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**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

SHIZUKO MITA, surviving spouse of Kay K. Mita; and FLOYD MITA,
individually, and as Personal Representative of the Estate of Kay K. Mita

Appellants,

vs.

GUARDSMARK, LLC, a Delaware limited liability company; and
SPOKANE COUNTY, a municipal corporation of the State of
Washington,

Respondents.

BRIEF OF RESPONDENTS

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II. ASSIGNMENTS OF ERROR

- A. The trial court did not err in granting summary judgment in favor of Guardsmark, LLC and dismissing the Mitas' sole negligence claim based upon the voluntary rescue doctrine.
- i. The trial court did not err in determining that Guardsmark owed no duty to Mr. Kay Mita under the voluntary rescue doctrine.
 - ii. The trial court did not err in recognizing that a plaintiff must face "present danger" or be in "imminent peril" in order for a duty to arise under the voluntary rescue doctrine.
 - iii. The trial court did not err by determining that the Mitas' failed to establish that Mr. Mita was facing "present danger" or "imminent peril" during his interaction with Guardsmark security officers.
 - iv. The trial court did not err in determining that Guardsmark could not incur liability under the Mitas' theory of "negligent omission" because it neither owed a duty to Mr. Mita nor increased the risk of harm to him.

- v. The trial court properly concluded that Guardsmark's actions did not increase the risk of harm to Mr. Mita.
- vi. The trial court did not err in ruling that Guardsmark could not incur liability for "withdrawing from its undertaking" because it recognized that Guardsmark's actions did not create a duty under the voluntary rescue doctrine.
- vii. The trial court properly concluded that Guardsmark was not liable for placing Mr. Mita "back into the peril in which he was rescued" because it recognized that Guardsmark's actions did not create a duty under the voluntary rescue doctrine.
- viii. The trial court did not err in determining that no genuine issues of material fact exist regarding whether Guardsmark's actions made Mr. Mita's situation worse.

III. STATEMENT OF THE CASE

Factual Background. The subject matter of this case involves the tragic death of Mr. Kay Mita. On November 26, 2007, Mr. Mita reported to the Spokane County Superior Courthouse for jury duty. CP 207. He was eighty-four years old at the time. *Id.*

As of the date he reported for jury duty, Mr. Mita was in overall good health and did not have any significant disabilities or impairments. CP 126, 254. In particular, he did not have hearing, speech or coordination difficulties and drove his car without restrictions on his license. *Id.* Mr. Mita was of Japanese descent, yet understood, spoke and communicated well in English. CP 207. He did not have a history of disorientation or confusion. CP 126, 255. In fact, he still managed his household finances and performed all of his household duties without assistance. CP 126. At all times prior to his death, Mr. Mita was able to communicate when in need of assistance or help. *Id.*

Mr. Mita was assigned to Spokane Superior Court Judge Salvatore Cozza's courtroom and participated in the morning session of jury selection. CP 816. At approximately 11:51 a.m., Mr. Mita, was excused for a two-hour lunch break along with all other potential jurors. *Id.* Jurors were instructed to return for the afternoon session at 2:00 p.m. CP 698,

816. However, Mr. Mita never returned and was subsequently excused from jury duty. CP 816.

The next known court personnel to have contact with Mr. Mita was Ms. Shannon Tritt, a judicial clerk to Judge Cozza. CP 817. Ms. Tritt saw Mr. Mita standing in the parking lot across the street from the courthouse as she was leaving work for the day at approximately 5:00 p.m. *Id.* She recognized him as the juror who had not returned to Judge Cozza's courtroom after the lunch break earlier in the day. *Id.*

Ms. Tritt got in her car and drove in Mr. Mita's direction. *Id.* She rolled down her window and asked Mr. Mita why he had not returned to the courtroom for jury selection that afternoon. *Id.* Mr. Mita told her that he could not find his car and that he had been looking for it since lunch. *Id.* At that point, Ms. Tritt offered to help Mr. Mita find his car, which he declined. *Id.* She then offered to make a cell phone call for him, which he also declined. *Id.*

Mr. Mita indicated that he needed no assistance. *Id.* However, Ms. Tritt suggested that Mr. Mita return to the courthouse and ask the security personnel for help. *Id.* Following this suggestion, Ms. Tritt observed Mr. Mita walk in the direction of the main courthouse entrance where security personnel were located. CP 818. During Ms. Tritt's interaction with Mr.

