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COURT OF APPEALS
DIVISION I

Case No. 64644-3-I

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DIVISION I
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SKAGIT EMERGENCY COMMUNICATIONS CENTER
d/b/a SKAGIT 911, SKAGIT COUNTY, and
SKAGIT COUNTY SHERIFF'S OFFICE,

Petitioners,

vs.

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

Respondent.

PETITION FOR REVIEW TO THE
SUPREME COURT OF THE STATE OF WASHINGTON:
SKAGIT 911, SKAGIT COUNTY, AND
SKAGIT COUNTY SHERIFF'S OFFICE

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I. IDENTITY OF PETITIONERS

Skagit 911, Skagit County and the Skagit County Sheriff's Office hereby petition the Court for review of the decision issued on April 11, 2011 by Division I of the Washington Court of Appeals.

II. CITATION TO COURT OF APPEALS DECISION

Gaye Diana Munich, as Personal Representative for the Estate of William R. Munich v. Skagit Emergency Communications Center d/b/a Skagit 911, Skagit County, and Skagit County Sheriff's Office, Docket No. 64644-3-1 Consolidated w/No. 64646-0-1, filed April 11, 2011.

III. ISSUES PRESENTED FOR REVIEW

- A. **THE NEED FOR 911 CENTERS TO BE ABLE TO ENGAGE IN TRUTHFUL COMMUNICATIONS WITH 911 CALLERS WITHOUT INCURRING LEGAL LIABILITY IS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DETERMINED BY THE COURT.**
- B. **THE COURT OF APPEALS DECISION THAT A PLAINTIFF NO LONGER NEEDS TO PROVE THE ELEMENT THAT A 911 CENTER'S VERBAL ASSURANCE WAS FALSE, INACCURATE OR UNFULFILLED IN ORDER TO SATISFY THE SPECIAL RELATIONSHIP EXCEPTION TO THE PUBLIC DUTY DOCTRINE CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.**

IV. 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

Ballsmidler, 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 Ballsmidler 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?

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?

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: 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 en route to the call. CP 46. Deputy Luvera testified that he was en route 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 en route 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 told Heiner 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.

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. With 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 to the 911 operator, who relayed it to Luvera. CP 128-130. Munich said he had no idea why Ballsmider started shooting.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

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.

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 vicariously liable for such breach pursuant to agency principles.⁴

On November 17, 2009, the Skagit County Superior Court denied summary judgment in part on the Estate's claim under the "special relationship" exception. CP 741-747. The court found the "express assurances" element of the special relationship exception to the public

⁴ Plaintiffs did not allege 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 before the court on appeal.

duty doctrine does not require that a false or inaccurate assurance be made, and further found there are disputed material facts on the issues of whether an express assurance was sought and given and whether Munich relied on any express assurances to his detriment. *Id.* The trial court certified its order. Skagit 911 and Skagit County sought discretionary review, which was granted on the issue of whether the express assurance requirement of the special relationship exception requires proof of a false or inaccurate assurance by the government.

On April 11, 2011, the Court of Appeals affirmed the trial court ruling. The court held the Estate does not need to prove the express assurance was false or inaccurate. Munich, p.6. The court further held that to the extent courts have considered or addressed the falsity or inaccuracy of an express assurance, such a consideration is not required in this context where the alleged express assurance does not consist of providing information but is instead a promise of future action. *Id.* Petitioners believe this decision is contrary to existing Supreme Court law, and is dangerously detrimental to the quality of future public emergency services. Therefore, they seek review of this decision.

V. ARGUMENT

Municipalities cannot be insurers for every harm that might befall members of the public. 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). “This potential exposure to liability can only dissuade public officials from carrying out their public duty.” Taylor, 111 Wn.2d at 170-71.

