

NOTE: In regards to this amended response, on page 3 of the Court of Appeals opinion, footnote 5, the Court stated: "Washburn moved to strike the City's late filing of its Amended Response to Brief of Amici Curiae Legal Voice and Washington Women Lawyers. We grant the motion in part and do not consider any new material in the City's amended brief."

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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

Case No. 66534-1-I

CAROLA WASHBURN and JANET LOH,
individually and on behalf of the
ESTATE OF BAERBEL K. ROZNOWSKI,
a deceased person,

Plaintiffs/Respondents,

v.

CITY OF FEDERAL WAY, a Washington
municipal corporation,

Defendant/Appellant.

**AMENDED RESPONSE TO BRIEF OF AMICI CURIAE
LEGAL VOICE AND WASHINGTON WOMEN LAWYERS**

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I. RESPONSE

The issue on appeal is whether Officer Hensing owed Ms. Roznowski a legal duty of care when he served an anti-harassment protection order on Mr. Kim. This is a threshold issue, requiring the Court to consider the state of the law at the time Officer Hensing served the anti-harassment order. The undisputed material facts demonstrate unequivocally that the City owed no duty in this case. Whether Officer Hensing breached a duty of care is a secondary issue and immaterial to the issue here of whether he owed a duty of care in the first place. As such, Amici's argument that Officer Hensing *did not act reasonably* or *should have acted differently* or that *Mr. Kim's actions were foreseeable* misses the point of this appeal entirely.

A. Restatement (Second) of Torts § 302B Does Not Apply.

Washington courts have acknowledged the existence of a doctrine set forth in Restatement (Second) of Torts § 302B where there is a "possibility of a duty to guard another person against a foreseeable risk of harm caused by a third person." *Robb v. City of Seattle*, 159 Wn. App. 133, 139 (2010)¹. However, § 302B does not establish a duty that does not otherwise exist in the law. Further, with the exception of *Robb*, no

¹ On June 8, 2011, the Washington Supreme Court accepted discretionary review of the *Robb* decision. *Robb v. City of Seattle*, 171 Wn.2d 1024 (2011). It is set for argument on January 19, 2012.

Washington court addressing a police officer engaging in governmental functions has imposed a duty on police to act in a particular way **absent** a recognized exception to the public duty doctrine. Washington courts discussing § 302 B have not created a separate “affirmative acts” exception as a basis for imposing liability.

Under comment e of § 302B, there are two situations in which a duty to protect against intentional or criminal misconduct of others may arise: (1) “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 (2) “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.” Restatement (Second) of Torts, § 302B, cmt. e.

The first situation discussed in comment e is inapplicable here, because the City did not owe a special responsibility toward Ms. Roznowski. Further, the City did not have any sort of relationship with Ms. Roznowski that gave rise to a duty to protect her from intentional misconduct. In *Hutchins v. 1001 Fourth Avenue Assoc.*, 116 Wn.2d 217, 802 P.2d 1360 (1991)(not a public duty doctrine case), the Court identified several examples of this type of special responsibility relationship, including one between a school and a student, a psychiatrist and a

dangerous patient, a carrier and its passenger, an employer and its employee, a hospital and a patient, and a business establishment and its customer. *Hutchins*, 116 Wn.2d at 227-29. The Court recognized that these relationships are protective in nature and historically involve “an affirmative duty to render aid.” *Id.* at 228, citing *Petersen v. State*, 100 Wn.2d 421, 426, 671 P.2d 230 (1983). The City of Federal Way did not have the same type of continuous relationship with Ms. Roznowski, nor did it have an ongoing duty to protect her from harm. The first situation under comment e does not apply.

The second situation in comment e is also inapplicable. Plaintiffs read this comment to mean that every time a police officer takes *any* affirmative act, that police officer will be exposed to liability if a jury believes he or she failed to act reasonably. This would serve to completely undermine effective law enforcement and is precisely the type of open-ended, nebulous liability the public duty doctrine eliminates.

