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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

Petitioners,

v.

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

Respondent,

FILED
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STATE OF WASHINGTON
CRP

BRIEF OF AMICI CURIAE ASSOCIATION OF WASHINGTON
CITIES AND WASHINGTON STATE ASSOCIATION OF
MUNICIPAL ATTORNEYS IN SUPPORT OF PETITIONERS

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I IDENTITY OF AMICI CURIAE

Amici are the Association of Washington Cities (AWC) and the Washington State Association of Municipal Attorneys (WSAMA) (hereinafter collectively Amici).

II STATEMENT OF THE CASE

As noted by the Court of Appeals, on June 26, 2005, 17 year old Samson Berhe was walking down Southwest Marginal Way in Seattle, carrying a long gun case. He flagged down a car, put a shotgun in the window, and shot and killed the driver, Michael Robb. *Slip Op.* at 1.

Seattle police officers had prior contacts with Berhe, starting in May 2004, and had taken him to Harborview Hospital for mental evaluations because of erratic and destructive behavior. *Id.* at 2. During the week before the murder, Berhe was again engaging in bizarre and aggressive behavior. On June 19, 2005, police officers responded to a call from Berhe's mother that he was making suicide threats. Berhe was taken to Harborview Hospital. *Id.* at 2. On June 22, officers responded to a 911 call at Berhe's home where Berhe had been punching a friend of his brother. When approached by officers, Berhe spoke in normal tones then switched to deep demonic tones, saying that all confused people need to be killed and tortured, and that he will kill all the haters. Berhe was then taken to Harborview Hospital for an involuntary mental health evaluation. On June 24, the police were called because Berhe and a friend, Valencia, were in the backyard fighting and both had shotguns. When the police arrived, the two boys and the shotguns were gone. *Id.* at 3.

In the morning of June 26, two officers questioned and released Berhe and Valencia at a vacant rental home on Berhe's street where they had spent the night until being discovered by the owner. *Id.* at 3. Then later in the afternoon of June 26, police responded to a report of a burglary about three miles from Berhe's home. Apparently, Berhe and Valencia were bragging about knowing where stolen items were being kept. Officers located Valencia and Berhe on a street near Berhe's home and stopped them on suspicion of the burglary. Berhe was very agitated, and the officers noticed yellow shotgun shells on the curb next to where Berhe was standing. The officers patted down the two youths to check for weapons but found none. Upon finding a stolen watch in Valencia's pocket, they took him into custody. They released Berhe and told him to go home. Berhe walked away. A neighbor who was watching these events saw Valencia throw down some shotgun shells before being stopped. After the police left with Valencia, another witness saw Berhe come back, pick something up, and walk away. *Id.* at 4. A bit later, Berhe stopped to show some neighbors a handful of yellow shotgun shells. He said he had a shotgun and was bragging about popping off rounds all night. *Id.* at 4-5. About two hours later, Berhe fatally shot Michael Robb. *Id.* at 5.

III ARGUMENT

A. The Public Duty Doctrine is an exception to negligence liability law.

Generally, a plaintiff alleging negligence "must establish the existence of a duty, a breach thereof, a resulting injury, and proximate causation between the breach and the resulting injury." *Schooley v.*

Pinch's Deli Mkt., Inc., 134 Wn.2d 468, 474, 951 P.2d 749 (1998). However, under the public duty doctrine, plaintiffs alleging negligence against government entities must show that a duty was owed specifically to the plaintiff, not to the public in general. *Taylor v. Stevens County*, 111 Wn.2d 159, 759 P.2d 447 (1998). Whether a duty exists is a question of law. *Osborn v. Mason County*, 157 Wn.2d 18, 22–23, 134 P.3d 197 (2006).

Basically, the public duty doctrine treats negligence cases against public agencies differently than other cases, in that the public agency responder responds not to where a duty is owed by reason of contract or family relationship, but where a duty to preserve the peace is owed to the public generally. The public duty doctrine recognizes that liability cannot be based on the government's amorphous "duty to all." The threshold determination in all negligence actions is whether the defendant owes the plaintiff a duty of care.

