NO. 100100-2

IN THE 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,

vs.

CITY OF SEATTLE,

Petitioner.

MEMORANDUM OF *AMICUS CURIAE* WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS IN SUPPORT OF PETITIONER

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I. INTRODUCTION

For decades, Washington jurisprudence has followed the doctrine of vertical stare decisis: "once [the Supreme] [C]ourt has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by this [C]ourt." *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984); *see also* M. DeForrest, *In the Groove or in a Rut? Resolving Conflicts Between the Divisions of the Washington State Court of Appeals at the Trial Court Level*, 48 GONZ. L. REV. 455, 488 (2013) ("Decisions of the state supreme court are binding on all lower Washington courts, whether trial courts or the appellate court sitting in its divisions."). Eschewing this longstanding rule, the Court of Appeals absolved Plaintiff DeLaura Norg from satisfying the three elements necessary to establish an actionable duty of care as required by *Cummins v. Lewis County*, 156 Wn.2d 844, 133 P.3d 458 (2006), a case involving functionally identical facts. *Norg v. City of Seattle*, 18 Wn. App. 2d 399, 404-06, 491 P.3d 237 (2021). Rather than following the *Cummins* majority, the Court of Appeals elected instead to adopt the *Cummins*

concurrence. *Id.* at 405. Specifically, the Court of Appeals explicitly excused Norg from establishing justifiable reliance to her detriment, an element that was essential to whether an actionable duty of care existed not only in *Cummins*, but also *Osborn v. Mason County*, 157 Wn.2d 18, 134 P.3d 197 (2006), a companion case argued the same day but decided months later. This was error.

When a Court of Appeals' published opinion so openly and flagrantly disregards Supreme Court precedent, review is warranted to ensure stability in the law. RAP 13.4(b)(1). *Amicus curiae* Washington State Association of Municipal Attorneys (WSAMA) submits this memorandum to persuade this Court to grant the City of Seattle's petition for review. RAP 13.4(h).

II. IDENTITY AND INTEREST OF *AMICUS CURIAE*

WSAMA is a nonprofit Washington corporation whose membership is comprised of the attorneys who represent cities and towns in this state. WSAMA provides education and training in the areas of municipal law to its members.

Municipalities around the state represented by WSAMA members rely on this Court's precedent in determining the existence and scope of the legal duties owed. The decision by the Court of Appeals undermines that reliance and erodes the law's clarity because it wrongly assumed it could disregard a decision from this Court in favor of a concurring opinion.

The Court should grant the petition.

III. ARGUMENT

The considerations governing review of decisions terminating review are spelled out in RAP 13.4(b).[1] Review is warranted when a "decision of the Court of Appeals … conflict[s] with a decision of the Supreme Court." RAP 13.4(b)(1). This case squarely fits that criterion.

Moreover, the Court can take this opportunity to clarify erroneous language in the Court of Appeals' opinion holding that

[1] The City filed a motion for discretionary review under RAP 13.5, arguing the Court of Appeals' decision should be reviewed under the "obvious error" or "probable error" criteria under RAP 13.5. This was mistaken. A Court of Appeals decision on the merits is a "decision terminating review," which is categorically distinct from an interlocutory decision. *Compare* RAP 13.3(a)(1) *to* RAP 13.3(a)(2). Therefore, RAP 13.4(b) governs disposition of the City's petition.

the public duty doctrine is an affirmative defense. RAP 13.4(b)(4) (review by the Supreme Court is warranted "[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court"). To the contrary, as this Court has explained multiple times, the public duty doctrine is merely a focusing tool used to determine whether the defendant owes an actionable duty of care in the first instance. Because the plaintiff—not the defendant—bears the burden to prove the existence of a duty, it logically follows that the doctrine is not an affirmative defense on which the defendant bears the burden of proof. In other words, a defendant need not adduce evidence to prove the non-existence of an essential element of which the plaintiff bears the burden to prove.

A. This Court requires justifiable reliance as an essential element of a claim alleging negligent dispatch, but the Court of Appeals wrongfully negated that element entirely.

Like the present case, *Cummins* involved an agency's alleged negligent dispatch of emergency medical aid in response to a 911 call prompted by a cardiac arrest. *Cummins*, 156 Wn.2d at 848. A dispatcher answered a 911 call in which the caller said,

"1018 E Street, heart attack," and hung up. *Id.* The dispatcher believed the call was a prank and, rather than erring on the side of caution, decided not to dispatch medical aid. *Id.* at 849. Instead, she dispatched a police officer who drove by the E Street address. *Id.* The officer "did not, however, stop at that location or attempt to contact anyone who may have been at the home." *Id.* As a result, the man's wife found her husband "dead on the kitchen floor" several hours later. *Id.* The wife then sued not only the County for "alleged … negligence [of the] County 911 emergency dispatch unit," but also the City "police department which had responded to the call." *Id.* at 850. The trial court granted summary judgment "for both defendants," a dismissal that this Court affirmed. *Id.* at 850, 860-61.

