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No. 96464-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SANDRA EHRHART, individually and as personal representative of the
Estate of Brian Ehrhart,

Plaintiff/Respondent,

vs.

KING COUNTY, operating through its health department, Public Health –
Seattle and King County,

Defendant/Petitioner.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking redress under the civil justice system, including an interest in the rights of plaintiffs to compensation for injuries caused by the tortious conduct of public entities.

II. INTRODUCTION AND STATEMENT OF THE CASE

Sandra Ehrhart brings this action against the King County Department of Health and others arising out of the death of her husband, Brian Ehrhart, due to Hantavirus Pulmonary Syndrome. The facts are drawn from the briefing of the parties. *See* King County Mot. for Disc. Rev. at 3-11; Ehrhart Resp. in Opp. to Disc. Rev. at 3-11; King County Op. Br. at 4-16; Ehrhart Resp. Br. at 6-20.

For purposes of this amicus brief, the following facts are relevant. In February of 2017, Brian Ehrhart reported to the emergency room at Swedish-Issaquah Hospital, suffering from flu-like symptoms. Not suspecting a more serious condition, his provider sent him home. The next day, he was taken by ambulance to Bellevue Hospital, where he died from the Hantavirus. Brian was 34 years of age and left behind a wife and two young children.

Hantavirus is a rare condition that cannot be transmitted between humans, and instead is contracted primarily by exposure to rodent urine or

droppings that have become airborne. In its early stages, the condition presents similar to the flu, but the disease progresses very quickly as it attacks the patient's lungs and other organs. Hantavirus is treatable if detected early, but has a mortality rate of approximately 30% because it is often misdiagnosed.

Chapter 246-101 WAC sets out protocols for public health officials, health care providers and others for "Notifiable Conditions." Hantavirus is a notifiable condition, and health care providers must report instances of the condition to the health department within 24 hours. *See* WAC 246-101-101. Upon receipt of a report of a notifiable condition, the local health department "shall . . . [r]eview and determine appropriate action for . . . [e]ach reported case or suspected case of a notifiable condition." *See* WAC 246-101-505(1)(a) (brackets added).

Approximately two months prior to Brian's death, a woman from Redmond, Maureen Waterbury, had also contracted the Hantavirus. A nurse, Waterbury recognized her symptoms were abnormal and severe, and obtained immediate and ultimately life-saving treatment. Thereafter, her condition was reported to the King County Health Department. The Health Department's Local Health Officer, Dr. Jeffrey Duchin, investigated. Duchin initially deemed the incident to be isolated and declined to notify area providers. Nearly a month following Brian's death, however, after a local media outlet contacted Duchin to inform him it planned to release a story about the Hantavirus outbreak, Duchin issued a public health advisory. At

least one person became infected with the Hantavirus after the advisory was issued. Having been advised of the outbreak, her provider correctly diagnosed her condition and she survived.

Brian's wife, Sandra Ehrhart, filed a complaint for negligence and wrongful death against King County on behalf of herself and her husband's estate.¹ In its answer, King County asserted discretionary immunity and argued Ehrhart's claims were barred by the public duty doctrine. Ehrhart filed a motion for partial summary judgment, maintaining 1) King County's decision to not issue an advisory was operational in nature, and thus not entitled to discretionary immunity, and 2) regarding the public duty doctrine, this case falls within the "failure to enforce" and the "rescue doctrine" exceptions. In response, the County abandoned its discretionary immunity argument, but reiterated that the public duty doctrine bars Ehrhart's claims.

The trial court denied Ehrhart's motion with respect to the rescue doctrine, but issued a "conditional" grant of partial summary judgment to Ehrhart regarding applicability of the failure to enforce exception. King County filed a Motion for Discretionary Review, which this Court granted.

III. ISSUE PRESENTED

Should the Court abandon the public duty doctrine?

IV. SUMMARY OF ARGUMENT

Following the Legislature's waiver of immunity from suit for the government's tortious conduct, the Court developed the public duty doctrine

¹ Swedish Hospital and Dr. Justin Reif were also named as defendants, but they are not parties to this appeal.

to determine whether a statutory or regulatory duty imposed upon a public entity was owed to a nebulous public or to a particular person or class of persons. Since its adoption, judges and commentators have lamented the confusion the doctrine inserts into tort duty analysis, as well as its inconsistency with the statutory waiver of sovereign immunity. This Court has never squarely addressed whether the doctrine should be abandoned.

