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No.: 40637-3-II.

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

STATE OF WASHINGTON
BY  DEPUTY

DEL JOHNSON, Individually and as the Personal Representative of the
Estate of BEVERLY JOHNSON,

Appellant

vs

STATE OF WASHINGTON; GRAYS HARBOR COUNTY, WASHINGTON;
GRAYS HARBOR COMMUNICATIONS CENTER A/K/A GRAYS HARBOR
E911 COMMUNICATIONS CENTER,

Respondents.

BRIEF OF APPELLANT

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CR 56(c)7

I. INTRODUCTION

The “public duty doctrine” is a judicially created tool intended to insure that the duty on which a plaintiff in negligence bases his claim is not a duty to the general public but a duty to the plaintiff individually. A duty to all is a duty to none.

Plaintiff’s wife, Beverly Johnson, died of exposure, lost and confused at the end of a forest road because of defendants’ mistaken failure to relay information about her condition to Tyler Trimble. Mr. Trimble was following Mrs. Johnson’s car when he dialed 911 to report her erratic driving. He offered to continue following Mrs. Johnson’s car so as to maintain contact, but defendants Grays Harbor 911 and Washington State Patrol did not tell him Mrs. Johnson had been reported “Missing/Endangered”. Defendants knew who plaintiff’s wife was and why the information they had about her impaired condition was important. In failing to disclose that information to Mr. Trimble, they breached a duty to plaintiff’s

wife specifically. The public duty doctrine should not apply on the facts of this case, and the trial court's decision should be reversed and the case remanded for trial.

II. ASSIGNMENT OF ERROR

The trial court erred in dismissing plaintiff's claim for wrongful death under the public duty doctrine.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

No. 1: Does the public duty doctrine apply at all to the facts of this case?

No. 2: Does one of the four currently recognized exceptions to the public duty doctrine – “legislative intent”, “failure to enforce”, “rescue”, “special relationship”– apply to these facts?

No. 3: Should the public duty doctrine be abrogated?

IV. STATEMENT OF THE CASE

Shortly after 7 p.m. on Saturday night, January 27, 2007, Beverly Johnson of Beaverton, Oregon was reported missing by the National Crime Information Center (NCIC). Her

status appeared on the system as “missing person endangered with a history of seizures.”¹ An hour and forty minutes later, at 8:40 P.M., Tyler Trimble, a Montesano Police Explorer, returning from officiating a high school basketball tournament, came upon Mrs. Johnson in her purple Honda Accord, headed west on US 12, southeast of Elma, Washington at about 35 MPH. The speed limit was 55. Mrs. Johnson was weaving, crossing the center and fog lines half a dozen times each. Joint Motion for Summary Judgment of Defendant Gray’s Harbor and Grays Harbor County (Joint Motion) at 3. (CP 33-38)

Mr. Trimble called Grays Harbor 911 at 8:41:15 and gave the operator, Natalie Streifel, a description of Mrs. Johnson’s car, its license number, XDN-364, and its erratic course. He also gave Ms. Steifel his cell phone number. She did not tell him the car was associated with a Missing/Endangered person entry but transferred the call to

¹Joint Motion for Summary Judgment of Grays Harbor County and Grays Harbor County 911 (“Joint Motion”) at 2.

the Washington State Patrol (WSP) at 8:42.30. Joint Motion, Declaration of Peggy Fouts (CP 49-66), Ex. 2 at 2-4 (call transcript). Mr. Trimble gave WSP the same information he had given Grays Harbor 911. Declaration of Tyler Trimble at 2 (CP 91-92).² During the call the WSP dispatcher ran the license plate on NCIC and learned that it was Mrs. Johnson's car and that she was listed as Missing/Endangered. State's Motion for Summary Judgment at 3 (CP 81-90). The WSP dispatcher did not tell Mr. Trimble this, though Mr. Trimble had asked whether he should continue to follow the car. Trimble Dec. at 2 (CP 92).

There is no dispute that, had WSP told him Mrs. Johnson was Missing/Endangered, Mr. Trimble would have continued to follow her car, providing updated information, until a patrol unit could contact the Honda. Trimble Dec. at 2 (CP 92). However, WSP terminated the call without telling Mr Trimble that Mrs. Johnson was missing and endangered, and,

² Mr. Trimble's declaration was filed separately, by agreement of the parties.

when Mrs. Johnson turned toward Elma, Mr. Trimble stopped following her and got on Route 12 westbound toward Montesano. WSP called Grays Harbor 911 back immediately, at 8:46, and told them the car Mr. Trimble had been following was associated with a Missing/Endangered person. Fouts Dec, Ex. 2 at 9 (CP 49-66). Though Grays Harbor had Mr. Trimble's phone number, neither Grays Harbor nor WSP called him back to tell him Mrs. Johnson was missing and endangered.