“Traditionally state and municipal laws impose duties owed to the public as a whole and not to particular individuals.” Meaney v. Dodd, 111 Wn.2d 174, 178, 759 P.2d 455 (1988), citing Chambers-Castanes v. King County, 100 Wn.2d 275, 284, 669 P.2d 451 (1983). These include duties to provide emergency fire, police and medical services, as well as court services, building permits, zoning information, educational and recreational programs, and many other services to the public. Therefore, for an individual to recover from a municipal corporation in tort, “a plaintiff must show that the duty is owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general.” Meaney, 111 Wn.2d at 178, citing Bailey v. Town of Forks, 108 Wn.2d 262, 265, 737 P.2d 1257 (1987). This legal principle is called the public duty doctrine. Whether a governmental entity owes a legal duty is a question of law. Keller v. City of Spokane, 146 Wn.2d 237, 243, 44 P.3d 845 (2002).

A. 911 CENTERS NEED TO BE ABLE TO ENGAGE IN TRUTHFUL COMMUNICATIONS WITH 911 CALLERS WITHOUT INCURRING LEGAL LIABILITY.

The Court of Appeals has ruled that 911 operators who provide accurate information to 911 callers who are seeking emergency assistance can now create a special relationship with those callers – and subject government agencies to legal liability for providing emergency police services to the public. Because of this decision, emergency communications centers and police departments will now significantly limit what 911 operators may say to emergency callers in order to try and limit the potential for liability. Essentially, emergency operators will be restricted from making any statements to callers beyond acknowledging that they have received the call for assistance. **This decision means 911 operators cannot provide any information in response to common questions such as “Are you sending someone?” or “Is someone on the way?” without creating a special relationship with the caller.**

Limiting 911 operators’ ability to answer questions and provide truthful information and assurances regarding the status of an emergency call will undermine public confidence in emergency services, and interfere with the free flow of information which is so vital in these calls. 911 operators will feel compelled to end calls rather than stay on the line to receive developing critical information about the emergency and convey it

to the police, firefighters and /or medical personnel coming to the scene. Almost all 911 calls involve potentially life-threatening circumstances and distressed members of the public seeking immediate assistance. After this decision, 911 operators are prevented from providing *any* information to callers, even if it is a truthful statement about what response is being sent, without automatically creating a special relationship with the caller and a legal duty to provide public emergency services.

If the Court of Appeals decision is not reversed, there will be more claims against the government and more lawsuits. Tragically, there will also be less communication with 911 callers during emergency situations for fear of creating further legal liability. All of this is contrary to the public policy which recognizes that legislative enactments for the public welfare should not be discouraged by subjecting a governmental entity to unlimited liability.

Creating a special relationship with emergency callers simply by providing them with accurate information or fulfilling a promise to take an action on their behalf has the potential to create a special relationship for nearly every emergency call from the public. Public policy demands that government agencies be held accountable when providing false information or false promises that cause citizens to rely on the wrong information to their detriment. Public policy does *not* call for agencies to

be liable for every public service rendered just because citizens may believe the government could have responded better, faster, or differently in some way. The Court of Appeals decision effectively creates an affirmative legal duty to provide police, fire and medical services to the public where none previously existed; and it will have a significantly destructive impact on the provision of emergency services in the future if it is allowed to stand.

B. THE DECISION THAT A PLAINTIFF NO LONGER NEEDS TO PROVE A 911 CENTER'S VERBAL ASSURANCE WAS FALSE, INACCURATE OR UNFULFILLED TO SATISFY THE SPECIAL RELATIONSHIP EXCEPTION CONFLICTS WITH PRIOR DECISIONS OF THE SUPREME COURT.

To establish a special relationship exception to the public duty doctrine, a plaintiff must show: (1) direct contact or privity between a 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 v. Mason County Fire Dist., 144 Wn.2d 774, 786, 30 P.3d 1261 (2001), citing Beal v. City of Seattle, 134 Wn.2d 769, 785, 954 P.2d 237 (1998), quoting Taylor, 111 Wn.2d at 166. In its decision in this case, the Court of Appeals incorrectly held the Estate is not required to prove that

the express assurance given by the government was false or inaccurate in order to establish a special relationship exception. Munich, p.6.

1. Prior Decisions Have Held The Government Must Set Forth Incorrect Assurances To Create A Special Relationship.

The decisions in Taylor, Meaney and Babcock all recognized that the government may only be liable when it provides incorrect information and assurances to an individual that he relied upon to his detriment.

