mitigate the dangers posed" *CP 114-117*. None of these theories implicate the four exceptions to the public duty doctrine. The legislative intent exception does not apply. The failure to enforce exception does not apply. The rescue doctrine does not apply. And the special relationship exception does not apply.

Harb argues that the public duty doctrine does not apply because supervising employees handling and securing dangerous instrumentalities are activities which many private employers perform. *Brief at p. 44.*

While some private employers do supervise people that handle dangerous instrumentalities, no private employer supervises deputy sheriffs. The Sheriff is an independently elected official whose duties to the public are set forth in RCW 36.28.010. These duties include the obligation "to arrest and commit to prison all people that break the peace"; "defend the county against those who . . . endanger the public safety"; "execute the process and orders of the courts of justice or judicial officers"; "execute all warrants"; "attend the sessions of the court"; "keep and preserve the peace"; etc. Every deputy sheriff has the same powers and duties as the elected sheriff. RCW 36.28.020. Deputies must perform their duties in compliance with the United States and Washington Constitutions and they must be supervised and trained in criminal procedure, court rules, criminal justice guidelines, criminal law, domestic violence, and a variety of other matters that apply only to public officers. Supervising deputy sheriffs is therefore clearly a function that is uniquely governmental.⁴

Nor can Harb produce a single case that imposes liability on an employer where its off duty employee's family member murders someone.

⁴ Harb apparently now concedes that decisions by the Sheriff's Office on what policies to

Having no case law supporting its attenuated liability theory, plaintiff relies on three sections of the Restatement to support its "direct negligence" theory against King County. That effort is misplaced.

Under §§ 315 and 319, liability can only be established where the defendant "takes charge" of the person who actually causes the injury or voluntarily assumes a duty to protect the victim. That did not happen here.

§ 317 is only triggered when the servant is on the premises of the master or is using a chattel of the master and the master has the "ability to control his servant." As for the chattel, plaintiff wrongly asserts that Mr. Zana's private weapon was his approved secondary weapon and as such a chattel of King County. While it is alleged that Mr. Zana used department issued ammunition, a bullet is not dangerous until it is in a gun. In this case the dangerous chattel (a gun) was a private weapon owned by Mr. Zana. As for the ability to control, King County could not "control" Mr. Zana's private life, must less control his domestic partner's private life.

Any duty that King County had was to the general public, not to Mr. Harb individually. Harb's claims against the County are therefore barred by the public duty doctrine.

adopt are protected by the public duty doctrine.

D. King County did not owe Mr. Harb a duty to foresee Mr. Bistryski's unforeseeable murder of Mr. Harb.

The murder of Mr. Harb by Mr. Bistryski was unforeseeable as a matter of law and King County cannot be required to have prevented it. *See Tortes v. King County*, 119 Wn. App. 1, 84 P.3d 253 (2003) (holding that a passenger walking onto a bus and shooting and killing the driver was unforeseeable as a matter of law); *Parrilla v. King County*, 138 Wn. App. 427, 436, 157 P.3d 879 (2007) ("If a risk of harm is not foreseeable, an actor generally has no duty to prevent it.") (citations omitted).

There is no way that King County could have, or should have, foreseen that on August 20, 2005, Mr. Bistryski would suddenly decide that he was going to steal Mr. Zana's handgun and then go and kill Mr. Harb in cold blood. While it was certainly known to the department that Mr. Zana had a domestic partner that had a juvenile record and had a drinking problem and had caused harm to himself four months earlier, there was nothing to suggest that the department should have or could have predicted that Mr. Bistryski would then commit murder on August 20, 2005. King County therefore cannot be liable for failing to prevent a murder that it could not reasonably foresee. *See Tortes*, 119 Wn. App. at 8 ("Metro cannot be held liable for a sudden assault that occurs with no warning and that is 'so highly extraordinary or improbable as to be wholly

beyond the range of expectability."") Just as Metro could not be held liable for the "sudden . . . extraordinary or improbable" murder of its driver by Silas Cool, King County cannot be held liable for the sudden intentional murder committed by Mr. Bistrski.

Additionally, the general rule is that people cannot be held liable for the criminal acts of others because criminal conduct is usually not reasonably foreseeable. *See e.g. Tortes*, 119 Wn. App. at 7. Putting aside the public duty doctrine, there are three exceptions to this rule, none of which apply here. The first two exceptions are "special relationship" exceptions: a person can potentially be responsible for the foreseeable criminal acts of another if they have a special relationship with the criminal or the victim. *See Kim v. Budget Rent A Car Sys., Inc.*, 143 Wn.2d 190, 196-97, 15 P.3d 1283 (2001). The third exception arises only where (1) the actor's "own affirmative act has created or exposed another to a recognizable high degree risk of harm" that a reasonable person would have taken into account, and (2) a third party then commits "foreseeable criminal conduct" that was enabled by the actor's "affirmative act." *Parrilla v. King County*, 138 Wn. App. at 439. An example would be giving a car to a person that was extremely intoxicated.