Mita, he appeared to be oriented and responded appropriately to her questions. *Id.*

Mr. Mita entered the courthouse through the south entrance and sat down on a bench next to a heater. CP 378. Guardsmark security officer Greg Jackson was on duty at the south entrance that evening. *Id.* Mr. Mita sat on the bench quietly and did not attempt to contact Mr. Jackson, or any other individual, for help. CP 378-79. At approximately 5:30 p.m., the building was cleared requiring all still inside, including Mr. Mita, to exit the courthouse. CP 379. Mr. Mita exited politely and did not indicate, in any manner, that he was in need of help. *Id.*

The Spokane County Superior Courthouse regularly closes at 5:30 p.m. every business day. CP 210. However, November 26, 2007 was a unique day wherein a Gonzaga School of Law class made arrangements to use a portion of the main courthouse from 6:00 p.m. to 9:00 p.m. to conduct a mock trial. CP 212. As a result, two Guardsmark security officers, Mr. Jackson and Brent Lewis, worked overtime to allow the law students to enter and exit the building. *Id.*

At approximately 7:00 p.m., Mr. Jackson and Mr. Lewis noticed Mr. Mita standing outside the south entrance doors. CP 433. It had begun to snow outside so the security officers discussed, and ultimately allowed, Mr. Mita to enter the courthouse to warm up for a short time near the

heater. CP 432. Mr. Lewis believed that Mr. Mita was homeless or transient. CP 434. He thought that Mr. Mita was out walking around looking for temporary shelter from the snowstorm. *Id.* Mr. Jackson simply thought that Mr. Mita was waiting for a ride. CP 461.

The security officers used hand gestures to direct Mr. Mita inside toward a bench near the heater. CP 440. Mr. Lewis attempted to have a conversation with Mr. Mita, however, a conversation was not possible because Mr. Mita was speaking in an unknown Asian language. CP 435, 438. Despite only speaking in a foreign language, Mr. Mita did appear to understand Mr. Lewis' directions and hand gestures. CP 441.

Throughout the time Mr. Mita remained inside the courthouse he never asked the security officers for help or requested them to call anyone for assistance. CP 437, 442. Mr. Mita did not look to be distressed, agitated, or confused. CP 442. Instead, Mr. Mita quietly sat next to the heater and followed all directions (verbal and hand gestures) given by Guardsmark security officers, without objection. CP 441.

At approximately 9:00 p.m., the mock trial had concluded and the security officers ushered all occupants out of the building, including Mr. Mita. CP 441-42. At that time, Mr. Mita did not appear to be in any type of medical danger. CP 471. In fact, he did not even appear to be cold. CP 441. Mr. Mita did not object or express concern about exiting the building,

nor did he ask or indicate, in any manner, that he was in need of further assistance. *Id.*

Mr. Mita was found the next morning. CP 15. Tragically, he passed away sometime during the night while sitting at the base of the courthouse's south entrance steps. *Id.* His cause of death was attributed to hypothermia. CP 475.

Procedural Background. The Mita family and the Estate of Kay Mita commenced a wrongful death and survival action against Guardsmark, LLC ("Guardsmark") and Spokane County on April 26, 2010 in the United States District Court for the Eastern District of Washington. CP 28-55. Ultimately, the case was removed and the Mitas filed their Complaint in Spokane County Superior Court on February 28, 2012. CP 1-26. The Mitas' Complaint set out three causes of action against Guardsmark: negligence under principles of premises liability, negligent hiring and supervision, and negligent rescue. CP 20-23. After discovery, Guardsmark moved for summary judgment to dismiss all of the Mitas' claims. CP 122-142. In response, the Mitas conceded their claims against Guardsmark for negligence under the principles of premises liability and negligent hiring and supervision. CP 335. The Mitas solely relied upon their negligent rescue claim in attempt to impose liability on Guardsmark. CP 335-358.

