

SUPREME COURT OF WASHINGTON

Cummins v. Lewis County

156 Wash. 2d 844 (2006) · No. Review granted; Washington Supreme Court docket number not stated in source
· Decided May 4, 2006

OPINION

ALEXANDER, J.

*848¶1 The question presented in this case is whether, under the public duty doctrine, an actionable “special relationship” is created between a member of the public and a government entity when an individual places a “911 call,” identifies the nature of his medical emergency, provides a street address but not his name, and “hangs up” prior to either requesting help or receiving an oral assurance from the operator that medical aid will be dispatched.

We answer “no” to that question, concluding that there is neither a statutory nor a common law duty on the part of a county to dispatch medical aid under such circumstances. We decline also the petitioner’s invitation to eliminate the express assurance requirement of the special relationship inquiry in cases involving 911 calls and medical emergencies.

We, therefore, affirm the Court of Appeals’ decision upholding the Lewis County Superior Court’s summary judgment dismissing the petitioner’s wrongful death action. Alexander, C.J. I. FACTS f2 On December 15, 1997, the Lewis County emergency dispatch call center received a 911 call.

The 911 dispatcher heard what she believed to be the voice of an adult male say, “1018 ‘E’ Street, heart attack.” Clerk’s Papers at 343. The caller hung up the telephone before the dispatcher could obtain additional information and before she could respond. ¶3 On the date of this incident, Lewis County had in place an “enhanced 911 (E911) system! J.” Id. at 303.

Unlike a regular 911 service, the E911 system automatically displays the telephone number and location from which a call is placed. In this instance, the system indicated that the “ ‘heart attack call’ ” was placed from a pay telephone in the vicinity of a grocery store on Tower Street in Centraba. Id. at 376. That location is roughly five blocks from the “E” *849Street address furnished by the caller.

A few minutes before the call in question, the 911 dispatcher had fielded a so-called “prank” 911 call from the same Tower Street pay telephone. Id. ¶4 Immediately after receiving the “heart attack” call, the dispatcher dialed the pay telephone number and received a busy signal. Another operator placed a telephone call to the “E” Street address and received a recorded answer from an answering machine.

This caused the dispatcher to treat the “heart attack” call as a “hang up,” meaning she did not immediately send medical aid to either location. *Id.* at 338. Instead, she dispatched a Centraba police officer to conduct an investigation. ¶5 In response to the directions from the dispatcher, a Centraba police officer drove to the location of the pay telephone.

Upon arriving there, he stopped a young man who was in the vicinity. The boy was well-known to the Centraba Police Department due to his prior contacts with that department. When questioned, the youngster said that he had placed the 911 call.

The officer then issued a warning to the boy and cleared the call with 911 as a “suspicious circumstance.” *Id.* at 369. The dispatcher indicated to the officer that she was surprised that a boy made the “heart attack” call given that it was a man’s voice that she had heard.

The officer responded that the boy tried to make his voice sound “old.” *Id.* at 349. After clearing the call, the police officer proceeded to the “E” Street address. He did not, however, stop at that location or attempt to contact anyone who may have been at the home. ¶6 Several hours later, Mary A. Cummins, the plaintiff and petitioner here, returned home to the “E” Street address and found her husband, Leon V. Cummins, dead on the kitchen floor.

Mrs. Cummins called 911. The E911 system identified her call as coming from 1018 “E” Street. This prompted the police officer who had earlier contacted the young man in the vicinity of the pay telephone to recontact him.

The youth told the officer that he had bed *850about making the earlier call. The E911 system was thereafter checked and found to be functioning properly. ¶7 Mrs. Cummins brought a wrongful death action in Lewis County Superior Court against Lewis County and the city of Centraba in her own capacity as well as in a representative capacity. She alleged that her husband’s death was the result of the negligence of the Lewis County 911 emergency dispatch unit as well as that of the Centraba police department which had responded to the call.

