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NO. 64646-0-I

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

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

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

Appellants/Defendants,

v.

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

Respondent/Plaintiff.

BRIEF OF RESPONDENT MUNICH

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I. INTRODUCTION

The Supreme 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 trial court correctly ruled that the case law does not require a fourth element – that the “express assurance” given by the public official be false -- as argued by Defendants Skagit 911 and Skagit County Sheriff’s Office.

Under the evidence in this case, Defendants clearly owed a duty of reasonable care to decedent Bill Munich because:

- (1) Defendants admit that there was direct contact between Bill Munich and Skagit 911;
- (2) Defendant Skagit 911 made express assurances to Bill Munich that law enforcement was on the way: “my partner’s . . . got a deputy that’s headed towards you;” “there’s already a deputy that’s en route to you, ok?”; and
- (3) a jury could reasonably find from the evidence that decedent Bill Munich relied to his detriment on Defendant Skagit 911’s assurances that help was on the way, because he lost critical time by remaining in his garage waiting for a deputy to arrive rather

than fleeing on foot or in one of the three vehicles in the garage to hide or seek help elsewhere. He did not leave the garage, which is where the 911 operator told him the deputy would contact him, until he was chased out by his assailant. Even at that point, he ran north on Highway 20, the direction from which law enforcement would arrive, rather than south, where there was a motel approximately 1,200 feet away at which he could have sought refuge from his assailant.

Under the applicable law and the evidence in this case, the trial court correctly ruled that there are questions of material fact for a jury to decide as to whether Defendants Skagit 911 and Skagit County Sheriff's Office failed to exercise reasonable care in responding to decedent Bill Munich's 911 call and therefore breached their duty to decedent Bill Munich. Munich's 911 call was not coded properly, and as a result, the response by law enforcement was delayed. Defendant Skagit 911's own policies, as well as testimony of Skagit 911 employees and the declaration of emergency communications expert Paul Linnee, demonstrate that the call should have been coded as an assault, which is Priority One, rather than a weapons offense, which is Priority Two. If the call had been coded properly, it would have been dispatched with an alert tone, and law enforcement personnel who were closer to Munich's location than Deputy

Luvera would have responded “in code,” with lights and sirens going, proceeding as fast as possible to Munich’s location. Instead, because the call was dispatched as Priority Two, without an alert tone, only one law enforcement officer responded, and he responded at normal speed, without any urgency. The evidence demonstrates that, had the call been dispatched as a Priority One, with the required alert tone, as it should have been, law enforcement personnel would have arrived in time to save Bill Munich’s life. This Court should affirm the rulings of the trial court.

II. RESTATEMENT OF ISSUES

1. Did the trial court (a) correctly follow established Supreme Court precedent holding that the three elements of the “special relationship” exception to the public duty doctrine are (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, and (b) correctly rule that the case law does not require a fourth element – that the “express assurance” given by the public official be false?

2. Did the trial court correctly find that there are genuine issues of material fact for a jury to decide as to whether Bill Munich

detrimentally relied on Skagit 911's assurance that law enforcement was on the way?

3. Did the trial court act within its broad discretion in refusing to strike portions of the declaration of 911 expert Paul Linnee, who has extensive experience in operating 911 call centers and 911 policies and procedures, and whose declaration sets forth in detail the factual bases and foundation for his opinions?

III. STATEMENT OF FACTS

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

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

A few minutes before 6:00 p.m., Bill called a friend, Bruce Heiner, and told him he just "had the hell scared out of him." CP 319, 320. Bill told Bruce that, as he was walking to his plane, his neighbor, Marvin Ballsmider, pointed a gun in his direction and fired. Bruce told Bill to call 911 and "get the Sheriff out there." CP 320-321.

Bill 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 reported that he was “rattled” and that Ballsmidler was “an alcoholic. . . . I mean he’s just a wipe out.” CP 111. He told Smith that he did not know where Ballsmidler was because he could not see him from inside the garage. CP 112.

Smith recorded the following in the call log: “rps¹ *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 consider or “code” the call to be an emergency. CP 346, 348, 356, 364.

The transcript of the call indicates that, when Bill spoke with Smith, he did not know where Ballsmidler was, and that the danger was ongoing:

Smith: Did he head back home?

Munich: *I don’t know what he’s doing . . .*

. . .

¹ “RP” refers to the reporting party. CP 343.

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

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

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

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

CP 111-112 (emphasis added).

Smith assured Bill that law enforcement was on the way: “[M]y partner [has] already got a deputy that’s headed towards you.” CP 112. Smith specifically asked Bill, “Ok, so are you going to wait there for contact?” Bill replied, “Oh yeah, definitely.” CP 112; CP 369. Smith confirmed a second time that Bill would wait in his garage for law enforcement: “Ok, you’re going to wait there at the garage for contact then?” Bill replied, “Yeah . . .” Smith assured him, “Ok, all righty, there’s already a deputy that’s en route to you, ok?” Bill replied, “Ok, thank you.” CP 112.

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

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

The call ended with Bill being fatally shot on Highway 20 as Ballsmider chased him down in a car while firing a shotgun out the window, approximately 14-1/2 minutes after a deputy was dispatched to respond.² As discussed below, the evidence indicates that 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.

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

There is substantial evidence establishing Skagit 911's negligence in failing to follow its own procedures, resulting in a delayed response by law enforcement to Bill Munich's call. In brief, Skagit 911 Call Taker Norma Smith should have coded Bill Munich's call as a Priority One; should have dispatched it with an alert tone; and should have notified all available law enforcement personnel. *See* CP 216-222. Law enforcement personnel testified that, had the call been dispatched as a Priority One, with an alert tone, they would have responded with more urgency. CP 406-407, 408; CP 564-565; CP 600; CP 470; CP 538.

² *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 6:16:30 p.m. with Bill Munich being shot); CP 403-404.

