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**NO. 64646-0
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

**ON APPEAL FROM
SKAGIT COUNTY SUPERIOR COURT NO. 07-2-02060-1**

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

Appellants,

vs.

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

Respondent.

**JOINT BRIEF OF APPELLANTS SKAGIT 911, SKAGIT COUNTY
AND SKAGIT COUNTY SHERIFF'S OFFICE**

**Mark R. Bucklin, WSBA #761
Shannon M. Ragonesi, WSBA #31951
Keating, Bucklin & McCormack, Inc., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104
(206) 623-8861**

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I. INTRODUCTION

At 5:57 p.m. on October 1, 2005 in rural Skagit County, William Munich called his friend, Bruce Heiner, to tell him a neighbor, Marvin Ballsmider, had just fired a shot at him. His friend told him to call 911 and report it, so he did. Cell phone records show, at 5:59 p.m., Munich called 911 and reported the incident. The 911 operator told Munich a deputy was enroute, and asked Munich if he planned to wait in his hanger for contact from police. Munich said yes. According to the cell phone records, this call lasted 4 minutes, and ended at 6:03 p.m.

At 6:04 p.m., the cell phone records show Munich called his friend back. He had already left the hanger and was running down the road away from Ballsmider who had fired more shots at him. This call lasted 5 minutes until 6:09 p.m. The friend again told Munich to call 911, so he did. At 6:09 p.m., Munich called 911 a second time and reported the additional shots. As Munich was on his cell phone with the 911 operator, the neighbor drove toward him with his car and fired shots from the open window.

Munich was shot and killed by the neighbor while still on the phone with the 911 operator. The police arrived on the scene approximately two minutes after Munich was shot. Munich's estate is now suing Skagit 911 and Skagit County for alleged negligence in

responding to this incident. The defendants brought a motion for summary judgment dismissal of the estate's claims based on the lack of legal duty owed to Munich as no false, express assurances of police assistance were provided to Munich by the 911 operator, and Munich did not rely on any express assurances to his detriment. The trial court granted summary judgment in part, and denied it in part. The trial court ruled that a genuine issue of material fact existed on the question of whether an express assurance was sought and given, and whether Munich detrimentally relied on any such assurance. The trial court also ruled that Washington law does not require a plaintiff to prove that an express assurance was false or inaccurate to give rise to a duty of care. Skagit 911 and Skagit County now appeal.

II. ASSIGNMENTS OF ERROR

(1) The Washington Supreme Court has previously held in regard to the special relationship exception to the public duty doctrine: "It is only where a direct inquiry is made by an individual and **incorrect** information is clearly set forth by the government, and the government intends that it be relied upon and it is relied upon by the individual to his detriment, that the government may be bound." Babcock v. Mason County, 144 Wn.2d 774, 789, 30 P.3d 1261 (2001), citing Meaney v. Dodd, 111 Wn.2d 174, 180, 759 P.2d 455 (1988). In light of this rule of law, was it error for the trial court to rule that the "express assurances" element of the special relationship exception to the public duty doctrine does not require that a 911 caller detrimentally relied on a **false or inaccurate** assurance of police assistance?

(2) Did the trial court err in ruling that there are disputed material facts on the issue of whether Mr. Munich detrimentally relied on an express

assurances from Defendant Skagit 911, when the undisputed evidence in this case indicates that no express assurance was made by Skagit 911, and when the plaintiffs have failed to proffer any competent evidence that Mr. Munich detrimentally relied on any statement by Skagit 911?

(3) Did the trial court err in denying defendants' motions to strike the declaration of purported 911 dispatching expert, Paul Linnee, when that declaration contains multiple inadmissible conclusions of fact and law as well as opinions outside of Mr. Linnee's qualifications and expertise?

III. STATEMENT OF THE CASE

At 5:57 p.m. on October 1, 2005, William Munich called his friend, Bill Heiner, and told him he had seen his neighbor, Marvin Ballsmider, standing at their fence line with a gun.¹ CP 706, 35:1-20. Heiner encouraged Munich to call 911 to report this, then called Heiner back to let him know what was happening. *Id.*

At 18:00:08, a Skagit 911 operator answered a call from Munich, who reported that Ballsmider had fired a shot at him. CP 30.² The conversation between Munich and the 911 operator, Norma Smith, was as follows. CP 30.

18:00:08 (00:00)

Smith: Skagit 911, what is your emergency?

Mr. Munich: I just had a guy point a rifle at me and I...

Smith: Where are you at? What address?

¹ The cell phone record provides time on a twelve hour clock and the police computer aided dispatch (CAD) record provides time on a 24 hour clock. The cell phone record provides time to the minute, the CAD provides time to the second. When referring to the cell phone record, the appellants will provide the twelve hour time as reflected in the cell phone record, so the cell phone evidence is accurately reflected. When referring to the CAD, the appellants will provide the 24 hour time as reflected in the CAD.

² Munich's cell phone statement recorded this call as being made at 5:59. CP 139.

Mr. Munich: 6480. And then he shot. I mean I'm...
Smith: 6480 what?
Mr. Munich: Lake Campbell road.
Smith: Why did he do that?
Mr. Munich: I don't know
Smith: Do you know him?
Mr. Munich: Yeah, he's my neighbor. The guy is a, he's an alcoholic everything. I mean he's just a wipe out.