The trial court granted a summary judgment dismissing Mrs. Cummins’s complaint against both defendants. The court held that she failed to show that the county or the city owed Mr. Cummins a duty of care it did not owe to the public generally and that her claims were thereby barred by the public duty doctrine. Division Two of the Court of Appeals affirmed the superior court.¹ Mrs. Cummins sought and was granted review by this court.² II.

LEWIS COUNTY’S MOTION TO STRIKE ¶8 During our consideration of this case, respondent Lewis County moved to strike a supplemental brief that Mrs. Cummins filed in response to an amicus curiae brief submitted by the Washington State Trial Lawyers Association Foundation (Foundation).³ The Foundation asked in its brief that this court permanently “inter” the public duty doctrine.⁴ In her response, Mrs. Cummins *851adopted for the first time this line of reasoning and joined the Foundation in requesting that this court abandon the public duty doctrine.

Mrs. Cummins argued additionally, and for the first time, that the special relationship exception to the doctrine should henceforth be limited to analyzing a government's duty only in those cases involving the criminal acts of third parties. f 9 Lewis County correctly notes that Mrs. Cummins initially sought this court's review only on the questions of whether a special relationship with the county had been established and whether the express assurance requirement needed to establish that particular relationship be eliminated or relaxed for medical emergency callers.

It is a well-established maxim that this court will generally not address arguments raised for the first time in a supplemental brief and not made originally by the petitioner or respondent within the petition for review or the response to petition. See *Douglas v. Freeman*, 117 Wn.2d 242, 258, 814 P.2d 1160 (1991).

Because Mrs. Cummins seeks a form of relief in her supplemental brief that she did not seek in her petition for review, Lewis County's motion to strike is granted. III. THE PUBLIC DUTY DOCTRINE AND THE SPECIAL RELATIONSHIP EXCEPTION THERETO ¶10 Mrs. Cummins contends that the trial court and Court of Appeals each erred in not concluding that an actionable special relationship was created between Lewis County and Leon Cummins when Mr. Cummins telephoned 911 and stated both his physical location and the nature of his medical emergency.⁵ Pointing to a long line of Washing*852ton public duty doctrine cases, Lewis County asserts that both courts below correctly determined that Mrs. Cummins does not have an actionable claim in negligence because the 911 dispatcher who fielded Mr. Cummins's call did not give him an "express assurance" of help upon which he could have "justifiably relie [d]." Resp't Lewis County's Suppl.

Br. at 7. ¶11 When reviewing an order on summary judgment, this court engages in the same inquiry as the trial court. *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 784, 30 P.3d 1261 (2001). Summary judgment is proper where the entire record demonstrates there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

In a negligence action, the determination of whether an actionable duty was owed to the plaintiff represents a question of law to be decided by the court. *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 128, 875 P.2d 621 (1994). A question of law is reviewed *do novo*. *Babcock*, 144 Wn.2d at 784. ¶12 A threshold negligence determination is whether a duty of care is owed to the plaintiff.

Id. at 784-85 (quoting *Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1998)). In negligence actions against a government entity, Washington courts follow the rule that 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".

Under the public duty doctrine, no 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)." *853Taylor, 111 Wn.2d at 163 (citations omitted) (quoting J&B Dev.

Co. v. King County, 100 Wn.2d 299, 303, 669 P.2d 468 (1983)). f 13 The public duty doctrine does not serve to bar a suit in negligence against a government entity. As a result of the enactment in 1967 of RCW 4.96.010, which did away with Washington's shield of absolute sovereign immunity, local governments such as a county may be liable for damages arising out of their tortious conduct or the tortious conduct of its employees "to the same extent as if they were a private person or corporation." RCW 4.96.010(1); Bailey v. Town of Forks, 108 Wn.2d 262, 265, 737 P.2d 1257, 753 P.2d 523 (1987).

