IN THE

COURT OF APPEALS OF MARYLAND

September Term, 2001

No. 83

SRIYANI MUTHUKUMARANA, INDIVIDUALLY, etc.,

Appellant

v.

MONTGOMERY COUNTY, MARYLAND, et al.,

Appellees

Pursuant to a Writ of Certiorari to the Court of Special Appeals
(Hon. Durke G. Thompson, Judge)

BRIEF OF APPELLEES

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STATEMENT OF THE CASE

After Sriyani Muthukumarana's children were murdered by their father, Muthukumarana sued, individually and as personal representative of the estates of her children, Montgomery County, Maryland and Kelley Woodward, a 911 call taker. Muthukumarana brought claims for wrongful death and survival actions against the County and Woodward based on Woodward's alleged negligence.

After the County and Woodward moved for summary judgment, Muthukumarana conceded that the County possessed governmental immunity. (E. 160) In its order and opinion, the Circuit Court for Montgomery County, Maryland granted Woodward's motion for summary judgment because there was no special relationship between Woodward and Muthukumarana and because Woodward possessed qualified immunity. (E. 351-55) Muthukumarana timely noted an appeal to the Court of Special Appeals. After Muthukumarana filed her brief, this Court issued a Writ of Certiorari on its own motion.

QUESTION PRESENTED

DID THE CIRCUIT COURT PROPERLY GRANT SUMMARY JUDGMENT WHERE THE RECORD ESTABLISHED THAT WOODWARD DID NOT OWE A SPECIAL DUTY TO MUTHUKUMARANA AND HER CHILDREN?

STATUTES, ORDINANCES AND CONSTITUTIONAL PROVISIONS

The full text of all relevant statutes, ordinances and constitutional provisions appears in the appendix to Appellees' brief.

STATEMENT OF ADDITIONAL FACTS

On August 23, 1998, Sriyani Muthukumarana and her children, Emil and Budrani, along with other relatives, celebrated Emil's birthday at Wheaton Regional Park. Muthukumarana's husband, Basuru, did not accompany the family to the park. Later that day, Muthukumarana, her children, and her niece, Tharanie, returned to the Muthukumarana house and the children went outside to play. When Basuru discovered that his wife had used a tray that belonged to him, he yelled at her, threw things, and bashed her head against the wall causing it to bleed. Muthukumarana screamed and the children came into the house. Muthukumarana called 911, informing the operator that her husband was trying to kill her. (E. 41-42) Basuru heard his wife telephone 911 and ran upstairs. (E. 45-46)

Kelley Woodward was the 911 operator who answered Muthukumarana's call. When Muthukumarana told Woodward that her husband was trying to kill her, Woodward immediately classified the call as a domestic violence call in progress, priority one (the highest priority level). (E. 60) Woodward asked Muthukumarana's name and address and where her husband was. (E. 3, ¶¶ 13-15) Finding it difficult to hear Muthukumarana because the children were screaming, Woodward again asked for Muthukumarana's name and where her husband was. (E. 4, ¶¶ 17-19, E. 61) Muthukumarana replied that her husband was home. Woodward asked Muthukumarana her husband's name and whether there were any weapons present. (E. 4, ¶¶ 21-22) Muthukumarana also had difficulty understanding Woodward because of the children screaming. (E. 4, ¶ 23) Woodward again

asked Muthukumarana whether there were any weapons present. Muthukumarana responded that her husband had a gun — a big rifle. (E. 5, ¶ 24) While Woodward attempted to determine where the gun was located, Basuru returned to the kitchen with a handgun. (E. 5, ¶¶ 25-30) When the niece saw Basuru with the gun, she ran out of the door to a neighbor's house. (E. 64) Approximately one minute and fifteen seconds after Muthukumarana dialed 911, Basuru began shooting, killing his children and then himself. (E. 5, ¶¶ 31-32)

ARGUMENT

In reviewing a grant of summary judgment, the proper standard is whether the trial court's decision was legally correct. *Goodwich v. Sinai Hospital of Baltimore, Inc.*, 343 Md. 185, 204, 680 A.2d 1067, 1076 (1999). Under Maryland Rule 2-501(e), summary judgment is appropriate when the motion and response show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. *Dobbins v. Washington Suburban Sanitary Commission*, 337 Md. 341, 344-45, 658 A.2d 675, 676-77 (1995).

