No. 29725-0-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

DONNA GARCIA; CONCEPCION GARCIA;
PATRICIA JANE LEIKAM, administrator of the
Estate of Tiarria Garcia, a deceased person

Appellants,

vs.

CITY OF PASCO, a municipal corporation,

Respondent

RESPONDENT'S APPEAL BRIEF

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I. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

A. A young lady on the town with her boyfriend and his friend was shot accidentally while the three sat in a parked van at a tavern. While the lady was either dead or dying and seated in the driver's seat, the boyfriend, from the passenger's seat, drove the van to another girlfriend's home. While in route, witnesses observed the van strike a parked vehicle. The witnesses phoned 911 dispatch to report their observations. Upon arriving at the destination, the boyfriend parked the vehicle in the backyard and the two men physically carried the young lady's body into the residence. A neighbor called 911 to report his observations of the car and the carrying of someone to the back of the house, but he did not state the person was taken into the house. A police officer responding to the 911 call knocked at the residence's front door, but did not go inside because the owner of the home pretended there was no problem. No observer claims he would have acted differently to save the life of the young lady, assuming she remained alive, had he or she known that the officer would not intervene at the residence. The estate and survivors of the young lady sue the officer's employer. Does the public duty doctrine bar recovery?

B. Is a 911 operator considered a gratuitous promisor for purpose of the voluntary rescue exception to the public duty doctrine?

C. Does the voluntary rescue exception to the public duty doctrine apply when a 911 operator made no promises and no caller claims to have withheld assistance to a dying person based upon any comment of the operator?

D. Does RESTATEMENT (SECOND) OF TORTS § 302 impose a duty on the police officers actionable in tort under such circumstances?

E. May an appellant assert an argument for the first time on appeal, even if a case decided after the Superior Court ruling supports that argument?

II. STATEMENT OF CASE

Donna Garcia sues the City of Pasco for the death of her daughter, Tiairra Garcia, who was killed by an accidental gunshot wound while on the town with her drinking friends, Marnicus Lockhard and Ashone Hollinquest. CP 413-20. After the gunshot, Tiairra Garcia sat dead or dying in the passenger seat of a van driven by Marnicus Lockhard. Donna Garcia claims Pasco is liable for the death of her daughter because of calls to 911 reporting that the van struck parked vehicles and a call from a neighbor to 1911 Parkview Street reporting the movement of a body from the van to the house. CP 419.

On June 22, 2008, Tiairra Garcia, along with Marnicus Lockhard and Ashone Hollinquest, locomoted in a borrowed van to Joey's 1983[1], a restaurant/tavern in Pasco. CP 174, 415. Marnicus "Pooh" Lockhard and Tiairra Garcia were dating, although Lockhard had a live-in girlfriend nicknamed Granny. CP 171-3. Because she was underage, Tiairra Garcia remained in the van while the two men entered the bar. CP 183, 5. Inside the tavern, Lockhard and Hollinquest exhibited signs of impairment from drugs and/or alcohol. CP 415. Nevertheless, Joey's 1983 served the two gentlemen alcoholic beverages over the course of 1 to 1.5 hours. CP 415. Joey's 1983 later removed Lockhart and Hollinquest from the premises after Lockhart assaulted another patron. CP 185, 6, 415.

After leaving Joey's 1983, Tiairra Garcia drove the two men to another liquid establishment, Panda Woks. CP 186, 415. After Garcia parked the vehicle, Marnicus Lockhard reached for a pistol in Ashone Hollinquest's possession. CP 187, 415. As the two men exchanged the weapon, the gun mistakenly discharged and struck Garcia[2]. CP 415.

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[1] This esteemed tavern is named for the year of its founding, not the overworked statute in Volume 42 of the United States Code.

[2] People don't kill. Guns do.

Garcia leaned her head back and started gurgling noises. CP 195.

