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NO. 64644-3

NO. 64646-0

COURT OF APPEALS STATE OF WASHINGTON
DIVISION I

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

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

Petitioner/Defendant,

v.

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

Respondent/Plaintiff.

JOINT REPLY BRIEF OF APPELLANTS SKAGIT 911, SKAGIT
COUNTY AND SKAGIT COUNTY SHERIFF'S OFFICE
IN COURT OF APPEALS CAUSE NOS. 64646-0 and 64644-3

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I. INTRODUCTION

The Estate is unable to demonstrate that Mr. Munich was owed any legal duty under the circumstances of this case. Instead, the Estate takes an incorrect view of the Public Duty Doctrine, asserting that a government agency need not provide false information to give rise to a duty of care under the special relationship exception, and that a duty may be created based on the implied or assumed expectations of a 911 caller. These assertions are contrary to established precedent, and should be rejected.

The special relationship exception to the Public Duty Doctrine does not apply because Mr. Munich did not seek or receive any express assurance that contained any false or unfulfilled promise, and because there is no actual evidence, other than the Estate's speculative and unsupported assertions, that Mr. Munich detrimentally relied on any assurance by Skagit 911.

II. REPLY TO STATEMENT OF FACTS

The Estate's statement of facts is largely devoted to a recitation of alleged breaches of standard of care by employees of Skagit 911. However, the legal issue before this Court is the absence of any duty owed to Mr. Munich under the circumstances of this case. Accordingly, while Skagit 911, Skagit County and Skagit County Sheriff's Office (hereinafter "Skagit County") strongly contest that any conduct by Skagit 911

constituted a breach of any standard of care, and disagree with numerous inferences contained in the Estate's statement of facts, a point-by-point rebuttal of the Estate's recitation of facts is unnecessary for the purposes of addressing the present issues before the Court. Skagit 911 and Skagit County respectfully refer the Court to the statement of facts contained in Appellants' opening brief.

III. REPLY TO LEGAL ARGUMENT

A. WASHINGTON LAW UNEQUIVOCALLY REQUIRES THAT A 911 CALLER SOUGHT, RECEIVED AND RELIED ON A FALSE, INACCURATE OR UNFULFILLED EXPRESS ASSURANCE TO GIVE RISE TO A DUTY OF CARE UNDER THE SPECIAL RELATIONSHIP EXCEPTION

Despite the Estate's arguments to the contrary, the special relationship exception to the Public Duty Doctrine gives rise to a duty only when a 911 caller both seeks and receives an express assurance, and only when the express assurance contains false or inaccurate information.

Again, our Supreme Court has held that a "special relationship" exists only when: (1) there is direct contact between the government entity; (2) there are express assurances given by the government official to the plaintiff; (3) which give rise to justifiable reliance on the part of the plaintiff. *Babcock v. Mason County Fire District No. 6*, 144 Wn.2d 744, 785-86, 30 P.3d 1261 (2001). Of particular importance here is the second requirement – express assurance.

Recent Washington Supreme Court precedent clearly holds that the express assurance element requires both: (1) that “a plaintiff must seek an express assurance and the government must unequivocally give that assurance; and (2) that the assurance must contain an element of falsity, such as incorrect information, or a false or unfulfilled promise to act in a particular manner. See *Harvey v. Snohomish County*, 157 Wn.2d 33 at 34-39, 134 P.2d 216 (2006); *Babcock*, 144 Wn.2d at 78.

The Estate is unable to demonstrate the existence of either of these elements.

1. Mr. Munich did not seek and receive an unequivocal express assurance

The facts of this case do not establish that Mr. Munich either sought or received an express, unequivocal assurance, as required under the special relationship exception.

In *Babcock*, our Supreme Court held that a fire fighter’s statement to plaintiff that fire fighters would take care of protecting his property did not constitute an express assurance because the plaintiff “did not seek any assurance from the fire fighter”; and (2) the statement made by the fire fighter “did not indicate that she or other fire fighters would act in a specific manner.” *Babcock*, 144 Wn.2d at 791.

