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COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

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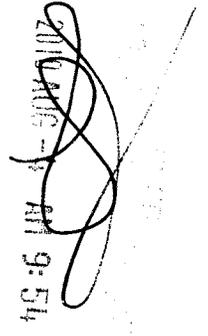
ESTATE OF HARB,

Appellant,

vs.

KING COUNTY SHERIFF'S OFFICE, et al.,

Respondents.

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OPENING BRIEF OF APPELLANT ESTATE OF HARB

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## **I. SUMMARY OF OPENING BRIEF**

### **A. The Facts**

The King County Sheriff's Office (KCSO) hired Ferenc Zana to be a Deputy Sheriff in 1985. Deputy Zana has an unenviable disciplinary history. In 1991, Deputy Zana became enamored with an underage man and provided alcohol to him. After drinking together, Deputy Zana then loaned his private car for the young man to drive, resulting in an accident. Future Sheriff Sue Rahr investigated this incident, and wrote that Deputy Zana used "extremely poor judgment," has "an unimpressive disciplinary record with this department," "accepted no responsibility for his action," lied during the internal investigation, and "encouraged one of the witnesses to lie." Sheriff Rahr concluded that Deputy Zana "does not possess the integrity to wear the uniform."

Deputy Zana's poor judgment in relation to his love life continued. By August 2005, he had been living with 24 year old Christopher Bistryski for 14 months. Mr. Bistryski was an extremely troubled young man with serious mental health problems, a history of violence, and felony convictions. His episodes of erratic, violent behavior were associated with alcohol abuse.

The Zana-Bistryski relationship came to the attention of

KCSO supervisors when in 2004, a Seattle police officer notified KCSO that Mr. Bistryski was a convicted felon who was stopped in a high crime/drug area driving Deputy Zana's private vehicle. Inquiry into Mr. Bistryski's criminal record reveals that in 1997 he was convicted of burglary for stealing guns. The police report and Mr. Bistryski's statement revealed that the guns were stolen to "go on a killing spree."

On March 31, 2005, while living with Deputy Zana, Mr. Bistryski attempted suicide. Mr. Bistryski violently resisted the responding KCSO officers' attempts to get him into custody. It was clear to the officers that he was drunk. In response to these events, members of KCSO's supervisory team met twice with Deputy Zana to discuss his association with Mr. Bistryski, Mr. Bistryski's use of Deputy Zana's private vehicle, and Mr. Bistryski's mental health and alcohol abuse problems.

Three weeks later, on April 23, 2005, Mr. Bistryski again attempted suicide in Deputy Zana's home. This time he attacked the responding KCSO officers and had to be tazed and handcuffed. Mr. Bistryski was taken to Harborview with the police urging commitment "so he can get the help he needs." The responding officer also stated in his report:

This is an ongoing pattern [of] suicide attempts and dangerous confrontations with citizens and police. Christopher is clearly a major danger to himself as well as to others.

A sergeant in Deputy Zana's precinct had a conversation with Deputy Zana in his home that day, filing a report stating:

I strongly suggested that he might want to consider obtaining another roommate because of Bistryski's unstable mental capacities. I went on to ask him if he had a gun safe or lock box in the residence. Zana replied that he did not. I remember suggesting that he invest in a lock box . . . I further suggested that Zana lock his police equipment in the trunk of his patrol car until he could obtain a lock box.

Deputy Zana also filed a statement, which concluded:

Christopher is clearly a danger to himself and obviously to others.

KCSO supervisors summoned Deputy Zana to a meeting, telling him that if the problems with Mr. Bistryski continue "and Ferenc does not remove him from the house, the department would get involved."

On August 19, 2005 Mr. Bistryski spent the evening drinking at home with Deputy Zana. Mr. Bistryski then went to the Empire Bar & Grill, where he continued drinking to excess. He got into at least three physical altercations at the bar. A bar patron called Deputy Zana to inform him that Mr. Bistryski was acting

aggressively, violently, and out of control, and needed to go home, but that he was too drunk to drive himself. Deputy Zana drove to the bar to pick Mr. Bistryski up. Upon returning to their home, Deputy Zana inexplicably went to bed leaving his "off-duty" firearm—a Glock 27 fully loaded with Sheriff Office bullets—on the kitchen counter with his Sheriff badge and ID card. Mr. Bistryski took the loaded gun, left the house, and shot at a passing motorist.

Deputy Zana heard the shot and immediately knew it was Mr. Bistryski. He called 911. While this was happening, Mr. Bistryski walked to the nearby Plaid Pantry, entered the store with Deputy Zana's gun drawn, and immediately upon seeing the clerk—Mr. Harb—began shooting. The wounded Mr. Harb fled for his life into the employee room in the back of the store. Mr. Bistryski left the store, but soon returned. He walked straight back to the employee room and shot Mr. Harb again, killing him.

By this time, Deputy Zana was on his police radio communicating with responding KCSO officers. After killing Mr. Harb, Mr. Bistryski returned home. Deputy Zana met him outside, disarmed him, seized him, heard his confession, and reported via radio that he had Mr. Bistryski in custody, unarmed, and that Mr. Bistryski had confessed to the Plaid Pantry killing.

KCSO initiated disciplinary proceedings against Deputy Zana arising out of these events, including charges that Deputy Zana's relationship with Mr. Bistryski and his "personal conduct" violated KCSO regulations. The disciplinary action ended with Deputy Zana's retirement.

### **B. The Law**

The primary issue on appeal is whether Deputy Zana's handling of the firearm he carries when "off-duty" falls within the scope of his job as a Sheriff's Deputy. Washington law provides that "the employer is liable if the act complained of was incidental to the acts expressly or impliedly authorized or indirectly contributed to the furtherance of the business of the employer." Poundstone v. Whitney, 189 Wash. 494, 499, 65 P.2d 1261 (1937). The estate submits that on the evidence of record, much more than a *prima facie* case has been made that Deputy Zana's home-based activities in arming himself to meet his "off-duty" job responsibilities are incidental to his job as a police officer and advance his employer's interests in public safety and officer self-protection.

First, police officer's have a 24-hour-per-day common law duty in Washington to preserve the public peace and protect the lives and property of the public. State v. Graham, 130 Wn.2d 711,

718, 927 P.2d 227 (1996). Moreover, the evidence shows that police officers in general, and King County Sheriff Deputies specifically, are expected to be ready to provide a police response at all times, and likewise to protect themselves while "off-duty." This requires that the officer be armed when "off-duty." As a result, the Legislature has authorized Washington police officers to carry concealed weapons while "off-duty" without obtaining a concealed weapon permit, solely by virtue of their employment as police officers. RCW 9.41.060(1).

Second, the Sheriff's Office's own standards, rules, and regulations demonstrate that the activities of its "off-duty" officers are of great importance to meeting their employer's expectations. KCSO has had numerous regulations regarding "off-duty" firearms, ammunition, officer relationships with felons, and "off-duty" conduct in place while Deputy Zana has been employed. In fact, KCSO encourages its "off-duty" officers to be armed by providing KCSO ammunition for its officers to load the weapons they carry when "off-duty." KCSO has an interest in its officers being armed even when "off-duty" because it has an interest in having its officers respond in appropriate circumstances with law enforcement action, and because it has an interest in its officers being able to protect

themselves at all times. Deputy Zana, like many, many other police officers in this state, met these "off-duty" responsibilities by owning, keeping in his home, and carrying an "off-duty" weapon loaded with Sheriff-issued ammunition.

Third, the actions of KCSO supervisors before Mr. Harb's death demonstrate that Deputy Zana's allegedly "off-duty" activities were of such concern and interest of KCSO that they investigated and intervened (albeit inadequately) on numerous occasions.

Fourth, the actions of Deputy Zana immediately after Mr. Harb's death to capture and disarm Mr. Bistryski show that a Sheriff's Deputy is never really "off-duty" but is, in fact, always "on-call" to provide law enforcement action.

Because the evidence of record establishes at the very least a *prima facie* case that Deputy Zana's negligence in failing to secure his firearms loaded with Sheriff-issued ammunition was incidental to his duties as a police officer, and that his maintenance of the firearm directly advanced his employer's interests in public safety and officer self-protection, the estate submits that the trial court erred in dismissing the estate's vicarious liability claim on summary judgment. Therefore, the estate respectfully urges Division One to reverse the trial court's summary judgment orders,

and remand either for entry of summary judgment in favor of the estate or for trial.

## **II. ASSIGNMENTS OF ERROR**

**No. 1.** The trial court erred when on November 23, 2009 it granted summary judgment dismissing all of the estate's claims against King County. CP 308-10.

**No. 2.** The trial court erred when on December 10, 2009 it denied the estate's motion for reconsideration of the order granting summary judgment to King County. CP 431.

