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SEP 09 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 314570

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

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

Appellants,

v.

GUARDSMARK, LLC, a Delaware limited liability company; and
SPOKANE COUNTY, a municipal corporation of the State of
Washington,

Respondents.

OPENING BRIEF OF APPELLANTS

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I. INTRODUCTION

This case concerns the tragic death of 84-year-old Kay Mita. Kay reported for jury duty the morning of November 26, 2007, and died later that night near the courthouse steps in subfreezing conditions. After morning proceedings at the courthouse, Kay and other potential jurors were excused for lunch, but Kay did not report back. Around 5:00 p.m., he was seen by a courthouse clerk, wandering in a snowy parking lot. The clerk directed Kay back to the courthouse to seek help from Guardsmark's security officers. It was bitter cold and temperatures had remained in the twenties all day. Kay entered the courthouse and warmed himself by a heater, but was ushered back outside by Guardsmark's security.

An hour and a half later, Guardsmark's security officers saw Kay again – this time in an obvious state of peril. They saw he was “sluggish and shivering,” trying to get warm by moving his hands and arms over his body; he was “obviously cold” and in need of help. They saw he was in the dark in a snowstorm, wearing slacks and a light jacket. He was a thin, elderly man, weighing under 150 pounds.

Guardsmark's security officers unlocked the courthouse and approached him. Kay was visibly shaking and unable to communicate intelligibly, and hand motions were used to direct him inside and back to the heater. Kay remained next to the heater for nearly two hours.

Guardsmark's security officers made no effort to further communicate with him or to determine his medical condition and why he had been outside the courthouse so long. In violation of its own policies and industry custom, Guardsmark's security officers failed to contact their supervisor, close-by law enforcement, or anyone else to assist Kay. Instead, around 9:00 p.m., they again ushered Kay out into the extreme cold and darkness.

While these events were unfolding, Kay's family was growing more and more concerned. Kay's son, Floyd Mita, called Spokane Crime Reporting Center and reported that his father, Kay, was missing and sought help locating him. Floyd made it clear he was Kay's son and that they shared a home. Floyd stated that Kay had been on jury duty that day, but failed to report back after a lunch break. He explained to the operator that such behavior was highly unusual, as was Kay's failure to return home for dinner. Floyd specifically said he was "very concerned" about the fact it was "snowing" and "very cold" outside. The operator unequivocally responded: "we will send out a policeman to immediately search for your father." Twice this promise was made. Floyd was also told he would be called when his father was found. Confident a search effort by police was underway, Floyd abandoned his plans to personally search for Kay. Yet, despite the promises and assurances to Floyd, the

operator never transmitted any of the information about Kay to the police. Law enforcement was never dispatched to search for Kay and he died of hypothermia.

The Mita family brought suit against Guardsmark and Spokane County. The trial court granted summary judgment dismissing the claims, ruling that neither defendant owed a duty to Kay. These rulings are in error.

Spokane County owed Kay a common law duty under well-established principles of tort law. Considerations of foreseeability, policy, justice and common sense all weigh strongly in favor of the existence of a legal duty. Moreover, the county formed a special relationship with Kay when Floyd—an immediate family member living in the same household—called the county for help on Kay’s behalf. The County’s promise of assistance created and defined the duty owed to Kay.

As for Guardsmark, there are genuine issues of fact concerning the question of whether it owed a duty under the voluntary rescue doctrine. Under that doctrine, a person who “voluntarily begins to assist an individual needing help” forms a special relationship with that individual, “giving rise to actionable negligence if [the party] breaches the duty of care by failing to act reasonably.” *Folsom v. Burger King*, 135 Wn.2d 658, 675-76, 958 P.2d 301 (1998). From the evidence in this case, a juror

could reasonably conclude this standard is met. The trial court was wrong in substituting its judgment for the jury's. This Court should reverse its error.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering the order of January 16, 2013, granting summary judgment in favor of Spokane County and dismissing the Mitas' negligence claims.
2. The trial court erred in entering the order of November 30, 2012, granting summary judgment in favor of Guardsmark, LLC and dismissing the Mitas' negligence claims.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Issues Concerning Spokane County

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

4. Did the trial court err in ruling that Spokane County did not owe a duty to Kay Mita based on a common law special relationship?

B. Issues Concerning Guardsmark, LLC

1. Did the trial court err in ruling that Guardsmark's security officers did not owe a duty to Kay Mita under the "voluntary rescue doctrine" or other principles of tort law?

2. Did the trial court err in ruling that Kay Mita needed to be in "imminent peril" for a duty to arise under the "voluntary rescue doctrine?"

3. If the trial court did not err in ruling that Kay Mita needed to be in "imminent peril" for a duty to arise under the "voluntary rescue doctrine," did the trial court nevertheless err in taking the issue from the jury?

4. Did the trial court err in ruling that Guardsmark may not incur liability for negligent omissions that increase the risk of harm?

5. Did the trial court err in ruling that a jury could not reasonably conclude Guardsmark's security officers increased the risk of harm to Kay Mita?

6. Did the trial court err in ruling that Guardsmark's security officers may not incur liability for withdrawing from its undertaking to help Kay Mita, even when such withdrawal created an unreasonable risk of harm?

7. Did the trial court err in ruling that Guardsmark may not incur liability for placing Kay Mita back into the peril from which he was rescued?

8. Did the trial court err in ruling there are no genuine issues of material fact regarding whether Guardsmark's security officers made Kay Mita's situation worse?

IV. STATEMENT OF THE CASE

November 26, 2007 was a bitter cold, early winter day in Spokane. CP at 8, 95. That morning, 84-year-old Kay Mita reported to Spokane County Courthouse for jury duty. CP at 7-8. When Kay parked his car and walked to the courthouse, the temperature was 9 degrees below freezing. CP at 8, 577, 674. It remained in the twenties the entire day. CP at 577, 673.

Kay was assigned to Judge Salvatore Cozza's courtroom for voir dire and potential empanelment. CP at 816. He participated in these proceedings during the morning and was excused for a lunch break at about 12:00 p.m. CP at 698. All prospective jurors, including Kay, were directed to report back to the jury room by 2:00 p.m. CP at 698, 816. Kay, however, never returned. CP at 816. Noting his absence, Judge Cozza excused him from jury duty. CP at 699-700.

Shortly after 2:00 p.m., a jury management staff member, Sherri Wright, called the Mitas' family home to inquire whether Kay was there. CP at 703. Kay's wife, Shizuko Mita, answered the phone and told Ms. Wright that Kay was not at home. CP at 707-12, 716-17. Shizuko then told her adult son, Floyd Mita, about the phone call.¹ CP at 727.

Just after 5:00 p.m., Judge Cozza's clerk, Shannon Tritt, left work at the courthouse and walked to her car, parked close-by. CP at 817. She saw Kay standing in the parking lot across the street from the courthouse. CP at 817.

Ms. Tritt recalled having a short conversation with Kay regarding his failure to return to the jury room. CP at 817. Ms. Tritt stated that Kay seemed confused and bewildered during her contact with him. CP at 613. Kay told Ms. Tritt that he could not locate his car and had been looking for it since the lunch break. CP at 817. Ms. Tritt then directed Kay to the courthouse to seek help from Guardsmark's security officers. CP at 817. When she last saw Kay, he was walking towards the south doors of the courthouse -- a direction Ms. Tritt expected would bring him in contact with Guardsmark's security officers. CP at 818.

¹ Floyd lived with his parents in the family home at the time, having moved back home in 2004, and continues to live there with his mother, Shizuko. CP at 680, 725-26.

Guardsmark's security officer Greg Jackson was on duty that evening, posted at the screening station on the first floor. CP at 422, 425, 444. He reported seeing Kay enter the south doors of the courthouse shortly after 5:10 p.m. and then sit down on a bench next to a heater. *Compare* CP at 378, 379, 381, 390 *with* CP at 469. According to Mr. Jackson, Kay remained on the bench and close to the heater until 5:30 p.m. *Compare* CP at 378, 379, 390 *with* CP at 469.

