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 PETITION FOR REVIEW

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A. Introduction.

A provider of ambulance services, public or private, owes a duty of reasonable care once it undertakes to respond to a call for emergency services. Over the course of a 17-minute 911 call, the City of Seattle's dispatcher repeatedly told respondent Delaura Norg that the City's emergency medical crew had arrived at the Norgs' apartment to respond to her husband's cardiac arrest. But within four minutes of Mrs. Norg's call, in which she gave the dispatcher her correct address, the City's responders had in fact driven past the Norgs' residence, going to an assisted living facility four blocks away. While the City dispatcher repeatedly told Mrs. Norg that the responders knew where they were going, giving Mrs. Norg no opportunity to correct the City's mistakes, Mr. Norg suffered irreversible brain damage as a result of the City's negligent response to his medical emergency.

The courts below rejected the City's sole argument—that it could owe the Norgs no duty of care unless they proved an "exception" to the public duty doctrine. The Court of Appeals correctly followed this Court's clear and recent precedent, affirming the trial court's decision that the public duty doctrine does not immunize the City from tort liability because the City's duty to the Norgs "is not a public duty owed to the general public at large but is instead a common law duty to exercise reasonable care in providing emergency medical services." (Op. ¶ 26) The City now ignores its concession below that no statute mandates its provision of emergency medical services; neither its "public duty" argument nor the other issues it raises for the first time in its petition warrant this Court's review.

B. Restatement of Issues.

Rather than providing this Court a "concise statement of the issues presented for review," RAP 13.4(c)(5), the City offers a hyperbolic and misguided

critique of the Court of Appeals decision as "obvious error."[1] Properly stated, the issues are:

1. Did the Court of Appeals correctly hold that a tort plaintiff need not prove an "exception" to the public duty doctrine in an action against a municipal defendant that does not allege a violation of a duty imposed by statute or regulation, but instead alleges the defendant breached the duty of ordinary care that a private actor would owe in similar circumstances in the course of directly and personally engaging with the plaintiff?

2. Do emergency responders who repeatedly assure the plaintiff that they have arrived, or would soon arrive at plaintiff's residence, owe a common law duty of ordinary care to respond to the location correctly provided

[1] The City erroneously argues that RAP 13.5 governs its petition. Because the Court of Appeals had accepted discretionary review and rendered a decision on the merits terminating review, this Court's Clerk correctly set the petition before a Department of the Court for consideration under RAP 13.4(b).

by the plaintiff once affirmatively undertaking to provide emergency assistance?

C. Restatement of the Case.

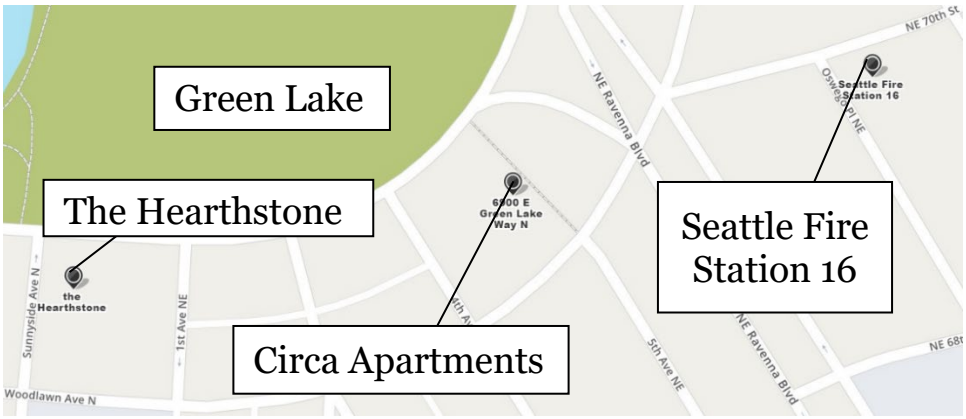
The City "does not contest that the SFD initially went to the wrong address, thereby delaying its medical response to Mr. Norg's medical emergency" (Pet. 6), but ignores the direct and substantial relationship formed between the City's dispatcher and a helpless Mrs. Norg over the course of their 17-minute phone call, the City's false assurances to Mrs. Norg, and the City's failure to check the Norgs' address until long after its responders drove past their residence within three minutes of their dispatch. This restatement of the case relies largely on the Court of Appeals' accurate recital of the relevant facts on summary judgment.

1. The City's responders inexplicably went to the wrong address in response to Mrs. Norg's 911 call.

"In the early morning hours of February 7, 2017, Delaura Norg awoke to find her husband, Fred [age 57], having a heart attack. She called 911 at 4:42 am. Delaura gave the dispatcher the couple's address: 6900 East Green Lake Way North Unit 306. The dispatcher alerted the Seattle Fire Department (SFD) at 4:43 am and its emergency medical units at Station 16, three blocks away, immediately responded to the call. The dispatcher told Delaura 'they are on the way' and instructed her to begin CPR." (Op. ¶ 2)

"Despite receiving the correct address, the responding SFD units assumed they were being dispatched to [the Hearthstone] nursing home at 6720 East Green Lake Way North, four blocks away from the Norgs' building. The responders drove past the Norgs' apartment and arrived at the nursing home at 4:46 am. They entered

the [Hearthstone] and proceeded to apartment 306." (Op. ¶ 3):



"Meanwhile, the 911 dispatcher continued to assure a distraught Delaura that help would arrive imminently. The dispatcher assured Delaura eight separate times that responders were arriving soon or had already arrived. Less than five minutes into the call, the dispatcher told Delaura that 'they are at the building.' Seven minutes in, the dispatcher stated 'They're coming up to your room now.' A minute later, he stated 'they are coming up to your door now.' Eleven minutes in, the dispatcher instructed Delaura not to leave her apartment to let the responders into the

building and instead to remain with her husband doing chest compressions. The dispatcher remained on the phone with Delaura for nearly 17 minutes. The SFD units, after realizing their mistake, verified the address and arrived at the Norgs' apartment at 4:58 am, fifteen minutes after they were dispatched. Fred survived the heart attack but suffered an anoxic brain injury and sustained permanent cognitive and neurological deficits." (Op. ¶ 4) [2]

