FILED

NOV 15 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

Court of Appeals No. 314570

COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

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

Appellant/Plaintiff

v.

SPOKANE COUNTY, et al.
Respondent/Defendants

RESPONDENT SPOKANE COUNTY'S ANSWERING BRIEF

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I. INTRODUCTION

Plaintiff, Shizuko Mita, surviving spouse, Floyd Mita, individually and as the personal representative of the Estate of Kay Mita (hereinafter "Mita") filed a lawsuit against Defendants, Spokane County and Guardsmark, LLC out of an incident arising on November 26, 2007. On that date Kay Mita, decedent, was a Spokane County Juror. Kay Mita failed to return following the juror lunch break and the following morning he was found dead outside the Spokane County Courthouse. The Mitas brought a lawsuit alleging negligence (among other claims not at issue in this Appeal.) Mitas essentially alleged that as a result of a special relationship, Spokane County and Guardsmark were both negligent in failing to protect Mr. Mita and ultimately causing his death.

On September 10, 2012, Defendants Spokane County filed their Motion for Summary Judgment (CP 332-334). The trial court heard the County's Motion for Summary Judgment on December 10, 2012 and ruled in favor of Defendants; on

January 16, 2013 an Order was entered dismissing Plaintiffs' claims with prejudice. (CP 874-877)

II. STANDARD OF REVIEW

"On appeal of summary judgment, the standard of review is de novo, and the appellate court performs the same inquiry as the trial court." *Lybbert v. Grant County, State of Washington*, 141 Wash.2d 29, 1 P.3d 1124 (2000) (citing *Nivens v. 7-11 Hoagy's Corner*, 133 Wash.2d 192, 197-98, 943 P.2d 286 (1997). "When ruling on a summary judgment motion, the court is to review all facts and reasonable inferences therefrom most favorably toward the nonmoving party." *Id.* (citing *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wash.2d 891, 897, 874 P.2d 142 (1994). "A court may grant summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* (citing *Ruff v. County of King*, 125 Wash.2d 697, 703, 887 P.2d 886 (1995); see also CR 56(c)). In a negligence action, whether

an actionable duty was owed to the plaintiff is a threshold determination. *Id.* That determination is a question of law reviewed de novo. *Munich v. Skagit Emergency Commc'n Ctr.*, 175 Wash.2d 871, 877, 288 P.3d 328, 332 (2012), *citing*, *Cummins v. Lewis County,* 156 Wash.2d, 844, 852, 133 P.3d 458 (2006)(en banc).

III. ISSUES ON APPEAL-SPOKANE COUNTY

The Mitas brought four issues on appeal regarding Spokane County. The issues raised are 1) Did the trial court err in ruling that the public duty doctrine applies to this case when appellants are basing liability on a common law duty as opposed to a duty mandated by the Legislature?; 2) Did the trial court err in ruling that Spokane County did not owe a duty to Kay Mita under basic tort principles and consideration material to determining whether a duty exists, namely, foreseeability, policy, common sense and justice?; 3) Did the trial court err in ruling that Spokane County did not owe a duty to Kay Mita under the "rescue doctrine?"; and 4) Did the trial court err in

ruling that Spokane County did not owe a duty to Kay Mita based on common law special relationship? This Response addresses these questions on behalf of Spokane County only. The trial court properly dismissed Spokane County on Summary Judgment and this Court should uphold the dismissal.

IV. STATEMENT OF THE CASE

Spokane County does not dispute Mitas' statement of the case except when specifically noted, but submits the following additional facts.

The Mitas were not initially concerned about Kay Mita's failure to return to the jury room, because it was "during the daytime [and] he was an alert person." (CP 257-258) He had just had a physical and was deemed to be in excellent health with no memory problems. (CP 569-572) The Mitas had no concerns about Kay Mita's absence until approximately 6:00 p.m. (CP 260-261)

In addition to Shannon Tritt's brief conversation with Mr. Mita regarding his car, Ms. Tritt also offered to assist Mr. Mita

in locating his vehicle. (CP 817) He declined the assistance. (CP 817) Ms. Tritt also offered to make a cell phone call for him, which he also declined, stating, "No, I am good." (Id.) Ms. Tritt then asked again if Mr. Mita had a ride and he repeated that he could not locate his vehicle. (Id.)

