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SUPREME COURT OF THE STATE OF WASHINGTON

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CITY OF SEATTLE, a municipal corporation;  
OFFICER KEVIN MCDANIEL; OFFICER  
PONHA LIM; and UNKNOWN JOHN DOES,

Petitioners,

v.

ELSA ROBB, personal representative of the  
ESTATE OF MICHAEL W. ROBB,

Respondent.

**FILED**  
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STATE OF WASHINGTON  
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BRIEF OF THE WASHINGTON ATTORNEY GENERAL,  
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ORIGINAL

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## I. INTRODUCTION

The Washington Attorney General is legal counsel for the State of Washington and its agencies, including the Washington State Patrol. The Attorney General, as a friend of the court, provides this briefing in support of the City of Seattle's appeal in this case. If *Robb v. City of Seattle*<sup>1</sup> is not reversed by this Court, Washington will be the first state in the union to hold that its law enforcement has a generalized common law tort duty to prevent crime. Under the court of appeals' decision, this duty is broad, yet ill defined, and could encompass not only the failure to seize property (shotgun shells) but also negligent failure to identify a suspect, negligent failure to arrest a suspect, and negligent failure to prevent crime. If it is not reversed by this Court, *Robb* will create a new tort duty—contrary to both statute and common law—that will hamper rather than improve the ability of the state and the municipalities to provide law enforcement services.

As developed by this Court, the public duty doctrine provides the proper analytical framework for determining liability for governmental regulatory and enforcement activity. The public duty doctrine embodies the proper balance of public policy: legislation for the public benefit should not be discouraged by subjecting the government to unlimited

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<sup>1</sup> 159 Wn. App. 133, 245 P.3d 242 (2010).

liability. The four well-established exceptions to the public duty doctrine's general rule of non-liability strike the proper equilibrium between the need to maintain public services and the need to compensate tort plaintiffs. Although the City of Seattle and the amici law enforcement agencies and municipal representatives have all emphasized the importance of maintaining the public duty doctrine, the Washington Attorney General hopes to contribute additional perspective on the public policy debate that is central to whether *Robb* provides a workable legal standard for Washington law enforcement.

In *Robb*, the court of appeals found that there was an issue of fact as to whether two individual law enforcement officers might be found liable for failing to pick up a few yellow shotgun shells during a brief investigative stop. The court of appeals' decision ignores the public policy established by the Legislature in RCW 9.41.0975. Appendix A. The Legislature has given law enforcement immunity from tort liability for failing to prevent the unlawful possession of firearms.

The Legislature set the scales of law enforcement liability when it enacted RCW 9.41.0975. It awarded statutory immunity. Yet, in *Robb*, the liability of these law enforcement officers is based upon their failure to seize ammunition that a criminal tortfeasor already possessed. Under RCW 9.41.0975, the same officers would have been immune if they had

failed to prevent the transfer of the *shotgun* itself. The incongruity between the Legislature's immunization of law enforcement for failing to prevent the unlawful possession of firearms, and the judicial imposition of liability for failure to prevent possession of ammunition is so arbitrary as to suffer from the lack of any defining principle.

Subjecting government to liability for negligent law enforcement is beyond the parameters of the Legislature's waiver of sovereign immunity under Washington State Constitution art. II, § 26. Under RCW 4.92.090 government is liable to the same extent as private persons or corporations. Private persons and corporations are not charged with responsibility for investigating crime, arresting criminals, and seizing stolen property or contraband. They have no generalized duty to protect citizens from criminal misconduct. In the absence of any private sector analogue, subjecting government to tort liability for negligent law enforcement is beyond the Legislature's waiver of sovereign immunity. The court of appeals errs in basing its erroneous application of *Restatement (Second) of Torts* § 302B cmt. e (1965) (§ 302B(e)) on an analysis of the waiver of sovereign immunity that fails to consider this crucial limitation. Private persons or corporations have no mandate to investigate burglaries in the City of Seattle. It is, consequently, a reversible error to assess the conduct of police officers under § 302B(e).

