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I. INTRODUCTION

This is a wrongful death case brought by the husband of Beverly Johnson, deceased, against the State of Washington, Washington State Patrol (WSP), Grays Harbor County, and Grays Harbor E911 Communications Center (a municipal corporation separate from Grays Harbor County).¹

Appellant alleged that the defendants collectively were legally responsible for Mrs. Johnson's death, on the theory that they were negligent in various communications made during the evening of January 27, 2007 regarding the reported presence of Mrs. Johnson's automobile in Grays Harbor County. CP at 1-7, 13-20. Mrs. Johnson had driven from her home town of Beaverton in what was apparently a "twilight seizure" state related to a longstanding epileptic disorder. On February 8, 2007, her body was found near her car on a tree-blocked remote Forest Service road in rugged terrain near Wynoochee Lake in Olympic National Forest land in Grays Harbor County. It is presumed that Mrs. Johnson drove in her mentally impaired state from the highways and back roads of the county and eventually onto this remote unimproved

¹ Plaintiff formerly had named the City of Beaverton, Oregon, as a defendant, but dismissed his allegations against that entity, presumably on grounds of lack of jurisdiction.

road where she stopped because of downed trees, eventually exiting and locking herself out of her vehicle and perishing of hypothermia.

Defendant Washington State Patrol claims that it breached no actionable duty to Mrs. Johnson. Its motion for summary judgment was based upon the lack of duty, and in particular, upon the public duty doctrine, which, under the circumstances of this case, entirely bars Mr. Johnson's claims. The trial court agreed, granted the motion and dismissed the case. Mr. Johnson appeals.

II. STATEMENT OF THE CASE

This case concerns a straightforward application of the public duty doctrine. Indeed, the application of this settled doctrine is virtually conceded by Mr. Johnson, who ultimately urges its abrogation as the only solution which would allow the case to proceed. Not only can this Court not abrogate the doctrine, of course, but all attempts by litigants at abrogation (and there have been several in recent years) have failed before the Supreme Court.

A review of the facts makes it readily apparent that the action is barred by the public duty doctrine and that the trial court correctly dismissed the case against all defendants upon summary judgment.

The facts are set forth in the declarations before the trial court and the undisputed facts and assumptions that formed the background to the

defendants' motions for summary judgment. Recognizing that the question of the applicability of the public duty doctrine would be largely determinative of the case, the parties deferred significant discovery or other procedural steps in the case until the resolution of the issue under undisputed facts. CP at 34-38. All parties have viewed the case as one of undisputed facts for purposes of the motions, and there were indeed neither disputed facts nor inferences before the trial court, nor on appeal. *See*, Brief of Appellant (Br. Appellant) at 6. These undisputed facts are, in summary, as follows:

The police department in Beaverton, Oregon at approximately 7:03 p.m. on January 27, 2007, entered a report concerning Beverly Johnson as a missing person into the National Crime Information Center (NCIC) computer system. The NCIC report gave her status as "a missing person endangered with history of seizures" along with personal descriptors, and her automobile model, description, and license plate number. CP at 34.

The data entry form used by NCIC also allowed the entering agency to request notification of any subsequent report concerning the subject license plate. The Beaverton Police Department did not enter such a request (had it done so, it would have received immediate and automatic notification of the later sighting of Mrs. Johnson's vehicle). CP at 34-35

Tyler Trimble, a Montesano resident, called Grays Harbor 911 later on January 27 at 8:41 p.m. He reported that he was driving behind a vehicle, westbound on SR 12 at Murray Place, near Elma, in Grays Harbor County, and that the vehicle was driving erratically—it was going about 35 miles per hour in a 55 miles per hour speed zone, and was weaving back and forth, “hitting the lane lines” on either side. He described the vehicle and its license plate, which was that of Mrs. Johnson. Because of the erratic nature of the driving, Trimble was reporting this as a possible DUI. CP at 96-98.

Because the report concerned a motorist on a state highway, the Grays Harbor 911 dispatcher transferred the call to the WSP dispatcher. The WSP dispatcher spoke to Mr. Trimble, who related the same information. He further reported that the subject vehicle was leaving SR 12 onto SR 8, and then entered the town of Elma. At that point, Mr. Trimble continued on westbound SR 12 and terminated the telephone call. CP at 96.