Rather than coding Bill Munich's call as a Priority One, Skagit 911 dispatched it as a Priority Two "weapons offense," which is defined as "reports of gunshots heard or brandishing of a weapon" (CP 643; CP 645) and includes things such as hearing a gunshot due to duck hunters in the area or illegal discharge of firearms. CP 468-469; CP 389, 405. What Bill Munich reported was not merely gun shots being heard or the brandishing of a weapon. What he reported was a life-threatening assault: a gun being pointed straight at him and fired from a short distance away. *See* CP 641 (Skagit 911's definition of "assault").

1. 911 call takers are responsible for coding/prioritizing calls correctly.

A 911 call taker answers 911 calls, obtains information from the caller, enters the call 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 based on the information they receive from the caller. CP 579 at § 2.0 ("Skagit 911 personnel will be familiar with the procedures for determining the priority of all calls received. Each call taker will be responsible to determine the proper code . . ."); CP 420, 441-442, 418, 419; CP 336-337.

Dispatchers trust call takers to prioritize calls correctly. CP 419, 441; CP 334-335, 350. It is important that call takers prioritize calls correctly, because the dispatchers, and in turn the responders (law enforcement, fire, emergency medical) rely on that information to determine how quickly they need to respond. CP 330, 350, 351-352, 361; CP 520; CP 536; CP 466-467, 471; CP 568-569; CP 388, 393-394, 408-409.³

2. Call Taker Norma Smith failed to code Bill Munich's call correctly.

a. Skagit 911's definition of Priority One calls

Under Skagit 911's Standard Operating Guidelines, a threat to life is to be given the utmost priority -- Priority One. CP 579 at § 3.0; CP 362; CP 423-424. Skagit 911's Standard Operating Guidelines define 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." CP 456 at § 3.3; CP 440. Skagit 911 Dispatcher Wesley Norton agreed that, if the shot that was fired at Bill Munich occurred within five minutes of the call, it should have been classified as "in progress." CP 448.

³ Luvera, Lindquist, Howell, and Grimstead are all Skagit County law enforcement personnel.

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 fast as they can. CP 492. Officers respond to a Priority One call in full code, meaning that they proceed to the scene as quickly as possible, with lights and siren on. CP 492; CP 551; CP 472; CP 399-400. The purpose of "running code" is to get to the scene as quickly as possible, to prevent harm.⁴ CP 472; CP 399-400; CP 478.

b. Skagit 911's definition of Priority Two calls

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. Defendants claim that Smith properly coded Bill Munich's call as a Priority Two because Munich had "walked away from Ballsmider and removed himself from the

⁴ As an example, after Bill Munich was fatally shot, one of the law enforcement officers who responded (identified in the radio transcript as U4), asked the dispatcher at 18:50, "I'm in traffic. I need to know if I need to go code to get through this." CP 688.

situation.” *Appellants’ Opening Brief* at p.4. The evidence, however, including Skagit 911’s own policies and procedures, shows that the situation was still in progress, and that the threat of serious injury to Bill Munich was still present.

c. Decedent Bill Munich reported an assault that was “in progress,” and his call therefore should have been coded as Priority One.

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; CP 446. Skagit 911’s policies classify “assault” as a Priority One call. CP 445; CP 623.

Call Taker Smith agreed that what happened to Bill Munich – a gun being pointed and fired -- was an assault, and that an alcoholic with a rifle shooting at a neighbor was a serious situation. CP 358-359, 360; CP 347, 362-363, 349, 353-354. She testified that a person threatening another person with a weapon is a Priority One:

Q. Is there any particular information that triggers priority one without hesitation?

A. . . . [E]ach call is individual and it’s the information that you’re given. I’m sure there is something that triggers that it’s a priority, priority call.

Q. Can you tell me what that would be?

- A. A person – if the person was threatening the other person with the weapon.

CP 338-339.

Bill Munich told Smith that he had “just” been shot at. That is all that Smith knew about the timing of when the shooting occurred. She did not ask for any additional information. Based on that information alone, she should have coded Bill Munich’s call as a Priority One. CP 216-217, CP 219 at fn.5 (*Declaration of Paul Linnee*). The evidence also indicates that Ballsmider was still on location – Bill told Smith that the shooter was his neighbor and was last seen standing on the fence line, before Bill went into his garage and could no longer see him. Because the criteria for a Priority One “in progress” call were met (event occurring within five minutes of the call and suspect on location), Bill Munich’s first call should have been coded as a Priority One, and should have been dispatched with an alert tone. CP 216-222 (*Declaration of Paul Linnee*).⁵

Skagit 911’s Standard Operating Guidelines state that call takers “shall obtain pertinent information, such as where the incident occurred, what type of incident occurred, *when* the incident occurred, if weapons

⁵ Dispatcher Norton testified that, based on his experience today, he would code a call like Bill Munich’s as Priority One. CP 439. Currently, Skagit 911’s policies call for assigning Priority One to events involving a weapon being pointed toward other people, which Call Taker Smith agreed would include the Munich incident. CP 365-366; 370-371.

were involved, who was involved, why it occurred and the reporting party's information.” CP 455 at § 3.0 (emphasis added). The transcript of Bill's first 911 call demonstrates that Call Taker Smith failed to ask Bill specifically when the incident occurred. CP 30-31. This is probably because Bill specifically told Smith that he had “just” had a guy point a rifle at him and shoot it, indicating that the incident occurred moments before the call – in other words, within the last five minutes. If Smith had any doubt about what Bill meant when he said the shooting “just” happened, she should have asked for clarification. CP 219 at p.9, fn. 5. If Smith had asked when the incident happened, the evidence indicates that Bill would have told her that the incident happened within the last five minutes, because a shot was fired during Bill's first call to Bruce Heiner (5:57 p.m. according to his cell phone records, CP 139; CP 320-321; 322-323; 324-325), and Bill's first 911 call was made at 5:59 p.m. according to the cell phone records. CP 139.

Skagit 911's Guidelines caution, “Don't underestimate the severity of a call.” CP 588 (Guideline 3.7). The Guidelines further caution, “Assume all calls are serious and require immediate action.” CP 509-510. Smith's unfounded assumptions that the shooting Bill Munich reported had occurred more than five minutes before his call, and that Bill was safe because he could no longer see Ballsmider from inside his garage, were

not supported by the information Bill reported to Smith and violated Skagit 911's fundamental rule not to underestimate the severity of a call.