"The purpose of the summary judgment procedure is not to try the case or to decide factual disputes, but to decide whether there is an issue of fact, which is sufficiently material to be tried." *Williams v. Mayor of Baltimore*, 359 Md. 101, 115, 753 A.2d 41, 48 (2000). A material fact is one that affects the outcome of the case. *King v. Bankerd*, 303 Md. 98, 111, 492 A.2d 608, 614 (1985). Once the moving party has provided the court with

sufficient grounds for summary judgment, the other party must prove, through pleadings, answers to interrogatories, admissions and affidavits, that there is a genuine dispute as to a material fact. *See e.g., Hoffman Chevrolet, Inc. v. Washington County National Savings Bank*, 297 Md. 691, 712, 467 A.2d 758, 769 (1983). The circuit court correctly applied these principles when it determined that there were no *material* facts in dispute and that the law required summary judgment for Woodward.

WOODWARD DID NOT OWE A SPECIAL DUTY TO MUTHUKUMARANA AND HER CHILDREN BECAUSE SHE TOOK NO AFFIRMATIVE ACTS TO INDUCE MUTHUKUMARANA'S RELIANCE ON POLICE PROTECTION.

Muthukumarana's claims against Woodward are based on negligence. In order to state a claim for negligence, a plaintiff must establish "(1) that the defendant was under a duty to protect the plaintiff from injury, (2) that the defendant breached that duty, (3) that the plaintiff suffered actual injury or loss, and (4) that the loss or injury proximately resulted from the defendant's breach of duty." *Rosenblatt v. Exxon*, 335 Md. 58, 76, 642 A.2d 180, 188 (1994). In this case, Muthukumarana failed to state a claim for negligence because she failed to establish the first element — that Woodward owed a duty to her, or to her children.

Duty "requires an actor to conform to a certain standard of conduct for the protection of others against unreasonable risks." *Lamb v. Hopkins*, 303 Md. 236, 241, 492 A.2d 1297, 1300 (1985). The existence of a legal duty is a question of law. *Valentine v. On Target, Inc.*, 353 Md. 544, 549, 727 A.2d 947, 949 (1999). In determining whether a duty exists,

this Court has applied a "'foreseeability of harm' test, 'which is based upon the recognition that duty must be limited to avoid liability for unreasonably remote consequences.'" *Coates v. Southern Maryland Electric Co-op., Inc.*, 354 Md. 499, 509, 731 A.2d 931, 936 (1999) (quoting *Rosenblatt v. Exxon*, 335 Md. 55, 77, 642 A.2d 180, 189 (1994)). "[T]he determination of whether a duty should be imposed is made by weighing the various policy considerations and reaching a conclusion that the plaintiff's interests are, or are not, entitled to legal protection against the conduct of the defendant." *Id*.

Although there is no set formula for this determination, this Court has looked to factors such as "convenience of administration, capacity of the parties to bear the loss, a policy of preventing future injuries, the moral blame attached to the wrongdoer. . . the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved." *Coates v. Southern Maryland Electric Co-op., Inc.*, 354 Md. at 509-10, 731 A.2d at 936 (citations omitted).

Woodward did not have a duty to protect Muthukumarana and her children from Basuru.

