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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.

RESPONDENTS' SUPPLEMENTAL BRIEF

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A. INTRODUCTION

This case arises from the tragic, preventable murder of Baerbel Roznowski at the hands of her estranged ex-boyfriend, Chan Kim. The City of Federal Way ("City") fails to advise this Court of its egregious negligence, and instead tries to hide the fact that its police officers did not read the contents of the anti-harassment order they were serving on Kim, who had a history of being unstable, violent, and likely to retaliate upon Roznowski upon being told to leave her home.

The City's trial counsel failed to properly preserve any alleged error regarding the City's duty to Roznowski under CR 50(b).

This Court should affirm the judgment on the jury's verdict for the CR 50(b)-related reasons articulated in the Court of Appeals opinion or, alternatively, because this case falls within § 302B of the *Restatement (Second) of Torts* and/or the public duty doctrine is inapplicable, this Court may affirm the judgment on those alternate grounds.

B. STATEMENT OF THE CASE

The City has implied throughout this case that Kim was nonviolent, that he understood his interaction with the City's officers, and that its officers properly did their job. The City's assertion is belied by the actual facts.

After a divorce, (Loh 12/14/10): 16-17, Roznowski met Chan Kim. RP (Loh 12/15/10): 3-4. Kim spoke Korean as his primary language; his capacity in English was rudimentary, described as being no better than that of a child. RP (Loh 12/15/10): 11, 52; (Washburn): 28-29; RP (Ganley): 18. Kim could not read English; Roznowski translated documents for him. RP (Loh 12/15/10): 12. Kim had serious mental health issues occasioned by a sports injury in Korea that caused him to act and speak slowly. RP (Ko): 14-15. He had outbursts of rage. Ex. 1; RP (Ganley): 21. Roznowski called 911 in 2006 because he came close to hitting her. Ex. 1; RP (Loh 12/15/10): 6; RP (Washburn): 34. He had a history of violent altercations with his son, Ex. 1, which even the City's police expert conceded was a domestic violence episode. RP (Ovens): 82. Roznowski was afraid of Kim. Ex. 1; RP (Washburn): 63. Kim was far more than merely a "hoarder." Pet. at 4. He was a dangerous, controlling individual. Br. of Resp'ts at 5-6.

Roznowski had an altercation with Kim on April 30, 2008 and she was compelled to call 911. CP 842. The call related that a physical DV (domestic violence) was in progress, *id.*, and City police officers responded. CP 841-42. An officer advised Roznowski that she could obtain an anti-harassment order and also obtain a court-ordered eviction of Kim from the house. *Id.* An officer told Kim to "take a walk," and he left

the home. CP 842, 959.¹ The officers gave Roznowski a copy of a DV booklet. CP 842, 851-75.

Roznowski thereafter went to the Kent Regional Justice Center to obtain an order. In her supporting affidavit, Roznowski explained that Kim was her estranged boyfriend and that he was living with her in her home. Ex. 1. She did more than merely assert Kim made verbal attacks on her after she moved to clean up a wood pile, as the City claims in its petition at 3. She had good reason to be afraid of him:

Last year his outburst frightened me, I called 911, he came close to hitting me. He left my place as promised. Within 15 min[utes] I received several calls from him. I changed the locks except for one door. He is capable of physical violence. I witnessed him beating his oldest son in the past. In his present state he can easily retaliate with me.

Ex. 1.² Commissioner Carlos Vilategui of the King County Superior Court heard Roznowski's petition and found that a protection order should be entered so as to "avoid irreparable harm" to her. Ex. 1. The order was explicit. Kim was restrained from keeping Roznowski under surveillance, from contacting her, or being within 500 feet of her residence. *Id.*

¹ That Kim immediately obeyed the officer's direction strongly implies he would have complied with directions from Officer Hensing, had they been given. CP 418-19, 426-27.

² The City's extensive treatment of Roznowski's interaction with Lorinda Tsai, pet. at 3-4, is belied by Roznowski's specific description of Kim under oath in her affidavit. Ex. 1.

Roznowski also completed a law enforcement information sheet ("LEIS") checking various boxes on the sheet that set forth the following information: (1) Kim had a history of assault; (2) he was living in Roznowski's home; (3) he did not know that Roznowski was going to be forcing him out of her home; (4) he was likely to react violently when served; and (5) a Korean interpreter would be required. Ex. 1.

Roznowski took the order and the LEIS to the City police that day for service. CP 1292. She told officers that she wanted Kim served and removed from her house. *Id.* Roznowski left with the distinct impression that the order would be served and enforced by City police officers. CP 1298. She returned home and wrote an email to her daughters: "I did it. Now to sort it out. They will actually stay here while he gets his stuff out." Ex. 8. Later that day, she told her daughters that "once served the temp order he'll be escorted out and can't call, visit, come near here within 500 feet." Ex. 9.

Officer Andrew Hensing arrived unannounced at Roznowski's residence on May 3, 2008. Ex. 1. Officer Hensing admitted at trial that *he had not read the petition and order he was about to serve, and he had also failed to read the LEIS* that would have alerted him to the volatile nature of the situation and the fact that Kim would likely react violently to being served. RP (Hensing): 8-10. Because he had not read these key

documents, Hensing was unaware of Kim's past violent acts, *id.* at 10, the 911 call by Roznowski, *id.* at 11, that Kim might react violently or retaliate against Roznowski, *id.* at 23, 34, or that Kim spoke little English and required a Korean interpreter. *Id.* at 15. Hensing never asked Kim if he understood English. *Id.* at 36. Instead, Hensing merely handed the order to Kim, told him he had been served, asked him if he had any questions, went back to his car, and drove away. CP 877-78, 1305.³ This entire transaction took five minutes or less. RP (Hensing): 20-21. Nothing prevented Hensing from staying at the house, *id.* at 32, or escorting Kim from it. *Id.* at 30.

During his interaction with Kim, Hensing did not explain the order, he did not tell Kim to leave, nor did he wait to see if Kim was planning to leave. *Id.* at 45. He acknowledged that Kim had no idea he was to leave the house. *Id.* at 22. Hensing was aware generally that the court order barred Kim from being within 500 feet of Roznowski's home, but having not read the order or LEIS, he did not know the house at which he served Kim was Roznowski's. *Id.* at 24-25. Having not read the materials, Hensing did not read a sticky note that referenced Roznowski's address

³ Kim was unaware that with the service of the order, he had to move from Roznowski's house, an important point for a law enforcement officer. RP (Hensing) at 22. In fact, upon service of the order, Kim turned to Roznowski and asked her: "What is this?" *Id.* at 41; RP (Ganley): 123.

where service occurred; he was unaware Kim and Roznowski were cohabitants. *Id.* at 25-26.⁴

Hensing saw a female "in the background" at the house while he was serving Kim. *Id.* at 39. He did not know if it was Roznowski, *id.* at 40, but he made no effort to contact her or ascertain her identity. *Id.* at 40, 46. Hensing made no efforts after Kim's service to contact Roznowski. *Id.* at 24.

Contrary to the City's description of Kim's post-service interaction with the officers in its petition at 5, Kim was *extremely upset* upon being served, realizing that the relationship was over, CP 322-23. He asked Roznowski for additional time to move his belongings; Roznowski agreed. CP 323; Ex. 50 at 243.