18:00:38 (00:30)

Smith: So when he shot the gun
Mr. Munich: I don't know where he shot it, but he was aiming it directly at me and I asked him "what are you doin" and he says "I'm aiming at that tree" and straight at me and I walked down to the shoreline. I was I just getting ready to plant some grass and I ...
Smith: Was it a rifle? What kind of a gun was it?
Mr. Munich: Yeah, it was a rifle (pause) – (Mr. Munich starts to say something and Smith asks the next question)

At 18:01:04, Ms. Smith, informed the Skagit County Sheriff's Office (SCSO) of the incident by entering it into the computer aided dispatch system (CAD). CP 22. Ms. Smith entered the call as a priority 2 weapons offense based on the information from Munich that he had walked away from Ballsmider and removed himself from the situation. CP 27, 116:8-12; CP 28, 118:12-16. She then entered the following information into the CAD system. CP 22.

18:01:04: rps neighbor just pointed a rifle at him – fired one shot

In the meantime, the 911 call with Munich continued as follows.
CP 30.

18:01:08 (01:00)

Smith: What is his name?
Mr. Munich: (attempts to pronounce the subjects name) Harold
Ballsmider, Ballsmiser, I can't even say his name,
I'm so rattled
Smith: What...and did he live north or south of you?
Mr. Munich: He lives on the next house, uh to the west of me.
Smith: Did he head back home?

At 18:01:36, while the call was continuing, Skagit 911 dispatcher,
Wes Norton, dispatched SCSO Deputy Dan Luvera to the call over the
radio, and Deputy Luvera acknowledged the dispatch and asked if they
knew the suspect's name, acknowledging thereby that he had received the
dispatch and was responding to the call CP 122; CP 125; CP 22. The 911
call continued. CP 30.

18:01:36 (01:28)

Mr. Munich: I don't know what he's doing, he's ... I just...I just
ignored him and walked back to...
Smith: How far away from you was he when he fired the
shot?
Mr. Munich: Uh, probably 25 feet. I mean, I don't...I...I was
just trying to completely ignore him and I
just...well, I just can't believe it.
Smith: Ok, what is your name sir?

During this exchange, Ms. Smith typed the following information
into the CAD system. CP 22.

18:01:45: Unk where male subj is now

At 18:01:59, in keeping with Deputy Luvera's acknowledgment
that he had received the dispatch and was responding, dispatcher Norton
logged Deputy Luvera into the CAD system as enroute to the call. CP 46.

Deputy Luvera testified that he was enroute to the Munich property at or close to this time. CP 97, 40:8-15. He began to drive from his location in the La Connor area to Munich's location at or a little above the speed limit. CP 37, 30:7-13; CP 39, 61:5-25.

The 911 call continued as follows. CP 30-31.

18:02:08 (02:00)

Mr. Munich: My name is Bill Munich. I have a seaplane here and I have to...

Smith: M-u-n-i-c-k

Mr. Munich: H

Smith: What's your cell number?

Mr. Munich: Uh, this cell number's 661-2200

Smith: Are you a William?

Mr. Munich: Yes, I am

Smith: Ok, do you live on Orcas Island then?

Mr. Munich: Yes, I do

Smith: Ok, 1-8 of 42 is your date of birth?

Mr. Munich: Yes

Smith: ok, where are you...you said you have a seaplane. What does that have to do with it?

At approximately 18:02, Mr. Norton provided the following updated information to Deputy Luvera: "the suspect will be a Harold Ballsmider, unsure of last name, unknown where the suspect is now" and "Also the RP is Bill Munich." CP 125-126. The 911 call concluded as follows. CP 31.

18:02:42 (02:34)

Mr. Munich: Well, I fly over here 2 or 3 times a week. I own this piece of property and I have to get home.

Smith: Ok

Mr. Munich: I have to fly home before dark.

Smith: Ok, my partners already got...my partners already got a deputy that's headed towards you.

Mr. Munich: Ok, thank you

Smith: Ok, so are you going to wait, you're going to wait there for contact?

Mr. Munich: Oh yeah, definitely

Smith: Ok, did the, when the guy with the gun left, did he leave on foot or in a vehicle

18:03:06 (02:58)

Mr. Munich: No, he lives right there, I know him, I mean he's standing right there right on the fence line

Smith: He's still standing there on the fence line?

Mr. Munich: I can't see him from here

Smith: Ok. Are you in a house? Are you someplace safe?

Mr. Munich: I'm in my...I'm in my garage right now

Smith: Ok, is there a house on that property or is there just a garage there?

Mr. Munich: There's just a garage, we're just in the process of building a., we just finished the garage and now we're trying a house

Smith: Ok, you're going to wait there at the garage for contact then?

18:03:38 (03:30)

Mr. Munich: Yeah, I have a cable across the driveway so..

Smith: Ok, all righty, there's already a deputy that's enroute to you, ok?

Mr. Munich: Ok thank you

Smith: All righty, thank you, bye bye. **(Call concludes at 18:03:49)**

After concluding the call to the 911 operator, the cell phone record shows Munich called Heiner back at 6:04 p.m. CP 706, 32:21-33:24; CP 139. Heiner was certain Munich was not inside the garage while they were talking. CP 712, 115:13-19; CP 710-711, 71:6-72:2. Munich said he was running down the road and the "crazy bastard" still had his gun. CP 709, 66:2-25. Heiner believed the road Munich was on was Campbell

Lake Road. *Id.*, 65:4-21. Heiner told him to stop someone on the road and get out of the area. *Id.*, 67:3-17. Munich said the cars were coming a hundred miles an hour down the hill and wouldn't stop. CP 710, 68:3-8. Heiner then heard gunshots over the phone. CP 707-708, 43:22-44:5. Munich told Heiner that Ballsmider was at the top of the driveway and was reloading. CP 710, 69:13-15. The second call to Heiner lasted five minutes. CP 706, 33:13-34:3; CP 139.