The courts of this State have long recognized the distinction between the duties of government which run to the public generally for which there is no recovery in tort, and those which run to individuals who may recover in tort for their breach. *See, e.g., Baerlein v. State*, 92 Wn.2d 229, 595 P.2d 930 (1979); *Halvorson v. Dahl*, 89 Wn.2d 673, 574 P.2d 1190 (1978). Under the public duty doctrine, liability should not be imposed upon a governmental entity unless the plaintiff can show that "the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (*i.e.*, a

duty to all is a duty to no one).” *Taylor v. Stevens County*, 111 Wn.2d at 163 (citations omitted).

Without the public duty doctrine, public sector agencies across the state would face impossible dilemmas whenever they considered measures to protect the public from the actions of third parties. Their choices could be to take no steps to protect the public, or to incur the substantial risk of indemnifying persons who claim to have sustained injury or damage as a result of not receiving an appropriate level of protection. If the public duty doctrine did not exist, public sector agencies might, perhaps understandably, decline to adopt many programs designed to protect the public because of the inability to fund potential liability costs. The public duty doctrine allows the government to provide a measure of protection for the public in a wide range of circumstances by exercise of the police power without becoming insurers against every error or harm that might arise.

The policy underlying the public duty doctrine is that action taken by public sector entities for the public welfare should not be discouraged by subjecting a governmental entity to unlimited liability. *Taylor*, 111 Wn.2d at 170-171 (citation omitted) (reversing *J & B Dev. Co. v. King County*, 100 Wn.2d 299, 304, 669 P.2d 468 (1983) on the ground that it obscured the doctrine’s purpose, exposing government to “virtual unlimited liability” for undertaking beneficial public duties). If day to day performance of governmental functions invoked tort liability, the government would have limitless liability and important public initiatives

would be deterred. Regulatory and law enforcement agencies cannot ensure or insure every statutory or regulatory program undertaken to protect the citizenry will be flawlessly executed.

B. None of the Exceptions to the Public Duty Doctrine Apply.

There are four exceptions to the public duty doctrine: (1) legislative intent;¹ (2) failure to enforce;² (3) the rescue doctrine;³ and (4) a special relationship.⁴ *Cummins v. Lewis County*, 156 Wn.2d 844, 853 n. 7, 133 P.3d 458 (2006). If any one of the exceptions applies, the governmental entity owes a duty to the plaintiff as a matter of law. *Cummins*, 156 Wn.2d at 853. Conversely, if none of the exceptions apply, no duty is owed. These are legitimate, recognized exceptions to the public duty doctrine, and they are the only exceptions to the doctrine. But as noted in the Court of Appeals' opinion, the trial court concluded, and the Plaintiff apparently does not dispute the fact, that none of the recognized exceptions to the public duty doctrine applied. *Slip Op.* at 2, 12. These

1 Under the **legislative intent exception**, governmental liability may occur when legislation "evidences a clear intent to identify and protect a particular and circumscribed class of persons." *Halvorson v. Dahl*, 89 Wn.2d at 676.

2 The **failure to enforce exception** applies where governmental agents responsible for enforcing statutory requirements (1) possess actual knowledge of a violation, (2) fail to take corrective action despite a statutory duty, and (3) the plaintiff is within the class of persons the statute intended to protect. *Honcoop v. State*, 111 Wn.2d 182, 190, 759 P.2d 1188 (1988).

3 The **rescue doctrine exception** is based on the theory that one who undertakes to render aid to another or to warn a person in danger must exercise reasonable care. *Pepper v. J.J. Welcome Const. Co.*, 73 Wn. App. 523, 871 P.2d 601 (1994).

4 The **special relationship exception** is where a "special relationship" exists between the plaintiff and the government entity. *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 784, 30 P.3d 1261 (2001). A special relationship arises where there is direct contact or privity between the public official and the injured plaintiff, setting the latter apart from the general public, and where express assurances are given by a public official, upon which the plaintiff justifiably relies. *See Beal v. City of Seattle*, 134 Wn.2d 769, 785, 954 P.2d 237 (1998).

exceptions to the public duty doctrine are comprehensive, and they do not include Restatement (Second) of Torts 302B.

