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NO. 85984-1

SUPREME COURT OF THE STATE OF WASHINGTON

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

Respondent,

v.

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

Petitioners.

RESPONDENT MUNICH'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

Bill Munich was shot and killed 16 minutes after he called Skagit 911 and reported that a neighbor had pointed a rifle at him and fired from 25 feet away. After the 911 operator told Munich that a deputy was “en route” to him, Munich told the operator that he would wait in his garage (the only structure on the property) for the deputy.

The 911 operator coded the call as a Priority Two rather than a Priority One, as it should have been coded. As a result, the call was not dispatched with an alert tone to notify all law enforcement personnel in the area of the need to respond, and the one officer who did respond traveled at normal speed, stopping for all traffic signals, rather than with his lights and siren on and the urgency the situation required. As a result, the response by law enforcement was delayed, and Munich was fatally shot 14 minutes after a deputy was dispatched to respond.

This case presents the issue of whether the express assurance element of the special relationship exception to the public duty doctrine requires that an express assurance given by a 911 operator be false. *Munich v. Skagit Emergency Communications Center*, 161 Wn. App. 116, 120, 250 P.3d 491 (2011). The Court of Appeals held that, where the 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.

This Court has repeatedly stated the three elements of the special relationship exception to the public duty doctrine as: (1) direct contact

between a public official and a citizen; and (2) an express assurance by the public official to the citizen (3) that gives rise to justifiable reliance on the part of the citizen. The Court of Appeals correctly held that this Court's precedents do not require a fourth element – that the express assurance be false. The evidence in this case establishes all three elements. This Court should affirm the Court of Appeals and remand this case for trial.

II. STATEMENT OF THE CASE

A. Bill Munich's first call for help to Skagit 911.

On October 1, 2005, Bill Munich flew his float plane to property he and his wife owned on Lake Campbell in Skagit County. The only structure on the property was a garage, which had three vehicles in it, with the keys in the vehicles. CP 304; CP 309; CP 315-316.

At 5:57 p.m., Munich called a friend, Bruce Heiner, and said that "he had the hell scared out of him" because his neighbor, Marvin Ballsmider, was on his property with a gun in one hand and a drink in the other, and had fired a shot. CP 320-321. Heiner told Munich to call 911 and "get the Sheriff out there." CP 321.

Munich called 911. He told Norma Smith, a Skagit 911 call taker, that he "just had a guy point a rifle" at him and "then he shot." CP 111. He told Smith that Ballsmider "was aiming it directly" at him, about 25 feet away. CP 111. He told Smith that he did not know where Ballsmider was because he could not see him from inside the garage. CP 112.

Smith assured Munich that law enforcement was on the way: “[M]y partner [has] already got a deputy that’s headed towards you.”¹ CP 112. Smith specifically asked him, “Ok, so are you going to wait there for contact?” Munich replied, “Oh yeah, definitely.” CP 112. Smith confirmed a second time that Munich would wait in his garage for law enforcement: “Ok, you’re going to wait there at the garage for contact then?” He replied, “Yeah . . .” Smith assured him, “Ok, all righty, there’s already a deputy that’s en route to you, ok?” Munich replied, “Ok, thank you.” CP 112.

¹ There are questions of fact as to whether the 911 operator’s assurance that a deputy was en route was true or false at the time it was made. The evidence indicates that Deputy Luvera was *not* en route to Munich’s location when Smith told Munich that a deputy was en route: (1) Deputy Luvera did not know where he was, what he was doing, or whether he was in his car when he was dispatched. CP 528-530. He responded to the dispatch by saying his radio call number, “40.” The 911 dispatcher admitted that, when he entered Luvera’s status in the computer system as “en route,” he had no way of knowing whether Luvera actually was en route to Munich’s location. CP 444. (2) If Deputy Luvera had been in his car, on his way to Munich’s location at 6:02 (when he was dispatched), he would have arrived sooner. It took Deputy Luvera about 17 minutes to reach Munich’s location after being dispatched. CP 544. One can drive at the speed limit from La Conner (where Luvera started) to the location where Munich was shot in about 15-1/2 minutes. CP 267-269. Further, Sergeant Lindquist testified that Deputy Luvera was the closest member of the Sheriff’s Department to Munich’s location. CP 483-484. The facts that (a) Lindquist arrived at the scene in just under 11 minutes (CP 478-479) running code from the Sheriff’s office in Mount Vernon when she decided to respond, and (b) was farther away than Luvera, indicate that Luvera could have made it to the scene in less than 11 minutes if he had run code – in time to save Munich’s life. *See also* CP 391-392 (Sheriff’s Office in Mount Vernon is farther away from scene of Munich incident than La Conner).

