ORIGINAL

IN THE SUPREME COURT OF MISSISSIPPI

LEE COUNTY, MISSISSIPPI,
LEE COUNTY EMERGENCY COMMUNICATION
DISTRICT, ET AL. APPELLANTS

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SUPREME COURT
COURT OF APPEALS

v. 2001-IA-00636

KERMIT DAVIS AND NANCY DAVIS APPELLEES

INTERLOCUTORY APPEAL FROM THE CIRCUIT COURT
OF LEE COUNTY, MISSISSIPPI

APPELLANTS' BRIEF

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court may evaluate possible disqualification or recusal.

1. Kermit Davis and Nancy Davis, Plaintiffs-Appellees;

2. Duncan Lott, attorney for Plaintiffs-Appellees;

3. Honorable Frank A. Russell, trial judge;

4. Lee County, Mississippi, Lee County Emergency Communication District, et al., Defendants-Appellants (collectively referred to as "Lee County"); and

5. Gregory M. Hunsucker, William M. Beasley, Phelps Dunbar, LLP, attorneys for Lee County.

This the 25th day of February, 2002.

Gregory M. Hunsucker

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STATEMENT OF THE ISSUES

1. Whether the "governmental/proprietary function" test applies to claims admittedly within the scope of the Mississippi Tort Claims Act (the "MTCA"). The trial court says "yes;" Lee County says "no."

2. Whether the Lee County Emergency Communication District is an entity entitled to the protections of the MTCA. The trial court says "no;" Lee County says "yes."

3. Whether the immunity of a governmental entity engaged in the performance of activities relating to police and fire protection can be lost when the plaintiffs alleging that the entity acted in "reckless disregard" of their safety were hundreds of miles away at the time. The trial court says "yes;" Lee County says "no."

4. Whether the immunity of a governmental entity engaged in the performance of activities relating to police and fire protection can be lost when the entity or its employees allegedly act in "reckless disregard" of property, but not in "reckless disregard" of the plaintiffs. The trial court says "yes;" Lee County says "no."

5. Whether the provision of 911 services falls within the scope of the "public duty doctrine" that encompasses general duties owed to the public which are not actionable in tort. The trial court says "no;" Lee County says "yes."

6. Whether the no duty rule of the "public duty doctrine" allows an exception to impose a duty actionable in tort against a governmental 911 provider when a third party calls 911, 911 does not immediately dispatch emergency personnel, and the vacationing plaintiff is unaware of the call at the time it is made. The trial court says "yes;" Lee County says "no."

STATEMENT REGARDING ORAL ARGUMENT

This case should be orally argued for two principal reasons. First, this Court's decision will be of substantial importance to every taxpayer that pays taxes in a Mississippi county that provides 911 services—taxpayers ought not be made home insurers simply because their county's 911 system does not dispatch police fast enough to prevent a burglary. Second, although this Court has addressed the public duty doctrine in similar cases in the past, this is the first time for the Court to address the question in the context of 911 services. Consequently, this Court's decision will provide future guidance in resolving these issues of general importance in the state-wide administration of justice and will impact the management of the public fisc by affecting the way counties allocate limited police resources.

STATEMENT OF THE CASE

1. Nature of the Case and Procedural History

While Plaintiffs were vacationing in Florida on June 13, 1998, R16, their home was burglarized.[1] On June 10, 1999, Plaintiffs commenced this tort action against Lee County, seeking compensatory and punitive damages for losses they allegedly incurred in the burglary of their home. R4. Plaintiffs specifically limited their suit to those persons and entities "protected under the immunity of state and political subdivisions from liability and suit for torts and torts of employees." R2 (¶3 of the Complaint).

On August 16, 2000, Lee County filed a motion to dismiss, R19-20, which was denied by the trial court, Honorable Frank A. Russell. R22-24. On March 19, 2001, Lee County

[1]As required by M.R.A.P. 30(a), Phelps Dunbar submits Appellee's Record Excerpts herewith, consecutively paginated and cited herein as "R_", followed by a parenthetical parallel pinpoint cite to the document cited where such additional information is useful.

timely filed a motion for a certificate for interlocutory appeal, R25-31, which was denied by the trial court on April 6, 2001. R32. On April 20, 2001, Lee County timely filed its Petition for Interlocutory Appeal, which was granted by this Court on October 15, 2001. R33.