## II. SUPPLEMENTAL STATEMENT OF FACTS

Both the briefing offered by personal representative Elsa Robb, and the decision of the court of appeals have shaped the facts of this case in a manner that suggests that the Seattle Police Department (SPD), and officers Kevin McDaniel and Ponha Lim had a special relationship with Michael Robb and had a duty to prevent the intentional actions of Samson Berhe because their own affirmative acts exposed Michael Robb to a high degree of harm. In order to reach that conclusion, the actual facts of this case have been substantially revised and edited.

The City of Seattle's briefing does not confront the errors in the court of appeals' factual statement because they argue (appropriately) that duty is a question of law and that the underlying facts of this case should be irrelevant to the question of whether the officers had a duty to Michael Robb. But the factual inaccuracies that underpin the court of appeals' decision should be acknowledged and understood when addressing the *Robb* court's misapplication of § 302B(e).

The most significant factual error relates to whether SPD knew, or should have known, that Samson Berhe possessed a shotgun. This misinterpretation of the record is pivotal to the court of appeals' erroneous reasoning.

In its opinion, the court of appeals states that on June 21, 2005:

[T]he auto theft division of Seattle police received information from Bellevue police that **Berhe had recently stolen a car and was keeping a shotgun under his bed at home.** The Bellevue police had been informed of this by Berhe's friend, Raymond Valencia, who they had recently arrested for car theft.

*Robb*, 159 Wn. App. at 136-37 (emphasis added).

The actual information Bellevue Auto Theft Detective Hoover transmitted to Seattle Auto Theft Detective Yamashita directly contradicts the court of appeals' statement. CP at 792-96. Detective Hoover's contemporaneous report (6/23/2005) makes the following statements:

Off. Borsheim told me that some of the people at the shelter said that Valencia had talked about having some guns in his car, but they didn't find any guns. I asked Valencia about the guns and he said:

- That a couple of weeks ago he was at [Berhe's] house on [SW Dawson] in Seattle, and [Berhe] showed him two shotguns that he was hiding under his bed;
- That they took the shotguns out into his yard and he shot one of them;
- That [Berhe's] mother heard them and [Berhe] told her they were lighting of fire crackers;
- **That the next day they were going to show another friend the shotguns, but they were gone;**
- **That [Berhe] thought that his father probably took the shotguns.**

CP at 794 (emphasis added).

In this same report, Detective Hoover states that, on June 21, 2005, he:

[C]alled Seattle Police Detective [Yamashita] of the Seattle

auto theft section and told him about Valencia stating that [Berhe] had stolen the Honda. I also told Det. Yamashita about how [Berhe] had shotguns under his bed, **but that Valencia and [Berhe] think that [Berhe's] father took the shotguns.**

CP at 796 (emphasis added).

Thus, the key fact the *Robb* court relies upon in finding that SPD had direct knowledge that Berhe was in possession of a shotgun is a misstatement of the record. On June 21, 2005, Auto Theft Detective Yamashita had been advised that Berhe **was no longer in possession of a shotgun**, and that Berhe and Valencia believed Berhe's father had taken the shotguns. CP at 794, 796.

The *Robb* opinion also misapprehended the facts surrounding the only report that Berhe wielded a shotgun. The opinion states:

On June 24, Berhe's father called police to report that Berhe and Valencia were in the backyard fighting **and that they both had shotguns.** Numerous officers from the Southwest Precinct responded. By the time they arrived, the two boys and the shotguns were gone.

*Robb* at 137 (emphasis added).

