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CAN POLICE DEPARTMENTS OR EMS PROVIDERS BE FOUND LIABLE FOR NEGLIGENCE WHEN THEIR OFFICERS OR RESPONDERS COMMITTED AN INTENTIONAL TORT WHILE ON DUTY? YES.

Recently, the Washington Supreme Court (hereinafter "Court") found that a person who has been shot multiple times by a police officer may sue the city employing that officer under a negligence theory, even though the on-duty actions of the officer may have been intentional *and* negligent. To be clear, the underlying reason why a plaintiff may wish to sue under a negligence theory, and not merely an "intentional tort" theory, is that an employer may be "vicariously liable" for the *negligent* acts of its employees.

In *Beltran-Serrano v. City of Tacoma,* 95062-8 (2019), the plaintiff, a mentally ill homeless man, sued the City of Tacoma (hereinafter "City") because a Tacoma police officer shot him multiple times during an encounter. He sued under the theory that (1) the officer was negligent despite the officer potentially having committed the intentional "torts" of battery and assault, and (2) that the City "failed to properly train and supervise officers to deal with the mentally ill and exercise appropriate force" and was therefore negligent. The Pierce County Superior Court dismissed his claim on the grounds that a negligence claim cannot be based on an intentional tort.

The City argued before the Court that "there is no such thing as the negligent commission of an

intentional tort." The Court disagreed, finding that the plaintiff did not assert a "negligent intentional shooting," but instead that the "totality of the circumstances" indicated a "lack of adequate training" and a failure on the part of the officer to apply any training she had received (in other words, that the officer not only intentionally wronged the man, she was also negligent in the performance of her duties leading up to and during the shooting).

Why is this case important? A general principle of personal injury law is that an *employer* is generally *not* liable for the *intentional torts* of its employees. *See Dickinson v. Edwards,* 105 Wn.2d 457, 466, 716 P.2d 814 (1986). However, another general principle of personal injury law is that an employer *may be held liable* for the *negligent* conduct of its employees when those employees are acting within the scope of their employment, i.e. when those employees are "on the clock" and are not on a "frolic and detour" of their own. *See Id.* This doctrine is known as "respondeat superior."

Another way of phrasing these concepts is as follows: When a public-safety employee is on the clock but decides to consciously hurt someone—assault and/or battery—that employee is not acting within the scope of her employment, and therefore the employer should *not* be found liable for that employee's conduct. However, in light of *Beltran*, if the public-safety employee may have engaged in an intentional tort—for example, assault and battery—but the circumstances indicate that the employee not only acted intentionally but also failed to exercise reasonable care and was therefore negligent, the *employer* may be found liable under a theory of *negligence.*

The second issue that the Court dealt with in *Beltran* was whether the police officer owed a "duty of care" to the mentally ill homeless man. As we have discussed on numerous occasions,[1] government agencies are generally shielded from liability for negligence under what is called the "public duty doctrine," unless an *individualized* duty is owed to a particular person (who is typically the plaintiff in a lawsuit). The old adage underlying the public duty doctrine is that "a duty owed to all is a duty owed to none."

The Court noted that generally there are four exceptions to the principle of non-liability known as the public duty doctrine. But instead of strictly applying any of those exceptions, the Court ultimately applied the common law duty of care to the officer, finding that "every individual owes a duty of reasonable care to refrain from causing foreseeable harm in interactions with others."

In other words, the police officer in this case should have taken reasonable precautions and behaved with reasonable restraint prior to firing the gun. The Court, without recognizing one of the four established exceptions to the public duty doctrine, found that the officer—and by extension the City—owed an *individualized* common law duty of "reasonable care" to the plaintiff. The Court found this duty may have been violated, and therefore the City-employer may be found liable in *negligence*—under the doctrine of respondeat superior. The Court therefore reversed the Pierce County Superior Court's dismissal of the plaintiff's lawsuit, and

[1] https://www.firehouselawyer.com/NewsletterResults.aspx?Topic=Civil+Actions&Subtopic=Public+Duty+Doctrine

remanded the case down to superior court for trial.

In so ruling, the Court was careful to outline that "[R]ecognizing such a duty does not open the door to potential tort liability for a city's statutorily imposed obligation to provide police services, enforce the law, and keep the peace."

There were two dissents[2] in *Beltran.* One of the dissenting judges found that "there is no doubt that the officer acted intentionally when she shot this man and it was the officer's action of shooting the man that caused the injury for which he now seeks compensation."

