Supreme Court No. 93137-2
COA No.: 332047-III

IN THE SUPREME COURT FOR THE 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.

FRANKLIN COUNTY, a Municipal Corporation,

Respondent

PETITION FOR REVIEW

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I. INTRODUCTION AND IDENTITY OF PETITIONERS

This matter stems from the shooting death of Tiairra Garcia on June 22, 2008. On that night, two of Tiairra Garcia's acquaintances shot her in a van parked outside of a restaurant in Pasco, Washington. Instead of driving her to the hospital, the acquaintances drove the van to the residence at 1911 Parkview. In route, the van struck multiple vehicles which resulted in numerous calls to the 911 Call Center operated by Franklin County. One particular caller, John Gorton, informed the 911 Operator that the van (which at that point in time had come to a stop on the lawn of 1911 Parkview) appeared to be smoking, that the occupants of the van had dragged someone out of the van and into the back of the house, that there had been a domestic dispute at the residence days before, and that "something was going on" that the police needed to respond to. The 911 Operator did not convey Gorton's information to Pasco Police. As a result, Pasco Police treated the scene as a hit and run only. While the Pasco Police were processing the scene, Tiairra Garcia died in the home.

Donna Garcia, Concepcion Garcia, and the Estate of Tiairra Garcia (collectively referred to as "Garcia") filed suit in Walla Walla Superior Court alleging that Franklin County, as the municipal corporation that operated the 911 Call Center, owed a duty of reasonable care to Tiairra

Garcia. By failing to convey Gorton's information to Pasco Police, Garcia asserted that Franklin County breached that duty. The County filed a motion for summary judgment alleging that Garcia's claims were collaterally estopped by Garcia's previous suit against the City of Pasco. The trial court granted summary judgment and Garcia timely appealed. Division III of Washington's Court of Appeals affirmed the trial court's dismissal but on different legal grounds. Division III found that collateral estoppel did not apply. Instead, Division III relied on this Court's ruling in **Robb v. City of Seattle** to find that the 911 Operator's failure to convey Gorton's information constituted a failure to act, i.e. a nonfeasance, and therefore the County did not owe Tiairra Garcia a duty of reasonable care under this Court's application of RESTATEMENT (SECOND) OF TORTS § 302B. In rendering its decision, Division III failed to address this Court's more recently ruling in **Washburn v. City of Federal Way**.

This Court should accept review for the reason:

Division III committed reversible error when it determined that the 911 Operator's failure to convey Gorton's information constituted a failure to act. The Operator's failure to convey Gorton's information is simply how the Operator performed her duties improperly, i.e. acted

negligently. The affirmative act that gave rise to a duty of reasonable care, however, was the act of speaking to callers—including but not limited to Gorton—to 911, collecting the information they provided, and purportedly conveying that information to Pasco Police. This Court clarified what constitutes an affirmative act in **Washburn v. City of Federal** for a duty of reasonable care to arise under RESTATEMENT (SECOND) OF TORTS § 302B. Division III's decision conflicts with the ruling in **Washburn** therefore warranting review pursuant to RAP 13.4(b)(1) and (4).

II. COURT OF APPEALS DECISION AT ISSUE

The Court of Appeals, Division III issued its opinion affirming dismissal of Garcia's claims April 12, 2016.

III. ISSUE PRESENTED FOR REVIEW

For purposes of RESTATEMENT (SECOND) OF TORTS § 302B does a 911 operator commit an affirmative (but negligent) act which would give rise to a duty of reasonable care when she answers calls to 911, collects the callers' information about an ongoing crime and injured person, indicates to the callers that the responding officers will address the callers' specific concerns, and then fails to provide the responding officers with the information provided by the callers which results in reasonably foreseeable injury to a third-party through the illegal conduct of another?

IV. 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 the 911 Operator that the occupants of the van were dragging an obviously injured person into the back of the home, that a domestic dispute had occurred at the home 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 her acquaintances, Ashone Hollinquest and Marnicus Lockhard, were ejected from a tavern. Upon arriving at another restaurant in Pasco, Washington, Hollinquest and Lockhard exchanged a gun that went off and the bullet struck Tiairra Garcia.[1] After Tiairra Garcia was struck by the bullet, Lockhard took control of the vehicle and drove to 1911 Parkview.[2] In route the van struck a number of parked vehicles which caused nearby residents to make a number of calls to 911.[3]

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[1] CP 162. It should be noted that the County stipulated to certain facts contained in Garcia's complaint for the purposes of its Motion for Summary Judgment.
[2] CP 162.
[3] Id.

One particular resident, John Gorton, called 911 and had the following conversation with the 911 Operator:

Operator: 911
Gorton: Yeah I live across the street from 1611[4] 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.[5]
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, dragged them to the back of the house.
Operator: Do you know if it's a car or the house?
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.[6]
Operator: OK. Thank you. Bye bye.[7]

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[4] The address is actually 1911.
[5] Division III incorrectly referred to the address where the van came to rest as 1611 as well. The actual address is 1911.
[6] CP 187, 472.
[7] CP 11-17.

Despite having this information, the operator did not convey Gorton's information to the responding officer. As a result, the Pasco Police treated the scene only as a hit and run with an abandoned vehicle. Because of the operator's failure to convey Gorton's information to the responding officer, no aide was rendered to Tiairra Garcia.

