IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

ROGER NORIEGA,
Plaintiff/Appellant,

v.

TOWN OF MIAMI,
Defendant/Appellee.

No. 2 CA-CV 2017-0007
Filed October 26, 2017

Appeal from the Superior Court in Gila County
No. CV201400223
The Honorable Gary V. Scales, Judge Pro Tempore

AFFIRMED IN PART;
REVERSED IN PART AND REMANDED

COUNSEL

Clausen & Williamson, PLLC, Phoenix
By Curt W. Clausen and Charles B. Williamson

and

Knapp & Roberts, P.C., Phoenix
By David L. Abney
Counsel for Plaintiff/Appellant

Titus Brueckner & Levine, PLC, Scottsdale
By Larry J. Crown and Elan S. Mizrahi
Counsel for Defendant/Appellee

OPINION

Presiding Judge Vásquez authored the opinion of the Court, in which Chief Judge Eckerstrom and Judge Eppich concurred.

V Á S Q U E Z, Presiding Judge:

¶1 In this tort action, Roger Noriega appeals from the trial court's entry of summary judgment in favor of the Town of Miami. Noriega contends the court erred by finding the Town had qualified immunity under A.R.S. § 12-820.02(A)(1) and his negligence claim against the Town was thus barred. He also contends the court erred in concluding his gross-negligence claim was legally and factually insufficient. For the reasons stated below, we affirm in part, reverse in part, and remand for further proceedings.

Factual and Procedural Background

¶2 On appeal from the trial court's entry of summary judgment, we view the facts—some of which are disputed—in the light most favorable to Noriega, the non-moving party. *See Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, ¶ 14, 292 P.3d 195, 199 (App. 2012). The events here occurred in Miami, Arizona, where all those involved were well acquainted with each other and lived in close proximity. In early September 2013, Henry Moreno approached his neighbor M.B. multiple times, claiming that Noriega had raped Moreno's eighty-one-year-old mother and was performing witchcraft. Moreno told M.B. he "was going to kill [Noriega]" and, on one occasion, "kept patting his right hip . . . indicating he had a gun under his shirt." M.B. shared this information with Noriega.

¶3 On September 10, Moreno went to the Miami Police Department (MPD) station and reported to Chief Daniel Rodriguez that Noriega and three other men had been raping his mother.[1]

[1]On September 8, Moreno entered the residence of another man, F.L., uninvited, pointed a gun at his head, and said he was going to shoot F.L. "for what he and [Noriega] did to his mother." However,

During the encounter, Moreno was rambling, sweating heavily, and continually scratching himself; could not stand still; and had to be reminded to pull up his pants when they fell down to his knees. Rodriguez suspected Moreno had been using drugs and asked him to write out a statement at home and bring it back because Rodriguez could not understand him.

¶4 Three days later, Moreno visited the MPD station and again spoke to Rodriguez, this time claiming that Noriega was performing witchcraft on him and his mother. That same day, Rodriguez contacted Noriega, who denied the allegations. Noriega, however, informed Rodriguez of Moreno's encounters with M.B., explaining that Moreno had "threatened to kill [Noriega] for what he did to [Moreno's] mother." In response, Rodriguez told Noriega, "Now I can arrest him." In reliance on that statement, Noriega "went back to [his] normal life" and stopped "ke[eping] a look out" for Moreno.

¶5 On September 16, Moreno returned to the MPD station, reporting that Noriega "hadn't physically raped his mother" but "was using his witchcraft again." Moreno stated that he would "deal with [Noriega]." Rodriguez warned Moreno to "stay away from anybody involved with these allegations," including Noriega. The following day, Moreno took his cell phone to Rodriguez and asked him to review text messages that showed Noriega was practicing witchcraft. Although the cell phone's battery died before Rodriguez could finish looking at all the messages, none of those he saw "indicated an assault of any kind or any type of witchcraft practice." During these two encounters, Rodriguez did not arrest Moreno.

¶6 On September 22, Moreno entered Noriega's backyard and shot him in the head while Noriega was working on a car. Shortly thereafter, Moreno turned himself in, explaining he had shot Noriega "to stop the witchcraft directed at his mother." Noriega survived the shooting. Rodriguez subsequently interviewed M.B. and his wife about the events. After the interview finished and Rodriguez had

---

Moreno left without harming F.L. because he feared the police would arrest him before he could shoot Noriega.

turned off the audio recorder, Rodriguez told M.B., "Off the record, I knew he was gonna shoot him."

