

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
5/16/2019 4:33 PM  
BY SUSAN L. CARLSON  
CLERK

Pages 1 - 9 of appendix stricken  
pursuant to October 11, 2019, ruling.

No. 96464-5

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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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.

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**PETITIONER KING COUNTY'S OPENING BRIEF**

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## I. INTRODUCTION

The estate of an individual who fatally contracted Hantavirus in his home (“Estate”) sued the Department of Public Health – Seattle and King County (“King County”) for the Department’s decision not to issue a public health advisory about a single prior case of the noncontagious disease. The County invoked the public duty doctrine as a defense, which shields the government from tort liability unless the government owes a specific duty to the individual plaintiff as opposed to the public in general. The Estate, in turn, argued that the “failure to enforce exception” to the doctrine applied.

The narrow question before the Court is whether King County owed the decedent a specific legal duty to issue a public health advisory about the prior Hantavirus case, distinct from its duty to the general public. It did not. No law compels King County to issue Health Advisories based on a single case of a noncontagious illness like Hantavirus. Instead, King County’s claimed duty arises from the general regulatory mandate in WAC 246-101-505 to “[r]eview and determine appropriate action” for over 80 various health conditions. The regulation requires the exercise of discretion, rather than mandating specific action. In this circumstance, the public duty doctrine shields King County from the Estate’s tort claim as a matter of law.

Despite acknowledging that the question of duty presented an issue of law, the trial court issued a “conditional grant” of the Estate’s motion for summary judgment sending the issue of King County’s duty to the jury at trial. This ruling is substantively and procedurally unprecedented, and deprived King County of a threshold legal defense that should have resulted in dismissal. The trial court’s ruling exposes King County and every other local health department to tort liability based on the general mandate for “appropriate action” in WAC 246-101-505. This Court should reverse the trial court, find the public duty doctrine applies as a matter of law, and dismiss the Estate’s suit.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in “conditionally” granting the Estate’s motion for summary judgment striking King County’s public duty doctrine defense and sending the question of the County’s duty to the jury.
2. The trial court erred in “conditionally” finding that the failure to enforce exception to the public duty doctrine applied to the Estate’s tort claims against King County.
3. The trial court erred in refusing to grant King County’s motion for summary judgment and rule that the public duty doctrine bars the Estate’s claims.

### **III. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. The application of the public duty doctrine is an issue of law involving statutory interpretation of the statute or regulation allegedly imposing a duty on a government entity. Here, the Estate claims King County's duty to Mr. Ehrhart arises from WAC 246-101-505 which directs King County to "[r]eview and determine appropriate action" when it receives notice of a "notifiable condition" such as a Hantavirus infection. Rather than interpret WAC 246-101-505 to determine whether the regulation imposed a duty on King County to Mr. Ehrhart, the trial court "conditionally granted" the Estate's motion for summary judgment, subject to factual findings by the jury. Did the trial court err by refusing to grant King County's motion for summary judgment and instead "conditionally" granting the Estate's motion for summary judgment on the public duty doctrine dependent on the jury's factual findings at trial?

2. The Estate alleged that the failure to enforce exception to the public duty doctrine applied and supported dismissal of King County's public duty defense. The Estate bears the burden of establishing each element of that exception, including that the government was aware of a statutory violation and failed to take corrective action specifically mandated by statute or regulation. Where there was no statutory violation,

no specific statutory mandate for corrective action, and no duty beyond that owed to the general public, did the trial court err in finding the Estate met its burden, conditioned on the jury's finding that King County's actions were not "appropriate" under WAC 246-101-505?

3. The Estate asserted that under WAC 246-101-505, King County has a duty to issue a public Health Advisory when medical providers report a case or a suspected case of any of the more than 80 notifiable conditions, including Hantavirus. That regulation only directs King County to take "appropriate action" when it receives notice of a notifiable condition. Moreover, Department of Health Guidelines do not require that a public Health Advisory be sent in response to a single reported case of Hantavirus. King County exercised its discretion investigating the Hantavirus case and not issuing a public Health Advisory. Did the trial court err by refusing to grant King County's motion for summary judgment because the County was only required to exercise discretion and was not mandated to take specific action?

