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Court of Appeals No. 63299-0-1

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

Respondent,

vs.

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

Petitioners.

BRIEF OF AMICUS CURIAE
WASHINGTON ASSOCIATION OF SHERIFFS AND POLICE CHIEFS

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ORIGINAL

TABLE OF AUTHORITIES

FEDERAL CASES:

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OTHER STATE CASES:

Kush v. Buffalo, 59 N.Y.2d 26, 449 N.E.2d 725,
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545 N.Y.S.2d 547 (1989).....7

OTHER AUTHORITIES:

Restatement (Second) of Torts 302B4, 5, 6, 7

I. IDENTITY AND INTEREST OF AMICUS

The Washington Association of Sheriffs and Police Chiefs (“WASPC”) regularly provides support and training on civil liability and criminal procedure to local law enforcement agencies. WASPC provides model policies for local law enforcement agencies. Therefore, WASPC is concerned about the training and policy implications that flow from the decision in *Robb v. Seattle*.¹ WASPC urges this Court to accept review and reverse the decision below.

II. STATEMENT OF THE CASE

The Court of Appeals equates a failure to act by officers with an affirmative act. The officers did not prolong the *Terry* stop to retrieve shotgun shells that were near the scene of the *Terry* stop of an unarmed individual. That individual later returned to the scene and retrieved the shells. Thereafter, that third party shot and killed Mr. Robb.

III. ARGUMENT

In 1968, the United States Supreme Court decided the case of *Terry v. Ohio*,² to which the term “*Terry* stop” refers. At 27, the Court concluded:

... that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the

¹ 159 Wn. App. 133, 245 P.3d 242 (2010).

² 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.

In 1993, the United States Supreme Court reiterated the very narrow scope of a *Terry* search. In *Minnesota v. Dickerson*,³ the Court considered a case where officers did a patdown of a suspect during the course of a *Terry* stop. The patdown revealed no weapons. During the pat-down, the officer felt a small soft lump in the subject's pocket and seized it. It was cocaine. The Court concluded that "the police officer in this case over-stepped the bounds of the 'strictly circumscribed' search for weapons allowed under *Terry*."⁴

Police training in Washington has long emphasized the limited scope of a *Terry* stop. The training is based on the well settled law regarding the scope, both physical and temporal, of a proper *Terry* stop.

In *Robb*, officers conducted a *Terry* stop of Mr. Berhe and determined he had no weapons. (CP 173) Any further detention to look for evidence or potentially dangerous items coincidentally nearby would have gone beyond the acceptable bounds of *Terry*.

Now, as a result of the *Robb* decision, there is considerable confusion regarding how to conduct a *Terry* stop and whether there is a

³ 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993).

⁴ 508 U.S. at 378.

duty to canvas the area for items that a third party could possibly use to harm another person in the future.

Sheriffs and chiefs now have a Hobson's choice: Train deputies and officers to expand the scope of their *Terry* stops (balancing the risks between civil rights versus personal injury lawsuits) or instruct officers not to make contact with people who are suspected of criminal behavior. Neither choice is acceptable to chiefs, sheriffs, officers or the public.

In the calm environment of chambers or a courtroom, the *Robb* decision might not seem problematic. However, in the quick moving, ever evolving, tension based environment in which law enforcement officers conduct hundreds of *Terry* stops each year, the *Robb* decision creates real life problems.⁵ If the officers comply with the standard the Robb's expert offered: "police have an affirmative duty to recover the shotguns" (CP

⁵ Consider a situation where a convenience store clerk reports that a robbery suspect had a gun in his pocket and pointed it at her. She reports the suspect as male/5'9" tall (according to the measurement coding on the door)/wearing a red ball cap/no facial hair/maybe 20 years old/wearing a black cotton jacket and jeans. About one block away from the store, the police see someone slightly matching the suspect's description (same height/wearing a brown colored ball cap/wearing jeans/ approximately 20 years old/ but, no jacket and he has a light mustache). What are they to do when they make contact with the person and conduct a *Terry* stop and find no firearm? Before *Robb*, this person would not be detained any longer than was necessary for the officers to conduct the pat-down, and make enough of an inquiry to satisfy themselves that they did not have enough for probable cause to arrest. Now, however, after *Robb*, the officers might detain the individual as they search for this alleged gun, or, worried the gun might still be in the jacket, the police might look for a black cotton jacket that this subject never wore to begin with because he was not the robber.

654, ln. 22), they will take time to search for instrumentalities of potential criminal conduct, which is well beyond the scope of *Terry*.⁶

For decades, trainers in Washington have instructed law enforcement officers not to expand the scope of a *Terry* stop beyond the permissible bounds of looking for reachable weapons immediate to the suspect that could be used to harm the officer or others immediately present. Now, after *Robb*, this training is in question.

