

NO. 35412-8-II

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

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
JUL 17 2013
CLERK OF COURT
KIMBERLY S. HARRIS

GLENN JOHNSON and DOLLIE JOHNSON, husband and wife,

Respondents,

v.

GOLDEN EAGLE EXPRESS, INC., a Washington corporation,

Appellant.

REPLY BRIEF

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INTRODUCTION

The central issue in this appeal is whether Golden Eagle had a legal duty to rescue Glenn Johnson. This turns on (1) whether Golden Eagle knew or had reason to know that Johnson was in imminent peril (as opposed to remote or potential peril); (2) whether Golden Eagle negligently attempted to rescue him or prevented others from doing so; and (3) whether Johnson reasonably relied on Golden Eagle. Under the facts most favorable to Johnson, Golden Eagle had no legal duty to rescue him as a matter of law.

Golden Eagle had no knowledge or reason to know whether Johnson was in imminent peril. When Vance Crofoot allegedly promised to get Johnson a ride, all evidence at his disposal – and most especially Johnson's own repeated refusals of medical assistance – indicated that Johnson was not in imminent peril. Johnson could not reasonably rely on someone to rescue him despite his repeated assertions that he was not in imminent peril. When Crofoot allegedly said that he had dealt with the problem, each driver had either left Johnson, seen no imminent peril, or undertaken his own rescue. Johnson's theory that Golden Eagle had a legal duty to diagnose alleged mental impairment from 500 miles away is irrational. This Court should reverse and dismiss.

REPLY RE COUNTERSTATEMENT OF THE CASE

The Johnsons begin their counterstatement of the case with a rather strident footnote claiming that Golden Eagle did not follow the rules in its opening brief. BR 3 n.2. Yet a careful comparison of the opening and responding fact statements reveals very few actual disagreements between them. Certainly, the plaintiffs emphasize different things than the defendant does, but that is hardly unusual. The Johnsons do not cite to a single misstatement in the opening brief because they cannot: Each fact statement in the opening brief has an accurate citation to the record directly following it.

The real “discrepancy” here is between Johnson’s unexpected direct trial testimony, on one hand, and Johnson’s earlier deposition testimony and his own testimony on cross, on the other. Johnson does not deny – because he cannot – that he admitted the following under cross-examination:

- ◆ Johnson did not recall the two phone calls he made on Wednesday, before he fell, one to his wife and the other to Golden Eagle (RP 558-59);
- ◆ Johnson did not recall the three phone calls with Golden Eagle on Thursday morning, after he fell, when he called to report that he could not finish his run (RP 559-60);
- ◆ Johnson did not recall the phone call from his wife on Thursday afternoon (RP 561);

- ◆ Johnson did not recall the Friday morning phone call from Golden Eagle checking up on him (RP 561-62);
- ◆ Johnson did not recall the two Friday afternoon phone calls he received (RP 562);
- ◆ Johnson did not recall the three phone calls he received on Saturday, the day he was taken up to Woodinville (RP 562);
- ◆ Johnson did not recall four Sunday phone calls (RP 563-64);
- ◆ Johnson did not recall Golden Eagle's Sunday evening phone call (RP 564);
- ◆ Johnson did not recall any phone calls from his wife: "No, I didn't, not at that time that I can remember, because I was out of it, I don't know nothing" (RP 565).

It is certainly true that Johnson's direct testimony contradicts one of these admissions.¹ But it is odd at best for Johnson to chastise Golden Eagle for relying on his own trial testimony. Johnson contradicted himself.

In any event, this appeal is not about Johnson's factual dispute with himself. Rather, it is about whether Golden Eagle had a legal duty to rescue him. As a matter of law, the answer is no.

¹ See BA 10-11 (*comparing* Johnson's assertion on direct that Crofoot promised to have someone pick him up *with* Johnson's much narrower deposition testimony *and with* his testimony on cross that he did not remember any of Crofoot's phone calls).

REPLY RE ARGUMENT²

A. Standard of Review

Johnson chastises Golden Eagle for not setting forth the standard of review, but he spends several pages on the wrong one. BR 14-19. Golden Eagle's primary argument on appeal is that the rescue doctrine does not impose a duty here as a matter of law. BA 30-45. It is very well established that whether a tort duty exists is a question of law that this Court reviews *de novo*. See, e.g., ***Linville v. State***, 137 Wn. App. 201, 208, 151 P.3d 1073 (2007).