The rule of stare decisis provides that precedent will not be overruled unless it is shown to be incorrect and harmful. The public duty doctrine is incorrect because it conflicts with the Legislature's mandate that the State is liable in tort to the same extent as private entities, whether acting in its governmental or proprietary capacity. It is harmful because it undermines the public interest, by denying aggrieved parties rightful claims, disrupting the separation of powers and introducing confusion into tort duty analysis.

Moreover, whatever purpose the public duty doctrine served at its inception, this Court's clarification that it is inapplicable to common law claims limits its relevance to whether an actionable duty inheres in a statute, regulation or ordinance. This inquiry can be accomplished with greater consistency through use of the implied cause of action doctrine. Eliminating the public duty doctrine in favor of the implied cause of action doctrine – a test used in tort duty analysis for private and public entities alike – has the benefit of better comporting with the legislative mandate that the State shall be liable in tort to the same extent as private entities. The time has come for

the Court to critically examine whether the public duty doctrine offers any helpful guidance in tort duty analysis under Washington law.

V. ARGUMENT

In its oral ruling, the trial court expressed confusion shared by many regarding application of the public duty doctrine in Washington:

The public duty doctrine has frustrated me for years. I mean, the reason is because originally I think the statute was passed in 1967 where the State abolished sovereign immunity and said that public entities will be liable to the same extent as an individual person, a private citizen. . . . The public duty doctrine was essentially adopted without any analysis; it was almost a footnote, in fact, from another jurisdiction. And ever since then, there has been nothing but inconsistency in the case law. The best that practitioners, both lawyers and courts, can do is to try and find a case that's factually similar and hope there's reasoning that makes sense in that decision.

Trial Court's Oral Ruling on Ehrhart's Motion for Partial Summary Judgment, App. to King County Mot. for Disc. Rev. at 147.

The trial court is not alone. Since its adoption, the public duty doctrine has generated confusion and in some cases extended a layer of immunity to public entities that is contrary to the Legislature's intent. Commentators in Washington and around the country have discussed the unpredictability the doctrine inserts into tort duty analysis. *See, e.g.*, Lee C. Baxter, *Gonzales v. City of Bozeman: The Public Duty Doctrine's Unconstitutional Treatment of Government Defendants in Tort Claims*, 72 Mont. L. Rev. 299, 308-15 (2011); Aaron R. Baker, Comment, *Untangling the Public Duty Doctrine*, 10 Roger Williams U. L. Rev. 731, 747 (Spring 2005); Shelly K. Speir, *The Public Duty Doctrine and Municipal Liability for Negligent Administration of Zoning Codes*, 20 Seattle U. L. Rev. 803

(1997). Based on these concerns, as well as separation of powers considerations, many courts have narrowed or abandoned altogether the public duty doctrine. *See Coleman v. East Joliet Fire Protection Dist.*, 46 N.E.3d 741, 755, 757 (Ill. 2016) (surveying case law and concluding that "the time has come to abandon the public duty rule" because "the underlying purposes of the public duty rule are better served by application of tort principles and the immunity protection afforded by statutes"); *see also Southers v. City of Farmington*, 263 S.W.3d 603 (Mo. 2008); *Jean W. v. Commonwealth*, 610 N.E.2d 305, 313 (Mass. 1993), *superseded by statute as stated in Coleman*, 46 N.E.3d at 754; *Hopkins v. State*, 702 P.2d 311 (Kan. 1985); *Adams v. State*, 555 P.2d 235 (Alaska 1976).

Recent developments in Washington jurisprudence, along with the complications associated with the public duty doctrine, provide warrant for the Court to address whether there is any remaining value to the continued use of the doctrine. The Court should take this opportunity to determine whether the public duty doctrine should be abandoned in favor of recognized principles that apply to public and private entities alike.

