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' Brief on Appeal

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## INTRODUCTION

With this Appeal, Appellants (collectively referred to as "Garcia") seek review of the trial court's dismissal of Appellants' claims on summary judgment. Specifically, Appellants challenge the trial court's determination that a prior matter, Garcia v. City of Pasco (70395-1-I), collaterally estops Garcia's claims against Franklin County.

## ASSIGNMENT OF ERROR

Did the trial court err when it determined that Garcia's claims against Franklin County were collaterally estopped by the Court of Appeals Division I (Case Number 70395-1-I) decision, when the Court's decision dealt solely with whether the City of Pasco owed a duty to Tiairra Garcia and not whether Franklin County owed her a duty?

Is summary judgment finding that Franklin County did not owe a duty to Tiairra Garcia proper when the county-operated 911 dispatch's actions constituted an affirmative act under RESTATEMENT (SECOND) OF TORTS 302B which gave rise to a duty of ordinary care?

## FACTUAL AND PROCEDURAL HISTORY

### A. Substantive Facts.

This case arises from the death of Tiairra Garcia due to a gunshot wound that occurred on June 22, 2008. Tiairra Garcia lay dying in 1911 Parkview, Pasco, Washington as the Pasco Police stood outside (and were

there in response to numerous 911 calls) questioning the residence's occupant about a van wrecked and abandoned on the property.[1] The responding 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 there days early, and that something other than a simple hit-and-run was transpiring.[2]

Although Tiairra Garcia's life ended at 1911 Parkview near midnight, her night began innocently enough with Marnicus "Pooh" Lockhard and Ashone Hollinquest picking her up to go out for the night.[3] The two drove with Tiairra Garcia to a Pasco tavern, Joey's 1983.[4] There, Tiairra Garcia sat in the van while Lockhard and Hollinquest drank inside until Lockhard and Hollinquest were ejected for fighting approximately half an hour to one hour after arriving.[5]

After being ejected from the tavern, Tiairra then drove the parties to another location. While in the parking lot of another tavern,

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[1] CP 695-96.
[2] CP 696.
[3] CP 695.
[4] Id.
[5] Id.

Hollinquest and Lockhard exchanged a gun.[6] The gun discharged and the bullet struck Tiairra.[7]

Lockhard then pushed Tiairra aside, at the time she was in the driver's seat, and began to drive the vehicle from the passenger's seat to 1911 Parkview.[8] In route Lockhard struck numerous vehicles which resulted in significant damage to the van. Numerous 911 callers reported that the vehicle was sparking because it was driving on its rims.[9] Upon arriving at 1911 Parkview, the van careened onto the lawn and struck a fence. The resulting noise startled Melissa Genett, a neighbor across the street, and she directed her fiancé, John Gorton, to contact 911.[10] In his 911 call, Gorton described to the 911 operator the scene unfolding outside. He described the state of the van and that two individuals were dragging/caring someone into the back of the house. Mr. Gorton also stated that a domestic dispute had occurred at the house the day prior and that the police needed to get there because it was clear "something was going on" because the men were clearly dragging an unconscious person into the back of the house. 911 indicated that police were in route and

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[6] Id.; see also CP 725.
[7] Id.
[8] CP 695, 725.
[9] CP 696.
[10] Id.

continued to request information related to the incident.[11] Gorton's call concluded when the police arrived at 1911 Parkview.[12]

Based on John Gorton's conversation with 911, he and Genett got the impression that 911 was there to respond to their specific concerns.[13] Gorton stated that someone was being dragged into the house, that he had witnessed a domestic dispute the night before, that something was going on, and that police needed to go to the house immediately.[14] Importantly, the 911 operator lead Gorton and Genett to believe that the police were there to address his concerns specifically (Tiairra Garcia being dragged into the house) and not simply in response to a hit-and-run.[15] Neither Gorton nor Genett spoke directly to the responding officer because they were lead to believe that the officers were there to investigate whether someone had been injured and needed assistance.[16]

Upon arrival at 1911 Parkview the police spoke to the renter of 1911 Parkview.[17] Then, after a cursory view of the van, the officer made arrangements for it to be towed and left.[18] Inside 1911 though, Tiairra Garcia lay in a room adjacent to the living room unconscious.[19] While