There is no duty to protect someone from the criminal acts of a third person in the absence of either a statute or a special relationship. *See Scott v. Watson*, 278 Md. 160, 166, 359 A.2d 548, 552 (1965) (citing *Restatement Second of Torts*, § 315). This rule applies to cases involving police protection. "[T]here is no duty to control a third person's conduct so as to prevent personal harm to another, unless a 'special relationship' exists either between

the actor and the third person or between the actor and the person injured." *Ashburn v. Anne Arundel County*, 306 Md. 617, 628, 510 A.2d 1078, 1083 (1986). To determine whether a special relationship exists between a police officer and a victim, the victim must show "that the local government or the police officer affirmatively acted to protect the specific victim or a specific group of individuals like the victim, thereby inducing the victim's specific reliance upon the police protection." *Id*. at 631, 510 A.2d at 1085. In *Ashburn,* this Court found no special duty between a police officer and a pedestrian who was injured by an intoxicated man that the officer did not arrest.

More recently, this Court applied the *Ashburn* test in *Williams v. Mayor of Baltimore*, holding that if a police officer or local government *affirmatively* acts to protect a specific individual or group of individuals and the victim relies on the assurances of police protection, a special relationship may have been created. In *Williams*, this Court found, however, that there was a dispute of fact as to whether the officer affirmatively acted to protect the victims. *Id*. at 150, 753 A.2d at 68.

Recently the Court of Special Appeals applied the *Ashburn* test, specifically addressing the issue of whether a 911 dispatcher has a special duty to aid victims. In *Fried v. Archer*, 139 Md. App. 229, 775 A.2d 430 (2001), *cert. granted*, 2001 Md. LEXIS 794 (October 12, 2001), four boys sexually assaulted and abused a young girl after she and her friends became inebriated in the basement of a townhouse. The boys dragged the semi-conscious girl outside in the cold and snowy weather and left her to die. Three of the boys

called the County Sheriff's Department and advised the dispatcher that a girl was lying near the woods and gave the proper street name but the wrong street number. The dispatcher told the boys that she would send someone out and then relayed the information to the police officers. The dispatcher, however, gave the wrong street name and did not mention that the girl was lying near the woods. Police officers searched the area of the erroneous street and did not find the girl. The girl froze to death.

In determining whether the dispatcher could be held responsible, the Court of Special Appeals properly examined the special relationship rule as it applies to police dispatchers. Since police dispatchers' work is an integral part of the work of police officers, the Court found that the same standard to measure negligence liability should be applied. Accordingly, the Court rejected a special duty "per se" rule for police dispatchers, holding instead "that the negligence liability of a police dispatcher must be decided on a case-by-case basis, using the 'special duty rule" to determine whether the dispatcher had a 'special relationship with the victim that justifies the imposition of a private duty of care toward the victim." *Id.* at 243, 775 A.2d at 438. The Court concluded that, in order for this duty to apply, a plaintiff must show that the dispatcher affirmatively acted to protect the particular victim, thereby inducing the victim to specifically rely upon police protection. The Court found that the victim did not detrimentally rely on the dispatcher's promise to send someone out, that she did not stay outside because she was expecting the police, and that she was not even aware

that her assailants had called the dispatcher much less that the dispatcher promised to send the police.

Muthukumarana attempts to distinguish *Fried* because the victim was unconscious and unable to rely on the words of the operator, the callers created the peril and reported inaccurate information and the callers had a continuing opportunity to rescue the victim. But *Fried* cannot be read so narrowly and is not limited to the unique facts of the case. The Court of Special Appeals specifically held that "neither a dispatcher's receipt of a call for help nor the dispatch of emergency assistance alone creates a special duty to the person in need of such assistance." *Id*. at 260, 775 A.2d at 448.