Smith testified that she coded Bill Munich's call as a Priority Two Weapons Offense because she believed he had walked away from Ballsmider and was no longer in danger. She ignored the fact that Bill Munich told her the shooter was his neighbor and was last seen at the fence line with a gun. Skagit County Sheriff Grimstead testified that if a person pointed a gun at someone and fired a shot and then walked away, the danger is not necessarily gone. CP 386-387. Sheriff Grimstead testified that someone pointing a gun at a person and firing would probably be classified as "assault first." CP 385.

Former Skagit 911 dispatcher Tammy Canniff⁶ agreed that Munich's 911 call was a Priority One and that a response to an incident involving guns requires the highest priority and highest action. CP 489, 490, 491, 506-507; *see also* 516, 493-495. She testified that, if someone reported being shot at and that the person with the gun was still there, she would code it as a Priority One. CP 496, 515 ("The man felt he was being

⁶ Canniff left Skagit 911 because of concerns about how it was being operated. CP 518. She had concerns about the adequacy of the training provided by Skagit 911 to its employees, failure to properly prioritize calls, and people not doing their jobs properly. CP 514, 517, 519, 521; CP 638.

shot at, then I would probably make it a priority one, yes.”). She agreed that Ballsmider pointing a gun at Munich met the definition of assault in Skagit 911’s Call Taker Training Manual: “An attempt, with force or violence, to do harm to another, as by striking at him with or without a weapon. Assault consists of physical force part[l]y or fully exerted contrary to law, i.e., the act of pointing a loaded gun at, or raising a club to strike, another.” CP 501; CP 641 (excerpt from the “2001-2005 Call Taker Training Manual”).

Skagit 911 Dispatcher Wesley Norton agreed that crimes in progress involving an immediate threat of serious physical injury to another person should be categorized as Priority One. CP 424, 425. He testified that he would code an incident involving a weapon that was within five minutes of occurrence as a Priority One call and use an alert tone. CP 426, 427, 430. He agreed that Skagit 911’s current policy⁷ would require someone dispatching an incident involving a weapon that

⁷ Norton did not know whether the Skagit 911 policy manual containing this language (CP 613) had been revised after the time of the Munich incident, but there is no evidence that the relevant language was any different at the time of the Munich incident. Norton agreed that if the language of the policy was the same at the time of the Munich incident, an incident involving a gun that was in progress or within five minutes of occurrence should have been dispatched as Priority One with an alert tone. CP 427-428.

occurred within five minutes of the call to code the event as a Priority One. CP 428.

Law enforcement personnel also testified that they would classify a report of someone shooting at another person as an assault, rather than a weapons offense. CP 469; CP 498, 499-500; CP 601, 602.

Rather than coding Bill Munich's call as an assault, Priority One, Skagit 911 dispatched it as a Priority Two "weapons offense," which includes hearing a gunshot due to duck or turkey hunters in the area or illegal discharge of firearms in the city limits. CP 468-469; CP 389, 405. Skagit 911's polices define "Weapon Offense" as "reports of gunshots heard or brandishing of a weapon." CP 643. The minutes of a meeting of Skagit 911's Law Operations committee on May 8, 2007 state that the "weapons offense" descriptor "should be used for those incidents where a weapon was seen but was not used in a threatening or assaultive manner." CP 645.

There is a clear distinction between somebody being shot at vs. somebody merely hearing shots. CP 421. What Bill Munich reported was not merely gun shots being heard 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 (Skagit 911's 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 drive to a caller’s location 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. CP 443. An alert tone notifies law enforcement that they need to listen carefully because there is an emergency situation. CP 564-565; CP 600; CP 443, 450; CP 470; CP 538 (a tone indicates “a priority response . . . it’s also an indication that there’s something important going on.”); 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 (a Weapon is defined as a gun or knife only)

...

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

Dispatcher Norton dispatched U40 (the radio identifier for Deputy Dan Luvera) to the scene at approximately 6:02 p.m. CP 442; CP 535.

If Call Taker Smith had correctly prioritized Munich's call as Priority One, Norton would have used an alert tone before dispatching the call. CP 451-452.

Skagit County Sheriff Sergeant Annette Lindquist testified that she would normally respond to a report of someone shooting at another person in code, depending on other information provided by the 911 dispatcher. CP 480. Skagit County Sheriff Richard Grimstead testified that, if the Munich incident had been dispatched as an assault rather than a weapons offense, a higher priority would have been placed on responding to the incident by law enforcement. CP 406-408.

Deputy Luvera testified that, based on 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. Luvera testified that, if the 911 dispatcher had regarded the incident as an emergency, "they would have toned this out." CP 531.

As set forth above, 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 Bill Munich's first

call should have been coded as Priority One, with an alert tone used when it was dispatched. Had that been done, Deputy Luvera would have responded more quickly and reached Bill Munich's location in time to save his life. CP 226-227 at ¶14(a); CP 267-269. Additionally, as discussed below, other law enforcement personnel who were closer to Munich's location than Luvera would have responded and arrived prior to Munich's death. CP 227-229 at ¶¶14(b), (c), (d), & (e).

Luvera does not recall where he was when he received the call, but he was assigned to the La Conner area and spent 90% of his time within the La Conner city limits. CP 527; CP 650, 658; CP 533-534. He took La Conner-Whitney Road to Highway 20 and then Highway 20 to Campbell Lake Road to respond to the call. CP 654, 661.

Because Luvera did not think it was an emergency call based on the information provided by Skagit 911, he drove at normal speed, rather than traveling in code. CP 539, 540-541, 547; *see also* CP 401-402. Deputy Luvera and Sergeant Lindquist, who was on duty at the Sheriff's office in Mt. Vernon at the time, testified that the situation would have been handled differently if it had been dispatched as a Priority One:

- A. It was dispatched as a routine call. There was no tone or alert sent by dispatch to indicate that there was some sort of an emergency situation at that time. There – we had deputies who were scheduled to get off or sign out of

service at about that time frame⁸ and those deputies did sign out of service and go home. If this call was an emergency situation we wouldn't have allowed those deputies to go home and sign out of service, we would have held them over.

