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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

332047-III
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

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.

BRIEF OF RESPONDENT
FRANKLIN COUNTY

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TABLE OF CONTENTS

I. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS..... 1

II. STATEMENT OF FACTS..... 1

A. Background 1

B. Procedural History..... 3

**C. Franklin County’s Motion for Summary
 Judgment Based on Collateral Estoppel..... 4**

III. ARGUMENT OF LAW 4

**A. Division I Conducted a Thorough
 Analysis of the 911 Operator’s Duties and
 Concluded that Plaintiffs’ Claims are
 Barred Under the Public Duty Doctrine..... 4**

**B. Division I Concluded Restatement Section
 302B Did Not Apply as the 911 Operator
 Made No Affirmative Act..... 7**

IV. CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Babcock v. Mason County, 101 Wn. App. 677, 5 P.3d 750 (2000), 144
Wn.2d 774, 30 P.3d 1261 (2001)..... 6

Beal v. City of Seattle, 134 Wn.2d 769, 9544 P.2d 237 (1998)..... 5

Chambers-Castanes v. King County, 100 Wn..2d 275, 669 P.2d 451
(1983)..... 5

Johnson v. State, 164 Wn. App. 740, 752, 265 P.3d 199 (2011), 178
Wn.2d 1027, 273 P.3d 982 (2012). 6

Parrilla v. King County, CP 190. 138 Wn. App. 427, 157 P.3d 879
(2007)..... 8

Robb v. City of Seattle, 176 Wn.2d 427, 295 P.3d 212 (2013)..... 8

OTHER AUTHORITIES

Restatement Section 302B 1, 3, 4, 7, 8, 9, 10

I. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

Where Division I concluded that the Franklin County 911 operator's actions of taking a call and collecting information do not amount to an assumption of the duty to aid thus barring Plaintiffs' claim under the Public Duty Doctrine, are Plaintiffs collaterally estopped from litigating this issue again?

Where Division I concluded that Restatement Section 302 does not apply because the Franklin County 911 Operator engaged in no affirmative act that created a recognizable and unreasonable risk of harm, are Plaintiffs collaterally estopped from litigating this issue again?

II. STATEMENT OF FACTS

A. Background

On June 22, 2008, Tiairra Garcia drove to a tavern in Pasco, Washington with Ashone Hollinquest and Marnicus Lockhard.¹ When the parties arrived, while still in the car, Hollinquest reached over to give Lockhard his handgun.² As the weapon was being exchanged, it discharged striking Garcia.³ Lockhard took control of the vehicle and drove to an acquaintance's house, striking many vehicles en route.⁴ While en route, several witnesses observed the vehicle striking several parked

¹ CP 175-181.

² *Id.*

³ *Id.*

⁴ *Id.*

cars.⁵ The witnesses phoned 911 to report their observations.⁶ Upon arriving at the destination residence, Lockhard parked the vehicle in the yard and both he and Hollinquest carried Garcia's body into the residence.⁷ Garcia died from her injuries.

One neighbor in particular called 911 and reported smoke coming out of the vehicle, a body being pulled out of the vehicle, a domestic fight at the residence the night before, and said the police had arrived.⁸ Specifically, neighbor John Gorton stated "they pulled somebody out of a van in the back of the house and dr[a]gged them to the back of the house."⁹ There was no indication by the 911 operator that she heard or acknowledged this statement. Instead, Mr. Gorton went on to say that the "police are here now."¹⁰

As a result of Garcia's death, Plaintiffs sued several parties, including Franklin County and the City of Pasco. Plaintiffs claimed that Franklin County was negligent in not relaying the 911 emergency call to the responding police officers, and that the City of Pasco was negligent in not relaying the information to the responding police officers. The facts and circumstances against the City of Pasco **are identical to those against**

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ CP. 186.

⁹ CP. 187

¹⁰ *Id.*

Franklin County. Similarly, the claims against the City of Pasco were indistinguishable to those against Franklin County.

B. Procedural History

The City of Pasco moved for summary judgment based upon the Public Duty Doctrine. The City of Pasco argued that the 911 dispatcher made no express assurances or promises of a specific police response. The Trial Court agreed and on or about December 10, 2010, the Trial Court granted the City of Pasco's motion dismissing all claims against it. Plaintiffs subsequently appealed the City of Pasco's dismissal to the Court of Appeals, Division I, Cause No. 70395-1-I. The appeal was filed on or about February 2, 2011. On appeal, Plaintiffs raised a claim for the first time that the 911 operator's actions qualified as an affirmative act under Restatement Section 302 and thus raised a duty to act. The Court of Appeals affirmed the Trial Court's ruling on March 24, 2014. In its opinion, Division I provided an analysis of the 911 operator's actions under both the Public Duty Doctrine and Restatement Section 302. Plaintiffs then sought review of the Court of Appeal's decision. The Supreme Court of Washington denied review and an Order to that effect was filed on October 8, 2014. The Court of Appeals issued its Mandate on October 29, 2014.

