

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SYDNEY ALLRUD, Administrator of the Estate of Tracey Kirsten Allrud,)	
)	No. 66061-6-I
Appellant,)	
)	DIVISION ONE
v.)	
)	
CITY OF EDMONDS, a municipal corporation; SOUTHWEST SNOHOMISH COUNTY PUBLIC SAFETY COMMUNICATIONS AGENCY, dba SNOCAM;)	
)	UNPUBLISHED OPINON
Respondents,)	
)	FILED: December 27, 2011
JOHN DOES I and II,)	
)	
Defendants.)	
_____)	

Becker, J. — A gravely disabled woman died alone in her home despite a 911 call hours earlier from a nurse practitioner asking for someone to check on the woman’s safety. The officer who went to the house found it locked and decided not to go in. The issue presented is whether the officer and the 911 dispatch agency owed the woman a duty actionable in tort. The estate would locate the source of such duty in the statute providing for involuntary commitment, one purpose of which is to provide prompt evaluation and treatment

of persons with serious mental disorders. But the statute has other purposes as well, including the safeguarding of individual rights and the protection of public safety, and it gives an officer discretion to assess whether the situation is sufficiently emergent to demand intervention. The only duties identified by the estate are owed to the public at large. The trial court correctly dismissed the estate's claim on summary judgment.

When reviewing an order on summary judgment, we engage in the same inquiry as the trial court. Cummins v. Lewis County, 156 Wn.2d 844, 852, 133 P.3d 458 (2006). Summary judgment is proper where the entire record shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Cummins, 156 Wn.2d at 852. We review the record taking all facts and inferences therefrom in the light most favorable to the nonmoving party. Babcock v. Mason County Fire Dist. No. 6, 144 Wn.2d 774, 784, 30 P.3d 1261 (2001).

At about 4:12 p.m. on February 16, 2006, 911 operators received a call from Diane Kaplan, an advanced registered nurse practitioner specializing in mental health. Kaplan said she was concerned that her patient, Tracey Kirsten Allrud, was "passively suicidal." Kaplan asked that someone go to Allrud's house in Edmonds and check on her. Kaplan advised that Allrud's ex-husband, Michael Faltisco, had a key to the house and could meet police there.

At about 4:19 p.m., Officer Eric Falk was dispatched. Falk called Kaplan while he was driving to the house. Kaplan told him Allrud was using alcohol,

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was not eating or drinking other fluids, was increasingly confused and dizzy, was possibly delirious, was not answering her phone, might not be able to walk, and was refusing help. Kaplan told Falk that Allrud and Faltisco had two teenage sons for whom they shared responsibility.

While en route to the house, Officer Falk also called Allrud's number. No one answered. He left a message for Allrud indicating that people were concerned for her welfare.

Officer Falk arrived at the house at about 4:33 p.m. He knocked on the front door and rang the doorbell. No one answered. He walked around the sides of the house and saw the backyard was fenced in and the house looked neglected.

Allrud's neighbor called out to Officer Falk and said Allrud was home. The neighbor described Allrud's behavior as unusual and antisocial. She said Allrud would not answer her door. She had seen Allrud's former husband, Faltisco, go inside the house twice that day with his sons.

At this point, Faltisco and his sons again arrived at the house. Officer Falk recognized Faltisco as a social worker at Stevens Hospital. Faltisco expressed concerns similar to Kaplan's. He said Allrud had quit going to work and had not kept their appointment that day for family counseling with Kaplan. Faltisco said he wanted Allrud to be taken to the hospital; he felt she was in need of involuntary commitment. He told Falk that Allrud was refusing medical care and that she would not want Falk's help.

Falk said he might violate Allrud's civil rights if he entered her house without permission. Faltisco told Falk he would allow the boys to unlock the door with their key, but he did not want them to go into the house.

Falk was not convinced there was an emergency. He said he could not force Allrud to get medical attention. When Faltisco offered to call 911 again to summon medical personnel, Falk replied that it was his investigation and that he would decide if there was an emergency. Falk asked dispatch to let him know if "aid gets dispatched to this address for any reason." These comments made Faltisco feel intimidated. He drove away with his sons.

Meanwhile, Officer Falk called his supervisor, who told him not to enter the house to check on Allrud unless a medical doctor asked him to. Falk called Kaplan to ask if she was calling for a medical doctor. Kaplan told him no. Kaplan thought Falk's questioning of her role was very inappropriate and that he did not appear to understand the role of a nurse practitioner.

Falk told Kaplan that the situation did not appear to be exigent and that he had to respect Allrud's civil liberties. He told Kaplan that he would enter the house if one of the boys opened the door and requested help.

Before leaving, Falk called Faltisco and left a message repeating what he told Kaplan. That message did not reach Faltisco, who was running some errands.

Faltisco and his sons returned to Allrud's house and went inside at about 6:30 p.m. They found Allrud unconscious. Faltisco began CPR and called 911.

Medical personnel were unable to revive Allrud.