With Garcia in the driver's seat and Marnicus Lockhard in the passenger seat, Lockhard drove the vehicle to Granny's house, 1911 Parkview, Pasco. CP 172, 196, 415. While in route, the van struck a parked car. CP 202, 415. Witnesses to the collision phoned 911 dispatch to report their observations. CP 415. Ashone Hollinquest wanted Marnicus Lockhard to drive the van to the hospital, but Lockhard went a different direction. CP 203. Lockhard stated that they cannot go to the hospital, but Hollinquest said: "Man, we got to go to the hospital, 'cause she might be dead." CP 203. By then, Tiairra Garcia was not moving, gurgling nor showing signs of life. CP 203. At the directions of Marnicus Lockhard, Hollinquest tossed the gun out the car. CP 203, 4.

Upon arriving at Granny's home, Lockhard parked the vehicle in the backyard and the two gents toted Garcia's corpus into the residence. CP 208, 210, 416. One of the men dropped his side of Tiairra Garcia's body. CP 314. Once inside Ashone Hollinquest "kinda heard" Garcia "making like she was trying to breath." CP 211. Hollinquest tried to give Tiairra Garcia CPR. CP 212.

As Lockhard stopped the car at the residence destination, John Gorton, a neighbor to Granny's home, also called 911. CP 129-30. Gorton was half asleep. CP 331. The verbatim transcript of the 911 call from Gorton follows:

> *911 Operator*: 911.
>
> *John Gorton*: Yeah, I live across the street from 1611 Parkview[3] and there's something going on over there. There's smoke coming out from a van on the north side of the house.
>
> *911 Operator*: Okay, and what's the address there?
>
> *John Gorton*: 1611 Parkview.
>
> *911 Operator*: 1611 Parkview.
>
> *John Gorton*: Yeah, and there's been a little - ah - I think it's like a Chevy Luv or small pickup - Chevy S10 - that's driven by like seven -
>
> *911 Operator*: And is that the address of the house?
>
> *John Gorton*: Yes. It's driven by like seven or eight times.
>
> *911 Operator*: Where's the smoke coming from?
>
> *John Gorton*: It's coming from the north side of the house. I don't know if - it look likes it's outside of the house.

---

[3] Gorton gave an incorrect address.

911 Operator: Okay, and do you see any flames?

John Gorton: No. No flames. Just smoke. They pulled somebody out of a van in the back of the house and drugged them to the back of the house.

911 Operator: So do you know if it's a car or it's the house or -?

John Gorton: I - don't know. The smoke is - smoke is gone now.

911 Operator: So the smoke is gone?

John Gorton: Yeah. There's - there's something going on over there. You need to get somebody over here.

911 Operator: Okay. And do you think it's a fire or -?

John Gorton: No. It's not a fire. There's been something going on all weekend over here. There was a huge domestic fight yest - last night.

Voice in background: Yep. Cop car's already there.

John Gorton: Okay. Police are here now.

911 Operator: Okay. The police are there now.

John Gorton: Yeah.

911 Operator: Okay. What's your name?

John Gorton: John Gorton.

911 Operator: John Gorton. And did you guys call already?

John Gorton: No. We didn't.

911 Operator: Okay. Thank you.

John Gorton: Uh huh.

911 Operator: Bye. Bye.

CP 129-30.

As noted by John Gorton in his 911 call, a Pasco police officer came to 1911 Parkview as Gorton spoke on the phone. CP 130. The officer first spoke with a man who had followed the van. CP 317. The officer looked around the home and then knocked on the door. CP 317. Granny answered the door and acted like she knew nothing. CP 317, 8.

III. ARGUMENT OF LAW

A. DONNA GARCIA MAKES FACTUAL ERRORS IN HER APPEAL BRIEF.

Donna Garcia misstates or invents facts in her brief. The most stunning creation comes from affidavits never signed by witnesses. CP 99-103. In her brief, Donna Garcia alleges that John Gorton and Melissa Genett withheld assistance to Tiairra Garcia because of promises by the 911 operator. Nevertheless, the 911 transcript does not support any

promises, let alone reliance on the promises by Gorton or Genett. The 911 operator did not promise any action by police and the conversation with Gorton ended when Gorton announced that police arrived.