B. Procedural History.

Garcia brought claims against the Franklin County for the negligent acts of the 911 Call Center in relation to Gorton's call and Tiairra Garcia's death.[8] Specifically, Garcia alleged that when Franklin County operated the 911 call center and failed to relay the information Gorton provided despite the fact the 911 operator indicated that she would convey the information, Franklin County owed Tiairra Garcia a duty of reasonable care pursuant to RESTATEMENT (SECOND) OF TORTS § 302(B) that it breached that duty. Franklin County has maintained that it owed not duty to Tiairra Garcia.

On January 30, 2015, Franklin County filed a motion for summary judgment alleging that Garcia's claims were collaterally estopped by a previous Court of Appeals, Division I decision.[9] In that decision, Division I found that the City of Pasco, i.e. the responding officers, did not owe

[8] CP 13.
[9] CP 161-70.

Tiairra Garcia a duty because their actions were, at best, a negligent omission. Garcia argued that Division I's decision did not estop their claims and that Franklin's actions constituted an affirmative act that gave rise to a duty of reasonable case to Tiairra Garcia.[10] The trial court granted summary judgment and dismissed Garcia's claims.[11] Garcia timely appealed the order.[12]

On appeal, Division III affirmed the trial court's ruling but on different legal grounds.[13] Division III found that collateral estoppel did not apply[14] and also found that the County's actions constituted nonfeasance (a failure to act).[15] Because there was no misfeasance (an affirmative negligent act). Division III reasoned, Franklin County could not owe Tiairra Garcia a duty of reasonable case. The basis of Division III's ruling was that it found that the actions of the 911 operator constituted nonfeasance, a failure to act, rather than malfeasance, an affirmative but negligent act.

Petitioners seek review of Division III's determination that Franklin County's act constituted nonfeasance and consequently that the

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[10] CP 198-224.
[11] CP. 779-80.
[12] 782-87.
[13] April 12. 2016 Unpub. Op. at p. 1.
[14] Id. at p. 4.
[15] Id. at pp. 10-12.

County owed no duty of reasonable case to Tiairra Garcia pursuant to RESTATEMENT (SECOND) OF TORTS § 302B.

V. LEGAL ARGUMENT

A. Introduction and Standard of Review

Garcia seek review of Division III's decision affirming the trial court's dismissal of Garcia's claims pursuant to CR 56. Because Garcia's claims were dismissed pursuant to CR 56. review of Division III's decision is de novo. **Sheikh v. Choe**, 156 Wn.2d 441. 447, 128 P.3d 574 (2006). For the purposes of its Motion, the County did not dispute the facts as set forth in Garcia's Complaint. Therefore, the parties do not dispute that Gorton spoke to the 911 Operator and that the 911 Operator did not convey the information Gorton provided to the responding officer. The central issue is whether the operator's actions—i.e. speaking to Gorton and other 911 callers, collecting the information they provided, and representing to Gorton that she would relay the information to the Pasco Police but failed to do so—constituted a failure to act or whether the Operator's actions constituted an affirmative but negligent act. The central question, what constitutes nonfeasance and what constitutes malfeasance for purposes of RESTATEMENT (SECOND) OF TORTS § 302B for government actors, has been addressed by Washington Courts in **Parrilla v. King County**, **Robb v. City of Seattle**, and most recently in

Washburn v. City of Federal Way. As set forth in greater detail below, Division III's determination that the County's actions constituted nonfeasance deviates from the Court's ruling in **Parrilla** and **Washburn**. As a result, discretionary review is warranted pursuant to RAP 13.4(b)(1) and (4).

B. The County's Actions Gave Rise to a Duty of Reasonable Care to Tiairra Garcia Under RESTATEMENT (SECOND) OF TORTS § 302B.

1. Actions That Constitute Misfeasance Under RESTATEMENT (SECOND) OF TORTS § 302B.

The first time Washington Courts squarely addressed whether a government entity could owe a duty for the illegal acts of a third-party pursuant to § 302B was in **Parrilla v. King County**. In **Parrilla**, the Court of Appeals, Division I, was asked to determine whether King County owed a duty to Parrilla who was injured when struck by a county bus that had been commandeered by an erratic passenger. **Parrilla v. King County**, 138 Wn. App. 427, 430, 157 P.3d 879 (2007). In 2002, after an altercation on a metro bus, the driver pulled the bus over and demanded that all the passengers exit the bus. Id. at 431. One passenger refused and the driver exited with the bus still running and the erratic passenger inside. Id. The passenger then drove the bus down MLK street in Seattle striking multiple vehicles, including the Parrillas' vehicle. Id. The Parrillas were injured as a result. Id. The Parrillas filed

suit against King County but the trial court dismissed their claims on a CR 12(c) motion finding that the County did not owe a duty to the Parrillas.