The cell phone record shows that at 6:09 p.m., Munich took Heiner's advice and called Skagit 911 a second time and reported his neighbor was now chasing him up Highway 20 and shooting at him with a rifle. CP 23; CP 711, 74:1-14; CP 139. Munich said he was on Highway 20 and Lake Campbell Road, and said Ballsmider had fired a dozen shots at him. CP 32; CP 23.

At 18:11, the dispatcher radioed Deputy Luvera and said, "have the RP back on the line, states that the suspect came into his garage or hanger and chased him up the road and fired approximately a dozen shots." CP 128; CP 102, 77:23-79:2. Because of this new information, Deputy Luvera turned on his emergency lights and siren and increased his speed. CP 102, 77:18-78:6.

Over the next few minutes, Deputy Luvera asked for a description and the reason for the dispute. Munich described Ballsmider. CP 128-

130. Munich said he had no idea why Ballsmider started shooting and repeated the conversation he had with Ballsmider when Ballsmider first fired a shot at him.³ CP 33-34. Munich next reported Ballsmider was coming up the road in his car with a gun pointed out of the window. CP 34. Soon thereafter, Munich cried out he had been shot and the call ended at 18:16:06. *Id.* Deputy Luvera arrived at the scene at 18:18, and immediately apprehended and arrested Ballsmider for Munich's murder. CP 108-109. During the arrest, Ballsmider told Deputy Luvera repeatedly, "I killed that mother fucker, I shot that mother fucker dead." CP 109, 124:8-17.

The Munich estate filed suit against Skagit 911 alleging negligence in its response to this call. The Estate later filed an amended complaint and added Skagit County and the Skagit County Sheriff's Office (hereinafter jointly referred to as "Skagit County") as defendants, alleging liability on the basis that Skagit 911 acted as their agent in handling the 911 call. Skagit 911 and Skagit County moved for summary judgment dismissal of all claims against them. CP 1-19; CP 143-165. In opposition to the motions, the Estate asserted Skagit 911 had breached a duty to Munich in its handling and dispatch of his call, and Skagit County was

³ Munich and Ballsmider were actually involved in a heated property dispute regarding access to a driveway and Ballsmider's property. This was not reported to the police during the 911 call.

vicariously liable for such breach pursuant to agency principles.⁴ The estate produced a declaration of Mr. Paul Linnee, who was purported to be an expert in 911 dispatching policy and procedure. CP 211-231. Skagit 911 and Skagit County objected to the court's consideration of Mr. Linnee's declaration as he provided unqualified opinions on police procedure and inadmissible factual and legal conclusions. CP 696-701; CP 714-727.

On November 17, 2009, the Skagit County Superior Court denied to the motion to strike Mr. Linee's declaration, and denied summary judgment in part. CP 741-747.

The trial court ruled that the "rescue doctrine" exception to the public duty doctrine does not apply to give rise to a duty of care under the circumstances of this case, and dismissed the Estate's claim under the "rescue doctrine" exception.

However, the trial court ruled the estate had alleged facts and argument that satisfy the special relationship exception to the public duty doctrine, so as to give rise to a duty of care owed by the defendants to

⁴ Plaintiffs did not rely on any independent acts of negligence by Skagit County Sheriff's Office ("SCSO") in responding to the dispatch, relying instead on the assertion that Skagit 911 acted as an agent of Skagit County in its handling of Mr. Munich's call. In reply, Skagit County did not concede that Skagit 911 acts as their agent, but asserted that the court need not decide that issue for the purpose of the summary judgment motion. Because the issue was not argued or briefed by the parties below, it was not ruled upon by the trial court and not before this Court on appeal.

All claims arising from independent acts of alleged negligence by Skagit County and SCSO were dismissed on summary judgment.

Munich under that doctrine. *Id.* The court found that the “express assurances” element of the special relationship exception to the public duty doctrine does not require that a false or inaccurate assurance be made, and further found that there are disputed material facts on the issue of whether Munich relied on any express assurances to his detriment. *Id.* Accordingly, the trial court denied summary judgment on Estate’s claim under the “special relationship” exception.

Skagit 911 moved for reconsideration of the partial denial of its summary judgment motion. CP 766-775. Skagit County joined in the motion for reconsideration. The trial court denied this motion on January 8, 2010. CP 793-794. Skagit 911 and Skagit County sought review of these rulings, which was granted on April 5, 2010.

IV. ARGUMENT

A. LEGAL STANDARD

Motions for summary judgment are reviewed de novo. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The appellate court engages in the same inquiry as the trial court. *Id.* 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 as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c);

Marincovich v. Tarabochia, 114 Wn.2d 271, 274, 787 P.2d 562 (1990). A material fact is one upon which the outcome of the litigation depends. Greater Harbor 2000 v. City of Seattle, 132 Wn.2d 267, 279, 937 P.2d 1082 (1997). If the nonmovant fails to establish a genuine issue of material fact as to *every essential element* of his claim, summary judgment is proper. Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (emphasis added).

Although the court must consider all facts submitted and draw all reasonable inferences from the facts in the light most favorable to the nonmoving party, the inferences must be reasonable. If such inferences are not reasonable, summary judgment is proper. See Scott v. Blanchet High School, 50 Wn. App. 37, 747 P.2d 1124 (1987).

B. TO PROVE NEGLIGENCE, THE ESTATE MUST PROVE MUNICH WAS OWED A LEGAL DUTY UNDER THE SPECIAL RELATIONSHIP EXCEPTION TO THE PUBLIC DUTY DOCTRINE.