The incident, as it is described in the report of Officer Barnes (who served as the primary officer) is significantly different:

I made contact with C/V Berhe and his wife, W/ Giorgis, while other officers made an area check C/V Berhe pointed out the bushes where he believed Valencia had hidden the shotgun. Officers checked this area, but did not locate the weapon. **According to W/ Giorgis there was only one**

**shotgun, possessed by Valencia, not two.** C/W Berhe seemed to agree with this however he changed his story several times during the investigation. C/W Berhe told me that he went out into his back yard and found Valencia standing there holding a shotgun in his hand. C/W Berhe states that he then picked up a stick and chased Valencia out of the yard onto SW Dawson Street. C/W Berhe states that Valencia said that he would come back and shoot him later and then went and hid the shotgun in the bushes across the street. **W/ Giorgis then added that Valencia then started back toward C/W Berhe holding a rock as if he were going to attack C/W Berhe with it. W/ Giorgis states that her son, W/ Berhe, then came out and told Valencia to drop the rock and leave his father alone.** Valencia complied and both Valencia and W/ Berhe left on foot westbound through a wooded area towards 21 Ave SW. Officers made an extensive area search with negative results.

CP at 123-24 (emphasis added).<sup>2</sup>

On June 24, 2005, the Seattle Police Department viewed Samson Berhe as a **witness** who had protected his father from his friend Raymond Valencia. CP at 123-24. There was no report that Berhe had ever threatened anyone with a shotgun, or even held a shotgun in his hand. CP at 123-24. If either of the two young men might have been considered a threat to Michael Robb, it would have been Valencia.<sup>3</sup>

The factual basis for the court of appeals' determination that SPD had a § 302B(e) special relationship with Samson Berhe, and in particular

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<sup>2</sup> The spent shotgun shell casings were found by K-9 units after Mr. Robb's murder. CP at 781. On June 24, 2005, they were not visible to the investigating officers.

<sup>3</sup> On August 8, 2005, during the homicide investigation, the fingerprints in the Cameron burglary (in which the shotguns were stolen on June 19, 2005) were identified as those of Roberto Valencia. CP at 784.

that SPD knew or should have known that Samson Berhe possessed a shotgun and would make use of shotgun shells left lying in the street, or that the officers committed an affirmative action (rather than an omission) when they failed to pick up shotgun shells at the scene of Valencia's arrest, conflict with the record. CP at 123-24, 794, 796.

On June 26, 2005, when SPD officers stopped Valencia<sup>4</sup> and Berhe, there had been no report of Berhe possessing or wielding a shotgun.<sup>5</sup> The only information the officers had about Berhe was that he had saved his father from Valencia on June 24, 2006, when **Valencia** was wielding a shotgun.

The "special relationship" the court of appeals creates and relies upon is unsupported by the record. Once the record is properly understood, the absence of a "special relationship" provides a basis for reversal.

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<sup>4</sup> Given the reports regarding Valencia's behavior on June 24, 2005, and the fact that Valencia possessed a watch that had been taken in the Mezas burglary, the officers were required to take Valencia into custody. Subsequent witness statements stated that it was Valencia not Berhe who threw the shotgun shells on the ground before the Terry stop on SW Brandon. CP at 781. The report of June 24, 2005, and any knowledge that might have been attributable to SPD as a result of that incident, would have meant that officers had a special duty to protect the general public from Valencia, not Berhe. They arrested Valencia for burglary as a result of the Terry stop on June 26, 2005, approximately three hours before Michael Robb's murder. CP at 170-71, 835-36.

<sup>5</sup> On June 22, 2005, Officer Lim had been the second officer at the Berhe home when a warrant check was run on Samson Berhe. CP at 156, 265-66. Because of the error in the entry of his name on the TMV warrant entered by the King County Prosecutor's Office ("Berne" rather than "Berhe"), both of those checks returned negative results. CP at 111-18, 156. Although it should not be relevant to any duty Lim had to Michael Robb, Lim must be presumed to have known that Berhe had no verifiable warrants in WACIC / NCIC / DOL on June 26, 2005, when he and McDaniel stopped him regarding the Mezas burglary. CP at 156, 765.