2. The Trial Court's Opinion

Notwithstanding the plain language of the MTCA and notwithstanding the fact that the Plaintiffs admittedly filed this action against only those persons and entities "protected under the immunity of state and political subdivisions from liability and suit for torts and torts of employees," R2 (¶3 of the Complaint), the trial court erroneously applied the governmental/proprietary function test, a legal standard overruled by this Court in *City of Tupelo v. Martin*, 747 So.2d 822 (Miss. 1999), to find that E911 is not a governmental function. R23 (Order denying motion to dismiss ¶2). The trial court also erroneously and confusingly found that the allegations made by the Plaintiffs reflect a "jury issue" (a jury trial is not available under the MTCA) as to whether or not the conduct of the E911 telecommunicators falls inside the "reckless disregard" exception of MISS. CODE ANN. § 11-46-9(1)(c). R23 (Order denying motion to dismiss ¶3). Finally, contrary to the great weight of authorities that have considered the issue, the trial court erroneously found that the no duty rule of the public duty doctrine did not apply on these facts because the vacationing Davises, who did not speak to the E911 telecommunicators and who were not even aware that their home had been burglarized until after the fact, fit into the "special relationship" exception to the public duty doctrine. R23 (Order denying motion to dismiss ¶4).

3. Statement of the Facts

For purposes of interlocutory appeal only, Lee County admits that the following facts and allegations in the complaint must be taken as true and are necessary to an understanding of the questions of law to be decided:

1. "The suit against Lee County, Mississippi, and any of the name[d] political subdivisions is brought pursuant to MCA Section 11-46-1 et seq. and is applicable only to those defendants protected under the immunity of state and political subdivisions from liability and suit for torts and torts of employees." R2 (Complaint at ¶III) (emphasis supplied).
2. On June 13, 1998, Plaintiffs' home was burglarized. R3 (Complaint at ¶IV).
3. At the time of the burglary, Plaintiffs were out of town. R16.
4. At the time of the burglary, Plaintiffs' home was unoccupied. R16.
5. Plaintiffs were unaware of the fact that their house had been burglarized until they were called by the Tupelo Police Department. R3, R10 (Complaint at ¶IV, Police Report Narrative).
6. On June 13, 1998, Plaintiffs' neighbor called 911 at 4:00 a.m. to report that three men exited a white sedan and approached Plaintiffs' home. R3, R9 (Complaint at ¶IV, Police Report Narrative).
7. Fifteen minutes later, the three men left in the white sedan and Plaintiffs' neighbor called 911 again. R3 (Complaint at ¶IV).
8. Plaintiffs' neighbor called 911 a third time after which a Tupelo police officer arrived on the scene at 5:32 a.m. R3, R10 (Complaint at ¶IV, Police Report Narrative).

STANDARD OF REVIEW

Although the familiar *de novo* review standard applies to this appeal, *Mississippi Transp. Comm'n v. Jenkins*, 699 So.2d 597, 598 (Miss.1997) (reversing and rendering trial court decision that denied motion to dismiss based upon sovereign immunity),[2] just like a motion for summary judgment, a motion to dismiss should not be viewed "as a disfavored procedural shortcut, but rather as an integral part of the [Mississippi] Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." MISS. R. CIV. P. 1; *compare Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (interpreting federal Rule 56 summary judgment in this manner); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994); *Murphree v. Federal Ins.*, 707 So.2d 523, 529 (Miss. 1997) (in construing the Mississippi Rules of Civil Procedure, it is appropriate for this court to rely on federal law.) (citations omitted). Early dismissal of meritless claims against government entities is particularly appropriate because of the "public interest in protecting governmental officials and entities from the costs associated with civil lawsuits." *Williams v. Lee County Sheriff's Dept.*, 744 So.2d 286, 291 (Miss. 1999) (citation omitted). Finally, although the allegations in the complaint must be taken as true, this "court does not have to accept legal conclusions or allegations as to the legal effect of events which may be included in a complaint." *Tucker v. Hinds County*, 558 So.2d 869, 872 (Miss. 1990) (citing *Davidson v. State of Georgia*, 622 F.2d 895, 897 (5th Cir.1980)).[3]

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[2]*See also Leslie v. City of Biloxi*, 758 So.2d 430, 434 (Miss. 2000) (affirming grant of summary judgment to City on basis of sovereign immunity and explaining that the purchase of insurance by the government does not waive affect defenses available to the sovereign).

[3]In this case, ¶¶V-VII of the Complaint are purely legal conclusions that should not be considered by the Court.

PRELIMINARY STATEMENT

The crux of this case is whether the risk of loss through burglary should be borne by the taxpayers or borne by homeowners through their homeowners' insurance. The vacationing Davises, who were on June 13, 1998, hundreds of miles away relaxing in Florida, suggest that the taxpayers should pay for items stolen by burglars from their insured home because 911 did not dispatch police officers fast enough. Lee County suggests that the taxpayers should not be converted into insurers simply by the provision of 911 services to the general public and should not be required to pay for the Davises' alleged losses because (1) under the public duty doctrine, no actionable duty was owed to the Davises and because (2) as the Davises admit, this case is governed by the MTCA, which bars their claims under the police protection immunity waiver exemption.