Smith recorded the following in the call log: “rps² *neighbor just pointed a rifle at him – fired one shot.* Male subj is harold ballsmizer? lives just south of rp. unk where male subj is now. male subj was approx 25 ft away from rp when he fired the gun. just a garage on rps property – he will be waiting there for contact.” CP 376 (emphasis added).

Smith entered the call into the computer dispatch system as a “weapons offense” and coded it as Priority Two. CP 341, 342. She did not code the call as an emergency (Priority One). CP 346, 348, 356, 364.

B. Bill Munich’s second call for help to Skagit 911

About seven minutes after the first call ended, Munich called 911 again and said that he was on Highway 20, running away from Ballsmidler, who was shooting at him. CP 113-114. Munich told Skagit 911 that Ballsmidler had come into his garage. CP 113.

The call ended with Munich being fatally shot on Highway 20 as Ballsmidler pursued him in a car while firing a shotgun out the window, approximately 14 minutes after a deputy was dispatched to respond.³ As discussed below, law enforcement personnel could have arrived within seven minutes or less if the call had been coded properly as a Priority One and dispatched with an alert tone.

² “RP” refers to the caller, or reporting party. CP 343.

³ See CP 46 (indicating that U40, Deputy Luvera, was dispatched to Munich’s location at approximately 6:02 p.m.) and CP 115 (call ended at 6:16:06 p.m. with Bill Munich being shot); CP 403-404.

C. Skagit 911 did not code Bill Munich's call properly, resulting in a slow response.

A 911 call taker answers 911 calls, obtains information from callers, enters calls into the computer system, and gives the information to a dispatcher, who dispatches law enforcement or fire/emergency medical services to respond. CP 416, 417. Call takers are responsible for correctly coding/prioritizing calls. CP 579 at § 2.0; CP 418-419, 420, 441-442; CP 336-337.

Dispatchers, and in turn responders (law enforcement, fire, paramedics), rely on call takers' coding of calls to determine how quickly they need to respond. CP 441-442; CP 350; CP 330, 351-352, 361; CP 520; CP 536; CP 466-467; CP 568-569; CP 388, 393-394, 408-409.⁴

Under Skagit 911's Standard Operating Guidelines, a threat to life is to be given the highest priority – Priority One. CP 579 at § 3.0; CP 362; CP 423-424. Skagit 911 defines Priority One calls as: “Crimes *in progress* involving an immediate threat of serious physical injury to another person” (emphasis added). CP 459. Skagit 911 defines “in progress” as: “0-5 minutes after occurrence, or suspect on location.”⁵ CP 456 at § 3.3; CP 440.

⁴ Luvera, Lindquist, Howell, and Grimstead are all Skagit County law enforcement personnel.

⁵ If Smith had asked Munich when the incident happened, the evidence indicates that Munich would have told her that it happened within the last five minutes, because a shot was fired during Munich's first call to Heiner (5:57 p.m. according to his cell phone records, CP 139; CP 320-321; 324-325), and Munich's first 911 call was made at 5:59 p.m. according to the cell phone records. CP 139.

Skagit 911's Standard Operating Guidelines give the following examples of Priority One calls:

3.1.2 A person threatening another with a weapon likely to inflict serious injury. (Gun, knife, club, etc.)

CP 580 at § 3.1; CP 586.

A Priority One code lets law enforcement know that they need to respond to an incident as quickly as possible, with lights and siren on. CP 492; CP 551; CP 472.

Priority Two calls are defined as: "Crimes that may or may not be in-progress but the circumstances do NOT present an immediate threat of serious physical injury of another person or there is NOT a safety risk due to physical resistance/escape." CP 580 at § 3.2. Skagit 911 claims that Smith properly coded Munich's call as a Priority Two because Munich had "walked away from Ballsmider and removed himself from the situation." *Petition for Review* at p.3. The evidence, however, shows that the situation was still in progress, and that the threat of serious injury was still present.

Skagit 911's policies define "assault" as:

Physical attack unlawful threat or attempt to injure another person.
Event may occur with or without weapons. . . .

CP 623. Skagit 911's policies classify "assault" as a Priority One call. CP 445; CP 623.

Smith agreed that what happened to Munich – a gun being pointed and fired – was an assault. CP 338-339, 347, 349, 358-359, 360, 362-363.

