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No. 63299-0-I

DIVISION I OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

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

Appellee,

vs.

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

Appellants,

and

UNKNOWN JOHN DOES,

Appellees.

REPLY BRIEF OF APPELLANTS CITY OF SEATTLE, OFFICER KEVIN MCDANIEL AND OFFICER PONHA LIM

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I. Introduction

Plaintiff advances three legal arguments in support of her case. All fail as matters of law.

First, plaintiff argues that "if a private actor would be liable under any circumstances, then the public actor is likewise liable," *Appellee's Brief* at p. 23. While plaintiff is correct that under RCW 4.96.010 a governmental entity is subject to liability for its tortious conduct to the same extent as would be a private person or entity, there is no common law cause of action, against either a public or private entity, for negligent investigation, and thus no circumstances here under which any actor – public or private – could be subject to liability for the acts or omissions alleged as occurring during the course of this police investigation. This reason in and of itself forecloses any inquiry into the reasonableness of the officers' alleged conduct in connection with their investigative stop of Samson Berhe and requires dismissal of the Complaint.

Second, plaintiff argues that "the common law distinction between governmental and proprietary functions [is] obsolete" and thus, the public duty doctrine does not serve as a bar to her claims. *Appellee's Brief* at p. 23. Plaintiff is mistaken. Courts continue to draw the distinction between governmental and proprietary functions for purposes of assessing a government's duty and it remains firmly entrenched in Washington law that

claims arising out of *governmental* acts or omissions are, absent an exception to the public duty doctrine, not actionable in tort. It is undisputed that no exceptions to the public duty doctrine apply in this case. CP 402.

Third, plaintiff argues that Restatement (Second) of Torts § 302(B) independently imposed upon Officers McDaniel and Lim a duty to guard Mr. Robb against Berhe's conduct. *Appellee's Brief* at p. 15. Plaintiff relies on *Parrilla v. King Cy.,* 138 Wn. App. 427, 157 P.3d 879 (2007), but *Parrilla* is not on point. *Parrilla*, a case in which the operator of a common carrier left his running vehicle in the possession of his crazed passenger, is not a public duty doctrine case and contributes nothing to the analytical framework within which this case must be considered. Where there is no underlying cause of action for the investigative acts or omissions alleged, and where the public duty doctrine would bar such claims notwithstanding, neither *Parrilla* nor § 302 operate to establish an independent basis upon which liability can be founded.

The principal issue raised on summary judgment is the preliminary issue that must be resolved in any negligence action: Whether Seattle Police Officers McDaniel and Lim owed a duty to Mr. Robb actionable in tort. The trial court correctly concluded that the public duty doctrine applied, but erred in finding a question of fact as to whether duty may exist pursuant to § 302 depending on whether the officers' conduct is determined to comprise

"affirmative acts" as may be distinguished from "omissions." Because § 302 does not independently establish a cause of action, because § 302 is not applicable to a public duty doctrine analysis, and because conduct analyzed under § 302 cannot result in liability unless a duty is first established, any inquiry into the reasonableness of the officers' conduct under § 302 and *Parrilla* is improper. The trial court's order denying summary judgment should be reversed and the matter remanded for dismissal.

II. There is no cause of action, against either public or private entities, arising out of an allegedly negligent investigation.

Under RCW 4.96.010(1),

> All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct ... to the same extent as if they were a private person or corporation.

Plaintiff is thus correct that under RCW 4.96.010, where factual circumstances exist under which a private entity may owe a duty to conform to a particular standard of care, so too may a governmental entity. Courts are clear, however, that in abolishing sovereign immunity for municipal corporations, the Legislature did not thereby create any new causes of action; it is still the law that to maintain a cause of action against a government, as against a private person, a plaintiff must first establish a duty owed by the defendant to the plaintiff. *Meaney v. Dodd*, 111 Wn.2d 174, 178, 759 P.2d 455 (1988) (citations omitted).

