102848-2

No. 82897-5-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

SINA GHODSEE, an individual, through Litigation Guardian ad Litem, JOSHUA BROTHERS,

Petitioners,

and

SHAHRBANOO GHODSEE, an individual,

Plaintiff,

v.

CITY OF KENT, a political subdivision of the State of Washington,

Respondent.

and

KING COUNTY, d/b/a King County Crisis and Commitment Services,

Defendant.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONERS

Sina Ghodsee's Litigation GAL, Joshua Brothers, seeks review of Division I's opinions on the liability of the City of Kent ("City").

B. COURT OF APPEALS DECISIONS TERMINATING REVIEW

Division I filed a published opinion on April 18, 2022. ("Op. 1"). After this Court directed it to reconsider that opinion in light of *Norg v. City of Seattle*, 200 Wn.2d 749, 522 P.3d 580 (2023), Division I issued an opinion again insisting that the public duty doctrine applies to common law negligence claims. ("Op. 2"). Both opinions are in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Misapplying the public duty doctrine to a common law negligence action, did Division I err in concluding that police officers owed no duty to a severely mentally ill person to execute a court's Involuntary Treatment Act, RCW 71.05 ("ITA"), detention order in a non-negligent fashion under the *Reinstatement (Second) of Torts* § 281 when the court determined that the person presented a likelihood of inflicting harm on others?

2. Did Division I err in ruling on breach of duty

as a matter of law, concluding that police officers' actions were reasonable and that officers could not enter a house pursuant to a court's ITA order to detain a severely mentally ill person?

3. Did Division I err in applying RCW 71.05.120(1) to the negligent execution of a court's ITA detention order?

D. STATEMENT OF THE CASE[1]

Division I opinions discussed the facts, op. 1: 2-3, op. 2: 2-5, but failed to convey Sina Ghodsee's manifest danger, the critical mandatory detention language of Judge Bender's detention order, or the inexplicable dithering of Kent Police Department ("KPD") law enforcement officers over the course of nearly two weeks while Sina descended into his deep mental distress.[2]

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[1] King County's Diane Swanberg prepared a chronology of events in the case. CP 365-67.

[2] Division I mischaracterizes Sina's case. Op. 2: 11 n.6. Division I asserts that Sina first contended at oral argument that KPD's interactions with the Ghodsee family and the DMHPs gave rise to the officers' actionable individualized duty of reasonable care to him. That is not true. Sina has *always* contended in his briefing that the KPD officers owed him an individualized common law duty of care from their interactions

On June 23, 2017, Shari Ghodsee, Sina's mother, called King County Crisis and Commitment Services ("KCCCS"), to request that Sina be involuntarily detained due to his mental health crisis. CP 315-18. Shari reported that Sina was not taking his anti-psychotic medications, CP 106, and was concerned for her personal safety due to Sina's recent aggressiveness toward her prompted by his mental illness. She left her home and remained away from it because of her fear that he would harm her; he believed he was the King of England and owned the house; he physically pushed her out of the home and threatened her with a table leg. CP 329. Sina's threats and screaming prevented Shari from living in her own home. CP 320, 332.

Sina had a *long* history of bipolar disorder and schizophrenia, CP 598-99, and an *extensive* criminal and ITA detention history. CP 106, 157, 166-86, 316. In 2012, law enforcement officers entered Sina's home to effectuate an ITA

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with him. Br. of Appellants at 31-32, 40-46; reply br. at 27-29; supp'l br. at 3-5.

detention by tackling him. CP 157.

KCCCS initially treated Shari's contact as non-emergent, simply putting Sina's case "in the pile," CP 357, but later sent a team of three County DMHPs[3] to the house on June 28, 2017. CP 366. An ambulance was summoned to take Sina to a hospital. CP 381. Suffering a psychotic episode, Sina would not speak with the DMHPs and made shooting gestures at them from a second story window using a table leg. *Id.* He put a chair against the door to prevent their access to him. CP 423. The DMHPs determined that Sina's situation was emergent, CP 379-80, meeting the criteria for ITA detention because he was imminently likely to hurt himself or others if he was not detained. CP 237, 243, 378-80, 382, 428. The DMHPs needed law enforcement assistance to effectuate Sina's detention. CP 245.[4]

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[3] A DMHP was the county official who made initial detention decisions under the ITA. Op. 1: 2 n.3.

[4] Those law enforcement officers had independent authority under the ITA to detain Sina in any event, as the KPD officers themselves testified. CP 115, 136, 412, 455. They did

The DMHPs summoned the Kent police on June 28 to detain Sina. CP 381-82. Five or six officers responded. CP 381, 424-25. The officers were told about Sina's history, advised that there were guns in the home believed to be in a locked safe in the garage, and told that he had threatened police in the past. CP 381, 423.

After attempting to contact Sina through the closed door, a KPD officer opened the door to try to contact Sina, and stepped into the home. CP 467-69. He saw Sina swinging a skateboard, but did not observe guns. CP 383, 426-27, 430-31, 467, 472, 485. That officer stated that he was "in a deadly force encounter," justifying the use of his gun. CP 467. He then stepped back out of the home and "closed the door real quick." *Id*. The KPD officers abandoned any effort to detain Sina that day. CP 435, 472, 477, 485.[5] They told the DMHPs that they

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not need traditional probable cause to do so. CP 457.

[5] KPD Commander Rob Scholl later acknowledged that his officers missed an opportunity to seize Sina on June 28. CP

would not enter the house to detain Sina without a court order. CP 366.

The DMHPs initially drafted their own detention order that would have been effective to detain Sina, CP 378, but they subsequently tore it up. CP 387, 392-93.[6] Given their evaluation of Sina, and the imminent risk of "something bad" happening based on his deteriorating mental condition, the DMHPs sought a court order authorizing law enforcement to immediately take Sina into custody because he posed an imminent threat of harm. CP 329-35, 380-81. King County Superior Court Judge Johanna Bender signed the order[7] on June 29, ruling that Sina was a

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135, 138, 543. Scholl mentioned the use of tasers or rubber bullets. CP 135-36. Swanberg, KCCCS's coordinator, agreed, noting that the KPD officers "had to intervene in order for this to stop. It was not gonna stop any other way." CP 546.

[6] DMHPs also have authority under the ITA to detain a person without a court order. CP 377-78. That emergency authority is not subject to judicial review, *In re Detention of Johnson*, 179 Wn. App. 579, 587, 322 P.3d 22, *review denied*, 181 Wn.2d 1005 (2014), and is constitutional. *Id*. at 587-91.

[7] Although called a "Nonemergent Detention Order"

danger to others, CP 333, that "[p]robable cause exists to order the respondent detained to an evaluation and treatment facility," and ordering that Sina *shall* be detained by a DMHP for evaluation and treatment under the ITA for up to 72 hours. CP 334. The order further specified: "When notified by a Designated Mental Health Professional for King County of this Order to Detain the King County Sheriff's Office or any peace officer *shall* take the respondent into custody…" CP 334-35 (emphasis added).

Despite the court's mandatory order, a pattern of failure ensued. Although SWAT involvement was needed, CP 265, KPD did not call its SWAT unit because, it asserted, SWAT is for criminal cases. CP 266. For days, its officers would go to the Ghodsee house and then do nothing. CP 321 (June 30); CP 322 (July 1).[8]

("NED"), such an order, authorizes immediate detention of an individual. CP 387.

[8] At all pertinent times, Shari had keys to the home and

According to Swanberg, the KPD made a decision to *never* enter the Ghodsee house. CP 540, 542, 545. The KPD's refusal to act became a source of intense frustration, boiling over into a verbal shouting match on the street near the Ghodsee home between the DMHPs and the police. CP 537-38.

In the meanwhile, Swanberg testified that Sina only deteriorated further. CP 538, 556. Sina's increasing volatility was communicated to KPD Commander Scholl. CP 539.

On July 2, 2017, Sina stepped outside of the home with a rifle and pointed it at a neighbor who was doing yardwork, while screaming and yelling incoherent, but threatening, statements. CP 494. KPD officers responded, but again took no action.

On July 3, 2017, Scholl demanded a plan from his officers for Sina's detention, but he also stated his officers must not force their way into the house. CP 323, 497. No further action was taken by the KPD until July 7, 2017 when a "plan" to detain Sina

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gave permission to the officers to enter it. CP 261, 266.

once he exited the house for groceries was developed. CP 498. That "plan" failed on July 9, 2017. CP 499. KPD officers then went to the Ghodsee residence later on July 9, but again took no action to detain Sina. CP 499.

Approximately 24 hours later, a number of noise complaints were reported to the KPD. CP 500. Three KPD officers responded, CP 106-07, 109, but again KPD officers took no action, gave up, and left. *Id.*

The next day, July 10, 2017, Sina came out of his home with the gun he had pointed at a neighbor over a week earlier, and pointed it into a neighbor's home, yelling for them to get out of his house and that they were terrorists. CP 501-02. He then shot into the home. *Id.* Multiple 911 calls resulted from the incident. CP 501-19. KPD officers responded, this time employing SWAT officers, CP 502, and an armored vehicle. CP 204. KPD officers shot Sina in the head, which he survived, CP 527, resulting in "significant cognitive impairments, including deficits in his speech and comprehension." CP 530.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

(1) The City Owed Sina a Duty of Care to Detain Him for Necessary Treatment

In its second opinion, Division I stubbornly insists that the public duty doctrine applies to Sina's common law claims against the City, despite this Court's *numerous* decisions to the contrary, culminating in *Norg*.