The WSP dispatcher entered the license-plate information provided by Mr. Trimble into the NCIC system as she was on the phone with him. This brought up the information that the vehicle was associated with a missing and endangered person with a history of seizures. She did not relay this information to Mr. Trimble. When the call was terminated, she

dispatched the “missing/endangered” information about the vehicle to the area WSP troopers under the “attempt to locate” (ATL) protocol. Four WSP troopers immediately acknowledged receipt of the ATL notification. CP at 96-97, 71-72.

The WSP dispatcher then called back Grays Harbor 911, and notified its dispatcher of the contents of the NCIC “hit” and the report that the Johnson vehicle had left the state highway and entered the town of Elma. CP at 96-97

No units of the WSP or other law enforcement agencies encountered the Johnson vehicle after these events, despite the broadcasts of the ATLs. Several days later, on February 7, 2007, Beverly Johnson’s body was found on a tree-blocked forest service road in a remote area near the Wynooche Dam in Grays Harbor County. Her death was caused by exposure to the elements. CP at 84, 101.

After news reports of this discovery, Randall Netherly came forward to authorities. He and his wife lived on their farm in rural Grays Harbor County. About 10:00 p.m. on January 27, 2007, he had heard his dogs barking and had looked out and seen the headlights of a vehicle near his barn. He drove his pickup out to investigate and saw an older woman in her car with an “odd, blank expression” on her face.

She obviously posed no threat, and he drove by her car; she then drove away. CP at 69-70.

The Netherly farm is within a few miles of the site where Mrs. Johnson was eventually found, and Mr. Netherly stated that he believed that the woman he saw was, in fact, Mrs. Johnson. These circumstances indicate that Mrs. Johnson was well into back-county roads within a short time after her erratically-driven vehicle was first reported by Mr. Trimble. CP at 69-70.

III. ARGUMENT

A. The Public Duty Doctrine Bars Appellant's Claim

The case law in this state concerning the public duty doctrine can only be described as thoroughly settled. As it specifically relates to law enforcement, all parties recognize that in Washington, general police functions, including investigations of and response to emergency calls, reports of possible criminal activities, and the entire gamut of ordinary police functions are not subject to suit, because the general duties of police work are owed to the public in general, not to individuals. *Torres v. City of Anacortes*, 97 Wn. App. 64, 74, 981 P.2d 891 (1999); *Chambers-Castanes v. King County*, 100 Wn.2d 275, 284, 669 P.2d 451 (1983); *Osborn v. Mason County*, 157 Wn.2d 18, 134 P.3d 197 (2006); *Cummins v. Lewis County*, 156 Wn.2d 844, 133 P.3d 458 (2006).

The policy underlying the doctrine has been often set forth: the state, municipalities, and other public bodies are not insurers for every harm that might befall members of the public, and legislative promotion of public safety activities should not be discouraged by the possibility of the subjection of governmental entities to broad and potentially unlimited liability. *Taylor v. Stevens County*, 111 Wn.2d 159, 170, 759 P.2d 447 (1988); *Babcock v. Mason County Fire District No. 6*, 144 Wn.2d 774, 30 P.2d 1261 (2001); *Beal v. City of Seattle*, 134 Wn.2d. 769, 793, 954 P.2d 237 (1998).

There are four exceptions to the public duty doctrine, none of which apply in this case. These will be discussed in detail below. However, Respondent State will first address Mr. Johnson's contention, made before the trial court and reiterated on appeal, that the doctrine should be abrogated in Washington. *See*, Br. Appellant at 18. While, of course, Mr. Johnson cannot seriously assert that this Court can abrogate a fundamental legal principle that has been recently upheld by our Supreme Court against just such attacks as Mr. Johnson makes here, in *Cummins, Id.*, and *Babcock, Id.*, in 2006 and 2001 respectively, nonetheless the argument is worth replying to, if only to refute the repeated contentions of litigants that the public duty doctrine in some way modifies the State's long-ago waiver of sovereign immunity.