At 5:30 p.m., Mr. Jackson ushered Kay out the main courthouse door. *Compare* CP at 378, 379, 390 *with* CP at 469. All doors were then locked down, securing the entire courthouse from outside entry. CP at 457, 458, 460, 465.

Floyd and Shizuko became "really concerned" when Kay did not return home for dinner by 6:30 p.m. CP at 731-34. Floyd called Spokane Crime Reporting Center ("SCRC") and reported that Kay was missing.² CP at 680-81. The call receiver, Kelli Johnson, told Floyd to call the four local Spokane hospitals before making an official missing persons report. CP at 680-81. Ms. Johnson also instructed Floyd to call SCRC back if he was unsuccessful in locating his father. CP at 681.

² SCRC was a service provided by Spokane County 911 for non-emergency calls, including calls concerning missing persons, regardless of their nature, and crime reporting from the public. SCRC performed this service pursuant to contracts with local law enforcement agencies. The service was separate from the emergency, 9-1-1 service provided by the county.

As directed, Floyd called each hospital and learned that none had admitted his father. CP at 681. After making these calls, Floyd called SCRC a second time, at about 7:11 p.m. CP at 681. This time, Ms. Johnson asked whether Floyd wished to make a missing persons report. CP at 681. Floyd answered, "yes," and Ms. Johnson proceeded to ask detailed questions about Floyd. CP at 681. Ms. Johnson recorded Floyd's name, race, sex, age, date of birth, address, and telephone number. CP at 681, 740.

Ms. Johnson then asked numerous questions about Kay, telling Floyd "the police would want [the information] so they could search for [his] father." CP at 681. Floyd provided Ms. Johnson with his father's name, date of birth, age, hair and eye color, height, weight, race and sex, among other things. CP at 681, 740. Floyd made clear he was Kay's son and they shared a residence and telephone number. CP at 680-83, 740-44.

Floyd also told Ms. Johnson that Kay had jury duty that day, but had failed to report back to the jury room after a lunch break. CP at 681-82, 744. Floyd said such behavior was unusual because his father was a very responsible person. CP at 681-82. He also communicated that it was very unusual that his father had not returned home immediately following his jury duty that day. CP at 681-82.

Floyd specifically told Ms. Johnson he was “very concerned” about the fact it was “snowing” and “very cold” outside. CP at 682. With concern and urgency in her voice, Ms. Johnson told Floyd that “we will send out a policeman to immediately search for your father.” CP at 682, 735, 736, 738. Ms. Johnson assured Floyd, at least twice, that the police would be sent to look for his father and that the police would call Floyd when Kay was found. CP at 682. To these assurances, Floyd said “thank you,” relieved a professional search effort by police was underway. CP at 682.

Based on Ms. Johnson’s assurances and promise of police assistance, Floyd forwent his plan to go look for his father:

Everything the call receiver said indicated to me that a search would begin immediately. Based on the representations made by the call receiver I forewent my plan to go look for my father. Based on the representations, I therefore did not personally go look for my father or seek help from others in locating him. I trusted the word of the call receiver that a search would be commenced by professionals and I wanted to be home in case Spokane Crime Reporting Center or the police called, as my mother spoke very limited English.

CP at 682-83 (emphasis added); *see also* CP at 736-37 (showing Floyd’s reliance on Ms. Johnson’s assurances). Despite Ms. Johnson’s assurances, she never transmitted the missing persons information to police dispatch.

And, despite Ms. Johnson's assurances, law enforcement never searched for Kay. CP at 578, 756-58, 747-52.

Meanwhile, a Gonzaga School of Law class was engaged in mock trials at the courthouse from 6:00 p.m. till 9:00 p.m., necessitating the presence of a two-person Guardsmark overtime security detail. CP at 11, 111. Guardsmark's security officers Brent Lewis and Greg Jackson worked that overtime assignment and conducted security screening of the students as they arrived through the main door. CP at 422, 430, 431, 444, 468, 452-53, 462-63. Their duties included opening the door for the students, as it was locked from the outside. CP at 455-57.

Mr. Lewis noticed Kay outside the main doors of the courthouse around 7:00 p.m. – one and a half hours after Mr. Jackson made Kay exit the building. CP at 433. Kay was observed to have walked up to the front door of the courthouse, peer inside, and then walk about the property. CP at 433, 434. According to Mr. Lewis, Kay appeared cold, and was “sluggish and shivering.” CP at 445. Mr. Jackson saw Kay trying to get warm by moving his hands and arms over his body; he was “obviously cold.” CP at 461, 465.

Mr. Lewis testified there was a “snowstorm” outside, the temperature was likely below freezing, and Kay was “underdressed for the weather.” CP at 434, 446. Mr. Jackson acknowledged that at 6:00 p.m.,

the sun had set and it was snowing. CP at 465. At 7:00 p.m., the temperature was 26.1 degrees, with a wind chill of 19.4 degrees. CP at 409. It was dark and still snowing. CP at 409, 432, 434. Despite the freezing conditions, Kay was wearing only slacks and a thin jacket. CP at 476-77. He had no hat or gloves. CP at 476-77. He was a thin 84-year-old man, weighing only 146 pounds. CP at 478.

Guardsmark's security officers Lewis and Jackson discussed letting Kay inside the courthouse to warm up. CP at 432. They discussed the fact that it was snowing, that Kay Mita's clothing "didn't seem appropriate for the temperature," and that he looked cold. CP at 432.

Mr. Lewis, a former EMT, reported that when he approached Kay, he was visibly shaking and "not able to communicate." CP at 435, 446. Although he could speak, Kay's words were "unintelligible." CP at 439. So, Mr. Lewis used hand motions to invite Kay inside, directing him through two sets of doors and back to the bench by the heater. CP at 440, 464.

The two security officers allowed Kay to remain in the courthouse next to the heater until around 9:00 p.m. CP at 437, 438. For nearly two hours, neither Mr. Lewis nor Mr. Jackson made any further attempt to communicate with Kay to determine the status of his medical condition or to inquire why he had been outside the courthouse door so long. CP at

436, 456. Despite their duty as security officers, neither Mr. Lewis nor Mr. Jackson contacted their supervisor, law enforcement or any other entity to help Kay. *See* CP at 442, 470-71.

Mr. Jackson testified that if a member of the public was having a medical problem, his job responsibilities as a Guardsmark's security officer were to call 9-1-1, contact the Spokane Sheriff's Office by radio, or help the person directly. CP at 449-50, 454. He testified Guardsmark's security officers were expected to observe "everything" about a person with whom they interacted. CP at 451. And, he testified Guardsmark expected that its security officers, including Messrs. Lewis and Jackson, obtain professional assistance and get help to a person having a medical issue or acting unusual. CP at 455. In fact, Mr. Jackson said his job was not just to protect the courthouse, but members of the public while they are in the courthouse. CP at 459.

By 9:00 p.m., after the law students concluded their mock trials, Mr. Lewis and Mr. Jackson ushered all courthouse occupants, including Kay, out the courthouse doors. CP at 488-89. Again, despite their observations about Kay, Mr. Lewis and Mr. Jackson made no effort at this time to communicate with Kay. CP at 436, 464. Instead, they used hand gestures to get Kay outside, and they locked the door behind him. CP at

441, 467. At this time of night, it was approximately 26.8 degrees outside, snowing, with a wind chill of 21.4 degrees. CP at 409, 442-43.

By early morning, Kay was dead. He was found slumped against a trash receptacle at the base of the front steps of the courthouse, covered in snow. CP at 578-79. The official cause of death: hypothermia. CP at 475, 503, 509, 578-79.

The Mita family commenced this wrongful death and survival action against Guardsmark and Spokane County. CP at 1-26. After discovery, both defendants moved for summary judgment dismissal of the action. CP at 140-42, 332-34. Guardsmark claimed it neither owed a duty to Kay nor caused his death. CP at 122-39. Spokane County made similar claims, arguing it is immune under the Industrial Insurance Act (IIA), it owed no duty to Kay and Guardsmark's conduct constituted a superseding cause of Kay's death. CP at 321-31.

