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COURT OF APPEALS
STATE OF NEW YORK

WILLIAM D. MALDOVAN,

Appellant,

-against-

COUNTY OF ERIE, ET AL.,

Respondents.

NO. 90

20 Eagle Street
Albany, New York
October 20, 2022

Before:

ACTING CHIEF JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

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Karen Schiffmiller
Official Court Transcriber



1 ACTING CHIEF JUDGE CANNATARO: Our first appeal
2 today is number 90, Maldovan v. County of Erie.

3 Counsel?

4 MR. LOSS: Before I forget, I just want to make
5 sure I reserve two minutes for rebuttal.

6 ACTING CHIEF JUDGE CANNATARO: You have two
7 minutes for rebuttal.

8 MR. LOSS: May it please the court. I am John
9 Loss, from Connors, LLP, in Buffalo, and on the brief with
10 my associate Andrew Debbins.

11 Today I speak for Laura Cummings. And after all,
12 this really is about her, a twenty-three-year-old mentally
13 challenged person who had the mental age of an eight-year-
14 old.

15 So let's focus on what civil justice requires,
16 what should be done for Laura, even though the appellate
17 court did not do so. As this court teaches us from the
18 Coleson case, this court should hold that a jury should
19 decide Laura's case and determine whether gross negligence
20 occurred, resulting in Laura being scalded, tortured,
21 abused, and finally suffocated to death.

22 JUDGE SIGNAS: Mr. Loss, you seem to rely in your
23 briefing extensively on the case of Boland?

24 MR. LOSS: Correct.

25 JUDGE SIGNAS: How would you reconcile Boland



1 with our case law, especially our recent case law?

2 MR. LOSS: Well, the recent case law, if what
3 you're referring to Just - - - Judge Singas, is it - - - am
4 I thinking about Coleson or some other aspect, Mark G.?

5 JUDGE SIGNAS: I'm thinking about the special
6 duty cases.

7 MR. LOSS: The special duty cases? Here's how I
8 reconcile Boland with that. Boland looked at the four
9 Cuffy factors, still. In other words, was there - - - you
10 know, the act - - - the promise to do something or - - - by
11 way of action. The second one, knowledge on the part of
12 harm. The third being direct contact. The fourth being
13 justifiable reliance.

14 So Boland presumed that there was direct contact
15 and that there was justifiable reliance. We are not
16 relying on the direct contact point - - - part of Boland,
17 because in Boland, they needed to do that because it was
18 neighbors that called. Here, the APS and CPS had direct
19 contact with Laura herself. So then if we go to the fourth
20 prong of Boland, the fourth prong that Boland looked at,
21 justifiable reliance, and what I would first say is, we
22 harmonize Boland because Coleson really would govern first.

23 Cole - - - so we - - - this court should reach
24 the Coleson aspect of the case first, and where Coleson
25 said it's a question of fact for the jury, the



1 reasonableness of the justifiable reliance. And in fact,
2 the PJI, I know - - -

3 JUDGE GARCIA: But in Coleson - - - I'm sorry to
4 interrupt. But wasn't Coleson that the plaintiff was
5 lulled into a false sense of security, right? That was the
6 issue in Coleson. And what we said was, "The statements
7 made by Officer Reyes to plaintiff may have lulled her into
8 believing that she could relax her vigilance for a
9 reasonable period of time, certainly more than two days."
10 What's the equivalent fact you have here?

11 MR. LOSS: The equivalent fact here, and - - -
12 and the distinction being that in Coleson, it's a police
13 case. So in the present case here, we have an Article 9(b)
14 situation. In other words, the legislature said, we want
15 to - - - and again, I saw in one of your cases, the past is
16 prologue. If we go back to 1979 - - -

17 JUDGE GARCIA: And my response to that was, the
18 past is precedent.

19 MR. LOSS: Right. It was, yes, precisely. But
20 the prologue piece, first, if I could, the legislature
21 said, we want to be able to take care of persons - - - we
22 want to protect persons who can't protect themselves. And
23 so Laura Cummings is clearly in that claim - - - class.
24 It's certainly in a summary judgment context as here - - -

25 JUDGE GARCIA: But isn't part of that - - - I



1 agree that that approach, the fact that the reliance could
2 be demonstrated by a relative. I believe in this case, the
3 brother. So it didn't have to be her justifiable reliance
4 or her being lulled into a sense of security, but her
5 brothers could have shown that.