¶7 In August 2014, Noriega filed this tort action against the Town, "by and through the acts and omissions of the [MPD]." Specifically, Noriega alleged that the MPD "ha[d] a duty to investigate all credible threats of specific harm against any citizen" and that Rodriguez had been "both negligent and grossly negligent for beginning to investigate, but then failing . . . to complete a full investigation into this conflict." He maintained that, "[h]ad Rodriguez conducted a full investigation . . . , he would have acquired more than enough evidence to arrest Moreno" and could have "properly warned [Noriega] about the danger" and "protect[ed] . . . him from being shot."

¶8 The Town filed a motion for summary judgment, asserting there was "no issue of fact or law in dispute" and it was "not liable." The Town construed Noriega's complaint as alleging that it should have protected Noriega by "civilly apprehending Moreno" or "arresting Moreno for an unspecified crime prior to the shooting." As to the former allegation, the Town maintained it had absolute immunity pursuant to A.R.S. § 36-525(B). And as to the latter, the Town argued it had qualified immunity under § 12-820.02(A)(1), leaving only Noriega's claim for gross negligence. The Town asserted Noriega could not establish gross negligence because of Rodriguez's lack of gross or wanton conduct. In addition, the Town suggested that it "had no general duty to 'protect' Noriega" and that causation was "speculative."

¶9 In response, Noriega argued he had "two separate negligence claims"—"failure to investigate" and "failure to protect/misrepresentation"—and that the Town had misconstrued those as a "failure to arrest." He therefore reasoned that the Town was not entitled to qualified immunity under § 12-820.02(A)(1), which specifically applies to a failure to arrest. Even if § 12-820.02(A)(1) applied, therefore precluding his negligence claim, Noriega argued that "there [were] genuine issues of material fact regarding [Rodriguez's] gross negligence." Noriega conceded that, to the extent he had asserted a claim for failing to apprehend Moreno pursuant to § 36-525, the Town had absolute immunity.

¶10 After hearing oral argument, the trial court granted the motion for summary judgment. The court explained that the Town had qualified immunity under § 12-820.02(A)(1) because the essence of Noriega's claim was a failure to arrest. Turning to the issue of gross negligence, the court concluded that the Town did not owe a duty of care to Noriega because no special relationship existed. The court further noted that, "[e]ven if such a relationship did exist," the facts did not "support any finding of intentional behavior or gross negligence on the part of [the Town]." This appeal followed the court's entry of a final judgment. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Standard of Review

¶11 We review a grant of summary judgment de novo. *Andrews v. Blake*, 205 Ariz. 236, ¶ 12, 69 P.3d 7, 11 (2003). Similarly, we review de novo questions of law concerning the interpretation of statutes, *Hogue v. City of Phoenix*, 240 Ariz. 277, ¶ 8, 378 P.3d 720, 722 (App. 2016), a municipality's immunity for negligence, *Smyser v. City of Peoria*, 215 Ariz. 428, ¶ 8, 160 P.3d 1186, 1190 (App. 2007), and the existence of a duty of care, *Vasquez v. State*, 220 Ariz. 304, ¶ 22, 206 P.3d 753, 760 (App. 2008).

¶12 Summary judgment is appropriate "if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). Thus, a motion for summary judgment "should be granted if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

Qualified Immunity

¶13 Noriega argues that the trial court erred in applying § 12-820.02(A)(1) because this is not a "failure-to-arrest case." Rather, he insists that his claims are based on Rodriguez "failing to investigate Moreno's threats" and "failing to properly warn and protect Noriega," which do not fall under § 12-820.02(A)(1).

¶14 Pursuant to § 12-820.02(A)(1):

> Unless a public employee acting within the scope of the public employee's employment intended to cause injury or was grossly negligent, neither a public entity nor a public employee is liable for . . . [t]he failure to make an arrest or the failure to retain an arrested person in custody.

Because it affords immunity to governmental entities, we must construe this statute narrowly. *Glazer v. State*, 237 Ariz. 160, ¶ 12, 347 P.3d 1141, 1144 (2015). However, we may not do so in a way that effectively abrogates the legislature's grant of immunity. *Hogue*, 240 Ariz. 277, ¶ 8, 378 P.3d at 723.

