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No. 85658-3

Court of Appeals No. 63299-0-1

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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

Respondent,

vs.

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

Petitioners.

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**PETITIONERS' CONSOLIDATED RESPONSE TO BRIEFS OF  
AMICI FAMILIES AND FRIENDS OF VIOLENT CRIME  
VICTIMS AND WASHINGTON STATE ASSOCIATION FOR  
JUSTICE FOUNDATION**

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## I. INTRODUCTION

Amici Families and Friends of Violent Crime Victims (“FFVCV”) and Washington State Association for Justice Foundation (“WSAJ”) (collectively “Amici”) set forth two principal arguments in support of Division I’s unprecedented decision. Amici argue (1) that Restatement (Second) of Torts § 302B can independently provide a basis for liability against government actors, and therefore (2) the public duty doctrine does not bar Respondent’s claims here. The City does not dispute, generally, that § 302B can be a framework for analyzing *any* actor’s conduct *if the actor owes an actionable duty not to be negligent*. However, as did Division I, Amici sidestep the preliminary points of law that (1) where an actor – public or private – owes no actionable duty to act or refrain from acting in the manners alleged, § 302B is irrelevant; and (2) regardless of the standard of care alleged (whether under § 302B or otherwise), in actions alleging negligence in the performance of a governmental function, *whether by affirmative act or omission*, the public duty doctrine remains the proper “focusing tool” for assuring, as is necessary in any negligence action, that the duty alleged is one that is actionable by the plaintiff. The cases on which Amici rely are distinguishable from the present case in both their facts and analyses and thus provide no guidance here.

A. **RESTATEMENT (SECOND) OF TORTS § 449  
FURTHER AFFIRMS THAT § 302B IS NOT IN  
AND OF ITSELF A COMPLETE SOURCE OF  
“DUTY.”**

WSAJ misstates the City’s position when it surmises that “[u]nderlying much of the City’s argument is the apparent premise that the Restatement § 302B & Comment *e* is not, or should not, be the law in Washington.” The City takes no position as to whether § 302B and any of its comments *should* be the law in Washington; the City duly acknowledges that this Court *has* recognized § 302B as potentially describing a standard of conduct *where there is a duty of care owed by the actor to the plaintiff*. See, e.g., *C.J.C. v. Corporation of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 725, 985 P.2d 262 (1999), in which the Court declined to “adopt wholesale the duty *described* in § 302B” but held that “*where a special protective relationship exists a principal may not turn a blind eye to a known or reasonably foreseeable risk of harm posed by its agents toward those it would otherwise be required to protect[.]*” *Id.* at 728 [emphases supplied]; see also *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 802 P.2d 1360 (1991) (considering § 302B in the context of the common law duties of a landowner); *Kim v. Budget Rent-a-Car Syst., Inc.*, 143 Wn.2d 190, 195, 15 P.3d 1283 (2001) (§ 302B inquiry premised on the general duty of the owner of an automobile so to manage it as not to create an unreasonable risk of harm). The City asks only that the Court hold true to its prior § 302B analyses and the fundamental threshold inquiries of *any* duty analysis and recognize that, *absent a duty owed by*

*the actor to the plaintiff*, any § 302B inquiry into the reasonableness of the actor's conduct is premature as a matter of law.