Ms. Tritt next suggested that Mr. Mita seek assistance from the security personnel who were still at the courthouse, which was open. (CP 817-818)

Contrary to Mita's assertion that Ms. Tritt found Mr. Mita, "confused and bewildered," (*Mita's Opening Brief*, p. 7) this is "fact" from a hearsay summary of Mita's expert, Al Odenthal's, investigation. Ms. Tritt actually testified that during her interaction with Mr. Mita, he was coherent and interacted appropriately during their discussion. (CP 818)

SCRC specifically defines "at risk" individuals. (CP 158, 161-162) SCRC did not consider Mr. Mita an "at risk," individual. (CP 242) A person qualifies as "at risk" only when they are vulnerable due to a mental or physical condition that

could compromise their own or other person's safety. (CP 242) Advanced age is not sufficient. (CP 242) Generally, it includes individuals with Alzheimer's, dementia, suicide and/or drug and alcohol related issues. (CP 312)

Floyd Mita did not provide information which indicated that Kay Mita was physically or mentally impaired. (CP 243) Thus, Kay Mita was not recognized as "at risk" and Floyd Mita's call was designated as "Priority 4, Disposition 15A." This means simply that a report was taken. (CP 314)

SCRC also has a specific procedure in place when a "non-at-risk" adult is reported as missing. (CP 154; 162; 243-44) A report is completed and forwarded to a supervisor. (CP 316) The report is simply forwarded into the Records Management System which is run by City of Spokane Police Department. (CP 244) An employee of the Records Management System then enters the information into WACIC. (Id.) Entry into the WACIC system means that if an officer comes across the individual in a traffic stop, or other police

contact, the inquiry will display the person as reported as missing. (CP 154)

Only an at-risk individual was forwarded to dispatch in 2007. (CP 154, 316) Once SCRC call takers forward the information, either to a supervisor, or dispatch they have no further duties or responsibilities. (CP 319)

Contrary to Floyd Mita's assertions that Ms. Johnson told Floyd Mita that she would "send a policeman out immediately," this is not an action that SCRC would do; nor is it a function that SCRC could perform. (emphasis added)(CP 154, 162, 298-299, 301, 316) If a caller to SCRC wanted an immediate response, that caller would need to contact 911. (CP 300-301)

Finally, contrary to Floyd Mita's testimony that he talked to Ms. Johnson for ten plus minutes, there is no evidence in the record to establish this. (See e.g. CP 635) In fact, the report was made at 19:11, the report was entered at the same time and then sent to the Supervisor. (CP 635) This is dictated by SCRC Policies. (Supra)

The Mitas made no independent effort to search for Kay Mita. (CP 682)

V. LAW/ANALYSIS

1. The Public Duty Doctrine "Special Relationship" Exception Does Not Apply.

"When the defendant in a negligence action is a government entity, the public duty doctrine provides that a plaintiff must show the duty breached was owed to him or her in particular, and was not the breach of an obligation owed to the public in general, i.e., a duty owed to all is a duty owed to none." *Munich v. Skagit Emergency Community Center* 175 Wash.2d 871, 878, 288, P.3d 328 (en banc)(2012). *Taylor v. Stevens County*, 111 Wash.2d 159, 759, P.2d 447 (1988)(internal citations omitted). Whether a duty exists is a question of law. *Osborn v. Mason County*, 157 Wash.2d 18, 22-23, 134 P.3d 197 (2006). One (of four) exceptions to the public duty doctrine is whether there is a "special relationship."