In Guardsmark's Motion for Summary Judgment, Guardsmark contended that it was not liable for Mr. Mita's death under the voluntary rescue doctrine because it did not owe a duty to Mr. Mita. CP 122-142, 527-536. Guardsmark established that it did not know of the particular dangers faced by Mr. Mita, that it did not take steps to rescue him from those dangers, nor did it make Mr. Mita's situation worse by allowing him to enter the courthouse for a period of time. *Id.*

The trial court ultimately agreed with Guardsmark and dismissed the Mitas' negligent rescue claim finding that not every "act of kindness constitutes a rescue." RP (October 15, 2012) at 45. The trial court reasoned that there was no affirmative act on behalf of Guardsmark that "created the harm and/or ma[de] the situation worse or induc[ed] reliance." *Id.* at 44. Furthermore, the trial court determined that Guardsmark was under no duty to rescue Mr. Mita because no evidence was presented establishing that Guardsmark knew that he was in imminent peril, danger, or even distress. *Id.* Instead, the evidence indicated that "he was simply cold." *Id.* The Mitas now appeal the trial court's dismissal of their sole remaining claim against Guardsmark under the voluntary rescue doctrine.

IV. LAW AND ARGUMENT

A. Standard of Review

Summary judgment is appropriately granted when the pleadings, affidavits, depositions, and admissions on file demonstrate that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56 (c); *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). When reviewing an order granting summary judgment, the appellate court sits in the same position as the trial court considering all evidence in the light most favorable to the nonmoving party. *Ganno v. Lanoga Corp.*, 119 Wn. App. 310, 315, 80 P.3d 180 (2003).

A motion for summary judgment that presents a question of law is reviewed de novo. *Id.*, see also *Osborn v. Mason County*, 157 Wn.2d 18, 22, 134 P.3d 197 (2006). The existence of a legal duty is a question of law and “depends on mixed considerations of logic, common sense, justice, policy, and precedent.” *Christensen v. Royal School Dist. No. 160*, 156 Wn.2d 62, 67, 124 P.3d 283 (2005) (internal citations omitted); see also *Osborn*, 157 Wn.2d at 23, 134 P.3d 197. “An appellate court may affirm a trial court’s disposition of a summary judgment motion on any basis supported by the record.” *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 491, 183 P.3d 283 (2008).

In this case, the trial court granted summary judgment in favor of Guardsmark on the basis that Guardsmark owed no duty to Mr. Mita under the voluntary rescue doctrine. Therefore, this case is subject to de novo review.

B. The Trial Court Properly Granted Summary Judgment in Favor of Guardsmark Because Guardsmark Owed No Duty to Mr. Mita Under the Voluntary Rescue Doctrine.

Absent affirmative conduct or a special relationship, no legal duty to come to the aid of a stranger exists under traditional tort law. *Folsom*, 135 Wn.2d at 674, 958 P.2d 301. However, there are exceptions to the rule, including an exception known as the “voluntary rescue doctrine.” *Id.* A person who undertakes to render aid to another, or to warn a person in danger, is required to exercise reasonable care in their efforts, even if their actions are gratuitous. *Id.* at 676 (citing *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 299, 545 P.2d 13 (1975)).

The Mitas appear to confound the elements required to impose liability under the voluntary rescue doctrine in their opening brief. However, the voluntary rescue doctrine is well-defined under Washington law. *See Folsom*, 135 Wn.2d 675-78, 958 P.2d 301; *Ganno*, 119 Wn. App. at 316-17, 80 P.3d 180; *Meneely v. S.R. Smith, Inc.*, 101 Wn. App. 845, 856, 5 P.3d 49 (2000); *Brown*, 86 Wn.2d at 299, 545 P.2d 13.

The Washington State Supreme Court set forth the doctrine, as applied in this state, in *Folsom v. Burger King*. Under the voluntary rescue doctrine, a “duty to rescue arises when a rescuer *knows* a danger is *present* and *takes steps* to aid an individual in need.” *Folsom*, 135 Wn.2d at 677, 958 P.2d 301 (emphasis added); *Ganno*, 119 Wn. App. at 316, 80 P.3d 180; *Meneely*, 101 Wn. App. at 858, 5 P.3d 49.

A person who attempts to voluntarily rescue another will be found to have a duty to exercise due care in performance of that undertaking if they make the plaintiff’s situation worse by (a) increasing the risk of harm, (b) misleading the plaintiff into believing the danger has been removed; or (c) depriving the plaintiff of the possibility of help from others. *Folsom*, 135 Wn.2d at 676, 958 P.2d 301 (1998); *see also* David K. DeWolf & Keller W. Allen, 16 Washington Practice, Tort Law and Practice § 1.20 (3d ed.). As the Division 2 Court of Appeals recognized in *Burnett v. Tacoma City Light*, “[t]he Supreme Court has declined to invoke the voluntary rescue doctrine where there was no affirmative act creating the harm, making the situation worse, or inducing reliance.” 124 Wn. App. 550, 564, 104 P.3d 677 (2004) (citing *Folsom*, 135 Wn.2d at 677, 958 P.2d 301).