Donna Garcia is not free to rely on unsigned affidavits. Unsigned affidavits should not be considered when ruling on a summary judgment motion. ***Our Lady of Lourdes Hospital v. Franklin County***, 120 Wn.2d 439, 452, 842 P.2d 956 (1993). The factual record therefore is devoid of any reliance by anyone upon any promise.

In her statement of issues, Donna Garcia claims Pasco "exposed" her daughter to "third-party criminal activity that is reasonably foreseeable." No facts support framing the issue such. Any criminal behavior that harmed Tiairra Garcia occurred long before 911 was called. The death of Tiairra Garcia was likely accidental rather than intentional, but regardless, Garcia, not Pasco, exposed herself to danger by carousing with drunkards.

B. THE PUBLIC DUTY DOCTRINE RELIEVES THE CITY FROM ANY LIABILITY AS A MATTER OF LAW.

The Garcia family's claims against the City of Pasco for alleged failures in police work raise the specter of the familiar public duty

doctrine. Washington has long abolished sovereign immunity. RCW 4.92.090. Nevertheless, the legislature's abolition of sovereign immunity did not affect the public duty doctrine. See **Chambers-Castanes v King County**, 100 Wn.2d 275, 288, 669 P.2d 451 (1983). Under the public duty doctrine, a public official's duty to the general public cannot be a source of liability unless the "duty breached was owed to the injured person as an individual." **Babcock v. Mason County Fire District**, 144 Wn.2d 774, 785, 30 P.2d 1261 (2001). Stated differently, "a duty to all is a duty to no one." **Taylor v. Stevens County**, 111 Wn.2d 159, 163, 759 P.2d 447 (1988); **J & B Development Co. v. King County,** 100 Wn.2d 299, 303, 669 P.2d 468 (1983). The threshold determination in a negligence action is whether a duty of care is owed by the defendant to the plaintiff. Whether the defendant is a governmental entity or a private person, to be actionable, the duty must be one owed to the injured plaintiff, and not one owed to the public in general. **Babcock v Mason County Fire Dist. No. 6**, 144 Wn.2d 774, 784 (2001). The public duty doctrine is a 'focusing tool' that courts use to determine whether a public entity owes a duty to a 'nebulous public' or to a particular individual, such as Tiairra Garcia. **Taylor v Stevens County**, 111 Wn.2d 159, 166 (1988).

In numerous suits based upon the conduct of law enforcement agents, courts have summarily dismissed claims on the ground of the public duty doctrine, because the relationship of police officer to a citizen is too general to create an actionable duty. Courts generally agree that responding to a citizen's call for assistance is basic to police work and not special to a particular individual. **Torres v. City of Anacortes**, 97 Wn. App. 64, 74, 981 P.2d 891 (1999); **Adams v. City of Fremont,** 68 Cal.App.4th 243, 279, 80 Cal.Rptr. 196 (1998). Accordingly, courts frequently deny recovery for injuries caused by the failure of police personnel to respond to requests for assistance, the failure to investigate properly, or the failure to investigate at all. **Torres v. City of Anacortes**, 97 Wn. App. 64, 74, 981 P.2d 891 (1999); **Dever v. Fowler,** 63 Wn.App. 35, 45, 816 P.2d 1237 (1991); **Williams v. State**, 34 Cal.3d 18, 25, 664 P.2d 137 (1983).

Washington courts have addressed the public duty doctrine in the context of police and 911 responses to emergency calls. Most cases make interesting reading. Since the cases involve emergency responses to criminal behavior, the opinions illustrate the bizarre and evil deeds, of which men are capable. Since the criminal is judgment proof, the victim

seeks to impose tort liability upon a municipality. The latest cases turn on whether a police or emergency officer directly and explicitly promised the victim specific action. Garcia loses under this standard.

In **Torres v. City of Anacortes**, 97 Wn. App. 64, 981 P.2d 891 (1999), the parties agreed that Shelley Torres had direct contact with the police, setting her apart from the general public. At issue was whether the record provided evidence that the Anacortes police made express assurances upon which Shelley justifiably relied.