CP 548, 549-550 (Luvera).

- A. . . . I heard weapons offense, Dan [Luvera] was en route. Okay, on [with] my stuff. When it got upgraded – and then I did hear, Subject is waiting in his garage for contact or hangar or however they put it. If you're waiting inside somewhere for contact and you're going to stay there, that to me was like, Okay, Dan's got it handled. I mean, that's not a priority response. I went back to doing my work, getting stuff taken care of.

When they updated it and said the subject was in the garage shooting, that's when to me everything started snowballing and then everybody that we had was en route. I mean I surely wouldn't have let people go home five minutes after the call came in, people wouldn't have been signing out of service if they would have thought that anything was serious. We're just not like that.

CP 481-482 (Lindquist); *see also* CP 396-397. Because the call was not coded properly, Sgt. Lindquist went about her business at the Sheriff's office until Munich's second call when the dispatcher said that Ballsmider was in Munich's garage shooting at him, 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,

⁸ *See* CP 634 (radio transcript showing that two deputies, U55 and U67, signed out of service at 6:06:21 and 6:09:39).

Sgt. Lindquist would have been informed of the seriousness of the situation and could have responded in time to save Bill Munich's life, given the fact that she arrived within eleven minutes when she did respond. CP 228 at ¶14(d).

Skagit County Deputy Kelly Howell was working an overtime detail doing security patrol for a refinery at the time of the incident, about five to six miles from where the incident occurred. CP 560-561, 567; CP 652-659. Howell heard Norton dispatch Munich's first call, but the manner in which the first call was dispatched did not warrant him leaving his overtime detail and responding. CP 563, 572-573. At 6:16 p.m., he heard dispatch advise Luvera that Munich had called back and had been shot. At that point, Howell responded, with lights and siren going, and arrived at the scene within seven minutes. CP 562-563, 566. If Bill 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 immediately or could have contacted Deputy Luvera by radio to find out which one of them was closer to Bill Munich's location. CP 570-571, 574. If he had left by the time the first call ended (6:04 p.m.), he would have arrived in time to save Bill Munich's life (the shooting occurred about 6:16 p.m. (CP 34)). CP 227 at ¶14(b). Deputy Howell did not recall hearing anyone from Skagit 911 try to figure out

which deputy was closest to Munich's location when the call was dispatched. CP 575-576.

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 was on the Swinomish Reservation, heading toward a theft call, when Norton dispatched Munich's first call. CP 603; CP 675. During Munich's second call, at about 6:11 p.m., when Deputy Luvera requested another unit to respond, Sgt. Erps determined that he was the closest law enforcement officer to the location based on where the other responding officers said they were. CP 595, 598-599, 605. Erps proceeded to the scene, with lights and siren going, driving as fast as he could. CP 596-597. He arrived within four minutes. CP 597. He would have responded sooner if requested. CP 606. Had Sgt. Erps been assigned or dispatched to respond to Bill Munich's first call, or been given the opportunity to become aware of its severity by way of an alert tone or a more accurate incident type, he would have arrived before Bill Munich was shot and killed. CP 227-228 at ¶14(c).⁹

⁹ 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 at the time of the Munich incident. Defendant Skagit 911 failed to inquire as to the location of any of those

It was about 14 minutes after Munich's first 911 call was dispatched that he was fatally shot. CP 604; 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) and 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.¹⁰

IV. AUTHORITY

A. Standard of review

This Court reviews a trial court's summary judgment order de novo, engaging in the same inquiry as the trial court, to determine if a party is entitled to judgment as a matter of law, or whether genuine issues

officers and failed to ask for assistance from them in responding to the Munich incident, 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.

¹⁰ 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).

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 the facts give rise to what a reasonable person under similar circumstances would take as explicit assurances and then reasonably rely upon those assurances in taking or refraining from taking action, summary judgment must be denied. *Noakes v. City of Seattle*, 77 Wn. App. 694, 700, 895 P.2d 842 (1995).

1. Direct contact

It is undisputed that Munich had direct contact with Skagit 911.

2. Express assurance

In *Noakes v. City of Seattle*, 77 Wn. App. 694, 895 P.2d 842 (1995), two women called 911 because an intruder was trying to break into their home. The 911 operator told the women that

- “We’re broadcasting this information,” and “We’ll send someone out.”
- “We’ll get somebody down there just as soon as we can get a unit available. We’ve got about fifteen waiting calls. . . . We’ll get somebody by just as soon as we can.”

Noakes, 77 Wn. App. at 696. This Court held that these statements were sufficient to establish a question of fact as to whether “express assurances” were made:

The statement “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. . . .

Noakes, 77 Wn. App. at 699.

The express assurances made by Skagit 911 Call Taker Norma Smith to Bill Munich (“my partner’s . . . got *a deputy* that’s *headed towards you*,” “there’s already *a deputy* that’s *enroute to you*, ok?” (emphasis added)) are indistinguishable from the assurances that this Court found sufficient in *Noakes* to satisfy the second element of the special relationship exception.

In *Beal v. City of Seattle*, 134 Wn.2d 769, 954 P.2d 237 (1998), the Supreme Court held that the following statements by a 911 operator were sufficient to establish “express assurances”:

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. Again, the express assurances given to Bill Munich by Skagit 911 Call Taker Norma Smith are indistinguishable from the assurances given in *Beal*.¹¹

Defendants' claim that this element is not met because Bill Munich "never sought or received an unequivocal express assurance of police assurance" is absurd and directly undermined by binding precedent with strikingly similar facts. In the cases relied upon by Defendants, there was either no direct contact between the plaintiff and the governmental agency¹² or no express assurance given.¹³ Here, it is clear from the transcript of the 911 calls that everyone understood that Bill Munich was seeking police assistance in response to being shot at, and Skagit 911 Call Taker Smith expressly assured him that law enforcement was on the way. The statement that "a deputy [is] headed towards you" is an unequivocal, express assurance that help is on the way. When a 911 operator tells a

¹¹ 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, Bill Munich not only told Skagit 911 that Ballsmidler had a gun, but that it had been fired at him.