Kim called his friend, Chong Ko, who subsequently met with Kim at Roznowski's home. RP (Ko): 5. The City's discussion of Kim's interaction with Ko in the petition at 5 is particularly disingenuous because Kim's conduct was that of a man "winding up" his affairs. Kim handed Ko a plastic bag containing personal items that Kim asked Ko to

⁴ At trial, Hensing acknowledged that he had a duty to enforce a court order, *id.* at 47, 83-84, but took no steps to enforce it. *Id.* at 43. When he left the house, Kim was in violation of the order. *Id.* at 43-44. The City's assertion in its petition at 5 and footnote 4 that Roznowski was somehow "unconcerned" by the officers' failure to enforce the order is yet another example of the City's effort to suggest this whole situation was benign, and to, in effect, "blame the victim."

give to his nephew. CP 69, 313-14, 1003-04. Ko accompanied Kim to a local bank where he withdrew money, and Kim asked Ko to deliver the money to that nephew. RP (Ko): 10-11; CP 69-70, 312-13. Kim also made statements that indicated he was about to kill Roznowski and commit suicide. CP 70, 321. Concerned by these interactions with Kim, Ko called the police.⁵

Kim returned to Roznowski's home where they argued about money. CP 315-19. She told him to leave. CP 341. Kim snapped and viciously stabbed Roznowski. CP 324.⁶

The City moved for summary judgment on the public duty doctrine; the trial court denied the motion and the Court of Appeals denied discretionary review. In the course of trial, the City filed a motion under CR 50(a) for judgment as a matter of law, CP 2049-59, which the trial court denied. CP 2096, 2131-36. After a lengthy trial, the jury returned a \$1.1 million verdict in favor of the Estate, on which the trial court entered

⁵ Although the trial court excluded evidence of Mr. Ko's call to Federal Way Assistant Police Chief Andy Hwang, CP 572, that evidence belies the City's effort in its petition to portray Ko as unconcerned about Kim's possible actions. In fact, Ko called Hwang to relay his concerns about Kim. CP 1017-18. Hwang received the call and quickly ascertained that the Kos were calling to report a DV murder-suicide in progress. CP 902. Hwang was on his way to a lunch with his wife and testified he was not "in a police mood." CP 934. Instead of responding, Hwang actually downplayed the situation by telling Mrs. Ko that "you know people make statements like this." CP 930.

⁶ As Dr. Donald Reay, King County's former medical examiner, testified, Kim's crime was particularly brutal. Kim stabbed Roznowski 18 times. RP (Reay): 9. Roznowski tried to defend herself. *Id.* at 10. The crime scene was bloody. *Id.* at 15-17.

a judgment. CP 728-29, 2089-94.⁷ The City did not renew its motion for judgment as a matter of law post-trial under CR 50(b).

The Court of Appeals initially affirmed the trial court's judgment, holding that the City failed to preserve any error associated with the duty instruction, Instruction Number 12, and ample evidence supported the jury's verdict. The City moved for reconsideration. The Court of Appeals withdrew its earlier opinion and filed a new opinion specifically *adding* to its analysis that the City failed to preserve the instructional error by not even assigning error to Instruction Number 12 in its brief, or arguing that the instruction was erroneous, and also making clear that there were evidentiary issues that formed the basis for the trial court's denial of its CR 50(a) motion, contrary to the City's *repeated* assertions in its petition that no evidentiary issues were present.

C. ARGUMENT

The Court of Appeals' determination that the City failed to preserve any alleged instructional error in Instruction Number 12, the general duty instruction, by failing to properly object to it under CR 51(f)

She was conscious for five to ten minutes and she likely lived up to twenty minutes after the assault commenced and was fully aware of the events. *Id.* at 20, 26; CP 332.

⁷ Washburn and Lo filed a CR 59 motion for additur or a new trial because, although the jury found the City liable as to Roznowski's two daughters, the jury awarded zero non-economic damages to them. The trial court granted the daughters a new trial on damages. CP 2146-50. The City's petition does not address this issue,

or to assign error to it in its brief, is consistent with a long line of Washington cases that make the instruction the law of the case. The Court of Appeals' determination that the City waived any argument on the public duty doctrine by not filing a CR 50(b) motion is consistent with that rule's purpose and a long line of analogous federal authorities. The City simply failed to preserve any alleged error on its duty to Roznowski.

Alternatively, this Court can affirm the trial court's judgment on the jury's verdict because the sole issue the City raises is whether it owed a duty to Roznowski. It owed her a duty under § 302B of the *Restatement (Second) of Torts*. The public duty doctrine does not apply because its duty was to her, not the public generally.⁸

(1) The City Failed to Preserve Any Instructional Error Regarding Instruction Number 12

thereby waiving it. RAP 13.7(b) (Court only reviews these issues raised in petition for review); *State v. Collins*, 121 Wn.2d 168, 178-79, 847 P.2d 919 (1993).

⁸ This Court may affirm the trial court's decision on these alternate grounds argued to the Court of Appeals. RAP 13.7(d); *State v. Michielli*, 132 Wn.2d 229, 239, 937 P.2d 587 (1997). It would be unfair to the Estate and Roznowski's daughters to face additional delay from a remand to the Court of Appeals if this Court decided that the City's duty argument was preserved for appellate review. The City argued its petition for review at 18-20 that this Court should decide the duty issue. This Court's order granting review does not in any way confine review to just the preservation of error issue, despite the Estate's request that this Court do so in its answer to the petition.

The City failed to preserve any instructional error for *two distinct reasons*. It did not object to Instruction Number 12,⁹ *and* it did not assign error to the giving of that instruction in its brief.

(a) The City's Objection to Instruction Number 12 Failed to Satisfy CR 51(f)

The City's counsel *never* claimed the specific duty language of Instruction Number 12 somehow misstated the law. As the Court of Appeals correctly noted, the actual objection merely related to the instruction's *wording*. Op. at 15. The City's counsel actually *conceded* that Instruction Number 12 was "appropriate" in light of the trial court's handling of the public duty doctrine issue. RP (12/10/10): 73-74.¹⁰

CR 51(f) mandates that objections to instructions must be *explicit* in order to apprise the trial court of any alleged error and to afford that court a full opportunity to correct any instructional problems. *Bitzan v. Parisi*, 88 Wn.2d 116, 124-25, 558 P.2d 775 (1977) (where the defendant failed to reference the paragraph or general part of an instruction that was erroneous and merely made a general exception to its contents, the

⁹ Instruction Number 12, the trial court's general instruction on duty, stated: "A city police department has a duty to exercise ordinary care in the service and enforcement of court orders." CP 2179. Instruction Number 12 was based on the general principles of RCW 4.96.010 that make a local government liable for its ordinary negligence as other persons and entities in Washington. CP 2079.

¹⁰ The City *admitted* in its reply brief that because it assigned error to the denial of its instruction on the public duty doctrine, "[i]t was not necessary for the City to assign error to jury instruction no. 12." Reply br. at 6; Op. at 16.

objection was insufficient); *Goehle v. Fred Hutchinson Cancer Research Center*, 100 Wn. App. 609, 615, 1 P.3d 579, review denied, 142 Wn.2d 1010 (2000).

Additionally, the City did not offer an instruction containing a correct statement of the law, as it was obliged to do. *City of Bellevue v. Kravik*, 69 Wn. App. 735, 740, 850 P.2d 559 (1993). The City cannot argue that its objection to the failure to give its proposed instruction *on the public duty doctrine*, CP 2070, preserved any error as to Instruction Number 12, the duty instruction, for review. The City's counsel insisted that any duty instruction had to include the wording of an exception to the public duty doctrine. RP (12/20/10): 80-81. As such, its proposed instruction over reached. In effect, the City sought an instruction asking the jury to decide *a question of law* properly reserved for the court. *Cummins v. Lewis County*, 156 Wn.2d 844, 853, 133 P.3d 458 (2006).¹¹ The City *knew* this was a *legal* issue. Reply br. at 4 n.2. Its proposed instruction was no substitute for properly addressing Instruction Number 12.

¹¹ The public duty doctrine is "a focusing tool that helped determine to whom a governmental duty was owed. It was not designed to be the tool that determined the actual duty. Properly, the public duty doctrine is neither a court created general grant of immunity nor a set of specific exceptions to some other existing immunity." *Id.* at 861-62 (citations omitted) (Chambers, J. concurring).

The City's objection to Instruction Number 12 was imprecise, relating only to its wording, and did not satisfy CR 51(f), as the Court of Appeals properly concluded. Op. at 14-15.

(b) The City's Brief Waived Any Instructional Error

The City not only failed to object to Instruction Number 12 below, *it also failed to assign error to the instruction on appeal or to offer any argument on the alleged instructional error in its briefing.*¹² The City essentially contends that the Court of Appeals should have somehow divined its non-existent argument on instructional error. But “[j]udges are not like pigs, hunting for the truffles buried in briefs.” *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991).

