IN THE SUPREME COURT OF THE STATE OF WASHINGTON

GAYE DIANA MUNICH, as personal representative for the Estate of William R. Munich,	)	
Respondent,	)	No. 85984-1
v.	)	
	)	EN BANC
SKAGIT EMERGENCY COMMUNICATION CENTER d/b/a SKAGIT 911; SKAGIT COUNTY; and SKAGIT COUNTY SHERIFF'S OFFICE,	)	
Petitioners.	)	Filed November 1, 2012

FAIRHURST, J.—This case involves the special relationship exception to the public duty doctrine. One of the elements necessary to satisfy the special relationship exception requires an express assurance by the defendant. The plaintiff in this case alleges a 911 operator negligently responded to an emergency call by coding (or prioritizing) it incorrectly, thereby causing a delayed response. The operator correctly informed the caller help was on the way, though the operator

made no time estimate or reference to the call's priority.

On summary judgment, the defendant argued express assurances must be false or inaccurate in order to satisfy the exception. The trial court and Court of Appeals disagreed. We affirm and hold where the express assurance promises action there is no falsity requirement because the assurances may be superficially correct but negligently fulfilled. The accuracy, or lack thereof, of an assurance has no bearing on the issue of whether an actionable duty was established.

I. FACTS AND PROCEDURAL HISTORY

William R. Munich was shot and killed by his neighbor, Marvin Ballsmider, approximately 18 minutes after he placed his first shaken phone call to Skagit Emergency Communications Center (Skagit 911). The tragic event began on rural property Munich and his wife owned on Lake Campbell in Skagit County. Munich flew his float plane to the property and at some point thereafter Ballsmider pointed a rifle in Munich's direction, fired, and missed. The two had been in a property dispute related to access to a driveway and Ballsmider's property.

After the first shot, Munich called his friend Bruce Heiner. Heiner advised Munich to call 911 to get police assistance. Munich called 911. He told Norma Smith, a Skagit 911 call taker (or operator), exactly what happened—his neighbor

pointed a rifle at him and fired a shot from about 25 feet away. Munich also informed Smith that he was hiding in his garage, the only structure on his property. The garage contained three unlocked vehicles with the keys located inside each.

Smith assured Munich that law enforcement was on the way, stating, "[M]y partner[1] [has] already got a deputy that's headed toward[] you." Clerk's Papers (CP) at 112. Smith then asked, "Ok, so are you going to wait . . . there for contact?" *Id*. Munich responded, "Oh yeah, definitely." *Id*. Smith later confirmed for a second time that Munich would wait for law enforcement in the garage and again assured him, "Ok, all righty, there's already a deputy that's en route to you, ok?" *Id*. Munich again replied, "Ok, thank you." *Id*.

Smith entered the call as a priority two weapons offense rather than a priority one emergency call. Based on the priority two code, the dispatched deputy, Dan Luvera, did not activate his emergency lights and only traveled slightly over the speed limit.

About seven minutes later, Munich again called 911. Tammy Canniff took the second call, and Munich told her that Ballsmider came into the garage. He stated he was now on Highway 20 running away from Ballsmider who was

[1]A 911 call taker answers phone calls, obtains information from the caller, then codes, or prioritizes, the calls based on urgency. The call taker relays that information to a dispatcher who is responsible for dispatching calls to the sheriff's office. Smith's "partner" was the Skagit 911 dispatcher.

following and shooting. Munich said Ballsmider shot at him around a dozen times. The dispatcher informed Deputy Luvera of these facts and Deputy Luvera consequently activated his emergency lights and siren and increased his speed. While on the phone with Skagit 911, Munich described how Ballsmider was chasing him down in a car while firing a gun out of the open window. The second call ended with the sound of Munich being fatally shot on the highway. Deputy Luvera arrived two minutes later and arrested Ballsmider for Munich's murder. Munich was running toward the direction from which Deputy Luvera arrived.

Munich's estate (the Estate) sued Skagit County, the Skagit County Sheriff's Office, and Skagit Emergency Communications Center (hereinafter the County) for wrongful death, alleging the County negligently responded to the incident. The Estate presented expert testimony opining that Munich's initial call should have been coded as priority one. Additional evidence suggested that had the call been coded as priority one, Deputy Luvera would have arrived on the scene before Munich was chased down and shot.

