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SUPREME COURT OF THE STATE OF WASHINGTON

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GAYE DIANA MUNICH, as Personal Representative of the Estate of William R. Munich,

Plaintiff/Respondent,

v.

SKAGIT EMERGENCY COMMUNICATIONS CENTER d/b/a SKAGIT 911, SKAGIT COUNTY, AND SKAGIT COUNTY SHERIFF'S OFFICE,

Defendants/Petitioners.

BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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STATE OF WASHINGTON

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ORIGINAL

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights of plaintiffs under the civil justice system, including an interest in the basis for government tort liability and the proper interpretation and application of the public duty doctrine and its exceptions.

II. INTRODUCTION AND STATEMENT OF THE CASE

This review principally involves the questions of whether and how the truth or falsity of express assurances by a government actor relates to the analysis of duty under the special relationship exception to the public duty doctrine. This wrongful death/survival action is maintained by Gaye Diana Munich, as Personal Representative of the Estate of William R. Munich (Munich) against Skagit Emergency Communications Center, doing business as Skagit 911, Skagit County and the Skagit County Sheriff's Office (Skagit). The facts are drawn from the Court of Appeals opinion and the briefing of the parties. See Munich v. Skagit Emergency

Communications, 161 Wn. App. 116, 250 P.3d 491, *review granted*, 172 Wn.2d 1026 (2011); Skagit Br. at 3-11; Munich Br. at 4-23; Skagit Pet. for Rev. at 1-10; Munich Ans. to Pet. for Rev. at 1-10; Skagit Supp. Br. at 3-7; Munich Supp. Br. at 2-10.

For purposes of this amicus curiae brief, the following facts are relevant: Munich sued Skagit for negligence in responding to the decedent's 911 call. Skagit moved for summary judgment based on the public duty doctrine, arguing that the special relationship exception to the doctrine did not apply on grounds that there was no express assurance of law enforcement assistance. Skagit also argued that Munich had to prove that any such express assurance was false or inaccurate.[1]

The record on summary judgment establishes that at 6:00 p.m. on October 1, 2005, Munich called 911 to report that a neighbor had just fired a rifle at him.[2] Munich described the incident, his location, and the proximity of the neighbor. The 911 operator informed Munich that a deputy was en route, and confirmed that Munich would wait in a garage on his property for the deputy to make contact. The 911 operator coded the call as Priority Two (weapons offense) rather than Priority One (assault/threat to life). The call terminated at 6:03 p.m.

---

[1] Skagit and amicus curiae Washington State Patrol (WSP) also seem to argue that Munich did not rely on any express assurance to his detriment, but Munich suggests that the issue of reliance is not before the Court. See Skagit Supp. Br. at 1, 17; WSP Am. Br. at 4-5; Munich Ans. WSP Am. Br. at 4.

[2] There are minor discrepancies in the times reflected in the computer-aided dispatch records and Munich's cell phone records. See Munich, 161 Wn.App. at 118-19 & nn.2-3; Munich Br. at 30 n.15.

At 6:10 p.m., Munich called 911 a second time to report that the neighbor had come into the garage, then started chasing him up the road, shooting at him again. Munich described the vehicle the neighbor was driving, his location, and the appearance of the neighbor. While Munich was still on the phone with the 911 operator, at 6:15 p.m., the neighbor shot and killed him.

The first officer on the scene arrived approximately two minutes after the shooting. Because the call had been coded as Priority Two, the officer drove at normal speed and stopped for traffic signals. Munich contends that, had the 911 operator properly coded the call as Priority One, the first officer would have arrived on the scene two minutes before the shooting, and that several other officers also would have arrived beforehand. See Munich Br. at 17-23 & Munich Supp. Br. at 7-10 (calculating response times).

The superior court denied Skagit's motion for summary judgment, ruling that there were genuine issues of material fact regarding the existence of an express assurance. In denying the motion, the court rejected Skagit's argument that the express assurance must be false or inaccurate to give rise to a duty, at least where the assurance involves a promise of future action instead of providing information.

The superior court certified its order for discretionary review, which was accepted by the Court of Appeals. The Court of Appeals affirmed, and this Court granted Skagit's petition for review.

III. ISSUES PRESENTED

1. When a 911 operator assures a caller that law enforcement officers are en route, but improperly codes the call as a non-emergency so that the officers respond at a slower pace than they would otherwise respond to an emergency call, are the operator and the local government entities that employ the operator subject to a duty under the special relationship exception to the public duty doctrine?