The majority of jurisdictions have applied the special duty rule to both dispatchers and responding emergency services personnel on a case-by-case basis. *Id*. at 258-59, 775 A.2d at 447.[1] *See also Bratton v. Welp*, 23 P.3d 19 (Wash. App. Div. 3 2001) (no special relationship between plaintiffs and 911 operator where no special assurances given); *Pierre v. Jenne*, 2001 Fla. App. LEXIS 13126 (Fla. App. 4 Dist. 2001) (no special relationship where no express promise or assurance given by 911 operator); *Bogart v. Town of New Paltz*, 537 N.Y.S.2d 678 (App. Div. 1989) (no special relationship between dispatcher and victims of drowning where no reliance on assurances of dispatcher); *Sawicki v. Village of Ottawa Hills*, 525 N.E.2d 468 (Ohio 1988) (no reliance by decedent on dispatcher's responding "ok" to request for help). *Cf. City of Gary v. Odie*, 638 N.E.2d 1326 (Ind. App.

[1]Even those jurisdictions not adopting the majority rule do not apply the special duty rule as a matter of law. *Fried*, 139 Md. App. at 258-59, 775 A.2d at 447.

1994) (operator liable where wife called 911 four times and was assured ambulance was on way); *Randall v. Fairmont City Police Department*, 412 S.E.2d 737 (W.Va. 1991) (complaint sufficiently alleged special relationship between victims and dispatchers); *St. George v. City of Deerfield Beach*, 568 So.2d 931 (Fla. App. 1990) (special relationship existed where 911 operator failed to dispatch police or paramedics when woman said her ex-husband threatened to kill her and was bleeding).

Extending the special relationship rule to 911 call takers is consistent with Maryland appellate courts' applying the rule to public employees other than police officers. For example, in *Lamb v. Hopkins*, 303 Md. 236, 492 A.2d 1297 (1985), this Court held that probation officers owed no duty to parents of a child injured by an automobile driven by a probationer under a theory that the officers had taken charge of an individual with dangerous propensities. This Court found that neither a probation order, which placed requirements on the probationer and probation officers, nor a statute placing a duty on probation officers to report whether probation was being complied with created a duty running to the parents. Similarly, the Court of Special Appeals in *Willow Tree Learning Center v. Prince George's County, Maryland*, 85 Md. App. 508, 584 A.2d 157 (1991), found no special relationship between a inspector of a day care center and a fatally injured child because Prince George's County did not affirmatively and specifically act to protect the child or any of the day care center's children.

Applying the law of Maryland and most states, no special relationship existed between Woodward and Muthukumarana and her children as Muthukumarana did not rely upon any affirmative assurances by Woodward. In the absence of a special relationship, Woodward owed no duty to Muthukumarana and her children.

The circuit court properly found no disputes of material facts.

Muthukumarana also asserts that there are disputes of material fact, namely whether there was an affirmative act and whether she relied on that act. This case is unlike *Williams* where there was a dispute as to what the police officer said to the mother. Here, it is undisputed what the parties said to one another because the County tape recorded the 911 call. The circuit court listened to the tape and found that Woodward did not affirmatively act:

> After carefully listening to the recorded 911 call between Woodward and Plaintiff, this Court finds absolutely no affirmative action by Woodward upon which Plaintiff relied that would create a liability-inducing special relationship. Woodward did not tell Plaintiff that help was en route (though apparently, Woodward *had* already dispatched police to the scene). Woodward did not tell Plaintiff to stay where she was; nor did Woodward make any assurances or suggest any course of action to Plaintiff.

(E. 354-55)

Muthukumarana would have this Court infer an affirmative act by Woodward and specific reliance by Muthukumarana merely because Woodward answered the phone and asked questions. But, "the presence of a special relationship between a dispatcher and a

victim should not be presumed solely on the basis of either a call for assistance or the dispatch of such assistance." *Fried*, 139 Md. App. at 254, 775 A.2d at 444. Nor was a special relationship formed merely because Muthukumarana received an instruction sheet after she was previously abused directing her to call 911 if she had reason to fear for her immediate safety. Montgomery County has not affirmatively and specifically acted to protect 911 callers. Further, there is no state or local statute that contains requirements for mandatory acts for the specific protection of a particular class of persons of which Muthukumarana is a member. Therefore, any duty owed to Muthukumarana is one owed to the public as a whole, negating any possible inference of a special relationship.

