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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 314570

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

SHIZUKO MITA, surviving spouse of Kay K. Mita; and FLOYD MITA,
individually, and as Personal Representative of the Estate of Kay K. Mita,

Appellants,

v.

GUARDSMARK, LLC, a Delaware limited liability company; and
SPOKANE COUNTY, a municipal corporation of the State of
Washington,

Respondents.

REPLY BRIEF

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I. INTRODUCTION

This case presents issues of first impression and calls upon this Court to assess and develop the common law.

Common law is not static. It is consistent with reason and common sense. The common law owes its glory to its ability to cope with new situations. Its principles are not mere printed fiats, but are living tools to be used in solving emergent problems. At times, this dynamic nature of the common law requires the courts to make logical extensions of principles announced in earlier decisions in order to meet evolving standards of justice.

Simonetta v. Viad Corp., 137 Wn. App. 15, 24, 151 P.3d 1019 (2007) (internal quotation and citation omitted).

This is such a case. Reason and common sense—the cardinal principles of the common law—marshal in favor of a pronouncement that both defendants owed a duty to Kay Mita. So do principles set forth in earlier decisions. Spokane County is not immune by way of the public duty doctrine. There is no essential reason why the breach of a promise which induced reliance and so caused harm should not be actionable in tort. In respect to Guardsmark, competing reasonable inferences preclude summary judgment. A reasonable juror could find liability under the voluntary rescue doctrine and other common law principles.

II. REPLY TO SPOKANE COUNTY

A. Spokane County is Wrong in Saying No Duty Exists Unless An Exception to the Public Duty Doctrine Applies.

Last year, in *Munich v. Skagit Emergency Commc'ns Ctr.*, our Supreme Court issued a concurrence signed by a majority of the Court. 175 Wn.2d 871, 885-95, 288 P.3d 328 (2012). The concurrence was issued to address “great confusion about what our public duty doctrine jurisprudence means.” *Id.* at 885-86. And the specific confusion it sought to dispel is the view advocated here by Spokane County: that the public duty doctrine mandates “some sort of broad limit on all governmental duties so that governments are never liable unless one of the four exceptions to the public duty applies, thus largely eliminating duties based on the foreseeability of avoidable harm to a victim.” *Id.* at 886.

Because our high court has “not been careful in what [it has] said in past cases[,]” and “could have been clearer in [its] analyses,” it saw fit to clarify, “the only governmental duties [it has] limited by application of the public duty doctrine are duties imposed by a statute, ordinance, or regulation.” *Id.* See also *id.* at 887, n.3 (citing 29 cases supporting this claim).¹ Thus, when liability is not founded upon a duty imposed by statute or ordinance, a plaintiff need not establish application of one of the

¹ Indeed, the majority opinion in *Munich* goes out of its way to point out the county’s duty in that case was mandated by statute and no common law duty was at issue. 175 Wn.2d at 878.

exceptions to the public duty rule. *Id.* at 887-95. In such cases, a duty extends to all those foreseeably harmed by a lack of reasonable care, and may exist despite the absence of a special relationship. *Id.* at 891-92. *See also Keller v. City of Spokane*, 146 Wn.2d 237, 243, 44 P.3d 945 (2002) (stating that a municipality owes a general duty of care and that whether it owes a duty in a particular situation is governed by a test of foreseeability, without applying public duty rule).

The Mitas are not basing liability on a legislatively mandated duty. They have asserted the County owed Kay a duty under fundamental common law principles. *Opening Br. of Appellants* at 23-27. They have also asserted the County owed Kay a common law special relationship duty modeled after, but not dictated by, the rescue and special relationship exceptions to the public duty doctrine. *Opening Br. of Appellants* at 26-27, 28-34.

B. Whether Kay Mita's Death Was Within the Scope of the Risks of Harm is a Question of Fact for the Jury to Resolve.

The thrust of the Mitas' first argument—that a duty arose under fundamental common law principles—is the operator's promises created an unreasonable risk of harm to Kay. *See Opening Br. of Appellants* at 23-27. The County fails to meaningfully address this argument, claiming

only that harm to Kay was unforeseeable. But, as explained below, this is ultimately a question of fact.