“It is an elementary principle that an indispensable factor to liability founded upon negligence is the existence of a duty of care owed by the alleged wrongdoer *to the person injured.*” *Kim v. Budget Rent A Car Sys., Inc.*, 143 Wn.2d 190, 194-95, 15 P.3d 1283 (2001) (*quoting Routh v. Quinn*, 20 Cal.2d 488, 491, 127 P.2d 1, 3 (1942)) [emphasis supplied]. Duty, as an element of any negligence action, has three independent facets, each of which must be separately proven: *by whom* is the duty owed, *to whom* is the duty owed, and *what* standard of care is owed. *Nivens v. 7-11 Hoagy's Corner*, 83 Wn. App. 33, 41, 920 P.2d 241 (1996). Case law and the Restatement make clear that § 302B may, under exceptional circumstances, provide a basis for analyzing the “standard of care” element of a duty analysis, but has nothing to do with determining the “to whom” element essential to establishing, in *any* negligence action, that the duty alleged is one that is actionable by the plaintiff. *Compare* Restatement (Second) of Torts § 283 (“Conduct of a Reasonable Man: The Standard”), Comment *a* (“This Section is concerned only with the standard of conduct required of the actor to avoid being negligent. *It is not concerned with the question of when he owes another a duty to conform to that standard.*”) [Emphasis supplied]. As specific to § 302B, *see Cross v. Chicago Housing Authority*, 74 Ill. App. 3d 921, 393 N.E.2d 580 (1979) (*if the actor is under no duty to the other to act*, his failure to do so may be negligent under §302B but does not subject him to liability)

[emphasis supplied]; *McKenzie v. Hawaii Permanente Medical Group, Inc.*, 98 Hawai'i 296, 300, 47 P.3d 1209 (Haw. 2002) ("Restatement (Second) § 302 by itself does not create or establish a legal duty; it merely *describes* a type of negligent act.") [Emphasis in original.] *See also, generally, Section D(I) of the City's Supplemental Brief.*

Restatement (Second) of Torts § 449 further clarifies that § 302B does not in and of itself render a standard of care actionable absent a duty actionable by the plaintiff individually. Section 449 provides in full:

**Tortious or Criminal Act the Probability of Which Makes  
Actor's Conduct Negligent**

If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.

Comment *a* to § 449 refers the reader back to § 302B and reiterates that, as to both § 302B and § 449, a preliminary showing that the duty alleged was owed *by the actor to the plaintiff* remains prerequisite to any inquiry under the standard described:

**Comment *a*:** This Section should be read together with § 302B, and the Comments to that Section, which deal with the foreseeable likelihood of the intentional or even criminal misconduct of a third person as a hazard which makes the actor's conduct negligent. *As is there stated, the mere possibility or even likelihood that there may be such misconduct is not in all cases sufficient to characterize the actor's conduct as negligence. It is only where the actor is under a duty to the other, because of some relation between them, to protect him against such misconduct, or where the*

*actor has created or increased the risk of harm through the misconduct*, that he becomes negligent.

[Emphasis supplied.]

While plaintiff and Amici understandably parse out and urge the Court to construe in isolation the “created or increased risk of harm” clause, the Restatement and case law make clear that this provision must be read in the context of circumstances where the actor has either (1) a sufficient relationship with the plaintiff or third person so as to create an actionable duty owed to the plaintiff (*accord C.J.C., supra; Restatement § 302B, Comment e, Examples A, B, D, and F*), or (2) an interest or relation to property at issue sufficient to implicate the actor’s common law duties with respect to that property. *Accord Hutchins, supra; Kim, supra; Restatement § 302B, Comment e, Examples C, E, and G; see also Restatement §§ 316-20, Sections E(2)(b) of the City’s Petition for Review, and Section D(I) of the City’s Supplemental Brief.* Amicus FFVCV emphasizes two out-of-jurisdiction cases, but neither case provides persuasive authority here for the specific reason that, unlike the present case, both involved either subject matter within the exclusive possession of the government defendant (thus predicating the government’s duty *not* on a § 302B inquiry *per se* but on the general duty of *any* property owner to manage his property reasonably so as not to create or increase the risk of harm to others (*accord Kim, supra; § 302B Comment e, Example G*)) or a relationship between the actor and plaintiff sufficient to give rise to a duty of care.

In *Stevens v. Battelle Memorial Institute and United States*, 488 F.3d 896 (2007), plaintiffs alleged that the government and a private laboratory had failed to exercise the “highest degree of care” required for the handling, storage, and use of anthrax so as to protect against its wrongful dissemination. The 11<sup>th</sup> Circuit certified to the Florida Supreme Court the question of whether:

Under Florida law, does a laboratory that manufactures, grows, test or handles ultra-hazardous materials owe a duty of reasonable care to members of the general public to avoid an unauthorized interception and dissemination of the materials, and, if not, is a duty created where a reasonable response is not made where there is a history of such dangerous materials going missing or being stolen?

