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NO. 85984-1

Court of Appeals, Case No. 64644-3-I & 64646-0-I (consolidated)

SUPREME COURT OF THE STATE OF WASHINGTON

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

Petitioners,

v.

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

Respondent.

RESPONDENT'S ANSWER TO BRIEF OF *AMICUS CURIAE*
WASHINGTON STATE PATROL IN SUPPORT OF PETITION FOR
REVIEW

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 2

 A. The Court of Appeals did not announce a new test for the special relationship exception to the public duty doctrine. 2

 B. The sole issue in the Court of Appeals was whether the express assurance element requires that the assurance be false or inaccurate. 3

 C. The Court of Appeals' decision provides appropriate incentives for 911 agencies to exercise reasonable care. 8

III. CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Beal v. City of Seattle, 134 Wn.2d 769, 785-786, 954 P.2d 237 (1998).....	4, 6, 7
Chambers-Castanes v. King County, 100 Wn.2d 275, 286, 669 P.2d 451 (1983).....	2
Cummins v. Lewis County, 156 Wn.2d 844, 133 P.3d 458 (2006).....	4, 6
Harvey v. County of Snohomish, 157 Wn.2d 33, 134 P.3d 216 (2006).....	4, 5, 6, 7, 8
Munich v. Skagit Emergency Communications Center, 161 Wn. App. 116, 121, 250 P.3d 491 (2011).....	2, 3, 9
Noakes v. City of Seattle, 77 Wn. App. 694, 895 P.2d 842 (1995).....	6, 7

I. INTRODUCTION

Respondent Munich submits this response to the Washington State Patrol's (WSP) amicus brief in support of Skagit County's Petition for Review.

The WSP's amicus brief repeats the same arguments made by Skagit County in its Petition for Review; mischaracterizes the Court of Appeals' decision as creating a new test for the special relationship exception to the public duty doctrine; and argues at length about the reliance element of the special relationship exception, which was not an issue on which the Court of Appeals accepted discretionary review.

The Court of Appeals followed existing law¹ in holding that the express assurance element of the special relationship exception to the public duty doctrine only requires proof that an express assurance was given to a 911 caller and does not require proof that the assurance was false. The Court of Appeals' decision does not conflict with any decisions of this Court, nor does it conflict with any other decision of the Court of Appeals or present an issue of substantial public interest. This case simply does not merit review by this Court.

¹ See, e.g., *Beal v. City of Seattle*, 134 Wn.2d 769, 785-786, 954 P.2d 237 (1998).

II. ARGUMENT

A. **The Court of Appeals did not announce a new test for the special relationship exception to the public duty doctrine.**

Contrary to the WSP's claim, the Court of Appeals did not announce a new test for the special relationship exception to the public duty doctrine. The Court of Appeals recited the same three elements that this Court has always required: (1) direct contact or privity between the public official and the plaintiff which sets the plaintiff apart from the general public, and (2) an express assurance given by the public official, which (3) gives rise to a justifiable reliance on the part of the plaintiff. *Munich v. Skagit Emergency Communications Center*, 161 Wn. App. 116, 121, 250 P.3d 491 (2011). The WSP itself acknowledges that these are the three elements that a plaintiff must establish to satisfy the special relationship exception. *WSP's Amicus Brief* at p.4.

The Court of Appeals did not "eliminate the falsity component" as claimed by WSP. As the Court of Appeals recognized, there never has been a requirement that the express assurance given by a public official be false in order to establish the elements of the special relationship exception in 911 cases, which involve assurances of future action, as opposed to cases involving building code issues, which involve public officials providing information.

This Court has required the same three elements to establish the special relationship exception for nearly 30 years. *Chambers-Castanes v. King County*, 100 Wn.2d 275, 286, 669 P.2d 451 (1983).

There is no evidence that the established elements of the special relationship exception have had any detrimental effect on the delivery of 911 services.

B. The sole issue in the Court of Appeals was whether the express assurance element requires that the assurance be false or inaccurate.

This case is on appeal as a result of the Court of Appeals granting discretionary review on the issue of whether the special relationship exception to the public duty doctrine requires a showing that the assurance received by a 911 caller be false or inaccurate. *Munich*, 161 Wn. App. at 117-118; *id.* at 120 (“Skagit 911 and Skagit County sought discretionary review, which we granted on the narrow issue of whether the express assurance requirement of the special relationship exception requires a false or inaccurate assurance.”). That is the only question that the Court of Appeals decided: “We hold that the [Munich] Estate does not need to prove that the assurance was false or inaccurate” *Munich*, 161 Wn. App. at 118; *see also id.* at 125.

