NO. 43363-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

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DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

TANYA AND TOMMY RIDER, wife and husband and the marital community composed thereof,
Appellants.

v.

KING COUNTY, in its capacity as the KING COUNTY SHERIFF'S DEPARTMENT,
Respondents.

APPEAL FROM THE SUPERIOR COURT FOR PIERCE COUNTY

THE HONORABLE GAROLD E. JOHNSON

BRIEF OF RESPONDENTS

ENDEL R. KOLDE
JESSICA H. KOZMA
Senior Deputy Prosecuting Attorneys
Attorneys for Respondents
King County Prosecuting Attorney's Office
500 Fourth Avenue, Suite 900
Seattle, Washington 98104
206-296-8820

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I. INTRODUCTION

This is an appeal from a personal injury case filed by Tom and Tanya Rider. They alleged that the King County Sheriff's Office should have found Ms. Rider sooner after she drove her car off the road and crashed into a hidden area, where she remained trapped. King County moved for summary judgment under the public duty doctrine and the motion was granted.

On appeal, the Riders allege that the special relationship and rescue exceptions should apply and allow their case to proceed. But the trial court correctly dismissed their claims because (1) King County did not make express assurances of specific conduct that the Riders detrimentally relied on; and (2) the rescue exception does not apply where police are engaged in a traditional, non-gratuitous, law enforcement function such as a missing person investigation. This Court should affirm the dismissal of this case.

II. ISSUES PRESENTED

1. Under the public duty doctrine, a government duty to the public in general does not create a legal duty toward any particular individual except where narrow exceptions apply. Among the necessary requirements for the special relationship exception are express and specific assurances by the government, coupled with detrimental reliance by the Plaintiff. Should this Court affirm the trial court's dismissal of the Riders' claims under the public duty doctrine where King County's employees made no express assurances and Mr. Rider did not rely on such assurances to his detriment?

2. The rescue exception to the public duty doctrine requires a gratuitous offer of aid, lack of reasonable care and detrimental reliance. Should this Court affirm the trial court's dismissal of the Riders' claims where King County's employees were engaged in the traditional police function of a missing person investigation and the Riders did not detrimentally rely on King County's investigation?

III. STATEMENT OF THE CASE

On Thursday, September 20, 2007, plaintiff Tanya Rider crashed her vehicle off of State Route 169, where she remained trapped for eight days before being located by King County deputies. The following events preceded her discovery.

Tanya's Accident

On the morning of September 20, 2007, plaintiff Tanya Rider left her overnight job in Bellevue, Washington, made a brief stop and began driving home to Maple Valley in her 2007 Honda Element. CP 43. Ms. Rider was traveling east on State Route 169 between Renton and Maple Valley. *Id.* At approximately mile post 19, Tanya's vehicle left the roadway and landed in a ravine on the east side of SR 169. *Id.* The vehicle was not visible from the roadway. *Id.*

The First 911 Call

Two days later on Saturday, September 22, Ms. Rider's husband, Tom Rider, called 911 to report his wife Tanya missing. CP 68. According to Mr. Rider, he had received a call

that morning from Tanya's boss at Fred Meyer saying she hadn't been at work for two days. CP 53. The last time Tom spoke with his wife was by phone the evening of Wednesday, September 19. CP 52.

911 Operator Aaron Siegrist asked Mr. Rider a series of questions to determine whether his wife met the criteria for a missing persons report. CP 69. Tom said that Tanya was not suicidal or on any medication, nor did she have any serious medical problems. *Id.* Additionally, Mr. Rider provided no information that would indicate Tanya had been the victim of a crime. *Id.* On more than one occasion during the call, Tom insisted that someone had stolen Tanya's brand new Honda Element and done something to her, but he could not tell operator Siegrist why he felt that way other than saying, "my wife is not like this." *Id.* Tom told the operator he had contacted area hospitals but had not contacted any jails. *Id.*

Operator Siegrist told Mr. Rider that he would need to contact area jails and call back before a missing persons report

could be taken. *Id.* He also told Tom that, at that time, his wife did not meet the criteria for a missing persons report (suicidal, serious medical problem, evidence of criminal activity, etc.). *Id.* Operator Siegrist advised him to continue checking area hospitals, and to look for any activity on Tanya's bank accounts. *Id. See also* CP 71-81.

