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No.: 40637-3-II.

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

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.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
A. The Public Duty Doctrine	2
B. Public Duty Doctrine Exceptions	4
1. Legislative Intent	4
2. "Failure to Enforce"	8
3. "Rescue" Exception	9
4. Special Relationship	10
C. Proximate Cause	13
1. The "shots fired" radio hold	13
2. Grays Harbor's misidentification of Mrs. Johnson's car ...	16
D. Conclusion	19

TABLE OF AUTHORITIES

CASES

Cummins v. Lewis County, 156 Wn2d 844 (2006) 10,11,12

Babcock v. Mason County Fire District, 101 Wn App 677,
686, 5 P.3d 750 (2000) 9

Herskovits v. Group Health Coop, 99 Wn2d 609, 619 (1983) 19

Honcoop v. State, 111 Wn2d 182, 188, 759 P.2d 1188 (1988) 4,5,9

Osborn v. Mason County, 157 Wn 2d 18, 27 (2006) 2,3

Pope v. Douglas County Pub. Util. Dist. No. 1, 158 Wn. App. 23,
26 (2010) 2,3

WASHINGTON STATUTES

RCW 70.96A.120(2) 4,5,6,8

APPELLANT'S REPLY BRIEF

Defendants held in their hands a lifeline, at the other end of which plaintiff's wife, unwittingly, dangled. That lifeline was Tyler Trimble, a Montesano Police Explorer¹ who was following her vehicle as it weaved slowly along US Route 12 southeast of Elma, Washington. Mr. Trimble was willing to follow Mrs. Johnson until a patrol unit could contact her, and would have done so had he known her condition. But Defendants, knowing Mrs. Johnson was "missing and endangered", failed to tell Mr. Trimble, so he stopped following her. Defendants let go of Mrs. Johnson's lifeline, and she disappeared, to die of exposure several days later on a remote forest road.

Defendants' duty to Beverly Johnson was a duty to a particular, living person, and because they breached that duty,

¹ Mr. Trimble was not a random bystander or just a "Montesano resident" as the State puts it (State's Brief at 4) but Montesano Police Explorer who knew personally the Grays Harbor 911 personnel he spoke to by phone that night about Plaintiff's Decedent. Trimble Dec., CP 91-92 at 1; Fouts Dec., CP 54-55, 65.

Mrs. Johnson died. Because Defendants' duty was to Mrs. Johnson, and not to the public at large, the public duty doctrine does not apply in this case, and the trial court's grant of summary judgment should be reversed.

A. The Public Duty Doctrine

When a public defendant asserts the public duty doctrine as a defense to an action for negligence, the question is whether the plaintiff has

adequately shown that the [defendants] owed an individualized duty to them as opposed to a duty to the public in general.

Pope v. Douglas County Pub. Util. Dist. No. 1, 158 Wn. App. 23, 26 (2010). The public duty doctrine is a "focusing tool" used to determine whether a public body owes a duty to a "nebulous public" or to a "particular individual". *Osborn v. Mason County*, 157 Wn 2d 18, 27 (2006). Plaintiffs in *Pope* were landowners who alleged negligence on the part of a firefighter in starting a backfire that destroyed their property. Division Three affirmed the trial court's grant of summary

judgment because the landowners

do not address the threshold question of whether these Fire Districts had a duty to these Landowners, as opposed to the public at large. ...[O]n that crucial question the Landowners offer nothing.

158 Wn App at 27. The backfire started by defendants in *Pope* did not focus on any particular person or property. In *Osborne, supra*, plaintiffs charged defendants with failing to notify them of the release of a sex offender, but that notice would have been to the general public. By contrast in this case, plaintiff alleges, and the undisputed facts show that Defendants had focused precisely on Mrs. Johnson. They knew she was missing and endangered, and they knew Mr. Trimble was willing to maintain contact with her until a patrol unit could arrive. Their duty to tell Mr. Trimble she was missing and endangered was a duty to her alone, not a duty to anyone else, let alone to the “public at large” as in *Pope* or to a “nebulous public” as in *Osborn*. The public duty doctrine should not apply where the duty alleged focuses entirely and

exclusively on the plaintiff, as it does here.

B. Public Duty Doctrine Exceptions

1. Legislative Intent

The legislative intent exception 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 cases). Defendants² argue that the “legislative intent” exception does not apply because plaintiff does not meet the terms of RCW 70.96A.120(2). State’s Brief at 13 ff. The general problem with Defendants’ argument is that it conflates the “legislative intent” and the “failure to enforce” exceptions to the public duty doctrine. These are two different exceptions, and they should be construed to mean two different things.

