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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,

Respondent,

v.

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

Petitioner,

JUSTIN WARREN REIF, an individual,

Defendant.

**PETITIONER KING COUNTY'S RESPONSE TO AMICUS BRIEF
OF WASHINGTON STATE ASSOCIATION FOR
JUSTICE FOUNDATION**

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TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. ARGUMENT 2

 A. WSAJF Focuses on Issues Not Properly Before the Court..... 2

 B. WSAJF Does Not Meet the High Burden for Overturning
 Precedent 4

 1. WSAJF Fails to Show the Public Duty Doctrine Is
 Incorrect 4

 2. WSAJF Fails to Show the Public Duty Doctrine Is
 Harmful 8

 C. WSAJF’s Reliance on the Implied Cause of Action
 Doctrine Is Belated and Unworkable 11

 D. Overruling the Public Duty Doctrine or Replacing It With
 the Implied Cause of Action Doctrine Would Not Create
 County Liability Here..... 15

III. CONCLUSION 16

TABLE OF AUTHORITIES

State Cases

<i>Babcock v. Mason Cty. Fire Dist. No. 6</i> , 144 Wn.2d 774, 30 P.3d 1261 (2001).....	5
<i>Babcock v. State</i> , 116 Wn.2d 596, 809 P.2d 143 (1991).....	10
<i>Bailey v. Town of Forks</i> , 108 Wn.2d 262, 737 P.2d 1257 (1987).....	8
<i>Beal v. City of Seattle</i> , 134 Wn.2d 769, 954 P.2d 237 (1998).....	8
<i>Bennett v. Hardy</i> , 113 Wn.2d 912, 784 P.2d 1258 (1990).....	13, 15
<i>Chambers-Castanes v. King Cty.</i> , 100 Wn.2d 275, 669 P.2d 451 (1983).....	4, 9
<i>Crisman v. Pierce Cty. Fire Prot. Dist. No. 21</i> , 115 Wn. App. 16, 60 P.3d 652 (2002).....	16
<i>Cummins v. Lewis Cty.</i> , 156 Wn.2d 844, 133 P.3d 458 (2006).....	2, 7, 11
<i>Dahl v. Fino</i> , No. 51455-9-II, 2019 WL 4274076 (Wash. Ct. App. Sept. 10, 2019) (unpublished).....	6, 7, 9
<i>Darkenwald v. State, Emp't Sec. Dep't</i> , 183 Wn.2d 237, 350 P.3d 647 (2015).....	3
<i>Edgar v. State</i> , 92 Wn.2d 217, 595 P.2d 534 (1979).....	4
<i>Fisk v. City of Kirkland</i> , 164 Wn.2d 891, 194 P.3d 984 (2008).....	passim

<i>J & B Dev. Co. Inc. v. King Cty.</i> , 100 Wn.2d 299, 669 P.2d 468 (1983), <i>overruled on other grounds</i> , <i>Honcoop v. State</i> , 111 Wn.2d 182, 759 P.2d 1188 (1988)	9
<i>Key Design Inc. v. Moser</i> , 138 Wn.2d 875, 983 P.2d 653 (1999).....	4
<i>Kitsap Cty. v. Allstate Ins. Co.</i> , 136 Wn.2d 567, 964 P.2d 1173 (1998).....	7
<i>Long v. Odell</i> , 60 Wn.2d 151, 372 P.2d 548 (1962).....	11
<i>Madison v. State</i> , 161 Wn.2d 85, 163 P.3d 757 (2007).....	11
<i>Meaney v. Dodd</i> , 111 Wn.2d 174, 759 P.2d 455 (1988).....	9
<i>Mohr v. Grant</i> , 153 Wn.2d 812, 108 P.3d 768 (2005).....	3
<i>Moore v. Wayman</i> , 85 Wn. App. 710, 934 P.2d 707 (1997)	9
<i>Munich v. Skagit Emergency Commc'n Ctr.</i> , 175 Wn.2d 871, 288 P.3d 328 (2012).....	passim
<i>Osborn v. Mason Cty.</i> , 157 Wn.2d 18, 134 P.3d 197 (2006).....	5, 8, 12, 15
<i>State v. Gonzalez</i> , 110 Wn.2d 738, 757 P.2d 925 (1988).....	11
<i>State v. Otton</i> , 185 Wn.2d 673, 374 P.3d 1108 (2016).....	4
<i>Taylor v. Stevens Cty.</i> , 111 Wn.2d 159, 759 P.2d 447 (1988).....	9, 12
<i>Timson v. Pierce Cty. Fire Dist. No. 15</i> , 136 Wn. App. 376, 149 P.3d 427 (2006)	9, 10