A. Background Regarding The Waiver Of Sovereign Immunity And The Public Duty Doctrine.

The State Constitution affords the Legislature the authority to determine whether and to what degree the government shall be liable in tort. *See Wash. Const. art. II § 26* (providing the "legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state"). For more than seventy years after Washington gained statehood, the

government enjoyed immunity from suit. However, in 1961 the Legislature waived the State's sovereign immunity for its tortious conduct. *See* Laws of 1961, ch. 136, § 1 (codified at RCW 4.92.090). Soon after it waived immunity for the tortious acts of local governmental entities as well. *See* Laws of 1963, ch. 159, § 2 (codified at RCW 4.96.010).²

Washington's waiver statute is "one of the broadest waivers of sovereign immunity in the country." *Savage v. State*, 127 Wn.2d 434, 444, 899 P.2d 1270 (1995); *see also* Comment, *Abolition of Sovereign Immunity in Washington*, 36 Wash. L. Rev. 312, 313 (1961). Pursuant to the waiver, the State is presumptively liable for its tortious conduct "in all instances in which the Legislature has *not* indicated otherwise." *Savage*, 127 Wn.2d at 444-45. Importantly, the waiver statute places governmental and proprietary acts on an equal footing, providing:

The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

RCW 4.92.090.

The legislative waiver required the Court to address separation of powers concerns that had previously been unnecessary under the reign of sovereign immunity. In the seminal case of *Evangelical United Brethren Church of Adna v. State*, 67 Wn.2d 246, 407 P.2d 440 (1965), the Court recognized that while the State had waived immunity for its tortious conduct, to be liable, government conduct must in fact be *tortious*, as opposed to

² The full text of the current versions of RCW 4.92.090 & RCW 4.96.010 are reproduced in the Appendix to this brief.

conduct related to governance. *See generally Evangelical*, 67 Wn.2d at 252-53 (recognizing "it is not a tort for government to govern") (citation omitted); *see also Munich v. Skagit Emer. Comm. Ctr.*, 175 Wn.2d 871, 887-88, 288 P.3d 328 (2012) (Chambers, J., concurring) (observing "[p]rivate persons do not govern, pass laws, or hold elections. Private persons are not required by statute or ordinance to issue permits, inspect buildings, or maintain the peace and dignity of the state of Washington" (brackets added)).

Two distinct but related concerns regarding governmental accountability emerged after the statutory waiver. First, the view that the legislative branch of government should have the discretion to legislate at the policy level led the Court to recognize the doctrine of discretionary immunity. *See Evangelical*, 67 Wn.2d at 252-53; *King v. Seattle*, 84 Wn.2d 239, 246, 525 P.2d 228 (1974). This "extremely limited exception" to liability ensured that courts "refuse to pass judgments on policy decisions in the province of coordinate branches of government." *Stewart v. State*, 92 Wn.2d 285, 293, 597 P.2d 101 (1979) (quoting *King*, 84 Wn.2d at 246). To be applicable, the government must demonstrate "that a policy decision, consciously balancing risks and advantages, took place." *Stewart*, 92 Wn.2d at 293. "[D]iscretionary immunity is narrow and applies only to basic policy decisions made by a high-level executive." *Taggart v. State*, 118 Wn.2d 195, 215, 822 P.2d 243 (1992) (brackets added).

Discretionary immunity is limited to policy decisions; the fact that an operational decision requires discretion does not entitle it to immunity:

A governmental entity's exercise of discretionary acts at a basic policy level is immune from suit, whereas the exercise of discretionary acts at an operational level is not. The purpose of such an exception is to preserve the integrity of our system of government by ensuring that each coordinate branch of government may freely make basic policy decisions.

Chambers-Castanes v. King County, 100 Wn.2d 451, 456, 669 P.2d 451 (1983) (citation omitted); *see also Bailey v. Town of Forks*, 108 Wn.2d 262, 265, 737 P.2d 1257 (1987) (noting "discretionary policymaking decisions remain protected from suit," but "[d]iscretionary decisions by police officers in the field . . . are not immune" (brackets added)).