**No. 3.** The trial court erred when on December 10, 2009 it denied Chestnut Hill's motion for reconsideration of the summary judgment order, CP 429, in which the estate had joined. CP 336.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**No. 1.** Has the estate made a *prima facie* case of vicarious liability under the doctrine of *respondeat superior*, when record evidence shows that Deputy Zana's possession and storage of an "off-duty" weapon loaded with Sheriff-issued ammunition in his home was incidental to his employment as a Sheriff's Deputy and that it directly advanced KCSO's interests in public safety and officer protection? (Assignments 1-3)

**No. 2.** Even if Deputy Zana was acting outside acting

outside the scope of his employment as a Sheriff's Deputy when possessing and storing his "off-duty" firearm loaded with KCSO-issued bullets, King County can still be held directly liable for breaching duties arising out of the employer-employee relationship. Niece v. Elmview Group Home, 131 Wn.2d 39, 48, 929 P.2d 420 (1997). Has the estate made a *prima facie* case of direct liability against King County under Restatement 2d of Torts § 317, Duty Of Master To Control Conduct Of Servant, when record evidence shows that the failure to safeguard a loaded weapon from a violent, unstable and dangerous individual constitutes a misuse of KCSO ammunition, that KCSO had the ability to prevent Deputy Zana from allowing his dangerous roommate access to that dangerous instrumentality, and that KCSO knew of the necessity of preventing that access? (Assignments 1-2)

**No. 3** Has the estate made a *prima facie* case of direct liability against King County for common law negligent supervision, when the facts of record show that King County knew of the dangerous situation created by Deputy Zana's failure to secure his firearms loaded with Sheriff-issued ammunition from Mr. Bistryski, knew that Deputy Zana did not adequately secure these dangerous instrumentalities, but did nothing to prevent Mr. Bistryski from

accessing them? (Assignments 1-2)

**No. 4** Does the public duty doctrine bar a common law negligent supervision claim against King County, when similar negligent supervision causes of action have been held to be exceptions to the public duty doctrine? Hertog v. City of Seattle, 138 Wn.2d 265, 272, 979 P.2d 400 (1999). Even if not an exception, does the public duty doctrine apply when the supervision of employees entrusted with dangerous instrumentalities is not "solely a governmental function"? (Assignments 1-2)

#### **IV. STATEMENT OF THE CASE**

##### **A. The King County Sheriff's Office Employs Deputy Ferenc Zana**

Deputy Zana became a Deputy in 1985. In 1991, Sheriff Sue Rahr (then a Lieutenant and IIU Unit Commander) wrote a memorandum detailing Deputy Zana's provision of alcohol to minors then letting one of them borrow his car resulting in an accident. Sheriff Rahr concluded that Deputy Zana used "extremely poor judgment," has "an unimpressive disciplinary record with this department," "accepted no responsibility for his action," lied during the IIU investigation, and "encouraged one of the witnesses to lie." Sheriff Rahr concluded that Deputy Zana

"does not possess the integrity to wear the uniform." CP 180.

**B. King County Intervenes in the Zana-Bistryski Relationship**

Deputy Zana in 2007 was 43. His boyfriend and roommate was Christopher Bistryski, 24. CP 95. They had lived together in Deputy Zana's condominium in Kenmore for 14 months. CP 66.

Mr. Bistryski was a very troubled young man with serious mental health problems, a violent history, and felony convictions. His episodes of erratic, violent behavior were associated with alcohol abuse. CP 207-09, 222-24, 226, 268, 275-76, 90.

In 2004, a Seattle police officer notified KCSO that Mr. Bistryski was a convicted felon who was stopped in a high crime/drug area driving Deputy Zana's private vehicle. CP 182. Inquiry into Mr. Bistryski's criminal record reveals that in 1997 he was convicted of burglary for stealing guns. CP 184-93. The police report and Mr. Bistryski's statement revealed that the guns were stolen to "go on a killing spree." CP 193, 199.

On March 31, 2005, while living with Deputy Zana, Mr. Bistryski attempted suicide. CP 203-08. Mr. Bistryski violently resisted the officer's attempts to get him into custody. CP 208. It was clear to the officers that he was drunk. Id. In response to

these events, members of KCSO's supervisory team met twice with Deputy Zana to discuss his association with Mr. Bistryski, Mr. Bistryski's use of Deputy Zana's car, and Mr. Bistryski's mental health and alcohol abuse problems. CP 211-20.

Three weeks later, on April 23, 2005, Mr. Bistryski again attempted suicide in Deputy Zana's home. This time he attacked the responding KCSO officers and had to be tazed and handcuffed. CP 222-26. Mr. Bistryski was taken to Harborview with a recommendation of commitment "so he can get the help he needs." CP 224. The responding officer also stated in his report:

This is an ongoing pattern [of] suicide attempts and dangerous confrontations with citizens and police. Christopher is clearly a major danger to himself as well as to others."

Major Fenton then met again with Deputy Zana. She told him that if the problems with Mr. Bistryski continue "and Ferenc does not remove him from the house, the department would get involved." CP 217. Major Norton reported that she never discussed with Deputy Zana safely securing his weapons from Mr. Bistryski. CP 220.

In response to Mr. Bistryski's actions, a sergeant in Deputy Zana's precinct, Sgt. Keeney, had a conversation with Deputy Zana

in his home on April 23rd. Sgt. Keeney reported:

I strongly suggested that he might want to consider obtaining another roommate because of Bistryski's unstable mental capacities. I went on to ask him if he had a gun safe or lock box in the residence. Zana replied that he did not. I remember suggesting that he invest in a lock box . . . I further suggested that Zana lock his police equipment in the trunk of his patrol car until he could obtain a lock box.

CP 229. Sgt. Keeney also discussed with Deputy Zana Mr.

Bistryski's felony convictions. After this episode, Deputy Zana also filed a statement, which concluded (CP 231):

Christopher is clearly a danger to himself and obviously to others.

**C. Pertinent Police Officer Standards, Rules, Regulations, and Expectations**

KCSO has had numerous regulations regarding firearms, ammunition, officer relationships, and "off-duty" conduct in place while Deputy Zana was employed. Generally, CP 234-58. The estate's police expert testified that these regulations are consistent with industry custom regarding police officer's responsibilities when "off-duty" and how they are customarily met. CP 163 at 7-9; CP 164 at 12-14.

Officer Zana was a King County Sheriff's Office (KCSO) deputy. Police officer's have a 24-hour-per-day common law duty

in Washington to preserve the public peace and protect the lives and property of the public. State v. Graham, 130 Wn.2d 711, 718, 927 P.2d 227 (1996). Police officers are expected to be able to provide a police response at all times, and to protect themselves while "off-duty." CP 261-62. As a result, police officers are authorized and expected to own and carry concealed weapons while "off-duty." CP 305. They may do so, without the concealed weapon permit required by RCW 9.41.050, by virtue of their employment as police officers. RCW 9.41.060(1). KCSO specifically required its officers to load "off-duty" weapons with KCSO ammunition and to keep them properly maintained. CP 164 at 12-14; 305 at 15-23. KCSO facilitated officers obtaining "off-duty" firearms by arranging below-retail-cost purchases. CP 235.

The KCSO General Orders Manual has had numerous provisions relating to firearms and ammunition used by its officers while Deputy Zana has been employed (CP 246):

§ 6.04.005 Policy Statement:

It is Department policy to have review procedures for firearms, ammunition, and accessories. Sworn department members shall comply with the following guidelines when carrying firearms, ammunition, and accessories.

The policy statement does not limit these regulations to when the

Deputy Sheriff is "on-duty" but instead require compliance whenever officers are carrying guns or ammunition:

In recognition of the 24-hour-per-day common law duty in Washington of all police officers to preserve the public peace and protect the lives and property of the public, the KCSO regulations specifically required Deputy Sheriff's to maintain their off-duty firearm. CP 246 (§ 6.04.015 Officer's Responsibility).<sup>1</sup>

The KCSO officer manual also contains several regulations which apply to a Sheriff's Deputy's "off-duty" conduct. CP 237-38.

In recognition of and compliance with the general duty on all police officers imposed by the State of Washington, and the expectation of and specific duty imposed by his employer KCSO, Deputy Sheriff Zana carried a privately-owned weapon whenever he left his home. He used to carry his department firearm when not in uniform, but he kept forgetting to bring it to work with him, so he switched to using his department-issued weapon when in uniform and a private weapon when not in uniform. CP 262-63. The purpose of carrying a weapon at all times was to be able to meet his 24-hour per day duty to take enforcement action when the situation arises, and to protect himself if he encountered someone

he had previously arrested. CP 261-62.

**D. Events Leading to Mr. Harb's Death on August 19, 2007**

On August 19, 2005 Mr. Bistryski spent the evening drinking with Deputy Zana. He then went to the Empire Bar & Grill, where he continued drinking to excess. He got into at least three physical altercations at the bar. A bar patron called Deputy Zana to inform him that Mr. Bistryski was acting aggressively, violently, and out of control, and needed to go home but was too drunk to drive himself home. CP 72-73. Deputy Zana drove to the bar to pick Mr. Bistryski up, and observed his condition and state of mind. Upon returning to their home, Deputy Zana inexplicably went to bed leaving his backup service pistol—a Glock 27 fully loaded with KCSO bullets—on the kitchen counter with his Sheriff badge and ID card. CP 78. Mr. Bistryski took the loaded gun, left the house, and shot at a passing motorist. CP 95-96.

Deputy Zana heard the shot and immediately knew it was Mr. Bistryski. He called 911. CP 74, 83-84. While this was happening Mr. Bistryski walked to the nearby Plaid Pantry, entered the store with Deputy Zana's gun drawn, and immediately upon

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1 This regulation was apparently withdrawn in 1999. CP 384.

seeing Mr. Harb began shooting. Mr. Harb fled for his life into the employee room, but after several moments Mr. Bistryski followed him and shot him several more times, killing Mr. Harb. CP 99-100.