In finding that the County did owe the Parrillas a duty, Division I relied on this Court's interpretation of § 302B in **Kim v. Budget Rent-A-Car** in which this Court discussed whether a duty could arise under Section 302B. **Kim v. Budget Rent A Car Sys.**, 143 Wn.2d 190, 196, 15 P.3d 1283 (2001). Relying upon this Court's adoption of Section 302B, it found that "a duty of care may arise "[w]here the actor acts with knowledge of peculiar conditions which create a high degree of risk of intentional misconduct," or "[w]here property of which the actor has possession or control affords a peculiar temptation or opportunity for intentional interference likely to cause harm." Each of these statements has obvious applicability to the case at hand." *Parrilla*, 138 Wn. App. at 434(citing RESTATEMENT (SECOND) OF TORTS § 302B, comment e). Division I, went on to discuss that a party need not establish that a "special relationship" between the injured party and government actor in order to establish that a duty was owed § 302B. Id. at 435-36. Therefore, Division I found that a Plaintiff asserting a duty was owed under § 302B need not establish that the government entity owed her a special duty that would serve as an exception to the public duty doctrine. Id. at 436-37.

Given the particular circumstances that led to the Parrillas being injured, the Court found that the County did owe them a duty of reasonable care. Id. at 440-41.

In **Robb v. City of Seattle**, this Court adopted the legal theory espoused in **Parrilla**. **Robb v. City of Seattle**, 176 Wn.2d 427, 435, 295 P.3d 212 (2013). In **Robb** this Court addressed whether officers conducting a "Terry Stop" could owe a duty of reasonable care to prevent harm from the illegal acts of the person subject to the stop. Id. at 433. The fact scenario in **Robb** was that Michael Robb was shot and killed by an individual who had been subject to a "Terry Stop" two hours beforehand. Id. at 403. During the stop shotgun shells were observed near the individual. Id. The facts of the case indicate that the individual later used some of those shells to kill Robb. Division I found that Seattle owed a duty to Robb pursuant to § 302B. This Court accepted review and reversed Division I's decision.

In reversing Division I's decision, however, this Court established that an officer may owe a duty of reasonable care to a victim of the criminal conduct of a third party pursuant to § 302B. **Robb**, 176 Wn.2d at 433. Whether a duty arose, this Court reasoned, depended on whether the government agent's actions constituted nonfeasance or misfeasance. Id. at 435-36. Nonfeasance, i.e. the failure to act, could not give rise to a

duty because the officer's actions simply failed to remove an existing harm. Misfeasance, in contrast, can give rise to a duty of reasonable care because the government's action "creates or exposes another to a situation of peril." Id. at 435. Therefore, whether a government agent owes a reasonable duty of care to another hinges on whether the agent simply failed to act, i.e. made the peril no worse, or acted affirmatively, i.e. increase the peril to another. In **Robb**, this Court found that the officers simply failed to remove a then existing danger. As a result, the City did not owe Robb a duty.

In 2013, this Court elaborated on its holding in **Robb** in **Washburn v. City of Federal Way**. In **Washburn**, the estate of Baerbel Roznowski and Roznowski's daughter, Washburn, filed suit against the City of Federal Way alleging that it owed Roznowski a duty of reasonable care when it served an antiharassment order on Roznowski's partner, Paul Chan Kim. **Washburn v. City of Fed. Way**, 178 Wn.2d 732, 738, 310 P.3d 1275 (2013). Critical to the Court's decision was the fact that the officer serving the antiharassment order was given a Law Enforcement Information Sheet ("LEIS") along with the order. Id. at 739-40. An LEIS is provided to law enforcement in order to provide them with information regarding the person upon whom the officer will serve an antiharassment order. Id. An LEIS contains important

information about the recipient of an antiharassment order including whether the person may become violent and whether the person will need an interpreter to understand the nature of the document being served upon him. In Chen case, the LEIS contained information that he lived with the person who sought the restraining order, that he had a history of violence, and would need a Korean interpreter understand the nature and terms of the antiharassment order. Id. at 739-40.

Unfortunately, when the officer who served Chan with the order did not read the LEIS. The officer testified that he saw Roznowski at the residence when he served Chen with the order. The officer did not bring an interpreter with him when he served Chen. After Chen was served with the order, and discovered the contents, he killed Roznowski. **Washburn**, 178 Wn.2d at 740-41.

Given these circumstances, this Court found that the officer, and therefore the City of Federal Way, owed Roznowski a duty of reasonable care pursuant to § 302B. **Washburn**, 178 Wn.2d at 757. In finding that Federal Way owed Roznowski a duty, this Court rejected the City's attempt to categorize the officer's actions as a failure to act, similar to the officer's failure to act in **Robb**. Notably this Court stated that:

> The bulk of testimony offered by Washburn at trial concerned Hensing's misfeasance in serving the antiharassment order. Washburn does tend to frame it in terms of a failure to perform, such as the failure to read the

> LEIS, the failure to bring an interpreter, and Hensing's decision to walk away instead of standing by to monitor Kim. Washburn, however, offers these examples as a list of the ways Hensing served the antiharassment order improperly. **Washburn**, 178 Wn.2d at 760-61.

Therefore, this Court acknowledged that even when a government agent commits an affirmative but negligent act, the description of said act will inevitably contain language that discusses the failure to do something. Such a description, however, does not transform the misfeasance into a nonfeasance.

Additionally, this Court rejected Federal Way's argument that adoption of § 302B would run contrary to the body of law that developed the exclusions to the public duty doctrine. **Washburn**, 178 Wn.2d at 761. This Court noted that Federal Way was equating duty with liability and that simply because a government entity may owe a duty of reasonable care in specific circumstances does not somehow guarantee that the entity will be found to have violated that duty or that the entity's actions were the proximate cause of harm to another. Id.