¶15 "The plain language of . . . § 12-820.02(A)(1) applies governmental immunity only to the failure to make an arrest or to retain an arrested person." *Greenwood v. State*, 217 Ariz. 438, ¶ 17, 175 P.3d 687, 692 (App. 2008). The Arizona courts have nonetheless interpreted § 12-820.02(A)(1) to apply when "the essence" or "core" of the claim is a "failure to arrest." *Id.* ¶¶ 17, 19-20, 22 (applying statute to claim that sheriff failed to maintain and disseminate defendant's criminal history because, "at its core, it [was] an allegation that [sheriff] failed to arrest or detain"); *see also Hogue*, 240 Ariz. 277, ¶ 10, 378 P.3d at 723 (applying statute to claims that city employees failed to test genetic material sooner or "take other investigatory steps to identify" defendant because allegations at core were failure to arrest defendant).

¶16 For example, in *Walls v. Arizona Department of Public Safety*, Walls's complaint alleged that a Department of Public Safety (DPS) officer was negligent in failing to stop a motorist he had seen weaving through traffic and had suspected was under the influence of alcohol. 170 Ariz. 591, 593, 826 P.2d 1217, 1219 (App. 1991). DPS filed a motion for summary judgment, arguing that § 12-820.02(A)(1) provided it with qualified immunity and that there were no facts supporting a finding of gross negligence. *Id.* The trial court granted the motion. *Id.*

¶17 On appeal, Walls argued that § 12-820.02(A)(1) did not apply because his claim was based on a "failure to make an investigatory stop, not [a] failure to make an arrest." *Id.* This court disagreed, first noting that "sovereign immunity is sometimes necessary given the breadth of the government's exercise of power" and that one such example is "the immunity for negligence in the failure to make an arrest." *Id.* at 594, 826 P.2d at 1220. We then recognized that the officer's "decision to make an investigatory stop of the [motorist] was merely the first step in arresting [him]" and that "an investigatory stop will often lead to an arrest." *Id.* We thus looked beyond the specific language used in the complaint in determining that § 12-820.02(A)(1) applied. *Id.* We also rejected Walls's argument that "qualified immunity should apply only when the officer has probable cause to arrest someone" because it would result in "absurdity." *Id.* at 594-95, 826 P.2d at 1220-21.

¶18 Here, Noriega's complaint on its face did not allege a failure to arrest as the basis of his claims. Accordingly, we must look to the complaint's "essence" or "core" to determine if § 12-820.02(A)(1) nonetheless applies. *Greenwood*, 217 Ariz. 438, ¶¶ 17, 22, 175 P.3d at 692-93; *see also Hogue*, 240 Ariz. 277, ¶ 10, 378 P.3d at 723. Noriega alleged Rodriguez had "failed to complete a full investigation into the conflict" between Moreno and Noriega. Had Rodriguez conducted that investigation, Noriega maintained that Rodriguez "would have acquired more than enough evidence to arrest Moreno," could have "warned [Noriega] about the danger posed towards him by Moreno," and could have "protect[ed Noriega] . . . from being shot." Noriega's claims thus "in essence" or "at [their] core" amount to a claim that Rodriguez failed to arrest Moreno. *Greenwood*, 217 Ariz. 438, ¶¶ 17, 22, 175 P.3d at 692-93. Indeed, this case is akin to *Hogue*, in which this court interpreted the plaintiff's claim that the city had failed to investigate and identify the defendant as the perpetrator as a failure to arrest. 240 Ariz. 277, ¶ 10, 378 P.3d at 723.

¶19 Although Noriega characterizes his claims as a "failure to investigate" and a "failure to protect," those two functions—investigating and protecting—coupled in this context necessarily

involved arresting.[2] As in *Walls*, investigating Moreno was a preliminary step in arresting him, which would have then afforded Noriega the exact protection he claims was lacking. Moreover, in conceding that the Town had absolute immunity under § 36-525, Noriega implicitly recognized that his claims could be construed as a failure to apprehend Moreno for a mental-health evaluation. But like the "failure to arrest," a "failure to apprehend" was not explicitly used in the complaint. Noriega thus seems to have recognized that we must look to the "essence" or "core" of the complaint and that his allegations therein necessarily involved some act of detention, similar to an arrest. *Greenwood*, 217 Ariz. 438, ¶¶ 17, 22, 175 P.3d at 692-93.