Folsom v. Burger King, 135 Wash.2d 658, 676, 958 P.2d 301 (1998)

Here, Mitas argue that the Supreme Court in *Munich* recently "clarified that duties based on the common law, as opposed to statutes, ordinances and regulations, are not limited by the doctrine and thus municipal liability may exist even though none of the exceptions can apply." (*Mitas Opening Brief*, p. 18)

However, there is absolutely no support for that argument in *Munich.* Instead, *Munich* answers two express questions regarding the special relationship doctrine. It does not in any way amend, or revise, the public duty doctrine which has long been the law in the State of Washington. Instead, the Court held:

> On the narrow issue before us, we hold express assurances promising action need not be false or inaccurate as a matter of law to satisfy the special relationship exception to the public duty doctrine.

> When a 911 operator assures a caller help is on the way, as in this case, truth or falsity is not determinative because the government actor may be negligent in fulfilling that assurance.

Munich, 175 Wash.2d at 877, 288 P.3d at 331.

Munich is thus wholly distinguishable. A determination of whether the statement was "false," is simply not at issue here. Rather, the determining issue here is whether there was any privity between Kay Mita and Spokane County such as is required to establish the special relationship to the Public Duty Doctrine. This is the second issue *Munich* specifically addressed; and it is one that Mita ignores, *Munich* does not, as Mita argues, rely on a legislative duty. (*see generally, Mita Opening Brief*, p. 22-23)

> Our holding does not increase municipalities' exposure to liability in this context. It simply recognizes what has always been the case—a special relationship is established by <u>privity, an</u>

> express assurance, and justifiable reliance. It is noteworthy that in every case discussing the special relationship exception, the same three elements are repeatedly cited and employed, even in cases where truth or falsity is tangentially discussed. *See, e.g., Harvey v. County of Snohomish*, 157 Wash.2d 33, 38–41, 134 P.3d 216 (2006)(en banc) (special relationship requires privity, express assurance, and reliance); *Meaney,* 111 Wash.2d at 178–79, 759 P.2d 455 (explicitly numbering the same three elements).

Munich, 175 Wash.2d at 884-85 (emphasis added).

It is not disputed that absent a "special relationship" there is generally no duty to prevent harm to an individual. *See e.g.*, *Folsom v. Burger King*, 135 Wash.2d 658, 676, 958 P.2d 301 (1998); *Brown v. MacPherson's, Inc.*, 86 Wash.2d 293, 299-301, 545 P.2d 13 (1975). It is also undisputed that there are a

limited number of exceptions that have been recognized as creating this special relationship:

> Under traditional tort law, absent affirmative conduct or a special relationship, no legal duty to come to the aid of a stranger exists...an exception may create an affirmative duty to protect another from harm. If an exception applies, liability may be imposed despite the absence of negligence. These special relationships typically arise when one party is entrusted with the well-being of the other party."

Folsom, 135 Wash.2d at 674-675(internal citations omitted).[1]

Here, Mitas appear to argue a "special relationship," and rescue doctrine based upon alleged discussions between Kelly

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[1] Those five exceptions are set forth in Restatement (Second) of Torts §§ 314A and 314B, none of which apply here. *See also*, *Folsom*, 135 Wash.2d at 675, fn.1

Johnson and Floyd Mita. However, as a matter of law, there was no "duty" created by Mr. Floyd Mita's call to the Spokane Crime Reporting Center for two reasons: (1) there was no privity between Ms. Johnson and Kay Mita; and (2) there was no breach of any duty (or a failure of reasonable care).

2. As A Matter Of Law Mitas Claim of Special Relationship Must Fail As No Privity Existed.

The special relationship exception to the public duty doctrine is one exception. Privity is a required element. "To establish this exception, the plaintiff must show that there is some form of privity between the plaintiff and the public entity that differentiates the plaintiff from the general public, that the public entity made an express assurance to the plaintiff, and that the plaintiff justifiably relied on the assurance." *Bratton v. Welp*, 145 Wash.2d 572, 576-577, 39 P.3d 959, 961 (2002); *citing*, *Taylor v. Stevens County,* 111 Wash.2d 159, 166, 759 P.2d 447 (1988); *Beal v. City of Seattle,* 134 Wash.2d 769, 785, 954 P.2d 237 (1998).