Based upon the **Parrilla**, **Robb**, and **Washburn**, the Court of Appeals, Division III committed reversible error when it found that the 911 Operator's failure to convey to the responding officer that Tiairra Garcia was being dragged into the house was a failure to act. Like Washburn's claims that the officer served the antiharassment order

improperly, Garcia's claims are that the 911 Operator performed her duties improperly. However, the performance of her duties, i.e. speaking to callers to 911, collecting information they provided, and relaying it to the responding officers, constituted an affirmative act, under these specific circumstances, that gave rise to a duty of reasonable care pursuant to § 302B. Therefore, Division III's statement that the Operator's failure to convey Gorton's information "involves nothing more than a failure to act, i.e., a failure to pass on the information. That failure is not an affirmative act. Even if the receipt of the 911 call gave rise to a duty to alert police about the caller's report—an issue we do not decide—the operator's failure to live up to that duty was not an affirmative action within the meaning of § 302B"[16] constitutes reversible error and discretionary review should be granted.

2. The 911 Operator's Collection of Information from Callers to 911 Constituted an Affirmative Act that was Performed Negligently When she Failed to Convey information Gorton Provided to the Responding Officer.

The core issue Petitioners seek review of is whether the Operator's actions constituted an affirmative but negligent act or whether the actions constituted a failure to act. Division III's finding that the Operator's actions constituted a failure to act is inconsistent with this

[16] Unpub. Op. at p. 11.

Court's ruling in **Washburn**. As this Court noted in **Washburn**, simply because a claim makes reference to a government actor's failure to do some act or step does not automatically relegate the claimant's claim into the category of an omission. **Washburn** 179 Wn.2d at 760-61. Indeed, most claims of negligence involve the Defendant's failure to perform some act properly. However, a failure to perform one's duties property is not the equivalent to a failure to perform the duties at all.

Here, the 911 Operator committed a misfeasance. Granted, the Operator would have committed an omission had she not answered Gorton's call or had the 911 Call Center not accepted any calls that day. If the Operator had failed to speak to Gorton then, like the officers in **Robb**, she would have simply made the matter no worse. However, the Operator did speak to Gorton. She did collect the information he provided and she did cause Gorton to reasonably believe that she would convey his information to the responding officer. The Operator did not commit an omission as Division III found. The Operator acted affirmatively but failed to perform her duties with reasonable care.

By speaking to Gorton, two important events occurred. First, the Operator gained knowledge that Garcia was injured and being dragged into the back of the house by individuals who clearly had the propensity to commit illegal acts. As noted in Comment e to § 302B:

> 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.

Here, the Operator acted—spoke to Gorton and other callers and relayed some of the information they provided to Pasco Police—and should have reasonably known that Gorton expected her to convey the information he provided to the responding officer. Further, the Operator should have reasonably known that unless she relayed Gorton's information to the responding officer, she was increasing the risk of harm Tiairra Garcia faced. By acting, the Operator was placed into a situation where a reasonable person who have taken into account what Gorton told her when she conveyed information to Pasco Police. Like the officer in **Washburn**, the Operator spoke to numerous callers regarding the events that were unfolding on June 22, 2008. When the Operator spoke to Gorton, the County owed a duty to convey his information to the responding officer. The Operator should have had known that if she did not convey Gorton's information to the responding officer, then Garcia would be placed in a greater risk of harm. Gorton presumed that the 911

Operator had conveyed his information he provided to the responding officer. As a result, neither he nor his partner spoke to the responding officer that night. Like the officer in **Washburn**, the Operator failed to take into account information that should have altered her course of conduct. When the Operator did not convey Gorton's information the Operator did not commit a nonfeasance. Instead, the Operator failed to properly serve as a conduit between the general public and the responding officer. Therefore, her actions constitute a misfeasance which gave rise to a duty of reasonable care pursuant to § 302B.

VI. CONCLUSION

On June 22, 2008, the 911 Operator committed an affirmative act that gave rise to a duty of reasonable care to Tiairra Garcia. In the performance of her duties, the Operator failed to convey Gorton's information to the responding officer. Therefore, she did not convey all the information provided by callers to 911 who called regarding the van that careened onto 1911 Parkview's lawn. As this Court noted in **Washburn**, discussion of a defendant's negligent act often involves a discussion of the defendant's failure to perform a duty properly. However, the failure to perform one's duties properly is not the equivalent to one's failure to perform a duty at all. Here, the Operator did not perform her duties properly. The Operator spoke to numerous parties that

night regarding the van. The Operator collected the information from those callers, including Gorton. When the Operator learned that Tiairra Garcia was injured, was being dragged into the back of 1911 Parkview, and that "something was going on", she owed Tiairra Garcia a duty to act reasonably pursuant to RESTATEMENT (SECOND) § 302B. This Court has already ruled as much in **Washburn v. City of Federal Way**.

Because the Operator committed an affirmative but negligent act and because Division III's opinion conflicts with this Court's decision in **Washburn v. City of Federal Way**, this Court should grant discretionary review and reverse Division III's decision in which it affirmed the lower court's dismissal of Garcia's claims pursuant to CR 56.

Respectfully submitted this 12th day of May 2016.

