

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
Nov 26, 2012, 4:08 pm  
BY RONALD R. CARPENTER  
CLERK

E      CPB  
RECEIVED BY E-MAIL

No. 87906-1

---

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.

---

RESPONSE TO WDTLA AMICUS MEMORANDUM  
IN SUPPORT OF PETITION FOR REVIEW

---

Philip A. Talmadge, WSBA #6973  
Talmadge/Fitzpatrick  
18010 Southcenter Parkway  
Tukwila, WA 98188  
(206) 574-6661

John R. Connelly, Jr., WSBA #12183  
Nathan P. Roberts, WSBA #40457  
Connelly Law Offices  
2301 North 30<sup>th</sup> Street  
Tacoma, WA 98403  
(253) 593-5100  
Attorneys for Respondents

 ORIGINAL

A. INTRODUCTION

The respondents, Carola Washburn and Janet Loh, the daughters of Baerbel Roznowski, who was killed as a result of the negligence of police officers of the City of Federal Way (“City”), submit this memorandum in response to the amicus memorandum of the Washington Defense Trial Lawyers Association (“WDTLA”).

The WDTLA memorandum makes no pretense of being a friend of the Court.<sup>1</sup> Rather, it is just another partisan for the City’s position.<sup>2</sup> WDTLA studiously avoids the citation of a key United States Supreme Court decision in *Ortiz v. Jordan*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 884, 178 L.Ed.2d 703 (2011),<sup>3</sup> misstates Washington law on interpreting court rules in light of their federal counterparts, and fails to address the history and policy of Washington’s CR 50, amended in 2005 to make it like the counterpart federal rule.

Accordingly, the Court should disregard WDTLA’s arguments and deny review.

---

<sup>1</sup> It is a group whose sole focus is “the protection of the interests of defendants in civil litigation,” as stated in its September 27, 2012 letter to the Clerk.

<sup>2</sup> For example, the WDTLA memorandum ignores the facts in the Court of Appeals opinion, or the facts presented by Washburn to the Court of Appeals or this Court. It relies *solely* on the facts in the City’s Court of Appeals motion for reconsideration, a severely truncated articulation of the facts. Memo. at 1. *See generally*, *Ryan v. Commodity Futures Trading Comm.*, 125 F.3d 1062 (7th Cir. 1997).

<sup>3</sup> *See generally*, *Gonzalez-Servin v. Ford Motor Co.*, 662 F.3d 931 (7th Cir. 2011).

B. FACTS

Were the Court to merely read the WDTLA memorandum, the Court would not readily glean that the City failed to object to Instruction Number 12, the trial court's general instruction on duty which stated: "A city police department has a duty to exercise ordinary care in the service and enforcement of court orders." CP 2179.<sup>4</sup> The Court of Appeals correctly noted that the City did not specifically object to Instruction Number 12.

Similarly, WDTLA does not address the fact that the City *did not assign error to Instruction Number 12, the duty instruction anywhere in its brief*. Br. of Appellant at 3.<sup>5</sup> It spent *no time* in its opening brief discussing how the actual language of Instruction Number 12 was erroneous. 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.<sup>6</sup>

---

<sup>4</sup> The City admitted as much in its reply brief, asserting 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. Particularly telling was the City's counsel's concession 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.

<sup>5</sup> The City's notice of appeal detailed alleged erroneous acts of the trial court at length. It nowhere mentions instructional error. CP 2095-96.

<sup>6</sup> To emphasize this point, the City did not set forth Instruction Number 12 in the Appendix to its brief, as required by RAP 10.3(g).

It is undisputed that the City never filed a motion under CR 50(b) or a motion for a new trial under CR 59.

C. ARGUMENT

(1) The Court of Appeals Correctly Addressed the Law of the Case Issue

WDTLA contends that the Court of Appeals incorrectly addressed the law of the case issue. Memo. at 4-5. It neglects to address how Instruction Number 12 was not the law of the case when the City *both* failed to properly object to the instruction and failed to assign error to it in its brief. The City argued the public duty doctrine below, but its counsel *never* claimed the specific duty language of Instruction Number 12 somehow misstated the law. 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.

