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SUPREME COURT  
STATE OF WASHINGTON  
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No. 85658-3

CLERK

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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

Plaintiff/Respondent,

vs.

CITY OF SEATTLE, a municipal corporation;  
OFFICER KEVIN McDANIEL; OFFICER PONHA LIM,

Defendants/Petitioners.

BRIEF OF AMICUS CURIAE  
WASHINGTON STATE ASSOCIATION FOR JUSTICE  
FOUNDATION

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FILED AS  
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## **I. IDENTITY AND INTEREST OF AMICUS CURIAE**

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to the Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights of plaintiffs under the civil justice system, including an interest in the proper analytical basis for imposing tort liability on governmental entities.

## **II. INTRODUCTION AND STATEMENT OF THE CASE**

This review presents the Court with an opportunity to re-confirm the nature and effect of the public duty doctrine as a “focusing tool” for determining when governmental entities have a duty in tort, and to ensure that they are liable for damages to the same extent as private persons or corporations, in keeping with the Legislature’s waiver of sovereign immunity. See Wash. Const. Art. II, § 26; Chs. 4.92 & 4.96 RCW; Osborn v. Mason County, 157 Wn.2d 18, 27-28, 134 P.3d 197 (2006). This review also requires the Court to determine whether the City of Seattle (City) and

Seattle Police Department (SPD) police officers Kevin McDaniel (McDaniel) and Ponha Lim (Lim) had a duty, pursuant to the Restatement (Second) of Torts § 302B & cmt. *e* (1965), to confiscate ammunition lying on the ground in the course of an investigative stop of a mentally disturbed person who shot Michael W. Robb (Robb) a short time later.<sup>1</sup>

The underlying facts are drawn from the Court of Appeals opinion and the briefing of the parties. See Robb v. City of Seattle, 159 Wn.App. 133, 245 P.3d 242 (2010), *review granted*, 171 Wn.2d 1024 (2011); City Br. at 1-6; Robb Br. at 1-10; City Pet. for Rev. at 1-5; Robb Ans. to Pet. for Rev. at 1-5; Robb Supp. Br. at 2-5. For purposes of this amicus curiae brief, the following facts are relevant: On the evening of June 26, 2005, Samson Berhe (Berhe), a mentally disturbed 17-year old, flagged down a car, pointed a shotgun into the window, and shot and killed the driver, Robb. In a series of encounters with SPD officers over the preceding year, including encounters with McDaniel and/or Lim, Berhe appeared to exhibit a pattern of significant mental disturbance.<sup>2</sup>

On the day of the shooting, McDaniel and Lim stopped Berhe and another person on suspicion of burglary. McDaniel had learned from a

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<sup>1</sup> As used in this brief, references to the “City” include all defendants/respondents.

<sup>2</sup> The encounters are described in detail in the Court of Appeals opinion and Robb’s briefing. See Robb, 159 Wn.App. at 135-38; Robb Br. at 4-10. The City appears to admit Robb’s allegations for purposes of this appeal. See City Br. at 2-3 & n.3; City Pet. for Rev. at 4 n.1.

witness that Berhe and the other person were bragging about knowing where stolen items were kept. During the stop, Berhe was very agitated. The officers patted down Berhe and the other person for weapons and arrested the other person upon discovering a stolen watch in his pocket. At the time of the stop, the officers noticed yellow shotgun shells on the curb next to where Berhe was standing, but did not confiscate them. They released Berhe, and left the shells on the curb. A witness observed Berhe return within a short time, apparently to retrieve the shells, and the shooting occurred approximately two hours later.

Robb's mother, as personal representative of Robb's Estate (Estate), filed suit against the City, McDaniel and Lim, alleging a claim for negligence based on the Restatement (Second) of Torts § 302B & cmt. *e.* Restatement § 302, subsection (b)—distinguished from § 302B—states the general rule regarding the duty to guard another person against harm caused by a third person, indicating “[a] negligent act or omission may be one which involves an unreasonable risk of harm to another through ... the foreseeable action of ... a third person[.]” (Brackets & ellipses added.) Section 302B, in turn, states a special application of this rule: “[a]n act or 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

... a third person which is intended to cause harm, even though such conduct is criminal.” Comment *e* to § 302B explains:

There are ... situations in which the actor, as a reasonable [person], 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 [or her] 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 [person] would take into account.*

(Ellipses, brackets & emphasis added.)<sup>3</sup>

The City moved for summary judgment based on the public duty doctrine, arguing that it could not be liable unless Robb's claim satisfied one of four recognized exceptions to the doctrine. See City Pet. for Rev. at 1. The Estate conceded that the claim under Restatement § 302B & cmt. *e* did not satisfy any of the exceptions, but argued that it was not necessary to do so. See Robb Ans. to Pet. for Rev. at 1. The superior court denied summary judgment but certified its order for discretionary review. The Court of Appeals affirmed, concluding that the City had a duty under Restatement § 302B & cmt. *e*, and reasoning that “it should not be surprising that tort liability can be imposed if officers take control of a situation and then depart from it leaving shotgun shells lying around within easy reach of a young man known to be mentally disturbed and in

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<sup>3</sup> Restatement §§ 302 & 302B, including comments, are reproduced in the Appendix.

possession of a shotgun.” Robb, 159 Wn.App. at 147. This Court granted review.

### III. ISSUES PRESENTED

1. What is the nature of the public duty doctrine and its exceptions?
2. What is the relationship between the public duty doctrine and a claim for negligence under the Restatement (Second) of Torts § 302B & cmt. *e*?
3. Does Washington recognize a duty grounded in negligence under Restatement § 302B & cmt. *e*?