SUMMARY OF THE ARGUMENT

Although the Davises' loss of personal property by the acts of unknown criminals is unfortunate, extension of tort law to the boundaries that the Davises suggest "would not only be unjust, but preposterous. Wisdom, the disciple of experience, advocates the extension of a rule of law only so far as reasonable necessity requires." *McGill v. City of Laurel*, 252 Miss. 740, 764, 173 So. 2d 892, 903 (1965).

Here, wisdom counsels that the trial court's decision should be reversed and rendered for three reasons. First, centuries old precedents firmly establish that services provided to the general public are not actionable in tort (under the public duty doctrine) unless the injured party (here the vacationing Davises) have a "special relationship" with the public entity that sets them apart from the general public. Under this Court's case precedents, the mere fact of

injury is not sufficient to establish the special relationship. And under the majority of authorities that have examined the public duty doctrine in the context of 911 services, claims based upon failure to timely dispatch police officers are fatally defective where, as here, a third party, rather than the injured plaintiff, contacts 911. Those authorities, out of concern for the public treasury (among other concerns), have uniformly held that the provision of 911 services is simply a general duty owed to the public that is not actionable in tort. In those narrow and few cases in which courts have recognized a duty actionable in tort, the plaintiff had to show, that they (not their neighbor as in this case): (1) had direct contact with 911 and (2) received express assurances from 911 which (3) gave rise to a justified and detrimental reliance on the part of the plaintiff, not some third party neighbor. The trial court ignored these authorities despite the Plaintiffs' failure to cite a single legal authority to the contrary. The trial court's erroneous decision to create a new legal duty in tort out of whole cloth that turns counties providing 911 services into property insurers for the general public against the criminal acts of third parties should be reversed.

Second, the trial court erroneously applied the governmental/proprietary function test to this action directly contrary to this Court's recent reversal of the same trial court's use of that obsolete test to claims within the scope of the MTCA. Moreover, the trial court's decision is contrary to the Plaintiffs' admission that this case is being pursued "applicable only to those defendants protected under the immunity of state and political subdivisions from liability and suit for torts and torts of employees." R2 (Complaint at ¶ III). Furthermore, the trial court's decision is also contrary to Mississippi law because E911 is an instrumentality of Lee County, and, therefore a "political subdivision" entitled to sovereign immunity. *See* MISS. CODE ANN.

§ 11-46-1(i) (political subdivision includes any instrumentality of any county); MISS. CODE ANN. § 11-46-3 (political subdivisions are immune from suit).

Finally, the trial court's decision is also directly contrary to another one of this Court's recent decisions that held that to lose the police protection immunity defense of MISS. CODE ANN. § 11-46-9(1)(c), the government entity must act in reckless disregard of the plaintiff or claimant (here, the vacationing and absent Plaintiffs), not property (the vacationing Plaintiffs' unoccupied home and contents). For these reasons, the trial court's decision should be reversed and this case should be rendered in favor of Lee County.

ARGUMENT

The initial question here, as with any cause of action sounding in tort, is purely one of law: Did Lee County owe the Plaintiffs a duty? *Stanley v. Morgan and Lindsey, Inc.*, 203 So.2d 473, 475 (Miss. 1967) (citations omitted). The Lee County Circuit Court says "yes," a person vacationing in Florida can sue a Mississippi county that provides E911 services when the vacationer's unoccupied Mississippi home is burglarized in his absence simply because the vacationer's neighbor calls 911 and 911 then fails to immediately dispatch police in response to the call. Lee County says "no," the public duty to provide police protection in the form of 911 services is a general duty owed to the public at large which is not actionable, rather than a specific duty owed to the Plaintiffs for which they can recover in tort. The second question is also one of law, whether Lee County is immune under the MTCA. The trial court says "no," Lee County says "yes."

I.

The trial court erroneously created a new legal duty owed to the general public contrary to the MTCA and contrary to the no duty rule of the public duty doctrine.

Although the State of Mississippi waived the shield of sovereign immunity under specifically prescribed statutory conditions, MISS. CODE ANN. §11-46-5(1) (Supp. 2001), its limited waiver of immunity did not create new causes of action where none existed before. *Compare id.* with MISS. CODE ANN. § 11-46-3. Thus, the initial question here, as with any cause of action sounding in tort, is purely one of law: Did the Defendants owe the Plaintiffs a duty? *Stanley*, 203 So.2d at 475. The answer in this case is clearly no—the public duty to provide police protection in the form of 911 services is not a specific duty owed to the vacationing Plaintiffs for which they can recover in tort.

A. The trial court created a duty in tort unknown in Mississippi contrary to Mississippi case law describing the boundaries of duties owed to the public at large and contrary to the overwhelming majority of cases that have considered the public duty doctrine in the context of 911 services.