In *Folsom v. Burger King*, the estate of two former fast food restaurant employees sought to impose liability on the defendant under the

voluntary rescue doctrine. 135 Wn.2d at 673-78. The defendant, a security company, had left a security alarm in place inside the restaurant where the employees worked. Because the security contract expired, the alarm was no longer monitored. *Id.* at 673-74. Thereafter, the employees were murdered during the course of a robbery at the restaurant. *Id.* During the robbery, one of the employees activated the defendant's security system. *Id.* at 674. Because the security system alarm remained, the defendant received a signal from the alarm and called the restaurant. *Id.* However, the telephone was disconnected. *Id.* The defendant then determined the account was closed and disregarded the signal. *Id.* The plaintiffs claimed that the defendant had a special relationship with the plaintiffs which created a duty to rescue or attempt to rescue them from dangers due to its failure to remove the security system. *Id.*

The defendant moved for summary judgment based upon the plaintiffs' failure to present facts showing the defendant owed a duty under the voluntary rescue doctrine. *Id.* at 673-78. In its opinion outlining the parameters of the voluntary rescue doctrine, the Supreme Court agreed with the defendant, finding that the defendant "did not undertake the duty to aid the employees by failing to remove the security system because the danger *was not imminent* and the threat of harm *was not present.*" *Id.* at 677 (emphasis added). The Court reasoned that the defendant neither

knew of the danger, nor did the defendants negligently withdraw from rescuing the employees once it learned of the danger, therefore, the voluntary rescue doctrine did not apply. *Id.*

Like the facts of *Folsom*, Guardsmark had no duty to rescue Mr. Mita from hypothermia (and ultimately death) because during the time of the security officers' interaction with him, they had no knowledge that his tragic death would occur. *Id.* at 677. The voluntary rescue doctrine only applies if the rescuer takes *affirmative steps* to aid an individual in need, *knowing* that a danger is present or that it is imminent. *Id.*; *Ganno*, 119 Wn. App. at 316, 80 P.3d 180; *Meneely*, 101 Wn. App. at 858, 5 P.3d 49. In this case, Guardsmark had no knowledge that Mr. Mita was in danger of dying from hypothermia. Furthermore, because it had no knowledge, Guardsmark could not have taken affirmative steps to rescue him from that danger.

The only knowledge that the security officers had regarding Mr. Mita's physical condition was that he appeared cold prior to the time they allowed him to come into the courthouse. However, looking cold is a common appearance of any individual standing in cold temperatures. One of the security officers believed that Mr. Mita was homeless or transient, needing only temporary shelter until he moved to another location. The other security officer believed that Mr. Mita was simply waiting for a ride.

Once inside the courthouse, it is undisputed that Mr. Mita never communicated, or attempted to communicate, that he was in need of help to the Guardsmark security officers. Mr. Mita never indicated nor displayed signs that he was in medical or emotional distress through words, actions, or body language. According to the testimony of the security officers, Mr. Mita spoke only in an Asian language which neither of them understood. Given the fact that Mr. Mita was of Asian descent, the security officers reasonably believed that Mr. Mita did not speak English.

Once allowed inside the courthouse, Mr. Mita sat quietly next to a heater and followed all directions (verbal and hand gestures) given by the Guardsmark security officers. Mr. Mita did not communicate with the security officers other than to smile at them. In other words, Mr. Mita made no communication and gave no indication that he was in danger or distress. Sadly, Mr. Mita, himself, likely did not know that he was in danger at the time. According to the undisputed testimony of the security officers, he no longer looked cold. Mr. Mita did not protest when directed out of the building nor did he make any indication that danger was looming. Instead, he quietly went on his way without a word or any objective manifestation of need. In other words, at no time during its encounter with Mr. Mita did Guardsmark know that Mr. Mita was in danger of dying due to hypothermia. Furthermore, Guardsmark security

officers did not reasonably know that Mr. Mita would later fail to seek additional shelter. *See Ganno*, 119 Wn. App. at 317, 80 P.3d 180 (finding that the defendant was not liable for danger created by plaintiff's own inaction).