State Statutes

RCW 4.92.090 7
RCW 4.96.010 7
RCW 68.50.015 6, 7

State Rules

RAP 2.5(a) 3

State Regulations

WAC 246-101-005..... 16
WAC 246-101-505..... 1, 15, 16

I. INTRODUCTION

The brief of Washington State Association for Justice Foundation (“WSAJF” or “Amicus”) focuses on two issues that are not properly before the Court: (1) whether the public duty doctrine and 50 years of precedent should be overturned and (2) whether the public duty doctrine should be replaced with the implied cause of action doctrine. The Court need not consider either question because neither were properly raised by the Estate.

Even if the Court takes up these new questions, the answer to both is no. With respect to overturning the public duty doctrine, like the Estate, WSAJF merely raises arguments this Court has already rejected. Regarding the implied cause of action doctrine, WSAJF fails to demonstrate how application of that doctrine would apply to tort claims and ensure that governments are not held liable simply for carrying out their statutory government functions.

Moreover, as WSAJF implicitly concedes, abolishing the public duty doctrine would not create County liability here. This is because the regulatory mandate in WAC 246-101-505 to “[r]eview and determine appropriate action” in response to a notifiable condition does not create a duty to individuals. Private doctors are not under any such obligation. And WSAJF does not argue otherwise. Nor does WSAJF claim a

common law duty to issue a Health Advisory, let alone after a single case of a noncontagious disease.

In sum, none of WSAJF's arguments have merit. This Court should therefore reverse and dismiss the Estate's tort claims against King County as a matter of law.

II. ARGUMENT

A. WSAJF Focuses on Issues Not Properly Before the Court.

WSAJF piggybacks on the Estate's merits brief by urging the Court to abandon the public duty doctrine and over 50 years of precedent. Br. of Amicus Curiae WSAJF ("WSAJF Br.") at 11-18. But as King County previously noted and as WSAJF concedes, the Estate did not raise this argument in opposition to King County's Motion for Discretionary Review or Statement of Grounds for Direct Review. *Id.* at 11; King Cty. Reply Br. at 20. The Court can therefore refuse to consider WSAJF's request on this ground alone. *See Cummins v. Lewis Cty.*, 156 Wn.2d 844, 850 n.4, 851, 133 P.3d 458 (2006) (declining amici's request to overturn public duty doctrine based on "well-established maxim" that this Court need not consider "arguments raised for the first time in a supplemental brief and not made originally by the petitioner or respondent within the petition for review or the response to [the] petition").

