2013 IL App (3d) 120583-U

Order filed June 12, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

MARCUS COLEMAN, as Successor Administrator of the Estate of Coretta Coleman, Plaintiff-Appellant, v. EAST JOLIET FIRE PROTECTION DISTRICT, a body corporate, LOUIS HELIS, individually, SCOTT MAZOR, individually, WILL COUNTY, a body politic and corporate, L. Zan, individually, ORLAND FIRE PROTECTION DISTRICT, a body corporate, a/k/a/ ORLAND FIRE DISTRICT, a/d/b/a/ ORLAND CENTRAL DISPATCH, ERIC JOHNSON, individually, Defendants-Appellees.	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois Appeal No. 3-12-0583 Circuit No. 09-L-817 Honorable Michael J. Powers, Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice Lytton and Justice Carter concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Under the public duty rule, public entities and their employees did not owe a duty to plaintiff's decedent to provide adequate 911 dispatch and emergency

> medical services; (2) the "special duty" exception to the public duty rule did not apply because plaintiff's decedent was not under the direct and immediate control of the defendants at the time of her death; (3) any duties created by the Emergency Telephone Systems Act or the Emergency Medical Services Act were owed to the public at large and not to individuals; and (4) the defendants did not assume a duty to the plaintiff's decedent under the "voluntary undertaking" doctrine.

¶ 2 After suffering a pulmonary embolism, Coretta Coleman dialed 911. She told the 911 dispatcher that she could not breathe and that she needed emergency assistance. Due to a series of errors by various dispatchers and emergency medical personnel, the paramedics did not arrive inside Coretta's house for approximately 42 minutes, by which time Coretta had died. Plaintiff Marcus Coleman (Coleman), as successor administrator of Coretta's estate, brought claims for wrongful death and survival against defendants Will County, Laurie Zan (a Will County 911 operator), the Orland Fire Protection District ("Orland Fire"), Eric Johnson (an emergency medical dispatcher employed by Orland Fire), East Joliet Fire Protection District ("East Joliet Fire"), Louis Helis (an emergency medical technician employed by East Joliet Fire), and Scott Mazor (a paramedic employed by East Joliet Fire). Coleman alleged that the defendants' actions deprived Coretta of a chance for survival and caused her pain and suffering.

¶ 3 After the parties conducted discovery, each of the defendants moved for summary judgment on two grounds. First, the defendants argued that they owed no duty to Coretta under the public duty rule and that no exception to the public duty rule applied. Second, the defendants argued that, even if they owed a duty to Coretta, they were immune from liability under section 3.150(a) of the Emergency Medical System Act (the EMS Act) (210 ILCS 50/3.150(a) (West 2006)) and/or section 15.1 of the Emergency Telephone System Act (the ETS Act) (50 ILCS 750/15.1 (West 2006)) because their conduct toward Coretta was not willful and wanton.

¶ 4 The trial court granted summary judgment to all defendants under the public duty rule. The court found that the "special duty" exception to the public duty rule did not apply as to any of the defendants because Coretta initiated the contact with the defendants and was not under the direct or immediate control of any of the defendants. Because the trial court found that no defendant owed a legal duty to Coretta, it dismissed Coleman's claims on that basis and did not reach the issue of immunity. This appeal followed.

¶ 5 FACTS

¶ 6 When Will County receives a 911 call from someone in need of an ambulance within East Joliet Fire's district, Will County transfers the call to Orland Fire. Pursuant to a Dispatch Agreement, Orland Fire's central emergency communication center dispatches ambulances and fire protection equipment operated by East Joliet Fire. Orland Fire and East Joliet Fire are municipal corporations authorized and organized under the Fire Protection District Act, 70 ILCS 705/1 *et seq.* (West 2008).

¶ 7 On June 7, 2008, at 6:10 p.m., Coretta Coleman called 911. She was connected to Laurie Zan, the Will County 911 operator on duty at the time. Coretta told Zan that she could not breathe and that she needed an ambulance. Coretta gave her address as "1600 Sugar Creek Drive" in Joliet. She told Zan to "hurry." Zan told Coretta to hold and then transferred the call to Orland Fire's dispatch center.

¶ 8 Eric Johnson (Johnson), an emergency medical dispatcher employed at Orland Fire's dispatch center, received the transferred 911 call from Zan. Coretta's name, telephone number, and address were immediately displayed on Johnson's computer screen. Although Will County's written procedures required Zan to communicate the emergency message from Coretta, Zan hung

up as soon as the call was transferred and did not tell Johnson the nature of the medical emergency. She did not tell Johnson that Coretta said that she could not breathe and that she needed help in a hurry. Zan did not speak to Johnson at all.

¶ 9 Johnson asked the caller some questions but did not receive any response. Johnson testified that he could not tell if anyone was on the line or if the call had been dropped. He hung up and called Coretta's number twice, receiving a busy signal both times. Johnson testified that Orland Fire dispatchers are trained to call the agency that transferred the call to them if they need more information. Johnson did not call the Will County dispatcher back. However, he testified that, while he was trying to contact the caller, he asked his partner to call the Will County dispatcher for more information.

¶ 10 Johnson identified the nature of the call as an "unknown medical emergency" and placed the call in line for an ambulance to be dispatched. Orland Fire's "Incident Detail Report" reflects that the call was placed in the ambulance dispatch queue by 6:13 p.m. and was assigned to Ambulance 524 by 6:16 p.m. The ambulance was dispatched for a "Priority 1: Hot" call, which means the ambulance would be "running hot with lights and sirens."

¶ 11 Ambulance 524 was manned by defendants Helis and Mazor. At that time, Helis was an emergency medical technician and Mazor was a licensed paramedic. Helis and Mazor were dispatched out of East Joliet Fire's Station 2. They were told only Coretta's address and that the call involved an "unknown emergency." They were provided with no further information about the call, including who placed the call, where the call came from, or the specific nature of the request for assistance.