None of the exceptions to the general rule of no liability for the criminal acts of others apply here. First, King County did not have a

special relationship with Mr. Harb. Second, it did not have a special relationship with Mr. Bistryski. Third, King County did not take any "affirmative act" with Mr. Bistryski that exposed Mr. Harb to any reasonably foreseeable criminal conduct by Bistryski. In fact, Harb's only stated bases for liability involved alleged *failures to act* which are insufficient for liability to attach. *CP 114-117*.

In interrogatory No. 1, King County specifically asked Harb to "[s]tate with particularity *every action that you claim King County negligently took* that forms the basis for your allegation that King County is legally responsible for Mr. Harb's murder by Mr. Bistryski. . . ." *CP 113* (emphasis added). Harb did not identify a single affirmative act. Instead, plaintiff stated "[s]ee answer to interrogatory No. 2." *Id.*

Interrogatory No. 2 then asked plaintiff to identify all actions King County "*negligently failed to take . . .*" *Id.* (Emphasis added.) Plaintiff's response is three pages of single spaced text. Every single alleged wrongdoing by the County is a failure to act. For example: ". . . King County did nothing"; "even so, King County did nothing"; King County failed "to conduct performance reviews"; King County failed "to create and implement policies, practices and procedures . . ."; King County failed "to adequately investigate and respond"; King County negligently supervised Deputy Zana; King County negligently failed "to follow up on

KCSO's advisement . . . that it "would 'get involved' in the situation"; and King County failed "to ensure that KCSO's intervention into the relationship . . . eliminated the dangers posed." *CP 113-117*.

Harb's entire case against King County is therefore premised solely on the theory that King County failed to act. Because the County did not take any "affirmative act" with regards to Mr. Bistryski and no "reasonably foreseeable criminal conduct" resulted from an affirmative act that did not occur, King County did not have any duty to protect Mr. Harb from the unforeseeable criminal acts of Mr. Bistryski. King County therefore simply did not owe Mr. Harb a duty to protect him from the unforeseeable criminal acts of Mr. Bistryski. The trial court should be affirmed.

E. Harb cannot prove a causal link between King County's alleged negligence and Mr. Bistryski's murder of Mr. Harb.

“The elements of a negligence cause of action are the existence of a duty to the plaintiff, breach of the duty, and injury to the plaintiff proximately caused by the breach.” *Bordon v. State*, 122 Wn. App. 227, 95 P.3d 764, 768 (2004). “There are two elements of proximate cause: legal causation and cause in fact.” *Bordon*, 95 P.3d at 770 (citation omitted). Proximate cause “may be a question of law for the court if the facts are undisputed, the inferences are plain and inescapable, and

reasonable minds could not differ.” *Id.* (citation omitted). “Cause-in-fact does not exist if the connection between an act and the later injury is indirect and speculative.” *Id.* at 770-71 (citation omitted).

Harb must therefore prove, without resorting to speculation, that Mr. Bistryski would not have killed Mr. Harb “but for” the claimed negligence of the King County Sheriff’s Office. *See Id.* at 771 (holding that a plaintiff must prove, without resorting to speculation, that a supervised offender could not have committed the crime because he “would have been incarcerated on the day of the” crime).

In *Bordon*, Richard Jones had been found guilty of second-degree burglary, and then for eluding police while out on bond. After his release from prison, the Department of Corrections (“DOC”) monitored Mr. Jones for payment of his financial obligations imposed by the court. Mr. Jones failed to comply with his reporting requirements, and two bench warrants were issued on March 19, 1998. Jones was arrested on the warrants on March 29, 1998. At the violation hearing, the DOC informed the court that Mr. Jones had violated his supervision requirements by failing to report on four occasions, not paying his financial obligations, and not providing a valid address. The DOC failed to inform the court, however, that Mr. Jones had recently been arrested for driving without a license. The court imposed 15 days in jail. Jones was then released on April 7,

1998. Four days later, Mr. Jones borrowed a car from an acquaintance. He drank to a level where he was intoxicated, drove across the centerline, and killed Ms. Bordon.

The Bordon estate sued the DOC for wrongful death, alleging that the negligent supervision of Richard Jones proximately caused Ms. Bordon's death. Despite the fact the plaintiff had insufficient evidence to show that Mr. Jones would have been in jail on the date of the accident "but for" the DOC's negligence, the trial court allowed the case to go to the jury. The jury returned a verdict against the DOC and Jones.

