CASE NO.: 332047-III

COURT OF APPEALS, DIVISION III
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,

Appellants,

v.

FRANKLIN COUNTY, a Municipal Corporation,

Respondent

Appellants' Reply Brief on Appeal

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[1] Appellants have attached a copy of Restatement (Second) of Torts § 302(B) to its opening brief.

I. ARGUMENT.

A. Collateral Estoppel does not Apply Because the Issue of Whether Franklin County Owed a Duty Pursuant to Restatement (Second of Torts § 302(B) was not Necessarily or Actually Decided by Division I in Case No. 70395-1.

The Court should reverse and remand the trial court's dismissal of Garcia's claims because decision No. 70395-1 did not determine whether Franklin County owed a duty to Tiairra Garcia. In order for collateral estoppel to apply, the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the prior litigation. **Nielson By & Through Nielson v. Spanaway Gen. Med. Clinic, Inc.**, 135 Wn.2d 255, 262, 956 P.2d 312 (1998). Collateral estoppel may be applied to preclude only those issues where there is no dispute that the issue was actually litigated and necessarily and finally determined in the earlier proceeding. **Christensen v. Grant Cnty. Hosp. Dist. No. 1**, 152 Wn.2d 299, 307, 96 P.3d 957 (2004). Further, courts only apply collateral estoppel to issues that were "ultimate facts" in the previous litigation and not simply "evidentiary facts." **McDaniels v. Carlson**, 108 Wn.2d 299, 305, 738 P.2d 254 (1987). The reason for the limited application of collateral estoppel is to ensure that a party is afforded the opportunity to have her claims decided on the merits.

In decision No. 70395-1, Division I's focus was on whether the responding officer's actions constituted an affirmative act, not whether the County acted affirmatively. Granted, Division I did discuss the County's actions. However, Division I did not determine whether the County acted affirmative or whether it owed Tiairra Garcia a duty. Instead, Division I concluded that no gratuitous promise was made either by the County or by Pasco. The analysis, however, did not go so far as to determine whether the County's actions constituted malfeasance or nonfeasance for purposes of RESTATEMENT (SECOND) OF TORTS § 302(B). Rather, Division I determined that the rescue exception to the public duty doctrine did not apply to Pasco because no promise to render aide was given to Gorton.[1] However, Division I also conceded that it was not clear from the record before it what the County did or did not convey to the responding officer.[2] Division I ultimately concluded that whether the County conveyed Gorton's information to the responding officer was irrelevant because, at best, the responding officer's actions could only be described as inaction.[3] Thus, the City of Pasco did not owe a duty pursuant to Restatement § 302(B). Whether the County's actions constitute an affirmative act pursuant to RESTATEMENT (SECOND) OF TORTS § 302(B), which is the

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[1] CP 185-87.
[2] CP 191.
[3] Id. "Their failure to investigate was an omission. Like the officers in Robb, the police did not create a new risk."

central question as to whether the County owed a duty, was not resolved by in No. 70395-1.

Division I did not decide whether the County acted affirmatively when it acted as the conduit for information the public intended to communicate to the responding officer regarding the events that occurred on June 22, 2008. Instead, Division I focused on whether a gratuitous promise was made by the City of Pasco and whether the responding officer's actions that night constituted malfeasance or nonfeasance. The County's actions were discussed but by no means was Division I's decision dependent upon a determination of whether the County owed a duty to Tiairra Garcia. Because Division I did not necessarily or actually decide whether the County owed Tiairra Garcia a duty, the trial court erred when it dismissed Garcia's claims as collaterally estopped by Division I's decision in No. 70395-1.

B. Franklin County's Role in the Events that Transpired on June 22, 2008 Differed from the Responding Officer's Role and Therefore the Duties the County Owed Tiairra Garcia did not Mirror the City of Pasco's Duties.

