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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.

SUPPLEMENTAL BRIEF ON
COURT'S *NORG* DECISION

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A. INTRODUCTION

In addition to the numerous other reasons this Court should grant review of Division I's published opinion including its patently erroneous decision on duty generally, op. at 4-5 (pet. at 10-15), its mistaken determination that breach had to be decided under a gross negligence standard in this case, op. at 16-18 (pet. at 23-26), and its ruling that breach could be decided as a matter of law, op. at 13-16 (pet. at 17-23), that court obviously erred in applying the public duty doctrine under these facts, op. at 4-12 (pet. at 15-17). This Court has now confirmed by its decision in *Norg v. City of Seattle,* __ Wn.2d __, 522 P.3d 580 (2023), that Division I misapplied the public duty doctrine.

Division I's opinion relying on the public duty doctrine to affirm the trial court's dismissal of Sina Ghodsee's action mandates that review be granted. RAP 13.4(b)(1). Division I's decision should be reversed, and the trial court's erroneous summary judgment for the City of Kent ("City") be reversed as

well.

B. SUPPLEMENTAL ARGUMENT WHY REVEW SHOULD BE ACCEPTED

(1) Division I's Published Opinion

Of critical importance to this Court's review decision are two facts regarding Division I's opinion. First, it is published, and second, its erroneous public duty doctrine analysis was the centerpiece of its opinion, encompassing nearly half of the twenty-page slip opinion discussing the doctrine and its exceptions. Op. at 4-12.

A published Court of Appeals opinion is consequential—it is controlling precedent. GR 14.1; RCW 2.06.040. It will affect the disposition of future cases.[1] As such, this Court's revisory authority compels it to grant review to excise from Washington precedent Division I's patently erroneous application of the public duty doctrine not only in the present

[1] A quick Westlaw search indicates that the case has been cited in appellate and trial court pleadings, albeit not as to the public duty doctrine.

case, but for any other case with analogous facts. As a published opinion, Division I's erroneous decision is a part of Washington's common law and theoretically articulated a principle of general public interest or importance. *State v. Fitzpatrick*, 5 Wn. App. 661, 669, 491 P.2d 262 (1971), *review denied*, 80 Wn.2d 1003 (1972). This Court necessarily corrects erroneous lower court analyses of the common law as part of its responsibility as "the court of general appellate jurisdiction over judicial decisions" under article IV, § 4 of our Constitution. *Community Care Coalition of WA v. Reed*, 165 Wn.2d 606, 617, 200 P.3d 701 (2009).

Further, the sheer scope of Division I's treatment of the public duty doctrine makes it clear that its erroneous public duty analysis colored its bottom line disposition of the case; the court evaluated duty generally in the illicit light of its erroneous public duty doctrine analysis. Op. at 5 ("In evaluating the duty of a governmental entity, we must also consider the public duty doctrine.").

It is likely that the City will attempt to argue that Division I's public duty decision is separable from the rest of its opinion. It is not. The erroneous public duty doctrine analysis permeated that court's thinking, leading to its ultimate, erroneous conclusion that no duty was owed to Sina by the City. Op. at 12 ("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."). Review is merited. RAP 13.4(b)(1).

(2) The Impact of *Norg*

There is no question that this Court's opinion in *Norg,* affirming Division I's correct analysis of the public duty doctrine there, stands at odds with Division I's published opinion in this case. The Court's majority opinion tracks Ghodsee's argument to Division I that the doctrine is inapplicable in this case. Br. of Appellant at 51-55 reply br. at

27-29.[2] It is also consistent with Sina's argument to this Court as to why review is necessary. Pet. at 15-17.

In *Norg,* this Court held that the public duty doctrine was inapplicable in a common law negligence claim, reaffirming its earlier decisions in *Munich v. Skagit Emergency Commc'ns Ctr.*, 175 Wn.2d 871, 887, 288 P.3d 328 (2012) (Chambers, J. concurring); *Beltran-Serrano v. City of Tacoma,* 193 Wn.2d 537, 442 P.3d 608 (2019); *Ehrhart v. King County*, 195 Wn.2d 388, 460 P.3d 612 (2020).