6 MR. LOSS: Well, the - - - but brother, Richard,
7 is number two, and number three is even Judge Stevens,
8 Judge Garcia. But number one is Laura herself. And that's
9 the real key here is, under the Cuffy's test -- the Cuffy
10 test all talks about the injured party. That person. That
11 injury.

12 JUDGE TROUTMAN: So you're saying that Laura
13 herself relied upon APS - - -

14 MR. LOSS: Correct.

15 JUDGE TROUTMAN: - - - and CPS?

16 MR. LOSS: That's - - - well, that's - - - what
17 we have to look at, Judge Troutman is, how do we factor in
18 a situation here, when the Cuffy test is really for an able
19 adult, right? I mean, even - - -

20 JUDGE WILSON: Well, that is the question, right?
21 Suppose she didn't have a brother or any other relative who
22 - - - I mean, obviously we're not going to task her mother
23 with being a representative, right? So - - -

24 MR. LOSS: Hopefully not.

25 JUDGE WILSON: So that - - - why don't you try



1 that question, then, which you're just about to get to, I
2 think. What if she had no other relatives?

3 MR. LOSS: That's the point, Judge. If she has
4 no other relatives, she had no one to rely on other than
5 CPS.

6 JUDGE WILSON: So then what do we do with that
7 fourth factor in that circumstance?

8 MR. LOSS: What we do in that fourth factor - - -

9 JUDGE WILSON: How do we address that?

10 MR. LOSS: - - - to say, well, was it still
11 reasonable, and we look at it as in - - - I submit, is - -
12 -

13 ACTING CHIEF JUDGE CANNATARO: I'm sorry. What
14 reason - - - when you say, was it still reasonable, what
15 are you saying - - - what are you asking it was reasonable?

16 MR. LOSS: Well, I think, on - - - Judge, on the
17 - - - on, Your Honor, on the fourth prong, the justifiable
18 reliance. I think that's the one that we're - - -

19 ACTING CHIEF JUDGE CANNATARO: No, I know that's
20 the prong you're talking about. When - - - but when you
21 say, we ask whether it's reasonable, are you - - - if
22 there's no one there, there's no reliance, so what - - -
23 what reasonableness are we measuring?

24 MR. LOSS: We're measuring Laura's reliance. In
25 other words, in Coleson, and in the PJI, it says, the



1 question would be to the jury, did Laura reasonably rely on
2 it? And to go to Judge Wilson's point, if she has nobody,
3 the question is, how does Laura rely on it, because the
4 statute says we want to protect people that can't protect
5 themselves. So we sort of have a circular argument here.

6 Here's someone that can't protect herself, and
7 APS is aware of the situation, gets the phone call, comes
8 out to her house, satisfies the first, second, and third
9 Cuffy prongs without question, assumes the duty. Knows
10 that if they don't do anything, harm is going to result, in
11 fact, it does. And third, has direct contact with Laura.
12 And so the question then becomes, how do we - - - how do we
13 work when Laura is a mentally challenged person? Sort of
14 like the child in Boland, to go back to Judge Singas'
15 question.

16 JUDGE TROUTMAN: So does that require a change of
17 our case law with respect to special duty when you have
18 someone as a child or an incapacitated person that can't
19 protect themselves? Are you asking us to expand - - -

20 MR. LOSS: Well - - -

21 JUDGE TROUTMAN: - - - the law further?

22 MR. LOSS: No, and perhaps. And to go to - - -
23 to Judge Wilson's point, because I think that it can still
24 fit within the framework of the Cuffy factors, except the
25 fourth prong is, what's reasonable, subjectively



1 reasonable, by a twenty-year-old, mentally challenged
2 person? In other words - - -

3 JUDGE TROUTMAN: Okay. So again, for
4 clarification, you're saying Laura relied, her brother
5 relied, and so did the pastor?