### III. ARGUMENT

The court of appeals disregarded precedent, and all relevant public policy considerations in holding that the City of Seattle may be liable for the affirmative acts of its law enforcement officers under § 302B(e). The decision below is erroneous because it: 1) is contrary to the Legislature's public policy determination that law enforcement has tort immunity for virtually all firearms violations, 2) fails to consider the case under the public duty doctrine, as fifty years of precedent requires, 3) imposes an unprecedented, expansive tort duty on municipalities to prevent criminals from injuring members of the public, and 4) provides a confusing liability standard that would impede the ability of municipalities to provide vital public services including law enforcement. Because the court of appeals' decision is contrary to both precedent and public policy, it should be reversed.

**A. The Incongruity Between The Legislature's Immunization Of Law Enforcement For Failing To Prevent Possession Of Firearms And The Court Of Appeals' Imposition Of Liability For Failure To Prevent Possession Of Ammunition Is So Arbitrary As To Lack Any Defining Principle**

If the officers had performed any of the affirmative acts identified in RCW 9.41.0975—including failing to prevent the unlawful transfer of the *shotgun* used to kill Michael Robb—they would have had immunity from tort liability. The Legislature has defined public policy in this area:

The state, local governmental entities, any public or private agency, and the employees of any state or local governmental entity or public or private agency, acting in good faith, are immune from liability: (a) For failure to prevent the sale or transfer of a firearm to a person whose receipt or possession of the firearm is unlawful.

RCW 9.41.0975. It is illogical for the law to provide the officers statutory immunity for the failure to prevent the unlawful sale or transfer of the shotgun to Berhe while, at the same time imposing liability for failing to prevent Berhe from lawfully possessing shotgun ammunition. The public policy articulated by the Legislature when it enacted RCW 9.41.0975 requires that the court of appeals' decision be reversed.

At common law, the SPD officers would also have had no tort liability if their investigation of Berhe been negligent. In *Dever v. Fowler*, 63 Wn. App. 35, 44, 816 P.2d 1237, *review denied*, 118 Wn.2d 1028 (1992), the court of appeals noted that:

The reason courts have refused to create a cause of action for negligent investigation is that holding investigators liable for their negligent acts would impair vigorous prosecution and have a chilling effect upon law enforcement.

*Id.* at 46 (citations omitted); *Blackwell v. Dep't of Soc. & Health Servs.*, 131 Wn. App. 372, 375, 127 P.3d 752 (2006).

The *Robb* decision's imposition of tort liability under § 302B(e) runs counter to statute and common law; it will necessarily have a chilling

effect on police investigations.

**B. The Robb Decision Is Counter To And Undermines The Public Duty Doctrine**

**1. The Public Duty Doctrine Is Essential To Preserving Public Safety**

As the City of Seattle and the amici who have filed in support of review have fully articulated, Washington's public duty doctrine enables the courts to make clear determinations of where governmental liability lies while balancing competing interests in maintaining public services and compensating tort plaintiffs.<sup>6</sup> The public policy supporting the public duty doctrine requires that legislation for the public benefit should not be discouraged by subjecting the government to unlimited liability. The four well-developed exceptions to the public duty doctrine's general rule of non-liability strike the proper equilibrium between the need to maintain public services and the need to compensate tort plaintiffs.<sup>7</sup>

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<sup>6</sup> City of Seattle's Petition for Review at 6-13; Brief of Amicus Curiae, Association of Washington Cities in Support of Petitioners' Motion for Discretionary Review at 1-5; Brief of Amici Curiae Association of Washington Cities and Washington Association of Municipal Attorneys in Support of Petitioners at 2-6. The Washington Attorney General incorporates by reference the accurate statement of the public duty doctrine—and the four current exceptions to the public duty doctrine's general rule of non-liability--contained in the City's petition and supportive briefing.

<sup>7</sup> This Court has identified four exceptions to the public duty doctrine—legislative intent, failure to enforce, rescue, and special relationship: *Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257, *opinion amended*, 753 P.2d 523 (1987).