*Stevens* at 904.

On certification, the Florida Supreme Court answered the question in the affirmative, holding that

a laboratory that *manufactures, grows, tests or handles ultrahazardous materials* does owe a duty of reasonable care to the general public to avoid an unauthorized interception and dissemination of the materials.

*U.S. v. Stevens*, 994 So.2d 1062, 1070 (Fla. 2008) [emphasis supplied]. In reaching this conclusion, however, the Court explained:

The allegations assert that the government and Battelle have affirmatively chosen to work with an ultrahazardous substance that poses virtually unparalleled risk of injury to the general public if its security is not assured. In coping with the heightened duty that comes with that risk, the government and Battelle are required to contemplate a countless variety of situations in which a reasonable laboratory in their position must anticipate and guard

against the unauthorized interception and dissemination of the dangerous substance.

*Id.* at 1069-70. In other words, it was the government's "commission of affirmative acts" with respect to "deadly laboratory organisms" that the government itself had introduced into existence that was sufficient to give rise to a § 302B inquiry into whether the government had exercised reasonable care with respect to *its* property (just as the private corporation (Battelle) engaged in the same activity could be subject to the same). *Id.* at 1068.

Efforts to draw a comparison between the facts of this case and the government's failure to secure its own deadly biohazards posing "unparalleled" risk of harm are without merit. Setting aside philosophical or social policy debate as to whether shotgun shells alone (of which either Berhe or Valencia could lawfully be in possession, which the officers, arguably, could not have permissibly investigated had they been on Berhe's person,<sup>1</sup> and where no weapon was present at the scene of this *Terry* stop to render them potentially harmful) should be characterized as "ultrahazardous" so as to impose upon *anyone* the "highest degree of care," the shells (unlike the anthrax in *Stevens*) were not introduced to the scene by the officers and were never in the possession or custody of the officers. While Amici apparently suggest that the Court should impute "possession" or "control" to the officers by virtue of the officers' arguable

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<sup>1</sup> See *U.S. v. Miles*, 247 F.3d 1009 (C.A.9 2001) (officers exceeded permissible scope of *Terry* pat-down by manipulating object that was clearly not a weapon).

*right to take* possession of abandoned property,<sup>2</sup> to impose liability on this reasoning would be to wrongly conflate an officer's *authority* to act with a nebulous *duty* to act that for obvious reasons of law, logic, common sense, and policy has never been recognized as actionable in this or any other State.

Nor does *McIntyre v. U.S.*, 447 F. Supp. 2d 54 (2006), provide useful guidance. In *McIntyre*, the plaintiff administrators of McIntyre's estate sued the government after McIntyre, an FBI informant, was killed by Boston Mafia boss "Whitey" Bulger and his lieutenant, Stephen Flemmi. The plaintiffs alleged that an FBI agent had negligently increased the risk of harm to McIntyre through his affirmative act of disclosing to Bulger and Flemmi classified information that led to their discovery of McIntyre's identity as a government informant against them. Finding that there was a foreseeable risk to McIntyre specifically (insofar as three other FBI informants had been killed by Bulger and Flemmi after this same agent had disclosed their identities), the Court concluded that the

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<sup>2</sup> An officer may, as part of a community caretaking function, "provide an infinite variety of services to preserve and protect community safety," *United States v. Rodriguez-Morales*, 929 F.2d 780, 784-85 (1<sup>st</sup> Cir. 1991), quoting W. LaFare, Search and Seizure § 5.4(c), at 535 (2d Ed. 1987), *cert. denied*, 502 U.S. 1030, 112 S. Ct. 868, 116 L.Ed.2d 774 (1992). As a matter of law, logic, and public policy, however, it is beyond absurd to suggest that an officer's failure to expand a criminal investigatory stop into a community caretaking endeavor can give rise to liability actionable by any given member of the general public – regardless of whether the harm was "foreseeable". As a matter of law, *absent a duty by the actor to the plaintiff*, any inquiry into whether a defendant has "negligently increased the risk of harm" is immaterial. *Osborn v. Mason Cy.*, 157 Wn.2d 18, 23, 134 P.3d 197 (2006).

agent's affirmative act of disclosing the FBI's classified information was sufficient to give rise to scrutiny of that act under § 302B. *Id.* at 107.