2. If the 911 operator's assurance to the caller that law enforcement officers are en route is true, in the sense that they are, in fact, on the way—albeit at a relatively slower, non-emergency pace—does the truth of the assurance preclude the existence of a duty, or does it merely relate to the separate question of whether the duty was breached?

IV. SUMMARY OF ARGUMENT

Under the special relationship exception to the public duty doctrine, a government actor has a duty of care under circumstances when there is (1) direct contact or privity between a public official and the injured plaintiff that sets the plaintiff apart from the general public ("privity"), and (2) there are express assurances given by the public official ("express assurances") that (3) give rise to justifiable reliance on the part of the plaintiff ("justifiable reliance"). The question of whether these elements are satisfied, giving rise to the existence of a duty of care, is analytically prior to and separate from the question of whether the government actor has been negligent and thereby breached the duty of care.

The elements of the special relationship exception to the public duty doctrine often present questions of fact for the jury. However, in the context of a 911 call, privity is established as a matter of law when the

plaintiff calls the operator to report an emergency. The express assurances requirement is satisfied when the 911 operator tells the plaintiff that law enforcement officers are en route. While justifiable reliance is unlikely to be decided as a matter of law, a caller's elicited statement to the 911 operator that s/he will wait for law enforcement officers to respond at a particular location supports an inference of justifiable reliance that creates a genuine issue of fact for trial.

With respect to express assurances in particular, the truth or falsity of an assurance may or may not be relevant to the separate and distinct question of whether the duty was breached, depending on the nature of the assurance in question, but it is not germane to the question of whether a duty arises in the first place. When the express assurance involves the transmittal of factual information, such as compliance with a building permit, the truth or falsity of the assurance obviously relates to the question of whether the government actor used reasonable care in furnishing the information. On the other hand, when the assurance involves a statement of present action or a promise of future action, such as "officers are en route," truth or falsity is not determinative because the government actor may be negligent in following through on the assurance.

Statements in Harvey v. Snohomish County, 157 Wn.2d 33, 41-42, 134 P.3d 216 (2006), a 911 case seeming to suggest that in this type of case the truth or falsity of the express assurance is part of the duty analysis as opposed to breach, should be clarified.

V. ARGUMENT

A. Overview Of The Special Relationship Exception To The Public Duty Doctrine In The Context Of A 911 Call.

Local government actors are subject to tort liability "to the same extent as if they were a private person or corporation." RCW 4.96.010(1).[3] To ensure that government actors are not subject to enhanced tort liability as compared to their private counterparts, the Court has developed the public duty doctrine and its exceptions, not as a defense to liability, but rather as a "focusing tool" to assist in determining whether a duty exists in the first place. See Osborn v. Mason County, 157 Wn.2d 18, 27-28, 134 P.3d 197 (2006). Although the exceptions to the doctrine are not exclusive, they represent an application of traditional negligence analysis in determining whether the government actor owes a duty to the plaintiff. See id.[4]

This Court typically analyzes the duty arising from a 911 call under the special relationship exception to the public duty doctrine. See

[3] The full text of the current version of RCW 4.96.010 is reproduced in the Appendix to this brief.

[4] For the traditional list of exceptions to the doctrine, see Cummins v. Lewis County, 156 Wn.2d 844, 853 & n.7, 133 P.3d 458 (2006). Regarding the non-exclusive nature of the list, see Taggart v. State, 118 Wn.2d 195, 218 n.4, 822 P.2d 243 (1992) (stating Petersen v. State, 100 Wn.2d 421, 425-29, 671 P.2d 230 (1983), "effectively created another exception to the doctrine").

Chambers-Castanes v. King County, 100 Wn.2d 275, 669 P.2d 451 (1983); Beal v. Seattle, 134 Wn.2d 769, 954 P.2d 237 (1998); Bratton v. Welp, 145 Wn.2d 572, 39 P.3d 959 (2002) (per curiam); Harvey, supra. Under the special relationship exception, a government actor has a duty of care under circumstances when there is (1) direct contact or privity between a public official and the injured plaintiff that sets the plaintiff apart from the general public ("privity"), and (2) there are express assurances given by the public official ("express assurances") that (3) give rise to justifiable reliance on the part of the plaintiff ("justifiable reliance"). See Beal, 134 Wn.2d at 785.

As the Court of Appeals below held, the elements of the special relationship exception may present questions of fact for the jury in the context of a 911 call. See Munich, 161 Wn.App. at 125; see also Beal, 134 Wn.2d at 786-87 (finding question of fact regarding justifiable reliance, affirming denial of summary judgment); Bratton, 145 Wn.2d at 577-78 (finding questions of fact regarding express assurances and justifiable reliance, affirming denial of summary judgment); Noakes v. Seattle, 77 Wn.App. 694, 699, 895 P.2d 842 (finding questions of fact regarding express assurances and justifiable reliance, reversing summary judgment of dismissal), *review denied*, 127 Wn.2d 1021 (1995).