Spokane County is held to a general duty of care, that of a “reasonable person under the circumstances.” *Keller*, 146 Wn.2d at 243 (quoting Dan B. Dobbs, *The Law of Torts* § 228, at 580 (2000)).² Whether the County owed a duty to Kay in particular turns on foreseeability. *See Id.* at 243; *King v. City of Seattle*, 84 Wn.2d 239, 248, 525 P.2d 228 (1974) (holding that “foreseeability of the risk of harm to the plaintiff is an element of the duty question”); *Berglund*, 4 Wn.2d at 321 (stating that whether county owed a duty to negligent driver was one of foreseeability). It is not necessary that the specific injury be foreseeable. It is only necessary that Kay’s death fall within the general field of danger the defendant should have reasonably anticipated. *Rikstad v. Holmberg*, 76 Wn.2d 265, 268-70, 456 P.2d 335 (1969). The Court “defines the duty of care and the risks of harm falling within the duty’s scope.” *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 395, 241 P.3d 1256 (2010). “[T]he jury decides whether the plaintiff’s injury was within the scope of

² *See also Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 553, 192 P.3d 886 (2008) (municipality is negligent if it fails to exercise “that care which an ordinarily reasonable person would exercise under the same or similar circumstances” (quoting *Berglund v. Spokane County*, 4 Wn.2d 309, 315, 103 P.2d 355 (1940))); *Parrilla v. King County*, 138 Wn. App. 427, 436, 157 P.3d 879 (2007) (rejecting county’s argument that liability could be imposed only if a special relationship existed and holding that, like every actor, county was under a duty to exercise reasonable care to prevent the risk of harm from taking effect).

the risks of harm, which the court has held the defendant owed a duty of care to avoid.” *Id.* Therefore, whether injury or damage is foreseeable “is a question of fact, unless the facts of the injury are so highly improbable or extraordinary that [the court] can conclude as a matter of law that they are not foreseeable.” *Yong Tao v. Heng Bin Li*, 140 Wn. App. 825, 834, 166 P.3d 1263 (2007).

On summary judgment, all facts and reasonable inferences are construed in the Mitas’ favor. Under this standard, the facts show the call receiver knew: (1) there was a snowstorm; (2) the temperature was well below freezing, and had been all day; (3) Kay was quite elderly; (4) he had been missing since lunchtime; (5) his failure to return to jury duty was unusual, given his history as a “very responsible” person; (6) he was not at any local hospital; (7) it was “very unusual” he did not to come home immediately after jury duty ended later that day; and (8) his family was very concerned because of the snowy, freezing conditions.

The call receiver should have reasonably anticipated that promising Floyd Mita a professional search was underway might cause him to forego his own search efforts (the County has not contested this point). And it was not “so highly extraordinary or improbable as to be wholly beyond the range of expectability” that Kay might have been lost in the inclement weather and in danger of developing hypothermia, and

even dying from hypothermia. *See Seeberger v. Burlington N. R.R.*, 138 Wn.2d 815, 823, 982 P.2d 1149 (1999); *Yong Tao*, 140 Wn. App. at 834. Because this is so, it is for the jury to decide whether Kay's demise was within the scope of the risks of harm.

C. **Whether "Privity" Existed Between the County and Kay Mita is Not the Real Issue.**

Another argument advanced by the Mitas is the County owed a common law duty to Kay based on a special relationship. Like the duties discussed at pages 23-27 of the Mitas' Opening Brief, this duty is not based on a statute, ordinance or regulation. Accordingly, the Mitas need not establish a particular "exception" to the public duty doctrine. The exceptions to the public duty doctrine are used in focusing a duty that is *already owed* by the government upon a particular person. Under the doctrine, once a plaintiff establishes the application of a particular exception, that plaintiff may proceed to establish breach of the underlying duty in any way the plaintiff sees fit. *See Cummins v. Lewis County*, 156 Wn.2d 844, 867-68, 133 P.3d 458 (2006). Here, on the other hand, the Mitas are drawing upon the special relationship exception (because it embodies common law precepts) to establish, in essence, an independent tort. The duty arose from, and is defined and limited by, the promises the County gave Floyd Mita. *See id.*

