90369-7

SUPREME COURT NO.
COURT OF APPEALS NO. 70395-1-I

SUPREME COURT, STATE OF WASHINGTON

DONNA GARCIA, A Washington Resident; CONCEPCION GARCIA, an Individual; PATRICIA JANE LEIKAM, as the Administrator of the Estate of Tiairra Garcia, A Deceased Person,

Petitioners,

v.

THE CITY OF PASCO, WASHINGTON, A Municipal City, et al.

Respondent.

PETITIONERS' PETITION FOR REVIEW TO THE SUPREME COURT

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I. IDENTITY OF PETITIONERS AND COURT OF APPEALS DECISION AT ISSUE

Donna Garcia, Concepcion Garcia, and the Estate of Tiairra Garcia (collectively referred to as "Garcia") hereby petition this Court for review of the Court of Appeals, Division I's decision affirming the trial court's dismissal of Garcia's claims on summary judgment. The Court of Appeals, Division I Case Number for which review is sought is 70395-1-I. the opinion terminating review was filed on March 24, 2014. The order denying Respondent's motion to publish was entered on April 28, 2014.

II. ASSIGNMENT OF ERROR

For purposes of RESTATEMENT (SECOND) OF TORTS § 302B does an officer engage in an affirmative act when he arrives at a potential crime scene with the knowledge that an injured person was dragged into the back of a residence with a history of domestic disputes and when the responding officer either knew or should have reasonably known that his presence would have caused all persons who knew of the injured person to cease to render aid?

III. STATEMENT OF THE CASE

A. Factual Background.

This case stems from the death of Tiairra Garcia from a gunshot wound on June 22, 2008 at 1911 Parkview, Pasco, Washington as the Pasco Police stood outside the residence. The officer treated the scene as

a hit and run despite the fact that a neighbor had contacted 911 and informed it that the occupants of the van were dragging an obviously injured person into the back of the home, that a domestic dispute had occurred there days early, and that something other than a simple hit and run was transpiring.

The van, and Tiairra, ended up at 1911 Parkview on June 22, 2008 because after being ejected from a tavern, Tiairra Garcia was shot by the other passengers of the van as they exchanged a handgun.[1]

As relevant to this Petition, the City of Pasco stipulated that the following facts occurred after the van came to rest at 1911 Parkview:

1. One caller informed 911 that the vehicle appeared to be on fire and that two males were carrying a body/person into the backyard of 1911 Parkview;
2. Once caller continued to be in contact with 911 until an unknown police officer arrived;
3. 911 dispatch indicated that the officer had all the information conveyed through the emergency call and that the police would be responding accordingly;
4. The officer spoke with the alleged owner of 1911 Parkview and left shortly thereafter; and

[1] CP 379. It should be noted that Pasco effectively stipulated to certain facts contained in Garcia's complaint for the purposes of its Motion for Summary Judgment. *See* CP 381-2.

5. The officer did not investigate the backyard of 1911 Parkview, did not investigate the van, and did not attempt to enter the home.[2]

The caller—John Gorton—who informed 911 that Tiairra Garcia was being dragged into the back of the house provided the following statements to 911:

Operator: 911

Gorton: Yeah I live across the street from 1611[3] Parkview and there's something going on over there. There's smoke coming out of a van on the north side of the house.

Operator: OK and what's the address there?

Gorton: 1611 Parkview.

Operator: 1611 Parkview?

Gorton: Yeah and there's been a little, ah like a Chevy Love or small Chevy S10 pickup driven by like...

Operator: And is that the address of the house?

Gorton: It's driven by like 7-8 times.

Operator: Where is the smoke coming from?

Gorton: It's coming from the north side of the house. I don't know if its outside the house.

Operator: OK do you see flames?

Gorton: No, no flames, just smoke. They pulled somebody out of a van in the back of the house, drove them to the back of the house.

Operator: Do you know if it's a car or the house?

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[2] CP 380-82 These stipulated facts served as the factual basis for the City's Motion for Summary Judgment.

[3] The address is actually 1911.

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

Operator: So the smoke is gone?

Gorton: Yeah, there's something going on over there. You need to get somebody over there. There was a huge domestic fight last night.

Gorton: Police are here now.

Operator: Police are here now?

Gorton: Yeah.

Operator: What's your name?

Gorton: John Gorton.

Operator: John Gorton.

Operator: Did you guys already call?

Gorton: No.

Operator: OK. Thank you. Bye bye.[4]

Despite having this information, the officer conducted only a cursory investigation of the house, called a tow truck, and left.[5] At some point during his investigation or shortly thereafter, Tiairra Garcia died while inside 1911 Parkview.

B. Procedural History.

Garcia brought claims against the City of Pasco for the negligent acts of the Pasco Police when the officer responded to the 911 calls.[6] Specifically, Garcia alleged that when Pasco Police dispatched an officer to 1911 Parkview, it acted negligently because the officer failed to address

[4] CP 348-9.
[5] CP 381.
[6] CP 418-9.

the specific information provided to Pasco Police through the 911 calls, namely the information provided by John Gorton and Melissa Genett.[7] In particular, despite the fact that the Gorton/Genett call specifically alerted Pasco Police to the fact that Tiairra Garcia was being dragged into the back of 1911, Pasco Police treated the incident solely as a hit and run.[8]

The City of Pasco moved for summary judgment based exclusively on the theory that Pasco owed no duty to Tiairra Garcia because of the public duty doctrine.[9] In response, Garcia argued that Tiairra Garcia fell within the voluntary rescue exception to the doctrine. Further, Garcia requested a continuance to obtain the signatures of Genett and Gorton on declarations based upon their conversation with Franklin County 911, what they observed, and their understanding of why the police had arrived at 1911 Parkview.[10] The trial court granted summary judgment finding that the public duty doctrine shielded Pasco Police because under the facts of this case the City could not be found to have owed a duty to Tiairra Garcia.[11]

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[7] CP 419.
[8] CP 381-2
[9] CP 379-402
[10] The court ultimately denied a continuance to obtain the signatures because it found that the content of the declarations was not relevant as to whether the public duty doctrine served as a complete bar to Garcia's claims. This position was later affirmed in the trial court's denial of Garcia's motion for reconsideration. VR 2-6; CP 15-17
[11] CP 95-98

Garcia then filed a motion for reconsideration based upon deposition testimony of Gorton and Genett that Garcia was not able to obtain prior to the December 20, 2010 summary judgment hearing.[12] In particular, Garcia focused on the testimony of Melissa Genett who indicated that she would have done something more than simply have Gorton call 911 had she known that the responding officer was not going to investigate the information she and Gorton relayed to 911.[13] The trial court denied Garcia's motion for reconsideration.[14] Garcia then filed a timely notice of appeal.