In this light, the doctrine serves as a framework for courts to use when determining when a governmental entity owes either a statutory or common law duty to a plaintiff suing in negligence. See, e.g., Jenifer Kay Marcus, Washington's Special Relationship Exception to the Public Duty Doctrine, 64 Wash. L. Rev. 401, 401 (1989).6 ¶14 There are four common law "exceptions" to the public duty doctrine.7 If one of these exceptions applies, the government will be held as a matter of law to owe a duty to the individual plaintiff or to a limited class of plaintiffs. *854Bailey, 108 Wn.2d at 268.

At issue in this case is application of the special relationship exception. A. Has Mrs. Cummins satisfied the three requirements of the special relationship exception? ¶15 The special relationship exception allows tort actions for negligent performance of public duties if the plaintiff can prove circumstances setting his or her relationship with the government apart from that of the general public.

Taylor, 111 Wn.2d at 166. A special relationship imposing an actionable duty to perform arises between the plaintiff and a government entity when " '(1) there is direct contact or privity between the public official and the injured plaintiff which sets the latter apart from the general public, and (2) there are express assurances given by a public official, which (3) gives rise to justifiable reliance on the part of the plaintiff' " Beal v. City of Seattle, 134 Wn.2d 769, 785, 954 P.2d 237 (1998) (quoting Taylor, 111 Wn.2d at 166).

1. Was there privity between Mr. Cummins and Lewis County? ¶16 Mrs. Cummins asserts that privity was established at the point when Mr. Cummins telephoned 911 and was able to state both his physical location and the nature of his medical emergency to an operator. Lewis County contends that Division Two of the Court of Appeals correctly held that in order for privity to exist in this context some form of communication between the 911 caller and the operator must occur.

See *Cummins v. Lewis County*, 124 Wn. App. 247, 254, 98 P.3d 822 (2004). ¶17 Mrs. Cummins correctly observes that a plaintiff can establish privity without having to prove the plaintiff herself communicated with the government entity. See *Bratton v. Welp*, 145 Wn.2d 572, 577, 39 P.3d 959 (2002). She is not correct, however, that prior case law establishes that the privity element is satisfied merely by the act of placing a call to 911.

Washington case law shows the *855required communication between the injured party and 911 by which the plaintiff is set apart from the general public requires both a (1) telephone conversation and (2) an affirmative promise or agreement to provide assistance. Accord *idr*, *Beal*, 134 Wn.2d at 785; *Chambers-Castanes v. King County*, 100 Wn.2d 275, 286, 669 P.2d 451 (1983). ¶18 In each of the above cases, the plaintiff established privity by showing that the 911 dispatcher affirmatively communicated some form of “promise” that assistance would be sent.

Furthermore, in each of these cases, the 911 caller established a dialogue with the government official after identifying the nature of his emergency and communicating his identity to the government official, thereby separating himself from the public at large. None of these activities have been shown here, the record revealing that Mr. Cummins hung up the telephone before a promise of assistance could be given and before an on-going dialogue could be established.

Furthermore, he did not identify himself. This one-way communication was not sufficient to establish privity in the 911 context. 2. Was an express assurance given? ¶[19 Mrs. Cummins must also show Mr. Cummins received an express assurance from a government official. Mr. Cummins must have sought an express assurance of assistance, and the government must have unequivocally given that assurance.

Babcock, 144 Wn.2d at 789. “A government duty cannot arise from implied assurances.” *Id.* (citing *Honcoop v. State*, 111 Wn.2d 182, 192-93, 759 P.2d 1188 (1988); *Taylor*, 111 Wn.2d at 167). ¶20 Mrs. Cummins does not contend that the 911 operator unequivocally gave Mr. Cummins an express promise that medical assistance would be dispatched.

Under Washington case law, this absence of an express assurance to dispatch assistance by the operator precludes this court from finding as a matter of law that Mrs. Cummins has established an actionable duty against the county. Accord *Babcock*, 144 Wn.2d at 791. *856¶21 To meet the express assurance requirement, Mrs. Cummins argues more generally that the nature of the E911 system provides an “inherent” government assurance that medical assistance will be forthcoming once a call is placed.