The City's contention that the "emergency responders arrived inside the Norgs' apartment unit about three minutes after arriving on-scene at their apartment

[2] "Time is brain;" each second is critical in responding to a heart attack, as brain cells begin to die rapidly after approximately eight minutes without oxygenated blood from the heart. (CP 101) Because the SFD arrived at the Circa 15 minutes, rather than within minutes of dispatch, Mr. Norg suffered a severe anoxic brain injury that left him incapable of normal activities of daily living, and requires 24-hour care. (CP 102-03) As the Court of Appeals correctly recognized, "[w]hether the Norgs can establish a causal link between the paramedics' delay and Fred's brain injury remains unresolved" (Op. ¶ 25), and is a factual issue for the jury.

complex" (Pet. 6), thus ignores that its three responding units initially went to the wrong location, wasting almost 12 precious minutes. None of the ten emergency responders on the three SFD vehicles verified the Norgs' address or used their onboard GPS devices to accurately locate their destination while en route. (CP 78, 81, 83) And although the City's dispatcher had the ability to monitor the responders' progress and location, he did not do so at any time during his 17-minute call with Mrs. Norg. (CP 64-75, 99-100)

2. The City's dispatcher repeatedly falsely assured Mrs. Norg that responders had arrived, or were about to arrive at the location she had given them.

The City's contention that "[a]t no time did the Norgs rely on the SFD to their detriment" (Pet. 6) cannot be given any credence on this record and given the procedural posture of this case. As the Court of Appeals correctly noted, while its EMTs were responding to the Hearthstone,

the City's "911 dispatcher assured Delaura eight separate times that the responders were arriving soon or had already arrived" (Op. ¶ 4), never verifying her address or the name of her building until 14 minutes into the call:

- "Okay. Ma'am, they are on the way. Okay." (00:31);
- "I do have a lot of people on the way." (1:00);
- "Ma'am, they can get in the building. They go there often. They will get in the building and get into your room, okay . . . They're just—they're on their way right now. They're coming from just a few blocks away." (3:02-3:12);
- "Okay. They're on the way. They just pulled up in front, okay . . . Ma'am, they are at the building. They're walking in the front door right now, okay." (4:33-4:48);
- "Okay. They're coming up to your room now. They're up to floor three now . . . And they're coming up to your door now." (7:15-8:20);
- "They're working their way up there, ma'am. I'm sorry. We're going to be there shortly." (9:33);
- "Ma'am, they are coming." (12:42);

- "Ma'am, then I'm going to have you go down to the front door. What's the name of your building?" (13:53);

- "You just stay right there. They're going to be coming in your door shortly." (15:10)

(CP 174-85)

While the responders were at the wrong location, Mrs. Norg diligently followed the dispatcher's instructions to stay by her husband's side. The City's dispatcher was Mrs. Norg's one and only "life line," upon whom Mrs. Norg relied to do "whatever [he] told [me] to do." (CP 90-91, 99-100, 174-86)

3. The Court of Appeals affirmed the trial court's partial summary judgment striking the City's public duty defense.

King County Superior Court Judge Suzanne Parisien ("the trial court") denied the City's motion for summary judgment of dismissal and granted the Norgs' motion for partial summary judgment striking the City's public duty defense (CP 540-42), then certified the order for

discretionary review under RAP 2.3(b)(4). (CP 469-70) The Court of Appeals affirmed, holding that because the Norgs were not claiming the breach of a generalized "public duty," the City owed them a duty of ordinary care based on its undertaking to provide emergency medical services directly to the Norgs. The issues of breach, proximate cause and damages are factual issues that remain to be resolved by the jury at trial. (Op. ¶ 25)

D. Argument Why Review Should be Denied.

1. The Court of Appeals did not create a "new test" in holding the City owed the Norgs a common law duty of ordinary care, rather than a "public" or generalized duty to provide 911 services.

The Court of Appeals did not create a "new test" for municipal liability in holding that the City owed the Norgs a particularized duty of care, rather than a generalized duty owed to the public at large. (Pet. 8) This Court's most recent cases squarely hold that "[a]s to common law negligence, . . . '[t]his court has never held that a

government did not have a *common law* duty solely because of the public duty doctrine.'" *Beltran-Serrano v. City of Tacoma,* 193 Wn.2d 537, 549-50, ¶ 20, 442 P.3d 608 (2019) (emphasis in original), quoting *Munich v. Skagit Emergency Commc'n Ctr.,* 175 Wn.2d 871, 886-87, ¶¶ 29-30, 288 P.3d 328 (2012) (Chambers, J., concurring).[3] The Court of Appeals faithfully adhered to this precedent, which carries out the Legislature's express directive that municipalities are to be held liable for negligence "to the same extent as if they were a private person or corporation." RCW 4.96.010(1); (*see also* Op. ¶ 15) As a consequence, a municipality is liable in tort for breach of a duty owed "to the plaintiff individually" as

[3] "Justice Chambers's concurring opinion in *Munich* [is] precedential because it received five votes from justices who also signed the majority opinion." *Ehrhart v. King Cnty.,* 195 Wn.2d 388, 398, ¶ 16 n.5, 460 P.3d 612 (2020). This brief cites Justice Fairhurst's opinion in *Munich* as the "lead opinion."

opposed to a duty owed "merely to the public as a whole." *Ehrhart,* 195 at 400, ¶ 20.

The public duty doctrine thus is shorthand for the "basic tenet of common law," *Ehrhart,* 195 Wn.2d at 398, ¶ 17, that the defendant owes a duty of care to the individual plaintiff "in particular, and . . . not . . . to the public in general, i.e., a duty owed to all is a duty owed to none." *Munich,* 175 Wn.2d at 878, ¶ 13 (lead opinion). The Court of Appeals' recognition that "[g]eneral obligations owed to the public are those mandated by statute or ordinance" (Op. ¶ 10) is not a "new test." This Court has repeatedly held that the public duty doctrine "comes into play when special governmental obligations are imposed by statute or ordinance." *Ehrhart,* 195 Wn.2d at 399, ¶ 18, quoting *Beltran-Serrano*, 193 Wn.2d at 549, ¶ 20.