The County moved for summary judgment dismissal of the Estate's claims asserting it was not liable for Munich's death under the public duty doctrine. The County argued, in relevant part, that the special relationship exception to the public duty doctrine was not satisfied because the County provided no inaccurate or false

information that Munich had detrimentally relied on. The trial court denied summary judgment, ruling the special relationship exception does not require false or inaccurate assurances. It further ruled the Estate alleged facts and argument satisfying the special relationship exception. The Court of Appeals affirmed, holding that where an express assurance involves a promise of future action, a plaintiff does not need to show the assurance was false or inaccurate to establish a special relationship. We granted the County's petition for review and now affirm. *Munich v. Skagit Emergency Commc'n Ctr.*, 172 Wn.2d 1026, 268 P.3d 225 (2011).

II. ISSUE

A. Must a plaintiff show a 911 operator's assurances promising action were false or inaccurate to establish a special relationship under the public duty doctrine?

III. ANALYSIS

On the narrow issue before us, we hold express assurances promising action need not be false or inaccurate as a matter of law to satisfy the special relationship exception to the public duty doctrine. When a 911 operator assures a caller help is on the way, as in this case, truth or falsity is not determinative because the government actor may be negligent in fulfilling that assurance.

A. Falsity Is Not a Requirement To Establish an Express Assurance under the

Special Relationship Exception to the Public Duty Doctrine

1. *Standard of review*

When reviewing an order on summary judgment, we engage in the same inquiry as the trial court. *Cummins v. Lewis County*, 156 Wn.2d 844, 852, 133 P.3d 458 (2006). Summary judgment is proper when the record demonstrates there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*.; CR 56(c). All facts and reasonable inferences are considered in a light most favorable to the nonmoving party. *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 784, 30 P.3d 1261 (2001). In a negligence action, whether an actionable duty was owed to the plaintiff is a threshold determination. *Id*. That determination is a question of law reviewed de novo. *Cummins*, 156 Wn.2d at 852.

2. *The Estate alleged facts sufficient to establish an actionable duty under the special relationship exception*

Municipal corporations are liable for damages arising out of their tortious conduct, or the tortious conduct of their employees, to the same extent as if they were a private person or corporation. RCW 4.96.010(1). When the defendant in a negligence action is a governmental entity, the public duty doctrine provides that a plaintiff must show the duty breached was owed to him or her in particular, and was

not the breach of an obligation owed to the public in general, i.e., a duty owed to all is a duty owed to none. *Babcock*, 144 Wn.2d at 785; *Beal v. City of Seattle*, 134 Wn.2d 769, 784, 954 P.2d 237 (1998) (citing *Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988)). This doctrine "recognizes that a fundamental element of any negligence action is a duty owed by the defendant to the plaintiff." *Meaney v. Dodd*, 111 Wn.2d 174, 178, 759 P.2d 455 (1998). In this way, the public duty doctrine is a focusing tool used to determine whether the defendant "owed a duty to a 'nebulous public' or a particular individual." *Osborn v. Mason County*, 157 Wn.2d 18, 27, 134 P.3d 197 (2006) (internal quotation marks omitted) (quoting *Taylor*, 111 Wn.2d at 166). In this case, the County owed a statutory duty to the general public, under RCW 36.28.010, to preserve the peace and arrest those who disturb it. RCW 38.52.020 similarly provides for emergency management by the State and the creation of local organizations for emergency management in the political subdivisions of the state, for many reasons, including to protect the public peace, health, and safety and to preserves the lives and property of the people of the state. Skagit 911 was formed to provide these necessary services.[2]

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*,

[2]The County's duty in this case was mandated by statute; no common law duty is at issue.

156 Wn.2d at 853. If any one of the exceptions applies, the government is held as a matter of law to owe a duty to the plaintiff. *Id*. The only exception at issue on appeal is the special relationship exception.

A special relationship between a municipality's agents and a plaintiff will exist and thereby give rise to an actionable duty, if three elements are established: (1) direct contact or privity between the public official and the plaintiff that sets the plaintiff apart from the general public, (2) an express assurance given by the

public official, and (3) justifiable reliance on the assurance by the plaintiff. *Babcock*, 144 Wn.2d at 786. It is undisputed that Munich had direct contact with Skagit 911, satisfying the first element of the exception. Further, the question of whether Munich detrimentally relied on assurances is a question of fact generally not amenable to summary judgment. *Beal*, 134 Wn.2d at 786-87.

The County argues the Estate must prove express assurances given by the government were false or inaccurate in order to establish the second element of the special relationship exception. It further reasons that, regardless of the coding decision, no special relationship was established because the 911 call taker's assurances to Munich were technically true (i.e., Deputy Luvera was in fact traveling to the scene, even if it was at a slower pace because of the priority two coding). We disagree. While some of our cases have considered or addressed the falsity or inaccuracy of an express assurance, that consideration has never been a necessary element, nor should it be, when the government is promising action.

