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Supreme Court No. 93137-2
COA No.: 332047-III

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

DONNA GARCIA, A Washington Resident; CONCEPCION GARCIA,
an Individual; PATRICIA JANE LEIKAM, as the Administrator of the
Estate of Tiairra Garcia, A Deceased Person,

Petitioners,

FRANKLIN COUNTY, a Municipal Corporation,

Respondent.

FRANKLIN COUNTY'S ANSWER TO PETITION FOR REVIEW

John M. Silk, WSBA No. 15035
Lesli S. Wood, WSBA No. 36643
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 ORIGINAL

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I. IDENTITY OF ANSWERING PARTY

The defendant below and respondent on appeal, Franklin County, seeks the relief states in section II, below.

II. STATEMENT OF RELIEF SOUGHT

Franklin County asks that the Court deny review of the decision of Division Three of the Court of Appeals, filed on April 12, 2016, in which the Division Three Panel affirmed the trial court's summary judgment order dismissing all of the family and estate of Tiairra Garcia's claims. Division Three of the Court of Appeals properly held that Appellants failed to demonstrate that the Franklin County 911 operator took an affirmative action that created a risk of harm under Restatement (Second) of Torts §302B.

III. ISSUES PRESENTED FOR REVIEW

This matter does not present any issues that warrant Supreme Court review under the criteria set forth in RAP 13.4. Franklin County does not seek review of any issues.

The family and estate of Tiairra Garcia petition for review of the following issue, summarized succinctly:

- Whether the Court of Appeals erred in stating, in its slip opinion at 11-12, that the 911 operator at most failed to convey information to the police, which was a failure to act or an omission, but "that failure is not an affirmative act" and was not a basis for liability under Restatement (Second) of Torts §302B; and whether this alleged error conflicts with *Washburn v. City of Federal Way*, 178

Wn.2d 732, 310 P.3d 1275 (2013); *Robb v. City of Seattle*, 176 Wn.2d 427, 295 P.3d 212 (2013); and *Parilla v. King County*, 138 Wn. App. 427, 157 P.3d 879 (2007).

IV. THE COURT SHOULD DENY REVIEW UNDER RAP 13.4.

A. Factual and procedural background of case.

The Court of Appeals opinion includes a comprehensive and concise recitation of the facts as established by the record on appeal.¹ On June 22, 2008, Ms. Tiairra Garcia drove to a bar in Pasco with two friends, Marnicus Lockhard and Ashone Hollinquest.² They were asked to leave after an altercation with another patron and chose to go to another bar.³ While still in the car, Lockhard asked Hollinquest to hand him a gun.⁴ As the weapon was being exchanged, it discharged striking Ms. Garcia.⁵

Rather than taking Ms. Garcia to the hospital, Lockhard drove to a friend's house striking a number of vehicles in route.⁶ Several witnesses phoned 911 to report their observations. The phone call at issue was placed by Mr. John Gorton, a neighbor of the destination residence.⁷ He reported to the 911 operator: "They pulled somebody out of a van in the back of the house, drove [sic] them to the back of the house."⁸ He stayed on the phone

¹ Slip op. at 1-3.

² Slip op. at 1.

³ Slip op. at 1-2.

⁴ Slip op. at 2.

⁵ Slip op. at 2.

⁶ Slip op. at 2.

⁷ Slip op. at 2.

⁸ Slip op. at 2, citing CP at 692.

until a police officer arrived.⁹ The 911 operator did not indicate that she heard or acknowledged this statement.

At the scene, City of Pasco police did not inquire about the body nor check the back of the premises.¹⁰ Ms. Garcia died at the residence.¹¹

In June of 2010, the family and estate of Tiairra Garcia filed against the City of Pasco, Hollinquest, Lockhard, and the bar.¹² Division One of the Court of Appeals affirmed summary judgment dismissing the City of Pasco and its offers holding that they did not owe Ms. Garcia a duty under the rescue exception to the public duty doctrine or under the Restatement (Second) of Torts §302B.¹³ This Court denied Appellant’s Petition for Review.¹⁴

In this separate action against Franklin County (the employer of the 911 operator), the trial court granted summary judgment based on collateral estoppel.¹⁵ Division Three affirmed on different grounds holding that the facts did not establish that Franklin County owed Ms. Garcia a duty under §302B.¹⁶ The alleged failure of the operator to convey certain information to the police is nothing more than a failure to act, and the Court concluded “[t]hat failure is not an affirmative action. Even if the receipt of the 911 call gave rise to a duty to alert the police about the caller’s report—an issue we

⁹ Slip op. at 2.

¹⁰ Slip op. at 2.