**E. Subsequent Police Actions of Deputy Zana**

By this time Deputy Zana was on his police radio communicating with responding KCSO officers. CP 75. After killing Mr. Harb, Mr. Bistryski returned home. Deputy Zana met him outside, disarmed him, seized him, and radioed in that he had Mr. Bistryski in custody, unarmed, and that Mr. Bistryski had confessed to the Plaid Pantry killing of Mr. Harb. CP 75-76, 271-72.

KCSO initiated disciplinary proceedings against Deputy Zana arising out of these events. CP 283. The disciplinary action included charges that Deputy Zana's relationship with Mr. Bistryski and his "personal conduct" violated KCSO regulations. Id. The disciplinary action ended with Deputy Zana's retirement. Id.

**F. Procedural History**

The estate filed this wrongful death action against King County in October 2008. The action was consolidated with wrongful death actions the estate had previously filed against Ferenc Zana, Christopher Bistryski, and Chestnut Hill Associates.

The estate brought a negligence claim against Mr. Zana for

leaving his loaded firearm accessible to Mr. Bistryski, who Mr. Zana knew to have violent tendencies , especially when drunk, and who Mr. Zana knew was drunk that night. The estate brought an assault claim against Mr. Bistryski. The estate also brought a dram shop claim against the owner of the bar where Mr. Bistryski was over-served and got into fights the night he killed Mr. Harb.

The estate brought a vicarious liability claim against King County, on the ground that Deputy Zana's handling of his off-duty weapon was incidental to his job as a Sheriff's Officer and furthered the Sheriff's interests of protecting officers and the public, and therefore KCSO was legally responsible for Deputy Zana's acts and omissions proximately causing Mr. Harb's death. The estate also brought direct negligence claims against King County for its own negligence in supervising Deputy Sheriff Zana. CP 1-10.

King County brought a motion asking for summary judgment dismissal of all of the estate's claims against it. CP 25. The estate opposed. CP 125. On November 23, 2009, the trial court granted the motion. CP 308-10. The estate moved for reconsideration, CP 333, which was denied. CP 431. Chestnut Hill also moved for reconsideration, CP 311, in which motion the estate joined, CP 336, which was also denied. CP 429.

The estate moved for an order under CR 54(b). The CR 54(b) order was entered on January 8, 2010. This appeal timely followed. CP 435. Subsequently, a motion to determine appealability was set *sua sponte* by this Court.

Contemporaneously, the estate settled its claims against CHA and Zana. Both settlements were determined to be reasonable by the trial court under RCW 4.22.060. The estate then voluntarily dismissed its claims against Mr. Bistryski. Commissioner Verellen granted review by order dated May 19, 2010.

## **V. ARGUMENT**

### **A. Standard of Review**

The trial court orders at issue in this appeal were made on summary judgment. The standard of review is therefore *de novo*. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

Summary judgment is appropriate only if reasonable persons could reach but one conclusion from the evidence, considering the facts in the light most favorable to the nonmoving party. Safeco Ins. Co. of America v. Butler, 118 Wn.2d 383, 394-395, 823 P.2d 499 (1992). The summary judgment court is not permitted to weigh the evidence or resolve any material factual issues in ruling on a motion for summary judgment. Fleming v.

Smith, 64 Wn.2d 181, 185, 390 P.2d 990 (1964). The summary judgment court cannot weigh the credibility of witnesses or treat a summary judgment motion as a trial by affidavit. Barker v. Advanced Silicon Materials, LLC, 131 Wn. App. 616, 624, 128 P.3d 633 (2006). The function of summary judgment is to avoid a useless trial. "A trial is not useless but absolutely necessary where there exists a genuine issue as to any material fact." Preston v. Duncan, 55 Wn.2d 678, 681, 349 P.2d 605 (1960).

In sum, a motion for summary judgment must be denied if the record shows any reasonable hypothesis which entitles the nonmoving party to relief. Mostrom v. Pettibon, 25 Wn. App. 158, 162, 607 P.2d 864 (1980).

**B. The Trial Court Erred When it Summarily Dismissed the Estate's Claim that King County is Vicariously Liable for Deputy Sheriff Zana's Negligence in Leaving his "Off-Duty" Firearm Loaded With Sheriff-Supplied Ammunition Accessible to Mr. Bistrski**

The estate's primary claim against King County is that, as Deputy Zana's employer, it is vicariously liable for Deputy Zana's negligent handling of the firearm loaded with KCSO ammunition that he kept in his home to meet his "off-duty" obligations as a police officer. Because the estate brought forth more than enough

evidence to make out a *prima facie* case of vicarious liability under Washington law, the trial court erred when it dismissed the estate's *respondeat superior* claim on summary judgment.

### 1. **Washington Law on Employer Vicarious Liability**

An employee does not have to be in uniform and officially "on-duty" to be acting within the scope of employment. Under Washington law, an employee is acting within the scope of employment if his or her acts are *incidental to* acts expressly or impliedly authorized by the employer, or if they merely *indirectly advance* the employer's interests.

It is the general rule in Washington that a principal may be held liable for the tortious acts of the agent if such acts are done within the scope of employment. Titus v. Tacoma Smeltermen's Union Local No. 25, 62 Wn.2d 461, 383 P.2d 504 (1963). The doctrine of *respondeat superior* holds the principal liable "for physical harm caused by the negligent conduct of servants within the scope of their agency." Cameron v. Downs, 32 Wn. App. 875, 881, 650 P.2d 260 (1982):

To be within the scope of one's agency, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized.

Determining the scope of employment is normally a jury question. Strachan v. Kitsap County, 27 Wn. App. 271, 274-275, 616 P.2d 1251, review denied, 94 Wash.2d 1025 (1980).

As stated by the Supreme Court in McNew v. Puget Sound Pulp & Timber Co., 37 Wn.2d 495, 497-98, 224 P.2d 627 (1950)

(emphasis added):

[W]here the employee is combining his own business with that of his employer, or attending to both at substantially the same time, no nice inquiry will be made as to which business the employee was actually engaged in when a third person was injured, and ***the employer will be held responsible unless it clearly appears that the employee could not have been directly or indirectly serving his employer***, also the fact that the predominant motive of the employee is to benefit himself does not prevent the act from being within the course or scope of employment, and ***if the purpose of serving the employer's business actuates the employee to any appreciable extent***, the employer is subject to liability if the act otherwise is within the service.

Thus, "the employer is liable if the act complained of was incidental to the acts expressly or impliedly authorized or indirectly contributed to the furtherance of the business of the employer."

Poundstone v. Whitney, 189 Wash. 494, 499, 65 P.2d 1261 (1937).

**2. Deputy Zana's Arming Himself While Not in Uniform is by Law Directly Related to His Employment as a Sheriff's Deputy, and in Addition it Directly Furthered His Employer's Interests in Both Public Safety**

### **and Officer Protection**

Applying these legal standards to the facts of record, and construing all evidence and inferences therefrom in favor of the estate per CR 59, at the very least there are material issues of fact regarding King County's vicariously liability for Deputy Zana's failure to secure his weapon loaded with Sheriff-issued ammunition. See Evans v. Thompson, 124 Wn.2d 435, 444, 879 P.2d 938 (1994) ("Usually it is a question for the jury whether an employee was acting within the scope of employment.").

#### **a. By Law, Washington Police Officers Have Public Safety Duties 24-7**

In the State of Washington, "off-duty" police officers have a common law duty to be prepared to respond to emergent situations at all times:

Under the common law, a police officer on "off-duty" status is not relieved of the obligation as an officer to preserve the public peace and to protect the lives and property of the citizens of the public in general. ***Indeed, police officers are considered to be under a duty to respond as police officers 24 hours a day.***

Graham, 130 Wn.2d at 718 (emphasis added) (internal quotation omitted). The Graham Court went on to state:

We hold that an off-duty police officer is a public servant, with the authority to respond to emergencies and to react to criminal conduct.

Id. at 719. The fact that " an off-duty police officer is a public servant" is why the dictum "an officer is on duty 24 hours a day" is uniform in the law enforcement community.

In addition to our Supreme Court, the fact that police officers are never fully "off-duty" has also been recognized by our Legislature. The need to be armed when not in uniform explains why the Legislature exempted all Washington police officers from the requirements of our concealed weapon permit statute, RCW 9.41.050. Simply by virtue of their employment as police officers, "off-duty" police officers may carry concealed weapons without the otherwise-required concealed weapon permit. RCW 9.41.060(1).

In sum, under Washington common law, police officers such as Sheriff's Deputy Zana have a duty to be prepared to take police action even when out of uniform and otherwise "off-duty." In recognition of a police officer's need to be armed to carry out these "off-duty" responsibilities, the Legislature has exempted them from concealed weapon statutes. Logic dictates that when a police officer takes steps to arm himself when "off-duty" by maintaining firearms in his residence, this is at least "incidental to" his duty as a police officer to be ready to take police action 24 hours per day.

**b. This Broad Scope of Employment is Also Established by Custom and by Employer Expectation**

The fact that police officers are never really "off-duty" is also established by industry custom and by employer standards and expectations, as the record in this case reflects.