It is only where a direct inquiry is made by an individual **and incorrect information is clearly set forth by the government**, 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 Fire District, 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). Therefore, falsity *has* been recognized as a required element in these prior Supreme Court decisions – even though it is not listed in the initial three numbered elements often cited in the special relationship case law.

The opinion in Taylor provides the reasoning for why the element of providing incorrect or false assurances is required. 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. Contrary to the Court of Appeals ruling in the present case, this principle logically applies both when an individual seeks an express assurance that information provided by the government is correct, and when an individual seeks a promise that the government will take a particular action.⁵ Either way, the individual is seeking an express assurance, and the government has an obligation to provide accurate information and fulfill its promise if it intends for the assurance to be relied upon by the requestor.

If public officials did not have a duty to provide accurate assurances, there would be no basis for a claim if a recipient was harmed by the government’s failure to act or to give accurate information. In contrast, if an official provides truthful and accurate information to a recipient and acts as promised, the recipient cannot prove detrimental reliance when the express assurance he relied on was the truth. The element of falsity is inherent in the special relationship exception.

2. **Prior Decisions Have Held The Government Must Fail to Fulfill A Promise of Future Action to Create A Special Relationship.**

In its ruling, the Court of Appeals conceded that prior Supreme Court decisions have considered or addressed the falsity or inaccuracy of an express assurance in the special relationship exception. However, the

⁵ An “assurance” is defined as a promise or pledge. www.dictionary.reference.com, 2011.

court declared that such a consideration is not required in the context where an express assurance is a promise of future action. Munich, p. 6. Yet, there is no legal authority to support the court's attempt to carve out and exclude "promises of future action" from the required element of express assurances. Rather, promises of future action are included in the element of express assurances, and this was previously recognized in both Beal v. City of Seattle, 134 Wn.2d 769, 954 P.2d 237 (1998) and Harvey v. Snohomish County, et al., 157 Wn.2d 33, 134 P.3d 216 (2006). The Court of Appeals failed to consider the precedent set in these cases.

In Beal, the 911 operator promised 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 of Seattle cited Meaney, and argued that the information given by the 911 operator had to be inaccurate at the time it was given to the caller in order to create a special relationship. The city reasoned that a prediction of future acts with no time requirements is not inaccurate information. *Id.*, at 786.

The court held the city's 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. *Id.*, at 786. The court pointed out that, "Meaney specifically involved

information about building permit requirements, which either is or is not accurate at the time given. The same cannot be said about assurances that future acts will occur.” *Id.* In other words, the assurance could be true when expressed, but if the agency doesn’t **fulfill** the assurance, it becomes false or incorrect, and can create a special relationship.

As the City concedes, **the duty which arises in a case like Chambers-Castanes (and argued in this case) involves express assurances which the plaintiff relies upon and the government fails to fulfill.** Thus, the duty is defined at least in part by the nature of the assurances given.

Beal, 134 Wn.2d at 787 (emphasis added). The clear precedent of Beal, Babcock, Meaney and Taylor establishes that a plaintiff must prove the government either gave incorrect information – or failed to fulfill a promise – in order to establish a special relationship exception to the public duty doctrine.

The 2006 decision in Harvey v. Snohomish County is further evidence of the requirement to establish that an express assurance was incorrect or unfulfilled in order to establish a special relationship exception. Mr. Harvey alleged police failed to rescue him from a disturbed and violent man who broke into his home and attacked him. Harvey, 157 Wn.2d at 37. The defendant 911 and police agencies asserted that no incorrect or untruthful information was provided to Mr. Harvey during his call to the 911 operator. Therefore, he did not rely on any

express assurance from the 911 operator to his detriment, and no special relationship was created.

In discussing whether Mr. Harvey had established the elements of a special relationship exception, the court held, “**However, while Harvey can establish privity, Harvey cannot show that any alleged assurance made by the operator was false, unfulfilled, relied upon, or made to his detriment.**” Harvey, 157 Wn.2d at 38 (emphasis added). The court expressly included the element of false information, or unfulfilled assurance, in its analysis.