1. Robb v. City of Seattle and Washburn v. City of Federal Way.

While this matter was pending before the Court of Appeals, this Court rendered two key decisions: **Robb v. City of Seattle** and **Washburn v. City of Federal Way**.[15] Garcia argued in briefing and at oral argument that the holdings in **Robb** and **Washburn** were dispositive. Specifically Garcia argued in briefing and at oral argument that under the RESTATEMENT (SECOND) OF TORTS § 302B, the City owed Garcia a duty because it should have reasonably known that the officer's affirmative acts exposed Tiairra Garcia to the greater danger of criminal activities by the

[12] CP 104, CP 84-88
[13] CP 39-40
[14] CP 15-17
[15] 176 Wn.2d 427, 295 P.3d 212 (2013); 178 Wn.2d 732, 310 P.3d 1275 (2013).

persons who dragged her into 1911 Parkview, Hollinquest and Lockhard.[16] This argument was based upon language found both in **Robb** and **Washburn**. In **Robb**, this Court acknowledge that an officer may owe a duty to protect a third party from the criminal acts of another absent a special relationship, but only if the affirmative act of the officer somehow increases or exposes the third party to a greater risk of peril. **Robb v. City of Seattle**, 176 Wn.2d 247, 435-6, 295 P.3d 212 (2013). The key analysis, this Court explained, was whether the exposure to peril was the result of a commission or an omission. **Id.** at 436-7. If the officer's affirmative acts create the peril, then there is no need to establish the existence of a special relationship between the officer and the injured third party. **Id.** "Liability for nonfeasance (or omissions), on the other hand, is largely confined to situations where a special relationship exists." **Id.** at 436.

Approximately nine months after the **Robb** decision, this Court expanded on its analysis of Restatement § 302B in **Washburn v. City of Federal Way**. In **Washburn**, the estate of Baerbel K. Roznowski sued the City of Federal Way for negligently serving an antiharassment order on her partner Paul Chan Kim. **Washburn v. City of Federal Way**, 178 Wn. 2d 732, 739-40, 310 P.3d 1275 (2013). In 2008, Roznowski decided to move to California, away from Kim. **Id.** at 739. As the result of a

[16] App. Brief on Appeal at pp. 17-18.

domestic fight related to the move, Roznowski decided to obtain an antiharassment order against Kim. **Id.** As part of her application for the antiharassment order, Roznowski provided a law enforcement information sheet (LEIS) that indicated she lived with Kim, that he would likely react violently upon receipt of the antiharassment order, and that an interpreter would be needed given Kim's limited proficiency in English. **Id.** The LEIS was given to the officer who served the order on Kim. **Id.** Despite the information provided by Roznowski, the officer did not bring an interpreter with him to serve Kim. Further, when he served Kim, the officer saw Roznowski in the residence but did not interact with her nor did he inquire as to her safety. **Id.** at 740. Instead, he simply served Kim with the order, informed Kim that he would need to appear at court, and left. **Id.** This left Roznowski to read and explain the order to Kim. **Id.** A fight ensued and sometime later Kim stabbed Roznowski to death and attempted to kill himself. **Id.**

In finding that Federal Way was partially liable for Roznowski's death, this Court stated that the officer owed Roznowski a duty to act reasonably when he served Kim with the antiharassment order which, given Kim's history and the information provided by Roznowski, included a duty to safeguard against the criminal conduct of Kim. **Washburn**, 178 Wn.2d at 759. Critically, the Court contrasted the facts in **Washburn** to

the facts in **Robb**. **Id.** at 759-60. The court noted that in **Washburn**, the officer's arrival at the home shared by Kim and Roznowski introduced a new risk. **Id.** at 760. In contrast, the officers in **Robb** ""failed to remove a risk" not of their own creation..." **Washburn**, 178 Wn.2d at 758-9(*citing* **Robb**, 176 Wn.2d at 438). In affirming that Federal Way owed a duty to Roznowski, this Court noted that:

> [t]he City had a duty to act here, and this duty required the City to act in a reasonable manner. [The officer] knew or should have known that Roznowski and Kim were both present and that his service of the antiharassment order might trigger Kim to act violently. Given this knowledge or constructive knowledge and Kim's proximity to Roznowski when [the officer] served Kim, [the officer's] duty to act reasonably required him to take steps to guard Roznowski against Kim's criminal acts. **Id.** at 762.

At oral argument Garcia argued that the holdings in **Robb** and **Washburn** established that the City owed a duty to Tiairra Garcia. Like the officer in **Washburn**, the arrival of the officer at 1911 introduced a new peril because it caused the neighbor, Genett, to cease to render aid.

In affirming the trial court's decision, Division I stated that the City took no affirmative acts because the "record does not demonstrate that the police promised to investigate Gorton's statement or were even aware of it."[17] Further, the court found that the city's failure to investigate was an omission similar to the omission of the officers in the **Robb**

[17] Opinion at p. 8

matter.[18] As a result, Division I affirmed the trial court's decision dismissing Garcia's claims on summary judgment.