The testimony of the estate's police policies, practices, and procedures expert establishes that police officers are expected to, and do, arm themselves when not in uniform. This expert testimony establishes that the combination of law enforcement culture and tradition, along with KCSO standards and expectations, results in a standard practice that Sheriff's Deputies are always on duty and carry a weapon even when "off-duty" in order to meet the expectations of their employer.

These facts are amply demonstrated further by the actual events leading up to Sheriff Deputy Zana's negligence and Mr. Harb's death. Deputy Zana's KCSO supervisors investigated, interviewed, and monitored Deputy Zana's "off-duty" activities extensively: they intervened in his relationship with Mr. Bistryski; they intervened in his lending out of his private automobile to Mr. Bistryski; they advised him (but took no action) regarding his safeguarding of his weapons and KCSO ammunition. These

actions show that to Deputy Zana's KCSO superiors, his "off-duty" activities are important factors in whether or not Deputy Zana was meeting his employer's expectations. Simply put, Deputy Zana's "off-duty" activities were of acute interest to his employer, establishing that they were at least "incidental to" and either beneficial or harmful to the Sheriff's interests. This fact alone is sufficient to preclude summary judgment on the *respondeat superior* liability issue.

That a police officer's "off-duty" readiness to take police action is within the scope of employment is also established by the KCSO manual and its provision of ammunition for "off-duty" use. The manual contains numerous rules, regulations, and standards governing "off-duty" officer activity, from rules regarding "private" weapons to standards governing "off-duty" readiness to standards for personal associations.<sup>2</sup> In particular, the fact that KCSO issued free ammunition that its officers used to load their "off-duty" weapons at King County's expense shows that it was in KCSO's

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2 The fact that KCSO eliminated these regulations prior to Mr. Harb's death in no way eliminates the material fact that both the employer and its employees viewed these allegedly "off-duty" activities as part of the job. The only way KCSO could materially impact this evidence would be to establish that it *prohibited* its officers from any police activity while using a private weapon, *prohibited* its officers from loading private weapons with KCSO ammunition, and actually took steps to enforce these tradition-changing rules.

interest to facilitate its officers' arming themselves when "off-duty."

There is ample evidence that it was KCSO's expectation that its Deputies arm themselves when out of uniform and when officially "off-duty." There is also ample evidence that KCSO's interest in and intervention in Deputy Zana's "off-duty" activities was extensive and that it played a large part in whether or not he was meeting his job duties and expectations. These facts are sufficient, in and of themselves, to justify the reasonable inference that Sheriff Deputy Zana's handling of his "off-duty" weapon in his home was at least "incidental to" his employment and that it directly furthered his employer's interest in officer readiness.

**c. That Deputy Zana Arming Himself When "Off-Duty" is Within the Scope of his Employment is also Established by Deputy Zana's Actions**

This view of the KCSO expectations was not simply imagined by the estate's attorney, as is demonstrated by the estate's police expert's testimony. But even beyond that, Deputy Zana's own testimony establishes that KCSO officers have expectations to meet even when they are out of uniform and officially "off-duty." Deputy Zana testifies that he, like other officers, kept a smaller firearm in his home for use when "off-duty"

in order to be prepared for police action and also for self-protection, and that he loaded that weapon with Sheriff-supplied ammunition. These facts show that Deputy Zana understood his employer's expectations for his "off-duty" activities in the same way as the estate has done in this case.

Moreover, Deputy Zana's actions immediately *after* Mr. Bistryski took his loaded gun and left their house further demonstrate that "off-duty" Deputy Sheriffs are expected to, and do, respond in a law enforcement capacity when the circumstance arises. It also shows that Deputies maintaining firearms in their homes is part of being ready to respond in a law enforcement capacity when "off-duty." The evidence shows that immediately upon hearing gunshots outside his house, Deputy Zana knew it was Mr. Bistryski and immediately called 911. Thereafter, he maintained constant radio communication with KCSO officers responding to reports of shots at a moving car and to reports of a man shot at the Plaid Pantry, actively participating in that radio communication. When Mr. Bistryski returned home after shooting Mr. Harb, and while responding KCSO officers were still *en route* to his house, Deputy Zana found Mr. Bistryski, disarmed him, seized him, and secured him until he turned Mr. Bistryski over to the

responding officers. These are police actions within the scope of his employment as a Sheriff's Deputy, even though Deputy Zana was "off-duty"—at home and in bed—at the time he heard the first shots. Clearly, as these events themselves show, a Sheriff's Deputy going home from work is not "off-duty" in the same way other employees are off-duty from their job when they go home.

**3. These Facts Establish At Least a *Prima Facie* Case of Vicarious Liability**

In sum, having his service weapon and his backup weapon in his home on a daily basis was part and parcel of Deputy Zana's job as a Sheriff's Deputy. It furthered his employer's interest in having "off-duty" officers in a state of readiness to respond to emergencies, to protect the public, to protect property, and to protect themselves. The manner in which Deputy Zana maintained this standard of readiness by keeping firearms in his home—loaded or unloaded, locked up and secured from Mr. Bistryski or not—was conduct by Deputy Zana that was at the very least incidental to his job as a King County Sheriff's Deputy.

King County's primary argument to the trial court, which the trial court adopted in its summary judgment order, was that Deputy Zana could not have been acting within the scope of employment

when he was home in bed, which is where he was when Mr. Bistryski took the gun. But the issue is not what exactly Deputy Zana was doing at the time the gun was taken. Rather, the issue is whether the actions Deputy Zana took to meet his "off-duty" responsibility to be ready to provide law enforcement action at all times—keeping a weapon in his home—was incidental to his employment or advanced his employer's interests in public safety and officer protection. The facts establish that Deputy Zana's actions were directly related to his employment and directly advanced the Sheriff's interests. Therefore, the estate has made out a *prima facie* case of vicarious liability.

The estate's vicarious liability claim against King County does not rely on expanding Washington law. In fact, it fits well with long-established law. An instructive case is Dickinson v. Edwards, 105 Wn.2d 457, 469, 716 P.2d 814 (1986). In that case, a drunk driver caused a serious motor vehicle accident. The pertinent issue in Dickinson was whether the drunk driver was within the scope of his employment when he was drinking at a banquet. There was evidence that the drunk driver deducted his banquet expenses as a business expense, and there was disputed evidence that his employer encouraged or expected its employees

to attend the banquet. The Supreme Court held:

In the present case the deduction of banquet expenses as a business expense is not alone sufficient to present a question for the jury. However, this fact plus the additional evidence that this type of function was undertaken by Kaiser to enhance employee relations presents a jury question as to whether the banquet was sufficiently for the benefit of Kaiser. The evidence that "employees were encouraged and expected to attend" presents the jury question of whether Edwards presence was requested or impliedly or expressly required by Kaiser. Therefore, a material issue of fact is raised on whether Edwards was within the scope of employment at the banquet."

Id. The Dickinson case is relevant here. The fact that the ammunition for Deputy Zana's "off-duty" firearm was supplied by KCSO at no cost is akin to the business expense deduction in Dickinson. It tends to show that the employer had a sufficient interest in these "off-duty" activities to subsidize them, but was, perhaps, in and of itself, insufficient to show that the activity was within the scope of employment. The fact that tipped the scales in Dickinson was the evidence indicating that his employer encouraged or expected its employees to attend the banquet. This was sufficient to make a *prima facie* case for vicarious liability. The corresponding facts in this case are that KCSO, like all employers of police officers in the State of Washington, expect and encourage

their police officer employees to be available and ready for police action and self-protection 24 hours per day, even when they are out of uniform and officially "off-duty."

As in Dickinson, the estate has established that Deputy Zana's "off-duty" readiness for police action is incidental to his employment as a police officer, that part of his readiness is to be armed, that being armed requires storing a firearm in his home, and that being armed while out of uniform ("off-duty") was recognized, facilitated, subsidized, and regulated by KCSO. This is more than enough to make out a *prima facie* case that the acts and omissions at issue in this case are incidental to Deputy Zana's employment as a police officer, and that they further the interests of his employer, King County.

**4. The Ninth Circuit Applies Washington Vicarious Liability Law in the Same Manner as the Estate Has in this Case**

The estate's reading of Washington employer vicarious liability law is also the same as the 9th Circuit Court of Appeals. In Vollendorff v. United States, 951 F.2d 215 (9th Cir. 1991), the 9th Circuit held that a *prima facie* case for vicarious liability had been made when the evidence showed that an Army officer, who was required for a tour of duty in Honduras to take, over several weeks,

an anti-malaria medication that is extremely dangerous to children, was acting within the scope of his employment when he transferred the medication out of the child-proof container and left it on his kitchen countertop. Thus, his employer was vicariously liable to his granddaughter, who was permanently brain-damaged when she consumed one of the pills when the employee was on vacation.

The Vollendorff Court's analysis and conclusions are compelling, as the similarities to this case are striking. Like in the case at bar, in that case the defendant argued that, as a matter of law, its employee's conduct was not within the scope of his employment because his use of the medication was for his personal benefit. Id. at ¶ 17. The Vollendorff Court first noted that:

Under Washington law, if the purpose of serving the employer's business "actuates the servant to any appreciable extent," the employer is vicariously liable for conduct of the employee within the agency, even if the predominant motive of the employee is to benefit himself or a third party. *Leuthold v. Goodman*, 22 Wash.2d 583, 157 P.2d 326, 330 (1945) (*citing* Restatement of Agency § 236 cmt. b (1933)).