The Second 911 Call

The next day, Sunday, September 23, 2007, Mr. Rider again called 911 and spoke with operator Thomas Lowe. CP 82. At the same time, Mr. Rider was on the phone with their car dealership to determine whether Tanya's Honda Element had a vehicle locater inside it. CP 83. Operator Lowe asked Tom to finish that call and then call him back. *Id.* When Mr. Rider called back, he told Mr. Lowe that the vehicle did not have a locater. *Id.* Operator Lowe then obtained all the necessary information from Tom to take a missing persons report on Tanya. *Id.* Lowe gave Mr. Rider a case number and told him that Tanya's information would be entered into a

nationwide computer system so that, if she were found and a check done on her name, she would be identified as a missing person and he would be contacted. *Id.* Mr. Lowe later called Tom back to obtain additional vehicle information and to tell him that an officer would be sent to his home sometime that day. *Id.* *See also* CP 85-113.

Contact with Deputy Cross

Deputy Christopher Cross was dispatched to the Rider home that same evening. CP 114. He met with Tom, who invited him to search the residence because in Tom's words, "the husband is usually looked at during this kind of thing ... ." CP 115. Deputy Cross searched the residence and, before he left, gave Mr. Rider a business card with the case number and the phone number for Major Crimes with instructions to contact them the next morning. *Id.* *See also* CP 117-19.

The Investigation into Tanya Rider's Disappearance

On Monday, September 24, 2007, Janet Rhodes, who investigates missing persons for the Sheriff's Office, reviewed

the missing person report about Tanya Rider. CP 121. That morning she called Tom Rider and asked him a number of questions about his wife, Tanya. *Id.* Ms. Rhodes wanted to obtain as much information as possible in order to determine whether Tanya was in fact missing. *Id.* When she asked Mr. Rider about the couple's finances, he told her that Tanya was the only one who had access to a USAA bank account and a Nordstrom Visa. *Id.* When Ms. Rhodes contacted USAA and Nordstrom, each confirmed that Tanya was the only person with access to the accounts. *Id.* Ms. Rhodes also called Fred Meyer and spoke with Tanya's supervisor, Roxanna Dressler. *Id.* Ms. Dressler said that she had called Tom Rider on Friday morning, September 21, at 7:00 a.m. to see if Tanya had slept in. *Id.* She also told Ms. Rhodes that Tom did not know Tanya had missed work. *Id.* Ms. Rhodes also tried calling Tanya's cell phone but got no response. *Id.* Additionally, she contacted Tanya's cellular provider, Verizon, and their automated

message said that information would not be released without a subpoena or court order. *Id.* *See also* CP 133.

Later that day, Ms. Rhodes used the automated system for USAA to access Tanya's account activity. CP 121. She learned that there was a debit withdrawal of $7.58 that day, as well as debit and automatic withdrawals from September 19, and an automatic withdrawal on September 20. *Id.* One of the September 19 debit charges was for $685.23. *Id.* On Tuesday, she again checked the account activity and discovered that a $1,000 transfer had been made from Tanya's savings account to her checking. *Id.* At that point, Ms. Rhodes believed that Tanya was not missing at all. *Id.*

The next morning, Wednesday, September 26, 2007, Mr. Rider finally told Ms. Rhodes that he did, in fact, have access to the USAA account. *Id.* He said he had misunderstood her earlier question about account access because he was so exhausted. *Id.* Ms. Rhodes told Tom that USAA was not responding to her requests for account information, and he said

he would call them. CP 121-22. Later that day, Mr. Rider faxed an account statement to Ms. Rhodes, and they discussed the charges from the past seven days. *Id.* Tom explained that all of the banking activity was his. *Id.*