The Court of Appeals determination that Instruction Number 12 is the law of the case is amply supported. *State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900 (1998); *Garcia v. Brulotte*, 94 Wn.2d 794, 620 P.2d 99 (1980). Op. at 11-14.¹³

¹² The City spent *no time* in its opening brief below discussing how the actual language of Instruction Number 12 was erroneous and apart from a terse mention of the instruction and why it did not need to assign error to it, the reply brief is equally silent on Instruction Number 12. Obviously, the City did not set forth Instruction Number 12 in the Appendix to its brief, as required by RAP 10.3(g). The City's notice of appeal detailed alleged erroneous acts of the trial court at length. It nowhere mentions instructional error. CP 2095-96. These facts lend further credence to the fact that the City ignored any instructional error as to Instruction Number 12.

¹³ It has *long* been the rule in Washington that the failure to assign error to an instruction in a brief waives any instructional error, rendering the instruction the law of the case. RAP 10.3(g); *Guijosa v. Wal-Mart Stores, Inc.*, 114 Wn.2d 907, 917, 32 P.3d

The Court of Appeals correctly determined that Instruction Number 12 is the law of the case here. Moreover, it is critical to note that the City *concedes* that substantial evidence supports the jury's finding if Instruction Number 12 controls. Pet. at 15.¹⁴

(2) The City's Failure to File a CR 50(b) Motion Barred the City's Appeal

The City could still have preserved any alleged error on duty by filing proper CR 50 motions, *but it failed to do so*. It tries to persuade this Court that its failure to file a CR 50(b) was understandable because it was a "surprise" that such a motion was mandatory. It also argues that such a motion only was necessary if sufficiency of the evidence was implicated.

First, the City asserts that no case law existed prior to the Court of Appeals opinion that a CR 50(b) motion was mandatory. Pet. at 16-17. That argument is disingenuous. CR 50 was amended *in 2005*, making a CR 50(a) motion a *mandatory* pre-condition to a CR 50(b) motion: "... a party who fails to make a CR 50 motion before the case is submitted to the jury may not make a similar motion after the jury reaches its verdict." 4

250 (2001) (failure to object to instruction); *Chelan County Deputy Sheriffs' Ass'n v. Chelan County*, 109 Wn.2d 282, 300 n.10, 745 P.2d 1 (1982) (failure to assign error to instruction). Further, the failure to offer argument on an alleged error *waives* any error. *Ang v. Martin*, 154 Wn.2d 477, 486-87, 114 P.3d 637 (2005).

¹⁴ Ample testimony by declaration, deposition, or at trial from Karil Klingbeil, the former director of the Harborview Sexual Assault Center, former Bellevue Police Chief Donald Van Blaricom, former Seattle Police Chief Norman Stamper, and Dr. Ann Ganley established that the City's breach of its duty resulted in Roznowski's death.

Karl B. Tegland, *Wash. Practice: Rules Practice* (5th ed. 2006) at 210. See *Hanks v. Grace*, 167 Wn. App. 542, 552 n.23, 273 P.3d 1029 (2012).¹⁵

Second, Washington's CR 50 finds its direct counterpart in Fed. R. Civ. Pro. 50. The text of those rules, if examined carefully, are *virtually identical*. The rules so closely mirror each other that CR 50(e) actually utilizes the federal terminology for appeals referencing an "appellee." See Appendix. The drafters' comments to those 2005 amendments articulated a *specific intent* to bring CR 50 more closely into conformity with Fed. R. Civ. Pro. 50. 4 Karl B. Tegland, *Wash. Practice: Rules Practice* (5th ed. 2006) at 211. The Court of Appeals properly looked to federal authority for guidance. Op. at 24-28. See *American Mobile Homes of Washington, Inc. v. Seattle-First Nat'l Bank*, 115 Wn.2d 307, 313, 796 P.2d 1276 (1990) ("When a state rule is similar to a parallel federal rule we sometimes look to the analysis of the federal rule for guidance.").

Federal cases make clear that a CR 50(b) motion is *mandatory* to preserve any alleged error. See, e.g., *Unitherm Food Systems, Inc. v.*

¹⁵ Further, Washington law has long recognized that there is a difference between motions for judgment as a matter of law pretrial and posttrial. Where a trial court denies summary judgment due to factual disputes, and a trial ensues, the losing party, like the City here, must appeal from the sufficiency of the evidence *at trial*, and not from denial of the motion for summary judgment. *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 35 n.9, 864 P.2d 921 (1993); *Johnson v. Rothstein*, 52 Wn. App. 303, 759 P.2d 471 (1988). In *Johnson*, the court dismissed an appeal that only raised the denial of summary judgment where the denial was based on questions of fact

Swift-Eckrich, Inc., 546 U.S. 394, 126 S. Ct. 980, 163 L.Ed.2d 974 (2006) (failure of a party to file a post-trial motion for judgment as a matter of law under Fed. R. Civ. Pro. 50(b) to challenge the sufficiency of the evidence supporting the jury's verdict forecloses appellate review even though the party had filed a prejudgment motion for judgment as a matter under Rule 50(a)); *Ortiz v. Jordan*, ___ U.S. ___, 131 S. Ct. 884, 889, 893, 178 L.Ed.2d 703 (2011) (defendants in a civil right case under 42 U.S.C. § 1983 did not renew their motion on qualified immunity under Fed. R. Civ. Pro. 50(b) post-trial; court held that the defense did not vanish, but it had to be evaluated in light of the character and quality of the evidence received at trial; the trial record, in effect, supersedes the summary judgment record; as qualified immunity of officials was not a "neat abstract issue of law," the jury's verdict held to stand.). The City *admitted* below that federal law predating the two U.S. Supreme Court cases mandated the filing of a 50(b) motion. Motion for Recons. at 13-14.

This was the genesis for the specific warning to practitioners in *Washington Practice* by Professor Tegland that in

order to lay a foundation for appeal, the party must first renew its motion for judgment as a matter of law pursuant to CR 50(b) or, in the alternative, move for a new trial based upon insufficient evidence. This requirement is based upon the belief that in the post-verdict context (CR

resolved at trial. In effect, the denial of summary judgment merges into the judgment on the verdict of the jury.

50(b)), the trial court should make the initial determination of whether the evidence was sufficient to support the verdict. The determination should not be made in the first instance by an appellate court.

4 Karl B. Tegland, *Wash. Practice: Rules Practice* (5th ed. 2006, pocket part) at 36. The City cannot legitimately contend that its trial counsel was not, or should not have been, aware that a CR 50(b) motion was mandatory to preserve error here.

Third, the City argued on reconsideration that it did not need to file a CR 50(b) motion because CR 50 only implicates the sufficiency of the evidence and there were no factual issues about the application of the public duty doctrine. The Estate provided the Court of Appeals with those factual issues in response to the City's motion, response to motion for reconsideration at 17-18, and the Court of Appeals agreed in its new opinion. Op. at 18-20, 29.

Here, as in *Ortiz*, the public duty doctrine or its exceptions do not constitute a "neat abstract issue of law." The trial court wanted to hear evidence when the City moved for summary judgment on the public duty doctrine and reconsideration of the order denying it. CP 25. The court also wanted a full record on the issue when it denied the City's CR 50(a) motion. CP 2114-36. The importance of the trial court's desire to have more evidence on the public duty doctrine in making its decision on

summary judgment and CR 50(a) cannot be understated. The court took into consideration the evidence adduced at trial to conclude that *the public duty doctrine did not apply given the facts*. This is precisely why *Unitherm* and *Ortiz* control. The application of the public duty doctrine and its exceptions, like qualified immunity in *Ortiz*, was not a “neat abstract issue of law.”

Finally, the requirement that a party that wishes to preserve a legal error raised on summary judgment or in a CR 50(a) motion must take the added step of renewing that motion under CR 50(b) is a wise course, requiring parties to be focused on legal issues, and preserving scarce judicial resources. “Rule 50(b) was designed to provide a precise plan to end the prevailing confusion about directed verdicts and motions for judgments notwithstanding verdicts.” *Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48, 52, 73 S. Ct. 125, 97 L.Ed. 77 (1952). The Court noted the rule was “not difficult to understand or to observe.” *Id.*

Critically, there is a difference between motions for judgment as a matter of law pre and post-verdict particularly where, as here, there are facts that bear on the legal question. A trial has occurred. The actual presentation of evidence on the public duty doctrine issues assisted Judge Darvas in making her decision on how to instruct the jury on the duty issue. Those facts appropriately become a part of any record in deciding a

CR 50(b) motion. The City should have renewed its motion accordingly. When it did not, it failed to preserve any alleged error for review.