Recognizing this, WSAJF cites to RAP 2.5(a) for the proposition that a “party may present a ground for affirm[ance]” which was “not presented to the trial court” so long as “the record has been sufficiently developed[.]” WSAJF Br. at 11 (internal quotations omitted). WSAJF cannot rely on RAP 2.5(a) for two reasons. First, the rule applies only to “part[ies],” which WSAJF is not. *See Darkenwald v. State, Emp’t Sec. Dep’t*, 183 Wn.2d 237, 245 n.3, 350 P.3d 647 (2015) (declining to consider the belatedly raised argument advanced by amici and petitioner because “RAP 2.5(a) . . . deems arguments waived if the **litigant** failed to raise them before the trial court” (emphasis added)); *Mohr v. Grant*, 153 Wn.2d 812, 830 n.11, 108 P.3d 768 (2005) (citing RAP 2.5(a) for the proposition that the Court does “not consider an issue raised only by amicus and not asserted by the parties”).¹ Second, WSAJF does not argue that rejecting the public duty doctrine and adopting the implied cause of action approach would result in affirmance of the trial court. WSAJF argues only that the Court take the opportunity to “abandon the public duty doctrine[.]” WSAJF Br. at 20; *see also* Sect. II.D, *infra*.

Accordingly, the Court need not entertain either issue advanced by WSAJF.

¹ Moreover, employing the rule for this purpose now would contradict the Estate’s recent, albeit incorrect, argument that the record is “undeveloped[.]” Estate Opp’n to Mot. Strike Suppl. CP at 2; King Cty. Reply in Supp. Mot. Strike Suppl. CP at 5.

B. WSAJF Does Not Meet the High Burden for Overturning Precedent.

WSAJF’s claim that the Court should abandon the public duty doctrine also fails on the merits. Like the Estate, WSAJF does not make a “clear showing” that the public duty doctrine is “both incorrect **and** harmful.” *State v. Otton*, 185 Wn.2d 673, 678, 687-88, 374 P.3d 1108 (2016) (internal quotations omitted and emphasis in original).

1. WSAJF Fails to Show the Public Duty Doctrine Is Incorrect.

WSAJF merely echoes arguments that the Court has already addressed throughout its public duty doctrine jurisprudence. For example, the primary reason WSAJF offers for the alleged incorrectness of the public duty doctrine is that it conflicts with the Legislature’s abrogation of sovereign immunity. WSAJF Br. at 4, 14. But as King County explained in its merits brief, this Court has already repeatedly rejected this argument. *See* King Cty. Reply Br. at 24; *see also* *Chambers-Castanes v. King Cty.*, 100 Wn.2d 275, 287-88, 669 P.2d 451 (1983) (the public duty doctrine does “not . . . reinstate[] the doctrine of sovereign immunity”); *Edgar v. State*, 92 Wn.2d 217, 228, 595 P.2d 534 (1979) (statutory abrogation of sovereign immunity “was not designed to create new causes of action”).²

² WSAJF’s argument is therefore insufficient to overturn precedent. *See* *Key Design Inc. v. Moser*, 138 Wn.2d 875, 882-84, 983 P.2d 653 (1999) (refusing to depart from

WSAJF's citation to *Babcock v. Mason Cty. Fire Dist. No. 6*, 144 Wn.2d 774, 30 P.3d 1261 (2001), for the proposition that the Court has held otherwise is misleading. WSAJF Br. at 14. The statement quoted by WSAJF is **not** from the majority opinion but is in fact from a non-precedential concurrence. See 144 Wn.2d at 795-802 (Chambers, J., concurring). And the only other case WSAJF cites for this proposition is also a non-precedential concurrence. WSAJF Br. at 14.

Moreover, many of WSAJF's own arguments further demonstrate that the public duty doctrine does not conflict with the Legislature's abrogation of sovereign immunity. As WSAJF acknowledges, the "Court has clarified" the doctrine does "**not** afford immunity[.]" *Id.* at 10 (emphasis added). Along the same lines, WSAJF acknowledges that governments have mere "hortatory" duties" and that "[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.'" *Id.* at 8-9 (quoting *Osborn v. Mason Cty.*, 157 Wn.2d 18, 28, 134 P.3d 197 (2006) & *Munich v. Skagit Emergency Comm'n Ctr.*, 175 Wn.2d 871, 887, 288 P.3d 328 (2012) (Chambers, J., concurring)). In other words, "[t]here are

precedent where Court had already "considered and rejected" concerns raised by party requesting a change in the law).

some activities that are so unique to government that there is no similar counterpart for which private persons or corporations may be liable.” *Fisk v. City of Kirkland*, 164 Wn.2d 891, 897, 194 P.3d 984 (2008); *see also Munich*, 175 Wn.2d at 894-95 (Chambers, J., concurring) (the public duty doctrine recognizes that “some governmental functions are not meaningfully analogous to anything a private person or corporation might do”); WSAJF Br. at 11 (similar). As a result, the public duty doctrine does not immunize governments from tort liability, but simply ensures that governments are liable only to the same extent as private persons.