The County discusses the “privity” element to the special relationship exception at length. *Spokane County’s Answering Brief* at 13-23. Yet, privity is not the issue here. Washington courts unequivocally hold that “a plaintiff can establish privity without having to prove the plaintiff communicated with the government entity.” *Cummins*, 156 Wn.2d at 854; *Chambers-Castanes v. King County*, 100 Wn.2d 275, 669 P.2d 451 (1983) (holding that privity existed between government entity and husband when only wife communicated with government). In other words, there need not be direct contact between the government and the injured plaintiff.³ *Id.*

“The term privity is used in a broad sense of the word and refers to the relationship between the [government entity] and any ‘reasonably foreseeable plaintiff.’” *Chambers-Castanes*, 100 Wn.2d at 286. The privity element is applied in the context of a pre-existing, legislatively mandated duty and its function is to determine whether a particular individual is set apart from the nebulous public, to whom that duty is owed. A plaintiff is set apart from the general public when a telephone conversation occurs and an affirmative promise of assistance is made.

³ Even the County recognizes this well-established principle. See *Spokane County’s Answering Brief* at 14 (stating that a special relationship required *either* “direct contact or privity”). Nonetheless, the County avers, “[a]s a matter of law, privity simply does not exist absent a direct contact” *Spokane County’s Answering Brief* at 15. It is mistaken.

Cummins 156 Wn.2d at 854-55; *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 786-88, 30 P.3d 1261 (2001). There is no doubt Kay was set apart from the general public. Every aspect of the communication between the government and Floyd Mita revolved around Kay. The government made a promise to provide assistance. And that promise assured action in respect to Kay.

The true issue presented under the Mitas' special relationship argument is whether the County owed a duty to Kay when it made promises to an immediate family member living in the same household and that family member (Floyd Mita), but not Kay, relied on the promise to Kay's detriment. The Mitas have argued that justice calls for the imposition of a duty in such circumstances. *See Opening Br. of Appellants* at 30-33. Besides distinguishing cases on irrelevant grounds, the County offers no significant policy reason why a duty should not exist here. This Court should decline to immunize the government from liability when its express promises induced reasonable reliance and caused harm. *See also Brown v. Macpherson's, Inc.*, 86 Wn.2d 293, 300-03, 545 P.2d 13 (1975).

D. Floyd Mita's Testimony is Not Hearsay.

As it did below, the County argues Floyd Mita's testimony is inadmissible hearsay. *Spokane County's Answering Brief* at 25-26; *See also RP* (December 10, 2012) at 2-10. The trial court ruled against the

County on this point and considered the evidence on summary judgment. RP (December 10, 2012) at 19. Yet, the trial court seemed to agree with the County, saying “it does certainly appear that the statement alleged to have been made by the operator is hearsay.” *Id.* at 18. The trial court also signaled it may disallow Floyd Mita from offering testimony at trial concerning his conversation with the call receiver, stating, “I’m sure if this matter proceeds to trial that I [will] have a different look at things.” *Id.* The trial court also stated that “[f]or purposes of today, though, I will accept what the plaintiffs argue. I do that without . . . making any opinion that that would be the same ruling at trial.” *Id.* at 19. Recordings of the call have been destroyed and thus Floyd Mita’s testimony is the only evidence of the promises made by the call receiver.

ER 801(c) defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Hearsay is generally inadmissible, unless there is an applicable exception. ER 802. As reflected in the hearsay rule, however, statements not offered to prove the truth of the matter asserted, but rather as a basis for inferring something else, are not hearsay. *State v. Collins*, 76 Wn. App. 496, 499, 886 P.2d 243 (1995). When determining whether a statement is hearsay, “the inquiry is whether the out-of-court statement has to be accepted as true before it is relevant to

the issues at hand. If the statement has to be true in order to be relevant, it is being offered to prove the truth of the matter asserted” 5B Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 801.8 (5th ed. 2007).