A death investigation attributed Allrud's death to acute intoxication due to the combined effects of methadone,¹ ethanol,² and citalopram.³ Fatty metamorphosis of the liver was considered a contributory cause of death.

Sydney Allrud, as administrator of her sister's estate, sued the city of Edmonds and the 911 dispatch agency for wrongful death. The trial court granted the defendants' motion for summary judgment. This appeal followed.

The involuntary commitment act imposes certain duties upon public and private agencies with regard to detaining, treating, and releasing individuals and who are thought to be gravely disabled. The act also provides that individuals performing such duties are immune from civil and criminal liability if they perform their duties "in good faith and without gross negligence." RCW 71.05.120.

The estate contends that Officer Falk breached a duty owed to Allrud under the act when he failed to enter the residence and complete the safety check. The estate further contends that Officer Falk had no statutory immunity because his disregard of the information he received indicating that Allrud was incapacitated amounted to gross negligence. The respondents contend they did not owe a duty to Allrud under these circumstances.

Whether an actionable duty was owed to the plaintiff is a question of law,

¹ Methadone is a narcotic drug used to relieve pain.

² Ethanol is alcohol.

³ Citalopram is an antidepressant drug.

reviewed de novo. Cummins, 156 Wn.2d at 852. When the defendant in a negligence action is a government entity, courts must ensure that the alleged breach was of a duty owed to the injured person as an individual, not merely the breach of an obligation owed to the public in general. Cummins, 156 Wn.2d at 853. A broad general responsibility to the public at large rather than to individual members of the public simply does not create a duty of care. Osborn v. Mason County, 157 Wn.2d 18, 28, 134 P.3d 197 (2006).

Our courts have recognized at least four common law theories defining situations in which a governmental entity may owe an actionable duty in tort to an individual: (1) legislative intent, (2) failure to enforce, (3) the rescue doctrine, and (4) a special relationship. Cummins, 156 Wn.2d at 853-54 n.7. The Estate argues the first three. The Estate does not argue there was a “special relationship” giving rise to a duty owed to Allrud.

LEGISLATIVE INTENT

A plaintiff’s action may lie against a governmental entity if a regulatory statute, by its terms, evidences a clear legislative intent to identify and protect a particular and circumscribed class of persons. Ravenscroft v. Wash. Water Power Co., 136 Wn.2d 911, 929, 969 P.2d 75 (1998). In such a case, a member of the identified class may bring a tort action against the governmental entity for its violation of the statute. Ravenscroft, 136 Wn.2d at 929. This intent must be clearly expressed within the provision—it will not be implied. Ravenscroft, 136 Wn.2d at 930. Though often referred to as an “exception,” it is simply duty

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imposed upon the governmental entity by statute. Smith v. State, 59 Wn. App. 808, 813, 802 P.2d 133 (1990), review denied, 116 Wn.2d 1012 (1991).

The Estate argues that Officer Falk owed Allrud an individualized duty of care under the involuntary commitment act, former RCW 71.05.150(4)(b) (1998).⁴ This statute authorizes an officer, in certain emergent circumstances, to take a person into custody for evaluation and treatment:

(4) A peace officer may, without prior notice of the proceedings provided for in subsection (1) of this section, take or cause such person to be taken into custody and immediately delivered to an evaluation and treatment facility or the emergency department of a local hospital:

.....

(b) When he or she has reasonable cause to believe that such person is suffering from a mental disorder and presents an imminent likelihood of serious harm or is in imminent danger because of being gravely disabled.

Former RCW 71.05.150(4)(b).

In ascertaining legislative intent, we may look to a statute's declaration of purpose. Dorsch v. City of Tacoma, 92 Wn. App. 131, 134, 960 P.2d 489 (1998), review denied, 137 Wn.2d 1022 (1999). The legislature has declared seven purposes for the involuntary commitment act:

- (1) To prevent inappropriate, indefinite commitment of mentally disordered persons and to eliminate legal disabilities that arise from such commitment;
- (2) To provide prompt evaluation and timely and appropriate treatment of persons with serious mental disorders;
- (3) To safeguard individual rights;
- (4) To provide continuity of care for persons with serious mental disorders;
- (5) To encourage the full use of all existing agencies, professional personnel, and public funds to prevent duplication of services and unnecessary expenditures;
- (6) To encourage, whenever appropriate, that services be provided within the community;

⁴ Former RCW 71.05.150(4)(b) (1998), amended and recodified as RCW 71.05.153(2)(b).

(7) To protect the public safety.

RCW 71.05.010. The legislature has further expressed its intent in another section:

It is the intent of the legislature to enhance continuity of care for persons with serious mental disorders that can be controlled or stabilized in a less restrictive alternative commitment. Within the guidelines stated in In Re LaBelle 107 Wn. 2d 196 [728 P.2d 138] (1986), the legislature intends to encourage appropriate interventions at a point when there is the best opportunity to restore the person to or maintain satisfactory functioning.

RCW 71.05.012.

The Estate argues these statements of purpose and intent establish a class protected by the statute—persons with serious mental disorders—and that Allrud was part of that class.

