

FILED
Court of Appeals
Division III
State of Washington
7/16/2019 8:00 AM

NO. 365727

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

Deborah Phifer, Personal Representative of the estate of Mr. Phifer,

Appellant/Plaintiff,

v.

State of Washington Department of Labor and Industries,

Respondent/Defendant.

APPELLANT'S REPLY BRIEF

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**I. THE COMMON LAW DOES IMPOSE ON DEFENDANT A
STANDARD OF CARE**

The common law imposes on everyone the standard of care to act as a reasonable person under the same or similar circumstances. WPI 10.02; *Mathis v. Ammons*, 84 Wn.App. 411, 415–16, 928 P.2d 431 (1996); *Baughn v. Malone*, 33 Wn.App. 592, 597, 656 P.2d 1118 (1983). This standard of care applies to governmental entities. *Harvey v. Snohomish County*, 157 Wn.2d 33, 39–42, 134 P.3d 216 (2006). In the case at bar, the Department, through its employees had the duty to act as a reasonable person/entity under the same or similar circumstances. In this case this means that the defendants should have listened to the plaintiff and act accordingly. Mr. Phifer specifically told Ms. Alvarado that he did not want her to call the authorities. Mr. Phifer specifically told Ms. Alvarado that he was going to follow up with his own healthcare provider. Despite these requests by Mr. Phifer, Ms. Alvarado failed to listen to Mr. Phifer and called the authorities insisting that he was suicidal. Ms. Alvarado own notes from the date of the incident, do not document any indications that Mr. Phifer said that he was going to hurt himself or commit suicide. A

reasonable person in the same circumstance as the Ms. Alvarado would have listened to Mr. Phifer and would have acknowledged his communication that he did not need the authorities to be called on him and would have just ended the conversation after resolving Mr. Phifer's concern of not receiving the workers compensation benefits that he was entitled to.

An additional aspect of this case that establishes a duty of care under common law, is the fact that Ms. Alvarado made an implied assurance to Mr. Phifer that the authorities would not be called. Our common law recognizes a claim for negligence in the context of a 911 call when a dispatcher makes assurances to a victim that the victim relies on to their detriment. For this standard of care to be created between a plaintiff and a governmental entity, the plaintiff has to establish that:

“(1) direct contact or privity between the public official and the plaintiff that sets the plaintiff apart from the general public, (2) an express assurance given by the public official, and (3) justifiable reliance on the assurance by the plaintiff. *Munich v. Skagit Emergency Commc'n Ctr.*, 175 Wn.2d 871, 879, 288 P.3d 328, 332 (2012).

This is analogous to what happened in this case. There was direct contact between Mr. Hitchcock and Ms. Alvarado. Ms. Alvarado asked Mr. Phifer whether he wanted her to call the authorities to come see him—which implies that assurance that she would only do it if he requested it. Mr.

Phifer indicated that he did not want her to call the authorities and that he would be following up with his health care provider. This creates an implied assurance that Ms. Alvarado was not going to call the authorities to come see Mr. Phifer. Ms. Alvarado further assured Mr. Phifer that he would be getting conditional benefits for his workers compensation claim. Mr. Phifer relied on these assurances and was happy that everything was going to be fine. This assurance was breached when Ms. Alvarado still proceeded to call the police and accused Mr. Phifer of being suicidal despite the fact that he indicated that he did not need the police to be called.

The Department also attempts to argue that the Industrial Insurance Act is the sole remedy for Mr. Phifer, this is a misguided argument.

“[A]n injury that is of a different nature, arises at a different time, and stems from different causes than a workplace injury is not barred by the IIA, even though it may result from actions by an employer that injure an employee.”
Birklid v. Boeing Co., 127 Wn.2d 853, 870, 904 P.2d 278, 288 (1995) (Citing *Reese v. Sears, Roebuck & Co.*, 107 Wash.2d 563, 731 P.2d 497 (1987)).

II. THE DEPARTMENT'S DUTY OF CARE IS IMPOSED BY STATUTE AND THE DEPARTMENT'S INTERNAL MEMORANDA

The Department's duty of care is also imposed by statute and the Department's internal memoranda. The Department's policy to call the police on an injured worker only applies when an injured worker actually threatens to commit suicide. Mr. Phifer did not threaten to commit suicide, therefore this policy did not apply. The fact that Ms. Alvarado still proceeded to call the police and accuse Mr. Phifer of being suicidal is evidence of the Department's negligence pursuant to RCW 5.40.050.

The Department's standard of care is also imposed by statute pursuant to Suicide-safer homes task force. RCW 43.70.445. The Department had a duty to LEARN: Look for signs, Empathize and Listen, Ask directly about suicide, Remove the Danger and Next steps. <https://depts.washington.edu/saferwa/resources/learn/>. These steps are just an expression of the what a reasonable person would do in the same or similar circumstances, which brings us full circle. An ordinary person would not have called the police and accused an injured worker of being suicidal if he did not threaten to commit suicide.

**III. THE DEPARTMENT IGNORES THE FACT THAT MR.
HITCHCOCK IS AN EGGSHELL PLAINTIFF IN ARGUING LACK
OF PROXIMATE CAUSE**

In arguing that Mr. Phifer cannot establish proximate cause, the department completely ignores the eggshell plaintiff concept. When there is evidence in the record that the plaintiff is an “eggshell plaintiff” the jury instruction on proximate cause WPI 30.18.01 becomes necessary.

Buchalski v. Universal Marine Corp., 393 F.Supp. 246, 248 (W.D.Wash. 1975). For an ordinary person, having the police called and being booked into jail would simply be an inconvenience and scary experience. For Mr. Phifer, however, being booked into jail re-triggered his PTSD symptoms from being unjustly arrested and taken to jail and beaten until he was unconscious.

Furthermore, but for Ms. Alvarado 's phone call to the police accusing Mr. Phifer of being suicidal, the police would not have had to detained and booked Mr. Phifer into jail. Ms. Alvarado 's phone call to the police accusing Mr. Phifer of being suicidal and having access to knives is a direct, logical, and foreseeable cause of Mr. Phifer being detained by the police.

If you Ms. Alvarado would have followed the department policy of also calling the injured workers physician, Dr. Lefors' would have been able to intervene and prevent Mr. Phifer from being detained in jail. When viewing the evidence in the light most favorable to Mr. Phifer, Mr. Phifer has established sufficient evidence to survive summary judgment on the issue of proximate cause.

IV. Conclusion

Mr. Phifer hereby requests that the Court reverse the trial court's decision and remand this matter for trial. Appellant is also asking the Court to award costs.

Respectfully submitted this 15th day of July, 2019.

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CERTIFICATE OF SERVICE

The undersigned makes the following declaration certified to be true under penalty of perjury pursuant to RCW 9A.72.085:

On the date given below, I hereby certify that the attached document hereto was served on the following in the manner indicated:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct

Executed this 15th day of July, 2019, at Yakima, Washington.

/S/ Favian Valencia
Favian Valencia

SUNLIGHT LAW, PLLC

July 15, 2019 - 5:00 PM

Transmittal Information

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