The question of whether a duty exists is a question of law. *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001). "A duty can arise either from common law principles or from a statute or regulation." *Doss v. ITT Rayonier, Inc.*, 60 Wn. App. 125, 129, 803 P.2d 4 (1991). In determining whether a legal duty exists, courts look to "mixed considerations of 'logic, common sense, justice, policy, and precedent.'" *Snyder*, 145 Wn.2d at 243 (*quoting Lords v. N. Auto. Corp.*, 75 Wn. App. 589, 596, 881 P.2d 256 (1994). Assuming as true the factual allegations as plaintiff has pled and argued, courts are clear and consistent that, applying principles of logic, common sense, justice, policy, and precedent, under these circumstances a cause of action will not lie – against either a public or private entity. In finding a question of fact as to whether a duty may exist under these circumstances, the trial court erred.

Absent statutory exception,[1] it is soundly established that Washington "does not recognize the tort of negligent investigation."

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[1] For example, Washington courts have held that DSHS caseworkers have a duty to exercise reasonable care when investigating child abuse allegations. But courts also recognize that these cases are distinguishable because the duty exists pursuant to statute and administrative regulations. *See, e.g., Lesley v. Dep't of Soc. and Health Servs.*, 83 Wn. App. 263, 273, 921 P.2d 1066 (1996) ("A specific statute provides that DSHS caseworkers have a duty to investigate. RCW 26.44.050. A cause of action thus exists against DSHS caseworkers."); *Yonker v. Dep't of Soc. and Health Servs.*, 85 Wn. App. 71, 81-82, 930 P.2d 958 (1997) (RCW 26.44.050 imposed duty to investigate reports of possible occurrence of child abuse).

Fondren v. Klickitat Cy., 79 Wn. App. 850, 862, 905 P.2d 928 (1995) ("a claim for negligent investigation is not cognizable under Washington law") (*citing Donaldson v. Seattle*, 65 Wn. App. 661, 671, 831 P.2d 1098 (1992), *rev. dismissed*, 120 Wn.2d 1031, 847 P.2d 481 (1993); *see also Blackwell v. DSHS*, 131 Wn. App. 372, 375, 127 P.3d 752 (2006) ("Generally a claim for negligent investigation does not exist under common law"); *M.W. v. Dep't of Soc. & Health Servs.*, 110 Wn. App. 233, 247-48, 39 P.3d 993, 1000 (2002) (generally no common law cause of action for negligent investigation); *Laymon v. Dep't of Natural Resources*, 99 Wn. App. 518, 530, 994 P.2d 232 (2000) (no cause of action for negligent investigation); *Corbally v. Kennewick Sch. Dist.*, 94 Wn. App. 736, 973 P.2d 1074 (1999) (no cause of action for negligent investigation of teacher by school district). Indeed, Washington's Supreme Court reaffirmed this established rule just one day prior to the filing of this Reply:

> Such claims [for negligent investigation] also do not exist under common law in Washington. *Pettis v. State*, 98 Wn. App. 553, 558, 990 P.2d 453 (1999) ("In general, a claim for negligent investigation does not exist under the common law of Washington. That rule recognizes the chilling effect such claims would have on investigations.") (*citing Corbally v. Kennewick Sch. Dist.*, 94 Wn. App. 736, 740, 973 P.2d 1074 (1999).

Ducote v. Dep't of Soc. & Health Servs., -- Wn.2d --, -- P.3d -- (December 17, 2009) (declining to imply from statute a cause of action for negligent investigation).

Washington's continuing refusal to recognize a cause of action for acts or omissions arising during the course of an investigation is firmly grounded in principles of logic, common sense, justice and policy. In the realm of police investigations, courts repeatedly observe that holding investigators liable for their negligent acts "would have a chilling effect upon law enforcement and would give rise to potentially unlimited liability for any type of police activity." *Keates v. City of Vancouver*, 73 Wn. App. 257, 269, 869 P.2d 88 (1994) (*citing Dever v. Fowler*, 63 Wn. App. 35, 44-45, 816 P.2d 1237 (1991). Thus, in *Dever*, Division I affirmed the dismissal of a claim for negligent fire investigation on the ground that plaintiff had "failed to state a claim upon which relief could be granted." *Id.* at 39.