So, what can inquiring minds make of this decision, in terms of the precedent it sets? Perhaps one might conclude that the public duty doctrine *is all but dead*, because the Court has carved out a "common law" exception to the doctrine without using any of the four recognized exceptions. Or perhaps the decision simply means that the Court was analyzing the potential liability as one for negligent failure to train the policewoman. But in that instance, the Court still did not address the public duty doctrine defense and the exceptions thereto.

Or perhaps, underlying the Court's written words, the necessary individualized duty of care was found due to policy considerations that protect the mentally ill as a special class of persons. After all, there are Washington statutes that provide for protection of the constitutional rights of the mentally ill.

Moreover, we have had occasion recently to examine the case law in all of the federal circuits, and found several cases finding liability against local governments for police mistreatment of the mentally ill, especially in the field of involuntary commitment of the mentally ill. According to this case law, in apparent disregard of the due process rights of the mentally ill, some police officers have detained persons without a hearing who are or appear to be suffering from a mental disability. Some of these cases have expressed a concern for lack of adequate police training in dealing with the mentally ill or even recognizing when bizarre behavior may be caused by something other than mental illness.[3] The statutes require a showing of "dangerousness" of the person, either to him/herself or to others. But what if that "diagnosis" of the situation is totally wrong? What if the police are not trained at all to deal with difficult questions as to what is causing the behavior?

The Court's opinion was devoid of in-depth discussion of these kinds of issues because the matter came up to the Court on a sparse record on a motion to dismiss and not after a full-blown trial subsequent to discovery. Nevertheless, the Court's opinion does invite us to speculate about what the results might be upon remand for a trial.

HIPAA VIOLATIONS AND AN UPCOMING MUNICIPAL ROUNDTABLE

Recently, we have needed to analyze whether the situation presented amounted to an inappropriate release of protected health information. Unfortunately, in some cases we had to conclude that there was a technical violation of HIPAA and the question became what the client was required to do to remedy that breach.

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[2] For new readers, a "dissent" is an opinion of another judge on the same court that disagrees with the majority opinion.

[3] *See Also* https://www.firehouselawyer.com/Newsletters/March2017FINAL.pdf

We think this is an important question from a financial and training standpoint so we will resume our quarterly Municipal Roundtable practice after a brief hiatus recently. We will let everyone know where and when that July Roundtable will be held.

Why does it matter? Here are just some of the scary headlines from a publication we receive weekly/monthly on HIPAA, "The HIPAA Journal": "AMCA Breach Sparks Flurry of Lawsuits and Investigations," "Alabama Jury Awards Woman $300,000 Damages over HIPAA Breach," "Nurse Fired over Alleged Theft and Impermissible Disclosure of PHI," and "PHI Potentially Compromised at Rosenbaum Dental Group and Kingman Regional Medical Center." The list goes on and on. Don't think it cannot happen to you because it can.

SOME PROPERTY TAX PROBLEMS TO THINK ABOUT

Occasionally, our articles reflect legal issues we have been grappling with for clients. In this article, we deal with the meaning of this section of the Washington Constitution—Article VII, Section 2(b)—insofar as it allows an excess tax levy for the sole purpose of paying the principal and interest on general obligation bonds issued for capital purposes, "other than the replacement of equipment."

This provision would seem to disallow using excess levy elections to seek voter approval of added taxes (beyond the regular levies) if part of the bond money is to be used to replace *equipment* as opposed to, for example, building fire stations. RCW 52.16.080 provides that fire districts can issue GO bonds for "capital purposes" but mentions no such limitation on "replacing" equipment. However, another very specific property tax statute—RCW 84.52.056—authorizes any municipal corporation to issue GO bonds for "capital purposes" and use an excess levy election to pay the principal and interest, and this statute <u>does</u> include the "no replacement of equipment" limitation.

In our experience, however, we believe we have rather often seen GO bonds issued, and excess levies utilized (at least in part) to purchase new apparatus, such as fire engines. Perhaps the municipal corporation is not really "replacing" any engines because the older engines (or the ones currently in use) are being moved to "reserve" status.

Or perhaps the new engine or engines are just being added to the fleet and not "replacing" anything. As you can see, it depends on what the word "replace" means. Generally, the ordinary meaning of the word "replace" is "to put something new in the place of".[4] Well, one might argue, isn't the new engine being used in place of the old engine, as the "first due" engine in a certain area? Can we call it an "upgrade" instead of a "replacement"? Well, the problem there is that one ordinary meaning of the word "upgrade" is "to *replace* something old with something new". (emphasis added).