Most recently, this Court in *Ehrhart* rejected a claim based on the death of plaintiff's husband from exposure to hantavirus after the County failed to warn residents of the

presence of the virus in the county. Plaintiff argued that the County owed a duty to warn based on a regulation requiring its health department to "determine appropriate action" when it received a report from a health care provider of certain serious conditions, and that the County should have warned that hantavirus was in the community. *Ehrhart,* 195 Wn.2d at 394, ¶¶ 8-9. This Court held that the regulation created a public duty owed to everyone, not a duty owed to the plaintiff.

"The public duty doctrine is properly applied to duties mandated by statute or ordinance" because they are not "owed to any particular *individual*." *Munich*, 175 Wn.2d at 888, ¶¶ 33-34 (emphasis in original, quoted case omitted). Here, as in *Beltran-Serrano* and in contrast to *Ehrhart,* the City's duty arises from its direct and particularized interaction with these particular plaintiffs. Once the City took action, it owed the Norgs a duty to act reasonably. *Beltran-Serrano,* 193 Wn.2d at 551, ¶ 23

("[U]nder the common law, 'if the officers do act, they have a duty to act with reasonable care.'") (quoted case omitted).

This Court has clearly, and recently, rejected the City's contention that the Norgs were required to prove an "exception" to the public duty doctrine to assert their common law negligence claim. "[A]n enumerated exception is not always necessary to find that a duty is owed to an individual and not to the public at large." *Beltran-Serrano,* 193 Wn.2d at 549, ¶ 19.

The City's insistence that an "exception" to the public duty doctrine must be established when considering a municipality's common law duties would be an unwarranted return to the repudiated sovereign immunity doctrine that "the king could do no wrong." *Munich*, 175 Wn.2d at 887, ¶ 31. The Court of Appeals' decision neither imposes a "new test," conflicts with any decisions of this or the Court of Appeals, nor warrants further review in this Court.

2. The City's argument, raised for the first time in its Petition, that it owes the public a statutory duty to provide 911 services, ignores its concession below that its duty does not arise from statute or ordinance.

The City essentially concedes that the public duty doctrine applies only to statutory duties, arguing for the first time in its Petition that the Court of Appeals held the City accountable for breach of the City's *statutory* duty to provide "911 emergency medical dispatch functions" (Pet. 11) under RCW 38.52.500. The City's statutory argument ignores its express concession in the Court of Appeals that no "statute or ordinance mandate[s] that municipal fire departments provide emergency medical services" to the Norgs (Op. ¶ 16; Transcript of Oral Argument, No. 80836-2-I, at 19) (Appendix A). In the trial court and Court of Appeals, the City failed to cite RCW 38.52.500, or *any* statute, that purported to make responding to the Norgs'

emergency a "public duty."[4] This Court generally refuses to address "issues and theories not appropriately raised before the Court of Appeals." *Peoples Nat. Bank of Wash. v. Peterson*, 82 Wn.2d 822, 830, 514 P.2d 159 (1973).

In any event, the City's argument grossly mischaracterizes this Court's actual holding in *Cummins v. Lewis Cnty.,* 156 Wn.2d 844, 133 P.3d 458 (2006), the case on which the City primarily relies. In *Cummins*, this Court looked to an "exception to the public duty doctrine"

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[4] RCW 38.52.500 (Appendix B) is the Legislature's "finding" "that a statewide emergency communications network of enhanced 911 telephone service, which allows an immediate display of a caller's identification and location, would further the safety, health, and welfare of the state's citizens, and would save lives." As noted by the Court of Appeals, the Legislature recognizes that private ambulance services continue to be responsible for responding to medical emergencies; "[p]roviding emergency life-saving medical help . . . is not a function unique to government." (Op. ¶ 15, citing RCW 35.21.766(2) and *Cummins,* 156 Wn.2d at 872, ¶ 59 (Chambers, J., concurring)). "Private ambulance service providers, providing emergency medical services, have historically been subjected to civil suit for negligence." (Op. ¶ 17, citing cases)

because the plaintiff alleged the breach of a statutory duty to provide 911 services to the public at large, rather than a particularized duty to the individual plaintiff. The Court refused to consider the argument, made for the first time by amicus WSAJ, "that this court abandon the public duty doctrine." 156 Wn.2d at 851, ¶ 8.

Moreover, the City concedes that this Court in *Cummins* rejected the existence of a duty "*under the facts of the case*" (Pet. 1) (emphasis added), but then proceeds to ignore those very facts. In *Cummins,* there was no duty of care to a heart attack victim who did not identify himself to the 911 operator and "hung up the telephone before a promise of assistance could be given and before an on-going dialogue could be established" that would have distinguished the plaintiff "from the public at large." 156 Wn.2d at 855, ¶ 18. The public duty doctrine squarely applied to plaintiff's argument in *Cummins* "that RCW 38.52.500 provides a 911 medical-emergency caller with an

implicit promise that the government entity fielding the call will 'provide a rapid response.'" 156 Wn.2d at 853, ¶ 13 n.6.[5] As the Court of Appeals held here, "under the facts of [the] case" (Op. ¶ 15), Cummins failed to "prove[] the 'special relationship' exception to the public duty doctrine"—"the sole question" presented to the Supreme Court. (Op. ¶ 12)

Ignoring that Justice Chambers' concurring opinion in *Cummins* formed the basis for his precedential analysis in *Munich*, the City in particular misplaces its reliance on Justice Chambers' statement in *Munich* that it "would not change any of [the Court's] precedents." (Pet. 10, citing

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[5] Recognizing that the City never relied on the statute below, the City now argues that "*the Norgs* cited RCW 38.52.500 in their briefing" in the Court of Appeals. (Pet. 11) (emphasis added) However, the Norgs cited the statute only to distinguish the statute-based argument for liability made by the plaintiff and addressed by the Court in *Cummins* (Resp. Br. 17)—precisely the distinction correctly relied upon by the Court of Appeals in rejecting the City's argument that *Cummins* controlled here. (Op. ¶ 16)