A second consideration arising out of the waiver was the concern that government may in some cases be obligated to perform tasks that may not have been intended to benefit individuals, and were instead merely "hortatory" duties intended only to provide a service to the public as a whole. *See Osborn v. Mason County*, 157 Wn.2d 18, 28, 134 P.3d 197 (2006). The public duty doctrine emerged as a court-crafted tool to examine whether, in particular instances, a duty imposed on a public entity was owed to the public at large or to an individual or class of persons. *See Campbell v. Bellevue*, 85 Wn.2d 1, 530 P.2d 234 (1975); *Bailey*, 108 Wn.2d at 265-68. Only in the latter case would a duty be actionable in tort. *See Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 457 (1988). Duties imposed upon government were generally understood to be owed to the public as a whole unless one of four exceptions was met: 1) the special relationship exception; 2) the rescue doctrine exception; 3) the legislative intent exception; or 4) the failure to enforce exception. *See Bailey*, 108 Wn.2d at 268.

Subsequent case law has refined the public duty doctrine in several important ways. First, the Court has clarified that the doctrine did not afford immunity for tortious conduct. Rather, it is a "focusing tool" used to ascertain whether a government defendant owes a duty to a particular person or class of persons, or instead to the public as a whole. *See Osborn*, 157 Wn.2d at 27-28; *Washburn v. City of Federal Way*, 178 Wn.2d 732, 754, 310 P.3d 1275 (2013). Second, the exceptions to the doctrine are not exhaustive, and the Court has identified other bases for liability outside the four exceptions. *See Bailey*, 108 Wn.2d at 268 (recognizing duty for proprietary actions);³ *Taggart*, 118 at 254 n.4 (recognizing *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983) "effectively created another exception to the doctrine").

A third refinement came in a concurring opinion issued by Justice Chambers in *Munich*, 175 Wn.2d at 886 (Chambers, J., concurring).⁴ Reviewing case law since the doctrine's inception, Justice Chambers observed that "[a]lthough we could have been more careful in our analysis, the only governmental duties we have limited by application of the public duty doctrine are duties imposed by a statute or ordinance, or regulation." *Id.*

³ It is unclear what relevance the governmental/proprietary distinction retains. The distinction has been difficult to apply with consistency. *See, e.g.*, Hugh Spitzer, *Realigning the Governmental/Proprietary Distinction in Municipal Law*, 40 Seattle U. L. Rev. 173, 175-79 (2016). While this Court in *Bailey* interpreted *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983), as constituting an exception to the public duty doctrine for "proprietary" functions of government, *see* 108 Wn.2d 268, others appear to conceive of *Petersen* as simply applying a common law duty, which is outside the reach of the doctrine. *See, e.g.*, *Hertog v. City of Seattle*, 138 Wn.2d 265, 276, 979 P.2d 400 (1999); *Munich*, 175 Wn.2d at 891 (Chambers, J., concurring). This characterization of *Petersen* appears to better comport with the Legislature's intent as expressed in the waiver statute, that the State is subject to suit whether acting in its governmental or proprietary capacity. *See* RCW 4.92.090.

⁴ Justice Chambers' concurrence in *Munich* was joined by a majority of justices and is considered precedential. *See Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 550 n.8, 442 P.3d 608 (2019); *Mita v. Guardsmark, LLC*, 182 Wn. App. 76 n.2, 328 P.3d 962 (2014).

(brackets added). Recently, the Court again confirmed that "[t]his court has never held that a government did not have a *common law* duty solely because of the public duty doctrine." *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 549-50, 442 P.3d 608 (2018) (brackets added) (quoting *Munich*, 175 Wn.2d at 886-87). The Court reasoned that "[t]o apply the doctrine so broadly would inappropriately lead to a partial restoration of immunity by carving out an exception to ordinary tort liability for government entities." *Beltran-Serrano*, 193 Wn.2d at 550 (brackets added). Instead, the doctrine is applicable only when "special government obligations are imposed by statute or ordinance." *Id.*, 193 Wn.2d at 549.

B. This Court Should Abandon The Public Duty Doctrine.

1. The Court should take this opportunity to address the continued vitality of the public duty doctrine.

Ehrhart argues in her Opening Brief that the continued vitality of the public duty doctrine should be examined. *See* Ehrhart Op. Br. at 36. The County offers a substantive argument in its Reply that the doctrine should be retained. *See* County Reply at 20-24. While Ehrhart's argument is raised for the first time in her opening brief, "[a] party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground." RAP 2.5(a) (brackets added).