In the instant case, Mr. Munich did not seek any assurance from 911 operators, and no unequivocal assurance to act in a specific manner

was provided. While Skagit 911 employee Norma Smith stated during Mr. Munich's call as follows: "my partner's already got a deputy that's headed toward you," that statement of fact contained no assurance that any government agent would act in a specific manner above and beyond the general provision of police services, a duty owed only to the public in general. Ms. Smith made no assurance that Mr. Munich would be protected, or that police contact would follow within any particular amount of time.

The Estate contends that the statement that a deputy was on his way to Mr. Munich "can be reasonably construed to mean that law enforcement will respond in a timely manner consistent with the nature of the incident," and, therefore, that such an implied assurance to respond in a "timely manner" gives rise to a duty to do so.

This is not the law. An inherent, implied or assumed assurance is not sufficient to create a legal duty under the special relationship exception to the Public Duty Doctrine. *See, e.g. Babcock*, 144 Wn.2d at 789; *Honcoop v. State*, 111 Wn.2d 182, 92-93, 759 P.2d 1188 (1988) (assumption that the government was acting reasonably did not give rise to a duty to do so); *Meaney v. Dodd*, 111 Wn.2d 174, 181, 759 P.2d 455 (1988) (no liability for alleged misrepresentations regarding compliance with noise regulations, when the plaintiffs never sought an express

assurance that such regulations would be complied with); *Cummins v. Lewis County*, 156 Wn.2d 844, 133 P.3d 459 (2006) (no duty arising as a result of a call to 911 for emergency assistance based on the alleged “inherent” assurance that medical assistance will be forthcoming once a call is placed); *Sinks v. Russell*, 109 Wn. App. 299, 301-04, 34 P.2d 1243 (2001) (police officers’ statement to a 911 caller that he would respond to the scene of a vehicular assault did not constitute an express assurance that he would protect the caller).

The Estate also asserts that a duty should arise here because the statements made by the 911 operator in this case are indistinguishable from the statements made in *Beal v. City of Seattle*, 134 Wn.2d 769, 954 P.2d 237 (1998). In that case, a 911 caller was told “We’ll get the police over there for you okay?” The Court held that this statement gave rise to a duty to dispatch police to the caller’s location. However, in *Beal*, the Court held that the duty created was consistent only with the express statement made – the duty to “get police over there” for the 911 caller. The duty was breached because the 911 call-taker ***never*** dispatched police in response to that call. By the time the caller was shot, at least 20 minutes later, “no police officer had been dispatched in response to the call for stand-by assistance.” *Beal*, 134 Wn.2d at 774. The *Beal* court did not hold that the promise to dispatch a police officer gave rise to any

additional implied duties, such as a duty to respond in a particular manner or with a particular urgency. It simply held that an express promise to dispatch a police officer gave rise to a duty to dispatch a police officer. *See Id.* at 245 (“express assurances were made that police would be dispatched to assist”).

Even assuming that *Beal* supports the conclusion that the 911 caller’s statement here (that a deputy was responding) gives rise to a duty to respond, *that duty was fulfilled*. *Beal* does not support the Estate’s proposition that that this statement gives rise to additional *implied* duties, such as a duty to respond in a particular manner or with a particular urgency. Again, an assurance that is not both express and unequivocal is insufficient to give rise to any duty. The test is what express and unequivocal assurances were made, not what the caller assumed or implied.

Because Mr. Munich did not seek or receive any unequivocal, express duty of protection, no such duty was created. The Estate’s claims fail on this basis.

2. Skagit 911 did not make any “false, inaccurate or unfulfilled” promise

The Estate next asserts that the special relationship exception to the Public Duty Doctrine does not require that an express assurance contain incorrect information in the context of this case, claiming that the incorrect

information requirement applies only in cases involving building code/permit issues; not in cases involving the provision of emergency services.

This is incorrect. Our Supreme Court held in both the *Babcock* and *Harvey* cases that, in the context of emergency services such as those here at issue, an express assurance must contain false information, such as a “false, inaccurate or unfulfilled” promise, to give rise to a duty of care. See *Babcock*, 144 Wn.2d at 789 (“the special relationship exception applies “only where a direct inquiry is made by an individual and incorrect information is clearly set forth by the government.”); *Harvey*, 157 Wn.2d at 34 (holding that an assurance must be “untruthful or inaccurate” to give rise to a duty of care) (emphases added).