Munich, 175 Wn.2d at 894, ¶ 44.) *Cummins* does not "still stand[] for the proposition the public duty doctrine applies to 911 emergency dispatch calls" (Pet. 2-3), because providing emergency medical assistance is not "a duty unique to government." *Cummins*, 156 Wn.2d at 872, ¶ 59 (Chambers, J., concurring); (Op ¶ 15). Justice Chambers concurred in the dismissal of Mrs. Cummins' claim because "no rational jury could find that the county breached its duty to exercise ordinary care under the circumstances," *Cummins,* 156 Wn.2d at 874, ¶ 66 (Chambers, J., concurring), not because of some blanket immunity from tort claims based on calls to 911.

In arguing that the public duty doctrine continues to apply whenever responding to a 911 call, the City misstates the holdings of both *Beltran-Serrano* and *Mancini v. City of Tacoma,* 196 Wn.2d 864, 479 P.3d 656 (2021), which it erroneously contends are limited to the proposition that "the public duty doctrine is not at issue in cases involving

misfeasance of law enforcement officials." (Pet. 14) The Court of Appeals properly rejected the City's argument that "the duty to respond to any 911 call is a public duty." (Op. ¶ 7) As the courts below held, the City's duty to refrain from causing foreseeable harm once directly engaging with another person is neither "nonfeasance" nor limited to law enforcement, but applies to a 911 operator's direct and substantial interaction with a caller. This Court's precedent, starting with *Munich,* support its decision. *See Munich*, 175 Wn.2d at 893, ¶ 40 ("The case before us is a 911 emergency operator case."); RAP 13.4(b)(1).

In *Munich*, this Court adopted Justice Chambers view, first expressed in *Cummins*, that the public duty doctrine provided no protection to a county sued for negligence when it failed to provide a timely response after its 911 dispatcher repeatedly and erroneously assured an assault victim that police were on their way. *Munich,* 175 Wn.2d at 886-87, ¶¶ 29-30.

Relying on *Munich* and the common law principle that "every individual owes a duty of reasonable care to refrain from causing foreseeable harm in interactions with others," this Court in *Beltran-Serrano* held that "Beltran-Serrano's negligence claims arise out of Officer Volk's direct interaction with him, not the breach of a generalized public duty," such as the general "statutorily imposed obligation to provide police services, enforce the law and keep the peace." 193 Wn.2d at 559-52, ¶¶ 20, 21, 23.

Then, in *Mancini,* the Court held police officers to "a duty to exercise reasonable care . . . when they invade another's property" to execute a search warrant, reasoning that the duty claimed "was not an abstract duty to the nebulous public, but a specific duty enforceable by Mancini in tort." Like *Beltran-Serrano,* the officers' common law duty to act reasonably arose out the officers' direct "interaction with others." *Mancini*, 196 Wn.2d at 886, ¶¶ 48-49, quoting B*eltran-Serrano*, 193 Wn.2d at 550.

Similarly, here, the City's duty of care arose not from a public or statutory duty owed to the citizenry at large, but from its dispatcher's direct interaction with Delaura Norg. The Court of Appeals correctly applied this Court's precedent in rejecting the City's reliance on the public duty doctrine to immunize it from its negligence in responding to the Norgs' medical emergency.

3. The Court of Appeals correctly held that the City could be liable once it affirmatively undertook to come to the Norgs' aid, and that whether the City's delayed response caused the Norgs' damages was a factual issue for the jury.

As a threshold matter, this Court need not consider the City's argument that it would owe the Norgs no common law duty of care because in the Court of Appeals the City relied entirely on the Norgs' supposed failure to prove an "exception" to the public duty doctrine to immunize its negligent response to the Norgs' medical emergency. (App. Br. 5 (statement of issues in Court of

Appeals); Reply Br. 11-19 (analyzing special relationship and rescue doctrine as "exception to public duty doctrine")) Just as with the City's newfound reliance on its claimed "mandatory" statutory duty to provide 911 services (*see supra,* § B.2) this Court should not accept review to consider this unbriefed issue, which the City has never before relied upon in its effort to evade common law liability for its negligence. *See Peoples Nat. Bank,* 82 Wn.2d at 830.

The Court of Appeals correctly held that "[u]nder common law, any entity, public or private, that undertakes to provide emergency medical services to others owes a duty of care to those to whom it provides such services." (Op. ¶ 17) The City owed the Norgs a common law duty of care based "not upon confused mechanical application of the public duty doctrine but upon policy considerations, foreseeability, and proximate cause." (Op. ¶ 15, quoting *Cummins,* 156 Wn.2d at 873 (Chambers, J. concurring))

A common law duty exists where the defendant and plaintiff have a sufficiently direct and particularized relationship to warrant legal protection as a matter of "logic, common sense, justice, policy, and precedent." *Volk v. DeMeerleer*, 187 Wn.2d 241, 263, ¶ 42, 386 P.3d 254 (2016); *Hartley v. State*, 103 Wn.2d 768, 779, 698 P.2d 77 (1985). Washington courts routinely impose a duty of reasonable care where, as here, the defendant has engaged in an undertaking or assumed responsibility to the plaintiff such that the defendant knew or reasonably should have known that harm would befall the plaintiff if it failed to exercise ordinary care. *See, e.g., Meneely v. S.R. Smith, Inc.,* 101 Wn. App. 845, 860, 5 P.3d 49 (2000) ("The ultimate test of a duty to use [due] care is found in the foreseeability that harm may result if care is not exercised.") (brackets in original, quoted cases omitted), *rev. denied*, 142 Wn.2d 1029 (2001).