The court's reasoning in *Dever* extends beyond governmental investigations; the rule rejecting a common law cause of action for negligent investigation is true regardless of whether the acts alleged are those of a public or private entity. *See, e.g.*, *Lambert v. Morehouse*, 68 Wn. App. 500, 505, 843 P.2d 1116 (1993) ("[a]s a matter of policy, we conclude that tort liability for negligent investigation is equally inappropriate in the employment relationship.") In *Lambert*, Division I, relying on *Dever*, noted

that "with the exception of Montana, other jurisdictions have 'uniformly rejected such claims'" [for negligent investigation]. *Lambert*, 68 Wn. App. at 504. This court then emphatically held: "Confronted squarely with the issue in this case, we conclude that Washington courts have not and should not recognize a cause of action for negligent investigation." *Id.*

In the case at bar, plaintiff alleges police negligence arising specifically out of officers' conduct in failing to pick up shotgun shells observed on or near a sidewalk during an investigation of a residential burglary, failing to conduct a warrant search (that undisputedly would not have resulted in Berhe's arrest), and failing to arrest Berhe prior to the murder of Mr. Robb. CP 7-20. Plaintiff urges, and the trial court found, a question of fact as to whether such conduct comprised "affirmative acts" (of apparently failing to act) as contrasted with "omissions," but any such semantic distinction is one without difference, under these circumstances, as to the question of duty. Such conduct, occurring as it did during the course of routine police investigation(s), does not and cannot, under established precedent, give rise to a cause of action. As our courts have held – repeatedly, consistently, and as to both public and private actors – there is simply no recognized cause of action that could give rise to liability for the negligent acts or omissions alleged here.

III. Even assuming, *arguendo*, a recognized cause of action for negligence exists, under the public duty doctrine it remains incumbent upon one seeking to recover from a public entity to establish that the duty breached was one owed to the injured person individually and was not merely the breach of a duty owed to the public in general.

Plaintiff urges, without citation to relevant authority, that RCW 4.96.010(1) rendered "obsolete" the distinction between governmental and proprietary acts, and 2) subjects a governmental entity to liability for harm arising out of the exercise of all governmental functions – regardless of whether the governmental is acting in a "governmental" or "proprietary" capacity. This is an incorrect statement of the law.

> 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.***

Meaney v. Dodd, 111 Wn.2d 174, 178, 759 P.2d 455 (1988) (citations omitted) [emphasis supplied]. Before a court may find an actionable duty owed by a governmental entity, a plaintiff must first establish that the duty was owed to the injured person individually and was not merely "an obligation owed to the public in general." *Taylor v. Stevens Cy.*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988) (*quoting J&B Dev. Co. v. King Cy.*, 100 Wn.2d 299, 303, 669 P.2d 468 (1983); *see also Vergeson v. Kitsap Cy.*, 145 Wn. App. 526, 536, 186 P.3d 1140 (2008) (under "established precedent,"

the public duty doctrine serves as "a 'focusing tool' that courts use to determine whether a public entity owes a duty to a "nebulous public" or to a particular individual."). Indeed, despite arguing the obverse, plaintiff concedes this point.[2]

In resolving the legal question as to whether a governmental entity owes a duty in a particular case, courts continue to look to whether the governmental acts alleged were committed in a governmental or proprietary capacity. *Stiefel v. City of Kent*, 132 Wn. App. 523, 132 P.3d 1111 (2006). A governmental entity acts in a governmental capacity "when the act performed is for the common good of all, that is, for the public[,]" *Hagerman v. City of Seattle*, 189 Wn. 694, 701, 66 P.2d 1152 (1937); where the act performed "is for the special benefit or profit of the corporate entity," the government acts in a proprietary capacity. *Id.*; *see also Russell v. City of Grandview*, 39 Wn.2d 551, 553, 236 P.2d 1061 (1951) (public entity acts in a proprietary rather than a governmental capacity when it engages in business-like activities that are normally performed by private enterprises).

