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SUPREME COURT NO. _____
COURT OF APPEALS NO. 56620-2-I

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

LEO C. BRUTSCHE,

Appellant,

vs.

CITY OF KENT, a municipal corporation,

Respondent.

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Brian Gain, Judge

PETITION FOR REVIEW

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ORIGINAL

TABLE OF CONTENTS

	Page
A. <u>IDENTITY OF PETITIONER</u>	1
B. <u>COURT OF APPEALS DECISION</u>	1
C. <u>ISSUES PRESENTED FOR REVIEW</u>	1
D. <u>STATEMENT OF THE CASE</u>	2
E. <u>ARGUMENT WHY REVIEW SHOULD BE ACCEPTED</u>	5
1. <u><i>The Court of Appeals Decision Conflicts With This Court's Decisions on the Duty of Care and Law Enforcement Liability for Negligence.</i></u>	5
2. <u><i>The Officers Were Trespassers Ab Initio; The Court of Appeals Decision Conflicts With Decisions of the Supreme Court.</i></u>	9
3. <u><i>Review Should Be Granted under RAP 13.4(b)(4) to Determine Whether the City of Kent Must Comply with the Interlocal Agreement Act, RCW 39.34.030(2) and .040, Before Deploying a SWAT Team Pursuant to an Interlocal Agreement.</i></u>	10
4. <u><i>This Court Should Grant Review Under RAP 13.4(b)(3) and Hold That the Destruction of the Property of an Innocent Third Party by Police Activity, Where No Evidence Is Seized, Constitutes a Compensable Taking Under Article I, § 16 of the Washington Constitution.</i></u>	12
5. <u><i>This Court Should Grant Review Under RAP 13.4(b)(3) and Hold That the Damaging of Mr. Brutsche's Doors by the Police, Where No Evidence Was Seized or Used in a Criminal Prosecution, Constituted a Compensable Taking Under the Fifth and Fourteenth Amendments to the United States Constitution.</i></u>	14
F. <u>CONCLUSION</u>	15

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<i>Bailey v. Town of Forks</i> , 108 Wn.2d 262, 737 P.2d 1257 (1987)	8
<i>Bender v. Seattle</i> , 99 Wn.2d 582, 664 P.2d 492 (1983)	8
<i>Coffel v. Clallam County</i> , 47 Wn. App. 397, 735 P.2d 686 (1987)	8
<i>Conger v. Pierce County</i> , 116 Wash. 27, 198 P. 377 (1921)	13
<i>Dickgieser v. State</i> , 153 Wn.2d 530, 105 P.3d 26 (2005)	14
<i>Eggleston v. Pierce County</i> , 148 Wn.2d 760, 64 P.3d 618 (2003)	12-14
<i>Employco Personnel Services, Inc. v. City of Seattle</i> , 117 Wn.2d 606, 817 P.2d 1373 (1991)	8
<i>Goldsby v. Stewart</i> , 158 Wash. 39, 290 P. 422 (1930)	5, 6, 10
<i>Hamilton v. King County</i> , 195 Wash. 84, 79 P.2d 697 (1938)	9, 10
<i>Hertog v. City of Seattle</i> , 138 Wn.2d 265, 979 P.2d 400 (1999)	7
<i>Jahns v. Clark</i> , 138 Wash. 288, 244 P. 729 (1926)	9
<i>Joyce v. State of Washington</i> , 155 Wn.2d 306, 119 P.3d 825 (2005)	7
<i>Keller v. City of Spokane</i> , 146 Wn.2d 237, 44 P.3d 845 (2002)	7

TABLE OF AUTHORITIES (CONT'D)

	Page
 <u>WASHINGTON CASES (Cont'd)</u>	
<i>Mason v. Bitton</i> , 85 Wn.2d 321, 534 P.2d 1360 (1975)	8
<i>Stalter v. State</i> , 151 Wn.2d 148, 86 P.3d 1159 (2004)	7
<i>State v. Plaggemeier</i> , 93 Wn. App. 472, 969 P.2d 519 (1999)	11
<i>Taggart v. State</i> , 118 Wn.2d 195, 822 P.2d 247 (1992)	7
 <u>FEDERAL CASES</u>	
<i>Loretto v. Teleprompter Manhattan CATV</i> , 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982)	15
<i>Turner v. Sheriff of Marion County</i> , 94 F. Supp. 2d 966 (S.D. Ind., 2000)	9
 <u>RULES, STATUTES AND OTHERS</u>	
Fifth Amendment to the United States Constitution	2, 14, 15
Fourteenth Amendment to the United States Constitution	2, 14, 15
RAP 10.8	6
RAP 13.4(b)(1)	5, 9
RAP 13.4(b)(3)	12, 14
RAP 13.4(b)(4)	10, 11
RCW 39.34.030	2

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHERS (Cont'd)</u>	
RCW 39.34.030(2)	10, 11
RCW 39.34.040	2, 10, 11
RCW 4.92.090	7
RCW 4.96.010	7
Washington Constitution, Article I, § 16	2, 12, 14

A. IDENTITY OF PETITIONER

Leo C. Brutsche, the Appellant, asks this Court to accept review of the Court of Appeals opinion designated below.

B. COURT OF APPEALS DECISION

Mr. Brutsche seeks review of the Court of Appeals decision affirming the summary judgment, filed July 17, 2006.¹ This Court should reverse the Court of Appeals decision, vacate the summary judgment, reverse the trial court's award of fees and remand for trial.

The Court of Appeals denied our motion for reconsideration on August 21, 2006.²

C. ISSUES PRESENTED FOR REVIEW

1. Are law enforcement activities reachable in negligence?
2. What is the standard of care that police owe in searching the property of innocent third parties when the police are executing a search warrant?
3. When police enter upon property of an innocent third party to execute a search warrant, and then cause damage to property while on the property, are the police liable as trespassers *ab initio*?

¹ A copy of the opinion is reproduced in the Appendix, Appendix pages A-1 to A-13.

² A copy of the order is reproduced in the Appendix, page A-14.

4. If a city engages a "SWAT team" composed of officers from other jurisdictions pursuant to an interlocal agreement for purposes of executing a search warrant locally, must the City comply with RCW 39.34.030 and .040 prior to such use?

5. Is there a compensable "taking" under Article I, § 16 of Washington's Constitution when police damage property of an innocent property owner during the execution of a search warrant, where no evidence is seized for use in a criminal prosecution?

6. Is the damaging of property of an innocent third party during execution of a search warrant by police a taking under the Fifth and Fourteenth Amendments to the United States Constitution, where no evidence is seized for use in a criminal prosecution?

D. STATEMENT OF THE CASE

This case stems from a raid on Mr. Brutsche's property conducted by police officers who were looking for drugs pursuant to a search warrant. CP 31, lines 18-23. During the raid, Plaintiff offered to escort the officers around the premises and open all doors with his keys. Certificate of Leo C. Brutsche, CP 135, ¶ 5 (offers keys to Sergeant Sidell), CP 136, lines 6-9 (offers to escort officers). The officers refused Plaintiff's offer and instead used battering rams to destroy doors and enter the various buildings. Certificate of Leo C. Brutsche, CP 135, lines 8-10. In his declaration in opposition to the summary judgment, Mr. Brutsche pointed out that the battering ram was unnecessary because using Mr. Brutsche's keys would have been much quicker and quieter,

thus taking less time. and would not alert criminals, had there been any. CP 89, lines 18-23, ¶ 7. As explained by Mr. Brutsche:

7. I believe the custom or practice of using a battering ram to breach the doors is unreasonable under the circumstances here. Use of my keys would be much quicker and quieter, making the entry much safer for the officers. Also, keys would not damage the doors and the door jams like the battering ram.

Certification of Leo C. Brutsche, CP 135, ¶ 7. Mr. Brutsche offered to escort the officers around his property because he knew there were no drugs present. CP 90, lines 3-9.

Use of the battering ram caused extensive damage to Mr. Brutsche's doors, door jams and windows. CP 90, lines 10-20. Mr. Brutsche had to hire a carpenter who repaired the door jams and doors for the sum of \$4,921.51. CP 90, lines 16-18, *See also* Declaration of James Warner, CP 131-133.

The officers found nothing. Nothing was seized. *See* Affidavit of Attestation of Documents, CP 87, the Inventory and Return of Search Warrant, CP 86, at page 87, answer to item 7.

The officers executing the search warrant were composed of various jurisdictions besides the City of Kent and formed a "SWAT" team. The SWAT team was purportedly formed pursuant to an interlocal agreement,³ but the agreement was not in force at the time of the raid. The City Council and Mayor did not approve the Interlocal Cooperative Agreement until four months after the raid. CP 81; Appendix page A-31. The agreement was not recorded until March 25, 2004. Appendix page A-20; CP 81. At the time

³ A copy of the Interlocal Agreement is reproduced in the Appendix, pages A-20 to A-35.

of the raid, July 10, 2003, as the agency with primary territorial jurisdiction, the City of Kent did not have authority to use the SWAT team under the interlocal agreement. CP 81.