The County's argument that it did not owe Tiairra Garcia a duty fails because the County's argument is based upon the false assumption that its actions (and therefore duties) mirrored those of Pasco. In its Responsive Brief, the County argues that Division I determined that the

911 operator's actions constituted nonfeasance based upon Division I's statement:

> "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 and affirmative indication that the police would investigate Gorton's statement."[4]

Division I's analysis, however, was not focused on whether Franklin County acted affirmatively but rather on whether there was an affirmative promise that Pasco would respond to Gorton's statements. Division I engaged in this analysis because Garcia argued "the police affirmatively indicated that they would investigate Gorton's statement about Tiairra Garcia's body and failed to do so."[5] Thus, Division I's reference to "no affirmative act" concerned actions by Pasco police, not Franklin County. Further, the analysis focused on whether the rescue exception to the public duty doctrine applied, not whether a duty was owed pursuant to RESTATEMENT (SECOND) OF TORTS § 302(B). In the Division I later goes on to discuss that Pasco's actions were nonfeasance and therefore could not serve as a basis for liability pursuant to Restatement § 302(B). Namely, Division I stated:

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[4] *See* Respondent's Brief at p. 7; CP 191.
[5] CP 189.

> "This leaves the police's failure to investigate as the remaining potential source of a duty to Tiairra. But, their failure to investigation 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."[6]

With these two paragraphs, Division I determined that there was no gratuitous promise by the City of Pasco to respond to Gorton's concerns and that at best the responding officer's actions constituted nonfeasance. However, the decision is silent as to whether the County owed Tiairra Garcia a duty given the circumstances and given the information Gorton relayed to 911.

As noted by the trial judge, Pasco's nonfeasance does not translate to a finding that Franklin County also failed to act. In response to this argument before the trial court, the trial judge noted:

> "Well, the [Division I] sentence that you are relying on, it really comes down to one sentence: "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.'" But that analysis is looking at it from the police standpoint, isn't it? Not whether or not 911 accurately took information and affirmatively passed it on."[7]

As the trial court noted, Division I's analysis was from the standpoint of Pasco's actions, not Franklin County's actions. Division I determined that Pasco did not act affirmatively and that there was no gratuitous promise

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[6] CP 191.
[7] VR 5:19-6:2.

that Pasco would act was made. However, Pasco's nonfeasance (and the lack of a gratuitous promise) does not resolve the issue in this matter: whether Franklin County actions constitute malfeasance that give rise to a duty pursuant to RESTATEMENT (SECOND) OF TORTS § 302(B). Franklin County acted as the conduit for information between the public and officer that responded to 1911 Parkview. The question in this matter is whether this affirmative act gave rise to a duty to Tiairra Garcia. Whether the 911 operator's conversation with Gorton gave rise to a duty to Tiairra Garcia pursuant to Restatement § 302(B) was not decided. Accordingly, reversal and remand is proper.

C. By Operating a 911 Call Center and by Speaking to John Gorton, Franklin County Acted Affirmatively Such that it Owed a Duty to Tiairra Garcia Pursuant to Restatement (Second) of Torts § 302(B).

Franklin County's conversation with Gorton caused it to owe Tiairra Garcia a duty of reasonable care with the collection and relay of information it received regarding the events at 1911 Parkview pursuant to RESTATEMENT (SECOND) OF TORTS § 302(B). The county acted affirmatively when it functioned as the conduit for information the public wanted to relay to the responding officer. Further, the County should have known that if it did not act on Gorton's information, then Tiairra Garcia would be put in a position where she was exposed to a greater risk of harm

had the County not acted. An act constitutes malfeasance (i.e. a negligent affirmative act) for purposes of RESTATEMENT (SECOND) OF TORTS § 302(B) if the act introduces a new risk of harm or increases the exposure to a risk of harm to the illegal acts of a third-party. **Robb v. City of Seattle**, 176 Wn.2d 427, 435, 295 P.3d 212 (2013). Thus, the affirmative cannot be an act that simply fails to reduce an already existing harm; thus if "the risk is merely made no worse" by the actions, then no duty of reasonable care is owed pursuant to 302(B). Id. at 437. In contrast, if the actor creates or exposes the party to a high degree of harm through the illegal acts of another, then the actor owes a duty of reasonable care. **Washburn v. City of Fed. Way**, 178 Wn.2d 732, 758, 310 P.3d 1275 (2013).