MDK Law
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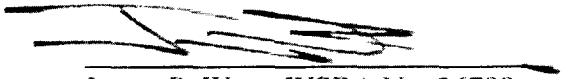

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DECLARATION OF SERVICE

I certify that on May 12, 2016 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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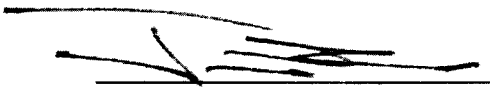

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RESTATEMENT (SECOND) OF TORTS § 302B

Restat 2d of Torts, § 302B

Restatement of the Law, Torts 2d ? Official Text > *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.

COMMENTS & ILLUSTRATIONS

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 § 8 A. 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 17 A) 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:

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:

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.

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:

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:

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 situations 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:

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:

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:

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:

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:

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:

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:

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 App. Div. 268, 134 N.Y.Supp. 765.

Illustration 4 is based on McFadden v. Bancroft Hotel Corp., 313 Mass. 56, 46 N.E.2d 573 (1943). See also Hillman v. Georgia R.R. & Banking Co. 126 Ga. 814, 56 S.E. 68, 8 Ann. Cas. 222 (1906); ***Quigley v. Wilson Line, Inc., 338 Mass. 125, 154 N.E.2d 77, 77 A.L.R.2d 499 (1958);*** Bullock v. Tamiami Trail Tours, Inc., 266 F.2d 326 (5 Cir. 1959); Jones v. Yellow Cab & Baggage Co., 176 Kan. 558, 271 P.2d 249 (1954); Dickson v. Waldron, 135 Ind. 507, 34 N.E. 506, 35 N.E. 1, 24 L.R.A. 483, 41 Am. St. Rep. 440 (1893); Mastad v. Swedish Brethren, 83 Minn. 40, 85 N.W. 913, 53 L.R.A. 803, 85 Am. St. Rep. 446 (1901); Liljegren v. United Railways of St. Louis, 227 S.W. 925 (Mo. App. 1921); Peck v. Gerber, 154 Or. 126, 59 P.2d 675, 106 A.L.R. 996 (1936); Sinn v. Farmers Deposit Savings Bank, 300 Pa. 85, 150 A. 163 (1930).

Compare, as to premises held open to the public: Stotzheim v. Dios, 256 Minn. 316, 98 N.W.2d 129 (1959); Wallace v. Der-Ohanian, 199 Cal. App. 2d 141, 18 Cal. Rptr. 892 (1962); Grasso v. Blue Bell Waffle Shop, Inc., 164 A.2d 475 (D.C. Munic. Ct. App.) (1960); Corcoran v. McNeal, 400 Pa. 14, 161 A.2d 367 (1960). See Note, 9 Vand. L. Rev. 106 (1955).

Illustration 6 is taken from ***Garceau v. Engel, 169 Minn. 62, 210 N.W. 608 (1926).*** Cf. Southwestern Bell Tel. Co. v. Adams, 199 Ark. 254, 133 S.W.2d 867 (1939); Jesse French Piano & Organ Co. v. Phelps, 47 Tex. Civ. App. 385, 105 S.W. 225 (1907). Apparently contra are Andrews v. Kinsel, 114 Ga 390, 40 S.E. 300, 88 Am. St. Rep. 25 (1901); Bresnahan v. Hicks, 260 Mich. 32, 244 N.W. 218, 84 A.L.R. 390 (1932).

Illustration 7 is taken from Brower v. New York Central & H. R. R. Co., 91 N.J.L. 190, 103 A. 166, 1 A.L.R. 734 (1918). See also Filson v. Pacific Express Co., 84 Kan. 614, 114 P. 863 (1911); Morse v. Homer's, Inc., 295 Mass. 606, 4 N.E.2d 625 (1936); White-head v. Stringer, 106 Wash. 501, 180 P. 486, 5 A.L.R. 358 (1919); National Ben Franklin Ins. Co. v. Carecetta, 21 Misc. 2d 279, 193 N.Y.S.2d 904 (1959).

Illustration 8 is taken from Marshall v. Caledonian Ry., [1899] 1 Fraser 1060.

Illustration 9 is taken from Hall v. Smathers, 240 N.Y. 486, 148 N.E. 654 (1925). See also Kendall v. Gore Properties, 98 App. D.C. 378, 236 F.2d 673 (1956); Note, 42 Va. L. Rev. 842 (1956); Hipp v. Hospital Authority of City of Marietta, 104 Ga. App. 174, 121 S.E.2d 273 (1961); Georgia Bowling Enterprises, Inc. v. Robbins, 103 Ga. App. 286, 119 S.E.2d 52(1961). Cf. De la Bere v. Pearson, Ltd., [1908] 1 K.B. 483, affirmed, [1908] 1 K.B. 280 (C.A.).

Illustration 10 is taken from Hines v. Garrett, 131 Va. 125, 108 S.E. 690 (1921). See also Neering v. Illinois Central R. Co., 383 Ill. 366, 50 N.E.2d 497, 14 N.C.C.A. N.S. 621 (1943); McLeod v. Grant County School District, 42 Wash. 2d 316, 255 P.2d 360 (1953).