In so doing, the Court adopted the County's and City's argument that "that there is *no justification as a matter of law for treating 911 callers differently based on the nature of the caller's emergency*," reaffirming that "*a municipality's duty to respond to a 911 call is a general duty owed to all* regardless of the type of aid requested." *Id.* at 858 (emphasis added). Justice Chambers

concurred in the result but disagreed with the majority's reasoning, instead advocating that "[t]he policy consideration for calls for medical treatment is fundamentally different from a request for police assistance." *Id.* at 872 (Chambers, J., concurring) (citing *Harris v. Kruetzer*, 624 S.E.2d 24, 29-30 (Va. 2006)).

Despite the *Cummins* majority rejecting the line of demarcation advocated by Justice Chambers, the Court of Appeals held that the concurrence trumped the majority opinion: "As Justice Chambers wrote, 'given that emergency medical assistance is not a unique function of government, when government decides to handle requests for emergency care, it should be held liable for damages for its tortious conduct in the same way as a private person or corporation.'" *Norg*, 18 Wn. App. 2d at 407 (quoting *Cummins*, 156 Wn.2d at 872 (Chambers, J., concurring)). In other words, the Court of Appeals disregarded the *Cummins* majority's clear holding that emergency medical response should be the same as all other 911 calls.

To support its conclusion, the Court of Appeals assumed that *Munich v. Skagit County Communications Center*, 175 Wn.2d 871, 288 P.3d 328 (2012), overruled *Cummins* in favor of the *Cummins* concurrence. *See Norg*, 18 Wn. App. 2d at 407. This assumption is belied by the *Munich* majority and Justice Chambers himself. The *Munich* majority *reaffirmed* the requirement to prove reliance. *Munich*, 175 Wn.2d at 884-85 ("a special relationship is established by privity, an express assurance, and justifiable reliance," and recognizing that "in every case discussing the special relationship exception, the same three elements are repeatedly cited and employed"). And Justice Chambers explicitly made clear that he "would not change any of our precedents," and "would not reexamine any case where we have held the government does or does not owe a duty," *id.* at 894 (Chambers, J., concurring). Yet the Court of Appeals here did exactly that—it assumed Justice Chambers "change[d]" and "reexamine[d]" *Cummins*. This was legally mistaken.

Overruling precedent by implication is strongly disfavored. As the United States Supreme Court has said: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, *the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions*." *Rodriguez de Quijas v. Shearson/Am. Express, Inc*., 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989) (emphasis added); *accord Gore*, 101 Wn.2d at 487. Though this Court has the power to overrule its precedent, doing so is a drastic step that requires a party to overcome the heavy burden of making a "clear showing" the prior decision is "'incorrect and harmful.'" *Deggs v. Asbestos Corp.*, 186 Wn.2d 716, 729, 381 P.3d 32 (2016) (quoting *W.G. Clark Constr. Co. v. P. NW Reg'l Council*, 180 Wn.2d 54, 66, 322 P.3d 1207 (2014)). No one has made such a showing vis-à-vis *Cummins*.

The Court of Appeals was obligated to follow *Cummins*. *Gore*, 101 Wn.2d at 487. The lower court plainly erred by

disregarding the *Cummins* majority opinion and assuming *Munich* overruled it *sub silentio*. The Court should grant review. RAP 13.4(b)(1).

B. Whether framed under a special relationship or rescue doctrine analysis, reliance remains a linchpin.

"[A] public entity is liable in tort '*to the same extent* as if it were a private person or corporation.'" *Osborn*, 157 Wn.2d at 27 (quoting RCW 4.92.090 and RCW 4.96.010) (emphasis added). By using the phrase "same extent," the legislature intended to prevent government entities from not only escaping liability where a private person would face exposure, but also incurring liability where a private person would not. If left unchecked, *Norg* creates precedent that elevates the duty owed by municipalities like the City of Seattle to one greater than that owed by private individuals and entities who undertake efforts to provide aid at no charge. At its core, such a decision violates the above-described fundamental tenet on which the abolition of sovereign immunity is based.

When a public or private entity undertakes a duty to render aid to another without compensation, "reliance [becomes] the linchpin" on which that duty is based. *Osborn*, 157 Wn.2d at 25. In *Osborn* the plaintiff sued Mason County for allegedly failing to properly notify the community of a Level III sex offender's presence, which resulted in the death of the plaintiff's teenage daughter. *Id.* at 21-22. The Court of Appeals found a duty of care existed under the rescue doctrine, but this Court reversed. *Id.* at 22, 25-27. The Court emphasized that "This Case Does Not Implicate the Public Duty Doctrine" because "[u]nder the rescue doctrine, *both public … and private …* entities have a duty to warn those who reasonably rely on a promise to warn. *But no duty* to warn *exists under the rescue doctrine* without *reasonable reliance* on such a promise." *Id.* at 28 (emphasis added) (citing *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 301, 545 P.2d 13 (1975), and *Meneely v. S.R. Smith, Inc.*, 101 Wn. App. 845, 860, 5 P.3d 49 (2000)). The rescue doctrine arises both in the contexts of warning others of a known danger, *id.* at 25-26, and taking affirmative action to abate a danger, *Folsom v. Burger King*, 135

Wn.2d 658, 675-77, 958 P.2d 301 (1998). Consequently, the present case should have implicated a straightforward application of the rescue doctrine that required proof of reliance.