¶20 Noriega nevertheless contends that extending § 12-820.02(A)(1) to a "failure to conduct any investigation, or otherwise to protect a specific, known victim, is tantamount to giving the police qualified immunity the moment they receive notice . . . of any specific threat, even if the police take no further action." He further reasons that this interpretation "run[s] afoul" of the rule that "immunity provisions are construed narrowly."

¶21 However, unlike his argument on appeal, Noriega's complaint did not allege that Rodriguez had failed to complete "any investigation." Instead, Noriega asserted that Rodriguez had failed to complete a "full investigation." In determining whether § 12-820.02(A)(1) applies to a particular case, we must look to the allegations in the complaint. *See Greenwood*, 217 Ariz. 438, ¶¶ 17, 20, 175 P.3d at 692-93. This will therefore be a fact-specific inquiry, and, as a result, we do not think our determination will have as far-reaching impact as Noriega seems to suggest. And although we must construe § 12-820.02(A)(1) narrowly, *Glazer*, 237 Ariz. 160, ¶ 12, 347 P.3d at 1144, our interpretation is consistent with our case law, *see Hogue*, 240 Ariz. 277, ¶¶ 8, 10, 378 P.3d at 723-24.

---

[2] We recognize that a police officer's responsibilities extend beyond a duty to arrest, thus exposing officers to liability for failing to protect the public in ways not covered by § 12-820.02(A)(1). However, Noriega has made no other claims beyond what we construe as a failure to arrest.

¶22 Because Noriega's claim at its core is that the Town, by and through the conduct of Rodriguez and the MPD, failed to arrest Moreno, the trial court properly concluded that § 12-820.02(A)(1) applies. *See Smyser*, 215 Ariz. 428, ¶ 8, 160 P.3d at 1190. The Town is therefore entitled to qualified immunity, and, to "hold the [Town] liable, [Noriega] must prove that [it] was grossly negligent in failing to arrest [Moreno]." *Hogue*, 240 Ariz. 277, ¶ 10, 378 P.3d at 723.

Gross Negligence

¶23 Noriega contends that, even assuming § 12-820.02(A)(1) applies, the trial court erred in granting the Town summary judgment because "reasonable jurors could easily conclude it was gross negligence to fail to arrest Moreno." A negligence claim requires proof of four elements: "(1) a duty requiring the defendant to conform to a certain standard of care; (2) a breach by the defendant of that standard; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual damages." *Sanders v. Alger*, 242 Ariz. 246, ¶ 7, 394 P.3d 1083, 1085 (2017), *quoting Gipson v. Kasey*, 214 Ariz. 141, ¶ 9, 150 P.3d 228 (2007). A gross-negligence claim additionally requires a showing of "[g]ross, willful, or wanton conduct." *Armenta v. City of Casa Grande*, 205 Ariz. 367, ¶ 20, 71 P.3d 359, 364 (App. 2003), *quoting Williams v. Thude*, 180 Ariz. 531, 539, 885 P.2d 1096, 1104 (App. 1994).

¶24 The trial court concluded that summary judgment on the issue of gross negligence was appropriate for two reasons: (1) the Town owed no duty of care to Noriega, and (2) even if the Town had a duty, Noriega had presented no evidence to show that the Town committed "gross or wanton negligence" because Rodriguez did not act intentionally or with a malevolent mental state. Because this court must affirm the entry of summary judgment if it is correct for any reason, we address both determinations in turn. *See Federico v. Maric*, 224 Ariz. 34, ¶ 7, 226 P.3d 403, 405 (App. 2010).

Duty of Care

¶25 "To establish a claim of gross negligence, the plaintiff must prove, among other things, the existence of a duty of care." *Hogue*, 240 Ariz. 277, ¶ 11, 378 P.3d at 723. "Duty is defined as an

'obligation, recognized by law, which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm.'" *Gipson*, 214 Ariz. 141, ¶ 10, 150 P.3d at 230, *quoting Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 352, 354, 706 P.2d 364, 366 (1985). A duty of care "may arise from special relationships based on contract, family relations, or conduct undertaken by the defendant" or "public policy considerations." *Id.* ¶¶ 18, 23; *see also Barkhurst v. Kingsmen of Route 66, Inc.*, 234 Ariz. 470, ¶ 10, 323 P.3d 753, 756-57 (App. 2014).