The circuit court properly based its decision on *Williams*. As it is clear from the transcript of the tape that Woodward did not affirmatively act to protect Muthukumarana and her children, the court correctly found that there was no special relationship in this case. In accordance with the Police Department's standard operating procedures, Woodward appropriately classified the call at the highest priority level and asked pertinent information such as Muthukumarana's name, address, husband's name and whether there were any weapons present. (E. 78-81) Woodward quickly forwarded the information via computer to the dispatcher, who in turn forwarded the information to police officers en route to the house. (E. 55-58)

Woodward attempted to obtain further information from Muthukumarana about the weapons when Basuru killed the children and then himself. It is undisputed that Woodward

made no guarantees or promises to Muthukumarana before the shooting. Since Woodward did not affirmatively act to protect Muthukumarana and her children, she owed them no special duty.

The Good Samaritan doctrine does not apply to this case.

Under the Good Samaritan doctrine, a person owes no duty to come to the aid or protection of another. Once that person undertakes to assist another, however, such assistance must be reasonably provided. The person is subject to liability if the other person suffers physical harm resulting from the Good Samaritan's failure to exercise reasonable care if his failure increases the risk of such harm or the harm is suffered because of the other person's reliance upon the Samaritan's undertaking. Liability attaches whether the services were rendered gratuitously or for consideration. *Restatement Second of Torts*, § 323. In this case, Woodward did not undertake to assist Muthukumarana. Woodward took basic information from Muthukumarana and did not give her any assurances.[2]

In light of this Court's holdings in *Ashburn* and *Williams*, the Good Samaritan doctrine is not the appropriate standard to apply to determine the liability of 911 operators. Moreover, public policy concerns dictate against application of that doctrine here. If the Good Samaritan doctrine is applied in situations such as this, it would have a chilling effect on a government's ability to hire and retain 911 operators if they knew that every time they

[2]In the case cited by Muthukumarana in support of the application of the Good Samaritan doctrine, *E. G. Rock, Inc. v. Danly*, 98 Md. App. 411, 633 A.2d 485 (1993), the defendants affirmatively acted to help the plaintiff — they did not simply gather information.

simply answered the telephone a duty would attach and they could be liable under the doctrine:

> The creation of direct, personal accountability between each government employee and every member of the community would effectively bring the business of government to a speedy halt, "would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties," and dispatch a new generation of litigants to the courthouse over grievances real and imagined.

Fried, 139 Md. App. at 249, 775 A.2d at 441 (citations omitted).

Because Woodward did not affirmatively act to assist Muthukumarana, Good Samaritan principles do not apply. Thus, this Court need not confront the applicability of that doctrine in this case.

Muthukumarana received sufficient notice of the nature of the circuit court hearing.

Muthukumarana asserts that the circuit court erred in finding that Woodward was a public official and entitled to qualified immunity. She advances two bases for this assertion: 1) the Circuit Court deprived Muthukumarana of her procedural due process right to adequate notice of the nature of the hearing; and 2) the Circuit Court improperly determined that Woodward was a public official entitled to immunity.

Muthukumarana mistakenly relies on Maryland Rule 2-311(f) as support for her procedural due process argument. That rule simply requires that a hearing must be provided, if requested, before a court may render a decision that is dispositive of a claim or defense. This case is distinguishable from *Phillips v. Venter*, 316 Md. 212, 557 A.2d 1338 (1989),

where the court held an impromptu hearing over the telephone that disposed of the case without giving the parties adequate notice, and *Van Schaik v. Van Schaik*, 90 Md. App. 725, 603 A.2d 908 (1992), where the parties were not notified that a hearing would involve a custody decision. Here, Muthukumarana received notice of the hearing and had an adequate opportunity to prepare and state her position that Woodward was not a public official, which she did in both her brief and at oral argument. (E. 149, 392) Muthukumarana knew that the court could determine the ultimate issue of whether Woodward was liable to her — and it made that determination. Muthukumarana has pointed to no authority that prohibits a court from disposing of claims on summary judgment on grounds other than those that the moving party proposed.