Id. at ¶ 23. The Vollendorff Court concluded that the employee's home use of the medicine served the Army's interest in readiness, so it was within the scope of his employment. Id. at ¶ 25.

The defendant next argued that the employee's storage of

the drug in his home was dictated by personal convenience not governmental interest, rendering his conduct outside the scope of his employment. Id. at ¶ 26. The Vollendorff Court disagreed, noting that the use of the drug was part of his employment, and that the storage of the drug in his home was incidental to its use.

Id. at ¶ 28. The Vollendorff Court stated (at ¶ 33):

[The employee's] conduct at home in leaving Chloroquine accessible was within the authorized scope of his employment with the Army.

Lastly, the defendant argued, as King County does here, that the employee's actions at home were not within the authorized limits of time or space and therefore outside the scope of his employment. Again, the Vollendorff Court disagreed:

Conduct remote in time and place is merely a "factor" in the scope of employment inquiry. It does not control. The trial court could properly find that [the employee] was acting within the scope of his employment in keeping the medication at home.

Id. at ¶ 34 (citing Cameron v. Downs, supra.)

The Vollendorff case has facts very, very similar to this one. An employee takes dangerous articles into his home, for the dual purpose of meeting his employer's expectations in a manner convenient to the employee. The employee negligently leaves these dangerous instrumentalities unsecured, where they are

accessed by the wrong person with tragic results. The Vollendorff Court held that, under Washington law, these facts are sufficient to make out a *prima facie* case that the employee's actions were within the scope of his employment. How can this case lead to the opposite conclusion, when the facts are essentially the same?

**5. The Trial Court Erred in Applying Washington Vicarious Liability Standards and in Determining Whether There Was a Material Issue of Fact**

The court's summary judgment order states that "Deputy Zana was not on duty or directly or indirectly serving his employer at the time of the murder." This indicates that the court weighed the evidence, since the issue is not the trial court's conclusions but whether there is a material issue of fact. It also indicates that the trial court did not apply the correct legal test for *respondeat superior* liability, because there is very clear evidence that Deputy Zana's keeping of a loaded firearm in his home was at the very least incidental to his job as a police officer. Finally, the trial court's ruling indicates that it was evaluating the vicarious liability issue in an inappropriately narrow time-frame ("the time of the murder"), rather than the pertinent time when Deputy Zana left his loaded firearm unattended and accessible to his drunk, violent housemate.

The estate respectfully submits that, evaluated properly, the only correct ruling on summary judgment on the *respondeat superior* claim is that, at worst for the estate, there are material issues of fact which must be resolved by a jury. In fact, the evidence on this issue is so pervasively one-sided that the Court of Appeals would be justified in resolving this issue on summary judgment in favor of the estate. Anderson v. State Farm Mut. Ins. Co., 101 Wn. App. 323, 339, 2 P.3d 1029 (2000) (reversing entry of summary judgment and remanding for entry of summary judgment for appellant); Impecoven v. Dept. of Revenue, 120 Wn.2d 357, 841 P.2d 752 (1992) (summary judgment for non-moving party entered by appellate court).

**C. The Trial Court Erred Granting King County's Motion for Summary Judgment on the Estate's Claim that King County was Directly Liable Under R2 Torts § 317 For Breaching its Duty to Control Deputy Zana's Use of KCSO Ammunition**

**1. King County Had a Duty Even If Deputy Zana Was Acting Outside the Scope of His Employment**

Under Washington law, a negligent supervision claim is permitted even when the employer has no *respondeat superior* liability because its employee acted outside the scope of employment. When there is no viable *respondeat superior* claim,

or when the claim is disputed, the door is opened for claims against the employer for the employer's own negligence. Elmview Group Home, 131 Wn.2d at 48. Thus, even if Deputy Zana was acting outside the scope of employment when his acts and omissions proximately caused Mr. Harb's death, King County can still be held directly liable for breaching its own duties to Mr. Harb.

**2. King County Had a Duty to Control Deputy Zana's Handling of Sheriff-Issued Ammunition**

The existence of a duty is a question of law. Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d 468, 474, 951 P.2d 749 (1998). Our Supreme Court has adopted Restatement 2d of Torts § 315 as part of Washington law, holding that § 315 states an exception to the common law rule that one has no duty to prevent a third party from causing harm to another. Taggart v. State, 118 Wn.2d 195, 218, 822 P.2d 243 (1992).

Arising out of its employer-employee relationship with Deputy Zana, King County had an obligation to control how Deputy Zana handled dangerous instrumentalities the Sheriff entrusted to him. The Restatement 2nd of Torts § 317 provides:

**§ 317. Duty Of Master To Control Conduct Of Servant**

A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if

(a) the servant

(i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or

(ii) is using a chattel of the master, and

(b) the master

(i) knows or has reason to know that he has the ability to control his servant, and

(ii) knows or should know of the necessity and opportunity for exercising such control.

As noted above, Washington has adopted § 315, the general duty to control another's actions. As comment (c) to § 315 makes clear, §§ 316-319 are specific rules governing the circumstances under which the general rule in § 315 applies:

The relations between the actor and a third person which require the actor to control the third person's conduct are stated in §§ 316-319.

By adopting § 315, Washington Courts have also adopted § 317.

**3. King County Breached its Duty, Proximately Causing Mr. Harb's Wrongful Death**

Comment b to § 317, entitled "Master's duty to police his premises and use made of his chattels," explains that:

[The master] is required to exercise his authority as master to prevent them from misusing chattels which he entrusts to them for use as his servants. This is true although the acts of the servant while upon the premises or in the use of the master's chattels are done wholly for the servant's own purposes and are, therefore, outside the course of the servant's employment and thus do not subject the master to liability under the rules of the law of Agency. On the other hand, the master as such is under no peculiar duty to control the conduct of his servant while he is outside of the master's premises, unless the servant is at the time using a chattel entrusted to him as servant.

Comment c to § 317 explains that the master is liable even when the servant is acting outside the scope of his employment:

Retention in employment of servants known to misconduct themselves. There may be circumstances in which the only effective control which the master can exercise over the conduct of his servant is to discharge the servant. Therefore the master may subject himself to liability under the rule stated in this Section by retaining in his employment servants who, to his knowledge, are in the habit of misconducting themselves in a manner dangerous to others. This is true although he has without success made every other effort to prevent their misconduct by the exercise of his authority as master. Thus a railroad company which knows that the crews of its coal trains are in the habit of throwing coal from the cars as they pass along tracks laid through a city street, to the danger of travelers, is subject to liability if it retains the delinquents in its employment, although it has promulgated rules strictly forbidding

such practices.

Finally, Comment d to § 317 explains that the master's liability does not depend on the servant's liability:

Cases in which servant not liable. In order that the master may be subject to liability under the rule stated in this Section, it is not necessary that the act of the servant which he has failed to control is one which is negligent on the part of the servant and, therefore, subjects the servant to liability. The master may know of circumstances of which the servant is excusably ignorant which should cause the master to realize that the servant's actions involve an unreasonable risk of harm to others of which the servant neither is nor should be aware.

Applying § 317 here, the estate has more than enough evidence to create material issues of fact on every essential element: Deputy Zana was King County's employee; he created a danger by failing to secure his loaded weapons against access by Mr. Bistryski; the weapon was related to Deputy Zana's duties as an officer and the bullets loaded into Deputy Zana's weapon were issued by KCSO; King County was aware of each element of the dangerous situation created; KCSO did not prevent Deputy Zana from providing Mr. Bistryski access to the dangerous instrumentalities it entrusted to him; Mr. Harb was harmed thereby.

#### **4. The Public Duty Doctrine Does Not Apply**

The Washington Supreme Court has held that § 315 and its

subsection § 319 constitute an exception to the public duty doctrine. Hertog, 138 Wn.2d at 272. By the same reasoning, § 317 is likewise an exception to the public duty doctrine.

**5. The Trial Court Erred in Applying This Law to the Facts in Evidence**

The court in its summary judgment order states that "Deputy Zana was not using or misusing chattels entrusted to him by his master when the murders occurred."

The estate urges that the court applied the wrong legal standard to the wrong events. The relevant time period in relation to Deputy Zana was prior to the murder—when he failed to safeguard his loaded weapon from the dangerous Mr. Bistryski. And, properly applying § 317 to Deputy Zana's failure to safeguard his "off-duty" weapon loaded with Sheriff-issued ammunition from Mr. Bistryski is a "misuse" of the Sheriff chattels provided for employment purposes. Because the Sheriff's Office knew that Deputy Zana failed to safeguard his loaded weapon, knew that it issued ammunition for its officers' use, knew that Deputy Zana lived with Mr. Bistryski, and knew that Mr. Bistryski would be dangerous to others should he obtain access to that loaded weapon, it is a jury question whether King County is liable under § 317.

**D. The Trial Court Erred Granting King County's Motion for Summary Judgment on the Estate's Common Law Negligent Supervision Claim that King County Breached its Duty to Supervise Deputy Zana**

The estate also appeals the trial court's summary judgment dismissal of its claim that King County is directly liable for its own negligent supervision of Deputy Zana.