Amicus' reliance on *Stevens* and *McIntyre* to support government liability here underscores Division I's error in turning to § 302B as a "source" of duty here. Both *Stevens* and *McIntyre* make clear that at a minimum, a special relationship or a showing of some affirmative act on the part of the defendant *with respect to its own property* is necessary before any inquiry into the reasonableness of the defendant's conduct can ripen under § 302B. Here, the shells having been thrown to the lawn (allegedly) by Valencia prior to the officers' investigative stop, § 302B Comment *e* might well serve to establish *Valencia's* liability for failing to reasonably manage his own property, *accord Kim, supra*, but just as the citizen witness to Valencia's act owed no legal duty to intervene, neither did the officers. Indeed, Division I itself acknowledged the significance of the "ownership" element when it posited § 302(B) as "a permissible basis for liability in certain situations where a defendant's property creates an especial temptation and opportunity for criminal misconduct[.]" *Robb v. City of Seattle*, 159 Wn. App. 133, 139, 245 P.3d 242 (2010) [emphasis supplied]; Division I's failure to follow its own reasoning in this case as to items that were *never* the "defendant's property" is inexplicable under precedent and the court's own analysis.

**B. WHERE NEGLIGENCE IS ALLEGED IN THE PERFORMANCE OF A GOVERNMENTAL FUNCTION, THE PUBLIC DUTY DOCTRINE REMAINS THE PROPER “FOCUSING TOOL” FOR DETERMINING TO WHOM THE DUTY ALLEGED WAS OWED.**

The public duty doctrine simply mirrors the law of negligence as applied to any defendant – public or private – by requiring a prerequisite showing that the duty alleged is one that is actionable by the plaintiff specifically (*i.e.*, the “to whom” element of a duty analysis, *see Nivens, supra*). It is, as this Court has explained,

a “focusing tool” we use to determine whether a public entity owed a duty to a “nebulous public” or a particular individual. The public duty doctrine simply reminds us that a public entity – *like any other defendant* – is liable for negligence *only if it has a statutory or common law duty of care.*

*Osborn*, 157 Wn.2d 27-28; *see also Debra L. Stephens and Bryan P. Harteniaux*, THE VALUE OF GOVERNMENT TORT LIABILITY: WASHINGTON STATE’S JOURNEY FROM IMMUNITY TO ACCOUNTABILITY, 30 Seattle U.L.Rev.35 (2006) (public duty doctrine is “merely a part of traditional tort analysis when an asserted duty is based on a statute, regulation, ordinance, or the like.”).

The law recognizes that, in carrying out its various functions, a government can operate in both proprietary and governmental capacities; the principal test in distinguishing between the two being whether the act performed is for the common good or whether it accrues to the special benefit for profit of the corporation. *Okeson v. City of Seattle*, 150 Wn.2d

540, 550, 78 P.3d 1279 (2003). If the government is engaged in a proprietary function, the public duty doctrine does not apply, and the government is held to the same duty of care as private individuals or institutions engaged in the same activity. *Bailey v. Town of Forks*, 108 Wn.2d 262, 268 737 P.2d 1257 (1987).<sup>3</sup> It is only when the government is engaged in exclusively governmental functions – law enforcement activities being paramount among these – that the public duty doctrine, and its exceptions, becomes the framework for determining whether “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.” *Taylor v. Stevens Cy.*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988); accord *Osborn*, *supra*. Thus, whereas § 302B may bear on the “standard of conduct”