In sum, the City did not properly preserve any alleged error for review when it failed to file a CR 50(b) motion.

(3) This Case Does Not Implicate the Public Duty Doctrine

If this Court concludes that the City preserved the alleged error for review, it should affirm nonetheless because the public duty doctrine is not implicated here, or one of its many exceptions applies. RAP 13.7(d).

The Estate's claims in this case are based on common law negligence arising out of the City's negligent actions at Roznowski's residence during the police service of the protection order.

The trial court here was correct that the public duty doctrine is inapplicable when the duty of the government is based on § 302B of the *Restatement (Second) of Torts*. Cases involving *active* negligence, or misfeasance, do not implicate the public duty doctrine; exceptions to the public duty doctrine are not even relevant. When law enforcement officials "*do act*, they have a duty to act with reasonable care," and the public duty doctrine does not bar claims for negligence. *Coffel v. Clallam County*, 47 Wn. App. 397, 403-04, 735 P.2d 686, *review denied*, 108 Wn.2d 1014 (1987) (emphasis added). In *Coffel* a number of local police officers and sheriff's deputies responded to two different break-ins at the

plaintiffs' place of business (both resulting from an ownership dispute). The day after the first break-in, the responding deputy told the plaintiff that the matter was "strictly a civil case, and that he 'didn't want to hear any more about it.'" 47 Wn. App. at 399. That evening, other officers responded to a second call and found that the perpetrator had returned and was destroying the premises. *Id.* Those officers "took no action to prevent the destruction" and, instead, told the property owners *they* had to leave. *Id.* at 399-400. In reversing summary judgment as to those officers and Clallam County, the court rejected the suggestion that the public duty doctrine applied to the claims against them:

The 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 403.¹⁶

Similarly, in *Parrilla v. King County*, 138 Wn. App. 427, 157 P.3d 879 (2007), a Metro bus driver left a bus running with keys in the ignition and the bus was seized by an occupant high on PCP; the Court of Appeals determined that the case involved affirmative acts, outside the scope of the

¹⁶ The voluntary assumption of a duty through affirmative conduct gives rise to liability if the actor does not use reasonable care. *See, e.g., Restatement (Second) of Torts* § 323; *Sado v. City of Spokane*, 22 Wn. App. 298, 301, 588 P.2d 1231, *review denied*, 92 Wn.2d 1005 (1979); *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 299, 545 P.2d 13 (1975).

public duty doctrine after *Coffel*, and found a duty was owed to the innocent victims of the occupant's subsequent negligent operation of the bus.

In this Court's recent decision in *Robb v. City of Seattle*, __ P.3d __, 2013 WL 363189, this Court held that the City was not liable for the shotgun slaying of Michael Robb at the hands of Samson Berhe, a man with a history of serious mental health problems. Berhe had twice been taken to Harborview Hospital for mental evaluations due to "erratic and destructive behavior." When Berhe again exhibited bizarre, aggressive behaviors, Seattle Police officers were repeatedly called by Berhe's parents and neighbors or advised by other law enforcement agencies of Berhe's conduct. After reports of Berhe's involvement in a burglary, two officers located Berhe and his confederate and stopped them on suspicion of burglary. Berhe shot Michael Robb about two hours later at a location near Berhe's home. *Id.* at 137-38. This Court concluded that this was a nonfeasance case,¹⁷ not subject to § 302B. Importantly, this Court recognized § 302B as a basis for a duty.

¹⁷ The difference between a *failure to act* (nonfeasance) and a negligent omission (misfeasance) is aptly described by Justice Cardozo in the landmark opinion of *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 167-69, 159 N.E. 896 (1928).

This is a malfeasance case like *Coffel* or *Parrilla*. The City's officers undertook service on Kim.¹⁸ In undertaking such service, they acted negligently; they were oblivious to their obligation to enforce the court's harassment prevention order in no small part because they had not read it or the LEIS. That negligence resulted in Roznowski's tragic, and avoidable, death, as the jury concluded. The public duty doctrine simply does not apply in this case.

(4) Even if the Public Duty Doctrine Applies, the Exceptions to that Doctrine Control

Even if the public duty doctrine were to apply in this case, at least three of the four exceptions to that doctrine recognized in *Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987) apply here.

(a) Failure to Enforce Exception

The failure to enforce exception applies where "governmental agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation" and "fail to take corrective action despite a statutory duty to do so[.]" *Bailey*, 108 Wn.2d at 268; *Campbell*

¹⁸ Ample testimony documented that Kim's conduct was foreseeable given his past behavior. Dr. Ann Ganley succinctly noted that "prevention of domestic violence is murder prevention." RP (Ganley): 45. *See also*, CP 419, 429. Even the City's expert, Sergeant Ovens, testified that if an officer failed to enforce an anti-harassment order, someone could get killed. RP (Ovens): 69.

v. *City of Bellevue*, 85 Wn.2d 1, 13, 530 P.2d 234 (1975).¹⁹ In *Bailey*, a police officer knew the driver of a vehicle was drunk, but failed to arrest him. The officer is not required to realize a crime is being committed to trigger liability; “knowledge of facts constituting the statutory violation, rather than knowledge of the statutory violation itself, is all that is required.” *Coffel*, 58 Wn. App. at 523.

This exception to the public duty doctrine has been applied in the context of domestic violence. *Donaldson v. City of Seattle*, 65 Wn. App. 661, 831 P.2d 1098 (1992), *review dismissed*, 120 Wn.2d 1031 (1993); *Rodriguez v. Perez*, 99 Wn. App. 439, 994 P.2d 874, *review denied*, 141 Wn.2d 1020 (2000). In *Roy v. City of Everett*, 118 Wn.2d 352, 823 P.2d 1084 (1992), the Supreme Court declined to apply the immunity afforded police officers for good faith enforcement of RCW 10.99.070. The Court held that the plaintiffs stated a cause of action for a year-long failure of the Everett Police Department to enforce the law and to protect the plaintiff and her daughter from their abuser’s “reign of terror,” where the officers knew of the abuser’s conduct. 118 Wn.2d at 354.

¹⁹ In *Campbell*, a city inspector failed to disconnect a nonconforming lighting system running under a local stream, a failure which later resulted in the electrocution of the plaintiff downstream. 85 Wn.2d at 2-6. This Court held that liability would be imposed “where a relationship exists or has developed between an injured plaintiff and agents of the municipality creating a duty to perform a mandated act for the benefit of particular persons or class of persons.” *Id.* at 10 (emphasis added). The *Campbell* court affirmed liability as to the city, noting that the Bellevue inspector had knowledge of the

Officer Hensing was not entitled to ignore the terms of the court's harassment prevention order. He chose to not even read it. He is held to know the contents of the papers he served on Kim. Had he merely read them and the accompanying LEIS *intended for law enforcement officers*, he would have known Kim had no business being within 500 feet of Roznowski's home or anywhere near her. Kim was in violation of the court's order when Hensing saw him at Roznowski's residence. RP (Van Blaricom 12/13/10): 30.

The duty of police officers with respect to an anti-harassment order under RCW 10.14 is clear.²⁰ The officers must serve the order, RCW 10.14.100(2), and cause the order to be entered in the law enforcement criminal intelligence data base. RCW 10.14.110(1). Violation of the order is a gross misdemeanor, RCW 10.14.170, for which the harasser can be arrested. RCW 10.14.120. *See generally, Trummel v. Mitchell*, 156 Wn.2d 653, 131 P.3d 305 (2006) (court partially upholds anti-harassment order by administrator of senior housing facility against resident); *Emmerson v. Weilep*, 126 Wn. App. 930, 110 P.3d 214, *review denied*,

particular nonconforming wiring system and the danger it posed to nearby residents. *Id.* at 13.

²⁰ Hensing's duty under RCW 10.99 is equally unambiguous. "The primary duty of peace officers, when responding to a domestic violence situation, is to enforce the laws allegedly violated and to protect the complaining party." RCW 10.99.030(5).