¹² *Cummins v. Lewis County*, 156 Wn.2d 844, 861 (2006); *Meaney v. Dodd*, 111 Wn.2d 174 (1988); *Honcoop v. State*, 111 Wn.2d 182 (1988); *Vergeson v. Kitsap County*, 145 Wn. App. 526 (2008).

¹³ *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774 (2001); *Sinks v. Russell*, 109 Wn. App. 299 (2001); *Williams v. Thurston County*, 100 Wn. App. 330 (2000); *Moore v. Wayman*, 85 Wn. App. 710 (1997).

caller that a police officer is en route to the caller's location, that can be reasonably construed to mean that law enforcement will respond in a timely manner consistent with the nature of the incident, as this Court stated in *Noakes*, 77 Wn. App. at 699.

3. Bill Munich justifiably relied to his detriment on the express assurances given to him by Skagit 911.

The third and final element of the special relationship exception to the public duty doctrine is that the plaintiff must show that he relied upon the assurance given by the 911 operator to his detriment. *Cummins*, 156 Wn.2d at 856; *Harvey*, 157 Wn.2d at 41. Whether a party justifiably relies upon information is a question of fact generally not amenable to summary judgment. *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 792, 30 P.3d 1261 (2001).

In *Noakes*, this Court held that the fact that the plaintiffs remained in their home after being assured that the police were on the way, rather than fleeing or taking other measures to protect their safety, was sufficient to establish a question of fact as to justifiable reliance:

. . . [I]t is hard to determine how else they could express any reliance on the police coming for their protection other than the fact that they stayed in their home. . . . If it weren't for the assurances of the police, the women might have attempted other methods of escape or self-assistance.

. . . In the case before us the question as to whether the 911 operator made express assurances to Shirley and Marie Noakes so as to give rise to a special relationship is one for the jury. The same is true with regard to the issue of whether the assurances were such that the Noakes could reasonably have relied on them. This is a classic circumstance where the duty arises from the facts presented and thus, all but infrequently, involves questions of material fact. . . .

Noakes, 77 Wn. App. at 700.

In *Beal*, justifiable reliance was found when a 911 operator assured the victim that the police were on the way, and the victim consciously waited for officers to arrive.¹⁴ *Beal*, 134 Wn.2d at 785. The Supreme Court held that this was sufficient to create an issue of fact on the reliance element:

The City also argues that as to the reliance element, “it is clear” that decedent did not change her position for the worse as a result of what the 911 operator said. . . . However, the evidence and reasonable inferences from the evidence must be construed in the light most favorable to the nonmoving party. . . . ***The fact that Ms. Fernandez told the operator that she would wait in front of the apartment after being told the police would be sent gives rise to the inference she relied upon the assurance that police protection would be forthcoming. She neither left the apartment nor attempted to proceed without police assistance. Further,***

¹⁴ “The fact that Ms. Fernandez told the operator she would wait in front of the apartment **after** being told the police would be sent gives rise to the inference she relied upon the assurance that police protection would be forthcoming.” *Beal*, 134 Wn.2d at 786 (emphasis added). The same is true here: Bill Munich told Call Taker Smith that he would wait in his garage **after** being told by Smith that a deputy was on the way to his location. CP 112.

whether a party justifiably relies on information is a fact question generally not amenable to summary judgment. . . .

Beal, 134 Wn.2d at 786-787 (emphasis added).

The trial court properly found that there are questions of fact for a jury to decide as to the reliance element of the special relationship exception because Bill Munich lost precious time waiting for a deputy to arrive,¹⁵ based on the assurance that a deputy was on the way, rather than immediately fleeing or attempting to hide in some other location.

Unlike *Harvey v. Snohomish County*, 157 Wn.2d 33, 134 P.3d 216 (2006), relied upon by Defendants, the evidence in this case establishes

¹⁵ The times on Munich's cell phone bill and Skagit 911's computer (CAD) log do not match up exactly. The cell phone bill says that the first call was made at 5:59 pm (CP 139), but the CAD log says 6:00 pm. CP 111. The cell phone bill says the second call was made at 6:09 (CP 139), but the CAD log says 6:10:24. CP 113. Thus, one minute has to be added to the cell phone times to try to make them match the CAD log times. The first 911 call ended at 6:03:38 according to the CAD log. CP 112. The second call to Heiner was 6:04 (CP 139) according to the cell phone bill, but to match the CAD log time, one minute must be added, which would be 6:05. Whether the second call to Heiner was placed at 6:05:01 or 6:05:59 is not known because the cell phone bill does not give seconds. Thus, the evidence, taken in a light most favorable to Respondent/Plaintiff, is that Munich remained in the garage for approximately two minutes between the end of the first 911 call and calling Heiner a second time. We know from the 911 call transcript that Munich was in the garage during the first 911 call, which lasted about four minutes. We know that he remained in the garage waiting for help after the call ended until Ballsmider entered the garage, because Munich told the 911 call taker during the second call that Ballsmider came into his garage. CP 113. If Munich had not been in the garage when Ballsmider came into the garage, he would not have known that fact.

genuine issues of material fact as to the reliance element of the special relationship exception. In *Harvey*, the plaintiff was effectively being held hostage in his condo and had no option other than to stay where he was. Bill Munich had options other than staying in his garage and waiting for police protection to arrive.¹⁶ We know that he could have fled on foot earlier, because he in fact did flee on foot after Ballsmidler entered the garage. He could have fled on foot sooner and been down the road by the time Ballsmidler entered the garage, out of Ballsmidler's sight. If Ballsmidler had not been able to see where Munich went, he would not have been able to chase him down. He could have ran *south* on Highway 20 to the Lake Campbell Lodging, approximately 1,200 feet away,¹⁷ and taken refuge there (and been out of Ballsmidler's line of sight), rather than running *north*, which is the direction he would have expected law enforcement to be arriving from (and the direction law enforcement did, in

¹⁶ *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 30 P.3d 1261 (2001), is also distinguishable in this regard, because like the plaintiff in *Harvey*, the plaintiffs in *Babcock* had no alternatives available to them to prevent their home from burning, and the only evidence was that, despite the fire department's alleged assurance to save their house, the plaintiffs ignored the firefighter's assurance and moved their truck. *Babcock*, 144 Wn.2d at 793-794.