The County's argument hinges on language stemming from cases that involved the public duty doctrine but that are distinguishable from the present context. In particular, the County relies on language from *Meaney*, 111 Wn.2d at 174. The issue in that case was whether a special relationship was established

where the county issued a special use permit to a sawmill operator. The operator later sued the county for negligence after it was determined the sawmill could not be operated within county noise limits. We said that in certain circumstances the builder is owed a particular duty and can justifiably rely on the government's assurances. *Id*. at 180. The County relies on the following language from that case:

> 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.

Id. (emphasis added). There, we held no special relationship was established because the operator did not make any specific inquiry or receive any false information about existing noise regulations. *Id*. at 181. In other words, the county gave no express assurance that the operator could justifiably rely on. *Id*.

The reasoning in *Meaney* is well founded in light of the context. The only way a plaintiff can detrimentally rely on government assurances regarding building code requirements is for the statement to be false or incorrect. The inaccuracy requirement is inherent to that scenario—if the assurances were true, there would be no conflict. While a number of other cases have referenced *Meaney*'s "incorrect information" language in connection with the special relationship exception, in each of those cases, the government was providing only information to the plaintiffs, and

not promising action. *See, e.g.*, *Taylor*, 111 Wn.2d at 166 (alleged negligence in issuing building permit); *Vergeson v. Kitsap County*, 145 Wn. App. 526, 539, 186 P.3d 1140 (2008) (no incorrect information provided by county regarding the status of court-quashed warrants from its database); *Smith v. State*, 135 Wn. App. 259, 282, 144 P.3d 331 (2006) (alleged negligence in providing information about appeal rights regarding adoption assistance benefits).

However, we have drawn a clear distinction between assurances involving *information* and assurances promising *action*. *Beal*, 134 Wn.2d at 786. In *Beal*, a wrongful death action was brought against the city based on a delayed response to a 911 caller who was later murdered by her estranged husband. *Id*. at 773-74. The caller in that case called from a neighboring apartment, stating her recently abusive husband was next door, possibly with a gun, and would not let her get her property out of the apartment. *Id*. at 773. We held the following exchange was sufficient to constitute an express assurance:

> 911: Okay. Well I'll tell you what, we're going to send somebody there. Are you going to wait in number 4 [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 [sic], thanks.

Id. at 785 (alterations in original). About 20 minutes later, the husband approached the vehicle where she was waiting and shot and killed her. *Id*. at 774. No police officer had been dispatched at the time of the shooting. *Id*.

The city in that case relied on *Meaney* for the proposition that the information provided must have been inaccurate at the time given and argued that an assurance of future acts with no time requirements is not inaccurate or false. *Id*. at 786. We squarely rejected that argument, explaining:

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

Id. (emphasis added).

The *Beal* opinion recognized the important distinction between building code cases and 911 cases. In 911 cases, the plaintiff relies not only on the information contained in the assurance, but also on the fulfillment of the action promised in the assurance. The implication from *Beal* is that it is possible for a 911 caller to detrimentally rely on a statement that is technically true but negligently fulfilled.

That principle contradicts the notion that surface level accuracy cannot constitute an express assurance.

The County also relies on *Harvey v. Snohomish County* for its argument that falsity is required. 157 Wn.2d 33, 134 P.3d 216 (2006). Yet an examination of that case does not mandate the County's interpretation. In *Harvey*, an assault victim claimed the county (including the 911 emergency communications center) negligently failed to rescue him, his son, and his neighbor from a deranged home intruder within eight minutes after placing a call to 911. *Id*. at 35. We said there were no express assurances the caller could rely on because the 911 operator was merely updating the caller on developments in the situation. *Id*. at 38. The operator remained on the phone with the caller at the same time that she informed a police dispatcher of the situation. *Id*. at 35-36. In response to the caller asking where he should go, the operator told him to do whatever he felt was most safe to do. *Id*. at 36. While the factual scenario is similar to Munich's, the legal context is different. The sole basis for the detrimental reliance claim in *Harvey* was that the caller stayed on the phone with the 911 operator in response to the operator's request to do so. *Id*. at 40. In contrast to Munich's case, the plaintiffs in *Harvey* did not allege the 911 operator acted negligently in fulfilling any promise of action.