The required elements to prove negligence are: duty, breach, causation, and injury. Keller v. City of Spokane, 146 Wn.2d 237, 242, 44 P.3d 845 (2002). Whether a governmental entity owes a duty is a question of law. Keller, 146 Wn.2d at 243, citing Hansen v. Friend, 118 Wn.2d 476, 479, 824 P.2d 483 (1992). When the defendant is a government entity, the duty must be one owed specifically to the injured plaintiff, not

to the public in general. J&B Dev. Co. v. King Cy., 100 Wn.2d 299, 304 669 P.2d 468, 41 A.L.R.4th 86 (1983), *overruled on other grounds by Taylor v. Stevens Cy.*, 111 Wn.2d 159, 759 P.2d 447 (1988). This principle of negligence law is called the public duty doctrine.

The policy underlying the public duty doctrine is that municipalities are not insurers for every harm that might befall members of the public, and legislative enactments for the public benefit should not be discouraged by subjecting a government entity to unlimited liability. Taylor v. Stevens County, 111 Wn.2d 159, 170, 759 P.2d 447 (1988); Babcock v. Mason County Fire District No. 6, 101 Wn. App. 677, 684, 5 P.3d 750 (2000); Beal v. City of Martinez, 134 Wn.2d 769, 954 P.2d 237 (1998).

There are four “exceptions” to the public duty doctrine, and they include: (1) legislative intent; (2) failure to enforce; (3) the rescue doctrine; and (4) special relationship. Babcock v. Mason County Fire Dist. No. 6, 144 Wn.2d 774, 784, 30 P.3d 1261 (2001). Here, the Estate alleged the special relationship exception and rescue doctrine applied. The trial court dismissed the claim under the rescue doctrine exception, but found a question of fact as to whether a special relationship could be established, and denied summary judgment on that basis.

To establish a special relationship exception to the public duty doctrine, the estate must show: (1) direct contact or privity between the public official and the injured plaintiff which sets him apart from the general public, and (2) express assurances given by the public official, which (3) gave rise to justifiable reliance on the part of the plaintiff. *Babcock*, 144 Wn.2d at 786. A plaintiff must show he relied on assurances he specifically sought and which the government expressly gave before a duty is created under the special relationship exception to the public duty doctrine. *Babcock*, at 789; *Pepper v. J.J. Welcome Constr. Co.*, 73 Wn. App. 523, 534-35, 871 P.2d 601 (1994); and *Meaney v. Dodd*, 111 Wn.2d 174, 179-80, 759 P.2d 455 (1988).

C. WASHINGTON LAW REQUIRES PROOF THAT A 911 CALLER DETRIMENTALLY RELIED ON A FALSE OR INACCURATE EXPRESS ASSURANCE TO ESTABLISH A SPECIAL RELATIONSHIP EXCEPTION.

Prior Washington Supreme Court precedent holds that, for a duty of care to arise under the special relationship exception, an express assurance of assistance must be both sought and given, and the assurance given must contain incorrect information upon which the plaintiff detrimentally relies.

It is only where a direct inquiry is made by an individual and incorrect information is clearly set forth by the government, and the government intends that it be relied upon and it is relied upon by the individual to his detriment, that the government may be

bound. The plaintiff must seek an express assurance and the government must unequivocally give that assurance.

Babcock, 144 Wn.2d 774, 789, 30 P.3d 1261 (2001), citing Meaney v. Dodd, 111 Wn.2d 174, 180, 759 P.2d 455 (1988) (emphasis added).

1. **In Harvey v. Snohomish County, The Court Held No Special Relationship Was Established Because No False Or Inaccurate Information Was Given By The 911 Operator To The Caller.**

The Washington Supreme Court decision in Harvey v. Snohomish County, et al., 157 Wn.2d 33, 134 P.3d 216 (2006) reaffirmed the standard that was set in Meaney, and reiterated in Babcock, that it is only where incorrect information is clearly set forth by the government that the government may be legally bound. Harvey is also strikingly similar to the present case and thus requires close comparison and legal analysis.

Harvey and his neighbor called 911 to report that a disturbed man was breaking into Harvey's condominium. The 911 operator remained on the line with Harvey and at the same time dispatched police. The 911 operator informed Harvey that she had notified the police about the situation. Approximately ten minutes later, a deputy arrived in the area and began to set up a couple of blocks away from Harvey's residence while he waited for backup units to arrive. The 911 operator informed Harvey there were deputies in the area preparing to respond. Harvey asked the operator whether he should go out on the porch to look for the

man or if he should lock himself in the bathroom. The operator told Harvey he should do whatever he felt was most safe to do. While the police were still getting set up, the man broke into the home. Harvey shot him multiple times, then fled.

In its decision, the Supreme Court distinguished prior 911 cases where false express assurances had been made to the detriment of 911 callers.⁵

Unlike *Chambers-Castanes*, *Beal*, and *Bratton*, in this case Harvey never received any assurance from the operator that was untruthful or inaccurate...In other words, when the operator told Harvey she had notified police of the situation, she had. When the operator told Harvey the police were in the area and officers were setting up, they were.

Harvey, 157 Wn.2d at 39 (footnotes omitted) (emphasis added).