The Court of Appeals thus properly held that "[r]esponding to a call for emergency medical help but doing so in a negligent manner" is misfeasance—"performing a lawful act in a wrongful manner; it is not the failure to act." (Op. ¶ 24) There is nothing novel in the common law principle that "one who assumes to act . . . may thereby become subject to the duty of acting carefully, if he acts at all." *Marks v. Nambil Realty Co.*, 245 N.Y. 256, 258, 157 N,E. 129 (1927) (Cardozo, J., quoted case omitted). The City cites no authority for its contention that a private emergency responder would owe no duty to act with reasonable care once undertaking to respond to the correct address (Pet. 12-13)—a proposition that other courts have rightly rejected as defying common sense and logic. *See, e.g., Blatz v. Allina Health Sys.,* 622 N.W.2d 376 (Minn. App. 2001) (affirming jury verdict for plaintiff who suffered anoxic brain injury as a result of delay in emergency responders' arrival; paramedics responding to

911 dispatch owed plaintiff a duty of ordinary care in locating plaintiff's residence).

The Court of Appeals properly rejected the City's cynical assertion that it could owe a duty of ordinary care only if the Norgs "detrimentally relied" on the dispatcher's assurances by failing to avail themselves of "alternative options for Mr. Norg to obtain care" (Pet. 17), or if the City "increase[d] the risk of harm" to the Norgs. (Pet. 19, citing *Folsom v. Burger King*, 135 Wn.2d 658, 676, 958 P.2d 301 (1998)). The City is wrong on the law and the facts, both of which support holding the City to a common law duty of ordinary care.

As to the law, the City ignores *Folsom's* corollary rule, recently reiterated by this Court: that "[t]he duty to rescue arises when a rescuer knows a danger is present and takes steps to aid an individual in need." *Turner v. Washington State Dep't of Soc. & Health Servs.*, No. 99243-6, 2021 WL 3557309, at *9, ¶ 34 (Aug. 12, 2021), quoting *Folsom*, 135

Wn.2d at 677. *Accord, Beltran-Serrano* 193 Wn.2d at 551, ¶ 23 ("if the officers do act, they have a duty to act with reasonable care.") (quoted case omitted) & n.10 (duty to exercise reasonable care arises "when a person undertakes to render aid to or warn a person in danger.").

The City's direct undertaking, in which it took control of the Norgs' medical emergency when they were helpless and entirely dependent on the City, is sufficient to establish a duty of ordinary care, even under the City's myopic view of the "special relationship" and "rescue" exceptions to the public duty doctrine. "By taking charge of the other, the rescuer may have prevented others from rescuing, but neither reliance nor increased risk need be proved. . ." Restatement (3rd) Torts § 44, comment d. (*See* Resp. Br. 25-27)

The Court of Appeals thus properly rejected the City's contention that the Norgs must establish "detrimental reliance" by proving that they could have obtained an

"alternative" emergency medical response to their medical emergency elsewhere.[6] Mrs. Norg clearly "detrimentally" relied on the City's assurances that they were promptly responding to her home at the Circa Apartments; she could have directed the City to her proper address had its dispatcher only asked the name of her building before its confused responders reported they were at the wrong location, some 13 minutes into her call. (CP 216: "Do they have a building name?") (*See* Resp. Br. 27-36)

As to the facts, the Court of Appeals correctly recognized whether "the delay in responding to the correct address caused Fred to experience oxygen deprivation" is

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[6] The City's cynical view of "detrimental reliance" in the rescue context would immunize 911 responses in any circumstance calling for critical care, simply because victims in severe medical crisis have no "alternative" but to "hang up and call 911" to obtain emergency assistance. The Court of Appeals properly rejected it. (Op. ¶ 17: "[I]f the City chooses to provide emergency medical services, and it is not statutorily mandated to do so, it should be treated no differently than private parties providing the same services under similar circumstances.") (*See supra*, § D.2)

an "unresolved" factual issue for the jury. (Op. ¶ 25) Its recognition of those remaining factual issues conflicts with no authority and warrants no further review in this Court. This Court should deny review and allow a jury to resolve the issues of breach, causation and damages at trial under instructions that properly hold the City to a duty of ordinary care.

E. Conclusion.

This Court should deny review of the Court of Appeals' well-reasoned decision, which is wholly consistent with this Court's recent and repeated case law interpreting the public duty doctrine and governmental tort liability.

I certify that this answer is in 14 point Georgia font and contains 4,881 words, in compliance with the Rules of Appellate Procedure.

Dated this 16th day of September, 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:

That on September 16, 2021, I arranged for service of the foregoing Answer to Petition for Review, to the Court and to the parties to this action as follows:

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DATED at Seattle, Washington this 16th day of September, 2021.

*/s/ Andrienne E. Pilapil*_____
Andrienne E. Pilapil

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

THE CITY OF SEATTLE, Defendant/Petitioner, vs. DELAURA NORG, as Litigation Guardian ad Litem for her husband, FRED B. NORG, an incapacitated man, and DELAURA NORG, individually, Plaintiffs/Respondents,	) COA NO. 80836-2-I) King County Superior) Court No. 18-2-25812-0

ORAL ARGUMENT

Heard before:

Stephen Dwyer, Beth Andrus, David Mann

June 8, 2021

Transcribed by: Reed Jackson Watkins, LLC
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A P P E A R A N C E S

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June 8, 2021

THE CLERK: The Washington State Court of Appeals, Division I is now in session. The Honorable Stephen J. Dwyer presiding.

JUDGE DWYER: Good morning everybody. We are -- the three of us are in the courtroom. We are vaccinated and we are alone with one another. So that's our situation. Everybody ready?

MR. GROSHONG: Yes, Your Honor.

JUDGE DWYER: It looks like it. Okay. Mr. Goodfriend, are you the appellant today?

MR. GOODFRIEND: No, I'm the respondent today, Your Honor. So you'll be hearing from me soon enough.

JUDGE DWYER: Counsel, how much time would you like for rebuttal?

MR. GROSHONG: Four minutes, please.

JUDGE DWYER: Okay. Go ahead.

MR. GROSHONG: Thank you, Your Honor. May it please the Court. Joe Groshong, assistant city attorney on behalf of the City of Seattle.