6 MR. LOSS: So did the judge; I'm sorry.

7 JUDGE TROUTMAN: The judge.

8 MR. LOSS: That's - - - yes. Yes, but primarily,
9 in Laura - - - and that's - - - and to go back to Judge
10 Singas' initial question, that's what Boland - - - that's
11 the point of Boland. Boland says, we're going to presume
12 reliance, because what else can we do? How do we - - - you
13 know, it's sort of like the eggshell plaintiff, or it's
14 sort of like we do a Noseworthy charge. I mean, in other
15 words, Laura, first of all, has deceased.

16 JUDGE SIGNAS: But I think you're saying that the
17 plaintiff belongs to a special class, right? That's where
18 I think you're going with this, and so my follow-up
19 question to that is, is there a private right of action
20 that the legislature thought about in this kind - - - in
21 this case?

22 MR. LOSS: Well, if we go that far, if we go
23 beyond Coleson, and beyond Boland, and then we look at
24 whether there was a private cause of action, well, the
25 answer to that would be, yes, if the court were to reach



1 that. And here's why, Judge. So I'm sensitive, of course,
2 to Mark G. So Mark G., in the context of CPS, Child
3 Protective Services, said that there was no private cause
4 of action.

5 But what we're dealing with here is an APS cause
6 of action. And what was critically - - - what's critically
7 different between Mark G. in the CPS context, and the
8 Article 9(b) in this context, is the following. Article
9 6(b) - - - I'm sorry - - - Article 6 allowed for a private
10 right of action in a certain circumstance, like failure to
11 report child abuse. And so this court said, well, gee, if
12 they allow the private right of action in that situation,
13 they could have just allowed the private right of action
14 for a child in the Mark G. situation.

15 JUDGE SIGNAS: But if we adopt your rationale,
16 wouldn't we be saying that every time someone made a call
17 to either ACS, SER, APS, that a special duty then arises?
18 And regardless of when that happened, you could call when a
19 child was two years old, and then you would argue, I think,
20 that a special duty has emerged, and maybe an injury
21 happens when the person is ten years old.

22 MR. LOSS: Well, on that point, Judge, and trying
23 to limit it. Because I know from, like, the Greene case,
24 when you're looking at the zone of danger. I mean - - -
25 only trying to answer what you need to answer. And all



1 we're asking in this case is under Coleson, is to have
2 Laura get to the jury.

3 Now, if you go to the private right of action,
4 and of course, that's the first - - - that's the first way
5 to have a special duty. I mean, there's three special
6 relationships, as this court knows, and you - - - I know
7 you just wrote the one on the third one, the no-knock
8 warrant in Ferreira. So we have the first - - - the first
9 one, if it's a private cause of action, then we have just
10 an ordinary duty; there's no special duty requirement in
11 that context, if there's a private right of action.

12 ACTING CHIEF JUDGE CANNATARO: Well, that private
13 right of action arises under a statute. And then we have
14 to analyze the statute and ask what I think is what Judge
15 Singas is asking, is does that statute provide for a
16 private right of action?

17 MR. LOSS: Well, we - - -

18 CHIEF JUDGE CANNATARO: And I think - - - by the
19 way, I think in this case, the - - - you know, the APS
20 provision is - - - does provide for a private right of
21 action, or at least could be read that way, but it's one
22 that requires a gross negligence standard, and that would
23 lead me to ask you a lot of questions about whether you
24 could show gross negligence in a case like this, under the
25 facts that we have.



1 MR. LOSS: Well, let me answer, and I appreciate
2 your comments, Judge. Let me say, I mean, on the private
3 right of action, to answer. This is the C - - - this is
4 Article 6 of the C.P.L.R. All of this and all of this.
5 That's what you said didn't do a private cause of action,
6 when Article 9(b) takes up this many pages. And the point
7 is, is in Article 9(b), the APS, to your point, Judge
8 Cannataro, is there isn't anything contradictory. There
9 was no - - - so it's fairly implied that there's a private
10 right of action, because there's nothing contradictory,
11 because in the very few pages of Article 9(b), there's
12 nothing that otherwise grants an action.