### IV. SUMMARY OF ARGUMENT

*Re: Public Duty Doctrine.* The public duty doctrine is a focusing tool to determine whether a duty is owed by a government actor or entity, and to ensure that government actors and entities are liable to the same extent as private persons and corporations, consistent with the abolition of sovereign immunity. The doctrine is not a defense to or immunity from tort liability.

The four traditional exceptions to the public duty doctrine incorporate standard negligence principles for determining whether a duty is owed. They are not exclusive, and the fact that a particular negligence claim may not fit neatly within one of the recognized exceptions does not preclude a tort claim against a government actor or entity. The Court of Appeals properly rejected the City’s argument that the four traditional

exceptions to the public duty doctrine are the sole source of a tort duty imposed on government actors or entities.

*Re: Restatement (Second) of Torts § 302B & cmt. e.* Under standard negligence principles embodied in the Restatement § 302B & cmt. e, the City has a duty—no less than a private person or corporation—not to affirmatively act in a way that exposes another person to a recognizable high degree of risk of harm through the criminal conduct of a third person. This duty has previously been recognized by the Court, and is a matter of stare decisis.

## V. ARGUMENT

### A. **The Court Of Appeals Properly Rejected The City’s Argument That The Four Traditional And Nonexclusive Exceptions To The Public Duty Doctrine Are The Sole Source Of A Tort Duty Imposed On Public Entities.**

When the Washington Constitution was adopted, the State originally enjoyed sovereign immunity, and it was not liable in tort absent statutory authority permitting the imposition of liability. See Charles F. Abbott, Jr., Cmt., Abolition of Sovereign Immunity in Washington, 36 Wash. L. Rev. 312, 313-14 (1961); see also Wash. Const. art. II, § 26 (stating “[t]he legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state”). Historically, municipalities shared the State’s sovereign immunity, but to a lesser

extent, as reflected in the problematic distinction between “private” or “proprietary” functions, for which a municipality was liable, and “governmental” functions, for which it was *not* liable. See e.g. Hagerman v. City of Seattle, 189 Wash. 694, 698, 66 P.2d 1152 (1937) (recognizing distinction and noting difficulty in applying it).

In 1961, the Legislature abolished the State’s sovereign immunity from tort liability. See Laws of 1961, ch. 136, § 1 (codified as RCW 4.92.090). As subsequently amended by Laws of 1963, ch. 159, § 2, the statute provides:

The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

RCW 4.92.090. This Court interpreted the foregoing language as abolishing sovereign immunity for municipalities as well. See Kelso v. Tacoma, 63 Wn.2d 913, 916-19; 390 P.2d 2 (1964).

In 1967, the Legislature codified the waiver of sovereign immunity for local government entities in much the same way that it had for the state. See Laws of 1967, ch. 164, § 1 (codified as RCW 4.96.010). In language that has not been altered since that time, the statute provides in pertinent part:

All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers,

employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation.

RCW 4.96.010(1).<sup>4</sup>

Although the state and local government entities are liable in tort to the same extent as a private person or corporation following the waiver of sovereign immunity, they retain narrow common law immunities for judicial, legislative and executive functions, reflecting the notion that “it is not a tort for government to govern.” Evangelical United Brethren Church v. State, 67 Wn. 2d 246, 253, 407 P.2d 440 (1965) (involving discretionary executive immunity; internal quotation omitted).<sup>5</sup> The activities covered by these immunities must be so unique to government that there is no similar counterpart for which private persons or corporations may be held liable. See id. The immunities do not apply to operational decisions that are subject to a standard of care. See e.g. Habermann v. WPPSS, 109 Wn.2d 107, 158, 744 P.2d 254 (1987) (distinguishing between arguably immune decision to build nuclear power plant and technical means by which decision was implemented, which was

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<sup>4</sup> The full text of the current version of RCW 4.96.010 is reproduced in the Appendix.

<sup>5</sup> See also Lallas v. Skagit County, 167 Wn.2d 861, 864-65, 225 P.3d 910 (2009) (involving judicial immunity); Mission Springs, Inc. v. City of Spokane, 134 Wn.2d 947, 969-70, 954 P.2d 250 (1998) (involving legislative immunity); see generally Restatement (Second) of Torts § 895B & cmt. (1965) (discussing sovereign immunity, modern waiver thereof, and remaining governmental immunities).

subject to ordinary tort principles; collecting other cases involving operational decisions subject to a standard of care).

Against this backdrop of the abolition of sovereign immunity and recognition of the limited immunities that apply to government activities for which no private person or corporation could be held liable, what came to be known as the public duty doctrine first surfaced in Campbell v. City of Bellevue, 85 Wn.2d 1, 530 P.2d 234 (1975). Campbell upheld a claim against the city for negligent failure to take action under its electrical code to remedy a known hazard. In the course of its analysis, the Court considered and rejected the city's argument, based on authority from other states, that its ordinances "give rise only to a broad general responsibility to the public at large rather than to individual members of the public." Id., 85 Wn.2d at 9. The opinion reflects traditional duty analysis in that statutory obligations do not generally give rise to tort liability in the absence of an express or implied statutory cause of action. See id. at 8-10.

Campbell also recognized what the Court described as "an exception" to the public duty doctrine "where a relationship exists or has developed between an injured plaintiff and agents of the municipality creating a duty to perform a mandated act for the benefit of particular persons or class[es] of persons[.]" 85 Wn.2d at 10. This later came to be known as the "special relationship" exception to the public duty doctrine.