C. Restatement (Second) of Torts 302B Does Not Apply to This Case.

The Court of Appeals found a basis for liability in the Restatement (Second) of Torts 302B (1965), which states as follows:

§ 302B. 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.

The Court of Appeals erroneously concluded that under the circumstances of this case, the officers owed Robb a duty in tort to protect against Berhe's criminal misconduct. *Slip Op.* at 15. Specifically, the Court of Appeals concluded that "comment e" of the Restatement is a source of [tort] duty. *Slip Op.* at 11. Comment e states in part as follows:

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. . . .

This comment does not relate to the public duty doctrine. It relates to *private* liability for actors, like hotel companies and tour companies, whose conduct leaves the known plaintiff at a specific risk of harm. *See*, for example, Restatement (Second) of Torts § 302B, Illustrations 3, 4, 5 and 6. These illustrations demonstrate that the Restatement drafters had *no*

thought to forcing police to arrest everyone for whom there was a possibility of making a rightful arrest, on pain of potential tort liability. Yet that is precisely what the Court of Appeals holding leads to, as a logical conclusion.

There is nothing in the Opinion that suggests Berhe knew the victim, or that he was a foreseeable victim in some specific way. Every day, the police come into contact with people who may pose a danger to others. Yet, in many of these instances, the police are unable to address the risk posed to unidentified victims, because the police have no grounds to arrest, or because they are too busy dealing with other public safety matters to arrest on the spot, or because the individual is not seen as being likely to pose a danger to others so as to warrant a court holding the person for mental evaluation and involuntary confinement.

These very factors demonstrate that the Court of Appeals decision creates a serious risk of hindsight quarterbacking, causing police to *have to arrest*, to avoid tort liability, even though there should be no liability under the “failure to enforce” exception to the public duty doctrine. Indeed, the decision below swallows whole the failure to enforce exception and creates a “could have enforced” exception to the public duty doctrine. This honorable Court is invited to review the illustrations to Official Comment *e* to Restatement (Second) of Torts § 302B. The Illustrations demonstrate that § 302B simply has no application here. It applies to the landlords who refuse to provide deadbolt locks or lit parking

lots in high-crime neighborhoods. It should not apply to police in evolving and unpredictable situations.

D. There was No Recognizable High Risk of Harm.

In support of its holding, the Court of Appeals cited a few cases, including *Hutchins v. 1001 Fourth Ave. Associates*, 116 Wn.2d 217, 802 P.2d 1360 (1991), *Parrilla v. King County*, 138 Wn. App. 427, 436, 157 P.3d 879 (2007) and *Kim v. Budget Rent A Car Systems, Inc.*, 143 Wn.2d 190, 15 P.3d 1283 (2001) as implicating Restatement (Second) of Torts 302B in light of the “recognizable high risk of harm.” *Slip Op.* 11, 14. These cases are distinguishable.

First, when the police made contact with Berhe on the day of the shooting, he was agitated, but his actions did not demonstrate recognizable high risk of harm. Second, neither *Hutchens* nor *Kim* relates to torts committed by public agencies, and *Parrilla* involved a distinct factual circumstance. In *Parrilla*, the court concluded that the county owed a duty to motorists because a bus driver’s affirmative act of leaving his bus with the engine running with a visibly irrational, erratic passenger on board exposed motorists to a recognizable high degree of risk of harm through the passenger’s criminal conduct of stealing the bus, which a reasonable person would have foreseen. The *Parrilla* court explained the county’s liability as follows:

As comment e to the section explains, a duty to guard against third party conduct may exist where there is a special relationship to the one suffering the harm, 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.”

Parrilla, 138 Wn. App. at 436, citing the Restatement’s comment e. The *Parrilla* court went further, saying “[t]his does not mean that any risk of harm gives rise to a duty. Instead, an unusual risk of harm, a high degree risk of harm, is required.” *Id.* This case is *markedly different factually* than the case now before the Court. The facts of this case are that not only was there no special relationship between the police officers in this case and Robb, there was *no affirmative act* relating to any foreseeable risk of harm.

