2011 Ill. App. (1st) 101301-U

SECOND DIVISION
November 8, 2011

1-10-1301 & 1-10-1333

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CYNTHIA OLLOWAY, Individually and as Special Administrator of the Estate of Cedric Coy Langston, Jr., a Deceased Minor,	)	
and	)	Appeal from the Circuit Court of Cook County
REVEREND DWAYNE FUNCHES, Individually and as Independent Executor of the Estates of Travis Funches, Dione Funches, and Dwayne Funches, Jr.; and Emily Funches, Lovera S. Funches, and Shatira Funches, Individually,	)	Nos. 04 CH 16049 & 05 L 9726, cons.
Plaintiffs-Appellants,	)	Honorable Lynn Egan Judge Presiding.
v.	)	
CITY OF CHICAGO, a Municipal Corporation,	)	
Defendant-Appellee.	)	

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Quinn specially concurs and Justice Harris dissents in the judgment.

ORDER

Held : Plaintiffs failed to present sufficient evidence that the City had a duty to the decedents under either the special relationship exception to the public duty rule, or under the voluntary undertaking doctrine; summary judgment in favor of the City was properly granted.

¶1 Following a fatal house fire, plaintiffs Cynthia Olloway ("Olloway"), individually and as administrator of the estate of her son, Cedric Coy Langston, Jr., and Reverend Dwayne Funches ("Funches"), individually and as executor of the estates of his three children that died in the fire, with his wife, Emily Funches, and daughters Lovera Funches and Shatira Funches (collectively, "plaintiffs"), sued the City of Chicago ("City") and other defendants. The City of Chicago filed a motion for summary judgment, alleging that plaintiffs could not establish that the City owed the decedents a duty of care. The trial court granted the motion and this appeal followed. For the following reasons, we affirm the judgment of the Circuit Court of Cook County.

¶2 I. BACKGROUND

¶3 On September 24, 2004, a fire broke out at the Funches' home located at 5056 West Huron in Chicago. The decedents (Cedric Coy Langston, Jr., Travis Funches, Dione Funches, and Dwayne Funches, Jr.) were inside the home when the fire broke out. Both Olloway and Funches filed suit. Only Funches' fourth amended complaint and Olloway's first amended complaint appear in the record. We will discuss each of the allegations against the City in turn.

¶4 A. Funches' Fourth Amended Complaint

¶5 Funches alleged that on September 24, 2004, neighbors placed multiple calls to the City's 9-1-1 center to report the fire and to request assistance. On September 29, 2004, a court order was entered requiring the City to preserve any and all evidence relating to all City of Chicago 9-

1-1 emergency intake and dispatch data for calls placed on the evening of September 24, 2004, between 10 p.m. and midnight. Subsequently, the City produced records which suggested that the first intake call reporting the fire in question came in at 11:25:37 p.m.

¶6 Funches alleged that the City failed to produce all of its records because there were at least three calls placed by residents to the 9-1-1 center prior to 11:25:37 p.m., and the City did not produce records relating to any of those three calls.

¶7 Counts I, II, and III of Funches' fourth amended complaint were against the City, and thus the only counts relevant to this appeal.

¶8 1. Count I - Wrongful Death

¶9 Count I, labeled "Wrongful Death - Willful and Wanton," alleged that on the night in question, the 9-1-1 intake and dispatch center, through its operators, failed to properly accept and handle calls made by residents prior to 11:25:37 p.m. Funches stated that the City knew of the dangers related to handling calls made by the general public to 9-1-1 centers, and that the City knew or should have known that callers could rely to their detriment upon the City for the proper handling of the 9-1-1 system. Funches further alleged that on the date in question the City breached its duty by: failing to properly accept and handle 9-1-1 calls, including hanging up on callers; failing to memorialize information obtained from 9-1-1 emergency calls concerning the fire; failing to coordinate and timely relay accurate information received from 9-1-1 callers; failing to properly train, instruct, and supervise the action of 9-1-1 center operators and employees; failing to operate the 9-1-1 emergency system in such a manner as to be able to quickly and adequately respond to persons seeking rescue services as required by the Emergency

Telephone System Act (50 ILCS 750/1 *et seq*. (West 2010)); and failing to timely and accurately correct systematic problems with the 9-1-1 system such as: unaccounted for calls, hangups, operator accusations of prank calling, and rude indifference to callers.

¶10 Funches alleged that as a direct and proximate result of one or more of those aforesaid willful and wanton acts by the City, the decedents sustained injuries that resulted in their deaths.

¶11 2. Count II - Survival Action

¶12 In count II, labeled " Survival Action - Willful and Wanton," Funches claimed that the City breached its duty in substantially the same ways as under count I, and that as a direct and proximate result of one of those willful and wanton acts, the decedents sustained injuries of a personal and pecuniary nature prior to their deaths, including conscious pain and suffering, and had they survived, they would have been entitled to bring an action for damages pursuant to the Illinois Survival Act (755 ILCS 5/27-6 (West 2010)).

¶13 3. Count III - Spoliation of Evidence

¶14 In count III, labeled "Willful and Wanton Spoliation of Evidence," Funches alleged that the City's mishandling of 9-1-1 calls regarding the fire resulted in a delayed emergency personnel response. He alleged that the City received 2,124 calls for help between the hours of 10 p.m. and midnight on the night in question, and that the City was required, pursuant to the Emergency Telephone System Act (50 ILCS 750/0.01 *et seq*. (West 2010)), to record every incoming 9-1-1 call. On September 29, 2004, the trial court entered a Temporary Restraining Order (TRO) ordering the City to preserve any and all evidence relating to any and all 9-1-1 calls between the hours of 10 p.m. and midnight on the night in question. On October 6, 2004, the City produced

audio recordings of "only" 19 incoming 9-1-1 calls.

¶15 Funches alleged that the City knew that there were relevant and material recordings received during the relevant time period that would have established that calls were received by the 9-1-1 center prior to the 19 calls the City produced. Funches claimed the City willfully and intentionally destroyed recordings of 2,105 incoming 9-1-1 calls that were received in the relevant time period, and that such destruction violated the TRO. Funches concluded that the plaintiffs were therefore unable to prove that the City's willful and wanton conduct resulted in a delay of emergency personnel to the fire and that such conduct was a direct and proximate cause of the death of the decedents.