See J&B Dev. Co. v. King County, 100 Wn.2d 299, 307, 669 P.2d 468 (1983).<sup>6</sup>

Over time, a list of four recognized “exceptions” has been developed and often repeated:

(1) when the terms of a legislative enactment evidence an intent to identify and protect a particular and circumscribed class of persons (legislative intent); (2) where governmental agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation, fail to take corrective action despite a statutory duty to do so, and the plaintiff is within the class the statute intended to protect (failure to enforce); (3) when governmental agents fail to exercise reasonable care after assuming a duty to warn or come to the aid of a particular plaintiff (rescue doctrine); or (4) where a relationship exists between the governmental agent and any reasonably foreseeable plaintiff, setting the injured plaintiff off from the general public and the plaintiff relies on explicit assurances given by the agent or assurances inherent in a duty vested in a governmental entity (special relationship).

Bailey v. Town of Forks, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987) (lead opinion; citations omitted); see also Babcock v. Mason County Fire Dist., 144 Wn. 2d 774, 785, 30 P.3d 1261 (2001) (listing exceptions per Bailey).

However, these four exceptions to the public duty doctrine are not exclusive. For example, in Petersen v. State, 100 Wn.2d 421, 425-29, 671 P.2d 230 (1983), without referencing the public duty doctrine, the Court held that the state may be liable in tort for a state-employed psychiatrist’s negligent release of a mentally disturbed patient, based on Restatement

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<sup>6</sup> Taylor v. Stevens County, 111 Wn.2d 159, 166-68, 759 P.2d 447 (1988), overruled J&B Dev. Co. to the extent that it held a local government entity is under a duty to verify that a building permit and the construction of a building is in compliance with all applicable codes.

(Second) of Torts § 315 (1965).<sup>7</sup> The plurality in Bailey cited Petersen as an example of an additional exception to the public duty doctrine, outside the list of four, where the state engages in a “proprietary function.” See Bailey, 108 Wn.2d at 268. In Taggart v. State, 118 Wn.2d 195, 218 n.4, 822 P.2d 243 (1992), the Court explained that “[a]lthough we did not discuss the public duty doctrine in Petersen, imposing liability on the State for the psychiatrist’s negligence presupposes that the doctrine is inapplicable,” and confirmed that Petersen “effectively created another exception to the doctrine.” In light of Petersen, especially as interpreted in Taggart, the City is simply incorrect when it states that it cannot be liable absent one of the four recognized exceptions to the public duty doctrine. Restatement § 302B & cmt. *e* can serve as a basis for the City’s duty, just as § 315 served as the basis for the State’s duty in Petersen.<sup>8</sup>

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<sup>7</sup> Petersen involved the “special relationship” between a state-employed psychiatrist and the patient who subsequently injured the plaintiff under Restatement § 315. This is different than the special relationship exception to the public duty doctrine, which requires a special relationship between the governmental actor in question and the injured plaintiff. See Babcock, 144 Wn.2d at 786.

<sup>8</sup> Fisk v. City of Kirkland, 164 Wn.2d 891, 194 P.3d 984 (2008), holding a municipality is not liable in tort for a water system with insufficient pressure for fire suppression, supports the notion that the four exceptions to the public duty doctrine are not the sole source of duty imposed on a public entity. In Fisk the Court considered whether RCW 80.28.010 created an express or implied cause of action. See 164 Wn.2d at 895-96. But see id. at 899 (Madsen, J., concurring; indicating that the Court should not have analyzed implied statutory cause of action in the absence of an exception to the public duty doctrine). It is not entirely clear whether the rationale for the decision in Fisk is based on discretionary (executive) immunity or the public duty doctrine, and the majority opinion does not specifically reference either doctrine. Compare 164 Wn.2d at 897 (stating “it is not a tort for government to govern,” and “there are some activities that are so unique to government that there is no similar counterpart for which private persons or corporations

The public duty doctrine does not comprise a defense to liability for governmental actors or entities, but instead serves as a “focusing tool” to assist in determining whether a duty of care is owed in the first place. See Osborn, 157 Wn.2d at 27. It “simply reminds us that a public entity—like any other defendant—is liable for negligence only if it has a *statutory or common law duty of care*.” Id. at 27-28 (emphasis added). The exceptions to the doctrine represent a shorthand form of traditional negligence analysis in determining whether the public entity owes a duty to the plaintiff. See id.<sup>9</sup> The City attempts to short-circuit a traditional negligence analysis based on nothing more than the concession by the Estate that its claim under Restatement § 302B & cmt. *e* does not fall within one of the four traditional (and nonexclusive) exceptions to the public duty doctrine. See City Br. at 9.

As the Court observed in Osborn, “the public duty doctrine does not—cannot—provide immunity from liability,” given the abolition of

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may be liable,” indicative of discretionary immunity), with id. at 895 (stating “[w]hen examining regulatory statutes and ordinances, we have held that if the statute serves the general public welfare ... then there is no duty to any individual unless a specific exception applies,” indicative of public duty doctrine). There is also confusion regarding the Court’s discussion of proprietary functions, which seems to be derived from the “for hire” language contained in a relevant statute, RCW 80.04.010. Presumably, the Court is not resurrecting the proprietary-governmental distinction that was rejected by the Legislature when it abolished sovereign immunity. See RCW 4.92.090; RCW 4.96.010(1).

<sup>9</sup> The Court in Osborn found it unnecessary to decide whether the public duty doctrine should be abandoned. See 157 Wn.2d at 27. Robb has not raised the issue, and the continued vitality of the public duty doctrine remains unresolved.

sovereign immunity. Osborn at 27. Properly understood, the doctrine and its exceptions ensure that public entities are liable for their tortious conduct to the same extent as a private person, no more and no less. See Robb, 159 Wn.App. at 146 (stating public duty doctrine “reminds us that municipalities are not to become liable for damages to a greater extent than if they were a private person or corporation”).<sup>10</sup> With this understanding of the public duty doctrine in mind, it is now possible to determine whether Restatement § 302B & cmt. *e* gives rise to an actionable duty on the part of the City.