Illustration 11 is based on Dixon v. Bell, 5 M. & S. 198, 105 Eng. Rep. 1023 (1816); Binford v. Johnston, 82 Ind. 426, 42 Am. Rep. 508 (1882); Meers v. McDowell, 110 Ky. 926, 62 S.W. 1013, 53 L.R.A. 789, 96 Am. St. Rep. 475 (1901); Carter v. Towne, 98 Mass. 567, 96 Am. Dec. 682 (1868).

Illustration 12 is taken from Austin W. Jones Co. v. State, 122 Me. 214, 119 A. 577 (1923). In accord are Missouri, K. & T.R. Co. v. Wood, 95 Tex. 223, 66 S.W. 449, 56 L.R.A. 592, 93 Am. St. Rep. 834 (1902), smallpox patient; Finkel v. State, 37 Misc. 2d 757, 237 N.Y.S.2d 66 (1962).

Illustration 14 was suggested by Glassey v. Worcester Consol. St. R. Co., 185 Mass. 315, 70 N.E. 199 (1904), where, however, the meddling was not on Halloween, and it was held there was no liability. In accord with the Illustration are, however, Richardson v. Ham, 44 Cal. 2d 772, 285 P.2d 269 (1955); Zuber v. Clarkson Const. Co., 363 Mo. 352, 251 S.W. 2d 52 (1952).

Illustration 15 is taken from International & G.N. R. Co. v. Johnson, 23 Tex. Civ. App. 160, 203, 55 S.W. 772 (1900). See also St. Louis S. F. R. Co. v. Mills, 3 F.2d 882 (5 Cir. 1924), reversed, 271 U.S. 344, 46 S. Ct. 520, 70 L. Ed. 979; Green v. Atlanta & C. A. L. R. Co., 131 S.C. 124, 126 S.E. 441, 38 A.L.R. 1448 (1925); Harpell v. Public Service Coordinated Transport, 35 N.J. Super. 354, 114 A.2d 295 (1955), affirmed, 20 N.J. 309, 120 A.2d 43.

Illustration 16 is taken from Williams v. State, 308 N.Y. 548, 127 N.E.2d 545 (1955).

Cross Reference

ALR Annotations:

Liability of carrier to passenger for assault by third person. 77 A.L.R. 2d 504.
Liability for furnishing or leaving gun accessible to child for injury inflicted by child. 68 A.L.R.2d 782.

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Negligence 61(2), 62(3)

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Transmittal Letter

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Comments:

No Comments were entered.

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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

DONNA GARCIA, A Washington Resident; CONCEPCION GARCIA, an Individual; PATRICIA JANE LEIKAM, as the Administrator of the Estate of Tiairra Garcia, A Deceased Person,	)	No. 33204-7-III
Appellants,	)	UNPUBLISHED OPINION
v.	)	
FRANKLIN COUNTY, A Municipal Corporation,	)	
Respondent.	)	

KORSMO, J. — The trial court dismissed this action against Franklin County on the basis that the appellants were collaterally estopped by a previous appeal involving the city of Pasco. We affirm, but on different grounds.

FACTS

Appellants are the family and estate of Tiairra Garcia, whose death on June 22, 2008, is the basis for this lawsuit. That evening she had gone out with two friends, Marnicus Lockhard and Ashone Hollinquest. They drove to a bar, and she waited inside the van. When they were thrown out of the bar due to an altercation with another patron, Ms. Garcia drove them to another bar.

After Ms. Garcia parked the van, Lockhard asked Hollinquest to hand him a gun that was in the backseat. While handing the weapon forward, it accidentally discharged and the bullet struck Ms. Garcia. Rather than take her to the hospital, Lockhard drove the van from his passenger seat toward a friend's house. He struck a number of vehicles along the route and several telephone calls were placed to the 911 system. The phone call at issue in this appeal was placed by neighbors across the street from where the van came to rest in the yard of a house at 1611 Parkview.

Melissa Gennett observed the activity while her husband, John Gorton, called 911. She saw two men take what looked like a body out of the van and carry it into the backyard. Mr. Gorton relayed to the 911 operator: "They pulled somebody out of a van in the back of the house, drove [sic] them to the back of the house."[1] Clerk's Papers (CP) at 692. Mr. Gorton stayed on the phone until an officer arrived. Ms. Garcia was still alive at this point.

The officer did not inquire about the "body" nor check the back of the premises; he investigated only the hit and run. Ms. Garcia died while at 1611 Parkview. The two men then attempted to hide the body. Ultimately, they dumped the body in Mt. Rainier National Park. It was not recovered until June, 2009.

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[1] A transcript provided by the city of Pasco for the first appeal translated the "drove" reference as "drugged", while Division One ultimately used the word "dragged." Clerk's Papers at 187.

The following June the appellants filed suit against the city of Pasco, Hollinquest, Lockhard, and the bar where the two men had been drinking. Our record does not indicate the resolution of the action against the last three defendants. The city of Pasco, however, successfully obtained summary judgment dismissal of the case on the basis of the public duty doctrine. The appellants appealed to this court, which administratively transferred the case to Division One of the Court of Appeals.

While that appeal was pending, Division One decided the case of *Robb v. City of Seattle*.[2] *Robb* recognized a cause of action under the *Restatement (Second) of Torts* § 302B (1965) notwithstanding the public duty doctrine. The appellants added that issue to their pending appeal in Division One. They also filed suit against Franklin County and the city of Pasco. Franklin County was named in the second action due to the actions of its employee, the 911 operator. The amended complaint alleged that the county's 911 operator negligently conveyed to the responding officer "either false and/or incomplete information regarding facts provided." CP at 14.