Michael McGuffey had a history of assaulting his wife, Shelley Torres McGuffey. Anacortes police instructed Shelley to obtain a no-contact order, assisted her by serving it on Michael, and enlisted Shelley's participation in the investigation by asking her to take a polygraph test. Anacortes police agreed to refer, to prosecutors, Michael's threatening Shelley with a gun. The police failed to make the referral. Weeks later, Michael McGuffey shot and killed Shelley.

The **Torres** court ruled there was an issue of fact as to the liability of Anacortes. Police uttered an explicit statement to Shelley, that the police would refer her assault and rape report for a charging decision. The police broke this explicit promise. A person in Shelley's circumstances

could reasonably have understood that a promise to forward the file to the prosecutor had great significance to her safety.

Beal v. City of Seattle, 134 Wn.2d 769, 787, 954 P.2d 237 (1998) is the Supreme Court's most recent decision finding evidence of a special relationship created by express assurances that a victim justifiably relied upon. The victim called 911 and asked for police assistance in removing her belongings from her estranged husband's apartment, saying he had beaten and threatened her and now held a gun. She awaited outside the apartment for the police to arrive when, 20 minutes later, the husband shot and killed her. The victim's estate alleged that the City's failure to dispatch a police officer promptly in response to her 911 call was a breach of a duty owed to her as an individual. The Supreme Court found a special relationship established by the assurances of police protection given by the 911 dispatcher. Contrary to the dispatcher's promise, no police officer was sent to the scene.

The facts before this court significantly differ, in terms of the special relationship doctrine. Notably, neither the Pasco police nor the 911 Dispatch Center had any conversation with Tiairra Garcia. Therefore, no assurances were given directly to Garcia, let alone assurances upon

which Garcia relied. The 911 center spoke to several witnesses, but Garcia had no knowledge of the calls. The 911 operator indicated police would be dispatched to the scene, nothing more. Police officers were immediately dispatched and they went directly to the scene.

The Garcia family argues that the 911 operator or the police should have investigated more or intervened further based upon information from witnesses. Yet, the 911 operator was given no specific information prompting further investigation. The witnesses did not report Garcia was in any trouble. Only random bits and pieces of information were supplied such as: (1) a van struck several parked cars, (2) a van parked in the yard on the northside of a Parkview residence; (3) there was a domestic dispute at that residence a day earlier; (4) "something is going on;" and (5) the van was smoking and somebody was pulled out to the back of the house. The witnesses never reported someone was inside the house. The 911 operator only stated to the 911 caller that an officer was on the way, which was true. There is no record what the 911 operator informed the responding officer and the officer arrived while John Gorton still spoke to 911. None of the witnesses were ever assured or given any promises of a specific police response.

Another Washington decision is **Sinks v. Russell**, 109 Wn.App. 299, 34 P.3d 1243 (2001). John Stocks and Gerald Sinks angered Nicholas Cencich by serving him legal papers. Cencich responded by blocking Stocks and Sinks in his driveway. When Cencich left and they were able to get out of the driveway, Stocks and Sinks drove away and called 911. Stocks told the 911 operator that Cencich was still at the scene. He said, "I'm pretty sure he doesn't have any weapons. I don't think he's dangerous. He's just angry." The 911 operator told the men to stay at the scene and a deputy would contact them.

Deputy Russell soon called and Stocks told him that Cencich seemed angry and agitated. Stocks said Cencich drove his truck so close to Stocks that the bumper nearly touched his knees. Stocks did not tell Russell that he felt he was in danger, that Cencich was armed or dangerous, or that Cencich had threatened or previously harmed himself or Sinks. Russell said he would come out to take Cencich's statement. Before Russell reached the scene, Cencich approached Stocks and Sinks' car and shot at them, nicking Stocks in the face and hitting Sinks in the stomach and elbow.

Stocks and Sinks argued that, if Russell had come faster or had not told them to wait at the scene, Cencich would not have shot them. Russell and the county argued the public duty doctrine barred the suit. Both the lower court and the court of appeals granted Russell and Thurston County a summary judgment of dismissal.