¶ 12 Helis and Mazor arrived at the Coleman residence at 6:19 p.m. They tried to enter the house but the doors were locked. They rang the doorbell, pounded on the doors, and yelled "Fire Department!," but no one answered. They walked around the house and tried a side door, but it too was locked. They looked in the windows but could not see anyone in the house. There was a car in the driveway and they could see lights on in the kitchen.

¶ 13 Pursuant to their training, Helis and Mazor radioed Orland Fire for more information about the caller. Because they did not have Coretta's phone number, they asked Orland Fire to call Coretta back. Jacqueline Johnson, a radio dispatcher for Orland Fire, told Helis and Mazor that "we'll try in a minute." Jacqueline Johnson testified that she asked one of Orland Fire's telephone dispatchers to call the Coleman residence back, but she could not recall whom she asked. Helis and Mazor never received a response back from Orland Fire. While they were in front of the Coleman house, Helis and Mazor were approached by two of the Colemans' neighbors who told them that: (1) an elderly man and woman lived at the Coleman house; (2) the man had heart issues; (3) the neighbors had seen the man cutting his grass earlier that day, but his truck was gone; and (4) they did not have the Colemans' phone number, and the woman would probably not answer the phone anyway.

¶ 14 Helis and Mazor determined that they could not make a forced entry based upon the information they had. They told the Colemans' neighbors that they could not make a forced entry without a police officer present. However, they advised the neighbors that the neighbors could call the police and ask the police to perform a forced entry. Helis and Mazor then called their supervisor, who ordered them to leave the scene and to go back into service. By that time, Helis and Mazor had been at the Coleman property for approximately 10 minutes.

¶ 15 Before they left, Helis and Mazor called Orland Fire and told them to "be advised" that there was "no patient." Orland Fire did not tell Helis and Mazor that they had received a busy signal when Eric Johnson called Coretta back. Helis testified that, if he had known that there was a busy signal at the house, he would have had justification for a forced entry.

¶ 16 While the defendants were attempting to respond to Coretta's emergency call, Will County was experiencing severe thunderstorms that spawned up to four separate tornados which caused widespread destruction. Shortly before Coretta called 911, Orland Fire entered "storm mode," paging its off duty employees to come into work in anticipation of high call volumes. At approximately the same time that Helis and Mazor asked Orland Fire to place a call to the Coleman residence, the Frankfort Fire Protection District asked Orland Fire to activate the Mutual Aid Box Alarm System (MABAS) Division 19 box alarm for a tornado disaster.[1] Between 6:20 p.m. (when Helis and Mazor asked Jacqueline Johnson to call the Coleman residence) and 6:23 p.m., Orland Fire dispatched five units to the MABAS alarm for the tornado disaster pursuant to the MABAS Box Alarm request. Between 6:21 p.m. and 6:30 p.m., Orland Fire contacted 19 separate units and dispatched 17 of them to respond to the tornado.

¶ 17 At approximately 6:24 p.m., Helis and Mazor notified Orland Fire that their ambulance (Ambulance 524) could go back in service because there was "no patient" at the Coleman residence. Orland Fire dispatched Ambulance 524 to the disaster box call in Frankfort directly

[1] Orland Fire is the dispatch center for the MABAS Division 19, which provides a means for mutual aid to be shared between several different jurisdictions in Cook and Will Counties if there is a disaster that demands resources from multiple departments.

from the Coleman residence. Orland Fire assumed that Helis and Mazor had more information about the situation at the Coleman residence because they were at the residence and because Orland Fire had no new information to convey. Once Ambulance 524 left the Coleman residence, Jacqueline Johnson assumed that the call had been resolved and that Helis and Mazor no longer needed the Orland Fire dispatchers to provide more information.

¶ 18 After Ambulance 524 left the Coleman residence, one of the neighbors who had spoken with Helis and Mazor called the Coleman residence. When she received a busy signal, the neighbor called 911 and spoke with Zan. She told Zan that paramedics had been at the Coleman residence but left when they could not get anyone to answer to door. The neighbor said that "Mr. Coleman has heart problems and we don't know if he is passed out in the house or what the problem is, but could you please send the police out to 1600 Sugar Creek Drive?" Shortly thereafter, another of Coleman's neighbors, Reverend Brown, called 911 and told Zan there was an emergency at 1600 Sugar Creek Drive.

¶ 19 After receiving these calls, Zan called Orland Fire and spoke with Eric Johnson. Zan told Johnson that she had transferred a call to him earlier from a "female [who] was unable to breathe," and that "all the neighbors are calling saying that the fire department left and did nothing." Johnson told Zan that "they were already there." Zan responded, "[a]ll right. Well, apparently they couldn't get in the house, and they cleared from the call. We don't know if the lady is alive or dead." Johnson said "Aw, crap."

¶ 20 Johnson attempted to dispatch a second ambulance (Ambulance 534) to the Coleman residence. He caused that unit to be dispatched for a "well being check," which he later changed to "difficulty breathing." This was a "high priority" or "run hot" dispatch. During her

conversation with Eric Johnson, Zan did not give him the Coleman's complete address. She said "1600 Sugar Creek," but the Colemans' subdivision contains both a "Sugar Creek Court" and a "Sugar Creek Drive." Johnson erroneously dispatched Ambulance 534 to "1600 Sugar Creek Court," instead of 1600 Sugar Creek Drive (the Colemans' actual address). When Ambulance 534 got to Sugar Creek Court, they could not find number 1600 because no such address exists. The ambulance crew called Orland Fire back to check the address because there appeared to be no number 1600. While waiting for Orland Fire's response, the crew pulled over to look at maps and spoke with a pedestrian about the location. Eric Johnson called Will County for more information about the address. The correct address was in his computer and could have been accessed.

