No. 100892-9

SUPREME COURT
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.

RESPONDENT'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION

There are two glaring differences between the 5-4 opinion in *Norg v. Seattle* and the present case. Both should cause this court to deny the petition for review. First, in *Norg* the City of Seattle chose to enter the ambulance business, where it competed against private businesses who also respond to emergencies. No private business operates a police department charged with enforcing the law. Second, Mrs. Norg had "extensive interactions" with the dispatcher, expressly requested help and was promised that responders were on the way. Here, the City had no interactions with Mr. Ghodsee, and never made promises to him or anyone else. Finally, the Court of Appeals holding of no duty, meant it did not need to address the troubling, dangerous and unconstitutional acts the Plaintiffs advocated the City should have done. Taking the case would require the Court to weigh in on whether the police could make a warrantless entry, or try and tear gas Mr. Ghodsee from the inside of his home, simply because he was in a mental crisis. He committed no crime, and the steps Plaintiffs claim the City should have done would upend decades of law protecting the rights of Washington citizens inside their homes.

The Court should deny the petition.

II. SEATTLE CHOSE TO OPERATE AN AMBULANCE SERVICE, JUST LIKE PRIVATE COMPANIES

A key difference between *Norg* and this matter, is that the City of Seattle chose to operate an ambulance business. Ambulances are operated by both private and public entities. *Vogreg v. Shepard Ambulance Co*., 47 Wash.2d 659, 289 P.2d 350 (1955); *Scott v. Rainbow Ambulance Serv., Inc.*, 75 Wash.2d 494, 452 P.2d 220 (1969); RCW 35.21.768 (allowing local government agencies to engage in "the ambulance business" and "billed" for the service); RCW 35.21.766 (permitting regional fire authority to evaluate whether public is "adequately served by existing private ambulance service…"); RCW 52.02.170 (acknowledging "private ambulance service"); RCW 36.01.095 (permitting counties that create emergency medical services with ambulances to "collect reasonable fees").

"The public duty doctrine applies when a public entity is performing a governmental function (citation omitted). If an entity is performing a proprietary function, it is held to the same duty of care as a private entity engaging in the same activity*." Norg v. City of Seattle*, 522 P.3d 580, 593 (Wash. 2023); *Okeson v. City of Seattle*, 150 Wn.2d 540, 544, 78 P.3d 1279, 1282 (2003) (City acts in a proprietary manner when it sells metered electricity, but in a governmental manner when it provides street lighting for the public).

It is easy to see how the 5-justice majority in *Norg* saw the City of Seattle as engaged in a proprietary function when operating an ambulance and saw how it should be treated like a private ambulance company for purposes of liability. As the majority noted, private ambulance companies were sued all the time for accidents and incidents. "The central purpose behind the public duty doctrine is to ensure that governments do not bear greater tort liability than private actors." *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 549, 442 P.3d 608, 614 (2019). This court in *Norg* properly noted that applying the public duty doctrine to the ambulance business would mean government had ***less*** liability than private actors.

The same would not hold true for the Kent Police Department. The Petitioners cannot point this Court to any cases where private police are sued for failing to arrest and detain a citizen in a mental crisis, or failing to tear gas someone from their home. While there are plenty of examples of such suits against private ambulances, there are no examples of such suits against private police making arrests or using force.

Police are defined in law. RCW 9A.76.020 (2); RCW 10.93.020 (4). Police officers then have special powers, like the power to make arrests. RCW 10.31.040. They can do so without warrants. RCW 10.31.100. They can use force in the performance of their legal duties. RCW 9A.16.020. Unlike private ambulances,

which the legislature and courts have acknowledged exist, Petitioners cannot point to any law or case referencing "private police." And unlike ambulance services, which are performed by both government and private entities, police work is exclusively government work. There are no private police enforcing the law and arresting people. Police work is not a proprietary business where fees are charged or arrestees billed for services. Police work is the definition of public duty work. [1]

And any attempt for Ghodsee to try and use *Norg* would raise a real appellate problem. Nowhere in the records below, or even in its petition for review, did Plaintiffs argue that the lawsuit against the Kent police was the same as a lawsuit brought against private citizens or corporations. It was not briefed at any level. Attempting to litigate for the first time now would violate this court's long standing rule that it only reviews well-developed and briefed issues. *Norg,* at 588, n. 4.

The decision in *Norg* does not *implicate Ghodsee* and review is not warranted by this court.

III. SEATTLE WHEN OPERATING AN AMBULANCE SERVICE MADE PROMISES AND ASSURANCES. KENT DID NOT.

[1] To be sure, police are sued all the time under exceptions to the public duty doctrine. They can also be sued when they act affirmatively to cause unreasonable harm. *Mancini v. City of Tacoma*, 196 Wn.2d 864, 879, 479 P.3d 656, 664 (2021). But that did not happen here, where the police are accused of not acting.

Another key distinction between *Norg* and *Ghodsee*, is that Mrs. Norg had extensive interaction with the dispatcher. *Norg v. City of Seattle*, 522 P.3d 580, 587 (Wash. 2023). Mrs. 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. *Norg v. City of Seattle*, 522 P.3d 580, 587 (Wash. 2023).

Accordingly, this court held; "The City, through its dispatcher, established a direct and particularized relationship with the Norgs." *Norg v. City of Seattle*, 522 P.3d 580, 588 (Wash. 2023).

Here, there was no relationship between the police and Mr. Ghodsee. The police tried to talk to him, but he refused. There were no promises or assurances because there was no contact. The level of relationship that the majority felt was important enough to cite in the opinion does not exist in the *Ghodsee* case.