¶16 B. Olloway's First Amended Complaint

¶17 Olloway alleged two counts against the City. In count I, labeled " Wrongful Death," Olloway claimed that the City knew of the dangers related to handling and timely acting upon calls made by the general public to the 9-1-1 center and the need for appropriate dispatch of fire personnel in response to notification of a fire, and that the city knew or should have known that callers could rely to their detriment upon the City for the proper representation and handling of the 9-1-1 system. Olloway alleged that the City breached its duty on the night of the fire by committing the same acts or omissions that were alleged in Funches' wrongful death count, and that as a result, Cedric Coy Langston, Jr., one of the decedents, died.

¶18 Olloway also included a survival action that was substantially the same as that of Funches' survival action.

¶19 C. City's Motion for Summary Judgment

¶20 The City filed a motion for summary judgment on February 10, 2010, against both Funches' fourth amended complaint and Olloway's first amended complaint.

¶21 1. Motion for Summary Judgment

¶22 The City argued that the Third District Appellate Court's opinion in *Donovan v. The Village of Ohio*, 397 Ill. App. 3d 844 (2010), *appeal denied* 236 Ill. 2d 503 (March 24, 2010), was controlling on the subject of duty, and thus mandated summary judgment in its favor against counts I and II of plaintiffs' complaints. The City stated that *Donovan* held that statutory duties under the Emergency Telephone Systems Act are owed only to the public at large absent a special relationship between a plaintiff and a defendant, and that the only duty identified by either plaintiff in this case arose under the ETS Act. The City claimed that there was no special relationship between the City and the decedents, and thus the plaintiffs' complaints must fail as a matter of law (735 ILCS 5/2-1005 (West 2008)). The City included a transcript from a March 7, 2007, hearing wherein Olloway's counsel admits that Olloway was not asserting any claims under the ETS Act.

¶23 The City further argued that under the public duty rule, the City had no duty to ensure 9-1-1 services to the plaintiffs. Specifically, the City stated that there is no common law duty to provide any specific governmental services to individual members of the public, and that the public duty rule makes clear that a municipality is not liable for failure to supply general police or fire protection. The City claimed that the public duty rule remained viable despite the passage of the Tort Immunity Act because the rule exists independently of statutory concepts of sovereign immunity. Further, as with the ETS Act, *Donovan* held that any common law duty to provide 9-

1-1 services ran to the public at large, not to individual plaintiffs, absent a special relationship between a plaintiff and a defendant. The City claimed that here, the plaintiffs failed to identify any common law duty or its source to support their allegation that the City owed 9-1-1- services to individuals. Rather, the only duty alleged by plaintiffs were pursuant to the ETS.

¶24 2. Summary Judgment as to Count III

¶25 Additionally, the City claimed that Funches' spoliation is a derivative claim to that of duty, and because the plaintiffs could not prevail on the underlying actions of their complaints due to their failure to establish lack of duty, the spoliation claim failed.

¶26 D. Funches' Response to City's Motion for Summary Judgment

¶27 In Funches' response to the City's motion for summary judgment, he admitted that the public duty rule protects a governmental unit from tort liability for failing to provide governmental services because the unit owes a duty only to the public at large and not individual citizens. Funches then argued for the first time that the City owed a duty under the "special duty doctrine" exception to the public duty rule.

¶28 Funches stated that in order to establish the special duty doctrine exception, a plaintiff had to prove that: (1) the municipality was uniquely aware of the particular danger or risk to which plaintiff is exposed; (2) the municipality engaged in specific acts or omissions on the part of the municipality; (3) the specific acts or omissions were affirmative or willful in nature; and (4) the injury occurred while the plaintiff was under the direct and immediate control of municipal employees or agents.

¶29 Funches argued that all direct evidence establishing a special relationship with the four

decedents was destroyed by the City, and thus there is only circumstantial evidence remaining. Nonetheless, Funches argued that the circumstantial evidence created a material issue of fact as to whether the City owed the four decedents a "special duty" thereby precluding summary judgment. Specifically, Funches argued that Dwayne Jr., who was 15 years old at the time of the incident, was very responsible and "had been admonished by Reverend and Emily Funches on numerous occasions to get everyone out of the house and call for help if there was a [sic] emergency." Both Funches and Emily attested to this in their deposition testimony.

¶30 Funches claimed that a neighbor told Dwayne to escape by jumping out a window, but that Dwayne remained in the burning building. Funches argued that there must have been something that made him remain in the house when he had the opportunity to escape, since he had been told to get the kids out of the house in case of a fire. While Funches admitted that Dr. Faucher, the City's expert, testified in his deposition that Dwayne Jr. likely did not try to exit the house because he was under the influence of carbon monoxide, Funches contended that it was equally possible that Dwayne Jr. "called 9-1-1 using the upstairs land line and was instructed to remain upstairs" by a 9-1-1 operator.

¶31 Funches argued that the "conclusion that Dwayne [Jr.] may have called 911 and had been instructed by the operator to remain on the second floor is a reasonable conclusion because he was told to call for help and common sense suggests that the operator would not have instructed him to get out through the fire on the first floor or have his sisters and himself jump out of a second story window."

¶32 Funches further argued that although the City asserted the first call relating to the fire was

received at 11:25:37, there was evidence of calls received earlier. Specifically, Funches contended that "Ms. Carter [a neighbor] called 911 at the latest by 11:24:59 as established by her phone records." Such phone records are not included in the record on appeal, but in her deposition, attached to Funches' response to the City's motion for summary judgment, Carter confirms that her phone bill indicates a call to 9-1-1 at "11:25 p.m." Funches contended that Sprint, Carter's cell phone carrier, rounds calls up to the nearest minute, and thus Carter's call was made between 11:24 and 11:25. There is no such confirmation in the record, however, of this fact, and no records are attached to Funches' response.