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[11] CP 477-78
[12] Id.
[13] CP 382.
[14] CP 477-78.
[15] CP 382.
[16] Id.
[17] CP 377-78.
[18] Id.
[19] CP 696-97.

the police were present and talking to the resident of the home (she is referred to as "Granny"), Hollinquest was in the room with Tiairra Garcia.[20] He left periodically to speak to Lockhard who, at some point in time, instructed Hollinquest to change clothes so that they could discard the ones they were wearing. After the police left Hollinquest and Lockhard dragged Tiairra Garcia into the garage where they discussed dismembering her body in order to dispose of it. Hollinquest apparently protested and the parties placed Tiairra Garcia into a sleeping bag and wrapped it with duct tape. The men then proceeded to procure a vehicle and dove to a place near Mt. Rainer National Park where they attempted to hide Tiairra Garcia's body in a ravine. Both men then fled the state. The police did not recover Tiairra Garcia's remains until June 2009.

B. Garcia v. City of Pasco (70395-1-I).

In Garcia v. City of Pasco, Garcia brought suit against the City of Pasco,[21] Joey's 1984, Hollinquest and Lockhard. The claims against the City of Pasco were relatively straightforward: Garcia claimed that the responding officer breached his duty to Tiairra Garcia when he investigated the scene at 1911 Parkview because he investigated the scene

[20] CP 697.

[21] It should be noted that at the trial court level, the City of Pasco was represented by the Honorable George Fearing. Judge Fearing presented argument at the summary judgment hearing that resulted in the dismissal of the claims against the City of Pasco.

only as a simple hit-and-run.[22] The trial court dismissed Garcia's claims on summary judgment stating that Garcia's claims did not fit into one of the four exceptions to the public duty doctrine.[23] Garcia timely appealed.

On appeal, Garcia focused their argument on a then recent decision by Division I, **Robb v. City of Seattle**, which stated that a government entity may owe a duty of ordinary care in certain circumstances pursuant to RESTATEMENT (SECOND) OF TORTS 302B. Specifically, the **Robb** decision stated that a government actor may owe a duty where the government agent either knew or should have known that her actions could increase another person's risk of harm from the illicit acts of a third-party.[24] Garcia argued that the City's action constituted an affirmative act which introduced a new risk to Tiairra Garcia. Because the City created a new risk, Garcia argued, the trial court erred when it dismissed Garcia's claims.[25]

In affirming the lower court decision, Division I found that the public duty doctrine barred Garcia's claims.[26] The Court stated that the rescue exception to the public duty doctrine was inapplicable because neither the City nor Franklin County, the operator of the 911 call system,

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[22] CP 757-64
[23] CP 432-33.
[24] CP 242-52
[25] The trial court dismissed Garcia's claims against the City because it found that the public duty doctrine applied and therefore, the City did not owe Tiairra Garcia a duty.
[26] CP 183

made any gratuitous assurances to render aide to Tiairra Garcia.[27] Further, the Court found that RESTATEMENT (SECOND) OF TORTS § 302B did not apply because Garcia's claims were based upon a failure to act, not an affirmative act.[28] Accordingly, the Court concluded, the City did not owe Tiairra Garcia pursuant to RESTATEMENT (SECOND) OF TORTS § 302B.

C. Procedural History of this Matter.

Garcia brought an action against Franklin County alleging common law negligence and negligent training and supervision of the 911 operator who spoke to John Gorton.[29] Franklin County moved for summary judgment alleging that the 70395-1-I decision collaterally estopped Garcia's claims.[30] The County argued that Division I found that Franklin County made "no promise to investigate the body that was dragged from the vehicle, let alone that the 911 dispatcher was even aware of it. The Court of Appeals ruled the 911 dispatcher's comments were not affirmative actions, as required by § 302."[31] As a result, the County argued, collateral estoppel applied and dismissal of the claims was proper.