¶ 21 While Eric Johnson was speaking to a Will County dispatcher about the matter, the crew of Ambulance 534 found the Coleman residence on their own. They arrived at the house at 6:51 p.m., 41 minutes after Coretta made the initial 911 call and approximately 32 minutes after Ambulance 524 first arrived at the Coleman residence. The crew knocked on the door. No one answered. They walked around the house. When no one answered, they called a supervisor to ask if they should force entry. Stanley Coleman (Stanley), the victim's husband, arrived home at the same time that a 534 crew member was grabbing a tool to force entry. Stanley let them in with his key. The crew found Coretta sitting upright on a bench at the foot of her bed. She was unresponsive. Attempts to revive her in the ambulance on the way to the hospital were unsuccessful, and Coretta was pronounced dead at the hospital. She died of cardiac arrest brought on by a rapid onset of pulmonary edema.

¶ 22 Coleman filed claims for wrongful death and survival on behalf of Coretta's estate. He alleged that Will County and its employee Laurie Zan acted negligently and /or wilfully and wantonly in handling and transferring Coretta's 911 call and by failing to communicate all relevant information to Orland Fire. Coleman also alleged that Orland Fire and its employee Eric Johnson acted negligently and/or wilfully and wantonly in dispatching paramedics to Coretta's home. Finally, Coleman alleged that East Joliet Fire and its employees Helis and Mazor acted negligently and/or willfully and wantonly by leaving the scene without forcing entry and treating Coretta, and by falsely informing Zan that there was "no patient" at the Coleman residence. Coleman claimed that these negligent and/or willful and wanton acts and omissions wasted crucial minutes and delayed life-saving treatment, thereby depriving Coretta of a chance to survive and causing her pain and suffering.

¶ 23 All of the defendants filed motions for summary judgment, arguing that: (1) they owed no duty to Coretta under the public duty rule; and (2) even if they did owe Coretta a duty, they were immune from liability under the EMS Act and ETS Act because their conduct was not willful and wanton. Defendants East Joliet Fire, Helis, Mazor, Will County, and Laurie Zan also asserted absolute immunity under various sections of the Local Governmental and Governmental Employees Tort Immunity Act (the Tort Immunity Act) (745 ILCS 10/1-101 *et seq.* (West 2006)). The trial court granted summary judgment to all defendants under the public duty rule. The trial court held that the "special duty" exception to the public duty rule did not apply to any of the defendants because Coretta "initiated the contact with the municipality and was not under the direct or immediate control of any of the defendants." This appeal followed. The Illinois Trial Lawyers Association (ITLA) has filed an amicus brief in support of Coleman's position.

¶ 24 ANALYSIS

¶ 25 1. Standard of Review

¶ 26 Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits and exhibits, when viewed in the light most favorable to the nonmoving party, indicate that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2–1005(c) (West 2010). We review a trial court's decision on a motion for summary judgment *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). "Summary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt." *Outboard Marine Corp.*, 154 Ill. 2d at 102. The moving party may meet his burden of proof either by affirmatively showing that some element of the case must be resolved in his favor, or by establishing " 'that there is an absence of evidence to support the nonmoving party's case.' " *Nedzvekas v. Fung*, 374 Ill. App. 3d 618, 624 (2007) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

¶ 27 2. Public Duty Rule

¶ 28 Coleman argues that the trial court erred by granting summary judgment to the defendants under the public duty rule. We disagree.

¶ 29 The public duty rule is a "long-standing [common law] precept which establishes that a governmental entity and its employees owe no duty of care to individual members of the general public to provide governmental services, such as police and fire protection." *Donovan v. Village of Ohio*, 397 Ill. App. 3d 844, 849 (2010) (quoting *Zimmerman v. Village of Skokie*, 183 Ill. 2d

30, 32 (1998)); see also *Harinek v. 161 North Clark Street Ltd. Partnership*, 181 Ill. 2d 335, 345 (1998) (stating that, under the public duty rule, public entities may not be "held liable for their failure to provide adequate governmental services"). This rule is based on the principle that any governmental duty to provide such services is "owed to the public at large, not the individual plaintiff." *Donovan*, 397 Ill. App. at 849; see also *Sims-Hearn v. Office of Medical Examiner, County of Cook*, 359 Ill. App. 3d 439, 445-46 (2005) ("a municipality's duty is to preserve the 'well-being of the community' and *** this duty is 'owed to the public at large rather than to specific members of the community' ") (quoting *Zimmerman*, 183 Ill. 2d at 44). The public duty rule reflects a policy decision that police and other public employees cannot guarantee the personal safety of every member of the community. *Leone v. City of Chicago*, 156 Ill. 2d 33, 47 (1993); See also *Downey v. Wood Dale Park District*, 286 Ill. App. 3d 194, 206 (1997) ("The public duty rule and the statutory immunities granted police officers rest on the sound public policy that municipalities undertake these services without becoming insurers").