Moreover, a critical examination of the public duty doctrine is long overdue. Since the adoption of the public duty doctrine, many have expressed concern that the doctrine introduces confusion and instability into

tort law and entrenches a modified form of immunity that is inconsistent with the Legislature's intent as expressed in the waiver statutes. A number of justices have urged the Court to critically examine the doctrine. *See, e.g., Cummins v. Lewis County*, 156 Wn.2d 844, 133 P.3d 458 (2006) (Chambers, J., concurring) (arguing "[t]he public duty doctrine undercuts legislative intent, is harmful, and should either be abandoned or restored to its original limited function" (brackets added)); *Beal v. City of Seattle*, 134 Wn.2d 769, 794, 954 P.2d 237 (1998) (Talmadge, J., dissenting) (noting the doctrine "had been seriously criticized," and urging that "[i]f we wish to eliminate the public duty doctrine in its entirety, we should say so" (brackets added)); *Bailey*, 108 Wn.2d at 267 (recognizing that the "myriad exceptions may well reveal that the exceptions have virtually consumed the rule," but declining "to reweigh the pros and cons of the public duty doctrine"); *J & B Dev. Co. Inc. v. King County*, 100 Wn.2d 299, 669 P.3d 468 (1983) (Utter, J., concurring) (urging the Court "should eliminate the 'public duty doctrine' and simply apply general principles of tort law"), *overruled on other grounds by Meaney v. Dodd*, 111 Wn.2d 174, 180, 759 P.2d 455 (1988).⁵

This Court has never squarely examined whether the public duty doctrine should be eliminated in Washington. In 2006, the Court was urged to abandon the doctrine, but noting the parties had not briefed the question,

⁵ Courts of appeals have also been urged to abandon the public duty doctrine, but have uniformly declined to do so because this Court has not addressed the issue. *See, e.g., Johnson v. State*, 164 Wn. App. 740, 754, 265 P.3d 199 (2011) (noting that "[u]ntil such time as our Supreme Court overrules itself, we are bound by its holding that the public duty doctrine applies in the State of Washington" (brackets added)); *Weaver v. Spokane County*, 168 Wn. App. 127, 143, 275 P.3d 1184 (2012) (same).

the Court did not reach the issue. *See Cummins*, 156 Wn.2d at 850 & n.4.⁶ Instead, the Court clarified that the doctrine is not an immunity, but is instead a "focusing tool" for determining whether a duty owed by a public entity is owed to the public as a whole, or instead to an identifiable class of persons:

Because a public entity is liable in tort "to the same extent as if it were a private person or corporation," former RCW 4.92.090 (1963) (state) *and* former 4.96.010 (1967) (municipality), the public duty doctrine does not—cannot—provide immunity from liability. Rather, it is a "focusing tool" we use to determine whether a public entity owed a duty to a "nebulous public" or a particular individual... 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.

Osborn, 157 Wn.2d at 27.

Despite the Court's clarification of the doctrine as a focusing tool, the reasons to critically examine the public duty doctrine remain. Confusion and inconsistency persist. The doctrine runs afoul of the Legislature's intent as expressed in the waiver statute, that the State is liable in tort "to the same extent as it were a private entity," whether "acting in its governmental or proprietary capacity." RCW 4.92.090. And, plaintiffs injured by the tortious conduct of public entities face the added and sometimes insurmountable burden of overcoming the presumptive bar to liability uniquely applicable to government. The Court should take this opportunity to examine the continued vitality of the public duty doctrine.

2. The public duty doctrine is incorrect and harmful and should be abandoned.

⁶ WSAJ Foundation appeared as amicus curiae in *Cummins* and *Osborn*, and urged the Court to abandon the public duty doctrine.

The rule of stare decisis "requires a clear showing that an established rule is incorrect and harmful before it is abandoned." *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004). Incorrectness and harmfulness must both be established to warrant overturning existing precedent. *See State v. Barber*, 170 Wn.2d 854, 864, 248 P.3d 494 (2011).

a. The public duty doctrine is incorrect.