Respondent timely filed a Motion to publish on April 14, 2014. Respondent's Motion was denied on April 28, 2014. Petitioners now file this timely Petition for Review to the Supreme Court.

IV. LEGAL ARGUMENT

A. Introduction.

Petitioners seek review of Division I's decision affirming the trial court's dismissal of Petitioners' claims pursuant to CR 56. Because Petitioners' claims were dismissed pursuant to CR 56, review of Division I's decision is de novo. **Sheikh v. Choe**, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). Discretionary review of the Court of Appeals, Division I's decision is proper because the Court's decision directly contradicts the holdings in two recent Supreme Court opinions: **Robb v. City of Seattle** and **Washburn v. City of Federal Way**. *See* RAP 13.4(b)(1). Here, the Court of Appeals erred when it found that the City did not owe Tiairra Garcia a duty. The officer's arrival at 1911 introduced a new risk to Tiairra Garcia because it caused Genett to cease to render aid. When the officer arrived at the scene, the City owed a duty to Tiairra Garcia to act reasonable given the information provided to it. Under the facts of this

[18] Id.

case, that meant that the City owed a duty to investigate and render aid to Tiairra Garcia in order to prevent further harm to her from the illegal acts of Hollinquest and Lockhard. The officer's failure to investigate Tiairra Garcia being dragged into the back of the house constituted the breach of the duty the City owed to Tiairra Garcia, not an omission as Division I asserted in its opinion. Therefore, the Court of Appeals erred when it focused its attention on the investigation by the officer and not his arrival at the scene. The officer's arrival at the scene constituted an affirmative act which, under the facts of this case, gave rise to a duty owed by the City to Tiairra Garcia.

As set forth in **Washburn**, an officer has a duty to perform his job function reasonably given the information provided to him. The officer in **Washburn** acted affirmatively when he arrived at the home shared by Roznowski and Kim. The omissions he then performed, failure to bring an interpreter, failure to ask if Roznowski needed assistance, failure to stand by to ensure Kim would not become violent, served as the basis for the argument that Federal Way breached its duty. Similarly here, the affirmative act by Pasco was the officer's arrival at 1911 Parkview. This affirmative act created a duty to protect Tiairra Garcia against potential criminal activities given the information conveyed by Gorton and Genett. The officer's failure to investigate the scene given the information relayed

by Gorton and Genett constituted a breach of that duty. Because the duty owed to Tiairra Garcia was created when the officer arrived at 1911 Parkview, the Court of Appeals erred when it affirmed the dismissal of Garcia's claims. Pasco owed a duty to Tiairra Garcia and therefore this matter should proceed to trial.

B. When the Police Officer Arrived at 1911 Parkview he Committed an Affirmative Act that Gave Rise to a Duty Under RESTATEMENT (SECOND) OF TORTS § 302(B)

The key to liability under RESTATMENT (SECOND) OF TORTS § 302B is that the actor's conduct must somehow alter the situation such that the degree of risk of harm has increased. *See* **Robb v. City of Seattle**, 176 Wn.2d 427, 436, 295 P.3d 212, 217 (2013); **Washburn v. City of Federal Way**, 178 Wn.2d 732, 757, 310 P.3d 1275, 1289 (2013); **Parrilla v. King County**, 138 Wn. App. 427, 437, 157 P.3d 879, 884 (2007). As stated in **Washburn** liability under Restatement § 302B may arise if the government agent's action increases the risk that a third party will be injured by the criminal conduct of another. **Washburn**, 178 Wn.2d at 758. Merely failing to removing an existing risk of criminal conduct, however, does not give rise to a duty under Restatement § 302(B). Id. at 758-59; see also **Robb**, 176 Wn.2d at 435-36. In **Washburn**, the affirmative act was serving the anti-harassment order. Even though the officer had a duty to serve the order, doing so created a new risk to

Roznowski that Kim may become violent. **Washburn**, 178 Wn.2d at 759-60. Because of the new risk, i.e. Kim's documented history of violence and the fact that he did not speak English, the officer owed a duty separate from his statutory duty to serve the antiharassment order. That duty was to serve the antiharassment order in such a manner as to safeguard against violence towards Roznowski.

In Garcia's case, the act that gave rise to a duty was the officer arriving at 1911 Parkview in response to the 911 calls. When the officer arrived, he had knowledge that Garcia was injured and that a domestic dispute had recently occurred at the residence. Therefore, he had a duty to act reasonably given the information provided to him via the 911. That included a duty to Tiairra Garcia to take steps to protect her from potential criminal acts of Hollinquest and Lockhard. The act that gave rise to the duty was an affirmative act, not a failure to act as the Court of Appeals asserted. Again, discussion of what the officer failed to do upon arriving at the scene merely illustrated how he acted improperly and therefore breach the duty owed to Tiairra Garcia. The duty owed to Tiairra Garcia, however, arose when he arrived at the scene. Accordingly, reversal of the Court of Appeals decision is proper.

In **Washburn**, the City of Federal Way attempted to adopt a rationale similar to that adopted by Division I in this matter. The City of

Federal argued that Restatement § 302B did not create a duty owed to Roznowski because the case was one of nonfeasance rather than one of misfeasance. **Washburn**, 178 Wn.2d at 760. In rejecting the argument, this Court stated that the examples provided at trial regarding the officer's failure to act merely illustrated how the city improperly served the antiharassment order. **Id.** However, the duty arose when the officer arrived at Roznowski and Kim's residence to serve the antiharassment order. That action constituted an affirmative act. **Id.** In **Washburn** the officer did not perform his duties in a reasonable fashion because he did not consider that the antiharassment order would likely result in a violent outburst by Kim and that Roznowski was present when he served the antiharassment order. **Id.** at 759-60. Therefore, the officer's presence at the residence increased the likelihood of violence and under Restatement § 302B, the officer had a duty to act reasonable given the situation.

