No. 100100-2

SUPREME COURT
OF THE STATE OF WASHINGTON

DELAURA NORG, as Litigation Guardian ad Litem for her husband, FRED B. NORG, an incapacitated man, and DELAURA NORG, individually,

Respondents,

v.

THE CITY OF SEATTLE,

Petitioner.

ANSWER TO MEMORANDUM OF AMICUS CURIAE WSAMA

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A. Introduction.

Amicus Curiae Washington State Association of Municipal Attorneys (WSAMA) mischaracterizes the decision of the Court of Appeals and the arguments of petitioner City of Seattle. The Court of Appeals did not hold that the public duty doctrine is an affirmative defense, did not purport to overrule *Cummins v. Lewis County*, 156 Wn.2d 844, 133 P.3d 458 (2006), and applied settled precedent in holding that one who affirmatively undertakes to assist another has a duty to exercise reasonable care.

B. Argument in Answer to Amicus.

1. The Court of Appeals did not hold the "public duty doctrine is an affirmative defense."

WSAMA's contention that the Court of Appeals held that "the public duty doctrine is an affirmative defense" (WSAMA 3-4, 11) illustrates WSAMA's lack of familiarity with the appellate decision and the record and briefing

below. *See* RAP 10.3(c) ("Amicus must review all briefs on file . . ."). While respondent City of Seattle characterized the public duty doctrine as an affirmative defense, the Court of Appeals correctly recognized that duty is an issue of law, not a factual issue upon which one or the other party bears the burden of proof.

In its answer, the City asserted as an affirmative defense to the Norgs' negligence claims that "Plaintiffs' claims are barred by the public duty doctrine." (CP 21) The Norgs moved for partial summary judgment asking the trial court to "strike Defendant City of Seattle's . . . public duty defense[] and to rule that the City owed the Norgs a common law duty of reasonable care while responding to Mr. Norg's cardiac arrest." (CP 23) The trial court granted the motion, ordering that "defendant City of Seattle owed plaintiffs a duty of ordinary care and the City's affirmative defenses Numbers 10 (Immunity), 11 (public duty), and 12 (no duty) are hereby STRICKEN." (CP 569)

There is a single reference in the Court of Appeals opinion to the trial court's "order striking the City's affirmative defense." (Op. ¶ 1) The Court of Appeals did not characterize the public duty doctrine as an affirmative defense; respondent City of Seattle did. WSAMA's contention that the Court of Appeals' single reference to the City's characterization of the issue of duty as an affirmative defense "involves an issue of substantial public interest" (WSAMA 4, citing RAP 13.4(b)(4)) is entirely devoid of merit.

2. The Court of Appeals did not purport to overrule *Cummins*.

WSAMA's assertion that the Court of Appeals "openly and flagrantly disregards Supreme Court precedent," by "overruling" *Cummins* either expressly or "by implication" (WSAMA 2), is similarly misguided. As the Court of Appeals noted (Op. ¶¶ 7, 17), this Court has rejected application of the rigid "public duty" exceptions that the City and its amicus continue to insist are a

necessary predicate to governmental liability in tort even where the government actor engages in unreasonable conduct in their affirmative interactions with the plaintiff:

> [B]ecause the public duty doctrine essentially asks whether the government owes a duty to particular individuals, 'an enumerated exception is not always necessary to find that a duty is owed to an individual and not to the public at large'. The enumerated exceptions simply identify the most common instances when governments owe a duty to particular individuals . . .

Ehrhart v. King County, 195 Wn.2d 388, 400, ¶ 20, 460 P.3d 612 (2020), quoting *Beltran-Serrano v. City of Tacoma,* 193 Wn.2d 537, 549, ¶ 19, 442 P.3d 608 (2019).

The Court of Appeals did not purport to overrule *Cummins* for the additional reason that the plaintiffs in *Cummins* claimed breach of a statutory duty. While the Norgs alleged that the City "[r]espond[ed] to a call for emergency medical help . . . in a negligent manner" (Op. ¶ 24), "Cummins' claim was premised on the statutory duty to provide a 'rapid response' to 911 calls under RCW

38.52.500." (Op. ¶ 11) As the Court of Appeals noted, the *Cummins* Court "assumed, without deciding that the duty at issue was owed to the public . . .". (Op. ¶ 12, citing 156 Wn.2d at 853-54)

WSAMA relies on the Court of Appeals' discussion of Justice Chambers' concurrence, which anticipated this Court's now-settled holding that "the public duty doctrine applies only when the duty at issue arises out of a statute or ordinance mandating action by the government entity." (Op. ¶ 16) *See Cummins,* 156 Wn.2d at 873 (Chambers, J., concurring in result). The Court of Appeals did not need to "overrule or disregard" *Cummins* in recognizing that the public duty doctrine applies to claims based on the violation of a statutory or other "public" duty—a limitation on the doctrine that this Court has repeatedly emphasized. *See Ehrhart,* 195 Wn.2d at 398, ¶ 16; *Beltran-Serrano,* 193 Wn.2d at 549-50, ¶ 20; *Munich v. Skagit Emergency*

Commc'n Ctr., 175 Wn.2d 871, 886-87, ¶¶ 29-30, 288 P.3d 328 (2012) (Chambers, J., concurring).

Like the City in its briefing below, WSAMA fails to identify any "public" or statutory duty implicated by the City's provision of emergency ambulance services. And WSAMA's contention that the Court of Appeals decision imposes liability on government "where a private person would not" face liability (WSAMA 9) is similarly without merit.