The “failure to enforce” exception requires four elements: (1) government agents responsible for enforcing

² Grays Harbor 911 and Grays Harbor County adopt the arguments of the State of Washington on the public duty doctrine.

statutory requirements know of a statutory 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 “legislative intent” exception, however, requires only that a statute show “a clear legislative intent to identify and protect a particular circumscribed class of persons.” *Id.* at 188. RCW 70.96A.120(2) shows clearly that the legislature wanted to “identify and protect” a particular kind of person: “a person who appears to be incapacitated or gravely disabled by alcohol or other drugs and who is in a public place”. Mrs. Johnson was driving on a public road and “appeared to be” incapacitated by some sort of intoxicant, according to Mr. Trimble. Trimble Dec., CP 91-92.

The State argues that the statutory scheme is intended to treat drug and alcohol intoxication as a health issue rather than a criminal issue, to recognize alcoholism or drug addiction as a disease. State’s Brief at 13-14. That is

correct, but it supports Plaintiff in this case. The point of RCW 70.96A.120(2) is to protect such persons rather than to criminalize their status. That is why they are to be taken into protective custody. The legislature intended that Defendants focus on plaintiff and protect her in her impaired state. The statute need not have applied directly in all respects to Mrs. Johnson (though, as below, it does); it need only show that the legislature meant to focus a public duty on her as opposed to the general public. Plaintiff meets the legislative intent exception to the public duty doctrine because RCW 70.96A.120(2) demonstrates “a clear legislative intent to identify and protect a particular circumscribed class of persons” that included his wife.

The State argues that law enforcement “did not find Mrs. Johnson in a ‘public place’, indeed, law enforcement did not come upon her at all.” State’s Brief at 14. First, Mrs. Johnson was on a public road, which is a public place. Second, there is no requirement that law enforcement “come upon” her. The

statute requires only that she be in a public place and that she be taken into protective custody “as soon as practicable”.

The State argues that, since Mrs. Johnson was impaired by disease rather than by drugs or alcohol, she is not within the statute’s terms. *Id.* However, the statute covers “a person who *appears to be* incapacitated or gravely disabled by alcohol or other drugs”. (Emphasis added) The question is not the actual nature of the impairment, which cannot be known on initial observation, but the “appearance” of intoxication.

Weaving from centerline to fog line at 35 miles per hour on a 55 mile per hour highway, Mrs. Johnson did so appear according to Mr. Trimble³. In any event, and taking the facts in the light most favorable to Plaintiff, Mrs. Johnson was just the kind of person on whom the legislature focused.

Finally, the State argues that, because she was driving a car, Mrs. Johnson is excluded from the coverage of the statute. State’s Brief at 14-15. The statute does not exclude

³ Trimble Dec., CP 91-92.

motor vehicle operators. It excludes

... 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 ...

RCW 70.96A.120(2). Mrs. Johnson was not, should not and would not have been apprehended for any such violation because law enforcement knew she was missing and endangered and suffering from a seizure disorder⁴.

The “legislative intent” exception applies because Mrs. Johnson was the kind of person on which RCW 70.96A.120(2) shows the legislature meant to focus an obligation to protect.

2. “Failure to Enforce”

This exception is distinct from the “legislative intent” exception, as above, because it requires more than legislative intent to focus on the Plaintiff. It requires an actual failure to carry out a statutory duty: (1) government agents responsible for enforcing statutory requirements know of a violation, (2)

⁴ The State’s “DUI” hypothetical, State’s Brief at 15, is not relevant precisely because Defendants knew Mrs. Johnson was not intoxicated but was suffering from a seizure disorder.

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 State's arguments discussed above address this exception, and they should be rejected for the reasons given above: Mrs. Johnson "appeared to be" under the influence of intoxicants, she was on a public road, and she would not have been apprehended for DUI because Defendants knew she was impaired by a seizure disorder.

3. "Rescue" Exception

Plaintiff recognizes that this Division's decision in *Babcock v. Mason County Fire District*, 101 Wn App 677, 686, 5 P.3d 750 (2000) requires that law enforcement have been acting in a "volunteer" capacity to fall within this exception. As in his opening brief, and for the reasons given there, Plaintiff urges that this requirement not be applied, but if it is, Plaintiff recognizes he cannot qualify.

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4. Special Relationship

Though Plaintiff has conceded that there was, and could have been no direct conversation between Defendants and Mrs. Johnson, Plaintiff urges the court to hold that the present facts effectively satisfy the “special relationship” exception. As stated in *Cummins v. Lewis County*, 156 Wn2d 844 (2006), the requirements for this exception are (1) direct contact or privity between the public official and the plaintiff that sets the plaintiff apart from the general public; (2) express assurances by the public official; and (3) those assurances give rise to justifiable reliance by the plaintiff. 156 Wn2d at 854.