Plaintiff gave due notice of his claims to the respective Defendants. After the statutory period and rejection, Plaintiff sued. CP 3-7.⁴ Plaintiff settled with the County and won a nominal award at arbitration against the City. We sought a trial *de novo*. The City of Kent moved for summary judgment which the trial court granted. The trial court awarded attorney fees to the City because Plaintiff had not improved its position after requesting trial *de novo* following arbitration. Plaintiff appealed the summary judgment (CP 225-27) and award of fees (CP 293-6). Kent cross-appealed regarding the amount of fees. The Court of Appeals affirmed the summary judgment and vacated and remanded for findings regarding the award of fees to the City in its opinion.

As noted, the Court of Appeals denied Plaintiff's motion for reconsideration on August 21, 2006. *See* Order Denying Motion for Reconsideration, Appendix A-14.

⁴ King County and the City of Kent were named as defendants. No individual officers were named.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. *The Court of Appeals Decision Conflicts With This Court's Decisions on the Duty of Care and Law Enforcement Liability for Negligence.*

The decision of the Court of Appeals is in conflict with decisions of the Supreme Court. Review should be granted under RAP 13.4(b)(1).

In the trial court and on appeal, Mr. Brutsche contended that the damage to his property inflicted by the officers was actionable in negligence. We rely on this Court's decision in *Goldsby v. Stewart*, 158 Wash. 39, 290 P. 422 (1930). In *Goldsby*, police served a search warrant on a building and caused property destruction in the course of the search. *Goldsby*, 150 Wash. at 39-40. Plaintiffs, the owners and a tenant of the building, filed an action seeking compensation for the property damage. This Court held that the officers had a duty not to cause unnecessary damage to the property being searched:

In executing a search warrant, officers of the law should do no unnecessary damage to the property to be examined, and should so conduct the search as to do the least damage to the property consistent with a thorough investigation.

Goldsby, 158 Wash. at 41, 290 P. at 422. The Court held that whether the police unnecessarily damaged the property was a jury question. *Goldsby*, 158 Wash. at 41-42, 290 P. at 423.

Goldsby is on point. The case demonstrates that the officers who raided the Brutsche family property owed a duty not to cause unnecessary property damage in the course of their search.

The Court of Appeals decision below is in conflict with *Goldsby*. The Court of Appeals simply refused to follow it. The Court stated that *Goldsby* itself was not cited until the reply brief. The Court of Appeals erroneously claimed that the citation of *Goldsby* somehow constituted the raising of a “new issue” in the reply brief.

With all due respect, the Court of Appeals is incorrect. Mr. Brutsche assigned error to the dismissal of the negligence claim by the Superior Court and specifically argued in his opening brief that the officers owed a duty of care to the Plaintiff not to cause unnecessary property damage during the service of the search warrant.⁵ The citation of *Goldsby* in the reply brief did not raise a “new issue”. Instead, it simply furnished additional authority to the court in support of our contention that the negligence claim should not have been dismissed. There is no prohibition against citing additional authority in a reply brief or, for that matter, even after oral argument has taken place. *See, e.g.*, RAP 10.8 (authorizing filing of statement of additional authorities). *Goldsby* is controlling and the Court of Appeals should have followed it.

In addition to not following *Goldsby*, the Court of Appeals went further and claimed that there is a “general rule that law enforcement activities are not reachable in negligence”.⁶ This contention conflicts with a number of decisions of this Court which hold that law enforcement activities are reachable in negligence.

⁵ *See* Appellant’s Opening Brief, pages 15-20.

⁶ Opinion of the Court of Appeals, Appendix page A-7.

Washington has waived sovereign immunity. RCW 4.92.090 (waiver of sovereign immunity for state government); RCW 4.96.010 (waiver of sovereign immunity for local government entities).

Implicitly, this waiver functions as a promise that the State and its agents will use reasonable care while performing its duties at the risk of incurring liability.

Joyce v. State of Washington, 155 Wn.2d 306, 309, 119 P.3d 825, 827 (2005) (state has a duty of reasonable care in supervising offenders). Contrary to the Court of Appeals' claim that police officers are exempt from negligence claims, this Court has held that "municipalities are generally held to the same negligence standards as private parties". *Keller v. City of Spokane*, 146 Wn.2d 237, 242-243, 44 P.3d 845, 847 (2002). "The municipality, as an individual, is held to a general duty of care, that of a reasonable person under the circumstances." *Keller*, 146 Wn.2d at 243, 44 P.3d at 847 (internal citation omitted).

In a series of decisions, both this Court and the Court of Appeals have applied these principles to hold that law enforcement activities are reachable in negligence, contrary to the claim of the court below. *See Joyce, supra; Stalter v. State*, 151 Wn.2d 148, 157, 86 P.3d 1159, 1164 (2004) (jail personnel have a duty to take steps to promptly release a detainee once they know or should know that there is no justification to hold the individual); *Taggart v. State*, 118 Wn.2d 195, 217, 224, 822 P.2d 247 (1992) (parole officers have a duty to protect others from reasonably foreseeable dangers engendered by parolees); *Hertog v. City of Seattle*, 138 Wn.2d 265, 292, 979 P.2d 400, 415 (1999) (municipal probation counselors and county pretrial

release counselors have duty of care to protect others from reasonably foreseeable dangers posed by probationers and pretrial releasees); *Bailey v. Town of Forks*, 108 Wn.2d 262, 265-269, 737 P.2d 1257, 1258-1261 (1987) (“discretionary decisions by police officers in the field, however, are not immune” from liability; duty of care owed by police officer in motorcycle/truck collision); see *Bender v. Seattle*, 99 Wn.2d 582, 590, 664 P.2d 492 (1983); *Mason v. Bitton*, 85 Wn.2d 321, 324, 327-328, 534 P.2d 1360, 1364-65 (1975) (genuine issues of material fact as to whether police officers who joined in high-speed chase breached statutory duty of care); *Coffel v. Clallam County*, 47 Wn. App. 397, 403-405, 735 P.2d 686, 690-691 (1987) (police officers had duty to act with reasonable care in connection with protecting property from destruction by a third party).

Here, the City of Kent is the defendant.

A municipality may be held liable for injuries to property belonging to another. [Footnote omitted.] It is firmly established that in a proper case a city may be held liable on the theory of negligence. [Footnote omitted.] A city may be held liable for either a negligent act of commission or a negligent act of omission. [Footnote omitted.] A city’s negligence need not be the sole cause of an injury, but if its negligence concurs with that of another to produce a wrong, both of the tortfeasors may be held liable. [Footnote omitted.]

Employco Personnel Services, Inc. v. City of Seattle, 117 Wn.2d 606, 615-616, 817 P.2d 1373, 1379 (1991).

The Court of Appeals opinion conflicts with the foregoing cases. The Court erred in claiming that the actions of police officers are not reachable in a negligence case against the City. The foregoing line of cases establishes

just the opposite. Mr. Brutsche should be permitted to present his negligence cause of action to a jury.

2. *The Officers Were Trespassers Ab Initio; The Court of Appeals Decision Conflicts With Decisions of the Supreme Court.*

The decision of the Court of Appeals is in conflict with a decision of the Supreme Court. Review should be granted under RAP 13.4(b)(1).

Mr. Brutsche sought damages under the trespass *ab initio* doctrine. The doctrine was recognized and applied against local government in *Hamilton v. King County*, 195 Wash. 84, 79 P.2d 697 (1938). In *Hamilton*, the owner of a mink farm gave county employees permission to construct a drainage ditch on his property. Unfortunately, the county employees constructed the ditch much closer to the building where the owner's mink animals were being raised than apparently had been agreed upon, causing the death of many mink kittens. This Court upheld that the county faced liability under the doctrine of trespass *ab initio*. *Hamilton*, 195 Wash. at 92-93, 79 P.2d at 701. The doctrine has been applied in other jurisdictions in the context of service of a search warrant:

Under the doctrine of trespass *ab initio*, a person who lawfully enters property under color of law (*e.g.*, a government agent or private individual acting under legal authority) then later abuses that authority by a positive act of misconduct will be considered a trespasser *ab initio* and liable in trespass for his acts from the first moment of his entry.

Turner v. Sheriff of Marion County, 94 F. Supp. 2d 966, 984 (S.D. Ind., 2000) (analyzing Indiana state law). *See also Jahns v. Clark*, 138 Wash. 288, 294-295, 244 P. 729 (1926).

The decision of the Court of Appeals herein conflicts with this Court's decision in *Hamilton*. Mr. Brutsche's theory was that the officers committed a trespass when they damaged the doors on his property after entry pursuant to the warrant. He should be permitted to present this claim to a jury.

In rejecting Mr. Brutsche's trespass claim on appeal, the Court of Appeals again declined to consider the *Goldsby* case because it was cited for the first time in Mr. Brutsche's reply brief. The issue of trespass *ab initio* was raised by Mr. Brutsche in his assignments of error and in his opening brief. As discussed above, there is no bar to citing additional authority in a reply brief. The court should have considered *Goldsby* on this issue.

3. *Review Should Be Granted under RAP 13.4(b)(4) to Determine Whether the City of Kent Must Comply with the Interlocal Agreement Act, RCW 39.34.030(2) and .040, Before Deploying a SWAT Team Pursuant to an Interlocal Agreement.*

Review should be granted under RAP 13.4(b)(4) to determine whether the City of Kent must comply with the Interlocal Agreement Act, RCW 39.34.030(2) and .040, before deploying a SWAT team pursuant to an interlocal agreement.