155 Wn.2d 1026 (2005) (harassment of City code enforcement officer); *Ledgerwood v. Lansdowne*, 120 Wn. App. 414, 85 P.3d 950 (2004) (landowner harassment of cattle rancher).

The City made the insulting argument below that anti-harassment orders are somehow less “important” than DV orders, although issued by a court, and a tolerance policy toward harassment is justifiable.²¹ That is wrong. Anti-harassment orders were meant to be properly implemented by the City’s police, for Roznowski’s benefit.

As the Estate's witnesses repeatedly testified, an order under RCW 10.14 is a form of DV order; RCW 10.14 does not create a “second class” order. RP (Van Blaricom 12/9/10): 17-18; RP (Van Blaricom 12/13/10): 36, 43-47; RP (Stamper): 60-61. It was a *court order*. Hensing knew that its violation subjected Kim to arrest and he had to enforce it. RP (Hensing): 83-84. Officer Hensing was obliged to enforce it when Kim violated it in his presence. RCW 10.31.100(8). His failure to enforce the order resulted in Kim’s return to Roznowski’s home and her death. CP 23.

²¹ The City’s contention that an harassment prevention order is a second class court order that need not be enforced is baseless. It defies common sense to believe that the Legislature, that expressed its intent in RCW 10.14.010 to treat harassment protection as “an important governmental objective” and to “prevent all further unwanted contact between the victim and the [harasser]” somehow intended that officers could be as cavalier about serving and enforcing harassment prevention orders as were Federal Way’s here. Harassment victims like Roznowski were intended to be protected by the statute.

Despite his duty under the law, Officer Hensing left Roznowski's home knowing that Kim remained in the residence in violation of the terms of the order that he had just been served. A specific court order, a clear and mandatory directive, was present. The failure to enforce exception applies.

(b) Legislative Intent Exception

The City acknowledged that Roznowski "is in the class RCW 10.14 intends to protect." Br. of Appellants at 31. The trial court understood that Roznowski was the intended beneficiary of RCW 10.14. CP 24. The legislative intent exception also applies.

The public duty doctrine does not apply where the Legislature has evidenced a clear intent to protect a particular class of persons. *Halvorson v. Dahl*, 89 Wn.2d 673, 676, 574 P.2d 1190 (1978). Where this "legislative intent" exception applies, a member of the identified class may bring a tort action against the governmental entity for its violation of the statute.²² An actionable duty will be imposed based on the text of a

²² This exception was well articulated by the *Donaldson* court:

It is well established that a statute which creates a governmental duty to protect particular individuals can be the basis for a negligence action where the statute is violated and the injured party was one of the persons designed to be protected. If the legislation evidences a clear intent to identify a particular and circumscribed class of persons, such persons may bring an action in tort for violation of the statute.

65 Wn. App. at 667-68.

municipal code, statute, or ordinance “if that code by its terms evidences a clear intent to identify and protect a particular and circumscribed class of persons.” *Halvorson*, 89 Wn.2d at 676.

The legislative intent exception has been addressed in a variety of cases involving the statutory duty to investigate and handle reports of child abuse or neglect. *See, e.g., Lesley v. Dep’t of Social & Health Services*, 83 Wn. App. 263, 921 P.2d 1066 (1996), *review denied*, 131 Wn.2d 1026 (1997). The courts even recognize a duty based on that statute to parents wrongfully accused of child abuse. *Tyner v. Dep’t of Soc. & Health Services*, 141 Wn.2d 68, 1 P.3d 1148 (2000).²³

The Legislature has expressed a clear intent to protect victims of domestic violence and harassment. Roznowski was a victim of domestic violence and harassment, and she was certainly within the class of persons the Legislature intended to protect when enacting RCW 10.14.

In arguing that RCW 10.99, dealing with domestic violence, was not applicable, the City put that statute at issue in this case. The City obtained jury instructions on RCW 10.99, CP 2183-84, consistent with its

²³ This Court has carefully adhered to the statutory language of RCW 26.44 in addressing duty. *See, e.g., Sheikh v. Choe*, 156 Wn.2d 441, 128 P.3d 574 (2006) (State owed no duty to victims of 2 children subject to dependency orders); *Beggs v. Dep’t of Soc. & Health Servs.*, 171 Wn.2d 69, 247 P.3d 421 (2011) (cause of action stated under RCW 26.44 against physicians who failed to report child abuse/neglect not precluded by medical malpractice statute, RCW 7.70).

requested instructions. CP 1978-80. RCW 10.99 was substantially amended in 1984 to provide for no-contact orders in instances where persons living in the same household engaged in violent conduct. RCW 10.99.010 expressed the intent of the Legislature in enacting such legislation. *See* Appendix. The Legislature even took the unusual step of providing for mandatory arrests where domestic violence was present. RCW 10.99.055.²⁴

In 1987, the Legislature provided a civil remedy for harassment, another form of domestic violence, authorizing an initial *ex parte* order of protection where a party demonstrated reasonable proof of unlawful harassment of that party by the respondent and that great or irreparable harm would result to the petitioner where the temporary order was not granted. RCW 10.14.080(1). Harassment was defined in RCW 10.14.020(1) as “a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose.” The legislative intent to protect harassment victims was unequivocal. RCW 10.14.010. *See* Appendix.

²⁴ The trial court instructed the jury on DV orders in Instruction Numbers 16-17. CP 2183-84. In this case, Roznowski may have qualified for an order under RCW 10.99 because she and Kim were in a domestic relationship. RCW 10.99.020(3-4, 8). But RCW 10.14.130 precludes issuance of a no-contact order under RCW 10.14 if RCW 10.99 applies.

Violation of an harassment prevention order subjects the harasser to contempt penalties, RCW 10.14.120, and arrest for gross misdemeanor. RCW 10.14.170. Police officers have express authority to effectuate a warrantless arrest of a violator of an harassment prevention order. RCW 10.31.100(8).

RCW 10.14 was designed to maximize the protection to the victim, ensure enforcement of the laws, and prevent “all further unwanted contact between the victim and the perpetrator.” Given this statutory scheme, the Legislature intended to impose a duty on law enforcement (and others) to protect victims of harassment. RCW 10.14 was intended to benefit Roznowski personally as a prospective victim of domestic violence and/or harassment by Kim. Just as domestic violence is not subject to the public duty doctrine, *Roy*, 118 Wn.2d at 358; *Donaldson*, 65 Wn. App. at 666-68 (legislature’s intent to protect victims of domestic violence is clear; “public duty doctrine” does not bar negligence claims by victims of domestic violence), the legislative intent exception applies to harassment victims like Roznowski.

(c) Special Relationship Exception

The special relationship exception applies where the government defendant and the plaintiff have a special relationship that sets the plaintiff apart from the public generally. Such a relationship exists wherever (1)

there is direct contact between the public official and the injured plaintiff which sets the latter apart from the general public, (2) there are assurances given, and (3) the contact gives rise to justifiable reliance on the part of the plaintiff. *Beal for Martinez v. City of Seattle*, 134 Wn.2d 769, 785, 954 P.2d 237 (1998). “As to the second element, the assurances need not always be specifically averred, as some relationships carry the implicit character of assurance.” *Chambers-Castanes v. King County*, 100 Wn.2d 275, 286, 669 P.2d 451 (1983). *See also, Bratton v. Welp*, 145 Wn.2d 572, 39 P.3d 959 (2002) (an assault on the plaintiff’s sister and threats to the plaintiff by her mother’s neighbor were reported to a 911 operator and the police assured the plaintiff that the neighbor “would be arrested the next time he caused an assurance.” In a subsequent altercation with the neighbor, the family called 911 three times. The neighbor shot the plaintiff three times. Court held that assurances made to another person that police would be dispatched were sufficient.); *Munich v. Skagit Emergency Communications Center*, 175 Wn.2d 871, 288 P.3d 328 (2012) (assurance need not be false or inaccurate; a representation by the 911 operator there to the victim that a deputy was “en route” to him was a sufficient assurance to meet the special relationship exception.).