It has long been required under CR 51(f), and cases interpreting it, that objections to instructions must be *explicit*. *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 objection was insufficient.); *Goehle v. Fred Hutchinson Cancer Research*

*Center*, 100 Wn. App. 609, 1 P.3d 579, *review denied*, 142 Wn.2d 1010 (2000). The City's objection to Instruction Number 12 was too imprecise to satisfy CR 51(f), as the Court of Appeals properly concluded.

Further, to preserve error for review, a party must propose an instruction that correctly states the law. *City of Bellevue v. Kravik*, 69 Wn. App. 735, 740, 850 P.2d 559 (1993); *Goehle*, 100 Wn. App. at 614. In this case, the City did not do so. The City's proposed instruction on the public duty doctrine, CP 2070, incorporated the wording of the public duty doctrine. RP 12/20/10: 80-81. In effect, the City sought an instruction asking the jury to decide *a question of law*. *Cummins v. Lewis County*, 156 Wn.2d 844, 853, 133 P.3d 458 (2006) (public duty doctrine is legal issue for the court). *See also, Munich v. Skagit Emergency Communication Center*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_ 2012 WL 5359274 (2012) (Chambers, J, concurring).<sup>7</sup> The City's proposed instruction on duty was an incorrect statement of law, elevating the public duty doctrine to an affirmative defense.

Left unaddressed in WDTLA's memorandum is the City's failure to expressly assign error in its brief to Instruction Number 12. *The City*

---

<sup>7</sup> As Justice Chambers stated in his *Cummins* concurrence, 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." 156 Wn.2d at 861-62 (citations omitted).

*failed to assign error to the instruction on appeal or offer any argument on the alleged instructional error in its briefing.* 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 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); *State v. Hickman*, 135 Wn. App. 97, 101-03, 954 P.2d 900 (1998). 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).

The Court of Appeals correctly addressed the law of the case here.

(2) The Court of Appeals Correctly Decided That the City's Failure to File a CR 50(b) Motion Barred the City's Appeal

The central focus of the City's briefing below was that the public duty doctrine applies, barring the Estate's negligence claims against it. *See, e.g.*, Br. of Appellant at 26-46. Given the Court of Appeals correct ruling on the law of the case, the issue before the Court of Appeals on review was whether the City properly preserved any alleged duty-related error for review by failing to file a CR 50(b) motion.

WDTLA *ignores* the history of CR 50 in Washington and the reasons why CR 50(a) and CR 50(b) motions are required. Washington's CR 50 finds its direct counterpart in Fed. R. Civ. Pro. 50.<sup>8</sup>

WDTLA asserts that Washington law has never required a post-judgment motion to preserve an alleged error for appellate review citing a pre-RAP case for this conclusion. Memo. at 6.<sup>9</sup> That assertion *ignores* the 2005 amendments to CR 50, and is also not entirely correct as Washington law has long recognized that there is a difference between motions for judgment as a matter of law, pretrial and posttrial.<sup>10</sup>

---

<sup>8</sup> Washington courts usually consider federal courts' construction of similar federal rules as persuasive authority, *Sanderson v. University Village*, 98 Wn. App. 403, 410 n.10, 989 P.2d 587 (1999), so long as the state and federal rules are "parallel." *American Mobile Homes of Washington, Inc. v. Seattle-First Nat'l Bank*, 115 Wn.2d 307, 313, 796 P.2d 1276 (1990); *Beal v. City of Seattle*, 134 Wn.2d 769, 777, 954 P.2d 237 (1998).

<sup>9</sup> That case was *overruled* by the 2005 amendments to CR 50. In *Barker v. Waltz*, 40 Wn.2d 866, 246 P.2d 846 (1952), the party failed to file the equivalent of a CR 50(a) motion, but was not precluded from filing a motion for judgment n.o.v., the equivalent of a CR 50(b) motion. As Washington Practice notes: "Under CR 50 as amended in 2005, a motion prior to submitting the case to the jury is *mandatory* if the same party intends to make the same motion later, after the jury has reached a verdict. . ." (emphasis added).

<sup>10</sup> 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); *Kaplan v. Northwest Mutual Life Ins. Co.*, 115 Wn. App. 791, 799-800, 65 P.3d 16 (2003); *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 resolved at trial. In effect, the denial of summary judgment merges into the judgment on the verdict of the jury.