If the entity is performing a proprietary function, it is held to the same duty of care as a private individual or corporation engaged in the same activity. *Dorsch v. City of Tacoma*, 92 Wn. App. 131, 135, 960 P.2d 489

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[2] See *Appellee's Brief* at p. 24,

(1998).[3] But where the public entity is performing a governmental function, no duty will lie absent an exception to the public duty doctrine. *Stiefel*, 132 Wn. App. at 528-29. Plaintiff cites no contrary authority.

It is well established, as a general rule, that law enforcement activities are by definition public duties that cannot be reached in negligence. *Chambers-Castanes v. King Cy.,* 100 Wn.2d 275, 288, 669 P.2d 451 (1983); *see also Vergeson*, 145 Wn. App. at 536 (claims alleging police liability for failure to remove quashed warrant from database not actionable under public duty doctrine); *Timson v. Pierce Cy. Fire Dist. No. 15 and Washington State Patrol*, 136 Wn. App. 376, 149 P.3d 427 (2006) (no actionable duty where State Patrol owed duty to public in general and not to plaintiff individually); *Torres v. Anacortes*, 97 Wn. App. 64, 981 P.2d 891 (1999) (barring exception to public duty doctrine, no liability in negligence for police conduct); *Keates v. Vancouver*, 73 Wn. App. 257, 869 P.2d 88 (1994), *citing Dever*, 63 Wn. App. at 44-45 (exposing police to liability for conduct in the course of police investigations "would have a chilling effect on police investigation and would give rise to potentially unlimited liability for any type of police activity").

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[3] Thus, in *Parrilla*, because King County was functioning in a proprietary capacity with respect to operating its bus service, the public duty doctrine did not apply and common law principles of negligence applied.

Plaintiff cites, and the trial court relied upon, *Coffel v. Clallam Cy.*, 47 Wn. App. 397, 735 P.2d 686 (1987) (*Coffel I*) for the proposition that where a law enforcement officer undertakes an affirmative act, the public duty doctrine does not apply. *Coffel* is not on point. In *Coffel I*, Division II found a question of fact as to whether certain officers responding to the demolition of a commercial building had acted reasonably by taking affirmative action to restrain a tenant from protecting merchandise inside the building and reversed the trial court's order of dismissal as to those officers. On remand, the trial court again dismissed, finding no actionable duty under the public duty doctrine arising from the affirmative acts of the officers. *Coffel v. Clallam Cy.,* 58 Wn. App. 517, 518, 794 P.2d 513 (1990) (*Coffel II*).

Shortly after Division II returned its decision in *Coffel I*, the Supreme Court issued its ruling in *Bailey v. Forks*, 108 Wn.2d 262, 737 P.2d 1257 (1987), establishing a "failure to enforce" exception to the public duty doctrine that applies 1) where governmental agents have knowledge of a statutory violation; 2) where the agents fail to take corrective action; and 3) where the plaintiffs are in the class the statute is designed to protect. *Id.* at 268. The *Coffel II* plaintiffs appealed the dismissal on remand, urging that the Supreme Court's ruling in the interim established a basis on which the appellate court could, setting aside the law of the case, find that the "failure

to enforce" exception to the public duty doctrine precluded summary judgment. *Coffel II* at 520. Applying the *Bailey* analysis, and citing to statutes intended to protect property owners such as plaintiffs from the invasion of their property rights such as at issue in that case, the *Coffel II* court found that plaintiffs had produced sufficient evidence of a breach of a duty owed to them individually so as to preclude summary judgment. *Id.* at 523-24. Neither *Coffel I* nor *Coffel II* stand for the premise that, absent an exception to the public duty doctrine, a governmental entity's performance of a public function, either by way of action or inaction, can establish an actionable duty.[4] *Compare*, e.g., *Babcock v. Mason Cy. Fire Dist. No. 6*, 144 Wn.2d 774, 30 P.3d 1261 (2001) (affirming Division II in finding no special relationship where firefighters affirmatively interfered with property owners' attempts to salvage belongings).