In light of this significant new information from Tom Rider, on the morning of Thursday, September 27, 2007, the sheriff's office requested Tanya's cell phone records from Verizon. CP 149-50. The records were requested due to exigent circumstances with a warrant to follow. CP 122. King County investigators were concerned that Tanya had been the victim of a crime. *Id.* Later that morning, the sheriff's office obtained Tanya's cell phone records, including the cell tower location of her last cell phone activity. *Id.* Using this information, King County deputies located Tanya that afternoon in her vehicle, which was about 30 feet down and 15 feet away from State Route 169, near Jones Road and over a steep embankment. *Id.* She was extricated and transported from the scene. *Id.*

Deposition Testimony of Tom Rider

Prior to his wife's being found, no one from King County made any guarantee to Tom Rider that Tanya would be found or that the King County Sheriff's Office would take any specific investigative measures to find her. *See* CP 69, 83, 115, 122. Mr. Rider acknowledged in his deposition that no express assurances were made by anyone from King County. CP 58-59 ("No one guaranteed me that they would find Tanya ... No they did not give me expressed guarantees. They did give me the impression they were looking."). Tom also testified that that Janet Rhodes told him that "[i]f something had gone wrong, that they would locate Tanya and find out what happened." CP 58. Ms. Rhodes denies making that statement, nor is it her practice to do so in a missing persons case where criminal activity has not been ruled out.[1] CP 122.

Mr. Rider made a number of assumptions about what would be done to locate Tanya, stating "I was thinking that as

[1] For purposes of summary judgment and this appeal, King County assumes that this statement was made.

soon as they, you know, actually started looking, they might trace her cell phone, find out, you know, if it was static in one place or if it was moving. But this is, you know, *just things that I was thinking* ... ." CP 54 (emphasis added). When asked whether King County employees told him they were taking any specific actions to locate Tanya (tracing her cell phone, driving her possible routes, etc.), he acknowledged they did not. CP 54-55. He also testified that he never asked what actions would be taken. CP 57. Finally, Tom did not identify any actions he would have taken to search for Tanya other than what he did. He said, "I guess, looking back, I could have hired a private investigator. ... But as far as what I could have done differently, I don't know." CP 61.

IV. ARGUMENT

A. STANDARD OF REVIEW

This Court reviews summary judgment orders de novo, performing the same inquiry as the superior court. *Hisle v. Todd Pac. Shipyards Corp.,* 151 Wn.2d 853, 860, 93 P.3d 108

(2004). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Vallandigham v. Clover Park Sch. Dist. No. 400,* 154 Wn.2d 16, 26, 109 P.3d 805 (2005). When reviewing a summary judgment, this Court considers all facts and reasonable inferences in the light most favorable to the non-moving party. *Vallandigham,* 154 Wn.2d at 26. But this Court should not consider inadmissible evidence when reviewing a summary judgment. CR 56(e); *see also Dunlap v. Wayne,* 105 Wn.2d 529, 535, 716 P.2d 842 (1986).

A party opposing summary judgment "may *not rely on speculation,* argumentative assertions that unresolved factual issues remain, or in having [her] affidavits considered at face value." *Seven Gables Corp. v. MGM/UA Entm't Co.,* 106 Wn.2d 1, 13, 721 P.2d 1 (1986) (emphasis added). Instead,

after the moving party meets its initial burden and submits adequate affidavits, the nonmoving party "must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists." *Seven Gables Corp.,* 106 Wn .2d at 13. If the nonmoving party fails to meet this burden, summary judgment is appropriate. *Id.* at 12–13. In a negligence action, determining whether the defendant owed an actionable duty to the plaintiffs represents a question of law, which this Court reviews de novo. *Cummins v. Lewis County,* 156 Wn.2d 844, 852, 133 P.3d 458 (2006). Here the Riders cannot meet their burden and summary judgment should be affirmed.

B. KING COUNTY DID NOT OWE A LEGAL DUTY TO EITHER TOM OR TANYA RIDER

As a threshold matter, to maintain a negligence claim, a plaintiff must prove that the defendant owed her a legal duty. *Cummins,* 156 Wn.2d at 852; *Johnson v. State,* 164 Wn. App. 740, 747, 265 P.3d 199 (2011). Whether a duty exists is a

question of law for this Court to decide. *Osborn v. Mason County,* 157 Wn.2d 18, 22, 134 P.3d 197 (2006). Here the Riders' claim fails because they cannot establish that King County owed them a legal duty to find Tanya Rider or to use any particular method to do so.

