IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DEIRDRA BRODERSON, individually,	)	**No. 27789-5-III**
	)	
Appellant,	)	
	)	
v.	)	
	)	**Division Three**
CITY OF WENATCHEE, a municipality,	)	
and DAVID NICHOLS, individually,	)	
	)	
Respondents.	)	**UNPUBLISHED OPINION**

Korsmo, J. — Ms. Deirdra Broderson fell into an open crawl space during an inspection conducted by a city building inspector in April 2005. Her negligence suit was dismissed on the ground that the public duty doctrine barred her claim. She argues that the public duty doctrine does not apply. We disagree and affirm.

FACTS

In April 2005, David Nichols, a building inspector for the City of Wenatchee (City), conducted an occupancy inspection of a newly constructed office building built by Dr. Fred Melton. Upon arriving, Mr. Nichols noticed Dr. Melton in a crawl space

arranging boxes. When Mr. Nichols was asked if he wanted Dr. Melton to leave the lid to the crawl space off to facilitate his inspection, he replied either "yes" or "go ahead." As a result of this direction, Dr. Melton left off the lid to the crawl space when he left. Shortly thereafter, while Mr. Nichols and Dr. Melton were engaged in conversation, Ms. Broderson entered the room carrying boxes. She apparently did not see that the lid to the crawl space was off. She fell, injuring herself.

In January 2007, Ms. Broderson filed a complaint against Mr. Nichols and the City alleging negligence. In November 2008, the Chelan County Superior Court granted Respondents summary judgment against Ms. Broderson on the ground that she had not demonstrated a material fact related to the obligation of a duty pursuant to the public duty doctrine. The court subsequently denied Ms. Broderson's motion for reconsideration and entered final judgment in January 2009.

Ms. Broderson timely appealed to this court.

ANALYSIS

This appeal challenges the application of the public duty doctrine to Ms. Broderson's negligence claim against Respondents.

Summary judgment review is *de novo*, and we perform the same inquiry as the trial court. *Lunsford v. Saberhagen Holdings*, *Inc.*, 166 Wn.2d 264, 270, 208 P.3d 1092

(2009). We view all facts and inferences in the light most favorable to the nonmoving party. *Id.* Summary judgment is proper "if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.*; *see also* CR 56(c). "Summary judgment is not proper if reasonable minds could draw different conclusions from undisputed facts or if all of the facts necessary to determine the issues are not present." *Schwindt v. Underwriters at Lloyd's of London*, 81 Wn. App. 293, 297-298, 914 P.2d 119 (citing *Ward v. Coldwell Banker/San Juan Props.*, *Inc.*, 74 Wn. App. 157, 161, 872 P.2d 69 (1994)), *review denied*, 130 Wn.2d 1003 (1996).

The party opposing a motion for summary judgment "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or having its affidavits considered at face value." *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Further, "after the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists." *Id.* at 13 (citing *Dwinell's Cent. Neon v. Cosmopolitan Chinook Hotel*, 21 Wn. App. 929, 587 P.2d 191 (1978), *review denied*, 92 Wn.2d 1009 (1979)). If the nonmoving party fails to show that a genuine issue as to a material fact exists, then summary judgment is appropriate. *Id.*

Public Duty Doctrine.

Ms. Broderson first argues that the abrogation of sovereign immunity under RCW 4.96.010 means that the City and Nichols owed her a duty of care under common law negligence because her injury was foreseeable.

In 1967 the Legislature stated:

> All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation.

RCW 4.96.010(1). The enactment of RCW 4.96.010 merely removed the barrier of sovereign immunity to permit a tort suit against a governmental entity; it did not create any new causes of action, duties, or liabilities where none existed before. *J & B Dev. Co. v. King County*, 100 Wn.2d 299, 304-305, 669 P.2d 468 (1983), *overruled on other grounds by Taylor v. Stevens County*, 111 Wn.2d 159, 759 P.2d 447 (1988); *see also Chambers-Castanes v. King County*, 100 Wn.2d 275, 288, 669 P.2d 451 (1983); *Moore v. Wayman*, 85 Wn. App. 710, 717, 934 P.2d 707, *review denied*, 133 Wn.2d 1019 (1997). It has been repeatedly held that

> [t]he threshold determination in a negligence action is whether a duty of care is owed by the defendant to the plaintiff. Whether the defendant is a governmental entity or a private person, to be actionable, the duty must be one owed to the injured plaintiff, and not one owed to the public in general. This basic principle of negligence law is expressed in the "public duty doctrine."