The SWAT team used in the raid on the Brutsche property was formed via an interlocal agreement. The agreement was not signed by Kent's Mayor until November 13, 2003, four months after the raid. CP 81. The agreement was not recorded until March 25, 2004, eight months after the raid.⁷ The opinion of the Court of Appeals acknowledges that the City's legislative body

⁷ As noted, a copy of the agreement is reproduced in the Appendix, pages A-20 to A-36.

had not ratified the interlocal agreement for a SWAT team nor had the agreement been recorded as required by statute. RCW 39.34.030(2) and .040, respectively.⁸ The Court of Appeals claimed these duties were public duties, not duties owed to Mr. Brutsche. We disagree. The City's failure to abide by the statutory prerequisites for the extra-jurisdictional SWAT team voided its authority. *State v. Plaggemeier*, 93 Wn. App. 472, 480, 969 P.2d 519 (1999). The wording of RCW 39.34.030(2) is mandatory:

Appropriate action by ordinance, resolution or otherwise pursuant to law of the governing bodies of the participating public agencies shall be necessary before any such agreement may enter into force.

RCW 39.34.030(2). The Court of Appeals opinion sought to avoid this delegation doctrine issue by making a factual finding that the outsiders were invited by the Kent police, although that fact was disputed by Mr. Brutsche and Tukwila's Officer Villa, who said he was working for Tukwila. CP 46.

Review should be granted under RAP 13.4(b)(4) to determine whether the City of Kent had to comply with the Interlocal Agreement Act, RCW 39.34.030(2) and .040, before deploying a SWAT team pursuant to the agreement.

⁸ Opinion, page 8. A copy of RCW 39.34.030 and .040 is reproduced in the Appendix, page A-17.

4. *This Court Should Grant Review Under RAP 13.4(b)(3) and Hold That the Destruction of the Property of an Innocent Third Party by Police Activity, Where No Evidence Is Seized, Constitutes a Compensable Taking Under Article I, § 16 of the Washington Constitution.*

Mr. Brutsche contends that the destruction of his property by the police in this instance was a compensable taking. Article I, § 16 of the state Constitution provides that no private property shall be taken or damaged for public or private use without just compensation.⁹ The Court of Appeals held that there was no taking under this Court's decision in *Eggleston v. Pierce County*, 148 Wn.2d 760, 64 P.3d 618 (2003). In *Eggleston*, a 6-3 decision, police rendered Mrs. Eggleston's property uninhabitable when they removed a load-bearing wall from her home, purportedly to use as evidence in a criminal prosecution. The majority held that the police action did not constitute a taking.

Our case is distinguishable from *Eggleston*. Here, police entered Mr. Brutsche's property, caused property damage to the structures on the property, and left. They found no evidence and seized none. There was no resulting criminal prosecution. The *Eggleston* majority's concerns regarding protection of the government's ability to prosecute criminal cases using seized evidence are absent here.

This Court should hold that Mr. Brutsche, an innocent third party, should be compensated for the damage done to his property under Article I, § 16. We respectfully suggest that this issue presents a significant question

⁹ A copy of Const., Article I, § 16 is reproduced in the Appendix at page A-16.

of law under the Constitution of the State of Washington. In further support of the grant of review, we respectfully contend that if *Eggleston* held that the property of an innocent third party can be damaged by the government without paying compensation, such decision is in conflict with two other decisions of this Court and should be overruled.

First, to the extent that *Eggleston* held that the damage to the property of a third party constitutes a non-compensable exercise of the police power, the decision is in conflict with *Conger v. Pierce County*, 116 Wash. 27, 198 P. 377 (1921). As Justice Sanders noted in his dissent in *Eggleston*:

Referring to the police power, *Conger* noted:

Because of its elasticity and the inability to define or fix its exact limitations, there is sometimes a natural tendency on the part of the courts to stretch this power in order to bridge over otherwise difficult situations, and for like reasons it is a power most likely to be abused. It has been defined as an inherent power in the state which permits it to prevent all things harmful to the comfort, welfare and safety of society.... Regulating and restricting the use of private property in the interest of the public is its chief business.... It does not authorize the taking or damaging of private property in the sense used in the constitution with reference to taking such property for a public use.

Conger, 116 Wash. at 35-36, 198 P. 377.

Eggleston v. Pierce County, 148 Wn.2d at 780-781, 664 P.3d at 629 (Sanders, J., dissenting). Under *Conger*, the damaging of private property that occurred in this case would constitute a compensable taking and not a non-compensable exercise of the police power.

Second, we respectfully suggest that *Eggleston*, if viewed as a bar to recovery in Mr. Brutsche's case, is also in conflict with this Court's decision

in *Dickgieser v. State*, 153 Wn.2d 530, 105 P.3d 26 (2005). In *Dickgieser*, the State Department of Natural Resources caused damage to private property which was adjacent to state lands the Department logged. This Court held that the damaging of the private property was compensable under Article I, § 16. *Dickgieser*, 153 Wn.2d at 534-540, 105 P.3d at 28-32.

This Court should grant review of this issue under RAP 13.4(b)(3) and either overrule *Eggleston* or distinguish it and hold that damage caused by police to the property of an innocent third party, where no evidence is seized or used in a criminal prosecution, constitutes a compensable taking under Article I, § 16 of the Constitution of the State of Washington.

5. *This Court Should Grant Review Under RAP 13.4(b)(3) and Hold That the Damaging of Mr. Brutsche's Doors by the Police, Where No Evidence Was Seized or Used in a Criminal Prosecution, Constituted a Compensable Taking Under the Fifth and Fourteenth Amendments to the United States Constitution.*

In the trial court and on appeal, Mr. Brutsche contended that the property damage to his doors constituted a taking under the Fifth and Fourteenth Amendments to the United States Constitution. In its opinion here, the Court of Appeals noted the federal takings clause but did not otherwise discuss it.

This Court should grant review and hold that damage to and destruction of property of an innocent third party by police, where no evidence is seized or used in a criminal prosecution, constitutes a compensable taking under the Fifth and Fourteenth Amendments to the United States Constitution. There was a physical invasion of Mr. Brutsche's property. His doors were damaged

and would have permanently remained in that condition had he not paid a carpenter to repair them. Stated another way, the police left the doors in a condition in which they could not be used. Under the United States Supreme Court's decisions, these circumstances demonstrate a compensable taking under the Fifth and Fourteenth Amendments. *See, e.g., Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 419, 425-437, 102 S. Ct. 3164, 3170-3177, 73 L. Ed. 2d 868 (1982), and cases discussed therein.

F. CONCLUSION

For the reasons stated, this Court should grant review, reverse the Court of Appeals, reverse the trial court's order on summary judgment and fee award, and remand the case for trial.

DATED this 27th day of September, 2006.

Respectfully submitted,

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APPENDIX

APPENDIX TABLE OF CONTENTS

<u>Document</u>	<u>Page</u>
Unpublished Opinion of the Court of Appeals	A-1
Order Denying Motion for Reconsideration	A-14
Article I, § 16 of the Washington State Constitution	A-16
RCW 39.34.030 and .040	A-17
Affidavit of Attestation of Documents	A-18
Interlocal Agreement re: "Valley Special Response Team"	A-20
Inventory and Return of Search Warrant	A-37

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

LEO C. BRUTSCHE,) NO. 56620-2-1
)
 Appellant,)
)
 v.) UNPUBLISHED OPINION
)
 CITY OF KENT, A Washington)
 municipal corporation, and KING)
 COUNTY, a political subdivision of the)
 State of Washington,)
)
 Respondents.) FILED: July 17, 2006

BECKER, J. -- Law enforcement damaged several doors on Leo Brutsche's property while executing a high-risk search warrant. The trial court properly concluded this police power exercise did not go so far as to require just compensation, and was not actionable in negligence.

FACTS

In July 2003, King County District Court issued a search warrant for property in Kent owned by Leo Brutsche, on probable cause that Brutsche's 45-

year-old son James was manufacturing methamphetamine there. The warrant commanded officers to search James and several outbuildings.

Because methamphetamine manufacturers are typically paranoid, irrational, and armed, the officers applying for the warrant asked the Valley Special Response Team to serve it. The Team was made up of officers from several law enforcement organizations.

When the Team arrived, James Brutsche tried to barricade himself inside a mobile home. Team members had to break a glass door and use a taser to subdue him. Police had reason to believe drug users were being allowed to stay on the property. Fearing other structures contained dangerous suspects who might destroy evidence, the Team decided to breach locked doors on those structures.

Leo Brutsche asserts that he was present when the Team made this decision. Hoping to save his doors, Brutsche offered his keys to an officer. He also offered to open any locked doors. The Team declined these offers and broke down several doors.

Brutsche presented a claim to the City and King County for nearly \$5,000 in repair costs. Both the City and the County denied his claim, and Brutsche sued both entities for negligence, conversion, and a taking. Brutsche settled with the County and went to arbitration with the City.

Brutsche requested a trial de novo after arbitration. The City moved for summary judgment dismissal. Brutsche filed an affidavit to the effect that using

his keys would have been a quicker, quieter, and safer method of opening the doors. Brutsche also claimed his son had not resisted the officers.