¶ 30 In granting summary judgment for the defendants in this case, the trial court relied upon our appellate court's recent decision in *Donovan*, which affirmed summary judgment in favor of a county and the county's emergency telephone system under the public duty rule. *Donovan* involved a wrongful death lawsuit brought by the estate of a decedent who died in a tavern fire while waiting for firemen to arrive after the tavern employees had dialed 911. The plaintiff alleged that the a signal repeater located on top of the Village of Ohio's water tower failed to transmit the 911 dispatcher's radio transmission to the Walnut Fire Department because the signal repeater's circuit had been tripped and the backup battery power system was depleted before anyone discovered the problem. *Donovan*, 397 Ill. App. 3d at 846-47. Our appellate

court ruled that the public duty rule applies to counties that operate a 911 system. *Id.* at 849-50. Applying that rule, we held that the defendants owed no duty to the plaintiff individually. *Id.* Although we recognized that the ETS Act established duties applicable to the operation of a 911 system, we ruled that such duties "ran to the public at large, not to each citizen individually." *Id.* at 850. Accordingly, we affirmed summary judgment in favor of the defendants. *Id.*

¶ 31 Coleman argues that the trial court erred in applying the public duty rule in this case. The ITLA agrees and goes one step further by arguing that the public duty rule no longer exists under Illinois law. Both Coleman and the ITLA rely heavily on our supreme court's decisions in *Jane Doe-3 et al. v. McLean County Unit District No. 5 Board of Directors et al.*, 2012 IL 112479 (2012) and *American National Bank & Trust v. City of Chicago*, 192 Ill. 2d 274 (2000). The ITLA also relies upon our supreme court's decisions in *DeSmet* and *Aikens v. Morris*, 145 Ill. 2d 273 (1991). However, none of these cases suggests that the public duty rule should not apply here. We will examine each of these cases in turn. We will then address Coleman's and the ITLA's attempts to distinguish *Donovan*.

¶ 32 a. *Jane Doe-3*

¶ 33 In *Jane Doe-3*, elementary school children who were sexually abused by a teacher sued officials of a school district where the teacher had previously taught. The plaintiffs alleged that the school officials provided a letter of recommendation on the teacher's behalf to the plaintiff's school which concealed the fact that the teacher had been removed from the classroom before the end of the previous school year because he had sexually abused female students. According to the plaintiffs, the letter falsely represented that the teacher had completed the prior school year. The trial court held that the defendants owed no legal duty to the plaintiffs under either the public

duty rule or the Tort Immunity Act, and dismissed all of the plaintiffs' claims with prejudice. Our appellate court reversed, holding that the plaintiffs' allegations could give rise to a duty under either the "voluntary undertaking" doctrine or the law of negligent misrepresentation.

¶ 34 Our supreme court affirmed, but it employed different reasoning than did the appellate court. A majority of our supreme court ruled that whether a defendant owes a duty to a plaintiff depends upon four factors: (1) the reasonable foreseeability of the injury; (2) the likelihood of the injury; (3) the magnitude of the burden of guarding against the injury; and (4) the consequences of placing the burden on the defendant. *Jane Doe*-3, 2012 IL 112479, ¶ 22 (Burke, J., joined by Kilbride, J., and Thomas, J.); *id.* ¶¶ 51-52 (Freeman, J., specially concurring); *id.* ¶¶ 62-64 (Garman, J., specially concurring in part and dissenting in part). Viewing these four factors as a whole, the majority held that the plaintiffs had sufficiently alleged facts which supported the finding that the defendants owed them a duty of care. *Id.* ¶ 35 (Burke, J., joined by Kilbride, J., and Thomas, J.); *id.* ¶¶ 51-52 (Freeman, J., specially concurring); *id.* ¶¶ 62-64 (Garman, J., specially concurring in part and dissenting in part). The plurality opinion authored by Justice Burke and joined by Justices Kilbride and Thomas noted that "our holding is further bolstered by the public policy in Illinois favoring the protection of children," particularly from the dangers of sex offenders, and that this public policy "weigh[ed] in favor of finding a duty under the facts of this case." *Id.* ¶¶ 36, 38.[2]

---

[2] Justice Freeman apparently agreed with this statement by the plurality. Although he wrote separately to address unrelated issues, Justice Freeman noted that he "agree[d] with the court's resolution" of the case and did not take issue with the plurality's reliance on Illinois' public policy of protecting children.

¶ 35 The plurality opinion in *Jane Doe-3* provides very little analysis of the public duty rule. It merely states that "the public duty rule is of no moment in this case" because "the plaintiffs [did] not allege that defendants failed to protect them or that they owed any affirmative duty to do so." *Id.* ¶ 40. Importantly, however, our supreme court did *not* hold that the public duty rule is no longer good law. To the contrary, as Justice Karmeier notes in his dissent, the plurality opinion suggests that the public duty rule still exists in Illinois. To be sure, in *Jane Doe-3*, three supreme court justices stated or implied that, in their view, the public duty rule is no longer viable. See *id.* ¶¶ 57-61 (Freeman, J., specially concurring); *id.* ¶¶ 114-15 (Karmeier, J., joined by Theis, J, dissenting). However, the plurality opinion in *Jane Doe-3* suggests that the rule remains viable, despite the fact that the majority declined to apply it to the particular facts of that case. Thus, *Jane Doe-3* did not abrogate the public duty rule or otherwise announce its demise.

¶ 36 In any event, *Jane Doe-3* is distinguishable from the case at bar in material respects. *Jane Doe-3* involved allegations that public officials engaged in misrepresentations while performing an act that was not part of their public duties (*i.e.*, writing a letter of recommendation for a teacher). Coleman's claims, by contrast, arise out of the allegedly negligent or willful and wanton performance of the defendants' core public duties of providing emergency medical services. The public duty rule applies "when a plaintiff alleges damages based on a governmental entity's *failure to perform adequate governmental services*," *i.e.*, when the plaintiff claims she suffered harm because government employees "negligently performed their ordinary governmental, policing, or enforcement-type function." (Emphasis added.) *Jane Doe-3*, 409 Ill. App. 3d 1087, 1095 (2011); see also *DeSmet*, 219 Ill. 2d at 500–01 (2006) (applying public duty rule to claim that police negligently failed to respond to dispatch call regarding a vehicle in a

ditch); *Donovan*, 397 Ill. App. 3d at 845 (applying public duty rule to claim that county's emergency dispatch system failed to work properly); *Anthony v. City of Chicago*, 382 Ill. App. 3d 983, 984 (2008) (applying public duty rule to claim that police failed to timely rescue people from a pileup in a stairwell). Unlike the plaintiffs in *Jane Doe*-3, Coleman makes precisely those types of claims in this case.