First, the connection between Defendants and Mrs. Johnson through Mr. Trimble certainly set Mrs. Johnson apart from the general public. Second, though Mrs. Johnson herself was not capable of communication, the communication between Defendants and Mr. Trimble acted as an assurance that Mr. Trimble need not continue following Mrs. Johnson, though he offered to do so. Third, of course Mr. Trimble

stopped following Mrs. Johnson in reliance on his conversation with Defendants, because they did not tell him she was missing and endangered. Trimble Dec. at CP 92.

This is not a case, like *Cummins*, in which plaintiff alleges a negligent failure to provide rescue assistance⁵. The *Cummins* model, requiring express assurance and justifiable reliance applies to that more common scenario, but that is not Plaintiff's allegation here. While plaintiff's decedent in *Cummins* did not rely on anything 911 said because he never talked to 911, Mr. Trimble relied on Defendants' failure to tell him Mrs. Johnson was missing and endangered, and that reliance caused Mrs. Johnson's death. *Cummins* would require application of the "special relationship" exception if Defendants had assured Mr. Trimble that they had Mrs.

⁵ Plaintiff's decedent in *Cummins* placed a call to 911, said his address and "heart attack" and hung up without ever talking to an operator. Police responded to the phone booth from which the call had been made, were told the call had been a prank, and took no further action. Decedent's wife found him dead when she returned home. 156 Wn2d at 848-49.

Johnson under surveillance and if he had stopped following her in reliance on that assurance. Defendants' failure to tell Mr. Trimble that Mrs. Johnson was missing and endangered amounts to the same assurance that it was not necessary to follow her⁶. These facts do not fit the common 911 analytical model, but they amount to the functional equivalent of a standard "special relationship", and the exception should be applied in a way that accounts for that difference.

The court should hold that the present facts created a special relationship so as to set plaintiff apart from the public at large and provide an exception to the public duty doctrine.

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⁶ Defendants argue that a "special relationship" may not be based on "inherent assurances". State's Brief at 12. However, the "inherent assurance" argued by plaintiff in *Cummins* was the very existence of the 911 system itself – a general assurance that aid would be provided. 156 Wn2d 856. That is indeed the kind of general assurance to the public at large that cannot support an exception to the public duty doctrine. In this case, however, Defendants' failure to tell Mr. Trimble of Mrs. Johnson's status clearly conveyed to Mr. Trimble alone the assurance that it was unnecessary for Mr. Trimble to continue following her.

C. Proximate Cause

Defendants Grays Harbor County and Grays Harbor
Count E-911 Communications Center ("Grays Harbor") join the
State's arguments on the public duty doctrine and make their
own separate argument that their negligence cannot have
been the cause of Mrs. Johnson's death. Grays Harbor 911
Brief at 1, 4-6.

1. The "shots fired" radio hold

Grays Harbor's theory is that Grays Harbor 911 did not
find out about Mrs. Johnson's missing and endangered status
until after WSP had hung up the phone with Mr. Trimble so
that, by the time Grays Harbor found out Mrs. Johnson was
missing and endangered, Mr. Trimble had already lost contact
with her. The facts do not support that theory, especially when
taken in the light most favorable to Plaintiff.

First, the timing on which Grays Harbor's argument is
based is not as clean as Grays Harbor would have it. Here is
how Mr. Trimble characterized the transaction:

The purple Honda [Mrs. Johnson's car] reached Elma and turned toward downtown. The WSP dispatcher did not inform me that the purple Honda was associated with a Missing/Endangered Person and did not transfer me back to Grays Harbor 911. Grays Harbor 911 did not call me back to inform me that the Honda was associated with a Missing/Endangered Person.

When the purple Honda turned toward downtown Elma, I ceased following it. If I had been informed that the vehicle was associated with a Missing/Endangered Person, I would have stayed with the vehicle, providing updated information until an available patrol field unit could contact the vehicle.

Declaration of Tyler Trimble (CP 91-92), par 3, 4. Mr.

Trimble's statement that Grays Harbor did not call him back, combined with his statement that, had he been informed, he would have stayed with Mrs. Johnson's vehicle, gives rise to a clear inference that, had Grays Harbor called him back, he would have been able to keep following Mrs. Johnson's car. He did not, as Grays Harbor's logic would require, simply disappear from the roadway as soon as WSP hung up the phone. Grays Harbor had his phone number (CP 55) and

could easily have called him back with the information that Mrs. Johnson was missing and endangered. Grays Harbor transferred Mr. Trimble to WSP by telephone at 20:42:32. CP 56. WSP called and told Grays Harbor of Mrs. Johnson's condition at 20:45:49. Grays Harbor's argument requires the assumption that, in the three minutes and 17 seconds between the transfer of Mr. Trimble to WSP and WSP's call back to Grays Harbor with the "missing/endangered" information on Mrs. Johnson, Mr. Trimble had had his call with WSP, decided to stop following Mrs. Johnson, reached his turnoff toward Montesano and lost her. The record, construed in the light most favorable to plaintiff, does not support that conclusion.

