

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Mar 28, 2011, 11:51 am
BY RONALD R. CARPENTER
CLERK

No. 85658-3

Court of Appeals No. 63299-0-1

RECEIVED BY E-MAIL

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

**RESPONDENT ELSA ROBB'S
ANSWER TO PETITION FOR REVIEW**

DANIELSON HARRIGAN LEYH
TOLLEFSON, LLP

Timothy G. Leyh WSBA #14853
Matthew R. Kenney WSBA #1420
Attorneys for Respondent Elsa Robb

999 Third Avenue, Suite 4400
Seattle, Washington 98104
Telephone: (206) 623-1700

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. STATEMENT OF THE CASE1

 A. Statement of Issues1

 B. Facts of the Case2

III. ARGUMENT WHY THE SUPREME COURT SHOULD DENY REVIEW5

 A. The Court of Appeals Applied Settled Law in Affirming the Trial Court’s Determination of the Existence of a Duty5

 B. Washington Courts Properly Examine the Circumstances of a Particular Case to Determine the Existence of Affirmative Acts and a Recognizable High Degree of Risk of Harm13

 C. The Cases Cited by Plaintiffs are Inapposite14

 D. None of the Criteria of RAP 13.4(b) Warrants Review of the Court of Appeals Decision17

IV. CONCLUSION19

TABLE OF AUTHORITIES

Cases

Aba Sheikh v. Choe
156 Wn.2d 441, 128 P.2d 574 (2005).....16

Beal v. City of Seattle
134 Wn.2d 769, 193 P.3d 110 (1998).....16

Boyles v. City of Kennewick
62 Wn. App. 174, 813 P.2d 178 (1991).....12

Brutsche v. City of Kent
164 Wn. 2d 664, 193 P.3d 34 (2008).....11

Chambers – Castanes v. King Cy.
100 Wn.2d 275, 669 P.2d 451 (1983).....9, 16

City of University Place v. McGuire
144 Wn.2d 640, 30 P.3d 453(2001).....3

Coffel v. Clallam Cy.
47 Wn. App. 397, 735 P.2d 686 (1987),
rev. denied, 108 Wn.2d 1024 (1987)11, 12, 18

Cowich Canyon Conservancy v. Bosley
118 Wn.2d 801, 828 P.2d 549 (1992).....13

Garnett v. City of Bellevue
59 Wn. App. 281, 796 P.2d 782 (1990).....12

Hutchins v. 1001 Fourth Ave. Assoc.
116 Wn. 2d 217, 802 P.2d 1360 (1991).....7, 9, 11, 18

J & B Dev. Co. v. King Cy.
100 Wn. 2d 299, 669 P.2d 468 (1983).....8, 9

Jamison v. Storm
426 F. Supp. 2d 1144 (W.D. Wash. 2006).....15

<i>Jimenez v. City of Olympia</i> 2010 U. S. Dist. LEXIS 77918 (W. D. Wash. Aug. 2, 2010)	16
<i>Johnson v. State</i> 385 F. Supp. 1091 (W. D. Wash. 2005).....	15
<i>Kim v. Budget Rent A Car Systems, Inc.</i> 143 Wn.2d 190, 15 P.3d 1283 (2001).....	7
<i>Locke v. City of Seattle</i> 162 Wn.2d 474, 172 P.3d 705 (2007).....	10
<i>Logan v. Weatherly</i> 2006 U.S. Dist. LEXIS 37258 (E.D. Wash. June 6, 2006)	12
<i>Minahan v. W. Wash. Fair Ass'n</i> 117 Wn. App. 881, 73 P.3d 1019 (2003)	11
<i>Osborn v. Mason Cy.</i> 157 Wn.2d 18, 134 P.3d 197 (2006).....	2, 17
<i>Parrilla v. King Cy.</i> 138 Wn. App. 427, 157 P.3d 879 (2007)	<i>passim</i>
<i>Potts v. City of Seattle</i> 2009 U.S. Dist. LEXIS 75708 (W. D. Wash. Oct. 26, 2010)	12
<i>Robb v. City of Seattle</i> 159 Wn. App. 133, ___ P.3d ___ (2010)	5
<i>Rodriguez v. Perez</i> 99 Wn. App. 439, 994 P.2d 874 (2000)	16
<i>Savage v. State</i> 127 Wn.2d 434, 899 P.2d 1270 (1995)	8

<i>Sjogren v. Properties of the Pacific Northwest, LLC</i> 118 Wn. App. 144, 75 P.3d 592 (2003)	13
<i>State v. Sullivan</i> 65 Wn.2d 47, 395 P.2d 745 (1964)	19
<i>The Value of Governmental Tort Liability: Washington State's Journey from Immunity to Accountability</i> 30 Seattle U. L. Rev. 35, 54 (2006)	10
<i>Timson v. Pierce Cy. Fire District and Washington State Patrol</i> 136 Wn. App. 376, 149 P.2d 427 (2006)	16
<i>Torres v. City of Anacortes</i> 97 Wn. App. 64, 981 P.2d 891(1999)	15
<i>Turner v. City of Port Angeles</i> 2010 U.S. Dist. LEXIS 114447 (W.D. Wash. Oct. 26, 2010)	12, 18
<i>Vergeson v. Kitsap Cy.</i> 145 Wn. App. 526, 186 P.3d 1140 (2008)	15
<u>Statutes</u>	
RAP 13.4(b)(1-4)	18
RAP 13.4(b)	1, 17, 18
RCW 4.96.010(1)	9, 10, 19
<u>Other</u>	
Restatement (Second) of Torts §302B comment e	1, 5, 6
Section 2.010 III. Terry Stops C.2., Appendix A	19
Section 2.049, Evidence, Private Property Collection & Release, I. D. 2. Appendix B	3, 19

I. INTRODUCTION

Respondent Elsa Robb ("Robb"), personal representative of the Estate of Michael W. Robb, opposes the City's petition for review. The Court of Appeals correctly affirmed the trial court, holding that the City of Seattle and the defendant Officers owed Michael Robb a duty of reasonable care under the common law rule set forth in Restatement (Second) of Torts §302B comment e. The court also properly rejected the City of Seattle's argument that the public duty doctrine bars all negligence claims arising out of police officers' affirmative acts unless one of four exceptions apply.

None of the RAP 13.4(b) considerations governing acceptance of review apply to this case. The City's petition for review should be denied.

II. STATEMENT OF THE CASE

A. Statement of Issues.

1. Should the Court review the Court of Appeals' ruling that §302B comment e of the Restatement (Second) of Torts creates a duty of care by both private and government actors to protect others from the criminal conduct of a third party, and that in determining the applicability of that rule, courts must necessarily examine the record to decide (1) whether defendants engaged in affirmative acts, and (2) whether such acts exposed another to a recognizable high degree of risk of harm from the third party?

2. Should the Court review the Court of Appeals' opinion, where it is consistent with controlling Washington case law refusing to apply the public duty doctrine to immunize police whose negligence arises out of their affirmative acts?