The statements contained in Floyd Mita’s declaration recount his conversation with the call receiver and are relevant to establishing the Mitas’ claim that a duty arose from the conversation. The statements are not hearsay because they are “verbal acts” of “independent legal significance.” *State v. Gillespie*, 18 Wn. App. 313, 315, 569 P.2d 1174 (1977); 5B Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 801.10 (5th ed. 2007). Like contractual promises, defamatory statements and statements evidencing malpractice, the significance of the statements at issue here lie not in the truth of their contents, but in the simple fact they were made. *See Matter of Estate of Starcher*, 447 N.W.2d 293 (N.D. 1989) (statements offered to prove the existence of a contract were not hearsay); *Dunlap v. Wayne*, 105 Wn.2d 529, 535-36, 716 P.2d 842 (1986) (statement constituting defamation was not hearsay); *Walker v. Bangs*, 92 Wn.2d 854, 861, 601 P.2d 1279 (1979) (in action alleging legal negligence in the conduct of litigation, the entire record of proceedings in the prior trial is not hearsay and is admissible on the issue of liability); *Anderson v. United States*, 417 U.S. 211, 220, n.8 (1974) (“Of

course, evidence is not hearsay when it is used only to prove that a prior statement was made and not to prove the truth of the statement.”). Because the existence of a duty is at issue, and a special relationship duty arises upon showing an express assurance and justifiable reliance, neither Floyd Mita’s statements to the call receiver nor the call receiver’s statements to Floyd Mita constitute hearsay.

The promises Floyd Mita attributes to the call receiver— “we will send out a policeman to immediately search for your father,” for example—are not being used to prove their truth, but to establish their existence and then, through other evidence, show them to be empty or false. In other words, the Mitas are using the statements to establish the fact or truth that they were said, not to show that what was said (i.e., the content) was true. The County (and apparently the trial court below) fails to grasp this critical distinction. The whole case against the County is that it made false promises.

The call receiver’s statements are also being offered to show their effect on the hearer, Floyd Mita, and to demonstrate, in part, his reasonable reliance on the statements. An out-of-court statement offered to show its effect on the person who hears the statement is not objectionable as hearsay. 5C Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 803.15 (5th ed. 2007). The statement may

be admitted to show the nature or quality of action taken by the hearer in response to the statement. *See, e.g., Patterson v. Kennewick Public Hosp. Dist. No. 1*, 57 Wn. App. 739, 744, 790 P.2d 195 (1990). Here, the statements themselves are of such nature as to support the reasonableness of Floyd Mita's reliance.

Moreover, two exceptions apply. "Rule 803(a)(3) creates a hearsay exception for statements expressing an intent or plan to do something" 5C Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 803.10 (5th ed. 2007); *State v. Terrovona*, 105 Wn.2d 632, 637-43, 716 P.2d 295 (1986). The statement, "we will send out a policeman to immediately search for your father," is being used to show the County intended to act in a certain way in the future. In this context, the statement adds additional support to the Mitas' claim that harm to Kay was foreseeable.

Lastly, the statements Floyd Mita attributes to the call receiver constitute admissions by a party-opponent and are thus nonhearsay under ER 801(d)(2):

When applying ER 801(d)(2), Washington follows the Restatement (Second) of Agency § 286 (1958), which requires that an agent have speaking authority. In order to fall under the rule, the declarant must be authorized to make the particular statement at issue, *or statements concerning the subject matter*, on behalf of the party. When a person does not have specific express authority to

make statements on behalf of a party, *the overall nature of his authority to act for the party may determine if he is a speaking agent.*

Passovoy v. Nordstrom, Inc., 52 Wn. App. 166, 169-70, 758 P.2d 524 (1988) (internal citation omitted and emphasis added); *see also Pannell v. Food Serv. of Am.*, 61 Wn. App. 418, 428-30, 810 P.2d 952 (1991). Here, the call receiver had authority to make statements concerning the subject matter of missing persons. Indeed, it was her job to take calls from the public concerning missing persons and to speak to the callers as an agent of Spokane County. Because this is so, she had speaking authority and her statements to Floyd Mita are not hearsay.

Under the County's view, it would be nearly impossible for a plaintiff to ever establish a duty based on a promise. The law does not countenance such harshness. Where evidence becomes relevant to show a particular statement was made, regardless of the truth of the statement itself, such evidence is not hearsay and properly admitted.

E. Spokane County's Policies Concerning Classification of Missing Persons Have Nothing Whatsoever to Do with Establishing a Duty.

Spokane County argues that Kay was not an "at risk" or "vulnerable" person under its own policies and procedures and, therefore, it had no duty to forward the call to police dispatch for action. *Spokane County's Answering Brief* at 26-28, 31. This makes little sense. Whether

the County followed its own policies has no bearing on the question of duty. County policy does not dictate the standard of negligence. *See Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 554, 192 P.3d 886 (2008) (“a defendant never may set its own tests Courts must in the end say what is required” (internal quotation and citation omitted)).