¶ 37 Moreover, in *Jane Doe-3*, our supreme court declined to apply the public duty rule because it found that "the plaintiffs [did] not allege that defendants failed to protect them or that they owed any affirmative duty to do so." *Jane Doe*-3, 2012 IL 112479, ¶ 40. In this case, Coleman alleges that the defendants' failed to provide life-saving medical assistance to Coretta in a timely fashion, which amounts to a claim that the defendants failed to protect Coretta from the consequences of a known medical emergency. Accordingly, *Jane Doe-3* suggests that the public duty rule should apply here.

¶ 38 Further, in *Jane Doe-3*, our supreme court emphasized that its holding was "limited to finding, *under the particular circumstances presented* [in *Jane Doe-3*], that the allegations in plaintiffs' complaints [were] sufficient to establish that defendants owed plaintiffs a duty of care." (Emphasis added.) *Jane Doe-3*, 2012 IL 112479, ¶ 45. In so holding, the supreme court stressed that "public policy concerns for the protection of children," particularly from the dangers of sex offenders, "weigh[ed] in favor of finding a duty" under the particular facts presented in *Jane Doe-3*. *Id.* ¶ 36; see also *id.* ¶ 38. No such policy concerns are implicated in this case. Accordingly, the supreme court's rationale for not applying the public duty rule in *Jane Doe-3* has no purchase here.

¶ 39 Thus, contrary to Coleman's and the ITLA's arguments, *Jane Doe-3* does not suggest that the public duty rule should not apply in this case. In fact, it supports the opposite conclusion.

¶ 40 b. *American National Bank*

¶ 41 Coleman and the ITLA also note that our Supreme Court did not apply the public duty rule in *American National Bank & Trust v. City of Chicago*, 192 Ill. 2d 274 (2000), a case that is factually analogous to this case. In *American National Bank*, the estate of a decedent brought wrongful death and survival claims against the City of Chicago and two of the City's paramedics in connection with their response to the decedent's 911 call requesting emergency medical assistance after she suffered an asthma attack. The plaintiff claimed that the defendants failed to locate and treat the decedent promptly, causing her death. The plaintiff further alleged that the defendants' misconduct in this regard was willful and wanton, and was therefore not immunized by the EMS Act or the ETS Act. *American National Bank*, 192 Ill. 2d at 278. The trial court granted the defendants' motion to dismiss the plaintiff's complaint. The trial court held that the defendants were immune from liability under the EMS Act and that the plaintiff had failed to adequately allege either a special duty or willful and wanton misconduct. *Id.* Our appellate court affirmed. *Id.*

¶ 42 The supreme court affirmed in part and reversed in part. After making several rulings on the scope and application of certain immunity provisions contained in the EMS Act and the Tort Immunity Act, the supreme court ruled that "the portions of the amended complaint that allege willful and wanton misconduct by the defendants are sufficient to withstand the defendants' motion to dismiss." *Id.* at 286. In other words, the supreme court held that the complaint did not establish on its face that the defendants were immune from liability under the

EMS Act. In so holding, the supreme court did not address the public duty rule or the "special duty" exception to that rule.

¶ 43 Justice Heiple dissented. Justice Heiple concluded that, under the public duty rule, the City was "presumptively immune" from liability for its failure to promptly locate and treat the decedent. *Id.* at 289 (Heiple, J., dissenting). Justice Heiple also concluded that the plaintiff had failed to allege facts sufficient to trigger the "special duty" exception to the public duty rule. *Id.* at 289-90 (Heiple, J., dissenting).

¶ 44 *American National Bank* does not suggest that the public duty rule no longer exists or that it should not apply in this case. The majority opinion in *American National Bank* did not address the public duty rule or its potential application to the facts presented in that case. That is not surprising, because the parties did not raise the issue in their briefs to the supreme court.[3] The only issues raised on appeal to the supreme court were: (1) whether the appellate court erred in determining that section 17 of the EMS Act immunized the defendants from liability for the conduct alleged in the complaint; and (2) whether the defendants' "hybrid" 2-615 / 2-619 motion to dismiss was prejudicial, thereby precluding dismissal of the plaintiff's claims. Accordingly,

---

[3] In his dissent, Justice Heiple noted that, in *American National Bank*, "the City argue[d] *** that even if [the EMS Act's immunity provision] does not apply, it is still immune from liability in the instant case under the common law "public duty" rule. *Id.* at 288 (Heiple, J., dissenting). However, we have reviewed the parties' briefs to the supreme court in *American National Bank* (which are included in the record in this case and are also available on Westlaw), and we found no reference to the public duty rule in either the City's brief or in any of the parties' briefs.

our supreme court had no occasion to address the public duty rule or the "special duty" exception to that rule. *American National Bank* is therefore inapposite. We will not presume that the supreme court overruled the public duty rule *sub silentio* in a case in which the rule was not raised by the parties.[4]

¶ 45 c. *DeSmet* and *Aikins*

¶ 46 The ITLA argues that, in two prior decisions, our supreme court stated that the common law public duty rule was "no longer good law" because it was "codified into section 4-102 of the Tort Immunity Act as an immunity" (citing *DeSmet*, 219 Ill. 2d at 508-09; *Aikens v. Morris*, 145 Ill. 2d 273, 278 n.1 (1991)). However, in *DeSmet*, our supreme court expressly noted that "the current status of the public duty rule [was] not a point th[e] court [had to] resolve" because it held that "section 4–102 immunity applie[d] in any event." 219 Ill. 2d at 509. Thus, the supreme court's statements about the status if the public duty rule in *DeSmet* were merely *dicta*. Similarly, *Aikens* involved the application of sections 2-202 and 2-109 of the Tort Immunity Act (745 ILCS 10/2-109, 10/2-202 (West 2006)), not the public duty rule. Thus, the *Aikens* court's statement that section 4-102 of the Tort Immunity Act codified the public duty rule is also *dicta*, and *Aikens* does not stand for the proposition that the public duty rule no longer applies in Illinois.