In response, Garcia noted that the opinion never actually discussed whether the County owed a duty.[32] Rather, Garcia argued, the Court

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[27] CP 186-87.
[28] CP 191.
[29] CP 9-17.
[30] CP 161-169.
[31] CP 168.
[32] CP 204.

determined that regardless of what the County did or did not do, the City did not take any affirmative steps to place Tiairra Garcia in greater peril.[33] Because the opinion only addressed whether the City owed a duty, Garcia argued, collateral estoppel did not apply.

Garcia also went on to argue that the County acted affirmatively and that the County's intervention created a new risk for Tiairra Garcia because the County's actions stopped the neighbors (Gorton and Genett) from personally informing the responding officer that Tiairra Garcia was dragged into the back of the house. As a result, Tiairra Garcia was exposed to additional criminal acts by the occupants of 1911 Parkview, Hollinquest, and Lockhard.[34]

In granting the summary judgment dismissing Garcia's claims, the trial court acknowledged Garcia's arguments.[35] However the trial court stated that it felt that the County's argument was persuasive. The trial court concluded that "I just think in the long run, I think I'm doing the plaintiff a favor."[36] Garcia then filed this timely appeal.

## LEGAL ARGUMENT

### A. Summary Judgment Generally.

[33] CP 205.
[34] CP 206-10.
[35] VR 3:16-7:16.
[36] VR 14:1-14:2.

This Appeal seeks review of a dismissal of Appellants' claims on a motion for summary judgment. When reviewing an order granting summary judgment, an appellate court engages in the same inquiry as the trial court. **Richard C. Gossett, et. al., v. Farmers Ins. Co. of Washington**, 82 Wn. App. 375, 381, 917 P.2d 1124 (1996) (reversed on other grounds, 133 Wn.2d 954, 948 P.2d 1264 (1997)). "Summary judgment is proper if the pleadings, depositions, and affidavits show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." **Id.** "The court must consider the facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party and the motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion." **Id.** (emphasis ours). Review is de novo, requiring the court to step into the shoes of the trial court by engaging in the same inquiry as the trial court. **Id.**

The trial court erred when it found that Garcia's claims were collaterally estopped by the 70395-1-I decision because the decision was silent to whether the County owed Tiairra Garcia a duty. Therefore, at best it is unclear whether Division I consider the County's duty. When the record does not show that the issue was actually and necessarily litigated, collateral estoppel cannot apply. Further, the duty of the City was

different than the duty owed by the County. 911 dispatch took it upon itself to take down the information given by the neighbor instead of allowing the neighbor communicating with the responding officer directly. Therefore, it knew or should have known that by gathering information from the neighbor and indicating it would give the information to the responding officer, the County took an affirmative act that both increased the existing risk and introduced new risks to Tiairra Garcia. The difference between the duty of the responding officer and 911 was different enough that, at the very least, it is not clear that the court in 70395-1-I decided whether the County owed a duty and therefore summary judgment was improper.

B. The Trial Court Erred When it Determined that Garcia's Claims were Collaterally Estopped Because Division I's Opinion in 70395-1-I did not Address Whether the County Owed a Duty and Because Division I Openly Acknowledged that it was not Clear what the County Communicated to the Responding Officer.

Summary judgment finding that Garcia's claims are collaterally estopped by the 70395-1-I decision was improper because whether Franklin County owed a duty to Tiairra Garcia was not addressed by the Division I in its 70395-1-I decision. Generally, courts disfavor the application of collateral estoppel. In order for collateral estoppel to apply, the issue in the subsequent case must have been actually and necessarily litigated in the previous action. This means that the issue cannot merely

be contemplated in the prior action but must have been litigated to a final, conclusive ending. Here, the Court's decision in 70395-1-I may have discussed whether 911 relayed John Gorton's information to the responding officer. However, the court never stated whether the County owed a duty to Garcia. Thus, the trial court erred when it found that the 70395-1-I decision collaterally estopped Garcia's claims.