The Mitas are not predicating duty or breach on a failure to follow Spokane Crime Reporting Center (“SCRC”) policy or procedure. Nor are they arguing that SCRC was negligent in failing to adopt policies and procedure that would have classified Kay as an “at risk” or “vulnerable” person, such that a search effort should have been commenced based on this classification. Instead, all theories of duty revolve around the promises made. If anything, the County’s policies *bolster* the Mitas’ case. Because no search would commence under County policy, the operator had a heightened duty to avoid making false promises to Floyd Mita and certainly to call him back after the promises were made to notify him that, contrary to what she said, a search was not underway.

III. REPLY TO GUARDSMARK

A. All Facts and Reasonable Inferences Are Construed in the Mitas’ Favor, Not Guardsmark’s.

Contrary to the correct summary judgment standard, Guardsmark’s brief is written as if all facts and inferences are to be construed in *its* favor.

It also misrepresents or is at least not careful with facts it presents. For example, it alleges Kay was “only speaking in a foreign language.” *Guardsmark’s Br. of Respondent* at 6, 14. That is not the testimony. Mr. Lewis testified he “assumed” Kay was speaking in “some sort of an Asian language.” CP at 438. When directly asked whether Kay spoke in an Asian language, Mr. Lewis said, “[o]r unintelligible. It was not English, understandable English.” CP at 76 (emphasis added).

Thus, what we know for sure is Kay was not able to “communicate verbally.” CP at 435. This testimony, along with weather conditions and other facts Guardsmark’s officers knew or should have known, gives rise to a reasonable inference that Kay was in danger and in need of help when he was approached by Guardsmark security outside the courthouse. A reasonable juror could conclude Kay was speaking unintelligible gibberish as a result of cognitive impairment attending the on-set of hypothermia (and the security officers should have recognized this) or that Kay had other cognitive difficulties making him particularly vulnerable to harm.

Kay was born in Yakima and spoke perfect English. CP at 207, 571. He also spoke Japanese, to his wife who spoke limited English. *See* CP 571. Even if Kay did in fact speak to Mr. Lewis in Japanese, this only underscores his inability to adequately protect himself from the subfreezing conditions. If he could not speak English, then he would have

great difficulty securing alternative help from English-speaking residents. Further, because Kay was a natural English-speaker, the fact he could not communicate in English at the time Mr. Lewis interacted with him gives rise to a reasonable inference that he presented in an even worse state than described.

As another example, Guardsmark represents that “[t]he only knowledge that the security officers had regarding Mr. Mita’s physical condition was that he appeared cold prior to the time they allowed him to come into the courthouse.” *Guardsmark’s Br. of Respondent* at 13. This assertion is false. Kay was notably “underdressed for the weather,” visibly shaking, “sluggish and shivering,” trying to get warm by moving his hands and arms over his body, and not able to communicate. *Opening Br. of Appellants* at 11-12, 35. He was a thin, elderly man in his mid-eighties. *Id.* at 12. It was also dark and storming, 26.1 degrees with a wind-chill of 19.4 degrees, and the security guards knew or should have known Kay had been outside for an hour and a half after being ejected from the courthouse the first time. *Id.* at 11-12, 40. Guardsmark ignores all of these important facts — facts from which a reasonable juror could conclude Kay was in danger.

The existence of a legal duty is generally a question of law. But sometimes duty depends on proof of certain facts or reasonable inferences

drawn from facts. When the facts or reasonable inferences are disputed, summary judgment is inappropriate and the question should be submitted to the jury. *See, e.g., Afoa v. Port of Seattle*, 160 Wn. App. 234, 238, 247 P.3d 482 (2011) (citing *Sjogren v. Props. of the N.W.*, 118 Wn. App. 144, 148, 75 P.3d 592 (2003)). Whether a duty existed under the voluntary rescue doctrine depends on whether Guardsmark's security officers knew or reasonably should have known Kay was in danger. Because reasonable minds could conclude he was, the issue of duty should be a question for the jury.