13 And if we go to 1979, again, past is prologue,
14 not to belabor the point, but in 1979, when they added the
15 gross negligence standard, the key there was a client - - -
16 and Laura was - - - no doubt, Laura was a client; that's -
17 - - that was her name - - - may seek judgments from the
18 responsible agency, should some cause exist for legal
19 action. And that's in 1979, even before we start putting
20 under the microscope in DeLong, in 1983, this whole idea of
21 special duty, and the whole idea of governmental immunity.

22 So when the legislature passes this in 1979 and
23 says that - - -

24 JUDGE WILSON: So when they say that in context,
25 I - - - at least I read it, but you know, I can - - - may



1 read it differently, it was in the context of saying - - -
2 and there were several things in the bill jacket that
3 reflect this - - - that the worry of the legislature was
4 the individuals, who'd be reluctant to work for APS because
5 of personal liability, and so what the legislature was
6 doing was providing immunity for those persons unless they
7 were engaged in gross negligence or willful acts that
8 caused the injury, and then said the portion you just said,
9 which is that - - - and in any event, regardless of the
10 immunity, they could still go after the agencies.

11 So I'm not sure whether you're saying that both
12 the agencies and the individuals would have to be pursued
13 under a gross negligence or higher threshold, or the gross
14 negligence and willful applies to the individuals, and the
15 agencies can be sued under ordinary standards.

16 MR. LOSS: Well, with the employees being
17 municipal employees, I - - - my understanding of it was to
18 read it as a gross - - - as a gross negligence to the
19 agency itself. And in that context, to go back to Judge
20 Cannataro's point, the gross negligence here is that APS
21 violated all of its policies. I mean, Kristen Hince got
22 written up. Gregory Bell got written up as a supervisor,
23 because no reasonable caseworker could do what she did. No
24 reasonable supervisor could do what he did. And so that
25 satisfied two things. It satisfied Hallock, which says



1 this is administerial and not discretionary, therefore
2 there's no governmental immunity. And secondly, at least
3 we get to the jury on gross negligence, Judge. We're not
4 asking for anything other than to - - - for Laura to have
5 her day in court. To get to the jury.

6 ACTING CHIEF JUDGE CANNATARO: Thank you, Mr.
7 Loss.

8 MR. LOSS: Thank you.

9 MR. GOODWIN: Good afternoon, may it please the
10 court, Robert Goodwin on behalf of the defendants, the
11 County of Erie, and Timothy Howard, Erie County Sheriff.

12 Your Honors, what we're encountering today is an
13 invitation to expand the scope of the special duty
14 requirement. We're asking that the court reject that
15 invitation to do so. The policy behind special duty is to
16 limit exposure of government, especially when that harm is
17 inflicted by third parties here.

18 JUDGE WILSON: Could I just ask you for a second
19 - - -

20 MR. GOODWIN: Yeah.

21 JUDGE WILSON: - - - to start with the sheriff.
22 Because I think the plaintiff here has got a much tougher
23 time with the sheriff.

24 MR. GOODWIN: I would agree, Your Honor. I would
25 agree, because when they were called, their actions twofold



1 were purely discretionary. They were called to
2 investigate. They were said there was a mentally
3 challenged woman at an abandoned camp site. They did not
4 know who that individual was. They have to make an
5 assessment at that time, using their discretion. They saw
6 there was no physical harm on her, she didn't appear she
7 didn't want to go back home, so based on that, I think
8 that's a pure governmental immunity case.

9 ACTING CHIEF JUDGE CANNATARO: So it's not
10 special duty so much with respect to the sheriff. It's
11 just governmental immunity.

12 MR. GOODWIN: I think it could be both, Your
13 Honor, because even then, the - - - they're not doing
14 anything. It's not special in the sense that they're doing
15 what their job requires them to do. They're executing
16 that. They haven't made any assurances. There is no
17 reliance that Laura could have in that instance, because
18 they returned her home. They didn't say, we're going to
19 take any further action or investigation here. So I think
20 it meets the requirements of both special duty and
21 governmental immunity.