Under the public duty doctrine, a plaintiff must show more than a broad duty owed to the public in general. In essence, a duty to all is a duty to no one. *Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988). It is well-settled that police functions, including investigations and responses to 911 calls, are ordinarily not subject to suit. *Cummins,* 156 Wn.2d at 860-61 (no duty to 911 caller requesting medical aid); *Osborn,* 157 Wn.2d at 24-27 (county had no duty to warn of presence of sex offender who raped and murdered plaintiffs' daughter); *Johnson,* 164 Wn. App. at 748 (no liability for allegedly negligently failing to find a missing and endangered person). This long-standing rule was recently reaffirmed by this Court in a missing person case. *Johnson,* 164

Wn. App. at 748. As a result, Division Two precedent precludes the Riders' claims here.

While King County might have an aspirational "'duty' to protect its citizens in the colloquial sense, it does not have a *legal* duty to prevent every foreseeable injury." *Osborn,* 157 Wn.2d at 28 (emphasis in original). To allow otherwise would be to subject local governments to broad and expansive liability.

There are four exceptions to the public duty doctrine: (1) legislative intent; (2) failure to enforce; (3) the rescue doctrine, and (4) a special relationship. *Cummins,* 156 Wn.2d at 855. King County moved for summary judgment on the grounds that none of these exceptions apply. CP 26-36. On appeal, however, the Riders allege only that the special relationship and rescue exceptions apply. App. Brief at 11. Consequently, we will focus our analysis on those exceptions.

C. KING COUNTY DID NOT HAVE A SPECIAL RELATIONSHIP WITH THE RIDERS BECAUSE IT MADE NO EXPRESS ASSURANCES ON WHICH THE RIDERS RELIED TO THEIR DETRIMENT

During discovery, King County asked Tom Rider in an interrogatory to identify the basis of his claims, and he responded that "Defendants' agents expressly and impliedly assured me that they would take all steps necessary to locate my wife." CP 66. On appeal, the Riders similarly assert that the public duty doctrine does not apply because they had a special relationship with King County. App. Brief at 11. But the Riders' claim fails and summary judgment was properly granted because (1) there were no express assurances; and (2) Tom Rider did not rely on such assurances to his detriment.[2]

When analyzing the question of government duty based upon a special relationship, Washington courts "look to the *manner* and *extent* of contact between the government official

[2] It is undisputed that Tanya Rider had no communication with King County prior to being located, thus the only statements at issue were those made by King County to Tom Rider.

and the member of the public and also look to how *explicit* were the *assurances* of aid allegedly created thereby." *Cummins,* 156 Wn.2d at 860 (emphasis in original). A special relationship creating a legal duty can only occur where: (1) there is contact or privity between the government official and the plaintiff that sets her apart from the general public; (2) there are express assurances given by a public official; which (3) give rise to justifiable reliance on the part of the plaintiff. *Id.* at 854; *see also Johnson,* 164 Wn. App. at 754.

1. The Privity Requirement

For purposes of the summary judgment below, King County assumed there was privity, even though Ms. Rider never had direct contact with King County prior to being found. CP 27-28; *see Cummins,* 156 Wn.2d at 854 (direct contact not always required; plaintiff-widow sought privity based on deceased husband's call for medical aid). Plaintiffs, however, could not meet their burden on the required elements of express assurance or detrimental reliance.

2. There were no express assurances of specific government conduct sought or given.

The Riders must show both that Tom Rider sought express assurances from King County and that such assurances were given. *See Cummins,* 156 Wn.2d at 855. Moreover, to create a legal duty, the assurances sought and given must unequivocally indicate that the government would act in a specific manner. *Babcock v. Mason County,* 144 Wn.2d 774, 789, 30 P.3d 1261 (2001); *see also Johnson,* 164 Wn. App. at 753 (quoting *Babcock:* "But the plaintiff must *'specifically s[eek]'* and the government must *'expressly g[i]ve'* assurances indicating the government would act in a specific manner.") (emphasis in original).