Many foreign cases support the proposition that a municipality will not be held liable for alleged negligent investigations or responses by 911 or police officers. **Denton v. City of Fullerton**, 233 Cal.App.3d 1636, 285 Cal.Rptr. 297 (1991); **Muthukumarana v. Montgomery County**, 370 Md. 447, 805 A.2d 372 (2002) (a one-time call to 911 for help is not enough to establish a special relationship); **Sachanowski v. Wyoming County Sheriff's Dept.**, 665 N.Y.S.2d 197 (1997).

C. THE VOLUNTARY RESCUE EXCEPTION IS ALSO INAPPLICABLE.

Donna Garcia contends the "voluntary rescue" exception rescues her suit from defeat. This rescue exception applies only when a governmental entity or its agent (1) undertakes a duty to aid or warn a person in danger; (2) fails to exercise reasonable care; and (3) offers to render aid, and as a result of the offer of aid, either the person to whom the

aid is to be rendered, or another acting on that person's behalf, relies on this governmental offer and consequently refrains from acting on the victim's behalf. **Vergeson v. Kitsap County**, 145 Wn. App. 526, 539, 186 P.3d 1140 (2008). For this exception, the offer to assist must be a "gratuitous" offer. **Babcock v. Mason County Fire Dist. No. 6**, 101 Wn.App. 677, 685, 5 P.3d 750 (2000), aff'd on other grounds, 144 Wn.2d 774, 30 P.3d 1261 (2001).

Under Washington case law, the offer to assist is not gratuitous if an emergency service responds in the normal course of its operations to an emergency. **Babcock v. Mason County Fire Dist. No. 6,** 101 Wn.App. 677, 5 P.3d 750 (2000), (fire department). Otherwise, the exception would swallow the rule and most people, calling a municipality for emergency assistance, would file a suit if the emergency response did not arrive in time. The law does not desire a municipality to be the insurer of emergency protection. A municipality is not in the business of guaranteeing the protection of citizens.

The decision of **Babcock v. Mason County Fire Dist. No. 6,** 101 Wn.App. 677, 5 P.3d 750 (2000), affirmed on other grounds, 144 Wn.2d 774, 30 P.3d 1261 (2001) controls this case. The Babcocks brought suit

against a fire district, for damages arising out of a fire in their mobile home. The Babcocks argued the fire district could have prevented the fire from spreading to their garage and a tent trailer, if the district had engaged in timely firefighting tactics. The Superior Court dismissed the suit on summary judgment and the appeals court and the state Supreme Court affirmed. The Supreme Court held that the duty to fight fires is a duty to the community, and not a duty to specific persons or property. 144 Wn.2d at 792. Sound public policy precludes judicial processes from governing a fire scene. 144 Wn.2d at 792.

Before the Court of Appeals, the Babcocks argued that the rescue exception to the public duty doctrine applied. The Babcocks asserted that, if they had known the fire district's response would not be timely, they would have taken alternative steps to save their property. The Babcocks argued that they neglected taking steps themselves to rescue their property, because of assurances, from the fire district, that their property would be saved. The Court of Appeals noted that integral to the rescue exception is that the rescuer, including a state agent, **gratuitously** assumes the duty to warn the endangered parties of the danger and breaches this duty by failing to warn them. 101 Wn.App. at 685. The fire district did not gratuitously

assume fighting the Babcocks' house fire. Rather, the district was established for the very purpose of fighting fires and protecting the property of all citizens, including, but not limited to, the Babcocks.

The state Supreme Court did not address, in **Babcock v. Mason County Fire Dist. No. 6,** the applicability of the rescue exception. The high court let stand the Court of Appeals decision on the issue. Perhaps the Supreme Court did not address the rescue doctrine, because of the frivolous nature of Babcock's argument.

The job of the Pasco police and the 911 dispatch center is to respond to emergencies. Thus, the 911 operator's statement that police would be sent to the scene was part and parcel of her job. Neither the operator nor the city's agents gave any gratuitous promises of assistance. Thus, the rescue exception is inapplicable to the facts here.