In fact, it is this particular requirement – that an express assurance must contain false information in order to give rise to a duty of care – that distinguished the *Harvey* case from those prior emergency services cases in which a duty was found to exist under the special relationship exception.

In *Harvey*, the most recent Supreme Court case discussing whether statements by 911 operators may give rise to a duty of care, the Court held that a 911 operator’s statements to a caller that the operator had dispatched the call to police, and that police were in the area, were insufficient to give

rise to a duty. In so holding, the Court explained that “Harvey cannot show that any alleged assurance made by the 911 operator was false, unfulfilled, relied upon, or made to his detriment.” *Harvey*, 157 Wn.2d at 38. Of particular significance, the Court relied on the fact that the plaintiff:

[N]ever received any assurance from the operator that was untruthful or inaccurate... in other words, when the operator told Harvey she had notified police of the situation, she had. When the operator told Harvey the police were in the area and officers were setting up, they were.

This factor distinguished the situation in *Harvey* from previous Supreme Court cases – including *Beal* – in which the Court held that specific assurances were not made “when the operator told the callers police were dispatched when they had not been”. *Id.* at 39 (emphasis added). The Court in *Harvey* distinguished these cases as follows:

See Chambers-Castanes, 100 Wn.2d at 279-80, 669 P.2d 451 (police received numerous calls about the incident, did not respond for an hour and a half and, at one point, the operator told the caller that an officer had been dispatched but in fact was not); *Beal*, 134 Wn.2d at 774, 785, 954 P.2d 237 (the caller was told by the operator to wait in her car for the police to arrive, but the police were never dispatched and the caller was shot and killed); *Bratton*, 145 Wn.2d at 575, 39 P.3d 959 (the operator told the caller that ‘if her or her family was threatened again that the police would be sent.’ Another call was made to report another threat, however, the operator did not send the police, and the caller was shot).

Id. (emphases added). The fact that no false or unfulfilled promise was made by the 911 operators in *Harvey* was dispositive to the determination that no duty existed:

Unlike *Chambers-Castanes*, *Beal*, and *Bratton*, in this case Harvey never received any assurance from the operator that was untruthful or inaccurate.

Harvey, 157 Wn.2d at 39 (footnotes omitted; emphases added).

Regardless of the origin of the falsity requirement, our Supreme Court expressly adopted and applied the requirement to the 911-call context in the *Harvey* case. It is Washington law, and applies to this case.

In attempted support of its contention that the falsity requirement need not be applied in this case, the Estate advances a tortured interpretation of *Beal v. City of Seattle*, 134 Wn.2d 769, 954 P.2d 237 (1998), contending that *Beal* stands for the proposition that the falsity requirement does not apply in cases where the negligence alleged is a failure to *act* rather than a failure to provide inaccurate information. *Beal* does not stand for this proposition.

In *Beal*, the plaintiff had obtained a no-contact order against her husband, who had assaulted her the previous week, and who had been harassing and threatening her since. The plaintiff called 911 from a neighbor's apartment to request a "civil stand-by" so that she could retrieve belongings from the apartment she shared with her husband. The

911 call-taker told the plaintiff that “we’re going to send somebody there” and “[w]e’ll get police over there for you okay?” The plaintiff told the 911 operator that she would wait outside the apartment. *Id.* at 774.

At least 20 minutes after the call to 911, the plaintiff’s husband came out of the apartment and shot her. Significantly, “By the time of the shootings, no police officer had been dispatched in response to the call for stand-by assistance.” *Id.* In other words, the act promised by 911, that police would be dispatched, was unfulfilled.

The defendant in *Beal* asserted that the operator’s assurances of future action were not sufficient to give rise to a duty of care under the special relationship exception, arguing that an assurance “must have been inaccurate **at the time given.**” Thus, a “prediction of future acts, with no time requirements is not inaccurate information” sufficient to give rise to a duty, because such a prediction of future acts cannot be considered inaccurate at the time it is made. *Id.* at 786.