The City owed a common law duty of care under *Restatement (Second) of Torts* § 281 to Sina arising out of its duty to execute Judge Bender's detention order. Judge Bender's order[9] is the predicate for the City's common law duty, not the ITA itself.[10] Division I agreed that a common law duty to Sina

[9] Judge Bender's order was entirely within her authority under the ITA. Br. of Appellants at 28-31. Division I agreed with that assertion and assumed the order's validity. Op. 1: 10.

[10] The ITA creates no private right of action, as the City *conceded* below. City br. at 15. *See Konicke v. Evergreen Emergency Services, P.S.*, 16 Wn. App. 2d 131, 146, 480 P.3d 424 (2021) (RCW 71.05.120 "does not create an independent cause of action, but, rather, serves to modify already existing causes of action.").

arose out of Judge Bender's order. Op. 1: 10 ("…the plain language of the court order directing the government to detain Ghodsee creates a legal duty.").

Division I's concession in its first opinion is supported. A § 281 duty was owed by the City to Sina after this Court's decisions in *Washburn v. City of Federal Way*, 178 Wn.2d 732, 759-61, 310 P.3d 1275 (2013); *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 550-57, 442 P.3d 608 (2019); and *Mancini v. City of Tacoma*, 196 Wn.2d 864, 886, 479 P.3d 656 (2021).

The City's § 281 duty to Sina derives from its negligent execution of Judge Bender's detention order, an order whose explicit terms the KPD officers were obligated to obey.[11] Judge

[11] KPD officers had a mandatory duty to enforce Judge Bender's order *as written*. *Miller v. Pierce County*, 16 Wn. App. 2d 1036, 2021 WL 463453 (2021) (plaintiff stated a "take charge" duty in a case where there was an order of commitment that directed an offender's supervision on probation or incarceration in the County Jail but, inexplicably, the County failed to enforce it, allowing the offender to brutally assault his estranged wife while he was free).

Bender's order was explicit, and *mandatory*. Sina was a danger to others because of his mental disorder. CP 333. He would not utilize voluntary treatment services for his mental disorder. CP 334. The court directed DMHPs to detain him. CP 334 ("*shall* be detained by a designated Mental Health Professional for King County…") (emphasis added). In assisting the DMHPs, the officers' duty was clearly *mandatory*. *Id*. ("the King County Sheriff's office or any peace officers *shall* take the respondent into custody of the evaluation and treatment facility designated by the Designated Mental Health Professional for King County…") (emphasis added). *Id*. at 334-35.[12]

Under § 281, law enforcement officers must employ reasonable care in discharging their responsibilities. In *Washburn*, this Court held that a duty was owed by Federal Way

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[12] Moreover, the officers knew Sina was dangerous, met the criteria for ITA detention as of June 28, and that they had independent authority under the ITA to detain him.

officers to a harassment victim when they served an anti-harassment order on the harasser. After seeing the harasser's victim in the house, the officers were negligent in failing to take precautions to protect her. Officers cannot be oblivious to the totality of the circumstances presented in executing a court order. In *Beltran-Serrano*, 193 Wn.2d at 550, an officer encountered a homeless, mentally ill Hispanic man and negligently used deadly force against him; the City owed him a duty of care. Similarly, in *Mancini*, where officers negligently executed a search warrant upon the incorrect party, the Court again recognized a common law duty in the law enforcement setting. 196 Wn.2d at 879. The Court cited numerous instances of such claims against law enforcement. *Id*. at 880 n.8. As the *Norg* court summarized: "This court has previously recognized that '[a]t common law, every individual owes a duty of reasonable care to refrain from causing foreseeable harm in interactions with others.'" (quoting *Beltran-Serrano*, 193 Wn.2d at 550).

Thus, the City's officers owed Sina a duty to refrain from

negligence when executing a court order or otherwise interacting with him. The City's inexplicable refusal over *two weeks* to execute a mandatory detention order while Sina decompensated led to his shooting.

While Division I's first opinion seemingly agreed with the existence of a City duty to Sina, it determined that the public duty doctrine foreclosed any duty.[13] Division I's second opinion insists that the public duty doctrine applies to a common law claim, despite *Norg*.

The public duty doctrine *categorically does not apply to Sina's common law negligence claims*.[14] The *Norg* court reaffirmed that the public duty doctrine is *inapplicable* to a common law negligence claim. *Accord*, *Munich v. Skagit*

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[13] It also held as *a matter of law* that the KPD officers' conduct in breach of the City's duty to Sina was "reasonable," intruding upon the jury's role. That, too, was error. *See infra*.

[14] The City *admitted* below that the doctrine does not apply to common law actions, citing *Beltran-Serrano*, City Br. at 7.

Emergency Commc'ns Ctr., 175 Wn.2d 871, 887, 288 P.3d 328 (2012) (Chambers, J., concurring); *Beltran-Serrano*, *supra*; *Ehrhart v. King County*, 195 Wn.2d 388, 460 P.3d 612 (2020). *See also, Mita v. Guardsmark LLC*, 182 Wn. App. 76, 84, 328 P.3d 962 (2014); *Watness v. City of Seattle*, 16 Wn. App. 2d 297, 307, 481 P.3d 570 (2021) (public duty doctrine inapplicable to police negligence in shooting woman with possible mental health issues). It is inapplicable specifically in *police practices cases*, *Beltran-Serrano*, 193 Wn.2d at 550-57; *Washburn*, 178 Wn.2d at 759-61. *Mancini*, 196 Wn.2d at 886, and in cases where officers negligently handle an ITA order. *Watness*, 16 Wn. App. at 307.

In *Norg*, Seattle contended that the plaintiffs' action was statutory, not common law, because a statute addressed 911 calls. But the Court rejected that argument; the plaintiffs' action had nothing to do with the particular statutory requirements. 200 Wn.2d at 764. Rather, as here regarding the ITA, the Court concluded that the City undertook to render emergency

assistance, but did so negligently by going to a wrong address. *Id*. at 764-65.

Sina's claim is no different; the City had a "direct and particularized" relationship with Sina. The KPD caused a court detention order for Sina to be issued in the first place after its officers informed the DMHPs that they would not enter the house to detain Sina without a court order. CP 366. The DMHPs obtained such a court detention order, CP 334-35, but KPD failed *over fourteen days* to detain Sina often interacting with him at his house. The KPD's interaction was with Sina, *not* the "nebulous public." The KPD officers shot Sina in the head.

A particularly problematic aspect of Division I's second opinion is its reference to discretionary immunity principles in discussing the public duty doctrine. Op. 2: 8-10. It introduces the propriety/governmental distinction from the discretionary immunity case law asserting that the KPD's actions were an inherent government function, *id.* at 10, a view incompatible with the waiver of sovereign immunity and this Court's recent public

duty doctrine precedents.

The Legislature did away with sovereign immunity and also discarded the government/proprietary function test that Division I now revives. The statutory waiver for municipalities like the City provides that "[a]ll local governmental entities, *whether acting in a governmental or proprietary capacity*, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers." RCW 4.96.010(1) (emphasis added). Division I's lengthy discussion of how police departments perform a "government function" (op. 2: 8-10) improperly revives this dichotomy.

This dichotomy has also arisen in *Fabre v. Town of Ruston*, 180 Wn. App 150, 160, 321 P.3d 1208 (2014) and in *Norg*, where the Court chose not to address it. 200 Wn.2d at 765, n. 4. This Court needs to give guidance on the relevance of a government performing a so-called government function in a government liability case. RAP 13.4(b)(1), (4).

Ultimately, the public duty doctrine is *not* an immunity –

a surreptitious restoration of sovereign immunity abolished by RCW 4.92.090/RCW 4.96.010. Rather, it is merely a focusing tool to avoid a duty to the "nebulous public." Judge Bender's order, the basis for the actions of the KPD officers, was not directed at the "nebulous public," it was aimed at a specific, readily identifiable individual – Sina Ghodsee.

Division I's stubborn insistence that the public duty doctrine applies to common law causes of action requires this Court's supervisory grant of review. It is apparent that Division I simply refuses to apply this Court's unambiguous public duty doctrine jurisprudence. Review is merited. RAP 13.4(b)(1)-(2).

(2) Division I Improperly Ruled on Breach as a Matter of Law[15]

While acknowledging that police "had a duty to exercise reasonable care when discharging their duties, including

[15] Division I's second opinion does not address breach or RCW 71.05.120(1), as did its first opinion. Its erroneous treatment of both issues in its first opinion further supports review.

effectuating court orders," op. 1: 13, Division I, nevertheless, determined in its first opinion what is "reasonable" *as a matter of law*, opining that police have discretion as to how to carry out their role. Op. 1: 13-16. But that analysis fails to appreciate that the negligent exercise of such discretion constitutes a breach of the law enforcement officers' duty to Sina and is a *question of fact*. *Hertog ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). *Davis v. King County*, 16 Wn. App. 2d. 64, 479 P.3d 1181 (2021) (deputies shoot and kill suicidal woman with history of mental issues who was allegedly engaged in assault on officers; fact questions on her intent assault officers).[16] Merely stating that police officers have discretion does not resolve whether officers exercised that discretion

[16] Federal courts have routinely denied summary judgment to governmental defendants after *Beltran-Serrano/Mancini*. *E.g.*, *Estate of Heath v. Pierce County*, 2021 WL 2682513 (W.D. Wash. 2021); *Joseph v. City of Kent*, 2021 WL 391763 (W.D. Wash. 2021); *Gill v. Magan*, 2021 WL 928174 (W.D. Wash. 2021); *Fair v. King County*, 2023 WL 2931327 (W.D. Wash. 2023); *Hanks v. Clark County*, 2023 WL 4623977 (W.D. Wash. 2023).

negligently after *Washburn*, *Beltran-Serrano*, and *Mancini*. Here, ample evidence documented the City's breach. Review is merited. RAP 13.4(b)(1).