Taylor, 111 Wn.2d at 163 (citation omitted); *accord Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 784-785, 30 P.3d 1261 (2001). Under the public duty doctrine

> [n]o liability may be imposed for a public official's negligent conduct unless it is shown that "the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (*i.e.* a duty to all is a duty to no one)."

Taylor, 111 Wn.2d at 163 (quoting *J & B Dev. Co.*, 100 Wn.2d at 303).

Plaintiffs must fall within one of the established exceptions[1] to the public duty doctrine in order to demonstrate that they were owed a duty of care by a governmental entity. *See*, *e.g.*, *Cummins*, 156 Wn.2d at 853. It is only once plaintiff has established that it was owed a duty of care as an exception to the public duty doctrine that RCW 4.96.010 serves as a vehicle "to insure that, having established [a] duty, claimants may proceed in tort against municipalities to the same extent as if the municipality were a private person." *J & B Dev. Co*., 100 Wn.2d at 305-306. Thus, at the outset of a negligence action against a governmental entity, we apply the public duty doctrine to determine whether the government owed plaintiff a duty of care. A duty of care attaches where a plaintiff falls within a recognized exception to the public duty doctrine.

Here the record makes clear that there is no genuine issue of material fact relating

[1] There are four exceptions to the public duty doctrine, "(1) legislative intent; (2) failure to enforce; (3) the rescue doctrine, and (4) a special relationship." *Cummins v. Lewis County*, 156 Wn.2d 844, 853 n.7, 133 P.3d 458 (2006).

to the existence of a duty. Ms. Broderson has continuously argued that the public duty doctrine does not apply and, consequently, does not claim that she falls into an exception thereto. Her first argument is unpersuasive in light of our public duty doctrine. *Id.*

Ms. Broderson next contends that appellate courts have traditionally exercised judicial restraint when barring a claim from suit under the public duty doctrine. She primarily relies upon *Chambers-Castanes*, 100 Wn.2d 275, *J & B Dev. Co.*, 100 Wn.2d 299, and *Baerlein v. State*, 92 Wn.2d 229, 233, 595 P.2d 930 (1979). She also points to these cases for the proposition that the trial court improperly perpetuated sovereign immunity by expanding the public duty doctrine.

It is well settled that in negligence actions we apply the public duty doctrine to determine whether a governmental entity owed a duty of care to an individual. Contrary to Ms. Broderson's assertion, where no exception applies, the courts have not found a duty of care, and, thus, have barred suit against a governmental entity. *See*, *e.g.*, *Babcock*, 144 Wn.2d 774 (finding no duty when no special relationship exception exists); *Taylor*, 111 Wn.2d 159 (holding no duty owed where no legislative intent or special relationship exception existed); *Meaney v. Dodd*, 111 Wn.2d 174, 759 P.2d 455 (1988) (holding no actionable duty due to lack of special relationship).

It is also well-established that the public duty doctrine is not sovereign immunity

in another guise. *See Chambers-Castanes*, 100 Wn.2d at 287-288; *J & B Dev. Co.*, 100 Wn.2d at 303 (stating that the concepts of sovereign immunity and public duty doctrine exist independently); *Babcock*, 144 Wn.2d at 784-785 (stating that "[t]he 'public duty doctrine' has modified the traditional concept of sovereign immunity"). Ms. Broderson's contentions regarding the application of the public duty doctrine and the doctrine's relationship to sovereign immunity are therefore erroneous in light of case law.

Ms. Broderson next contends that analogous statutes and administrative regulations make the hazards maintained by Mr. Nichols foreseeable under common law negligence. However as discussed previously, foreseeability under common law negligence is irrelevant to the determination of duty in a negligence suit against a governmental entity. That determination is properly made through application of the public duty doctrine.[2]

We conclude that the trial court did not err in applying the public duty doctrine. Ms. Broderson has failed to demonstrate otherwise.

[2] Ms. Broderson also argues that Mr. Nichols is not subject to immunity under the discretionary governmental immunity exception, as his direction to leave the crawl space open did not involve a discretionary governmental decision. She relies upon *Evangelical United Brethren Church v. State*, 67 Wn.2d 246, 407 P.2d 440 (1965). In *Evangelical*, the court was called upon to determine the extent of discretionary governmental immunity in a torts case. Ms. Broderson's argument need not be decided because the record does not show a discretionary governmental decision was at issue here and Respondents do not rely upon it.

The judgment is affirmed.

A majority of the panel has determined this opinion will not be printed in the

Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, J.

WE CONCUR:

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Kulik, A.C.J.

_____
Sweeney, J.