Nevertheless, Harvey contended he relied on the operator's assurances to his detriment because the operator asked Harvey to remain on the line on several occasions. Harvey, at 40. He alleged he was directed to stay in the house on the phone rather than try to escape. However, the court found Harvey never asked whether he should try to

⁵ See Chambers-Castanes v. King County, 100 Wn.2d 275, 669 P.2d 451 (1983) (911 operators told callers "We have the officers on their way out there right now" when in truth, no police had been dispatched); Beal v. City of Seattle, 134 Wn.2d 769, 954 P.2d 237 (1998) (911 operator told caller, "We're going to send somebody there" when no police were dispatched); and Bratton v. Welp, 145 Wn.2d 572, 39 P.3d 959 (2002) (911 operator told plaintiff, "if [you] or [your] family are threatened again the police will be sent," yet when they called again, no police were sent).

escape or remain in the condo, nor did the operator ever tell him that he should remain in the condo and wait for the police to arrive instead of escaping. *Id.* Rather, the operator told him he should do what he felt was safe to do. *Id.* **“In order to demonstrate that a duty has been created to respond to a 911 call for police assistance, a claimant must show that assurances were made to the detriment of the caller. A careful review of the record reveals that Harvey never received any assurance from the operator that was untruthful or inaccurate, nor has he shown that he relied on any assurance to his detriment.”** Harvey, 157 Wn.2d at 41-42.

The present case is similar to Harvey because no false or inaccurate information was given to Munich by the 911 operator. The 911 operator told Munich a deputy was enroute – and he was. The deputy had been dispatched to the call, and had acknowledged the dispatch over the radio. The Estate failed to show Munich relied on any false or inaccurate information to his detriment.

2. The Element Of Falsity Applies To All Special Relationship Cases, Not Just Building Code Cases.

The Estate has argued that the element of falsity only applies in building code cases. It is true that this element was first recognized in building code cases. However, it has been required in a variety of other

public duty doctrine cases as well, including 911 emergency response cases. It is important to examine the underlying reason for requiring this element as it applies in **all** special relationship cases, not just building code cases.

The opinion in Taylor provides this reasoning. In this building code case, the court stated, “[a] duty of care may arise where a public official charged with the responsibility to provide accurate information fails to correctly answer a specific inquiry from a plaintiff intended to benefit from the dissemination of the information.” Taylor, 111 Wn.2d at 171. This principle logically applies in all special relationship exception cases, not just in building code cases. If the public official did not have a responsibility to provide accurate information, there would be no basis for a claim if a recipient was harmed by inaccurate information he received. In contrast, if an official provides truthful and accurate information to a recipient, the recipient cannot prove detrimental reliance when what he relied on was the truth. The element of falsity in establishing the special relationship exception is inherent.

The Court of Appeals recently considered the falsity element in the non-building code case of Vergeson v. Kitsap County, 145 Wn. App. 526, 186 P.3d 1140 (2008). In Vergeson, the plaintiff sued the County alleging it was negligent by failing to remove all records of her quashed arrest

warrants from state and national databases. The court found the plaintiff had not made any direct inquiry seeking an express assurance that the County would remove her quashed warrant from computer databases. Vergeson, 145 Wn. App. at 540. The court further held she failed to show the County had set forth any incorrect information regarding removing her warrant from the databases. *Id.* Therefore, the court ruled she failed to establish a special relationship exception.

As noted previously, in the context of a 911 case, the Harvey court concluded the plaintiff failed to prove a special relationship exception existed in part because the 911 operator only provided truthful information to Mr. Harvey. Harvey, at 39. She informed him that deputies were in the area and setting up, and that was a true statement. Any assumptions Harvey made about how quickly police would come to help him were insufficient to constitute an express assurance or a special relationship exception.

In Meaney, a noise regulation case, the court stated the government owes the plaintiff a duty of due care to ensure that the assurances given are correct. Meaney, 111 Wn.2d at 178-79. The court held there was no evidence the plaintiff made any specific inquiry, or received false information about existing noise regulations. Meaney, at 181. Therefore, the court concluded the County did not give any express assurance that the

business would comply with noise regulations; and no special relationship was established giving rise to an actionable duty. Meaney, at 181.

Smith v. State, 135 Wn. App. 259, 281-83, 144 P.3d 331 (2006), is a case where a plaintiff sued DSHS for failing to provide her with accurate information regarding her hearing rights for financial assistance. The court not only cited Babcock, but it further recognized that the Supreme Court had elaborated on the special relationship exception in Taylor when it stated a duty of care may arise where a public official charged with the responsibility to provide accurate information fails to correctly answer a specific inquiry from a plaintiff intended to benefit from the dissemination of the information. Smith, 135 Wn. App. 283. The court held the plaintiff had established a special relationship exception to the public duty doctrine because she was provided with false information regarding her right to appeal, which she relied on to her daughter's detriment because she was unable to obtain financial benefits.

The question of whether falsity is a required element was also mentioned in the Beal case. However, the issue considered in Beal was different. In Beal, the 911 operator stated she was going to send police to a call to assist with a civil stand by, but by the time the caller was shot and killed by her estranged husband 20 minutes later, the operator had not dispatched any police. The city cited Meaney, and argued the information

given by the 911 operator had to be inaccurate at the time it was given to the caller, and reasoned that a prediction of future acts with no time requirements is not inaccurate information. *Id.*, at 786. The court held this reading of Meaney was too narrow because a definite assurance of future acts could be given without a future time frame, with the government later failing to carry out those acts. In other words, the assurance was true when expressed, but the agency did not fulfill the assurance so it was ultimately false. Skagit 911 and Skagit County are not making this narrow argument. Rather, as acknowledged by the Beal court, if an express assurance ultimately turns out to be false based on subsequent action or inaction, it does not matter if it was true when it was first uttered as it can still potentially create a special relationship with the governmental agency. In the case at hand, however, the 911 operator's statement to Munich that a deputy was enroute to the scene remained true throughout the incident.