C. **Franklin County's Motion for Summary Judgment Based on Collateral Estoppel**

On January 29, 2015, Franklin County brought a motion for summary judgment based on collateral estoppel. Franklin County argued that the Division I's ruling collaterally estopped Plaintiffs' claims against it as the ruling thoroughly litigated the issue of the 911 operator's actions and duties under both the Public Duty Doctrine and Restatement Section 302. The trial court agreed and granted Franklin County's motion. Plaintiffs subsequently appealed.

III. ARGUMENT OF LAW

A. **Division I Conducted a Thorough Analysis of the 911 Operator's Duties and Concluded that Plaintiffs' Claims are Barred Under the Public Duty Doctrine.**

Franklin County's involvement in this case is limited to its receipt of 911 calls including one from John Gorton. Plaintiffs attempt to argue that Division I made only a cursory remark about the 911 operator's actions. Contrary to Plaintiffs' assertions, however, Division I conducted a thorough analysis of the 911 operator's duties under Washington case law. Notably, Division I's analysis was in response to Plaintiffs' argument that the 911 operator made an implicit promise to convey Gorton's statement to the police.¹¹ In other words, Plaintiffs themselves raised the issue of the 911 operator's actions and Division I, in response, thoroughly analyzed the issue.

¹¹ CP 187.

Division I first noted that under the Public Duty Doctrine, a government actor is not liable for injuries caused by his or her negligent conduct unless one of four exceptions apply, including the rescue exception.¹² In this matter, Division I analyzed whether the 911 operator had given an express assurance that help would be provided, thus triggering the rescue exception.¹³ Division I analyzed the issue of express assurance in context of *Beal v. City of Seattle*¹⁴ and *Chambers-Castanes v. King County*¹⁵. In *Beal* and *Chambers-Castanes*, the 911 operator specifically stated they would send the police but failed to dispatch the police.¹⁶

Division I then contrasted the Garcia matter by stating, “No express assurance was made in the present case.”¹⁷ Division I inserted the entire transcript of the brief call between John Gorton and the 911 operator in the Garcia matter.¹⁸ The Court noted that the operator repeatedly said, “okay” but made no statements about police response.¹⁹ Following this review, the Court then went on to state: “No affirmative promise was

¹² CP 185.

¹³ CP 186.

¹⁴ 134 Wn.2d 769, 786, 788, 954 P.2d 237 (1998).

¹⁵ 100 Wn.2d 275, 279-81, 669 P.2d 451 (1983).

¹⁶ *Id.* CP 186.

¹⁷ *Id.* *Emphasis added.*

¹⁸ CP 186-187.

¹⁹ CP 187.

made. This does not amount to an assumption of the duty to aid or warn Tiarra.”²⁰

Division I then went on to note that **Plaintiffs argued** that the 911 operator made an implicit promise to convey Gorton’s statement.²¹ Division I noted that there is no authority for Plaintiffs’ assertion and that Washington case law does not support it.²² The Court then thoroughly analyzed the issue under *Babcock v. Mason County*²³ and *Johnson v. State*.²⁴ The Court began its analysis by stating that, “Even if the 911 operator promised to relay Gorton’s statement to the police, that would have been within the scope of her duty to the general public – not a gratuitous promise.”²⁵ The Court stated that to trigger the rescue exception to the Public Duty Doctrine, the assumption of the duty to aid must be gratuitous as noted in *Babcock*.²⁶ The Court then analyzed 911’s duties under *Johnson* where the court found that the 911 operator did not make a gratuitous offer to render aid, because their actions were “made as part of its duty to all citizens.”²⁷ The Court then equated the 911 operator’s actions in Garcia to those in the *Johnson* case. Specifically, Division I stated:

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ 101 Wn. App. 677, 685, 5 P.3d 750 (2000), *aff’d on other grounds*, 144 Wn.2d 774, 30 P.3d 1261 (2001).

²⁴ 164 Wn. App. 740, 752, 265 P.3d 199 (2011), *review denied*, 178 Wn.2d 1027, 273 P.3d 982 (2012).

²⁵ CP 187.

²⁶ CP 188.

²⁷ *Id.*

“Here the 911 operator did nothing more than her duty to all citizens: responding to and relaying calls. This was not a gratuitous promise to an individual necessary to trigger the rescue exception.”²⁸

Division I went on to note that the trial court properly dismissed Plaintiffs’ claims on the basis of the Public Duty Doctrine.