"Under the special relationship exception a government entity may be liable to an individual where a relationship either exists, or has developed, between the plaintiff and the municipality's agents such that a duty to perform a mandated act for a particular person or class exists." *Chambers–Castanes v. King County,* 100 Wash.2d 275, 285, 669 P.2d 451 (1983). A special relationship requires: (1) direct contact or privity between the public official and the injured plaintiff which sets that person apart from the general public, (2) express assurances given by a public official, and (3) the plaintiff justifiably relies upon those assurances. *Beal,* 134 Wash.2d at 785, 954 P.2d 237.

Here, Mitas' attempt to establish a special relationship by arguing that alleged promises made to Floyd Mita somehow creates a duty to Kay Mita. (emphasis added) Essentially, Mitas then argue that dying from the cold was "reasonably perceived as being within the general field of danger" and that

Ms. Johnson should have reasonably assumed Kay Mita would freeze to death. (*See generally Mita Opening Brief*, p. 28)

However, Mitas' reliance on *Chambers-Castanes* for this premise is misguided at best. *Chambers-Castanes* is no different than every other Washington case addressing privity in public duty doctrine special exception cases. Privity existed between the dispatchers to Steve Ann Chambers-Castanes because they assured her help was on the way. (Emphasis added) *Chambers-Castanes v. King Cnty.*, 100 Wash.2d at 287, 669 P.2d at 458. As a matter of law, privity simply does not exist absent a direct contact; and Washington has not expanded this definition. "A special relationship arises where (1) there is direct contact or privity between the public official and the injured plaintiff which sets the latter apart from the general public, and (2) there are express assurances given by a public official, which (3) gives rise to justifiable reliance on the part of the plaintiff." *Taylor*, 111 Wash.2d at 166, 759 P.2d at 45; *citing*, *Chambers–Castanes v. King Cy.,* 100 Wash.2d at 286–

87, 669 P.2d 451, 39 A.L.R.4th 671 (1983); *see also Bailey v. Forks,* 108 Wash.2d 262, 268, 737 P.2d 1257 (1987); *Bratton v. Welp*, 145 Wash.2d at 576-77, 39 P.3d at 961. (To establish this exception, the plaintiff must show that there is some form of privity between the plaintiff and the public entity that differentiates the plaintiff from the general public); *Beal*, 134 Wash.2d at 785, 954 P.2d 237 (direct contact or privity between the plaintiff and the public official which sets the plaintiff apart); *Babcock v. Mason Cnty. Fire Dist. No. 6*, 101 Wash. App. 677, 687, 5 P.3d 750, 756 (2000) aff'd, 144 Wash.2d 774, 30 P.3d 1261 (2001)(Three prerequisites must be met to establish a special relationship: (1) [t]here is direct contact or privity between the public official and the injured plaintiff which sets the latter apart from the general public...).

Absolutely none of the Washington cases finding special exceptions expands the concept of privity to anything other than "direct contact," or "privity" between the public official and the injured plaintiff as Mitas attempt to argue. As recent as *Munich*

in 2012 the Supreme Court has made no changes. While Floyd Mita had contact with Ms. Johnson, Kay Mita had no knowledge of this contact and privity simply does not exist.[2] Here, Kelli Johnson had absolutely no contact with Kay Mita. While Mitas attempt to boot strap Floyd Mita's discussion with Kelli Johnson into creating privity, as a matter of law, it cannot. In making this argument, Mitas rely on cases which in reality support Spokane County's argument regarding privity.