Contrary to the trial court's decision, duties owed by a public entity to the general public, rather than to specific individuals, are not actionable in tort unless a plaintiff establishes a special relationship between himself and the public entity that sets him apart from all others of the public in respect to it. *Gant v. Maness*, 786 So.2d 401, 406 (Miss. 2001) (reversing and rendering trial court's decision not to grant summary judgment where plaintiff sued Sheriff, whose duties are owed to the general public and therefore not actionable, where plaintiff failed to establish a special relationship); *State v. Matthews*, 196 Miss. 833, 18 So.2d 156, 158 (Miss. 1944); *Bratton v. Welp*, 23 P.3d 19, 23-26 (Wash. Ct. App. 2001) (reversing and rendering trial court's decision not to grant summary judgment under the no duty rule of public duty doctrine, where plaintiff was shot after third party called police and 911 operator input

wrong address which delayed dispatch of police, because plaintiff failed to establish a special relationship); *Warren v. District of Columbia*, 444 A.2d 1, 2-3 (D.C. Ct. App. 1981) (affirming dismissal for failure to state a claim under the no duty rule of public duty doctrine where intruders broke into house and raped plaintiffs for fourteen hours after plaintiff called police dispatcher, police dispatcher assigned wrong code, then failed to dispatch police officers in response to later call); *Hartzler v. City of San Jose*, 46 Cal. App. 3d 6, 10 (Cal.App. 1975) (affirming dismissal for failure to state a claim under the no duty rule of public duty doctrine where plaintiff was murdered by intruder after she called police dispatcher and dispatcher failed to dispatch police officer for 45 minutes); *Galuskzynksi v. City of Chicago*, 475 N.E.2d 960, 962 (Ill. App. 1985) (affirming dismissal for failure to state a claim under the no duty rule of public duty doctrine where burglars broke into house, injured plaintiff and stole personal property after plaintiff called 911 and 911 failed to promptly dispatch police officers); *Doe v. Hendricks*, 590 P.2d 647, 649, 651 (N.M. Ct. App.1979) (affirming dismissal for lack of actionable duty under the no duty rule of public duty doctrine where police dispatcher's errors in identifying caller, identifying place of incident and identifying victim, delayed dispatch of police to assist young boy who was sexually assaulted); *see also South v. Maryland*, 59 U.S. 396, 18 How. 396 (1855) (Sheriff, who did not protect plaintiff from mob after plaintiff requested such protection, entitled to judgment as a matter of law because duty of police protection is owed to public generally); *Robinson v. Estate of Williams*, 721 F. Supp. 806, 808 (S.D. Miss. 1989) (Sheriff, who allowed two prisoners to escape who murdered plaintiff's husband, entitled to judgment as a matter of law notwithstanding various statutory duties of the Sheriff to keep charge of his jail because such duties are "owed to public as a

whole" and not civilly actionable because plaintiff failed to establish special relationship between herself and Sheriff).

Although no reported Mississippi case has applied the public duty doctrine in the specific context of 911 services, this Court has held that absent a special relationship, the duty to provide police protection is a general duty owed to the public as a whole, rather than a specific and actionable duty owed to a specific person. *Gant*, 786 So.2d at 406; *Matthews*, 18 So.2d at 158. For example, in *Matthews*, this Court stated the general principle of law regarding the general duty to provide police protection as follows:

> When the duty imposed upon an officer is one solely to the public, the failure to perform it, or an erroneous or negligent performance, is regarded as an injury to the public and not to an individual member of the public; and an individual harmed thereby may not have redress against the officer unless the individual had in it such a direct and distinctive interest as to set him apart from all others of the public in respect to it, and the fact of the injury does not in itself serve to make out the direct and distinctive interest which is essential. (citations omitted).

Matthews, 18 So.2d at 158.

This principle of Mississippi law was applied in *Robinson v. Estate of Williams*, 721 F. Supp. 806 (S.D. Miss. 1989). In *Robinson,* the plaintiff sought wrongful death damages from a Sheriff after two prisoners escaped and murdered her husband. The court acknowledged the various statutory duties of the Sheriff to keep charge of his jail and protect against escape. Nevertheless, following this Court's decision in *Matthews*, the district court held that such duties are "owed to public as a whole" and not civilly actionable unless a plaintiff establishes a special relationship between himself and the Sheriff. 721 F.Supp. at 808; *accord McQueen v. Williams*, 587 So.2d 918, 920 (Miss. 1991) (on same facts, noting without comment that the trial court found no duty, but going further to reject claim on qualified immunity grounds).