The *Beal* court rejected this reasoning, holding that the inaccuracy of a statement, particularly one promising future acts, cannot necessarily be determined at the moment the statement is made. In other words, “a definite assurance of future acts could be given without a specific time frame, with the government then failing to carry out those acts.” *Id.* Thus, a government agency may make a promise to act, and the promise may be

proven false by the agency's subsequent failure to fulfill the promise and perform the promised acts.

Beal does not support plaintiff's proposition that a statement need not be false, inaccurate or unfulfilled to give rise to a duty in 911 cases. In fact, the *Beal* Court's holding actually supports the proposition that the falsity requirement applies to 911 cases such as this one. The *Beal* Court adopted the falsity requirement, and explained how it applies in 911 cases where a promise to act is made. *Beal* holds that a promise to act that is unfulfilled is sufficient to satisfy the requirement of falsity and, thus, give rise to a duty of care. Accordingly, the holding in *Beal* is consistent with the holdings in *Meaney*, *Babcock*, and *Harvey*, that a promise must be "false," "inaccurate", or "unfulfilled" to give rise to a duty of care.

In *Beal*, the court held that the falsity requirement was satisfied because the promise act remained unfulfilled. 911 promised to send police to the plaintiff's location in compliance with her request, but never did. This case is distinguishable.

Here, the Skagit 911 call-taker did not promise a future act. She stated that a deputy was on his way. This statement was truthful *at the time it was made*. Even if the call-taker's statement could be interpreted as a future promise to dispatch police, this promise was fulfilled. Deputy Luvera had been dispatched and was on his way to Mr. Munich, just as

Skagit 911 said he was. All of the available evidence indicates that Deputy Luvera was responding to the call at the time 911 said he was. At the time the call-taker made this statement, a dispatcher had dispatched Deputy Luvera to the call. CP 125. Deputy Luvera had responded to 911 by stating his radio call number, “40”, acknowledging thereby that he had received the dispatch and was responding to the call. *Id.* Deputy Luvera then began asking clarifying questions of the 911 dispatcher, an additional indication that he was responding to the call. *Id.* In fact, Deputy Luvera testified at his deposition that he began to drive from his location in the La Conner area to Mr. Munich’s location when he received the dispatch. CP 97.

The Estate has not proffered any evidence whatsoever that Deputy Luvera was not actually responding to the call at the time 911 told Mr. Munich that a Deputy was responding. The Estate relies only on the speculative assertion that the Deputy was not actually enroute. However, this assertion is not supported by any actual evidence, and unsupported assertions of fact are insufficient to overcome a motion for summary judgment. *See Seven Gables Corp. v. MGM/UA Entm’t Co.*, 106 Wn.2d 113 (1986) (a non-moving party may not rely on speculation or argumentative assertions to overcome a motion for summary judgment); *Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 359-60 (1988)

(unsupported statement of ultimate facts, conclusions of fact, or conclusory statements of fact are insufficient to overcome a motion for summary judgment).

The Estate also asserts that, even if Deputy Luvera was en route, 911 had an implied duty to ensure that he “exercise reasonable care and respond in a timely manner.” Again, however, an express promise, such as a promise to dispatch police, does not give rise to any implied or assumed duty to respond in any particular manner or within any particular timeframe. *See, e.g. Cummins v. Lewis County*, 156 Wn.2d 844, 133 P.3d 459 (2006) (no duty arising as a result of a call to 911 for emergency assistance based on the alleged “inherent” assurance that medical assistance will be forthcoming once a call is placed).

911 did not make any false, inaccurate or unfulfilled assurance to Mr. Munich. The Estate’s claim under the special relationship exception fails on this basis as well.

B. THERE IS NO EVIDENCE THAT MR. MUNICH DETRIMENTALLY RELIED ON ANY STATEMENT BY 911.

The Estate’s claims under the special relationship exception also fail because there is no evidence to support its assertion that Mr. Munich detrimentally relied on any statement by Skagit 911.