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<sup>3</sup> In *Okeson*, for example, the operation of an electrical utility in providing services to ratepayers was deemed proprietary, where as the maintenance of streetlighting was a governmental function. Similarly, in *Steifel v. City of Kent*, 132 Wn. App. 523, 132 P.3d 1111 (2006), Division I recognized that the general operation of a municipal water system is a proprietary function, but the servicing of fire hydrants is governmental; accord *Fisk v. City of Kirkland*, 164 Wn.2d 891, 194 P.3d 984 (2008) (RCW 80.28.010 does not create an actionable duty with respect to maintenance of water pressure for fire suppression). While Amici WSAJ suggests, in fn. 8 of its Brief, that the Legislature “rejected” the distinction between governmental and proprietary functions when it abolished sovereign immunity, this Court, repeatedly, has recognized that the distinction remains critical to determining whether a cause of action may arise in favor of the plaintiff individually. *Okeson*, *supra*; see *J&B Dev. Co. v. King Cy.*, 100 Wn.2d 299, 304-05, 669 P.2d 468 (1983), *overruled on other grounds by Taylor v. Stevens Cy.*, 111 Wn.2d 159, 759 P.2d 447 (1988) (the enactment of RCW 4.96.010 merely removed the barrier of sovereign immunity to permit a tort suit against a governmental entity; it did not create any new causes of action, duties, or liability where none existed before); *Meaney v. Dodd*, 111 Wn.2d 174, 178, 759 P.2d 455 (1988) (citations omitted) [emphasis supplied] (although the Legislature abolished sovereign immunity for municipal corporations in 1967, it did not thereby create any new causes of action or liability .... *The public duty doctrine recognizes that a fundamental element of any negligence action is a duty owed by the defendant to the plaintiff.*)

element of the three-pronged duty analysis, the public duty doctrine stands independent of § 302B and provides the appropriate framework for determining “to whom” such duty of care might be owed.

Ignoring the analytical distinction between proprietary and governmental functions, Amici focus on lines of cases factually and analytically distinct from this case in that each case either (1) involves a proprietary function of the government to which the public duty doctrine does not apply; or (2) rests on statutory duties or specific exceptions to the public duty doctrine that rendered the claims actionable.

*Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983), for example, is a case that involved a government actor serving, in a proprietary capacity, as a psychiatrist at a state hospital; it is not a public duty doctrine case. *Petersen* was analyzed under Restatement (Second) of Torts § 315, as applied by the California Supreme Court in *Tarasoff v. Regents of University of California*, 17 Cal.3d 425, 551 P.2d 334 (1976), which found the relationship between a therapist and a patient sufficient to fall within the Restatement exceptions to the general rule that there is no duty to protect against the criminal acts of a third person. See Restatement (Second) of Torts § 319, Comment *a*, Illustration 2 (duty to exercise reasonable care to control acts of persons having dangerous propensity applied to private sanitarium). Thus, because a private psychiatrist could be subject to the duty articulated, so too could a government actor performing the same function.

Similarly, because construction and maintenance of city streets is considered to be a proprietary function of government, the public duty doctrine does not apply to a road authority's duty to the traveling public to maintain streets in reasonably safe condition for ordinary travel. *See, e.g., Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002); *Goggin v. City of Seattle*, 38 Wn.2d 894, 897, 297 P.2d 602 (1956) (supervision and control of streets is a governmental function, but construction and maintenance of city streets is a proprietary function); *accord* Washington Pattern Instruction (Civil) 140.01. Accordingly, none of the road design cases cited bear on whether the public duty doctrine properly applies here. Likewise, *Parilla v. King Cy.*, 138 Wn. App. 427 (2007), involved a government entity performing the proprietary function of a common carrier, thus implicating the general duty of the owner of any automobile with respect to that property, *accord Kim, supra*, and to which no public duty doctrine analysis applies.