Guardsmark did not know of the particular peril faced by Mr. Mita, therefore, it was not unreasonable that no affirmative steps were taken to protect him from the (unknown) danger. As noted above, the voluntary rescue doctrine only applies if the rescuer is aware of the present or imminent danger and takes affirmative steps to aid the endangered individual. Guardsmark neither knew that Mr. Mita faced the present or imminent danger of dying from hypothermia nor did it take affirmative steps to protect him from that specific peril. Due to the fact that Guardsmark did not know that the tragic event of Mr. Mita's death would take place, it did not owe a duty to him under the voluntary rescue doctrine.

i. The Trial Court Properly Concluded that Not All Acts of Kindness Implicate the Voluntary Rescue Doctrine.

As the trial court properly noted, not every act of kindness imposes a duty under the law. RP (October 15, 2012) at 45; *see French v. Chase*, 48 Wn.2d 825, 829-30, 297 P.2d 235 (1956). In other words, not every act of assistance is an attempted rescue. “[E]very person who gives aid to an

injured person is not necessarily engaged in a rescue...where a rescuer is not aware [sic] of imminent peril to the injured person, and merely goes to his aid, the fact that such imminent peril exists does not bring the rescuer within the doctrine.” *Id.* The duty to use reasonable care in effectuating a rescue is triggered only in situations where the potential danger is known and affirmative actions are taken to protect against it. Without such a requirement, the imposition of liability under the voluntary rescue doctrine would essentially be the “imposition of liability without fault.” *See Meneely*, 101 Wn. App. 845, 860, 5 P.3d 49.

By way of example, last year a New York City police officer gained national attention when he purchased a pair of boots for a barefoot homeless man sitting in Times Square. *Photo of Officer Giving Boots to Barefoot Man Warms Hearts Online*, NEW YORK TIMES (Nov. 28, 2012) http://www.nytimes.com/2012/11/29/nyregion/photo-of-officer-giving-boots-to-barefoot-man-warms-hearts-online.html?_r=0. The police officer purchased the boots because of the freezing temperatures outside. *Id.* Hypothetically, if later that evening the homeless man failed to seek shelter and died from hypothermia, under the Mitas’ argument the police officer would be liable for the homeless man’s death because of the simple act of kindness in attempting to keep the man warm. To impose liability in

such a situation would create nearly unlimited liability for virtually any innocent Good Samaritan.

The factual circumstances in this case are akin to the above example. Allowing a cold man to come inside to warm during inclement weather does not impose a duty under the voluntary rescue doctrine. To hold otherwise would subject all persons or business owners who allow members of the general public to enter their homes or establishments during harsh conditions to strict liability for subsequent injuries suffered by a person who is later exposed to the weather. Imposing such a legal duty would deter individuals from doing good deeds and other acts of kindness.

Simply because Guardsmark allowed a man to come inside the courthouse to warm himself does not create a legal duty to protect him from the unknown threat of death from hypothermia due to his failure to seek alternative shelter. In other words, the voluntary rescue doctrine is not applicable to this case because no rescue was underway. The trial court properly concluded that:

The aid did not increase the danger and for that matter in the Court's judgment it may be a stretch to say that offering this simple act of kindness could be considered a rescue any more so than anyone while doing so created a duty of anything other than reasonable care while he was inside the

building. It makes no sense to the Court that Guardsmark wouldn't be here today if they simply denied a cold man access to a heater in a locked building but are urged to have assumed a continuing duty under the [voluntary] rescue doctrine and consequent liability for allowing a cold man to come inside and warm up during inclement weather. To hold otherwise in my judgment would create nearly unlimited liability for virtually any innocent Samaritan.

RP (October 15, 2013) at 44-45.

ii. In Order for a Duty to Arise Under the Voluntary Rescue Doctrine, the Party Asserting the Claim Must Show that the Danger Was Present or that it Was Imminent.

The Mitas go to great lengths in their Opening Brief to distinguish the rescue doctrine from the voluntary rescue doctrine in an attempt to explain why the “imminent peril” standard does not apply to the facts of this case. However, this distinction is made without a difference and is based upon a misunderstanding of Washington law.

In this case, the trial court properly determined that summary judgment was appropriate as Guardsmark incurred no duty to rescue Mr. Mita because no danger was present or otherwise imminent during the security officers' interaction with him. The trial court did not indicate what case law it was relying upon to make this determination. However, the Mitas take issue with the trial court's alleged reliance on *French v.*

Chase, 48 Wn.2d 825, 297 P.3d 235 in determining that the voluntary rescue doctrine only applies if the peril, or reasonable appearance thereof, is imminent.