Perhaps the solution is to **not** issue bonds for capital purposes, but rather to issue them for "district purposes" (implying that the purchase is operational) under RCW 52.16.061. In other words, do not use RCW 84.52.056 at all. Using RCW 84.52.130, a fire district can use a "maintenance and operation" excess levy authorized under Article VII Section 2(a) of the Constitution instead, and simply say they are

[4] https://www.merriam-webster.com/dictionary/replace

buying the engine(s) for operational purposes. That type of levy can be spread over as long as four years to help raise the funds for repayment of the bonds. This of course assumes that issuing bonds **is necessary in the first place.**

But, you point out, what if we are a regional fire authority and not a fire district? RCW 84.52.130 only allows a four-year M&O levy for fire districts, not RFAs. In that case, you could use RCW 84.52.052 and RCW 52.26.140 (2), which allows an excess levy (levied one year and collected the next) to repay principal and interest on bonds issued for "authority purposes." Of course, an RFA could not levy so much that the voters would not approve it, so the amount of funds that could be generated in that fashion in one year would not be enough to pay the debt service on a debt of several million dollars to "replace" a large number of engines or trucks.

The reason that RFAs do not have the same powers in regard to "M&O levies" that can be spread over four years is that the state Constitution, Article VII Section 2 (a), only allows M&O levies for fire districts and school districts specifically. (Indeed, it took a constitutional amendment first before RCW 84.52.130 could be enacted into law.) The concept of a regional fire authority came into being in 2004, so that concept did not exist in 2002, when RCW 84.52.130 was enacted or when the state constitution was amended before that.

SOME THOUGHTS ABOUT TAXES AND FORESTLANDS

Recently, we have been getting some questions about forestlands and about the taxation and assessment of such lands to pay for fire protection. Maybe this is a "hot topic" because the wildland fire season is upon us and it looks like fire districts in Western Washington will not be exempt from the demands for service just because we are on the "wet side" of the state of Washington.

"Forestlands" are defined broadly in RCW 76.04.015 to mean "unimproved lands which have enough trees, standing or down, or other flammable material …to constitute a fire menace to life or property." As we said, this is a pretty broad definition but it excludes lands with structures when it includes the word "unimproved". A "forest landowner" is defined broadly enough to include public as well as private owners of forestlands.

RCW 76.04.600 requires forest landowners with such land in fire protection zones (set by the Department of Natural Resources or DNR) to provide adequate fire protection to be approved by the DNR. If such an owner neglects or fails to provide such adequate protection, the DNR will do it and assess the owner a forest land protection assessment. RCW 76.04.610.

But here's the rub: At least in Kitsap, Pierce and King Counties, vast swaths of what seem to be forest lands (owned by private and public owners) are removed from the DNR fire protection zone and therefore are under the protection of fire districts. See WAC 332-24-710 (Kitsap), 720 (Pierce) and 730 (King), in which it states that these removed forestlands are "best protected" by fire districts and therefore DNR removed them from DNR's fire protection zone.[5] This means there is no fire protection assessment. State and federally owned lands are not removed from DNR jurisdiction.

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5 https://www.firehouselawyer.com/Newsletters/May2019FINAL.pdf

For example, WAC 332-24-730 states that all forestlands on Vashon and Maury Islands are removed. But what if tax-exempt property (owned by public entities) constitutes the largest number of acres in your fire district, and you have no contract under RCW 52.30.020? Chances are you receive no taxes and no assessments for that protection.

What about the other counties in the state? There are no similar WACs removing forestlands from the DNR fire protection duties in other counties. However, we must consider RCW 52.16.170 and RCW 52.26.160. These two identical statutes, applicable to fire districts and RFAs respectively, address the assessment and taxation (by your local county assessor) of forestland properties that are (1) within a forest protection assessment zone and (2) also within a fire district.

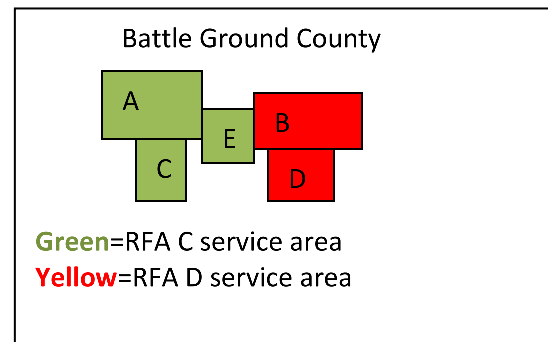
These statutes differentiate between properties that are "wholly unimproved" and those that are partly improved and partly unimproved. If such property is "wholly unimproved"—meaning no structures whatsoever—then only the forest protection assessment applies and there are no taxes for the fire district. If, on the other hand, the property is partly improved, there should be both taxes but the law goes on to allow segregation of the land into two parts upon request. In other words, the fire district could get taxes on the improved part.