Similarly a duty to protect Tiairra Garcia arose when the responding officer arrived at 1911 Parkview. Gorton and Genett alerted Pasco of the fact that Tiairra Garcia was being dragged into the back of the house, that there was a history of domestic disputes at the house, and that something other than a mere hit and run was transpiring. As a result, the officer should have reasonably known that if he did not act upon the

information provided to the 911 operator then his presence would actually increase the risk of harm Tiairra Garcia faced.

C. **Washburn** and **Robb** Hold that the City Owed a Duty to Tiairra Garcia.

Once the officer arrived at the scene, he owed a duty to Tiairra Garcia to act reasonably given the information conveyed to him through the 911 calls. Critically, in **Washburn** the Court clarified what actions and circumstances may give rise to a duty under Restatement § 302(B). Namely, the Court clarified that under certain circumstances a duty may arise when an officer performs his customary duties as an officer. In **Washburn** the officer was serving an antiharassment order, something typically performed by officers. **Washburn**, 178 Wn.2d at 753-5. While such activities normally would not give rise to a duty pursuant to Restatement § 302B, the facts surrounding Kim and his relationship with Roznowski gave rise to a duty. **Id.** at 759-60. In **Robb**, the Court found that the "situation of peril [in the **Robb** matter] existed before law enforcement stopped Behre, and the danger was unchanged by the officer's actions." **Robb**, 176 Wn.2d at 438. Because the officers in **Robb** did nothing but fail to remove a risk, they did not introduce a new risk or augment an existing risk and therefore liability under 302(b) did not apply. In **Washburn** though, the risk was much more apparent and it was the officer's performance of his duties that greatly increased the risk

to Roznowski. In **Washburn**, Court recognized that a duty can be created by the officer's presence a potential crime scene—even when performing actions customarily carried out by officers—and the duty is breached by a failure to act reasonably given the knowledge the officer has going into the scene.

The Court of Appeals affirmed the lower court's dismissal of Garcia's claims because:

> their failure to investigate was an omission. Like the officers in **Robb**, the police did not create a new risk. Instead, they failed to reduce an already-existing risk: Tiairra's injuries from the gunshot." Conversely, the driver in Parrilla increased the risk to nearby drivers through his affirmative act of leaving the buss running with an erratic passenger inside. Here, the officers' failure to investigate was nonfeasance, which does not give rise to liability under § 302B. [19]

This position, however, mimic's Federal Way's failed argument in **Washburn**. The duty arose when the officer arrived at the scene knowing that: (1) they had dragged someone into the back of the house and (2) that there was a domestic dispute at 1611 Parker the night before, and (3) that the neighbors were concerned that someone was injured. Given this information the officer either knew or should have known that someone was injured by the perpetrators of an ongoing crime and that his presence would cause the neighbors to cease to render aid. Given this information,

[19] Opinion at p. 9.

the officer owed a duty to Tiairra Garcia under Restatement § 302B to perform his duties reasonably given the circumstances.

D. A Finding that the City Owed a Duty to Tiairra Garcia Will not Unduly Burden Officers Responding to 911 Calls.

Finally, there is no policy concern regarding whether a finding that the Division I erred because even if a duty exists, no liability will exist if the responding officer acts reasonably given the information conveyed via 911. Again, a duty to act does not equate liability. **Washburn**, 178 Wn.2d at 761. Rather, a plaintiff would have to show that the officer acted negligently given the circumstances. Here, Garcia is not asking that this Court find that the City of Pasco acted negligently. That is a factual issue that will be resolved by a jury. Rather, Garcia seeks reversal of the Court of Appeals decision because when the officer arrived at 1911 Parkview, he committed an affirmative act that required he act reasonably given the facts conveyed to 911. The officer's arrival at the scene constituted an affirmative act that gave rise to a duty owed by the City to Tiairra Garcia. As a result, the lower courts erred in finding that the City owed no duty and dismissing Garcia's claims.

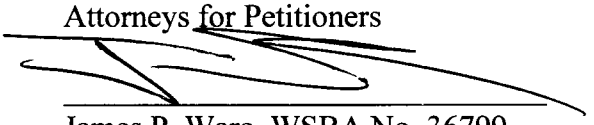
V. CONCLUSION

When the officer arrived at 1911 Parkview, he committed an affirmative action that, given the facts of this case, gave rise to a duty owed to Tiairra Garcia. Both **Robb** and **Washburn** established that a

duty was owed to Tiairra Garcia. Critically, the holding in **Washburn** established that an officer can owe a duty to protect against the criminal conduct of another even when he is performing acts customarily reserved to law enforcement. For these reasons and for the reasons set forth above, Petitioners' Petition for Discretionary Review should be granted and the dismissal of Garcia's claims should be reversed.

Respectfully submitted this 28th day of May, 2014.

MDK Law
Attorneys for Petitioners



James P. Ware, WSBA No. 36799

DECLARATION OF SERVICE

I certify that on May 28, 2014 I caused a true and correct copy of Petitioners' Petition for Discretionary Review to be served on the following in the manner indicated below:

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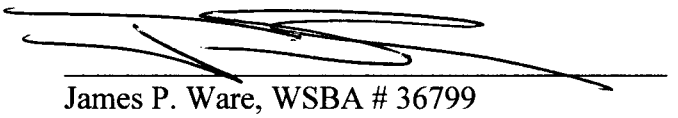
PDF Attachment to Counsel's Email Address of Record and via United States First Class Mail

Dated: May 28, 2014.



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APPENDIX

1. RESTATEMENT (SECOND) OF TORTS § 302B

Restatement (Second) of Torts § 302B (1965)

Restatement of the Law - Torts

Database updated March 2014
Restatement (Second) of Torts

Division 2. Negligence

Chapter 12. General Principles

Topic 4. Types of Negligent Acts

§ 302B 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.

See Reporter's Notes.