Munich told Smith that he had “just” been shot at. The evidence also indicates that Ballsmider was still on location – Munich told Smith that the shooter was his neighbor and was last seen standing on the fence line. CP 112. Because the criteria for a Priority One “in progress” call were met (event occurring within five minutes of the call and suspect on location), Munich’s first call should have been coded as Priority One, and should have been dispatched with an alert tone. CP 216-222 (*Declaration of Paul Linnee*).

Rather than coding the call as an assault, Priority One, Skagit 911 dispatched it as a Priority Two “weapons offense,” which Skagit 911’s polices define as “reports of gunshots heard or brandishing of a weapon” (CP 643), and includes hearing a gunshot due to illegal discharge of firearms in the city limits. CP 468-469; CP 389, 405.

There is a clear distinction between somebody being *shot at* versus merely *hearing shots*. CP 421. What Bill Munich reported was not merely hearing gun shots or the brandishing of a weapon. What he reported was an assault: a gun being pointed “straight at” him and fired from a relatively short distance away. CP 641 (definition of “assault”).

D. If Bill Munich’s call had been properly coded, law enforcement would have responded on an emergency basis and arrived in time to save his life.

Skagit 911’s Standard Operating Guidelines state that Priority One calls are to be “dispatched immediately to the area or zone car *preceded by an emergency alert tone*.” CP 580 at § 3.1.6 (emphasis added); CP 586; CP 357; CP 427, 428, 429-430.

Law enforcement personnel decide how fast to respond to a call based on the information provided by the 911 dispatcher. CP 442. An “alert tone” (three beeps) is a method for dispatchers to prioritize calls for law enforcement and let them know that there is an emergency situation. CP 443, 450; CP 564-565; CP 469-470; CP 538; CP 408. An alert tone is broadcast to all officers on the particular radio frequency. CP 512-513.

Skagit 911’s Standard Operating Guidelines provide as follows:

Alert tones (ALERT 1) are activated prior to the dispatch for the following situations:

...

Incidents involving Weapons that are in progress or within 5 minutes of occurrence

CP 613; CP 502-503, 504-505.

Skagit 911 Dispatcher Norton dispatched Deputy Luvera at approximately 6:02 p.m.⁶ CP 442; CP 535. Deputy Luvera testified that, based on the lack of an alert tone and the information provided by Norton, it was a routine call: “It was not an emergency, there was no immediate threat.” CP 531-532, 552-553.

The testimony of Skagit 911’s own employees, as well as Skagit 911’s policies and the declaration of emergency communications expert Paul Linnee, demonstrate that Munich’s first call should have been coded as Priority One, with an alert tone used when it was dispatched. Had that

⁶ Norton’s “en route” notation referred to by Skagit 911 was merely a code entered in the computer system by Norton after Deputy Luvera acknowledged the dispatch, not an indication that Luvera was actually driving toward Munich’s location. CP 224-225.

been done, Deputy Luvera would have responded quickly and reached Munich's location in time to save his life. CP 226-227 at ¶¶14(a); CP 267-269. Additionally, other law enforcement personnel who were closer to Munich's location than Luvera would have responded and arrived prior to Munich being shot. CP 227-229 at ¶¶14(b), (c), (d), & (e).

Because Luvera did not think it was an emergency call based on the information provided by Skagit 911, he drove at normal speed. CP 539, 540-541, 547-548. Because the call was not coded properly, Sgt. Lindquist, who was on duty at the Sheriff's office, went about her business at the office until Munich's second call, at which point Sgt. Lindquist took off for the scene, with her lights and siren going. CP 476, 477. It took her a little less than eleven minutes to get to the scene. CP 478-479. If the first call had been coded properly as Priority One, with an alert tone, Sgt. Lindquist would have been informed of the seriousness of the situation and would have responded in time to save Munich's life, given the fact that she arrived within eleven minutes when she did respond. CP 228 at ¶14(d).

Deputy Kelly Howell was working an overtime security detail about five to six miles from where the incident occurred. CP 560-561, 567. After dispatch advised that Munich had been shot, he arrived at the scene within seven minutes. CP 562-563, 566. If Munich's first call had been properly coded and dispatched with an alert tone, Deputy Howell would have known that it was an emergency situation and could have left his security detail and responded. CP 570, 574. If he had left by the time

the first call ended (6:04 p.m.), he would have arrived in time to save Munich's life (the shooting occurred about 6:16 p.m. (CP 34)). CP 227 at ¶14(b).