¶26 Noriega argues the Town owed him a duty of care because a special relationship arose between Rodriguez and himself.[3] In response, the Town contends that Noriega waived this argument by not raising it below and therefore "not giving [the Town] and the trial court a full and fair opportunity to evaluate [it]."

¶27 The Town is correct that this court generally does not consider arguments raised for the first time on appeal. *See, e.g.*, *Evans Withycombe, Inc. v. W. Innovations, Inc.*, 215 Ariz. 237, ¶ 15, 159 P.3d 547, 550 (App. 2006); *Englert v. Carondelet Health Network*, 199 Ariz. 21, ¶ 13, 13 P.3d 763, 768-69 (App. 2000). That is because "a trial court and opposing counsel should be afforded the opportunity to correct any asserted defects before error may be raised on appeal." *Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994). However, the doctrine of waiver is discretionary, *see Nold v. Nold*, 232 Ariz. 270, ¶ 10,

---

[3]Noriega also argues that a duty of care existed because "under the common law, the Town . . . voluntarily acted to protect [him] and thus assumed a duty to perform that undertaking non-negligently." Although his arguments overlap, this appears to be a public-policy argument. *See Wickham v. Hopkins*, 226 Ariz. 468, ¶ 15, 250 P.3d 245, 249 (App. 2011) ("Public policy, the other factor used to determine the existence of a duty, may be found in state statutes and the common law."). However, Noriega apparently did not raise this argument below, and the trial court did not consider it. We therefore do not address it further. *See Evans Withycombe, Inc. v. W. Innovations, Inc.*, 215 Ariz. 237, ¶ 15, 159 P.3d 547, 550 (App. 2006); *see also Englert v. Carondelet Health Network*, 199 Ariz. 21, ¶ 13, 13 P.3d 763, 768-69 (App. 2000).

304 P.3d 1093, 1096 (App. 2013), and for the reasons that follow we decline to apply it here.

¶28 Although Noriega did not explicitly argue in his response to the motion for summary judgment that a special relationship existed between Noriega and Rodriguez, the Town did not base its motion for summary judgment on the lack of a duty of care. Citing two out-of-state cases, the Town made one fleeting argument that it had "no general duty to 'protect' Noriega," but the thrust of the motion was that it had qualified immunity under § 12-820.02(A)(1) and that Noriega could not show gross negligence based on Rodriguez's lack of a "malevolent mental state." It was not until its reply brief that the Town cited *Hogue* to suggest there was no special relationship upon which to base a duty of care. Noriega thus had little reason to focus on the existence of a special relationship giving rise to a duty in his response. *See Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, ¶¶ 14-18, 180 P.3d 977, 980-81 (App. 2008) (discussing moving party's burden under motion for summary judgment). Moreover, the parties apparently discussed this issue at the hearing,[4] and the trial court determined in its ruling that no special relationship existed. Accordingly, we consider whether a special relationship existed here.

¶29 "A defendant's conduct may create a special relationship that gives rise to a duty." *Hogue*, 240 Ariz. 277, ¶ 12, 378 P.3d at 723. The police do not owe a duty to every citizen within their jurisdiction from all potential harms. *Id.*; *cf. Hafner v. Beck*, 185 Ariz. 389, 391, 916 P.2d 1105, 1107 (App. 1995) ("We do not understand the law to be that one owes a duty of reasonable care at all times to all people under all circumstances."). However, "if police endeavor to provide specific protection to a particular person, they generally . . . have 'a duty to

[4]In his reply brief, Noriega maintains the special-relationship issue "was addressed at oral argument." However, we do not have a transcript from that hearing. *See* Ariz. R. Civ. App. P. 11(c)(1)(A) (appellant's duty to order necessary transcripts). Nonetheless, Noriega's assertion is consistent with the discussion of a special relationship in the Town's reply to the motion for summary judgment and the trial court's ruling.