This argument was most recently made, and rejected, in *Pope v. Douglas County Fire Dist. No. 3*, 158 Wn. App. 23, ___ P.3d ___ (2010).

As said in that case (a fire fighting case):

The Landowners urge that application of the public duty doctrine here effectively ignores legislative abolition of sovereign immunity. *Chambers-Castanes v. King County*, 100 Wn.2d 275, 281, 669 P.2d 451 (1983). Not exactly. Sovereign immunity “admits the existence of a duty and a tort for its breach, but denies liability because of immunity.” *Oberg v. Dep’t of Natural Res.*, 114 Wn.2d 278, 289, 787 P.2d 918 (1990). No duty has been admitted here. The Landowners have failed to show an individualized duty, which they had to do to survive summary judgment and to ultimately prevail on their claim. *Babcock*, 144 Wn.2d 785 (government entity is not liable for its public official’s negligence unless plaintiff proves existence of an individualized duty). Summary judgment is proper when a plaintiff fails to produce sufficient evidence of a essential element of his or her case; that failure renders all other facts immaterial. *Young v. Key Pharm.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

Pope, 157 Wn. App. at 27-28.

In short, the waiver of sovereign immunity was a waiver of an immunity defense – the waiver establishes no affirmative duties. These still must be sought, and found, in any individual case against a public entity, just as against an individual. See *Edgar v. State*, 92 Wn.2d. 217, 226, 595 P.2d 534 (1979) (action alleged against state official was outside the state’s waiver of sovereign immunity because plaintiff had drawn “no analogy between the conduct complained of and any conduct of a private

individual which would be actionable” in tort). *See also, Morgan v. State*, 71 Wn.2d 826, 430 P.2d 947 (1967). And, just as in the case of individuals, absent special circumstances, public entities have no actionable duty to act on behalf of individuals who may be reported to be in peril. In the case of individuals, a duty may arise from what the courts describe as “special relationships.” *See, e.g., Wilbert v. Metropolitan Park Dist.*, 90 Wn. App. 304, 950 P.2d 522 (1998). In the case of public entities, the analysis revolves around the presence or absence of four established exceptions to the general rule of non-liability: 1) the “legislative intent” exception; 2) the “failure to enforce” exceptions; 3) a “special relationship” and 4) the “rescue doctrine.” *See, e.g., Babcock*, 144 Wn.2d at 774.

Each of these will be discussed below; none of them apply to the undisputed facts of this case. As can be seen from Mr. Johnson’s brief, he appears to recognize, without actually conceding, that two of these exceptions to the public duty doctrine cannot apply: the “special relationship” exception and the “rescue doctrine”.

B. The “Special Relationship” Exception Does Not Apply

Cummins, 156 Wn.2d at 855, disposes of the question of the application of the special relationship exception. *Cummins* presented the question of the contours of the public duty doctrine in the context of a 911

call. That the involvement of WSP dispatch originated with a 911 call to another agency, and thus was a “step removed” from the situation in *Cummins*, only strengthens the conclusion that that case requires summary judgment dismissal of this suit as to the WSP.

In *Cummins*, our Supreme Court held that no statutory, regulatory, or common law duty arises on the part of a public agency providing 911 services to dispatch aid, including medical aid. The Court also reaffirmed earlier holdings that the “express assurances” requirement of an analysis of the “special relationship exception” to the public duty doctrine, involving 911, calls requires a significant conversational interaction as to the substance of the “emergency”, together with express assurances, i.e., a promise to send aid. The Court articulated the general rule as follows:

The special relationship exception allows tort actions for negligent performance of public duties if the plaintiff can prove circumstances setting his or her relationship with the government apart from that of the general public. *Taylor*, 111 Wash.2d at 166, 759 P.2d 447. A special relationship imposing an actionable duty to perform arises between the plaintiff and a government entity when " '(1) there is a direct contact or privity between the public official and the injured plaintiff which sets the latter apart from the general public, and (2) there are express assurances given by a public official, which (3) gives rise to justifiable reliance on the part of the plaintiff.' " *Beal v. City of Seattle*, 134 Wash.2d 769, 785, 954 P.2d 237 (1998) (quoting *Taylor*, 111 Wash.2d at 166, 759 P.2d 447).