The lesson to be learned here is that, if the county assessor says the land is "wholly unimproved", just make sure the land is actually located in a fire protection assessment area before you give up. The fire districts and RFAs may not be able to get much revenue from forestlands, but some diligence should enable to at least get what you are entitled to get.

REVISITING ANNEXATION INTO RFAs AND CITY ANNEXATIONS

In December 2018, we wrote an article discussing the consequences of annexing into regional fire authorities and the effects of a city annexing territory that is already part of an RFA, or not such a part.[6] In one part of that article we concluded that there is no law preventing a city from annexing part of an existing RFA and thereby removing it from that RFA, to be served by the city's existing fire department instead. In this article we take a somewhat deeper dive into the possibly complex scenarios that might arise.

This hypothetical situation involves City A, City B, RFA C, and RFA D, all in the same region of Battleground County. Oh, I forgot. There is also a minor bit player, known as Fire District E. The unlucky Fire District E is contiguous on one side to City A and on the other to City B. Fire District E currently has a service contract with RFA C, which includes actually—as one of its participating fire protection jurisdictions—City A! Fire District E is located in unincorporated Battleground County, as shown by the map below:



[6] https://firehouselawyer.com/Newsletters/December2018FINAL.pdf

Suppose that Fire District E would like to annex into RFA D and therefore obtain the services of RFA D, instead of obtaining services through their current contract for service with RFA C. Oh, and by the way, RFA D includes—as one of its participating fire protection jurisdictions—City B! After Boundary Review Board (BRB) proceedings that led to recommending it, an election is held in which annexation of all of Fire District E's territory is approved into RFA D, to get that service area. That means that RFA D is the service provider of Fire District E, but Fire District E *remains unincorporated* and therefore subject to annexation by City A, pursuant to the language of RCW 35.13.010 (emphasis added):

> "[A]ny portion of a county not incorporated as part of a city or town but lying contiguous thereto may become *a part of* the city or town by annexation."

The annexation of the (unincorporated) area of Fire District E by RFA D makes RFA C unhappy. That is because the service contract RFA C had with Fire District E generated revenue. So they go to their "friend", City A, and ask if the city could annex the territory that was Fire District E, but is still in unincorporated Battleground County. City A is supportive so that is proposed.

The BRB again takes up the issue, which of course is different than the question presented at the first BRB proceeding, because the city annexation statutes relate to providing all urban services and not just fire and EMS. Suppose the BRB approves the annexation applying the "factors and objectives" of the BRB statute—RCW 36.93.170-180—and an election is called for. The voters then approve of annexation of the former Fire District E territory into City A, so we are almost right back where we started in the first place.

At long last, here is the issue: Does that annexation approval mean the territory is removed from RFA D and will now be served by RFA C, as it was in the first place (by contract)? I would say that it does! Consistent with our December 2018 article, I conclude that such an annexation takes priority over any "service annexation" such as the one annexing the fire district E territory into RFA D.

Ultimately, our conclusion is that the city annexation statutes would trump the RFA annexation statutes in the event of the hypothetical conflict above.

Why? Because the language of the city annexation laws is clear: "[A]ny portion of a county not incorporated as part of a city or town but lying contiguous thereto may become *a part of* the city or town by annexation." RCW 35.13.010 (emphasis added).

One other wrinkle: Let us return to our original hypothetical (RFA D annexes Fire District E) and assume that the disputed territory is included in the county comprehensive plan as within the Urban Growth Area (UGA) and Potential Annexation Area (PAA) for **both** city A and city B. This makes the hypothetical more clear with respect to the BRB decisions: The city with that territory shown in only *their* UGA and/or PAA would have a distinct advantage in our opinion—due to the objectives of the Growth Management Act that the BRB must consider, including the "preservation of logical service areas." *See* RCW 36.93.180.

Of course, annexation of Fire District E into City B would prevent the first step of annexation into RFA D in the first place, because annexation into one city as a practical and legal matter would not be reversible or changeable, should a different city try to annex such a city's territory, due to the clear language of RCW 35.13.010. Logically, if City B, instead of *RFA D,* annexed Fire District E, then RFA D would become the service provider to the former Fire District E by default, and City A would be precluded from annexing that RFA territory due to the language of RCW 35.13.010, quoted above.

SAFETY BILL

Labor and Industries recently, in November 2018, turned the word "shall" into "must" throughout many provisions of WAC 296-305, the safety standards for firefighters.[7]

We shall see if this impacts our interpretation of those regulations, but we do not assume at this time that it will.

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[7] http://lawfilesext.leg.wa.gov/law/wsr/2018/22/18-22PERM.pdf