Although no reported Mississippi case has applied the public duty doctrine in the context of 911 services, several other state courts have. Under the majority rule, to carry the burden of stating a prima facie case, those non-Mississippi authorities uniformly require a plaintiff to, at a minimum, demonstrate (1) that he (rather than a third party neighbor as in the present case) had direct contact with the 911 services and (2) that he received express assurances from the 911 services which (3) gave rise to a justified and detrimental reliance on the part of the plaintiff. The majority of these courts have dismissed claims for lack of an actionable duty when a third party (rather than the plaintiff) contacted 911. *Compare Doe v. Hendricks*, 590 P.2d 647, 651 (N.M. Ct. App. 1979) (no duty arises where third party contacts police) *and Merced v. City of New York*, 75 N.Y.2d 798, 800 (N.Y. 1990) (reversing lower court and holding that a special relationship sufficient to overcome the no duty rule cannot arise without proof that the injured party had direct contact with the government's agents and justifiably relied to his detriment upon governmental assurances that it would act upon his behalf); *with Beal ex rel. Martinez v. City of Seattle*, 954 P.2d 237, 244-245 (Wash. 1998) (special relationship arises only where (1) there is direct contact between the public official and the injured plaintiff, (2) express assurances are given by the public official to the plaintiff which (3) gives rise to a justifiable reliance on the part of the injured plaintiff) (but upholding a denial of summary judgment where plaintiff contacted police because a question of fact existed as to whether explicit assurances of protection had been made).[4]

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[4]Some states require plaintiffs to meet a much higher standard to meet the special relationship exception. *See Galuskzynksi v. City of Chicago*, 475 N.E.2d 960, 962 (Ill. App. 1985) (plaintiff must also show acts or omissions of a willful nature and the injury must occur while the plaintiff is under the direct and immediate control of the public entity). Other states reject the public duty doctrine altogether. *Adams v. State*, 555 P.2d 235 (Alaska 1976). Mississippi has long recognized the doctrine, *see e.g., Matthews*, 18 So.2d at 158, but has never addressed the question in the context of 911

For example, in *Merced v. City of New York*, 75 N.Y.2d 798, 800 (N.Y. 1990), the highest court in the State of New York reversed a lower court decision denying the City of New York's motion for judgment notwithstanding the verdict. The New York Court of Appeals held that a special relationship sufficient to overcome the no duty rule of the public duty doctrine cannot arise without proof that the injured party had direct contact with the government's agents and justifiably relied to his detriment upon governmental assurances that it would act upon his behalf. *Id.* Therein, the evidence showed that neighbors, who heard screams for help coming from the apartment of the murdered victim, rather than the murder victim, called 911. *Merced*, 75 N.Y.2d at 800. The Court explicitly rejected the contention (which is the same contention that the Plaintiffs make in this case) that a third party can act as an agent for the plaintiff and supply the justifiable detrimental reliance by the injured party necessary to fit within the special relationship exception to the no duty rule of the public duty doctrine. *Id.*

Similarly, in *Doe v. Hendricks*, 590 P.2d 647, 651 (N.M. Ct. App. 1979), the New Mexico Court of Appeals affirmed summary judgment against the plaintiff where the proof showed that the victim (a young boy who was sexually assaulted) had no direct contact with the police dispatcher. The court held that to overcome the no duty rule of the public duty doctrine, the plaintiff must show a direct contact between himself and the police. *Id.* Therein, (just as in this case) a neighbor called the police dispatcher. *Doe*, 590 P.2d at 649. The police dispatcher erroneously identified the caller, the place of incident and the identity of victim, which resulted in a delayed dispatch of police to assist the young boy. Notwithstanding the

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services.

errors committed by the dispatcher, the court affirmed summary judgment against the plaintiff because there was no direct contact between the public entity and the plaintiff and therefore he failed to establish the "special relationship" exception to the public duty doctrine. *Id.* at 651.

Direct contact by the plaintiff (rather than by a third party as in the present case) has thus been the determinative fact in cases finding no duty (*see City of Rome v. Jordan*, 426 S.E.2d 861 864, (Ga. 1993); *Doe*, 529 P.2d at 651; *Merced*, 75 N.Y. 2d at 800), in cases finding a duty, *see DeLong v. County of Erie*, 60 N.Y. 2d 296, 304 (N.Y. 1983), and in cases rejecting defense motions for summary judgment. *See Beal ex rel. Martinez*, 954 P.2d at 784; *but compare Hartzler v. City of San Jose*, 46 Cal. App. 3d 6, 10 (Cal.App. 1975) (telephone call from the victim to the police is insufficient to establish a special relationship absent some voluntary assumption of a duty toward the injured party that induces the individual's reliance thereon); *Warren v. District of Columbia*, 444 A.2d 1, 2-3 (D.C. Ct. App. 1981) (rejecting contention that telephone call from victim in and of itself gives rise to a special relationship).

Here, it is undisputed that the vacationing Davises had no direct contact with 911. The Davises were, in fact, unaware of the burglary of their house until they were called by the Tupelo Police Department. R3, R10 (Complaint at ¶IV, Police Report Narrative). The Davises have provided not a single case authority standing for the proposition of law that they contend for, i.e., that a vacationing plaintiff can sue a 911 provider in tort for failing to timely dispatch police when their neighbor makes the call to 911 and the plaintiffs are unaware of the fact of the telephone call.