This argument fails. Even if this court were to decide that the very nature of the 911 system provides the public with an “inherent” promise of emergency aid dispatch, Mrs. Cummins cites no authority for equating an “inherent” assurance to the required express assurance.

Thus, we conclude that an inherent assurance, like an implied assurance, does not provide us with a sufficient basis for finding an actionable duty under the special relationship exception. See *Meaney v. Dodd*, 111 Wn.2d 174, 180, 759 P.2d 455 (1988); *Taylor*, 111 Wn.2d at 168 (overruling in part *J&B Dev. Co.*, 100 Wn.2d 299, a case imposing government liability in part on the government's implicit assurances that the plaintiff had complied with building codes).

Because Mrs. Cummins fails to show the 911 operator gave Mr. Cummins an unequivocal statement that assistance would be forthcoming, we conclude as a matter of law that no express assurance was provided. 3. Was there justifiable reliance on the part of Mr. Cummins? ¶22 Mrs. Cummins must further demonstrate sufficient facts showing that Mr. Cummins justifiably relied on an explicit assurance given by the 911 operator.

Babcock, 144 Wn.2d at 791-92. To bind the government, Mr. Cummins must have relied upon the assurance to his detriment. *Id.* at 793. ¶23 Even after viewing the facts and inferences in a light most favorable to her, we are satisfied that Mrs. Cummins has not shown that Mr. Cummins justifiably relied upon an explicit promise of assistance or that he relied on an assurance to his detriment.

First, as noted above, the 911 operator did not communicate an express assurance of assistance upon which Mr. Cummins could *857have relied. Second, even if this court were to infer that Mr. Cummins was provided an assistance promise, Mrs. Cummins does not show Mr. Cummins was induced to and did purposefully remain at his physical location awaiting help in reliance upon the dispatcher's assistance assurance.

Accord *Beal*, 134 Wn.2d at 786 (justifiable reliance found when 911 operator gave assurance that police protection was on the way and shooting victim consciously waited for officers to arrive at the location based upon that assurance); *Noakes v. City of Seattle*, 77 Wn. App. 694, 700, 895 P.2d 842 (1995) (reliance found where plaintiffs remained in the house in anticipation of police assistance rather than attempting to escape or to use self-help in removing an intruder).

Rather, under the facts submitted, it is likely that given the severity of the heart attack, Mr. Cummins was physically unable to move beyond his home and, thus, he was not induced to remain there and/or did not eschew other avenues of help as a result of the 911 call. ¶24 Mrs. Cummins seeks to satisfy the reliance requirement by generally asserting that “[a] caller seeking assistance for a medical emergency does so in reliance on the government's promise [under RCW 38.52.500] to provide a rapid response.” Pet. for Review at 12.

However, this court cannot as a matter of law use a broad statement of legislative intent as the sole basis from which to find factually that a 911 caller justifiably relied upon a 911 operator's alleged promise of aid. Mrs. Cummins fails to show the necessary reliance. B. Should we accede to Mrs. Cummins's novel request to relax or eliminate the express assurance requirement in 911 cases

where medical aid is sought? ¶25 In the face of case law demonstrating she has not satisfied the three elements necessary to establish a “special relationship,” Mrs. Cummins asks this court to modify the test for emergency medical condition 911 callers.

The rule of law Mrs. Cummins proposes would strike out *858the “express assurance” element from the “special relationship” determination in 911 medical emergency cases only. Mrs. Cummins does not, however, propose to eliminate application of this requirement for determining a government entity’s duty to respond to 911 calls for either police or fire emergencies. ¶26 Mrs. Cummins supports her position by arguing that a municipality’s duty to provide emergency medical services is different, and thus distinguishable, from its duty to provide emergency police or fire services.

She argues that medical aid focuses on a single individual, whereas the duty to prevent crime is owed to the public at large. “Unlike police protection...,” she writes, dispatching ambulance services is “not a traditional governmental function provided to the public at large. Instead, government has taken over the role of emergency response and transport formerly performed by private ambulance services.