For stare decisis purposes, precedent may be deemed incorrect where it is inconsistent with this Court's precedent, with the state constitution, with state statutes or with pertinent public policy considerations. *See Barber*, 170 Wn.2d at 864-65. The public duty doctrine is incorrect because it inserts a special framework for examining tort duties that is unique to government and is contrary to the Legislature's intent. In the waiver statute, the Legislature expressly provides that government shall be liable "to the same extent" as private entities, "whether acting in its governmental or proprietary capacity." RCW 4.92.090. In formulating and applying the doctrine, "the courts have conflicted with the clear intent of our Legislature to abolish sovereign immunity." *Babcock v. Mason County*, 144 Wn.2d 774, 802-03, 30 P.3d 1261 (2001); *see also Chambers-Castanes*, 100 Wn.2d at 291 (Utter, J., concurring) (criticizing the public duty doctrine as "a rather flagrant exercise of judicial lawmaking where the Legislature has already spoken"). Despite the Court's clarification that the doctrine should operate as a focusing tool for ascertaining whether a duty is owed to the plaintiff, in practice it continues to be characterized as, and in some cases function as, an additional

layer of immunity. *See, e.g., Barker v. Town of Ruston*, No. 77745-9-I, 2018 WL 2095685 at *2 (Wash. Ct. App. May 7, 2018) (characterizing the public duty doctrine as one that "immunizes a public official from liability for his negligent conduct unless the injured plaintiff shows that the official owed the duty breached to the plaintiff individually"); *Oliver v. Cook*, 194 Wn. App. 532, 536, 377 P.3d 265 (2016) (County arguing "it was immune from liability under the public duty doctrine"); *Pope v. Douglas County*, 158 Wn. App. 23, 27, 241 P.3d 797 (2010) (stating "[t]he public duty doctrine . . . provides immunity to fire fighters in the performance of their duties" (brackets added; citation omitted)); *Conine v. County of Snohomish*, No. 57961-4-I, 2007 WL 1398846 at *6 (Wash. Ct. App. May 14 2007) (concluding management of public streets "is a governmental function for which public entities are immune").

In some cases, it is not simply a misstatement; functional immunity is afforded for conduct solely because it is undertaken by, or for, government, when it would otherwise be reachable in tort if performed in the private sector. Take, for instance, the court of appeals' recent examination of the public duty doctrine in *Dahl v. Fino*, No. 51445-9-II, 2019 WL 4274076 (Sep. 10, 2019).⁷ There, an inmate committed suicide in jail following an attack by fellow inmates. A private doctor, Gina Fino, was hired by the County Coroner to conduct an autopsy, which she allegedly performed

⁷ *Dahl* is an unreported opinion. Unreported opinions may be cited for their persuasive value as nonbinding authorities, *see* GR 14.1. This brief examines *Dahl* only to illustrate the layer of immunity that can sometimes be extended under public duty doctrine analysis.

negligently. The inmate's estate sued Fino, and Fino moved for summary judgment, relying on the public duty doctrine. The court summarized her position: "Fino argues that Dahl cannot establish that she owes a duty to *him* 'to conduct an autopsy of his son's body in accordance with the degree of skill, ability and learning common to forensic pathologists rather than to the public in general.'" 2019 WL 4274076 at *2. The court denied the motion, but the court of appeals reversed. It reasoned that because Fino was directed by the County Coroner to conduct the autopsy, it "was a governmental function performed for a public purpose. As a result, unless an exception applies, the public duty doctrine bars [the] claim." 2019 WL 4274076 at *3 (brackets added). Significantly, had Fino *not* been hired by the County, she would have had a duty to conduct the autopsy with reasonable care for the benefit of those who may be foreseeably harmed by her negligent conduct. *See N.L. v. Bethel Sch. Dist.*, 186 Wn.2d 422, 378 P.3d 162 (2016). The *identical conduct* performed in the private sector would have been subject to a duty of reasonable care and evaluated under traditional tort principles, but under the court's analysis, the public duty doctrine extended what functioned as immunity, solely because Fino acted under the direction of government. This squarely conflicts with the Legislature's edict that a public entity "shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation." RCW 4.92.090.

b. The public duty doctrine is harmful.