Sergeant Ray Erps was on duty for the Swinomish Tribe at the time of the incident but also was deputized by and had radio contact with the Skagit County Sheriff's Office. CP 593-594. He responded to Munich's second call and arrived within four minutes. CP 595, 597, 599, 605. Had Sgt. Erps been dispatched to respond to Munich's first call, or been notified of the seriousness of the call by way of an alert tone, he would have arrived before Munich was shot and killed. CP 227-228 at ¶14(c).⁷

About 14 minutes after Munich's first 911 call was dispatched, he was fatally shot. CP 403-404.

It was not until about 1-1/2 minutes (a couple of miles) from the scene that Deputy Luvera changed from driving normal speed to driving in code. CP 542-543; CP 679; CP 226-227 at ¶ 14(a); CP 239-240. It took approximately 17 minutes from the time Luvera was dispatched for him to reach Bill Munich's location. CP 544. If he had arrived just a few minutes earlier, it would have saved Bill Munich's life.

⁷ In addition to Lindquist, Howell, and Erps, several other law enforcement personnel, including two City of Anacortes police officers, were on duty and available to respond. Skagit 911 failed to inquire as to the location of any of those officers and failed to ask for assistance from them in responding, despite the high likelihood that some of them were much closer than Deputy Luvera, given the fact that it is under six miles from the Munich property to the Anacortes Police Station. CP 216, 228-229, 230-231, 234-235.

III. ARGUMENT

- A. The trial court and Court of Appeals correctly followed this Court's precedents in holding that the special relationship exception to the public duty doctrine does not require that the express assurance be false.**

This Court has never required plaintiffs in 911 cases to prove that an assurance of future action given by a 911 operator was inaccurate to establish a special relationship. This Court has consistently required only three elements to satisfy the special relationship exception: (1) direct contact between a public official and a citizen; and (2) an express assurance by the public official to the citizen (3) that gives rise to justifiable reliance on the part of the citizen. *See, e.g., Cummins v. Lewis County*, 156 Wn.2d 844, 854, 133 P.3d 458 (2006); *Bratton v. Welp*, 145 Wn.2d 572, 576-577, 39 P.3d 959 (2002); *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 786, 30 P.3d 1261 (2001); *Beal v. City of Seattle*, 134 Wn.2d 769, 785, 954 P.2d 237 (1998).

If these three elements are satisfied, a duty exists. Whether the assurance given by a public official was inaccurate (building code cases), or whether a governmental agency failed to exercise reasonable care in fulfilling an assurance of future action (911 cases), relates to the separate issue of *breach* of duty. *Munich*, 161 Wn. App. at 122 (“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.”). The requirements for establishing the existence of a duty should not be confused with the requirements for establishing breach of a duty.

The express assurances given to Bill Munich by Skagit 911 are indistinguishable from the assurances this Court found to be sufficient to satisfy the “express assurance” element of the special relationship exception in *Beal v. City of Seattle*, 134 Wn.2d 769, 954 P.2d 237 (1998):

911: Okay. Well I'll tell you what, we're going to send somebody there. Are you going to wait in [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, thanks.

Beal, 134 Wn.2d at 785.⁸

The “inaccurate information” language relied upon by Skagit 911 comes out of cases involving building code/permit issues, such as *Meaney v. Dodd*, 111 Wn.2d 174, 759 P.2d 455 (1988) and *Taylor v. Stevens County*, 111 Wn.2d 159, 759 P.2d 447 (1988). Building code cases present different issues in terms of the special relationship exception than 911 cases. Whether information given by a public official is incorrect is important in building code cases because accurate information is what people seek from building officials. In 911 cases, however, callers seek *action*, not information.

⁸ The facts of this case are even stronger than *Beal*, because in *Beal*, the plaintiff told the operator that her estranged husband was next door and had reportedly been seen with a gun, “though she did not know for sure if he had one.” *Beal*, 134 Wn.2d at 774. Here, Munich not only told Skagit 911 that Ballsmidler had a gun, but that it had been fired at him.

In *Meaney*, this Court held that a builder could rely on a governmental entity for accurate information and building permits binding on the government if the builder could show that he justifiably relied on assurances which the government expressly gave. “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.” *Meaney*, 111 Wn.2d at 180.⁹ 911 cases, however, are not about binding the government to a building code or zoning interpretation. They involve assurances of action that people rely upon in forgoing other options such as calling a cab or a friend to take them to the hospital rather than waiting for an ambulance, or attempting to escape from an intruder or threat rather than staying on location and waiting for law enforcement.