D. DONNA GARCIA MAY NOT RELY ON THE RESTATEMENT OF TORTS SINCE THE ARGUMENT WAS NOT FORWARDED BELOW.

On appeal, Donna Garcia contends RESTATEMENT (SECOND) OF TORTS § 302 applies and saves her suit from dismissal. Garcia never

asserted this claim in the trial court[4] and thus waived the claim for purposes of an appeal.

RAP 2.5(a) reads:

> Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court.

Generally, appellate courts will not entertain issues raised for the first time on appeal. **Brundridge v. Fluor Federal Services , Inc.**, 164 Wn.2d 432, 441, 191 P.3d 879 (2008); **Wilson Son Ranch, LLC v. Hintz**, 253 P.3d 470, 473 (2011). Going further, a reviewing court will not review an issue, theory, argument, or claim of error not presented at the trial court level. **Doe v. Puget Sound Blood Center**, 117 Wn.2d 772, 780, 819 P.2d 370 (1991); **Lindblad v. Boeing Co.**, 108 Wn.App. 198, 207, 31 P.3d 1 (2001). The reason for this rule is to afford the trial court with an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials. **Smith v. Shannon**, 100 Wn.2d 26, 37, 666 P.2d 351 (1983).

Donna Garcia contends she is free to argue the Restatement for the first time on appeal, because **Robb v. City of Seattle**, 159 Wn.App. 133, 245 P.3d 242 (2010), was decided after the Superior Court ruling. This

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[4] Since the waiver is based on an omission rather than an affirmative statement, Pasco cannot cite the trial court record.

argument is both erroneous on the facts and the law. **Robb v. Seattle** was decided on December 27, 2010. The summary judgment motion was argued on December 20, 2010, but the court did not enter the order granting the motion until January 26, 2011. CP 95-8. Garcia could have brought a motion for reconsideration before or after entry of the January 26 order, if she deemed **Robb v. Seattle** to be of importance.

Even were Pasco to concede that **Robb v. Seattle** was decided after the summary judgment hearing, the decision did not create new law. Nor did **Robb v. Seattle** reverse earlier law. **Robb** is just another in a series of Washington appellate decisions applying §302 of the Restatement. §302 was adopted by the Washington Supreme Court at least by 2001 in **Kim v. Budget Rent A Car Systems**, 143 Wn.2d 190, 15 P.3d 1283.

Absent a change in applicable law, a reviewing court will not consider arguments raised for the first time during oral argument. **State v. Olson**, 126 Wn.2d 315, 319, 20, 893 P.2d 629 (1995); **Heller Bldg., LLC v. City of Bellevue**, 147 Wn.App. 46, 59, 194 P.3d 264 (2008). In **Brundridge v. Fluor Federal Services , Inc.**, 164 Wn.2d 432 (2008), the appellant argued that it had not waived an argument by failing to assert the

argument in the Superior Court because of an intervening decision supporting the argument. The Supreme Court ruled otherwise, since the intervening decision had not changed the law but rather addressed an open issue. Here **Robb v. Seattle** did not even address an open issue.

E. RESTATEMENT SECOND OF TORTS §302 DOES NOT APPLY TO OUR UNDISPUTED FACTS.

Even were this court to permit Donna Garcia to assert RESTATEMENT (SECOND) OF TORTS §302 as a ground of recovery despite her waiver, Garcia still loses.

RESTATEMENT (SECOND) OF TORTS §302 addresses the possibility of a duty to guard another person from a foreseeable risk of harm caused by a third person. The section reads:

> A negligent act or omission may be one which involves an unreasonable risk of harm to another through either
>
> (a) the continuous operation of a force started or continued by the act or omission, or
>
> (b) the foreseeable action of the other, a third person, an animal, or a force of nature.