When Franklin County spoke to John Gorton, the County interposed itself into the situation. In doing so, the County knew (or should have known) that unless it acted appropriately, the County's actions would expose Tiairra Garcia to a high risk of harm from the illegal acts of the occupants inside 1911 Parkview. Given the information Gorton provided the 911 operator, the fact that Tiairra Garcia was in grave harm was (or should have been) apparent. Further, given the actions that were unfolding at the van careened into 1911 Parkview's yard, it was (or should have been) apparent that Lockhard, Hollinquest, and the residence of 1911

Parkview were likely to commit illegal acts (obstruction, rendering criminal aid, making a false statement) that would place Tiairra Garcia into greater harm. Further, but for the 911 operator speaking to Gorton and collecting the information he provided, he and Melissa Genett would have relayed what they saw directly to the responding officer. This is not a situation where the County's actions simply failed to remove a pre-existing risk and made the situation no worse. *See* **Washburn**, 178 Wn.2d at 758(citing **Robb**, 176 Wn.2d at 438). Instead, the County increased the risk of harm to Tiairra Garcia and allowed for additional criminal acts to place her in further danger.

Unlike the situation in **Robb**, the County did not merely fail to reduce an already existing peril. Instead, the County made it worse through its affirmative acts. For example, had 911 dispatch not spoken to Gorton then he and Ms. Genett would have spoken to the officer directly. This is not a situation where the County simply failed to pick up errant bullets or failed to hit the brakes in the proverbial car discussed in **Robb**. **Robb**, 176 Wn.2d at 437. the County increased the risk of harm to Tiairra Garcia by interposing itself into the events that were unfolding at 1911 Parkview. The County did not fail to act. It did not sit by passively as the events unfolded. Rather, the County actively participated in the gathering and relaying of information to the responding officer. Given the

information it collected that night (including the information Gorton provided) the County should have known that unless it relayed all the information to the responding officer, Tiairra Garcia would face an increased risk of harm from criminal acts at 1911 Parkview. Because the County's actions increased the risk of harm to Tiairra Garcia and because it knew or should have known that its actions would increase the risk of harm to Tiairra Garcia, the County owed Tiairra Garcia a duty of reasonable care pursuant to RESTATEMENT (SECOND) OF TORTS § 302(B).

II. CONCLUSION.

The trial court erred when it dismissed Garcia's claims because Division I did not decide whether Franklin County owed a duty to Tiairra Garcia pursuant to Restate (Second) of Torts § 302(B). In decision No. 70395-1, Division I's focus was on two issues: whether Pasco made a gratuitous promise to rescue (it did not) and whether the responding officer committed nonfeasance or misfeasance (his acts were nonfeasance). Division I did not, however, necessarily or actually decide whether Franklin County owed Tiairra Garcia a duty. Accordingly, Division I's decision in No. 70395-1 did not collateral estop Garcia's claims in this matter.

In addition, under RESTATEMENT (SECOND) OF TORTS 302(B), **Robb**, and **Washburn**, the County owed Tiairra Garcia a duty of reasonable care. Here, the County did not fail to reduce the effects of an already existing danger. Instead, the County's intervention into the events unfolding at 1911 Parkview exposed Tiairra Garcia to a greater risk of harm from the increasingly illegal acts of Lockhard, Hollinquest, and the occupants of 1911 Parkview. Given the information Gorton provided the 911 operator, their actions were foreseeable. Further, given that it was evident someone was injured, Franklin County should have known that absent the exercise of reasonable care, its actions would expose Tiairra Garcia to an unreasonable risk of harm. This is not a situation where the County simply failed to remove an existing harm or did not make the situation more dangerous. It acted and in doing so increased the risk of harm to Tiairra Garcia. Accordingly, dismissal of Garcia's claims was in error.

Because Division I did not decide whether Franklin County owed Tiairra Garcia a Duty in No. 70395-1 and because pursuant to RESTATEMENT (SECOND) OF TORTS § 302(B) the County owed Tiairra Garcia a Duty, the trial court when it dismissed Garcia's claims. Thus, reversal and remand is proper.

Respectfully submitted this 29th day of October 2015.

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Proof of Service

The undersigned certifies that on October 29, 2015 arrangements were made for service of a true and correct copy of the within and foregoing Reply Brief upon the Respondent via messenger as set forth below:

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