This duty is owed not to the public at large but only to specific individuals requesting assistance.” Pet. for Review at 17. ¶27 In response, Lewis County asserts that there is no justification as a matter of law for treating 911 callers differently based on the nature of the caller’s emergency.

The county notes that the public is encouraged to call 911 in the case of any type of emergency. The county asks us to reject Mrs. Cummins’s proposal, arguing that a county’s duty to provide 911 services to the public cannot be greater or lesser depending on whether a call is for medical or police aid because it has a statutory obligation to field both kinds of calls.

We agree with the county. ¶28 Mrs. Cummins cites no case law from Washington or from other jurisdictions to support her proposition that a governmental unit’s duty to respond to a 911 medical emergency caller is somehow greater than that owed to a caller who phones with another type of 911 emergency.

As previously defined by this court, a municipality’s duty to respond to a 911 call is a general duty owed to all regardless of the type of aid requested. *859¶29 The District of Columbia Court of Appeals has rejected an argument similar to that advanced by Mrs. Cummins.

In *Hines v. District of Columbia*, 580 A.2d 133, 135-36 (D.C. App. 1990), the decedent’s personal representative sued the District of Columbia for wrongful death damages arising from the alleged negligent dispatch of medical emergency services.

The personal representative’s claim in that case, similar to that which Mrs. Cummins makes here, was analyzed within the parameters of the public duty doctrine and was dismissed by the trial

court on summary judgment. Unlike this case, there was an express promise in *Hines* by the dispatcher to render aid and emergency aid was actually sent — though it was alleged by the plaintiff that the life support unit was not dispatched in a timely fashion. ¶30 Seeking to get around the public duty doctrine in the District of Columbia case, the personal representative argued on appeal that the doctrine should not apply to calls for emergency medical services.

Like the instant case, the personal representative sought to distinguish the duty to dispatch ambulance services from police and fire protection on the basis that emergency medical attention is summoned for and focuses on a particular individual, whereas the duty to prevent crime and protect against fires is owed to the public at large.

In rejecting the personal representative's invitation to make such a distinction and to find that an exempted special relationship forms at the exact point in time emergency medical services have been requested, the District of Columbia court wrote: Virtually every citizen of the District [of Columbia] could find himself or herself in need of assistance from the EAD [Emergency Ambulance Division] at one time or another; if there is a particular "class" of citizens who benefit, its members are distinguished from the general public only in that they are temporarily in need of emergency services.

In this, they do not differ from citizens who find themselves in need of emergency police or fire services. *Id.* at 138. *860 ¶31 The District of Columbia Court of Appeals continued its reasoning by noting that every member of the public may become a "temporary member[] of one or more of these 'classes' [of persons in need of emergency fire, police, or medical aid] at some time." *Id.* The court indicated that by virtue of being an individual who calls for emergency medical assistance, the person does not put himself or herself in a class in a "sense that would justify invoking the special relationship exception to the public duty doctrine." *Id.* In our view, the District of Columbia court's reasoning is logical, and we adopt its reasoning as a basis for rejecting Mrs. Cummins's request to create an exception to the public duty doctrine for medical emergency calls or to impose a heightened duty to respond to only this type of call. ¶32 Like the District of Columbia case law, jurisprudence from this state does not define the duty owed by a government entity to respond to a member of the public based upon the underlying nature of the individual's problem.

Rather, Washington courts have applied the public duty doctrine uniformly in a variety of governmental negligence claims,⁸ and where duty is analyzed based upon the assertion of a special relationship exception, the courts look to the manner and extent of contact between the government official and the member of the public and also look to how explicit were the assurances of aid allegedly created thereby.

Mrs. Cummins provides neither a strong public policy nor a sound legal argument for moving away from this line of analysis. IV. CONCLUSION ¶33 In sum, we conclude that Mrs. Cummins

has failed to produce facts which show that she satisfies any one of the three requirements of an actionable special relationship. *861The record demonstrates that the county was merely carrying out responsibilities it generally owed to the public when it fielded Mr. Cummins's call and that no common law duty was owed to Mr. Cummins individually or as a member of a particular class under these circumstances.