Courts have applied the second situation described in comment e in *Robb and Parilla v. King County*, 138 Wn. App. 427, 436, 157 P.3d 879 (2007). *Parilla* is not a public duty doctrine case at all. It involved an owner/operator of a common carrier that transferred possession of a

running bus to a known unstable passenger.² In the context of a CR 12 (b)(6) motion to dismiss, the Court of Appeals reversed summary judgment for King County, focusing on comment e, subsections H and G to the Restatement. *Parilla* provides no support for the notion of an “affirmative acts” exception to the public duty doctrine or a separate theory of tort liability against police officers.

Robb is unique and at odds with the well-settled line of Washington Supreme Court cases holding that

[a]s a general rule, our common law imposes no duty to prevent a third person from causing physical injury to another. See Restatement (Second) of Torts § 315. Additionally, under the public duty doctrine, the [governmental entity] is not liable for its negligent conduct even where a duty does exist unless the duty was owed to the injured person, and not merely the public in general. [Citations omitted.]

Aba Sheikh v. Choe, 156 Wn.2d 441, 448, 128 P.3d 574 (2006).

The *Robb* court cites to *Coffel v. Clallam Cy*, 47 Wn. App. 397 (1987) (*Coffel I*). In that case, Division II found a question of fact as to whether officers responding to the demolition of a commercial building

² The public duty doctrine applies only when the public entity is performing a governmental function. *Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987). 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 (1998). A public entity acts in a proprietary rather than a governmental capacity when it engages in business-like activities that are normally performed by private enterprise. See *Dorsch*, 92 Wn. App. at 135.

had acted reasonably by taking affirmative action to prevent a tenant from protecting merchandise inside the building. It reversed and remanded. On remand, the trial court again dismissed the case, finding no duty under the public duty doctrine. Shortly after *Coffel I* was decided, the Supreme Court decided *Bailey v. Forks*, 108 Wn. 2d 262 (1987), which established the “failure to enforce” exception to the public duty doctrine. In *Coffel II* (58 Wn. App. 517 (1990)), Division II decided that plaintiffs should have the benefit of *Bailey*. Neither *Coffel I* nor *Coffel II* stand for the proposition that a governmental entity’s performance of a public function, either by way of action or inaction, can establish an actionable duty **absent an exception to the public duty doctrine.**

Even in *Robb* and *Parilla* the “affirmative acts” were wrongful in a tortious sense, justifying the imposition of a duty and civil liability. These affirmative acts were not mandated by statute – here, serving an anti-harassment order as RCW 10.14.100 directs. In *Robb*, the alleged “affirmative act” was the officers taking “control of a situation and then depart[ing] from it leaving shotgun shells lying around within easy reach of a young man known to be mentally disturbed and in possession of a shotgun.” *Id.* at 147. In *Parilla*, again, not a public duty doctrine case, the “affirmative act” was the bus driver departing the bus and leaving the keys in the ignition, aware that “an instrumentality uniquely capable of causing

severe injuries was left idling and unguarded within easy reach of a severely impaired individual.” *Parilla*, 138 Wn. App. at 440-41.

Here, Officer Hensing’s only “affirmative act” was serving the temporary anti-harassment order exactly as RCW 10.14.100 prescribes. A police department has no option but to serve these orders if the petitioner so requests. It is a mandatory statutory action. RCW 10.14.100(2). By law, the act of serving a temporary anti-harassment order in exact compliance with RCW 10.14.100 cannot be a tortious “affirmative act” that gives rise to civil liability. Section § 302 B does not create a duty on the part of a police officer that does not otherwise exist by virtue of a recognized exception to the public duty doctrine. In any event, there can be no duty under the affirmative act section of § 302B comment e where an officer acts exactly as commanded by statute.³

B. The Legislative Intent Exception to the Public Duty Doctrine Does Not Apply.

The Legislature does not treat all protection orders equally, and it intentionally developed a wide variety of protection orders available to petitioners. They are not interchangeable. While it may be difficult to

³ To hold otherwise would be to (1) ignore the well-established line of Washington cases that police are not liable for negligent conduct even where a duty does exist unless the duty was owed to the injured person, and not merely the public in general, and (2) expose police to liability without limitation for any “affirmative act” even if the sole reason for the officer taking the act is a statutory directive and even if he acted in strict compliance with that directive.

determine what order to obtain, that decision is ultimately up to the petitioner and the court. Law enforcement officers are not tasked (nor should they be) with second-guessing the court's order and individually determining what type of protection applies. Instead, law enforcement are required to follow the law as articulated by the Legislature.