¹¹ Slip op. at 2.

¹² Slip op. at 3.

¹³ Slip op. at 7, citing *Garcia v. City of Pasco*, Slip Opinion at 7.

¹⁴ *Garcia v. Joey’s 1983, Inc.*, 181 Wn.2d 1009, 335 P.3d 940 (2014).

¹⁵ Slip op. at 4.

¹⁶ Slip op. at 10.

do not decide—the operator’s failure to live up to that duty was not an affirmative action within the meaning of §302B.”¹⁷

The record fails to provide a reasonable basis for Supreme Court review.

B. The appellate court properly held that a failure to act is not an affirmative action within the meaning of Restatement (Second) of Torts §302B.

Division Three’s opinion is consistent with this Court’s opinion in *Robb v. City of Seattle*.¹⁸ In *Robb*, the Court held that a duty under §302B arises only when the government’s own affirmative act created the harm.¹⁹ There the police officer’s failure to pick up a shotgun shell at a crime scene that was later used to shoot and kill Mr. Robb was an omission and not an affirmative act that created the harm.²⁰

Similarly, here, the 911 operator did not engage in any affirmative act.²¹ To the extent that the operator allegedly failed to convey specific information to the police, the failure to pass on was an omission and not an affirmative act under §302B.²² There is no conflict of decisions giving rise to appellant’s petition for review under RAP 13.4(b)(1) or (2). Further, petitioners fail to identify a substantial public interest or provide any meaningful argument to permit the Court to accept review pursuant to RAP 13.4(b)(4).

¹⁷ Slip op. at 11.

¹⁸ 176 Wn.2d 427, 295 P.3d 212 (2013).

¹⁹ 176 Wn.2d at 433-34.

²⁰ 176 Wn.2d at 433-34.

²¹ Slip op. at 11.

²² Slip op. at 11.

C. *Collateral estoppel bars appellants claims because these issues were decided by the Court of Appeals, Division One in Garcia v. City of Pasco, Cause No. 70395-1-I, noted at 181 Wn.2d 1009 (2014).*

The Court may also deny the petition for review because this action is barred by collateral estoppel. In *Garcia v. City of Pasco*, the parties litigated Division One's thorough analysis of the 911 operator's duties under Washington case law. Notably, Division One's analysis was in response to Plaintiff's argument that the 911 operator made an implicit promise to convey Gorton's statement to the police.²³

Division One's opinion considers the entire transcript of the brief call between John Gorton and the 911 operator in the *Garcia* matter.²⁴ The Court noted that the operator's failure to convey the information which was not an affirmative action.²⁵ Following Division One's ruling, the appellants filed a petition for review, which this Court denied.²⁶ The Court may find that Division One necessarily resolved Franklin County's duty, or lack thereof, to Ms. Garcia and deny the petition for review on that ground.

V. CONCLUSION

The trial court and the Court of Appeals both correctly dismissed this matter.

Neither the trial court nor the Court of Appeals erred in any manner; and there is nothing for this Court to review further under RAP 13.4.

²³ CP 187.

²⁴ CP 186-187.

²⁵ Slip op. at 10; *see also Garcia v. Joey's 1983, Inc.*, 181 Wn.2d 1009, 335 P.3d 940 (2014), Slip op. at 12-13.

²⁶ *Garcia v. Joey's 1983, Inc.*, 181 Wn.2d 1009, 335 P.3d 940 (2014).

Franklin County therefore asks the Court to deny the family and estate of Tiairra Garcia's Petition for Review; and to issue a Mandate bringing an end to the Garcias' and Leikam's claims against Franklin County.

DATED and respectfully submitted this 13th day of June, 2016.

/s/John M. Silk

/s/Lesli Wood

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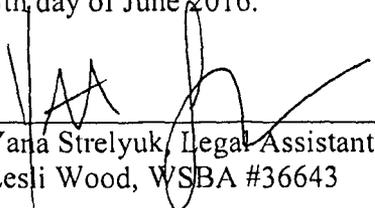
DECLARATION OF SERVICE

The undersigned certifies that under penalty of perjury under the laws of the State of Washington, that on the below date I caused to be served *Franklin County's Answer to Petition for Review* in the manner indicated below:

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DATED at Seattle, Washington this 13th day of June 2016.



Yana Strelyuk, Legal Assistant to
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Re: Donna Garcia, et al. v. Franklin Count
Supreme Court No. 93137-2
(Court of Appeals No. 332047-III)

Dear Clerk of the Court:

Attached please find Franklin County's Answer to Petition for Review being filed by attorney Lesli Wood, WSBA #36643. Ms. Wood's contact information is below:

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