Later that evening, around 10:15, Mr. Trimble saw a television news broadcast concerning Mrs. Johnson and her vehicle. He called Grays Harbor 911 again and told Ms. Streifel and a trainee he thought this was the same car he had reported following earlier. They told him it was not. He persisted, but they assured him the cars were not the same. Fouts Dec. Ex. 2 at 13-14 (CP 49-66). They were mistaken. Joint Motion at 6 (CP 33-48). None of the parties saw Mrs.

Johnson alive again.³ She was found 11 days later, dead of exposure, at the end of an unpaved road near Wynoochee Lake Dam, north of Elma. Fouts Dec. at 2 and Ex. 1 (map) (CP 49-66).

Mrs. Johnson's widower, Del Johnson, brought this action on behalf of his wife's estate, against Grays Harbor and WSP for negligence. Defendants moved for summary judgment below, arguing that they cannot be liable because the public duty doctrine absolves them of the duty to act with due care in handling the situation described above. The trial court granted Defendants' motions, and plaintiff appeals.

V. ARGUMENT

A. Standard of Review

There is no dispute about the facts presented in the trial court, and there is therefore no genuine issue as to any

³The only known person to see plaintiff's wife alive after Mr. Trimble stopped following her car was Randall Neathery, who has a farm north of Montesano where she appeared in her car "with a very odd blank expression on her face" at about 10 P.M. on January 27. Joint Motion, Declaration of Randall Neathery at 1.

material fact. The only question below was whether defendants were entitled, on those facts, to judgment as a matter of law. CR 56 (c). This court reviews the trial court's grant of a motion for summary judgment de novo, performing the same inquiry as did the trial court. *Owen v. Burlington N. & Santa Fe RR Co.*, 153 Wn2d 780, 787, 108 P.3d 1220 (2005)(de novo review where motion for summary judgment granted). All facts and reasonable inferences from them are taken in favor of the non-moving party, here the plaintiff. *Id.*

B. The Public Duty Doctrine

The public duty doctrine is a judicial creation, often called a "focusing tool" intended to require that the duty that serves as basis for a plaintiff's claim for negligence is a duty to the plaintiff, not a duty to the public generally. *E.g. Cummins v. Lewis County*, 156 Wn2d 844, 853, 133 P.3d 458 (2006). The doctrine is not a form of immunity. Sovereign immunity was abolished by the legislature in 1967, and public bodies in Washington are liable in tort "to the same extent as if they were a private person or corporation." RCW

4.96.010(1). The public duty doctrine is a device for deciding when the government does or does not have a duty to a particular individual to use due care. *Cummins, supra* at 853.

Nevertheless, the public duty doctrine is based on the same policy considerations used to undergird sovereign immunity: legislative enactments for the public benefit should not be discouraged by subjecting the government to unlimited liability. *Taylor v. Stevens County*, 111 Wn2d 159, 170, 759 P.2d 447 (1988). It has also been argued that the doctrine is needed to keep public bodies from becoming “insurers for every harm that might befall members of the public interacting” with them. *E.g. Beal v. City of Seattle*, 134 Wn2d 769, 793, 954 P.2d 237 (1998)(Talmadge, J, dissenting).

Of course those policies do not come into play in this case. Plaintiff here charges very specific negligence on the part of defendants in that they knew Mr. Trimble was following Mrs. Johnson, that she was missing and endangered and that he was willing to keep following her until law enforcement could contact her. They failed to

tell him, though they knew, that she was missing and endangered. They dropped that lifesaving connection, which would have cost them nothing to maintain, and relied instead on the random chance that officers might find Mrs. Johnson later. Plaintiff asks not that the government have been an insurer, only that it have used reasonable care in its dealings with Mrs. Johnson's particular situation.

Defendants have a duty to the public to perform search and rescue operations generally, and the public duty doctrine says they cannot be liable in negligence for failing to find a missing and endangered person. However, once they had found Mrs. Johnson, knew she was missing and endangered, and held a lifesaving connection to her individually through Mr. Trimble, their duty was no longer to the public in general. It was to Mrs. Johnson. If defendants had spoken directly to Mrs. Johnson by cell phone, and she had relied on their advice, the public duty doctrine would be no defense. *E.g. Cummins*, 156 Wn2d at 857. It should make no difference that Mrs. Johnson, because of her condition, was unable to communicate and that defendants' direct connection was with Mr. Trimble, in the

car behind Mrs. Johnson. Mr. Trimble relied on defendants' communications, and because he did, Mrs. Johnson was lost.