Amici's reliance on RCW 10.99.020 is misplaced. They ignore section (5)(r), which contains an *inclusive* list of the types of orders that, if violated, constitutes domestic violence. That list specifically *excludes* anti-harassment orders issued under chapter 10.14 RCW. Similarly, the Legislature requires law enforcement officers to effect an arrest when they have probable cause that an individual has knowledge of and violated a restraining order issued *only* under RCW 26.44.063 or chapter 7.90, 10.00, 26.09, 26.10, 26.26, 26.50, or 74.34 RCW. RCW 10.31.100(2)(a). The Legislature excluded chapter 10.14 RCW anti-harassment protection orders from this list. Instead, the Legislature gives law enforcement officers *discretion* to effect an arrest when they have probable cause to believe an individual had knowledge of and violated an anti-harassment protection order. This demonstrates that the Legislature had no intent to establish a governmental *duty* to take any particular action in response to violation of an anti-harassment order.

Finally, application of the legislative intent exception to the public duty doctrine here would require Officer Hensing to investigate the nature of each individual anti-harassment order served to independently determine whether the petitioner is a family or household member and whether a respondent would be trespassing by remaining on the property where served. Chapter 10.14 RCW does *not* require that officers investigate the circumstances of an anti-harassment protection order. Nor do the courts. *See Donaldson v. City of Seattle*, 65 Wn. App 661, 671-75, 831 P.2d 1098 (1992) (there is no mandatory duty to investigate). The Legislature *only* requires officers in these circumstances to serve the order and file a return of service.⁴

II. CONCLUSION

Amici's commitment to protect women and their families from domestic violence is notable. Domestic violence is a tragic injustice, and work to prevent it is a worthy cause. However, public expectations about what police officers should do under certain circumstances do not create

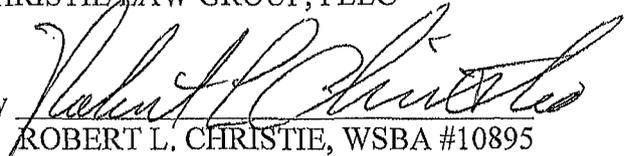
⁴ Commissioner Verellen effectively rejected the very same arguments that Amici now put forth in his order denying the motion for discretionary review. He stated: "A police officer arriving at Ms. Roznowski's residence with knowledge that Kim was living with her at that address, that he has a history of assault and is capable of physical violence, that in a prior incident Kim came close to hitting her, that she feared retaliation by Kim and that Kim is likely to react violently, could have inquired whether she was present and, if so, whether she wanted police to standby until Kim removed his property from her residence or wanted police to escort her if she left while Kim removed his property from her residence. But there is no mandatory statutory duty under chapter 10.14 RCW to do so, and the failure to do so is not a violation of mandatory statutory duty under chapter 10.99 RCW." (October 22, 2010 Order, p.7)

an actionable duty under tort law. Only the Legislature can create such a duty. The Legislature has drawn clear distinctions between enforcement of anti-harassment orders issued under chapter 10.14 RCW and domestic violence orders issued under chapters 10.99 RCW and 26.50 RCW. Officer Hensing did precisely what the statute directed him to do – personally serve Mr. Kim and document that service. If Amici believe that a police officer serving an anti-harassment order should be legally required to do more, they should pursue this change with the Legislature, not ask this Court to create a duty retrospectively as an emotional reaction to an obvious tragedy.

Respectfully submitted this 7th day of November, 2011.

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Defendant/Petitioner.

NO. 66534-1-I

Superior Court No.
09-2-19157-3 KNT

DECLARATION OF
SERVICE

MAUREEN E. PATTSNER hereby declares:

That she is a citizen of the United States and the State of
Washington, living and residing in King County in said State; that she is
over the age of eighteen years, not a party to the above-entitled action, and
competent to be a witness therein; that she caused a copy of the
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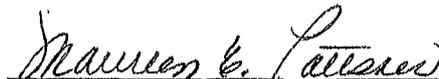
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I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

DATED at Seattle, Washington this 7th day of November, 2011.


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