In *Babcock v. Mason County Fire Dist.*, there was direct contact between the Fire District and Babcock. In fact, the Court specifically stated, "[a] special relationship arises where "'(1) <u>there is direct contact or privity between the public official and the injured plaintiff</u> which sets the latter apart from the

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[2] Perhaps Floyd Mita had some separate cause of action which arose on his own behalf as a result of the contact between he and Ms. Johnson. However, no claim, based on their direct contact was made.

general public..." *Babcock v. Mason Cnty Fire Dist.No. 6*, 144 Wash.2d, 774, 786, 30 P.3d 1261, 1268 (2001).

Mitas also rely on cases outside of Washington. *Maltman v. Sauer*, arguing that case somehow stands for the premise that privity is not necessary so long as there is "foreseeability." However, *Maltman* is distinguishable; first, *Maltman* is a case of rescue doctrine – not a special relationship for which it was offered. Regardless, it is wholly distinguishable and not remotely on point for this particular principle. In *Maltman*, the Court held that, "...a professional rescuer, in making a deliberate attempt at saving a life, and under the correct factual setting, is within the intended scope of the 'rescue doctrine'." *Maltman v. Sauer*, 84 Wash.2d 975, 978, 530 P.2d 254, 257 (1975). The case focused solely on a professional rescuer.

Mitas next argue that the Court should find privity between Floyd Mita and Kelli Johnson by referring to the discussion as an express assurance and rely on New York case

law to somehow argue that Washington should change its longstanding holdings. Regardless, whether this Court finds that there were express assurances made by Ms. Johnson to Floyd Mita, the issue remains one of privity. An assurance is only one of the three elements of a Special Relationship. Without privity, there simply can be no special relationship exception and the New York cases are distinguishable and fail to bolster Mitas' argument.

In *Cuffy v. City of New York*, the case involved law enforcement. There, the Cuffys had gone to the local precinct and were promised by the desk officer that "an arrest would be made or something else would be done about the situation 'first thing in the morning'." *Cuffy v. City of New York*, 69 N.Y.2d 255, 259 (1987). Instead, no action was taken. There, the courts found that there was a relationship created because there was knowledge on the part of the municipality's agents that inaction could lead to harm. *Id.* at 260.

Here, there was absolutely no knowledge of an "inaction" leading to harm (notwithstanding that there is no evidence of any "promises or actions" by SCRC in the record). In fact, as set forth supra, SCRC did not view Kay Mita as a vulnerable person. Floyd Mita did not provide any information that would indicate Kay Mita was vulnerable. There was no evidence in the record that there was any risk of harm to Kay Mita. Mitas simply argue that this Court find it foreseeable that Kay Mita would freeze to death simply because he had "gone missing." Missing adults are not a rarity evidenced by the fact that before SCRC would even take a report, Floyd Mita was instructed to call all of the hospitals in Spokane first.

Thus, despite Mitas' (understandable) desire that Kay Mita be "foreseeable as a vulnerable person," there is simply no indication that such was the case.

Sorichetti by Sorichetti also does not support Mitas' argument. Instead, *Sorichetti* supports Spokane County's position. That case specifically holds "a key element in each of

these cases, as well as in those cases that have found a special duty of reasonable care in the performance of other governmental functions is *some direct contact between the agents of the municipality and the injured party.* *Sorichetti by Sorichetti v. City of New York*, 65 N.Y.2d 461, 469 (1985). There, the courts found a special relationship between the mother and a daughter who was harmed because of very specific factors of first-hand involvement with the police. The court found that the police had enough knowledge to create a special relationship based upon (1) the department's knowledge of the violence of the father; (2) the order of protection that existed; and (3) its response or failure to respond to mom's pleas for assistance and the reasonable expectation that existed because the police specifically had her wait for an extended period of time before acting. *Sorichetti*, 65 N.Y.2d at 469.

Again, *Sorichetti* is distinguishable from the facts of this case. While there was a creation of an exception via discussions with the mother, the daughter was aware of the contact and the

police had significant information. (Emphasis added) Here, Kelli Johnson knew only limited facts, had no authority to take any action, and was not in a position to render any assistance or aid.