¹⁷ If he had run to the motel at 4 mph (5.87 feet/second) from the corner of Lake Campbell Road and Highway 20, it would have taken him 204 seconds, or 3.5 minutes, to reach the motel. If he had run to the motel at 5 mph (7.33 feet/second), it would have taken him 164 seconds, or 2.75 minutes.

fact, arrive from).¹⁸ He could have driven away in one of the three vehicles on the premises.¹⁹ Instead, in reliance on Skagit 911's promise that a Deputy Sheriff was on the way, Bill Munich lost precious time as he waited in his garage for law enforcement to arrive. And, the fact that he ran north on Highway 20 rather than south after Ballsmidler came into the garage further demonstrates his reliance on the assurance of the 911 operator, because he knew law enforcement would arrive via Highway 20 from the north.

The facts of this case are closer to *Beal* than *Harvey*. In *Beal*, the victim/caller was told by a 911 operator that the police would be sent, and the caller told the 911 operator that she would wait outside the apartment. *Beal*, 134 Wn.2d at 785. As discussed above, the Supreme Court held that this was sufficient to create an issue of fact on the reliance element. *Beal*, 134 Wn.2d at 786-787.

¹⁸ See CP 681 (map of the area from Google Maps showing Lake Campbell Lodging location); CP 683 (map of the general area, showing that law enforcement responding from La Conner or Mount Vernon would come via Highway 20 from the north). A survey diagram of the Munich property, which shows the location of the adjacent roads, is at CP 412.

¹⁹ This would have required that he unlock the cable on his driveway or drive through the cable, which we know was possible to do because Ballsmidler drove his station wagon through the cable after he shot Bill Munich. CP 554.

C. The special relationship exception does not require that the express assurance be false.

The “inaccurate information” language relied upon by Defendants comes out of public duty doctrine 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 are seeking *action* by the 911 agencies, not merely information.

In *Meaney*, the Supreme Court held that a builder could rely on a governmental entity for accurate information and building permits binding on the government if the builder can show that he justifiably relied on assurances which he specifically sought and 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 180.²⁰ 911 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 foregoing 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 to arrive.

In *Beal*, a 911 case, the Supreme Court specifically rejected a claim by a governmental entity, based on *Meaney*, that the express assurance relied upon by the plaintiff 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.

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.

²⁰ In *Meaney*, the Court found that there was no evidence that the builder made a specific inquiry.

The same cannot be said about assurances that future *acts* will occur.

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

In *Beal*, the Supreme 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. Bill Munich could have fled his property rather than waiting for law enforcement in his garage, where Marvin Ballsmidler found him and then pursued him with a shotgun. 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.²¹ As the Supreme Court stated in *Beal*, however, detrimental reliance can occur in 911 cases regardless of whether an assurance of action is false. 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. 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. The Supreme Court recognized this important distinction in *Beal*.

²¹ *Smith v. State*, 135 Wn. App. 259, 144 P.3d 331 (2006), cited by Defendants, is in the same vein as the building code cases because it involved a claim against DSHS for providing inaccurate information. This Court held that a prima facie case of negligence under the special relationship exception was presented because the plaintiff specifically inquired to DSHS about what her rights were, and DSHS officials gave her false information, which she relied on.

Defendants also cite *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 Defendants 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. Like numerous other cases before and after it, *Babcock* stated the same three elements for the special relationship exception that have always been required and did not add any additional elements. *Babcock*, 144 Wn.2d at 794.

Defendants also cite *Vergeson v. Kitsap County*, 145 Wn. App. 526, 186 P.2d 1140 (2008), but *Vergeson* does not stand for the proposition that a plaintiff in a case against a 911 agency must show that the assurance of action given by the 911 agency was false. *Vergeson* was not a 911 case. In *Vergeson*, a woman sued Kitsap County, arguing that the county had a duty to exercise ordinary care to remove court-quashed warrants from a computer database. The plaintiff had a warrant that was quashed but not removed from the database. She was later arrested on the

warrant because it was still in the computer system, even though it had been quashed.

The Court of Appeals held that the plaintiff failed to satisfy any of the exceptions to the public duty doctrine. The court further stated that, even if a duty could be shown, the plaintiff failed to show that the county did not exercise ordinary care. *Vergeson*, 145 Wn. App. at 529.

With regard to the special relationship exception, the court stated the three elements the same as every other case. *Vergeson*, 145 Wn. App. at 539. The plaintiff in *Vergeson* did not produce evidence sufficient to establish any of the three elements. The court found that the plaintiff had not made a direct inquiry seeking an assurance that the county would remove her quashed warrant from the computer database. She had only an unspoken expectation that her warrant would be removed from the database.

Defendants rely on *Harvey v. Snohomish County*, 157 Wn.2d 33, 134 P.3d 216 (2006), but *Harvey* is distinguishable on several grounds. First, police officers were on location within eight minutes of Harvey's 911 call. The incident happened almost simultaneously with the police moving in to respond. The 911 operator who took Harvey's call coded it properly, and law enforcement personnel responded promptly. That did not happen here. Second, Harvey was unable to show detrimental reliance

because the Supreme Court found that he had no options other than to stay in his residence because he knew that there was an armed, 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. *Harvey*, 157 Wn.2d at 40. Here, fleeing, either by foot or by vehicle, was a viable option for Bill Munich if he had not remained in the garage waiting for law enforcement to arrive. Third, the Supreme 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 42.²² In *Harvey*, the 911 operator and the police 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

²² Even the dissent, which argued that a duty had been established, agreed that there was no breach of duty. *Harvey*, 157 Wn.2d at 44 (Sanders, J., dissenting).

requested to respond. As a result, only one law enforcement officer responded, and only at normal speed. CP 216-222, 230-231.