The Court should deny the petition for review.

IV. IF THIS COURT ACCEPTS REVIEW, IT WILL HAVE TO EVALUATE THE DANGEROUS AND UNCONSTITUTIONAL ACTS PROPOSED BY PLAINTIFS. SOMETHING THE COURT OF APPEALS AVOIDED BY APPLICATION OF PUBLIC DUTY DOCTRINE

The Court of Appeals held that the public duty doctrine applied to this case. *Ghodsee v. City of Kent*, 21 Wn. App. 2d 762, 780, 508 P.3d 193, 203 (2022). Due to that holding, the appeals court

did not need to address the dangerous and unconstitutional police acts that Plaintiffs claimed would have resulted in Mr. Ghodsee's detention. Some background is in order.

In the Petition, Plaintiff claims the NED Order authorized a search of Mr. Ghodsee's house. Pet. at p. 21. In support, Plaintiff offers three threadbare claims. First, Plaintiff repeats the false claim that the mother's alleged permission allows the officers to enter without a warrant. Second, Plaintiff claims the police and the SWAT team armed with tear gas, could enter to provide "community caretaking." Finally, Plaintiff claims that Judge Bender's Non-Emergent Detention Order contains a silent and implied search warrant, even though no one asked her to secretly include a search warrant in the Non-Emergent Detention Order. Each of these claims will be addressed seriatim.

A. Permission

Plaintiffs note that Mrs. Ghodsee gave permission for the Kent Police to enter. Petition, p. 22. They fail to acknowledge that Sina Ghodsee was a cohabitant in the residence. This has constitutional implications. In 1989, this Court ruled that a co-habitant must also consent, or the search is illegal. *State v. Leach*, 113 Wn.2d 735, 744, 782 P.2d 1035, 1040 (1989).

Plaintiffs' Petition has no answer for this bedrock principle. But if this Court accepts review, it will have to address this

argument. It should deny the Petition.

B. Community Caretaking Function

Plaintiff argues that Kent Police could enter her home without a warrant and would be able to cite the "community caretaking function" exception to the warrant requirement. Pet. at p. 22, n. 12. But this Court has said "[w]e must 'cautiously apply the community caretaking function exception because of a real risk of abuse…'" *State v. Acrey*, 148 Wn.2d 738, 750, 64 P.3d 594, 600 (2003). The limited exception to the warrant rule only applies if the police believe someone is in an emergency. *State v. Kinzy*, 141 Wn.2d 373, 386–87, 5 P.3d 668, 676 (2000), as corrected (Aug. 22, 2000). And, most importantly, the "noncriminal investigation must end when reasons for initiating an encounter are fully dispelled." *State v. Kinzy*, 141 Wn.2d 373, 388, 5 P.3d 668, 677 (2000), as corrected (Aug. 22, 2000).

Mr. Ghodsee was only a danger to others, not himself. *Ghodsee v. City of Kent*, 21 Wn. App. 2d 762, 773, 508 P.3d 193, 200 (2022). The community care taking exception to the warrant requirement does not apply.

C. Judge Bender Issued a Search Warrant, She Just Did Not Know It.

Plaintiffs' final stab at this issue is to claim that Judge Bender – an "impartial magistrate" (Pet. at p. 22) – did provide a

search warrant when she issued her Non-Emergent Detention Order. There are several problems with this analysis. The biggest problem is that this was not an argument made in the trial court. CP 294-308; RAP 2.5(a).

The second problem is statutory. State law requires search warrants to be specific as to what property is being searched and what "evidence" is being seized. RCW 10.79.035(1) Searching a home in violation of this statute is a crime. RCW 10.79.040. Nowhere do Plaintiffs square their argument with these statutes, possibly because this is newly minted.

At no time during the course of events did the police have any basis to enter the Ghodsee home. And at no time was there probable cause to arrest Ghodsee for anything. Plaintiffs' Petition repeats the false claim that Ghodsee threatened a neighbor with a gun. Petition, p. 10. The police determined that the crime never happened. CP 494-495. The Court of Appeals agreed.

A person in a mental crisis does not surrender their constitutional rights. *Ghodsee v. City of Kent*, 21 Wn. App. 2d 762, 778, 508 P.3d 193, 202 (2022). The violent and dangerous suggestions of Plaintiffs' experts would be illegal and unconstitutional as a matter of law.

Finally, the Petition breathlessly claims, "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." Petition, p. 23. This is not what the opinion said, and contrary to the facts of this case. Ghodsee was only a danger to others, and he was alone in his house. If he was a danger to himself, or gravely disabled, the existing case law allows entry by police without a warrant. *Caniglia v. Strom*, 141 S. Ct. 1596, 1599, 209 L. Ed. 2d 604 (2021). The Court of Appeals was correct and no review is warranted.

V. CONCLUSION

The 5-4 decision in *Norg* was decided on doctrines that do not implicate *Ghodsee.* The Court should deny the petition.

This document contains 1,933 words, excluding the parts of the document exempted from the word court by RAP 18.17.

DATED: March 3, 2023.

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DECLARATION OF SERVICE

I, Cindy Marlatte, declare that I am over the age of 18 and am a legal assistant at the law office of Keating, Bucklin & McCormack, Inc. P.S. I further declare that on July 11, 2022, a true and correct copy of the *Respondent's Supplemental Brief* was e-filed and e-served electronically through Washington State Appellate Court's portal as follows:

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