act as would a reasonably careful and prudent police department in the same circumstances.'" *Hogue*, 240 Ariz. 277, ¶ 12, 378 P.3d at 723, *quoting Austin v. City of Scottsdale*, 140 Ariz. 579, 581-82, 684 P.2d 151, 153-54 (1984). Thus, "Arizona courts have found that police conduct has created a special relationship giving rise to a duty only in specific circumstances, for example when police take a 911 call about a potential threat and tell the caller that they will take action on that information." *Id.*

¶30 Noriega argues that "[a] special relationship was created when Noriega told Rodriguez that Moreno had threatened to harm him." Noriega reasons that this case does not involve "protecting the public at large" or "an unidentified suspect [and] unknown targeted citizen"; instead, Noriega asserts, "Rodriguez knew precisely 'who' was making threats of harm and death . . . and 'about whom' he was making those threats." In addition, Noriega points out Rodriguez "assured Noriega that he would [investigate and] arrest Moreno" but "failed to carry through." The Town maintains this is a disputed fact.

¶31 Generally, the existence of a duty is a question of law "to be determined before the case-specific facts are considered." *Gipson*, 214 Ariz. 141, ¶ 21, 150 P.3d at 232. As such, the proper focus of our inquiry is on established special relationships. *See id.* ¶¶ 19-21. However, "the existence of a duty may depend on preliminary questions that must be determined by a fact finder." *Estate of Maudsley v. Meta Servs., Inc.*, 227 Ariz. 430, ¶ 23, 258 P.3d 248, 255 (App. 2011), *quoting Diggs v. Ariz. Cardiologists, Ltd.*, 198 Ariz. 198, ¶ 11, 8 P.3d 386, 388 (App. 2000). "If preliminary facts are in dispute, summary judgment should not be entered." *Id.*; *see also Muthukumarana v. Montgomery County*, 805 A.2d 372, 387-88 (Md. 2002) (when facts undisputed and reasonable minds could draw only one inference, issue of duty may be resolved as matter of law); *Morrow v. Bank of Am., N.A.*, 324 P.3d 1167, ¶ 78 (Mont. 2014) (generally, existence of special relationship is question of law, but when genuine issue of material fact exists, fact finder must resolve).

¶32 Turning to our established standards, as *Hogue* explains, a special relationship is created—and thus a duty of care owed—when police officers learn of a potential threat and tell the victim that they will take action on that threat. 240 Ariz. 277, ¶ 12, 378 P.3d at

723; *see also Austin*, 140 Ariz. at 581-82, 684 P.2d at 153-54. Put another way, a "duty toward specific individuals can be found . . . where there has been a specific promise or representation by police to a person in a situation which creates justifiable reliance." *McGeorge v. City of Phoenix*, 117 Ariz. 272, 277, 572 P.2d 100, 105 (App. 1977); *see also* 30 Am. Jur. 2d *Proof of Facts* § 429 (1982) (special relationship exists where police promised to protect individual and then failed to do so); 18 McQuillin, *The Law of Mun. Corps*. § 53:21 (3d ed.) ("[D]uty to provide police services arises where a special relationship exists between a police department and the victim of a criminal offense and where express assurances of protection are given that give rise to reliance on the part of the victim.").

¶33 Relying on *Hogue* and *Austin*, the trial court nevertheless reasoned that no special relationship was created in this case because it "did not involve a 911 call." Our supreme court has treated the creation of the 9-1-1 system as imposing a special duty of care because, by creating the system, the police "accepted the obligation of attempting to prevent" the harms that are reported. *Hutcherson v. City of Phoenix*, 192 Ariz. 51, ¶ 26, 961 P.2d 449, 453 (1998), *abrogated on other grounds by State v. Fischer*, 242 Ariz. 44, ¶ 18, 392 P.3d 488, 494 (2017); *see Wertheim v. Pima County*, 211 Ariz. 422, ¶¶ 17-18, 122 P.3d 1, 5 (App. 2005). However, a special relationship involving the police does not arise based solely on a 9-1-1 call. Other avenues of communication exist between the police and a victim and can serve the same purpose as a 9-1-1 call. *See, e.g.*, *McCutchen v. Hill*, 147 Ariz. 401, 404, 710 P.2d 1056, 1059 (1985) (deputy's agreement in court not to release individual from custody until bond posted gave rise to duty).