Comment:

a. This Section is a special application of the rule stated in Clause (b) of § 302. Comment *a* to that Section is equally applicable here.

b. As to the meaning of "intended," see § 8A. The intentional conduct with which this Section is concerned may be intended to cause harm to the person or property of the actor himself, the other, or even a third person.

c. Where the intentional misconduct is that of the person who suffers the harm, his recovery ordinarily is barred by his own assumption of the risk (see Chapter 17A) or his contributory negligence (see Chapter 17). This does not mean, however, that the original actor is not negligent, but merely that the injured plaintiff is precluded from recovery by his own misconduct. There may still be situations in which, because of his immaturity or ignorance, the plaintiff is not subject to either defense; and in such cases the actor's negligence may subject him to liability.

Illustration:
Illustration:

1. A leaves dynamite caps in an open box next to a playground in which small children are playing. B, a child too young to understand the risk involved, finds the caps, hammers one of them with a rock, and is injured by the explosion. A may be found to be negligent toward B.

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. This is true particularly where the intentional conduct is a crime, since under ordinary circumstances it may reasonably be assumed that no one will violate the criminal law. Even where there is a recognizable possibility of the intentional interference, the possibility may be so slight, or there may be so slight a risk of foreseeable harm to another as a result of the interference, that a reasonable man in the position of the actor would disregard it.

Illustration:
Illustration:

2. A leaves his automobile unlocked, with the key in the ignition switch, while he steps into a drugstore to buy a pack of cigarettes. The time is noon, the neighborhood peaceable and respectable, and no suspicious persons are about. B, a thief, steals the car while A is in the drugstore, and in his haste to get away drives it in a negligent manner and injures C. A is not negligent toward C.

With this illustration, compare Illustration 14 below.

e. There are, however, situations in which the actor, as a reasonable man, is 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 exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account. The following are examples of such situations. The list is not an exclusive one, and there may be other situations in which the actor is required to take precautions.

A. Where, by contract or otherwise, the actor has undertaken a duty to protect the other against such misconduct. Normally such a duty arises out of a contract between the parties, in which such protection is an express or an implied term of the agreement.

Illustration:
Illustration:

3. The A Company makes a business of conducting tourists through the slums of the city. It employs guards to accompany all parties to protect them during such tours. B goes upon such a tour. While in a particularly dangerous part of the slums the guards abandon the party. B is attacked and robbed. The A Company may be found to be negligent toward B.

B. Where the actor stands in such a relation to the other that he is under a duty to protect him against such misconduct. Among such relations are those of carrier and passenger, innkeeper and guest, employer and employee, possessor of land and invitee, and bailee and bailor.

Illustrations:
Illustrations:

4. The A company operates a hotel, in which B is a guest. C, another guest, approaches B in the hotel lobby, threatening to knock him down. There are a number of hotel employees on the spot, but, although B appeals to them for protection, they do nothing, and C knocks B down. The A Company may be found to be negligent toward B.
5. A rents an automobile from B. A keeps the automobile in his garage, but fails to lock either the car or the garage. The car is stolen. A may be found to be negligent toward B.

C. Where the actor's affirmative act is intended or likely to defeat a protection which the other has placed around his person or property for the purpose of guarding them from intentional interference. This includes situation where the actor is privileged to remove such a protection, but fails to take reasonable steps to replace it or to provide a substitute.

Illustrations:
Illustrations:

6. A leases floor space in B's shop. On a holiday, A goes to the shop, and on leaving it forgets to take the key from the door. A thief enters the shop through the door and steals B's goods. A may be found to be negligent toward B.

7. A negligently operated train of the A Railroad runs down the carefully driven truck of B at a crossing, and so injures the driver as to leave him unconscious. While he is unconscious the contents of the truck are stolen by bystanders. The A Company may be found to be negligent toward B with respect to the loss of the stolen goods.
8. The A Company has a legislative authority to excavate a subway, and in so doing to remove a part of the wall of the basement of B's store. The workmen employed by the company remove a part of the wall, leaving an opening sufficient to admit a man. They leave the opening unguarded. During the night a thief enters the store through the opening, and steals B's goods. The A Company may be found to be negligent toward B.

D. Where the actor has brought into contact or association with the other a person whom the actor knows or should know to be peculiarly likely to commit intentional misconduct, under circumstances which afford a peculiar opportunity or temptation for such misconduct.

Illustrations:
Illustrations:

9. A is the landlord of an apartment house. He employs B as a janitor, knowing that B is a man of violent and uncontrollable temper, and on past occasions has attacked those who argue with him. C, a tenant of one of the apartments, complains to B of inadequate heat. B becomes furiously angry and attacks C, seriously injuring him. A may be found to be negligent toward C.
10. A, a young girl, is a passenger on B Railroad. She falls asleep and is carried beyond her station. The conductor puts her off of the train in an unprotected spot, immediately adjacent to a "jungle" in which hoboes are camped. It is notorious that many of these hoboes are criminals, or men of rough and violent character. A is raped by one of the hoboes. B Railroad may be found to be negligent toward A.

E. Where the actor entrusts an instrumentality capable of doing serious harm if misused, to one whom he knows, or has strong reason to believe, to intend or to be likely to misuse it to inflict intentional harm.

Illustration:
Illustration:

11. A gives an air rifle to B, a boy six years old. B intentionally shoots C, putting out C's eye. A may be found to be negligent toward C.

F. Where the actor has taken charge or assumed control of a person whom he knows to be peculiarly likely to inflict intentional harm upon others.

Illustration:
Illustration:

12. A, who operates a private sanitarium for the insane, receives for treatment and custody B, a homicidal maniac. Through the carelessness of one of the guards employed by A, B escapes, and attacks and seriously injures C. A may be found to be negligent toward C.

G. Where property of which the actor has possession or control affords a peculiar temptation or opportunity for intentional interference likely to cause harm.