In *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992), the Court – emphasizing as “a preliminary matter” the general rule that there is no duty to control the acts of a third person absent a “definite, established, and continuing relationship” between the actor and third person – held narrowly that the relationship between parole officers and the parolees they supervise was sufficiently definite, established, and continuing to give rise to an actionable duty under Restatement § 315. *Taggart* specifically bases its holding, however, on the duties established by RCW 72.04A.080 and the authority that statute grants to parole officers

to supervise parolees. *Taggart, supra*, at 219. Although *Taggart* cited *Petersen* in its analysis, neither *Petersen* nor *Taggart* provide guidance in the present case for the basic but critical reason that, in each, the duty asserted was premised specifically on a “definite, established and continuing relationship between the defendant and the third party” established either by common law (*Peterson*) or statute (*Taggart*). Contrast *Aba Sheikh v. Choe*, 156 Wn.2d 441, 128 P.3d 574 (2006) (State has no duty to protect public from criminal acts of dependent children). Here, as a matter of soundly established law, the relationship between a police officer and a member of the public is simply too remote to establish the requisite relationship necessary to establish an action in negligence,<sup>4</sup> and, as in *Aba Sheikh*, sound public policy weighs strongly against creating any actionable duty here. See *Keates v. City of Vancouver*, 73 Wn. App. 257, 269, 869 P.2d 88 (1994) (subjecting officers to liability for negligence in the course of police investigations “would have a chilling effect upon law enforcement”); *State v. Bliss*, 153 Wn. App. 197, 204, 222 P.3d 107 (2009) (mere generalized suspicion that a person may be up to no good insufficient to support detention).

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<sup>4</sup> See, e.g., *Osborn, supra*; *Beal v. City of Seattle*, 134 Wn.2d 769, 954 P.2d 237 (1988); *Vergeson v. Kitsap Cy.*, 145 Wn. App. 526, 536, 186 P.3d 1140 (2008); *Timson v. Pierce Cy. Fire Dist. No. 15 and Washington State Patrol*, 136 Wn. App. 376, 149 P.3d 427 (2006); *Johnson v. City of Seattle*, 385 F. Supp. 2d 1091, 1100 (W.D. Wash. 2005); *Jamison v. Storm*, 426 F. Supp. 2d 1144, 1158 (E.D. Wash. 2006).

The remaining cases Amici cite are likewise easily distinguishable in that each implicated a specific exception to the public duty doctrine that rendered actionable the standard of care alleged. In *Bailey*, for example, a duty was found based on the “failure to enforce exception” to the public duty doctrine and an officer’s statutory duty under RCW 70.96A.120 to take into custody a publicly incapacitated individual. There is no such statutory duty in this case. In *Mason v. Bitton*, 85 Wn.2d 321, 534 P.2d 1360 (1975), a duty was found based on the “legislative intent” exception and an officer’s statutory obligation under RCW 46.61.035, when in pursuit or emergency mode, to drive with due regard “for the safety of all persons” – a class of individuals, the Court held, that the statute was intended to protect. Here, again, there is no such statutory duty implicated, let alone any protected class that would include Mr. Robb. In *Campbell v. City of Bellevue*, 85 Wn.2d 1, 530 P.2 234 (1975), the decision turned on the special relationship between agents of the City of Bellevue and the plaintiffs established by virtue of the assurance imparted to plaintiffs that action to correct the faulty electrical wiring at issue had been taken. *See Baerlein v. State*, 92 Wn.2d 229, 234, 595 P.2d 930 (1979) (“The *Campbell* exception contemplates a situation where the agents of the governmental body had knowledge of a defect which violated the statute, failed to take corrective action, and caused plaintiffs to rely on an assurance that the situation had been corrected.”) Here, there was no statutory violation, nor was there any privity between any City agent and Mr. Robb. And, in *McLeod v. Grant Cy. School Dist. No. 128*,

42 Wn.2d 316, 255 P.2d 360 (1953), the duty was explicitly premised on the *in loco parentis* relationship between a school and its pupils: “As a correlative of this right on the part of a school district to enforce, as against the pupils, rules and regulations prescribed by the state board of education and the superintendant of public instruction, a duty is imposed by law on the school district to protect the pupils in its custody from dangers reasonably to be anticipated.” *Id.* at 319-20 [emphasis supplied].