Contrary to what the Riders claim, a government's duty "cannot arise from implied assurances." *Babcock,* 144 Wn.2d at 789. Thus, in *Babcock,* a firefighter's alleged statement that they "would take care of protecting [plaintiffs'] property" was not sufficiently specific to create a legal duty. *Id.* at 789-91.

The Supreme Court reasoned that the alleged statement did not indicate that she, or any of the other firefighters, would act in a specific manner to save the plaintiffs' property, which was being engulfed in flames. *Id.* at 791. Accordingly, the Supreme Court affirmed Division Two, which had upheld dismissal of the plaintiffs' claims. *Id.* at 794-95.

Much like the *Babcock* case, the Riders claim that Janet Rhodes gave Tom Rider vague assurances that: "[I]f something had gone wrong, that they would locate Tanya and find out what happened." CP 58. King County disputes that Ms. Rhodes made such a statement, but assumed for purposes of the summary judgment motion below that she did make such a statement. CP 29. Even so, such a vague statement did not amount to a legally-binding promise that King County would take any specific steps to search for Tanya Rider.[3]

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[3] Moreover, it is undisputed that King County did in fact locate Ms. Rider and determine that she had experienced a one-car collision. Thus, even if Ms. Rhodes' alleged statement amounted to a promise, the promise was fulfilled.

Notably absent were any promises to use specific methods to find Ms. Rider or to find her on a specific timeline. To infer such from Ms. Rhodes' alleged statement is unreasonable and amounts to speculation that is insufficient to establish a special relationship.

Furthermore, the notion that Ms. Rhodes made any specific guarantee to Mr. Rider is contradicted by his own deposition testimony. He was emphatic that King County did not give him express guarantees or indicate what specific steps it was taking to locate Tanya Rider: "No one guaranteed me that they would find Tanya ... No they did not give me expressed guarantees. They did give me the impression they were looking." CP 58-59. When asked whether King County employees told him they were taking specific actions such as getting her cell-phone records, tracing her phone or searching along her driving route, Mr. Rider acknowledged that they did not. CP 54-55. He also did not ask Janet Rhodes how they would search for Ms. Rider. CP 57.

In his declaration at the summary judgment stage, Mr. Rider states "I was relieved" and "I *assumed* they would use all reasonable means to locate her." CP 301 (emphasis supplied). But Mr. Rider's subjective assumptions about what King County was doing at the time or *post-hoc* assertions about what King County should have done, are simply irrelevant in the absence of a promise that King County was going to act in a specific manner with regard to locating Ms. Rider. Moreover, it should be noted that Mr. Rider did not even *seek* express assurances of specific conduct. He simply made assumptions: "[I] thought they took the ball. I thought they were going to do whatever it is they do... ." CP 55.

Thus, as in *Babcock,* even if a King County employee made general statements meant to reassure Mr. Rider and gain his cooperation in an ongoing missing person investigation, such general statements do not amount to an unequivocal, legally-binding promise. *See Babcock,* 144 Wn.2d at 789-91 ("The plaintiff must seek an assurance and the government must

unequivocally give it.") Furthermore, even if Mr. Rider can show that he sought and received a promise of specific conduct, he cannot show that he relied on the promise to his detriment.

3. The Riders did not rely to their detriment on an express assurance that they had sought from King County.

A promise without detrimental reliance does not create a legal duty. Here Mr. Rider did not point to an action he would have taken but for King County's promise. And he cannot show that any such action by him would have made any difference.