There is no dispute the City of Seattle provides medical rescue to its citizens without charging any fee therefor. In this sense, the City should have been treated the same as a volunteer rescuer, which would have required the plaintiff to prove reliance before an actionable duty of care was found. *Osborn*, 157 Wn.2d at 25-27; *Cummins*, 156 Wn.2d at 860-61. The Court of Appeals' opinion squarely conflicts with this precedent, and thereby providing yet another reason why this Court should grant review. RAP 13.4(b)(1).

C. Because the public duty doctrine is used to determine whether an essential element of a plaintiff's case exists, this Court should clarify that it is not an affirmative defense.

The Court of Appeals also erred by characterizing the public duty doctrine as an affirmative defense. *Norg*, 18 Wn. App. at 401. The *Norg* decision is not unique in this regard—this Court characterized the doctrine as an affirmative defense as recently as last year. *Ehrhart v. King County*, 195

Wn.2d 388, 410-11, 460 P.3d 612 (2020). But it is not an affirmative defense, and this Court should make that point clear.

"[T]he public duty doctrine is simply a 'focusing tool' to ensure that the government is not held liable in tort for duties owed solely to the general public." *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 549, 442 P.3d 608 (2019). "The public duty doctrine simply reminds us that a public entity—like any other defendant—is liable for negligence only if it has a statutory or common law duty of care. And its 'exceptions' indicate when a statutory or common law duty exists." *Osborn*, 157 Wn.2d at 27-28. The law has for many decades recognized that one "essential element[] of actionable negligence is … the existence of a duty owed to the complaining party." *Pedroza v. Bryant*, 101 Wn.2d 226, 228, 677 P.2d 166 (1984). And it must be remembered that the *plaintiff* always bears the burden to prove every element of a negligence claim, *Crowe v. Gaston*, 134 Wn.2d 509, 514, 951 P.2d 1118 (1998), which includes whether a duty exists in the first instance, *Pedroza*, 101 Wn.2d at 228; *accord Ang v. Martin*, 154 Wn.2d 477, 485-86, 114 P.3d 637

(2005) (rejecting contention in legal malpractice suit that "plaintiff's actual … innocence" is an affirmative defense, instead holding it remained "an element of plaintiff's cause of action" on which the plaintiff bears the burden of proof).

Labeling the public duty doctrine as an affirmative defense is problematic because under case law, the defendant bears the burden to prove any affirmative defense alleged. *Gerlach v. Cove Apartments, LLC*, 196 Wn.2d 111, 126, 471 P.3d 181 (2020) (quoting *Olpinski v. Clement*, 73 Wn.2d 944, 950, 442 P.2d 260 (1968)). If the public duty doctrine continues to be labeled as an affirmative defense, courts will first require the plaintiff to establish "the existence of a duty owed to the complaining party, *Pedroza*, 101 Wn.2d at 228, but then require the defendant to prove its affirmative defense that the duty is absent. Such is a circular paradox that should not exist.

This Court should take this opportunity to clarify that the defendant does not have the burden to prove that the public duty doctrine bars a claim. RAP 13.4(b)(4).

IV. CONCLUSION

For the reasons set forth above, and as requested by the City of Seattle, WSAMA respectfully requests this Court grant review.

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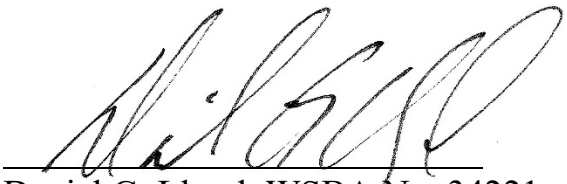

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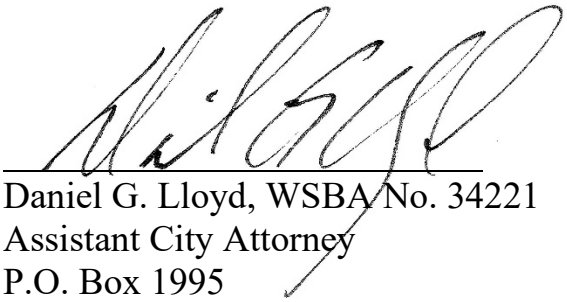

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