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SUPREME COURT OF THE STATE OF WASHINGTON

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

Respondents,

v.

CITY OF FEDERAL WAY, a Washington municipal corporation,

Petitioner.

BRIEF OF *AMICUS CURIAE*
WASHINGTON DEFENSE TRIAL LAWYERS

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington Defense Trial Lawyers association (“WDTL”), established in 1962, includes more than 750 Washington attorneys engaged in civil defense litigation and trial work. The purpose of WDTL is to promote the highest professional and ethical standards for Washington civil defense attorneys and to serve our members through education, recognition, collegiality, professional development and advocacy. One important way in which WDTL represents its member is through amicus curiae submissions in cases that present issues of statewide concern to Washington civil defense attorneys and their clients.

The Court of Appeals’ decision in this case implicates such concerns, bearing directly on what a reasonably prudent defense attorney must do in order to preserve error. The Court of Appeals’ decision misapplies the law of the case doctrine, and adopts a hyper-technical requirement under CR 50 practice that a party make two motions for judgment as a matter of law (one during the course of trial, and a second after an adverse verdict) in order to preserve the issue of insufficiency of the evidence for appeal. For the reasons set forth below, WDTL respectfully urges this Court to reverse the decision.

II. STATEMENT OF THE CASE

WDTL relies upon the facts set forth by the City of Federal Way in its brief.

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III. ARGUMENT

A. The Court of Appeals Misapplied the Law of the Case Doctrine.

Plaintiff asserted that the City's police officer breached a duty of care owed to the victim when he served a domestic restraining order on her boyfriend. Throughout the case, including after the plaintiff rested, the City vigorously argued that it owed no duty to the victim under the public duty doctrine. The City made this argument numerous times and in multiple ways, including: (a) filing a motion for summary judgment before trial (CP 817-40; 1739-50); (b) seeking discretionary review of the denial of that motion (CP 27-28); (c) filing a CR 50(a) motion at the close of plaintiff's case (CP 2049-59); and (d) during the discussion on jury instructions. Report of Proceedings (Dec. 20, 2010) at 5; 73-75. While the City was unable to expressly reassert its "no legal duty" argument in its second motion for summary judgment or its trial brief -- coming in the wake of the trial court's ruling that the City *did* owe a duty under the failure to enforce exception to the public duty doctrine (CP 23-25) -- other documents nevertheless served as a reminder to the trial court of the City's original position. (CP 45, 53-54) (Second Motion for Summary Judgment); (CP 605-06) (Defendant's Trial Brief).

The colloquy on jury instructions establishes that the City's position (that it owed no legal duty based on the public duty doctrine) was readily understood by plaintiff's counsel and the trial court. At one point, plaintiff's counsel expressly mentioned the City's objection to the proposed jury instructions on duty -- an objection based on its argument

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that no duty applied in the first place. The trial court responded: “I know.” Report of Proceedings (Dec. 20, 2010) at 5. Later, the trial court noted: “I understand the defendant’s objection to [the duty of care instruction], why it is being made, but I think the duty of care instruction is implicit in my allowing the case to go forward.” Report of Proceedings (Dec. 20, 2010) at 73. The City’s counsel also stated: “For the way you are presenting the case, I think that’s appropriate. I will take exception [to Instruction 12] for other reasons.” Report of Proceedings (Dec. 20, 2010) at 75. The trial court’s statements during this colloquy plainly reflect its understanding of the City’s oft-asserted “no legal duty” argument, and reflect the City’s reassertion of that argument and objection. Similarly, the statements of counsel for the plaintiff and for the City demonstrate that the City did not at any time waive its legal argument that it owed no duty to the victim.