The expansion of *Terry* that the *Robb* decision precipitates is particularly troublesome when considering the cases upon which the panel relied. The *Robb* decision relied on the cases of *Hutchins*,⁷ *Kim*,⁸ and *Parrilla*⁹ for the proposition that Restatement (Second) of Torts 302B comment e is a *source* of a duty.¹⁰ The *Robb* decision proclaimed, at 146, that “[t]his is an affirmative acts case” without explaining why the facts of *Robb* match the examples provided or how the failure to act amounts to an affirmative act.

⁶ See, *State v. Williams*, 102 Wn.2d 733, 740, 689 P.2d 1065 (1984), where the court said: “... the United States Supreme Court has suggested at least three relevant factors in determining whether an intrusion on the suspect’s liberty is so substantial that its reasonableness is dependent upon probable cause: the purpose of the stop, the amount of physical intrusion upon the suspect’s liberty, and the length of time the suspect is detained.”

⁷ *Hutchins v. 1001 Fourth Avenue Assoc., et al.*, 116 Wn.2d 217, 802 P.2d 1360 (1991).

⁸ *Kim v. Budget Rent A Car Systems, Inc.*, 143 Wn.2d 190, 15 P.3d 1283 (2000).

⁹ *Parrilla v. King County*, 138 Wn. App. 427, 157 P.3d 879 (2007).

¹⁰ *Robb*, 159 Wn. App. at 144.

The *Robb* court quoted heavily from its earlier decision in *Parrilla*. The *Parrilla* decision quoted from comment a, but did not explain the difference between an actor's omission as compared to an actor's failure to act. The *Parrilla* court quoted the comment (which did address an omission) then said it is silent on this issue of a failure to act. The *Parrilla* decision said, in pertinent part¹¹ :

That comment provides:

.... 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.

RESTATEMENT (SECOND) OF TORTS § 302 cmt a. However, the quoted comment cautions only that the section does not describe a rule giving rise to a duty on the part of an individual whose *failure* to act exposes another to harm. In regard to the duties of one who undertakes an *affirmative act*, the comment merely restates the general rule that actors are "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." RESTATEMENT (SECOND) OF TORTS § 302 cmt a. (Emphasis in original.)

Then, the *Parrilla* court said: "...the section does not describe a rule giving rise to a duty on the part of an individual whose *failure* to act exposes another to harm." (Emphasis in original.) Neither the *Parrilla*

¹¹ *Parrilla*, at 138 Wn. App. at 435-438 (footnotes omitted).

decision nor the *Robb* decision (which relied on *Parrilla*) explained how one who merely “omits to act” is different from one who “fails to act”.¹² There is no difference. *Robb*'s analysis of *Parrilla* is very troubling to WASPC. How do we train an officer to recognize when his/her failure to act at a scene is going to be second guessed by the court and labeled as an “affirmative act” rather than a mere omission? Before *Robb*, sheriffs and police chiefs understood the boundaries in the illustrative examples in the Restatement. Now, they do not. Here is why.

Ignoring a distinguishing fact, the *Robb* decision relied on cases involving instrumentalities that those defendants introduced into an otherwise benign situation. In *Hutchins, supra*,¹³ the Court considered a case involving a criminal assault that took place in an armored car delivery area of the defendant's building. At 230-231, the *Hutchins* court quoted from subcomment G to Restatement 302B. The court went on to set out the examples to that subcomment.¹⁴

The illustrations to this subcomment give as examples (1) where the defendant leaves dynamite caps in an open box next to a playground where small children play. A very young child finds the caps, strikes them with a rock, and

¹² Obviously, if there is a statutory duty to act (like arresting a domestic violence suspect with whom the police come into contact within the 4-hour time frame and for whom they have probable cause to arrest) then a failure to arrest is a breach of a duty. However, neither *Parrilla* nor *Robb* involved a duty created elsewhere. Rather, both decisions used the Restatement as the source of the duty.

¹³ Ultimately, the court ruled in favor of the land owner.

¹⁴ 116 Wn. 2d at 230-231.

the resulting explosion injures another child. Illustration 13.
(2) "In a neighborhood where young people habitually commit depredations on the night of Halloween," defendant leaves a large reel of wire cable at the top of a hill. Some boys roll the reel down the hill on Halloween, and it injures another.