B. Facts of the Case.

The City's preliminary statement is misleading. The defendant Officers' McDaniel and Lim knew or should have known much more about the deranged, mentally unstable, aggressive, threatening, and dangerous behavior of Samson Berhe than the City's version of the record reveals.¹

On June 26, 2005, Berhe murdered Michael Robb,² using a shotgun and ammunition Berhe had stolen earlier in the week. After the murder, Berhe's companion, Valencia, admitted to a Seattle Detective that he and Berhe stole guns and ammunition in the course of a burglary on June 19, which officers from the Southwest Precinct had investigated. CP 311-13, 772-74. Less than two hours before the fatal shooting of Robb, the Officers had stopped Berhe and Valencia on suspicion of a different burglary, two blocks from where Berhe lived. CP 170-71, 173. After taking control of Berhe and Valencia, the Officers patted-down both

¹ On review of a summary judgment order, the record must be viewed in the light most favorable to Robb. *See Osborn v. Mason Cy.*, 157 Wn.2d 18, 22, 134 P.3d 197 (2006).

² King County Superior Court found Berhe not guilty by reason of insanity and committed him to Western State Hospital.

young men for weapons.³ The Officers saw yellow shotgun shells on the ground near where the two suspects were standing, CP 170-71, 173. But they did not question Berhe or Valencia about the shells and did not pick them up. CP 244.

After about twenty minutes of investigation, the Officers released Berhe because he did not have any stolen property on him, CP 170-71, 173. They left the scene of the stop and left the visible yellow shotgun shells on the ground.⁴ CP 244. Minutes later, Berhe returned to the scene, picked up the shotgun shells, loaded his stolen shotgun with two of the shells, and fatally shot Robb.⁵ CP 317-18.

Before, during, and after making the investigative stop on June 26, Officers McDaniel and Lim knew or reasonably should have known that Berhe presented an extreme risk of harm to others. On June 19, the Officers were dispatched to Berhe's home because his mother reported that Berhe was threatening suicide. CP 173, 175-76. Officer Lim described Berhe as "acting strange" and being "unresponsive," and stating,

³ CP 173, 204-05. SPD Policy and Procedure Manual provides that "Officers may frisk or pat-down the stopped individual for dangerous weapons if the officer reasonably believes the suspect may have a weapon." *Section 2.010 III. Terry Stops C.2. Appendix A.*

⁴ The police use the same color and shape of shotgun shells that the Officers left on the ground. CP 244.

⁵ Whether the shotgun shells were live or spent ammunition, whether the same shells were used by Berhe to murder Robb, whether Berhe had access to shells other than the shells the Officers left on the ground, whether Berhe picked up the shotgun shells after the Officers departed from the scene, and other related questions are factual issues to be resolved at trial. *See City of University Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453(2001) (witness credibility and proximate cause are issues of material fact to be determined by the trier of fact).

"Someday, you'll see," and "Fuck all the haters in the world." CP 173. Officer McDaniel acknowledged that Berhe was "out of touch with reality most of the time." CP 228. Two days later, on June 21, Bellevue police advised the SPD Auto Theft Division that Berhe had stolen an automobile and had shotguns under his bed at home. CP 796.

On June 22, Officer Lim was dispatched to Berhe's home, this time because of a report that Berhe had assaulted a friend of his brother's. CP 173. In Officer Lim's presence, Berhe "spoke in normal tones then switched to deep demonic tones." CP 265-66. Berhe "stated he ruled the world and that all confused people need to be killed & tortured." *Id.* Officer Lim heard Berhe rant: "You'll see, when I rule the world"; "I control all the money"; and "I'll kill all the haters." CP 173.

Berhe was transported to Harborview for an involuntary mental health assessment. CP 266. However, a mental health professional (MHP) released Berhe because the boy Berhe assaulted declined to testify at a commitment hearing, and the MHP was unable to contact Berhe's parents. CP 806-07. Initially, Berhe's family refused to collect him from the hospital because they were afraid of him. CP 810. The police ultimately pressured the family to pick him up. *Id.* Because Berhe was not welcome at home, he returned to the streets. CP 720, 838-42.

In the early morning of June 24, Berhe's father called 911 to report that his son and Valencia were fighting in the backyard and that they both

had shotguns. Several officers from the Southwest Precinct responded but they arrived too late to find either the boys or the shotguns. CP 271-73, 276-82.

Then on June 26, Berhe murdered Robb, allegedly with the same yellow shotgun shells the Officers left on the ground after they departed from the scene of their burglary stop. Considering these facts, the Court of Appeals reasoned:

The officers noticed yellow shotgun shells on the curb next to where Berhe was standing. It is a disputed issue of fact whether McDaniel and Lim personally knew or should have known that Berhe possessed a shotgun. For purposes of summary judgment we assume they were aware of the information about Berhe gathered by fellow officers during the three days preceding this burglary stop. The officers did not ask any questions about the shotgun shells they saw lying on the ground, and they did not confiscate the shells.⁶

III. ARGUMENT WHY THE SUPREME COURT SHOULD DENY REVIEW

A. The Court of Appeals Applied Settled Law in Affirming the Trial Court's Determination of the Existence of a Duty.

The Court of Appeals correctly held that “[t]his is an affirmative act case” under Restatement (Second) of Torts §302B comment e.

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 with[in] easy reach of a young man known to be mentally disturbed and in possession of a shotgun. . . . Under these circumstances,

⁶ *Robb v. City of Seattle*, 159 Wn. App. 133, 137, ___ P.3d ___ (2010).

the officers owed Robb a duty in tort to protect against Berhe's criminal misconduct.⁷

The Court reached this conclusion by applying *Parrilla v. King County*, 138 Wn. App. 427, 157 P.3d 879 (2007), which recognized a duty of care under Restatement (Second) of Torts §302B comment e when "an actor's affirmative act has exposed the other to a recognizable high degree of risk of harm . . . which a reasonable person would have taken into account." *Id.* at 430 (emphasis added).⁸ In *Parrilla*, the Court of Appeals found that a Metro bus driver who left his bus, with the engine running and a visibly erratic passenger on board, owed a duty of care to passengers injured in a collision between the bus and their auto, because his affirmative acts exposed them to a recognizable high degree of risk of harm. *Id.* at 430. The Court held:

The interpretation of section 302B advanced by the Parrillas, that a duty of care may arise pursuant to that section where an actor's affirmative act has created or exposed another to a recognizable high degree risk of harm,

⁷ *Id.*

⁸ Restatement (Second) of Torts §302B comment e, provides in its entirety: 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. (Emphasis added.)

is entirely consistent with that general principle [stated in §302 comment a⁹]. In the present case, it is an affirmative act, rather than a failure to act, that is at issue.

138 Wn. App. at 438. The decision in *Parrilla* was consistent with and based upon Washington Supreme Court jurisprudence recognizing that §302B can be the source of a duty to exercise reasonable care to protect against third-party criminal acts. *See Hutchins v. 1001 Fourth Ave. Assoc.*, 116 Wn. 2d 217, 230-32, 802 P.2d 1360 (1991) (endorsing §302B comment e as the source of a duty, although none was found under the facts of that case); *Kim v. Budget Rent A Car Systems, Inc.*, 143 Wn.2d 190, 196-98, 15 P.3d 1283 (2001) (acknowledging that §302B comment e may support a duty of care where the facts indicated a recognizable high degree of risk of harm to others).¹⁰

The Officers' duty of care in this case is based on their affirmative acts of making a stop, controlling the scene of the stop, and then releasing Berhe and leaving the scene with the shotgun shells still on the ground. Like the bus driver in *Parrilla* who left the bus he controlled with a potentially-dangerous individual on board, the Officers left the scene that

⁹ As the *Parrilla* court confirmed, "[i]n regard to the duties of one who undertakes an affirmative act the comment [§302a] 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.'" 138 Wn. App. at 438 (emphasis in original).