Review of whether collateral estoppel applies to a particular matter is reviewed *de novo.* **State v. Vasquez**, 109 Wn. App. 310, 314, 34 P.3d 1255 (2001) *aff'd,* 148 Wn. 2d 303, 59 P.3d 648 (2002). Collateral estoppel, or issue preclusion, bars relitigation of an issue in a subsequent proceeding involving the same parties. **Christensen v. Grant Cnty. Hosp. Dist. No. 1**, 152 Wn. 2d 299, 306, 96 P.3d 957 (2004). Collateral estoppel is different from claim preclusion in that claim preclusion prevents a litigant from asserting a claim that was litigated in a previous action while issue preclusion prevents the litigation of a particular element of a party's claim if that issue was previously litigated. **Id.** "Collateral estoppel may be applied to preclude only those issues that have actually been litigated and necessarily and finally determined in the earlier proceeding." **Christensen**, 152 Wn. 2d at 307. The elements for collateral estoppel are: (1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a

party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied. **Reninger v. State Dep't of Corr.**, 134 Wn. 2d 437, 449, 951 P.2d 782 (1998). The party asserting collateral estoppel bears the burden of establishing each element. **Christensen**, 152 Wn. 2d at 307.

Franklin County has failed to establish the elements necessary to show that collateral estoppel bars Garcia's claims. Namely, Franklin County failed to show that the issue of whether the County owed Tiairra Garcia a duty was actually and necessarily litigated. The County focused on two portions of the opinion to argue that collateral estoppel applied. The first portion upon which the County relied is found on pages 5-6 of the opinion where the Court determined that the 911 operator made no gratuitous promise to John Gorton that his information would be relayed to the responding officer.[37] Whether the promise was or was not made to John Gorton, however, does not show whether the County owed a duty. Critically, the statement "no affirmative promise was made"[38] does not establish that the Court found that the County owed no duty to Garcia. The statement merely shows that the County did not explicitly represent to

[37] CP 187-88.
[38] CP 187.

Gorton that it would relay the information to the responding officer, not whether it has assumed the duty to do so under RESTATEMENT § 302B.

The second portion upon which the County relied is found on page 9 where the Court found that the City took no affirmative acts that would cause it to owe Tiairra Garcia a duty under § 302B.[39] However, in this portion of the opinion the Court specifically notes that it does not know what information was relayed by 911 to the responding the officer.[40] Whether the Gorton's information was relayed to the responding officer, however, was not relevant to whether the City owed Tiairra a duty under § 302B because at best, the City's actions would constitute a failure to act upon information. Therefore, it would be nothing more than an omission, not a commission. The determination that the City did not owe a duty under § 302B, however, was wholly independent on whether the County owed a duty to Tiairra Garcia. Any affirmative act by the County that caused it to owe Tiairra Garcia a duty could not impact the fact that at best the City's actions amounted to inaction.

The County has also failed to show that 70395-1-I decided it owed no duty to Tiairra Garcia because in that opinion the Court acknowledged that the Court did not know what information had, or had not, been

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[39] CP 191.

[40] Id. "The record does not demonstrate that the police promised to investigate Gorton's statement or were even aware of it."

relayed to the responding officer.[41] The Court's acknowledgment that it did not have all the information related to 911's actions illustrates that the Court did not have to decide whether the County owed a Duty to Tiairra Garcia to determine that the City did not owe her a duty. Therefore, whether the County owed a duty was not necessarily or actually decided. Rather, it was merely discussed and ultimately determined to be irrelevant to the issues in 70395-1-I.

Division I in 70395-1-I did not determine whether the County owed a duty to Tiairra Garcia because the issue was not before it and because whether the City owed Tiairra Garcia a duty was not dependent upon whether the County owed a duty. Thus, the Court did not actually consider the County's duty and did not necessarily determine whether the County owed a duty to Tiairra Garcia. 70395-1-I only focused on the inaction of the City of Pasco. Because the responding officer's actions constituted, at best, a failure to act, whether the County took affirmative acts that gave rise to a duty was irrelevant to the Court's decision. As a result, 70395-1-I did not actually and necessarily determine whether the County owed a duty to Tiairra Garcia and the trial court erred when it determined that Garcia's claims were collaterally estopped. Therefore, reversal and remand is proper.

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[41] CP 191.

C. Summary Judgment was not Proper Because the Actions by 911 Constituted an Affirmative Act that Caused the County to Owe Tiairra Garcia a Duty.