On appeal, the State argued that the trial court erred by submitting the issue of proximate cause to the jury because it required speculation for the jury to conclude there was a causal connection between the DOC's negligence and Ms. Bordon's death. Division I agreed, reversed the trial court, and entered judgment on behalf of the State. The court held as follows:

[T]he evidence presented at this trial leaves gaps in the chain of causation such that the conclusion that Jones would have been incarcerated on the day of the accident has to be based on speculation.

Bordon, 95 P.3d at 771. In other words, even if the State had done every single thing that plaintiff complained of, the only way to conclude that Ms. Bordon would not have been killed anyway would be to guess what *might*

have happened. *Bordon* held that this level of speculative evidence is insufficient to go to trial.

The same is true here. In this case, Harb claimed that King County's was negligent in four ways: (1) the County failed to adopt policies; (2) the County failed to train and supervise Mr. Zana; (3) the County should have fired Mr. Zana; and (4) the County should have intervened in Mr. Zana's relationship with Mr. Bistryski "to the extent necessary to mitigate the dangers posed" Harb has not met its burden to produce real evidence that Mr. Bistryski would not have killed Mr. Harb if the County had acted without negligence.

Instead it is clear that even if King County had done every single lawful thing that Harb claims it should have, it still requires significant speculation to conclude that Mr. Bistryski would not have killed Mr. Harb anyway. Even if the County adopted any policy Harb wants, trained and supervised Mr. Zana every single moment of every single working day, fired Mr. Zana without cause, and "intervened in Mr. Zana's relationship" with his domestic partner in every lawful way possible, it cannot be said that Mr. Zana would not still have owned a personal weapon and that Mr. Bistryski would not have murdered Mr. Harb.

Harb cannot prove causation without resorting to speculation. The claims against King County were properly dismissed.

F. Harb cannot show that King County negligently supervised or trained Mr. Zana.

Putting aside the significant problems with Harb's case set forth above, in order to prove that the County negligently supervised Mr. Zana, plaintiff had to prove that the murder committed by Mr. Bistryski "must be [inside] the scope of" King County's duty to supervise Mr. Zana. *See Scott v. Blanchet High School*, 50 Wn. App. 37, 44, 747 P.2d 1124 (1987). In *Scott*, a teacher at Blanchet High School allegedly had sex and an improper relationship with one of his minor students. These actions were alleged to have occurred off campus and outside the school hours. The student's parents sued Blanchet alleging that it was liable for the teacher's actions. All claims against Blanchet were dismissed on summary judgment and Division One affirmed. One of the theories was that Blanchet failed in its duty to supervise the teacher. The Court rejected that theory, holding that the duty to supervise the teacher did not apply to matters that were "outside the scope of the school's duty" to supervise him. *Scott*, 50 Wn. App. at 44.

The same is true here. In this case, the domestic partner of a King County employee decided to murder a person. This act occurred while the employee was off-duty. Thus, Harb's case is substantially weaker than plaintiff's case in *Scott*. Here, Mr. Zana did not shoot the plaintiff -- his

domestic partner did. Additionally, the intentional murder committed by Mr. Bistryski, who was not employed by King County, cannot be said to be "inside the scope" of the County's duty to supervise Mr. Zana. Nor can it be said that King County had any duty or ability to control Mr. Bistryski from committing this unforeseeable act. Therefore, the actions of Mr. Zana and Mr. Bistryski all occurred well outside the scope of any duty that King County had to supervise Mr. Zana.

Additionally, the gist of Harb's claim that the County negligently supervised Mr. Zana is that the County "should have followed up on its intervention in Deputy Zana's relationship with Mr. Bistryski to the extent possible to mitigate the dangers posed thereby" (whatever that means) and that it should have done something (what is unclear) to force Deputy Zana to "adequately secure" his personal handgun. These claims must be examined in light of the significant constitutional rights they implicate.

As to the theory that the County should have "intervened" in the relationship between Mr. Zana and Mr. Bistryski, it is unclear exactly what Harb means by that vague statement. Employers, and in particular public employers, do not have a right or duty to "intervene in" the intimate relationships of their employees unless the relationship is affecting job performance. *See e.g. Christensen v. County of Boone, Illinois*, 483 F.3d 454 (2007) ("plaintiff's relationship is a form of 'intimate association'

protected by the Constitution.") While it is clear that Mr. Zana was making poor choices in his life, it is unclear exactly what King County was supposed to do about those decisions.