This case is on appeal because the lower court erred in dismissing the City's public duty doctrine defense and determining that the City owed a common law duty in

responding to a 911 medical emergency call.

It's also on appeal because as a result of the first error, the lower court also erred in denying the City's motion for summary judgment on the public duty doctrine.

So the City is now asking for two things: First, reversal of the court's grant of the Norg's summary judgment motion on the public duty doctrine. Without court intervention, no record regarding the exceptions to the doctrine will be developed at the trial court on the present rulings.

Second, on de novo review, it would also be appropriate for this Court to grant the City's motion for summary judgment. There are no exceptions to the public duty doctrine that apply to these facts as a matter of law.

JUDGE ANDRUS: Let's back up a step. Under the new Supreme Court decision in Mancini vs. City of Tacoma, don't you need to get over the hurdle of establishing how this public duty doctrine applies in the first place before we start talking exceptions?

MR. GROSHONG: Well, Your Honor, Mancini makes clear that Beltran-Serrano did not overturn prior public duty cases. And if you go back to Cummins and Munich and other 911 emergency response cases, it's very clear that the public duty doctrine applies to cases like this one.

And the court in Mancini drew a helpful distinction and drawing on Beltran-Serrano and other cases, it distinguished

between cases like Beltran-Serrano involving a government actor directly causing harm through a shooting or through negligent execution of a search warrant and entering a home versus failure to protect cases like Munich and Ehrhart, which is another recent Supreme Court case.

This case is a failure to protect case. The government here, the City, did not cause Mr. Norg's heart attack. And the complaint of the plaintiffs is that the City did not get there sooner to alleviate the harm that it did not cause. I hope that addresses your question.

JUDGE ANDRUS: I understand the distinction that you're making. So you're talking about -- you're looking at the language in Mancini about the difference between misfeasance and nonfeasance; is that the language you're relying on?

MR. GROSHONG: Yes, Your Honor. And -- yes, it is.

JUDGE MANN: Well, nonfeasance would be not acting at all. What's the difference between going to the wrong apartment with your search warrant and going to the wrong apartment with your medic unit?

MR. GROSHONG: So, Your Honor, the critical distinction is direct harm. And by entering the wrong apartment, the actors in Mancini did cause direct harm to that apartment occupant, to Mancini, because she never should have been subjected to a search and handcuffed and held outside her apartment.

Whereas here, the City did not directly cause any harm to the Norgs. Indeed, it didn't do anything that made the Norg situation worse than it would have been in the absence of governmental action.

JUDGE DWYER: Well, that's certainly not true within the pleadings. If that was true, then there'd be no damages, and the tort claim would take care of itself by a failure to prove damages. Because at trial, the City is not going to be held liable for causing the heart attack. The claim against the City is going to be that the situation was worsened as a result of the City's negligence, not that the situation of the heart attack was created by the City's negligence. Nobody is saying a firefighter jumped out from behind a door and yelled "boo." They're saying that the firefighter went to the wrong door.

MR. GROSHONG: Yes, Your Honor, I agree. And the distinction I'm drawing -- I suppose I'm jumping ahead to the exceptions to the public duty doctrine. Because unless an exception to the public duty doctrine applies, the damages don't --

JUDGE DWYER: That's not true. If the public duty doctrine doesn't apply, then there isn't an exception that need be discussed.

MR. GROSHONG: Yes, Your Honor, that's right. And I agree. If the public duty doctrine does not apply and this

is a common law case, then you would remand to the court for trial on the current ruling. For the reasons that --

JUDGE DWYER: So why is a claim that I was on the phone with 911, they told me that the paramedics were coming to my door, while the paramedics were, in fact, going to someone else's door, why is that a violation of a duty owed to the general public?

MR. GROSHONG: Well, in Cummins and Munich and all of the other 911 emergency response cases, all the courts --

JUDGE DWYER: I don't want to hear about that. I want you to tell me why that is a -- why that's a duty owed to the general public. You don't need to cite cases to answer that question.

MR. GROSHONG: So a duty to respond to medical emergency is a general public duty. It's -- that's a -- the 911 system is a system that is set up for the public for public benefit.

JUDGE DWYER: And a duty to enforce drug laws is a duty owed to the general public, but that didn't stop the application of tort law in Mancini. The question is --

MR. GROSHONG: Again --

JUDGE DWYER: -- when it's coming down to this particular instance, why is a failure to go to the wrong door a violation of a duty owed to the general public -- or failure to go to the right door.

(Beep)

JUDGE DWYER: And in ten minutes, you'll be able to inform us to what the answer to that question is.

Mr. Goodfriend.

MR. GOODFRIEND: Good morning, Your Honor, may it please the Court. Howard Goodfriend representing Fred and Delaura Norg.

As your questions, I think, indicate, it's pretty clear by now after Mancini, Beltran-Serrano, and Munich that public duties arise by virtue of statutes, regulations or ordinances that are enacted for the benefit of the public at large. And, you know, our court has now very consistently disclaimed the requirement that governmental liability based upon direct and particularized relationship between a governmental agent and the plaintiff must fall under an exception to the public duty doctrine in order to be actionable.

JUDGE ANDRUS: Okay. Mr. Goodfriend, let me stop you there for a moment. So if I understand you correctly, Judge -- or Justice Chambers has repeatedly written in concurrences that in his opinion, the public duty doctrine only triggers if the duty the plaintiff is relying on arises out of a statute. Is that your understanding?

MR. GOODFRIEND: That's correct. A statute, a regulation or an ordinance enacted for the benefit of the public at

large. And the Norgs are not claiming a duty --

JUDGE ANDRUS: (Inaudible).

MR. GOODFRIEND: Oh, I'm sorry; I didn't mean to interrupt you.

JUDGE ANDRUS: Yeah, so your position is in Beltran-Serrano and Mancini because the duty that was being alleged was not a duty arising out of a statute, an ordinance or regulation. The duty arose out of common law tort; and therefore, the public duty doctrine is inapplicable in its entirety?

MR. GOODFRIEND: Correct.