22 JUDGE WILSON: There's no private right of
23 action. There's no statute comparable to the APS statute.

24 MR. GOODWIN: That is correct, Your Honor.

25 In the instances of CPS and APS, under the



1 existing framework, we still do not believe the special
2 duty requirement is satisfied. In each case, they go, they
3 do an investigation, they close their files. That closure
4 signifies we're not taking any further action. There's
5 nothing here for Laura or her brother to rely on.

6 ACTING CHIEF JUDGE CANNATARO: That speaks very
7 powerfully to reliance, but could we go back to this debate
8 we were having over whether this is a Cuffy common law
9 special duty or a statutory com - - - statutory special
10 duty, that under - - - you know, under - - - what is it - -
11 - Section 473 - - -

12 MR. GOODWIN: Correct, Your Honor.

13 ACTING CHIEF JUDGE CANNATARO: - - - or something
14 like that?

15 MR. GOODWIN: Under either scenario. The problem
16 with the statutory special duty scenario, Your Honor, is if
17 you look at the legislative history, you look at the
18 language, there is no specific private right of action
19 there. It's the same language that this court had examined
20 in the Mark G. case when it comes to this immunity
21 provision. In that instance, we - - - the court didn't
22 view that as being significant enough to establish a
23 private right of action. They actually noted - - -

24 JUDGE TROUTMAN: Is statutory special duty
25 preserved?



1 MR. GOODWIN: I don't believe so, Your Honor. I
2 believe that in this case, the statute was only argued in
3 context of Boland, and that came under there heading of the
4 voluntary assumption of special duty. We do not believe
5 the APS statute in and of itself to establish special duty
6 was ever preserved at the lower courts.

7 ACTING CHIEF JUDGE CANNATARO: Do you think
8 Boland is still good law?

9 MR. GOODWIN: I do not, Your Honor. I think the
10 treatment by the other courts, I think the treatment by
11 this court in Mark G., we see that there's moving away from
12 that idea that the statutes can satisfy the third and
13 fourth elements of special duty under voluntary assumption.
14 Because that would substantially broaden the scope of what
15 special duty is for.

16 You're having a whole opportunity for people to
17 come in who may not have a claim, which would violate the
18 principal and policy behind special duty. And I think we
19 see this court has crafted exceptions for people like
20 Laura. The close family members can satisfy those
21 elements. The only reason those elements did not apply to
22 this case is because the facts didn't warrant it. There
23 was no direct contact with CPS from the brother. He never
24 reached them.

25 ACTING CHIEF JUDGE CANNATARO: And how would you



1 deal with Judge Wilson's hypothetical? What if there is no
2 third person upon whom to pin the reliance?

3 MR. GOODWIN: In that case, Your Honor, I think
4 we have to look at it. Unfortunate - - - this is an
5 unfortunate case, and this court has said so many times
6 when examining special duty. We're dealing with
7 unfortunate cases. But they're still adhering to that
8 principal, that making a further exception for the facts of
9 this case, when then having that precedent for future
10 cases, it then conflicts the two statutory and voluntary
11 assumption of duties - - - special duty scenarios. It
12 combines them together, creates confusion, would again
13 expand the scope of beyond what special duty is - - -
14 wanted to - - - the purpose behind it, to limit that
15 exposure, especially when that harm is caused by third
16 parties, so I think it would lead to more confusion.

17 ACTING CHIEF JUDGE CANNATARO: Last question, and
18 then I'll stop here. Your adversary intimated that one of
19 the possibilities was - - - in terms of the detrimental
20 reliance - - - or the, sorry, justifiable reliance, would
21 be Laura herself.

22 MR. GOODWIN: Correct.

23 ACTING CHIEF JUDGE CANNATARO: And I'm wondering
24 whether you think it's feasible or viable to create a
25 standard that you can apply to a person of diminished



1 mental capacity that fits within the pure Cuffy framework.

2 MR. GOODWIN: Not in that instance, Your Honor.

3 I think this is why the court has crafted in those
4 instances, if allowed, the statutory, or has the family
5 member step in to fill that void by those individuals.