**1. King County Had a Common Law Duty to Supervise Deputy Zana**

"The elements of a negligence cause of action are the existence of a duty to the plaintiff, breach of the duty, and injury to plaintiff proximately caused by the breach." Hertog, 138 Wn.2d at 275. The "existence of a duty is a question of law." Id.

As stated by the Supreme Court in Elmview Group Home, 131 Wn.2d at 48:

Even where an employee is acting outside the scope of employment, the relationship between employer and employee gives rise to a limited duty, owed by an employer to foreseeable victims, to prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others. This duty gives rise to causes of action for negligent hiring, retention and supervision. Liability under these theories is analytically distinct and separate from vicarious liability.

**2. King County Breached its Duty to Supervise Deputy Zana, Proximately Causing Mr. Harb's Wrongful Death**

KCSO knew of Officer Zana's relationship with Mr. Bistryski, knew that Mr. Bistryski lived with Officer Zana, knew that Mr. Bistryski was extremely troubled, violent, and dangerous, knew that Mr. Bistryski was a convicted felon, and knew of the danger created by Deputy Zana providing Mr. Bistryski access to loaded firearms. Upon learning these facts, KCSO undertook an investigation of Officer Zana and his association with Mr. Bistryski and intervened in that relationship. Despite a complete failure by Officer Zana to modify his behaviors as instructed by KCSO to eliminate these dangers, KCSO did nothing.

KCSO knew that Officer Zana kept a service revolver issued by KCSO in his home, owned and carried an "off-duty" firearm which he kept in his home, kept ammunition issued by KCSO for these weapons in his home, and kept these weapons loaded in the home he shared with Mr. Bistryski. KCSO also knew that Deputy Zana did not adequately secure these dangerous instrumentalities from Mr. Bistryski. KCSO also knew that, in the 6 months leading up to Mr. Harb's death, Mr. Bistryski had twice attempted suicide in Deputy Zana's home, and had attacked the responding KCSO officers. KCSO knew or should have known of the danger posed

by Deputy Zana keeping his badge, his guns, and his ammunition unsecured in the home he shared with Mr. Bistryski. KCSO had the administrative authority to control Deputy Zana's handling of Sheriff-issued ammunition, and had the authority to require Deputy Zana to secure his duty-related firearms, but failed to do so.

The evidence also shows that King County simply did nothing about this situation, even though it knew from experience that Deputy Zana displayed poor judgment, was untrustworthy, did not seem to understand the danger his actions created, and did "not possess the integrity to wear the uniform."

The estate put forth evidence of what King County had a duty to and should have done, in the form of the testimony of its police procedures expert. CP 155-66, 303-06. This evidence creates a material issue of fact as to whether King County breached its duty to adequately supervise Deputy Zana.

**3. The Public Duty Doctrine Does Not Immunize King County Because Supervising Employee Handling of Dangerous Instrumentalities is Not a Function "Performed Exclusively by Governmental Entities"**

The Supreme Court has held that § 315 constitutes an exception to the public duty doctrine. Hertog, 138 Wn.2d at 272.

The essence of a common law negligent supervision claim is the same as a § 315 claim—a relationship that gives rise to a duty to control a third party's actions to prevent foreseeable harm. For the same reasons that § 315 constitutes an exception to the public duty doctrine under Washington law, that exception should also apply to a common law negligent supervision claim. But even if the exception does not apply, the public duty doctrine is inapplicable to this case because it only applies to activities which are "performed exclusively by governmental entities."

**a. Washington Law on Application of the Public Duty Doctrine**

Under Washington law, the public duty doctrine does not apply when the state engages in a proprietary or ministerial function as opposed to a governmental function. Borden v. City of Olympia, 113 Wn. App. 359, 371, 53 P.3d 1020 (2002); Petersen v. State, 100 Wn.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).

For instance, the "ownership, control, and supervision" of streets is a governmental function for which public entities are immune. However, the *maintenance* of roads is a proprietary

function for which public entities can face liability. “[T]he duty of a city to keep streets in repair was not a governmental but a ministerial duty, and for a breach thereof an action will lie in favor of a person injured as a result of such negligence.” Hewitt v. City of Seattle, 62 Wash. 377, 379, 113 P. 1084 (1911).

"Governmental functions are those generally performed exclusively by governmental entities." Stiefel v. City of Kent, 132 Wn. App. 523, 529, 132 P.3d 1111 (2006) (identifying building permits and inspections, the auditing of public offices, and the registration of securities as governmental functions).

Stated simply, if the undertaking of the government is one in which only a governmental agency could engage, it is governmental in nature; it is proprietary and private when any corporation, individual, or group of individuals could do the same thing.

57 Am.Jur.2d Municipal, County, School, and State Tort Liability § 53.

An example of a government performing a ministerial act is when a government employee causes a motor vehicle collision. Because this is an activity that is not limited only to governmental personnel—any other entity or individual can do the same—it is not a "governmental function." Therefore, in such cases the plaintiff is not forced to overcome the public duty doctrine bar, and it never becomes an issue in the case. See, e.g., Rahman v. State, 150

Wn. App. 345, 208 P.3d 566 (2009).

When an activity or function performed by a governmental entity is ministerial or proprietary, the governmental entity is held to the same duty of care as private individuals or institutions engaging in the same activity. Bailey v. Town of Forks, 108 Wn.2d 262, 268-69, 737 P.2d 1257 (1987). .

Here, the activities which the estate claims King County performed negligently are not exclusively governmental functions in which only a governmental agency could engage. Supervising employee handling and securing of dangerous instrumentalities—whether the dangerous instrumentality is guns, explosives, poisons, etc.--and responding to dangerous situations created by employees are activities which many private employers in the State of Washington perform on a daily basis.

**b. The Public Duty Doctrine Does Not Apply in this Case Because Supervising Employee Handling of Dangerous Instrumentalities Provided by the Employer is Not a Function "Performed Exclusively by Governmental Entities"**

Determining what is a function "performed exclusively by governmental entities" is an exercise in labeling. If the label applied to the function at issue is as broad as "supervising Sheriff's

deputies" then clearly the conclusion follows that the function is "solely governmental." Alternatively, if the label applied is narrower and less categorical—for instance "supervising the employee's safeguarding of dangerous instrumentalities entrusted by the employer to the employee" (which is something done on a daily basis by at least some non-governmental employers)—then the conclusion logically follows that the function is not "solely governmental."

The estate urges that Washington precedent should be read to apply a narrower functional label rather than a broad categorical label as the trial court applied on summary judgment. The Supreme Court's holding in Hewitt, 62 Wash. at 379, is instructive. In that case, the issue was whether road maintenance is a solely governmental function. The Hewitt Court held that, while the "ownership, control, and supervision" of public streets is a solely governmental function for which public entities are immune, the *maintenance* of roads is not. Had the Hewitt Court labeled the function of road maintenance as broadly as the court labeled the function at issue in this case, it would have labeled road maintenance as "an exercise of police power" or "preservation of public infrastructure" or "maintenance of public assets for public

use for public benefit." But instead, the Hewitt Court focused narrowly on the specific function at issue.

The estate urges that the appropriately narrow focus on the function at issue here leads inexorably to the conclusion that supervision of employees' safeguarding of dangerous instruments provided to them by their employer is a function performed by many non-governmental employers, and is therefore not a function "performed exclusively by governmental entities" immunized by the public duty doctrine.

But even if the court disagrees with the estate on the "governmental function" issue, the trial court's summary judgment ruling on the public duty doctrine is inconsistent with its ruling on the *respondeat superior* claim. That is because it is impossible for King County's actions in supervising Deputy Zana's relationship with Mr. Bistryski and his handling of his "off-duty" weapon loaded with Sheriff-issued ammunition to be a "purely governmental function" for purposes of the public duty doctrine, when at the same time those same activities are completely isolated from Deputy Zana's employment as a Sheriff's deputy for purposes of *respondeat superior*.

Put another way, if King County's supervision of Deputy

Zana's "off-duty" activities (which, recall, his supervisors thought were sufficiently related to his job to intervene on multiple occasions before Mr. Harb's death) is a purely governmental function because it is supervision of a Sheriff's deputy, then how can those same "off-duty" activities be completely unrelated to Deputy Zana's employment?

**4. The Trial Court Erred in Applying Washington Law to the Facts in Evidence**

The court in its summary judgment order stated that the estate's common law negligent supervision claim is barred by the public duty doctrine because "the supervision of Sheriff's deputies is solely a governmental function." To the contrary, as a matter of Washington law, supervising employee handling of dangerous instrumentalities entrusted by the employer to the employee is not a function "performed exclusively by governmental entities." Therefore, the trial court erred in barring the estate's common law negligent supervision claim pursuant to the public duty doctrine.

**E. RAP 18.1(b)**

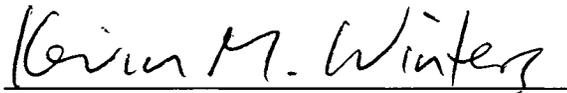
Pursuant to RAP 18.1, appellant Estate of Harb requests that, should it prevail, the appellate court award its taxable costs incurred on appeal. See RAP 14.2.