¶33 Funches further alleged that Carter's testimony that she called before 11:25 was corroborated by a paramedic's deposition testimony stating that the on-board computer recorded a dispatch time of 11:24. Again, a copy of the on-board computer record was not attached to the response, but there is a copy of the paramedic's deposition testimony confirming that the dispatch time on the computer read "11:24 p.m." Funches argued that Carter and the paramedic's deposition testimony strongly suggested that there were prior calls made to 9-1-1 on the night in question that were destroyed by the City, and that one of those calls was likely made by Dwayne Jr., from the second floor of the house.

¶34 Funches concluded that the above circumstantial evidence was sufficient to show that the City may have created a special relationship with the children and as such, there was a material issue of fact as to whether the City's conduct created a special duty, thereby precluding summary judgment on all three counts. Funches made no claim regarding spoliation of evidence since the motion for summary judgment was based solely on duty, and spoliation is a derivative claim to

that of duty.

¶35 E. Olloway's Response to City's Motion for Summary Judgment

¶36 In Olloway's response to the City's motion for summary judgment, she argued for the first time that because the City "owed a duty to the plaintiff-decedent separate and apart from the [ETS] Act, the motion for summary judgment must be denied." Olloway stated that the ETS Act applies to the public in general, but that the City still had a duty to the decedent independent from that duty. Specifically, Olloway asserted that there existed a common law duty whereby liability is imposed when a defendant's undertaking of protective services increases the risks to the plaintiff or otherwise causes harm. In this case, Olloway claimed that the City undertook a common law duty to the decedent to exercise reasonable care in the handling of 9-1-1 calls seeking assistance for the fire in question.

¶37 Additionally, Olloway argued that the mishandling of the 9-1-1 calls caused a bystander, Emanuel Herrera, to attempt to rescue the decedents after being told that a 9-1-1 operator hung up on a caller. Olloway stated that Herrera kicked in the front door and unknowingly increased the intensity of the fire. She stated that Craig Beyler, plaintiffs' retained expert, opined in his report that had the City properly handled the calls for emergency assistance, Herrera never would have opened the front door and the deaths of the decedents could have been avoided.

¶38 Finally, Olloway concluded that she was not seeking to hold the City liable as an insurer for failing to protect a member of the general public, or for breach of a duty owed to the general public, but rather for undertaking to operate a 9-1-1 system that did not properly handle phone calls made on behalf of the decedents.

¶39 F. City's Reply to Funches

¶40 In the City's reply to Funches' response, it noted that five years into the litigation, Funches argued for the first time that the City owed a "special duty" to decedents. The City urged the court to reject Funches' response for three reasons: (1) he failed to allege, in any of his amended complaints, that the City owed decedents a special duty, (2) he concocted a chain of inferences as to why the City owed a special duty, namely that Dwayne Jr. called 9-1-1 and was instructed to stay on the second floor, and (3) there is no evidence in the record establishing a special duty.

¶41 G. City's Reply to Olloway

¶42 The City replied to Olloway's argument by stating that it must fail because her complaint and the record failed to establish that the City voluntarily undertook a duty to the decedents by holding out 9-1-1 as the number to call for emergency assistance. Additionally, the City asserted that the 9-1-1 system was not a voluntary undertaking because the ETS Act required all local public agencies in a county having 100,000 or more inhabitants to implement such a system. Accordingly, there was no "voluntary" undertaking.

¶43 H. April 8, 2010 Hearing

¶44 On April 8, 2010, a hearing was held in this case. In regards to the summary judgment motion, the following colloquy took place:

> "THE COURT: In reading through the briefs and reviewing both complaints, I agree with the City that there are no allegations in either complaint regarding the voluntary undertaking or special duty exception to the public duty rule. And, of course, that subject has kind of been the 800-

pound gorilla that hasn't been addressed for six years. But I appreciate the arguments. I also appreciate that despite any specific allegations about voluntary undertaking or a special duty or a special relationship that there are lots of factual allegations in both complaints from which one could argue in position of a duty. With that said, I think that it is very important that our record is very focused and very precise in terms of how we move forward on this.

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So what I would like to get confirmation from the plaintiffs is this: Are both plaintiffs comfortable committing to the fact that voluntary undertaking and special duty, special relationship are the sole bases for invocation of duty for purpose - and the attendant factual allegations that support those theories for purposes of resolving the City's summary judgment motion?"

MR. WOLF: That's correct, Judge. And the only reason we didn't argue it in the briefs is the City has correctly cited the law in Illinois. There is a Third District case, *Donovan*, that says what it says, and to my knowledge, there is no contrary case that says that, and - at least to the extent that *Donovan* goes as far as it did. So we have dealt with *Donovan* in the way that we think is most appropriate under the facts of this case.

Again, I just don't want there to be some perception that we have

somehow waived attacking the legitimacy or viability of *Donovan* should this matter go to the Appellate Court.

THE COURT: I don't think you would. ***.

And I want to make sure, since I'm addressing a threshold issue, the issue of duty of the City, I want to make sure I understand the scope of the plaintiffs' bases for imposition of a duty on the City, and as I understand it, Ms. Propes is comfortable committing that the sole bases for any imposition of a duty on the City are a voluntary undertaking and special duty exception, and are the Funches plaintiffs willing to make the same commitment?

MR. WOLF: For purposes of this motion, yes, your Honor, given my earlier comments.

THE COURT: Great. Then I don't think we need to get into a pleading issue. I'm going to rely on the representations of the plaintiffs that the only sources of any potential duty as to the City is voluntary undertaking and special duty exception."

¶45 G. April 14, 2010 Hearing

¶46 On April 14, 2010, the court heard oral arguments on the motion for summary judgment. Mr. Jones, counsel for the City, argued first. He stated that there was no question that before *Donovan* came down, each of the plaintiffs believed that the duty that was exercised was going to be pursuant to the ETS Act. He stated that Olloway, for the first time, was claiming a voluntary

duty, but that the ETS Act mandates that every municipality over 100,000 people must establish a 9-1-1 system, and thus the 9-1-1 system was not a voluntary undertaking but, rather, a mandatory one. Jones went on to state that the only exception the *Donovan* court permitted was the special duty doctrine. In terms of the special duty doctrine, Mr. Jones accused Funches of attempting to rewrite the facts in this case in order to meet the four elements necessary to plead special duty. Specifically, Funches alleged that Dwayne Jr. had called the 9-1-1 center and was instructed to stay in the burning building on the second floor.