Cummins, 156 Wn.2d at 854.

The Court then elaborated with respect to a 911 call:

Mrs. Cummins asserts that privity was established at the point when Mr. Cummins telephoned 911 and was able to state both his physical location and the nature of his medical emergency to an operator. Lewis County contends that Division Two of the Court of Appeals correctly held that in order for privity to exist in this context some form of communication *between* the 911 caller and the operator must occur. See *Cummins v. Lewis County*, 124 Wash.App. 247, 254, 98 P.3d 822 (2004).

Mrs. Cummins correctly observes that a plaintiff can establish privity without having to prove the plaintiff herself communicated with the government entity. See *Bratton v. Welp*, 145 Wash.2d 572, 577, 39 P.3d 959 (2002). She is not correct, however, that prior case law establishes that the privity element is satisfied merely by the act of placing a call to 911. Washington case law shows the required communication between the injured party and 911 by which the plaintiff is set apart from the general public requires both a(1) telephone *conversation* and (2) an affirmative promise or agreement to provide assistance. *Accord id.*; *Beal*, 134 Wash.2d at 785, 954 P.2d 237; *Chambers-Castanes v. King County*, 100 Wash.2d 275, 286, 669 P.2d 451 (1983).

Cummings, 156 Wn.2d at 854-55.

The direct implications of *Cummins* to the facts of the instant case are obvious. The “bottom line” is that not only is there no statute or regulation or common law rule which would create a duty to make the response by WSP that Mr. Johnson asserts should have been made (communication to a citizen who reports the actions of a vehicle of information contained in NCIC information as to the occupant of the

vehicle), there was no “conversation” of the type contemplated by *Cummins*, and no assurances of any kind were given (to him as a proxy or in any other context) so as to create any exceptions to the public duty doctrine rules.

The *Cummins* court also rejected the notion that liability can be predicated upon “inherent assurances” that 911 systems will dispatch aid:

Mrs. Cummins must also show Mr. Cummins received an express assurance from a government official. Mr. Cummins must have sought an express assurance of assistance, and the government must have unequivocally given that assurance. *Babcock*, 144 Wn.2d at 789, 30 P.3d 1261. "A government duty cannot arise from implied assurances." *Id.* (citing *Honcoop v. State*, 111 Wn.2d 182, 192-93, 759 P.2d 1188 (1988); *Taylor*, 111 Wn.2d at 167).

Cummins, 156 Wn.2d at 855.

This point should apply with even more force to the situation of the WSP dispatch, which is at a significant remove from a 911 system and any “inherent assurances” of such a system.

C. The Rescue Doctrine Does Not Apply

Appellant concedes the point, albeit reluctantly. In addition to the points discussed by Mr. Johnson, it also must be pointed out that no “assurances” (offer to render aid) of any kind were given to Mr. Trimble which caused him to abandon or not attempt a “rescue.” This is another element of the doctrine. See *Babcock*, 101 Wn. App. at 677.

D. Neither The “Legislative Intent” Nor “Failure To Enforce” Exceptions Apply

Mr. Johnson has scoured the statute book in search of a statute which can support a specific duty and has settled on RCW 70.96A.120. While this is an imaginative approach, it fails utterly for a variety of reasons. Mr. Johnson recognizes that the “legislative intent” and “failure to enforce” exceptions require a statute which “evidences a clear legislative intent to identify and protect a particular circumscribed class of persons.” *Honcoop v. State*, 111 Wn.2d. 182, 188, 759 P.2d 1188 (1988).

First, Chapter 70.96A RCW is a statutory scheme concerned with the treatment of alcoholism and drug addiction. The whole tenor of the statutory scheme insofar as it relates to law enforcement at all, is the treatment of public intoxication, where appropriate, as a health issue rather than as a criminal issue.

Thus, RCW 70.96A.011 shows the legislative intent:

The legislature finds that the use of alcohol and other drugs has become a serious threat to the health of the citizens of the state of Washington. The use of psychoactive chemicals has been found to be a prime factor in the current AIDS epidemic. Therefore, a comprehensive statute to deal with alcoholism and other drug addiction is necessary.