The Mitas opposed the motions, arguing that Guardsmark owed a duty under the "voluntary rescue doctrine" and that principles of causation do not insulate Guardsmark from liability. CP at 331-58, 545-50. In respect to Spokane County, the Mitas argued that the IIA is inapplicable because Kay was not acting in the "course of employment" at the time he died, as required by the Act. CP at 827-31. The Mitas also asserted the county owed a common law duty to Kay based on a special relationship

and under fundamental principles of negligence law. CP at 831-43. Finally, the Mitas argued that Guardsmark's actions were not a superseding cause. CP at 843-46.

After oral argument, the trial court granted summary judgment in favor of both defendants on the sole ground that neither defendant owed a duty of care. CP at 869-72, 874-77; RP (October 15, 2012) at 39-46, RP (December 10, 2012) at 46-52. Although the trial court felt "somewhat ill-equipped to address the matter," RP (October 15, 2012) at 39, it ruled that Guardsmark did not owe a duty under the voluntary rescue doctrine unless Kay was in "imminent peril," that no juror could reasonably conclude Kay was in such peril, and that Guardsmark's actions did not increase the risk of harm to Kay. RP (October 15, 2012) at 43-46. In regard to Spokane County, the Court ruled that the public duty doctrine applied and the Mitas failed to show application of any of its established "exceptions," as it was Floyd, not Kay, who relied on the county's express assurances. RP (December 10, 2012) at 46-53. The Mitas appeal.

V. LAW & ARGUMENT

A. Standard of Review

Summary judgment is properly granted when there is no genuine issue of material fact and the moving party is entitled by law to prevail. CR 56(c). When reviewing a grant of summary judgment, the appellate

court engages in the same inquiry as the trial court, considering all facts and inferences in the light most favorable to the nonmoving party and reviewing questions of law de novo. *Bishop v. Miche*, 137 Wn.2d 518, 523, 973 P.2d 465 (1999).

“The existence of a legal duty is generally a question of law.” *Afoa v. Port of Seattle*, 160 Wn. App. 234, 238, 247 P.3d 482 (2011). But where duty depends on proof of certain facts—or the reasonable inferences from certain facts—that may be disputed, summary judgment is inappropriate. *Id.* Summary judgment should be granted only if, from all the evidence, reasonable minds could not differ. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

B. Spokane County Owed a Duty of Care to Kay Mita Under Considerations of Foreseeability, Policy, Justice and Common Sense. It Also Owed a Duty Under Common Law Principles Expressed in the “Special Relationship” Exception to the Public Duty Doctrine.

1. Overview and Nature of the Public Duty Doctrine and Municipal Tort Liability

“Under basic tort principles, an action for negligence does not lie unless the defendant owes a duty of care to the plaintiff.” *Bailey v. Forks*, 108 Wn.2d 262, 266, 737 P.2d 1257 (1987). Whether a duty is owed is generally a question of law for the Court and “turns on foreseeability and pertinent policy considerations.” *Id.*; *Eastwood v. Horse Harbor Found.*,

Inc., 170 Wn.2d 380, 389, 241 P.2d 1256 (2010) (“[t]he existence of a duty is a question of law and depends on mixed considerations of logic, common sense, justice, policy, and precedent.”). A duty may arise under a statute, ordinance, regulation or the common law. *Doss v. ITT Rayonier*, 60 Wn. App. 125, 129, 802 P.2d 4 (1991); see *Munich v. Skagit Emergency Comms Ctr.*, 175 Wn.2d 871, 886-87, 288 P.3d 328 (2012) (Chambers, J., concurring).

For some time now, our courts have recognized that governmental duties imposed by legislative bodies (i.e., statutes and ordinances) are owed merely to the “public at large” and may not be used as a basis for tort liability absent a showing that the duty owed by the government was focused on the injured person “as an individual.” *Halvorson v. Dahl*, 89 Wn.2d 673, 676, 574 P.2d 1190 (1978); *Baerlein v. State*, 92 Wn.2d 229, 232, 595 P.2d 930 (1979); *Hartley v. State*, 103 Wn.2d 768, 782, 698 P.2d 77 (1985); *Meaney v. Dodd*, 111 Wn.2d 174, 178, 759 P.2d 455 (1988); *Taylor v. Stevens County*, 111 Wn.2d 159, 163-65, 759 P.2d 447 (1988); *Aba Sheikh v. Choe*, 156 Wn.2d 441, 448, 128 P.3d 574 (2006). This rule is expressed as the “public duty doctrine.” *Id.* The doctrine is not a form of immunity, but a “framework” for determining whether the governmental duty was focused on the particular claimant. *Osborn v. Mason County*, 157 Wn.2d 18, 27, 134 P.3d 197 (2006); *Weaver v.*

Spokane County, 168 Wn. App. 127, 135 P.3d 1184 (2012). Indeed, municipal corporations are liable in tort to the same extent as private persons and corporations. RCW 4.96.010(1). The aim of the public duty doctrine, therefore, is simply to “ensure that governments are not saddled with greater liability than private actors as they conduct the people’s business.” *Munich*, 175 Wn.2d at 886 (Chambers, J., concurring).

Integral to the public duty doctrine framework are its numerous “exceptions.” *Taggart v. State*, 118 Wn.2d 195, 217, 822 P.2d 243 (1992). “These exceptions generally embody traditional negligence principles, and may be used as ‘focusing tools’ to determine whether the public entity had a duty to the injured plaintiff. The question whether an exception to the public duty doctrine applies is thus another way of asking whether the [public entity] had a duty to the plaintiff.” *Id.* at 217-18 (internal citation omitted).³

Noting “great confusion” about the nature of the public duty doctrine, our Supreme Court recently clarified that duties based on the common law, as opposed to statutes, ordinances or regulations, are not limited by the doctrine and thus municipal liability may exist even though none of the exceptions can be established. *Munich*, 175 Wn.2d at 885-95

³ The four most commonly recited exceptions are (1) legislative intent, (2) failure to enforce, (3) the rescue doctrine, and (4) a special relationship. *Babcock v. Mason County Fire Dist.*, 144 Wn.2d 774, 786, 30 P.3d 1261 (2001).

(Chambers, J., concurring).⁴ In so doing, the Court reaffirmed its earlier jurisprudence where it found actionable common law duties without resort to the public duty doctrine. *See, e.g., Petersen v. State*, 100 Wn. 2d 421, 671 P.2d 230 (1983) (holding action may lie for State’s negligent release of mentally disturbed patient); *Taggart*, 118 Wn. 2d at 218 n.4 (noting that *Petersen* was later described as effectively creating exception to public duty doctrine); *Robb v. City of Seattle*, 159 Wn. App. 133, 139-47, 245 P.3d 242 (2010) (holding that a duty arises under RESTATEMENT (SECOND) OF TORTS § 302B (1965) comment e and rejecting city’s claim that no duty can exist unless one of the four recognized exceptions to the public duty doctrine is present).

The distinction between mandated duties and common law duties is important because duties imposed by common law are owed to all those foreseeably harmed by the breach of the duty. In contrast, under the public duty doctrine analysis . . . the duty is generally owed only to those with whom the government has a special relationship.

Munich, 175 Wn.2d at 891.

Although analysis under the public duty doctrine framework is unnecessary when a common law (as opposed to a legislatively mandated) duty is asserted, the exceptions embody “traditional negligence principles,” as noted above. *Taggart*, 118 Wn.2d at 217. Thus, decisional

⁴ Justice Chambers’ concurrence was signed by a majority of justices and was authored to provide guidance to Washington courts regarding the nature and applicability of the public duty doctrine.

law discussing the exceptions—particularly the rescue doctrine and special relationship exceptions—may nevertheless assist the Court in determining whether “a governmental entity owes . . . a common law duty to a plaintiff suing in negligence.” *Cummins v. Lewis County*, 156 Wn.2d 844, 853, 133 P.3d 458 (2006). *See Taggart*, 118 Wn.2d at 217-19 (analyzing common law special relationship duty under public duty doctrine framework); *Osborn*, 157 Wn.2d 18 (stating that “no public duty doctrine analysis is necessary” but examining rescue doctrine principles as expressed in cases discussing rescue doctrine exception to public duty doctrine); *see Cummins v. Lewis County*, 156 Wn.2d 844, 867-72, 133 P.3d 458 (2006) (Chambers, J., concurring) (implying the special relationship exception may function as an independent tort if it is used to create as well as define the duty owed).