It is an uncontested fact that at 18:01:36, Deputy Luvera was dispatched by the 911 operator, and Luvera acknowledged the dispatch before Munich's first call to Skagit 911 ended, acknowledging thereby that he had received the dispatch and was responding. Deputy Luvera began asking the dispatcher clarifying questions about the call while Munich was still on the telephone with the 911 operator. At 18:01:59, the

dispatcher logged Deputy Luvera into the CAD system as enroute to the call, and Deputy Luvera testified that he was enroute to the Munich property at or close to that time. Hence there was no “false express assurance” given to Munich that he could have relied upon to his detriment. The only statement made by Skagit 911 to Munich – that a deputy was enroute – was true. As such, the Estate has failed to produce evidence to support the required element that Skagit 911 gave Munich a false express assurance.

D. MUNICH NEVER SOUGHT OR RECEIVED AN UNEQUIVOCAL EXPRESS ASSURANCE OF POLICE ASSISTANCE.

An inherent, implied, or assumed assurance that police will come to a person’s aid is not sufficient to create a legal duty to provide assistance under the special relationship exception to the public duty doctrine. In fact, in Taylor, 111 Wn.2d at 168, the Washington Supreme Court expressly **overturned** its prior decisions in J&B Dev. Co. v. King County, 100 Wn.2d 299, 669 P.2d 468 (1983) and Chambers-Castanes v. King County, 100 Wn.2d at 286, which had held a plaintiff could rely on inherent or implicit assurances from a public official. Rather, a caller must seek an express assurance of police assistance, and the governmental agency must unequivocally give an express assurance with the intent that

it be relied upon by the caller, before a legal duty to provide assistance is created.

In Babcock, the court concluded a firefighter did not give an express assurance to the petitioner when she told him the fire fighters would “take care of protecting his property.” Babcock, at 789. The court stated the petitioner did not seek any assurance from the fire fighter, nor did he even claim to have specifically sought any such assurance. Babcock, at 791. Further, the statement made did not indicate the fire fighters would act in a specific manner. As no express, unequivocal assurance was sought or given, the statement by the fire fighter did not create a special relationship with the petitioner, or a legal duty to protect his property. *Id.*

In Honcoop v. State, 111 Wn.2d 182, 192-93, 759 P.2d 1188 (1988), the court held a governmental duty cannot arise from implied assurances. Although the plaintiffs alleged they “assumed” the State was doing a good job licensing cattle dealers and enforcing requirements for importing and selling cattle, the court held this was not sufficient to satisfy the express assurance prong of the special relationship test. *Id.*

In Meaney v. Dodd, 111 Wn.2d 174, 181, 759 P.2d 455 (1988), the plaintiffs alleged the County was liable for misrepresentations regarding compliance with County codes and noise regulations. However, the court

held they did not make any specific inquiry about existing noise regulations or seek any express assurance of compliance from the County when their building application was submitted. Therefore, no special relationship or legal duty was created.

In Cummins v. Lewis County, 156 Wn.2d 844, 133 P.3d 459 (2006), the plaintiff argued the nature of the 911 system provides an “inherent” government assurance that medical assistance will be forthcoming once a call is placed. The court rejected this argument and stated, “we conclude that an inherent assurance, like an implied assurance, does not provide us with sufficient basis for finding an actionable duty under the special relationship exception.” Cummins, at 856.

In Sinks v. Russell, 109 Wn. App. 299, 301-04, 34 P.2d 1243, a deputy told 911 callers he would come out to take their statement about a vehicular assault. Before he arrived, the suspect came back and shot at them. The plaintiffs did not show they were requesting protection from an ongoing violent attack. The court held a person does not have a special relationship with law enforcement unless he gave an express assurance of protection from an ongoing attack or the immediate threat of one.

See also, Vergeson, 145 Wn. App. at 541 (“No matter how reasonable, Vergeson’s unspoken expectation that her quashed warrant would be removed from the databases does not qualify as an express

assurance for purposes of establishing this special relationship exception to the public duty doctrine.”); Williams v. Thurston County, 100 Wn. App. 330, 333, 997 P.2d 377 (2000) (without evidence of specific inquiries and express assurances, other than a general approval of construction by a public official, there is no special relationship); and Moore v. Wayman, 85 Wn. App. 710, 718-721, 934 P.2d 707 (1997), review denied, 133 Wn.2d 1019 (1997) (special relationship exception requires evidence of specific inquiries and express assurances).

Here, Munich never sought a specific express assurance from the 911 operator that a deputy would arrive within a certain amount of time, or would protect him from Ballsmidler, and no unequivocal assurance to act in a specific manner was provided. 911 made no assurance that Munich would be protected, or that contact by a police officer would follow within any particular amount of time.

Although the estate argues it is reasonable to believe police will respond quickly due to the nature of the call, this is at best an assumption. The test is what express and unequivocal assurances were made; not what the caller assumed.

Likewise, the estate may argue Munich was inherently or impliedly requesting police protection by calling 911. This is insufficient to satisfy the requirement to show an express assurance was specifically sought by

Munich and expressly given by the 911 operator. No legal duty was created in this case as Munich did not seek or receive any unequivocal express assurance of protection.

E. THERE IS NO EVIDENCE THAT MUNICH RELIED ON ANY FALSE OR INACCURATE EXPRESS ASSURANCE TO HIS DETRIMENT.

The estate has alleged Munich relied to his detriment on the statement of the 911 operator that a deputy was enroute and would contact him in the hanger by waiting in the hanger for police. The estate's entire argument of detrimental reliance rests on the time period of a few seconds to two minutes at most. The estate argues that had Munich not waited in the garage for a deputy for those two minutes (or less), he would have escaped Ballsmidler. Yet, there is no evidence to prove waiting in the garage for two minutes or less was detrimental to Munich as there is no evidence he would have escaped Ballsmidler even if he *had* left the garage immediately.