The trial court dismissed Brutsche's case on summary judgment.

Brutsche appeals.

Summary judgment is proper when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. A material fact is one on which the litigation's outcome depends. All facts and reasonable inferences are taken in the light most favorable to the nonmoving party. Review is de novo. Aba Sheikh v. Choe, 156 Wn.2d 441, 447, 128 P.3d 574 (2006).

TAKING

Brutsche contends the Team's damaging of his property was a taking that required just compensation.

The power of eminent domain and the police power are essential and distinct powers of government. Eggleston v. Pierce County, 148 Wn.2d 760, 767, 64 P.3d 618 (2003). The state constitution provides: "No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner". Const. Art. I, § 16. The federal takings clause provides that private property shall not "be taken for public use, without just compensation." U.S. Const. Amend. V. But the State also has the power to regulate for the health, safety, morals, and general welfare of the public. The incidental burdens imposed by police power regulations are not takings unless they "manifest in certain, enumerated ways." Eggleston, 148

Wn.2d at 767.

Courts look behind labels to determine whether a particular exercise of power was properly characterized as police power or eminent domain:

Eminent domain takes private property for a public use, while the police power regulates its use and enjoyment, or if it takes or damages it, it is not a taking or damaging for the public use, but to conserve the safety, morals, health and general welfare of the public.

Conger v. Pierce County, 116 Wash. 27, 36, 198 P. 377 (1921).

In Eggleston, the Supreme Court confronted a case of destruction of property by police and declined to characterize it as an act of eminent domain. There, after a shooting, law enforcement took two walls from a home to preserve as evidence, as authorized by a search warrant. This left the home "unstable and uninhabitable." Eggleston, 148 Wn.2d at 764. The trial court dismissed the takings claim on summary judgment, and our Supreme Court affirmed:

Those courts rejecting takings claims based on police destruction of property have relied on the original understanding of the constitutions and the continuing vitality of the separate doctrines of eminent domain and police power. The courts that have found takings have been justifiably outraged by the destruction of real property owned by third parties utterly unconnected with the alleged crime. While we too feel the pull of the justness of the cause, the vehicle is not article I, section 16.

Eggleston, 148 Wn.2d at 773-774. The court noted that the outcome would not differ under federal takings analysis. Eggleston, 148 Wn.2d at 760.

Brutsche attempts to distinguish this case in several ways. First, Brutsche notes that the Supreme Court recognized that even an exercise of

police power can be a taking when it goes too far. See Eggleston, 148 Wn.2d at 760 n.6. But inasmuch as that court declined to hold that rendering a home uninhabitable went too far, we cannot hold that the destruction of doors went too far.

Second, Brutsche contends Eggleston is limited to claims for the temporary preservation of evidence, whereas his doors were permanently destroyed. But the destruction there was just as complete; the State rendered a home uninhabitable. Thus, we cannot find in Eggleston the distinction proposed by Brutsche.

Third, Brutsche notes that the search warrant here did not authorize destroying doors, while the Eggleston warrant explicitly authorized seizing the walls in question. With respect to the authority of the officers executing the search warrant to break his doors, this distinction is immaterial. See Dalla v. United States, 441 U.S. 238, 257, 99 S. Ct. 1682, 60 L. Ed. 2d 177 (1979) (criminal case holding that the Fourth Amendment does not require warrants to include a specification of the manner in which they are to be executed). Brutsche has not shown us why his distinction should become relevant simply because he alleges a taking. The search warrant here ordered law enforcement to search buildings that were locked. The officers determined that the safest and most effective way to do so was by breaking the doors. Brutsche offers nothing other than his personal belief to support characterizing the decision by the officers as unreasonable under the circumstances.

Under Eggleston, the destruction of the doors was not a taking.

NEGLIGENCE

Brutsche contends the damage to his property was actionable in negligence.

The threshold determination in any negligence action is whether the defendant owed a duty of care to the plaintiff. The existence of a duty is a legal question. Kae Kim v. Budget Rent A Car Sys. Inc., 143 Wn.2d 190, 195, 15 P.3d 1283 (2001). The existence of a duty depends on mixed considerations of logic, common sense, justice, policy, and precedent. Keates v. City of Vancouver, 73 Wn. App. 257, 265, 869 P.2d 88 (1994). The primary question is whether the conduct in question is unreasonably dangerous: i.e., "the risks of harm outweigh the utility of the activity." Keates, 73 Wn. App. at 266. A defendant owes no duty for conduct that is not unreasonably dangerous. Keates, 73 Wn. App. at 266.

In Keates, an exonerated murder suspect claimed the police breached a duty of care when they interrogated him so harshly that he developed post-traumatic stress disorder. This court affirmed dismissal of the claim, recognizing that as a general rule, "law enforcement activities are not reachable in negligence" and declining to create an exception to that rule because the utility of police interrogation "vastly outweighs the risk of harm." Keates, 73 Wn. App. at 266, 267.

Similarly, the utility of duly authorized police searches vastly outweighs the risk of unnecessary property damage. We are aware of no considerations of

logic, common sense, justice, policy, or precedent that support making the execution of warrants an exception to the general rule that law enforcement activities are not reachable in negligence.

Brutsche contends no exception is necessary because everyone owes a duty to exercise reasonable care. This contention is based on a misinterpretation of language in Callan v. O'Neil, 20 Wn. App. 32, 36, 578 P.2d 890 (1978). In the course of explaining why a tavern owner could be negligent for serving alcohol to a minor, Callan states:

As a general proposition, everyone has a duty to exercise ordinary care. However, if legislatures proscribe certain conduct by statute, that establishes the duty, i.e., the standard of care, and a violation of the statute may be negligence per se.

Callan, 20 Wn. App. at 36-37. Read in context, this statement means that, where a duty is owed, the standard of care will be ordinary care unless otherwise defined. It does not relieve plaintiffs of their burden to show a duty. See Young v. Caravan Corporation, 99 Wn.2d 655, 660, 663 P.2d 834 (1983) (explaining that the duty recognized in Callan was imposed by statute).

Brutsche also argues that police officers are not immune from tort liability for their discretionary acts taken during a criminal investigation. See Bender v. Seattle, 99 Wn.2d 582, 588-589, 664 P.2d 492 (1983). But a lack of immunity does not show the presence of a duty.

Brutsche asserts that a duty owed by officers was established in a 1930 case in which several individual law enforcement officers were sued for causing

unnecessary damage during execution of a search warrant. Goldsby v. Stewart, 158 Wash. 39, 290 P. 422 (1930). However--whether Goldsby recognized a duty relevant to this case or not--Brutsche did not cite Goldsby until his reply brief. The City has had no opportunity to address it, and we decline to consider it. See Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration.").

Brutsche next contends the City breached a statutory duty to ensure that the officers serving the warrant had met reasonable training or certification standards and followed those standards. For this rule, he relies on RCW 10.93.130. That statute allows cities to impose certain training requirements, but does not require cities to do so: "The agency with primary territorial jurisdiction may require that officers from participating agencies meet reasonable training or certification standards or other reasonable standards." RCW 10.93.130 (emphasis added). This provision imposes no relevant duty.

Brutsche claims a duty arises from statutes governing interlocal agreements. See RCW 39.34.030(2) and RCW 39.34.040. At the time of the search, the interlocal agreement creating the Team had not been ratified by Kent's legislative body or filed with the county auditor as required by statute. The lack of formal processing of the agreement does not support Brutsche's negligence claim for two reasons. First, any duty owed under these statutes is owed to the public in general, not to individual persons. See Meany v. Dodd, 111

Wn.2d 174, 178, 759 P.2d 455 (1988) (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). Second, the officers from other jurisdictions were asked to participate in this particular search, and therefore did not need the interlocal agreement to authorize their activity in Kent. See RCW 10.93.070(3).

Because Brutsche has failed to identify a duty owed to him, the trial court properly dismissed Brutsche's negligence claims.

TRESPASS

Brutsche contends the law enforcement officers are liable in trespass for the damage to his property.

Brutsche admits that the Team was authorized to enter his property: "Plaintiff's claim for trespass has nothing to do with the officers executing the search warrant, but only with the pointless, tortious property destruction."¹ Brutsche cites to authority that supports the proposition that a person who lawfully enters property can be liable for tortious conduct on that property. But Brutsche does not clearly explain why breaking his doors was tortious.

At oral argument before this court, Brutsche relied on Goldsby to argue that officers may not damage property unnecessarily. Again, we decline to consider Goldsby because Brutsche cited it for the first time in his reply brief. Brutsche has provided no authority that breaking his doors to execute the

¹ Brief of Appellant at 26.

warrant constituted a trespass.

The trial court properly dismissed Brutsche's trespass claim.

MAR 7.3 FEE AWARD

At the mandatory arbitration with the City, Brutsche received an award of \$135. This was in addition to the County's pre-arbitration settlement. He appealed and obtained a trial de novo. The court granted the City's motion for summary judgment, thereby reducing Brutsche's award to zero. For purposes of MAR 7.3, a summary judgment is a trial de novo. Puget Sound Bank v. Richardson, 54 Wn. App. 295, 299, 773 P.2d 429 (1989). Because Brutsche did not improve his position on trial de novo, he became liable for the City's costs and reasonable attorney fees incurred after the request for a trial de novo. MAR 7.3.

