

# WASHINGTON CASE UPDATE

## Surviving Summary Judgment with the Voluntary Rescue Doctrine

case in point...

**From the desk of Kyle Riley:** While the public duty doctrine shields government entities from liability when a duty is owed to the general public, liability can still be established under the common law duties imposed by the voluntary rescue doctrine and a special relationship. See how the plaintiffs survived the summary judgment motions of a government entity and security agency in this wrongful death case, decided by Washington's Division Three Court of Appeals.

**Claims Pointer:** Under the voluntary rescue doctrine, someone who voluntarily promises to aid or warn another person in need may be liable if that person or a third person reasonably relies on the promise and instead harm results. A variation on this allows for liability if, after removing the person from harm, the individual puts them back into the same harm or another peril. The relationship necessary for the special relationship exception to the public duty doctrine, can be established even without direct communication between the government entity and the harmed person.

*Mita v. Guardsmark, LLC*, --- P.3d ----, 2014 WL 2862208 (Wash.App. Div. 3)

Kay Mita, 84, died of hypothermia, huddled against a garbage container just outside of the Spokane County Superior Court. The temperature was below 30 degrees and, by the time that he was found, Kay was covered in two inches of snow. Kay's surviving spouse and son (the Mitas) brought suit against Spokane County (County) and Guardsmark, LLC for wrongful death based on negligence, alleging that the County and Guardsmark owed Kay the common law duties of care imposed by the voluntary rescue doctrine and a special relationship. At trial, both the County and Guardsmark successfully moved for summary judgment on the ground that they owed no duty of care to Kay. The Mitas appealed and, viewing the facts in the light most favorable to the nonmoving party, the Court of Appeals reversed the trial court's summary judgment dismissal.

On the morning before his death, Kay Mita had reported to the Spokane County Superior Court for jury duty. It was snowing heavily and the temperature was in the low twenties. When the jurors were dismissed for lunch, Kay did not return to the jury room. The jury manager called Kay's home and spoke with his wife, who stated that she did not know Kay's whereabouts. Kay's wife relayed her conversation with the jury manager to her son. Around 5:00 pm, the court clerk saw Kay in the parking lot and asked why he had not returned to the jury room after lunch. Kay stated that he had been looking for his car, but had not been able to find it. She offered to help Kay in his search, but he declined. Instead, upon her suggestion, he headed back to the courthouse to seek assistance from the security personnel. Around 5:10 pm, a Guardsmark security officer observed Kay enter the courthouse and

sit next to a heater. At 5:30 pm, the officer escorted Kay out of the courthouse and locked the doors.

When Kay did not return home at 6:00 pm, the Mitas became concerned and contacted Spokane's nonemergency line. The Mitas reported Kay missing and provided information about Kay to assist law enforcement's search. The Mitas explained that Kay had not returned to jury duty after lunch and had not returned home that evening. The Mitas told the call receiver that they were "very concerned" about how cold it was and that it was snowing. According to the Mitas, the call receiver replied, "we will send out a policeman immediately to search." The call receiver said that they would contact the Mitas once Kay was found. Kay's son waited at home for an officer to contact him instead of beginning his own search efforts. The missing person's report, however, was never transmitted and no law enforcement officer searched for Kay.

During the time that Kay's family thought Kay was being searched for, Kay had been pacing in the snow outside of the courthouse doors. Two Guardsmark security officers, who had previously opened up the courthouse for some mock trial competitions, brought Kay inside and sat him next to the heater. He was cold, thinly dressed, and unable to communicate intelligibly. The officers assumed he was homeless. At 9:00 pm when the mock trials concluded, the officers ushered Kay back outside and locked the courthouse doors.

While the public duty doctrine often shields public entities from liability, it does not operate where the duty is a common law duty and shared by private entities. One example is the common law voluntary rescue doctrine, where, if someone voluntarily promises to aid or warn a person in need, the individual owes a duty to



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that person if that person or a third person reasonably relies on the promise. If the promise causes the third person to refrain from action on behalf of the person in need, reasonable reliance is established. Additionally, at common law, a special relationship creates a duty. A special relationship exists between a public entity and a person where (1) the entity has direct contact or a relationship with the person that sets him or her apart from the general public, (2) the entity makes an express assurance, and (3) the person justifiably relies on the assurance. A public entity may have a relationship with a person, even without direct personal communication with the person.

Here, the County had sufficient information from the Mitas to know that Kay was in need. According to the Mitas, the County's call receiver made an express assurance to them that law enforcement would be immediately sent out to search for Kay and that the Mitas would be contacted when the officer found Kay. The Mitas reasonably relied on this promise and abandoned their own search efforts. Kay, in turn, reasonably relied on his immediate family members to find him, establishing a relationship of reliance between himself and his family. Furthermore, because the County should have known that Kay might be harmed if an officer did not conduct a search, the County had a relationship with Kay, setting him apart from the general public. As such, the County owed Kay a common law duty under the voluntary rescue doctrine and a special relationship. Dismissing the Mitas' negligence suit against the County was in error.

Likewise, dismissing the negligence suit against Guardsmark was in error. A recognized variation of the common law voluntary rescue doctrine states that an individual "owes a duty to a person who reasonably appears imperiled and incapable of adequately caring for himself or herself if (1) the actor voluntarily takes charge of the helpless person intending to assist him or her in confronting the peril, and (2) the individual discontinues the assistance and leaves the helpless person in a worse position than before." The individual cannot, after successfully removing the helpless person from the peril, unreasonably put the helpless person back into the same peril or a new one. Doing so would increase the risk of harm to the person because the assistance would mislead them into believing that the danger had passed and deprive them of the possibility of help from other sources.

Here, the Mitas presented evidence that Guardsmark

should have known Kay was in need. After bringing Kay into the courthouse and seating him next to the heater, putting Kay back outside of the courthouse two hours later increased his risk of harm. Doing so may have mislead Kay into believing that the harm had been removed and deprived him the opportunity of seeking help outside of the courthouse. The Mitas raised sufficient evidence of a legal duty under the voluntary rescue doctrine to survive summary judgment. Therefore, the trial court erred in dismissing the Mitas' negligence suit against Guardsmark. threat of immediate and severe consequences by reason of the contamination." As such, the functional equivalent of a lawsuit was not present and the duty to defend was not triggered. The Washington Court of Appeals affirmed the lower court's holding.



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