The WSP’s amicus brief discusses the reliance element of the special relationship exception and broader issues of liability, none of which were before the Court of Appeals. As discussed in Respondent Munich’s Answer to Petition for Review, there is substantial evidence in this case that Skagit 911 was negligent in failing to code Bill Munich’s call properly and failing to dispatch law enforcement with an alert tone, which resulted in a delayed response to Mr. Munich’s call and ultimately

his death.² *Answer to Petition for Review* at pp.3-10. But the issues of Skagit 911's breach of duty and Mr. Munich's detrimental reliance on the 911 operator's assurances were not before the Court of Appeals and are inappropriately raised by WSP in its amicus brief.

WSP's argument that the Court of Appeals disregarded the reliance element of the special relationship ignores the fact that the reliance element was not before the Court of Appeals. *WSP Amicus Brief* at p.3. WSP discusses at length what is required to prove detrimental reliance (*WSP Amicus Brief* at pp.4-6), but WSP is arguing an issue that was not before the Court of Appeals and was not decided by the Court of Appeals. The Court of Appeals did not grant discretionary review on the question of what is required to prove reliance or whether the evidence in this case is sufficient to create an issue of material fact as to whether Mr. Munich relied to his detriment on the assurances given by Skagit 911.

While it is correct that a plaintiff must show reliance on the assurance given by a 911 operator, WSP misrepresents the holdings of *Harvey*³, *Cummins*⁴, and *Beal* in claiming that the only way to prove

² As a practical matter, there is no difference between a 911 call taker failing to dispatch an officer altogether in response to a call for assistance, as in *Beal v. City of Seattle*, 134 Wn.2d 769, 954 P.2d 237 (1998), and, as occurred in this case, a 911 call taker failing to dispatch a call at the priority level that a threat to human life requires and failing to alert or dispatch the officers closest to the caller's location, who would be in the best position to respond promptly. The result in both cases is a delayed response by law enforcement, which in both cases resulted in the caller's death.

³ *Harvey v. County of Snohomish*, 157 Wn.2d 33, 134 P.3d 216 (2006).

⁴ *Cummins v. Lewis County*, 156 Wn.2d 844, 133 P.3d 458 (2006).

detrimental reliance is to establish that the express assurance was false or unfulfilled. *WSP Amicus Brief* at p.5. WSP cites *Cummins*, 156 Wn.2d at p.855, which merely states that a plaintiff must prove privity and an express assurance. The page cited by WSP does not say anything about the assurance needing to be false or unfulfilled. Likewise, the page cited in *Beal*, 134 Wn.2d at p.787, supports the Court of Appeals' decision. There, this Court stated that a 911 case like this "involves express assurances which the plaintiff relies upon and the government fails to fulfill." The Court indicated at footnote 5 that the issue with regard to breach of duty is whether the 911 agency exercised reasonable care in the circumstances – in other words, did the 911 agency exercise reasonable care in fulfilling the promise of future action made to the plaintiff? The question of whether a governmental entity exercised reasonable care in *fulfilling* a promise of future action relates to the issue of *breach* of duty, not the *existence* of a duty under the special relationship exception.

And the portion of *Harvey* cited by WSP, 157 Wn.2d at pp.38-39, simply suggests that, in order to satisfy the reliance element of the special relationship exception, a plaintiff in a 911 case must show that the assurance given by the 911 agency was either untruthful, inaccurate, or relied upon to the caller's detriment. While the only way to prove detrimental reliance in a building code case might be to prove that the information provided by the governmental entity was inaccurate, in a 911 case a plaintiff can prove detrimental reliance through other means, such as showing that the plaintiff delayed pursuing other options to protect

himself from an assailant (e.g., by remaining on the premises waiting for law enforcement to arrive rather than attempting to escape) as a result of a 911 operator's assurance that help was on the way, and the governmental entity then failing to exercise reasonable care in fulfilling the promise of assistance. *See, e.g., Beal*, 134 Wn.2d at 786-787; *Noakes v. City of Seattle*, 77 Wn. App. 694, 895 P.2d 842 (1995). As this Court has recognized, whether a party justifiably relies on a statement or promise of future action is a fact question generally not amenable to summary judgment (*see, e.g., Beal*, 134 Wn.2d at 786-787), except in cases like *Harvey* or *Cummins* in which the plaintiff fails to establish an issue of material fact as to reliance. The plaintiff in *Harvey* simply failed to show any evidence of an express assurance by the 911 operator that he relied on to his detriment.