Sina was *dangerous* to others. The court's order was clear and prescriptive – detain him *now* for reasons of public safety. That order did not contemplate the nearly *two weeks* of delay by KPD officers in failing to enforce Judge Bender's order. To be blunt, it would be a clear-cut case of negligence if a medical provider failed for two weeks to address an emergency medical condition like a broken leg. It is no different for Sina's mental condition.

Division I ignores expert testimony documenting that the City's officers failed to exercise their discretion as to Sina's detention reasonably. CP 538, 566-67, 575, 589-90, 646. Such expert testimony on breach created an issue of fact on summary judgment. *Strauss v. Premera Blue Cross*, 194 Wn.2d 296, 301, 449 P.3d 640 (2019).

Moreover, a particularly troubling aspect of Division I's

first published opinion is its assertion in passing, that Judge Bender's detention order did not authorize KPD officers to enter Sina's house to detain him. Op. 1 at 16 ("…the NED order does not function as a warrant or otherwise suspend Ghodsee's individual rights…"). Not only is that wrong, it is pernicious public policy.

The City argued below that its officers could not enter the Ghodsee home given the constitutional protections that are present. Indeed, this is a topic of substantial misinformation, as Swanberg testified; although KPD officers told the DMHPs they could not enter the house, CP 544, officers in other local jurisdictions do so. CP 549. The KPD officers here believed they had authority to enter the house. CP 410, 470. They had done so in 2012. Moreover, they had Shari's permission to enter the house.

Division I's ruling on the authority of officers to enter a house pursuant to a court's ITA detention order is unsupported. More importantly, Judge Bender's order satisfies any Fourth

Amendment concerns. Reply br. at 39-41.[17] Importantly, the 2021 Legislature amended RCW 71.05.150 to now describe the order issued by Judge Bender as a *warrant*. Laws of 2021, ch. 264, § 1(2)(a).

An impartial magistrate entered an order determining that there was *probable cause* for Sina's detention. If Division I is correct, DMHPs or law enforcement officers executing an ITA detention order must stop at the door of a house while the mentally ill person who is a danger to himself or others, or is gravely disabled, decompensates, until a *further* order is obtained. That is profoundly dangerous for a severely mentally

[17] And even if officers' entry was "warrantless" on June 28, it would have been justified given Sina's plain distress or Shari's permission, contrary to Division I's belief. (Op. 1: 16). Justice Charles W. Johnson, Justice Debra L. Stephens, *Survey of Washington Search and Seizure Law: 2013 Update*, 36 Seattle U. L. Rev. 1581 (2013) (parent can consent to entry into home (1722); community caretaker function/aid to victims (1705-06)); *State v. Weller*, 185 Wn. App. 913, 344 P.3d 695, *review denied*, 183 Wn.2d 1010 (2015) (upholding warrantless entry to aid abused children).

ill individual who needs detention, as well as the affected public. This issue merits a far more robust treatment than Division I offered in its first, published opinion. The breach issue merits this Court's review. RAP 13.4(b)(1), (4).

(3) A Gross Negligence Standard Does Not Apply to the City's Negligent Conduct

The trial court did not clearly articulate the duties owed to Sina by the City and assumed that the ITA's limited liability provision applied to them. CP 724-27, 759-60. Division I agreed that RCW 71.05.120(1) applied, contrary to the statute's express language. Op. 1: 18. That was error because RCW 71.05.120(1) is narrower than the trial court understood. This Court has never definitively addressed the reach of RCW 71.05.120(1). Review is merited. RAP 13.4(b)(4).

By its express language,[18] RCW 71.05.120, as it existed in

[18] *Federal Home Loan Bank of Seattle v. Credit Suisse Sec. (USA) LLC*, 194 Wn.2d 253, 258, 449 P.3d 1019 (2019) (the "bedrock principle of statutory interpretation" is the statute's "plain language").

2017,[19] (*see* Appendix), creates a good faith/gross negligence standard for decisions "*whether* to admit, discharge, release, administer antipsychotic medications, or detain a person for evaluation and treatment." (emphasis added). The KPD officers' actions at issue here did not involve the decision *whether* to detain Sina; Judge Bender made that decision. By its express terms the statute does not apply to *how* detention was carried out. *See Peralta v. Blakley*, 25 Wn. App. 2d 1004, 2022 WL 17818001 (2022) (unpublished) at *5-6 (RCW 71.05.120(1), strictly construed, applied by its terms *only* to ITA decisions to admit, discharge, release, administer antipsychotic medications, or detain a person for evaluation and treatment). *Accord, Dietrich v. Neely*, 26 Wn. App. 2d 1008, 2023 WL 2754570 (2023)

[19] As RCW 71.05.120 is in derogation of the common law, *Konicke*, 16 Wn. App. 2d at 146, such a statutory grant of immunity must be *strictly construed*. *Desmet v. State*, 200 Wn.2d 145, 165, 514 P.3d 1217 (2022); *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 600, 257 P.3d 532 (2011); *Harris v. Federal Way Pub. Schools*, 21 Wn. App. 2d 144, 148, 505 P.3d 140 (2022).

(unpublished) at *15-16.

Moreover, unaddressed by Division I in its first opinion, even if gross negligence applies, there was a question of fact on that issue. In *Harper v. Department of Corrections*, 192 Wn.2d 328, 429 P.3d 1071 (2018), this Court refined the gross negligence analysis, reaffirming that gross negligence remains a *question of fact* for the jury. *See* WPI 10.07. The *Harper* court noted that a plaintiff must present substantial evidence that the defendant exercised substantially or appreciably less than that degree of care a reasonably prudent entity would have exercised in the same or similar circumstances for gross negligence to go to the jury. A court must have a "baseline" on which to assess gross negligence. *Id*. at 342-45. Once that baseline of potential gross negligence is established, the *Harper* court held that gross negligence is an issue of fact to be decided by the jury. *Id*. at 345-46 ("If reasonable minds could differ…the court should not grant summary judgment").

Division I's analysis contravenes *numerous* post-*Harper*

Court of Appeals decisions, holding that gross negligence is a *fact question* for the jury, particularly where, as here, a plaintiff provides substantial lay and expert testimony on the defendant's gross negligence. *Dalen v. St. John Med. Ctr.*, 8 Wn. App. 2d 49, 436 P.3d 877 (2019); *Kelly v. County of Snohomish*, 8 Wn. App. 2d 1038, 2019 WL 1772329 (unpublished), *review denied*, 194 Wn.2d 1011 (2019).

Division I's first published opinion erroneously addresses RCW 71.05.120(1). Review is merited. RAP 13.4(b)(2), (4).

F. CONCLUSION

Division I's opinions touch upon numerous critical issues associated with law enforcement's tort liability for the blatantly negligent effectuation of a court-ordered detention of a severely mentally ill man. Not only does Division I continue to insist on an incorrect interpretation of the public duty doctrine, that court improperly handled issues that have profound significance for mentally ill people and public safety in Washington. Review is crucial. RAP 13.4(b).

This document contains 4,599 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 4th day of March, 2024.

Respectfully submitted,

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APPENDIX

Ch. 158, Laws of 2016, § 4:

(1) No officer of a public or private agency, nor the superintendent, professional person in charge, his or her professional designee, or attending staff of any such agency, nor any public official performing functions necessary to the administration of this chapter, nor peace officer responsible for detaining a person pursuant to this chapter, nor any county designated mental health professional, nor the state, a unit of local government, or an evaluation and treatment facility shall be civilly or criminally liable for performing duties pursuant to this chapter with regard to the decision of whether to admit, discharge, release, administer antipsychotic medications, or detain a person for evaluation and treatment: PROVIDED, That such duties were performed in good faith and without gross negligence.

FILED
4/18/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SINA GHODSEE, an individual, through Litigation Guardian ad Litem, JOSHUA BROTHERS, Appellant, and SHAHRBANOO GHODSEE, an individual, Plaintiff, v. CITY OF KENT, a political subdivision of the State of Washington, and KING COUNTY, d/b/a King County Crisis and Commitment Services, Respondents.	)	No. 82897-5-I DIVISION ONE PUBLISHED OPINION

HAZELRIGG, J. — Sina Ghodsee appeals from an order granting summary judgment in favor of King County and the City of Kent. Ghodsee sued in negligence, alleging both government entities failed to exercise reasonable care in detaining him under the involuntary treatment act.[1] Ghodsee fails to meet his burden of raising a material issue of fact as to each of the essential elements of

[1] Ch. 71.05 RCW.

negligence or demonstrate that the entities were not entitled to statutory immunity. Accordingly, summary judgment dismissal was proper and we affirm.

FACTS

On Friday, June 23, 2017, Shahrbanoo Ghodsee[2] contacted King County Crisis and Commitment Services (KCCCS) with concerns about her son, Sina Ghodsee. Shahrbanoo reported Ghodsee was not taking his medication, was "agitated" and "delusional," and she had left the home to stay elsewhere. Four days later, a "Designated Mental Health Professional" (DMHP)[3] called to schedule an appointment for a team of DMHPs to meet with Shahrbanoo at the Ghodsee home. The DMHPs intended to interview Ghodsee pursuant to the involuntary treatment act (ITA), but were unsuccessful and eventually left the home after Ghodsee pointed "what appeared to be a table leg at [them] like a gun." They called the police; officers from the Kent Police Department (KPD) responded and attempted to make contact with Ghodsee, but were similarly unsuccessful and disengaged.[4] On Thursday, June 29, a DMHP filed a Petition for Initial Detention (Non-Emergency) in King County Superior Court, which the court granted.