In their trial court memorandum, Plaintiffs relied upon a Georgia Supreme Court case (pointed out by Defendants to the trial court in their supporting Memorandum of Authorities).

That case, *City of Rome v. Jordan*, 426 S.E.2d 861 (Ga. 1993), held that no duty arose under the special relationship exception to the public duty doctrine where a third party, rather than the plaintiff contacted the police. In *dicta*, however, *City of Rome* did state that it would not strictly impose the "direct contact" requirement between the public entity and the plaintiff. *City of Rome*, 426 S.E.2d at 863. Nevertheless, the Georgia Supreme Court imposed a substantively identical requirement by "specifically requiring that the injured party rely on the promise of the [public entity] to her detriment." *City of Rome*, 426 S.E.2d at 863.[5]

In *City of Rome*, the plaintiff—Patricia—argued that since a third party—Dana—told her that she would call the police and in fact Dana did call the police, Patricia was justified in relying upon the police to come (the police failed to come and Patricia was repeatedly sexually assaulted). *Id.* at 864. The Georgia Court expressly rejected the plaintiff's argument (which is the same argument made by the Plaintiffs in this case) that she was entitled to rely upon her belief that the police would come because a third party called. In explaining its rejection of the plaintiff's theory, the Georgia Court noted that the "evidence shows that [plaintiff] was not aware that the police had made any promise of assistance, if in fact they did." *City of Rome*, 426 S.E.2d at 864. "To allow such an expression of reliance to satisfy the reliance requirement in the special relationship test would render the requirement virtually meaningless." *Id.* Plaintiffs in this case are in an identical position, i.e., they were unaware of

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[5]*City of Rome* applied a three-part test adapted from New York case law that requires (1) an explicit assurance from the public actor to the injured party, (2) knowledge on the part of the public actor that inaction could lead to harm and (3) justifiable and detrimental reliance by the injured party on the public actor's affirmative undertaking. 426 S.E.2d at 863. Although *City of Rome* rejected the absolute requirement of New York law that "direct contact" be shown in all cases, *id.*, it affirmed the trial court's award of summary judgment against the plaintiff because no direct contact was made by the plaintiff to the police and therefore the reliance element could not be met as a matter of law. 426 S.E.2d at 864.

any alleged "promise of assistance" made by Lee County. Consequently, Plaintiffs claims fail even under relaxed requirements of *City of Rome*.

There are cases in which express assurances to and detrimental reliance thereupon by a plaintiff-victim was sufficiently established to arguably fit within the special relationship exception to the no duty rule of the public duty doctrine. *See Delong*, 60 N.Y.2d at 301 (911 operator was told by a murder victim who called from her home to report a burglar inside her home was assured that the police would be there "right away"); *Noakes v. City of Seattle*, 895 P.2d 842 (Wa. 1995) (pleas of a rape victim, who made three calls within the span of eleven minutes, were met with "[w]e'll send someone out"). This is not one of them, however. In this case, the trial court erroneously created a new duty in tort out of whole cloth on facts far more remote than any reported case found by Appellants (and Appellees cited no case below that supports such an unwarranted extension of tort law).

B. The trial court erroneously applied the governmental/proprietary function test contrary to the MTCA and contrary to this Court's recent decisions.

The trial court erroneously held (applying the overruled governmental/proprietary function test) that the Lee County E911 Commission is not entitled to sovereign immunity. R23 (Trial court opinion at ¶2). The trial court's holding is directly contrary to this Court's decision in *City of Tupelo v. Martin*, 747 So.2d 822 (Miss. 1999), a decision reviewing the same trial court's application of the governmental/proprietary function test to a claim within the scope of the MTCA.

In *Martin* (also on interlocutory appeal), this Court reversed the same trial court on its use of the governmental/proprietary function test and held that claims with the scope of the MTCA are not subject to the governmental/proprietary function test:

> Prior to the enactment of the MTCA, we did use the governmental/proprietary function test in applying sovereign immunity to municipalities. *See, e.g., Parker v. City of Philadelphia*, 725 So.2d 782, 784 (Miss.1998); *White v. City of Tupelo*, 462 So.2d 707, 708 (Miss.1984). However, **with the enactment of the MTCA, that test [the governmental/proprietary function test] is no longer applicable** to claims subject to the MTCA except to the extent which it may be incorporated in the provisions of the MTCA. We find no such incorporation. Therefore, we reject the argument that we must apply that test here . . ..

Martin, 747 So.2d at 828 ¶19 (emphasis supplied).