Division One issued its decision and affirmed the dismissal of the case against the city of Pasco and its officers. The court also discussed the actions of the 911 operator in the course of its analysis.[3] After the Division One opinion issued, the city of Pasco was

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[2] 159 Wn. App. 133, 245 P.3d 242 (2010), *rev'd*, 176 Wn.2d 427, 295 P.3d 212 (2013).

[3] This opinion will address the Division One analysis later in this opinion.

dismissed from the current case. Franklin County also sought dismissal, arguing that the Division One opinion in the first appeal collaterally estopped the appellants from pursuing action against the 911 operator and the county. The trial court granted summary judgment in favor of the county.

The appellants once again appealed to this court. We retained this case and the parties presented oral argument to a panel.

ANALYSIS

The primary issue in this appeal is whether the ruling in the first appeal required the trial court to dismiss this action against Franklin County. The appellants also argue that the county undertook a duty to Ms. Garcia due to the county's operation of the 911 system and the acceptance of the telephone call from Mr. Gorton. We conclude that appellants correctly argue that collateral estoppel does not apply, but we nonetheless affirm because they do not establish that the county had a duty to act under the *Restatement*.

This court applies de novo review to an order granting summary judgment on the basis of collateral estoppel. *Barr v. Day*, 124 Wn.2d 318, 324, 879 P.2d 912 (1994). 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. CR 56(c); *Wilhelm v. Beyersdorf*, 100 Wn. App. 836, 842, 999 P.2d 54 (2000). We consider the facts in a light

most favorable to the nonmoving party. *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998).

Collateral estoppel precludes re-litigation of the same issue in a subsequent action involving the parties. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004). In order to prevail on a claim of collateral estoppel, the party seeking application of the doctrine bears the burden of showing that (1) the identical issue necessarily was decided, (2) there was a final judgment on the merits, (3) the party against whom the doctrine is asserted must have been a party (or in privity with a party) to the earlier proceeding, and (4) application of collateral estoppel will not work an injustice against the estopped party. *Id.* at 307. The estopped party must have had a "full and fair opportunity to litigate the issue in the earlier proceeding." *Id.*

Although Washington abolished sovereign immunity in 1967,[4] that action did not itself create any new causes of action, duties, or liabilities where none existed before. *J & B Dev. Co. v. King County*, 100 Wn.2d 299, 304-305, 669 P.2d 468 (1983), *overruled on other grounds by Taylor v. Stevens County*, 111 Wn.2d 159, 759 P.2d 447 (1988); *see also Chambers-Castanes v. King County*, 100 Wn.2d 275, 288, 669 P.2d 451 (1983). It has been repeatedly held that

> [t]he 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

[4] LAWS OF 1967, ch. 164.

> 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. This basic principle of negligence law is expressed in the "public duty doctrine."

Taylor, 111 Wn.2d at 163 (citation omitted); *accord Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 784-785, 30 P.3d 1261 (2001). Under the public duty doctrine

> no liability may be imposed for a public official's negligent conduct unless it is shown that "the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (*i.e.*, a duty to all is a duty to no one)."

Taylor, 111 Wn.2d at 163 (quoting *J & B Dev. Co.*, 100 Wn.2d at 303).

Plaintiffs must fall within one of the established exceptions[5] to the public duty doctrine in order to demonstrate that they were owed a duty of care by a governmental entity. *Cummins v. Lewis County*, 156 Wn.2d 844, 853, 133 P.3d 458 (2006). It is only once plaintiffs have established that they were owed a duty of care as an exception to the public duty doctrine that "claimants may proceed in tort against municipalities to the same extent as if the municipality were a private person." *J & B Dev. Co.*, 100 Wn.2d at 305-306. Thus, at the outset of a negligence action against a governmental entity, courts look to the public duty doctrine to determine whether the government owed the plaintiffs a duty of care.

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[5] There are four exceptions to the public duty doctrine, "(1) legislative intent, (2) failure to enforce, (3) the rescue doctrine, and (4) a special relationship." *Cummins v. Lewis County*, 156 Wn.2d 844, 853 n.7, 133 P.3d 458 (2006).

The appellants originally relied upon the rescue doctrine exception to assert that the county owed Ms. Garcia a duty of care. One who undertakes to render aid or warn someone in danger is required to exercise reasonable care in his or her efforts. *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 299, 545 P.2d 13 (1975). Where that person fails to exercise reasonable care and the offer to render aid is relied upon, the rescuer may be liable for negligence. *Chambers-Castanes*, 100 Wn.2d at 285 n.3. This doctrine applies even if the state agent is acting gratuitously or beyond his or her statutory authority. *Id.* The purpose of the rescue doctrine is to impose a duty where the government affirmatively undertakes to either warn someone of danger or render aid. *Brown*, 86 Wn.2d at 299.

An alternative basis to the public duty doctrine for finding governmental liability is found in *Restatement* § 302B. That section provides that 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."