However, it appears that the privity requirement is established as a matter of law when the plaintiff calls a 911 operator to report an emergency. See Harvey, 157 Wn.2d at 38 (holding "[a]s a preliminary

matter, we note there was sufficient contact between [plaintiff] and the [911] operator to establish privity," and noting that privity was established in Beal based on plaintiff calling 911 to report husband's threats); Chambers-Castanes, 100 Wn.2d at 287 (stating "[p]rivity existed ... as evidenced by the transcript of the police tape log which contains statements by the dispatchers to [one of the plaintiffs] assuring her help was on the way"); Bratton, 145 Wn.2d at 577 (seeming to find privity as a matter of law between 911 operator and sister of caller, stating "[p]rivity should be construed broadly, and, in cases based on failure by the police to timely respond to requests for assistance, it refers to the relationship between the public entity and a reasonably foreseeable plaintiff").[5]

The express assurance requirement is satisfied when the 911 officer tells the plaintiff that law enforcement officers are on their way or will be sent to the caller's location. See Harvey, 157 Wn.2d at 38-39 (discussing Beal, Chambers-Castanes, and Bratton, and stating "[i]n all three cases, this court found that assurances were made to the detriment of the caller when the operators told the callers police were dispatched when they had not been"); Beal, 134 Wn.2d at 785 (finding that "express assurances were made" when 911 operator stated "we're going to send somebody there" and "[w]e'll get the police over there for you," in

[5] But cf. Sinks v. Russell, 109 Wn.App. 299, 304, 34 P.3d 1243 (2001) (indicating reports of a non-emergency *past* threat of violence may not satisfy the privity element).

affirming denial of summary judgment for municipality); Chambers-Castanes, 100 Wn.2d at 279-80 & 287 (finding sufficient assurances to withstand CR 12(b)(6) motion to dismiss when 911 operator made statements of present action, including "[w]e have the officers on their way out there right now," and "[t]hey're on their way"); Bratton, 145 Wn.2d at 576-77 (finding sufficient assurances to withstand summary judgment when 911 operator said "that police would be dispatched if the family again complained ..."); Noakes, 77 Wn.App. at 699 (holding 911 operator's statement that "we'll send someone out" presented "at a minimum, a question of fact" and "could be construed by a reasonable trier of fact as an express and explicit assurance that the police would be right out"); Munich, 161 Wn.App. at 118-19 (finding arguable express assurances based on transcript of 911 operator, saying "my partners [sic] already got a deputy that's headed towards you," and "there's already a deputy that's enroute [sic] to you").

While justifiable reliance is unlikely to be established as a matter of law, a caller's statement to the 911 operator that s/he will wait for the law enforcement officers to respond at a particular location supports an inference of justifiable reliance that creates a genuine issue of fact for trial. See Beal, 134 Wn.2d at 786-87; Noakes, 77 Wn.App. at 699-700.

With this understanding of the special relationship exception to the public duty doctrine in the context of a 911 call, it is possible to address

whether and how the truth or falsity of an express assurance that law enforcement officers are en route relates to the duty analysis in this case.

B. The Truth Or Falsity Of An Express Assurance Is Not Relevant To The Question Of Whether A Duty Exists, Although It May Be Relevant To The Question Of Whether The Duty Has Been Breached In An Appropriate Case.

Skagit argues that no duty can arise under the special relationship exception to the public duty doctrine unless the express assurances in question are in some sense false or inaccurate. See Skagit Br. at 15-22; Skagit Supp. Br. at 11-17. The very same argument was rejected by this Court in Beal. See 134 Wn.2d at 785-86. The argument conflates the question of whether a duty exists with the question of whether the duty was breached, and it overlooks the fact that negligence can take forms other than the mere transmittal of incorrect factual information.

The Court's decision in Beal is central to understanding the distinction between duty and breach in this context. The Court held that "express assurances were made that police would be dispatched to assist" a 911 caller, based on statements made by the 911 operator that "we're going to send somebody there," and "[w]e'll get the police over there for you okay?" 134 Wn.2d at 785. The Court described the statements as "assurances that future acts will occur," although it did not specify whether the future acts in question were the dispatch of law enforcement officers, their arrival on the scene, or both. See id. at 786. In holding that such assurances give rise to a duty of care, the Court rejected the defendant's arguments that they must either be inaccurate at the time

given or specify a time for response, so that they would then become inaccurate after the time elapsed. See id. at 786-87. Instead, the Court recognized that the performance or non-performance of the promised actions involves the separate question of whether the duty arising from the assurances was breached, stating: "Of course, the trier of fact may ultimately conclude that the [defendant] acted reasonably in the circumstances by not dispatching an officer in the time period before [the plaintiff] was killed, *and therefore did not breach any duty owed to her.*" Id. at 787 n.5 (emphasis added).