The cell phone record shows Munich ended his call to 911 at 6:03, and placed his call to Heiner at 6:04. The dispatch tapes demonstrate Munich ended his 911 call at 18:03:49 and called Heiner back at 18:04. Even viewing the evidence in a light most favorable to the estate, and assuming the call to Heiner ended at 6:03:01 and the call to 911 was placed at 6:04:59, the maximum amount of time he was in the garage was

two minutes. This time frame is overly generous because when Munich called Heiner at 18:04, *he was already well away from the garage and running up the hill on Campbell Lake Road*. Munich told Heiner the cars were coming down the hill at a hundred miles an hour and they wouldn't stop for him. Thus, it is *highly* unlikely Munich remained in the hanger more than a few seconds before running out to the road and calling Heiner back. Unfortunately, we will never know how long he stayed in the hanger, and it is pure speculation to try and guess how long he remained there before leaving. Speculative assertions of fact are insufficient to overcome a motion for summary judgment. Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13 (1986).

Even assuming Munich *did* wait in the hanger for two minutes, and Ballsmider came into the garage after him; there is absolutely no admissible evidence that Munich would have had any chance to escape Ballsmider who was already right outside the garage and coming in after him. Either Munich left the garage of his own accord because he decided to make a run for it; or he left because Ballsmider came into the garage after him. Either way, there is no actual evidence that Munich relied *to his detriment* on any express assurance that a deputy was enroute and would contact him at the garage, because leaving the garage sooner would not have changed the outcome. Whether Munich waited in the garage for two

minutes or whether he left the garage right away – Ballsmider was close enough to chase after him, first on foot, then later with his car, until he killed him. There is no factual evidence – just pure speculation – that the outcome would have been different if Munich had left the garage sooner.

In addition, even assuming that Munich did wait in his hanger for two minutes after getting off the phone with 911, there is no evidence that he would have acted any differently in the absence of any statement by 911. See Harvey, 157 Wn.2d at 40 (absence of detrimental reliance found as a matter of law when there was no evidence that the plaintiff would have left his location in the absence of any statement by the 911 operator, “especially that there appeared to be a crazed man waiting outside.”).

The estate cannot prove detrimental reliance under the tragic facts of this case.

F. IF THE COURT ADOPTS A STANDARD BASED ON THE CALLER’S EXPECTATION, AS PROPOSED BY THE ESTATE AND ITS ALLEGED EXPERT, PAUL LINNEE, IT WILL BE CONTRARY TO LAW AND COMMON SENSE.

The estate offers the opinion of its dispatching expert, Paul Linnee, that, “When a 911 employee tells a caller that they already have someone enroute to that person, that...creates reliance by the caller that a law enforcement officer is, in fact heading in the caller’s direction from a

reasonable response location and will be arriving shortly to provide assistance.” CP 223, ln.3-6.

This “opinion” contains numerous implied assumptions. This is in direct violation of every prior ruling of the courts discussed in Section D above, holding that an implied or assumed assurance is not sufficient to create a legal duty.

The nature of the duty owed by 911 agencies or police agencies cannot be determined by a 911 caller’s expectation of what constitutes a timely response to their call. This would be based on an assumption, not an express and unequivocal assurance, as required by established case law. If a frightened 911 caller expects the police to be there within five minutes, there is no legal duty to meet the caller’s assumption. Rather, the nature of the duty, if any, is defined by the express assurance given by the 911 operator to the caller.

G. THE TRIAL COURT IMPROPERLY CONSIDERED THE DECLARATION OF PAUL LINEE AS HE WAS NOT QUALIFIED TO GIVE OPINIONS REGARDING POLICE PROCEDURE, AND HIS DECLARATION CONTAINED MULTIPLE INADMISSIBLE FACTUAL AND LEGAL CONCLUSIONS.

The opinions contained in Mr. Linnee’s declaration constitute impermissible conclusions of law, speculative assertions of fact outside the scope of Mr. Linnee’s purported expertise and are otherwise unhelpful to the trier of fact. As such, the trial court’s denial of Skagit 911 and

Skagit County's motion to strike the declaration of the estate's expert constitutes obvious and probable error.

The admission of expert testimony generally is governed by Washington Rule of Evidence 702, which provides:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The rule requires a two-step inquiry: (1) whether the witness qualifies as an expert; and (2) whether the expert testimony will be helpful to the trier of fact. Rees v. Stroh, 128 Wn.2d 300, 305-06 (1995); State v. Russell, 125 Wn.2d 24, 51, 882 P.2d 747 (1994). The admissibility of an expert's opinion pursuant to ER 702 is a matter within the trial court's discretions. In Re Twining, 77 Wn. App. 882, 891, 894 P.2d 1331 (1994). In ruling on the admissibility of expert testimony under the rule, the court should keep in mind the danger that the jury may be overly impressed with a witness possessing the "aura of an expert." Davidson v. Metropolitan Seattle, 43 Wn. App. 569, 571-72, 719 P.2d 569 (1986).

Here, the opinions expressed in Mr. Linnee's declaration are inadmissible because: (1) they express legal conclusions; and (2) they express speculative assertions of fact that are not conceivably based on the area of Mr. Linnee's asserted expertise.