Summary judgment finding that the County did not owe Tiairra Garcia a duty under RESTATEMENT (SECOND) OF TORTS § 302B is improper because 911 dispatch's affirmative actions caused the County to owe a duty to relay the information Gorton provided to the responding officer. Franklin County owed Tiairra Garcia a duty because it acted affirmatively when it spoke to Gorton and gathered the information he provided. Pursuant to RESTATEMENT § 302B a person (including a government entity) may owe a duty of reasonable care if "the actor realizes 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 act is criminal." RESTATEMENT (SECOND) OF TORTS § 302B. In **Washburn v. City of Federal Way** the Washington Supreme Court determined that an officer's affirmative acts, even if part and parcel to her general duties, may give rise to a general duty of care if she knows that her actions may expose a third party to an increased risk of harm from the illegal acts of another party. Here, the County acted affirmatively when the 911 operator answered John Gorton's 911 call, and gathered information from him that he intended to be relayed to the responding officer. 911 dispatch knew or should have known that Gorton intended to

relay this information to the responding officer and that had 911 dispatch not taken the information from him, he would have personally relayed the information to the responding officer. Thus, similar to the officer in **Washburn,** the 911 operator owed a duty to Tiairra Garcia to relay the information it gathered from John Gorton because the County knew or should have known that by operating a 911 dispatch center, callers contacted 911 to report information that the caller intended to be relayed to responding authorities. Accordingly, summary judgment was not proper.

The general facts of this case parallel those in **Washburn v. City of Federal Way**. In **Washburn**, the Supreme Court found that an officer owed a duty of reasonable care to a woman who had obtained a no contact order against her live in boyfriend because the officer knew (or should have known) that the woman lived with her boyfriend who had a history of violence. In late April, Baerbel K. Roznowski sought a protective order against her violent live-in boyfriend, Paul Kim. **Washburn v. City of Federal Way**, 178 Wn. 2d 732, 739-40, 310 P.3d 1275 (2013). After she obtained the order, she requested that an officer from the Federal Way Police Department serve Kim with it. **Id.** at 739. When an officer is to serve a no contact order, the officer will be given a "Law Enforcement Information Sheet" ("LEIS") that provides relevant information about the

victim and the person upon whom the order is to be served. **Id.** For Kim's no contact order, the LEIS stated that he had a history of violence, lived with Roznowski, and that he would likely need an interpreter. **Id.** at 740. When the no contact order was served, however, the serving officer, Officer Hensing, admitted that either he did not read the LEIS or, at best, gave it a cursory glance. **Id.** Additionally, Hensing observed that Roznowski was in the house at the time he served Kim with the no contact order. **Id.** Hensing confirmed Kim's identity, served him with the no contact order, told him he had to appear at court on the prescribed date, and left the task of explaining to Kim that he had to vacate the home to Roznowski. **Id.** A fight ensued and Kim eventually killed Roznowski with a knife. **Id.**

In finding that Federal Way owed a duty to Roznowski, the Court noted that while the criminal conduct of a third party is hard to foresee, such conduct is not unforeseeable *per se*. **Washburn**, 178 Wn.2d at 757. As a result, the Washington Courts have adopted RESTATEMENT (SECOND) OF TORTS § 302(B) which states "[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 third person which is intended to cause harm, even though such conduct is illegal." **Id.** "The duty to protect against the criminal acts of third parties can arise "where

the actor's own affirmative act has created or exposed the other to a recognizably high degree of risk of harm through such misconduct."" **Id.** at 757-758(citing RESTATEMENT (SECOND) OF TORTS § 302B cmt e). With respect to Roznowski, the Court noted that Hensing knew or should have known that Kim may turn violent once he was served because of the information on the LEIS and that he was serving Kim at Roznowski's house. **Id.** at 759-60. These issues coupled with the fact that Kim may need a translator to understand fully what the no contact order said and meant created new risks of harm to the already contentious relationship.