¶47 In response, Funches' attorney addressed the special duty doctrine argument. He stated that the City destroyed all of the recordings other than the 19 phone calls that it produced. Additionally, counsel argued that he had Connie Carter's cell phone bills that show she called before the first call that the City says came in, and that a paramedic testified that the on-board computer recorded their dispatch time at 11:24 p.m., which counsel claimed was more than a minute and half before the City alleged the first call was received. Additionally, counsel argued that Dwayne Jr. was a 15-year old boy that was responsible and had been told to get everybody out of the house, and that there was a phone available to him on the second floor. Counsel argued that it "doesn't take much of a stretch at all to assume this man would have called 9-1-1 when he discovered there was a fire in the house." Counsel then went on to argue that there was a second inference, which was admittedly "a little more tenuous." That second inference was that there must have been a reason that Dwayne did not leave the second floor when people were urging him to do so, and that reason was that a person from the 9-1-1 center must have told him to stay there.

¶48 Ms. Propes, counsel for Olloway, admitted, "I think the Court recognizes that we have not asserted a duty under the [ETS] Act." She then argued that the Illinois Supreme Court adopted the Restatement of Torts § 323, which states that when a governmental entity like the City undertakes to render services, it is liable for harm that results from the failure to exercise reasonable care in the rendering of those services. Counsel continued her argument by stating that when the City undertook to answer 9-1-1 calls, and when operators hung up on those callers and did not properly respond to those calls, "that was willful and wanton conduct that increased the risk of harm to the plaintiffs."

¶49 The trial court then made its finding, stating that duty is an essential element of any cause of action alleging willful and wanton conduct, thereby making the lack of duty an appropriate basis for a summary judgment motion since whether a duty exists is a question of law. The court stated that "the involvement of a governmental entity such as the City of Chicago requires that the duty analysis begin with the so-called public duty rule," and that "plaintiffs' reliance on the special duty exception implicitly acknowledges the continued viability of this rule."

¶50 The trial court recognized that "after sovereign immunity was abolished and the Tort Immunity Act became law, two conflicting approaches to the interplay between the public duty rule and the Tort Immunity Act began to appear in decisions of the Illinois Supreme Court." The first approach appeared in *Huey v. Town of Cicero*, 41 Ill. 2d 361 (1969), where the court found that the general rule was that a municipality and its employees are not liable for failure to supply general police or fire protection. Several cases continue to cite *Huey* for the proposition that the public duty rule survives independent of constitutional or statutory provisions. The trial court

noted that *Harineck v. 161 North Clark Street*, 181 Ill. 2d 335 (1998), "expressly declared the public duty rule remains viable," and that in *Zimmerman v. Village of Skokie*, 183 Ill. 2d 30 (1998), the supreme court again relied on *Huey* in declaring that the public duty rule lives on despite the Tort Immunity Act or the 1970 Illinois Constitution. The trial court also stated that "[t]he *Donovan v. Village of Ohio* case cited by the City follows this line of cases, expressly relying on *Zimmerman* and specifically holding that the public duty rule applies to operation of a 9-1-1 emergency system." Thus, the trial court noted that under the *Huey* line of cases, including *Donovan*, the duty owed by the City in the present context "run[s] to the general public and not to individual citizens such as the plaintiffs. Thus, absent an exception, application of the public duty rule in the present case would mandate summary judgment."

¶51 The trial court then noted that the manner in which Olloway articulated her voluntary undertaking argument directly collided with the public duty rule "since it's clear the undertaking runs to the public in general." However, the trial court stated that "the question about whether the public duty rule survives is still unanswered by the Illinois Supreme Court." While *Donovan* expressly found that it does, and that it applies to operation of a 9-1-1 system, "its decision is only binding on this court if the *Huey* line of Supreme Court decisions controls."

¶52 The trial court then noted that there is a conflicting line of supreme court decisions on the issue. It noted that the cases of *Burdinie v. Village of Glendale Heights*, 139 Ill. 2d 502 (1990), *Bartnett v. Zion Park District*, 171 Ill. 2d 378 (1996), and *Moore v. Green*, 219 Ill. 2d 470 (2006), all take the position that the public duty rule was codified in the Tort Immunity Act and does not exist independent of it. The trial court then stated that "[g]iven this conflict in Supreme

Court decisions, *Donovan* does not provide the answer and is not even particularly helpful since this Court cannot simply rely on the *Huey* line of cases to the exclusion of the codification decisions," nor could it rely solely on the codification decisions. The trial court stated that even though plaintiffs' response briefs "seem to concede the continued existence of the public duty rule, the conflicting Supreme Court decisions is the primary reason this Court ordered the parties to appear last week and provide confirmation about plaintiffs' theory supporting imposition of a duty upon the City." Continuing, the trial court stated that just as importantly, it was essential for the court to obtain commitments from plaintiffs that:

> "their duty theories were limited to those articulated in the response briefs since they provide an analytical alternative to resolving whether the public duty rule still exists. Indeed, since all plaintiffs expressly agreed their only duty theories for purposes of the summary judgment motion are voluntary undertaking and special duty, this Court can resolve the City's motion without making a pronouncement about the continued vitality of the public duty rule."

¶53 Starting first with the argument about a voluntary undertaking, one that was "confined to well-established principles now that consideration of the public duty rule is unnecessary," the trial court noted that in order to prevail, plaintiffs must establish that the undertaking was in fact voluntary. The trial court found that as noted by the City, the plain language of the ETS Act makes a 9-1-1 system compulsory in a county the size of Cook County. Thus, as a matter of law,

the trial court found that the City did not owe plaintiffs a duty based upon a voluntary undertaking.