**2. Contrary To The Decisions Of This Court, The *Robb* Decision Eliminates The Failure To Enforce Exception To The Public Duty Doctrine**

The *Robb* decision is inconsistent with the public policy underlying the public duty doctrine. The decision imposes liability not just for affirmative acts that create or expose another to a high risk of harm, but also for the failure to act to eliminate a risk of harm that exists through no fault of government. The *Robb* decision sets such a low threshold for tort liability that it changes the elements of the “failure to enforce” exception to the public duty doctrine. There is no longer any requirement that a government official must have a mandatory duty to take corrective action. Under *Robb*, any failure to take corrective action to enforce criminal laws or regulatory requirements can be the basis for tort liability. This expansion of liability lacks logic and common sense because the government does not have the resources to fully enforce all criminal laws and regulatory requirements. Imposing liability on government for failing to do what it can not do is directly contrary to the long line of public duty doctrine cases in which this Court has recognized the need to limit government tort liability.

The public policy underpinning the public duty doctrine and its exceptions is the proper balance between the need to compensate tort victims and the need to avoid discouraging the adoption and

implementation of programs designed to promote public health safety and welfare. The liability that the *Robb* decision creates for the state and municipalities is so great that it eviscerates the public duty doctrine and the public policy behind it.<sup>8</sup>

Although the public duty doctrine fills the need for an effective guideline to define where the government owes tort duties to members of the public, the court of appeals erroneously disregarded the doctrine in *Robb*, reasoning that *Coffel v. Clallam County*, 47 Wn. App. 397, 735 P.2d 686, review denied, 108 Wn.2d 1024 (1987) (*Coffel I*), provides “[p]recedent for analyzing a claim involving affirmative acts by police officers without considering the four exceptions of the public duty doctrine.” *Robb* at 146.

The court of appeals errs because the *Coffel I* court’s “reasoning that the public duty doctrine provides only that an individual has no cause of action against law enforcement officials for failure to act,” *id.*, is incompatible with the four-exception public duty doctrine framework this Court subsequently announced in *Bailey*. In fact, the incompatibility is

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<sup>8</sup> This Court has observed that “the *standard* rationale of the ‘public duty doctrine’ has historically been (1) prevention of excessive governmental liability and (2) the need to avoid hindering the governing process,” *J&B Dev. Co. v. King County*, 100 Wn.2d 299, 304, 669 P.2d 468 (1983), *overruled on other grounds by Taylor v. Stevens County*, 111 Wn.2d 159, 166-68, 759 P.2d 447 (1988). It has further noted that the public duty doctrine provides a needed “focusing tool” for determining where the government owes duties of care to members of the public. *J&B*, 100 Wn.2d at 304-05; *Bailey*, 108 Wn.2d at 267.

aptly illustrated by the court of appeals' own reasoning in *Coffel v. Clallam County*, 58 Wn. App. 517, 794 P.2d 513 (1990) (*Coffel II*), in which the court abandoned *Coffel I*'s reasoning regarding affirmative acts and remanded the case for further consideration under *Bailey*'s then newly articulated failure to enforce standard. *Coffel II* at 518.

The parties in *Robb*, and the court of appeals, agree that none of the exceptions to the public duty doctrine may be properly applied in this case. This should have been the end of the court's enquiry. The *Robb* decision contradicts all of this Court's public duty doctrine precedent. Specifically, the decision guts this Court's precedent on the requirements of the "failure to enforce" exception. For this reason alone, it should be reversed.

**C. No Duty Should Be Imposed On Law Enforcement Under § 302B(e) Because To Do So Would Be Inimical To The Public Interest.**

Although the Legislature has immunized law enforcement for tort liability related to the transfer, sale, and licensing of firearms, the court of appeals accepted Ms. Robb's invitation to impose a radically expansive new tort duty upon law enforcement officers under § 302B(e) for failure to pick up a few shotgun shells. The vaguely defined duty recognized by the court of appeals would lead to inconsistent determinations of public officers' duties and would, consequently, frustrate municipalities' ability

to fund vital public services. The § 302B(e) standard has been rejected by every jurisdiction that has considered applying it to law enforcement activities because it would destroy a police officer's discretion to discharge his duty without fear of civil liability. Washington should not be the first state to recognize a duty for law enforcement officers under § 302B(e).