The legislature agrees with the 1987 resolution of the American Medical Association that endorses the proposition that all chemical dependencies, including alcoholism, are diseases. It is the intent of the legislature

to end the sharp distinctions between alcoholism services and other drug addiction services, to recognize that chemical dependency is a disease, and to insure that prevention and treatment services are available and are of high quality. It is the purpose of this chapter to provide the financial assistance necessary to enable the department of social and health services to provide a discrete program of alcoholism and other drug addiction services.

As can readily be seen, this statutory scheme has absolutely no application to the facts of this case, which does not in any way involve the treatment of alcoholism or drug addiction. RCW 70.96A.120(2) relied upon by Mr. Johnson, appears only to posit that should law enforcement find a person intoxicated in a public place, not otherwise engaged in a crime, nor operating a motor vehicle, then that person should be taken into custody for treatment, rather than for jail.

In this case, there are several things that exclude the application of the statute, even apart from the obvious non-application of this overall scheme to the whole scenario of this case. First, law enforcement did not find Mrs. Johnson in a "public place;" indeed, law enforcement did not come upon her at all. Secondly, she was not intoxicated, nor affected by alcoholism or drug abuse, and so there is no place in the RCW 70.96A statutory scheme for her situation in the first place. Thirdly, she was operating a motor vehicle, and in fact had the issue been one of her intoxication while doing so (as Mr. Trimble initially concluded), which

Mr. Johnson appears to be “arguing for,” then the cited statute flatly does not apply, precisely because she was operating a motor vehicle, something which is exempt from the reach of the statute by its own terms.

Accordingly, Mr. Johnson’s proposed “legislative intent” and “failure to enforce” arguments would not in any way apply to a possibly intoxicated driver reported by a citizen, much less to a driver who was, in fact, not intoxicated! (Note that Mr. Trimble, while he believed the driver to be intoxicated, did not and would not have followed her. He says in essence that he would have followed her had he known that she was in fact not intoxicated). What Mr. Johnson is in effect arguing is that a police agency should be liable based upon a simple report by a citizen of a possible DUI, should the police then not “enlist” the citizen to follow the drunken driver until an officer can locate the vehicle, should the drunken driver in turn harm himself or others! The implications of this remarkable assertion are arresting, indeed, starting with possible liability of the agency to the enlisted citizen when the “following” invariably goes bad. CP at 114-15.

IV. CONCLUSION

This case presents unusual facts. The outcome for Mrs. Johnson was tragic. But the fact remains that Mr. Johnson is left in the following situations, both before the trial and on appeal: 1) the public duty doctrine

is the law of the state and it applies to the actions of law enforcement;
2) he recognizes, and concedes, that under current law “rescue doctrine”
and “special relationships” exceptions do not apply; and 3) the “legislative
intent” and “failure to enforce” arguments are based upon a statute which
by its own express terms has no application to the facts of this case.

Accordingly, the order granting summary judgment should be
affirmed.

RESPECTFULLY SUBMITTED this 8th day of December, 2010.

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NO. 40637-3-II

STATE OF WASHINGTON

COURT OF APPEALS, DIVISION BY _____
OF THE STATE OF WASHINGTON DEPUTY

DEL JOHNSON, Individually and as the
Personal Representative of the Estate of
BEVERLY JOHNSON,

Appellant,

v.

STATE OF WASHINGTON; GRAYS
HARBOR COMMUNICATIONS
CENTER A/K/A GRAYS HARBOR
E911 COMMUNICATIONS CENTER,

Respondents.

NO. 40637-3-II

(Grays Harbor County
Cause No. 08-2-1743-1)

PROOF OF SERVICE

I, REBECCA WRIGHT hereby certify that on December 8, 2010, I caused
to be served a copy of the BRIEF OF RESPONDENT STATE OF
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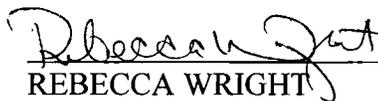
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I certify under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.

DATED this 8th day of December, 2010 at Olympia, Washington.



REBECCA WRIGHT
Legal Assistant