Here, it is undisputed that the public duty doctrine applies to law enforcement activities. It is undisputed that no exceptions to the public duty doctrine apply. CP 401-402. In finding a question of fact under *Coffel I* as to whether the public duty doctrine would bar the claims as pled here, the trial court erred.

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[4] Plaintiff's reliance on the U.S. District's Court's unpublished decision in *Logan v. Weatherly*, 2006 U.S. Dist. Westlaw 1582379, likewise fails to address the *Coffel* opinion as modified by *Coffel II*.

IV. Absent a duty, Restatement (Second) of Torts § 302 does not establish a cause of action, and conduct, even if negligent under Restatement (Second) of Torts § 302, "does not result in liability unless there is a duty owed by the actor to the other not to be negligent." Because Officers McDaniel and Lim owed Mr. Robb no actionable duty in connection with their investigative encounter with Samson Berhe, neither *Parrilla* nor § 302 generally are relevant to the legal inquiry at bar.

Relying heavily on dicta in *Parrilla*, the trial court found a question of fact as to whether a duty could be found under § 302. The trial court's reasoning, and plaintiff's argument, must be rejected for two reasons: 1) whether a duty is owed is a question of law, not fact; and 2) Section 302 does not independently establish a cause of action. *Parrilla* is not on point, and § 302 does not apply under these circumstances.

A. Whether Officers McDaniel and Lim owed Mr. Robb a duty in connection with the conduct alleged is a legal inquiry that does not turn on any factual dispute as to the nature of the officers' actions.

The trial court erred in turning to questions of fact to determine whether Officers McDaniel and Lim owed Mr. Robb a duty. *Osborn v. Mason Cy.,* 157 Wn.2d 18, 134 P.3d 197 (2006), is instructive on this point. In *Osborn*, the parents of a girl who was raped and murdered by a Level III sex offender brought suit against Mason County for failing to warn them of the offender's presence. They argued that a detective's affirmative act of stating that he would post flyers around the neighborhood and otherwise notify the community of the sex offender's presence gave rise to a duty to

warn or otherwise protect foreseeable victims. They produced evidence that despite knowing that the sex offender had followed two minor children, the detective not only failed to take protective measures but affirmatively discouraged others from taking protective action. *Id.* at 20-22.; *accord Coffel II.* The Supreme Court rejected the Court of Appeals' finding that Mason County's affirmative acts had created a separate duty actionable in tort:

> 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 under the rescue doctrine." *Osborn*, 122 Wn. App. at 837, 95 P.3d 1257. But, of course, the existence of a duty is a question of law," not a question of fact. *Tae Kim v. Budget Rent A Car Sys. Inc.*, 143 Wn.2d 190, 195, 15 P.3d 1283 (2001).

Osborn, 157 Wn.2d at 22-23. The Court went on to note that neither party disputed any fact relevant to the existence of a duty, but only whether Mason County's actions "negligently increased the risk of harm to [the offender's] potential victims." *Id.* at 23 (citation to appellate opinion omitted).

Here, whether Officers McDaniel and Lim owed a duty, and the nature of that duty, are matters of law. *Id.* at 23; *Snyder*, 145 Wn.2d at 243. If the duty owed was a public duty, the Officers owed no duty individually to plaintiff or her decedent absent an exception to the public duty doctrine. *See* Section III, *supra.* As a matter of law, there is no cause of action for

negligent investigation. *See* Section II, *supra.* As a matter of law, law enforcement activities in general are public duties that are not actionable in tort. *See* Section III, *supra.* As a matter of law, the public duty doctrine applies. It is undisputed that no exception to the public duty doctrine is at issue. CP 401-402.