¹⁰ In *Kim*, the Court held that §302B comment e did not support imposition of a duty because there was "nothing in the facts of this case indicating that a *high degree* of risk of harm to plaintiff was created by Budget's conduct of leaving the keys in the ignition of an automobile in an area where Budget had never had a prior vehicle theft." 143 Wn.2d at 196 (emphasis in original).

they controlled despite shotgun shells clearly visible on the ground within reach of a young man they knew to be mentally unstable, and whom they knew or should have known possessed a shotgun.¹¹

The City ignores this settled law and the fact that this case involved the above-described affirmative acts. The City contends that §302B does not give rise to a duty of care, but only explains when a defendant has breached an already-existing duty. King County lost this argument in *Parrilla*, as did the City in both the trial court and the Court of Appeals in this case.

In 1967, the Washington legislature waived the sovereign immunity of municipalities, providing in relevant part:

All local government 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 . . . employees . . . , to the same extent as if they were a private party or corporation.¹²

One of the concerns raised in connection with the statute was that courts not impose new, general “public” duties upon governmental entities. As this Court explained in *J & B Dev. Co. v. King Cy.*:¹³

¹¹ Possession of a shotgun by a juvenile under 18 is a class C felony in Washington. RCW 9.41.040(2)(a)(iii). It is illegal for a dealer to sell ammunition to a minor. 18 U.S.C. § 922(b)(1). Officer McDaniel knew that possession of a firearm by a minor was illegal and he acknowledged that there is no place where Berhe could have legitimately purchased shotgun ammunition. CP 260.

¹² RCW 4.96.010(1). The legislature’s action is “one of the broadest waivers of sovereign immunity in the country. *Savage v. State*, 127 Wn.2d 434, 444, 899 P.2d 1270 (1995).

¹³ 100 Wn. 2d 299, 305, 669 P.2d 468 (1983).

It is well recognized that RCW 4.96.010 was not intended to create new duties where none existed before. Rather, it was to permit a cause of action in tort if a duty could be established, just the same with a private person.¹⁴

As is evident from *Parrilla, Kim and Hutchins*, recognizing a §302B cause of action against defendants in an affirmative act case does not “create new duties where none existed before.”

The City attempts to distinguish *Parrilla* on the grounds that there, the government was acting in a proprietary capacity, while in this case the Officers were acting in a governmental capacity. The statutory language on its face (“whether acting in a governmental or proprietary capacity”) defeats this argument. The legislature waived immunity for governmental actors regardless of the capacity in which they acted. RCW 4.96.010(1).

The City contends that if Robb cannot perfectly analogize the Officers’ conduct to the actions of private actors in a “narrowly circumscribed *Terry* stop” type of situation, the Officers’ conduct is immunized from tort liability. That is not the law. If it were, the resulting immunity would defeat the purpose of RCW 4.96.010(1).¹⁵ Moreover, this Court has rejected the City’s interpretation of the phrase “as if they

¹⁴ *Id.* at 305.

¹⁵ If a comparison to the conduct of private actors were required, it probably would be to private security guards. In *J & B Dev. Co. v. King County*, *supra*, 100 Wn.2d at 311, Justice Utter concurring in the result, noted that “[i]n a case involving the negligence of law enforcement personnel, such as *Chambers-Castanes v. King Cy.*, *supra*, we might analogize to the negligence of a private security firm hired by a large condominium association.”

were a private party or corporation” in the statute.¹⁶ In *Locke v. City of Seattle*, 162 Wn.2d 474, 172 P.3d 705 (2007), the Court considered whether a provision in the LEOFF statute giving law enforcement and firefighters the right to sue their employers for damages in excess of workers’ compensation payments, violated the provisions of RCW 4.96.010(1), which could be construed as limiting government liability to those circumstances where a private party or corporation would be liable. The Court rejected the position of the City, holding:

Allowing LEOFF members to sue their employers for negligent or intentional harm does not create a new municipal duty not otherwise existing for private parties. Further, the language of RCW 4.96.010 does not state that parties may sue governmental entities “only to the same extent as a private party may be liable.” Rather, it merely notes that municipalities may not be liable for breaches of duties not generally existing for private entities or corporations. Thus, we hold that RCW 4.96.010 waives the City’s sovereign immunity.

Id. at 481. Here, Robb’s claims are standard negligence claims. Allowing Robb to sue the City in tort under Restatement §302B comment e does not create a new duty, or one that applies only to government actors. *Kim* and

¹⁶ See Debra L. Stephens and Bryan P. Harnetiaux, *The Value of Governmental Tort Liability: Washington State’s Journey from Immunity to Accountability*, 30 Seattle U. L. Rev. 35, 54 (2006): “Notably, the statutory language, ‘as if,’ suggests that liability may be imposed even in areas in which no prior analogous liability has been found in the private sector, so long as a private entity would be subject to liability if the same theory were asserted against it in the first instance. A more restrictive analysis might have been required if the statutes imposed liability only for conduct ‘performed by’ or even ‘to the same extent as’ private defendants, rather than ‘as if . . . a private person or corporation.’”

Hutchins demonstrate that private parties can be sued in tort under §302B comment e.

The City's argument under *Brutsche v. City of Kent*, 164 Wn. 2d 664, 193 P.3d 34 (2008), is equally unavailing. There, the Court declined to address plaintiff's negligence claim because plaintiff had failed to argue any authority for it. *Id.* at 679.¹⁷ It clearly was not sovereign immunity that led this Court to decline to address plaintiffs' negligence claim.

Applying negligence law to police actors simply reflects the general rule that "every actor whose conduct involves an unreasonable risk of harm to another 'is under a duty to exercise reasonable care to prevent the risk from taking effect.'" *Minahan v. W. Wash. Fair Ass'n*, 117 Wn. App. 881, 897, 73 P.3d 1019 (2003). There is nothing unique about police officers' conduct that exempts their affirmative acts from this principle. For example, in *Coffel v. Clallam Cy.*, 47 Wn. App. 397, 735 P.2d 686 (1987), *rev. denied*, 108 Wn.2d 1024 (1987), the Court held that three police officers could be held liable for affirmative acts to prevent plaintiffs from protecting their property. The Court of Appeals thus reversed 12(b)(6) dismissal of those claims, holding that "[t]he [public duty]

¹⁷ The Court stated:

Mr. Brutsche also asserted a negligence claim, but in his petition for review and supplemental brief in this court he relies entirely on *Goldsby* as controlling precedent on his negligence claim. Because *Goldsby* is, as explained, a trespass case, and because the actions of the officers in breaching the doors on Brutsche's property were intentional, not accidental, we decline to address the negligence claim.
164 Wn.2d at 679.

doctrine provides only that an individual has no cause of action against law enforcement officials for failure to act. [I]f the officers do act, they have a duty to act with reasonable care.” *Id.* at 403.¹⁸

Recently, in *Turner v. City of Port Angeles*,¹⁹ another federal district court stated that under Washington law, “[d]efendant incorrectly infers that police officers are never liable for their negligent conduct” (citing *Garnett v. City of Bellevue*, 59 Wn. App. 281, 287, 796 P.2d 782 (1990), holding police officer liable for negligent infliction of emotional distress). *See also Boyles v. City of Kennewick*, 62 Wn. App. 174, 178, 813 P.2d 178 (1991) (“a claim for negligence against a police officer is possible.”)