**B. The Duty Imposed Under The Restatement (Second) Of Torts § 302B & Cmt. *e* Has Been Recognized In Washington And Is A Matter Of Stare Decisis.**

Underlying much the City’s argument is the apparent premise that that the Restatement § 302B & cmt. *e* is not, or should not be, the law in Washington. See e.g. City Supp. Br. at 1; City Pet. for Rev. at 2, 6. Even though the Court has found Restatement § 302B & cmt. *e* inapplicable in

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<sup>10</sup> The City argues that no private actor could ever be in the position of the police *in detaining another person*. See City Pet. for Rev. at 8-9 & n.5. At one level, this argument is beside the point because it does not appear that Robb is seeking to impose liability solely for failure to detain Berhe, as opposed to the decision to leave ammunition on the ground where he could later retrieve it. See City Br. at 4 (describing Robb’s claims). At another level, the City’s argument is incorrect because there is a private analog to a Terry stop embodied in the shopkeeper’s privilege to detain suspected shoplifters. See RCW 4.24.220. In any event, the duty imposed by Restatement § 302B & cmt. *e* does not make a distinction between public and private actors, let alone impose a more expansive duty on public actors. See infra note 12. It is not difficult to imagine a private security guard or “bouncer” in a situation similar to the stop of Berhe by officers McDaniel and Lim. See J&B Dev. Co., 100 Wn.2d at 311 (Utter, J., concurring; drawing analogy between law enforcement officers and private security guards hired by condominium association); see also Robb Ans. to Pet. for Rev. at 9 n.15 (discussing J&B Dev. Co.).

the two cases where it has been addressed, the rule has been adopted and should be given stare decisis effect. The statement and application of a rule is precedential, even if the rule is found to be inapplicable to the circumstances presented by a given case. See State ex rel. Lemon v. Langlie, 45 Wn.2d 82, 90, 273 P.2d 464 (1954) (stating “[e]ven though we held [in a prior case] that he had not shown compliance with the rule, the statement of this legal principle was still necessary to the decision reached,” and holding that the statement of the inapplicable legal principle was “controlling” as precedent in subsequent case). Such precedent cannot be ignored, and it can only be overruled upon a showing that it is incorrect and harmful. See Hardee v. State, 172 Wn.2d 1, 15, 256 P.3d 339 (2011). No such showing has been offered here.

The Court first examined Restatement § 302B & cmt. *e* in Hutchins v. 1001 Fourth Ave. Assocs., 116 Wn.2d 217, 230-31, 802 P.2d 1360 (1991). Hutchins involved a negligence claim against an occupier of land for failure to employ security measures to protect passersby from the risk of criminal assault on the premises. Based upon Restatement § 302B, the Court specifically rejected the occupier’s argument that “one never has a duty to protect others from third party criminal conduct” apart from a special relationship with either the criminal or the victim. See id., 116 Wn.2d at 230. The Court stated that “in some exceptional circumstances a

defendant may be liable for harm caused by a third party,” followed by a quotation of Restatement § 302B and an extended discussion of its provisions, including cmt. *e*. See id. at 230-31. The Court concluded its discussion of the Restatement and cases following a similar rule by finding no duty under the circumstances “[i]n light of the principles set forth above[.]” Id. at 233. While the Court does not “conclusively define the parameters” of the duty recognized in the case, the recognition of the duty based on Restatement § 302B & cmt. *e* is an essential part of the analysis. See id.

In its petition for review, the City characterizes Hutchins as finding “no liability under § 302B,” and does not address its precedential value. See City Pet. for Rev. at 18. In its supplemental brief, the City notes that the majority in CJC v. Corporation of Catholic Bishop, 138 Wn.2d 699, 728 n.17, 985 P.2d 262 (1999), stated “[n]or need we adopt wholesale the duty described in § 302B of the Restatement (Second) of Torts (1965),” given the special relationship that the defendant church had with both the criminal and the victim in that case. See City Supp. Br. at 6-7. However, as noted in the concurring opinion in CJC, the majority’s reasoning and result are consistent with § 302B, and the lack of “wholesale” adoption is far from a rejection of the rule. See 138 Wn.2d at 731-32 (Madsen, J., concurring). In addition, the concurring opinion correctly describes

adoption of Restatement § 302B & cmt. *e* in Hutchins as a holding, stating: “this court has *held* that ‘exceptional circumstances’ are required before imposition of the duty described in [Restatement § 302B] cmt. *e*, para. D to protect others from third party criminal conduct.” CJC at 740 (Madsen, J., concurring; brackets & emphasis added).

More recently, the Court addressed Restatement § 302B & cmt. *e* in Kim v. Budget Rent A Car Sys., Inc., 143 Wn.2d 190, 196-97, 15 P.3d 1283 (2001), which involved a negligence claim against a rental car agency for leaving the keys in a vehicle that was subsequently stolen and used to commit vehicular assault. The plaintiff in Kim relied on § 302B & cmt. *e* as the basis for his claim. See id., 143 Wn.2d at 196-97. The Court did not suggest that the plaintiff’s claim was unfounded in Washington law, only that it involved an exception to the general rule of nonliability for criminal conduct of a third person. See id. Instead, the Court quoted and discussed the Restatement, including cmt. *e*, and found it was not met under the facts of the case. See id.