Plaintiff's reliance on *Parrilla* is misplaced. *Parrilla* is not a public duty doctrine case. *Parrilla* involves a bus driver who affirmatively left a bus of which he was in possession running on a public street with a crazed passenger on board. *Citing* to *Kim v. Budget Rent A Car Syst., Inc.*, 143 Wn.2d 190, 15 P.3d 1283 (2001), in which the Supreme Court declined to apply § 302 to the facts of that case but recognized in dicta its potential viability in other circumstances, the *Parrilla* court held narrowly that plaintiff had alleged sufficient facts to withstand CR 12(b)(6) judgment on the pleadings as to whether King County, operating in a proprietary capacity, owed plaintiffs a duty to guard against its passenger's foreseeable criminal conduct. *Parrilla*, 138 Wn. App. 441. The *Parrilla* court emphasized that its ruling was specific to the facts of that case. *Id.* at 430. The court's discussion of § 302, and its applicability in common law, is formulated in a framework relevant only to the facts of *Parrilla*, premised on dicta in *Kim*, and is itself dicta that relates only to the specific circumstances at issue in *Parrilla.*

In *Cameron v. Murray*, 151 Wn. App. 646, 214 P.3d 150 (2009), this court recognized the limited applicability of *Parrilla*. In *Cameron*, a high school student died of a head injury received by way of a criminal assault at a keg party for graduating students. His mother brought suit against non-assailant students who had planned the party, analogizing to *Parrilla* and urging under § 302 that common law liability of persons supplying intoxicants should extend to circumstances, such as a teen-age keg party, where violence inheres, resulting in foreseeable injury. *Cameron*. at 652. While finding that the mother's comparison of a "teenage kegger" to a large bus as "an instrumentality uniquely capable of causing severe injuries" was not "inapt," *Id.* at 654, this court nonetheless declined to analyze the case under § 302, concluding that it was bound by precedent closer in point. *Id.*

This court is bound by the same rule here. Precedent directly on point holds that no common law cause of action for negligent investigation will be recognized by Washington courts. *See* Section II, *supra*. Precedent directly on point bars claims arising out of governmental activities unless an exception to the public duty doctrine applies. *See* Section III, *supra*. Particularly in these circumstances, where interacting with persons with criminal propensities is a routine part of a paramount public duty, which in all circumstances must be performed with due regard for the rights and privileges that the Constitution secures notwithstanding the foreseeability of

one's future criminal conduct, rules of *stare decisis* bind this court to the precedent soundly established and oft-affirmed in analyzing the duty owed by police officers to the public they serve. To reject decades of established precedent directly on point in favor of dicta specific only to the particular circumstances of *Parrilla* would be clear error of law.

B. In the absence of an established duty, § 302 does not independently establish a theory of recovery.

Plaintiff, and the trial court, focus their attention on *Restatement (Second) of Torts*, § 302(B):

> An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.

Section 302(B), Comment (a) explains § 302(B) as a special application of the general rule stated in § 302. Section 302(B), Comment (a), references the reader to § 302, Comment (a), which clarifies:

> This section is concerned only with the negligent character of the actor's conduct, and not with his duty to avoid the unreasonable risk.

Restatement (Second) of Torts, § 302, Comment (a).

To the extent plaintiff construes the court's dicta in *Parrilla* to support the creation of a new theory of recovery under § 302, the comments, illustrations, and scope notes of the Restatement itself belie such a reading.