Skagit recognizes Beal's holding that express assurances giving rise to a duty do not have to be false at the time given, but argues that they must become false at an unspecified point in the future when the government actor in question fails to fulfill them. See Skagit Pet. for Rev. at 16-17. This argument cannot be reconciled with the Court's statement in Beal that the timeliness of the response to the 911 call presented a question of fact for the jury. The performance or non-performance of the assurance in question presents a question of breach rather than duty.

If Skagit's reading of Beal were correct, then the existence of a duty would depend on the form rather than the substance of a 911 operator's assurances to a caller. For example, Skagit argues that the assurances giving rise to a duty in Beal were false because they involved an unfulfilled future action (i.e., "we're going to send somebody there," and "[w]e'll get the police over there for you okay?"), whereas the

assurances in this case are true, and hence distinguishable, because they involve a present action (i.e., "my partners [sic] already got a deputy that's headed towards you," and "there's already a deputy that's enroute [sic] to you"), even though the assurances in both cases are functionally equivalent. See Skagit Br. at 20-22. The Court of Appeals below described the statements in this case as "a promise of future action" akin to those in Beal, presumably because in both cases the promised action was the arrival of officers on the scene. See Munich, 161 Wn.App. at 121, 122 & 125. If Skagit's distinction were valid, then the existence of a duty would hinge on the verb tense used in the course of the emergency phone call. Any such distinction elevates form over substance because the gravamen of each case is the same, the reasonableness of the response to the 911 call.

Insofar as it relates to the breach of a duty, rather than the existence of a duty, the truth or falsity of an assurance may be relevant in an appropriate case. The typical case where it would be relevant involves a public official charged with responsibility to provide accurate information, who receives an inquiry from a plaintiff intended to benefit from the dissemination of the information. See Taylor v. Stevens County, 111 Wn.2d 159, 171, 759 P.2d 447 (1988) (involving statements regarding compliance with building code). However, even in this type of case, the truth or falsity of the information relates to the question of breach rather than duty. Thus, in Taylor the Court described the express assurances

giving rise to a duty of care without reference to truth or falsity. See 111 Wn.2d at 171 (describing the express assurances element as "the official, in response to a specific inquiry, provides express assurances that a building or structure is in compliance with the building code"). Once a special relationship based on such assurances has been created, then truth or falsity has a bearing on whether the government actor making the assurance has exercised reasonable care. See id. (stating "[t]he creation of a special relationship ... gives rise to a duty to use reasonable care when furnishing information"); see also Meaney v. Dodd, 111 Wn.2d 174, 179, 759 P.2d 455 (1988) (stating "specific assurances are given by the agency, resulting in a duty being undertaken by the government entity .... The government then owes the plaintiff a duty of due care to ensure that the assurances given are correct").

Truth or falsity may be relevant to breach of duty in a 911 case, for example, if the 911 operator's assurance that officers are en route is false in the sense that the officers are not, in fact, en route, either because they have not been dispatched or because they have been dispatched to the wrong address. See Noakes, 77 Wn.App. at 699 (discussing with approval De Long v. Erie, 457 N.E.2d 717 (N.Y. 1983), involving 911 operator dispatching officers to wrong address). Nonetheless, the truth or falsity of an express assurance is not the full measure of whether a 911 operator (or any other government actor, for that matter) has exercised reasonable care

in performing the promised actions. Because this case involves alleged negligence in failing to properly code a 911 call, and, as a consequence, the failure to respond in a timely fashion, it does not appear to hinge upon the truth or falsity of the 911 operator's express assurances that officers were en route.[6]

Contrary to the suggestion of amicus curiae WSP, requiring a 911 operator or other government actor to exercise reasonable care in performing the promised actions that are the subject of an express assurance would not be tantamount to imposing a duty based on *implied* assurances. See WSP Am. Br. at 6-7. Under Beal, the express assurances need not be specific as to the response time. See 134 Wn.2d at 787. Thus, the Court in Beal allowed the jury to determine whether the defendant acted reasonably by not dispatching officers in a timely manner, even though the express assurances in question specified no time frame for their response. See id. at 786-87 & n.5. This result is wholly consistent with the distinction between the separate analysis of duty and breach.