Laratro v. City of New York, also supports Spokane County's argument that there can be no special relationship because there was no direct contact. There, the court held that the plaintiff did not satisfy any of the special relationship test because plaintiff did not have direct contact with the City's 911 operator. "We decide the case on that ground and do not reach the issue of whether the 911 operator's statement was specific enough to be an 'affirmative undertaking' on which a party could justifiably rely." *Laratro v. City of New York*, 8 N.Y.3d 79, 83 (2006).

Finally, Mita also relies on *Chambers-Castanes*. However, these facts are also distinguishable. There, Plaintiffs, husband and wife were both assaulted by unidentified men. *Chambers-Castanes v. King County,* 100 Wash.2d at 278, 669

P.2d 451. The injured wife called the King County Police Department three separate times on the phone and was told each time by police department operators that help was on the way. *Id.* at 279-80. Here, SCRC has no authority to dispatch. An individual needing immediate assistance must call 911 and further Kay Mita did not qualify as at-risk and his information is simply forwarded to City of Spokane Records. (CP 145, 148, 149, 150) Again, the privity issue is distinguishable as the caller herself was a victim.

Here, there was no privity between Kay Mita and Spokane County. In fact, unlike in *Bratton*, *Taylor* and *Beal*, there was no contact whatsoever between Kay Mita and Spokane County. Thus, the first element – privity between the governmental entity and the victim – does not apply.

3. The Harm To Kay Mita Was Neither A Breach Of Duty Or Foreseeable

A municipality does not have a "duty" to protect its citizens in a colloquial sense, but it does not have a *legal* duty

to prevent every foreseeable injury. See *Osborn*, 157 Wash.2d at 28 (internal citations omitted); *Campbell v. City of Bellevue,* 85 Wash.2d 1, 9, 530 P.2d 234 (1975)(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).

As the *Osborn* Court noted; "The public duty doctrine simply reminds us that a public entity—like any other defendant—is liable for negligence only if it has a statutory <u>or common law duty of care</u>. And its 'exceptions' indicate when a statutory or common law duty exists. 'The question whether an exception to the public duty doctrine applies is thus another way of asking whether the State had a duty to the plaintiff.' " *Osborn*, 157 Wash.2d at 28, *citing*, *Taggart v. State,* 118 Wash.2d 195, 218, 822 P.2d 243 (1992)(en banc). *See also Bishop v. Miche,* 137 Wash.2d 518, 530, 973 P.2d 465 (1999) ("Exceptions to the doctrine generally embody traditional negligence principles and may be used as focusing tools to determine whether a duty is owed."). "In other words, the

public duty doctrine helps us distinguish proper legal duties from mere hortatory duties." *Osborn*, 157 Wash.2d at 27-28.

Here, Mitas simply cannot establish that there was a legal duty owed to Kay Mita. While Kay Mita's death is unfortunate, this simply does not create a duty.

First, Mitas' case is built solely on hearsay statements by Floyd Mita. (CP 559)[3] Spokane Crime Reporting Center does not, and cannot, make any express assurances. It is not disputed that there was a phone call from Floyd Mita to the SCRC. However, absent testimony from the son, conveniently not recalled until after his deposition on June 8, 2011 in a Declaration signed on November 1, 2012. This declaration was then filed virtually the same as an Affidavit on November 29,

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[3] While Plaintiffs raised numerous "facts" (also based on inadmissible evidence) the only facts are what was said on the phone. Absent this utter reliance on hearsay, Plaintiffs cannot raise any question of fact.

2012 (CP 680-683) the only evidence in the record is that Floyd Mita represented to SCRC that Kay Mita was elderly. (CP 149, 150) Regardless, even after this supplemental Affidavit was filed, nothing in the record indicates that Spokane County was aware of any facts other than basic identifiers. In fact, in Mitas own statement of material facts, they argue that Kay Mita was in good health for his age. (CP 569-573) He had just had a physical; there were no concerns with dementia, etc. (Id.) Contrary to Plaintiffs' argument then, without a hearsay Affidavit, the information supplied does not establish that SCRC had any knowledge that would lead them to consider Kay Mita as a "vulnerable person." Even with this supplemental Affidavit, Kay Mita does not meet criteria of a vulnerable person.