Additionally, we decline Mrs. Cummins's invitation to depart from existing Washington precedent by eliminating the express assurance requirement of the special relationship test in only those cases involving 911 calls and medical emergencies.

The Court of Appeals is, therefore, affirmed. Madsen, Bridge, Owens, Fairhurst, and J.M. Johnson, JJ., concur. *Cummins v. Lewis County*, 124 Wn. App. 247, 257, 98 P.3d 822 (2004). By joint motion, the city of Centralia was dismissed as a party to this review.

Thus, Mrs. Cummins sought and was granted review of the Court of Appeals' decision only as it applies to respondent Lewis County. *Cummins v. Lewis County*, 154 Wn.2d 1030, 114 P.3d 1198 (2005). See Resp't Lewis County's Mot. to Strike Pet'r's Answer to Amicus Curiae Mem. of Foundation.

The Foundation contends, and the concurrence agrees, that the public duty doctrine wrongly undermines statutory waiver of sovereign immunity under RCW 4.96.010 by judicially imposing what it contends is a second layer of tort liability immunity for government entities. Mrs. Cummins did not make this argument to the trial court, to the Court of Appeals, or to this court in her petition for review.

We, thus, decline to consider the Foundation's request. The Foundation is not a *851party to this case, and its interest in the outcome of it is merely tangential. Under case law from this court, we address only claims made by a petitioner and not those made solely by amici. *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 827, 854 P.2d 1072 (1993).

This opinion, therefore, addresses only those claims raised by Mrs. Cummins in her petition for review. Lewis County argues that Mrs. Cummins has failed to show that the deceased, Mr. Cummins, was the "heart attack" caller.

However, on summary judgment, all *852evidence and inferences are viewed in a light most favorable to the nonmoving party. That being the case, we must assume that Mr. Cummins placed the "heart attack" call. We note at this point that Mrs. Cummins points to no express statutorily imposed duty applicable to Lewis County under these circumstances. Rather, she asserts that RCW 38.52.500 provides a 911 medical-emergency caller with an implicit promise that the government entity fielding the call will "provide a rapid response." Pet. for Review at 12.

Lewis County counters that under the controlling case law Mrs. Cummins's argument that the government's implicit promise under the E911 statute to promptly dispatch medical aid to save the caller's life cannot be a basis for a court to impose municipal liability. This is also what the appeals court held. Citing to this court's decision in Honcoop as its authority, Division Two stated that an individual cannot rely on broad statements of legislative intent to support a tort action against a public entity.

Cummins, 124 Wn. App. at 255 (citing Honcoop v. State, 111 Wn.2d 182, 188, 759 P.2d 1188 (1988)). We concur with the appeals courts' statutory duty analysis. At most, the E911 statute imposes upon Washington's counties an obligation to have in place an enhanced 911 system by December 31, 1998. See RCW 38.52.510. Mrs. Cummins does not contend that Lewis County breached its statutory duty to have in place an E911 system, and the record shows that the county did, in fact, have such a system in place and operating at the time Mr. Cummins placed the 911 call at issue.

Therefore, we discern no basis in the E911 statute upon which to conclude Lewis County had an actionable statutory duty to Mr. Cummins. The exceptions are (1) legislative intent, (2) failure to enforce, (3) the rescue doctrine, and (4) a special relationship. Babcock, 144 Wn.2d at 786. See, e.g., Bratton, 145 Wn.2d at 577 (analyzing duty owed by 911 to send police); Babcock, 144 Wn.2d at 785 (analyzing duty owed by fire department when fire fighter communicated with plaintiffs in person); Mull v. City of Bellevue, 64 Wn.

App. 245, 823 P.2d 1152 (1992) (analyzing government duty owed to building owner).