Similar to the officer in **Washburn**, the County owed a duty to Tiairra Garcia even though the duty created by the operator speaking to John Gorton was part and parcel to 911's general function. When the operator gathered information from John Gorton, she knew or should have known that Gorton intended for the responding officer to receive information he provided, i.e. that Tiairra Garcia was being dragged into the back of the house, and that he contacted 911 so that it would relay the information to the officer. Gennet testified that had she known that 911 would not have conveyed the information to the responding officer regarding Tiairra Garcia being dragged into the back of 1911 Parkview, she would have done it herself. Therefore, by operating a 911 dispatch and accepting Gorton's call, the County took an affirmative act. Note that

accepting Gorton's call is no different than Officer Hensing performing his duties when he served Kim with the no contact order. Accepting Gorton's call is part and parcel to the daily functions of a 911 operator. Serving a no contact order is part and parcel to the job function of a police officer.

Additionally, when the operator took that affirmative step, i.e. gathered Gorton's information, she either knew or should have known that unless she acted upon the information provided by Gorton, then Tiairra Garcia would be subject to additional harm by the criminal acts of the persons who dragged her into the back of the house. Similar to Officer Hensing, the operator was given information that was pertinent not only to the administration of her duties, i.e. notify the City that medical assistance will likely be needed, but also the information was pertinent to Tiairra Garcia's safety. Officer Hensing ignored the LEIS and therefore did not conduct his duties properly. Similarly, the operator ignored Gorton's information and did not conduct her duties properly. In both instances the improper performance of their official duties exposed a person to a greater risk of harm in the hands of a third party. In Roznowski's case the third party was Kim and his violent outburst. In Tiairra Garcia's case the third parties were Hollinquest, Lockhard, and 1911's occupants who obstructed the officer's investigation and provided false statements. In both

instances, however, the government actor knew or should have known that unless they performed their duties in accordance with specific information they had, another party would be placed into higher risk of harm by the acts of a third parties.

Because the County operated a 911 call center that took Gorton's call and gathered information from him, the County took affirmative steps to become involved in the unfolding situation at 1911 Parkview. Had 911 not taken Gorton's call, then he and his cohabitant would have relayed information regarding Tiairra Garcia being dragged into the back of the house directly to the officer. The operator either knew or should have known that unless she performed her duties in accordance with Gorton's information that Tiairra Garcia would face escalating harm from the illegal acts of third parties. Thus, to the extent the trial court found the County did not owe Garcia a duty, the trial court erred and remand is proper.

## CONCLUSION

The trial court's application of collateral estoppel in this matter constitutes reversible error. Division I's decision in 70395-1-I focused solely on the duty of the City of Pasco and whether the responding officer's actions constituted an affirmative act that caused the City to owe Tiairra Garcia a duty under RESTATEMENT § 302B. The Court explicitly acknowledged it did not know whether 911 dispatch had relayed John

Gorton's call to the responding offer. However, for the purposes of the Court's analysis in 70395-1-I, whether the County relayed the information was irrelevant because the Division I's inquiry focused on the responding officer's conduct. Therefore, the notion that the court determined that Franklin County did not owe a duty to Garcia is inconsistent with the Division I's opinion. At the very least, there is doubt as to whether the Court decided the issue and therefore, a finding that Garcia's claims are collaterally estopped was improper.

Further, summary judgment finding that Franklin County did not owe a duty to Tiairra Garcia is equally improper. The facts show that the County took affirmative steps that it knew or should have known placed Tiairra Garcia in a greater risk of harm by the illegal acts of third parties. Accordingly, to the extent the trial court found that the County owed no duty to Tiairra Garcia, the trial court erred and reversal and remand is proper.

Dated August 26, 2015.

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**DECLARATION OF SERVICE**

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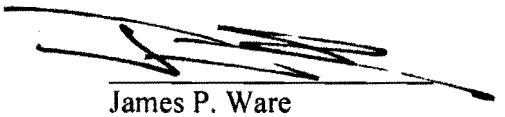

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# SECOND (RESTATEMENT) TORTS § 302B

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Case Citations

Rules and Principles

Division 2 - Negligence

Chapter 12 - General Principles

Topic 4 - Types of Negligent Acts

Restat 2d of Torts, § 302B

§ 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.

**REPORTERS 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. Carecota, 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 REFERENCES:** 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.

Digest System Key Numbers:

Negligence 61(2), 62(3)