B. The Mitas are Not Arguing All Acts of Kindness Impose Liability under the Voluntary Rescue Doctrine.

Guardsmark asserts the factual circumstances of this case are akin to a police officer giving a pair of boots to a barefoot homeless man. *Guardsmark's Br. of Respondent* at 16-17. It also claims that “[hypothetically, if later that evening the homeless man failed to seek shelter and died from hypothermia, under the Mitas’ argument the police officer would be liable for the homeless man’s death” *Id.* These assertions rest upon an analogy between two factually dissimilar situations and a gross distortion of the Mitas’ argument.

First, unlike this case, there is no evidence the police officer acted negligently. The issue whether Guardsmark breached the standard of care

is not before this Court, but it should note the requirement functions to prevent an “imposition of liability without fault,” a concern raised by Guardsmark. Second, unlike the police officer, Guardsmark’s security officers increased the risk of harm to Kay. *See Opening Br. of Appellants* at 43-50. This is a critical distinction.

The Mitas are not arguing all acts of kindness impose liability under the voluntary rescue doctrine. As in all negligence cases, there must be a failure to observe the applicable standard of care. The injury resulting from such failure must “fall within the ambit of the hazards covered by the duty imposed upon defendant.” *Rikstad v. Holmberg*, 76 Wn.2d 265, 269, 456 P.2d 355 (1969). And failure to adhere to the standard of care must increase the risk of harm to the injured party. Under Guardsmark’s example, none of these liability requirements are satisfied. The better example is the one articulated by the Mitas. *See Opening Br. of Appellants* at 46.⁴

C. The Danger Need Not Be “Imminent.”

The Mitas have explained the theoretical underpinnings of the “imminent danger” requirement under the rescue doctrine and why it does

⁴ The Court should note this example was offered to support the Mitas’ argument that liability may exist for withdrawing from an undertaking when doing so leaves an unreasonable risk of harm to the injured party. The Mitas have asserted other arguments supporting the notion that a jury could find Guardsmark’s security officers increased the risk of harm. *See Opening Br. of Appellants* at 43-44, 48-50.

not apply here. *See Opening Br. of Appellants* at 36-39. Guardsmark has not pointed to *any* holding stating the voluntary rescue doctrine is applicable only where there is an emergency requiring immediate action. There are none. Instead, Guardsmark points to dicta in *Folsom*, where the court parenthetically mentioned *French*.

All cases discussing the “voluntary rescue doctrine” a special relationship duty arises when a person undertakes to render aid to a person “in need” or “in danger.” *See, e.g., Brown v. Macpherson’s, Inc.*, 86 Wn.2d 293, 299, 545 P.2d 13 (1975); *Folsom v. Burger King*, 135 Wn.2d 658, 675-77, 958 P.2d 301 (1998); *Ganno v. Lanoga Corp.*, 119 Wn. App. 310, 80 P.3d 180 (2003); *Meeneely v. S.R. Smith, Inc.*, 101 Wn. App. 845, 5 P.3d 49 (2000). Only “rescue doctrine” cases state the “imminent peril” requirement. *See, e.g., Highland v. Wilsonian Inv. Co.*, 171 Wash. 34, 17 P.2d 631 (1932); *McCoy v. American Suzuki Motor Corp.*, 136 Wn.2d 350, 961 P.2d 350 (1998); *Jay v. Walla Walla College*, 53 Wn.2d 590, 335 P.2d 458 (1959); *French v. Chase*, 48 Wn.2d 825, 297 P.2d 235 (1956); *Maltman v. Sauer*, 84 Wn.2d 975, 530 P.2d 254 (1975); *Estate of Keck v. Blair*, 71 Wn. App. 105, 856 P.2d 740 (1993). The requirement negates an assumption of the risk argument and establishes proximate cause by tying the rescuers injuries to the negligence of the person who created the

imminently dangerous situation. *Highland v. Wilsonian Inv. Co.*, 171 Wash. 34, 17 P.2d 631 (1932).

The Mitas should not be held to a heightened “imminent peril” standard never before applied under the voluntary rescue doctrine.

Washington courts have pronounced a clear, simple test:

A person who undertakes, albeit gratuitously, to render aid to . . . a person in danger is required by Washington law to exercise reasonable care in his or her efforts. If a rescuer fails to exercise such care and consequently increases the risk of harm to those he or she is trying to assist, the rescuer may be liable for physical damage caused.