¶34 Here, it is undisputed that, when Rodriguez confronted Noriega about Moreno's allegations of rape and witchcraft, Noriega reported to Rodriguez that Moreno had told M.B. he was going to "kill Noriega for what he did to his mother." What occurred thereafter, however, is disputed. Noriega maintains that Rodriguez then told him, "Now, I can arrest [Moreno]," and that he relied on Rodriguez's assertion. The Town insists Rodriguez made no such statement. Because the existence of a special relationship under the reasoning of *Hogue* is dependent on this precise fact, there is a

"preliminary question[] that must be determined by a fact finder." *Estate of Maudsley*, 227 Ariz. 430, ¶ 23, 258 P.3d at 255, *quoting Diggs*, 198 Ariz. 198, ¶ 11, 8 P.3d at 388. Accordingly, the trial court erred in granting the motion for summary judgment based on no special relationship and, therefore, no duty of care. *See id.*; *see also Andrews*, 205 Ariz. 236, ¶ 12, 69 P.3d at 11.

Gross or Wanton Conduct

¶35 "A party is grossly or wantonly negligent if he acts or fails to act when he knows or has reason to know facts which would lead a reasonable person to realize that his conduct not only creates an unreasonable risk of bodily harm to others but also involves a high probability that substantial harm will result." *Walls*, 170 Ariz. at 595, 826 P.2d at 1221; *see also Williams*, 180 Ariz. at 539, 885 P.2d at 1104. Gross negligence "is different from ordinary negligence in quality and not degree." *Kemp v. Pinal County*, 13 Ariz. App. 121, 124, 474 P.2d 840, 843 (1970). It is "action or inaction with reckless indifference to the . . . safety of others." *Williams*, 180 Ariz. at 539, 885 P.2d at 1104.

¶36 Our supreme court has recognized that the definition of gross negligence "is, at best, inexact." *Weatherford ex rel. Michael L. v. State*, 206 Ariz. 529, n.4, 81 P.3d 320, 326 n.4 (2003). However, the court explained, "As between negligence and gross negligence, negligence suggests 'a failure to measure up to the conduct of a reasonable person.'" *Id.*, *quoting Daniels v. Williams*, 474 U.S. 327, 332 (1986). And, "[g]ross negligence generally signifies 'more than ordinary inadvertence or inattention, but less perhaps than conscious indifference to the consequences,'" which "falls closer to [the] recklessness standard" that "usually involves a conscious disregard of a risk." *Id.*, *quoting Fargo v. City of San Juan Bautista*, 857 F.2d 638, 641 (9th Cir. 1988), *abrogated on other grounds by Lewis v. Sacramento County*, 98 F.3d 434, 440 (9th Cir. 1996).

¶37 Generally, whether gross negligence occurred is a question of fact for a jury to determine. *Armenta*, 205 Ariz. 367, ¶ 21, 71 P.3d at 365. "In order to present such an issue to the jury, gross negligence need not be established conclusively, but the evidence on the issue must be more than slight and may not border on conjecture." *Walls*, 170 Ariz. at 595, 826 P.2d at 1221. Summary judgment is

appropriate "if 'no evidence is introduced that would lead a reasonable person to find gross negligence.'" *Badia v. City of Casa Grande*, 195 Ariz. 349, ¶ 27, 988 P.2d 134, 141 (App. 1999), *quoting Walls*, 170 Ariz. at 595, 826 P.2d at 1221.

¶38 Noriega argues "the evidence is clear, comprehensive, and strong" and "[r]easonable jurors could conclude that . . . Rodriguez was grossly negligent when he failed to protect Noriega." He maintains Rodriguez "had good reason to know" that his "conduct created an unreasonable risk of bodily harm to Noriega" and that "[t]here existed a high probability that substantial harm to Noriega would result from [his] inaction." In response, the Town contends Noriega failed to offer any evidence that "the police officers acted with an intent to cause injury to Noriega." It reasons that Rodriguez "had no probable cause to arrest Moreno for anything" and, therefore, "there can be no conclusion of wantonness."