In its petition for review, the City characterizes Kim as “declining to adopt § 302B.” City Pet. for Rev. at 17; accord id. at 18 (stating “*Kim* neither purports to adopt § 302B ...”). This characterization of Kim is incorrect. There is no express language declining to adopt § 302B & cmt. *e*, nor is there any other indication in the opinion that the Restatement is

subject to criticism or contrary to Washington law. If the Court had, in fact, declined to adopt the Restatement in Kim, it would not have been necessary to evaluate its applicability to the facts of the case. Not surprisingly, the Court of Appeals interprets Kim as precedential.<sup>11</sup>

In its reply brief in the Court of Appeals, the City more accurately states that Kim “declined to apply § 302 [sic] to the facts of that case,” and “recognized its potential viability in other circumstances.” City Reply at 15. However, the City goes on to characterize the Court’s discussion of § 302B & cmt. *e* as dicta. See City Reply at 15 & 19; City Pet. for Rev. at 17-18. This characterization is not supported by any analysis or citation to authority, and it is contrary to the principle that the statement of a rule is precedential, even if the rule is found inapplicable under the facts of the particular case. See Lemon, *supra*.<sup>12</sup>

The City also argues that the Restatement § 302B & cmt. *e* can only serve as the basis for a finding of negligence (i.e., breach of a duty), not as the source of a duty. This is contrary to Hutchins and Kim, where the Court phrased its discussion in terms of duty rather than negligence or

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<sup>11</sup> See Parilla v. King County, 138 Wn.App. 427, 434-35, 157 P.3d 897 (2007) (discussing “*Kim*’s adoption of the rule described” in § 302B. & cmt. *e*); *id.* at 437 (referring to “[t]he rule articulated by section 302 B and adopted by the court in *Kim*”); see also Robb, 159 Wn.App. at 144 (stating “[c]onsistent with *Hutchins*, *Kim* and *Parilla*, we conclude that *Restatement (Second) of Torts* § 302B comment *e* is recognized in Washington as a source of duty”).

<sup>12</sup> Both Hutchins and Kim involved the duty of *private* parties under Restatement § 302B & cmt. *e*. As noted above, there is nothing about § 302B & cmt. *e* that imposes a more expansive duty on public actors than private persons. See *supra* note 10.

breach. See Hutchins, 116 Wn.2d at 230 (rejecting argument that “one never has a *duty* to protect others from third party criminal conduct” based on § 302B & cmt. *e*; emphasis added); Kim, 143 Wn.2d at 196 (holding § 302B & cmt. *e* “does not support imposition of a *duty* in this case” because of the lack of a high risk of harm; emphasis added).

Moreover, the City’s argument appears to be based on a misapprehension of the Restatement, which distinguishes between “affirmative acts” on one hand, and “omissions” on the other. One who performs an affirmative act generally has a duty to use reasonable care to protect others from an unreasonable risk of harm arising out of the act, including criminal conduct of a third person. See Restatement (Second) of Torts § 302 cmt. *a*; see also id. § 302B cmt. *a* (stating § 302 cmt. *a* is “equally applicable” to § 302B). One who merely omits to act generally does *not* have a duty to use reasonable care to protect others in the absence of a special relationship. See id. § 302 cmt. *a*. The City quotes the relevant provisions of the Restatement, and recognizes the distinction between affirmative acts and omissions, but fails to appreciate its significance, arguing that there is no duty under § 302B & cmt. *e*, even when affirmative acts are at issue. See City Br. at 18-19; City Reply at 17-18.

As defined by the Restatement, an “act” is “an external manifestation of the actor’s will.” Restatement (Second) of Torts § 2. The

key component of the definition is volition. See id. § 2 cmt. *a.* The Restatement does not separately define the phrase “affirmative acts,” nor does it appear to make any distinction between an affirmative act and any other type of act. Instead, an affirmative act is merely contrasted with an omission.<sup>13</sup>

In this case, officers McDaniel and Lim performed an affirmative act when they decided to leave the abandoned ammunition on the curb, where it could later be retrieved and misused by Berhe or someone else.<sup>14</sup> This was an affirmative act because it was volitional.<sup>15</sup> If the officers had failed to discover the ammunition and did not otherwise know that it was there, then the requisite element of volition would be lacking and the conduct would be considered a mere omission, not giving rise to a duty of

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<sup>13</sup> Although Washington law does not appear to define an affirmative act, the distinction between such acts and omissions has been recognized and incorporated into the analysis of duty in other contexts. See e.g. Folsom v. Burger King, 135 Wn. 2d 658, 677, 958 P.2d 301 (1998) (stating “the failure of [a security company] to telephone emergency services does not invoke the voluntary rescue doctrine because the failure to call was not an *affirmative act* creating the harm, making the situation worse, or inducing reliance”; emphasis added); Hennig v. Crosby Group, Inc., 116 Wn. 2d 131, 133-34, 802 P.2d 790 (1991) (stating “[t]he general rule is that the owner of premises owes to the servant of the independent contractor employed to perform work on his premises the duty to avoid endangering him by his own negligence or *affirmative act*, but owes no duty to protect him from the negligence of his own master”; internal quotation omitted).

<sup>14</sup> The briefing suggests the officers had authority to confiscate the ammunition under City policy. See Robb Ans. to Pet. for Rev., at 19 & App. B (SPD Policies and Procedures, Title II, Ch. 049, § I.D.2., stating SPD has authority to take certain types of property into possession under RCW 63.21.050, including “[a]ny item that is dangerous ... or presents a danger to the public”).

<sup>15</sup> See Merriam-Webster Online, s.v. “volition” (defining “volition” as “an act of making a choice or decision” and “the power of choosing or determining”) (available at [www.m-w.com](http://www.m-w.com); viewed Dec. 20, 2011).

care under Restatement § 302B & cmt. *e*. However, because they knew the ammunition was there, the Court of Appeals properly concluded that they had a duty, and, under the circumstances, a jury could find that the affirmative acts of the officers were negligent and created a recognizable high degree of risk of harm that Berhe would come back for the shells and use them to harm someone. See Robb at 147.<sup>16</sup>

## VI. CONCLUSION

The Court should resolve this appeal in accordance with the principles described in this amicus curiae brief.