WSAJF mistakenly relies on *Dahl v. Fino*, No. 51455-9-II, 2019 WL 4274076 (Wash. Ct. App. Sept. 10, 2019) (unpublished), to claim that the public duty doctrine is incorrect because it allowed a private person to escape liability. WSAJF Br. at 15-16. There, an inmate allegedly hanged himself and the county coroner, acting pursuant to statute, took jurisdiction over the inmate’s body to investigate the cause and manner of death. 2019 WL 4274076, at *1. The county coroner directed a private doctor to conduct an autopsy under the same statutory scheme and the decedent’s father later sued that doctor for negligently conducting the autopsy. *Id.* at *1-*2. The doctor argued that she was “immune from civil liability under RCW 68.50.015,” i.e., the same statutory scheme that authorized her to perform the autopsy in the first place. *Id.* at *2. The

court agreed and dismissed the tort claim. *Id.* at *2-*5, *7. Thus, contrary to WSAJF’s assertion, *Dahl* does not conflict with the Legislature’s directive in RCW 4.92.090 and RCW 4.96.010 because the result turned on a separate statute providing that a “county coroner or county medical examiner or persons acting in that capacity **shall be immune from civil liability** for determining the cause and manner of death.” RCW 68.50.015 (emphasis added).³

WSAJF next cites to several justices’ concurring and dissenting opinions to argue that the public duty doctrine is incorrect. In addition to holding no precedential value, these opinions are mostly older outliers and in some instances are misrepresented by WSAJF. For example, WSAJF cites to a concurrence in *Cummins*, suggesting that former Justice Chambers thought the public duty doctrine should be overruled. WSAJF Br. at 12. But WSAJF misconstrues that concurrence, in which Justice Chambers instead disagreed only with application of the public duty doctrine in the context of 911 calls. *See* 156 Wn.2d at 869-74 (Chambers, J., concurring). Regardless, Justice Chambers later stated in *Munich* that he “would not change any” of the Court’s prior rulings applying the public

³ Even if *Dahl* were wrongly decided that alone would not satisfy the criteria for overturning a well-established rule like the public duty doctrine because, as WSAJF acknowledges, *Dahl* is an unpublished opinion with no precedential value. *See* WSAJF Br. at 15 n.7; *Kitsap Cty. v. Allstate Ins. Co.*, 136 Wn.2d 567, 577 n.10, 964 P.2d 1173 (1998).

duty doctrine. 175 Wn.2d at 894 (Chambers, J., concurring). Nor did former Justice Talmadge in *Beal v. City of Seattle*, 134 Wn.2d 769, 954 P.2d 237 (1998), advocate for overturning the public duty doctrine as WSAJF asserts. WSAJF Br. at 12. Rather, a review of his non-precedential dissent demonstrates that he would have dismissed the plaintiff's tort claim purely on procedural grounds. 134 Wn.2d at 793-95 (Talmadge, J., dissenting). The same is true of *Bailey v. Town of Forks*, 108 Wn.2d 262, 737 P.2d 1257 (1987), where the Court did not state that the public duty doctrine is problematic, but merely remarked on the number of exceptions to the doctrine. *Id.* at 267.⁴ Moreover, since each of these cases was decided, this Court has repeatedly affirmed the application of the public duty doctrine. *See, e.g., Osborn*, 157 Wn.2d at 27-29.