---

[4] Like *American National* Bank, several of the appellate court decisions cited by Coleman decided an immunity issue without addressing the public duty rule. See, *e.g.*, *Chiczewski v. Emergency Telephone System Board of DuPage County*, 295 Ill. App. 3d 605 (1997); *Shefts v. City of Chicago*, 238 Ill. App. 3d 37 (1992); *Gleason v. Village of Peoria Heights*, 207 Ill. App. 3d 185 (1991). We decline to rely on these cases for the same reason.

¶ 47 In other decisions, our supreme court has noted that, after the abolition of sovereign immunity in Illinois and the passage of the Tort Immunity Act, "[g]overnmental units are liable in tort on the same basis as private tortfeasors unless a valid statute dealing with tort immunity imposes conditions upon that liability." *Barnett v. Zion Park Dist.*, 171 Ill. 2d 378, 386 (1986); see also *Harris v. Thompson*, 2012 IL 112525, ¶ 16. However, in *Zimmerman*, which was decided after *Barnett*, our supreme court explicitly ruled that neither the abolition of sovereign immunity nor the legislature's passage of the Tort Immunity Act "altered the common law public duty rule that a governmental entity generally owes no duty to provide an individual citizen with specific municipal services." *Zimmerman*, 183 Ill. 2d at 45. Although these statements are arguably in tension with one another, it is for our supreme court, not this court, to resolve the matter.

¶ 48 In sum, no Illinois Supreme Court decision has expressly abrogated the public duty rule or declared that it is no longer the law in Illinois. Until that occurs, the supreme court's pronouncement in *Zimmerman* that the rule continues to apply remains good law. The fact that some Illinois supreme court justices have questioned the continued viability of the public duty rule in dissents or special concurrences does not change our analysis. Until our supreme court expressly abrogates the public duty rule in a binding decision, we will continue to apply the rule, as the supreme court itself has done in recent years. See, *e.g.*, *Zimmerman*, 183 Ill. 2d at 32; *Harinek*, 181 Ill. 2d at 345; see also *Hess v. Flores*, 408 Ill. App. 3d 631, 638-39 (2011) (noting that, while it is "reasonable to question the continuing relevance" of the public duty rule in light of the abolition of sovereign immunity in the 1970 Illinois Constitution, the subsequent passing of the Tort Immunity Act, and the supreme court's recent questioning of the rule's continuing

validity, "in the absence of a decision from the supreme court to the contrary, it remains clear that the public duty rule continues to play a role in the determination of governmental tort liability").

¶ 49 d. *Donovan*

¶ 50 In *Donovan,* our appellate court held that the public duty rule barred claims against a county for delivering inadequate 911 dispatch service. We agree with the trial court that *Donovan* controls the outcome of this case. Coleman argues that *Donovan* is distinguishable because it involved allegations of an "equipment system failure," whereas this case involves allegations that the individual employees of a 911 system committed "affirmative acts *** which increased the harm to [Coretta] at the time of her death." Similarly, the ITLA argues that the plaintiff in *Donovan* was "attacking the 911 or emergency medical services systems at large," whereas Coleman is challenging the "essentially ministerial implementation of those systems." Put another way, the ITLA maintains that Coleman "does not complain about the adequacy of government services, but rather, about the manner these services were rendered." Thus, the ITLA contends, the public duty rule is of no moment in this case. We disagree. *Donovan* is not distinguishable in any material sense. In *Donovan*, the public defendants' failure to provide a more reliable backup power source for the 911 signal repeater and their failure to implement and maintain the signaling system so that it would not fail in the first place arguably increased the danger to the decedent. In the same way, Coleman alleges in this case that the defendants' acts and omissions while attempting to provide 911 dispatch and emergency medical services increased the harm to Coretta. In both cases, the wrongdoing alleged involves the failure to

provide adequate 911 call dispatch and emergency medical services. Accordingly, *Donovan's* holding that the public duty rule barred the plaintiffs' claims compels the same result here.[5]

¶ 51 3. "Special Duty" Exception

¶ 52 Coleman and the ITLA argue that, even if the public duty rule remains the law in Illinois, the "special duty" exception to that rule bars its application in this case. The "special duty" exception is the only recognized exception to the public duty rule. *Harinek*, 181 Ill. 2d at 345-46; *Alexander v. Consumers Illinois Water Co.*, 358 Ill. App. 3d 774, 779 (2005). The exception applies where a public entity assumes a "special duty to a particular individual" (*Harinek*, 181 Ill. 2d at 346), such as when the public entity "steps outside its governmental function and acts in a private capacity or develops a relationship with the plaintiff" (*Alexander*, 358 Ill. App. 3d at 779). To establish the special duty exception, a plaintiff must prove all four of the following elements: (1) the municipality was uniquely aware of the particular danger or risk to which the plaintiff is exposed; (2) there are allegations of specific acts or omissions on the part of the municipality; (3) the specific acts or omissions are either affirmative or willful in nature; and (4) the injury occurred while the plaintiff was under the "direct and immediate control" of the employees and agents of the municipality. *Alexander*, 358 Ill. App. 3d at 779.

¶ 52 Coleman cannot establish the fourth element. The control element to the special duty exception arises only when the public employee "initiates the circumstances which create the dangerous situation *** without any suggestion from the plaintiff." *Burdinie v. Village of Glendale Heights*, 139 Ill. 2d 501, 525-26 (1990) (overruled on other grounds by *McCuen v.*

[5] The public duty rule also bars Coleman's claim against Will County and Zan for failing to dispatch police services.