The Mitas' argument is premised on the fact that *French* involves an action brought by a rescuer for injuries sustained in the course of a rescue; opposed to an action brought by a rescuee for injuries sustained as a result of the rescuer's negligent actions during the course of a rescue. However, the Supreme Court's decision in *French* addressed both situations where a rescuer is injured in effecting a rescue and also a rescuer's duty to exercise reasonable care in carrying out a rescue. *French*, 48 Wn.2d 825, 829-30, 297 P.2d 235. In both scenarios, the Court recognized that a "rescue," as defined under the law, is triggered by a "dangerous situation which imminently imperils the life or limb of another." *Id.* at 829. Whether the imposition of liability is for a rescuer injured in the course of a rescue or for a rescuer who negligently performs the rescue, the triggering event which may then give rise to a subsequent duty is the same under the law.

Despite the plain meaning of *French*, the Mitas claim that in cases involving the voluntary rescue doctrine, "a plaintiff need only show, at most, that the individual needed help." Appellants' Opening Brief, at 39 (citing *Folsom*, 135 Wn.2d at 675-76). Such an articulation greatly

understates the requirements of the voluntary rescue doctrine and would lead to the imposition of nearly endless liability. Importantly, it is contradicted by the plain language of *Folsom*.

In *Folsom*, the Court explained that the “duty to rescue [under the voluntary rescue doctrine] arises when a rescuer knows *a danger is present* and takes steps to aid an individual in need.” 135 Wn.2d at 677, 958 P.2d 301 (emphasis added). The Court recognized the importance of *French* by parenthetically noting that the “[voluntary] rescue doctrine applies when the peril, or reasonable appearance of peril, is imminent.” *Id.* The Mitas erroneously claim that the existence of “imminent peril” is not required under the voluntary rescue doctrine, however, they ignore the plain language and meaning of *Folsom*. Under *Folsom*, the Court made clear that a known danger must be present or peril must be imminent in order for a duty to arise. *Id.* at 677, 958 P.2d 301. The Mitas’ argument to the contrary is nothing more than a play on semantics.

Alternatively, the Mitas claim that if the imminent peril does in fact apply, the Court erred by taking the issue from the jury. Interestingly, the Mitas cite *French* to support this position, but erroneously cite the portion of the opinion which specifically sets forth the four elements required to establish liability under the “rescue doctrine” (where a rescuer

is injured during the course of a rescue).¹ See *French*, 48 Wn.2d at 830, 297 P.2d 235. The elements required to establish liability under the “rescue doctrine” do not apply to this case. Instead, this Court should look to *Folsom* for guidance and apply the necessary elements to establish a duty under the “voluntary rescue doctrine.”

As outlined above, Guardsmark owed no duty to Mr. Mita because the danger of him dying from hypothermia was not imminent nor was the threat of his death present at the time the security officers interacted with him. Mr. Mita did not indicate by words or conduct that his was in imminent peril, danger or even distress. The trial court appropriately granted summary judgment in favor of Guardsmark finding that no duty existed as a matter of law.

¹ The Court stated: “On the basis of these cases, we hold that, in this jurisdiction, *the rescue doctrine, as it is applied to situations of this kind, includes the following elements:*

- (1) There must be negligence on the part of the defendant which is the proximate cause of peril, or what would appear to a reasonable person, under the circumstances, to be peril, to the life or limb of another.
 - (2) The peril, or reasonable appearance of peril, to the life or limb of another must be imminent.
 - (3) In determining whether the peril, or appearance of peril, is imminent, in the sense that an emergency exists requiring immediate action, the circumstances presented to the rescuer must be such that a reasonably prudent man, under the same or similar circumstances, would determine that such peril existed. (The issue of whether the rescuer’s determination conformed with the reasonably prudent man standard is a question for the jury, under proper instructions.)
 - (4) After determining that imminent peril to the life or limb of a person exists, the rescuer, in effecting the rescue, must be guided by the standard of reasonable care under the circumstances. (Whether there has been conformance with this standard also is a question for the jury, under proper instructions.)
- (emphasis added).

iii. *The Trial Court Properly Concluded that the Mitas Failed to Show that a Duty Existed Under the Voluntary Rescue Doctrine Because Guardsmark Did Not Make Mr. Mita's Situation Worse.*

In this case, Guardsmark neither owed a duty to Mr. Mita under the voluntary rescue doctrine nor did the security officers' actions make Mr. Mita's situation worse. However, the Mitas assert that Guardsmark need not have made Mr. Mita's situation worse in order to impose liability under the voluntary rescue doctrine. Again, this argument is based upon a misreading of both the Supreme Court's decision in *Folsom* and subsequent case law.