This is not a case about second-guessing a judgment call or challenging a decision to allocate governmental resources to one effort rather than another. Plaintiff's wife died because of defendants' failure to execute the simple, operational task of telling Tyler Trimble what they well knew while they had him on the phone – that Mrs. Johnson was missing and endangered. The court should hold that the public duty doctrine does not apply because defendants' duty of due care ran specifically to Mrs. Johnson on these facts.

C. Exceptions to the Public Duty Doctrine

The public duty doctrine is subject to four exceptions: legislative intent, failure to enforce, rescue doctrine and special relationship. *E.g. Babcock v. Mason County Fire Dist*, 144 Wn2d 774, 785, 30 P.3d 1261 (2001). This case fits at least two of these and should fit all four.

1. Legislative Intent Exception

The “legislative intent” exception to the public duty doctrine applies where a statute “evidences a clear legislative intent to identify and protect a particular circumscribed class of persons.” *Honcoop v. State*, 111 Wn2d 182, 188, 759 P.2d 1188 (1988), *citing Baerlein v. State*, 92 Wn2d 229, 231-32, 595 P.2d 930 (1979) and *Halvorson v. Dahl*, 89 Wn2d 673, 676, 574 P.2d 1190 (1978). For example, in *Honcoop*, the supreme court held an anti-brucellosis statute was intended to protect the general public, not to protect the plaintiff dairy farmers. 111 Wn2d at 188-89. In *Halvorson*, on the other hand, the Seattle municipal building code gave rise to a duty because, by its terms, it sought to protect not the general public but the “occupants” of covered buildings, a specific group. 89 Wn2d at 677.

RCW 70.96A.120(2) requires that incapacitated persons in public places shall be taken into protective custody by local law enforcement or other staff:

Except for a person who may be apprehended for possible violation of laws not relating to alcoholism, drug addiction, or intoxication and except for a person who may be apprehended for possible violation of laws relating to

driving or being in physical control of a vehicle while under the influence of intoxicating liquor or any drug and except for a person who may wish to avail himself or herself of the provisions of RCW 46.20.308, ***a person who appears to be incapacitated or gravely disabled by alcohol or other drugs and who is in a public place*** or who has threatened, attempted, or inflicted physical harm on himself, herself, or another, ***shall be taken into protective custody by a peace officer or staff designated by the county and as soon as practicable, but in no event beyond eight hours brought to an approved treatment program for treatment.*** If no approved treatment program is readily available he or she shall be taken to an emergency medical service customarily used for incapacitated persons. ***The peace officer or staff designated by the county, in detaining the person and in taking him or her to an approved treatment program, is taking him or her into protective custody and shall make every reasonable effort to protect his or her health and safety.*** In taking the person into protective custody, the detaining peace officer or staff designated by the county may take reasonable steps including reasonable force if necessary to protect himself or herself or effect the custody. A taking into protective custody under this section is not an arrest. No entry or other record shall be made to indicate that the person has been arrested or charged with a crime.

(Emphasis added). Mrs. Johnson was such a person. She was known to be seriously impaired, possibly by alcohol or drugs, though that was unknown, and was in a public place. Defendants' duty to her was not a duty to the general public; it was a duty to a person

specifically identified by the legislature as impaired and requiring assistance. The legislature's intent that impaired persons in public places be assisted is clear and gives rise to a duty of reasonable care under the legislative intent exception to the public duty doctrine.

2. Failure to Enforce

Similarly, and under the same statute, a duty to Mrs. Johnson arose under the "failure to enforce" exception to the public duty doctrine. This exception applies where (1) government agents responsible for enforcing statutory requirements know of a violation, (2) they fail to take the required action, (3) they have a statutory duty to do so, and (4) plaintiff is one of those the statute is designed to protect. *E.g. Honcoop, supra*, 111 Wn2d at 190.

The protective custody statute quoted above lays down a statutory requirement that sets plaintiff apart from the general public. It requires law enforcement to take publicly impaired persons into custody. Defendants knew plaintiff was impaired, they failed to take the required action, and plaintiff is clearly an object of the statute's protection.

3. Rescue

In what is generally recognized as the seminal “public duty doctrine” case in Washington, the supreme court articulated the “rescue exception” to the public duty doctrine as follows:

We have also recognized an exception arising in situations where a governmental entity or its agent undertakes a duty to aid or warn a person in danger and fails to exercise reasonable care, and the offer to render aid is ***relied upon by either the person to whom the aid is to be rendered or by another who, as a result of the promise, refrains from acting on the victim’s behalf.*** Under this exception, commonly referred to as the rescue doctrine, the governmental entity may be liable even if the agent acts gratuitously or beyond his or her statutory authority.

Chambers-Castanes v. King County, 100 Wn2d 275, 285 n.3, 669 P.2d 451 (1983) (emphasis added). In this case, Mr. Trimble was in the course of aiding Mrs. Johnson by maintaining contact with her, but he refrained from aiding her further because defendants failed to tell him she was missing and endangered.