The City presented a claim for costs and fees in the amount of \$27,124. The trial court awarded only \$4,050. The City contends on cross-appeal that the court erred by failing to make findings showing how the award was calculated, and by reducing the claim so substantially without explaining its reasons.

Fee decisions are entrusted to the trial court's discretion. Mahler v. Szucs, 135 Wn.2d 398, 435, 957 P.2d 632 (1998). The party seeking fees bears the burden of proving those fees reasonable. Mahler, 135 Wn.2d at 434. The absence of adequate findings and conclusions upon which to review a fee award requires remand for development of such a record. Mahler, 135 Wn.2d at 435.

The City provided affidavits outlining the time its lawyers spent on the case after the arbitration proceeding. These affidavits laid out how much time each of the City's attorneys spent during four billing periods, and what those attorneys were doing during that time. The City claimed its reasonable hourly rates were \$180 and \$190 respectively for two different attorneys. The total number of hours claimed was 148.5. The City proposed findings and conclusions in support of its requested award of \$27,124.

Brutsche challenged the City's request by submitting his own attorney's affidavit. The affidavit analyzed each billing period discussed by the City's affidavit, identifying hours that he alleged were either spent on irrelevant issues or were duplicative of work already done during the arbitration stage. Brutsche argued the City's attorneys should have spent no more than 22.5 hours after arbitration.

The trial court signed the City's proposed findings and conclusions, but first modified them by striking out the amount that the City claimed it deserved:

having reviewed the declaration of counsel, the Court concludes that the City of Kent incurred reasonable attorney fees, for the period from April 19, 2005 through July 22, 2005 ~~in the amount of \$27,124.00.~~^{2]}

The court initialed this change and inserted a new amount of \$4,050.

The court's findings should include the basis for and calculation of the award. Bentzen v. Demmons, 68 Wn. App. 339, 351, 842 P.2d 1015 (1993). An

² Clerk's Papers at 295.

"explicit hour-by-hour analysis of each lawyer's time sheets" is unnecessary, but the award must be made with a consideration of the relevant factors and give reasons sufficient for review of the amount awarded. Progressive Animal Welfare Society v. University of Wash., 54 Wn. App. 180, 187, 773 P.2d 114 (1989), rev'd on other grounds, 114 Wn.2d 677, 790 P.2d 604 (1990).

It is clear enough that the \$4,050 awarded is equal to 22.5 (the amount of hours Brutsche argued were reasonable) multiplied by \$180 (the lower of the two hourly rates the City proposed for its attorneys). The record thus sufficiently demonstrates the basic lodestar the court used in calculating its award of attorney fees. But the record fails to sufficiently demonstrate why the court chose to recognize such a small percentage of the hours the City claimed were reasonably devoted to defending against Brutsche's claim in superior court.

An award of substantially less than the amount requested "should indicate at least approximately how the court arrived at the final numbers, and explain why discounts were applied." Absher Constr. Co. v. Kent Sch. Dist., 79 Wn. App. 841, 848, 917 P.2d 1086 (1995). In calculating a fee award, a court "may discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time." Absher Constr. Co., 79 Wn. App. at 847. The court's failure to explain why it chose to discount such a large portion of the hours the City claimed deprives us of the opportunity to provide meaningful appellate review. We remand for development of a record capable of meaningful review.

APPELLATE FEES

A party entitled to attorney fees under MAR 7.3 at the trial court level is also entitled to attorney fees on appeal if the appealing party again fails to improve its position. Arment v. Kmart Corp., 79 Wn. App. 694, 700, 902 P.2d 1254 (1995). Therefore, the City is entitled to an award of attorney fees on appeal upon compliance with RAP 18.1.

Brutsche also contends he is entitled to appellate attorney fees. Brutsche relies on 42 U.S.C. § 1988(b), which allows a fee award to a party that successfully enforces certain federal rights. Because Brutsche has not been successful, he is not entitled to appellate attorney fees.

The judgment is affirmed. The award of attorney fees is vacated and remanded for reconsideration and entry of more definite findings.

Becker, J.

WE CONCUR:

Schindler, ACS

Columan, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

LEO C. BRUTSCHE,) NO. 56620-2-1
)
Appellant,) ORDER DENYING
)
v.) MOTION FOR
)
CITY OF KENT, A Washington) RECONSIDERATION
municipal corporation, and KING)
COUNTY, a political subdivision of the)
State of Washington,)
)
Respondents.)
_____)

The appellant, Leo Brutsche, having filed his motion for reconsideration, and a panel of the court having determined that the motion should be denied, Now, therefore, it is hereby

ORDERED that the Motion for Reconsideration is denied.

Dated this 21st day of August, 2006.

FOR THE COURT

Becker, J.
Judge

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STATE OF WASHINGTON
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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FOR THE COURT

Becker, J.
Judge

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STATE OF WASHINGTON

§ 16 EMINENT DOMAIN. Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public: *Provided*, That the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use. [AMENDMENT 9, 1919 p 385 § 1. Approved November, 1920.]

39.34.010 Declaration of purpose. It is the purpose of this chapter to permit local governmental units to make the most efficient use of their powers by enabling them to cooperate with other localities on a basis of mutual advantage and thereby to provide services and facilities in a manner and pursuant to forms of governmental organization that will accord best with geographic, economic, population and other factors influencing the needs and development of local communities. [1967 c 239 § 1.]

Joint operations by municipal corporations and political subdivisions, deposit and control of funds: RCW 43.09.285.

39.34.020 Definitions. For the purposes of this chapter, the term "public agency" shall mean any agency, political subdivision, or unit of local government of this state including, but not limited to, municipal corporations, quasi municipal corporations, special purpose districts, and local service districts; any agency of the state government; any agency of the United States; any Indian tribe recognized as such by the federal government; and any political subdivision of another state.

The term "state" shall mean a state of the United States. [1985 c 33 § 1; 1979 c 36 § 1; 1977 ex.s. c 283 § 13; 1975 1st ex.s. c 115 § 1; 1973 c 34 § 1; 1971 c 33 § 1; 1969 c 88 § 1; 1969 c 40 § 1; 1967 c 239 § 3.]

Severability—1977 ex.s. c 283: See note following RCW 28A.310.010.

39.34.030 Joint powers—Agreements for joint or cooperative action, requisites, effect on responsibilities of component agencies—Financing of joint projects. (1) Any power or powers, privileges or authority exercised or capable of exercise by a public agency of this state may be exercised and enjoyed jointly with any other public agency of this state having the power or powers, privilege or authority, and jointly with any public agency of any other state or of the United States to the extent that laws of such other state or of the United States permit such joint exercise or enjoyment. Any agency of the state government when acting jointly with any public agency may exercise and enjoy all of the powers, privileges and authority conferred by this chapter upon a public agency.

(2) Any two or more public agencies may enter into agreements with one another for joint or cooperative action pursuant to the provisions of this chapter: PROVIDED, That any such joint or cooperative action by public agencies which are educational service districts and/or school districts shall comply with the provisions of RCW 28A.320.080.

Appropriate action by ordinance, resolution or otherwise pursuant to law of the governing bodies of the participating public agencies shall be necessary before any such agreement may enter into force.

(3) Any such agreement shall specify the following:

(a) Its duration;

(b) The precise organization, composition and nature of any separate legal or administrative entity created thereby together with the powers delegated thereto, provided such entity may be legally created. Such entity may include a nonprofit corporation organized pursuant to chapter 24.03 or 24.06 RCW whose membership is limited solely to the participating public agencies or a partnership organized

pursuant to chapter 25.04 RCW whose partners are limited solely to participating public agencies and the funds of any such corporation or partnership shall be subject to audit in the manner provided by law for the auditing of public funds;

(c) Its purpose or purposes;

(d) The manner of financing the joint or cooperative undertaking and of establishing and maintaining a budget therefor;

(e) The permissible method or methods to be employed in accomplishing the partial or complete termination of the agreement and for disposing of property upon such partial or complete termination;

(f) Any other necessary and proper matters.

(4) In the event that the agreement does not establish a separate legal entity to conduct the joint or cooperative undertaking, the agreement shall, in addition to items (a), (c), (d), (e) and (f) enumerated in subdivision (3) hereof, contain the following:

(a) Provision for an administrator or a joint board responsible for administering the joint or cooperative undertaking. In the case of a joint board, public agencies party to the agreement shall be represented;

(b) The manner of acquiring, holding and disposing of real and personal property used in the joint or cooperative undertaking. Any joint board is authorized to establish a special fund with a state, county, city, or district treasurer servicing an involved public agency designated "Operating fund of joint board".

(5) No agreement made pursuant to this chapter shall relieve any public agency of any obligation or responsibility imposed upon it by law except that to the extent of actual and timely performance thereof by a joint board or other legal or administrative entity created by an agreement made hereunder, the performance may be offered in satisfaction of the obligation or responsibility.

(6) Financing of joint projects by agreement shall be as provided by law. [1992 c 161 § 4; 1990 c 33 § 568; 1981 c 308 § 2; 1972 ex.s. c 81 § 1; 1967 c 239 § 4.]