Section 302 is included, along with Sections 297-309, under Topic 4 of the Restatement, *Types of Negligent Acts*. The Scope Note explains that § 302 does not in and of itself establish a duty but relates only to circumstances in which one's conduct may be found to be negligent. The Scope Note begins:

> In order that either an act or a failure to act may be negligent, the one essential factor is that the actor realizes or should realize that the act or the failure to act involves an unreasonable risk of harm to an interest of another, which is protected against unintended invasion.

Restatement (Second) of Torts Topic 4, Types of Negligent Acts, Scope Note [emphasis supplied]. This is, effectively, the crux of § 302. But the Scope Note continues:

> In order, however, that liability may result from such negligence, it is essential that there be a breach of such a duty. ***Conduct which is negligent in character does not result in liability unless there is a duty owed by the actor to the other not to be negligent.***

Id. [Emphasis supplied.] In other words, if the actor owes a duty not to be negligent in performance of the conduct at issue, §§ 297-309 of the Restatement may be applicable in determining whether the alleged conduct conformed to the Standard(s) of Conduct discussed. But where the actor owes no duty not to be negligent in his performance, his conduct, no matter how negligent under §§ 297-309, does not result in liability. <u>Section 302 does not relieve plaintiff of her burden to show a duty</u>.

In *Parrilla*, this court relied on dicta in *Kim*, 143 Wn.2d 190, in determining whether the pleadings were sufficient to state a cause of action given the analytical framework of § 302. In *Kim*, the Court references "the duty of the owner of an automobile to manage it as not to create an unreasonable risk of harm to others." *Kim*, 143 Wn.2d at 195 (quoting *Richards v. Stanley*, 43 Cal.2d 60, 65, 271 P.2d 23 (1954); *see also* WPI 70.01. It is in the context of this overarching duty of the owner (or possessor) of an automobile not to create an unreasonable risk of harm that the *Parrilla* court's analysis § 302 must be read. In contrast, Officers McDaniel and Lim owed no duty to plaintiff or Mr. Robb in connection with their investigative encounter with Samson Berhe. *See* Sections II and III, *supra*. Absent such a duty, any analysis into the character of the officers' conduct is irrelevant, and the character of the conduct itself, as the Scope Note to Topic 4 and the Comments to §§ 302 and 302(B) make clear, cannot result in liability. Section 302 does not in and of itself establish a cause of action. It does not create an exception to the public duty doctrine. In applying § 302 very narrowly to the specific facts of that case and the procedural posture of that case on appeal pursuant to dismissal under CR 12(b)(6), the *Parrilla* court did not hold otherwise.

V. Conclusion

The question before this court is one that can only be decided as a matter of law: Whether Officers McDaniel and Lim owed Mr. Robb any duty in connection with their brief investigative encounter with Samson Berhe on June 26, 2005. As a matter of law, they did not. Well-established precedent articulates the obvious bases in logic, common sense, justice, and policy underlying Washington courts' consistent refusal to recognize negligent investigation as a cause of action and affirming that law enforcement activities in general, like all public duties performed by governmental entities operating in a governmental capacity, cannot be reached in negligence absent an exception to the public duty doctrine.

For the reasons briefed before this Court, the trial court's order denying the City's Motion for Summary Judgment should be reversed and this matter remanded for dismissal.

RESPECTFULLY SUBMITTED this 18th day of December, 2009.

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Seattle City Attorney

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Attorneys for Appellants, City of Seattle,
Officer Kevin McDaniel
& Officer Ponha Lim

PROOF OF SERVICE

DONNA 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 18, 2009, I requested ABC Legal Messengers to serve, by December 18, 2009, a copy of this document upon the following counsel:

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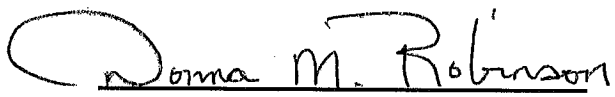
I further state that I requested ABC Messengers to file, by December 18, 2009, the original and one copy of this document with the Court of Appeals, Division I.

DATED this 18th day of December, 2009.



DONNA ROBINSON