**VI. CONCLUSION**

Based on Washington law and the demonstrated facts of the case, the Estate of Harb respectfully requests that this court reverse the trial court's summary judgment orders dismissing the estate's vicarious liability and direct liability claims against King County, and remand with instructions to enter summary judgment in favor of the estate or for trial.

Respectfully Submitted on AUG 2<sup>ND</sup>, 2010.

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## **Appendix**

1. Vollendorff v. United States, 951 F.2d 215 (9th Cir. 1991).
2. Restatement 2d of Torts § 317

# Appendix 1

« up

951 F.2d 215

Nicole VOLLENDORFF, a minor child and her parents Michael  
and Heidi Vollendorff, a married couple, and  
Gordon Godfrey, guardian ad litem for  
Nicole Vollendorff, Plaintiffs-Appellees,

v.

UNITED STATES of America, Defendant-Appellant.

*No. 91-35435.*

**United States Court of Appeals,  
Ninth Circuit.**

*Argued and Submitted Sept. 10, 1991.*

*Decided Dec. 9, 1991.*

William G. Cole, U.S. Dept. of Justice, Wash., D.C., for defendant-appellant.

John A. Hoglund, John A. Hoglund, P.S., Olympia, Wash., Charles K. Wiggins, Edwards, Sieh,  
Wiggins & Hathaway, Seattle, Wash., for plaintiffs-appellees.

Appeal from the United States District Court for the Western District of Washington.

Before WRIGHT, FARRIS and TROTT, Circuit Judges.

FARRIS, Circuit Judge:

1 The United States appeals the district court's judgment, following a bench trial, in favor  
of Nicole Vollendorff, her parents Michael and Heidi Vollendorff, and Gordon Godfrey,  
Nicole's guardian ad litem, on their claim under the Federal Tort Claims Act, 28 U.S.C. §§  
1346(b) and 2671, et seq. We affirm.

2 \* On August 6, 1987, when Nicole Vollendorff was 19 months old, she ingested  
Chloroquine, a malarial prophylactic prescription medicine.

3 Chloroquine is especially toxic to young children. The Physicians' Desk Reference  
advises that a number of fatalities have been reported following accidental ingestion of  
Chloroquine. See Physicians' Desk Reference 2320 (45th ed. 1991).

4 Chloroquine had been prescribed by an Army physician at Madigan Army Medical  
Center for Nicole's grandfather, Chief Warrant Officer Gary Vollendorff, an Army  
helicopter pilot, in connection with Gary's recent tour of duty in Honduras. Because  
Honduras is an endemic malarial area, the Army requires its personnel serving there to  
take Chloroquine, both for personal benefit and because of readiness concerns.

5 To be effective, Chloroquine must be taken once a week for a period of six weeks after  
departure from the malarial area. Gary had a bottle of the medicine on the kitchen  
counter of his home near Fort Lewis, Washington on or around August 2, 1987, before  
leaving with his wife for a one-week vacation. Because Gary disliked child-proof medicine  
bottles, he stored the Chloroquine without securing the bottle top.

6 Twice in the period before his departure on vacation, Nicole had gained access to  
Gary's pills when she was placed on the kitchen countertop by Gary or his wife. Both

« up mes, the pills were taken from Nicole, and she was removed from the countertop by either Gary or his wife. In spite of his knowledge that Nicole had been attracted in the past to his pills, Gary continued to store his medication on the countertop without securing the child-proof bottle top.

7 During Gary's absence, his son Michael, daughter-in-law Heidi, and their daughter Nicole, house sat for Gary and his wife. On August 6, 1987, Heidi placed Nicole on the countertop while she washed dishes. While working at the sink, Heidi heard pills spilling and looked to see Nicole with an open pill bottle in her hand. Heidi saw that Nicole had something in her mouth, opened the child's mouth, and removed part of a pill. She took the bottle from Nicole's hand and removed the child from the countertop, believing that she had averted an accident. Ten minutes later, Nicole began to show signs of distress, prompting Heidi to call the local hospital, which connected her with poison control. While Heidi was on the line with poison control, Nicole's condition deteriorated. Heidi was then transferred to 911. Emergency crews arrived soon after to find Nicole unconscious. Their resuscitation efforts continued for about an hour. Nicole was then taken to the hospital.

8 At the hospital it was determined that Nicole had ingested Chloroquine. Permanent brain damage resulted causing substantial cognitive and communicative impairment. In 1989, Nicole's guardians ad litem and her parents initiated this diversity action against various defendants. Several orders by the district court left the government as the sole defendant at trial.

9 Following a bench trial, the district court held that the prescribing Army physician and the dispensing Army pharmacist breached a duty to warn and thereby proximately caused Nicole's injury. The district court alternatively held that the Army was vicariously liable for Gary's negligent handling of his medication.

## II

10 If, as the record reflects, Gary left the medication on the counter with the child-proof top ajar, under the circumstances as he knew them to be, the court could find that he was negligent. The question is whether there is a basis to hold the government vicariously liable for that negligence.

11 We review a district court's finding of negligence under the clearly erroneous standard. *Barnett v. Sea Land Service, Inc.*, 875 F.2d 741, 745 (9th Cir.1989). This is an exception to the general rule that mixed questions of law and fact are reviewed de novo. *Id.* A finding of negligence requires testing particular facts against a standard of conduct. *Armstrong v. U.S.*, 756 F.2d 1407, 1409 (9th Cir.1985). The existence and extent of the standard of conduct are questions of law, reviewable de novo, but issues of breach and proximate cause are questions of fact, reviewable for clear error. *Id.*

12 The district court held that the government was responsible for Gary's negligence on a respondeat superior analysis. The government argues (a) that Gary did not commit a tort, and (b) that Gary was not acting within the scope of his employment.

13 \* Although the district court did not explicitly ground its finding of Gary's negligence on a particular theory, the government relies on the law of premises liability.

14 Citing *Lucas v. Barner*, 56 Wash.2d 136, 351 P.2d 492, 493 (1960), and *Porter v. Ferguson*, 53 Wash.2d 693, 336 P.2d 133, 134 (1959), the government contends that Gary's duty to Nicole, as a licensee on his premises, was to refrain from wantonly or willfully injuring her. To buttress its contention, the government notes that *Younce v.*

« up Ferguson, 106 Wash.2d 658, 666, 724 P.2d 991, 995 (1986), held that Washington continues to recognize the common law distinction between invitees and licensees. The government's argument overlooks *Memel v. Reimer*, 85 Wash.2d 685, 538 P.2d 517 (1975), which replaced the willful and wanton conduct standard toward licensees with a duty to exercise reasonable care where there is a known dangerous condition that the owner can reasonably anticipate the licensee will not discover or will fail to appreciate. *Id.* at 688-89, 538 P.2d at 519 (citing Restatement (Second) of Torts § 342 (1965)). See also *Younce*, 106 Wash.2d at 667-68, 724 P.2d at 996 (citing *Memel*, 85 Wash.2d at 689, 691, 538 P.2d 517).

15 The government argues, in any event, that Gary satisfied his duty of care to Nicole, a licensee, by warning Michael about the drugs. The answers of Gary and his wife on direct and cross-examination, however, suggest that no warnings were given. Therefore, the district court's failure so to find was not clearly erroneous.

16 The court found that Gary knew that he was leaving a prescription drug in a place accessible to a young child and failed to make the condition safe by storing the medicine in a place inaccessible to the child. The record supports those findings. Thus, the district court's determination that Gary was negligent toward Nicole is not clearly erroneous. Had the district court explicitly found Gary negligent on a theory of premises liability, it would necessarily have found either that no warning was given or that the warning given to Michael was not sufficient to discharge the duty of reasonable care. The record supports such findings. The district court's finding of negligence is therefore not clearly erroneous.

#### B

17 The government contends that, as a matter of law, Gary's conduct was not within the scope of his employment with the Army because (a) his use of Chloroquine was for his personal benefit, and (b) his storage of the drug was not sufficiently related to his employment. This argument is pivotal where the injury is to a third party and the use of the injuring agent is for the benefit of the user.

18 *Greene v. St. Paul-Mercury Indemnity Co.*, 51 Wash.2d 569, 320 P.2d 311 (1958), articulates the standard in Washington for determining whether an employee, at a given time, acts within the scope of employment:

19 The test is ... whether the employee was, at the time, engaged in the performance of the duties required of him by his contract of employment, or by specific direction of his employer; or, as sometimes stated, whether he was engaged at the time in the furtherance of the employer's interest.

20 *Id.* at 573, 320 P.2d at 314 (citations omitted) (emphasis in original).

21 The district court correctly found that Gary was under orders to take Chloroquine. The government admitted at the discovery stage that Gary was within a class of soldiers required by Army regulation and policy to take Chloroquine. Additionally, Army Regulation 40-5 provides that commanders will direct disease control measures and ensure compliance, and that personnel will comply with such measures. Army Reg. 40-5, Ch. 4, § 1, at 4-3 (1986).

22 The government argues that we must find as a matter of law that, because Gary took Chloroquine chiefly to avoid malaria, using Chloroquine was not within the scope of his employment, but was for his personal benefit. We reject the argument.