In *Folsom*, the Court succinctly stated that liability for attempting to voluntarily rescue an endangered person may be imposed when the defendant "makes the plaintiff's situation worse by: 1) increasing the danger; 2) misleading the plaintiff into believing the danger has been removed; or 3) depriving the plaintiff of the possibility of help from other sources." 135 Wn.2d at 676, 958 P.2d 301 (emphasis added); *see also Ganno*, 119 Wn. App. at 316, 80 P.3d 180. Making an endangered person's situation worse is therefore a prerequisite to the imposition of liability under the voluntary rescue doctrine. Using the standard set out in *Folsom*, the trial court properly concluded that Guardsmark did not make

Mr. Mita's situation worse by increasing the harm to Mr. Mita, inducing his reliance based upon an implied or explicit assurance, or depriving him of the ability to seek aid elsewhere.

Furthermore, the Mitas claim that under the voluntary rescue doctrine a rescuer can breach his duty by omission or affirmative act. This assertion is unsupportable as the voluntary rescue doctrine requires a rescuer to 1) know a danger is present; and 2) "take steps to aid" the individual in need. *Folsom*, 135 Wn.2d at 677, 958 P.2d 301. "Taking steps to aid," of course, involves affirmative action.

In support of their proposition that the duty can be breached by affirmative act or omission, the Mitas cite *Herskovits v. Group Health Coop.*, 99 Wn.2d 609, 664 P.2d 474 (1983). However, the Mitas fail to acknowledge that *Herskovits* was decided over a decade before the Supreme Court's decision in *Folsom*. Furthermore, it is wholly distinguishable because it dealt with a physician's failure to timely diagnose an illness rather than the voluntary rescue doctrine.

The Mitas also cite *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 545 P.2d 13 to support their argument that the voluntary rescue doctrine does not depend upon whether the breach was achieved by "act" or "omission." However, *Brown* dealt with a situation where the defendant made an affirmative promise to warn the plaintiff of an imminent danger

but failed to actually perform the promised warning. In such a situation, a duty to act under the voluntary rescue doctrine is “imposed by reliance on a gratuitous promise.” *Brown*, 86 Wn.2d at 301, 545 P.2d 13. The Mitas’ dependence on *Brown* to support their claim that the voluntary rescue doctrine can be applied in this case as a result of Guardsmark’s alleged omissions is in error because this case does not involve the failure to warn. In this case, the Mitas’ claims are based upon Guardsmark’s alleged negligence in carrying out an attempted rescue of Mr. Mita.²

Notably, the imposition of liability under the voluntary rescue doctrine for negligent omission is contrary to well-established tort law. Such an imposition of liability would create strict liability for anyone who comes into contact with a person in need yet fails to render assistance. Under traditional tort law, no legal duty to come to the aid of a stranger exists. *Folsom*, 135 Wn.2d at 674, 58 P.2d 301. Therefore, one cannot be liable for failing to act when they are solely confronted with an endangered person. In order for a duty to arise under the voluntary rescue doctrine, one must first recognize that an individual is in danger. If such a

² Even if the Mitas’ claim was based upon Guardsmark’s failure to make good on a gratuitous promise to come to Mr. Mita’s aid, such a claim would fail because no evidence has been presented showing that Mr. Mita reasonably relied on such a promise. In *Osborn v. Mason County*, the Supreme Court stated, “A duty exists under the rescue doctrine only if an injured party reasonably relied on the assurances of the negligent rescuer...reliance is the linchpin of the rescue doctrine.” 157 Wn.2d 18, 23-25, 134 P.3d 197. No evidence exists establishing that Guardsmark wither made a promise to Mr. Mita or that he reasonably relied upon such a promise.

danger is recognized, the individual must then take affirmative action to help the endangered individual. Only after those two prerequisites are met can the rescuer become “liable for attempting a voluntary rescue and making the plaintiff’s situation worse.” *Ganno*, 119 Wn. App. at 316, 80 P.3d 180.

iv. Guardsmark Did Not Increase the Risk of Harm to Mr. Mita.