On Friday, June 30 and again on Saturday, July 1, a team of DMHPs and several officers from KPD went back to the Ghodsee home but were ultimately unable to detain Ghodsee. On Sunday, July 2, KPD was dispatched to the

[2] Shahrbanoo is a plaintiff in the case but not a party to the appeal. We refer to her by her first name and her son, the appellant, as Ghodsee. No disrespect is intended.

[3] Subsequent amendments to the involuntary treatment act replaced the term "Designated Mental Health Professional," or DMHP, with "Designated Crisis Responders" (DCRs). This opinion uses the terminology applicable at the time of the events at issue.

[4] KPD reported Ghodsee swung a skateboard at them "like a bat" when an officer attempted contact.

Ghodsee home after a neighbor called law enforcement concerned that Ghodsee was threatening someone and possibly carrying a rifle. The caller could not state with any certainty that he saw a gun, and KPD never observed a crime, so the officers eventually left without attempting to contact Ghodsee. The next week, on Friday, July 7, KPD officers formulated a plan to take Ghodsee into custody when he left his home to get groceries or cigarettes. Around midnight on July 9, the manager at a local grocery store called KPD to inform them Ghodsee was on site, but by the time officers arrived Ghodsee had left.

On Monday, July 10, KPD received two emergency calls from Ghodsee's neighbors, reporting Ghodsee had shot at the neighbor's occupied home. KPD responded and saw Ghodsee in the window of his home with a rifle raised, pointed in the direction of the officers. Two officers simultaneously fired, and Ghodsee disappeared from sight. Officers on the scene used a drone to see inside of the home, where they observed Ghodsee laying on the floor. Ghodsee was taken into custody. He sustained a gunshot wound to the head, surviving but suffering significant and life-changing injuries.

On May 28, 2020, Ghodsee, through a litigation guardian ad litem, and Shahrbanoo filed a civil complaint against the City of Kent (City). They later amended their complaint to add King County (County), doing business as KCCCS, as a defendant. On May 21, 2021, both defendants moved for summary judgment dismissal on the basis of the public duty doctrine and claims of statutory immunity. The motion was heard on June 18, 2021. The trial court granted summary judgment for both defendants on July 8, 2021. Ghodsee timely appeals.

ANALYSIS

I. Standard of Review

This court reviews a summary judgment order de novo, engaging "in the same inquiry as the trial court." Wallace v. Lewis County., 134 Wn. App. 1, 12, 137 P.3d 101 (2006). Like the trial court, this court "review[s] all evidence and reasonable inferences in the light most favorable to the nonmoving party," affirming if there are no genuine issues of material fact "and the moving party is entitled to judgment as a matter of law." Dalen v. St. John Med. Ctr., 8 Wn. App. 2d 49, 57, 436 P.3d 877 (2019). A genuine issue of material fact exists if reasonable minds could differ on facts which control the outcome of the proceeding. Id. at 58.

A negligence action contains four elements: (1) duty, (2) breach, (3) injury, and (4) proximate cause. Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). "If any of these elements cannot be met as a matter of law, summary judgment for the defendant is proper." Id.

II. Duty of Care and the Public Duty Doctrine

Ghodsee first argues both entities owed him a duty of care. He contends the County owed him (1) a "take charge duty" under the special relationship exception to the public duty doctrine, and (2) a duty to enforce the non-emergency detention order (NED) issued by the trial court. He asserts the City owed him a duty (1) to exercise reasonable care in discharging its responsibilities, and (2) to enforce the NED. This court reviews "the existence of a duty as a question of law" de novo. Washburn v. City of Fed. Way, 178 Wn.2d 732, 753, 310 P.3d 1275

(2013). Duty is a "threshold issue." Mita v. Guardsmark, LLC, 182 Wn. App. 76, 83, 328 P.3d 962 (2014).

In evaluating the duty of a governmental entity, we must also consider the public duty doctrine. Washburn, 178 Wn.2d at 753–54. To succeed in a negligence claim against a governmental entity, the plaintiff must demonstrate the government owed a duty to the individual plaintiff, rather than the public at large. Id. at 754. "[A] duty to all is a duty to no one." J & B Dev. Co. v. King County, 100 Wn.2d 299, 303, 669 P.2d 468 (1983) (overruled on other grounds by Meaney v. Dodd, 111 Wn.2d 174, 179–80, 759 P.2d 455 (1988)). While similar to sovereign immunity, the public duty doctrine uniquely "recognizes the existence of a tort, authorizes the filing of a claim against a [government entity] and also recognizes applicable liability subject to some limitations." Id. This differs from sovereign immunity, which denies all liability. Id.

There are several exceptions to the public duty doctrine, which are "used as 'focusing tools' to determine whether the public entity had a duty to the injured plaintiff." Taggart v. State, 118 Wn.2d 195, 218, 822 P.2d 243 (1992). The four exceptions are (1) legislative intent, (2) failure to enforce, (3) rescue doctrine, and (4) special relationship. Beltran-Serrano v. City of Tacoma, 193 Wn.2d 537, 549 n.7, 442 P.3d 608 (2019); [5] see also Cummins v. Lewis County, 156 Wn.2d 844, 853 n.7, 133 P.3d 458 (2006).

[5] Beltran-Serrano noted the public duty doctrine does not lessen the government's duty of reasonable care in direct interactions with others, specifically law enforcement's "duty to refrain from directly causing harm to another through affirmative acts of misfeasance." Id. at 550.

A. Whether the County Has a Duty Based on a Special Relationship

Ghodsee first argues the County owed him an individualized duty akin to the take charge duty or provider-patient special relationship exception to the public duty doctrine. He specifically alleges the language and posture of the NED order created a take-charge-like relationship between Ghodsee and the DMHPs.[6]

Under the Restatement (Second) of Torts § 315 (Am. Law Inst. 1965), there is generally no duty to prevent a third party from harming another. If, however, "a special relation exists between the actor and the third person," there may be a duty to "control the third person's conduct." Id. One such special relationship arises when an actor "takes charge of a third person whom [they] know or should know to be likely to cause bodily harm to others if not controlled," creating "a duty to exercise reasonable care." Id. at § 319. Our courts have held "this duty extends to self-inflicted harm." Gregoire v. City of Oak Harbor, 170 Wn.2d 628, 639, 244 P.3d 924 (2010). Our courts have recognized a special relationship, separate from a take charge duty, between mental health providers and patients under § 315 of the Restatement. See Petersen v. State, 100 Wn.2d 421, 426–27, 671 P.2d 230 (1983).

In Estate of Davis v. Department of Corrections, the Washington State Supreme Court considered whether there was a special relationship between an

[6] The respondents argue this issue is not properly before this court because it was not raised in the trial court. This court only considers issues raised on summary judgment before the trial court "to ensure that we engage in the same inquiry as the trial court." Kave v. McIntosh Ridge Primary Rd. Ass'n, 198 Wn. App. 812, 823, 394 P.3d 446 (2017). However, Ghodsee did argue duty based on the special relationship exception before the superior court and the record provided is sufficient for us to consider this issue. See Turner v. Dep't of Soc. & Health Servs., 198 Wn.2d 273, 293 n.15, 493 P.3d 117 (2021) (citing RAP 2.5(a) (court reached an issue not brought before the trial court on summary judgment)).

individual on community custody and a mental health counselor who conducted "an initial assessment" to evaluate whether counseling would be beneficial to the person under supervision by the Department of Corrections. 127 Wn. App. 833, 837, 113 P.3d 487, 491 (2005). The court found there was no special relationship because the counselor met with the individual "only one time," to provide an initial assessment. Id. at 842. This brief interaction was "not a definite, established, and continuing relationship that would trigger a legal duty." Id.

Our Supreme Court then reviewed whether there was a special relationship between a mental health professional and patient in Volk v. DeMeerleer. There, the court held a psychiatrist and their outpatient client had a nine-year relationship which triggered a duty under § 315 of the Restatement. Volk, 187 Wn.2d 241, 274, 386 P.3d 254 (2016). More recently in Konicke v. Evergreen Emergency Services, P.S., this court analyzed the existence of a special relationship between a patient and an emergency health provider. We found there was no "definite, established, and continuing" relationship where the patient made a single visit to the emergency room. 16 Wn. App. 2d 131, 138, 480 P.3d 424 (2021) (quoting Volk, 187 Wn.2d at 256).

The statutory role of the DMHP, now "Designated Crisis Responder" (DCR), is to investigate and evaluate information, determine whether to file a petition for initial detention or involuntary outpatient evaluation, and personally interview the individual to determine if they will voluntarily receive evaluation and treatment. See former RCW 71.05.150 (2015), amended by LAWS of 2016, ch. 29 § 211. Even viewing the evidence in the light most favorable to Ghodsee, there was no definite,

established, and continuing relationship here. The first indirect interaction the DMHPs had with Ghodsee was on June 23, when Shahrbanoo contacted KCCCS. A DMHP team attempted to conduct an initial assessment on June 28 but never made direct contact with Ghodsee. After the DMHPs heard yelling inside and saw Ghodsee holding "something" that looked like a rifle in an upstairs window, they left. Based on the information available to the DMHPs through those limited interactions, the County filed a petition for non-emergency detention the next day, June 29, but did not attempt to make contact with Ghodsee. The DMHP team next had limited interaction with Ghodsee on June 30, when they accompanied KPD to the home in an attempt to effectuate the NED order. They did not make direct contact. The DMHPs returned again on July 1, with police, but again did not make direct contact with Ghodsee due to safety concerns. After that date, the DMHPs never returned to the home or made direct contact with Ghodsee at any point prior to the shooting.