CR 50 was amended in 2005. The drafters' comments to those amendments articulated a *specific intent* to bring CR 50 more closely into conformity with Fed. R. Civ. P. 50. *See* Appendix.<sup>11</sup> This was the genesis for the specific warning to practitioners in *Washington Practice* by Professor Tegland:

*Foundation for appeal.* A party may not simply move for judgment as a matter of law before the case is submitted to the jury pursuant to CR 50(a), and then (if the motion is denied) appeal from the final judgment on the basis of insufficient evidence. 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 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. *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 126 S. Ct. 980, 163 L. Ed. 2d 974 (2006) (7-2 decision, interpreting language virtually identical to the language of Washington's CR 50).

*Id.* (5th ed. pocket part) at 36.

WDTLA is critical of the requirement that both a CR 50(a) and CR 50(b) motion must be filed, memo. at 7-8, but it does not seriously address the federal cases in which the reason for both motions is articulated. In

---

<sup>11</sup> The drafters' comments plainly evidence an intent to require both a CR 50(a) and CR 50(b) motion to preserve error. *Hanks v. Grace*, 167 Wn. App. 542, 273 P.3d 1029, 1034 n.23 (2012). Any lack of awareness of the 2005 amendments to CR 50 mandating the filing of a CR 50(a) motion to allow a party file a CR 50(b) motion was not "excusable." *Id.* at 1035.

*Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 126 S. Ct. 980, 163 L.Ed.2d 974 (2006), the United States Supreme Court held that the 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 foreclosed appellate review even though the party had filed a prejudgment motion for judgment as a matter under Rule 50(a). The Court extended that rule in *Ortiz*, a case not even addressed by WDTLA. There, defendants in a civil right case under 42 U.S.C. § 1983 contended they were entitled to qualified immunity on summary judgment, but the district court denied their motion. They did not renew their motion under Fed. R. Civ. P. 50(b) post-trial. The 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. *Id.* at 889. The Court ruled that because qualified immunity of officials was not a "neat abstract issue of law," the jury's verdict had to stand, notwithstanding the qualified immunity defense. *Id.* at 893.

Here, as in *Ortiz*, the public duty doctrine or its exceptions do not constitute a "neat abstract issue of law." Most critically, *a trial* intervenes between a CR 50(a) motion and a CR 50(b) at which facts are *resolved* by the trier of fact. 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."<sup>12</sup>

Finally, WDTLA's complaint about the Court of Appeals decision on policy grounds, memo. at 7-8, is meritless.<sup>13</sup> The requirement that a

---

<sup>12</sup> The Court of Appeals recognized this in modifying its opinion on reconsideration. WDTLA does not reference the fact that the court substantially altered its original opinion to address the issues raised by it and the City on reconsideration.

<sup>13</sup> Federal courts have required two motions for more than half a century. They have not done so for whimsical reasons. The best that WDTLA can do is to cite a *dissent* criticizing the rule. The *majority* there reaffirmed the requirement of two motions stating: "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.* Finally, the Court reiterated that pre and post-trial motions are different:

This requirement of a timely application for judgment after verdict is not an idle motion. This verdict solves factual questions against the post-verdict movant and thus emphasizes the importance of the legal issues. The movant can also ask for a new trial either for errors of law or on discretionary grounds. The requirement for timely motion after verdict is thus an essential part of the rule, firmly grounded in principles of fairness.

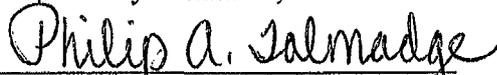
party wishing to preserve a legal error raised on summary judgment or in a CR 50(a) motion must renew that motion under CR 50(b) is wise, requiring parties to be focused on legal issues, and preserving scarce judicial resources. More critically, there is a difference between motions for judgment as a matter of law pre and post-verdict particularly where, as here, there are facts that bear on the legal question. *A trial has occurred.* Those facts appropriately become a part of any record in deciding a CR 50(b) motion. The City, warned by the 2005 amendments to CR 50 and *Washington Practice*, should have renewed its motion accordingly. When it did not, it failed to preserve any alleged error for review.

D. CONCLUSION

The Court of Appeals properly applied the law of the case doctrine and properly interpreted CR 50. Review here should be denied.

DATED this 26<sup>th</sup> day of November, 2012.