Johnson attempts to reduce Golden Eagle's legal-duty arguments to mere fact questions, but they are not. Rather, where (as here) the argument on the motion for judgment as a matter of law is that no tort duty exists, review is simply *de novo*:

The standard on a motion for judgment as a matter of law mirrors that of summary judgment. See ***Reeves v. Sanderson Plumbing Prods., Inc.***, 530 U.S. 133, 150, 120 S. Ct. 2097, 147 L.Ed.2d 105 (2000). The elements of negligence include the existence of a duty to the plaintiff, breach of that duty, and injury to the plaintiff proximately caused by the breach. ***Degel v. Majestic Mobile Manor, Inc.***, 129 Wn.2d 43, 48, 914 P.2d 728 (1996). Whether or not the duty element exists in the negligence context is a question of law that is reviewed *de novo*. ***Hertog v. City of Seattle***, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

² Johnson notes issues not appealed, which are irrelevant. BR 13-14.

Aba Sheikh v. Choe, 156 Wn.2d 441, 447-48, 128 P.3d 574 (2006). Johnson's standard of review is contrary to this very well established, controlling precedent.

B. Johnson tacitly concedes that *Webstad* and *Folsom* are controlling, but erroneously relies on the RESTATEMENT.

Golden Eagle first set forth Washington's law regarding the voluntary rescue doctrine duty. BA 30-40. Johnson does not challenge Golden Eagle's conclusion that in cases like this one alleging a failure to rescue the controlling authorities are ***Webstad v. Stortini***, 83 Wn. App. 857, 924 P.2d 940 (1996), *rev. denied*, 131 Wn.2d 1016 (1997) and ***Folsom v. Burger King***, 135 Wn.2d 658, 673-74, 958 P.2d 301 (1998). BA 35-42. Indeed, Johnson cites these two cases without even attempting to distinguish them. They control.

On the other hand, Johnson cites and quotes RESTATEMENT (SECOND) OF TORTS § 324A as the "roots" of the rescue doctrine. BR 19. This seems odd, as on the next page he admits that Washington has never adopted this provision. BR 20. Johnson did not ask the trial court or this Court to adopt § 324A. This Court should not adopt it *sua sponte* after so many years. This provision is thus irrelevant.

C. Johnson still fails to establish a duty under *Webstad & Folsom*.

The nub of Johnson's response is found at BR 21-23. He relies on (a) his own unexpected statement on direct (that Crofoot said "he would send down help to get me back") contradicting both his prior deposition testimony and his subsequent testimony on cross that he had no recollection of these phone calls; (b) Crofoot's sending a driver to recover the trailer, but leaving Johnson there; and (c) Crofoot's alleged virtually identical statements to three different drivers (*e.g.*, "I've taken care of it"). BR 21-23. As carefully explained in the opening brief (BA 37-42) none of this establishes a duty to rescue.

One key problem with this evidence is that – like Johnson's own testimony – it is self-contradictory. Contrary to Johnson's wholly unsupported assertion at BR 21, Crofoot did not "initiate[] the rescue" at all. It remains undisputed that Crofoot sent Sanchez to pick up the trailer – not Johnson – because Johnson told Crofoot that he did not need any medical assistance.

Since Crofoot had no reason to believe that Johnson was in imminent peril, he did not send anyone to "rescue" Johnson, and had no duty to do so. This is true regardless of whether Crofoot

despite Johnson's own denials, he was nonetheless in imminent peril necessitating an immediate rescue. Under Washington law, Golden Eagle thus had no legal duty to rescue him.

Johnson says that Crofoot was the "ultimate authority" and "lifeline" for drivers on the road. BR 22 (citing RP 713, 721). This sort of hyperbole is endemic throughout Johnson's brief. Here is the actual testimony:

Q. Now, as the terminal manager, you control what the dispatchers do, correct?

A. Yeah.

Q. You're the ultimate authority up in Vancouver?

A. That's correct.

RP 713. Plainly, this testimony refers to dispatchers, not to drivers.

Q. Now, as terminal manger, if a driver gets stuck in the middle of nowhere or gets lost and the dispatcher is busy, you're the guy who steps in; aren't you?

A. I can be, yeah.

Q. And you've found – you've looked up on the Internet to help drivers get directions, you're the lifeline to them out on the road more or less; isn't that true?

A. That's correct.

RP 721. Equally plainly, Crofoot was talking about giving drivers directions, not about "rescuing" a driver who says he does not need any medical assistance.