Like the victims above, Roznowski contacted the police and received assurances (both express and implied) that an officer would serve

the order and remove Kim from her home. The first assurances were made by Officer Parker on April 30, 2008, and employee Gretchen Sund later accepted the order (and the completed LEIS) and agreed to have them served by the City's police. Roznowski's emails confirm these contacts and her reliance on the police. One email stated: "They will actually stay here while he gets his stuff out." Ex. 8. Another said: "[O]nce served the temp order he'll be escorted out and can't call, visit, come near here within 500 feet." Ex. 9. Like the victim in *Beal*, Roznowski was killed when the police failed to follow through and protect her. Roznowski's contacts with the City's police set her apart from the "nebulous public," and this relationship places Roznowski's claims beyond the reach of the public duty doctrine. *Taylor v. Stevens County*, 111 Wn.2d 159, 166, 759 P.2d 447 (1988); *Babcock*, 144 Wn.2d at 786.

Additionally, a second type of "special relationship" case is present in Washington where the government agency has a special relationship *with a third person* who causes injury to the plaintiff. The public duty doctrine does not apply where "a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct." *Restatement (Second) of Torts* § 315.²⁵

²⁵ There are numerous examples of such a special relationship in case law. *See, e.g., Petersen v. State*, 100 Wn.2d 421, 426, 671 P.2d 230 (1983) (State had special relationship with patient recently released from Western State Hospital); *Taggart v. State*,

Here, the anti-harassment order specifically directed the City to *restrain Kim* from coming into contact with Roznowski. The City had a *court-ordered responsibility with respect to Kim* that takes the case within the special relationship exception. Thus, where the City had an explicit responsibility under the no-contact order issued by the court as to Kim to separate him from Roznowski, but failed to do so, the public duty doctrine is inapplicable. Either aspect of the special relationship exception applies here.

D. CONCLUSION

The City owed Roznowski a duty of care, but breached that duty by the cavalier attitude of its police officers toward a harassment victim. The City's officers were ill-trained on harassment and acted negligently in failing to properly protect Roznowski from Kim. Hensing did not read

118 Wn.2d 195, 218 n.4, 822 P.2d 243 (1992) (supervised offender assaulted plaintiff); *Hertog, ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 979 P.2d 400 (1999) (offender under supervision of city probation officers and county pre-release counselors raped 6-year-old child); *Joyce v. Dep't of Corrs.*, 155 Wn.2d 306, 119 P.3d 825 (2005) (offender under DOC community supervision killed motorist while driving a stolen vehicle); *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 244 P.3d 924 (2010) (jail had duty to protect inmate); *Estate of Jones v. State*, 107 Wn. App. 510, 15 P.3d 180 (2000), *review denied*, 145 Wn.2d 1025 (2002) (State had a duty to the murder victim of a juvenile offender who escaped from a group care facility for juveniles; the juvenile offender had a history of parole violations that should have disqualified him from placement in a group care facility); *Caulfield v. Kitsap County*, 108 Wn. App. 242, 29 P.3d 738 (2001) (county undertook in-home care of MS patient and was liable when caregiver county provided was negligent in providing care); *Estate of Bordon ex rel. Anderson v. Dep't of Corrs.*, 122 Wn. App. 227, 95 P.3d 764 (2004), *review denied*, 154 Wn.2d 1003 (2005).

Roznowski's petition, the court order, or the LEIS designed to afford Roznowski protection.

The City simply failed to preserve for review any errors relating to the City's duty to Roznowski.

Alternatively, this is a case involving the City's failure to take affirmative steps as in *Robb*, *Coffel*, and *Parrilla*. The public duty doctrine is inapplicable.

Even if the doctrine applies, that doctrine afforded the City no immunity for its negligent and callous behavior toward an harassment victim. Here, the issue is not a duty owed to the "amphorous public," it was a duty owed specifically by City officers to protect Roznowski pursuant to a court order to protect her from Kim, a man with violent proclivities.

This Court should affirm the judgment on the verdict of the jury and the trial court's decision to allow a new trial to the daughters on damages.

DATED this 7th day of March, 2013.

Respectfully submitted,



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APPENDIX

From Washburn's Response to City's Motion for Reconsideration
at 10-12:

CR 50:

(a) Judgment as a Matter of Law.

(1) *Nature and Effect of Motion.* If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim, counterclaim, cross claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment. A motion for judgment as a matter of law which is not granted is not a waiver of trial by jury even though all parties to the action have moved for judgment as a matter of law.

(2) *When Made.* A motion for judgment as a matter of law may be made at any time before submission of the case to the jury.

(b) *Renewing Motion for Judgment After Trial; Alternative Motion for New Trial.* If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to

Fed. R. Civ. Pro. 50:

(a) Judgment as a Matter of Law.

(1) *In General.* If party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) *Motion.* A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) *Renewing the Motion After Trial; Alternative Motion for a New Trial.* If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment -- or if the motion addresses a jury issue not

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| <p>have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment – and may alternatively request a new trial or join a motion for a new trial under rule 59. In ruling on a renewed motion, the court may:</p> <p>(1) If a verdict was returned:</p> <p>(A) allow the judgment to stand,</p> <p>(B) order a new trial, or</p> <p>(C) direct entry of judgment as a matter of law; or</p> <p>(2) if no verdict was returned:</p> <p>(A) order a new trial, or</p> <p>(B) direct entry of judgment as matter of law.</p> | <p>decided by a verdict, no later than 28 days after the jury was discharged – the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:</p> <p>(1) allow judgment on the verdict, if the jury returned a verdict;</p> <p>(2) order a new trial; or</p> <p>(3) direct the entry of judgment as a matter of law.</p> |
|--|---|

RCW 10.14.010:

The legislature finds that serious, personal harassment through repeated invasions of a person's privacy by acts and words showing a pattern of harassment designed to coerce, intimidate, or humiliate the victim is increasing. The legislature further finds that the prevention of such harassment is an important governmental objective. This chapter is intended to provide victims with a speedy and inexpensive method of obtaining civil antiharassment protection orders preventing all further unwanted contact between the victim and the perpetrator.

RCW 10.99.010:

The purpose of this chapter is to recognize the importance of domestic violence as a serious crime against society and

to assure the victim of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide. The Legislature finds that the existing criminal statutes are adequate to provide protection for victims of domestic violence. However, previous societal attitudes have been reflected in policies and practices of law enforcement agencies and prosecutors which have resulted in differing treatment of crimes occurring between cohabitants and of the same crimes occurring between strangers. Only recently has public perception of the serious consequences of domestic violence to society and to the victims led to the recognition of the necessity for early intervention by law enforcement agencies. It is the intent of the Legislature that the official response to cases of domestic violence shall stress the enforcement of the laws to protect the victim and shall communicate the attitude that violent behavior is not excused or tolerated. Furthermore, it is the intent of the Legislature that criminal laws be enforced without regard to whether the persons involved are or were married, cohabiting, or involved in a relationship.

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CASE NUMBER: 09-2-19157-3 KNT

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

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

Plaintiffs,

v.

CITY OF FEDERAL WAY, a Washington
municipal corporation,

Defendant.

NO. 09-2-19157-3 KNT

ORDER DENYING DEFENDANT'S
MOTION FOR RECONSIDERATION OF
ORDER DENYING SUMMARY
JUDGMENT

THIS MATTER having come on regularly before this court on defendant's "Motion for Reconsideration of Order Denying Summary Judgment and, in the alternative, for Certification of August 13, 2010 Order Pursuant to RAP 2.3(b)". The Court reviewed the pleadings and files in this matter, specifically including the following:

1. Defendant's Motion for Reconsideration of Order Denying Summary Judgment and, in the alternative, for Certification of August 13, 2010 Order Pursuant to RAP 2.3(b);

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Maleng Regional Justice Center
401 Fourth Avenue N.
Kent, WA 98032
(206) 296-9270

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- 2. The pleadings, declarations and exhibits set forth in the Court's Order of August 13, 2010, which denied the defendant's Motion for Summary Judgment of dismissal;
- 3. Plaintiff's Opposition to Defendant's Motion for Certification, Clarification, Reconsideration, and Partial Summary Judgment;
- 4. The Declaration of John R. Connelly, Jr. in Opposition to Defendant's Motion for Certification, Clarification, Reconsideration, and Partial Summary Judgment; and
- 5. Defendant's Reply in Support of Motion for Reconsideration of Order Denying Summary Judgment and, in the alternative, for Certification of August 13, 2010 Order Pursuant to RAP 2.3(b).