JUDGE ANDRUS: So how do you address Mr. Groshong's argument that really Mancini was not -- did not adopt the Chambers statute versus common law distinction but adopted a different one: The failure to protect versus the direct harm caused by government misfeasance? How do you respond to that argument?

MR. GOODFRIEND: Well, I think there's -- I don't think it's applicable. I mean, the difference between -- certainly in Mancini and in Beltran-Serrano, there was a direct engagement by the officers. But that wasn't the basis of the court's adoption of Justice Chambers' concurring opinion in Munich which, in fact, is the majority opinion, as this court has recognized.

And, you know, what is important, I think, is not a

difference between nonfeasance and misfeasance. Although, if you go there, this case is really no different than the prior cases that Justice Chambers has indicated, you know, he wouldn't change any of the results in. Particularly Munich, Beal and Washburn, which are 911 cases, where the government failed to act. I mean, they didn't show up. And that was why they were liable. They had a direct and particularized relationship with the person on the phone, even less so, particularly in Beal, than what you see here where for 17 minutes --

JUDGE ANDRUS: Right. All --

MR. GOODFRIEND: Go ahead.

JUDGE ANDRUS: All three of those cases, however, assumed the public duty doctrine did apply and they were invoking an exception to the rule, correct?

MR. GOODFRIEND: That's correct.

JUDGE ANDRUS: Either the special relationship or the rescue doctrine exception.

MR. GOODFRIEND: Right. But what Chambers -- what Justice Chambers said -- and if you go back to Cummins and Babcock, his concurrences there, I think they're very revealing, and that is that, you know, duty is a question of law for the court based on considerations of policy and foreseeability, not whether the parties' relationship, you know, is -- it's based on the parties' relationship and not based on a

mechanical and myopic requiring of express assurances and reliance to establish a protectable relationship.

But if that's what you have, we have that in spades here. Because over the course of this 17-minute phone call in which the City's dispatcher repeatedly, emphatically, and directly told Ms. Norg that the firefighters were either on the scene or going to the building; they knew where they were going, they knew how to get in.

And, in fact, four minutes into this 17-minute phone call, they drove right by it and went to an assisted living facility and woke up the guy in Unit 302. They --

JUDGE ANDRUS: Let me interrupt you there. Let me interrupt you there. How do you respond to the argument the City has made that she did not justifiably rely or didn't rely at all on everything the dispatcher said because she couldn't have done anything differently? She wouldn't have done anything differently. She continued to apply CPR throughout the entirety of the emergency until they arrived. And she didn't stop. So his condition wasn't worsened because she stopped CPR because they told her that the medical team was right there. So I think -- how do you address that argument?

MR. GOODFRIEND: Well, the City's view of detrimental reliance to require a plaintiff to forgo an alternative means of help as -- and this is what Justice Chambers said

in Babcock and Cummins in his concurrence. What it does is it deprives the seriously injured or unconscious victims of relief. There's no requirement that a city's assurances cause you to refrain from seeking help elsewhere where: A, you've taken control by undertaking to assist one able to help or self.

So that type of control -- and it doesn't have to be physical custody is here in spades and, you know, they exercised that control in directing her during the 17 minutes.

JUDGE ANDRUS: In granting your summary judgment, did the trial court determine that the public duty doctrine did not apply?

MR. GOODFRIEND: Yes.

JUDGE ANDRUS: Or did the trial court determine that it applied and there were no genuine issues of fact as to whether there was a special relationship or the rescue doctrine applied?

MR. GOODFRIEND: The trial court said the public duty doctrine is inapplicable where you have a direct and particularized relationship to this specific individual based on your direct interactions with that person.

And let me give you a couple hypotheticals. One is from Justice Chambers' opinion in Cummins. A heart attack victim two blocks from the hospital calls four times and is told

each time by the receptionist, I'll tell the doctor. But the doctor does nothing because he's drunk or for whatever reason. There's no duty there because there's no express assurance of help or reliance. Justice Fairhurst hypo- in Munich, the responders stopped for coffee on their way to responding. There's only a duty if the person they were responding to is sufficiently able to call for an alternative means of getting to the hospital. So the person broke their leg, there'd be a duty but if it was a heart attack victim, no? What sense does that make as a matter of policy and foreseeability? Absolutely none.

Now, to say that Ms. Norg is entitled to relief only if she could have called a cab or a friend to take her unresponsive husband to the hospital is, as I've stated in the brief, the height of cynicism and it relies upon the simple fact that the City has monopolized emergency responses by telling the public repeatedly to call 911 and sending their dispatchers instead of private ambulances.

There's nothing governmental about an ambulance coming to a victim's home. And it is -- once it's undertaken, it should be done reasonably. That is the quintessential foundation of tort law.

So really the argument that she had no alternatives to call 911 and that's why she should lose is really nothing but a sovereign immunity dressed up as a lack of reliance.

Once they monopolized this service, requiring victims of medical emergencies to call 911, the City has a duty to respond with reasonable care. And the fact that it has eliminated the alternative of calling a private ambulance shouldn't give the City any greater rights than would a private responder. That's the argument that they're making, not that the City should be held responsible as would a private person under the same or similar circumstances under RCW 4.96.010.

JUDGE ANDRUS: There are a series of 911 call cases that precede this one, and then we had Beltran-Serrano and we had Mancini that sort of intervened between the last 911. What you're advocating sounds like that in light of Beltran-Serrano and Mancini, the prior 911 cases really don't have any precedential value. Can we at this court say that?

MR. GOODFRIEND: May I respond in the brief time I have, Your Honor? The City's --

(Beep)

JUDGE ANDRUS: Certainly.

JUDGE DWYER: Go ahead.

MR. GOODFRIEND: No, you don't have to rule -- you know, the dispositive case is a 911 case and that is Justice Chambers' concurring opinion in Munich, which has been recognized repeatedly as the opinion of the court because it

garnered five votes. And that is a 911 case.