Intent—1992 c 161: See note following RCW 70.44.450.

Purpose—Statutory references—Severability—1990 c 33: See RCW 28A.900.100 through 28A.900.102.

Severability—1981 c 308: See note following RCW 28A.320.080.

Joint operations by municipal corporations or political subdivisions, deposit and control of funds: RCW 43.09.285.

39.34.040 Agreements to be filed—Status of interstate agreements—Real party in interest—Actions. Prior to its entry into force, an agreement made pursuant to this chapter shall be filed with the county auditor. In the event that an agreement entered into pursuant to this chapter is between or among one or more public agencies of this state and one or more public agencies of another state or of the United States the agreement shall have the status of an interstate compact, but in any case or controversy involving performance or interpretation thereof or liability thereunder, the public agencies party thereto shall be real parties in interest and the state may maintain an action to recoup or otherwise make itself whole for any damages or liability which it may incur by reason of being joined as a party therein. Such action shall be maintainable against any public agency or agencies whose default, failure of performance, or other conduct caused or contributed to the incurring of

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July 22, 2005, 3:30 p.m.

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KING COUNTY SUPERIOR COURT

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

LEO C. BRUTSCHE)	
Plaintiff.)	NO. 04-2-12087-0
)	KNT
vs.)	
)	AFFIDAVIT
CITY OF KENT,)	OF ATTESTATION
a Municipal Corporation; et. al.)	OF DOCUMENTS
Defendants.)	

STATE OF WASHINGTON
COUNTY OF KING

I, Jerald A. Klein, certify as follows:

That I am the Attorney for the Plaintiff herein and
a Notary Public;

That attached hereto is a true and correct copy of
Interlocal Cooperative Agreement Between Auburn, Federal Way,
Kent, Renton, Tukwila and the Port of Seattle, for Cration
of the Valley special Response Team, the original of which
was recorded with the King County Recorder's Office and the
electonic image is scanned under Recorder's No.
20040325000463, as of this date.

Also attached hereto is a true and correct copy of

JERALD A. KLEIN
823 Joshua Green Bldg.
Seattle, WA 98101-2236
(206) 623-0630

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Inventory And Return of Search Warrant for the subject raid at Plaintiff's property, the originals of which are in the possession of the Court Clerk for the King County District Court at the Regional Justice Center as of this date.

I certify under penalty of perjury under the laws of the State of Washhington that the above is true and correct.

Dated: 7/6/05
Seattle, Washington



Jerald A. Klein, #9313

JERALD A. KLEIN
823 Joshua Green Bldg.
Seattle, WA 98101-2236
(206) 623-0630

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FEDERAL WAY CI AG 32 00
PAGE 001 OF 014
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KING COUNTY, WA

Return Address

Name City of Federal Way

Address Attn: Police Dept.
P.O. Box 9718

City, State, Zip Federal Way, WA 98063

Document Title(s) (or transactions contained therein):

1. Interlocal Cooperative Agreement between
2. Auburn, Federal Way, Kent, Renton, Tukwila,
3. and the Port of Seattle, for creation of the
4. Valley Special Response Team

Reference Number(s) of Documents assigned or released:
(on page _____ of document(s))

Grantor(s) (Last name first, then first name and initials)

- | | |
|--|-----------------|
| 1. City of Federal Way | City of Renton |
| 2. City of Auburn | City of Tukwila |
| 3. City of Kent | Port of Seattle |
| 5. Additional names on page _____ of document. | |

Grantee(s) (Last name first, then first name and initials)

- | | |
|--|-----------------|
| 1. City of Federal Way | City of Renton |
| 2. City of Auburn | City of Tukwila |
| 3. City of Kent | Port of Seattle |
| 5. Additional names on page _____ of document. | |

Legal description (abbreviated i.e. lot, block, plat or section, township, range)

Additional legal is on page _____ of document.

Assessor's Property Tax Parcel/Account Number

Additional legal is on page _____ of document

The Auditor/Recorder will rely on the information provided on the form. The staff will not read the document to verify the accuracy or completeness of the indexing information provided herein.

WASHINGTON STATE COUNTY AUDITOR/RECORDER'S
INDEXING FORM (Cover Sheet)

**INTERLOCAL COOPERATIVE AGREEMENT BETWEEN AUBURN,
FEDERAL WAY, KENT, RENTON, TUKWILA, AND THE PORT OF
SEATTLE, FOR CREATION OF THE**

VALLEY SPECIAL RESPONSE TEAM

I. PARTIES

The parties to this Agreement are the Port of Seattle and the municipalities of Auburn, Federal Way, Kent, Renton, and Tukwila, each of which is a municipal corporation operating under the laws of the State of Washington

II. AUTHORITY

This Agreement is entered into pursuant to Chapters 10 93, 39 34, and 53 08 of the Revised Code of Washington

III. PURPOSE

The parties hereto desire to establish and maintain a multi-jurisdictional team to effectively respond to serious criminal occurrences as described below

IV. FORMATION

There is hereby created a multi-jurisdictional team to be hereafter known as the "Valley Special Response Team" ("SRT"), the members of which shall be the Port of Seattle, and the cities of Auburn, Federal Way, Kent, Renton, and Tukwila. As special needs arise, it may be necessary to request from other law enforcement agencies assistance and/or personnel, at the discretion of the SRT Incident Commander and/or the SRT Tactical Commander

V. STATEMENT OF PROBLEM

King County and the municipalities within the Puget Sound area have experienced increasingly violent criminal confrontations due to increased gang activity, increased drug abuse, increased urbanization, and increased population densities. The ability to safely control, contain, and resolve criminal conduct such as civil disobedience, barricaded subjects, hostage situations, gang member arrests, high risk felony arrests, and narcotic/high risk search warrants has strained resources of the members' individual police department specialty teams

Law enforcement efforts directed at dealing with these violent confrontations have, for the most part, been conducted by law enforcement agencies working independently. A multi-jurisdictional effort to handle specific serious criminal confrontations, as well as weapons of mass destruction, will result in more effective pooling of personnel, improved utilization of municipal funds, reduced duplication of equipment, improved

training, development of specialized expertise, and increased utilization/application of a combined special response team. The results of a multi-jurisdictional effort will be improved services for the citizens of all participating jurisdictions, increased safety for officers and the community, and improved cost effectiveness.

VI. TEAM OBJECTIVES

The individual specialty units from each participating jurisdiction will be consolidated and combined to form the SRT. The SRT shall service each participating jurisdiction. The SRT shall also be available to outside law enforcement agencies as provided by chapter 10 93 RCW.

The objective of the SRT shall be to provide enhanced use of personnel, equipment, budgeted funds, and training. The SRT shall respond as requested by any of the participating jurisdictions and provide a coordinated response to high-risk incidents.

VII. DURATION AND TERMINATION

The minimum term of this Agreement shall be one (1) year, effective upon its adoption. This Agreement shall automatically be extended for consecutive one (1) year terms, unless terminated pursuant to the terms of this Agreement.

A jurisdiction may withdraw its participation in the SRT by providing written notice of its withdrawal, and serving such notice upon each Executive Board member of the remaining jurisdictions. A notice of withdrawal shall become effective ninety (90) days after service of the notice on all participating members.

The SRT may be terminated by a majority vote of the Executive Board. Any vote for termination shall occur only when the police chief of each participating jurisdiction is present at the meeting in which such vote is taken.

VIII. GOVERNANCE

The affairs of the team shall be governed by an Executive Board ("Board"), whose members are composed of the police chief, or his/her designee, from each participating jurisdiction. Each member of the Board shall have an equal vote and voice on all Board decisions. All Board decisions shall be made by a majority vote of the Board members, or their designees, appearing at the meeting in which the decision is made. A majority of Board members, or their designees, must be present at each meeting for any actions taken to be valid. A presiding officer shall be elected by the Board together with such other officers as a majority of the Board may decide.

There shall be a minimum of four (4) Board meetings each year. One meeting shall be held in March of each year to review the prior year's service. Another meeting shall be held in August of each year to review and present a budget to the participating jurisdictions. At least two (2) other meetings shall be held each year to review the SRT's activities and policies. The presiding officer, or any Board member, may call extra meetings as deemed appropriate. The presiding officer shall provide no less than forty-eight (48) hours notice of all meetings to all members of the Board, PROVIDED,

however, that in emergency situations, the presiding officer may conduct a telephonic meeting or poll of Board members to resolve any issues related to such emergency

The Board shall develop SRT written policies, regulations, and operational procedures within ninety (90) calendar days of the execution of this Agreement. The SRT written policies, regulations, and operational procedures shall apply to all SRT operations. Thus, to the extent that the written policies, regulations, and operational procedures of the SRT conflict with the policies, regulations, and operational procedures of the individual jurisdictions, the SRT written policies, regulations, and procedures shall prevail.

IX. STAFF

A Tactical Commander, which shall be a command level officer, shall be appointed annually by the Board to act as the principal liaison and facilitator between the Board and the members of the SRT. The Tactical Commander shall operate under the direction of the presiding officer of the Board. The Tactical Commander shall be responsible for informing the Board on all matters relating to the function, expenditures, accomplishments, training, number of calls that the SRT responds to, problems of the SRT, and any other matter as requested by the Board. The Tactical Commander may be removed by action of the Board at anytime and for any reason, with or without cause.