The court explained, “This court has dealt specifically with the express assurances requirement in the context of 911 calls for police assistance in three cases: Chambers-Castanes v. King County, 100 Wn.2d 275, 669 P.2d 451 (1983), Beal, and Bratton v. Welp, 145 Wn.2d 572, 39 P.3d 959 (2002). In 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.*” Harvey, 157 Wn.2d at 39 (emphasis added). In other words, the operators had made a false assurance or an unfulfilled promise of future action.

The court went on to distinguish these three prior cases based on the fact that no untruthful or inaccurate assurance was given to Mr. Harvey. **Unlike Chambers-Castanes, Beal, and Bratton, in this case**

Harvey never received any assurance from the operator that was untruthful or inaccurate. Harvey, 157 Wn.2d at 39 (emphasis added).

The court held, “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 (emphasis added). This opinion reflects the fact that the element of proving the express assurance was untruthful, inaccurate or unfulfilled is inherent, and is necessary to prove there was detrimental reliance on the assurance. In Harvey, without proof that inaccurate information was provided or a promise was unfulfilled, the court held no special relationship was created.

In the case at hand, the 911 operator’s statement to Mr. Munich that a deputy was en route to the scene was true. The statement that a deputy was en route to the scene was fulfilled as a deputy was dispatched promptly and began driving to the scene and asking questions to get more information about the call. Therefore, no special relationship was created as the plaintiff could not identify any false or inaccurate information, or any unfulfilled promise, given by the 911 operator to Mr. Munich during

the call. The Court of Appeals decision that the plaintiff was not required to prove false or inaccurate information or an unfulfilled promise by the government to establish a special relationship directly conflicts with the prior decisions in Harvey, Beal, Babcock, Meaney and Taylor.

VI. CONCLUSION

The Court of Appeals decision will detrimentally impact the future provision of public emergency services. This is an issue of significant public interest. Because the decision directly conflicts with existing Supreme Court decisions, Petitioners respectfully request the Court to grant review of this decision.

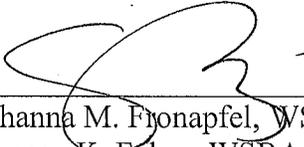
RESPECTFULLY SUBMITTED this 11th day of May, 2011.

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Skagit County Sheriff's Office

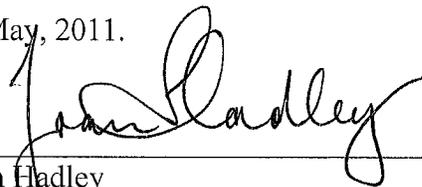
CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that I caused copies of the *Petition for Review to the Supreme Court of the State of Washington: Skagit 911, Skagit County, and Skagit County Sheriff's Office* to be served upon:

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Dated this 11th day of May, 2011.



Joan Hadley

APPENDIX

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

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

Respondent,)

v.)

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

Petitioners.)

No. 64644-3-I
Consolidated w/No. 64646-0-I

PUBLISHED OPINION

FILED: April 11, 2011

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COURT OF APPEALS DIV #1
STATE OF WASHINGTON
2011 APR 11 AM 8:54

SPEARMAN, J. — We are asked to decide on discretionary review whether, in order to satisfy the special relationship exception to the public duty doctrine, the Estate of William Munich must show that Munich received an express assurance from Skagit County that was false or inaccurate.¹ We hold that the Estate does not need to prove that the assurance was false or inaccurate, and affirm.

FACTS

On October 1, 2005, William Munich flew his plane to property that he and his wife, Gaye, owned in rural Skagit County. The only building on their property

¹The County also sought review of the trial court's ruling denying the County's motion to strike the Declaration of Paul D. Linnee, but we deny review of that ruling. The County fails to show obvious or probable error under RAP 2.3(b), and the Linnee declaration is not relevant or necessary to our substantive ruling.