Our courts have consistently held that detrimental reliance is a required element of the special relationship exception to the public duty doctrine. *Cummins,* 156 Wn.2d at 855-857 (no showing that heart attack victim stayed at location in reliance upon dispatcher's unproven assurance of assistance); *Babcock,* 144 Wn.2d at 794 (no reasonably safe alternatives for plaintiffs to salvage property in burning building). In *Harvey v. County of Snohomish,* the Supreme Court held that there had been no detrimental reliance where the plaintiff had to shoot an

intruder after calling 911, because the plaintiff had never asked the operator whether he should remain in the condo and wait for the police to arrive, nor was he instructed by the operator to do so. 157 Wn.2d 33, 40, 134 P.3d 216 (2006); *compare Chambers-Castanes v. King County,* 100 Wn.2d 275, 279-80, 609 P.2d 451 (1983) (police received numerous calls about an assault, did not respond for one-and-a-half hours, and 911 operator incorrectly told caller that police had been dispatched); *Beal v. City of Seattle,* 134 Wn.2d 769, 774, 785, 954 P.2d 237 (1998) (caller was told by 911 operator to stay in her car and wait for police; police were never dispatched and caller was shot and killed). In *Harvey,* the Supreme Court noted that, unlike other cases where they had found detrimental reliance, the operator there had accurately relayed that she had notified the police and that they were in the area and setting up. *Harvey*, 157 Wn.2d at 39, There are similarly no false statements at issue in this case.

As in *Harvey,* Mr. Rider 's claim appears to be that the police should have responded faster or differently, but he cannot show detrimental reliance on express promises that were not given:

Q. So you testified -- earlier in your deposition we talked about the steps that you took to search for Tanya, driving the routes, posting flyers, making, you know, a couple of phone calls, driving by a family member's house. Is there anything, in your mind, anything else you didn't do that you could have done in searching for Tanya?

A. I guess, looking back, I could have hired a private investigator. But I sort of trusted that the right people were looking for her. So I only did the other things to keep me from going insane waiting. *But as far as what I could have done differently, I don't know.*

Q. Did King County ever prevent you from doing anything to locate your wife?

A. No. Detective Rhodes said the more help, the better.

CP 60-61 (emphasis added).

"I don't know" is not an answer that indicates detrimental reliance. Mr. Rider said "I don't know" because there was no action that he decided to forego as a result of King County's promise. Nor did he articulate how an independent

action on his part would have led to finding Tanya Rider any sooner. There is no evidence, not even an assertion, that Mr. Rider could have obtained the cell records on his own without law enforcement involvement. Furthermore, the evidence shows that Mr. Rider continued looking for his wife, even after he returned to work. *See* CP 345 (posted flyers after work), 346 (tried to call her cell phone), and 347 (drove Tanya's route to and from work and to their Shelton property).

Consequently, summary judgment was properly granted.

D. THE RESCUE EXCEPTION DOES NOT APPLY BECAUSE KING COUNTY DID NOT GRATUITOUSLY ASSUME A DUTY TO FIND TANYA RIDER

For the rescue exception to apply, the Riders must show that King County (1) gratuitously offered to aid or warn Tanya Rider, (2) failed to exercise reasonable care, and (3) the offer of aid or warning was relied on by the Riders to their detriment. *Johnson,* 164 Wn. App. at 750-51; *Babcock v. Mason County Fire District No. 6,* 101 Wn. App. 677, 685-86, 5 P.3d 750

(2000), *affirmed,* 144 Wn.2d 774 (2001). This Court has repeatedly emphasized that the offer of aid must be *gratuitous.*

Thus, in *Babcock,* the rescue exception did not apply because the fire district had a duty to protect the property of all citizens, including, but not limited to the plaintiffs. 101 Wn. App. at 686. This Court noted that the fire district was established for this very purpose. *Id.* Similarly, in *Johnson,* this Court recently held that the general police powers statutes created a duty to all citizens, so that the State Patrol's indication to caller Trimble that it would "notify troopers" did not amount to a gratuitous offer of aid. 164 Wn. App. at 751-52.

Here, the Riders were unable to show that King County made a gratuitous offer of aid that set them apart from the public in general. King County's missing person investigation was no different than the Mason County Fire District's response to fight a house fire or the Washington State Patrol dispatching troopers in response to a report of an erratic driver -- it was based on the King County Sheriff's Office police powers and

did not amount to a *gratuitous* offer of aid. To find otherwise would be to potentially subject every police response to the rescue exception. *See Babcock,* 101 Wn. App. at 686 (agreeing with trial court that to apply rescue exception there would be to take all firefighting responses to a location outside of the public duty doctrine).