Based on the statutory role of DMHPs, now DCRs, and the actions of the specific DMHPs at issue here, there was no continuing, definite, and established relationship giving rise to a legal duty. The DMHP-potential detainee relationship is more akin to a patient and emergency room provider (Konicke) or a client and mental health provider in the context of an initial assessment (Davis), and less similar to a nine-year outpatient therapeutic relationship between a psychiatrist and patient (Volk). If the DMHPs had any direct contact with Ghodsee, their role would have been limited to conducting an investigation and filing a petition for detention if they felt it was called for. See former RCW 71.05.150. Viewing the facts in the

light most favorable to Ghodsee as we must when reviewing an order on summary judgment, the period of time during which the DMHPs were tangentially involved with Ghodsee was brief, lasting only from June 23 until July 10. This differs starkly from cases where our courts have found a special relationship.

The limited role of the DMHP as defined by statute, and the brief relationship between Ghodsee and the specific DMHPs at issue here, does not rise to the level of a "definite, established, and continuing relationship" to support a legal duty within the framework of the public duty doctrine.

B. Whether the County or City Has a Duty Under the NED Order

In analyzing whether a "take charge" duty under § 319 of the Restatement exists, we first look to the nature of the relationship. Davis, 127 Wn. App. at 842. In Davis, the court held "[t]he two most important considerations are the court order placing the corrections officer in charge and the statutes giving the officer the power to act." Id. Our courts have applied this duty in the context of "various types of community supervision programs," including the duties of community corrections officers, city probation counselors, county pretrial release counselors, and county probation officers. See Harper v. State, 192 Wn.2d 328, 342, 429 P.3d 1071 (2018) (internal citations omitted). Ghodsee asks us to extend the application of this type of duty outside the context of corrections or community supervision based on the NED order.

Ghodsee argues the language of the NED order created a take charge duty by directing DMHPs and KPD to detain him. However, we consider a court order and statutory authority to act. See Davis, 127 Wn. App. at 842, see also Miller v.

Pierce County, No. 53344-8-II (Wash. Ct. App. Feb. 9, 2021) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2%2053344-8-II%20Unpublished%20Opinion.pdf (county owed a duty under its statutory authority to confine an individual "and the court's order requiring it to do so" pursuant to a judgment and sentence).[7] Former RCW 71.05.150(4) only grants DMHPs authority to "notify a peace officer to take such person or cause such person to be taken into custody." They have no statutory authority nor statutory mandate to physically detain an individual themselves. Rather the statute is clear that they "may notify" a peace officer to take an individual into custody. See Id.

The language of the NED order is similarly clear. The superior court found Ghodsee "presents a likelihood of serious harm to others," but did not find he presented a likelihood of harm to himself. The court ordered that Ghodsee "shall be detained by a [DMHP]" and further ordered "any peace officer shall take the respondent into custody." Washington case law has consistently held "'that the word "shall" in a statute is presumptively imperative and operates to create a duty.'" In re Dependency of T.P., 12 Wn. App. 2d 538, 548, 458 P.3d 825 (2020) (quoting In re Parental Rights to K.J.B., 187 Wn.2d 592, 601, 387 P.3d 1072 (2017)). Likewise, the plain language of the court order directing the government to detain Ghodsee creates a legal duty. However, this duty is one owed to the public at large, not an individual duty owed to Ghodsee. See Osborn v. Mason County, 157 Wn.2d 18, 28, 134 P.3d 197 (2006) ("County has a 'duty' to protect its citizens in

[7] We may utilize unpublished opinions when "necessary for a reasoned decision." GR 14.1(c). Miller provides a helpful analysis of duty in the context of a court order.

a colloquial sense, but it does not have a legal duty to prevent every foreseeable injury.").

For example, in Miller, the County had a duty to an individual under the special relationship and take charge doctrines where the County was authorized by statute to confine an offender pursuant to a criminal conviction and a superior court "order required the County to ensure Robinson reported for [electronic home monitoring] or reported to the jail on August 5, 2016." No. 53344-8-II, slip. op. at 7 (analyzing dismissal of a complaint under CR 12(b)(6)). A critical factual distinction from the case before us is that Miller was ordered remanded to the custody of the county pursuant to a felony judgment and sentence and accompanying warrant of commitment. Id. at 2–3. In contrast, the NED order did not direct any specific law enforcement agency to detain Ghodsee, nor did it dictate any particular date or mechanism for detaining Ghodsee.

In evaluating a take charge relationship, the inquiry is specific to "the relationship" between the government actor and tortfeasor.[8] Hertog, ex rel. S.A.H. v. City of Seattle, 138 Wn.2d 265, 279, 979 P.2d 400 (1999). Hertog analyzed the relationship between a pre-trial probation officer and probationer, holding that because the probation officer "is clearly in charge of monitoring the probationer [ ] and has a duty to report violations to the court," there is a take charge duty. Id. The probation officer-probationer relationship differs significantly from an officer ordered to detain an individual under the ITA. There is no ongoing, monitoring

[8] Our courts have held this duty includes protection from self-inflicted harm. Gregoire, 170 Wn.2d at 639. Ghodsee alleges the County and City had a duty to protect him from self-inflicted harm under the take charge duty.

relationship and no duty to report actions to the court. In a probation officer-probationer relationship, "two of the most important features" are a court order placing an offender "on the supervising officer's caseload and the statutes that describe and circumscribe the officer's power to act." Couch v. Dep't of Corr., 113 Wn. App. 556, 565, 54 P.3d 197 (2002). This individualized responsibility differs from the general language in the NED order, and there is no similar language in the order or in the ITA that "describe[s] and circumscribe[s]" how the officers may act in effectuating the detention order. Id.

There are three historical purposes underlying the public duty doctrine: (1) preventing excessive liability for government entities, (2) avoiding "hindering the governing process," and (3) providing "a mechanism for focusing" the element of duty. J & B Dev. Co., 100 Wn.2d at 304. This doctrine balances the rights of an injured plaintiff with the need to limit governmental liability "[b]ecause governments, unlike private persons, are tasked with duties that are not legal duties within the meaning of tort law." See Washburn, 178 Wn.2d at 753, see also Osborn, 157 Wn.2d at 28 ("the public duty doctrine helps us distinguish proper legal duties from mere hortatory 'duties.'").

Ghodsee bears the burden to demonstrate the government owed him an individual duty, rather than a duty to the public at large, in order to survive summary judgment. Viewing the facts in the light most favorable to Ghodsee, he fails to show an actionable duty based on the NED order as to either the County or the City. For this reason, his negligence claim fails as a matter of law.

C. Law Enforcement Duty of Care

Ghodsee also argues KPD breached its duty of reasonable care in its direct interaction with him by failing to detain him more swiftly after the NED order was issued. His claim is essentially that, had he been detained sooner, he would not have been shot by KPD or suffered the serious injuries that resulted from the shooting. Generally, "'every individual owes a duty of reasonable care to refrain from causing foreseeable harm in interaction with others,'" including law enforcement officers. Mancini v. City of Tacoma, 196 Wn.2d 864, 879, 479 P.3d 656 (2021) (quoting Beltran-Serrano, 193 Wn.2d at 550). Washington case law has held this duty applies in direct interactions with individuals. See, e.g., Watness v. City of Seattle, 16 Wn. App. 2d 297, 307, 481 P.3d 570 (2021) ("an officer owes a legal duty to exercise reasonable care when engaging in affirmative conduct toward others.") (emphasis added)); Robb v. City of Seattle, 176 Wn.2d 427, 439, 295 P.3d 212 (2013) ("In order to properly separate conduct giving rise to liability from other conduct, courts have maintained a firm line between misfeasance and nonfeasance.").

Police have a duty to exercise reasonable care when discharging their duties, including effectuating court orders. See Mancini, 196 Wn.2d at 880. This necessarily includes the exercise of discretion by law enforcement as to how to effectuate those court orders. There is nothing in statute or in the NED order that required KPD to enforce the detention order in any particular way; the officers had discretion to determine the safest way to carry out the court's order. Their actions in effectuating the NED order were further constrained by various constitutional

considerations that necessitate a flexible response based on the particular circumstances of the interaction.

In Konicke, this court declined to recognize a claimed duty for emergency healthcare providers to detain patients under the ITA in part because it would "seriously undermine[] the legislative goal of safeguarding the individual rights of such patients." 16 Wn. App. 2d at 144. Likewise, finding legal liability on the part of a governmental entity based on detaining an individual would also seriously undermine this legislative goal. In Robb, our Supreme Court discussed the distinction in tort law between misfeasance and nonfeasance, holding that where officers "did not affirmatively create a new risk," the act was nonfeasance and did not give rise to liability. 176 Wn.2d at 437–39. To hold otherwise would lead to "an unpredictable and unprecedented expansion of . . . liability." Id. at 439.

As Konicke noted, "chapter 71.05 RCW was not enacted for the particular benefit of third parties injured by people suffering from serious behavioral health disorders but, rather, for the benefit of people with behavioral health disorders themselves." 16 Wn. App. 2d 140–41. While the legislative intent of the statute includes "'protect[ing] public safety through use of the parens patriae and police powers of the state,'" applying broad liability "runs counter to the statutory scheme, which specifically limits liability for the detention decisions made by emergency healthcare providers" and government actors. Id. at 143 (quoting RCW 71.05.010). Additional legislative intent expressed in former RCW 71.05 is preventing inappropriate or indefinite commitment, safeguarding individual rights,

and providing continuity of care.[9] Allowing for broad liability of government entities does not support any of these purposes, and as this court noted in Konicke, expanding liability seriously undercuts the purpose of safeguarding individual rights.