Illustrations:
Illustrations:

13. The same facts as in Illustration 1, except that the explosion injures C, a companion of B. A may be found to be negligent toward C.
14. In a neighborhood where young people habitually commit depredations on the night of Halloween, A leaves at the top of a hill a large reel of wire cable which requires a considerable effort to set it in motion. A group of boys, on that night, succeed in moving it, and in rolling it down the hill, where it injures B. A may be found to be negligent toward B, although A might not have been negligent if the reel had been left on any other night.

H. Where the actor acts with knowledge of peculiar conditions which create a high degree of risk of intentional misconduct.

Illustration:
Illustration:

15. The employees of the A Railroad are on strike. They or their sympathizers have torn up tracks, misplaced switches, and otherwise attempted to wreck trains. A fails to guard its switches, and runs a train, which is derailed by an unguarded switch intentionally thrown by strikers for the purpose of wrecking the train. B, a passenger on the train, and C, a traveler upon an adjacent highway, are injured by the wreck. A Company may be found to be negligent toward B and C.

f. It is not possible to state definite rules as to when the actor is required to take precautions against intentional or criminal misconduct. As in other cases of negligence (see §§ 291- 293), it is a matter of balancing the magnitude of the risk against the utility of the actor's conduct. Factors to be considered are the known character, past conduct, and tendencies of the person whose intentional conduct causes the harm, the temptation or opportunity which the situation may afford him for such misconduct, the gravity of the harm which may result, and the possibility that some other person will assume the responsibility for preventing the conduct or the harm, together with the burden of the precautions which the actor would be required to take. Where the risk is relatively slight in comparison with the utility of the actor's conduct, he may be under no obligation to protect the other against it.

Illustration:
Illustration:

16. A, a convict, is confined in a state prison for forging a check. His conduct while in prison exhibits no tendency toward violence, and prison tests show that he is mentally normal. In company with other prisoners, A is permitted to do outside work on the prison farm, in accordance with the prison system. While at work he is not properly guarded, and escapes. In endeavoring to get away, A stops B, an automobile driver, threatens him with a knife, and takes B's car. B suffers severe emotional distress, and an apoplectic stroke from the excitement. The State is not negligent toward B.

Reporter's Notes

This Section has been added to the first Restatement. The Comments and Illustrations are in large part transferred from the original § 302.

Illustration 1 is based on Vills v. City of Cloquet, 119 Minn. 277, 138 N.W. 33 (1912); Fehrs v. McKeesport, 318 Pa. 279, 178 A. 380 (1935); City of Tulsa v. McIntosh, 90 Okla. 50, 215 P. 624 (1923); Luhman v. Hoover, 100 F.2d 127, 4 N.C.C.A.N.S. 615 (6 Cir.1938). Otherwise where the caps are left where it is not reasonably to be expected that children will interfere with them. Vining v. Amos D. Bridges Sons Co., 142 A. 773 (Me.1929); Perry v. Rochester Lime Co., 219 N.Y. 60, 113 N.E. 529, L.R.A.1917B, 1058 (1916). Past experience of meddling is to be taken into account. Katz v. Helbing, 215 Cal. 449, 10 P.2d 1001 (1932).

Illustration 2 is based on Richards v. Stanley, 43 Cal. 2d 60, 271 P.2d 23 (1954). In accord are Curtis v. Jacobson, 142 Me. 351, 54 A.2d 520 (1947); Lustbader v Traders Delivery Co., 193 Md. 433, 67 A.2d 237 (1949); Roberts v. Lundy, 301 Mich. 726, 4 N.W.2d 74 (1942); Gower v. Lamb, 282 S.W.2d 867 (Mo. App 1955); Saracco v. Lyttle, 11 N.J. Super. 254, 78 A.2d 288 (1951); Castay v. Katz & Besthoff, 148 So. 76 (La. App.1933); Walter v. Bond, 267 App. Div. 779, 45 N.Y.S.2d 378 (1943), affirmed, 292 N.Y. 574, 54 N.E.2d 691 (1944); Wagner v. Arthur, 11 Ohio Op. 2d 403, 73 Ohio L. Abs. 16, 134 N.E.2d 409 (Ohio C.P.1956); Rapczynski v. W. T. Cowan, Inc., 138 Pa.Super. 392, 10 A.2d 810 (1940); Teague v Pritchard, 38 Tenn.App. 686, 279 S.W.2d 706 (1955). Contra, Schaff v. R.W. Claxton, Inc., 79 App.D.C. 207, 144 F.2d 532 (1944). See Notes, 1951 Wis.L.Rev. 740; 24 Tenn.L.Rev. 395 (1956); 43 Calif.L.Rev. 140 (1955); 21 Mo.L.Rev. 197 (1956).

Special circumstances may impose the duty. Compare Illustration 14.

Illustration 3: Compare Silverblatt v. Brooklyn Tel. & Messenger Co., 73 Misc. 38, 132 N.Y.Supp. 253 (1911), reversed, 150

2. ORDER DENYING MOTION TO PUBLISH

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

DONNA GARCIA, a Washington resident; CONCEPCION GARCIA, an individual; and PATRICIA JANE LEIKAM, as the administrator of the estate of Tiairra Garcia, a deceased person, Appellants, v. JOEY'S 1983, INC., a Washington corporation; MARNICUS ANTONIO LOCKHARD, a Washington resident; ASHONE HOLLINQUEST, a Washington resident; "JOHN DOE" 1-10; and Defendants, CITY OF PASCO, WASHINGTON, a municipal city, Respondent.	No. 70395-1-I ORDER DENYING MOTION TO PUBLISH

The respondent, City of Pasco, having filed its motion to publish, and a panel of the court having considered its prior determination and finding that the opinion will not be of precedential value; now, therefore it is hereby

ORDERED, that the unpublished opinion filed March 24, 2014, shall remain unpublished.

DATED this 28th day of April, 2014.