DATED this 20<sup>th</sup> day of December, 2011

  
GEORGE M. AHREND

  
BRYAN P. HARNETIAUX, *with authority*

On behalf of WSAJ Foundation

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<sup>16</sup> The conduct of officers McDaniel and Lim appears to be most analogous to Restatement § 302B & cmt. *e*, sub-paragraphs G and H. See Appendix. Paragraph G describes situations “[w]here property of which the actor has possession or control affords a peculiar temptation or opportunity for intentional interference likely to cause harm,” and Paragraph H describes situations “[w]here the actor acts with knowledge of peculiar conditions which create a high degree of risk of intentional misconduct.” A mere passerby would not have the control, nor would s/he have the knowledge of peculiar conditions that the officers had here.

## APPENDIX

### Restatement (Second) of Torts § 302 (1965). Risk Of Direct Or Indirect Harm

A negligent act or omission may be one which involves an unreasonable risk of harm to another through either

(a) the continuous operation of a force started or continued by the act or omission, or

(b) the foreseeable action of the other, a third person, an animal, or a force of nature.

#### Comment:

*a.* This Section is concerned only with the negligent character of the actor's conduct, and not with his duty to avoid the unreasonable risk. In general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act. The duties of one who merely omits to act are more restricted, and in general are confined to situations where there is a special relation between the actor and the other which gives rise to the duty. As to the distinction between act and omission, or "misfeasance" and "non-feasance," see § 314 and Comments. If the actor is under no duty to the other to act, his failure to do so may be negligent conduct within the rule stated in this Section, but it does not subject him to liability, because of the absence of duty.

*b.* A special application of Clause (b) of this Section, involving the risk of harm through the negligent or reckless conduct of others, is stated in § 302A. A second special application of Clause (b), involving the risk of the intentional or criminal conduct of others, is stated in § 302B.

*c.* The actor may be negligent in setting in motion a force the continuous operation of which, without the intervention of other forces or causes, results in harm to the other. He may likewise be negligent in failing to control a force already in operation from other causes, or to prevent harm to another resulting from it. Such continuous operation of a force set in motion by the actor, or of a force which he fails to control, is commonly called "direct causation" by the courts, and very often the question is considered as if it were one of the mechanism of the causal sequence. In

many instances, at least, the same problem may be more effectively dealt with as a matter of the negligence of the actor in the light of the risk created.

**Illustrations:**

1. A sets a fire on his own land, with a strong wind blowing toward B's house. Without any other negligence on the part of A, the fire escapes from A's land and burns down B's house. A may be found to be negligent toward B in setting the fire.

2. A discovers on his land a fire originating from some unknown source. Although there is a strong wind blowing toward B's house, A makes no effort to control the fire. It spreads to B's land and destroys B's house. A may be found to be negligent toward B in failing to control the fire.

*d. Probability of intervening action.* If the actor's conduct has created or continued a situation which is harmless if left to itself but is capable of being made dangerous to others by some subsequent action of a human being or animal or the subsequent operation of a natural force, the actor's negligence depends upon whether he as a reasonable man should recognize such action or operation as probable. The actor as a reasonable man is required to know the habits and propensities of human beings and animals and the normal operation of natural forces in the locality in which he has intentionally created such a situation or in which he knows or should realize that his conduct is likely to create such a situation. (See § 290.) In so far as such knowledge would lead the actor as a reasonable man to recognize a particular action of a human being or animal or a particular operation of a natural force as customary or normal, the actor is required to anticipate and provide against it. The actor is negligent if he intentionally creates a situation, or if his conduct involves a risk of creating a situation, which he should realize as likely to be dangerous to others in the event of such customary or normal act or operation. (See § 303.)

*e. Meaning of "normal."* The actor as a reasonable man is required to anticipate and provide against the normal operation of natural forces. And here the word "normal" is used to describe not only those forces which are constantly and habitually operating but also those forces which operate periodically or with a certain degree of frequency.

**Illustration:**

3. A erects a swinging sign over the highway. He is required to keep it in such condition that it will not be blown down, not only by the ordinary breezes which are of everyday occurrence, but also by the gales which experience shows are likely to occur from time to time.

*f. Normal conditions of nature.* As stated in § 290, Comments *g* and *h*, the actor is required to recognize the fact that a certain number of animals and human beings may act in a way which is not customary for ordinary individuals, and that there are occasional operations of natural forces which are radically different from the normal. It would, however, be impracticable to set a standard of behavior so high as to require every man under all circumstances to take into account the chance of these exceptional actions and operations. Therefore, except where the actor has reason to expect the contrary, he is entitled to assume that human beings and animals will act and the natural forces will operate in their usual manner, unless their exceptional action or operation would create a serious chance of grave harm to some valuable interest and there is little utility in the actor's conduct. Thus a motorist driving along a highway is entitled to assume, unless he has special reason to expect the contrary, that other motorists will keep to the right side of the road, since motor traffic would be unduly hindered unless motorists were free to act on that assumption. On the other hand, a motorist approaching a railroad crossing is not entitled to assume that the railway company will comply with its duty to blow the whistle and ring the bell, but is required to take very great precautions to look out for trains which have not given such notice of their approach.