Invoking these principles, the Mitas argue two theories under which Spokane County owed a common law duty of care to Kay. The first theory is that basic negligence principles and considerations material to determining whether a duty exists—foreseeability, policy, common sense and justice—fully support the conclusion that a duty existed here. The Mitas’ second theory is that a duty arose from a common law “special relationship” between the county and Kay, formed when Floyd—an immediate family member living in the household—called SCRC on

Kay's behalf. For this theory, the Mitas draw upon common law principles expressed in the "special relationship exception" to the public duty doctrine, as well as other persuasive law.⁵

2. This Case is Not Restricted by the Public Duty Doctrine Because the Mitas are not Basing Liability on a Legislatively Mandated Duty Owed to the General Public.

As discussed above, the public duty rule of non-liability does not apply when the plaintiff bases liability on a common law duty. *Munich*, 175 Wn.2d at 885-95 (Chambers, J., concurring). The trial court erred in saying otherwise. The public duty doctrine applies only if the duty asserted is mandated by a statute or ordinance and owed to all. *Id.*; see also *Robb*, 159 Wn. App. at 139-47 (holding that a duty arises under RESTATEMENT (SECOND) OF TORTS § 302B comment e and rejecting city's claim that no duty can exist unless one of the four recognized exceptions to the public duty doctrine is present); *Osborn*, 157 Wn.2d 18 (stating that "no public duty doctrine analysis is necessary" but examining rescue doctrine principles as expressed in cases discussing rescue doctrine exception to public duty doctrine); *Cummins*, 156 Wn.2d at 867-68 (Chambers, J., concurring) (explaining the difference between a common law "special relationship" giving rise to an actionable tort duty and the

⁵ See *Cummins*, 156 Wn.2d at 867-68, for an insightful discussion regarding the term "special relationship" as it is used in two different contexts: (1) establishing a common law tort involving a promise, and (2) establishing that a preexisting public duty was owed to a particular plaintiff under the public duty doctrine.

“special relationship exception” of the public duty doctrine, which, properly understood, does not create a duty).

The framework of the public duty doctrine was found applicable in *Munich* because in that case, the county owed a statutory duty to the general public under RCW 36.28.010.⁶ 175 Wn.2d at 878. RCW 36.28.010 charges the county sheriff with a duty to “keep and preserve the peace” and defend citizens against persons who “endanger the public peace or safety.” Those duties were implicated in *Munich* because an emergency call to 911 was placed and the caller sought police protection from a dangerous individual committing a crime. *Id.* at 874-77. In this case, the call was to SCRC, a non-emergency service, and the caller did not seek police protection from a person endangering the “public peace or safety.” Accordingly, the mandated duties contained in RCW 36.28.010 are inapposite here.

But most importantly, the Mitas’ theories of liability are not based on a duty the legislature imposed on the government. Spokane County owed an individualized duty to Kay under the common law. Application

⁶ The Court in *Munich* also implied the county may have owed a statutory duty under RCW 38.52.020 because Skagit 911 was formed to provide the services spelled out in that statute. 175 Wn.2d at 878. RCW 38.52.020 empowers political subdivisions to take actions to combat local disasters. *Burnett v. Tacoma City Light*, 124 Wn. App. 550, 104 P.3d 677 (2004). The statute arguably had no bearing on the duty involved in *Munich* and is certainly inapplicable here, where Floyd did not place a call to Spokane County’s emergency, 9-1-1 service, but rather to the county’s nonemergency service, SCRC.

of the public duty doctrine framework is therefore unnecessary to focus the duty owed upon the particular individual. Ms. Johnson's promises both created and defined the duty owed to Kay. Accordingly, a duty may exist without fitting any particular "exception" to the public duty doctrine.⁷

The Mitas do, however, point to public duty doctrine cases to support their second argument - that a special relationship existed because the doctrine's so-called "exceptions" embody "traditional negligence principles." *Taggart*, 118 Wn.2d at 217. They are being drawn from to help show a duty and do not function as a rigid obstacle to liability.

3. A Duty Arose Under Fundamental Principles of Negligence Law.

Municipal corporations are liable in tort to the same extent as private persons and corporations. RCW 4.96.010(1). "The municipality, as an individual, is held to a general duty of care, that of a 'reasonable person under the circumstances.'" *Keller v. City of Spokane*, 146 Wn.2d 237, 243, 44 P.3d 845 (2002) (quoting Dan B. Dobbs, *The Law of Torts* § 228, at 580 (2000)); *see also Daly v. Lynch*, 24 Wn. App. 69, 76, 600 P.2d 592 (1979) (quoting W. Prosser, *The Law of Torts* § 30, at 143 (4th ed.

⁷ In the event this Court disagrees, it should note the Mitas' second argument—that a common law duty existed based on a special relationship—directly addresses the question of whether a duty existed under the special relationship exception to the public duty doctrine.

1971) (A duty is an “obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct for the protection of others against unreasonable risks.”). “Whether a municipality owes a duty in a particular situation . . . generally includes a determination of whether the incident that occurred was foreseeable.” *Keller*, 146 Wn.2d at 243. The question of duty also involves “mixed considerations of logic, common sense, justice, policy, and precedent.” *Snyder v. Med. Serv. Corp.*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001) (internal quotation omitted).

Legal duties may arise in different ways. The most common and obvious example is when a party takes an affirmative action that creates an unreasonable risk of harm to others. *See* David K. DeWolf and Keller W. Allen, 16 WASHINGTON PRACTICE: TORT LAW AND PRACTICE § 1.13, at 23-24 (3d ed. 2006) (concluding that affirmative conduct imposing a risk of harm to others creates a duty to use reasonable care to prevent resulting injury, and that this type of negligence is so common and simple that “no one gives a second thought to whether the defendant owed a duty to use reasonable care”). That party has a duty to act reasonably under the circumstances to prevent foreseeable injury from the risk he or she created. Put another way, a person has a duty to prevent unreasonable risk of harm to others from his or her own actions. *Minahan v. W. Wash. Fair Ass’n*, 117 Wn. App. 881, 897, 73 P.3d 1019 (2003) (quoting

RESTATEMENT (SECOND) OF TORTS § 321 (1965)); *see also* RESTATEMENT (SECOND) OF TORTS § 302 (1965).

Ms. Johnson promised Floyd the police would be sent to immediately search for his father and she promised Floyd he would be contacted when Kay was found. CP at 682. These promises created an unreasonable risk of harm to Kay. It was foreseeable that Ms. Johnson's promises might induce reliance, causing Floyd to forego search efforts. The potential consequence of such reliance was also foreseeable. Kay dying from hypothermia was "reasonably perceived as being within the general field of danger" covered by a failure to make good on the promise to send police to search for Kay. *See Maltman v. Sauer*, 84 Wn.2d 975, 981, 530 P.2d 254 (1975) (discussing the concept of foreseeability as related to the duty element in a tort action). In fact, the subfreezing weather was the very reason Ms. Johnson made the promise. *See* CP at 682. Ms. Johnson knew Kay was elderly and missing in freezing conditions (both because Floyd told her and she was located in Spokane). She knew it was unusual that Kay failed to report back for afternoon jury duty. And she knew he had not returned home for dinner as expected. Obviously, something was wrong and a risk of danger was present. By her promises, Ms. Johnson injected a new danger into the situation, amplifying the risk of harm.