Through Beal, application of the special relationship exception to the public duty doctrine in the context of a 911 call was relatively clear. However, the Court's decision in Harvey has created uncertainty because it contains language suggesting that in order to satisfy the express assurance requirement, the plaintiff must show that the particular

[6] It appears that there may be a separate basis for liability involving truth or falsity in this case. See Munich Supp. Br. at 3 n.1 (providing record citations suggesting "[t]here are questions of fact as to whether the 911 operator's assurance that a deputy was en route was true or false at the time it was made").

assurance was false or inaccurate. See 157 Wn.2d at 38, 39 & 41-42.[7] However, the actual holding of Harvey appears to be that no express assurances were given to the 911 caller:

> We conclude that under the facts of this case, Harvey has failed to demonstrate that assurances were given by the 911 operator to his detriment and even if such assurances could be gleaned from the record, Harvey cannot, as a matter of law, show any breach of duty toward him.

Id. at 35; accord id. at 40 (stating "[s]imply put, no assurance was ever sought by Harvey and none was ever given by the operator").

The other, troublesome statements in Harvey are surplusage, and Harvey should be read as consistent with Beal, in recognizing that an express assurance, e.g., that officers are en route, may be accurate but nonetheless actionable because the promised action was not performed with reasonable care. See Beal at 787 n.5; Noakes at 699-700. For its part, the Harvey opinion does not evince any disagreement with Beal, nor any intent to retreat from its holdings. The Court of Appeals below correctly concluded that Harvey should not be read as injecting truth or falsity into the express assurance requirement. See Munich, 161 Wn.App. at 125.[8]

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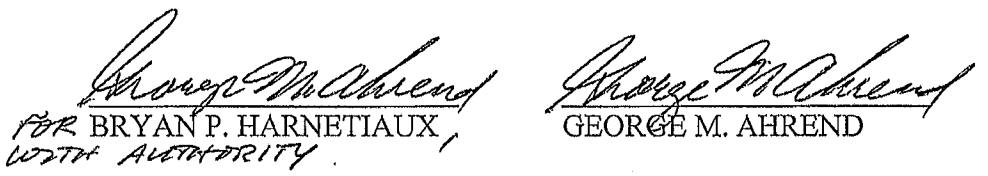
[7] Headnote 3 to the Harvey opinion published in the Washington Reports states: "Government liability cannot be predicated on assurances given by a 911 operator to a caller for police assistance if the assurances were truthful and accurate."

[8] Nonetheless, Harvey does seem inconsistent with Beal in its assessment of the facts, to the extent it concludes no express assurances were made by the 911 operator. The operator's statements that "she had notified the police about the situation," that "there were deputies in the area preparing to respond," and that "she told Harvey she had informed the deputies about the suspect's attempts to enter through the window" are express assurances under Beal. Harvey at 36. The result in Harvey may be best understood as demonstrating the absence of reliance by Harvey on any of the assurances, and/or the absence of any breach of duty. See id. at 36-37.

VI. CONCLUSION

This Court should adopt the argument advanced in this brief and resolve this appeal accordingly.

DATED this 3rd day of April, 2012.



FOR BRYAN P. HARNETIAUX, WITH AUTHORITY

GEORGE M. AHREND

On behalf of WSAJ Foundation

APPENDIX

RCW 4.96.010. Tortious conduct of local governmental entities—Liability for damages

(1) All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation. Filing a claim for damages within the time allowed by law shall be a condition precedent to the commencement of any action claiming damages. The laws specifying the content for such claims shall be liberally construed so that substantial compliance therewith will be deemed satisfactory.

(2) Unless the context clearly requires otherwise, for the purposes of this chapter, "local governmental entity" means a county, city, town, special district, municipal corporation as defined in RCW 39.50.010, quasi-municipal corporation, any joint municipal utility services authority, any entity created by public agencies under RCW 39.34.030, or public hospital.

(3) For the purposes of this chapter, "volunteer" is defined according to RCW 51.12.035.

[2011 c 258 § 10, eff. July 22, 2011; 2001 c 119 § 1; 1993 c 449 § 2; 1967 c 164 § 1.]

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Dear Mr. Carpenter:

On behalf of the Washington State Association for Justice Foundation, a letter request to appear as amicus curiae and a proposed amicus curiae brief are attached to this email. The parties and other amicus are being served simultaneously by copy of this email in accordance with a prior agreement among counsel.

Respectfully submitted,

--
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