The record is undisputed that SCRC does not consider every elderly person as vulnerable. The record is further undisputed that an elderly, even elderly missing person, does

not qualify as a "vulnerable person," - one which would trigger certain actions by SCRC. (CP 148, 149, 150)

If this Court were to accept Mitas' argument, the County should now be the insurer for every elderly person. As a matter of public policy this is unsustainable. Nor was Kay Mita's freezing to death a foreseeable outcome of Floyd Mita's contact with SCRC. Even Plaintiffs' own expert, Odenthal, stricken on Summary Judgment, admits that there are vulnerable person procedures – not that there is a duty owed to every missing person. (Emphasis added) Odenthal's opinion relies on all of the information that was known by Plaintiffs after Kay Mita was found, not the information that was known, and supplied to SCRC at the time. SCRC's vulnerable person requirements were not triggered by a phone call from Floyd Mita saying that his father was elderly and it was "unlike him to do this." (CP 149, 150)

Finally, as clearly set forth by Ms. Johnson and Ms. Mizell, there would be no offer of assistance; in fact the training

specifically instructs operators otherwise. (CP 140, 151) There is absolutely no evidence whatsoever that Spokane County failed to follow its policies and procedures or that it had any information that would indicate that Mr. Mita was a "vulnerable" person. Thus, there was no duty owed.

While Floyd Mita testified that he was told they would send a car out, this is not the responsibility of Spokane County. In fact, Ms. Johnson followed the standard policies and procedures – if an individual is "at risk," the report is forwarded to a supervisor to the Spokane Records Management system for entry into WACIC – which information will show up if the individual is stopped for a traffic stop, or other law enforcement inquiry. (CP 154-155, 243-244) This did not occur because Kay Mita was not a vulnerable person – based upon the information given by Floyd Mita.

By his own testimony, Floyd Mita waited until 6:30 before he became concerned about his father. (CP 144-145) He called back SCRC and provided a physical description. (CP

145, 263, 264) There was simply nothing in that information relayed to SCRC that created any special concerns. Had Floyd Mita indicated that Kay Mita had a physical condition that may have been a different triggering event. (CP 149, 150) Operators are trained not to provide any specific assurances for liability purposes. (CP 149, 151)

While Kay Mita's death remains unfortunate, by failing to establish Kay Mita as a vulnerable person, there is no existing duty that was breached. Nor should Spokane County become an insurer for every elderly person's safety.

4. Kay Mita's Unfortunate Death Is Not A Foreseeable Outcome

Mitas also argue that the Washington Supreme Court has already recognized that a duty to act may be created by a person who, as a result of a promise, refrains from acting on that person's behalf. (*Mitas' Opening Brief*, p. 32) Yet the cases relied upon by Mita are again distinguishable. More importantly the cases do nothing to bolster Mitas' argument

expanding privity. However, *Osborn* actually held "Mason County had no duty to warn the Osborns because they did not rely on a promise to warn and Jennie Mae Osborn was not a foreseeable victim. The Supreme Court thus reversed the court of appeals and granted Mason County's Motion for Summary Judgment. *Osborn v. Mason Cnty.*, 157 Wash.2d 18, 20, 134 P.3d 197, 199 (2006) (en banc).

In *Osborn*, a sex offender was released and Mason County failed to post his presence. He ultimately murdered the Osborns' daughter and the parents (Osborns) brought suit against Mason County. The *Osborn* Court specifically held, with respect to the special relationship doctrine, that it had no "special relationship" duty to warn the Osborns because Jennie Mae Osborn was not a foreseeable victim of the sex offender. *Id.* at 25.