WSP repeatedly blurs the distinction between building code cases and 911 cases by referring to "statements" made by 911 call takers, rather than "promises of future action." This Court recognized the distinction between building code and 911 cases in *Beal*, as the Court of Appeals noted. *Munich*, 161 Wn. App. at 122-123. While in some cases 911 call takers may merely make statements providing information (such as in *Harvey*), that is not what happened in this case. Here, the 911 call taker made express assurances of future action: "My partner [has] already got a deputy that's headed towards you," and "There's already a deputy that's

en route to you, ok?”⁵ CP 112. Although not an issue on appeal, there is substantial evidence that Skagit 911 failed to exercise reasonable care in fulfilling these promises of future action, because Mr. Munich’s 911 call was dispatched as a Priority 2 rather than a Priority 1. As a result, the police officers who were closest to Mr. Munich’s location did not respond, and the one officer who did respond did so at normal speed, thinking it was a routine call, rather than responding “in code” – traveling at a faster speed with lights and siren on.

WSP’s assertion that the Court of Appeals’ decision “expands the special relationship exception to create actionable tort liability based upon any communication that takes place between a member of the public and the public official” is simply untrue. *WSP Amicus Brief* at p.5. Under the Court of Appeals’ decision, a 911 call taker’s communication to a caller must involve an express assurance of future action, and there must be evidence that the caller relied to his or her detriment on that assurance. If no assurance is given or no evidence of detrimental reliance is shown, no duty is created, and the case will be dismissed, as demonstrated by this Court’s decision in *Harvey*.

⁵ WSP’s suggestion that there was no express assurance in this case is not well taken. *WSP Amicus Brief* at p.6. The assurances given by the 911 call taker in this case were indistinguishable from the assurances found sufficient to establish the express assurance element of the special relationship exception in *Beal*, 134 Wn.2d at 785, and *Noakes*, 77 Wn. App. at 699.

C. The Court of Appeals' decision provides appropriate incentives for 911 agencies to exercise reasonable care.

As discussed above, the Court of Appeals' decision follows existing law. It does not expose WSP or any other governmental entity providing 911 services to new liability.

Nor does the Court of Appeals' decision penalize 911 call takers for providing accurate information to callers. In order to come within the special relationship exception, a 911 call taker must provide an express assurance of action to a caller, and the caller must rely to his or her detriment on that assurance of action. If a 911 call taker merely makes an accurate statement providing information to a caller, without making any promise of action being taken on the caller's behalf, or if there is no evidence that the caller relied to his or her detriment on an assurance of action, the special relationship exception will not be established, and there will be no liability on the part of the 911 agency, as demonstrated by *Harvey*.

Rather than weakening the 911 system as claimed by WSP, the Court of Appeals' decision strengthens public confidence in the 911 system by affirming that governmental entities providing 911 services can be held accountable when they make a promise of future action to a caller and then fail to exercise reasonable care in fulfilling that promise. Holding governmental agencies accountable for their negligence through tort litigation provides an incentive for government agencies to provide

proper training to their employees and to exercise reasonable care.⁶ Allowing 911 agencies to be held accountable in cases in which the elements of the special relationship exception are satisfied will have the beneficial effect of giving 911 agencies the incentive to use reasonable care in responding to calls and to train their employees properly.

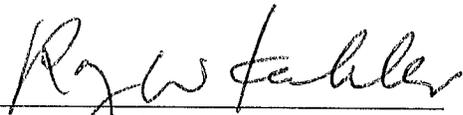
III. CONCLUSION

For the most part, the WSP's amicus brief repeats arguments already made by Skagit County. To the extent the WSP goes beyond the arguments made by Skagit County and discusses broader issues of liability and the reliance element of the special relationship exception, the WSP's amicus brief goes beyond the narrow issue on which the Court of Appeals granted discretionary review in this case. The Court of Appeals followed existing law in deciding "the narrow issue of whether the express assurance requirement of the special relationship exception requires a false or inaccurate assurance."⁷ There is no conflict between the Court of Appeals' decision and decisions of this Court, nor does this case present an issue of substantial public interest that merits review by this Court. This Court should deny Skagit County's Petition for Review.

⁶ There is evidence in this case that Skagit 911 failed to provide adequate training to its 911 call takers and that other call takers failed to dispatch Priority One calls properly. CP 514, 517, 518, 519, 521, 631 (testimony of former Skagit 911 dispatcher Tammy Canniff, describing some of the problems she observed with how Skagit 911 was being operated, which caused her to resign her position).

⁷ *Munich*, 161 Wn. App. at 120.

RESPECTFULLY SUBMITTED this 20th day of July, 2011.

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