Being otherwise fully advised in this matter, it is hereby

ORDERED that Defendant's Motion for Reconsideration of Order Denying Summary Judgment and, in the alternative, for Certification of August 13, 2010 Order Pursuant to RAP 2.3(b), is hereby DENIED.

DISCUSSION

A. Relevant Facts.

The basic facts pertinent to the issues in this motion for reconsideration are not disputed. The decedent, Baerbel Roznowski, obtained an RCW 10.14 Temporary Order of Protection on May 1, 2008, after she signed a petition under penalty of perjury alleging that her long time boyfriend, Paul Kim, had been engaging in harassing and stalking activity against her. Roznowski stated in her petition that although Kim's behavior thus far had consisted of "verbal attacks" involving "violent verbal, insulting outbursts," she nevertheless believed that Kim was "capable of physical violence." The petition explained that although Kim had his own residence, he stayed at Roznowski's home. Roznowski asked for and obtained a court order that restrained Kim from (1) making any attempt to

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1 keep Roznowski under surveillance; (2) making any attempts to contact Roznowski; and (3) being
2 within 500 feet of Roznowski's residence. After obtaining the Temporary Order of Protection,
3 Roznowski dropped it off at the Federal Way Police Department for service on Kim.¹

4 On May 3, 2008, shortly after 8:00 a.m., Officer Andrew Hensing of the Federal Way Police
5 Department served Kim with the Temporary Notice of Protection and Notice of Hearing. Officer
6 Hensing served Kim at Roznowski's home. Kim confirmed his identity, and Officer Hensing
7 explained to Kim that he had to be present in court for a hearing, as noted on the order, and that Kim
8 was required to comply with the terms of the order and to leave the premises. Officer Hensing
9 noticed that there was another person present in the home, but he did not make any attempt to deter-
10 mine the identity of the other person, and does not know if it was Roznowski. Officer Hensing then
11 left, without taking any steps to see that Kim complied with the order. Some hours later, Kim
12 stabbed Roznowski to death in her home.²

13 **B. Chapter 10.14 RCW.**

14 The legislature adopted RCW 10.14 in 1987, after making a finding that prevention of
15 harassment "is an important governmental objective." RCW 10.14.010. The statute was "intended
16 to provide victims with a speedy and inexpensive method of obtaining civil antiharassment protect-

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18 ¹ Roznowski was informed that the law provides that the Temporary Order of Protection would
not take effect until Kim had been served with a copy.

19 ² Plaintiff has additional theories of liability against the defendant based on events that occurred
20 after Kim was served but before Roznowski was killed. However, the court does not reach those
21 issues in this decision, as it was not necessary to do so in order to decide the defendant's motion
for summary judgment or the defendant's motion for reconsideration.

1 tion orders preventing all further unwanted contact between the victim and the perpetrator.” *Id.*
2 The antiharassment statute contains provisions for enforcement by the police. It states that law
3 enforcement agencies who receive the antiharassment order “shall forthwith enter the order into any
4 computer-based criminal intelligence information system available,” and provides that “[t]he order
5 is fully enforceable in any county in the state.” RCW 10.14.110(1). While Chapter 10.14 RCW
6 does not require a police officer to arrest a person who violates an antiharassment order, the statute
7 does make a knowing violation of an Order of Protection issued under that Chapter a criminal
8 offense.³

9 C. The Public Duty Doctrine

10 “To prove negligence, a plaintiff must show that the defendant (1) had a duty to the
11 plaintiff, (2) breached that duty, and (3) proximately caused the plaintiff’s injuries by the
12 breach.” *Smith v. City of Kelso*, 112 Wn. App. 277, 281 (2002), citing *Hertog v. City of Seattle*,
13 138 Wn.2d 265, 275, 979 P.2d 400 (1999). “The existence of a duty is a question of law and
14 depends on mixed considerations of ‘logic, common sense, justice, policy, and precedent.’”
15 *Caulfield v. Kitsap County*, 108 Wn. App. 242, 248 (2001), quoting *Hartley v. State*, 103 Wn.2d
16 768, 779 (1985).

17 In cases involving claims of negligence against government entities, courts have reasoned
18 that it would be unfair and unworkable to impose liability on the government to an entire

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20 ³ “Any respondent age eighteen years or over who willfully disobeys any civil antiharassment
21 protection order issued pursuant to this chapter shall be guilty of a gross misdemeanor.” RCW
10.14.170.

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1 universe of persons who are not reasonably foreseeable victims of any particular act of negli-
2 gence by public officials.

3 [N]o liability may be imposed for a public official's negligent conduct unless it is
4 shown that the duty breached was owed to the injured person as an individual and
5 was not merely the breach of an obligation owed to the public in general (*i.e.*, a
6 duty to all is a duty to no one).

7 *Taggart v. State*, 118 Wn.2d 195, 217 (1992), quoting from *Taylor v. Stevens Cy.*, 111 Wn.2d
8 159, 163 (1988).

9 An appropriate analysis of the issues raised by defendant's motion for summary judgment
10 and defendant's motion for reconsideration requires careful examination of both the underlying pur-
11 pose and the application of the "public duty doctrine". The public duty doctrine was developed by
12 our courts after sovereign immunity was abolished. The doctrine was necessitated by the need to
13 shape and to narrow the scope of governmental liability where an alleged tort involved the
14 breach of a duty to the public as a whole, rather than to a particular plaintiff.

15 Although it began its life with a legitimate purpose, the public duty doctrine is
16 now regularly misunderstood and misapplied. Its original function was a
17 focusing tool that helped determine to whom a governmental duty was owed.
18 It was not designed to be the tool that determined the actual duty. *J & B Dev.
19 Co. v. King County*, 100 Wn.2d 299, 303-05, 669 P.2d 468 (1983). Properly,
20 the public duty doctrine is neither a court created general grant of immunity
21 nor a set of specific exceptions to some other existing immunity. *Id.* at 303-04,
669 P.2d 468 (explaining doctrinal differences between the public duty
doctrine and sovereign immunity). The doctrine was a judicial creation and
has evolved on a case-by-case basis with this court looking only backward,
seizing the doctrine and molding it to the facts of whatever case is currently
before it.

Cummins v. Lewis County, 156 Wn.2d 844, 861-62 (2006) (Chambers, J. concurring).

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1 In general, courts have recognized five exceptions to the public duty doctrine's bar on
2 recovery for the negligence of public employees:

3 These exceptions include: (1) when the terms of a legislative enactment evidence
4 an intent to identify and protect a particular and circumscribed class of persons
5 (legislative intent), *Halvorson v. Dahl, supra*, 89 Wn.2d at 676-77, 574 P.2d
6 1190; (2) where governmental agents responsible for enforcing statutory require-
7 ments possess actual knowledge of a statutory violation, fail to take corrective
8 action despite a statutory duty to do so, and the plaintiff is within the class the
9 statute intended to protect (failure to enforce), *Campbell v. Bellevue, supra*, 85
10 Wn.2d at 12-13, 530 P.2d 234, *Mason v. Bitton, supra*, 85 Wn.2d at 326-27, 534
11 P.2d 1360; (3) when governmental agents fail to exercise reasonable care after
12 assuming a duty to warn or come to the aid of a particular plaintiff (rescue
13 doctrine), *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 299, 545 P.2d 13 (1975),
14 *see also Chambers-Castanes v. King Cy., supra*, 100 Wn.2d at 285 n. 3, 669 P.2d
15 468; or (4) where a relationship exists between the governmental agent and any
16 reasonably foreseeable plaintiff, setting the injured plaintiff off from the general
17 public and the plaintiff relies on explicit assurances given by the agent or assur-
18 ances inherent in a duty vested in a governmental entity (special relationship),
19 *Chambers-Castanes v. King Cy., supra* at 286, 669 P.2d 468, *J & B Dev. Co. v.*
20 *King Cy., supra*.

21 In addition to these exceptions, we have not applied the public duty doctrine
where the state engages in a proprietary function such as providing medical or
psychiatric care. *Petersen v. State*, 100 Wash.2d 421, 671 P.2d 230 (1983) (the
state can be held liable for negligent decision by physician to release a mentally
disturbed patient from Western State Hospital).