At 231, the court mentioned other examples from the New York cases of *Kush v. Buffalo*¹⁵ and *Russo v. Grace Inst.*¹⁶

In all of these cases, the instrumentality used by the criminal was introduced into the environment by the defendant. That is an important distinguishing factor that *Robb* overlooked. The officers in *Robb* did not introduce the instrumentality of harm. The *Robb* decision also relied on *Kim*, and *Parrilla*. In *Kim*, the defendant had introduced the keys of the car into the situation.¹⁷ In *Parrilla*, the defendant had introduced not only the keys, but the bus as well.¹⁸

¹⁵ 59 N.Y.2d 26, 449 N.E.2d 725, 462 N.Y.S.2d 831 (1983) (dangerous condition on high school property consisted of unsecured chemicals stored in place accessible by school children; chemicals removed by students who dropped them in bushes outside school; young child playing on grounds found the chemicals, played with them and matches, and was injured when chemicals exploded)

¹⁶ 145 Misc. 2d 242, 546 N.Y.S.2d 509, *aff'd*, 153 A.D.2d 820, 545 N.Y.S.2d 547 (1989). (scaffolding around defendant landowner's building gave robbers easy access to plaintiff neighbor's home who bound and robbed him.)

¹⁷ *Kim v. Budget Rent A Car Systems, Inc.*, 143 Wn.2d 190, 15 P.3d 1283 (2000). A Budget Rent A Car vehicle in a parking lot had a key left in the ignition overnight. A thief came along, stole the car. The next day, while under the influence of intoxicants and marijuana, the thief drove the vehicle. Attempting to elude the police he caused an accident with Kim.

¹⁸ *Parrilla v. King County*, 138 Wn. App. 427, 157 P.3d 879 (2007). A fight broke out on the bus. The driver asked everyone to exit. The driver exited as well, leaving the bus running. One passenger did not leave the bus. Instead, the passenger took control of the running bus, drove it away from the scene and crashed into Parrilla.

Unlike the shotgun shells in *Robb*, in the cases relied upon by the court and those in the Restatement comments, the instrumentality was introduced by the defendants. Up until the *Robb* decision, sheriffs and police chiefs understood that law enforcement officers might be responsible for the consequences of introducing the instrumentality that is ultimately used by a miscreant to harm a third party. Now, with the *Robb* decision, police are responsible for instruments introduced into a scene by others. It raises the question of whether this includes vehicles, baseball bats, alcohol, or tire irons when these are ultimately used to commit a crime.

The *Robb* panel also cited to the case of *Coffel v. Clallam County*.¹⁹ That case involved the interference by the officers in keeping Coffel from protecting his property from destruction by a third party. The *Coffel* court distinguished between doing nothing and an affirmative act at 404: “Moreover, the prosecutor's advice in this case was to do nothing, whereas the deputies' liability will lie, if at all, only for their affirmative actions.” (Emphasis added.) The *Robb* decision favorably cited *Coffel*, but completely ignored the distinction it makes between doing nothing and affirmatively interfering.

¹⁹ 47 Wn. App. 397, 735 P.2d 686 (1987). *Coffel* was a public duty doctrine case. It was not decided on the basis of the Restatement.

In *Robb*, the officers did nothing regarding the shotgun shells that were nearby. According to *Coffel*, liability will not lie where the officers did nothing.

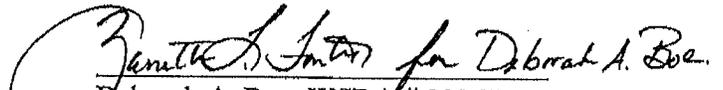
IV. CONCLUSION

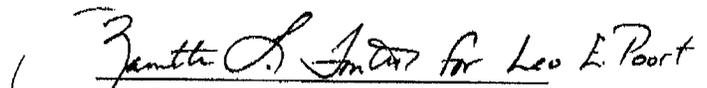
The existence of a duty is a question of law.²⁰ This court needs to determine, as a matter of law, if a duty exists where the actor did not introduce the instrumentality that is used by a criminal to harm a third party. Allowing the *Robb* ruling to stand would result in a vast expansion of the heretofore narrow application of *Terry* to contacts by law enforcement. That is not acceptable.

The sheriffs and police chiefs are not unmindful of the tragic death in *Robb*. Neither are they unmindful of their oath to uphold the constitutions of the United States and the state of Washington. The sheriffs and police chiefs ask this court to accept review, reverse the *Robb* decision, and allow law enforcement officers to honor their express duty imposed by the state and federal constitutions rather than follow the questionable expansion of their duty imposed in the flawed *Robb* decision.

²⁰ *Minahan v. W. Wash. Fair Ass'n*, 117 Wn. App. 881, 890, 73 P.3d 1019 (2003).

RESPECTFULLY SUBMITTED this 21st day of April, 2011.


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