As for his choice to live with Mr. Bistrski, Mr. Zana and Mr. Bistrski had a Fourteenth Amendment constitutional right "in this highly personal relationship" to be free "from unjustified interference by the State." *Roberts v. United States Jaycees*, 468 U.S. 609, 618, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). It is clear that "[f]reedom of association receives protection as a fundamental element of personal liberty" under the Due Process Clause. *Christensen v. County of Boone, Illinois*, 483 F.3d at 463 (citations omitted). While Harb goes on at length to criticize the County inactions in this regard, what Harb does not do is provide any *specific steps* on how King County -- as a public employer -- could have legally "intervened" in a domestic relationship in a way that would have prevented this murder from occurring.

What Harb implies but never states is that King County should have threatened to fire or discipline Mr. Zana if he did not leave Mr. Bistrski. The likely reason why Harb never actually says this is because it would have been illegal under the Due Process Clause to condition Mr. Zana's continued employment on terminating an intimate relationship. Nor could the County have a blanket rule that its employees not live with

people the County deems unacceptable. *See Reuter v. Skipper*, 832 F. Supp. 1420 1423 (1993) (holding that an employer rule that Sheriff's employees could not live with convicted felons was unconstitutional and that without a "showing that plaintiff's relationship with her domestic partner has had any impact on plaintiff's on-the-job performance" that a "relationship rule" could not be enforced). There are therefore serious constitutional problems with Harb's theory that King County should have somehow "intervened in the relationship" between Mr. Bistryski and Mr. Zana.

On the issue of the gun, Harb's theory seems to be that King County should have somehow compelled Mr. Zana to store his gun in some particular manner or to get rid of it. Yet as with the "intervention" theory, this theory ignores the limitations that King County has in light of Mr. Zana's constitutional rights. *See District of Columbia v. Heller*, 128 S.Ct. 2783, 1717 L.Ed.2d 673, 76 USLW 4631 (2008) (holding that the Second Amendment is an enforceable individual right). *See also McDonald v. City of Chicago, Ill.*, 130 S.Ct 3020, 3050 (2010)(holding that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*). There is nothing that King County -- a public employer and agency -- could have done to force Mr. Zana to do anything whatsoever with his personal firearm while off-

duty. While the County clearly would have liked to have done so, it is required to act in compliance with the United States Constitution. Harb's claims to the contrary are without merit.

Finally, it is undisputed that King County's final dealings with the problems shown by Mr. Bistryski occurred about four months prior to the murder. *CP 49-61*. It is undisputed that Sgt. Keeney and Chief Fenton counseled Mr. Zana about the relationship and Sgt. Keeney counseled him about his personal firearm. It is undisputed that Mr. Zana's job performance was not affected in any known way during the four months before the murder. *CP 51*. ("Nor is there anything in his personnel history to suggest that he was not appropriately performing his job duties during that period.") It is undisputed that King County did not violate any standards, guidelines, laws or rules. It is undisputed that at the time of Mr. Harb's murder King County did not know that Mr. Bistryski had committed any other violent criminal acts against third parties. *CP 49-61*. It is undisputed that the department's dealings with Mr. Zana needed to respect his and Mr. Bistryski's rights under the United States Constitution. Under these undisputed facts, King County is entitled to summary judgment on Harb's claims that the County was negligent in its dealings with Mr. Zana and Mr. Bistryski.

Harb's claim that King County negligently supervised Mr. Zana fails because the murder by Mr. Bistryski occurred outside the scope of the County's duty to supervise and the County was not negligent for respecting the constitutional rights of Mr. Bistryski and Mr. Zana.

CONCLUSION

Harb's claim that King County is responsible for Mr. Bistryski's intentional murder of Mr. Harb was properly dismissed. Mr. Zana was not acting within the scope of his employment. Harb's claims are barred by the public duty doctrine. The murder was not foreseeable. King County cannot be found liable for this unforeseeable criminal act. It requires speculation to conclude that the County could have taken any lawful action to prevent this crime. And King County was not negligent in its supervision of Mr. Zana. Even if it was, the crime occurred outside the scope of its supervision of Mr. Zana. For all of these reasons, the trial court should be affirmed.

Respectfully submitted this 7th day of September, 2010

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CERTIFICATE OF SERVICE

On the 7th day of September, 2010, I sent, by ABC Messenger Service, with instructions to be delivered no later than 5:00 p.m. on the afternoon of September 7, 2010, the original BRIEF OF RESPONDENT KING COUNTY to the following:

CLERK, COURT OF APPEALS, DIVISION I
One Union Square
600 University Street
Seattle, WA 98101

And a copy to:

Kevin Winters
HAWKES LAW FIRM, P.S.
19929 Ballinger Way N.E., Suite 200
Shoreline, WA 98155-1223

Appellant's Attorney was also served via Facsimile and Electronic Mail on September 7, 2010.

DATED this 7th day of September, 2010 at Seattle, Washington.



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