Grays Harbor does not argue that Mr. Trimble was not still following Mrs. Johnson when Grays Harbor failed to pass on the information that she was missing and endangered. Their argument is in fact that there was another incident in progress to which they devoted all their radio traffic, Mr. Trimble had lost contact with Mrs. Johnson, and that by the

time that other incident – the “shots fired” incident – had cleared some 9 minutes later.⁷ Grays Harbor’s argument depends on the implied assertion that Grays Harbor exercised due care in failing to call Mr. Trimble back immediately with the information on Mrs. Johnson while its radio was devoted exclusively to the “shots fired” incident. The radio, however, was not important to communicating with Mr. Trimble. All of Grays Harbor 911’s communications with Mr. Trimble, as well as with WSP, were by telephone. CP 54, 65 (Trimble). 56, 60, 61 (WSP). The radio hold for the “shots fired” incident has nothing to do with proximate causation on these facts.

2. Grays Harbor’s misidentification of Mrs. Johnson’s car

After Tyler Trimble stopped following Mrs. Johnson’s car, he returned to his home in Montesano. Watching the evening television news at about 10:15, he saw a story with a

⁷ Compare Grays Harbor 911 Brief at 2 and CP 36, 61 (WSP phones Grays Harbor with missing/endangered information at 8:46) *with id.* at 3 and CP 37, 64 (normal radio traffic resumes at 8:55).

photo of Mrs. Johnson's car. 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. CP 65-66. They were mistaken. Joint Motion at 6, CP 39. If they had not made this additional error, Mrs. Johnson's presence in the Grays Harbor County area would have been made known to Plaintiff and local law enforcement. Because of this error, Plaintiff had no idea where to look for his wife.

Gray's Harbor dismisses this second error as "completely immaterial to the circumstances of Mrs. Johnson's death". Grays Harbor 911 Brief at 4. Grays Harbor suggests that, by the time Mr. Trimble called 911 at 10:15 P.M. on January 27, Mrs. Johnson was already well on the way to the location of her death. *Id.* at 6. However, Mrs. Johnson was not found until 11 days later. Fouts Dec. at 2, CP 50. On summary judgment, defendants are not entitled to a ruling as a

matter of law that Mrs. Johnson could not have been found alive at any time during that week and a half.

It is worth noting that, in their motion for summary judgment below, the Grays Harbor defendants commented that “unfortunately” the Beaverton, Oregon Police Department had not requested NCIC notification should Mrs. Johnson be located. Grays Harbor Joint MSJ at 3, CP 35. Of course lack of notice to the Beaverton Department of Mrs. Johnson’s location information would be “unfortunate” only if, as is true, the absence of that information caused Mrs. Johnson injury. If Mrs. Johnson’s chances of survival suffered because of Beaverton’s failure to request NCIC notification, they also suffered because of Grays Harbor’s error in failing to recognize her car when asked by Mr. Trimble. Grays Harbor’s argument does not demonstrate the absence of proximate cause.

The loss of some degree of chance of survival because of a defendant’s negligence is actionable. The chance of

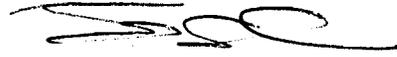
survival lost need not have been greater than 50%. *E.g.*
Herskovits v. Group Health Coop, 99 Wn2d 609, 619
(1983)(Doctor liable for failure to diagnose cancer that reduced
patient's chance of survival from 39% to 25%). Grays
Harbor's admitted mistake in failing to confirm Mr. Trimble's
identification of Mrs. Johnson's car on the television news
deprived Mrs. Johnson of any chance to be found by her
husband by depriving him of the knowledge that she was in
Grays Harbor County.

D. Conclusion

The public duty doctrine should not apply to the facts of
this case, and one or more of its exceptions should apply. The
failures of both WSP and the Grays Harbor defendants caused
Mrs. Johnson to be lost and deprived Plaintiff of any chance to
find her. The trial court erred in granting summary judgment
for defendants.

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CERTIFICATE OF SERVICE

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I certify that on February 3, 2011, I filed the original and one copy of the foregoing Appellant's Reply Brief via first class United States mail to the Washington Court of Appeals, Division II.

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