The Tactical Commander shall prepare monthly written reports to the Board on the actions, progress, and finances of the SRT. In addition, the Tactical Commander shall be responsible for presenting rules, procedures, regulations, and revisions thereto for Board approval.

Each jurisdiction shall contribute seven (7) full-time commissioned officers, which shall include at least one (1) Sergeant or other first level supervisor, to be assigned to the SRT. The personnel assigned to the SRT shall be considered employees of the contributing jurisdiction. The contributing jurisdiction shall be solely and exclusively responsible for the compensation and benefits for the personnel it contributes to the SRT. All rights, duties, and obligations of the employer and the employee shall remain with the contributing jurisdiction. Each jurisdiction shall be responsible for ensuring compliance with all applicable laws with regard to employees and with provisions of any applicable collective bargaining agreements and civil service rules and regulations.

The Board may appoint the finance department of a participating jurisdiction to manage the finances of the SRT. Before appointing the finance department of a particular jurisdiction to manage the finances of the SRT, the Board shall consult with the finance department of the jurisdiction and obtain its approval. The duty of managing the finances of the SRT shall be rotated to other participating jurisdictions at the discretion of the Board.

The Board may, at its discretion, appoint one (1) or more legal advisors to advise the Board on legal issues affecting the SRT. The legal advisor(s) shall be the legal representative(s) for one or more of the jurisdictions participating in the SRT. The legal

advisor(s) shall, when appropriate or when requested by the Board, consult with the legal representatives of all participating jurisdictions before rendering legal advice

X. COMMAND AND CONTROL

During field activation of the SRT, an Incident Commander, SRT Tactical Commander, and SRT Team Leader(s) will be designated. The duties and procedures to be utilized by the Incident Commander, the SRT Tactical Commander, and the SRT Team Leader(s) shall be set forth in the standard operating procedures approved by the Board. The standard operating procedures approved by the board may designate other personnel to be utilized during an incident.

XI. EQUIPMENT, TRAINING, AND BUDGET

Each participating jurisdiction shall acquire the equipment of its participating SRT members. Each participating jurisdiction shall provide sufficient funds to update, replace, repair, and maintain the equipment and supplies utilized by its participating SRT members. Each participating jurisdiction shall provide sufficient funds to provide for training of its participating SRT members.

The equipment, supplies, and training provided by each jurisdiction to its personnel participating in the SRT shall be equal to those provided by the other participating jurisdictions.

Each member jurisdiction shall maintain an independent budget system to account for funds allocated and expended by its participating SRT members.

The Board must approve any joint capital expenditure for SRT equipment.

XII. DISTRIBUTION OF ASSETS UPON TERMINATION

Termination shall be in accordance with those procedures set forth in prior sections. Each participating jurisdiction shall retain sole ownership of equipment purchased and provided to its participating SRT members.

Any assets acquired with joint funds of the SRT shall be equally divided among the participating jurisdictions at the asset's fair market value upon termination. The value of the assets of the SRT shall be determined by using commonly accepted methods of valuation. If two (2) or more participating jurisdictions desire an asset, the final decision shall be made by arbitration (described below). Any property not claimed shall be declared surplus by the Board and disposed of pursuant to state law for the disposition of surplus property. The proceeds from the sale or disposition of any SRT property, after payment of any and all costs of sale or debts of the agency, shall be equally distributed to those jurisdictions participating in the SRT at the time of dissolution in proportion to the jurisdiction's percentage participation in the SRT as of the date of dissolution. In the event that one (1) or more jurisdictions terminate their participation in the SRT, but the SRT continues to exist, the jurisdiction terminating participation shall be deemed to have waived any right or title to any property owned by the SRT or to share in the proceeds at the time of dissolution.

Arbitration pursuant to this section shall occur as follows

- A. The jurisdictions interested in an asset shall select one (1) person (Arbitrator) to determine which agency will receive the property. If the jurisdictions cannot agree to an Arbitrator, the chiefs of the jurisdictions participating in the SRT upon dissolution shall meet to determine who the Arbitrator will be. The Arbitrator may be any person not employed by the jurisdictions that desire the property.
- B. During a meeting with the Arbitrator, each jurisdiction interested in the property shall be permitted to make an oral and/or written presentation to the Arbitrator in support of its position.
- C. At the conclusion of the presentation, the Arbitrator shall determine which jurisdiction is to receive the property. The decision of the Arbitrator shall be final and shall not be the subject of appeal or review.

XIII. LIABILITY, HOLD HARMLESS, AND INDEMNIFICATION

It is the intent of the participating jurisdictions to provide services of the SRT without the threat of being subject to liability to one another and to fully cooperate in the defense of any claims or lawsuits arising out of or connected with SRT actions that are brought against the jurisdictions. To this end, the participating jurisdictions agree to equally share responsibility and liability for the acts or omissions of their participating personnel when acting in furtherance of this Agreement. In the event that an action is brought against any of the participating jurisdictions, each jurisdiction shall be responsible for an equal share of any award for or settlement of claims of damages, fines, fees, or costs, regardless of which jurisdiction or employee the action is taken against or which jurisdiction or employee is ultimately responsible for the conduct. The jurisdictions shall share equally regardless of the number of jurisdictions named in the lawsuit or claim or the number of officers from each jurisdiction named in the lawsuit or claim. This section shall be subject to the conditions and limitations set forth in subsections A through G below.

- A. Jurisdiction Not Involved in SRT Response. In the event that a jurisdiction or its personnel were not involved in the SRT response to the incident that gives rise to a claim or lawsuit, and judgment on the claim or lawsuit does not, in any manner, implicate the acts of a particular jurisdiction or its personnel, such jurisdiction shall not be required to share responsibility for the payment of the judgment or award.
- B. Intentionally Wrongful Conduct Beyond the Scope of Employment. Nothing herein shall require, or be interpreted to require indemnification or payment of any judgment against any SRT personnel for intentionally wrongful conduct that is outside of the scope of employment of any individual or for any judgment of punitive damages against any individual or jurisdiction. Payment of any award for punitive damages shall be the

sole responsibility of the person or jurisdiction that employs the person against whom such award is rendered

- C. Collective Representation and Defense The jurisdictions may retain joint legal counsel to collectively represent and defend the jurisdictions in any legal action. Those retaining joint counsel shall share equally the costs of such representation or defense.

In the event a jurisdiction does not agree to joint representation, the jurisdiction shall be solely responsible for all attorneys fees accrued by its individual representation or defense

The jurisdictions and their respective defense counsel shall make a good faith attempt to cooperate with other participating jurisdictions by, including but not limited to, providing all documentation requested, and making SRT members available for depositions, discovery, settlement conferences, strategy meetings, and trial

- D. Removal From Lawsuit In the event a jurisdiction or employee is successful in withdrawing or removing the jurisdiction or employee from a lawsuit by summary judgment, qualified immunity, or otherwise, the jurisdiction shall nonetheless be required to pay its equal share of any award for or settlement of the lawsuit, PROVIDED, however, that in the event a jurisdiction or employee is removed from the lawsuit and subsection (A) of this section is satisfied, the jurisdiction shall not be required to pay any share of the award or settlement

- E. Settlement Process It is the intent of this Agreement that the jurisdictions act in good faith on behalf of each other in conducting settlement negotiations on liability claims or lawsuits so that, whenever possible, all parties agree with the settlement or, in the alternative, agree to proceed to trial. In the event a claim or lawsuit requires the sharing of liability, no individual jurisdiction shall be authorized to enter into a settlement agreement with a claimant or plaintiff unless all jurisdictions agree with the terms of the settlement. Any settlement made by an individual jurisdiction without the agreement of the remaining jurisdictions, when required, shall not relieve the settling jurisdiction from paying an equal share of any final settlement or award

- F. Defense Waiver This section shall not be interpreted to waive any defense arising out of RCW Title 51

- G. Insurance The failure of any insurance carrier or self-insured pooling organization to agree to or follow the terms of this section shall not relieve any individual jurisdiction from its obligations under this Agreement

XIV. NOTICE OF CLAIMS, LAWSUITS, AND SETTLEMENTS

In the event a claim is filed or lawsuit is brought against a participating jurisdiction or its employees for actions arising out of their conduct in support of SRT operations, the jurisdiction shall promptly notify the other jurisdictions that the claim or lawsuit has been initiated. Any documentation, including the claim or legal complaints, shall promptly be provided to each participating jurisdiction.

Any jurisdiction or member who believes or knows that another jurisdiction would be liable for a claim, settlement, or judgment that arises from a SRT action or operation, shall have the burden of notifying each participating jurisdiction of all claims, lawsuits, settlements, or demands made to that jurisdiction. In the event a participating jurisdiction has a right, pursuant to section XIII of this Agreement, to be defended and held harmless by another participating jurisdiction, the jurisdiction having the right to be defended and held harmless shall promptly tender the defense of such claim or lawsuit to the jurisdiction that must defend and hold the other harmless.

XV. COMPLIANCE WITH THE LAW

The SRT and all its members shall comply with all federal, state, and local laws that apply to the SRT.