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There is no relationship that could impose any such duty here.

**C. ANY SEMANTIC DISTINCTION BETWEEN AN “AFFIRMATIVE ACT” AND “OMISSION” IS ULTIMATELY IMMATERIAL TO A PROPER ADJUDICATION OF THIS CASE.**

Without explanation, Division I bluntly decided that “[t]his is an affirmative acts case.” *Robb, supra* at 146. Plaintiff and Amici predicate their theory of liability on the officers’ failure to preemptively arrest Berhe and/or take possession of abandoned shells, but argue more broadly that the officers’ acts of initiating and terminating the stop itself were sufficiently “affirmative” to apparently characterize as “affirmative” all

Conduct occurring during the course of the stop.<sup>5</sup> The City appreciates the necessity of framing the *inaction* complained of as an “affirmative act” in order to fall within a § 302B inquiry as to the reasonableness of the officers’ conduct. However, because § 302B is immaterial in determining *to whom* any duty of care would be owed, and because overwhelming Supreme Court precedent declines to distinguish between “affirmative acts” and “omissions” for purposes of determining whether any duty alleged is actionable, any semantic distinction between the terms is ultimately a red herring in this case.<sup>6</sup>

Division I, plaintiff, and Amici cite *Coffel v. Clallam Cy.*, 47 Wn. App. 397, 735 P.2d 686 (1987) (*Coffel I*), exclusively, for the proposition

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<sup>5</sup> Amicus WSAJ alternatively submits that the critical factor in determining whether the officers “affirmatively acted” or merely “failed to act” depends on whether the officers *observed* the shells and made a “volitional” decision not to confiscate the shells – suggesting that the *legal* inquiry into whether an officer at the scene of a *Terry* stop owes a particular plaintiff the duty of care described by § 302B hinges on a *factual* inquiry into what happens to pass through the officer’s visual field. *Brief of Amicus WSAJ* at 19. This argument is creative, but utterly unsupported by precedent or logic. See *Osborn, supra* at 22-23 (“Puzzlingly, the Court of Appeals denied summary judgment because ‘the Osborns could have asserted facts from which a trier of fact could find that Mason County’s actions affirmatively created a separate duty[.]’ *But, of course, the existence of a duty is a question of law, not a question of fact.* [Emphasis supplied; citations omitted.]

<sup>6</sup> The City is accordingly reluctant to further contribute to the needless semantic debate of which the Court has probably grown weary, but is compelled to note that § 302, Comment *a* (incorporated by reference in § 302B, Comment *a*) references § 314 “as to the distinction between act and omission, or ‘misfeasance’ and ‘non-feasance’”; a reading of § 314, along with Black’s definitions contrasting ‘nonfeasance,’ ‘misfeasance,’ and ‘malfeasance,’ should be dispositive as to the points (1) that the officers failure to pick up the shells can *only* be characterized as an “omission,” and (2) that their failure to take action to pick up the shells, *even if the officers realized or should have realized that such action on their part was necessary for another’s aid or protection (i.e., “volitional”)*, does not of itself impose upon them an actionable duty to Mr. Robb to take such action.

that “[the public duty doctrine] provides only that an individual has no cause of action against law enforcement officials for failure to act. Certainly if the officers do act, they have a duty to act with reasonable care.” *Id.* at 403. Division II cited no authority for drawing this distinction, and the City is unaware of any precedent<sup>7</sup> that might support Division II’s conclusion. Rather, Division II’s conclusion in *Coffel I* is contradictory to multiple lines of Supreme Court precedent that draw no distinction between “affirmative acts” and “omissions” and affirm the continued viability of the public duty doctrine as to both. *See, e.g., Taylor v. Stevens Cy.*, 111 Wn.2d 159, 759 P.2d 447 (1988) (public duty doctrine applies where a public entity affirmatively issues a permit); *Babcock v. Mason Cy.*, 144 Wn.2d 774, 30 P.3d 1261 (2001) (public duty doctrine applies where – as in *Coffel* – public officials affirmatively prevented the plaintiffs from entering their property to save items).