“If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect.” RESTATEMENT (SECOND) OF TORTS § 321 (1965). Once Ms. Johnson made the promise, she was under a duty to either perform the promise or notify Floyd that she was not going to perform the promise. Even Ms. Johnson’s long-time training supervisor said that if Ms. Johnson told Floyd she would send the police to search for Kay, then she should have done what she promised to do. CP at 753-53. Simply put, a duty arose because reliance was foreseeable, as was the harm reliance could cause.

A duty also arose under the “rescue doctrine.” *See Osborn*, 157 Wn.2d at 25-27 (and authority cited therein). According to the doctrine, “[a] person who voluntarily promises to perform a service for another in need has a duty to exercise reasonable care when the promise induces reliance and causes the promisee to refrain from seeking help elsewhere.” *Folsom*, 135 Wn.2d at 676; *see also* RESTATEMENT (SECOND) OF TORTS § 323, comment d (1965) (“There is no essential reason why the breach of a promise which has induced reliance and so caused harm should not be actionable in tort.”); *Osborn*, 157 Wn.2d at 26 (“a public entity has a duty under the rescue doctrine when an injured party reasonably relies, or is in

privity with a third party that reasonably relies, on its promise to aid or warn”).⁸ Floyd refrained from acting as a result of Ms. Johnson’s assurances. CP at 682-83, 736-37. And, as will be shown below, there was “privity of reliance” because Floyd was acting on behalf of an immediate family member with whom he lived.

Justice and common sense also support the conclusion that a duty existed, as do considerations of policy. Holding the county liable for its negligence will not undermine its effectiveness for fear of future liability. As recently pronounced: counties “can still engage in truthful communication with callers without incurring legal liability if they keep callers informed with timely and accurate information while correctly dispatching law enforcement.” *Munich*, 175 Wn.2d at 884. Here, a duty arose by reason of express promises, reasonable reliance and foreseeable harm. Ms. Johnson’s communications with the caller increased the risk of harm to Kay. Such harm-causing communications should be discouraged and truthful communications fostered through the imposition of a duty under the circumstances of this case.

⁸ See also RESTATEMENT (SECOND) OF TORTS § 324A (1965) (stating that a person who gratuitously undertakes “to render services to another which he should recognize as necessary for the protection of a third person . . . , is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if . . . (c) the harm is suffered because of reliance *of the other or the third person* upon the undertaking” (emphasis added))

4. Spokane County Owed a Common Law Duty to Kay Mita Based on a Special Relationship.

The Washington Supreme Court has recognized that a special relationship imposing a duty to perform arises when “(1) there is direct contact or privity between the public official and the injured plaintiff which sets the latter apart from the general public, and (2) there are express assurances given by a public official, which (3) gives rise to justifiable reliance on the part of the plaintiff.” *Beal v. City of Seattle*, 134 Wn.2d 769, 785, 954 P.2d 237 (1998) (quoting *Taylor*, 111 Wn.2d at 166). These elements—privity, assurance and reliance—are typical of the type of special relationship torts that require some type of representation, a “failure to do what is gratuitously promised, followed by injury stemming from the failure.” *Cummins*, 156 Wn.2d at 867 (Chambers, J., concurring). Here, a jury could reasonably find each of these elements satisfied, creating a special relationship, and thus a duty, in respect to Kay.

First, there was privity between the public official, Ms. Johnson, and the injured plaintiff, Kay, sufficient to set the latter apart from the general public. “The term privity is used in the broad sense of the word and refers to the relationship between the [governmental entity] and any ‘reasonably foreseeable plaintiff.’” *Chambers-Castenes v. King County*, 100 Wn.2d 275, 286, 669 P.2d 451 (1983). “[A] plaintiff can establish

privity without having to prove the plaintiff [himself] communicated with the government entity.” *Cummins*, 156 Wn.2d at 854 (citing *Bratton v. Welp*, 145 Wn.2d 572, 577, 39 P.3d 959 (2002)). In this case, privity was established when Floyd placed a call to SCRC, had a telephone conversation with Ms. Johnson about Kay, and Ms. Johnson affirmatively and repeatedly promised to provide immediate assistance. *See Id.* at 844-55; *Babcock v. Mason County Fire Dist.*, 144 Wn.2d 774, 786-88, 30 P.3d 1261 (2001). Floyd had extensive dialogue with Ms. Johnson and communicated numerous details about his missing father, including Kay’s name, age, address, physical description and details pertaining to Kay’s jury duty, his subsequent disappearance, and why Floyd was concerned for his well being. CP at 681-82, 740. The promises given by Ms. Johnson were made in response to Floyd’s concern about the harsh weather and the harm it could cause his father who was missing in it. CP at 682. Kay dying from the cold was “reasonably perceived as being within the general field of danger” covered by a failure to make good on the promises to send police to search for Kay. *See Maltman v. Sauer*, 84 Wn.2d 975, 981, 530 P.2d 254 (1975) (discussing the concept of foreseeability as related to the duty element in a tort action). By Floyd’s communication with Ms. Johnson, Kay was separated from the public at large and thus, privity was established.

Second, an express assurance of assistance was made by Ms. Johnson to Floyd that the police would be sent to look for his father and that Floyd would be called when Kay was found. CP at 682, 735, 736, 738. The assurance was not implied, but unequivocally given, at least twice. CP at 682. Thus, the “express assurance” element is satisfied beyond dispute. *See Beal*, 134 Wn.2d at 785.

Third, Floyd relied upon Ms. Johnson’s express assurances to his and Kay’s detriment. Instead of searching for his father or seeking assistance elsewhere, as was his plan, he stayed at home with his worried mother. CP at 682-83, 736-37. In essence, Floyd was lulled into inaction by Ms. Johnson’s promise. As to whether Floyd’s reliance was justifiable, our high court has made clear the question is one of fact, “generally not amenable to summary judgment.” *Beal*, 134 Wn.2d at 786-87; *Chambers-Castanes*, 100 Wn.2d at 279-80.

The main issue revolves around the fact it was Floyd, not Kay, who relied on Ms. Johnson’s assurances. It is an issue of first impression whether a common law special relationship may exist where, by nature of the circumstances, the person on whose behalf the assurance was ultimately made is him or herself unable to rely on the assurance (due to incapacity, unconsciousness or other circumstances) and the person to whom the assurance was given is an immediate family member. New

York courts have addressed the issue, however, in the context of their public duty cases.

New York has a special relationship exception similar to Washington's. See *Cuffy v. City of New York*, 505 N.E.2d 937, 940 (1987). And its courts have "ample experience applying both the public duty rule and its special duty exception." *City of Gary, Indiana v. Odie*, 638 N.E.2d 1326 (Ind. App. 1994).⁹ New York has recognized that a special relationship may exist between the injured plaintiff and the government even though the plaintiff did not rely on the promise made by the government. *Sorichetti v. City of New York*, 482 N.E.2d 70 (1985); *Cuffy v. City of New York*, 505 N.E.2d 937 (1987); *Laratro v. City of New York*, 861 N.E.2d 95 (2006). As explained by its Court of Appeals:

Our cases have accepted . . . reliance by someone other than the plaintiff as sufficient to create a special relationship only where the person making the contact was acting on behalf of his or her immediate family. Thus in *Sorichetti v City of New York* (65 NY2d 461, 482 NE2d 70, 492 NYS2d 591 [1985]) we found a special relationship where a mother had sought the help of the police to protect her six-year-old daughter; and in *Cuffy* we found a special relationship where a man sought police protection for his wife and the children who lived with him--but we rejected a claim made on behalf of an adult child who was not a member of his household.

⁹ It is also worth noting that Washington borrowed the public duty doctrine from a series of New York cases concerning government tort liability. See *Campbell v. Bellevue*, 85 Wn.2d 1, 9 n.5, 530 P.2d 234 (1975).

Laratro, 861 N.E.2d at 97. The rule expressed above is explained by the close relationship between the interests of immediate family members living in the same household and by the fact the contact with the government was made solely for the benefit of the family member in need of assistance. *Cuffy*, 505 N.E.2d at 941.