Moreover, in holding that E911 is not entitled to sovereign immunity, the trial court ignored the Plaintiffs' specific admission that this suit is subject to the MTCA:

> "The suit brought against Lee County, Mississippi, and any of the named political subdivisions is brought pursuant to MTCA 11-46-1 et seq. and is applicable only to those defendants protected under the immunity of state and political subdivisions from liability and suit for torts and torts of employees."

R2 (Complaint at ¶III).[6]

Furthermore, even if the Court were to create from whole cloth a specific actionable duty owed by Lee County to Plaintiffs, all claims against the sovereign (including political subdivisions such as Lee County) are subject to the limitations of the MTCA. MISS. CODE ANN. §§ 11-46-1 to 11-46-23 (Supp. 2001). Although the MTCA initially declares the sovereign immune from all suits at law or in equity, MISS. CODE ANN. § 11-46-3, the MTCA then waives that immunity for certain classes of claims up to specified limits. MISS. CODE

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[6]Even if Plaintiffs had not admitted that their claims were subject to the MTCA, E911 is clearly an instrumentality of Lee County, and, therefore a "political subdivision" entitled to sovereign immunity. *See* MISS. CODE ANN. § 11-46-1(i) (political subdivision includes any instrumentality of any county); MISS. CODE ANN. § 11-46-3 (political subdivisions are immune from suit). The Mississippi Attorney General recognized this almost a decade ago when he opined that an E911 Commission, as an instrumentality of the county, is a political subdivision within the meaning of the MTCA. Op. Miss. Att'y Gen. No. 1991-0614 (Aug. 19, 1991) ("It is our opinion that the E911 Commission, as an instrumentality of the county, would meet this definition and would have sovereign immunity").

ANN. § 11-46-15. For certain other classes of claims, however, the MTCA preserves retains the sovereign's cloak of absolute immunity. *See* MISS. CODE ANN. § 11-46-9.

For example (with a narrow exception, which as explained below was not triggered on these facts), the MTCA's police protection exception preserves the sovereign's absolute immunity for acts or omissions of employees of governmental entities engaged in the performance of activities "relating to police . . . protection." MISS. CODE ANN. § 11-46-9(1)(c). Specifically, the plain language of MISS. CODE ANN. § 11-46-9(1)(c) provides that:

> A governmental entity and its employees acting within the course and scope of their employment or duties **shall not be liable for any claim**:
>
> ***
>
> (c) Arising out of any act or omission of an employee of a governmental entity engaged in the performance or execution of duties or activities **relating to police or fire protection unless the employee acted in reckless disregard of the safety and well-being of any person** not engaged in criminal activity at the time of injury.

(emphasis supplied).

Here (even assuming a newly created duty actionable in tort), Lee County is immune from Plaintiffs' claims because they arise out of alleged acts and omissions by 911 employees (the "Employees") engaged in police-related activity that was not in reckless disregard of the safety and well-being of the Plaintiffs.[7] As this Court made clear in *Simpson v. City of*

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[7]The question of whether the Employees alleged acts and omissions "relate to" police protection is a question of statutory construction that requires ascertaining the legislature's intent. *See Clark v. State ex rel. Miss. State Medical Ass'n*, 381 So.2d 1046, 1048 (Miss. 1980) (fundamental duty of a court in construing a statute is to give effect to the legislature's intent); *see also Kerr-McGee Chemical Corp. v. Buelo*, 670 So.2d 12, 16-17 (Miss. 1995) (citations omitted). Because conduct that "relates to" police protection is not defined by the MTCA or by other statutory authority, the phrase must be ascribed its common and ordinary meaning, MISS. CODE ANN. § 1-3-65 (1972), *see also Tower Loan v. Miss. State Tax Comm'n*, 662 So.2d 1077, 1083 (Miss. 1995) (relying upon BLACK'S LAW DICTIONARY (6th ed. 1990)), in light of the best statement of policies and principles justifying the

Pickens, 761 So.2d 855 (Miss. Jun 01, 2000), to lose the immunity defense of MISS. CODE ANN. § 11-46-9(1)(c), the government must act in reckless disregard of the plaintiff or claimant, not property:

> We hold that **a governmental agency and its employees acting within the course and scope of their employment or duties shall not be liable for any claim** arising out of any act or omission of an employee of a governmental entity engaged in the performance or execution of duties or activities relating to police or fire protection **unless . . . the employee acted in reckless disregard of the safety and well-being of any person (claimant)** not engaged in criminal activity at the time of injury.

Simpson, 761 So.2d at 859 (emphasis supplied).

The trial court's legal conclusion that the Plaintiffs' allegations "clearly reflect a jury issue"[8] as to whether or not this case falls into the "reckless disregard exception" is thus erroneous as a matter of law because it is clearly contrary to the MTCA and to *Simpson*.