Harvey did not interpose any new requirement that assurances be false or

inaccurate. However, some language in the opinion comments on the accuracy of the particular statements that were at issue. For example, we concluded there was no special relationship because the victim could not show "any alleged assurance made by the operator was false, unfulfilled, relied upon, or made to his detriment." *Id*. at 38; *see also id*. at 39 (the caller "never received any assurance from the operator that was untruthful or inaccurate"). But the veracity of assurances was relevant in that context because it demonstrated there was no breach, *even if* a duty was created, "[E]ven if we assume the statements . . . created a duty, there is no showing the 911 operator ever breached that duty or that [the caller] relied on those statements to his detriment." *Id*. at 40. Indeed, our use of the disjunctive conjunction "or" suggests that a special relationship could have been established had the operator's statements been technically truthful, yet ultimately "unfulfilled." *Id*. at 38. We do not read *Harvey* to stand for the proposition that falsity is a requirement to establish a duty in the first place.

The County's argument ignores the fact that negligence can take forms other than the mere transmittal of incorrect factual information. In cases like this, where the express assurance involves a promise of action (i.e., "I'll send an officer to your location" or "a deputy is en route"), truth or falsity is not determinative because the government actor may be negligent in following through on the assurance. The

Estate offers a hypothetical that correctly illustrates the County's flawed reasoning:

> Under [the County's] 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 "on the way" and would eventually arrive.

Resp't's Suppl. Br. at 18. Arguing the County would have no duty in that scenario because it "truthfully" assured the caller help was "on the way" rings hollow. It is readily apparent that promised *action* requires more than superficially accurate *words*.

We hold that here, where the alleged express assurance involves a promise of action, the plaintiff is not required to show the assurance was false or inaccurate in order to satisfy the special relationship exception. In a 911 case like this, the express assurance element is satisfied when the operator assures the caller law enforcement officers are on their way or will be sent to the caller's location. *See, e.g.*, *Beal*, 134 Wn.2d at 785 (finding express assurance made when 911 operator stated, "'[W]e're going to send somebody there'" and "'We'll get the police over there for you.'" (quoting CP at 119)); *Chambers-Castanes v. King County*, 100 Wn.2d 275, 279-80, 669 P.2d 451 (1983) (express assurance where operator said,

"We have the officers on their way out there right now."); *Bratton v. Welp*, 145 Wn.2d 572, 576-77, 39 P.3d 959 (2002) (express assurances where operator told caller if she or her family was threatened again that the police would be sent). Whether or not the assurances were ultimately truthful or accurate may be relevant, but only in relation to the issue of a breach, not to the establishment of a duty.

The County speculates that holding 911 centers accountable for the failure to fulfill its assurances will undermine their effectiveness for fear of liability. 911 centers provide vital services to the community, and we do not take lightly issues implicating their potential liability. But the County's speculation is misguided. As evidenced in *Harvey*, 911 centers can still engage in truthful communication with callers without incurring legal liability if they keep callers informed with timely and accurate information while correctly dispatching law enforcement. Our holding does not increase municipalities' exposure to liability in this context. It simply recognizes what has always been the case—a special relationship is established by privity, an express assurance, and justifiable reliance. It is noteworthy that in every case discussing the special relationship exception, the same three elements are repeatedly cited and employed, even in cases where truth or falsity is tangentially discussed. *See, e.g.*, *Harvey*, 157 Wn.2d at 38-41 (special relationship requires privity, express assurance, and reliance); *Meaney*, 111 Wn.2d at 178-79 (explicitly

numbering the same three elements).

We emphasize that a special relationship does not automatically result in liability. Plaintiffs seeking to recover must still establish breach, proximate cause, and damages, just as if they were suing a private defendant. If the government acted reasonably under the circumstances, no liability will incur. *See Beal*, 134 Wn.2d at 787 n.5 ("Of course, the trier of fact may ultimately conclude that the City acted reasonably in the circumstances . . . and therefore did not breach any duty owed."). The Estate has alleged facts sufficient to withstand the County's motion for summary judgment on the issue of whether a duty existed as a matter of law. Whether or not the Estate can prove the County acted negligently in this case remains to be seen.

IV. CONCLUSION

Express assurances promising action need not be false or inaccurate in order to satisfy the special relationship exception to the public duty doctrine. 911 callers rely not only on accurate information, but also the reasonable fulfillment of assurances. The trial court and Court of Appeals properly held the same. We affirm.

AUTHOR:
Justice Mary E. Fairhurst

WE CONCUR:
Chief Justice Barbara A. Madsen

Justice Charles W. Johnson	Justice Debra L. Stephens
Justice Tom Chambers	Justice Charles K. Wiggins
Justice Susan Owens	Justice Steven C. González