Judge

3. UNPUBLISHED OPINION NO 70395-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DONNA GARCIA, a Washington resident; CONCEPCION GARCIA, an individual; and PATRICIA JANE LEIKAM, as the administrator of the estate of Tiairra Garcia, a deceased person, Appellants, v. JOEY'S 1983, INC., a Washington corporation; MARNICUS ANTONIO LOCKHARD, a Washington resident; ASHONE HOLLINQUEST, a Washington resident; "JOHN DOE" 1-10; and Defendants, CITY OF PASCO, WASHINGTON, a municipal city, Respondent.	No. 70395-1-I DIVISION ONE UNPUBLISHED OPINION FILED: March 24, 2014

APPELWICK, J. — Garcia[1] appeals the trial court's grant of summary judgment dismissing her negligence claim against the City. Garcia argues that the public duty doctrine did not bar her claim, because the rescue exception applied. She further contends that Pasco had a duty under Restatement (Second) of Torts § 302B (1965) to protect her daughter from the criminal acts of a third party. We affirm.

[1] Donna Garcia is joined in the suit by her daughter, Concepcion Garcia, and Patricia Jane Leikam, the administrator of Tiairra's estate. For the sake of clarity, we refer to the appellants simply as "Garcia."

FACTS

On June 22, 2008, Tiairra Garcia drove Marnicus Lockhard and Ashone Hollinquest to a tavern in Pasco. In the parking lot, Lockhard reached for a gun Hollinquest was holding. The gun discharged and struck Tiairra.[2]

Lockhard panicked and took control of the van. Instead of taking Tiairra to the hospital, he drove to the home of a woman referred to as "Granny." Lockhard drove erratically, striking a number of cars before parking on the lawn. This alerted several neighbors who called 911. Police were dispatched to the scene.

One of the neighbors who called 911 was John Gorton. While Gorton was on the phone, Lockhard and Hollinquest pulled Tiairra's body out of the van and around to the back of the house. Gorton relayed this information to the operator. Gorton told the operator the police had arrived. The operator replied, "Okay. The police are there now," and took down Gorton's name.

The police questioned Granny about the vehicle collisions and arranged to have the van towed. They did not investigate the allegation that a body had been dragged into the house. Tiairra lay unconscious in a room inside, where she ultimately died.

Tiairra's mother, Donna Garcia, sued the City of Pasco (City) for negligent performance of its duties. The trial court granted summary judgment, finding that the public duty doctrine barred Garcia's claim. Garcia appeals.

DISCUSSION

Garcia asserts that the public duty doctrine does not bar her claim. She maintains that the rescue exception to that doctrine applies, because the City assumed

[2] We use Tiairra's first name to avoid confusion, but intend no disrespect.

the duty to aid Tiairra. She further argues that summary judgment was improper, because the police had a duty to protect Tiairra under the Restatement § 302B.

This court reviews a trial court's summary judgment order de novo. Korslund v. DynCorp Tri-Cities Servs., Inc., 156 Wn.2d 168, 177, 125 P.3d 119 (2005). Summary judgment is proper if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Id. This court construes the facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. Id.

I. Public Duty Doctrine: Rescue Exception

Garcia argues that her claim should have survived summary judgment, because the rescue exception to the public duty doctrine applies here. Under the public duty doctrine, a government actor is not liable for injuries caused by his or her negligent conduct, unless that conduct breached a duty to the injured person as an individual, rather than the actor's duty to the general public. Babcock v. Mason County Fire Dist. No. 6, 144 Wn.2d 774, 785, 30 P.3d 1261 (2001). There are four exceptions to this doctrine, including the rescue exception. Id. at 785-86.

The rescue exception applies where a government actor (1) assumes the duty to aid or warn a person in danger; (2) fails to exercise reasonable care; (3) offers to render aid; and (4) in doing so, causes either the person to whom the aid is to be rendered, or another acting on that person's behalf, to refrain from acting on the victim's behalf. Vergeson v. Kitsap County, 145 Wn. App. 526, 539, 186 P.3d 1140 (2008).

A public official's routine responses will not give rise to an enforceable promise of protection. See Torres v. City of Anacortes, 97 Wn. App. 64, 76, 981 P.2d 891 (1999). In public duty doctrine cases involving 911 calls, Washington courts have found that a

duty was owed to the victim where the operator made an express assurance that help would be provided, but it was not. See, e.g., Beal v. City of Seattle, 134 Wn.2d 769, 786, 788, 954 P.2d 237 (1998); Chambers-Castanes v. King County, 100 Wn.2d 275, 279-81, 669 P.2d 451 (1983). In Beal, the victim called 911 for a civil standby so she could pick up her belongings from her estranged husband. 134 Wn.2d at 773. The operator told the victim that "'we're going to send somebody there'" and "'[w]e'll get the police over there for you okay?'" Id. at 774 (alteration in original). Twenty minutes later, the victim's husband shot and killed her while she waited for the police. Id. No officer had been dispatched by that point. Id. In Chambers-Castanes, a woman called 911 multiple times to report an ongoing assault. 100 Wn.2d at 279-80. During each call, the operator assured that help would be provided, stating, "'All right, we'll get somebody up there then'"; "'We have the officer; he is on the way'"; and that the police "'are almost there now. In fact they are probably there.'" Id. Police were not dispatched until the woman called a third time, roughly 30 minutes after the original call. Id.

No express assurance was made in the present case. The following is a transcript of the call between Gorton and the 911 operator:

> *911 Operator*: 911.
> *John Gorton*: Yeah, I live across the street from 1611 Parkview 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[s] likes [sic] it's outside of the house.
> *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 dr[a]gged them to the back of the house.
> *911 Operator*: So you don't 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.

The operator repeatedly said, "okay" and took down Gorton's name, but made no statements about a police response to Gorton's observations. No affirmative promise was made. This does not amount to an assumption of the duty to aid or warn Tiairra.