The Supreme Court did not say in *Harvey* that it was adding a new element to the special relationship exception in 911 cases – that the assurance must be inaccurate. There is nothing in *Harvey* that indicates the Supreme Court intended to change the three elements of the special relationship exception. The fact that the opinion was written by Justice Chambers, who has argued repeatedly that the public duty doctrine should be abandoned,²³ underscores the lack of intent to add a fourth element that would make it more difficult to meet the requirements of the exception.

The fact that the Supreme Court did not change the law in *Harvey* is further demonstrated by the fact that, two weeks before the *Harvey* decision was issued, the Supreme Court decided *Cummins v. Lewis County*, 156 Wn.2d 844, 133 P.3d 458 (2006), which also involved the special relationship exception to the public duty doctrine in the context of

²³ See, e.g., *Cummins v. Lewis County*, 146 Wn.2d 844, 861, 133 P.3d 458 (2006) (Chambers, J., concurring); *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 795, 30 P.3d 1261 (2001) (Chambers, J., concurring). For the reasons set forth in Plaintiff's briefing in the trial court, CP 191-193, Plaintiff agrees that the public duty doctrine should be abandoned. The trial court acknowledged the arguments in favor of abandoning the public duty doctrine but did not believe it was the trial court's place to do so. VRP 7, 28-29.

a 911 call, and the Court stated the three requirements of the exception the same as it always has. *Cummins*, 156 Wn.2d at 854.

The result in *Harvey* was driven by the fact that the 911 agency did everything right – they recognized the threat to human life; they asked for an emergency response by all available officers; and law enforcement was on the scene within 6-8 minutes. That did not happen in this case. Bill Munich’s call was not dispatched with the proper code; Deputy Luvera was not dispatched with the urgency that the call required; and no other officers were toned or dispatched. The facts of this case are very different than *Harvey*.

The *Harvey* court appears to have considered whether the assurance was false as an aspect of the reliance element: the fact that an assurance is false is evidence demonstrating detrimental reliance. At page 38 of the decision, the Court stated: “Harvey cannot show that any alleged assurance made by the operator was false, unfulfilled, relied upon, or made to his detriment.” (emphasis added) The Court used the word “or,” indicating that reliance can also be demonstrated by evidence that the assurance was unfulfilled, or that the assurance was detrimentally relied upon by the caller. Thus, evidence that an assurance was false is not the only way to prove detrimental reliance in a 911 case. Detrimental reliance can be shown through circumstantial evidence, as in this case.

At the end of the *Harvey* opinion (pages 41-42), the Court summarized the required showing: “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 have always been required. The plaintiff in *Harvey* simply failed to show detrimental reliance.

A statement promising future action does not have to be false for someone to justifiably rely upon it. What a 911 operator’s assurances would mean to a reasonable person in the caller’s situation is a question of fact. In *Noakes v. City of Seattle*, 77 Wn. App. 694, 895 P.2d 842 (1995), for example, this Court stated that 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.” *Noakes*, 77 Wn. App. at 699. While the assurance itself must be express and not implied, once an assurance of action is given, there are questions of fact as to what the meaning of the assurance is to a reasonable person. 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. Under Defendants’ 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 in fact "on the way" and eventually arrived. That is not the law in Washington in 911 cases.

Finally, there are questions of fact as to whether Call Taker Smith's assurance to Bill Munich that a deputy was en route to him 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:

- 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 merely saying his radio call number, "40." Dispatcher Norton admitted that, when he entered Luvera's status in the CAD system as "en route," he had no way of knowing whether Luvera actually was en route to Munich's location. CP 444.
- If Deputy Luvera had been in his car, on his way to Bill Munich's location at 6:02 (when he was dispatched), he would have arrived sooner. It took Deputy Luvera 17 to 18 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.

We do not know if 911 Call Taker Smith's assurance that a deputy was en route to Munich was true or false at the time it was given. We do

not know what time Deputy Luvera actually was “en route” because he never told anyone when he began driving to Munich’s location. The “en route” notation was merely a code entered in the CAD system by Dispatcher Norton after Deputy Luvera acknowledged the dispatch, not an indication that Luvera was actually driving toward Munich’s location. CP 224-225. What we do know is that Munich’s call was dispatched as a Priority 2 Weapons Offense without an alert tone and that Deputy Luvera treated it as a routine call, not an emergency call. It is a reasonable inference from the evidence that Deputy Luvera did not in fact respond right away, because the manner in which the call was dispatched did not indicate any urgency. What we also know is that no other officer responded in an urgent manner because of the improper coding of the event and the lack of an alert tone.

A person who calls 911 should be entitled to rely on the 911 personnel dispatching the call properly, consistent with the 911 agency’s policies and procedures. There was no way for Bill Munich to have known that Smith and Norton had dispatched the call in violation of Skagit 911’s policies requiring that an incident involving a threat to human life be dispatched with the utmost priority. Instead, it was dispatched as a Priority Two Weapons Offense, and Deputy Luvera and others therefore failed to respond with the urgency that the situation required.

D. The trial court acted well within its broad discretion in ruling on evidentiary matters in denying Defendants' motion to strike the Declaration of Paul Linnee.

Paul Linnee currently works as a consultant to local governments on matters relating to Emergency Communications dispatching, operations, and related issues. CP 211-212. He is a three term past president of the Minnesota Chapter of the National Emergency Number Association and has been a member of the Association of Public Safety Communications Officers (APCO) for over 30 years and received their Life Member designation in 2008. CP 212. Contrary to Defendants' claim that Linnee "has no training or education as a police officer, and is not a police practices expert," his declaration states that he spent "24 years as a police officer, firefighter, public safety dispatcher and the manager of two E-911 dispatch centers." CP 212. As the Director of Emergency Communications for the City of Minneapolis for nine years, he worked closely with law enforcement and fire personnel because those were the services that the 911 center dispatched. CP 738. He also served for ten years as the Director of Administrative Services for the Public Safety Department of Richfield, Minnesota, which included police, fire, emergency preparedness, and inspections services. CP 738. Before that, he was licensed and certified by the State of Minnesota as a police officer and fire fighter in 1970 and worked for three years as a police officer and

firefighter and then for two years for the State of Minnesota's Police Planning team. CP 738. As his CV indicates, he also has extensive experience in the technological systems used by 911 centers and has been involved with private companies that provide technology products to the 911 industry. CP 738-739.