To expand liability of a law enforcement agency based on failure to detain pursuant to the ITA or a NED order in a particular way or within a particular timeframe would undermine the very language of the ITA itself, which seeks to safeguard individual rights. The risk that imposing liability "could encourage" law enforcement "to detain patients merely to avoid potential liability to third parties," presents a significant challenge to the individual rights of potential detainees who are protected under the ITA. See Id. at 144.

Importantly, the NED order only ordered Ghodsee to be detained by law enforcement. Exercising reasonable care, particularly in the constantly evolving circumstances of a mental health crisis, necessitated discretion on the part of police in terms of how that order would be carried out. The existence of the NED did not suspend Ghodsee's right to privacy in his home, for example, or to be free from search or seizure in the absence of either a warrant or applicable exception to state and federal warrant requirements.[10] While a neighbor reported Ghodsee "was threatening some unknown individual and had a gun," when officers responded, the neighbor admitted he did not see Ghodsee "directly threatening

[9] The statements of legislative intent expressed in the former version of RCW 71.05.010, applicable at the time of the incident, are identical to those expressed in the current version discussed in Konicke.

[10] "Officers must have a warrant or a well-established exception to the warrant requirement before intruding into a home." City of Shoreline v. McLemore, 193 Wn.2d 225, 226 (2019).

anyone nor could he be sure he saw a firearm." The City argues that no exception to the warrant requirement applied, as there was no probable cause that a crime had occurred which would have been a prerequisite to arresting Ghodsee[11] on that date and there were no exigent circumstances to justify entering the home.[12] Contrary to Ghodsee's assertion, the NED order does not function as a warrant or otherwise suspend Ghodsee's individual rights protected by warrant requirements and other constraints on the actions of law enforcement.

Viewing the evidence in the light most favorable to Ghodsee, he fails to demonstrate that the City owed him a duty beyond the exercise of reasonable care, or that there exists a material issue of fact as to this claim, and summary judgment in favor of the City is proper.

III. Whether the County or City Is Entitled to Immunity Under Former RCW 71.05.120

Ghodsee next alleges the trial court erred in finding that both government entities had immunity under former RCW 71.05.120. (Laws of 2016, ch. 29 § 208). He concedes the statute applies to the County's "belated decision to detain Sina," but asserts that it does not apply to its actions "in the execution of the detention order." Ghodsee argues he raised a material question of fact as to whether the County was grossly negligent sufficient to defeat any claim of statutory immunity.

[11] Probable cause alone is not sufficient for a warrantless search, but may support an arrest, which in turn supports a search incident to arrest. State v. Tibbles, 169 Wn.2d 364, 369, 236 P.3d 885 (2010); State v. Salinas, 169 Wn. App. 210, 216, 279 P.3d 917 (2012).

[12] "The exigent circumstances exception to the warrant requirement applies where 'obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape[,] or permit the destruction of evidence.'" Tibbles, 169 Wn.2d at 370 (internal quotation marks omitted).

For both entities, Ghodsee contends the statute is inapplicable because the allegedly negligent acts were unrelated to the "decision of whether to . . . detain" Ghodsee as the superior court had already made that decision when it signed the NED order. Former RCW 71.05.120 states:

> (1) No officer of a public or private agency, nor the superintendent, professional person in charge, his or her professional designee, or attending staff of any such agency, nor any public official performing functions necessary to the administration of this chapter, nor peace officer responsible for detaining a person pursuant to this chapter, nor any designated crisis responder, nor the state, a unit of local government, an evaluation and treatment facility, a secure detoxification facility, or an approved substance use disorder treatment program shall be civilly or criminally liable for performing duties pursuant to this chapter with regard to the decision of whether to admit, discharge, release, administer antipsychotic medications, or detain a person for evaluation and treatment: PROVIDED, That such duties were performed in good faith and without gross negligence.

The statutory language addresses detention, but also expressly includes a variety of other duties—admitting or discharging a patient, releasing a patient, and administering medication. Id., see also Konicke, 16 Wn. App. 2d at 145–46. These duties are more than mere mental decisions, but encompass the acts taken to effectuate those decisions. Potential civil liability does not only arise from the choice to administer medications or detain an individual, but also the acts taken to carry out those decisions. To hold otherwise would result in an unlikely or illogical outcome. "We interpret statutes to avoid unlikely, strained, or absurd consequences." Michel v. City of Seattle, 19 Wn. App. 2d 783, 792, 498 P.3d 522 (2021). And while, as Ghodsee notes, we do "generally construe statutory immunities narrowly," if "the plain meaning is unambiguous, statutory construction

is inappropriate." Leishman v. Ogden Murphy Wallace, PLLC, 196 Wn.2d 898, 906, 479 P.3d 688 (2021).[13] The statute uses the phrases "performing functions" and "performing duties," which clearly intends to capture actions taken "with regard to" the decisions made as to detention and treatment of a person under the ITA. The plain meaning of the statute is unambiguous.

Because the plain language of the statute provides immunity for actions as well as decision-making, both the City and County are entitled to statutory immunity for their actions "with regard to" the decision to detain and Ghodsee must demonstrate gross negligence in order to overcome immunity. However, because Ghodsee fails to demonstrate either entity owed him an individualized duty of care as a matter of law, we need not reach the issue of gross negligence. To survive summary judgment, Ghodsee must raise a material issue of fact as to all four elements of negligence: duty, breach, damage and causation. Because the failure to meet his burden on the element of duty is fatal to his claim, we need not review the other elements.[14]

[13] Per Montoya-Lewis, J., with three justices concurring and one justice concurring separately.

[14] The City dedicated a portion of its brief, and its oral argument, to the felony defense to Ghodsee's excessive force and assault claims. RCW 4.24.420 provides a "complete defense" to an action against law enforcement for personal injuries or death if the injured person "was engaged in the commission of a felony at the time." The trial court found Ghodsee's excessive force and assault claims (Cause of Action V) were barred under RCW 4.24.420. Ghodsee does not assign error to this decision, and states explicitly he is not advancing his excessive force argument on appeal.

While Ghodsee's reply brief contains a heading stating "Trial Court Erred in Applying the Felony Defense," RCW 4.24.420 was applied only to the excessive force and assault claims, which Ghodsee concedes he is not appealing. The City likewise does not assign error to the trial court's limitation of RCW 4.24.420 to assault and excessive force. As such, we decline to reach the merits of this issue.

Ghodsee suffered immense injuries as a result of a devastating situation. He survived a gunshot wound to the head, but suffered a traumatic brain injury and severe cognitive impairments. He may never regain full independence. We acknowledge that Ghodsee and his family have suffered, and we are aware that by affirming the trial court, his civil claim is dismissed. We, however, also recognize that responding to mental health crises necessarily requires flexibility and individualized responses.

Our state legislature has made clear that officers must retain discretion as they interact with individuals in our communities so that they may be appropriately responsive to the circumstances presented to them. SUBSTITUTE H.B. 1735, 67th Leg., Reg. Sess. (Wash. 2022).[15] The law recognized that specific de-escalation tactics "[d]epend[] on the circumstances," (Section 2), but also clarifies that physical force may still be used in certain circumstances, including in detaining an individual under the ITA. Our legislature has also implemented crisis intervention training requirements for law enforcement officers. See RCW 43.101.427. There are crucial policy reasons, including the very nature of mental health crises and de-escalation, to empower agencies to adapt and respond to each unique situation as it unfolds. Our legislature has directed that agencies must be able to work responsively, and be able to prioritize de-escalation. Even in amending RCW 10.120.020, the legislature acknowledged that the statute "represents national

[15] We recognize this law, passed in 2022, was inapplicable at the time of the incident. However, Ghodsee submitted the session law, in its entirety, to this court as an additional authority under RAP 10.8. While he urged this court to focus on sections 3(1)(d), 3(1)(f) and 3(5)(a)-(b), we would be remiss if we ignored the other sections which assist in our analysis. We cite to this law for its persuasive value as it sheds light on how our legislature navigates issues of de-escalation by law enforcement agencies.

best practices." SUBSTITUTE H.B. 1735. Washington statute requires law enforcement officers to "[w]hen possible, use all de-escalation tactics that are available and appropriate under the circumstances before using physical force." RCW 10.120.020(3)(a).

When KPD made direct contact with Ghodsee on June 28, he responded in a threatening manner and the officer implemented the de-escalation technique of shielding by retreating from the home and closing the door between himself and Ghodsee. Ghodsee's argument that the officer should have been more aggressive in that moment so that the detention could have been completed, and thus avoiding the tragic shooting days later, runs counter to the clear policy considerations of our legislature. Officers must be empowered to continue utilizing de-escalation techniques whenever possible, as "best practices." The court did not err in granting summary judgment in favor of both the City and County.[16]

Affirmed.

WE CONCUR:

[16] On February 22, Ghodsee filed a Statement of Additional Authorities with this court. The City objected, arguing this court should decline to consider authorities which were published before Ghodsee's reply brief was submitted. The City is correct that the purpose of RAP 10.8 "is to provide parties with an opportunity to bring to the court's attention cases decided after the parties submitted their briefs." See Gull Indus., Inc. v. Granite State Ins. Co., 18 Wn. App. 2d 842, 857 n.11, 493 P.3d 1183 (2021). However, had the authorities been brought to the attention of this court at oral argument, we would have properly considered them and we consider the authorities insofar as they are helpful in reaching our decision.

FILED
2/12/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SINA GHODSEE, an individual, through Litigation Guardian ad Litem, JOSHUA BROTHERS,

Appellant,

and

SHAHRBANOO GHODSEE, an individual,

Plaintiff,

v.

CITY OF KENT, a political subdivision of the State of Washington, and KING COUNTY, d/b/a King County Crisis and Commitment Services,

Respondents.