On appeal, the Riders mischaracterize King County's position and conflate the notion of public duty with legal duty. App. Brief at 20; *see also Osborn,* 157 Wn.2d at 28 (explaining the distinction). From this starting point the Riders attempt to reason that if King County did not have a legal duty to search for Ms. Rider then any search it undertook must have been gratuitous. App. Brief at 20. But their reasoning is not based on any legal authority and would create an unprecedented new interpretation of the rescue exception. The Riders appear to have no response to the concept that missing persons investigations are part of traditional police functions, for which

the police may owe a duty to the public in general, but not to a specific person.

It is undisputed that Ms. Rhodes and other King County personnel were engaged in core police functions when conducting the missing person investigation regarding Ms. Rider. Since 1998, one Ms. Rhodes' primary functions has been to conduct such investigations. CP 120, 355-56. In fact, Mr. Rider appropriately contacted the King County Sheriff's Office for that very purpose. CP 342-43. But there is a significant distinction between Ms. Rhodes' job duties to investigate missing persons in general, and a legal duty to rescue Ms. Rider in this case. *See Johnson,* 164 Wn. App. at 750-752 (discussing the "gratuitous" requirement and finding it inapplicable in a general police powers context); *Babcock,* 101 Wn. App. at 686 (*volunteer* firefighting district did not gratuitously assume fighting a house fire); *see also* RCW 36.28.010(6) (county sheriff "shall keep and preserve the peace in their respective counties").

It is undisputed that it was Ms. Rhodes' job to investigate missing persons, so it is unreasonable to argue that she "gratuitously" assumed the duty to rescue Ms. Rider. She was simply not a volunteer or a good Samaritan.[4] You cannot gratuitously assume a duty that you are paid to do and which is one of your central job functions. If Plaintiffs were correct on this point, then *every* missing person police investigation would involve the gratuitous rescue exception, and the public duty doctrine would cease to exist.

Finally, even if the Riders could overcome the gratuitous offer of aid hurdle, they have not shown detrimental reliance, for reasons already discussed above. Consequently, the rescue exception does not apply and summary judgment was appropriate.

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[4] Gratuitous is defined as "[g]iven or granted without valuable or legal consideration ... voluntary... ." *Black's Law Dictionary* (Abridged 5th Ed.) at 358.

E. IMPLIED ASSURANCES CANNOT FORM THE BASIS OF A SPECIAL RELATIONSHIP OR THE RESCUE EXCEPTION

On appeal, the Riders continue to cite obsolete authority for the proposition that a special relationship or a gratuitous assumption of duty can be "implied based upon the relationship at issue." App. Brief at 22. Plaintiffs similarly use the language of implied assurances when claiming to discuss express assurances. *See* App. Brief at 16 ("In this context, Ms. Rhodes repeatedly represented to Mr. Rider that she was actively looking for his wife *implying* if not stating that she would use all reasonable means to find [her]...") (emphasis added).[5]

While there were some early public-duty decisions leaving the door open for implied assurances, that door has been shut for well over two decades. *Honcoop v. State,* 111 Wn.2d 182, 191-93, 759 P.2d 1188 (1988) (recognizing that *J*

[5] The Riders have also cited no legal authority for the proposition that the frequency of contact alone gives rise to a "context" implying assurance. *See* App. Brief at 15.

& B Dev. Co. v. King Cy., 100 Wn.2d 299, 669 P.2d 468 (1983) was overruled in *Taylor v. Stevens Cy.,* 111 Wn.2d 159, 759 P.2d 447 (1988) and *Meany v. Dodd,* 111 Wn.2d 174, 759 P.2d 455 (1988)); *see also Webstad v. Sortini,* 83 Wn. App. 857, 875, n.7, 924 P.2d 940 (1996) (Division Two case recognizing that, unlike *Chambers-Castanes,* the Supreme Court now requires express assurances); *Johnson v. State,* 77 Wn. App. 934, 939, n.12, 894 P.2d 1366 (1995), *review denied,* 127 Wn.2d 1020 (1995) (Division One case recognizing that authority allowing for implied assurances has been overruled). The notion that exceptions to the public duty doctrine can be implied is not good law. *Babcock,* 144 Wn.2d at 789 ("A government duty cannot arise from implied assurances."). This Court should decline the Riders' invitation to rely on cases that have been overruled on this issue.