Finally, the City’s negligent investigation argument is a “red herring.” Robb has not alleged a claim for negligent investigation. Here, the burglary investigation was the reason why the Officers stopped Berhe and Valencia. The burglary investigation merely presented the context in which the affirmative acts occurred. Moreover, the City first presented this argument in its Reply Brief at the Court of Appeals. “An issue raised and argued for the first time in the reply brief is too late to warrant

¹⁸ Citing *Coffel*, the federal district court in *Logan v. Weatherly*, 2006 U.S. Dist. LEXIS 37258, at * 10-12 (E.D. Wash. June 6, 2006) held that a police negligence claim arising from an affirmative act as opposed to a failure to act is not barred by the public duty doctrine. Another federal district court also named *Coffel* as authority, stating: “Washington courts have recognized that a local government may be held vicariously liable for the state law torts of its public officers.” *Potts v. City of Seattle*, 2009 U.S. Dist. LEXIS 75708, at *43 (W. D. Wash. Oct. 26, 2010).

¹⁹ 2010 U.S. Dist. LEXIS 114447, at *11 (W.D. Wash. Oct. 26, 2010).

consideration.” See *Cowich Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

B. Washington Courts Properly Examine the Circumstances of a Particular Case to Determine the Existence of Affirmative Acts and a Recognizable High Degree of Risk of Harm.

Under Washington law, courts may examine the facts where necessary to determine the existence of duty as a matter of law. See, e.g., *Sjogren v. Properties of the Pacific Northwest, LLC*, 118 Wn. App. 144, 148, 75 P.3d 592 (2003) (“The existence of a legal duty is generally a question of law. But where duty depends on proof of certain facts, which may be disputed, summary judgment is inappropriate.”)

In *Kim*, this Court, in examining the record, ruled that plaintiffs had shown an affirmative act but not--based on the facts and circumstances of that case--a recognizable high degree of risk of harm.²⁰ The *Parrilla* court, following *Kim*, also examined the relevant facts to determine the existence of a duty under §302B comment e. The court stated:

The Parrillas first contend that King County owed them a duty of care because the bus driver should have known that his affirmative act of exiting the bus while the engine was running, leaving the visibly erratic Carpenter alone on board, exposed the Parrillas to a recognizable high degree of risk of harm from misconduct by Carpenter, which a reasonable person would have taken into account. Assuming the truth of the facts alleged by the Parrillas in their complaint, we agree.²¹

²⁰ The *Kim* Court held that “the facts of this case” did not show a “high degree of risk of harm” to plaintiff was created by Budget’s conduct. 143 Wn. 2d at 196.

²¹ 138 Wn. App. at 433 (emphasis in original).

After examining the facts and determining that the bus driver's affirmative acts gave rise to a duty of care under §302B, the *Parrilla* court concluded that "pursuant to the circumstances alleged, King County owed a duty of care to the Parrillas." 138 Wn. App. at 433.

[A]n additional comment to section 302B explains that the existence or nonexistence of a duty pursuant to that section must be determined by reference to the particular circumstances at issue . . .

Id. at 434.

Based on *Kim* and *Parrilla*, and after considering the facts in the light most favorable to Robb, the Court of Appeals correctly found that Robb established that the Officers owed him a duty of care under §302B comment e.²²

Defendants have cited no authority holding that the court must determine duty under §302B comment e without regard to the particular facts and circumstances of the case. Washington law is to the contrary.

C. The Cases Cited by Plaintiffs are Inapposite.

None of the cases cited by the City stands for its stated proposition that the public duty doctrine immunizes police officers' affirmative negligent conduct unless plaintiff proves an exception to the public duty doctrine. The City's named authority shows only that officers are not liable under the public duty doctrine where they failed or declined to act,

²² 159 Wn. App. at 147.

unless an exception to the doctrine applies. Neither the doctrine nor the exceptions apply here, where the Officers engaged in affirmative acts.

The City relies on *Johnson v. State*, 385 F. Supp. 1091 (W. D. Wash. 2005), without disclosing that Judge Lasnik had denied a 12(b)(6) motion to dismiss because plaintiffs alleged that the police acted affirmatively by announcing a policy of non-intervention. Plaintiffs' negligence claims were dismissed only on summary judgment when plaintiffs had failed to provide evidence of such a policy of non-intervention, and therefore plaintiffs had only proved that the defendant officers had merely failed to act.

Likewise, *Vergeson v. Kitsap Cy.*, 145 Wn. App. 526, 186 P.3d 1140 (2008) is a distinguishable failure-to-act case. There, a clerk failed to remove a court-quashed warrant from the County's computerized information system. The court properly dismissed plaintiff's failure to act negligence claim because plaintiff could not prove an exception to the public duty doctrine. *See also Jamison v. Storm*, 426 F. Supp. 2d 1144 (W.D. Wash. 2006) (where defendant officer failed to arrest an intoxicated teenager whose later reckless driving caused a fatal accident, court denied police officer's motion to dismiss based on the failure-to-enforce exception to the public duty doctrine); *Torres v. City of Anacortes*, 97 Wn. App. 64, 981 P.2d 891(1999) (court denied defendants' motion to dismiss because a special relationship was created by a detective's assurance to the

victim that he would present a case against her abusive husband to the prosecutor for a charging decision and he failed to do so).²³

Other cases on which the City relies involve entirely different factual and legal circumstances. *Timson v. Pierce Cy. Fire District and Washington State Patrol*, 136 Wn. App. 376, 149 P.2d 427 (2006), involved a claim for negligent infliction of emotional distress based on the delay by rescue workers in removing a child from the scene of a car accident. Emergency medical service statute did not create a duty owed to family members of injured persons who came upon the scene. In *Jimenez v. City of Olympia*, 2010 U. S. Dist. LEXIS 77918 (W. D. Wash. Aug. 2, 2010), involving a police shooting after a high speed chase and a confrontation, the court rejected plaintiff's "legislative intent" defense to the public duty doctrine because the legislation addressing the use of deadly force by police officers did not show clear legislative intent to provide a cause of action to those injured by officers during an arrest.

In *Rodriguez v. Perez*, 99 Wn. App. 439, 994 P.2d 874 (2000), the public duty doctrine did not apply because a statute held law enforcement to a standard of negligence in child abuse investigations. In *Aba Sheikh v. Choe*, 156 Wn.2d 441, 128 P.2d 574 (2005), this Court held that social workers do not have an obligation to protect the public from harm caused

²³ In *Beal v. City of Seattle* 134 Wn.2d 769, 193 P.3d 110 (1998) and *Chambers – Castanes v. King Cy*, 100 Wn.2d 275, 669 P.2d 451 (1983), both police failure to act cases, the Court held that the public duty doctrine did not apply because plaintiffs had proved a "special relationship".

by dependent children because the welfare statutes were enacted to protect the children, not the public.