Peoria Park District, 163 Ill. 2d 125, 129-30 (1994)); see also *Lawson v. City of Chicago*, 278 Ill. App. 3d 628, 638 (1996) ("The determinative factor for a finding of direct and immediate control is whether the public official was responsible for the occurrence which gave rise to the need for protection.") For example, courts have found the public duty rule applicable where a police officer or fireman directs the plaintiff to do something that puts her in danger. See, *e.g.*, *Leone*, 156 Ill. 2d 33, 40 (1993) (plaintiff was in police officer's direct and immediate control for purposes of special duty rule where police officer "placed [the plaintiff] in a highly perilous position" during a traffic stop by directing her to halt in an active traffic lane in inclement weather without providing warnings to oncoming traffic, parking close behind her, and then directing her to stand in the area between his car and hers to discuss the matter); *Anthony*, 168 Ill. App. 3d at 738 (holding that plaintiff had alleged facts demonstrating that he was within the defendant firefighters' direct and immediate control at the time of his injury where he alleged that the defendants "instructed, directed and encouraged" him to "aid" them in combatting a fire). However, where the plaintiff initiates the contact with the public entity and asks for assistance regarding a preexisting danger or emergency, the plaintiff is not under the public entity's direct and immediate control. *Galuszynski v. City of Chicago*, 131 Ill. App. 3d 505, 508 (1985) (no direct or immediate control over 911 callers because the callers were not "called into a position of peril by" police who were tardy in responding to the plaintiff's 911 call). As the Illinois supreme court put it:

> "Where a private citizen asks the municipal employee to perform a task, and the employee performs the task so as to injure the citizen, the citizen cannot claim he was under the municipality's direct or immediate control. The

[municipality] must protect those it throws into snake pits, but [it] need not guarantee that volunteer snake charmers will not be bitten."

(Internal quotation marks omitted.) *Burdinie*, 139 Ill. 2d at 526.

¶ 53 Here, the 911 call was initiated by Coretta, who was already in grave peril when she placed the call. None of the defendants did anything to bring about the medical emergency which prompted Coretta to seek their assistance. Nor did any of the defendants subject Coretta to any danger independent of her medical emergency. Moreover, Coretta's health crisis and death occurred outside of the presence of the defendants. Thus, as a matter of law, Coretta was not under the direct and immediate control of any of the defendants, and the special duty exception to the public duty rule does not apply.

¶ 54 Coleman and the ITLA argue that, in *American National Bank*, our supreme court implicitly ruled that the special duty exception did not apply to facts similar to those presented in this case. We disagree. As noted above, the parties did not raise the public duty rule or the special duty exception in *American National Bank*. Thus, our supreme court had no occasion to address those issues in that case. Addressing the issue raised by the parties, the supreme court merely held that the plaintiff's complaint did not establish on its face that the defendants' were immune from liability under the EMS Act. *American National Bank*, 192 Ill. 2d 274 (2000). This narrow holding does not imply anything regarding the application of the special duty exception.

¶ 55 4. Duties under the ETS Act, the EMS Act, and other Sources

¶ 56 Coleman also argues that ETS Act, the EMS Act, and the defendants' written policies and procedures created legal duties binding on the defendants and that the defendants can be

found liable for breaching these duties notwithstanding the public duty rule. However, even assuming *arguendo* that these statutes and/or policies establish enforceable legal duties, we would still hold that the defendants in this case owed no duty to Coretta individually. As this court noted in *Donovan,* even though the ETS Act establishes independent statutory duties regarding the administration of a 911 system once such a system is provided, "those duties r[un] to the public at large, not to each individual citizen." *Donovan,* 397 Ill. App. 3d at 850. That must also be true of any duties arising from the EMS Act or from any of the defendant's policies. Thus, even if these Acts and policies create independent legal duties, Coleman cannot show that the defendants' owed any enforceable duty to *Coretta*.[6]

[6] Coleman and the ITLA note that the ETS Act immunizes public agencies, local governments, and their employees and agents from liability for civil damages "as a result of any act or omission *** in connection with developing, adopting, operating or implementing any plan or system required by [the ETS] Act," "except willful or wanton misconduct." 50 ILCS 750/15.1 (West 2008). Similarly, the EMS Act immunizes certified and licensed individuals and government bodies that provide emergency medical services from civil liability for their acts and omissions except for willful and wanton misconduct. See 210 ILCS 50/3.150 (West 2008). Coleman and the ITLA argue that there would be no need to provide these immunities if there was no duty in the first instance. We agree. However, as noted above, a duty to provide 911 dispatch or emergency medical services to any individual member of the public arises only where the special exception to the public duty rule applies. Then, and only then, do the immunity provisions in the ETS Act and the EMS Act come into play.

¶ 57 5. Voluntary Undertaking

¶ 58 Coleman also argues that the public duty rule should not bar recovery in this case because the defendants voluntarily undertook to help Coretta and ended up increasing the risk of harm to her. We disagree.

¶ 59 The Illinois Supreme Court has adopted sections 323 and 324 of the Restatement of Torts (Second), which provide, in relevant part, that:

> "[o]ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.
>
> *****
>
> One who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by
>
> (a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge, or
>
> (b) the actor's discontinuing his aid or protection, if by so doing he leaves the other in a worse position than when the actor took charge of him."

Wakulich v. Mraz, 203 Ill. 2d 223, 243-45 (2003) (quoting Restatement (Second) of Torts §§ 323-324 (1965)).

Applying these principles, our supreme court has ruled that, "where a defendant delays in sending for aid and the other person's condition worsens, resulting in his or her death, the defendant may be liable under a wrongful death statute." *Wakulich*, 203 Ill. 2d at 244-45 (citing Restatement (Second) of Torts § 324, Illustration 2, at 140 (1965)). However, this "voluntary undertaking" theory of liability is "narrowly construed" and is "limited to the extent of the undertaking." *Bell v. Hutsell*, 2011 IL 110724, ¶ 12.