In sum, WSAJF fails to demonstrate that the public duty doctrine is “incorrect” such that it, and 50 years of precedent, should be overturned.

2. WSAJF Fails to Show the Public Duty Doctrine Is Harmful.

WSAJF also fails to show that the public duty doctrine is harmful. WSAJF Br. at 4, 17-18. Its claim that the doctrine “denie[s]” parties “rightful claims” is incorrect because, *id.* at 17, as explained above, the

⁴ The remaining opinion WSAJF cites to is a non-precedential concurrence from an early decision in 1983. WSAJF Br. at 12.

doctrine simply ensures that “governments are not saddled with greater liability than private actors[.]” *Munich*, 175 Wn.2d at 886 (Chambers, J., concurring).⁵ Similarly, this Court has already rejected WSAJF’s argument that the public duty doctrine violates separation of powers. *See* WSAJF Br. at 7 (“The legislative waiver required the Court to address separation of powers concerns[.]”); *see also Chambers-Castanes*, 100 Wn.2d at 287-88 (the public duty doctrine does not violate separation of powers by reviving the abolished sovereign immunity doctrine).⁶ Further, WSAJF states in passing that a handful of other jurisdictions have narrowed or abandoned the public duty doctrine, but provides no argument as to why the Court should follow the case law of a few other jurisdictions, which is not binding on this Court. WSAJF Br. at 6. Lastly, none of the cases upon which WSAJF relies support its argument that the public duty doctrine creates “confusion.” *Id.* at 17-18. Specifically, the court in *Timson v. Pierce Cty. Fire Dist. No. 15*, 136 Wn. App. 376, 149 P.3d 427 (2006), merely affirmed the trial court’s finding that the

⁵ Nor does *Dahl* support WSAJF’s argument because, as explained above, that case turned on a specific statute providing immunity for private persons acting as county coroners and thus the plaintiff had no rightful claim to begin with. 2019 WL 4274076, at *2, *5-*7 (relying on RCW 68.50.015).

⁶ *See also Meaney v. Dodd*, 111 Wn.2d 174, 178, 759 P.2d 455 (1988) (waiver of sovereign immunity did not create new causes of action); *J & B Dev. Co. Inc. v. King Cty.*, 100 Wn.2d 299, 303-05, 669 P.2d 468 (1983) (distinguishing between public duty doctrine and sovereign immunity), *overruled on other grounds, Honcoop v. State*, 111 Wn.2d 182, 759 P.2d 1188 (1988), & *Taylor v. Stevens Cty.*, 111 Wn.2d 159, 759 P.2d 447 (1988); *Moore v. Wayman*, 85 Wn. App. 710, 716-17, 934 P.2d 707 (1997) (same).

plaintiff's claim under the legislative intent exception was not frivolous. *Id.* at 385-86. And WSAJF again mischaracterizes *Babcock v. State*, 116 Wn.2d 596, 809 P.2d 143 (1991): there, the writing justice did not broadly state that there is confusion between the doctrine of immunity and the public duty doctrine, but rather stated that the non-precedential "dissent confuse[d]" the two. *Id.* at 641 (Andersen, J., concurring in part and dissenting in part).⁷

WSAJF not only fails to show that the public duty doctrine is harmful, but also fails to appreciate the substantial harm that would result from the expansion of municipal liability it seeks. As the Washington State Association of Counties correctly notes in its amicus brief ("WSAC Br."), overturning the public duty doctrine would "undermine counties' ability to carry out their mission to serve the public." WSAC Br. at 2. This is because "Washington counties perform hundreds of duties pursuant to statute and regulation," and a decision in the Estate's favor would subject counties across the state to "jury trials (at public expense) any time a citizen disagreed with a county's discretionary actions taken to carry out statutory and regulatory functions." *Id.* at 1-2, 5-8 (compiling county duties); *see also Fisk*, 164 Wn.2d at 897 (refusing to hold

⁷ WSAJF also cites to older opinions by Justice Chambers, but as noted above, he later stated that he "would not change any" of the Court's public duty doctrine cases. *Munich*, 175 Wn.2d at 894 (Chambers, J., concurring).

municipality liable for the provision of water for fire suppression—a “service to the public”—in part because doing so “could lead to catastrophic liability for a municipality”).