The City's reliance on *Osborn v. Mason Cy.*, 157 Wn.2d 18, 134 P.3d 197 (2006) also is misplaced. There, plaintiffs alleged that the County's affirmative actions created a duty of care under the common law rescue doctrine. The Court dismissed the lawsuit, holding that there was no duty to warn because of the lack of justifiable reliance. Without reliance, neither a public nor a private actor would owe a duty in a rescue case, and no public duty doctrine analysis was necessary. Significantly, however, the Court noted:

“We have almost universally found it unnecessary to invoke the public duty doctrine to bar a plaintiff's lawsuit.”
Bailey, 108 Wn.2d at 266. And this case is no exception.

157 Wn.2d at 27.

D. None of the Criteria of RAP 13.4(b) Warrants Review of the Court of Appeals Decision.

Under RAP 13.4(b), “[a] petition for review will be accepted by the Supreme Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.”²⁴

“To be successful, a petition for review should persuade the court that one or more of the considerations identified in Rule 13.4(b) compels review.”²⁵ This case involves none of them.

As shown above, the *Robb* case is not in conflict with a decision of the Supreme Court, or the Court of Appeals. In fact, it is consistent with *Kim* (acknowledging that §302B comment e may support a duty of care where the facts indicated a recognizable high degree of risk of harm to others) and *Hutchins, supra* (endorsing §302B comment e as the source of a possible duty).

The Court of Appeals’ decision expressly relies on *Parrilla* and is consistent with *Coffel, Turner v. City of Port Angeles*, and other Washington case law. The City has failed to point to any Supreme Court or Court of Appeals case with which the *Robb* ruling is purportedly in conflict. There is none.

The City does not argue that the *Robb* decision involves any significant constitutional question, and it does not.

Finally, the fact that this case involves a municipality and police defendants does not implicate “substantial public interest.” As shown above, Washington courts already impose duties of care on police officers when they engage in affirmative acts. The result in the *Robb* case does not

²⁴ RAP 13.4 (b)(1-4).

²⁵ Editorial Commentary to Rule 13.4.

change this law. It also does not affect the ability of police officers to make *Terry* stops and confiscate property. In fact, the SPD's Police and Procedure Manual states that officers have "legal authority to take certain types of property into possession . . . [Including] [a]ny item that is dangerous or illegal to possess or presents a danger to the public."²⁶ See also *State v. Sullivan*, 65 Wn.2d 47, 52, 395 P.2d 745 (1964) (an officer of the law has "the right and the duty to seize what reasonably appear(s) to him to be contraband.").

Given the legislature's waiver of government immunity in RCW 4.96.010(1), if defendants have any concerns with the effects of *Parrilla* and similar case law on their "in the field" procedures, the place to voice those concerns is the legislature, not the courts. Only the legislature has the authority to change the scope of a governmental actor's waiver of immunity. Until that happens, police are liable for their tortious affirmative acts to the same extent as if they were a private party or corporation.

IV. CONCLUSION

This Court should deny the City of Seattle's and Officers Kevin McDaniel's and Ponha Lim's petition for review.

²⁶ Section 2.049, Evidence, Private Property Collection & Release, I. D. 2. Appendix B.

RESPECTFULLY SUBMITTED this 28th day of March 2011.

DANIELSON HARRIGAN LEYH
& TOLLEFSON LLP



By _____
Timothy G. Leyh WSBA #14853
Matthew R. Kenney WSBA #1420
Attorneys for Respondent Elsa Robb as
Personal Representative of the Estate of
Michael W. Robb

APPENDIX A

Seattle Police Department

Policy and Procedure Manual



Seattle Police Department
Audit, Accreditation and Policy Section
Building Address: 610 Fifth Avenue
Mailing Address: PO Box 34986
Seattle, WA 98124-4986
(206) 684-4116
Fax (206) 684-4112



An Accredited Law
Enforcement Agency

Originally Published 12/2000

Revised 08/11/2006

<http://www.cityofseattle.net/police/>

- C. To the extent that safety considerations and confidentiality requirements allow, employees will answer questions posed by the persons that they are contacting and will comply with the provisions of Section 1.003 (VII-5) should the citizen request the identification of the employee.
- D. Closing Contacts
1. Once the contact is completed, employees should make every attempt to provide a professional closing. This is an opportunity to ensure that the citizen leaves the contact with the best possible view of the employee, the department and the profession. In closing a contact, employees will:
 - a. Return any identification, paper work and property obtained from the citizen
 - b. Ensure that the person understands when they are free to leave
 - c. Thank the person for their cooperation and understanding, as appropriate
 - d. Explain the results of the contact especially if the contact results in the reasons for the stop being dispelled or the person being cleared of suspicion.
 - e. If the contact results in the issuance of a notice of infraction or a citation, the officer will explain the options available to the person for disposing of the case and should identify the phone number that persons may call to have any additional questions or concerns.
 - f. Express regret for any inconvenience that may have been caused to the person being contacted, if appropriate.

II. Social Contact

- A. A contact with a citizen for the purpose of asking questions and gathering information.
1. Reasonable suspicion and probable cause are not required to initiate a social contact.
 2. The contact is voluntary or "consensual". The citizen is under no obligation to answer any questions and is free to leave at any point.
 - a. As in all encounters with the public, officers shall treat citizens in a professional, dignified, and unbiased manner.
 - b. Officers should safeguard their actions and requests so that a reasonable citizen does not perceive the contact as a restraint on their freedom. They should act respectfully, attempt to build rapport, and keep the contact as brief as possible

III. Terry Stops

- A. Terry v. Ohio is the landmark case on investigatory stops, which declares:
1. That a police officer may stop a person for questioning, if the officer reasonably suspects that the person has committed, is committing, or is about to commit a crime.
 2. The officer is not required to have probable cause to arrest the individual at the time of contact, but must have reasonable suspicion that the individual is involved in criminal activity.
 3. Reasonable suspicion must be based on objective or specific facts known or observed by the officer prior to the contact and that the officer can later articulate in detail.
- B. Factors considered in determining reasonable suspicion for a Terry Stop:
1. The officer's experience and specialized training.
 2. The individual is located in proximate time and place to an alleged crime.

3. The individual is in a location at a time of day or night that appears unusual for the norm.
 4. The individual flees upon seeing an officer.
 5. The individual is carrying a suspicious object, etc.
- C. The contact should be limited in duration, detaining the individual only long enough to confirm or dispel the officer's original suspicion.
1. The detention and questioning shall be done in the general area of the original contact.
 2. If the individual being questioned fails to accurately identify themselves or if information is gathered to further validate the officer's suspicion, the detention may be extended. Officers may frisk or pat-down the stopped individual for dangerous weapons if the officer reasonably believes the suspect may have a weapon.
 - a. The officer must have a separate, reasonable basis for this suspicion. Some factors considered by officers may include:
 - (1) Crime involving weapon.
 - (2) Time of day and location of stop.
 - (3) Prior knowledge that the individual is known to carry weapons.
 - (4) Furtive movements.
 - (5) Suspicious bulges, consistent with carrying a concealed weapon.
- D. Officers should always consider officer safety measures while conducting contacts and Terry Stops.
1. Advise radio.
 2. Choose safe locations.
 3. Request back up units if needed.