In any event, Johnson misapprehends Golden Eagle's point: Since Crofoot was 500 miles away, he was entirely dependant upon Johnson's self-reporting and the reports of the various drivers who looked in on Johnson. None of them (not even Johnson) ever told Golden Eagle that Johnson was in imminent peril. None of the drivers undertook to get Johnson medical care until Saturday night, when Gomez left Johnson alone in a parking lot (after the ambulance also left him there) without telling Golden Eagle where Johnson was. Yet the jury found that none of the first-hand responders either had a duty to rescue Johnson or caused him any harm. If they are not liable, then Golden Eagle – which relied entirely upon them – also cannot be liable.

As noted in the opening brief, there was a hospital nearby. There was also 911. Yet none of the people who saw Johnson firsthand chose to contradict his instruction that he did not want or need medical care. It is irrational to conclude that Golden Eagle had a greater duty than they did, apparently a duty to force Johnson to accept medical care. Under *Folsom* and *Webstad*, no duty to rescue arises when, as here, the defendant had no knowledge or reason to know of imminent peril. Washington's rescue doctrine imposes no legal duty in these circumstances.

D. Johnson fails to establish reasonable reliance and the Court should reverse any verdict based on Johnson's theory of a quasi-medical duty to diagnose his alleged mental impairment from 500 miles away over the phone.

Golden Eagle next explained why Johnson failed to establish reasonable reliance on Golden Eagle. BA 42-45. Johnson could not reasonably rely on any alleged Thursday promise to get him home because it is undisputed that he repeatedly told Golden Eagle he did not need any medical assistance – in the absence of imminent peril, Golden Eagle had no legal duty. The three drivers did not and could not reasonably rely on Golden Eagle – they each had either left Johnson at the scene before hearing Crofoot's alleged statements, saw no imminent peril, and/or undertook a rescue rather than relying on Golden Eagle. Without reasonable reliance by Johnson, no duty exists. *Osborn v. Mason County*, 157 Wn.2d 18, 23, 134 P.3d 197 (2006) (“A duty exists under the rescue doctrine only if an injured party reasonably relies on the assurance of a negligent rescuer”).

Johnson responds that the jury could have found him “in an impaired condition,” “perhaps having suffered a concussion,” and “unable to make decisions for himself” (BR 24) in light of his surprise testimony:

Q. As fully as you can, tell me what you remember you said to Vance Crofoot ... and what Vance Crofoot said to you in that [Thursday] morning conversation on October 31, 2002.

A. I told [Crofoot] that I could not make the load because there was something wrong, I couldn't walk, I fall down, and he said that he would send somebody to pick up the load and he would send help down to get me back.

RP 533.³ While the jury certainly could have inferred that Johnson was in an "altered mental state" by Saturday evening,⁴ the law imposes no legal duty on Golden Eagle's terminal manager to make any sort of medico-psychological diagnosis from 500 miles away. It also imposes no duty on anyone to guess or hypothesize whether someone might be impaired from a distance.

Yet Johnson goes on at length about medical expert testimony he presented. BR 24-26. Regardless of whether a medically trained person could have directly or even from a distance diagnosed Johnson as being to any degree impaired, the law imposes no duty on Golden Eagle to do so. Any verdict based

³ As noted above, however, Johnson also testified on cross that he did not remember the content of these phone calls. RP 559-60. And in his deposition, Johnson did not recall any such statements. BA 10-11. Nothing supports Johnson's new "concussion" assertion.

⁴ The only relevant testimony was that he could have been in an "altered mental state" 24 hours prior to Sunday night. See BA 26.

on Johnson's theory of a quasi-medical duty to diagnose mental impairment from afar cannot stand.

While repeatedly denying that any duty issue exists, Johnson attempts to build the basis of a duty – Golden Eagle's knowledge of imminent peril – out of whole cloth. BR 26-30. Johnson here misstates, overstates and decontextualizes the record to such a degree that dozens of pages would be required to set it straight. The Court will review the record. A few examples must suffice here.

For instance, Johnson insists that Crofoot knew he "was in trouble" on Thursday morning because Crofoot told Sanchez that Johnson could not help him unhook the trailer. BR 27. Johnson omits, however, his admissions that at this very time he was telling Crofoot that he did not need medical assistance and just wanted a ride home. RP 550, 688-89. Regardless of whether Johnson was "in trouble" on Thursday, Golden Eagle had no reason to believe that he was in imminent peril.

Johnson also insists that Golden Eagle "kept getting information about Glen's condition." BR 27. While Sanchez said he told Crofoot on Thursday that Johnson might need some help, Sanchez admitted that he knew Johnson had refused an

ambulance. RP 91-93, 98. Johnson also relies on Mendez (BR 28) but omits that Mendez said that while Johnson looked sick, he did not look like he needed medical attention on Friday because his condition was not serious. RP 124, 125-26.