¶54 In regards to the other theory advanced by plaintiffs, the "special duty doctrine" exception, the trial court found that "there is nothing in the record before this Court which demonstrates such a relationship was established in this case." Instead, the trial court noted, the plaintiffs relied on deposition testimony that Dwayne Funches, Jr. was responsible and had previously been instructed to gather his siblings and leave the house and call for help if there was an emergency, and that a neighbor encouraged Dwayne Jr. to jump out of a window in order to escape the fire. The court noted that "[t]his is the full extent of the direct evidence relied upon by plaintiffs in an effort to establish a special duty on the part of the City. It is insufficient." The trial court explained that while circumstantial evidence may establish facts necessary to a claim, those facts must show a "probability rather than just the mere possibility of the existence of the facts sought to be proven." The court found that the fact plaintiffs wished to establish, which was that Dwayne Funches, Jr. called 9-1-1 from the second floor of his home and was told by a 9-1-1 operator to remain in the home, was only supported by "the fact that Dwayne Jr. was a responsible young man who had previously been instructed to call for help and leave the home in the event of an emergency."

¶55 The trial court went on to state that even the evidence establishing calls made to the 9-1-1 center prior to those identified by the City as the first calls received did not alter the fact that the evidence was insufficient circumstantial evidence of the ultimate scenario urged by the plaintiffs, "namely that Dwayne, Jr. had a conversation with the 9-1-1 operator and was instructed to

remain in the home." The trial court found that instead it was purely speculative and devoid of evidence either establishing or raising a reasonable inference that the City did something that created a special relationship with any of the plaintiffs.

¶56 The trial court thus found that summary judgment was appropriately granted in the City's favor and that the City did not owe plaintiffs a duty under a voluntary undertaking or special duty theory, and that "plaintiffs have not advanced any alternative basis for imposition of a duty on the City. In fact, as previously noted, both plaintiffs affirmatively *disavowed* any other bases for imposition of a duty on the City." (Emphasis added). Plaintiffs now appeal.

¶57 II. ANALYSIS

¶58 On appeal, plaintiffs contend that the City owed a duty of care to the decedents pursuant to the ETS Act, and that the *Donovan* court improperly found that the common law public duty doctrine defeated the statutory duties imposed by the ETS Act. Alternatively, plaintiffs argue that the "special relationship" exception to the public duty rule has been met in this case, and that the voluntary undertaking doctrine applies.

¶59 A. Standard of Review

¶60 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. However, "[m]ere speculation, conjecture, or guess is insufficient to withstand summary judgment." *Source v. Naperville Jeep Eagle, Inc*., 309 Ill. App. 3d 313, 329 (2007). 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)).

¶61 B. Common Law Public Duty Rule v. Statutory ETS Act Duty

¶62 Plaintiffs' first argument on appeal is that the judicially-created public duty doctrine does not defeat statutory duties to persons the statute intended to protect, and thus, *Donovan* was incorrect in finding the public duty rule defeats the duties outlined in the ETS Act. We note, however, that this issue is waived. See *Prodromos v. Forty East Cedar Condominium Ass'n*, 264 Ill. App. 3d 363, 366-67 (1994). As detailed above, plaintiffs specifically conceded in the trial court that *Donovan* controlled, and that the only two methods of proving a duty on the part of the City that remained after *Donovan* were the special duty doctrine and the voluntary undertaking doctrine. The trial court went to great lengths to solicit affirmation from the plaintiffs that those two theories of duty were the only two theories of duty remaining at the summary judgment stage. The trial court discussed the public duty rule at length and then noted that the plaintiffs' duty theories were limited to those articulated in the response briefs, which provided an alternative to resolving whether the public duty rule still exists. The trial court stated: "Indeed, since all plaintiffs expressly agreed their only duty theories for purposes of the summary

judgment motion are voluntary undertaking and special duty, this court can resolve the City's motion without making a pronouncement about the continued vitality of the public duty rule."

¶63 Moreover, in finding that the City did not owe a duty to plaintiffs under either a voluntary undertaking or a special duty theory, the trial court specifically stated that plaintiffs did not advance any alternative basis for imposition of a duty on the City. "In fact, as previously noted, both plaintiffs affirmatively *disavowed* any other bases of imposition of a duty on the City." (Emphasis added). Thus, because plaintiffs *disavowed* any alternative theories of duty, including a duty under the ETS Act, they cannot now claim on appeal that *Donovan* was wrongly decided and that the City owed a duty under the ETS Act. See *Prodromos*, 264 Ill. App. 3d at 366-67 (1994) (at a summary judgment hearing, plaintiffs' counsel specifically conceded that plaintiffs violated an ordinance, and thus waived that argument on appeal). The trial court accordingly never ruled on this issue, and we have no decision to review.

¶64 Because plaintiffs conceded in the trial court that *Donovan* controlled and that the only two duty theories that applied were a voluntary undertaking and a special duty, they have waived the argument that the City owed a duty under the ETS Act.

¶65 C. Special Duty Doctrine

¶66 Plaintiffs' next contention on appeal is that the City owed decedents a duty pursuant to the special duty doctrine, which is an exception to the common law public duty rule. The public duty rule establishes that " 'a municipality or its employees is not liable for failure to supply general police or fire protection.' " *Zimmerman v. Village of Skokie*, 183 Ill. 2d 30, 44 (1998) (quoting *Huey v. Town of Cicero*, 41 Ill. 2d 361, 363 (1968)). The rationale behind the

nonliability principle of the public duty rule is that a municipality's duty is to preserve the well-being of the community and that such a duty is owed to the public at large rather than to specific members of the community. *Zimmerman*, 183 Ill. 2d at 44 (citing *Schafrath v. Village of Buffalo Grove*, 160 Ill. App. 3d 999, 1003 (1987)).

¶67 A common law exception to the public duty was recognized, however, where a governmental unit was operating under a "special duty" to a particular individual such that it could be held liable in tort. *Hess*, No. 1-08-1653, slip op. at 8 (Ill. App. Mar. 31, 2011) (citing *Huey*, 41 Ill. 2d at 363). The special duty doctrine is applicable in certain limited instances where a governmental entity has assumed a special relationship to an individual so as to elevate that person's status to something more than just being a member of the public. *Zimmerman*, 183 Ill. 2d at 32-33; *Schaffrath v. Village of Buffalo Grove*, 160 Ill. App. 3d 999, 1003 (1987). For there to be a special duty, four requirements must be met: (1) the governmental entity must be uniquely aware of the particular danger or risk to which plaintiff is exposed; (2) plaintiff must show specific acts or omissions on the part of the entity; (3) those specific acts or omissions must be affirmative or willful in nature; and (4) the injury must occur while plaintiff is under the direct and immediate control of employees or agents of the governmental entity. *Ries v. City of Chicago*, 242 Ill. 2d 205, 225 (2011), citing *DeSmet v. County of Rock Island*, 219 Ill. 2d 497, 519-20 (2006).