First, Mr. Linnee's declaration expresses impermissible legal conclusions. Testimony in the form of a legal conclusion is improper and should always be excluded; experts may not testify that a party's conduct was in violation of the law. State v. Olmedo, 112 Wn. App. 525, 532, 49 P.2d 960 (2002); *See also* Comment to ER 704 ("experts are not to state opinions of law or mixed fact and law."). For example, in Washington State Physicians Ins. Exch. & Assoc. v. Fisons Corp., 122 Wn.2d 299, 244, 858 P.2d 1054 (1993), the court held that the trial court erred in considering the opinions of experts concerning whether the attorneys had complied with the standard of care. The court reasoned, "[l]egal opinions on the ultimate issue before the court are not properly considered under the guise of expert testimony."

In Tortes v. King County, 119 Wn. App. 1, 84 P.3d 252 (2003), the plaintiff's police expert offered opinions regarding the foreseeability of events and whether the defendant took adequate measures or should have taken additional action. These opinions were excluded by the court as they were conclusions of law which offered improper legal opinions on the ultimate legal issue. Tortes, 119 Wn. App. at 13.

Mr. Linnee's declaration is filled with impermissible legal opinions. For example, he states that, "in my opinion, Skagit 911 undertook a special duty to decedent William Munich." CP 222, In.23.

The existence of a “special duty” is a legal question and, thus, an opinion of this nature is improper. Following Mr. Linnee’s legal opinion regarding the “special duty” created, is a litany of additional legal conclusions (e.g. Skagit 911 made an “express assurance” that created “reliance” by Mr. Munich – CP 223, ln.3-5 – and was a “proximate cause of Mr. Munich’s death”). CP 231, ln.5. These opinions are similarly improper.

Second, Mr. Linnee’s declaration makes speculative factual contentions not based on the area of his asserted expertise. An expert opinion is inadmissible unless the witness has first been qualified by a showing that he has sufficient expertise to state a helpful and meaningful opinion. See, Sehlin v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 38 Wn. App. 125, 132-33, 686 P.2d 492 (1984). Inherent in this requirement is that the area of the witness’s expertise must be that upon which the opinion is offered. See, e.g. Germain v. Pullman Baptist Church, 96 Wn. App. 826, 838, 980 P.2d 809 (1999) (psychologist unqualified to express an opinion regarding the duties of a pastoral counselor); State v. Swagerty, 60 Wn. App. 830, 835-36, 810 P.2d 1 (1991) (counselor with degree in sociology unqualified to express an opinion regarding the effects of alcohol on the defendant).

Further, the courts have repeatedly held that an expert's opinion is inadmissible if it amounts to no more than conjecture or speculation. McBride v. Walla Walla County, 95 Wn. App. 33, 975 P.2d 1029 (1999) (police expert opinion excluded because it contained conclusory assertions rather than factual allegations); Safeco Insurance v. McGrath, 63 Wn. App. 170, 177, 817 P.2d 861 (1991) (expert did not have factual evidence to support opinion regarding mental capacity of suspect); Hash v. Children's Orthopedic Hosp., 49 Wn. App. 130, 133, 741 P.2d 584 (1987), aff'd 110 Wn.2d 912 (1988) (unsupported conclusory statements in affidavits filed in summary judgment proceedings are improper and should be disregarded). When an expert's opinion is based on theoretical speculation, it is properly excluded. Hiner v. Bridgestone/Firestone, Inc., 91 Wn. App. 722, 735, 959 P. 2d 1158 (1998).

Here, Mr. Linnee's asserted area of expertise appears to be 911 policy and procedure. However, several of his opinions are not conceivably based on this asserted area of expertise. For example, Mr. Linnee asserts that, as "evidence" of Mr. Munich's "reliance" on Skagit 911 statements, Munich "was running North on Highway 20 when he was killed. North is the direction that help was coming from." CP 225, ln.18-20. Not only is this opinion extremely speculative, but Mr. Linnee's area of expertise is 911 policy and procedure, not the state of mind Mr. Munich

or any other 911 caller. Likewise, Linnee's opinion that "When a 911 employee tells a caller that they already have someone enroute to that person, that...creates reliance by the caller that a law enforcement officer is, in fact heading I the caller's direction from a reasonable response location and will be arriving shortly to provide assistance" is inadmissible as Linnee is not a psychologist or expert on the state of mind of 911 callers. CP 223, ln.3-6.

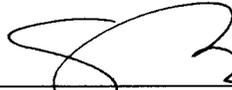
In addition, Linnee offers numerous opinions regarding how the actions of the 911 operators affected the police response to the scene, and the time police arrived. For example, he opines that if Skagit 911 would have coded the call differently, the police would have "on a more probable than not basis, saved Mr. Munich's life" (CP 231) and "if he had left by the time the first call ended, he would have arrived in time to save Mr. Munich's life." CP 227. However, Linnee has no training or education as a police officer, and is not a police practices expert. It is pure speculation as to whether police would have been able to save Munich, even if they had arrived before the shots were fired. Therefore his opinions regarding the ability, procedure and response of police are inadmissible and should have been stricken by the trial court.

V. CONCLUSION

Skagit 911 and Skagit County respectfully request the court to reverse the decision of the trial court and grant summary judgment dismissal of this case.

DATED the 16th day of August, 2010.

KEATING, BUCKLIN & McCORMACK, INC., P.S.



Shannon M. Ragonesi, WSBA #39151
Mark R. Bucklin, WSBA #761
Attorneys for Appellant Skagit 911

PATTERSON BUCHANAN FOBES



FOR Rhianna M. Fronapfel, WSBA #38636
Duncan Fobes, WSBA #14964
Attorneys for Appellant Skagit County and
Skagit County Sheriff's Office