As a final example, Johnson fully decouples from the record to the extent that he argues or implies that Golden Eagle's "supervisory personnel" "admitted" that they knew Johnson was in imminent peril. BR 28-29. Clohessy testified unequivocally that he had one conversation with Johnson on Thursday morning in which Johnson said that he did not feel well, but he did not request medical assistance. RP 693-94. Clohessy then overheard a conversation in which Crofoot offered Johnson medical assistance, but Johnson refused. RP 694-95. While Clohessy did overhear vague allusions that Johnson did not look well over the next few days, he never testified that he heard Johnson was in danger or imminent peril. Nor did Crofoot admit or even vaguely suggest that he knew or had reason to know that Johnson was in imminent peril.

Based solely on vague and inaccurate allusions, Johnson claims the jury heard "substantial evidence that Golden Eagle knew about Glenn's continuing physical decline, but negligently failed to address it" BR 30. Not only is the evidence to the contrary,

but Washington imposes no legal duty on someone who merely “knew of” someone’s “physical decline” over several days. On the contrary, addressing much more pressing and immediate dangers – such as a person committing suicide in your presence (*Webstad*) or an alarm company receiving an emergency alarm (*Folsom*) – our courts have found no legal duty because there was insufficient evidence of knowledge of imminent peril. Johnson simply relies on a nonexistent duty.

Golden Eagle believed Johnson when he implied that no imminent peril existed by declining medical assistance. It had no reason to know otherwise. This Court should reverse and dismiss.

E. No reasonable jury could fail to find contributory negligence in this case.

Golden Eagle next explained why no reasonable jury could absolve the Johnsons, driver Gomez and Woodburn ambulance from all responsibility in this case. BA 46-49. The undisputed evidence in this case shows the following:

- ◆ Glenn Johnson ignored his own foot problem, drove on it until it festered, and turned down repeated proffers of medical assistance;
- ◆ Dolly Johnson did nothing despite hearing nothing for several days;

- ◆ Gomez drove Johnson for 10 hours and left him in a parking lot rather than taking him a few miles to a hospital; and
- ◆ Woodburn Ambulance left Johnson in the parking lot after conducting a grossly inadequate interview, apparently because Johnson said his insurance would not cover it.

Compared to such negligence, Golden Eagle's failure to force Johnson to accept emergency medical care from 500 miles away pales in significance.

Johnson's first response is to accuse Crofoot of lying. BR 35-36. This assertion might arguably explain why the jury acted so irrationally – passion and prejudice. But regardless of whether the jury believed Crofoot, the uncontradicted evidence is that Johnson ignored his foot problem, had the capacity to call 911 on Thursday and Friday, but declined medical assistance.

Johnson also again argues that he was incapacitated. BR 36-38. He thus again implies that Crofoot had to make a medico-psychological diagnosis over the phone, somehow intuit that Johnson was too sick to make his own decisions, and then override Johnson's expressed desires to reject medical care and stay with his truck. No such duties exist under Washington law, except (perhaps) for EMTs like Woodburn Ambulance; but the jury absolved them of liability.

Conceding that Dollie Johnson “heard nothing from Glenn for a period of days, but did nothing” (BR 38) Johnson argues that the jury could absolve her from fault because she had no legal duty to rescue her husband. BR 38-39. She knew as much as Golden Eagle. *A fortiori*, Golden Eagle had no duty.

Johnson’s hyperbole reaches a nadir in discussing the evidence regarding Gomez. BR 40-42. There is no evidence in this record that Golden Eagle “instructed” Gomez or anyone else not to assist Johnson. It is undisputed that these were all independent truckers who were not employees of Golden Eagle, but independent contractors. Indeed, Johnson admits that numerous drivers were making independent plans over the CB to give Johnson a ride, yet there is no evidence that Golden Eagle ever told them to stop talking or ordered them not to pick him up.

And Johnson ignores the most salient points about Gomez: he alone actually took steps to give Johnson a ride; he alone made the highly questionable judgment to drive Johnson for ten hours rather than taking him to the nearest hospital; and Gomez alone chose to leave Johnson in a parking lot without notifying Golden Eagle or anyone else. Since Gomez is the only person who

undertook a negligent rescue attempt in this case, it is simply irrational to find him completely free from fault.