¶68 We begin our analysis with the fourth requirement. It "has been held that a person is under the direct and immediate control of a municipality if a municipal employee who is acting with official authority which private citizens would reasonably believe they cannot refuse (such

as a police officer's authority) makes a request of the private citizen and the citizen complies with the request." *Burdinie v. Village of Glendale Heights*, 139 Ill. 2d 502, 526 (1990), overruled on other grounds in *McCuen v. Peoria Park District*, 163 Ill. 2d 125 (1994). Plaintiffs allege that this prong has been met because "[d]espite the lifelong admonitions of his parents and the screams of his neighbors, Junior stayed in the house," and that he stayed in the house "because of the shroud of authority of a 9-1-1 operator who told him to stay where he was."

¶69 As the trial court noted, there is no direct evidence that Dwayne Jr. called 9-1-1 or spoke to a 9-1-1 operator, and thus the evidence put forth by Plaintiffs is entirely circumstantial. When circumstantial evidence is relied upon, that evidence must support an inference which is reasonable and probable, not merely possible. See *Pyne v. Witmer*, 129 Ill. 2d 351 (1989); *Stojkovich v. Monadnock Bldg*., 281 Ill. App. 3d 733, 739 (1996). "When a party seeks to rely on circumstantial evidence, the conclusion sought must be more than speculative, it must be the only probable conclusion that could be drawn from the known facts." *Stojkovich*, 281 Ill. App. 3d at 739. "If the circumstantial evidence allows for an inference of the nonexistence of a fact which is just as probable as its existence, then the conclusion that it exists is not a reasonable inference, but rather a matter of speculation, surmise, and conjecture." *Id*.

¶70 Here, plaintiffs have not presented sufficient circumstantial evidence establishing that Dwayne Jr. called 9-1-1 and was told by an operator to remain in the house, and therefore have not presented sufficient evidence indicating that Dwayne Jr. was under the direct or immediate control of the City. The evidence presented was mere speculation and conjecture. The record materials do not demonstrate the probability of the inference plaintiffs seek to draw, and they

specifically failed to attach any evidence of Sprint's billing practices or EMT's data to the response to the City's summary judgment motion. Accordingly the trial court's entry of summary judgment in favor of the City on this issue was proper where the evidence was insufficient to support a claim under the special duty doctrine.

¶71 D. Voluntary Undertaking

¶72 Plaintiffs' second argument on appeal is that the City undertook a common law duty to the decedents to exercise reasonable care in the handling of telephone calls it received seeking emergency assistance. Plaintiffs contend that the City breached that duty when 9-1-1 operators mishandled the calls by hanging up on a caller, which caused bystander Emanuel Herrera to attempt his own rescue effort by kicking in the front door and unknowingly increasing the intensity of the fire.

¶73 Generally, pursuant to the voluntary undertaking theory of liability, "one who undertakes gratuitously or for consideration to render services to another is subject to liability for bodily harm caused to the other by one's failure to exercise due care in the performance of the undertaking." *Rhodes v. Illinois Central Gold R.R.*, 172 Ill. 2d 213, 239 (1996); see also *Wakulich v. Mraz*, 203 Ill. 2d 223, 241 (2003). Section 323 of the Restatement (Second) of Torts provides that one who undertakes to render necessary services to another "is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if *** his failure to exercise such care increases the risk of such harm, or *** the harm is suffered because of the other's reliance upon the undertaking." *Wakulich*, 203 Ill. 2d at 243. However, under the voluntary undertaking of liability, the duty of care to be imposed upon

the defendant is limited to the extent of the undertaking. *Frye v. Medicare-Glaser Corp*., 153 Ill. 2d 26, 32 (1992); *Castro v. Brown's Chicken and Pasta, Inc*., 314 Ill. App. 3d 542, 549 (2000).

¶74 In the case at bar, plaintiffs allege that the City undertook a common law voluntary duty to the decedents when the City instructed its citizens to dial 9-1-1 to report a fire rather than calling the local fire station, and that because of the City's operation of the 9-1-1 system, calls for assistance relating to the fire were placed to 9-1-1 rather than to other sources of assistance.

¶75 However, as the trial court correctly noted, the City did not voluntarily and gratuitously undertake to provide the decedents with 9-1-1 services. Rather, the ETS Act requires the City to provide services to the public: "[e]very local public agency in a county having 100,000 or more inhabitants within its respective jurisdiction, *shall* establish and have in operation *** a basic or sophisticated system as specified in this Act." 50 ILCS 750/3 (West 2008) (emphasis added). Because the City of Chicago is in a county with more than 100,000 inhabitants, it was required to implement a 9-1-1 system. Thus, the undertaking of such system was compulsory and not voluntary.

¶76 Additionally, the cases cited by plaintiffs in support of voluntary undertaking are distinguishable from the case at bar. See *Torres v. City of Chicago*, 352 Ill. App. 3d 533 (2004) (the City had no duty to respond to the 9-1-1 call, but voluntarily undertook a duty not to harm the victim of a gunshot wound once they responded to the call); *Lurgio v. Commonwealth Edison*, 394 Ill. App. 3d 957 (2009) (an electrical company assumed a duty to arrive in a timely fashion when it gave plaintiff an estimated time of arrival); *Rice v. White*, 374 Ill. App. 3d 870 (2007) (defendants voluntarily undertook a duty to prevent the entrance of weapons into the party

when they stated on a flyer for their party that they would check for weapons); *Pippin v. Chicago Housing Authority*, 78 Ill. 2d 204 (1979) (Chicago housing authority contracted with a security company to provide guard services - the security company voluntarily assumed a duty of exercising reasonable care in performing its contractual obligations by voluntarily contracting with the company). Only one of these cases, *Torre*s, involved an alleged voluntary undertaking by a municipal employee. In *Torres*, the liability of the police officer was premised on the manner in which he acted after he arrived at the scene of a shooting pursuant to a 9-1-1 call that was placed, not based on the establishing and handling of a 9-1-1 center. Here, plaintiffs do not allege that police officers or firefighters were negligent in their response to the fire in question.