IV. Field Interview Reports

- A. The field interview still remains an important point of contact for officers in preventing and investigating criminal activity. Field interview contacts should be documented to provide other officers, detectives, and crime analysts with information concerning suspicious activity.
1. The Seattle Police Department's Field Interview Report, form 7.9, will be used.
 2. A Field Interview Report can be completed even if contact was not initiated.
 3. Officers completing Field Interview Reports shall submit them to a supervisor for approval.

V. Terry Stops of Vehicles

- A. Police may stop vehicles based on the same standard for stopping people. One practice to avoid is stopping vehicles for minor traffic infractions as a pretext to investigate unrelated crimes for which the officer lacks reasonable suspicion. If the stop turns into an arrest, and the search reveals incriminating evidence, the defense may claim the original stop was pretextual. Successful claims may result in suppressed evidence and the case may not go forward (See State V. Ladson).
- B. Evidence obtained through a Terry Stop of a vehicle is acceptable as long as it was a result of reasonable suspicion that a crime occurred.

APPENDIX B





Seattle Police Department

Policies and Procedures

Section

2.049

Title:

II - Operations

Chapter:

049 – Evidence, Private Property
Collection & Release

REFERENCES

CALEA standards, 42.2.1, 74.4.1, 83.1.2, 83.2.1, 83.3.1, 83.3.2, 84.1.1, 84.1.2, 84.1.4.

RCW 7.69.030 & RCW 9.68A.120

POLICY

This Department will make every reasonable effort to recover lost or stolen property, to identify rightful owners, and to ensure its prompt return. Recovered evidence will be handled in a manner to ensure a successful investigation and prosecution of the suspected crime.

All evidence shall be handled, packaged, and submitted per the guidelines in the on-line WSP Physical Evidence handbook, SPD Evidence Packaging Guide and the SPD After Hours Evidence Submission manual. In the event of inadvertent conflicts between these documents, the SPD Evidence Packaging Guide shall be the controlling document.

While handling evidence and property, officers will follow exposure control procedures when necessary (See DP&P 1.265a-Exposure Control).

I. Guidelines

- A. Employees shall not retain any found property or evidence that has come into their possession through the course of their official duties for personal use.
- B. Once an employee has taken possession of an item, the item must be placed into the Evidence Unit or other authorized evidence storage area as soon as possible, but no later than the completion of the employee's shift.
- C. Information concerning collected items or property shall not be inappropriately disclosed to those outside the criminal justice system.
- D. The Seattle Police Department has legal authority to take certain types of property into possession (RCW 63.21.050). The property must meet one of the following criteria to be taken into possession.
 1. If there is reasonable suspicion that the property is evidence of a crime.
 2. Any item that is dangerous or illegal to possess or presents a danger to the public.
 3. Found property where the owner is known or it is reasonably believed that the owner can be located.
 4. Any item of found property that has an apparent value over \$25.00.
- E. Property may be 'detained', while the officer investigates the circumstances and screens for the listed criteria. Once the property is taken into possession, it must be placed into the Evidence Unit. The release of these items is closely regulated by statute; therefore, officers are encouraged to screen items carefully prior to taking possession of any property.

II. Physical Evidence-General Procedures

- A. The Seattle Police Department will generally adhere to the guidelines set by the Washington State Patrol Crime Laboratory Division's Physical Evidence Handbook for collecting, packaging and

storing evidence. The Evidence Unit, WSP Crime Laboratory or the proper follow up unit may be contacted with questions about evidence handling.

B. Identifying Evidence and Chain of Custody

1. When evidence is located, the officer will note the location and condition of the item. If the officer chooses to photograph the item, it should be done prior to moving the evidence and should include a scale reference (small ruler). As soon as the evidence is taken into possession, the finder will label the item listing their name, serial number and case number. The item should be retained by the officer who recovered it until it is submitted into evidence. The chain of custody must be documented on the Incident Report.
2. When evidence is collected specifically for the purposes of testing or comparison, similar materials or substances from a known source should be collected and submitted for comparison purposes. The collection of known samples is a critical component of the evidentiary process. Types of evidence requiring samples for comparison may include hair, fibers, fabrics, paint, glass, wood, soil, tool marks, shoes and blood.

C. Labeling and Packaging

1. Evidence Label

- a. The evidence label is used to document and identify the item as evidence.
- b. Each individual item of evidence requires an evidence label that must be completely filled out by the person who recovered the evidence.
- c. The label may be attached directly to the item or to the item's packaging. Care should be taken so that attaching the label directly to the item doesn't damage the item.
- d. The Evidence Unit will not accept an item that is not properly labeled or documented.
- e. Narcotics and currency envelopes have the evidence label printed directly on them and do not require a separate label.

2. Packaging

- a. An item should be packaged in a manner that does not diminish its evidentiary value. Refer to The Washington State Patrol Physical Evidence Handbook or the SPD Evidence Packaging Guide for proper packaging techniques or call the appropriate follow up unit or Evidence Unit.
- b. If several items are packaged together, each item must be labeled and an itemized list must accompany the package to the Evidence Unit giving a description of the item and the name of the person who found it.

3. Marking

- a. The 'marking' of evidence should not be needed if the item is properly labeled and packaged. If an item is to be marked, the mark should be small, legible and distinctive. The marking should not diminish the value of the property and not be easily duplicated. A recommended procedure is for officers to use their own initials for marking evidence.

4. Sealing

- a. Not all items are required to be in a sealed package.
- b. To seal evidence packaging, use only clear packing tape provided by the Evidence Unit or Quartermaster. Initial across the sealed opening.

D. Checking out evidence

1. When an employee checks out evidence from the Evidence Unit, they are personally responsible for that evidence until it is turned over to the court, returned to the owner, or returned to the Evidence Unit.
 2. The officer must provide the Evidence Unit with the court cause number from the subpoena regarding the case the evidence is needed for and complete any other documentation that is required by the Evidence Unit. The court tracks submitted evidence by cause number and not by the SPD incident number. The only way for the department to track these items once they are turned over to the court is through the cause number.
 3. When evidence is left with the prosecuting attorney in court, the officer or investigator who checked out the evidence shall have the prosecutor sign the pink copy and print their name and Washington State Bar number on the Receipt for Evidence (form 13.2). The officer or investigator must immediately return one copy of the Receipt for Evidence to the Evidence Unit while the other copy remains in court with the item(s).
- E. Laboratory processing of evidence
1. The primary investigator assigned to the case shall make the determination to submit an item of evidence to the WSP Crime Lab.
 2. Any items to be submitted to the lab shall be packaged according to guidelines published in the WSP Physical Evidence handbook. The "Request for Laboratory Examination" shall be completed by the investigator and submitted with the item.
 3. The Evidence Unit will arrange the delivery and pick up of items to and from the laboratories. All standard documentation of evidence transfers shall apply.
 4. A form letter requesting written examination results shall be attached to the "Request for Laboratory Examination".