Here, Mitas' attempt to argue that because of a conversation between Floyd Mita, third party, and Kelli Johnson, a call taker at SCRC, that somehow Kay Mita freezing

to death became a foreseeable outcome. There is no support for that illogical conclusion found in the facts - or common sense. There is no dispute that a call was made. However, that in and of itself does not establish any legal duty under either SCRC, or as Mitas argue, a creation of a foreseeable outcome.

Plaintiffs' allegation of a duty is based upon an apparent lack of understanding of the policies and procedures for the call center. (CP 148-149) Based upon the information received from Floyd Mita, Mr. Kay Mita was never considered "vulnerable." (CP 148-149) Nor is there any evidence in the record that the operator took steps to assist "a person in need" (in this case Mr. Mita). (CP 148, 149) Here, Ms. Johnson followed the standard policies and procedures. Even assuming *arguendo* that Ms. Johnson did tell Floyd Mita someone would respond, as a matter of law, this does not create a special relationship nor does it create a foreseeable outcome that Kay Mita would freeze to death.

5. The Rescue Doctrine Exception Does Not Apply.

Under traditional tort law, absent affirmative conduct or a special relationship, no legal duty to come to the aid of a stranger exists…an exception may create an affirmative duty to protect another from harm. If an exception applies, liability may be imposed despite the absence of negligence. These special relationships typically arise when one party is entrusted with the well-being of the other party. *Folsom v. Burger King*, 135 Wash.2d at 674-675(internal citations omitted). "An additional exception to the traditional 'no duty to rescue' rule may arise if a defendant takes steps to assist a person in need and acts negligently in rendering that assistance." *Folsom*, 135 Wash.2d at 667. Nor does this duty arise unless a plaintiff can establish that a danger is present and takes steps to aid an individual in need. *Folsom*, 135 Wash.2d at 677, *citing*, *French v. Chase*, 48 Wash.2d 825, 830, 297 P.2d 235 (1956)(rescue doctrine applies when the peril, or reasonable appearance of peril, is imminent).

The rescue doctrine further does not apply unless a plaintiff can establish that a danger is present. Here again, the evidence is undisputed that Kay Mita was not established as a vulnerable person by the information that Floyd Mita provided. (CP 153-56, 240-44) As Plaintiffs note, Kay Mita, at least relative to his age, was in good health. (CP 144) Age alone does not qualify an individual as vulnerable. (CP 153-56, 240-44)

The facts here simply do not establish that Spokane County knew that Mr. Mita was "vulnerable," as they have argued. (CP 19, 20) Shannon Tritt was the last (known) Spokane County employee to see Mr. Mita – but she was not the last person to see him. (CP 146) She observed him while she was leaving work for the day. (CP 145, 146) When she asked if he needed assistance, the only thing that he said was that he "couldn't find his car." Ms. Tritt directed Mr. Mita to the security office at the County. (CP 146) When she left him, he was heading that direction. (CP 146) She did not believe he

was incoherent or unable to understand her. (CP 146) Thus, Ms. Tritt's behavior is simply insufficient to create any duty pursuant to the rescue doctrine.

VI. CLOSING

For the reasons stated above Spokane County respectfully request that this court uphold the trial court's granting of Defendant Spokane County's Motion for Summary Judgment.

DATED THIS 14 day of November, 2013.

Respectfully Submitted,

EVANS, CRAVEN & LACKIE, P.S.

By: _____ for
HEATHER C. YAKELY #28848
Attorney for Respondent, Spokane County

CERTIFICATE OF SERVICE

STATE OF WASHINGTON)
) ss
County of SPOKANE)

I hereby certify that on November 15, 2013, I filed the Respondent's Motion and Affidavit for Continuance to file Response brief with the Clerk of the Appellate Court. And I hereby certify that I had the Respondent's Answer to Plaintiff's Opening brief delivered to:

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SUBSCRIBED AND SWORN TO before me this 14 day of November, 2013.

Barbara Bergstrom

NOTARY PUBLIC in and for the
State of Washington
Residing at: Spokane
My Commission Expires: 6/25/17