*g. Abnormal conditions of nature.* The actor is not required to anticipate or provide against conditions of nature or the operation of natural forces which are of so unusual a character that the burden of providing for them would be out of all proportion to the chance of their existence or operation and the risk of harm to others involved in their possible existence or operation. It is therefore not necessary that a particular operation of the natural force be unprecedented. The likelihood of its recurrence may be so slight that in the aggregate the burden of constantly providing against it would be out of all proportion great as compared with the magnitude of the risk involved in the possibility of its recurrence.

**Illustration:**

4. In 1938 a hurricane caused serious damage in a city in New England. There is no record of any hurricane of similar force within the preceding

130 years. A, thereafter constructing a building in the city in question, is not negligent in failing to adopt an expensive method of construction which would make it safe against damage from a similar hurricane.

5. The same facts as in Illustration 4, with the additional fact that by 1957 hurricanes of similar violence have recurred four times in New England. A, constructing a building in 1957, may be found to be negligent in failing to adopt a method of construction which would make it safe against such hurricanes.

*h.* If the actor knows or should perceive circumstances which would lead a reasonable man to expect a particular operation of a natural force, he is required to provide against it, although, but for such circumstances, it would be so extraordinary that he would be entitled to ignore the possibility of its occurrence.

**Illustration:**

6. A moors his boat in a river fed by mountain streams. The moorings are sufficient to prevent the boat from being cast adrift by any stage of water likely to occur at that season of the year. A sudden cloudburst in the mountain causes an extraordinary flood which sweeps his boat away, causing it to collide with the boat of B. A may be found to be negligent if he has or should have such knowledge of the occurrence of the cloudburst as to give him reason to expect the unusual and otherwise unforeseeable flood.

*i. Action of domestic animals.* The actor as a reasonable man is both entitled to assume and required to expect that domestic animals will act in accordance with the nature of such animals as a class, unless he knows or should know of some circumstances which should warn him that the particular animal is likely to act in a different manner.

*j. Action of human beings.* As stated in § 290, the actor is required to know the common qualities and habits of other human beings, in so far as they are a matter of common knowledge in the community. The actor may have special knowledge of the qualities or habits of a particular individual, over and above the minimum which he is required to know. His act or omission may be negligent because it involves an unreasonable risk of harm to another through the intervention of conduct on the part of the other, or of third persons, which a reasonable man in the actor's position would anticipate and guard against. As to the actor's negligence where such

foreseeable conduct is itself negligent, see § 302A. As to his negligence where the foreseeable conduct is intentional or criminal, see § 302B.

**Restatement (Second) of Torts § 302B (1965). Risk Of Intentional Or  
Criminal Conduct**

**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.**

**Comment:**

*a.* This Section is a special application of the rule stated in Clause (b) of § 302. Comment *a* to that Section is equally applicable here.

*b.* As to the meaning of "intended," see § 8A. The intentional conduct with which this Section is concerned may be intended to cause harm to the person or property of the actor himself, the other, or even a third person.

*c.* Where the intentional misconduct is that of the person who suffers the harm, his recovery ordinarily is barred by his own assumption of the risk (see Chapter 17A) or his contributory negligence (see Chapter 17). This does not mean, however, that the original actor is not negligent, but merely that the injured plaintiff is precluded from recovery by his own misconduct. There may still be situations in which, because of his immaturity or ignorance, the plaintiff is not subject to either defense; and in such cases the actor's negligence may subject him to liability.

**Illustration:**

1. A leaves dynamite caps in an open box next to a playground in which small children are playing. B, a child too young to understand the risk involved, finds the caps, hammers one of them with a rock, and is injured by the explosion. A may be found to be negligent toward B.

*d.* Normally the actor has much less reason to anticipate intentional misconduct than he has to anticipate negligence. In the ordinary case he may reasonably proceed upon the assumption that others will not interfere in a manner intended to cause harm to anyone. This is true particularly where the intentional conduct is a crime, since under ordinary circumstances it may reasonably be assumed that no one will violate the criminal law. Even where there is a recognizable possibility of the intentional interference, the possibility may be so slight, or there may be so slight a risk of foreseeable harm to another as a result of the

interference, that a reasonable man in the position of the actor would disregard it.

**Illustration:**

2. A leaves his automobile unlocked, with the key in the ignition switch, while he steps into a drugstore to buy a pack of cigarettes. The time is noon, the neighborhood peaceable and respectable, and no suspicious persons are about. B, a thief, steals the car while A is in the drugstore, and in his haste to get away drives it in a negligent manner and injures C. A is not negligent toward C.

With this illustration, compare Illustration 14 below.

e. There are, however, 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. The following are examples of such situations. The list is not an exclusive one, and there may be other situations in which the actor is required to take precautions.

A. Where, by contract or otherwise, the actor has undertaken a duty to protect the other against such misconduct. Normally such a duty arises out of a contract between the parties, in which such protection is an express or an implied term of the agreement.

**Illustration:**

3. The A Company makes a business of conducting tourists through the slums of the city. It employs guards to accompany all parties to protect them during such tours. B goes upon such a tour. While in a particularly dangerous part of the slums the guards abandon the party. B is attacked and robbed. The A Company may be found to be negligent toward B.

B. Where the actor stands in such a relation to the other that he is under a duty to protect him against such misconduct. Among such relations are

those of carrier and passenger, innkeeper and guest, employer and employee, possessor of land and invitee, and bailee and bailor.

**Illustrations:**

4. The A company operates a hotel, in which B is a guest. C, another guest, approaches B in the hotel lobby, threatening to knock him down. There are a number of hotel employees on the spot, but, although B appeals to them for protection, they do nothing, and C knocks B down. The A Company may be found to be negligent toward B.

5. A rents an automobile from B. A keeps the automobile in his garage, but fails to lock either the car or the garage. The car is stolen. A may be found to be negligent toward B.