A number of other jurisdictions have adopted these principles. *See, e.g., Odie*, 638 N.E.2d at 1332-34 (Ind. App. 1994); *Wolfe v. Wheeling*, 387 S.E.2d 307, 311-12 (W. Va. Sup. Ct. 1989); *White v. Beasley*, 552 N.W.2d 1, 11-15 (Mich. Sup. Ct. 1996). The Mitas urge this Court to follow suit and rule that reliance by someone other than the plaintiff may create a special relationship where the person making the contact with the public entity was acting on behalf of his or her immediate family.

The Washington Supreme Court has already recognized that “a duty to act” may be “created by reliance not by the person to whom the aid is to be rendered, but by another who, as a result of the promise, refrains from acting on that person's behalf.” *Brown v. Macpherson's Inc.*, 86 Wn.2d 293, 301, 545 P.2d 13 (1975); *Osborn*, 157 Wn.2d at 25-26.¹⁰ In *Osborn*, the Court held there must be “privity of reliance” between the

¹⁰ These cases involve the creation of a special relationship via the rescue doctrine, which is analytically similar to the “special relationship exception” in terms of requiring a promise and reasonable reliance.

injured party and the third party who refrained from acting as a result of the promise. *Osborn*, 157 Wn.2d at 26-27. That case concerned a lawsuit brought against Mason County by the Osborn family after their 15-year-old daughter was raped and murdered by a registered sex offender. *Id.* at 20-22. The issue before the Court was whether the county had assumed a duty to warn the family of the sex offender's presence. *Id.* at 22. The county assured a third party resident that it would post flyers regarding the sex offender's presence, then failed to post the flyers and discouraged the third party from distributing flyers herself. *Id.* at 21. The Court held that because the Osborns did not rely on the third party (who refrained from acting as a result of the county's assurances), there was no "privity of reliance," and thus no duty owed by the county. *Id.* at 25-26. Nowhere did the Court say that the daughter must have relied on the third party. Instead, the Court repeatedly emphasized that no duty arose because "the Osborns" did not rely on the third party. *Id.* at 20, 23, 25, 26, 27. By so doing, the Court signaled that reliance, not by the injured individual, but by immediate family members acting on that individual's behalf, may be sufficient "privity of reliance" to warrant liability.

As a member of the household, Floyd's interests were intrinsically tied to Kay's. Floyd called SCRC on Kay's behalf in the context of that close familial relationship. And, the assurances given by Ms. Johnson

were given for Kay's benefit and the benefit of his family. To be sure, the whole point of SCRC's service in respect to missing persons is to assist in finding the person who is missing. Kay was the person upon which both the call and the assurances were concentrated. Accordingly, under the circumstances of this case, there is sufficient "privity of reliance" to warrant imposition of a duty. A special relationship duty may be found where the person making the contact was acting on behalf of his or her immediate family.

C. Guardsmark Owed a Duty to Kay Under the Voluntary Rescue Doctrine and Other Common Law Principles.

The voluntary rescue doctrine is a firmly rooted exception to the "no duty to rescue" rule. *Folsom v. Burger King*, 135 Wn.2d 658, 675, 958 P.2d 301 (1998); *Meneely v. S.R. Smith, Inc.*, 101 Wn. App. 845, 856, 5 P.3d 49 (2000). Under the doctrine, a party that "voluntarily begins to assist an individual needing help" forms a special relationship with that individual, "giving rise to actionable negligence if [the rescuer] breaches the duty of care by failing to act reasonably." *Folsom*, 135 Wn.2d at 675-76. From the evidence in this case, a juror could reasonably conclude Guardsmark is liable under the doctrine.

1. Guardsmark Assumed a Duty of Care When Its Security Officers Took Steps to Assist Kay, a Person in Need.

“The duty to rescue arises when a rescuer knows a danger is present and takes steps to aid an individual in need.” *Folsom*, 135 Wn.2d at 677. Under the facts of this case, a juror could quite reasonably conclude Guardsmark’s security officers knew, or reasonably should have known, a danger was present. A juror could also reasonably conclude Guardsmark’s security officers took steps to aid Kay, “an individual needing help.” *Id.* at 675.

When Kay was observed outside the courthouse at 7:00 p.m., the temperature was 26.1 degrees, with a wind chill of 19.4 degrees. CP at 409. There was a “snowstorm” outside. CP at 409, 432, 434, 446. Despite the freezing conditions, Kay was wearing only slacks and a light jacket and had been wandering the courthouse grounds since he was ushered from the building at 5:30 p.m. CP at 378, 379, 390, 433, 434, 469. He was “underdressed for the weather,” appeared cold, and was “sluggish and shivering.” CP at 432, 434, 445, 446, 461, 465.

Seeing Kay in distress, Mr. Lewis approached him. Kay was visibly shaking and “not able to communicate.” CP at 435, 446. His words were “unintelligible.” CP at 439. These facts give rise to a reasonable inference that Kay—a thin, elderly man in his mid-eighties—was in need of help (developing or already having hypothermia) when he presented at the front doors of the courthouse at 7:00 p.m. Because this

inference could be reasonably drawn from the evidence, the question must be put to the jury.

Observing that Kay needed help, Guardsmark's security officers invited him into the locked courthouse. Because of Kay's condition, hand motions were used to direct him to a bench next to a heater. These voluntary actions—approaching Kay, inviting him into the locked building and placing him next to a heater—give rise to a duty. In short, a fair-minded juror could find Guardsmark's security officers took steps to aid an individual in need. In the context of these undisputed facts, the trial court improperly granted summary judgment.

2. Kay Did Not Need to be in “Imminent Peril” for a Duty to Arise. But Even if that is the Standard, the Question is for the Jury.

Relying on the case of *French v. Chase*, 48 Wn.2d 825, 297 P.2d 235 (1956), the trial court mistakenly believed the voluntary rescue doctrine applies only if the peril, or reasonable appearance thereof, is “imminent.” RP (October 15, 2012) at 43-46. The trial court then apparently decided the “imminent peril” standard could not be established under the facts, even when viewed in the light most favorable to plaintiffs. RP (October 15, 2012) at 43-46. The ruling is in error.

“The rescue doctrine is invoked in tort cases for a variety of purposes in a variety of scenarios.” *McCoy v. Am. Suzuki Motor Corp.*,

136 Wn.2d 350, 355, 961 P.2d 952 (1998). Most commonly, the doctrine is invoked in tort actions brought by a rescuer injured in the course of rescue efforts. In such cases, the doctrine is used to establish a duty running from the tortfeasor, who created the imminent peril, to the rescuer who came to the aid of the person imperiled by the tortfeasor's negligence. *See Id.* This is the form of the rescue doctrine discussed by the Washington Supreme Court in *French*, 48 Wn.2d 825. There, the Court set forth the elements that must be shown for a plaintiff to "achieve rescuer status" and establish a claim under the doctrine, "as it is applied to situations of [that] kind." 48 Wn.2d at 830; *McCoy*, 136 Wn.2d at 356-57.

In other scenarios, the rescue doctrine is used to establish a duty running from the rescuer to the person in danger. Under this iteration of the doctrine (often dubbed the "voluntary rescue doctrine"), a duty of care arises "when one party voluntarily begins to assist an individual needing help." *Folsom*, 135 Wn.2d at 675-76. If the rescuer then "breaches the duty of care by failing to act reasonably," and "consequently increases the risk of harm to those [the rescuer] is trying to assist," actionable negligence will lie. *Id.* This is the form of the doctrine at play here, being used by the *Mitas* to establish a duty of care owed by Guardsmark to Kay.

The heightened, "imminent peril" requirement exists only in cases where a plaintiff rescuer is suing the party that created the emergency or

imminent peril. *Compare French*, 48 Wn.2d 825 (applying the imminent peril requirement to a case brought by rescuer against negligent driver who created the peril and holding the requirement applies “to situations of [the] kind” presented there) *with Folsom*, 135 Wn.2d at 676-77 (only requiring the individual be “in need” or “in danger”) *and Brown v. MacPherson’s, Inc.*, 86 Wn.2d 293, 545 P.2d 13 (1975) (stating a rescuer must use reasonable care in his efforts to render aid to “a person in danger”).