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was a garage. At 5:57 p.m., Munich called his friend Bruce Heiner to tell him that a neighbor, Marvin Ballsmider, had just fired a shot at him. Heiner told Munich to call 911. At 6:00 p.m., according to the computer-aided dispatch (CAD) record, Munich called 911 and reported that a guy had pointed a rifle at him and "then he shot."² Munich said that Ballsmider "was aiming it directly" at him, from about 25 feet away. He reported that he was "rattled" and that Ballsmider was "an alcoholic." At 6:01 p.m., the 911 operator, Norma Smith, informed the Skagit County Sheriff's Office (SCSO) of the incident by entering a notation into the CAD system: "rps neighbor just pointed a rifle at him -- fired one shot." She entered the call as a priority two weapons offense. Meanwhile, Skagit 911 dispatcher Wes Norton dispatched SCSO deputy Dan Luvera to the call. Luvera began to drive from La Conner to Munich's property. At 6:02 p.m., the following exchange took place between Munich and Smith:

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

Munich: Ok, thank you[.]

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

Munich: Oh yeah, definitely[.]

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

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?

Munich: I can't see him from here[.]

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

Munich: I'm in my . . . I'm in my garage right now[.]

² Munich's cell phone statement recorded the call as being made at 5:59 p.m.

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

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?

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?

Munich: Ok thank you[.]

Smith: All righty, thank you, bye bye.

The call terminated at 6:03 p.m. At 6:04 p.m.,³ according to his cell phone records, Munich called Heiner again. During this call, Munich told Heiner he was running down the road and that the "crazy bastard" still had his gun. Heiner told Munich to stop someone on the road and get out of the area, but Munich said cars were coming quickly and would not stop. Heiner heard gunshots. Munich said Ballsmider was at the top of the driveway and was reloading his gun. At 6:10 p.m., after hanging up with Heiner, Munich called 911. He told the 911 operator that Ballsmider, while driving a green station wagon, was chasing him up the road and shooting at him with a rifle. Munich told the operator his location and described Ballsmider's appearance. At 6:15 p.m., while Munich was still on the phone with the 911 operator, Ballsmider drove toward him and shot him through the car's open window. Munich died from his wounds. Luvera arrived on the scene at 6:18 p.m., approximately two minutes after the shooting, and

³ This would have been at approximately 6:05 p.m. according to the CAD system, if the cell phone times were consistently one minute ahead of the CAD times.

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arrested Ballsmidler for Munich's murder. Luvera's arrival was approximately 18 minutes after Munich first called 911.

Munich's estate (the Estate) sued Skagit County, the Skagit County Sheriff's Office, and Skagit Emergency Communications Center (jointly, the County) for negligence in responding to the incident. The County brought a motion for summary judgment dismissal of the Estate's claims, arguing that under the public duty doctrine, it owed no legal duty to Munich. The County argued that the "special relationship" exception to the public duty doctrine did not apply because there was no express assurance of police assistance by the 911 operator and Munich did not rely on any express assurance to his detriment. It also argued that the Estate had to show that any express assurance was false or inaccurate. The trial court, granting summary judgment in part and denying it in part, ruled that a genuine issue of material fact existed on the issues of whether an express assurance was sought and given and whether Munich detrimentally relied on any such assurance.⁴ It rejected the County's argument that Washington law requires a plaintiff to prove that an express assurance was false or inaccurate to give rise to a duty of care. The trial court certified its order. Skagit 911 and Skagit County sought discretionary review, which we granted on the narrow issue of whether the express assurance requirement of the special relationship exception requires a false or inaccurate assurance.

⁴ The trial court granted the County's motion for summary judgment to dismiss the Estate's claim based on the rescue doctrine.

DISCUSSION

We examine issues of law de novo. State v. McCormack, 117 Wn.2d 141, 143, 812 P.2d 483 (1991). The County argues that under Washington law, the Estate is required to prove that any express assurance given by the 911 operator was false or inaccurate. The Estate, on the other hand, contends that it need only prove that an express assurance was given. We agree with the Estate and hold that where, as here, the alleged express assurance involves a promise of future action, a plaintiff is not required to prove that the express assurance was false or inaccurate to establish the existence of a special relationship.