¶77 Accordingly, we find that there was insufficient evidence presented to support a claim of duty under a voluntary undertaking theory, and thus the trial court properly granted the City's motion for summary judgment on this issue.

¶78 III. CONCLUSION

¶79 Because there was insufficient evidence presented to support a claim for either the special duty doctrine, or for a voluntary undertaking, the trial court properly granted the City's motion for summary judgment.

¶80 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶81 Affirmed.

¶82 PRESIDING JUSTICE QUINN, specially concurring.

¶83 I agree with Justice Connors' holding and analysis in affirming the circuit court's order granting summary judgment to the City.

¶84 I agree that by their concession in the circuit court that the holding in *Donovan v. The Village of Ohio*, 397 Ill. App. 3d 844 (2010), *appeal denied* 236 Ill. 2d 503 controlled, and they disavowed any claim under the ETS Act, they cannot now argue that the City owed a duty under the ETS Act. Even if this issue were not waived, I believe that the *Donovan* court correctly held that the duties established under the ETS Act run to the public at large, not to each citizen individually. *Donovan*, 397 Ill. App. 3d at 850. Plaintiffs argue that *Donovan* was wrongly decided as "it is impossible to distinguish in any meaningful way, the Domestic Violence Act and the ETS Act." Plaintiffs cite the holdings in *Calloway v. Kinklear*, 169 Ill. 2d 312 (1995) and *Moore v. Greene*, 355 Ill. App. 3d 81 *affirmed* 219 Ill. 2d 470 (2006). However, in both *Calloway* and *Moore*, the plaintiffs (or their decedents) were named in the orders of protection which the police failed to enforce, resulting in plaintiffs' injuries. This aspect of the Domestic Violence Act is completely different than the duty to protect the general public imposed by the ETSA.

¶85 It is understandable that plaintiffs made this concession as the holding in *Donovan* directly refuted plaintiffs' assertions that the City owed a duty to plaintiffs. Further, the circuit court was obligated to follow the holding in *Donovan* in the instant case. There is only one appellate court in the State of Illinois, and the decisions of the appellate court are binding on all circuit courts, regardless of locale. *People v. Harris*, 123 Ill. 2d 113, 127 (1998); *People v.*

Layhew, 139 Ill. 2d 476, 489 (1990).

¶86 It is also understandable why the circuit court took the actions it took in an effort to allow the plaintiffs to attempt to proceed with their case. The case had been pending for more than five years and trial was set to begin in three weeks. The *Donovan* case had been decided some three months prior to the motion for summary judgment being heard.

¶87 However, I also agree with the City on appeal that as Olloway did not allege voluntary undertaking in her first-amended complaint and the Funches did not plead special duty in their fourth-amended complaint, those theories of recovery cannot be raised on appeal. The plaintiffs were required to amend their complaints in the circuit court if they wished to preserve the issue for review. If a plaintiff fails to plead a theory in the complaint, he must "move to file an amended complaint before *** summary judgment is granted," because he "will not be heard to complain that summary judgment was inappropriately granted" to the defendant on "theory of recovery that he never pled in his complaint." *Pagano v. Occidental Chemical Corp.*, 257 Ill. App. 3d 905, 911 (1994). Also see *Eagan v. Chicago Transit Authority*, 158 Ill. 2d 527, 534-35 (1994) ("Since Eagan failed to raise the 'special duty' exception in his complaint and did not amend his complaint to include this exception, it is not properly before this court.")

¶88 In her reply brief, Olloway asserts that if we agree with the City on this point, we should remand the case back to the circuit court to allow plaintiffs to file new amended complaints. I disagree.

¶89 Section 2-1005(g) of the Code of Civil Procedure provides in pertinent part: "Before or after the entry of a summary judgment, the court shall permit pleadings to be amended upon just

and reasonable terms." 735 ILCS 5/2-1005(g)(West 2008). The supreme court interpreted section 2-1005(g) in *Loyola Academy v. S&S Roofing Maintenance, Inc.*, 146 Ill. 2d 263 (1992). The court held that the four factors to be examined in determining whether a party should be granted leave to file an amended pleading pursuant to Section 2-1005(g) after the entry of a summary judgment are as follows: (1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified. *Loyola Academy*, 146 Ill. 2d at 273.

¶90 In the instant case, allowing the plaintiffs to amend their complaints to reflect their reliance on the theories of voluntary undertaking or special duty would not have cured the defective pleading. As the trial court and Justice Connors explain in their excellent analyses, neither the voluntary undertaking nor special duty doctrines apply in this case. In his well-written dissent, Justice Harris in part cites the holding in *Torres v. City of Chicago*, 352 Ill. App. 3d 533 (2004) for the proposition that "where a defendant undertakes to provide a service intended for the protection of others, it has a duty to exercise reasonable care in the performance of the undertaking." However, the court in *Torres* began its analysis by saying "[f]or purposes of this opinion, we assume that the City had no enforceable duty to respond to the 911 call." *Torre*s, 352 Ill. App. 3d at 535. This assumption was correct under both the ETS Act (see *Donovan*, 397 Ill. App. 3d at 850) and under the public duty doctrine. The City conceivably had a duty to the plaintiff in *Torres* because the police did not request an ambulance to assist the plaintiff until 90 minutes had passed after their arrival and they were informed there was a person

shot in addition to the two gunshot victims removed from the scene. Indeed, the police in *Torres* refused to allow others to provide aid to the plaintiff even after they saw him and realized that he had been shot.

¶91 The dissent also cites *Wakulich v. Mraz*, 203 Ill. 2d 223, 244-45 (2003) for the proposition 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." In *Wakulich*, an adult social host failed to seek aid for an intoxicated minor who had become unconscious. The supreme court reversed the circuit court's order of dismissal entered pursuant to section 2-615. In doing so, the court relied on the voluntary undertaking doctrine. It should be noted that *Wakulich* held that it was the defendant host's actions constituting a voluntary undertaking which brought his failure to act under sections 323 and or 324 of the Restatement (Second) of Torts (1965). The Restatement did not trump Illinois' well-established policy of not providing for any form of social host liability, which was affirmed in *Wakulich*, 203 Ill. 2d at 230. Similarly, I believe that sections 323 and 324 of the Restatement are subject to the public duty doctrine. While government entities may be held liable under sections 323 and 324, they may also invoke the public duty doctrine, as was done here.