6 ACTING CHIEF JUDGE CANNATARO: So are you saying,
7 if there is no statutory cause of action, and in this case,
8 there might not be a statutory special duty, there's just
9 nothing for Laura here?

10 MR. GOODWIN: Yes, Your Honor. I would un - - -
11 that's the unfortunate nature of this case. Again, as this
12 court has said so many times with special duty, there is
13 just that issue. And I think the danger of expanding
14 special duty to account for the statute and allow it to
15 come in under the involuntary assumption would just
16 unnecessarily expand what the purpose of that is. And I
17 think we have to be conscious of that, also.

18 Under the facts of this case, too, Your Honor,
19 you have to rely to your detriment. There's a question of
20 whether Laura was really relying, because as pointed out in
21 the plaintiff's brief, she did run away. And again, she
22 had a conscious level to some degree that I can't rely on
23 what these people are going to do, so - - -

24 ACTING CHIEF JUDGE CANNATARO: Do you know what
25 it is that Laura would be relying on? Because I have a



1 hard time figuring out what she's relying on, because she
2 got a letter saying there's nothing wrong in your house;
3 we're going to go away now.

4 MR. GOODWIN: And that's - - - I think, that's
5 the also the problem. What she's relying on is twofold,
6 Your Honor. The argument - - - if I'm misreading
7 plaintiff's argument, I apologize - - - it could be two
8 things. One, that the file was opened. We are going to
9 investigate this or we're going to look into it. The
10 problem is that's an open-ended reliance because that can
11 go on for perpetuity and then there's no end in sight. Or
12 the reliance could be, we're closing the file; everything's
13 okay. Well, that's - - - undermines reliance, because
14 there's nothing assuring her of future con - - - action,
15 future conduct.

16 JUDGE TROUTMAN: Does that apply to her brother
17 also and the judge?

18 MR. GOODWIN: Yes, Your Honor, I believe so,
19 because they got a definitive endpoint, saying, we are not
20 taking any further action. The brother didn't rely on
21 that. He continued to call. They said, you need to
22 provide us with additional information.

23 ACTING CHIEF JUDGE CANNATARO: So would that be
24 the opposite of reliance? If - - - if you - - - if you
25 keep calling and saying there's something wrong, you have



1 to go back, you have to go back, that's anti-reliance?

2 MR. GOODWIN: I - - - to a certain degree, Your
3 Honor, and I think specifically for the brother, too. We
4 have to remember, before government was even involved, they
5 did foreclose an avenue of protection. They said, we're
6 not getting law enforcement involved; we don't want law
7 enforcement involved here. And then he reached out to
8 someone else, did not have that direct contact with the
9 government. He had someone else reach out to them
10 initially for him.

11 So his reliance, he didn't foreclose the other
12 avenues. CPS and APS didn't necessarily foreclose other
13 avenues of protection to him. They chose to do that before
14 the government even got involved. And then with that
15 closure of the case, there was nothing left there for there
16 to be reliance on.

17 JUDGE SIGNAS: The - - - I mean, do you think
18 it's unfair for us to be talking about reliance on Laura's
19 part?

20 MR. GOODWIN: I do, Your Honor. And I - - - just
21 to point to this court's precedent in McLean, though, v.
22 City of New York, because even in that case, the same
23 request was made, that there be a hybrid special duty
24 scenario, and it highlighted the fact that the - - - -
25 obviously, the pool of young children that we're dealing



1 with here, and it's a sensitive pool that have their own
2 issues, and because of New York State's interest through
3 CPS and things like that, to be heavily handed and involved
4 there, plaintiff was asking, we need to create an exception
5 here.

6 The court, acknowledging, obviously, this is a
7 sensitive group of people, said we still cannot expand
8 special duty in these instances to accommodate for that.
9 We have our framework in place. It's designed for a
10 specific policy purpose and we need to adhere that. We'll
11 tinker with it a little bit, like we saw in the Applewhite
12 case, allowing family members to satisfy some elements, but
13 to then completely undo it or make a new exception or
14 scenario, that's not something the courts have been willing
15 to do, because it will lead to, again, undermining the
16 purpose of special duty, expanding the scope of
17 governmental liability for actions of third parties and
18 things of that nature, Your Honors.

