No. 85984-1

J.M. JOHNSON, J. (dissenting)—The requirement of a false, inaccurate, or unfulfilled assurance has always been part of the special relationship exception to the public duty doctrine. This is because falsity is *inherent* in the prerequisite that an individual detrimentally rely on the government's assurance before a duty toward that individual is recognized. It is impossible to detrimentally rely on a true and accurate statement of fact: central to detrimental reliance is the notion that a false or misleading representation causes the individual to act differently than he or she would act with accurate information. The majority ignores this by reading into the Skagit 911 operator's true factual statements an *implied* promise regarding the length of time it would take for an officer to arrive on site. Yet, our precedent states that only "express assurances" sought out by the plaintiff may give rise to a special relationship. I am concerned the majority's

decision will put unwarranted pressure on every statement made by 911 operators, straining communications that depend on the free flow of information. I dissent.

Pursuant to the public duty doctrine, in order to recover from a governmental entity in tort, a plaintiff must establish the existence of a duty owed to him or her as an individual, rather than a general obligation to the public at large. *Taylor v. Stevens County*, 111 Wn.2d 159, 759 P.2d 447 (1988). The doctrine exists to protect governmental entities that provide services to the general public from opening themselves up to unlimited liability. *Id.* at 170 ("The policy underlying the public duty doctrine is that legislative enactments for the public welfare should not be discouraged by subjecting a governmental entity to unlimited liability.").

An exception to the public duty doctrine arises if a "special relationship" is established between a government agent and a specific individual. A duty is established through a special relationship if (1) there is direct contact or privity between the public official and the injured plaintiff that sets the latter apart from the general public, (2) there are express assurances given by the public official, and (3) the plaintiff justifiably relies

on those express assurances to his or her detriment. *Beal v. City of Seattle*, 134 Wn.2d 769, 785, 954 P.2d 237 (1998). The existence of a duty is a question of law. *Taylor*, 111 Wn.2d at 159.

This case asks whether, in order to establish the special relationship exception to the public duty doctrine, the assurances given by the government actor must be false, inaccurate, or unfulfilled. The Court of Appeals refused to recognize falsity as an "additional element" necessary to find a special relationship (and duty). *Munich v. Skagit Emergency Commc'ns Ctr.*, 161 Wn. App. 116, 125, 250 P.3d 491 (2011). The majority affirms this reasoning. Though the provision of inaccurate information is not an "additional element" necessary to form a special relationship, it *is inherent in the special relationship and duty formulation*. For the third element—detrimental reliance—to be established, the government's express assurance must be false or fail. *See Harvey v. County of Snohomish*, 157 Wn.2d 33, 41-42, 134 P.3d 216 (2006) (holding there was no duty owed where the plaintiff "never received any assurance from the operator that was untruthful or inaccurate" and did not "show[] that he relied on any assurance to his detriment").

At the heart of detrimental reliance is the notion that incorrect or misleading information caused the recipient (here the caller of 911) to act to his or her disadvantage. *See* Black's Law Dictionary 1404 (9th ed. 2009) (defining "*detrimental reliance*" as "[r]eliance by one party on the acts or representations of another, causing a worsening of the first party's position"). The detriment arises when one relies on faulty information and therefore makes choices that are different from those the person would have made with accurate information. If truthful information is given, detrimental reliance cannot be established. Most information is known directly to the 911 caller.

The estate of William R. Munich claims that Skagit 911 should be held liable because an officer could have arrived to assist Munich faster had Munich's initial call been coded as a level one emergency. But, the Skagit 911 operator made no express assurances regarding how the call was prioritized nor did she approximate an arrival time.

The operator made the following true statements: that an officer had been dispatched and was traveling toward Munich. A special duty does not attach merely because the operator correctly states that help has been dispatched and is on the way. A caller who receives this information stands

in the same position as every 911 caller who requests and receives assistance. Plaintiffs would charge defendants with misfeasance that arose out of a general duty to the public to respond to emergency situations, not from any "special relationship."

This court has consistently held, in order for a duty to arise, the individual must be given express assurance from the government and inaccurate information must be provided that the individual relies on to his or her detriment. In *Meaney v. Dodd*, we stated:

> 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 their detriment, that the government may be bound.

111 Wn.2d 174, 180, 759 P.2d 455 (1988) (emphasis added). Here, Munich sought no assurance relating to the time of the officer's arrival, and the operator made no such assurance. *See Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 789, 30 P.3d 1261 (2001) (In order for a duty to arise, "[t]he plaintiff must seek an express assurance and the government must unequivocally give that assurance."). Still, the majority finds an unfulfilled assurance hidden somewhere in the operator's truthful words.

The bulk of the majority's reasoning rests on language from *Beal* regarding the difference between the provision of information and the promise of future action. Majority at 10. Assuming such a distinction can sometimes be drawn, it is not relevant to this case. Just because this case—like *Beal*—involved a 911 call, does not mean every piece of information from the call center operator automatically transforms into an "assurance of future action." The operator in *Beal* made clear assurances of future action ("we're going to send somebody there" and "[w]e'll get the police over there for you okay?"), which the government subsequently failed to carry out. 134 Wn.2d at 785-86. No police officer was ever dispatched. *Id.* at 774. Similarly, in every other case in which a duty arose based on a 911 operator's statements, "the operators told the callers police were dispatched *when they had not been.*" *Harvey*, 157 Wn.2d at 39 (emphasis added).

In contrast, the Skagit 911 operator provided Munich with correct information regarding what had occurred: a police officer had been dispatched and was heading in Munich's direction. We found no duty in *Harvey* when the operator made statements similar to those given to Munich:

> Harvey never 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.

Id. (footnote omitted). Nevertheless, the majority reads into the operator's statements an implied promise that the officer would arrive as quickly as humanly possible. This runs afoul of our prior declaration that "[a] government duty cannot arise from implied assurances." *Babcock*, 144 Wn.2d at 789.

The consequences that may flow from the majority's reasoning are especially worrisome. Based on this decision, 911 operators will be unlikely to answer typical questions like "are you sending someone?" without fear of giving rise to a special relationship. In fact, the only information an operator may divulge without creating a special relationship is that the call was received. Public confidence in emergency services will surely diminish and the service become less valuable if callers in potentially life-threatening situations are unable to receive assurances that help is on the way. Callers are often frightened and flustered by the event they are reporting, and operators may need to convey calming and reassuring information to the caller to obtain necessary information. This dynamic will be seriously altered if operators must fear that their reassurances, even though true, may be used

to impose liability on emergency service providers. The effectiveness of emergency service response may also be threatened if providers are worried about their decisions being second-guessed in hindsight.

As a matter of law, the estate has failed to establish detrimental reliance—the third element of the special relationship exception to the public duty doctrine.[1] Detrimental reliance cannot be established where a government actor merely provides true and accurate statements of fact. Nor can implied promises read into truthful statements give rise to a governmental duty. I respectfully dissent.

AUTHOR:
Justice James M. Johnson

WE CONCUR:

[1] The majority states the question of detrimental reliance is "a question of fact generally not amenable to summary judgment." Majority at 8. However, in *Harvey*, we "disagree[d]" with the Court of Appeals' holding "that it was a question of fact for a jury to decide whether [the 911 operator's statements] were relied upon to the detriment of Harvey." *Harvey*, 157 Wn.2d at 40 n.4. Detrimental reliance is only one element required to establish the existence of a duty. The overarching question of whether a duty exists is one of law. *Taylor*, 111 Wn.2d at 171.