¶39 Viewing the evidence in the light most favorable to Noriega, *see Wells Fargo Bank, N.A.*, 231 Ariz. 209, ¶ 14, 292 P.3d at 199, there is sufficient evidence from which a jury could conclude that the Town was grossly negligent, *see Badia*, 195 Ariz. 349, ¶ 27, 988 P.2d at 141-42. Rodriguez knew Moreno repeatedly had made statements accusing Noriega of raping his mother and performing witchcraft directed at Moreno. Rodriguez suspected Moreno of drug use and was aware of Moreno's criminal history, which included assault and domestic violence. In addition, Rodriguez knew Moreno had threatened to kill Noriega. Upon learning of that threat, Rodriguez told Noriega, "Now I can arrest him." But in Rodriguez and Moreno's subsequent interactions, Rodriguez never questioned Moreno about the threat, let alone arrested him. Instead, after Moreno told Rodriguez he would "deal with [Noriega]," Rodriguez simply warned Moreno "to stay away from Noriega." Perhaps most notably, however, Rodriguez admitted to others that he "knew [Moreno] was gonna shoot [Noriega]."

¶40 In addition, Noriega offered the affidavit of an expert "in the field of law enforcement policy, procedures, training and supervision." The expert avowed, "Based upon what Rodriguez knew about Moreno, his use of drugs, and his fixation on [Noriega] as the source of his delusions, Rodriguez should have known that

there was a high probability that Moreno would inflict substantial harm to [Noriega], especially when considering that the two men live less than half a mile away from each other." In light of Moreno's specific threat, the expert opined that Rodriguez was grossly negligent in "do[ing] nothing to attempt to stop Moreno from his inevitable course of action of assaulting [Noriega]."

¶41 "We recognize that proving gross negligence is no easy task." *Luchanski v. Congrove*, 193 Ariz. 176, ¶ 19, 971 P.2d 636, 640 (App. 1998). But reasonable minds could disagree with the Town that Rodriguez's conduct simply did not rise to the level of gross negligence. *See Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008; *cf. Austin*, 140 Ariz. at 582, 684 P.2d at 154 (directed verdict inappropriate where reasonable jury could find police negligent in responding to potential threat reported to department dispatcher); *Rourk v. State*, 170 Ariz. 6, 13, 821 P.2d 273, 280 (App. 1991) (summary judgment inappropriate given sufficient evidence that state was grossly negligent in not removing victim from foster home when it knew or should have known adequate supervision not provided). Although the evidence is not conclusive, it need not be. *See Walls*, 170 Ariz. at 595, 826 P.2d at 1221. The trial court therefore erred in granting summary judgment on gross negligence on this basis. *See Andrews*, 205 Ariz. 236, ¶ 12, 69 P.3d at 11.

Causation

¶42 The Town additionally argues that "[t]here is no evidence . . . of actual and proximate causation to tie any failure to arrest to Moreno's shooting of Noriega." Because we must affirm the entry of summary judgment if correct for any reason, the Town urges us to address this issue as well. *See Federico*, 224 Ariz. 34, ¶ 7, 226 P.3d at 405. However, the trial court declined to address causation, in part, because "[t]he parties did not discuss [it] in a meaningful way." As discussed above, we generally deem arguments not raised below waived on appeal because the trial court did not have "an effective opportunity to rule" on them. *Van Dever v. Sears, Roebuck & Co.*, 129 Ariz. 150, 152, 629 P.2d 566, 568 (App. 1981). Although this issue was raised below, we think the same waiver reasoning applies here, when the trial court deemed the presentation insufficient for it to address the issue. Additionally, causation is generally a question of fact for

the jury to resolve. *Salica v. Tucson Heart Hosp.-Carondelet, L.L.C.*, 224 Ariz. 414, ¶ 16, 231 P.3d 946, 951 (App. 2010). And because of the lack of "meaningful" discussion below, the record is not sufficiently developed for us to determine the issue. We therefore do not address it further. *See Evans Withycombe, Inc.*, 215 Ariz. 237, ¶ 15, 159 P.3d at 550; *see also Englert*, 199 Ariz. 21, ¶ 13, 13 P.3d at 768-69.

Disposition

¶43 For the reasons stated above, we affirm the entry of summary judgment in favor of the Town on Noriega's negligence claim, reverse the entry of summary judgment on Noriega's gross-negligence claim, and remand for further proceedings consistent with this opinion. Noriega is entitled to his costs on appeal, *see* A.R.S. § 12-341, contingent upon his compliance with Rule 21(b), Ariz. R. Civ. App. P.