Further, if Muthukumarana felt prejudiced by the court's reliance on an issue not thoroughly briefed and argued by the parties, under Maryland Rule 2-534 she could have requested the court to reconsider its decision and receive additional evidence, amend its findings or enter new findings. Since she failed to do so, her procedural due process claim has been waived. *See Noffsinger v. Noffsinger*, 95 Md. App. 265, 620 A.2d 415, *cert. denied*, 331 Md. 197, 627 A.2d 539 (1993) (error waived where parties did not raise issue of stale evidence before court's decision or request reconsideration).

This Court need not address Woodward's status as a public official.

Since the circuit court found that Woodward did not have a special relationship with Muthukumarana, whether the court erred in holding that Woodward was a public official entitled to qualified immunity is not dispositive to this appeal. Although the circuit court considered whether there was a special relationship in the context of Woodward's status as a public official, nevertheless, this Court may affirm the circuit court's decision. It is well settled that an appellate court may affirm a trial court's decision on any ground adequately shown by the record, even if it was not relied on by the lower court or the parties. *See Offutt v. Montgomery County Board of Education*, 285 Md. 557, 404 A.2d 281 (1979). "In other words, a trial court's decision may be correct although for a different reason than relied on by that court." *Robeson v. State,* 285 Md. 498, 502, 403 A.2d 1221, 1223 (1979). As long as the record supports a ground for granting summary judgment, the appellate court may affirm even if the circuit court did not rely on that particular ground. Since the record in this case adequately supported a finding that there was no special relationship because Woodward did not affirmatively act to protect Muthukumarana and her children, the decision of the circuit court should be affirmed.

CONCLUSION

Muthukumarana failed to demonstrate that Woodward owed a special duty to her and her children. Based on the record in this case, the circuit court correctly granted Woodward summary judgment. The court's decision, therefore, should be affirmed.

Respectfully submitted,

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Statement pursuant to Maryland Rule 8-504(a)(8): This brief was prepared with proportionally spaced type, using Times New Roman font and 13 point type size.

APPENDIX

Excerpts from the Maryland Rules:

Rule 2-311. Motions

* * *

(f) **Hearing — Other motions.** A party desiring a hearing on a motion, other than a motion filed pursuant to Rule 2-532, 2-533, or 2-534, shall so request in the motion or response under the heading "Request for Hearing." Except when a rule expressly provides for a hearing, the court shall determine in each case whether a hearing will be held, but it may not render a decision that is dispositive of a claim or defense without a hearing if one was requested as provided in this section.

* * *

Rule 2-501. Motion for summary judgment.

* * *

(e) **Entry of judgment.** The court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law. By order pursuant to Rule 2-602 (b), the court may direct entry of judgment (1) for or against one or more but less than all of the parties to the action, (2) upon one or more but less than all of the claims presented by a party to the action, or (3) for some but less than all of the amount requested when the claim for relief is for money only and the court reserves disposition of the balance of the amount requested. If the judgment is entered against a party in default for failure to appear in the action, the clerk promptly shall send a copy of the judgment to that party at the party's last known address appearing in the court file.

* * *

Rule 2-534. Motion to alter or amend a judgment — Court decision.

In an action decided by the court, on motion of any party filed within ten days after entry of judgment, the court may open the judgment to receive additional evidence, may amend its findings or its statement of reasons for the decision, may set forth additional findings or reasons, may enter new findings or new reasons, may amend the judgment, or may enter a new judgment. A motion to alter or amend a judgment may be joined with a motion for new trial.