**1. Section 302B(e) Is An Unworkable Standard For Determining Tort Liability For Law Enforcement Officers**

Here again, the Legislature has already defined the public policy and eliminated law enforcement tort liability in this area. The liability the court of appeals created under § 302B(e) is a vague and unworkable standard for determining where law enforcement officers owe tort duties towards members of the public. (*See* Appendix B for the text of § 302B(e) as abbreviated by the *Robb* court.) Applying § 302B(e), the court of appeals peremptorily reached the conclusion that the matter before the Court "is an affirmative acts case," *Robb* at 146, and accordingly held that the City owed Michael Robb a tort duty, notwithstanding the public duty doctrine.

The Restatement's own illustrations to § 302B(e) and courts' interpretations of that section in Washington and elsewhere suggest the duty recognized by § 302B(e) is only meant to apply where a defendant's

“affirmative act” *furnishes* a criminal or negligent party with means later used to injure the plaintiff (emphasis added).” See *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 231-32, 802 P.2d 1360 (1991) (liability exists under § 302B(e) “where the defendant leaves dynamite caps in an open box next to a playground where small children play”); see also *Morgan v. Dist. of Columbia*, 449 A.2d 1102, 1109 n.6 (D.C. 1982) (*Morgan I*) (liability exists under § 302B(e) where: “A gives an air rifle to B, a boy six years old. B intentionally shoots C, putting out C’s eyes. A may be found to be negligent toward C”). The sole Washington precedent imposing a duty upon a government agency under § 302B(e), *Parrilla v. King County*, 138 Wn. App. 427, 157 P.3d 879 (2007), did so on the basis that the defendant “bus driver affirmatively acted by leaving [a deranged passenger] alone on board the bus with its engine running.” *Id.* at 438. Put simply, in *Parrilla*, the driver *gave* the passenger the bus. All of the § 302B(e) illustrations, including *Parrilla*, are readily distinguishable from *Robb*. The police did not give Berhe the shotgun shells.

No case supports the contention that a defendant’s failure to eliminate a hazard created by someone other than the defendant himself is an affirmative act for purposes of § 302B(e). *Parrilla*, like the illustrations cited in *Hutchins* and *Morgan I*, regarded a defendant as liable if he *possesses* a dangerous item that he allows to fall into the hands of a

third party, who, in turn, causes the plaintiff's injury. In *Robb*, contrary to all prior precedent, the court of appeals reasoned that where law enforcement officers "did not confiscate the [shotgun] shells" ultimately used to kill Michael Robb, *Robb* at 137, there was sufficient evidence of affirmative acts to justify the imposition of a duty under § 302B(e). *Robb* at 147.<sup>9</sup>

That the court of appeals found an affirmative act in the officers' *failure* "to protect [Robb] against [Berhe's] criminal misconduct," *Robb* at 147, blurs the bright line between affirmative acts and omissions under § 302B(e). Taken to its logical conclusion, the rule of law recognized by the court of appeals finds that law enforcement officers owe actionable tort duties toward the public at large by reason of their mere *presence* in the vicinity of dangerous items later used to injure plaintiffs.

Such an open-ended understanding of tort duty would require law enforcement officers to foresee dangers everywhere they go, and eliminate all potential hazards to the public at their peril—depriving them entirely of the "discretion to proceed without fear of civil liability in the unflinching discharge of their duties." *Morgan v. Dist. of Columbia*, 468 A.2d 1306,

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<sup>9</sup> As discussed in the Supplemental Statement of Facts, section II above, the court of appeals' statement of the facts related to Berhe's possession of the shotgun and shells is unsupported by the Clerk's Papers. The true facts make any determination that the officers acted affirmatively when they left the shotgun shells on the sidewalk an absurd conclusion.

1311 (D.C., 1983) (*Morgan II*).