First, because no express assurance was made to Mr. Munich, Mr. Munich could not have justifiably relied on any such assurance as a matter of law. *See Cummins*, 156 Wn.2d at 856-57 (holding that a 911 caller did not justifiably rely on any express assurance, because no assurance was made sufficient to justify any such reliance).

Second, the Estate has not proffered any actual evidence that Mr. Munich remained in his garage for any length of time after his call to Skagit 911 ended. In fact, he made a call to his friend Mr. Heiner from Highway 20, several yards away from his garage, less than two minutes after he got off the phone with Skagit 911.

Third, the Estate is without evidence tending to demonstrate that Mr. Munich would have acted any differently in the absence of any statement by Skagit 911 employees. *See Harvey*, 157 Wn.2d at 40 (absence of detrimental reliance found as a matter of law when there was no evidence that the plaintiff would have left his location in the absence of any statement by the 911 operator, “especially considering that there appeared to be a crazed man waiting outside.”).

The Estate makes several highly speculative assertions in arguing that Mr. Munich relied on statements by Skagit 911. For instance, the Estate contends that Mr. Munich ran North on Highway 20 “because he knew law enforcement would arrive via Highway 20 from the North.”

This and the Estate's additional contentions regarding Mr. Munich's alleged reliance are purely speculative and without evidentiary support. Thus, they are insufficient to overcome a summary judgment motion. *See Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1 13 (1986); *Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 359-60 (1988).

The Estate is unable to demonstrate that that Mr. Munich detrimentally or justifiably relied on any assurance by Skagit 911. Its claims under the special relationship exception fail on this basis as well.

C. THE TRIAL COURT IMPROPERLY CONSIDERED THE DECLARATION OF MR. LINNEE.

The trial court erred in denying defendants' motion to strike and exclude the testimony of Mr. Linnee, and in considering Mr. Linnee's declaration in conjunction with Skagit 911 and Skagit County's summary judgment motions. The standard of review of evidentiary rulings made in conjunction with a summary judgment motion is *de novo*. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998); *Warner v. Regent Assisted Living*, 132 Wn. App. 126, 135-36, 130 P.3d 865 (2006).

Mr. Linnee is not a police practices expert, and his three years working as police officer in the 1970s does not qualify him as such. His opinions as to police practices and procedure are improper and should have been stricken by the trial court.

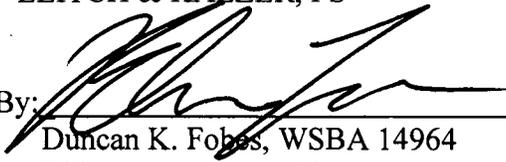
As discussed in Skagit 911 and Skagit County's opening brief, Mr. Linnee's declaration contains numerous improper legal conclusions and speculative assertions of fact not conceivably based on Mr. Linnee's asserted area of expertise. These assertions are similarly improper, and should also have been stricken by the trial court. *See Washington State Ins. Exch. & Assoc. v. Fisons Corp.*, 122 Wn.2d 299, 244, 858 P.2d 1054 (1993) (“[I]legal opinions on the ultimate issues before the court are not properly considered in the guise of expert testimony.”); *McBride v. Walla Walla County*, 95 Wn. App. 33, 975 P.2d 1029 (1999) (police expert opinion excluded because it contained conclusory assertions rather than factual allegations).

IV. CONCLUSION

Respondents Skagit 911, Skagit County and Skagit County Sheriff's Office respectfully request this Court to reverse the decision of the trial court and grant summary judgment dismissal of this case.

RESPECTFULLY SUBMITTED this 15th day of October, 2010.

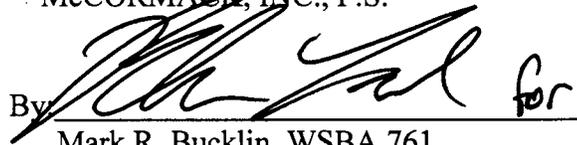
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By

A handwritten signature in black ink, appearing to be "Mark R. Bucklin", written over a horizontal line. To the right of the signature, the word "for" is written in a cursive script.

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