XVI. ALTERATIONS

This Agreement may be modified, amended, or altered by agreement of all participating jurisdictions and such alteration, amendment, or modification shall be effective when reduced to writing and executed in a manner consistent with paragraph XX of this Agreement.

XVII. RECORDS

Each jurisdiction shall maintain training records related to the SRT for a minimum of seven (7) years. A copy of these records will be forwarded and maintained with the designated SRT Training Coordinator. All records shall be available for full inspection and copying by each participating jurisdiction.

XVIII. FILING

Upon execution hereof, this Agreement shall be filed with the city clerks of the respective participating municipalities, the Director of Records and Elections of King County, the secretary of state, and such other governmental agencies as may be required by law.

XIX. SEVERABILITY

If any part, paragraph, section, or provision of this Agreement is held to be invalid by any court of competent jurisdiction, such adjudication shall not affect the validity of any remaining section, part, or provision of this Agreement.

VALLEY SPECIAL RESPONSE TEAM
OPERATIONAL AGREEMENT

7

XX. MUNICIPAL AUTHORIZATIONS

This Agreement shall be executed on behalf of each participating jurisdiction by its duly authorized representative and pursuant to an appropriate resolution or ordinance of the governing body of each participating jurisdiction. This Agreement shall be deemed effective upon the last date of execution by the last so authorized representative. This Agreement may be executed by counterparts and be valid as if each authorized representative had signed the original document.

By signing below, the signor certifies that he or she has the authority to sign this Agreement on behalf of the jurisdiction, and the jurisdiction agrees to the terms of this Agreement.

<u>[Signature]</u> Mayor, City of Auburn	<u>4/17/03</u> Date	<u>[Signature]</u> City Attorney, City of Auburn	<u>4/09/03</u> Date
<u>[Signature]</u> City Clerk, City of Auburn	<u>9/17/03</u> Date		
_____ Mayor, City of Renton	_____ Date	_____ City Attorney, City of Renton	_____ Date
_____ City Clerk, City of Renton	_____ Date		
_____ Mayor, City of Tukwila	_____ Date	_____ City Attorney, City of Tukwila	_____ Date
_____ City Clerk, City of Tukwila	_____ Date		
_____ Mayor, City of Kent	_____ Date	_____ City Attorney, City of Kent	_____ Date
_____ City Clerk, City of Kent	_____ Date		
_____ City Manager, City of Federal Way	_____ Date	_____ City Attorney, City of Federal Way	_____ Date
_____ City Clerk, City of Federal Way	_____ Date		
_____ Executive Director, Port of Seattle	_____ Date	_____ Port Counsel, Port of Seattle	_____ Date

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_____ Mayor, City of Auburn 30 June 03	Date	(Mirrored Stamp) _____ City Attorney, City of Auburn	Date
_____ City Clerk, City of Auburn	Date	_____ City Attorney, City of Renton	Date
_____ Mayor, City of Renton	Date	_____ City Attorney, City of Tukwila	Date
_____ City Clerk, City of Renton	Date	_____ City Attorney, City of Kent	Date
_____ Mayor, City of Tukwila	Date	_____ City Attorney, City of Federal Way	Date
_____ City Clerk, City of Tukwila	Date	_____ City Attorney, City of Federal Way	Date
_____ Mayor, City of Kent	Date	_____ City Attorney, City of Federal Way	Date
_____ City Clerk, City of Kent	Date	_____ City Attorney, City of Federal Way	Date
_____ City Manager, City of Federal Way	Date 6/2/03	_____ City Attorney, City of Federal Way	Date 6/2/03
_____ City Clerk, City of Federal Way	Date 6/2/03		
_____ Executive Director, Port of Seattle	Date	_____ Port Counsel, Port of Seattle	Date

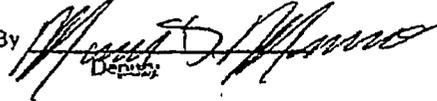
STATE OF WASHINGTON)
County of King }

The Director of Records & Elections, King County, State of Washington and exofficio Recorder of Deeds and other instruments, do hereby certify the foregoing copy has been compared with the original instrument as the same appears on file and of record in the office, and that the same is a true and perfect transcript of said original and of the whole thereof.

Witness my hand and official seal this _____ day
of ~~JUNE 28 2003~~ 19 _____

Director of Records & Elections

By


Deputy



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Mayor, City of Auburn Date City Attorney, City of Auburn Date

City Clerk, City of Auburn Date

Jesse Tanner 5-22-03

Mayor, City of Renton Date

City Clerk, City of Renton Date

Bonnie J. Walton 5-22-03

City Clerk, City of Renton Date

City Clerk, City of Renton Date

Mayor, City of Tukwila Date

City Clerk, City of Tukwila Date

Mayor, City of Kent Date

City Clerk, City of Kent Date

City Manager, City of Federal Way Date

City Clerk, City of Federal Way Date

Thomas Perry for MRD 7-10-03

Executive Director, Port of Seattle Date

Executive Director, Port of Seattle Date

City Attorney, City of Auburn Date

Lawrence J. Warner 5-22-03

City Attorney, City of Renton Date

City Attorney, City of Renton Date

City Attorney, City of Tukwila Date

City Attorney, City of Kent Date

City Attorney, City of Federal Way Date

Linda J. Stout 7-11-03

Port Counsel, Port of Seattle Date

Port Counsel, Port of Seattle Date

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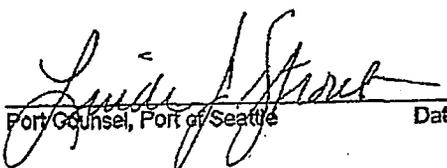
_____ Mayor, City of Auburn	_____ Date	_____ City Attorney, City of Auburn	_____ Date
_____ City Clerk, City of Auburn	_____ Date		

_____ Mayor, City of Renton	_____ Date	_____ City Attorney, City of Renton	_____ Date
_____ City Clerk, City of Renton	_____ Date		
<i>Saxon M. Mullett</i>	<i>5-20-03</i>	<i>David B. Quinn</i>	<i>5-19-03</i>
_____ Mayor, City of Tukwila	_____ Date	_____ City Attorney, City of Tukwila	_____ Date
_____ City Clerk, City of Tukwila	_____ Date		
_____ Mayor, City of Kent	_____ Date	_____ City Attorney, City of Kent	_____ Date
_____ City Clerk, City of Kent	_____ Date		
_____ City Manager, City of Federal Way	_____ Date	_____ City Attorney, City of Federal Way	_____ Date
_____ City Clerk, City of Federal Way	_____ Date		
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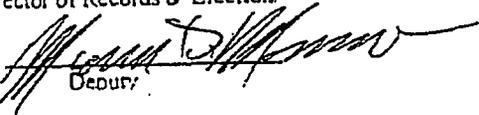
_____ Mayor, City of Auburn	Date	_____ City Attorney, City of Auburn	Date
_____ City Clerk, City of Auburn	Date		
_____ Mayor, City of Renton	Date	_____ City Attorney, City of Renton	Date
_____ City Clerk, City of Renton	Date		
_____ Mayor, City of Tukwila	Date	_____ City Attorney, City of Tukwila	Date
_____ City Clerk, City of Tukwila	Date		
_____ Mayor, City of Kent	Date	_____ City Attorney, City of Kent	Date
_____ City Clerk, City of Kent	Date		
_____ City Manager, City of Federal Way	Date	_____ City Attorney, City of Federal Way	Date
_____ City Clerk, City of Federal Way	Date		
<i>Brian Tesnyak for MRED</i> _____ Executive Director, Port of Seattle	Date	 _____ Port Counsel, Port of Seattle	Date

STATE OF WASHINGTON
County of King

The Director of Records & Elections, King County, State of Washington and exofficio Recorder of Deeds and other instruments, do hereby certify the foregoing copy has been compared with the original instrument as the same appears on file and of record in the office, and that the same is a true and perfect transcript of said original and of the whole thereof

Witness my hand and official seal this _____ day
of JUN 28 2005 19____

Director of Records & Elections

By 
Deputy

AUKEN DIV.

COURT FOR KING COUNTY

STATE OF WASHINGTON)

NO. RJC 011853

COUNTY OF KING)

INVENTORY AND RETURN
OF SEARCH WARRANT

1. I received a search warrant for the premises, vehicle or person specifically described as follows:

BIDDINGS LOCATED INSIDE COMPOUND LOCATED AT
4212 SWADLOW AVE KENT, WA. © JAMES F BRUSCHKE
DOB/6-26-58

2. On the 10 day of JULY, ~~19~~ 2003, I made a diligent search of the above-described premises, vehicle or person and found and seized the items listed below in Item 7.

3. Name(s) of person(s) present when the property was seized:

JAMES F BRUSCHKE DOB/6-26-58

4. The inventory was made in the presence of:

() The person(s) named in (3) from whose possession the property was taken.

Others: UNET DETECTIVES

5. Name of person served with a copy or description of place where copy is posted:

LEFT AT ABOVE ADDRESS.

6. Place where property is now stored: N/A

(Continued on next page)

Inventory and Return
Page 1 of 2

White Copy: Court File
Canary Copy: Police File
Goldenrod Copy: Left at Premises
searched