Garcia does not demonstrate that the City affirmatively assumed a duty to aid or warn Tiairra. Instead, she argues that the 911 operator made an implicit promise to convey Gorton's statement to the police and that the police would then investigate. She cites no authority for this assertion, and Washington case law does not support it.

Even if the 911 operator promised to relay Gorton's statement to the police, that would have been within the scope of her duty to the general public—not a gratuitous promise. And, to trigger liability under the rescue exception, the government actor's

assumption of the duty to aid or warn must be gratuitous. 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). While the Babcock court called this aspect "integral," it did not define gratuitous. See id. However, it found that when a fire district assumes the duty of fighting a fire, it does not do so gratuitously. Id. at 686. The court reasoned that the district was established for "this very purpose—to fight fires and to protect the property of all citizens." Id. (emphasis in original).

Like a fire district responding to a fire, the very purpose of a 911 dispatch is to receive emergency calls and relay information to the police. See Johnson v. State, 164 Wn. App. 740, 752, 265 P.3d 199 (2011), review denied, 178 Wn.2d 1027, 273 P.3d 982 (2012). In Johnson, a man called 911 to report a car driving erratically in front of him. Id. at 745. The 911 operator transferred him to the Washington State Patrol, who told the man that it would notify troopers. Id. When the erratic driver exited the highway, the caller did not follow her and continued along the highway. Id. The erratic driver was later found dead. Id. Her widower brought suit, arguing that the State caused the 911 caller to refrain from aiding his late wife. Id. at 751. The court found that the State did not make a gratuitous offer to render aid, because its actions were "made as part of its duty to 'all citizens.'" Id. (quoting Babcock, 101 Wn. App. at 686).

Here, the 911 operator did nothing more than her duty to all citizens: responding to and relaying calls. This was not a gratuitous promise to an individual necessary to trigger the rescue exception. The trial court did not err in granting summary judgment dismissing Garcia's claims on the basis of the public duty doctrine.

II. Restatement (Second) of Torts § 302B

Garcia argues that the police had a duty to protect Tiairra under the Restatement § 302B. Section 302B provides that "[a]n act or 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." More specifically, the provision imposes a limited duty to protect third parties where an actor's own affirmative act creates a recognizable and unreasonable risk of harm. Robb v. City of Seattle, 176 Wn.2d 427, 433-34, 295 P.3d 212 (2013). Garcia contends that § 302B creates a duty here, because the police affirmatively indicated that they would investigate Gorton's statement about Tiairra's body and failed to do so.

As a threshold matter, the City argues that Garcia should not be allowed to raise this argument for the first time on appeal. This court may refuse to review any assignment of error that was not first raised in the trial court. RAP 2.5(a). An exception applies when, while the appeal is pending, a new issue arises because of a change in law. Brundridge v. Fluor Fed. Servs., Inc., 164 Wn.2d 432, 441, 191 P.3d 879 (2008). Garcia maintains that a change in law occurred after the trial court dismissed her claim. She cites to Robb v. City of Seattle, where this court held that a government actor—like a private actor—can owe a duty under § 302B. 159 Wn. App. 133, 145, 245 P.3d 242 (2010). reversed by, 176 Wn.2d 427. Garcia argues that this constituted a significant change in public duty doctrine jurisprudence. While the Court of Appeals decision may have represented a significant change in the law, the Washington Supreme Court

subsequently reversed the outcome of the appellate decision in Robb. 176 Wn.2d at 439-40.

In Robb, the court found that the officers' failure to act did not create a duty under § 302B. Id. at 437-38. There, two officers stopped a man named Samson Berhe on suspicion of burglary. Id. at 430. During their stop, the officers observed several shotgun shells on the ground near Berhe, but did not question him about them or pick them up. Id. Because they did not have probable cause to hold Berhe, the officers released him. Id. Less than two hours later, Berhe shot and killed Michael Robb, likely with the same shells. See id.

Robb's widow sued the city, arguing that the officers breached their duty under § 302B. Id. at 429. The court recognized that § 302B may create a duty to certain third parties, but emphasized that this duty arises out of only affirmative acts, rather than omissions. Id. at 433, 436-37. It explained that an affirmative act—or misfeasance—entails the creation of a new risk to the plaintiff. Id. at 437. By contrast, an omission—or nonfeasance—consists of passive inaction or failure to protect others from harm. Id. The court found that the officers' failure to pick up the shells (and thereby prevent Behre from shooting Robb) was an omission, not an affirmative act. Id. at 437-38.

By contrast, in Parrilla v. King County, 138 Wn. App. 427, 440-41, 157 P.3d 879 (2007), a government actor's affirmative act led to liability. There, a bus driver exited his bus with the engine still running, leaving a visibly erratic passenger inside. Id. at 431. The passenger took control of the bus and crashed into a car. Id. The court found that the bus driver committed an affirmative act that gave rise to a duty of care to occupants of the car under § 302B. Id. at 440-41.

Here, there was no affirmative act. The record does not demonstrate that the police promised to investigate Gorton's statement or were even aware of it. The 911 operator did not indicate that the police would take any particular action and did not acknowledge Gorton's statement about a body, other than to respond, "Okay." This does not constitute an affirmative indication that the police would investigate Gorton's statement.

This leaves the police's failure to investigate as the remaining potential source of a duty to Tiairra. But, their failure to investigate was an omission. Like the officers in Robb, the police did not create a new risk. Instead, they failed to reduce an already-existing risk: Tiairra's injuries from the gunshot. Conversely, the driver in Parrilla increased the risk to nearby drivers through his affirmative act of leaving the bus running with an erratic passenger inside. 138 Wn. App. at 438. Here, the officers' failure to investigate was nonfeasance, which does not give rise to liability under § 302B.

The City did not have a duty to Tiairra under either the rescue exception to the public duty doctrine or Restatement (Second) of Torts § 302B. The trial court properly granted summary judgment dismissing Garcia's negligence claims. We affirm.

Appelwick, J.

WE CONCUR:

Ellington, J.

Cox, J.