As a general rule, a duty in tort arises from a statute only where there is language mandating, rather than merely authorizing, certain actions. For example, an officer may be liable in tort for failing to arrest a perpetrator of domestic violence, because the pertinent statute uses the phrase “shall exercise arrest powers.” RCW 10.99.030(6)(a); Donaldson v. City of Seattle, 65 Wn. App. 661, 667-71, 831 P.2d 1098 (1992), review denied, 120 Wn.2d 1031 (1993). Another statute that used the word “shall,” former RCW 26.44.050 (1987), established an individualized duty that could be breached by failing to investigate reports of possible child abuse. Yonker v. Dep't of Soc. & Health Servs., 85 Wn. App. 71, 78-80, 930 P.2d 958, review denied, 132 Wn.2d 1010 (1997). Here, the statutory language is not mandatory. The pertinent statute

says a peace officer “may” cause the person to be taken into custody. Former RCW 71.05.150(4)(b). This is not a case in which there is a compelling reason to interpret “may” as meaning “shall.” See In re Ellis, 118 Wash. 484, 489, 203 P. 957 (1922).

While the declarations of legislative intent concerning involuntary commitment do give special attention to persons with serious mental disorders, the overall purpose of the involuntary commitment act is broad. The legislation was intended not only to encourage treatment of persons with serious mental disorders, but also to protect their individual rights by preventing unnecessary detention. Nowhere in the act is there a directive for an officer to enter a home without consent upon receiving information that the person inside is gravely disabled. The limited authority granted to an officer to take a mentally disturbed person into custody is permissive, not mandatory. Even assuming that people with “serious mental disorders” is a circumscribed class, an officer’s decision not to intervene does not violate the specific statute relied on by the Estate. Under the statute, Officer Falk had discretion to decide whether or not to take Allrud in for evaluation and treatment.

A police officer ordinarily must refrain from entering a home without a warrant. It is true that an officer who believes in good faith that someone’s health or safety may be endangered need not wait for a warrant. Indeed, not acting promptly to ascertain if someone needs help in an emergency can be considered a dereliction of duty. State v. Gocken, 71 Wn. App. 267, 277, 857

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P.2d 1074 (1993), review denied, 123 Wn.2d 1024 (1994). The Estate attempts to fashion a tort duty from the Gocken line of cases. But these cases address the law of search and seizure; they are not civil actions. The “duty” referred to is

no more than the generalized public duty involved in the job of being a police officer.

We conclude the involuntary commitment act does not manifest a legislative intent to impose civil liability upon an officer or a 911 dispatch agency for failing to detain and obtain treatment for a gravely disabled person who has not consented to be helped.

FAILURE TO ENFORCE

A duty of care can be owed in tort to an individual where (1) governmental agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation, (2) they fail to take corrective action, (3) there is a statutory duty to do so, and (4) the plaintiff is within the class the statute intended to protect. Smith, 59 Wn. App. at 814. This exception applies only where there is a mandatory duty to take a specific action to correct a known statutory violation. Donohoe v. State, 135 Wn. App. 824, 849, 142 P.3d 654 (2006). Such a duty does not exist if the government agent has broad discretion about whether and how to act. Donohoe, 135 Wn. App. at 849.

Former RCW 71.05.150 does not impose a mandatory duty on officers to enter a person's home and perform a safety check when notified that the person is in danger. The statute gives officers discretion. Therefore, no duty in tort arises for failure to enforce the statute.

VOLUNTEER RESCUE

An actor may owe a duty to a person in danger if the actor (1) undertakes a duty to aid or warn the person; (2) fails to exercise reasonable care; and (3) offers to render aid and, as a result of the offer of aid, either the person to whom the aid is to be rendered, or another acting on that person's behalf, relies on the offer and consequently refrains from acting on the victim's behalf. Vergeson v. Kitsap County, 145 Wn. App. 526, 539, 186 P.3d 1140 (2008). The duty arises only if the actor, including an actor who is the agent of a governmental agency, breaches an obligation that has been *gratuitously* assumed. Babcock v. Mason County Fire Dist. No. 6, 101 Wn. App. 677, 685, 5 P.3d 750 (2000), affirmed, 144 Wn.2d 774, 30 P.3d 1261 (2001).

In this case, the evidence does not establish the elements of a voluntary rescue. Neither the 911 agency nor Officer Falk acted gratuitously. By responding to the 911 call and investigating the situation, they performed a public duty owed to all. In addition, there was no promise or offer to go inside Allrud's house. Falk informed Faltisco and Kaplan of the decision not to go in, thus there was no induced reliance.

The Estate argues that the conduct of the respondents was so egregious that a jury could find them exempt from the immunity provided by RCW 71.05.120(1). Because no suit for negligence can be maintained, it is unnecessary to decide whether the respondents are immune from suit. We conclude the Estate's negligence action fails for lack of the element of duty.

Affirmed.

Becker, J.

WE CONCUR:

Jau, J.

Cox, J.