Under the public duty doctrine, a plaintiff alleging negligence against a government entity must show that a duty was owed specifically to the plaintiff, not to the public in general. Taylor v. Stevens County, 111 Wn.2d 159, 759 P.2d 447 (1998) (citing J & B Dev. Co. v. King County, 100 Wn.2d 299, 304, 669 P.2d 468 (1983)). Whether a duty exists is a question of law. Osborn v. Mason County, 157 Wn.2d 18, 22–23, 134 P.3d 197 (2006). One exception to the public duty doctrine is where a “special relationship” exists between the plaintiff and the government entity. Babcock v. Mason County Fire Dist. No. 6, 144 Wn.2d 774, 784, 30 P.3d 1261 (2001). The special relationship exception is a “focusing tool” used to determine whether a local government “is under a general duty to a nebulous public or whether that duty has focused on the claimant.” Taylor, 111 Wn.2d at 166 (quoting J & B Dev. Co., 100 Wn.2d at 304-05).

In order to establish that a special relationship exists, a plaintiff must prove three elements: (1) direct contact or privity between the public official and the plaintiff which sets the plaintiff apart from the general public, and (2) an express assurance given by the public official, which (3) gives rise to a justifiable reliance on the part of the plaintiff. Babcock, 144 Wn.2d at 786. "The plaintiff must seek an express assurance and the government must unequivocally give that assurance." Id. at 789.

We hold that the Estate is not required to prove, in addition to these three elements, that the express assurance was false or inaccurate. The cases cited by the County to argue otherwise are distinguishable. Initially, we note that all of the cases cited by the County apply the same three-part test we have identified for finding a special relationship: privity, express assurance, and detrimental reliance. See, e.g., Harvey v. Snohomish County, 157 Wn.2d 33, 38-41, 134 P.3d 216 (2006); Meaney v. Dodd, 111 Wn.2d 174, 178-79, 759 P.2d 455 (1988); Taylor v. Stevens County, 111 Wn.2d 159, 166, 759 P.2d 447 (1988); Vergeson v. Kitsap County, 145 Wn. App. 526, 539, 186 P.3d 1140 (2008); Smith v. State, 135 Wn. App. 259, 282, 144 P.3d 331 (2006). To the extent that courts have considered or addressed the falsity or inaccuracy of an express assurance, we conclude that such a consideration is not required in this context, where the alleged express assurance does not consist of providing information but is instead a promise of future action.

In several cases, the issue of whether information conveyed by the government to the plaintiff was false or inaccurate was central to the plaintiff's negligence claims. Meaney involved a negligence claim against a county in issuing a building permit to operate a mill and failing to provide accurate information during the application process. Meaney, 111 Wn.2d at 175. Taylor also involved a negligence claim against the county in issuing a building permit. Taylor, 111 Wn.2d at 160-62. And in Smith, the plaintiff alleged that the state was negligent in providing inaccurate information about appeal rights regarding her application for adoption assistance benefits. Smith, 135 Wn. App. at 263. In these cases, the government was involved with providing information in some capacity to the plaintiffs, and the plaintiffs' negligence claims depended on whether that information was accurate, true, or reliable. But here, the alleged assurance does not involve providing information. It involves a promise of future action.

A similar issue arose in Beal v. City of Seattle, 134 Wn.2d 769, 785-86, 954 P.2d 237 (1998), where the Washington Supreme Court considered the government's argument that where the issue involved reliance by a plaintiff on assurances, the information relied upon must be incorrect or there could be no cause of action. There, Melissa Fernandez called 911 from the apartment next to her estranged husband's to report that he would not let her retrieve her belongings. Id. at 773. She reported that her husband had been harassing and

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threatening her and that she had heard he had a gun. The conversation that the court found to contain express assurances was as follows:

911: Okay. Well I'll tell you what, we're going to send somebody there. Are you going to wait in number 4 [another apartment] until we get there?

CALLER: I'll be waiting outside in the front with my mom.

911: Okay. We'll get the police over there for you okay?

CALLER: Alright [sic], thanks.

Id. at 785. Approximately 20 minutes after this conversation, Fernandez's husband shot and killed her and then himself. By the time of the shootings, no police officer had been dispatched. The city, citing Meaney, argued that in any set of circumstances the information must be inaccurate at the time given, and argued that a prediction of future acts with no time requirements is not inaccurate information. Id. at 786. But the court rejected this analysis:

This reading of Meaney is too narrow, because a definite assurance of future acts could be given without a specific time frame, with the government then failing to carry out those acts. Meaney specifically involved information about building permit requirements, which either is or is not accurate at the time given. The same cannot be said about assurances that future acts will occur.