In *Beal*, this Court specifically rejected a claim by a governmental entity, based on *Meaney*, that the express assurance relied upon by the plaintiff in a 911 case must be “incorrect or there is no cause of action”:

The City contends . . . that where the issue involves reliance by the plaintiff on assurances by a municipality’s agent, the information relied upon must be incorrect or there is no cause of action, citing *Meaney v. Dodd*, 111 Wn.2d 174, 759 P.2d 455 (1988). In *Meaney*, the court . . . held that ***in order to maintain an action based upon negligent issuance of a building permit***, a direct inquiry must have been made by the plaintiff and incorrect information clearly set forth by the government. *Meaney*, 111 Wn.2d at 179-180, 759 P.2d 455. The City reasons that a prediction of future acts with no time requirements is not inaccurate information.

⁹ In *Meaney*, the Court found that there was no evidence that the builder made a specific inquiry.

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.

Beal, 134 Wn.2d at 785-786 (emphasis added).

In *Beal*, this Court drew a distinction between assurances involving information (building code cases) and assurances involving action (911 cases). Here, a Skagit 911 call taker gave Bill Munich a specific assurance of action – that a deputy was on the way – but Skagit 911 failed to exercise reasonable care in carrying out that assurance of action. Skagit 911 coded the call improperly and did not dispatch law enforcement with the urgency that the situation required. Law enforcement could have easily arrived in time to save Bill Munich’s life if the call had been coded properly. As a result of Skagit 911’s failure to exercise reasonable care and follow their own policies and procedures, Bill Munich was shot dead running along the highway in the direction from which law enforcement would ultimately arrive.

The only way for a plaintiff to detrimentally rely on a statement by a government official regarding building code requirements is for the statement to be false. As this Court stated in *Beal*, however, a 911 operator can give a caller an assurance of action without a specific time frame (i.e., “law enforcement is on the way,” or “an ambulance is on the way”), and the assurance of action can result in detrimental reliance because the government fails to exercise reasonable care and respond in a

timely manner, and the plaintiff loses precious time waiting for public safety personnel to respond rather than taking other measures to protect himself/herself. As the Court of Appeals recognized, there is a significant difference between building code cases and 911 cases in that the accuracy of the *information* contained in the express assurance is what the plaintiff in a building code case relies on, whereas, in a 911 case, the plaintiff relies on the *action* promised by the assurance, not just the information contained in the assurance. This Court recognized this important distinction in *Beal. Munich*, 161 Wn. App. at 123 (“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.”).

Skagit 911 also relies upon *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 30 P.3d 1261 (2001), which was a plurality decision and therefore has limited precedential value. See *State v. Gonzalez*, 77 Wn. App. 479, 486, 891 P.2d 743 (1995); *State v. Zakel*, 61 Wn. App. 805, 808, 812 P.2d 512 (1991). Additionally, the language cited by Skagit 911 is dicta. The plurality quoted language about “incorrect information” from *Meaney*, but did not discuss or rely upon that language because the plurality found that no express assurance had been given. *Babcock*, 144 Wn.2d at 791.

Skagit 911 also relies on *Harvey v. Snohomish County*, 157 Wn.2d 33, 134 P.3d 216 (2006), but *Harvey* is distinguishable on several grounds. First, the Court found that no express assurance/promise of action was

given by the 911 operator. Second, Harvey was unable to show detrimental reliance. He had no options other than to stay in his residence because he knew that there was a crazed individual outside blocking his exit. The sole basis for Harvey's detrimental reliance claim was that he remained on the line with the 911 operator in response to the operator's request to do so.¹⁰ *Harvey*, 157 Wn.2d at 40. Third, this Court stated that, *even if reliance had been shown, the case still would have been dismissed because there was no evidence of a breach of duty*: "On the contrary, in this case, the SNOPAC operator and the Snohomish County Sheriff's Office seemed to have acted swiftly and effectively throughout the entire 15 minutes between the initial call and the shooting." *Harvey*, 157 Wn.2d at 42. In *Harvey*, the 911 operator followed proper procedures. The dispatcher requested that "all available law enforcement respond to Harvey's residence." *Harvey*, 157 Wn.2d at 36. Here, in contrast, the Munich incident was not coded properly, was not dispatched with an alert tone, and nearby law enforcement personnel were not notified or asked to respond. As a result, only one law enforcement officer responded, and did so without any urgency. CP 216-222, 230-231.