The continued application of the public duty doctrine is also harmful. The "harm" standard may be satisfied in a variety of ways, but the "common thread" among decisions deemed harmful is a detrimental effect on the public interest. *Barber*, 170 Wn.2d at 865. Under this general principle, a decision may be deemed harmful where it deprives aggrieved parties of a rightful claim, *see Rose v. Anderson Hay and Grain Co.*, 184 Wn.2d 268, 282, 358 P.3d 1139 (2015), undermines the purposes of a statute and "risks offending the separation of powers doctrine," *see Barber*, 170 Wn.2d at 871, or creates confusing and inconsistent precedent, *see Rose*, 184 Wn.2d at 286.

Several of these public interest concerns are implicated by application of the public duty doctrine. First, as illustrated by the *Dano* case, aggrieved plaintiffs may be denied rightful claims as a result of its application. Second, use of the public duty doctrine overlooks that government is liable for its tortious conduct, *whether governmental or proprietary*, to the same extent as a private entity. Extending a unique protection for governmental conduct conflicts with the statutory waiver, invading the Legislature's authority to establish the scope of the State's tort liability and disrupting the separation of powers doctrine. Finally, confusion and frustration has persisted under the doctrine, as expressed by the trial court below as well as other Washington courts. *See, e.g., Timson v. Pierce County*, 136 Wn. App. 376, 386, 149 P.3d 427 (2006) (noting "the confusion surrounding the public duty doctrine"); *Cummins*, 156 Wn.2d at 861 (Chambers, J., concurring) (observing "this court continues to confuse and

misapply the public duty doctrine"); *Babcock*, 144 Wn.2d at 795 (Chambers, J., concurring) (recognizing "[t]he public duty doctrine injects confusion into the law" (brackets added)); *Babcock v. State*, 116 Wn.2d 596, 641, 809 P.2d 143 (1991) (Andersen, J., concurring in part and dissenting in part) (noting confusion about the relationship between the doctrine of immunity and the public duty doctrine).

In sum, the public duty doctrine is incorrect and harmful and should be abandoned in favor of a framework that offers greater consistency in tort duty analysis and is equally applicable to public and private entities alike.

3. The public duty doctrine's narrowed function – to ascertain whether a duty owed by a public entity inheres in a statute, regulation or ordinance – can be better accomplished by application of the implied cause of action doctrine.

As clarified by this Court's recent public duty jurisprudence, in Washington the public duty doctrine does not apply to claims asserted under the common law. *See Beltran-Serrano*, 193 Wn.2d at 549-50; *Munich*, 175 Wn.2d at 886-87; *Mita v. Guardsmark, LLC*, 182 Wn. App. 76, 83 n.2, 328 P.3d 962 (2014). Rather, "the public duty doctrine comes into play when special governmental obligations are imposed by statute or ordinance." *Beltran-Serrano*, 193 Wn.2d at 549. Presumably, in such cases the public duty doctrine would be employed to ascertain whether a duty imposed by a statute, regulation or ordinance was "owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general." *Taylor*, 111 Wn.2d at 163.

Outside the public duty context, the Court has adopted and significantly refined its framework for determining whether an actionable duty inheres directly under a statute, regulation or ordinance. *See Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990); *see also Swank v. Valley Christian Sch. Dist.*, 188 Wn.2d 663, 398 P.3d 1108 (2017); *Kim v. Lakeside Adult Family Home*, 185 Wn.2d 532, 374 P.3d 121 (2016). In the absence of an express provision creating a cause of action, the Court uses the three-part test adopted in *Bennett*, 113 Wn.2d at 920-21, to determine whether a cause of action may be implied. The elements of the *Bennett* test are 1) whether the plaintiff is within the class of persons for whose “especial” benefit the statute was enacted; 2) whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and 3) whether implying a remedy is consistent with the underlying purpose of the legislation. *See id.* All three must be present for a cause of action to be found.