Plaintiff recognizes that a division of this court in *Babcock v. Mason County Fire District*, 101 Wn App 677, 686, 5 P.3d 750 (2000) added a further requirement not only that, as in *Chambers-Castanes*, gratuitous action is included, but that *only* gratuitous action is

included within the rescue doctrine. Thus, in its evolution, the doctrine has grown a “volunteer” appendage that excludes police, fire and rescue entirely because police officers and firefighters are not “volunteers” – rescue is their regular job. In effect, they have no duty in negligence because they have a statutory duty that cannot be enforced. *Babcock* cites for this proposition only *Smith v. State*, 59 Wn App 808, 802 P.2d 133 (1990), which offers no citation or discussion to support this added requirement. *Id.* at 814.⁴

In *Babcock* itself, Division Two explained that the rescue exception would swallow the public duty doctrine if the requirement for “gratuitous” action were not added. 101 Wn App at 686. Of course, adding the requirement completely nullifies the exception for police, fire and rescue. Further, the rescue exception operates only where rescue efforts are actually undertaken and would therefore not apply to cases of nonfeasance. In addition, the requirements of reliance by the plaintiff or worsening of the situation because of

⁴ The supreme court, on review in *Babcock*, did not discuss the court of appeals’ addition of a “gratuitous” requirement to the rescue exception. 144 Wn2d 774 (2001)

defendant's action, as in ordinary negligence law, keep the rescue doctrine within its traditional bounds. *E.g. Folsom v. Burger King*, 135 Wn2d 658, 677, 958 P.2d 301 (1998). If, indeed public bodies are to be liable "to the same extent as if they were a private person or corporation", as required in RCW 4.96.010(1), the rescue exception should apply here.

4. Special Relationship

Plaintiff concedes that, as it is presently articulated, he cannot qualify for the "special relationship" exception to the public duty doctrine. It is undisputed that Mrs. Johnson did not communicate, in fact could not have communicated directly with defendants, and they made no assurances directly to her on which she personally relied. *Cummins, supra*, 156 Wn 2d at 856 (direct contact or privity and reliance on explicit assurances required). Plaintiff notes that "privity" in this context was once "broadly defined to include any reasonably foreseeable plaintiff." *Taylor v. Stevens County*, 47 Wn App 134,

139, 732 P.2d 517 (1987), quoting *Chambers-Castanes, supra*. As the court said in *Chambers-Castanes*,

The term privity is used in the broad sense of the word and refers to the relationship between the police department and any "reasonably foreseeable plaintiff." *** As to the second element, the assurances need not always be specifically averred, as some relationships carry the implicit character of assurance.

100 Wn2d at 286. Plaintiff recognizes that the supreme court's current public duty doctrine jurisprudence no longer follows that holding.

Plaintiff asserts that defendants had a duty specifically to her that should avoid the public duty doctrine because she was, albeit unconsciously, helpless and within their control. They held her individual fate in their hands, and that made their duty to her personal, as distinguished from any general duty to the public. Plaintiff had a special relationship with defendants that should have taken her outside the public duty doctrine and given rise to a duty in defendants to use reasonable care in assisting her.

D. The Public Duty Doctrine Should Be Abrogated

Recognizing that this court is bound to follow the law as construed by the supreme court, plaintiff nevertheless contends that the public duty doctrine amounts to a modern, slightly less sweeping, version of sovereign immunity. Indeed, the supreme court in *Babcock* said “The ‘public duty doctrine’ has modified the traditional concept of sovereign immunity.” 144 Wn2d at 784. The legislature abolished sovereign immunity in 1967, and the courts should not have created a modified version to replace it. The public duty doctrine should be abrogated. See *Cummins, supra*, 156 Wn2d at 861 ff (Chambers, J concurring; joined by C. Johnson and Sanders, JJ); *Babcock, supra*, 144 Wn2d at 795 (Chambers, J, concurring; Ireland and Sanders, JJ, concurring in Chambers’ concurrence).

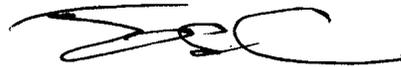
VI. Conclusion

The “public duty doctrine” should not have been applied to these facts, plaintiff’s case falls or should fall within each of the four exceptions to that doctrine, and the doctrine should be abrogated.

The trial court's decision granting defendants' motions for summary judgment should be reversed, and the case should be remanded for trial.

Dated: September 7, 2010

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CERTIFICATE OF SERVICE

I certify that on September 7, 2010, I filed the original and one copy of the foregoing Appellant's Brief via first class United States mail to the Washington Court of Appeals, Division II.

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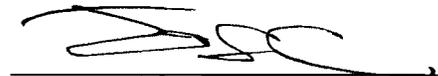
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