In sum, WSAJF has failed to identify any basis on which to abandon the public duty doctrine and overrule the hundreds of cases applying it. The Court should therefore reject WSAJF’s request, which would lead to a substantial and unwarranted expansion of governmental tort liability across the state, a diversion of significant public funds, and a reduction of important public services.

C. WSAJF’s Reliance on the Implied Cause of Action Doctrine Is Belated and Unworkable.

WSAJF next attempts to inject an issue into this appeal that has not been raised or briefed by any party: whether the Court should replace the public duty doctrine with the implied cause of action doctrine. WSAJF Br. at 4, 18-20. But this Court “does not consider issues raised first and only by amici,” *Madison v. State*, 161 Wn.2d 85, 104 n.10, 163 P.3d 757 (2007), who are “not [] part[ies] to [the] case” and whose “interest in the outcome . . . is merely tangential.” *Cummins*, 156 Wn.2d at 850 n.4; *see also State v. Gonzalez*, 110 Wn.2d 738, 752 n.2, 757 P.2d 925 (1988) (listing cases). Rather, the “case must be made by the parties[’] litigant, and its course and the issues involved cannot be changed or added to by

friends of the court.” *Long v. Odell*, 60 Wn.2d 151, 154, 372 P.2d 548 (1962) (internal quotations omitted). The Estate has never argued that the Court should replace the public duty doctrine with the implied cause of action doctrine. The Court should therefore decline to consider this new claim now.

Even if the Court considers WSAJF’s procedurally inappropriate argument (which it should not), WSAJF fails to demonstrate that the implied cause of action doctrine is an appropriate substitute for the public duty doctrine. “Under the public duty doctrine, no liability may be imposed for a public official’s negligent conduct unless it is shown that the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (i.e., a duty to all is a duty to no one).” *Taylor v. Stevens Cty.*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988) (internal quotations and emphasis omitted). The exceptions to the public duty doctrine are the “focusing tool” through which courts evaluate the threshold question of duty to an individual. *Osborn*, 157 Wn.2d at 27-28 (internal quotations omitted). Assuming a plaintiff is able to prove an exception, and therefore satisfy the threshold question of duty to the plaintiff, then a successful tort claimant against the government would still need to prove the remaining elements of

negligence: breach of that duty and injury to the plaintiff proximately caused by the breach. *Munich*, 175 Wn.2d at 885.

The implied cause of action doctrine, by contrast, does not address tort duties. Rather, the doctrine employs a three-part test to determine whether a remedial statute creates an independent cause of action for a statutory violation. In *Bennett v. Hardy*, adapting the federal test, this Court observed that the “legislature would not enact a remedial statute granting rights to an identifiable class without enabling members of that class to enforce those rights.” 113 Wn.2d 912, 919-21, 784 P.2d 1258 (1990) (internal quotations omitted). As such, courts examine three factors when determining whether a particular remedial statute creates a cause of action: (1) “whether legislative intent, explicitly or implicitly, supports creating or denying a remedy,” (2) “whether implying a remedy is consistent with the underlying purpose of the legislation,” and (3) “whether the plaintiff is within the class for whose ‘especial’ benefit the statute was enacted.” *Fisk*, 164 Wn.2d at 896. After determining a cause of action is implied by a remedial statute, the court then looks to the statute and related case law to establish the elements of the implied cause. *Bennett*, 113 Wn.2d at 921-22. This test is distinct from the common law tort test.