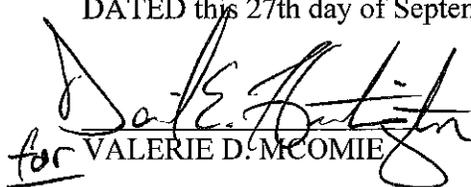
Significantly, the primary justification for the public duty doctrine – to ascertain whether a duty is owed to the public or to an individual plaintiff or class of persons – is incorporated into the first element of the *Bennett* test. *See Bennett*, 113 Wn.2d at 920 (stating the first factor inquires “whether the plaintiff is within the class of persons for whose ‘especial’ benefit the statute was enacted”). Given the statutory mandate that government is liable “to the same extent as if it were a private person or corporation,” RCW 4.92.090, it would appear more consistent with legislative intent to employ the same test

for both public and private defendants in determining whether a cause of action arises out of a statute, regulation or ordinance.⁸

VI. CONCLUSION

While the rule of stare decisis endeavors to preserve precedent, that rule "does not compel [the Court] to follow a past decision when its rationale no longer withstands careful analysis." *Rose*, 184 Wn.2d at 282 (brackets added). The public duty doctrine conflicts with the Legislature's intent as expressed in the waiver statute, deprives aggrieved parties of rightful claims, and injects confusion and inconsistency into tort law. The "slow dismemberment by exception" of the doctrine, *Chambers-Castanes*, 100 Wn.2d at 293 (Utter, J., concurring), combined with the Court's more recent rulings that the doctrine does not apply to common law claims, has dramatically narrowed its application. Whatever remaining purpose the doctrine may arguably serve can be better accomplished through application of the implied cause of action doctrine, without the complications that have plagued the public duty doctrine under Washington law. The Court should abandon the public duty doctrine for the reasons presented in this brief.

DATED this 27th day of September, 2019.


for VALERIE D. MCOMIE


DANIEL E. HUNTINGTON

On behalf of
Washington State Association for Justice Foundation

⁸ The overlap between the public duty and implied cause of action inquiries has led the Court to apply both doctrines in the same case where a question of a governmental duty was at issue. See *Fisk v. City of Kirkland*, 164 Wn.2d 891, 194 P.3d 984 (2008).

APPENDIX

RCW 4.92.090

Tortious conduct of state—Liability for damages.

The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

[**1963 c 159 § 2; 1961 c 136 § 1.**]

RCW 4.96.010

Tortious conduct of local governmental entities—Liability for damages.

(1) All 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, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation. Filing a claim for damages within the time allowed by law shall be a condition precedent to the commencement of any action claiming damages. The laws specifying the content for such claims shall be liberally construed so that substantial compliance therewith will be deemed satisfactory.

(2) Unless the context clearly requires otherwise, for the purposes of this chapter, "local governmental entity" means a county, city, town, special district, municipal corporation as defined in RCW 39.50.010, quasi-municipal corporation, any joint municipal utility services authority, any entity created by public agencies under RCW 39.34.030, or public hospital.

(3) For the purposes of this chapter, "volunteer" is defined according to RCW 51.12.035.

[2011 c 258 § 10; 2001 c 119 § 1; 1993 c 449 § 2; 1967 c 164 § 1.]

NOTES:

Short title—Purpose—Intent—2011 c 258: See RCW 39.106.010.

Purpose—1993 c 449: "This act is designed to provide a single, uniform procedure for bringing a claim for damages against a local governmental entity. The existing procedures, contained in chapter 36.45 RCW, counties, chapter 35.31 RCW, cities and towns, chapter 35A.31 RCW, optional municipal code, and chapter 4.96 RCW, other political subdivisions, municipal corporations, and quasi-municipal corporations, are revised and consolidated into chapter 4.96 RCW." [1993 c 449 § 1.]

Severability—1993 c 449: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not

affected." [1993 c 449 § 15.]

Purpose—1967 c 164: "It is the purpose of this act to extend the doctrine established in chapter 136, Laws of 1961, as amended, to all political subdivisions, municipal corporations and quasi municipal corporations of the state." [1967 c 164 § 17.]

Severability—1967 c 164: "If any provision of this act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [1967 c 164 § 18.]

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of September, 2019, I electronically filed with the Clerk of the Court using the Washington State Appellate Courts Portal and also served via email the foregoing document to the following:

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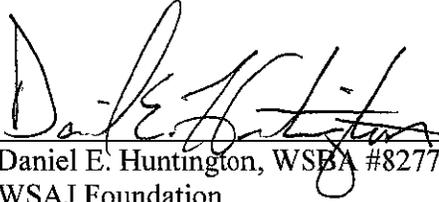
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