23 Under Washington law, if the purpose of serving the employer's business "actuates the

« up servant to any appreciable extent," the employer is vicariously liable for conduct of the employee within the agency, even if the predominant motive of the employee is to benefit himself or a third party. *Leuthold v. Goodman*, 22 Wash.2d 583, 157 P.2d 326, 330 (1945) (citing Restatement of Agency § 236 cmt. b (1933)).

- 24 In *Leuthold*, an employee had used his employer's truck to dump rubbish from the employer's store and was returning home, as authorized by his employer, to do maintenance work on the truck. *Id.* at 585-86, 157 P.2d at 328. On the way home, he made a deviation of about six blocks in order to pick up family members. *Id.* at 586, 157 P.2d at 328. During that detour, the employee was involved in a mishap. *Id.* at 587, 157 P.2d at 328. The court held that, in spite of the fact that the employee's primary motive for detouring was personal benefit, the evidence sustained a jury finding that the employer was vicariously liable. *Id.* at 594, 157 P.2d at 332.
- 25 Gary was ordered to take Chloroquine. His use of the drug was in furtherance of the Army's interest insofar as malarial prophylaxis serves Army concerns for readiness. *Cf. Greene*, 320 P.2d at 314. The district court could properly hold, as a matter of Washington law, that Gary's use of Chloroquine was within the scope of his employment.
- 26 The government also argues that Gary's storage of Chloroquine was dictated by personal convenience, not governmental interest, and therefore his conduct in that regard was not within the scope of his employment. To address this argument, we turn again to Washington law.
- 27 In *Cameron v. Downs*, 32 Wash.App. 875, 650 P.2d 260 (1982), the court held: "[t]o be within the scope of one's agency, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized." *Id.* at 881, 650 P.2d at 263 (citing Restatement (Second) of Agency § 229(1) (1958)). The *Cameron* court concluded that relevant factors are the time, place and purpose of the act, and whether or not the employer had reason to expect that such an act would be done. *Id.*
- 28 Gary's use of Chloroquine was authorized by the Army, and his storage of the drug was incidental to that authorization. The critical question is whether the Army should have expected that Gary would ignore the generic warning that was plainly printed on the medication, "KEEP OUT OF REACH OF CHILDREN," and that Gary would not secure the child-proof cap. One might assume, with the government, that the answer is no. However, we cannot ignore competent evidence to the contrary which, if believed, supports the trial court's finding. Dr. Neal Benowitz testified that
- 29 people don't ... respond to [a generic warning] as a special warning.... And so it is quite common for people who have medications like that to put it on counters.... People know about it, maybe, but it's never taken seriously because, in fact, in most cases, kids, if they get into it, can take a pill or two and there is no serious harm.... [I]f a child gets into [a bottle of Chloroquine]--and we know it's going to happen because it happens with every other drug--... one or two pills may mean the child's death.
- 30 The evidence also included a report, Plaintiff's Exhibit 4, by Colonel Scherz, then Chief of Pediatrics at Madigan Army Hospital, stating that "there was a common disregard in the homes of practicing pediatricians of a basic principle of poison prevention extolled to their patients: 'Keep all medications out of reach of children.'" Dr. Vincent DiMaio, a forensic pathologist who researched armed forces experience with Chloroquine during the Vietnam era, testified that "we know and all physicians know that patients don't always fully appreciate how dangerous certain drugs can be so you have to emphasize the fact to them that [Chloroquine] is a very dangerous drug and that extreme precautions have to be taken."

« up We recognize that expectation is not a part of the traditional respondeat superior discourse. We include a discussion of it here, however, because it is relevant to the characterization of the task an employer sets for an employee. If that task, as understood by the employer, encompasses the potential for the employee's negligence, the employer will be liable when the potential becomes manifest. We find these considerations implicit in the treatise approach to respondeat superior analysis. Section 228 of the Restatement (Second) of Agency (1957) speaks in terms of "authorization." Such a term is given content by reference to expectation.

32 The government stresses that the basis for much of this evidence predated the advent of child-proof bottles and warning labels. The record supports the government's position, but this goes to the weight and not to the sufficiency of the evidence. We cannot conclude, on this record, that the finding of conduct within the scope of employment is clearly erroneous.

33 By reference to this evidence, we do not imply that the government must develop new standards and procedures when prescribing Chloroquine because it cannot rely on child-proof bottles and warning labels. The elaboration of such a duty is more properly a matter for Washington courts. We only say that this evidence indicates to us that Gary's conduct at home in leaving Chloroquine accessible was within the authorized scope of his employment with the Army.

34 Finally, the government argues that Gary's storage of Chloroquine at home, off-base, was not within the authorized limits of time or space. Conduct remote in time and place is merely a "factor" in the scope of employment inquiry. *Cameron*, 32 Wash.App. at 881, 650 P.2d at 263. It does not control. The trial court could properly find that Gary was acting within the scope of his employment in keeping the medication at home.

35 We need not reach the question of negligence of the treating physician and pharmacist.

36 AFFIRMED.



# **Appendix 2**

**C**Restatement of the Law — Torts  
Restatement (Second) of Torts  
Current through August 2009

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Division 2. Negligence  
Chapter 12. General Principles  
Topic 7. Duties Of Affirmative Action  
Title A. Duty To Control Conduct Of Third Persons

§ 317. Duty Of Master To Control Conduct Of Servant

[Link to Case Citations](#)

**A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if**

- (a) the servant**
  - (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or**
  - (ii) is using a chattel of the master, and**
- (b) the master**
  - (i) knows or has reason to know that he has the ability to control his servant, and**
  - (ii) knows or should know of the necessity and opportunity for exercising such control.**

See Reporter's Notes.

**Comment:**

*a.* The rule stated in this Section is applicable only when the servant is acting outside the scope of his employment. If the servant is acting within the scope of his employment, the master may be vicariously liable under the principles of the law of Agency. See Restatement of Agency, Second, Chapter 7.

*b. Master's duty to police his premises and use made of his chattels.* A master is required to police his own premises, and those upon which, though in the possession of another, he has a privilege of entry for himself and his servants, to the extent of using reasonable care to exercise his authority as a master in order to prevent his servant from doing harm to others. So too, he is required to exercise his authority as master to prevent them from misusing chattels which he entrusts to them for use as his servants. This is true although the acts of the servant while upon the premises or in the use of the master's chattels are done wholly for the servant's own purposes and are, therefore, outside the course of the servant's employment and thus do not subject the master to liability under the rules of the law of Agency. On the other hand, the master as such is under no peculiar duty to control the conduct of his servant while he is outside of the master's premises, unless the servant is at the time using a chattel entrusted to him as servant. Thus, a factory owner is required to exercise his authority as master to prevent his servants, while in the factory yard during the lunch hour, from indulging in games involving an unreasonable risk of harm to persons outside the factory premises. He is not required, however, to exercise any control over the actions of his employees while on the public streets or in a neighboring restaurant during the lunch interval, even though the fact that they are his ser-

vants may give him the power to control their actions by threatening to dismiss them from his employment if they persist.

*c. Retention in employment of servants known to misconduct themselves.* There may be circumstances in which the only effective control which the master can exercise over the conduct of his servant is to discharge the servant. Therefore the master may subject himself to liability under the rule stated in this Section by retaining in his employment servants who, to his knowledge, are in the habit of misconducting themselves in a manner dangerous to others. This is true although he has without success made every other effort to prevent their misconduct by the exercise of his authority as master. Thus a railroad company which knows that the crews of its coal trains are in the habit of throwing coal from the cars as they pass along tracks laid through a city street, to the danger of travelers, is subject to liability if it retains the delinquents in its employment, although it has promulgated rules strictly forbidding such practices.

*d. Cases in which servant not liable.* In order that the master may be subject to liability under the rule stated in this Section, it is not necessary that the act of the servant which he has failed to control is one which is negligent on the part of the servant and, therefore, subjects the servant to liability. The master may know of circumstances of which the servant is excusably ignorant which should cause the master to realize that the servant's actions involve an unreasonable risk of harm to others of which the servant neither is nor should be aware.

**COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON**

ESTATE OF HARB,

Appellant,

No. 64833-1-I

vs.

KING COUNTY,

Respondent.

DECLARATION OF SERVICE  
OF APPELLANT'S OPENING  
BRIEF

ORIGINAL

COMES NOW the undersigned and declares under penalty of perjury under the Laws of the State of Washington as follows:

1. I am of legal age, have personal knowledge of the facts set forth herein, and am competent to testify.
2. I am an employee of Hawkes Law Firm, P.S., 19929 Ballinger Way N.E., Shoreline, WA 98155, attorney of record for appellant in this matter.
3. Per RAP 18.6(b), on August 2, 2010, I sent by U.S. mail, first class postage prepaid, an original and one copy of the Opening Brief of Appellant Estate of Harb, addressed to:

Court of Appeals, Division I  
One Union Square  
600 University Street  
Seattle, WA 98101-4170

4. Per RAP 18.6(b), on August 2, 2010, I sent by U.S. mail, first class postage prepaid, a true and correct copy of the Opening Brief of Appellant Estate of Harb to counsel of record for all parties, addressed as follows:

**Attorneys for Respondent King County**

Kristofer J. Bundy, WSBA 19840  
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DATED at Shoreline, Washington on August 2, 2010.

  
Kevin M. Winters  
Kevin M. Winters