19 And then, in addition to special duty, again, we
20 rely on our arguments of governmental immunity, even though
21 we take the position that Kristen Hince's actions and mom,
22 she was exercised her discretion. She was - - - went
23 there, she followed it. It's not just violating policies
24 or procedures, but there has to be evidence that she didn't
25 exercise any discretion. She did. She talked to people,



1 she observed Laura in her state. She made a determination.
2 We know that was the wrong determination, and that's the
3 unfortunate thing in this case. But it was discretion,
4 nonetheless, similar to the discretion exercised by CPS and
5 the sheriffs.

6 JUDGE WILSON: So when you say an exception would
7 undermine and expand special duty, I understand expand.
8 What do you have in mind by undermine? What - - -
9 undermine the purpose of - - -

10 MR. GOODWIN: The purpose.

11 JUDGE WILSON: So what is the purpose of special
12 duty?

13 MR. GOODWIN: The purpose of the special duty,
14 Your Honors, as this court is aware, to limit the scope of
15 government liability. There is the framework of making
16 sure that - - - allowing individuals who are employing
17 government tasks, or can have the ability to exercise their
18 discretion for - - - without fear of governmental
19 liability. The ability to use resources available to the
20 government to make sure the monies are going to the people
21 who need the services.

22 JUDGE WILSON: Well, let me ask it the other way
23 around. What is the purpose of allowing some suits to
24 proceed if there is a special duty? What's the purpose
25 there?



1 MR. GOODWIN: Because that special duty has shown
2 that there was something in place here that government had
3 assumed more than what was required, and gone and helped
4 those individuals in those circumstances, and then based on
5 those factors, whether it be the statutory duty, whether it
6 be the Cuffy factors, there was a reliance to their
7 detriment. And those factors, as we know, just were not in
8 place in this case.

9 JUDGE WILSON: Okay. So the purpose is to
10 compensate people where there's a reliance to the
11 detriment?

12 MR. GOODWIN: Yes, Your Honor. Because of - - -
13 because of the special assumption by the government going
14 above and beyond what was required, because what these
15 individuals were doing were - - - whether it's the sheriffs
16 with their jobs in performing a discretionary function,
17 whether it's CPS or APS going to do something based on what
18 the statute had already told them to do, there was no
19 assumption beyond what was required, and then there was
20 absolutely no reliance, given the facts of this case, given
21 in the current framework of what the courts have allowed.

22 ACTING CHIEF JUDGE CANNATARO: Thank you.

23 MR. GOODWIN: Thank you, Your Honor.

24 MR. LOSS: If I could pick right up with your
25 point, Judge Wilson, it's - - - it would be incredibly



1 unfair - - - it's not - - - we're not asking to expand.
2 We're just asking for Laura Cummings to be the same as
3 everybody else.

4 JUDGE GARCIA: But Counsel, let - - - on that
5 point, if we don't adopt Boland or in some other way,
6 adjust our special duty rule, can you show justifiable
7 reliance under the Cuffy factors?

8 MR. GOODWIN: Well, if the Cuffy factor is - - -
9 is what would an able adult do? No.

10 JUDGE GARCIA: What if it's what would her
11 brother do or, you know, or what would even the judge do
12 here? What - - - was there justifiable reliance by a third
13 party that we've considered in the past, again, applying
14 our standard. Could you show justifiable reliance here?

15 MR. LOSS: I think so, because of the brother
16 still, even when he then keeps going back and back and
17 making the phone calls, and wanting them to do it, the
18 brother still says APS is the place to be. That's what
19 they testify at their depositions, that that's the place to
20 be. And - - -

21 JUDGE GARCIA: But is he relying on something
22 they've done or some representation they've made in not
23 taking some course of action that leads to her injury?