This case involves specialized police and emergency dispatch procedures, codes, and radio logs. Paul Linnee has extensive experience in this area, and his testimony will greatly assist the jury in understanding the issues and evidence in this case. CP 211-213; CP 738-739.

Linnee's declaration does not contain opinions of law like those excluded in some cases. Rather, his declaration contains allowable opinions on ultimate issues, based on the facts of the case. "Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." ER 704. Though the rule can be difficult to apply when testimony "straddles the line between permissible testimony on an ultimate issue of *fact* and impermissible testimony on a conclusion of law," 5B KARL B. TEGLAND, WASH. PRAC.: EVID. § 704.3, 260-61 (5th ed. 2007), the opinions set forth in Paul Linnee's declaration are based on specific facts and are therefore proper.

In *State v. Olmedo*, 112 Wn. App. 525, 49 P.3d 960, cited by

Defendants, the court stated, “[u]nder ER 704, a witness may testify as to matters of law, but may not give legal conclusions.” *Olmedo*, 112 Wn. App. at 532. The court explained, “Improper legal conclusions include testimony that a particular law applies to the case, or testimony that the defendant’s conduct violated a particular law.” *Ibid.* Linnee’s declaration does not opine on whether certain statutes or regulations were violated, as was the case in *Olmedo*. Linnee’s opinions relate to standard practices and procedures in the emergency communications field as applied to the facts of this case. For example, Linnee’s opinion that the police would have been able to save Munich’s life if the call had been coded properly and law enforcement had arrived earlier is not speculative as claimed by Defendants. It is based on specific facts relating to the time it took other officers to respond and the time it takes to drive from La Conner (Deputy Luvera’s starting point) to the scene, as set forth in Linnee’s declaration. CP 216, 225-230.

In *Noakes*, 77 Wn. App. at 697, as here, the plaintiffs alleged negligence in responding to their 911 calls, and the defendant brought a motion for summary judgment based on the public duty doctrine. The plaintiffs submitted the declaration of a retired police officer expert witness, who “opined that the police should and could have done more to get assistance to the Noakes, that it improperly classified the call as being

of lesser importance, and that the police had given specific assurances of assistance to them.” *Id.* The expert witness specifically opined that “the Seattle Police Department undertook a special duty to plaintiffs.” *Id.* at 699. This Court, in relying on the expert witness’ declaration, necessarily would have had to accept that such opinions were not conclusions of law, but instead opinions on factual issues. Similar to the expert’s opinions in *Noakes*, Linnee’s opinions are based on the specific facts of this case, and the factual bases for his opinions are clearly set forth in his declaration, unlike the expert declaration stricken in *McBride v. Walla Walla County*, 95 Wn. App. 33, 37, 975 P.2d 1029 (1999) (“Nothing in the declaration set forth specific facts indicating a genuine issue of material fact existed.”), cited by Defendants.

Defendants also rely on *Tortes v. King County*, 119 Wn. App. 1, 13, 84 P.3d 252 (2003), but *Tortes* stated that “testimony by an expert embracing the ultimate issue may be allowed.” *Id.* at 13. In *Tortes*, the portion of the expert’s opinion found objectionable related to opinions on foreseeability, and the court held that, under the facts of that case, foreseeability was a question of law rather than a question of fact. *See id.* (“although the question of foreseeability is usually one for the trier of fact, in this case the circumstances of the injury are so highly extraordinary and beyond the range of expectability that foreseeability is not correctly

framed as an issue of fact”). Additionally, the court found that the expert’s opinions on foreseeability were outside his area of expertise.

Finally, Linnee’s opinions are not speculative as claimed by Defendants. To the contrary, his 21-page declaration sets forth in detail the factual bases for his opinions, citing to and quoting from specific documents and deposition testimony. CP 211-231. The factual statements in Linnee’s declaration are based on the specific facts that he cites and his extensive experience in 911/emergency services operations.

V. CONCLUSION

The trial court appropriately denied Defendants’ motions for summary judgment because the assurances given to Bill Munich by Skagit 911 -- “my partner’s . . . got a deputy that’s headed towards you,” “there’s already a deputy that’s en route to you, ok?” – were indistinguishable from the assurances found sufficient to satisfy the “express assurances” requirement of the special relationship exception in *Beal* (“we’re going to send someone there”) and *Noakes* (“we’ll send someone out”). In fact, the assurances given to Bill Munich were even stronger because he was told that a deputy was already on the way.

We do not know whether the express assurance given by Skagit 911 to Bill Munich was true at the time it was given. The evidence indicates that Deputy Luvera probably was not actually “headed towards”

Munich when he was told that a deputy was “headed towards” him. In any event, never have the courts required a fourth element – that the assurance be false, as argued by Defendants – to satisfy the special relationship exception to the public duty doctrine in a 911 case.

While some cases have discussed whether the assurance given by the governmental official was true or false in connection with the issue of reliance, detrimental reliance can be established through evidence other than an assurance being false in a 911 case. Here, a jury could reasonably find that Bill Munich relied to his detriment on the assurances that help was on the way, because he lost critical time by remaining in his garage waiting for law enforcement to arrive rather than fleeing or seeking help elsewhere.

The trial court properly applied the law to the facts of this case in ruling that there are questions of material fact for a jury to decide in this case. The trial court also acted well within its discretion in refusing to strike portions of the declaration of 911 expert Paul Linnee. This Court should affirm.

RESPECTFULLY SUBMITTED this 14th day of September, 2010.



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CERTIFICATE OF MAILING

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