No. 82897-5-I

DIVISION ONE

UNPUBLISHED OPINION

HAZELRIGG, A.C.J. — Sina Ghodsee sued the City of Kent and King County for negligence based on their actions taken to detain him pursuant to a court order issued under the involuntary treatment act. Both defendants moved for summary judgment dismissal based on the public duty doctrine and statutory immunity, and trial court granted the motions. This court affirmed. Ghodsee petitioned for review by our Supreme Court, which stayed the petition pending its final decision in *Norg v. City of Seattle*, 200 Wn.2d 749, 522 P.3d 580 (2023). After issuance of that opinion, the Supreme Court remanded Ghodsee's case to this court for

reconsideration in light of *Norg*. Because *Norg* is materially distinguishable, we do not change our opinion on reconsideration.

FACTS

In *Ghodsee v. City of Kent*, this court provided the underlying facts as follows:

> On Friday, June 23, 2017, Shahrbanoo Ghodsee contacted King County Crisis and Commitment Services (KCCCS) with concerns about her son, Sina Ghodsee. Shahrbanoo reported Ghodsee was not taking his medication and was "agitated" and "delusional," and she had left the home to stay elsewhere. Four days later, a "Designated Mental Health Professional" (DMHP) called to schedule an appointment for a team of DMHPs to meet with Shahrbanoo at the Ghodsee home. The DMHPs intended to interview Ghodsee pursuant to the involuntary treatment act (ITA), but were unsuccessful and eventually left the home after Ghodsee pointed "what appeared to be a table leg at them like a gun." They called the police; officers from the Kent Police Department (KPD) responded and attempted to make contact with Ghodsee, but were similarly unsuccessful and disengaged. On Thursday, June 29, a DMHP filed a "Petition for Initial Detention (Non-Emergency)" in King County Superior Court, which the court granted.
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> On Friday, June 30 and again on Saturday, July 1, a team of DMHPs and several officers from KPD went back to the Ghodsee home but were ultimately unable to detain Ghodsee. On Sunday, July 2, KPD was dispatched to the Ghodsee home after a neighbor called law enforcement concerned that Ghodsee was threatening someone and possibly carrying a rifle. The caller could not state with any certainty that he saw a gun, and KPD never observed a crime, so the officers eventually left without attempting to contact Ghodsee. The next week, on Friday, July 7, KPD officers formulated a plan to take Ghodsee into custody when he left his home to get groceries or cigarettes. Around midnight on July 9, the manager at a local grocery store called KPD to inform them Ghodsee was on site, but by the time officers arrived Ghodsee had left.
>
> On Monday, July 10, KPD received two emergency calls from Ghodsee's neighbors, reporting Ghodsee had shot at the neighbor's occupied home. KPD responded and saw Ghodsee in the window of his home with a rifle raised, pointed in the direction of the officers. Two officers simultaneously fired, and Ghodsee disappeared from sight. Officers on the scene used a drone to see inside of the home,

> where they observed Ghodsee laying on the floor. Ghodsee was taken into custody. He sustained a gunshot wound to the head, surviving but suffering significant and life-changing injuries.

21 Wn. App. 2d 762, 766-67, 508 P.3d 193 (2022) (footnotes omitted), *remanded,* 1 Wn.3d 1001 (2023).

In 2020, Sina Ghodsee, through a guardian ad litem, and his mother filed a civil complaint against the City of Kent and King County for negligence. *Id*. at 765, 767. He contended that both governmental agencies failed to exercise reasonable care in detaining him pursuant to the ITA. *Id.* at 765-66. In 2021, the defendants moved for summary judgment based on the public duty doctrine and statutory immunity. *Id.* at 767. The trial court granted the motions and Ghodsee appealed. *Id*.

On appeal, Ghodsee argued that both the County and the City owed him an individualized duty of care. *Id.* at 768. He asserted that the County, through its DMHPs[1] owed him a duty of care pursuant to the special relationship exception to the public duty doctrine. *Id.* at 769-70. Based on the "limited role of the DMHP as defined by statute, and the brief relationship between Ghodsee and the specific DMHPs at issue," this court determined no "'definite, established, and continuing relationship'" arose and thus concluded no special relationship existed. *Id.* at 772. Ghodsee also argued that that the nonemergency detention (NED) order imposed a "take charge" duty on the County and City because it directed the DMHPs and KPD to detain him. *Id.* at 772-73. We disagreed, again highlighting the lack of an

[1] As noted in *Ghodsee*, "Subsequent amendments to the involuntary treatment act replaced the term 'Designated Mental Health Professional,' or DMHP, with 'Designated Crisis Responders' (DCRs)." 21 Wn. App. 2d at 766 n.3. We continue to use the terminology applicable at the time of the events in Ghodsee's case.

"ongoing, monitoring relationship," and explained that the order to detain Ghodsee created a general duty to the public rather than an individual duty to him. *Id.* at 774-75.

Further, this court analyzed the City's potential liability under the duty of law enforcement to exercise reasonable care. *Id.* at 775-76. In rejecting Ghodsee's claim that the KPD breached that duty by not detaining him sooner after the issuance of the NED order, this court noted that law enforcement's duty of care necessarily entails the exercise of discretion "to determine the safest way to carry out the court's order," nothing in the ITA statute or NED order imposed a duty to detain him by means of a particular method or within a certain timeframe, and the NED order did "not function as a warrant or otherwise suspend Ghodsee's individual rights protected by warrant requirements." *Id.* at 776-78. Finally, this court considered Ghodsee's challenge to the trial court's finding that the defendants were entitled to statutory immunity under RCW 71.05.120. *Id.* at 779. "Because the plain language of the statute provides immunity for actions as well as decision-making," this court held that "both the City and County are entitled to statutory immunity for their actions 'with regard to' the decision to detain." *Id.* at 780 (quoting former RCW 71.05.120(1) (2016)). As Ghodsee failed to show that either entity owed him an individualized duty of care as a matter of law, this court affirmed summary judgment in favor of the defendants. *Id.* at 782.

Ghodsee petitioned for review by our Supreme Court and that petition was stayed pending the final decision in *Norg v. City of Seattle*, 200 Wn.2d 749, 522

P.3d 580 (2023) (*Norg* II).[2] On April 5, 2023, the court issued an order that remanded Ghodsee's case to this court for reconsideration in light of *Norg* II. Ord., *Ghodsee v. City of Kent,* No. 100892-9 (Wash. Apr. 5, 2023). On August 10, 2023, this court directed the parties to submit supplemental briefing on the applicability of *Norg* II to the facts and issues of this case.[3]

ANALYSIS

Ghodsee contends that "*Norg* [II] shows that this [c]ourt misapplied the public duty doctrine" in his case. *Norg* II does no such thing.

Norg II addressed whether the public duty doctrine applied to the City of Seattle in its response to a 911 call which the Norgs alleged was negligent. 200 Wn.2d at 752. Delaura Norg[4] woke up to find her husband, Fred, unresponsive and making loud noises. *Id.* at 753. She called 911, spoke with a dispatcher who the court noted was employed by the Seattle Fire Department (SFD), and provided the dispatcher with their home address. *Id.* The 911 dispatcher assigned three units from two nearby SFD stations and gave them the correct address, which was

[2] In supplemental briefing, Ghodsee notes that he did not seek Supreme Court review of this court's affirmance of summary judgment as to his claims against King County based on the actions, or inaction, of the DMHPs. The County also acknowledges this procedural posture and contends that the portion of the *Ghodsee* opinion that affirmed dismissal of his claims against the County is final. Accordingly, we only consider the applicability of *Norg* II as it relates to the City through the KPD.

[3] Following this court's directive to the parties calling for supplemental briefing on the applicability of *Norg* II, the County complied and submitted a brief. The County's brief begins with a paragraph acknowledging the relevant procedural facts, including the fact that Ghodsee did not appeal summary judgment as to the County, and then complied with the order to analyze the applicability of *Norg* II.

On August 28, 2023, Ghodsee filed a motion to strike the County's supplemental brief pursuant to RAP 10.7 and requested sanctions against it. Essentially, Ghodsee asks us to sanction the County for strictly complying with an order issued by this court. Ghodsee's reasoning on this matter is unavailing and his motion for sanctions is denied.

[4] Because the Norgs share the same last name, we refer to them by their first names as needed for clarity. No disrespect is intended.

only three blocks from the nearest station. *Id.* While the dispatcher assured Delaura that the units were on the way to their apartment, all three of the dispatched units drove past the Norgs' apartment and went to a nearby nursing home they assumed had been the source of the 911 call. *Id.* After the units realized they were at the wrong address, they went back to the Norgs' apartment building and "reached the Norgs approximately 16 minutes after Delaura began speaking with the 911 dispatcher." *Id.* at 753-54. Ultimately, Fred was diagnosed with a heart attack and the Norgs sued the City, alleging its employees were negligent in responding to the medical emergency. *Id.* at 754. The City asserted the public duty doctrine as an affirmative defense, but the trial court ruled that it did not apply. *Id.* at 754-55. On interlocutory review, this court affirmed.[5] *Id.* at 755. Our Supreme Court then granted discretionary review. *Id.*

On review, the Supreme Court reiterated that "a government entity's breach of a duty owed to the general public cannot sustain a tort claim for negligence as a matter of law." *Id.* at 757. "[T]he public duty doctrine provides 'a mechanism for focusing upon whether a duty is actually owed to an individual claimant rather than the public at large.'" *Id.* at 758 (quoting *J&B Dev. Co. v. King County*, 100 Wn.2d 299, 304-05, 669 P.2d 468 (1983), *overruled on other grounds by Meaney v. Dodd*, 111 Wn.2d 174, 759 P.2d 455 (1988)). Put simply, the court explained, "If the duty that the government allegedly breached was owed to the public at large, then the

[5] "Because the duty at issue in this case 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, the public duty doctrine does not apply and the trial court did not err in so concluding." *Norg v. City of Seattle*, 18 Wn. App. 2d 399, 413, 491 P.3d 237 (2021), *aff'd,* 200 Wn.2d 749, 522 P.3d 580 (2023) (*Norg* I).

public duty doctrine applies; if the duty was owed to an individual, then the public duty doctrine does not apply." *Id.* However, the court noted, the public duty doctrine is not applicable to all tort claims against governmental entities whose duty was to the individual plaintiff; it "applies only to claims based on an alleged breach of 'special governmental obligations that are imposed by statute or ordinance.'" *Id.* (quoting *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 549, 442 P.3d 608 (2019)).