The “imminent peril” standard is a corollary to the principle, succinctly stated by Justice Cardozo, that “danger invites rescue.” *Wagner v. International Ry. Co.*, 232 N.Y. 176, 133 N.E. 437, 437, 19 A.L.R. 1 (1921); *McCoy*, 136 Wn.2d at 355 (“the heart of this doctrine is the notion that ‘danger invites rescue.’”). The type of danger that “invites rescue” is the type that exposes an individual to imminent harm. When that type of peril is present, a rescue is foreseeable, a duty running from the emergency-causing defendant to the rescuer is created, and the “assumption of the risk” defense is cut off. *McCoy*, 136 Wn.2d at 355; *French*, 48 Wn.2d at 829; 16 Karl B. Tegland, WASHINGTON PRACTICE: TORT LAW AND PRACTICE, § 1.18, at 35 (3rd ed. 2006) (stating that the imminent peril requirement “establishes the foreseeability of a rescuer coming to the aid of the person imperiled by the tortfeasor’s conduct,” and

“negates the argument that the rescuer assumed the risk of injury by undertaking the rescue.”).

Quite plainly, the imminent peril standard was developed to address issues of causation arising under a form of the rescue doctrine having nothing to do with this case. It does not make sense to apply a heightened standard to a case prosecuted against a defendant who acted in direct relation to the plaintiff. In these types of cases, a plaintiff need only show, at most, that the individual needed help. *Folsom*, 135 Wn.2d at 675-76. “It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all.” *Roth v. Kay*, 35 Wn. App. 1, 4, 664 P.2d 1299 (1983) (quoting *Glanzer v. Shepard*, 135 N.E. 275, 276, 233 N.Y. 236 (1922)) (internal quotations omitted).

Even if “imminent peril” is somehow required under the voluntary rescue doctrine, the trial court erred in taking the issue from the jury. As set forth in *French*, 48 Wn.2d at 830:

In determining whether the peril, or appearance of peril, is imminent, in the sense that an emergency exists requiring immediate action, the circumstances presented to the rescuer must be such that a reasonably prudent man, under the same or similar circumstances, would determine that such peril existed. (The issue of whether the rescuer's determination conformed with the reasonably prudent man standard is a question for the jury, under proper instructions.)

When viewed in the light most favorable to the Mitas, the facts create a genuine issue of material fact as to whether a reasonably prudent person, under the same circumstances presented to Guardsmark's security officers, would determine that Kay was in a state of emergency.

The evidence shows that one officer, Mr. Jackson, observed Kay enter the courthouse shortly after 5:00 p.m. and sit by a heater, warming himself until the officer ushered him outside. One and a half hours later, that same officer observed Kay again. He saw that the same thin, elderly man was still on the property, wandering the grounds and peering in courthouse windows, looking for help. The security officers knew it was below freezing outside and observed Kay's hypothermic condition. A reasonable inference is that Kay was unequipped to fend for himself and would suffer harm if left unassisted. For this very reason, Guardsmark's security officers took steps to safeguard Kay's wellbeing. It was foreseeable that physical harm—even death—could soon befall Kay if he remained outside longer. Accordingly, a jury could fairly conclude an emergent situation existed. And, as the *French* court unequivocally stated, the imminent peril question is “for the jury.” 48 Wn.2d at 830.

In its moving papers, Guardsmark emphasized that “[i]t was not the “*intent*” of Guardsmark's security officers to undertake a ‘rescue

mission' to protect Kay Mita against the particular harm of hypothermia.” CP at 136. However, the *French* court made clear the test used to determine whether the appearance of peril is imminent is not a subjective test, but is instead the objective, “reasonably prudent man” standard. *Id.* For this reason too, the question whether Kay was in peril is not amenable to summary judgment. Regardless whether Guardsmark’s security officers believed they were undertaking a “rescue mission,” a juror could reasonably draw the conclusion that they took steps to aid an individual facing an emergency situation. Noting the emergency, they unlocked the courthouse doors, invited Kay inside the building and directed him to a heater. By such action, Guardsmark assumed a duty of care.¹¹

3. Guardsmark Did Not Need to Make Kay’s Situation Worse to Be Liable Under the Voluntary Rescue Doctrine; Increasing the Risk of Harm Was Enough.

The trial court erred in taking from the jury the issue whether Guardsmark’s actions increased the risk of harm to Kay or made his

¹¹ The duty Guardsmark owed to Kay was to exercise reasonable care in rendering assistance. See *Folsom*, 135 Wn.2d at 675-76. However, the issue of whether Guardsmark failed to exercise reasonable care is not before this Court. Guardsmark has never argued it is entitled to summary judgment on the issue of breach. It is for the jury to decide. *French*, 48 Wn.2d at 830; *Highland v. Wilsonian Investment Co.*, 171 Wash. 34, 42, 17 P.2d 63 (1932). At trial, appellants will present their designated expert, J. Patrick Murphy, who will testify that Guardsmark’s security officers failed to exercise reasonable care by failing to contact a supervisor, emergency personnel, or gain assistance to protect a life that was under their self-imposed care. CP at 403-04. As discussed later, appellants also contend Guardsmark breached its duty by prematurely ending its rescue and sending Kay from the courthouse when he would likely suffer serious harm as a result.

situation worse. As explained in Subsection 6 *intra*, Guardsmark's negligence did, in fact, place Kay in a worse situation. Yet, plaintiffs' primary position is that the duty to rescue is not always limited to avoiding affirmative acts that place the endangered person in a worse predicament than that which existed before the duty of care arose. Actionable negligence exists when the rescuer, by breaching the duty of care, "increases the risk of harm" to the person in need. *Folsom*, 135 Wn.2d at 676.

The Washington Supreme Court has stated that "[t]ypically, liability for attempting a voluntary rescue has been found when the defendant makes the plaintiff's situation worse by: (1) increasing the danger; (2) misleading the plaintiff into believing the danger had been removed; or (3) depriving the plaintiff of the possibility of help from other sources." *Id.* (emphasis added). By using the word "typically," and based on other, more expansive language in *Folsom*, our Supreme Court signaled that a plaintiff need not demonstrate one of these three particular methods of harm in every factual scenario. *See, e.g., Id.* at 675-76 (making clear liability may attach when rescuer increases risk of harm, without also holding rescuer must make rescuee's situation worse); *see also Id.* at 677 (noting "[t]he plaintiffs have not presented any facts showing . . . that [the defendant] negligently withdrew from rescuing once the security officers

were in danger.”).

As proclaimed in *Folsom*, the general rule is that liability attaches when a defendant breaches the duty of care in rendering assistance and, by doing so, “increases the risk of harm to those he or she is trying to assist.” 135 Wn.2d at 676; *see also* RESTATEMENT (SECOND) OF TORTS § 324A (1965). The rule applies regardless whether the rescuer breached his or her duty by omission or by affirmative act. *See, e.g., Herskovits v. Group Health Coop.*, 99 Wn.2d 609, 664 P.2d 474 (1983) (recognizing that under RESTATEMENT (SECOND) OF TORTS § 323 (1965), a defendant can increase the risk of harm through a negligent omission). *See also Brown*, 86 Wn.2d at 300-03 (holding applicability of voluntary rescue doctrine does not depend on whether breach was achieved by “act” or “omission”). Accordingly, it is merely sufficient—not necessary—that a plaintiff establish the defendant made the plaintiff’s situation worse by way of one of the three methods mentioned in *Folsom*. So long as the rescuer’s negligence increased the risk of harm, liability may be imposed.

4. Guardsmark’s Negligence Increased the Risk of Harm to Kay.

In determining whether the rescuer’s negligence increased the risk of harm, the focus is on the difference between the risk of harm that would be present had the rescuer complied with his or her duty of reasonable care

and the risk of harm that existed after the negligence. *See, e.g., Herskovits*, 99 Wn.2d 609 (recognizing that under RESTATEMENT (SECOND) OF TORTS § 323, a defendant can increase the risk of harm through a negligent omission, although injured party was left in same predicament as existed before omission). In determining whether the rescuer's negligence made the plaintiff's situation worse, the focus is upon the endangered person's predicament, both before and after the undertaking. The inquiries are different, although both are concerned with causation.