This Court did not say in *Harvey* that it was adding a new element to the special relationship exception in 911 cases – that the express

¹⁰ Due to space constraints and the fact that it is not an issue on appeal, Respondent does not discuss the evidence of reliance by Bill Munich on the assurances given by Skagit 911. The evidence and law relating to reliance was discussed in Respondent's Brief in the Court of Appeals at pp. 28-32.

assurance must be inaccurate. As the Court of Appeals held, there is nothing in *Harvey* that indicates an intent to change the three elements of the special relationship exception.

At the end of the *Harvey* opinion (pages 41-42), this Court summarized the showing required to establish a duty under the special relationship exception: “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.” These are the same express assurance and reliance elements that this Court has always required. The plaintiff in *Harvey* simply failed to show evidence of detrimental reliance, as well as evidence of breach of duty.

A statement promising future action does not have to be false for someone to justifiably rely upon it. A reasonable juror would expect that the assurance “a deputy is on the way,” in response to a 911 call reporting a gun being fired at the caller, means that the police will respond on an emergency basis, not at the slower speed that they respond to routine calls. *See Noakes v. City of Seattle*, 77 Wn. App. 694, 699, 895 P.2d 842 (1995) (an assurance that “we’ll send someone out” “could be construed by a reasonable trier of fact as an express and explicit assurance that the police would be right out”). Skagit 911 coded Munich’s call incorrectly, which resulted in a delayed response to an emergency situation in which Munich’s life was at risk. Skagit 911 failed to exercise reasonable care in fulfilling the promise it made to Munich.

Under Skagit 911's position, if someone calls 911 for a medical emergency and is told an ambulance is on the way, and the person waits at home for the ambulance rather than calling a cab or a friend to take them to the hospital, but the ambulance personnel stop for coffee on the way and the person dies, there would be no cause of action because an ambulance had been dispatched and was "on the way" and would eventually arrive. That is not and should not be the law in Washington in 911 cases.

B. The Court of Appeals' decision promotes public confidence in 911 agencies.

Contrary to the claims of Skagit 911 and amicus Washington State Patrol, the Court of Appeals' decision does not undermine the effectiveness of 911 agencies. The Court of Appeals' decision promotes public confidence in 911 agencies by affirming that a 911 agency can be held accountable if the elements of the special relationship exception to the public duty doctrine are established and the 911 agency fails to exercise reasonable care in dispatching public safety personnel, thereby delaying the emergency response time. A person who calls 911 should be entitled to rely on 911 personnel dispatching the call properly, consistent with the 911 agency's policies and procedures. Allowing 911 agencies to evade accountability for negligence such as occurred in this case would undermine public confidence in 911 agencies.

This Court has previously recognized the important deterrent effect of governmental agencies being held accountable for their negligence

through tort liability. In *Babcock v. State*, 116 Wn.2d 596, 622, 809 P.2d 143 (1991), the Court observed that the existence of tort liability against the State would have a desirable deterrent effect of encouraging the State Department of Social & Health Services to avoid negligent conduct, in addition to providing compensation for people injured as a result of the State's tortious conduct. *See also* Stephens & Harnetiaux, *The Value of Government Tort Liability: Washington State's Journey from Immunity to Accountability*, 30 *Sea. U. L. Rev.* 35, 58-62 (2006) (discussing the social benefits of imposing tort liability on governmental units).

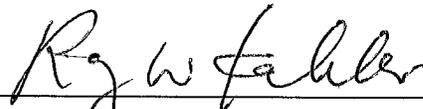
The Court of Appeals' decision does not in any way change the law in 911 cases. It follows existing law, which has not been shown to have had any detrimental effect on the quality of 911 services. Nor does the Court of Appeals' decision impose automatic liability on 911 agencies. Demonstrating that an express assurance was given by a 911 operator is not by itself sufficient to establish a duty under the special relationship exception to the public duty doctrine. Evidence of detrimental reliance must also be shown. And for the 911 agency to be held liable, the plaintiff must further establish a breach of duty -- that the 911 agency failed to exercise reasonable care.

IV. CONCLUSION

The Court of Appeals' decision that a duty arises under the special relationship exception to the public duty doctrine when a 911 operator makes an express assurance to a 911 caller, which the caller relies on to his or her detriment, is consistent with this Court's precedents, as well as

Court of Appeals precedents. This Court should affirm the trial court and the Court of Appeals and remand this case for trial.

Respectfully submitted this 1st day of December, 2011.

A handwritten signature in cursive script, appearing to read "Ray W. Kahler", written over a horizontal line.

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