While there is often overlap between components of this inquiry and the threshold public duty doctrine questions, WSAJF does not articulate how this doctrine would apply to tort claims, nor how application of the doctrine would achieve the goal of ensuring that the government is not exposed to a greater level of liability than private individuals. *Munich*, 175 Wn.2d at 886 (Chambers, J. concurring) (“[T]he public duty doctrine is simply a tool we use to ensure that governments are not saddled with greater liability than private actors as they conduct the people’s business.”). Indeed, WSAJF disingenuously suggests that the third element of the implied cause of action doctrine (as stated in *Fisk*) mirrors the public duty doctrine test, and therefore suggests that applying the implied cause of action doctrine would **not** expand municipal liability. Given WSAJF’s mission, such a result cannot not be what WSAJF seeks.

Moreover, to the extent WSAJF intends that all the statutory and regulatory obligations of government could be converted into potential independent causes of action, this Court has repeatedly rejected this notion. *See id.* at 886, 894-95 (Chambers, J., concurring). Moreover, as explained below, the implied cause of action doctrine would not create County liability here, and WSAJF does not claim otherwise. In sum, the Court should refuse to replace the public duty doctrine with the implied cause of action doctrine.

D. OVERRULING THE PUBLIC DUTY DOCTRINE OR REPLACING IT WITH THE IMPLIED CAUSE OF ACTION DOCTRINE WOULD NOT CREATE COUNTY LIABILITY HERE.

WSAJF effectively acknowledges that its request to abolish the public duty doctrine or replace it with the implied cause of action doctrine would not create liability for the County here. WSAJF does not argue that the trial court should be affirmed, nor explain how its theories support the Estate, likely because the trial court's opinion is indefensible. Even absent the public duty doctrine, King County, like any other private defendant, can only be liable in tort "if it has a statutory or common law duty of care." *Osborn*, 157 Wn.2d at 27-28. But as the County demonstrated in its merits brief, no private person would be liable under the facts alleged. King Cty. Reply Br. at 22. The County's decision not to issue a Health Advisory after a single case of Hantavirus was not tortious in and of itself, and there is no common law duty to issue Health Advisories at all, let alone after a single case of a noncontagious disease. WSAJF does not argue otherwise, nor could it.

Similarly, there is no implied cause of action arising out of WAC 246-101-505. The notifiable conditions regulations do not "grant[] rights to an identifiable class[.]" *Bennett*, 113 Wn.2d at 921. Rather, the "purpose of notifiable conditions reporting is to provide the information necessary for public health officials to protect the public's health by

tracking communicable diseases and other conditions.” WAC 246-101-005. Similarly, the regulation creates no right to the issuance of a Health Advisory after a single case of a noncontagious condition. Rather, WAC 246-101-505 empowers county health departments to “[r]eview and determine appropriate action” in response to a notifiable condition. Accordingly, where a regulation imposes a duty to the general public and no rights to an identifiable class, no cause of action will be implied. *See Fisk*, 164 Wn.2d at 895-96 (courts will not imply a cause of action if statute in question benefits the “general public” rather than “an identifiable class of persons”); *Crisman v. Pierce Cty. Fire Prot. Dist. No. 21*, 115 Wn. App. 16, 23-24, 60 P.3d 652 (2002) (refusing to imply cause of action in part because relevant statute “consistently refer[red] to the ‘public’ or ‘people,’ thereby expressing its goal of protecting the public rather than any individual”).

III. CONCLUSION

No argument advanced by WSAJF supports creating the expanded tort liability sought by the Estate. This Court should reverse the trial court, hold that the public duty doctrine applies as a matter of law, and dismiss the Estate’s claim against the County.

RESPECTFULLY SUBMITTED this 29th day of October, 2019.

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I am and at all times hereinafter mentioned was a citizen of the United States, over the age of 21 years, and not a party to this action. On the 29th day of October, 2019, I caused to be served, via the Washington State Appellate Court's Portal System, and via electronic mail, a true copy of the foregoing document upon the parties listed below:

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