Guardsmark increased the risk of harm to Kay by failing to further communicate with Kay, assess his situation more thoroughly, contact a supervisor, or seek assistance from other sources. *See* CP at 403-04 (plaintiffs' expert's testimony). Guardsmark also increased the risk of harm by prematurely and unreasonably aborting the rescue which, if carried out in a reasonable manner, would have likely resulted in a successful rescue. *See* CP at 521-22 (plaintiffs' expert's testimony). Guardsmark put an elderly, underdressed man back out in a snowstorm in freezing temperatures. It did so when it should have known such action could result in grievous harm which, in fact, it did. By such negligence, Guardsmark deprived Kay of a significant chance of being successfully rescued and concomitantly increased the risk of harm.

5. Guardsmark is Subject to Liability for Withdrawing from Its Undertaking When Such Withdrawal Left an Unreasonable Risk of Harm to Kay. It is also Liable for Putting Kay Back into the Peril from Which He Was Rescued.

RESTATEMENT (SECOND) OF TORTS § 323 expresses the general rule:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking.

See also RESTATEMENT (SECOND) OF TORTS §§ 324, 324A (1965); *Folsom*, 135 Wn.2d at 675-76 (favorably quoting RESTATEMENT (SECOND) OF TORTS § 324A (1965)).

Immediately following this articulation is a "caveat," stating: "The Institute expresses no opinion as to whether: . . . (2) there may not be other situations in which one may be liable where he has entered upon performance, and cannot withdraw from his undertaking without leaving an unreasonable risk of serious harm to the other." The comment on this caveat reads:

The Caveat also leaves open the question whether there may not be cases in which one who has entered on performance of his undertaking, and cannot withdraw from it without leaving an unreasonable risk of serious harm to another, may be subject to liability even though his conduct has induced no reliance and he has in no way increased the risk. Clear authority is lacking, but it is possible a court may hold that one who has thrown rope to a drowning man, pulled him half way to shore, and then unreasonably abandoned the effort and left him to drown, is liable even though there were no other possible sources of aid, and the situation is made no worse than it was.

RESTATEMENT (SECOND) OF TORTS § 323, comment e (1965).

This comment countenances a factual scenario like the one presented here. The analogy would be more apt, however, had the drowning person been pulled all the way to shore and then been pushed back out into the water. Appellants submit the facts of this case call for an imposition of liability, even though Kay was returned to an environment similar to that existing before Guardsmark began to help him. Guardsmark unreasonably discontinued its undertaking and, by doing so, left an unreasonable risk of serious harm to Kay.

As the RESTATEMENT (SECOND) OF TORTS puts it, in Section 324:

One who, being under no duty to do so, takes charge of another which is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by . . . (b) the actor's discontinuing his aid or protection, if by so doing he leaves the other in a worse position than when the actor took charge of him." Speaking to a situation where the actor discontinues gratuitous services, comment g to section 324 states that

“[i]f the actor has succeeded in removing the other from a position of danger to one of safety, he cannot change his position for the worse by unreasonably putting him back into the same peril

This principle should be recognized here. Guardsmark had a duty to exercise reasonable care in deciding whether to discontinue its rescue efforts and put Kay back into subfreezing temperatures.

As stated in *Meneely*, 101 Wn. App. at 860, ““[t]he ultimate test of a duty to use [due] care is found in the foreseeability that harm may result if care is not exercised.”” (quoting *King v. Nat’l Spa & Pool Inst., Inc.*, 570 So. 2d 612, 615 (Ala. 1990) (quoting *Bush v. Ala. Power Co.*, 457 So. 2d 350, 353 (Ala. 1984))). It was foreseeable Kay would develop hypothermia if further assistance was not provided. When noticed by Guardsmark’s security officers at 7:00 p.m., Kay was in danger. He was underdressed, wet, confused and unable to save himself from the cold. He was seen entering the courthouse shortly after 5:00 p.m. and then sitting beside the heater, before Guardsmark’s security officers ushered him out the first time. He was no better equipped to survive the weather at 9:00 p.m., when he was directed to leave the courthouse again. Displacing Kay from the safety of the courthouse created an unreasonable risk of harm.

“If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to

another, he is under a duty to exercise reasonable care to prevent the risk from taking effect.” RESTATEMENT (SECOND) OF TORTS § 321 (1965).

The RESTATEMENT (SECOND) OF TORTS recognizes this basic principle in § 302:

A negligent act or omission may be one which involves an unreasonable risk of harm to another through either (a) the continuous operation of a force started or continued by the act or omission, or (b) the foreseeable action of the other, a third person, an animal, *or a force of nature*.

(emphasis added).

Guardsmark entered into a special relationship with Kay. It was duty-bound to exercise reasonable care to complete its undertaking or to otherwise protect Kay when it should have known that discontinuing the rescue and ejecting Kay into the cold would likely result in serious harm. Accordingly, Guardsmark should be held liable for placing Kay back into the same peril from which he was rescued.

6. Guardsmark’s Omissions and Affirmative Act of Ushering Kay Out of the Courthouse Made His Situation Worse.

A jury could also reasonably conclude that Guardsmark made Kay’s situation worse by depriving him of the possibility of help from other sources. Kay was inside the courthouse from approximately 7:00 p.m. until 9:00 p.m. A reasonable inference arising from this fact is there were less people on the streets at 9:00 p.m., when Kay was ushered out,

than there were at 7:00 p.m. It stands to reason that Guardsmark's actions decreased the possibility a good Samaritan would come along and help him.

In *Brown v. MacPherson's Inc.*, 86 Wn.2d 293, 299, 545 P.2d 13 (1975), the court favorably cited the case of *Zelenko v. Gimbel Bros., Inc.*, 158 Misc. 904, 287 N.Y.S. 134 (1935). In *Zelenko*, the court stated that “[i]f defendant had left plaintiff's intestate alone, beyond doubt some bystander, who would be influenced more by charity than by legalistic duty, would have summoned an ambulance. Defendant segregated this plaintiff's intestate where such aid could not be given and then left her alone.” *Zelenko*, 158 Misc. at 905. The same principle is at work here.

Seeing Kay in need, Guardsmark's security officers unlocked the courthouse and invited him inside. Then, the security officers directed him to the heater. He remained there for approximately two hours, while the night drew darker and colder. According to Mr. Lewis, even if someone had looked in the front doors of the courthouse, that person would not have been able to see Kay sitting by the heater. CP at 433. If Guardsmark's security officers had not invited Kay inside, it is possible some passerby would have summoned help. By segregating a likely hypothermic Kay, Guardsmark deprived him of the possibility of help from other sources. This is a reasonable inference from the facts. But

instead, the security officers kept him inside until later in the evening and then ushered him back outside into the cold and snow.

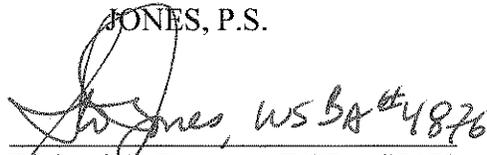
Further, comment *g* to RESTATEMENT (SECOND) OF TORTS § 324 makes plain that an imperiled person's situation is made worse when the rescuer places the person in a position of peril identical to that from which he was rescued. *See also Parvi v. City of Kingston*, 41 N.Y.2d 553, 362 N.E.2d 960, 394 N.Y.S.2d 161 (1977) (recognizing that once affirmative action has been voluntarily undertaken, the duty to observe due care "cannot be fulfilled by placing the helpless person in a position of peril equal to that from which he was rescued."). This is exactly what Guardsmark did when it indiscriminately ceased its rescue efforts and ushered Kay back outside into subfreezing temperatures. The question of Guardsmark's negligence is for a jury.

VI. CONCLUSION

For the reasons stated above, this Court should reverse the trial court and remand the case for trial.

DATED this 9 day of September, 2013.

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CERTIFICATE OF SERVICE

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