III. Special Physical Evidence

- A. Dangerous/Hazardous Evidence (See DP&P 2.105 – Bomb Threats and Explosive Devices and DP&P 2.109 – Hazardous Conditions).
1. When officers encounter evidence related to biohazards, chemicals, or explosives, they will follow department procedures for notification and response. The Evidence Unit will not accept dangerous/hazardous material unless it is first screened by the specialized unit that deals with these items. If these items are brought to the Evidence Unit without prior screening, the Evidence Unit will refuse the item and initiate a Haz-Mat or Bomb Threat response.
- B. Unknown Items
1. Due to facility and personal safety concerns, the Evidence Unit will not accept unknown items unless a search warrant to open or examine the item is being obtained. This includes, but is not limited to: locked safes, briefcases and luggage. Officers and Detectives should contact the Evidence Unit before bringing these types of items.
 2. If the Evidence Unit is not contacted regarding the status of a search warrant within 3 business days, the item will be administratively opened and inventoried. This should not be construed as a method to avoid obtaining a search warrant when legally required.
- C. Special Physical Evidence Procedures
1. Ammunition (See DP&P 2.105 – Bomb Threats and Explosive Devices)
 - a. The Evidence Unit will take ammunition smaller than .50 caliber. If officers encounter a large quantity of ammunition and want to place it into evidence, they should screen the incident with the Evidence Unit.

2. Boats (See DP&P 3.049 – Boating Accidents)
 - a. If probable cause exists to believe that the boat constitutes evidence of a crime or contains evidence of a crime, the officer will:
 - (1) Complete the Vessel, Watercraft, or Obstruction Theft and Impound Report (form 5.42).
 - (2) Notify the Harbor Unit to arrange for the boat to be towed. All impounds will be stored at the Harbor Patrol Unit boat shed on Lake Union.
3. Cash (See DP&P 2.057 – Evidence Money Submission)
4. Cellular phone/pagers
 - a. All cellular phones and pagers must be turned off prior to being placed into evidence.
 - b. When completing paperwork, document the item's phone number (with area code) as an owner applied number.
5. Computers
 - a. If there is a question as to how to take a computer into evidence, the officer should call the Vice Section or the Evidence Unit.
6. 35 mm film, Polaroid's Advanced Photo System (APS) film, digital images and video images. (See DP&P 2.051-Film, Polaroid and Digital Images)
7. Firearms (See DP&P 2.053 – Firearms as Evidence).
8. Fireworks (See DP&P 3.054 – Fireworks Disposal and Disposition).
9. Knives
 - a. If the knife will not be processed for biological evidence or for latent prints, the blade of the knife should be covered, to prevent injury during handling.
10. Large Items
 - a. Large or heavy items should be screened with the Evidence Unit to determine if alternative storage is required.
11. Narcotics (Note: the term "narcotics" is meant to include all controlled substances, for the purposes of this section.)
 - a. Seized narcotics will be packaged using a "Narcotics only" envelope (form 9.17) and must be weighed on a digital scale prior to being packaged. The majority of narcotics submitted as evidence will fit into a narcotics envelope. Narcotics that will not fit into the envelope will be packaged and sealed according to the on-line evidence packaging guidelines, located on the SPD In-Web. Narcotics that are going to be submitted with the packaging it was recovered in will be weighed with that packaging. If the officer places the narcotics in additional packaging, the narcotics will be weighed before being placed in additional packaging. If the narcotics are going to be removed from the original packaging and the packaging is not going to be included in the narcotics envelope, the narcotics will be weighed without the packaging. Narcotics should not be packaged in the container it was recovered in, such as film canisters or tin mint boxes. If the container is to be tested for trace evidence it should be packaged separately in a sealed envelope the same way that paraphernalia is packaged.
 - (1) Weighing and packaging procedure:

- i. A digital scale and printer will be located in each precinct, the Narcotics Section and the Evidence Unit. The scales will weigh items from 0.1 grams to 2100 grams. It is important that items heavier than 2100 grams, or approximately 4.6 lbs., not be placed on the scale pan or damage to the scales may occur. The Equipment and Facilities Coordinators will maintain the scales and printers. If a scale is not functioning the evidence must be transported to a working scale to complete the procedure.
 - ii. Turn the scale on by pushing the on/off button and wait for the word 'Stable' to appear in the upper left-hand corner of the scale display. The scale should read 'Weight 0.0 grams'.
 - iii. Place the narcotics on the scale pan, making sure that nothing else is touching the pan. If the narcotics to be submitted are wrapped in packaging (for example, in a paper bundle or wrapped in plastic) weigh the narcotics in the packaging material.
 - iv. Once the narcotics have been placed on the pan, wait for the measured weight to show on the display and 'Stable' to appear in the upper left-hand corner. Once the stable weight appears, press the 'print' button on the scale.
 - v. Once 'print' has been pushed the printer will produce a receipt that records the time and date, the scale balance ID number, the 'user number' which indicates the unit the scale is assigned to, and the weight of the narcotics in grams.
 - vi. Advance the receipt by pressing the 'feed' button on the printer until the printout can be read. Tear the receipt off.
 - vii. Complete the front of the narcotics envelope using a ballpoint pen.
 - viii. The white copy of the receipt will be placed in the narcotics envelope with the seized narcotics. Make sure that the receipt faces out the backside of the envelope and can be clearly read. The officer may retain the yellow copy of the receipt for later reference.
 - ix. Seal the envelope by removing the protective strip and folding over the adhesive flap. Once the envelope is sealed the person who sealed it will initial the box on the sealed flap. Submit the item to evidence per established procedure.
 - x. Record the serial number of the envelope in the serial number field and the recorded weight of the narcotics in the additional descriptor field, on the *Evidence Submission Report* (form 13.3).
12. Needles/syringes
- a. The Evidence Unit will generally not accept a syringe. Officers should review the handling of syringes as described in DP&P 1.265a – Exposure Control.
13. Vehicles (See DP&P 2.065 – Vehicle Evidence and Seizures).

IV. Found Property

- A. Under state law (RCW 63.21), a citizen has the right to make a claim to certain types of found property. If the finder complies with legal procedures, the finder may obtain ownership of the

- property. The Seattle Police Department will handle the disposition of found property on a Found Property Report.
- B. A citizen can not make a claim to found property if any of the following circumstances apply:
1. The property's owner is known.
 - a. If the owner of found property is known, a found property report will be completed and the officer will try to contact the owner and return the property. If the owner cannot be contacted, or it is impractical to return the property to the owner, the officer will place the property into evidence. The Property Release Notice (form 13.9) or (form 7.10.01), provided by Evidence, should be mailed to the owner. The officer will sign the Property Disposition Authorization (form 1.17), authorizing the Evidence Unit to release the property to the owner.
 2. The property is illegal to possess.
 - a. If the found property is illegal to possess, an Incident Report will be completed. List the finder as a witness and place the item into evidence. Civilian employees will not take possession of illegal items, but will call a police officer to respond to their location to recover the property.
 3. A found motor vehicle.
 - a. A found vehicle will be handled on a Vehicle Report. Found boats and boating equipment may be treated as found property. If a boat is the found item the Harbor Unit has responsibility for safekeeping and follow-up.
 4. The finder is a government employee at work.
 - a. If a government employee finds the property while at work, complete the Found Property report and place the item into evidence.
- C. If the property is eligible to be claimed, ask the finder if they wish to make a claim on the property. Complete the Found Property Report. If the item is estimated to be over \$25.00 in value, the property must be taken into custody and placed into the Evidence Unit. If the value is \$25.00 or less, the finder may have the option of keeping the property. Instruct the finder to carefully read the 'Notice To Finders' on their copy of the Found Property Report.
- D. The Burglary and Harbor units will complete the appropriate follow-up on found property.
- E. Found Narcotics
1. Found narcotics with no suspect information may be reported on a Found Property Report. When narcotics are submitted as found property, complete a Property Disposition Authorization Report (1.17) at the Evidence Unit. Found narcotics must be packaged in a Narcotics Envelope.