The Mitas assert that the court also erred in determining that Guardsmark did not increase the risk of harm to Mr. Mita. This assignment of error is made despite the fact that the trial court made its decision based upon the finding that Gaurdmark owed no duty to Mr. Mita under the voluntary rescue doctrine because it neither knew of the danger faced by him nor came to his aid to protect him from that danger. To support this argument, the Mitas again cite *Herskovits*, 99 Wn.2d 609, 664 P.2d 474 even though the case is inapplicable to the facts here.

It is important to note that the determination of whether a rescuer’s actions made the rescuee’s situation worse by increasing the danger is only appropriate if it has been established that the rescuer knows of the danger and affirmatively takes steps to protect the individual from that particular harm. The Mitas have failed to establish the first two

prerequisites; therefore, no determination regarding the risk of harm is necessary.

Moreover, the actions taken by the Guardsmark security officers did not increase any danger to Mr. Mita. The security officers' only action in relation to Mr. Mita was to allow him to enter the courthouse for a short period of time so he could get warm while the building remained in use. In no way did Guardsmark's actions increase the risk that Mr. Mita would later fail to seek alternative shelter or to return home, which ultimately led to his death.

The Mitas argue that Guardsmark also increased the danger to Mr. Mita by terminating or withdrawing from the rescue prematurely. The Mitas' dedicate a section of their opening brief to this argument relying upon sections of the Restatement (Second) of Torts that have not been adopted in Washington. As did the plaintiffs in *Folsom*, the Mitas appear to be weaving multiple "theories of tort law together in an effort to impose potential liability" on Guardsmark. 135 Wn.2d at 674, 958 P.2d 301. Rather than relying upon legal theory that has not been adopted in this State, this Court should turn to well-developed case law by Washington courts regarding the voluntary rescue doctrine and apply it to this case.

Guardsmark asserts, again, that no rescue was underway and therefore no duty existed under the voluntary rescue doctrine. Guardsmark

did not increase the danger by terminating or withdrawing from the rescue because no rescue had been attempted. As the trial court appropriately noted, the peril or risk of hypothermia was no greater to Mr. Mita when he was allowed into the building than when he was ushered out at 9:00 p.m. Guardsmarks' simple act of opening the door so that Mr. Mita could warm did not increase any danger to him of suffering from hypothermia.

Lastly, the Mitas argue that Guardsmark is liable for making Mr. Mita's situation worse by depriving him of the possibility of help from other sources. This argument is also without merit. Guardsmark employees did not interfere in any manner with any attempt by Mr. Mita to seek help from any individual the night of the encounter. Sadly, Mr. Mita did not seek help from anyone or indicate he was in need of assistance.

Furthermore, Mr. Mita was in no way confined to the courthouse and was free to leave at any time. Guardsmark did not segregate Mr. Mita from the public; Mr. Mita chose to stay inside the courthouse during the time period he was allowed. Simply because Mr. Mita failed to seek help from alternative sources does not make Guardsmark liable under the voluntary rescue doctrine. Guardsmark cannot be made liable for Mr. Mita's own misjudgments or inaction, especially when he displayed no signs of further need. *See Ganno*, 119 Wn. App. at 317, 80 P.3d 180.

V. CONCLUSION

For the reasons stated above, this Court should affirm the trial courts grant of summary judgment.

DATED this 15th day of November, 2013.

ETTER, McMAHON, LAMBERSON,
CLARY & ORESKOVICH, P.C.



William F. Etter, WSBA 9158
Courtney A. Garcea, WSBA 41743

CERTIFICATE OF SERVICE

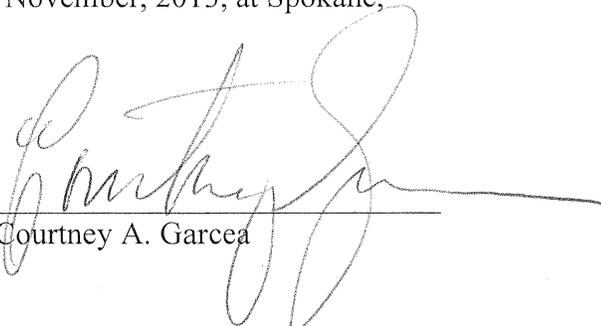
I hereby certify that on the 15th day of November, 2013, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Richard C. Eymann _____ Personal Service
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Dated this 15th day of November, 2013, at Spokane,
Washington.



Courtney A. Garcea