The Court of Appeals’ decision must be assessed against this factual backdrop. Quite apart from its adoption of the federal “dual motion” rule expressed in *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 126 S. Ct. 90, 163 L. Ed. 2d 974 (2006), and earlier cases, the Court of Appeals misapplied the law of the case doctrine in order to reach the conclusion that the City waived the core legal argument it had been asserting repeatedly and strenuously throughout the proceedings. All who were present during the colloquy understood very well (and manifested their understanding) that the City did not object to the specific wording of the duty instruction, Instruction 12; it objected to

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giving any general duty instruction *at all*, as it had since the earliest days of the case.

The Court of Appeals' "law of the case" decision amounted to an extremely technical application of CR 51(f),¹ which ultimately disregarded that rule's very purpose: to "sufficiently apprise the trial court of any alleged error in order to afford it the opportunity to correct the matter if necessary." *Schmidt v. Cornerstone Investments, Inc.*, 115 Wn.2d 148, 163, 795 P.2d 1143 (1990). This Court explicitly considered the application of that rule in similar circumstances, in *Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha*, 126 Wn.2d 50, 63-64, 882 P.2d 703, 711 (1994). In *Queen City*, the plaintiff raised an argument about the applicable standard in an unsuccessful motion for summary judgment before trial, and reiterated that argument during discussion of jury instructions. *Id.* at 64. The Supreme Court held that because the trial judge understood the argument and because Queen City Farms had sufficiently apprised the trial court of its objection, the issue was preserved for appeal. *Id.* That precise reasoning applies in the present case, where the City's argument was clearly presented through multiple vehicles and the trial court was apprised of it. The Court of Appeals' decision is

¹ CR 51(f) provides, in relevant part: "Counsel shall then be afforded an opportunity in the absence of the jury to make objections to the giving of any instruction and to the refusal to give a requested instruction. The objector shall state distinctly the matter to which he objects and the grounds of his objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made."

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contrary to the holding in *Queen City*, and contrary to the underlying purpose of the law of the case doctrine.

Despite the clarity and frequency with which its “no duty” argument was presented, and the fact that the trial court plainly understood the argument, the Court of Appeals declined to address the merits of the City’s appeal, concluding instead that the City failed to properly object or preserve error. This decision rested on a misapplication of the law of the case doctrine, and this Court should reverse it.

B. The State of Washington, Both as a Matter of Case Law and Well-Established Practice Based on That Case Law, Has Not Adhered to the Federal Practice of Requiring Both a Motion for Judgment as a Matter of Law During Trial and a Second Motion for Judgment as a Matter of Law After an Adverse Verdict in Order to Preserve the Issue of Insufficiency of the Evidence for Appeal.

The Court of Appeals held that it may not review the City’s CR 50(a) motion for judgment as a matter of law because the City did not renew that motion after trial under CR 50(b). This holding erroneously promotes a formalistic requirement that heretofore has not actually existed in Washington CR 50 practice. It requires a party to renew and reiterate an objection the trial court has already ruled on and rejected.

The Court of Appeals’ decision relies in large part on *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 126 S. Ct. 90, 163 L. Ed. 2d 974 (2006). *Unitherm* is one of several Supreme Court decisions dating back to 1947 to express this heretofore unique federal procedural requirement. *See, e.g., Cone v. West Virginia Pulp & Paper*

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Co., 330 U.S. 212, 67 S. Ct. 752, 91 L. Ed 849 (1947). But the federal requirement was never previously part of Washington CR 50 practice.

Even well after the federal requirement was established, the Washington Supreme Court chose to adhere to the long-established and more permissive approach that post-verdict CR 50(b) motions were *not* required in order to preserve objections to the sufficiency of the evidence for appeal. *See, e.g., Barker v. Waltz*, 40 Wn.2d 866, 867-68, 246 P.2d 846 (1952). The Court of Appeals' decision seems implicitly to recognize this fact, acknowledging that a party is "allowed" to challenge the sufficiency of the evidence under CR 50(a), and "may" renew such a motion after the verdict and judgment under CR 50(b). *See Washburn v. City of Federal Way*, 169 Wn. App. 588, 611-14, 283 P.3d 567 (2012); Petition for Review, 16-17. Despite this implicit recognition, the Court of Appeals discounted the longstanding CR 50 practice in Washington, instead seizing on the *Unitherm* opinion, and a mistaken conclusion laid out in the Washington Practice Series based on that decision,² to support its conclusion that Washington should now apply the federal construction of FRCP 50 to CR 50. *Washburn*, at 614-15. While courts "may" look to