Folsom, 135 Wn.2d at 676 (internal citation omitted). This is the test to be applied. The trial court erred in ruling no reasonable juror could find this test satisfied.

D. A Defendant May Increase the Risk of Harm by Negligent Omission. Because this Case Involves Competing Reasonable Inferences from the Facts, It Should be Submitted to the Jury.

Guardsmark’s security officers assumed a duty and entered into a special relationship with Kay when they took steps to render assistance. *See Opening Br. of Appellants* at 35-36 (explaining the security officers took steps to aid by approaching Kay, inviting him into the locked building and placing him next to a heater). Once the duty arose, the security officers were obligated to exercise reasonable care in their efforts. The standard of care practiced by security officers in the industry is

evidence of what constitutes reasonable care. *See Ranger*, 164 Wn.2d at 553-54. According to the Mitas' security expert, the applicable standard of care, derived from industry custom and Guardsmark policy, required the security officers to either contact a supervisor, emergency personnel or gain professional assistance to protect the life under their self-imposed care. CP at 403-05.⁵ Thus, it was precisely Guardsmark's omissions (and affirmative act of ushering him outside) that constituted a breach of the standard of care in this case and, ultimately, increased the risk of harm to Kay.

The Mitas cited *Herskovits* and *Brown* in their opening brief for the principle that a defendant can breach its duty by omission under the voluntary rescue doctrine. Of course, *Herskovits* is distinguishable on the ground it deals with a physician's duty, as Guardsmark points out. But that is beside the point. The case embraces the principle that a person can increase the risk of harm to another by negligent omission. In making this point, the *Herskovits* court relied on Restatement (Second) of Torts § 323 (1965) and *Brown*, which cited § 323 as setting forth the underlying principles of the voluntary rescue doctrine. *Herskovits v. Group Health*

⁵ If this case is remanded for trial, the Mitas will make other arguments regarding the question of breach, including that the officers were obligated to attempt further assessment and communication with Kay during the two hours he was under their self-imposed care, and to contact law enforcement on his behalf. These arguments rest primarily on Guardsmark policy.

Coop., 99 Wn.2d 609, 613, 664 P.2d 476 (1983); *Brown v. Macpherson's Inc.*, 86 Wn.2d 293, 299-303, 545 P.2d 13 (1975). Like in *Herskovits* and *Brown*, Guardsmark's inaction increased the risk of harm to Kay. Washington courts recognize liability for nonfeasance (or omissions) in situations where a special relationship exists. *See, e.g., Brown*, 86 Wn.2d at 299-301; *Robb v. City of Seattle*, 176 Wn.2d 427, 435-36, 295 P.3d 212 (2013).

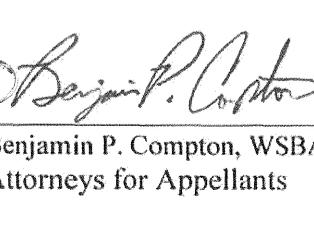
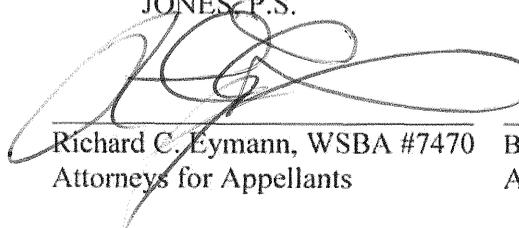
Guardsmark claims it did not increase the risk of harm to Kay or make his situation worse. A jury could agree and indeed, Guardsmark may ultimately prevail on this point. But, it is for the jury to resolve, not the trial court on summary judgment. What this case presents is competing reasonable inferences related to whether Guardsmark security increased the risk of harm or otherwise made Kay's situation worse. The Mitas have put forth their view. *See Opening Br. of Appellants* at 43-50. And, they rest on their prior briefing.

IV. CONCLUSION

For the reasons stated above, this Court should reverse the trial court's decisions granting summary judgment and remand for trial.

Respectfully submitted this 16th day of December, 2013.

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CERTIFICATE OF SERVICE

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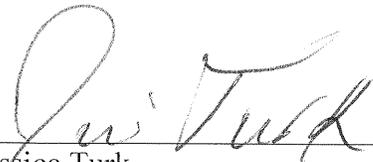
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