F. THE RIDERS CANNOT OVERCOME THE LACK OF LEGAL DUTY BY EXPERT DECLARATION

Although both the summary judgment and this appeal are concerned with the issue of legal duty, the Riders persist in

their attempts to get into questions of breach by pointing to the declaration of their retained expert, D.P. Van Blaricom. App. Brief at 26-27. But this Court need not delve into questions of breach of duty in the absence of a legal duty. *Cummins,* 156 Wn.2d at 852 ("A threshold negligence determination is whether a duty of care is owed to the plaintiff.").[6]

Nor should this Court consider Mr. Van Blaricom's opinions on the legal question of the whether King County had a legal duty to the Riders. *See* CP 311 ("In my opinion, the KCSD [sic] undertook a special duty to find Victim…"). Determining whether a defendant owes an actionable duty to the plaintiff is a legal question for the Court. *Osborn,* 157 Wn.2d at 22-23; *Cummins,* 156 Wn.2d at 852; *Johnson,* 164 Wn. App at 747. It would be inappropriate for Plaintiffs to invite this Court to outsource its duty to their expert.

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[6] In-so-far-as the Riders' claim this issue is relevant to the applicability of the rescue exception, this Court need not address the second element, reasonable care, where the Riders have failed to satisfy the first element: a gratuitous offer of aid. *Johnson,* 164 Wn App. at 752.

An expert's testimony may embrace an ultimate issue to be decided by the trier of fact. ER 704. However, courts have long prohibited opinions on legal issues under the guise of expert testimony. *See Washington State Physicians Ins. Exch. & Ass'n. v. Fisons Corp.*, 122 Wn.2d 299, 344, 858 P.2d 1054 (1993) (error for court to consider legal opinions expressed in affidavits); *see also Tortes v. King County*, 119 Wn. App. 1, 13, 84 P.3d 252 (2003) (trial court properly excluded expert testimony on ultimate legal issue at summary judgment). Thus, Mr. Van Blaricom's opinion regarding the existence of King County's alleged legal duty to Plaintiffs is inadmissible and should be disregarded by this Court. *See also Dunlap,* 105 Wn.2d at 535 ("A court cannot consider inadmissible evidence when ruling on a motion for summary judgment.").

V. CONCLUSION

King County respectfully requests that this Court affirm the trial court's dismissal of this action because, pursuant to the public duty doctrine, King County owed no legal duty to the

Riders. The special relationship exception did not apply because no express assurances were made on which the Riders relied to their detriment. Similarly, the rescue exception did not apply because King County never made a gratuitous offer of aid, and the Riders never detrimentally relied on such an offer.

DATED this 19th day of September, 2012.

RESPECTFULLY submitted,

DANIEL T. SATTERBERG
Prosecuting Attorney

By: _____
ENDEL R. KOLDE, WSBA 25155
JESSICA H. KOZMA, WSBA 30416
Senior Deputy Prosecuting Attorney
Attorneys for the Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of September, I served by ABC Messenger Service, with instructions to be delivered no later than 4:30 p.m. on the afternoon of September 19, 2012, the original and a copy of the foregoing to Division Two of the Washington Court of Appeals, and a copy via email to the following:

Paul A. Spencer, WSBA #19511
Oseran, Hahn, Spring, Straight & Watts,P.S.
Email: pspencer@ohswlaw.com

Boyd S. Wiley, WSBA #18817
Attorney at Law
E-Mail: bwiley@puyallup-law.com

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STATE OF WASHINGTON
BY _____
DEPUTY

DATED this 19th day of September, 2012 at Seattle, Washington.

By: _____
LIAH TRAVIS
Paralegal, Litigation Section