C. Where the actor's affirmative act is intended or likely to defeat a protection which the other has placed around his person or property for the purpose of guarding them from intentional interference. This includes situation where the actor is privileged to remove such a protection, but fails to take reasonable steps to replace it or to provide a substitute.

**Illustrations:**

6. A leases floor space in B's shop. On a holiday, A goes to the shop, and on leaving it forgets to take the key from the door. A thief enters the shop through the door and steals B's goods. A may be found to be negligent toward B.

7. A negligently operated train of the A Railroad runs down the carefully driven truck of B at a crossing, and so injures the driver as to leave him unconscious. While he is unconscious the contents of the truck are stolen by bystanders. The A Company may be found to be negligent toward B with respect to the loss of the stolen goods.

8. The A Company has a legislative authority to excavate a subway, and in so doing to remove a part of the wall of the basement of B's store. The workmen employed by the company remove a part of the wall, leaving an opening sufficient to admit a man. They leave the opening unguarded. During the night a thief enters the store through the opening, and steals B's goods. The A Company may be found to be negligent toward B.

D. Where the actor has brought into contact or association with the other a person whom the actor knows or should know to be peculiarly likely to commit intentional misconduct, under circumstances which afford a peculiar opportunity or temptation for such misconduct.

**Illustrations:**

9. A is the landlord of an apartment house. He employs B as a janitor, knowing that B is a man of violent and uncontrollable temper, and on past occasions has attacked those who argue with him. C, a tenant of one of the apartments, complains to B of inadequate heat. B becomes furiously angry and attacks C, seriously injuring him. A may be found to be negligent toward C.

10. A, a young girl, is a passenger on B Railroad. She falls asleep and is carried beyond her station. The conductor puts her off of the train in an unprotected spot, immediately adjacent to a "jungle" in which hoboies are camped. It is notorious that many of these hoboies are criminals, or men of rough and violent character. A is raped by one of the hoboies. B Railroad may be found to be negligent toward A.

E. Where the actor entrusts an instrumentality capable of doing serious harm if misused, to one whom he knows, or has strong reason to believe, to intend or to be likely to misuse it to inflict intentional harm.

**Illustration:**

11. A gives an air rifle to B, a boy six years old. B intentionally shoots C, putting out C's eye. A may be found to be negligent toward C.

F. Where the actor has taken charge or assumed control of a person whom he knows to be peculiarly likely to inflict intentional harm upon others.

**Illustration:**

12. A, who operates a private sanitarium for the insane, receives for treatment and custody B, a homicidal maniac. Through the carelessness of one of the guards employed by A, B escapes, and attacks and seriously injures C. A may be found to be negligent toward C.

G. Where property of which the actor has possession or control affords a peculiar temptation or opportunity for intentional interference likely to cause harm.

**Illustrations:**

13. The same facts as in Illustration 1, except that the explosion injures C, a companion of B. A may be found to be negligent toward C.

14. In a neighborhood where young people habitually commit depredations on the night of Halloween, A leaves at the top of a hill a large reel of wire cable which requires a considerable effort to set it in motion. A group of boys, on that night, succeed in moving it, and in rolling it down the hill, where it injures B. A may be found to be negligent toward B, although A might not have been negligent if the reel had been left on any other night.

H. Where the actor acts with knowledge of peculiar conditions which create a high degree of risk of intentional misconduct.

**Illustration:**

15. The employees of the A Railroad are on strike. They or their sympathizers have torn up tracks, misplaced switches, and otherwise attempted to wreck trains. A fails to guard its switches, and runs a train, which is derailed by an unguarded switch intentionally thrown by strikers for the purpose of wrecking the train. B, a passenger on the train, and C, a traveler upon an adjacent highway, are injured by the wreck. A Company may be found to be negligent toward B and C.

f. It is not possible to state definite rules as to when the actor is required to take precautions against intentional or criminal misconduct. As in other cases of negligence (see §§ 291-293), it is a matter of balancing the magnitude of the risk against the utility of the actor's conduct. Factors to be considered are the known character, past conduct, and tendencies of the person whose intentional conduct causes the harm, the temptation or opportunity which the situation may afford him for such misconduct, the gravity of the harm which may result, and the possibility that some other person will assume the responsibility for preventing the conduct or the harm, together with the burden of the precautions which the actor would be required to take. Where the risk is relatively slight in comparison with the utility of the actor's conduct, he may be under no obligation to protect the other against it.

**Illustration:**

16. A, a convict, is confined in a state prison for forging a check. His conduct while in prison exhibits no tendency toward violence, and prison tests show that he is mentally normal. In company with other prisoners, A is permitted to do outside work on the prison farm, in accordance with the prison system. While at work he is not properly guarded, and escapes. In endeavoring to get away, A stops B, an automobile driver, threatens him with a knife, and takes B's car. B suffers severe emotional distress, and an apoplectic stroke from the excitement. The State is not negligent toward B.

**RCW 4.96.010. Tortious conduct of local governmental entities--  
Liability for damages**

(1) All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation. Filing a claim for damages within the time allowed by law shall be a condition precedent to the commencement of any action claiming damages. The laws specifying the content for such claims shall be liberally construed so that substantial compliance therewith will be deemed satisfactory.

(2) Unless the context clearly requires otherwise, for the purposes of this chapter, "local governmental entity" means a county, city, town, special district, municipal corporation as defined in RCW 39.50.010, quasi-municipal corporation, any joint municipal utility services authority, any entity created by public agencies under RCW 39.34.030, or public hospital.

(3) For the purposes of this chapter, "volunteer" is defined according to RCW 51.12.035.

[2011 c 258 § 10, eff. July 22, 2011; 2001 c 119 § 1; 1993 c 449 § 2; 1967 c 164 § 1.]