The court of appeals radical expansion of § 302B(e) would leave the courts to determine the scope of law enforcement officers' tort duties by resort to the nebulous question of whether officers have committed "affirmative act[s]" that later expose plaintiffs to an unreasonable risk of a third party's criminal or negligent conduct. Where the definition of affirmative acts includes the failure to prevent a criminal from using a possible means of injuring a plaintiff, there is no difference between affirmative acts and omissions. In *Robb*, § 302B(e) has become an unworkable standard for determining the scope of negligence duties, particularly those of law enforcement officers who must routinely encounter dangerous individuals and situations in the discharge of their duties. *Robb's* unworkable standard should be reversed.

**2. Other Jurisdictions Have Considered And Rejected § 302B(e) As A Source Of Duty For Law Enforcement**

No jurisdiction that has considered applying a duty under § 302B(e) in the law enforcement context has ultimately done so. The two known cases in which other jurisdictions considered, and rejected, applying a duty under § 302B in the law enforcement context are discussed below:

In *Morgan I*, the court considered a case where a police officer began making violent threats toward his wife. *Id.* at 1105. The officer's

wife reported the threats to his employer, the police department. When the police attempted to arrest him, the husband used his service revolver to shoot his wife and their four-year-old son and kill his father-in-law. *Id.* at 1106. The District of Columbia Court of Appeals endorsed the wife's theory of liability under § 302B(e). On review, the court explored the implications of imposing duties upon law enforcement officers under § 302B(e) and held:

Severe depletion of [law enforcement] resources could well result if every oversight, omission or blunder made by a police official rendered a state or municipality potentially liable in . . . damages.

*Morgan II* at 1311 (internal quotation marks and citations omitted). The court then turned to consider the potential implications for law enforcement agencies should duties be imposed under § 302B(e):

Rather than exercise reasoned discretion and evaluate each particular allegation on its own merits the police may well be pressured to make hasty arrests solely to eliminate the threat of personal prosecution by the putative victim. Such a result historically has been viewed, and rightly so, as untenable, unworkable and unwise.

*Id.* (citation omitted). The *Morgan II* court concluded that the District of Columbia owed no duty to the plaintiffs. *Id.* at 1319. Similarly, in *Poliny v. Soto*, 178 Ill. App. 3d 203, 533 N.E.2d 15 (1988), the Illinois Court of Appeals rejected Poliny's argument that § 302B(e) provides an exception to the general rule that the police owe no tort duty to the public as a whole

in a case where police refused to take a victim into the station after a street assault and the victim was injured by an accomplice. *Id.* at 209.

The few courts that have considered the issue have rejected the argument that § 302B(e) imposes a tort duty upon law enforcement officers. Moreover, the *Morgan II* and *Poliny* courts reached this conclusion even where the police acts at issue amounted to “affirmative acts” as understood by the court of appeals in *Robb*. As other jurisdictions recognize, § 302B(e) would impose broad and unworkable tort duties upon law enforcement officers to the detriment of the public interest. For the reasons discussed in *Morgan II* and *Poliny*, this Court should reverse the court of appeals’ decision.

**D. The Court Of Appeals Erred When It Failed To Recognize That RCW 4.92.090 Requires Analogous Private Sector Liability Before The State Or A Municipality Can Be Liable In Tort For Damages**

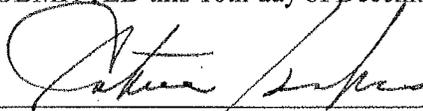
In 1961, the Legislature waived state immunity for tort claims by enacting RCW 4.92.090. The waiver in RCW 4.92.090 is conditional and limited. The court of appeals erred when it failed to recognize that it was incumbent upon the Robb estate to show that the conduct complained of constitutes a tort which would be actionable if it were done by a private person in a private setting. *Edgar v. State*, 92 Wn.2d 217, 226, 595 P.2d 534, *cert. denied*, 444 U.S. 1077 (1980). In *Edgar*, this Court held that the

claim was outside the State's waiver of sovereign immunity because the plaintiff had drawn "no analogy between the conduct complained of and any conduct of a private individual which would be actionable" in tort. *Edgar*, 92 Wn.2d at 228. In *Robb* there is no conduct by private individuals that is comparable to that of the SPD officers. The court of appeals erred in not recognizing Seattle's abrogation of sovereign immunity is too narrow to encompass the officers' conduct.