To the contrary, quoting the concurrence in *Cummins*, the Court of Appeals noted that "given that emergency medical assistance is not a unique function of government, when government decides to handle requests for emergency care, it should be held liable for damages for its tortious conduct *in the same way as a private person* or corporation." (Op. ¶ 15, quoting 156 Wn.2d at 872) (emphasis added) Indeed, WSAMA acknowledges that adopting Justice Chambers' view that governmental actors

should be held to the same standards of care as private parties engaging in the same activity does not result in "changing" any of this Court's precedent. (WSAMA 7, quoting *Munich*, 175 Wn. 2d at 894).

3. WSAMA's "reliance" argument ignores that no affirmative misconduct was alleged in *Cummins,* but that here the City actively assured Mrs. Norg for 17 minutes that it was responding to the correct location.

WSAMA's related argument that the Court of Appeals dispensed with "reliance" as the "linchpin" for a public or private entity's liability when undertaking a duty to render aid entirely disregards the facts in both the instant case and those that WSAMA cites, including *Cummins* and *Osborn v. Mason County,* 157 Wn.2d 18, 134 P.3d 197, 201 (2006), in which the government never undertook an affirmative duty of assistance. As the Court of Appeals held, reliance on a rescuer's assurances is one way of defining a relationship that merits protection under the law of torts, but it is not the only means of establishing

a direct and particularized relationship that carries with it a duty of reasonable care. (Op.¶ 17, citing *Restatement (Second) Torts*, § 323; *see also Restatement (Third) Torts,* § 44, comment d)

As the Court of Appeals noted, in *Cummins* "[t]he 911 dispatcher received a call in which a man said '1018 E Street, heart attack' before hanging up. Mistakenly believing the call was a hoax, the dispatcher did not send any emergency services to the address." (Op. ¶ 11, citing 156 Wn.2d at 848-49) *Cummins* held that there was no "reliance" because the dispatcher made no assurances and never affirmatively established any relationship whatsoever with the caller.

In *Osborn*, "[t]he Osborns d[id] not claim Mason County promised to warn them" that a convicted sex offender had moved to Shelton. 157 Wn.2d at 26, ¶ 12. The Court held that the Mason County sheriff had neither a statutory nor a "'special relationship' duty to warn the

Osborns because Jennie Mae Osborn was not a foreseeable victim" of the offender. *Osborn*, 157 Wn.2d at 25, ¶ 10.

As this Court held in *Cummins,* which was issued the same term as *Osborn*, there is no basis to hold a defendant to a duty of care in the absence of any assurances whatsoever. 156 Wn.2d at 855, ¶¶ 20-21. Rather than adopting the City's mechanistic notion of "detrimental reliance," the Court of Appeals in this case properly looked to the existence of the direct and individualized relationship between the City's dispatcher and Mrs. Norg. Consistent with this Court's precedent, the Court of Appeals held that the City's affirmative conduct established a definitive and particularized relationship giving rise to a duty of care.

"The duty to exercise reasonable care arises "when a person undertakes to render aid to or warn a person in danger," *Beltran-Serrano* 193 Wn.2d at 551, ¶ 23, n.10, that is, "when a rescuer knows a danger is present and

takes steps to aid an individual in need." *Folsom v. Burger King*, 135 Wn.2d 658, 677, 958 P.2d 301 (1998). (*See* Answer to Pet. 25-29)

Here, the City's "911 dispatcher assured Delaura eight separate times that the responders were arriving soon or had already arrived" during a 17-minute phone call (Op. ¶ 4), without verifying her address or the name of her building until 14 minutes into the call. "[D]espite receiving the [Norgs'] correct address," the responders drove past the Norgs' apartment under the erroneous assumption they were dispatched to a nursing home "four blocks away from the Norgs' building." (Op. ¶ 3) And during the entire time its responders were at the wrong location, the City's 911 dispatcher repeatedly and continually "assure[d] a distraught Delaura that help would arrive imminently"

(Op. ¶ 4)[1], telling her to "stay right there" and declining Mrs. Norg's desperate inquiry whether she should let the responders into her building. (CP 180-85)

WSAMA's argument that the Norgs failed to "rely" on these assurances ignores that Mrs. Norg could have easily corrected the City's erroneous belief that her husband's heart attack was occurring at a nearby nursing home, were she only given the opportunity and not instead repeatedly told that the responders knew where they were going and would be there momentarily. The City's dispatcher was Mrs. Norg's one and only "life line," upon whom the Norgs relied to do "whatever the 911 call taker told me to do." (CP 90-91, 99-100, 174-86) "It is readily apparent that promised action requires more than superficially accurate words." *Munich*, 175 Wn.2d at 884, ¶ 24.

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[1] Noting the City's eight assurances, at 31 seconds, 1:04 minutes, 3:02 minutes, 4:33 minutes, 7:15 minutes, 9:33 minutes, 12:42 minutes, 14:00 minutes, and 15:10 minutes into the call. (CP 175, 176, 178, 179, 181, 182, 183, 184, 185)

The extent to which the City's failure to allow Mrs. Norg to correct its error during these long minutes worsened Mr. Norg's condition is a factual issue of causation, as the Court of Appeals correctly recognized. (Op. ¶ 25) That issue of fact does not implicate the legal issue of duty, let alone bar the Norgs' claim based on the "public duty doctrine."

C. Conclusion.

This Court should reject WSAMA's transparent attempt to return Washington to the time when the public duty doctrine imposed a higher burden on plaintiffs, based solely on whether a public, rather than a private, individual acts negligently. This Court has rejected that distinction as an arbitrary one given the Legislature's waiver of sovereign immunity. Because the Court of Appeals properly rejected it here as well, this Court should deny review.

I certify that this brief is in 14-point Georgia font and contains 1,873 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

Dated this 10th day of November, 2021.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

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