And what Justice Chambers says is you don't have to rule -- overrule any of this Court's prior cases. You don't have to overrule Cummins where there was no relationship whatsoever between the victim and the 911 caller, and you don't have overrule Babcock where it was the most fleeting of contact and where moreover what Justice Chambers indicates is there was no reasonable person could find on those facts a breach of any duty of ordinary care.

So the answer is, no, you don't have to overrule any of the courts' decisions. You have to follow the Court's decision in Munich as it was followed in Mancini and Beltran-Serrano.

We ask the Court to affirm.

JUDGE DWYER: Okay. Thank you.

Counsel, I'm giving you a bonus minute to even things up. You would be more productive if you'd unmute yourself.

MR. GROSHONG: Still in this day, I still do that.

Okay. So I'd like to start with Judge Andrus' question: Yes, this court would have to reverse prior precedent to find that the trial court properly ruled that the City had a common law duty to respond.

The cases are very clear that there is no common law duty to respond to 911 calls. Such duty arises if and only if an exception to the public duty doctrine is satisfied. And the

public duty doctrine is widely recognized as being a somewhat confusing area of law.

But the question here is: Is there a duty and if so, when did it arise? And the prior cases say --

JUDGE ANDRUS: So let me step back. There is no duty to respond to a 911 call, period?

MR. GROSHONG: It is a public duty --

JUDGE ANDRUS: (Inaudible).

MR. GROSHONG: There is not actionable duty, Your Honor. There is a public duty that is owed to the general public, but there is no actionable duty until an exception to the doctrine is satisfied.

JUDGE ANDRUS: Even in the circumstance where the dispatcher says -- make a post-call assurance: We have dispatched somebody, they are on their way. At that point there's still -- the duty is still owed generically to the public, not to the person to whom you've made the assurance?

MR. GROSHONG: Yes, Your Honor. And that's entirely consistent with the rescue doctrine which applies to private parties. So if a private volunteer said, I'm going to take you to the hospital in response to, you know, some medical emergency, and then that person turned down assistance from another neighbor and said, no, no, so-and-so is on the way, you don't have to help me out and then a bad thing occurred because they had turned down the second offer of assistance,

which would actually have gotten them there -- gotten them to the hospital faster, then liability under the rescue doctrine could arise. And the same analysis is appropriate under the special relationship test.

And while we're talking about this, there is no recognized take-charge-by-phone doctrine in Washington. Mita v. Guardsmark is the leading case on the take-charge duty and it requires physical control. And under the facts of Mita, you know, someone was taken out of harm's way, out of a storm, brought into a building and then discharged back into the storm without adequate protection.

So I'm covering a fair amount --

JUDGE DWYER: When a 911 call is for police assistance, that's plainly something that has historically been a request for governmental action. When it's for health care, that has historically not been something that's a request for governmental action.

Mr. Goodfriend argues that the City is operating in a proprietary capacity by connecting the 911 call to the delivery of health care, which would ordinarily have been done -- or historically been done by private parties.

First, is that so? And second, does that make this a medical negligence action?

MR. GROSHONG: No, Your Honor. That is not so and this is not a medical negligence action.

Medical negligence would not be a factor unless and until the City arrived on the scene. The City had no ongoing medical --

JUDGE DWYER: What if he was in an emergency room waiting area for far too long before attended to, that would be a medical negligence action, right?

MR. GROSHONG: That could be. But that's very distinguishable from the facts here. Because, again --

JUDGE DWYER: I know. It's a hypothetical. It's intended to be different.

MR. GROSHONG: Yes.

JUDGE DWYER: But my question is: If the City's operating in a proprietary capacity, it replaced what used to be done by private parties with its endeavor, why would the public duty doctrine apply at all in a proprietary situation?

MR. GROSHONG: Well, first, it's not a proprietary situation. And, second, this argument is one that must be made --

JUDGE DWYER: Well, was it -- was it when it was -- was it a proprietary situation when it was performed solely by private ambulance companies? The answer is, of course.

MR. GROSHONG: Your Honor, I would say --

JUDGE DWYER: How did it -- how did it become not that just because the City is engaged in the action?

MR. GROSHONG: Well, again, Your Honor, this is an

argument that must be made to the Supreme Court. Cummins is controlling --

JUDGE DWYER: Well, I don't make arguments to the Supreme Court. I ask questions of lawyers and request an answer.

JUDGE ANDRUS: Is there any statute that mandates cities of Seattle's size to provide this type of medical emergency service?

(Beep)

MR. GROSHONG: No, Your Honor, not in the record.

THE COURT: Very interesting. Thank you.

MR. GROSHONG: Thank you, Your Honors.

MR. GOODFRIEND: Thank you.

(Conclusion of hearing)

C E R T I F I C A T E

STATE OF WASHINGTON)

)

COUNTY OF KING)

I, the undersigned, do hereby certify under penalty of perjury that the foregoing court proceedings or other legal recordings were transcribed under my direction as a certified transcriptionist; and that the transcript is true and accurate to the best of my knowledge and ability, including any changes made by the trial judge reviewing the transcript; that I received the electronic recording directly from the trial court conducting the hearing; that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

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s/ Bonnie Reed, CET

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West's Revised Code of Washington Annotated
Title 38. Militia and Military Affairs (Refs & Annos)
Chapter 38.52. Emergency Management (Refs & Annos)

West's RCWA 38.52.500

38.52.500. Statewide enhanced 911 service--Finding

Currentness

The legislature finds that a statewide emergency communications network of enhanced 911 telephone service, which allows an immediate display of a caller's identification and location, would serve to further the safety, health, and welfare of the state's citizens, and would save lives. The legislature, after reviewing the study outlined in section 1, chapter 260, Laws of 1990, further finds that statewide implementation of enhanced 911 telephone service is feasible and should be accomplished as soon as practicable.

Credits
[1991 c 54 § 1.]

OFFICIAL NOTES

Referral to electorate--1991 c 54: See note following RCW 38.52.030.

West's RCWA 38.52.500, WA ST 38.52.500
Current with all effective legislation of the 2021 Regular Session of the Washington Legislature.

End of Document

SMITH GOODFRIEND, PS

September 16, 2021 - 2:41 PM

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