24 MR. LOSS: Well, here's what Laura and her
25 brother have done, because you've asked what the reliance



1 is. First of all, she tries self-help. When we say that
2 that would be - - -

3 JUDGE GARCIA: Does the brother ever, for
4 example, say, boy, if it hadn't been for APS, I would've
5 taken her out of the home? Is that in the record anywhere?

6 MR. LOSS: I'm not so sure that it is, and that's
7 why I'm focusing today on Laura. And my point being with
8 Laura is, Laura - - -

9 JUDGE GARCIA: See - - - okay, sorry.

10 MR. LOSS: That's okay. Laura does the self-
11 help. She runs away; she's taken home by the sheriff's
12 deputy. And then they send a letter, and let's even
13 presume that she reads the letter and understands it. That
14 letter says to her, you're safe here; this is the place for
15 you to be. And so she stays there. I mean, she was known
16 to CPS since she was a little girl.

17 ACTING CHIEF JUDGE CANNATARO: Can we just go
18 back to the first part of your statement? You said Laura
19 engages in self-help. She runs away. Those are the acts
20 of a person who seems to be trying to protect herself from
21 a dangerous situation, because quite possibly, she doesn't
22 think anyone else is going to do that for her.

23 MR. LOSS: And she still can't do it, Judge.
24 That's why she needs APS.

25 ACTING CHIEF JUDGE CANNATARO: It's a tragic case



1 that you can't deny it, but we're struggling to find even a
 2 - - - of a person in Laura's mental state, what it is that
 3 happened here that she could possibly have relied on,
 4 reasonably, unreasonably, to the mind of a person like
 5 Laura's, whatever - - - whatever standard you want to use,
 6 what happened here that could form the basis of reliance?

7 MR. LOSS: The jury could find that Laura stayed
 8 where she was and thought, reasonably, that if I'm in the
 9 APS world, APS is going to do what they're supposed to do
 10 and get me out of here.

11 JUDGE TROUTMAN: So your argument is, in the very
 12 least, there's a question of fact as to justifiable
 13 reliance?

14 MR. LOSS: Without question, Judge. And
 15 otherwise, we're making disabled people less than other
 16 people.

17 JUDGE GARCIA: Could we go to a bit of a policy
 18 question? In McLean, we said, you know, lawsuits - - -
 19 these are tragic cases; I mean, you've read all of the ones
 20 that we have here, and many more, I'm sure. But lawsuits
 21 aren't the only answer here, in that lawsuits can have
 22 unintended consequences. So I think in McLean, we said
 23 that might be the pulling back of resources.

24 I don't see that here, but I do take the point of
 25 McLean and unintended consequences if we adjust the rules



1 the way you're suggesting, because the natural reaction to
2 that, it seems to be, would be to avoid liability. Because
3 you're holding them to this standard now. So it would be
4 removal. It would be taking children out. And one, in
5 this case, as I understand it, the criminal justice system
6 was another avenue of redress and people are serving
7 lengthy sentences, and again, I don't think that makes
8 anyone whole, but that's a response.

9 And two, I see a reaction from the protective
10 services being, err on the side of removal, err on the side
11 of finding harm. And as you know, I am sure, those
12 determinations, even at a preliminary level by these types
13 of agencies, have very big repercussions, not only for the
14 child, if it isn't true, but for the parents, who may have
15 that now on a record in some agency of the state.

16 MR. LOSS: Well, and that's why I go back to
17 1979, when the legislature passed this, and said - - - the
18 gross negligence - - - they knew that - - - they wanted
19 lawsuits to be a possibility here. They wanted the courts
20 to be involved. They didn't want to leave it to unbridled
21 administrators. They didn't want to leave it to, let's
22 say, the executive or the APS people to police themselves,
23 things of that sort, Judge.

24 I mean, at the end of the day, all Laura wants to
25 do is be treated like anybody else would have been treated.



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So like for instance, Mrs. Coleson, an able adult, she gets to go to a jury. That's all Laura wants to do, even though she's a mentally challenged woman. She just wants to be able to go to a jury.

ACTING CHIEF JUDGE CANNATARO: Thank you, Mr. Loss.

MR. LOSS: Thank you very much.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of William D. Maldovan v. County of Erie, et al., No. 90 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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