V. Safekeeping

- A. If an officer arrests and books a person into the King County Jail and they have property that the Jail will not take, and this property is not contraband or evidence, the officer may place the property into safekeeping at the Evidence Unit.
1. When prisoner property is refused at the Jail and must be kept for safekeeping, the transporting officer will complete a SKO Tag (form 12.8)
 - a. A tag is required for each item you will be submitting to the Evidence Unit.
 2. Detach the top copy of the SKO Tag and give it to the jail staff. This notifies the property owner that SPD has their property and that we will hold it for them for 60 days. It also provides them with contact information for the Evidence Unit.

3. Attach the second copy to the item being submitted. The SKO Tag becomes the evidence label for the item. Complete an Evidence Submission Report and submit the item to Evidence.
 - a. SKO items may now be listed on the same Evidence Submission Report as evidence items submitted under the same Incident Number.
 - b. Money and perishable items will not be accepted for safekeeping. Money shall remain with the arrestee. Perishable items should be documented, and then discarded.

VI. Releasing Evidence

- A. Evidence should be released once it has been determined that it is no longer needed. Evidence will be released using the Property Release Authorization Form (form 1.17) or, if being returned to the owner, a direct signature to form 13.1 "Release of Evidence" by the authorizing Officer/Detective will suffice.
- B. The Property Release Authorization Form gives three options: "Release to Owner", "Release to Director", and "Do Not Release".
 1. If the item is legal to possess and a person is able to show reasonable proof of ownership, the item must be released to the owner.
 - a. To release property to the legal owner, a Property Notification Card (form 7.10.1) or a Property Release Letter (form 13.9) will be completed and sent to the owner by the officer or detective wishing to release the property to the owner. The owner must pick up the property in 60 days or the property will be turned over to the Director for final disposition. Complete a Follow Up Report to document the actions taken to notify the owner and include a copy of the Property Notification Card or the Property Release Letter with the follow up report. An owner may be notified by telephone but that alone will not satisfy the RCW requirement. Notification must also be made in writing.
 2. If the item is contraband, the owner cannot be identified, or the court directs another release, the item will be released to the Director.
 3. If an employee receives a request to release the property and the item is still needed, mark 'Do Not Release' and note the reason on the Property Release Authorization form. If form 1.17 is not returned within 30 days of being sent out, the director will automatically dispose of the listed property.
- C. Release of evidence by other than an involved officer
 1. If the arresting officer is unavailable to release evidence or property (for example if they are on extended sick leave, retired, resigned, etc.), the arresting officer's sergeant or above will be responsible for the release of the evidence.
- D. Release of Firearms
 1. Prior to completing the Property Release Authorization Form (form 1.17) the person completing the form shall:
 - a. Attempt to obtain a Washington DOL registration for the firearm.
 - b. Check WACIC/NCIC to verify that the firearm is not listed as stolen or missing.
 - c. Print out all of the results of the queries.
 2. If a registration, stolen, or missing hit is found the officer must attempt to locate the owner of the firearm. All attempts to locate the owner shall be documented on an incident report or follow-up report.

3. Include all printouts with the incident report or follow-up report; a copy of the printouts shall be attached to the Property Release Authorization Form (form 1.17) when submitting it.
4. The Evidence Unit will check the owner's status to legally possess a firearm through the Records Section prior to releasing a firearm.

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Mar 28, 2011, 11:54 am
BY RONALD R. CARPENTER
CLERK

No. 85658-3

RECEIVED BY E-MAIL

Court of Appeals No. 673299-0-I

**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,

CERTIFICATE OF SERVICE

DANIELSON HARRIGAN LEYH
TOLLEFSON, LLP

Timothy G. Leyh WSBA #14853
Matthew R. Kenney, WSBA #1420
Elizabeth Weden Perka, WSBA #37095
Attorneys for Respondent, Elsa Robb

999 Third Avenue, Suite 4400
Seattle, Washington 98104
Telephone: (206) 623-1700

I, SUSIE CLIFFORD, certify and state as follows:

1. I am a citizen of the United States and a resident of the State of Washington; I am over the age of 18 years and not a party of the within entitled cause. I am employed by the law firm of Danielson Harrigan Leyh & Tollefson, LLP, whose address is 999 Third Avenue, Suite 4400, Seattle, WA 98104.

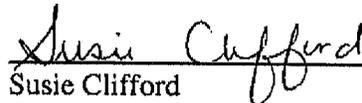
2. I caused to be served upon counsel of record at the addresses and in the manner described below, on March 28, 2011, the following documents:

- RESPONDENT ELSA ROBB'S ANSWER TO PETITION FOR REVIEW
- CERTIFICATE OF SERVICE

Ms. Rebecca Boatright, WSBA #32767	[]	U.S. Mail
Assistant City Attorney	[✓]	Legal Messenger
PETER S. HOLMES, Seattle City Attorney	[]	Federal Express
600 Fourth Avenue, 4 th Floor	[]	Via Facsimile
Seattle, WA 98124-4769	[]	Via E-mail
Telephone: (206) 684-8200	[]	Other _____
Facsimile: (206) 684-8284		
E-mail: rebecca.boatright@seattle.gov		

I hereby declare under penalty of perjury and the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington, this 28th day of March, 2011.



Susie Clifford

OFFICE RECEPTIONIST, CLERK

To: Susie Clifford
Cc: Matt Kenney
Subject: RE: Case No.: 85658-3; Robb v. City of Seattle, et al.

Rec. 3-28-11

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Susie Clifford [<mailto:susiec@dhl.com>]
Sent: Monday, March 28, 2011 11:50 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Matt Kenney; Susie Clifford
Subject: Case No.: 85658-3; Robb v. City of Seattle, et al.

Dear Clerk of the Court:

Attached please find for filing the following pleadings in regard to the above-referenced matter.

1. Respondent Elsa Robb's Answer to Petition for Review.
2. Certificate of Service.

<<03.28.11 Robb Answer to Petition for Review.pdf>> <<03.28.11 Robb Certificate of Service.pdf>>

Thank you
Susie Clifford
Legal Assistant to Matthew R. Kenney
Danielson Harrigan Leyh & Tollefson LLP
999 Third Avenue, Suite 4400
Seattle, WA 98104
Telephone: (206) 623-1700
Fax: (206) 623-8717

This internet e-mail message contains confidential, privileged information that is intended only for the addressee. If you have received this e-mail message in error, please call us (collect, if necessary) immediately at (206) 623-1700 and ask to speak to the message sender. Thank you. We appreciate your assistance in correcting this matter.