#### IV. CONCLUSION

The Washington Attorney General respectfully requests that the court of appeals' decision be reversed and that summary judgment for the City of Seattle be granted as a matter of law.

RESPECTFULLY SUBMITTED this 16th day of December 2011.



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# Appendix A

RCW 9.41.0975

Officials and agencies — Immunity, writ of mandamus.

(1) The state, local governmental entities, any public or private agency, and the employees of any state or local governmental entity or public or private agency, acting in good faith, are immune from liability:

(a) For failure to prevent the sale or transfer of a firearm to a person whose receipt or possession of the firearm is unlawful;

(b) For preventing the sale or transfer of a firearm to a person who may lawfully receive or possess a firearm;

(c) For issuing a concealed pistol license or alien firearm license to a person ineligible for such a license;

(d) For failing to issue a concealed pistol license or alien firearm license to a person eligible for such a license;

(e) For revoking or failing to revoke an issued concealed pistol license or alien firearm license;

(f) For errors in preparing or transmitting information as part of determining a person's eligibility to receive or possess a firearm, or eligibility for a concealed pistol license or alien firearm license;

(g) For issuing a dealer's license to a person ineligible for such a license; or

(h) For failing to issue a dealer's license to a person eligible for such a license.

(2) An application may be made to a court of competent jurisdiction for a writ of mandamus:

(a) Directing an issuing agency to issue a concealed pistol license or alien firearm license wrongfully refused;

(b) Directing a law enforcement agency to approve an application to purchase wrongfully denied;

(c) Directing that erroneous information resulting either in the wrongful refusal to issue a concealed pistol license or alien firearm license or in the wrongful denial of a purchase application be corrected; or

(d) Directing a law enforcement agency to approve a dealer's license wrongfully denied.

The application for the writ may be made in the county in which the application for a concealed pistol license or alien firearm license or to purchase a pistol was made, or in Thurston county, at the discretion of the petitioner. A court shall provide an expedited hearing for an application brought under this subsection (2) for a writ of mandamus. A person granted a writ of mandamus under this subsection (2) shall be awarded reasonable attorneys' fees and costs.

[2009 c 216 § 7; 1996 c 295 § 9; 1994 sp.s. c 7 § 413.]

Notes:

**Finding -- Intent -- Severability -- 1994 sp.s. c 7:** See notes following RCW 43.70.540.

**Effective date -- 1994 sp.s. c 7 §§ 401-410, 413-416, 418-437, and 439-460:** See note following RCW 9.41.010.

# Appendix B

§ 302B(e) provides in pertinent part:

An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal. . . .

e. There are . . . situations in which the actor, as a reasonable man, is required to anticipate and guard against the intentional, or even criminal, misconduct of others. In general, these situations arise where the actor is under a special responsibility toward the one who suffers the harm, which includes the duty to protect him against such intentional misconduct; *or where the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account.*

Restatement (2d) of Torts § 302B cmt. e (1965) as quoted in *Robb*, 159 Wn. App. at 140

(emphasis in original).

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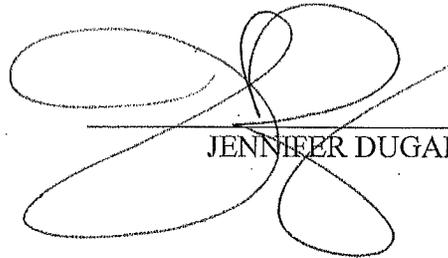
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I certify under penalty of perjury under the laws of the state of  
Washington that the foregoing is true and correct.

DATED this 16th day of December 2011, at Seattle WA.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

JENNIFER DUGAR, Legal Assistant

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