Bailey v. Town of Forks, 108 Wn.2d 262, 268-270 (1987).

In this case, the City of Federal Way argued in its original motion for summary judgment
that none of the recognized exceptions to the public duty doctrine apply. This court denied the
motion, finding that Officer Hensing had a duty to enforce the terms of the Order of Protection that

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1 he served on Kim, when Officer Hensing was aware that Kim was currently in violation of that
2 Order while in Officer Hensing's presence.⁴

3 The failure to enforce exception to the public duty doctrine states that a general
4 duty of care owed to the public can be owed to an individual where governmental
5 agents responsible for enforcing statutory requirements (1) possess actual know-
6 ledge of a statutory violation, (2) fail to take corrective action despite a statutory
7 duty to do so, and (3) the plaintiff is within the class the statute intended to
8 protect.

9 *Forest v. State*, 62 Wn. App. 363, 368 (1991), citing *Bailey v. Town of Forks*, *supra*.

10 The crux of the City's argument in this case is that because Officer Hensing did not have
11 a **mandatory statutory duty** to arrest Kim for violating the Order of Protection, the "failure to
12 enforce" exception to the public duty doctrine does not apply. Defendant contends that, because
13 no prior case has explicitly held that police have a duty to enforce court orders, they cannot have
14 any such duty.

15 Applying to its analysis "considerations of logic, common sense, justice, policy, and
16 precedent," *Hartley v. State*, 103 Wash.2d 768, 779 (1985), this court finds that the City's
17 analysis of its duty is far too narrow. While Officer Hensing may not have been statutorily
18 obligated to **arrest** Kim for Kim's violation of the Order of Protection after he was served in
19 Roznowski's home, this does not lead to the conclusion that Hensing had no duty to enforce the
20 Order of Protection. On the contrary, it is axiomatic that police have a duty to enforce court orders.
21 Court orders would be meaningless if the police were free to treat them as optional.

⁴The court did not reach plaintiff's arguments relating to other alleged exceptions to the public duty doctrine, as it was not necessary to do so.

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1 In this case, Officer Hensing knew he was serving a court order that prohibited Kim from
2 having contact with Roznowski and that prohibited Kim from being within 500 feet of Roznowski's
3 home. He knew that the order was for Roznowski's personal protection -- not for the protection of
4 the public at large. Roznowski clearly was within the class of persons that Chapter 10.14 RCW was
5 intended to protect, and that this particular order was intended to protect. Officer Hensing knew that
6 Kim was in violation of the Order of Protection because he served Kim with the Order in Roznow-
7 ski's home. Yet Officer Hensing walked away, leaving Kim in ongoing violation of the Order.
8 Officer Hensing also knew (or should have known) that Roznowski had alleged under oath that Kim
9 was capable of violence. While Officer Hensing may not have had a duty to arrest Kim, he none-
10 theless had a duty to enforce the court order and to make sure that Kim left Roznowski's home.

11 The proposition that a police officer is immune from liability as matter of law when the
12 officer (1) is personally aware that a respondent is in the home of a protected person in clear
13 violation of a court order of protection, (2) has personally served the respondent with the order of
14 protection, (3) has reason to believe that the protected person may be present in the home, but does
15 nothing to investigate that possibility, (4) has in his possession information that the respondent is
16 capable of violence, and (5) walks away, leaving the respondent in the protected person's home,
17 would stretch the public duty doctrine past the point of absurdity. It would violate "principles of
18 logic, common sense, justice, policy, and precedent". *Hartley v. State*, 103 Wash.2d 768, 779,
19 (1985).

20 Defendant's argument that this court's "newly created duty is vague and unworkable" does
21 not mandate a different result. This court's order is quite narrow: the public duty doctrine does not

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1 bar plaintiff's claims against the City of Federal Way. What Officer Hensing should have done to
2 enforce the court order, and whether his failure to take any step to enforce the court order was a
3 proximate cause of Roznowski's death, are issues that the trier of fact will need to decide based on
4 the evidence that will be presented at trial.

5 **D. Defendant's Request for Certification to the Court of Appeals.**

6 Discretionary review generally is disfavored, because of the danger of piecemeal, multiple
7 appeals. *Right-Price Recreation, L.L.C. v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 380
8 (2002). "Denial of a motion for summary judgment is generally not an appealable order, RAP
9 2.2(a), and discretionary review of such orders is not ordinarily granted." *Caulfield v. Kitsap*
10 *County*, 108 Wn .App. 242, 249 (2001).

11 While defendant is correct that the issue of whether it owed Roznowski any duty "is a
12 threshold legal issue," defendant's argument that the issue "is both novel and complex" is not a
13 compelling basis for interlocutory appellate review. This court declines to certify its order denying
14 the defendant's motion for summary judgment of dismissal under RAP 2.3(b)(4).

15 DATED this 8th day of September, 2010.

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17 s/ _____
HONORABLE ANDREA DARVAS

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ORDER DENYING DEFENDANT'S MOTION
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Judicial Electronic Signature Page

Case Number: . 09-2-19157-3
Case Title: WASHBURN ET AL VS FEDERAL WAY CITY OF
Document Title: . ORDER DENYING DEF'S MOT FOR RECONSID
Signed by Judge: Andrea Darvas
Date: 9/8/2010 11:51:50 AM



Judge Andrea Darvas

This document is signed in accordance with the provisions in GR 30.
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CA, O=State of Washington PKI, C=US

DECLARATION OF SERVICE

On said day stated below, I emailed a courtesy copy and deposited into the U.S. Mail for service a true and accurate copy of the Motion for Leave to File Over-Length Supplemental Brief and Respondents' Supplemental Brief in Supreme Court Cause No. 87906-1 to the following parties:

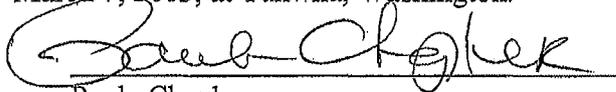
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|---|--|
| Robert L. Christie Thomas P. Miller Christie Law Group, PLLC 2100 Westlake Ave. N., Suite 206 Seattle, WA 98109 | John R. Connelly, Jr. Nathan P. Roberts Connelly Law Offices 2301 N. 30 th Street Tacoma, WA 98403 |
| David J. Ward Legal Voice 907 Pine Street, Suite 500 Seattle, WA 98101-1818 | Jeanne Marie Clavere Washington State Bar Association 1325 4 th Avenue, Suite 600 Seattle, WA 98101-2539 |
| Stewart E. Estes Keating Bucklin & McCormack 800 5 th Avenue, Suite 4141 Seattle, WA 98104-3175 | Mike King Carney Badley Spellman 701 5 th Avenue, Suite 3600 Seattle, WA 98104-7010 |
| Christopher W. Nicholl Nicholl Black & Feig PLLC 1325 4 th Avenue, Suite 1650 Seattle, WA 98101 | Mary H. Spillane Daniel W. Ferm Williams, Kastner & Gibbs PLLC 601 Union Street, Suite 4100 Seattle, WA 98101 |

Original efiled with:

Washington Supreme Court
Clerk's Office
415 12th Street West
Olympia, WA 98504-0929

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

DATED: March 7, 2013, at Tukwila, Washington.



Paula Chapler
Talmadge/Fitzpatrick

OFFICE RECEPTIONIST, CLERK

To: Paula Chapler
Subject: RE: Washburn, et al. v. City of Federal Way--Cause No. 87906-1

Rec'd 3-7-13

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

From: Paula Chapler [<mailto:paula@tal-fitzlaw.com>]
Sent: Thursday, March 07, 2013 4:25 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: Washburn, et al. v. City of Federal Way--Cause No. 87906-1

Per Mr. Talmadge's request, attached is the Motion for Leave to File Over-Length Supplemental Brief and Respondents' Supplemental Brief for filing in the following case:

Case Name: Carola Washburn, et al. v. City of Federal Way
Cause No. 87906-1
Attorney: Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188
(206) 574-6661

Sincerely,

Paula Chapler
Legal Assistant
Talmadge/Fitzpatrick
(206) 574-6661