¶92 JUSTICE HARRIS, dissenting.

¶93 The trial court erred in granting summary judgment in favor of the city as a duty of care was well pleaded and argued by the plaintiff-decedents.

¶94 On September 24, 2004, calls were made to the city of Chicago's 911 center to report a fire and request help at 5056 West Huron Street. It has been well pleaded that the initial calls for emergency assistance were mishandled by the city, with some callers not being answered, other callers being hung up on, and still other callers dismissed as pranksters and their requests for help ignored. As a result, the pleadings urge that the wrongful handling of these 9-1-1 calls caused a delay in emergency assistance arriving at the burning house, and four young children died.

¶95 Chicago's motion for summary judgment argues that the city owed no duty to the plaintiff-decedents. I would hold otherwise, as the city owed a duty of care to the minor plaintiff-decedents in the handling of these calls under section 323 and/or section 324A of the Restatement (Second) of Torts §§323, 324A (1965). Under these sections, a common law duty is owed where a defendant's undertaking of protective services increases the risk of harm to others. This duty either flows directly between the city and the plaintiff-decedents under section 323, or is owed to the plaintiff-decedents as third parties on whose behalf the calls for emergency assistance were made under section 324A.

¶96 Under the provisions of the Restatement (Second) of Torts, a common law duty is owed and liability is imposed where a defendant's undertaking of protective services increases the risks to the plaintiff or otherwise causes harm. 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 v. Mraz,* 203 Ill.2d 223, 244-245 (2003).

¶97 In this case, the city undertook a common law duty to the plaintiff-decedents to exercise reasonable care in the handling of telephone calls that it received seeking emergency assistance for this fire. The city has instructed its citizens to dial 9-1-1 to report a fire rather than calling the local fire stations. The importance of calling 9-1-1 for emergency assistance rather than other phone numbers is displayed throughout the city. It is written on the back of police cars, advertised on the front page of phone books, and children are instructed at a young age that the number to call to report an emergency is 9-1-1. Having instructed its citizens to use 9-1-1 as the telephone number to call in an emergency, the city took complete charge in the manner fires were to be reported, and undertook a duty to exercise reasonable care in the handling of telephone calls that were actually placed to 9-1-1 seeking emergency assistance.

¶98 Illinois courts have repeatedly held that, where a defendant undertakes to provide a service intended for the protection of others, it has a duty to exercise reasonable care in the performance of the undertaking. See *Torres v. City of Chicago*, 352 Ill.App.3d 533, 535 (2009) (where the city assumed a duty to aid the victim of a shooting by responding to 9-1-1 calls and dispatching police officers to the scene). Likewise, by operating the 911 center in which persons were expected and told to dial 9-1-1 to report fires rather than call the local fire house or other sources of assistance, the city of Chicago undertook to exercise reasonable care in the handling of these telephone calls seeking emergency assistance.

¶99 The majority opinion does not apply the Restatement because the city's operation of the 911 center was not voluntary, but rather a mandatory obligation set forth by the Emergency

Telephone System Act, 50 ILCS 750/1 *et seq.* (West 2006). *Supra*, ¶ —, (unpublished order under Supreme Court Rule 23). That position is inconsistent with the Restatement, which draws no distinction between services that were rendered voluntarily, charitably, or for any other reason. To the contrary, the comments to Section 323 state that "[t]his Section applies to *any* undertaking to render services to another which the defendant should recognize as necessary for the protection of the other's person or things." Restatement (Second) of Torts §323, cmt. a, at 136 (1965). Similarly, the comments to section 324A state "[t]his Section applies to *any* undertaking to render services to another, where the actor's negligent conduct in the manner of performance of his undertaking... results in physical harm to the third person or his things." Restatement (Second) of Torts §324A, cmt. b, at 142 (1965).

¶100 The reason why a party renders services to another is not relevant under sections 323 and 324A. All that matters is that, when a party renders services to another which he should recognize as necessary for the protection of another or a third person, a duty of care arises, and liability is imposed where the actor's failure to exercise reasonable care increases the risk of harm.

¶101 Because questions of fact exist whether the city breached a duty by mishandling the calls to 9-1-1, whether the breach rose to the level of willful and wanton misconduct as required by the qualified immunity available to the city, and whether the failure to properly handle these calls was a proximate cause of the death of the plaintiff-decedents, the circuit court erred in granting summary judgment.

¶102 Accordingly, I would reverse the order of the trial court and remand for further

proceedings.

¶ 103 PRESIDING JUSTICE QUINN, specially concurring.

¶ 104 I agree with Justice Connors' holding and analysis in affirming the circuit court's order granting summary judgment to the City.

¶ 105 I agree that by their concession in the circuit court that the holding in *Donovan v. The Village of Ohio*, 397 Ill. App. 3d 844 (2010), *appeal denied* 236 Ill. 2d 503 controlled, and they disavowed any claim under the ETS Act, they cannot now argue that the City owed a duty under the ETS Act. Even if this issue were not waived, I believe that the *Donovan* court correctly held that the duties established under the ETS Act run to the public at large, not to each citizen individually. *Donovan*, 397 Ill. App. 3d at 850. Plaintiffs argue that *Donovan* was wrongly decided as "it is impossible to distinguish in any meaningful way, the Domestic Violence Act and the ETS Act." Plaintiffs cite the holdings in *Calloway v. Kinklear*, 169 Ill. 2d 312 (1995) and *Moore v. Greene*, 355 Ill. App. 3d 81 *affirmed* 219 Ill. 2d 470 (2006). However, in both *Calloway* and *Moore*, the plaintiffs (or their decedents) were named in the orders of protection which the police failed to enforce, resulting in plaintiffs' injuries. This aspect of the Domestic Violence Act is completely different than the duty to protect the general public imposed by the ETSA.

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