¶ 60 Coleman and the ITLA argue that these principles compel the finding of an enforceable duty to Coretta in this case. Coleman argues that "Will County and Zan undertook to answer 911 calls," "Orland [Fire] and Johnson undertook to dispatch properly," and "[t]he first responders undertook to respond to a 911 medical call to provide aid," and that "[e]ach [d]efendant took on an obligation to serve as a proper 911 operator, EMS dispatcher and first responder." Similarly, the ITLA contends that "the [d]efendants voluntarily assumed duties to accept all emergency calls and dispatch the necessary emergency services." Coleman and the ITLA maintain that, by failing to exercise reasonable care in performing these tasks, the defendants unduly delayed the provision of potentially life-saving medical treatment, thereby increasing the risk of harm to Coretta. Accordingly, Coleman and the ITLA argue that the defendants were subject to liability under *Wakulich.*

¶ 61 We disagree. *Wakulich* does not help Coleman, for several reasons. First, the defendants in *Wakulich* were private parties, not government employees. Accordingly, the public duty rule did not apply in *Wakulich*, and the supreme court's finding of a duty in *Wakulich*

provides little guidance in this case. The parties cite no case wherein an Illinois court has found a public employee providing 911 dispatch or emergency medical services in his official capacity liable for failing to provide adequate emergency services to an individual plaintiff under the "voluntary undertaking" theory.[7] Nor have we found any. Such a holding would contravene the public duty rule.

¶ 62 Moreover, in Illinois, the voluntary undertaking doctrine applies only to undertakings that are truly voluntary, not to actions that the defendant was legally obligated to perform. See, *e.g.*, *Fichtel v. Board of Directors of River Shore of Naperville Condo Ass'n*, 389 Ill. App. 3d 951, 961 (insurance adjuster who investigated plaintiffs' attic for water damage after plaintiff filed an insurance claim did not voluntarily undertake to disclose the existence of mold he discovered in the attic because the insurer was required by contract to investigate the attic and to resolve the claim); *Combs v. Schmidt*, 2012 IL App (2d) 110517, ¶ 37 (landlord's insurer did not

---

[7] In *Torres v. City of Chicago*, 352 Ill. App. 3d 533 (2004), the First District of our appellate court reversed summary judgment in favor of the City and held that the City could be found liable for wrongful death under the "voluntary undertaking" theory where Chicago police officers responded to a 911 call reporting a shooting and then failed to request emergency medical assistance for a shooting victim for several hours. *Id.* at 535-36. However, the *Torres* court made clear that, when the police officers delayed in obtaining medical help for the victim and deterred a neighbor from assisting the victim, they were not acting in their official capacity (*i.e.*, they were not providing police services). *Id.* at 536. By contrast, the defendants in this case were performing their core public duties as 911 dispatchers and first responders when the actions and omissions at issue occurred.

voluntarily assume a duty to preserve evidence of a fire that killed a tenant by investigating the landlord's house after the fire because the insurer's investigation was "part of its duties as the [landlord's] insurer" and was therefore "not voluntary"). Here, defendant Will County was required by law to establish and operate a 911 call center.[8] As a Will County employee, Zan had a contractual obligation to handle 911 calls placed to Will County. Both of these defendants had legal obligations (either statutory or contractual) that preexisted Coretta's 911 call. Similarly, Orland Fire and East Joliet Fire are municipal corporations organized as fire protection districts and authorized by the legislature to "promote and protect the health, safety, welfare and convenience of the public." 70 ILCS 705/1, § 1 (West 2008)). The powers conferred upon such fire protection districts "are public objects and governmental functions in the public interest." *Id.* While responding to Coretta's 911 call, the individual defendants in this case were discharging duties they were authorized to perform under the ETS Act and/or the EMS Act and were providing emergency 911 services that Will County was required to provide under those Acts. Accordingly, the defendants' handling of Coretta's 911 call was not a "voluntary undertaking" under *Wakulich.*

¶ 63 Further, finding that any of the defendants in this case assumed a duty under the voluntary undertaking doctrine would contravene both the public duty rule and the public

---

[8] Section 3 of the ETS Act proves that "[e]very local public agency in a county having 100,000 or more inhabitants, within its respective jurisdiction, shall establish and have in operation within 3 years after the implementation date or by December 31, 1985, whichever is later, a basic or sophisticated system as specified in this Act." 50 ILCS 750/3 (West 2008). We take judicial notice of the fact that Will County has more than 100,000 inhabitants.

policies animating several immunity statutes. As noted, the public duty rule provides that government employees have no duty to provide adequate police, fire, 911 dispatch, or other public services to any individual member of the public. *Zimmerman*, 183 Ill. 2d at 32; *Donovan*, 397 Ill. App. 3d at 849-50. Moreover, the ETS Act and the EMS Act immunize public entities and their employees from liability for negligence in the performance of emergency dispatch or medical services. 50 ILCS 750/15.1 (West 2008); 210 ILCS 50/3.150 (a) (West 2008). The voluntary undertaking doctrine imposes a duty to exercise reasonable care, which is a negligence standard. Finding the defendants in this case subject to such a duty would nullify the public duty rule and flout the policies behind the legislature's decision to immunize 911 dispatchers and emergency medical technicians from liability for negligence.

¶ 64 Because we find that the defendants did not owe a duty to Coretta, we do not need to address whether any statutory immunity provision applied to the defendants' conduct.

¶ 65 CONCLUSION

¶ 66 For the foregoing reasons, we affirm the judgment of the Will County circuit court.

¶ 67 Affirmed.