Section 302A refines clause (b) of section 302 by addressing the risk of harm through the negligent or reckless conduct of others. Section 302B, in

turn, addresses the risk of the intentional or criminal conduct of others. Presumably Donna Garcia relies only on §302B, but one must even question whether the conduct of Ashone Hollinquest and Marnicus Lockhard constituted intentional or criminal conduct, since the killing may have been a mistake. Section 302B provides:

> Risk of Intentional or Criminal Conduct
>
> An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.
>
> ...
>
> d. Normally the actor has much less reason to anticipate intentional misconduct than he has to anticipate negligence. In the ordinary case he may reasonably proceed upon the assumption that others will not interfere in a manner intended to cause harm to anyone....
>
> e. There are, however, situations in which the actor, as a reasonable man, in required to anticipate and guard against the intentional, or even criminal, misconduct of others. *In general, these situations arise where the actor is under a special responsibility toward the one who suffers the harm, which includes the duty to protect him against such intentional misconduct; or where the actor's own affirmative act has created or expose the other to a recognizable high degree of risk of harm through such misconduct,*

which a reasonable man would take into account.

Italics added.

As a matter of law, RESTATEMENT (SECOND) OF TORTS §302 does not apply in the present suit since the shooting of Tiairra Garcia occurred during a time that law enforcement held no special relationship with Garcia. Also, no affirmative act of the officers created or exposed Tiairra Garcia to a high risk of harm. Section 302 generally applies when a government entity knew of a dangerous criminal, had personal contact with the criminal, and either released the criminal into the public or failed to take the criminal into custody under circumstances where the criminal was likely to cause harm to an innocent person. The Pasco police officers and 911 never encountered Marnicus Lockhard or Ashone Hollinquest under circumstances that they should have worried about them committing a criminal act unless taken into custody. Neither gentlemen had a history of violent incoherence. Law enforcement performed no affirmative act that exposed Tiairra Garcia to the nefarious acts of Lockhard and Hollinquest, nor did law enforcement take any steps to prevent Garcia from protecting herself. Once 911 was called any criminal act had already occurred and Tiairra Garcia was either dead or on death's doorstep.

Robb v. Seattle is a good illustration of the application of §302. A recitation of its facts shows the circumstances to be a world apart from the instant suit. One year before the tragic death of Michael Robb, Seattle police officers twice took Samson Berhe to Harborview Hospital for a mental evaluation at the request of Berhe's parents, who were afraid for the family's safety because of his erratic and destructive behavior. One week before Robb's death, Seattle police learned that Samson Berhe again engaged in bizarre and aggressive behavior and that he possessed a shotgun. At that time Berhe's mother reported to police that Samson was uttering suicidal threats. Two officers took Berhe again to Harborview after observing Berhe's unresponsive and strange behavior.

Five days before Robb's death, Bellevue police reported to Seattle police that Samson Berhe had stolen a car and kept shotguns under his bed. Four days before Michael Robb's death, Officer Ponha Lim and another officer responded to a 911 call reporting that Samson Berhe punched a brother's friend. When Lim approached Berhe, Berhe switched to a "deep demonic" tone of voice. Berhe claimed to rule the world and advocated the torture and killing of all confused people. He boasted of controlling all money and said he would kill the "haters." Officer Lim and

his partner transported Berhe to Harborview Hospital.

On the day of Michael Robb's killing, Officer Lim and Officer McDaniel placed Samson Berhe in their patrol car because of suspicions of burglary. The officers noticed shotgun shells on the curb where they found Berhe. The officers shortly released Berhe and instructed him to go home. Berhe uttered incoherent comments as he walked from the patrol car. Two hours later Samson Berhe randomly killed Michael Robb with a bullet from a shotgun to the face.

IV. CONCLUSION

As a matter of law, the claims of Tiairra Garcia's family against Pasco must be dismissed. Garcia received no express assurances of protection, upon which she relied. The public duty doctrine therefore bars this suit. This reviewing court should affirm the Superior Court.

DATED this 22nd day of August, 2011.

LEAVY, SCHULTZ, DAVIS & FEARING, P.S.
Attorneys for Defendant City of Pasco

By: _____
GEORGE FEARING, WSBA NO. 12970

CERTIFICATE OF SERVICE

I, Kristi L. Flyg, hereby certify that on the 22nd day of August, 2011, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

☐	Hand-delivered	MARK D. KIMBALL
☒	First-Class Mail	JAMES P. WARE
☐	Overnight Mail	MDK LAW ASSOCIATES
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Kristi Flyg

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