The Norgs argued that the public duty doctrine was inapplicable because the City owed them an individual duty to exercise reasonable care once "the City, through its dispatcher, established a direct and particularized relationship" with them. *Id.* at 763. The court extensively highlighted the interaction giving rise to this duty, "Delaura Norg expressly requested help, remained on the phone with the 911 dispatcher for over 15 minutes, was assured by the dispatcher that medical aid was on the way, and confirmed her address to the dispatcher multiple times." *Id.* at 762. Accordingly, the court determined that the City owed the Norgs, individually, a common law duty of reasonable care pursuant to the rescue doctrine, which "'arises when one party voluntarily begins to assist an individual needing help.'" *Id.* at 763 (quoting *Folsom v. Burger King*, 135 Wn.2d 658, 674-75, 958 P.2d 301 (1998)). The court further noted that "[s]uch a claim could certainly arise against a private ambulance service, given that 'emergency medical assistance is not a unique function of government.'" *Id.* at 765 (footnote omitted) (quoting *Cummins v. Lewis County*, 156 Wn.2d 844, 872, 133 P.3d 458 (2006) (Chambers, J., concurring)). Because the "Norgs' claim was based on the City's

alleged breach of its common law duty to exercise reasonable care when responding to their call for emergency medical assistance," the court held that the public duty doctrine did not apply and affirmed without considering any of the doctrine's exceptions. *Id.* at 765-66.

Norg II is materially distinguishable and does not impact this court's holding in *Ghodsee*. In *Norg* II, the City of Seattle was not engaged in "'a unique function of government,'" rather, it was operating an emergency ambulance service, circumstances wherein private providers of those same services "'have historically been subjected to civil suit for negligence.'" *Id.* at 765 (first quoting *Cummins*, 156 Wn.2d at 872 (Chambers, J., concurring); and then quoting *Norg v. City of Seattle*, 18 Wn. App. 2d 399, 409, 491 P.3d 237 (2021) (*Norg* I)). However, in *Ghodsee*, the City was operating a police department and our opinion was based, in part, on the premise that "providing police protection is an inherent government function." *Norg* I, 18 Wn. App. 2d at 409-10. Far from a proprietary function, providing security to the community in the interest of public safety has been said to be "'the most basic function of any government,'" and "the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted." *United States v. U.S. Dist. Ct.*, 407 U.S. 297, 312, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972) (quoting *Miranda v. Arizona*, 384 U.S. 436, 539, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) (White, J., dissenting)); *Thornhill v. Alabama*, 310 U.S. 88, 105, 60 S. Ct. 736, 84 L. Ed. 1093 (1940). As such police functions are inherently governmental, it is unsurprising that Ghodsee identifies no case in which a private entity has been held liable for negligence in

its failure to seize or detain an individual pursuant to a non-emergent detention order.

Even in medieval England before police forces—as we have come to understand them—had been established, the duties of law enforcement were governmental by nature as the king relied upon local officials to serve in those roles. *See* David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 64 (1996). After the Norman Conquest in 1066, English sheriffs acted as the king's local agents and it was their duty to be "'the keeper of the king's peace.'" *McMillian v. Monroe County,* 520 U.S. 781, 793, 117 S. Ct. 1734, 138 L. Ed. 2d 1 (1997) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 328, 332 (1765)). "As the basic forms of English government were transplanted in our country, it also became the common understanding here that the sheriff . . . was in reality an officer of the State, and ultimately represented the State in fulfilling his duty to keep the peace." *Id.* at 794 (footnote omitted).

Initially, the colonies relied on "[n]ight watches, constables, and sheriffs" to maintain the peace, but "'by the late 1880s, all major U.S. cities had municipal police forces in place.'" *Alsaada v. City of Columbus*, 536 F. Supp. 3d 216, 226-27 (quoting Olivia B. Waxman, *How the U.S. Got Its Police Force*, TIME (May 18, 2017), https://time.com/4779112/police-history-origins), *modified by Alsaada v. City of Columbus*, No. 2:20-CV-3431, 2021 WL 3375834 (S.D. Ohio June 25, 2021). Today, cities are statutorily obligated to "provide police services, enforce the law, and keep the peace." *Beltran-Serrano*, 193 Wn.2d at 552. As our

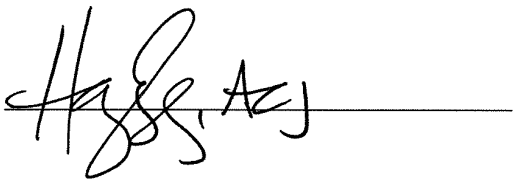
Supreme Court recently reiterated, "[t]he legislative branch writes laws, WASH. CONST. art. II, § 1, the executive branch faithfully executes those laws, WASH. CONST. art. III, § 5, and 'it is emphatically the province and duty of the judicial department to say what the law is.'" *Colvin v. Inslee*, 195 Wn.2d 879, 892, 467 P.3d 953 (2020) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803)). Law enforcement is a fundamental function of the executive branch and the constitution "does not empower us to dictate 'how the executive, or executive officers, perform duties in which they have a discretion.'" *Id.* at 898 (quoting *Marbury*, 5 U.S. at 170). In other words, from the king at common law to the elected executive today, the duties of enforcing the law and preserving the peace have remained an exclusive function of the State.

Norg II is also distinguished on the basis of the City's duty, which is glaringly absent here. The City of Seattle's duty to exercise reasonable care to the Norgs individually arose from the 15-minute-long "direct and particularized interaction" between Delaura and the 911 dispatcher, during which the dispatcher expressly assured her that medical aid for Fred was on the way. *Id.* at 760-62. Conversely, in *Ghodsee*, there was no sustained direct and/or particularized interaction between Sina and the KPD officers and the City provided neither Sina nor his mother an express assurance or promise to aid. The only interactions between the Ghodsee family and the KPD officers occurred on June 23, when officers unsuccessfully attempted to contact Sina, and on June 30 and July 1, when several officers went to the Ghodsee house to effectuate the NED order but were unable to detain Sina. *Ghodsee*, 21 Wn. App. 2d at 766-67. Thus, the basis of the

individualized common law duty to exercise reasonable care, that was established in *Norg* II when the City of Seattle took steps to provide aid, is not present here.[6] Ghodsee effectively seeks, without characterizing it in this manner, a broad duty to act.

While Ghodsee insists that "Sina's claim is no different" than that of the Norgs, their respective claims against the government entities are fundamentally distinct and Ghodsee's attempt to stretch the holding of *Norg* II to apply to his case is without merit. Because the KPD did not owe Ghodsee an individualized duty of care, his negligence claim against the City fails as a matter of law. Accordingly, our analysis and holding in *Ghodsee* remain unchanged after reconsideration.

Affirmed.



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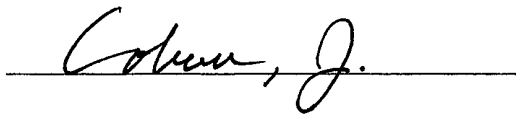

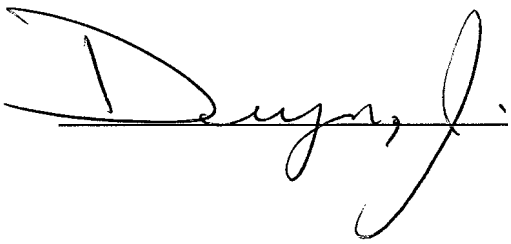

[6] At oral argument before this court, Ghodsee argued for the first time that the interactions between the King County DMHPs and the Ghodsee family gave rise to an actionable duty by the City of Kent, via the KPD, to exercise reasonable care to Ghodsee individually. Wash. Ct. of Appeals oral argument*, Ghodsee v. City of Kent*, No. 82897-5-I (Nov. 9, 2023), at 7 min., 50 sec., *video recording by* TVW, Washington State's Public Affairs Network, https://tvw.org/video/division-1-court-of-appeals-2023111142/?eventID=2023111142.

Despite an affirmative statement to the contrary, Ghodsee's new theory was not presented in briefing at any stage in this case and it is wholly unsupported by any reference to authority. This court "will decide a case only on the basis of issues set forth by the parties in their briefs." RAP 12.1(a). And we "will not consider an issue raised for the first time during oral argument where there is no argument presented on the issue and no citation to authority provided." *State v. Olson,* 126 Wn.2d 315, 320, 893 P.2d 629 (1995). Because Ghodsee's novel argument was not raised in briefing and is unsupported by any citation to authority, we decline to reach the merits.

DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the ***Petition for Review*** in Court of Appeals, Division I Cause No. 82897-5-I to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: March 4, 2024 at Seattle, Washington.

/s/ Brad Roberts
Brad Roberts, Legal Assistant
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TALMADGE/FITZPATRICK

March 04, 2024 - 9:40 AM

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