In *Norg*, the City contended that the action was not, in fact, a common law action because a statute addressed 911 calls. But the Court rejected that argument because the plaintiffs' action had nothing to do with the particular requirements of the statute. 522 P.3d at 588. Rather, the "Norgs claim that the City answered their 911 call and undertook to render emergency assistance, but that the City

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[2] Sina cited Division I's *Norg* decision that this Court later affirmed. Br. of Appellant at 54-55; reply br. at 28.

acted negligently in doing so by going to the wrong address." *Id*. "The City, through its dispatcher, established a direct and particularized relationship with the Norgs and that the City breached this duty." *Id.* (quotation omitted).

It is no different here as to Sina's claim; the City established a "direct and particularized" relationship with Sina. The Kent Police Department ("KPD") caused a court detention order to be issued in the first place after its officers informed King County's Designated Mental Health Professionals ("DMHPs"), they would not enter the house to detain Sina without a court order. CP 366. The DMHPs went to court to obtain such an order mandating that "any peace officer shall take [Sina] into custody ..." CP 334-35 (emphasis added). Still, KPD did nothing other than go to the house on multiple occasions without effecting the court's mandatory order and engaging in verbal shouting matches outside the Ghodsee home with the DMHPs, who were fed up with KPD's negligence. CP 537-38. KPD responded multiple times to the home as Sina's

condition worsened, developed detention plans, but failed to carry them out for weeks until Sina brandished a weapon at a neighbor, leading to their final response that resulted in Sina being shot in the head.

If this is not a "direct and particularized" relationship within the meaning of *Norg*, then that opinion has zero teeth. No city will ever be liable for negligently responding to a particularized duty to an individual.

The claim here is rooted in common law and the general duty police owe to refrain from negligence when effecting a particularized court order or otherwise interacting with a particularized member of the public. *Norg*, *supra*; *Beltran-Serrano*, *supra*. The public duty doctrine is not implicated. As Sina has consistently argued, the duty owed to him predicated on common law principles arising out of the *Restatement (Second) of Torts* § 281. The City's law enforcement officers negligently failed to detain him in violation of a particularized court order to do so. Division I's opinion conflicts with *Norg*

and review is necessary to resolve this conflict in law on an issue of public importance. RAP 13.4(b)(1), (4).

C. CONCLUSION

This Court's *Norg* decision clearly compels this Court to grant review as to the public duty doctrine; review is also merited as to the other erroneous aspects of Division I's published opinion. This Court should reverse Division I's decision and afford Sina Ghodsee his day in court.

This document contains 1,214 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 3rd day of March, 2023.

Respectfully submitted,

/s/ Philip A. Talmadge

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APPENDIX

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February 3, 2023

LETTER SENT BY E-MAIL ONLY

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Re: Supreme Court No. 100892-9 – Sina Ghodsee, et al. v. City of Kent, et ano.
Court of Appeals No. 82897-5-I

Counsel:

This case was stayed pending a final decision in *Delaura and Fred B. Norg v. City of Seattle*, Supreme Court No. 100100-2. That case is now final. Therefore, the petition for review in this case has been scheduled for consideration on the Court's April 4, 2023, petition for review calendar.

The parties are each requested to file a supplemental brief of no more than 2,500 words regarding the impact of *Delaura and Fred B. Norg v. City of Seattle*, No. 100100-2 on this case. Any supplemental brief should be served and filed by no later than **March 3, 2023**.

The parties are advised that the results of the petition for review calendar are posted on the internet as soon as they are official, which is typically the day after the calendar. That website address is: http://www.courts.wa.gov/appellate_trial_courts/supreme/

Sincerely,

Sarah R. Pendleton
Supreme Court Deputy Clerk

SRP:jm

DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the ***Supplemental Brief*** in Supreme Court Cause No. 100892-9 to the following:

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Original E-filed via appellate portal:
Supreme Court Clerk's Office

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 3, 2023 at Seattle, Washington.

/s/ Brad Roberts
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Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

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