² The Washington Practice Series gives no reason for why Washington courts should feel compelled to follow *Unitherm* when this Court evidently had never been persuaded to conform Washington practice to the federal rule, despite the long line of federal cases preceding *Unitherm* that applied that rule. *See* 14A Karl B. Tegland, Washington Practice: Rules Practice CR 50 author's cmts. at 36 (5th ed. 2011) (text found in pocket part to hard copy volume).

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federal cases for guidance in interpreting Washington Court Rules when those rules are substantially similar to the Federal Rules of Civil Procedure, they are not required to do so, particularly against the backdrop of Washington Supreme Court case law to the contrary. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 218-19, 829 P.2d 1099 (1992)).³

The Court of Appeals' decision, if allowed to stand, will not only contravene the longstanding CR 50 practice in Washington, but will also have negative and far reaching implications moving forward. As the facts of this case make plain, the adoption of such a requirement is unnecessary, serving no useful purpose that a single motion made during trial could not serve on its own. Other states have considered and rejected the application of the federal rule explicitly. *See, e.g., Skaling v. Aetna Ins. Co.*, 742 A.2d 282, 287 (R.I. 1999) ("After careful consideration, we have concluded that we shall not apply this interpretation [requiring renewal of a CR 50(a) motion to preserve an issue for appeal] to the Rhode Island rule"); *Fulton County Adm'r v. Sullivan*, 753 So.2d 549, 553 (Fla. 1999)

³ The Respondent suggests that prior Washington practice was displaced by the 2005 amendment to CR 50. *See* Respondents' Supplemental Brief at 13-14. But what the Respondent quotes is not the text of the amended rule, only Washington Practice's characterization of the effect of the amendment. In fact, all the 2005 amendment did was eliminate the prior Washington practice allowing a party to make a motion for judgment as a matter of law after an adverse verdict, without first having made such a motion at the close of all the evidence. Nothing in the language of that amendment, nor the Comments accompanying the amendment, shows an intent to require a party to make a post-verdict motion for judgment as a matter of law if such a motion has been made at the close of all the evidence (or, as here, if the trial court has already definitively rejected the legal basis for any such motion, by prior rulings on summary judgment and motions *in limine*).

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(rejecting the federal practice and instead holding that requiring parties to renew such motions after judgment “does not facilitate the proper administration of justice”). Washington should follow suit.

Justice Frankfurter’s dissent in *Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48, 73 S. Ct. 125, 97 L. Ed. 77 (1952), pointedly criticizes the formalistic requirement adopted by the federal courts:

[U]nder the Court's holding it is no longer sufficient to move for a directed verdict and then, within the time provided by the Rule, ask the trial judge either to grant judgment or a new trial. The Court so holds even though the trial judge already has expressly stated he has reserved for his consideration at that time (after verdict) the very issue which a motion for judgment n.o.v. would repeat. The obvious, which is left unsaid in colloquies between counsel and the court, must now be spoken. The redundant, omitted out of respect for a judge's intelligence and professional competence, must always be spelled out. The parties must be sure to indulge the ancient weakness of the law for stylized repetition, and it is necessary that the judge answer the same question twice before his answer is to be recognized.

...

It has been said of the great Baron Parke: “His fault was an almost superstitious reverence for the dark technicalities of special pleading, and the reforms introduced by the Common Law Procedure Acts of 1854 and 1855 occasioned his resignation.” Sir James Parke, 15 D.N.B. 226. Baron Parke despaired prematurely. If he had waited another hundred years this Court today would have vindicated his belief that judges must be imprisoned in technicalities of their own devising, that obedience to lifeless formality is the way to justice.