In the previous appeal, Division One concluded that the city of Pasco did not owe Ms. Garcia a duty under either the rescue doctrine or § 302B.[6] In this appeal, the appellants do not pursue their claim that the rescue doctrine exception applied and only

[6] *Garcia v. City of Pasco*, noted at 181 Wn.2d 1009, slip op. at 9 (2014).

argue § 302B. Since the primary issue presented involves the scope of the Division One ruling, it is time to consider it.

At issue in the first appeal was whether the city of Pasco and its officers were liable for failing to investigate the report by Mr. Gorton that the occupants of the van had taken a body to the back of the house at 1611 Parkview. Specifically, the appellants contended that the Pasco Police Department had knowledge that someone had been dragged[7] into the 1611 Parkview house and did not act upon the information. Division One rejected the argument on both factual and legal grounds. Reciting the transcribed conversation between Mr. Gorton and the 911 operator, the court noted that the operator had not promised to do anything with the information. *Garcia*, slip op. at 4-5. The court also rejected the argument that the operator had implicitly promised to convey the information to the police. *Id.* at 5. Because there was no gratuitous promise to aid Ms. Garcia, the rescue doctrine was inapplicable. *Id.* at 5-6.

The court then turned to analyze potential liability under § 302B. *Id.* at 7-8. The court found that there was no affirmative act by the police that would give rise to liability. *Id.* at 9. The court stated:

> 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

[7] As noted in footnote 1, different verbs have been used in different transcripts of the recording. We use "dragged" in accordance with appellants' view of the evidence.

> 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.

Id. The court then noted that the officers' failure to investigate was at most nonfeasance and did not give rise to liability under the § 302B. *Id.*

With this background in mind, it is finally time to address the appellants' arguments. First, they contend that the trial court erred in granting summary judgment on the basis of collateral estoppel. We agree. Critical here is whether the Division One opinion *necessarily* determined the *identical* issue. *Christensen*, 152 Wn.2d at 307. It did not.

At issue before Division One was the duty, if any, owed by the city of Pasco and its police force to Ms. Garcia under § 302B. The duty of Franklin County and its 911 operator[8] was not *necessarily* at issue. Nonetheless, the Division One opinion appears to address, in part, the operator's actions. It expressly notes that the operator did not convey Gorton's comment about a dragged body to the police. For that reason, the police did not know about Ms. Garcia and had no obligation to investigate because there was no affirmative action taken. Slip opinion at 9. Accordingly, Franklin County argues that

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[8] There apparently was confusion in the early stages of the first case whether or not the 911 operator was employed by Pasco or by Franklin County. It is unclear whether that confusion reached Division One or not. The discovery that the operator was employed exclusively by the county was the basis for the current suit listing the county as a defendant.

Division One already determined that the operator undertook no action for purposes of § 302B liability.

That contention fails for two reasons. First, in context, the Division One opinion was addressing the *duty*, if any, *of the police* to act. It did not address the operator's responsibilities, but simply noted the *fact* that the operator's failure to convey the information did not amount to an affirmative action by the police. Second, even if it had squarely addressed the *duty* of the 911 operator, that discussion would not have been *necessary* to the resolution of the question concerning any duty owed by the officers. Any such discussion would amount to little more than informative dicta on this topic.

At most, the trial court could have given collateral estoppel to the factual ruling that the operator did not convey Mr. Gorton's information to the police. The legal consequences flowing from that fact were decided only as they related to the duty of the police, but not as to any duty of the operator. Accordingly, the Division One opinion did not necessarily resolve whether Franklin County owed a duty to Ms. Garcia and the trial court erred in ruling otherwise.

Nonetheless, that error does not resolve this case. The appellants argue that the facts establish that Franklin County owed Ms. Garcia a duty under § 302B. Specifically, they contend that the operation of a 911 system and the receipt of the phone call from Mr. Gorton constituted an affirmative action giving rise to liability under § 302B. We disagree.

This issue was decided in *Robb*, 176 Wn.2d 427. There the court authoritatively construed § 302B. At issue was the fact that police investigating a disturbance noticed, but did not seize, several shotgun shells laying on the ground near the men they talked to. After police left, one of the men returned to scene, picked up one of the shells, and soon thereafter used it to shoot and kill Mr. Robb. *Id.* at 430. Our court suggested that § 302B was an alternative basis to the public duty doctrine's four exceptions for finding governmental liability. *Id.* at 433, 439 n.3. However, that duty arose only in situations where the government's own affirmative act created a high risk of harm. *Id.* at 433-434. The fact that the police did not pick up and remove the shells was, at most, an omission. It was not an affirmative action that created a risk of harm. *Id* at 435-438. To rule otherwise would be to extinguish the "firm line between misfeasance and nonfeasance." *Id.* at 439.

The same problem is presented in this case. Allegedly, the operator failed to convey information to the police that Ms. Garcia had been dragged into the house. On its face, that allegation involves nothing more than a failure to act, *i.e.*, a failure to pass on the information. That failure is not an affirmative action. Even if the receipt of the 911 call gave rise to a duty to alert the police about the caller's report—an issue we do not decide—the operator's failure to live up to that duty was not an affirmative action within the meaning of § 302B. It was no more than an omission. As *Robb* teaches, that omission is not a basis for liability.

Summary judgment was properly granted to Franklin County. The judgment is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Siddoway, J.

Lawrence-Berrey, A.C.J.