Moreover, the procedural history of *Coffel* itself defeats the reasoning in *Coffel I* that Division I applied here. Plaintiff, Amici, and Division I all ignore that, on remand, *Coffel* was again dismissed and was

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<sup>7</sup> Plaintiff cites *Logan v. Weatherly*, 2006 WL 1582379 (E.D. Wash.) as affirming *Coffel I*. In *Logan*, officers in control of a harmful substance discharged the substance in a manner that directly harmed the plaintiffs, thus implicating the officers’ common law duties with respect to an instrumentality within their possession and control as well as establishing privity with the plaintiffs under the transferred intent element of a second degree assault analysis sufficient to defeat any public duty doctrine analysis. *Logan* is an unpublished decision issued prior to the amendment to FRCP 32.1 and thus has no precedential or persuasive value here. Moreover, insofar as *Logan* is based on *Coffel I* alone, it too ignores the subsequent reasoning in *Coffel II* and its abrogation of the dicta in *Coffel I*.

heard a second time on appeal. *Coffel v. Clallam Cy.*, 58 Wn. App. 517, 794 P.2d 513 (1990) (*Coffel II*). The issue on the second appeal was whether the law of the case as set forth in *Coffel I* (distinguishing between affirmative acts or omissions) applied, or whether plaintiffs should be permitted the benefit of this Court's decision in *Bailey, supra*, which, while *Coffel* was on remand, set forth the "failure to enforce" exception to the public duty doctrine. In *Coffel II*, Justice Pearson, sitting pro tem in Division II, rejected *Coffel I* as the law of that case, and instead, *applying a public duty doctrine analysis*, re-analyzed the alleged affirmative acts within the specific context of the "failure to enforce" exception. Division I holds out *Coffel I* as its grounds for ignoring the public duty doctrine here, but that reasoning is defeated by *Coffel II* and its recognition that claims against government actors engaged in governmental conduct can *only* be analyzed within the framework of the public duty doctrine and its exceptions – regardless of whether such conduct comprises "affirmative acts" or "omissions." *Coffel II*, in rejecting *Coffel I*, is in turn consistent with all Washington case law analyzing the duties of a law enforcement officer engaged in law enforcement activities and affirming – repeatedly and consistently – that the general duties of a law enforcement officer cannot give rise to liability absent an exception to the public duty doctrine that sets the plaintiff apart from the general public and thus renders the duty actionable.

## II. CONCLUSION

The City is of course mindful of the deeply tragic circumstances underlying this case, as is true in many that come before this Court. Sad facts, however, should not create bad law. Where the Restatement itself defines the parameters of § 302B, where § 302B does nothing to establish the privity between parties necessary in any negligence action, where there is no cause of action generally that could lie against a private actor here, and where no exception to the public duty doctrine creates an actionable duty, the Court should decline to toss aside decades of established precedent that guide trial courts and litigants alike. This Court should reverse Division I's published decision and remand for dismissal.

DATED this 29<sup>th</sup> day of December, 2011.

PETER S. HOLMES  
Seattle City Attorney

By:   
REBECCA BOATRIGHT, WSBA #32767  
Assistant City Attorney

Attorneys for Petitioners

**CERTIFICATE OF SERVICE**

Donna M. Robinson certifies under penalty of perjury under the laws of the State of Washington that the following is true and correct.

I am employed as a Legal Assistant with the Seattle City Attorney's office.

On December 30, 2011, I emailed, per agreement, a copy of this document to the following counsel:

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I further state that I requested ABC Messengers to file the original and one copy of this document with the Washington State Supreme Court.

DATED this 30<sup>th</sup> day of December, 2011.

  
DONNA M. ROBINSON