As a result of Plaintiffs’ arguments, Division I conducted a very thorough analysis of the 911 operator’s actions. Division I’s conclusion that the 911 operator’s actions do not trigger the rescue exception of the public duty doctrine collaterally estop Plaintiffs from litigating this issue a second time.

B. Division I Concluded Restatement Section 302B Did Not Apply as the 911 Operator Made No Affirmative Act

Plaintiffs continue to argue that the 911 operator’s actions constituted an affirmative act.²⁹ This was the precise argument rejected in the Court of Appeals’ decision. Division I stated:

*“Here, there was no affirmative act... The 911 operator did not indicate that the police would take any particular action and did not acknowledge Gorton’s statement about a body, other than to respond, “Okay”.”*³⁰

Division I already noted that the action of gathering information does not amount to the duty to aid. As there was no affirmative act, Restatement Section 302B does not apply.

²⁸ *Id.*

²⁹ Appellant’s Brief, pg. 15.

³⁰ *Id.* *Emphasis added.*

Division I thoroughly analyzed a government actor's duties under Restatement Section 302B, as well as what constitutes an affirmative act under *Robb v. City of Seattle*.³¹ Division I noted that Section 302B and *Robb* "imposes a limited duty to protect third parties where an actor's own affirmative act creates a recognizable and unreasonable risk of harm".³² Division I continued in distinguishing an omission or nonfeasance as a passive inaction and specifically stated that an omission is not an affirmative act.³³ This, Division I noted, was precisely the issue in *Robb* where an officer's failure to pick up gun shells (thereby preventing a later shooting) was an omission, not an affirmative act.³⁴ The court in *Robb* found that the officer's failure to act did not create a duty under Sec. 302B.³⁵

Division I went on to contrast an actual affirmative act in *Parrilla v. King County*.³⁶ In *Parrilla*, Division I noted, a bus driver committed an affirmative act by exiting a bus with the engine running while there was an erratic passenger inside the bus who then took control of the bus and crashed into a car.³⁷ The bus driver's affirmative act of leaving the bus

³¹ CP 189, 176 Wn.2d 427, 433-44, 295 P.3d 212 (2013).

³² *Id.*

³³ CP 190.

³⁴ *Id.*

³⁵ *Id.*

³⁶ CP 190. 138 Wn. App. 427, 440-41, 157 P.3d 879 (2007).

³⁷ *Id.*

with the engine still running gave rise to a duty of care to the occupants of the car under Section 302B.³⁸

Division I unequivocally stated that in the Garcia matter, “Here there was no affirmative act.”³⁹ Division I first analyzed the 911 operator’s actions. Division I noted that the 911 operator never stated that the police would take any particular action.⁴⁰ Division I stated that, in fact, “the 911 operator did not acknowledge Gorton’s statement about a body, other than to respond, ‘Okay’.”⁴¹ Division I concluded, “This does not constitute an affirmative indication that the police would investigate Gorton’s statement.”⁴²

As Division I already analyzed the issue of the 911 operator’s duties under Restatement Section 302B and concluded that the 911 operator made no affirmative act, Garcia is collaterally estopped from litigating this issue again.

IV. CONCLUSION

Franklin County’s involvement in this case is limited to the actions of the 911 operator. Division I analyzed the 911 operator’s actions under both the Public Duty Doctrine and Restatement Section 302B. Division I specifically determined that the 911 operator engaged in no express assurance nor any affirmative act giving rise to a duty under either. Thus,

³⁸ *Id.*

³⁹ CP 191.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

Division I affirmed that Plaintiff's claims are barred under the Public Duty Doctrine and further affirmed that Restatement Section 302 B does not apply. The trial court in this matter properly found that Plaintiffs are collaterally estopped from litigating these same issues against Franklin County. This reviewing court should affirm the trial court.

DATED and respectfully submitted this 28th day of September, 2015.



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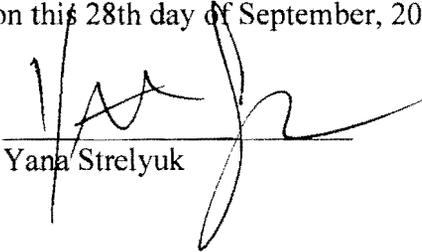
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DECLARATION OF SERVICE

The undersigned certifies that under penalty of perjury under the laws of the State of Washington, that on the below date I caused to be served by hand-delivery via legal messenger the attached document to the following:

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DATED at Seattle, Washington this 28th day of September, 2015.



Yana Strelyuk