344 U.S. 61-62 (cited and quoted in part and with approval by the Florida Supreme Court in *Fulton County Adm’r v. Sullivan, supra*). Justice Frankfurter’s concerns are as applicable to this case and this era as they were in 1952. Requiring practitioners to renew CR 50 objections after

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trial not only contravenes the process previously employed in Washington, but it also undermines the average practitioner's understanding of what is required to preserve an objection for appeal. The Court of Appeals' interpretation of CR 50 serves little purpose aside from creating a trap for the unwary, prizing formality and "stylized repetition" over a trial court's actual understanding of a party's arguments (and a party's stated intentions at trial to preserve those arguments for appeal).

IV. CONCLUSION

A. The Court of Appeals' Error Requires Reversal.

The Court of Appeals improperly applied the law of the case doctrine to avoid reviewing the foundational issue of this litigation, namely whether the City owed a duty. The Court of Appeals' conclusion that defendants must renew a CR 50(a) motion after trial, or else forever waive the arguments previously asserted (whether in a pre-trial motion for summary judgment or a motion to dismiss during trial) creates exactly the kind of peril and inefficiency that Justice Frankfurter feared. It forces attorneys to repeat an argument post-verdict, in the hopes that a trial court will have a "eureka" moment, despite having squarely and decisively rejected that exact same argument before the verdict. The rule propounded by the Court of Appeals' decision is, at best, a new procedural hoop for parties to jump through, and at worst, will punish unwary practitioners in the most hyper-technical of ways, indifferent to both the longstanding interpretation in Washington practice to the contrary, and to the much more significant question of whether the trial court was actually

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apprised of a party's position or objection. The Court of Appeals' holding ultimately undermines the interests of justice. This Court should reverse.

B. Outstanding Issues of Duty and Causation Require Remand.

This Court should reject Respondents' argument in their Supplemental Brief that, if this Court determines the duty argument was preserved for appeal, then pursuant to RAP 13.7 it should resolve that issue as a matter of law rather than remand it. Respondents' Supplemental Brief at 9. A cursory review of the briefing reveals that, if reversed on the issue of duty, the case must be remanded. For example, if this Court concludes that error was preserved and the Primary Duty Doctrine, subject to any applicable exceptions, applies, there is at least one causation question that a fact finder will have to resolve. After Officer Hensing served the order in this case, it is undisputed that Kim left the victim's house voluntarily before subsequently returning in violation of the protection order after Officer Hensing had departed the area. It is when Kim returned that he murdered Ms. Roznowski. *See* Respondents' Supplemental Brief at 24 (“[Officer Hening’s] failure to enforce the order resulted in Kim’s return to Roznowski’s home and her death.”). A fact finder will have to determine whether Kim’s voluntary departure from the home after service of the order and subsequent return to the home in violation of it severs the causal chain between Officer Hensing’s alleged failure to enforce the order, and the harm that was later suffered, potentially rendering at least one of the asserted exceptions to the rule inapplicable. Because the jury was not properly instructed on public duty

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or the asserted exceptions, no lower court or fact finder has adequately considered this factual question of causation, much less Respondents' interwoven arguments that (a) the public duty doctrine does not apply, and (b) that there are applicable exceptions to it. Those issues should be addressed on remand.

RESPECTFULLY SUBMITTED this 3 day of May, 2013.

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Corrected Subject Line.

Thanks counsel.

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Dear Mr. Carpenter:

Pursuant to the Court's prior permission, please find attached WDTL's application to file an Amicus Curiae Brief in the above matter, and our (proposed) Brief.

I am hereby contemporaneously serving electronically, by copy of this message, counsel for the parties, and the Washington State Association for Justice Foundation, who by agreement have accepted this method of service.

Thank you,

Stew Estes
Chair, WDTL Amicus Committee

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