Even assuming that a risk of harm could be foreseen, the police officers’ decision not to pick up the shotgun shells was *not* an affirmative act, it was an omission to act. Thus, *Parrilla* and the Restatement do not support the lower courts’ findings. However, if *Parrilla* is nevertheless seen as a departure from the public duty doctrine, it must be evaluated cautiously, as undue encroachment of the public duty doctrine and/or its specific exceptions would defeat the legitimate purposes of the doctrine.

E. Erosion of the Public Duty Doctrine Would Create Practical Dilemmas for Public Agencies.

When the police made contact with Berhe and Valentia on June 26, both were searched. Valentia was found to be in possession of stolen property and was arrested. Berhe was not. The police searched him but did not locate any evidence that Berhe had committed a crime, nor was Berhe threatening to harm himself or others. Thus, there was no basis to arrest.

If a police officer were to arrest a subject without probable cause, he or she would be facing civil liability for false arrest. *See Bender v. City*

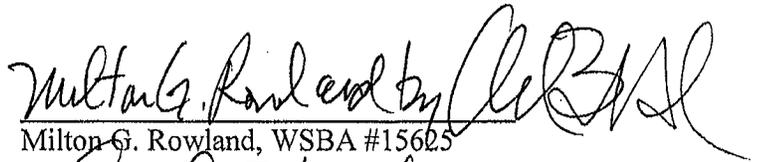
of Seattle, 99 Wn.2d 582, 590-91, 664 P.2d 492 (1983). If, as it sounds, Robb expected the police to arrest Berhe, this would put the police officer in the position of a Morton's fork; where two choices may exist, but both are disadvantageous.

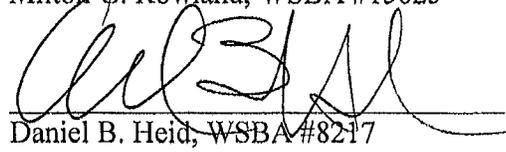
Putting police officers in the position of having to choose courses of action which, either way, leave them facing personal liability exposure, will not only erode the purposes of the public duty doctrine, it will result in a chilling effect on the ability and willingness of police officers to respond to emergency situations. The job of police officers is regularly dangerous, as shown by the number of officers who fall in the line of duty each year. This danger is only heightened as officers must become more concerned about - distracted with - how their response could leave them and their departments exposed to liability. When officers must sort out various courses of action to take, they may hesitate in responding. Even a slight hesitation could leave society less protected, and more vulnerable to those dangers to which the police respond.

IV. CONCLUSION

The Court of Appeals opinion essentially eliminates the public duty doctrine. This is something that would affect every public agency across the state and their law enforcement officers. The elimination of that doctrine leaves our society and its public safety needs more vulnerable. For all the reasons set forth above, and those provided by the Petitioners, Amici respectfully requests that this Court accept review as sought by the Petitioners and reverse the decision of the Court of Appeals.

RESPECTFULLY SUBMITTED this 25th day of April, 2011.


Milton G. Rowland, WSBA #15625


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Attorneys for Amici, Association of
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SEATTLE, a municipal
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v.

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

Respondent,

Cause No. 856583

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on April 29, 2011, I caused service of the Amici Motion and Brief of the Association of Washington Cities and the Washington State Association of Municipal Attorneys on the attorneys of record herein via e-mail and U.S. Mail, to the following addresses:

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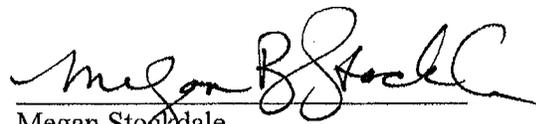
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Subject: WSAMA - AWC Amici Request / City of Seattle v. Elsa Robb / No. 85658-3

The Honorable Ronald R. Carpenter, Supreme Court Clerk:

Attached hereto please find electronic copies of the Motion for Leave to File an Amici Curiae Brief and the Amici Curiae Brief in Support of the Petitioner, City of Seattle, by the Washington State Association of Municipal Attorneys (WSAMA) and the Association of Washington Cities (AWC) in the above-referenced case. Also attached is my cover letter. Please note that the Certificate of Service for the Motion and Brief is appended to the Brief. If you have any questions of me in these regards, please let me know.

Thank you for your attention to these matters.

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