Johnson illogically relies on a portion of Jury Instruction 22 concerning liability for successor negligence to argue that the jury could find Gomez fault free. BR 40-41. That Golden Eagle might (*arguendo*) also be liable for Gomez's negligence does not render Gomez fault free. If the jury so found, its verdict must be reversed.

Finally, Johnson again evokes the jury's passion and prejudice toward Crofoot and Clohessy's allegedly "callous disregard" for Johnson to justify its irrational verdict in favor of Gomez and against Golden Eagle. BR 41-42. Contrary to Johnson's arguments, this issue has nothing to do with Crofoot's credibility versus Gomez's credibility. The issue is whether a rational jury could possibly absolve Gomez from all liability – a man who twice saw Johnson firsthand, the second time thinking he was in horrible condition, and yet he called no one and drove Johnson 10 hours and left him in a parking lot without telling anyone where he was. Golden Eagle never saw Johnson and had no way to know his condition or location on Saturday. The verdict is irrational.

And if the Gomez verdict is irrational, the Woodburn Ambulance verdict is dumbfounding. Johnson's point that "fecal

matter was not present until sometime between Friday afternoon and Saturday mid-day” (BR 43) not only fails to support the verdict absolving Woodburn Ambulance, but it again shows why Golden Eagle had no duty: By the time anyone knew that the likely infectious agent was present (*i.e.*, that Johnson might face imminent peril) Gomez was already driving Johnson northward, and Golden Eagle had no way of knowing his condition or location.⁵ Indeed, unlike Gomez and Woodburn Ambulance, Golden Eagle never had knowledge or reason to know whether Johnson faced imminent peril because no one told Golden Eagle about his infection or the fecal matter. Yet the jury chose to absolve the only medical personnel who saw Johnson and could make such a judgment – Woodburn Ambulance – while holding Golden Eagle liable. This is a gross injustice. The Court should reverse and dismiss or, at the very least, order a new trial.

⁵ Johnson erroneously asserts that the jury had sufficient evidence on which to conclude that fecal matter was present on Friday afternoon. BR 44-45. Nothing Johnson cites, nor any evidence in the record, supports such an inference. Fecal matter was not seen by anyone until Saturday, when Gomez unilaterally decided to drive Johnson for 10 hours without notifying Golden Eagle of his condition. Moreover, Johnson’s own expert testified that it was “impossible to know” when Johnson’s foot became unsalvageable (RP 658) so the jury had no evidence from which to infer.

V. CONCLUSION

In his conclusion, Johnson deploys the same florid “rot” rhetoric that impassioned this jury and led it to its prejudiced and irrational verdict. BR 46. Johnson also demonstrates once again that he is asking this Court, just as he asked the trial court, to impose a duty never before recognized in this State:

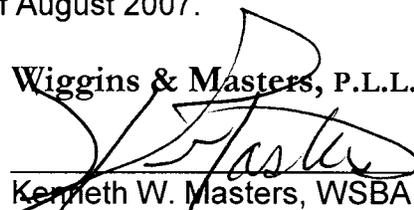
In short, the jury listened to the Johnsons’ evidence that Golden Eagle ***ignored the many offers of help that it received, choosing instead to do nothing***

Id. (emphasis added). No legal duty exists to notice or accept “offers of help” to rescue someone else.

On the contrary, because Johnson indisputably rejected “the many offers of [medical] help” that he received from Golden Eagle, lulling Golden Eagle into a reasonable belief that no imminent peril existed, Golden Eagle had no legal duty to come to Johnson’s rescue. This Court should reverse and dismiss.

DATED this 21st day of August 2007.

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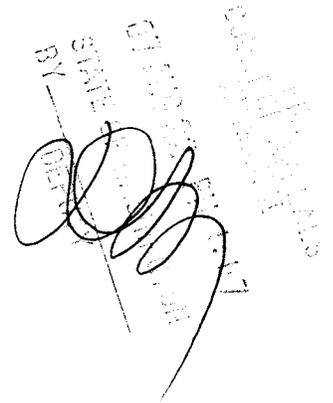
I certify that I mailed, or caused to be mailed, a copy of the foregoing REPLY BRIEF postage prepaid, via U.S. mail on the 21st day of August 2007, to the following counsel of record at the following addresses:

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A handwritten signature in black ink is written over a circular postmark stamp. The stamp contains the text "DEPT. OF JUSTICE" and "STATE OF OREGON" around the perimeter, with a central date and time stamp that is partially obscured by the signature.A handwritten signature in black ink, appearing to read "K. Masters", is written over a horizontal line.

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