Respectfully submitted,



Philip A. Talmadge, WSBA #69730  
Talmadge/Fitzpatrick  
18010 Southcenter Parkway  
Tukwila, WA 98188  
(206) 574-6661

---

*Id.* (quoting *Cone v. West Va. Pulp & Paper Co.*, 330 U.S. 212, 217-18, 67 S. Ct. 752, 91 L.Ed. 849 (1947)).

John R. Connelly, Jr., WSBA #12183  
Nathan P. Roberts, WSBA #40457  
Connelly Law Offices  
2301 North 30<sup>th</sup> Street  
Tacoma, WA 98403  
(253) 593-5100  
Attorneys for Respondents  
Washburn and Loh

# APPENDIX

*Purpose.* The suggested amendments to CR 50 seek to make Washington's practice with respect to motions for judgment as a matter of law more comparable to federal practice under Fed. R. Civ. P. 50. This is accomplished in a number of ways.

First, it is suggested that the caption of the rule be changed to be the same as Fed. R. Civ. P. 50. In addition, the caption of subsection (b) will be changed to conform to Fed. R. Civ. P. 50(b).

Second, the last sentence of existing Fed. R. Civ. P. 50(a)(1) is deleted and replaced with the language from Fed. R. Civ. P. 50(a)(2). This change makes CR 50(a) substantively the same as Fed. R. Civ. P. 50(a) with respect to motions for judgment as a matter of law before submission of a case to the jury.

Third, the suggested amendments to CR 50(b) replace the existing section with the language of Fed. R. Civ. P. 50(b) regarding motions for judgment as a matter of law after trial. This suggested amendment changes Washington practice and *requires* that a motion for judgment as a matter of law be made before submission of the case to the jury as a condition to renewing the motion post-verdict. The Committee concluded that requiring a motion for judgment as a matter of law before the case is submitting to the jury enhances the administration of justice because the parties and/or the court can correct possible errors before verdict. Absent such a motion before submission of the case to the jury, a party may not bring a motion for judgment as a matter of law thereafter. In addition, it is beneficial in this situation to have Washington and federal practice be the same.

Fourth, the suggested amendments add a new section (d), which is identical to Fed. R. Civ. P. 50(d). This section addresses the rights of party who prevailed on a motion for judgment as a matter of law with respect to preserving issues on appeal.

4 Karl. B. Tegland, *Wash. Practice: Rules Practice CR 50* (5<sup>th</sup> ed. 2006) at 211.

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 Response to WDLA Amicus Memorandum in Support of Petition for Review in Supreme Court Cause No. 87906-1 to the following parties:

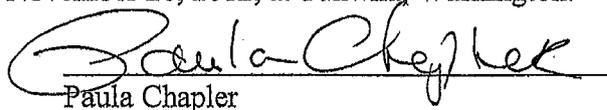
Robert L. Christie Thomas P. Miller Christie Law Group, PLLC 2100 Westlake Ave. N., Suite 206 Seattle, WA 98109	John R. Connelly, Jr. Nathan P. Roberts Connelly Law Offices 2301 N. 30 <sup>th</sup> Street Tacoma, WA 98403
David J. Ward Legal Voice 907 Pine Street, Suite 500 Seattle, WA 98101-1818	Alison Maria Romano Bettles Nordstrom, Inc. 1700 7 <sup>th</sup> Avenue, Suite 1000 Seattle, WA 98101-4407
Stewart E. Estes Keating Bucklin & McCormack 800 5 <sup>th</sup> Avenue, Suite 4141 Seattle, WA 98104-3175	Mike King Carney Badley Spellman 701 5 <sup>th</sup> Avenue, Suite 3600 Seattle, WA 98104-7010
Christopher W. Nicholl Nicholl Black & Feig PLLC 1325 4 <sup>th</sup> 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 filed with:

Washington Supreme Court  
Clerk's Office  
415 12<sup>th</sup> 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: November 26, 2012, at Tukwila, Washington.

  
Paula Chapler  
Talmadge/Fitzpatrick

## OFFICE RECEPTIONIST, CLERK

---

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

Rec'd 11/26/12

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:** Monday, November 26, 2012 4:02 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Subject:** Washburn v. City of Federal Way -- Cause No. 87906-1

Per Mr. Talmadge's request, attached is the Response to WDTLA Amicus Memorandum in Support of Petition for Review for filing in the following case:

Case Name: Carola Washburn, et al. v. City of Federal Way  
Cause Number: 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