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statutory language. *See Jones v. Mississippi Employment Security Comm'n*, 648 So.2d 1138, 1142 (Miss. 1995). Here, the legislative policy of the MTCA appears on its face as broadly immunizing all governmental entities from liability, MISS. CODE ANN. § 11-46-3, except to the extent that the MTCA waives such immunity. MISS. CODE ANN. § 11-46-5(1) (waiving immunity to the extent provided for in MISS. CODE ANN. § 11-46-15). Construing the phrase "relating to" in light of this legislative policy of broad immunity then, an act "relates to" police protection if it has a connection with such protection. BLACK'S LAW DICTIONARY 1288 (6th ed. 1990) (defining related as being connected); *see also* THE AMERICAN HERITAGE DICTIONARY 1211 (3d ed. 1992) (defining related as being associated or connected with). 911 dispatch services, which form a telecommunications link in the cloak of police protection, are clearly connected with and related to police protection, and, therefore, fall within the police protection liability shield. *Compare Fried v. Archer*, 775 A.2d 430, 447 (Md. App.2001) (courts treat emergency service dispatchers and responding emergency personnel services personnel alike for purposes of determining whether an enforceable duty in tort exists) (citing *Sullivan v. City of Sacramento*, 190 Cal.App.3d 1070 (1987) (liability of police operator determined under same duty rule applied to responding police officer); *Noakes v. City of Seattle*, 895 P.2d 842 (1995) (same, 911 dispatcher); *City of Rome v. Jordan*, 263 Ga. 26, 426 S.E.2d 861 (1993) (same, police dispatcher); *Koher v. Dial*, 653 N.E.2d 524 (Ind.App.1995) (same, police radio dispatcher); *De Long v. County of Erie*, 457 N.E.2d 717 (1983) (same, 911 "complaint writer" and police dispatcher)).

[8]As a matter of law, jury trials are not available under the MTCA. MISS. CODE ANN. § 11-46-13(1); *Simpson*, 761 So.2d at 860.

Here, it is undisputed that the vacationing Plaintiffs were hundreds of miles away in Florida when the 911 calls were made. R3 (Complaint at ¶IV). Thus, it was a factual impossibility for Lee County to have acted in "reckless disregard of the safety and well-being of [Plaintiffs]" because the vacationing Plaintiffs were nowhere near their home at the time of the burglary. Consequently, regardless of whether the Employees' alleged acts and omissions rose to the level of "reckless disregard," such acts and omissions were taken with respect to property and not taken in reckless disregard of the Plaintiffs' safety and well-being. Accordingly, Lee County is entitled to judgment as a matter of law under MISS. CODE ANN. § 11-46-9(1)(c) because the narrow waiver of the police protection immunity shield was not triggered.

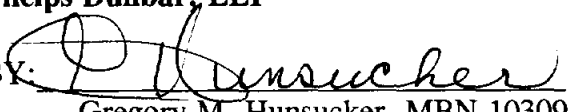
CONCLUSION

The trial court's decision to create a new duty in tort shifts the risks of loss resulting from criminal acts of third parties from property owners (for whom property insurance is readily available) to the public at large in conflict with the expressed policy of the State of Mississippi and in conflict with the reasoned judgment of the majority of state courts that have carefully considered the broader implications of such a duty. As one court wisely cautioned, "[f]or the courts to proclaim a new and general duty of protection in the law of tort, even to those who may be the particular seekers of protection based on specific hazards, could and would inevitably determine how the limited police resources of the community should be allocated and without predictable limits." *Riss v. City of New York*, 240 N.E.2d 860, 861 (1968). Ultimately, it could even result in the reduction of public safety services, including emergency response programs and personnel, to the community. For the reasons explained

above and in the authorities cited herein, this Court should reverse the trial court's erroneous decision and render the case in favor of Lee County.

Respectfully submitted,

Phelps Dunbar, LLP

BY: 

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CERTIFICATE OF SERVICE

I, Gregory M. Hunsucker, one of the attorneys for Petitioners do hereby certify that I have this day served a true and correct copy of the above and foregoing brief along with its accompanying record excerpts on the following counsel of record by placing said copy in the United States Mail, postage prepaid:

Duncan Lott, Esquire
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with a copy to

Honorable Frank A. Russell
First Circuit Court District of Mississippi
c/o Circuit Court Administrator
P. O. Drawer 1100
Tupelo, Mississippi 38802-1100

THIS, the 25th day of February, 2002.

Gregory M. Hunsucker

CERTIFICATE OF FILING

I, Phyllis Schmidt, do hereby certify that I have this day transmitted by Federal Express, for overnight delivery, postage prepaid, the original and four (4) copies of Brief of Appellant along with the original and four (4) copies of the Appellant's Record Excerpts for filing to:

Ms. Betty Sephton
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This the 25th day of February, 2001.

Phyllis Schmidt