Id. Significantly, the Beal court, in circumstances much like those in this case, declined to impose a requirement that the plaintiff prove that the assurance was false or inaccurate.

In Vergeson, another case cited by the County, the plaintiff alleged negligence against the county in failing to remove records of court-quashed warrants from its databases. There we applied the three-part test and affirmed

the summary judgment dismissal of Vergeson's claims because she failed to identify any express assurances given to her by the county that it would remove her quashed warrant from the databases or that she would not be subsequently arrested. Id. at 541. Although we noted that Vergeson had not shown that the county had provided her any incorrect information regarding the status of her warrants, the case turned on Vergeson's failure to identify any express assurances given to her by the county. Nowhere in our analysis did we suggest that in all cases, the plaintiff bears the additional burden of proving the falsity or inaccuracy of any express assurance given by the government.

Finally, of the cases cited by the County, Harvey is the most factually relevant, as it also involved a call to 911 for assistance.⁵ In that case, the Washington Supreme Court held that the caller did not seek any express assurance, the 911 operator did not give an express assurance, and the caller

⁵ In Harvey, Robert Harvey, his infant son, and their neighbor Alex Keltz were inside Harvey's home when a stranger who claimed to be "serving God" began breaking in. Harvey, 157 Wn.2d at 35. Keltz called 911 at approximately 5:35 p.m. The operator, while on the line with Keltz, informed a police dispatcher of the situation, and at 5:38 p.m., the dispatcher requested law enforcement to respond. Id. at 35-36. Within one minute, two sheriff deputies responded to the call and informed the dispatcher that they were on their way. Around this time, the 911 operator informed Harvey that police had been notified. The dispatcher advised police that the suspect was armed with a handgun and threatening to shoot Harvey. At 5:44 p.m., a deputy arrived and began setting up a couple blocks away from the residence while waiting for backup to arrive. Id. at 36. At 5:46 p.m., another deputy arrived. Harvey had lost sight of the suspect at this point and asked the operator whether he should go out on the porch to look for the suspect or lock himself in the bathroom. The operator told Harvey to do whatever he felt was most safe. The suspect attempted to enter the house through a window. At 5:49 p.m., deputies began to move in on the residence. Within a minute, other deputies arrived with a ballistic shield, and the operator stated that gunfire had been heard and telephone contact with Harvey was lost. Id. at 36-37. Deputies saw Harvey and Keltz coming toward them, and Harvey said that the suspect was inside the home and had been shot several times. The deputies went inside and subdued the suspect. None of the victims were physically injured. Harvey sued various parties for negligent infliction of emotional distress.

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did not rely on any assurance to his detriment. Harvey, 157 Wn.2d at 40.

Furthermore, even if any assurance could be found, the caller could not show any breach of duty. Id. The County cites the following language from Harvey:

[I]n this case, Harvey never received any assurance from the operator that was untruthful or inaccurate. Nor has Harvey shown that he relied on any assurance to his detriment. 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.

Id. at 39 (footnotes omitted). The Court also wrote:

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.

Id. at 41-42. We do not view this language as holding that the falsity or inaccuracy of an express assurance is an additional element necessary to find a special relationship. Rather, it supports the Court's point that there was no express assurance upon which the plaintiff detrimentally relied, because the 911 operator statements were not an express assurance, but instead simply informed him, accurately, of developments in the situation.

In sum, we hold that here, where the alleged express assurance involved a promise of future action, the Estate is not required to show that the express assurance was false or inaccurate in order to establish the existence of a special relationship. The cases repeatedly employ the same three-part test, which does

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not require a plaintiff to show the falsity or inaccuracy of an assurance. Based on our holding, we conclude that the trial court did not err in finding that there were genuine issues of material fact regarding the existence of a special relationship between William Munich and Skagit County.

Affirmed.

WE CONCUR:

Becker, J.

Spearman, J.

Grove