#### **IV. STATEMENT OF THE CASE**

##### **A. King County Employs Condition-Specific Investigation Procedures in Responding to Notifiable Conditions.**

The Department of Public Health – Seattle and King County, a department of King County, is a "[l]ocal health department" that "provides public health services to persons within the [County.]" RCW

70.05.010(1). It is one of the largest metropolitan health departments in the United States and serves a resident population of 1.9 million people. App. at 2 ¶ 2.<sup>1</sup> King County carries out its public health functions through, among other things, core prevention programs, environmental health programs, community-oriented personal health care services, public health preparedness programs, and community-based public health assessment and practices. App. at 2 ¶ 2. As a practical matter, the County’s broad public health functions span from promoting emergency preparedness and ensuring food safety to analyzing population-level health data and promulgating community health policy. App. at 2 ¶ 2.<sup>2</sup>

One of King County’s many public health responsibilities is to collect and review information from healthcare providers pertaining to “notifiable conditions.” *See* WAC 246-101-505. “Notifiable condition[s]” encompass over 80 diseases or conditions “of public health importance,” WAC 246-101-010(31), ranging from rabies and AIDS to Autism Spectrum Disorder and Cerebral Palsy. WAC 246-101-101. The regulations set condition-specific timeframes in which healthcare providers must report diagnoses of these conditions to local health departments and/or the Washington State Department of Health (“DOH”).

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<sup>1</sup> King County has attached Dkt. Nos. 6 (Decl. of Dr. Jeffrey Duchin in Supp. King. Cty. Mot. Disc. Rev.) and 22 (Ruling Granting Dir. Disc. Rev.) as an appendix to this brief.

<sup>2</sup> Background information on Public Health – Seattle & King County is *available at* <https://www.kingcounty.gov/depts/health/about-us.aspx> (last visited May 15, 2019).

WAC 246-101-101. “The purpose of notifiable conditions reporting” is for healthcare providers to “provide the information necessary for public health officials to protect the public’s health[.]” WAC 246-101-005.

Under WAC 246-101, King County is primarily the **recipient** of information from healthcare providers about the occurrence of notifiable conditions, and a conduit of that information to DOH. App. at 2 ¶ 3. Specifically, healthcare providers are required to notify King County regarding cases of and, for certain diseases, suspected cases of, notifiable conditions. WAC 246-101-101, -010(31). In turn, King County is directed to “[r]eview and determine appropriate action” for each report received. WAC 246-101-505. “Appropriate action” is not defined under the regulations, but it may include, for example, “outbreak investigation, redirection of program activities, or policy development.” See WAC 246-101-005.

DOH has also published guidelines (the “Guidelines”) that set forth disease-specific recommendations for local public health department investigations of each of the over 80 notifiable conditions, including when information concerning the occurrence of notifiable conditions should be transmitted to healthcare providers, the general public, or others.<sup>3</sup> Though

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<sup>3</sup> The “Guidelines for Public Health Investigations” are *available at* <https://www.doh.wa.gov/ForPublicHealthandHealthcareProviders/NotifiableConditions/ListofNotifiableConditions> (last visited May 15, 2019).

not binding, King County generally follows these Guidelines in deciding how to respond to reports of notifiable conditions. App. at 2 ¶ 3. As detailed in the Guidelines, DOH’s recommended approach depends on several condition-specific factors, including the type of condition, the level of contagion, the type and place of exposure, the number of cases, and the nature and extent of risk to the public. App. at 3 ¶ 3. Each of the over 80 notifiable conditions has unique investigation procedures, some of which include outreach and public education components, and others which do not. App. at 3 ¶ 3.

For example, the Guidelines for Measles recommend that King County alert any healthcare facility “visited by the [patient] during the contagious period” and consider issuing a “press release” if “transmission may have occurred in a public place and potentially exposed individuals cannot be identified[.]”<sup>4</sup> Such recommendations are based on the fact that measles is “spread directly from person to person” and is “one of the most contagious of all infectious diseases[.]”<sup>5</sup>

For a noncontagious condition like Hantavirus,<sup>6</sup> by contrast, the Guidelines recommend that King County “[i]dentify other persons who

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<sup>4</sup> Available at <https://www.doh.wa.gov/Portals/1/Documents/5100/420-063-Guideline-Measles.pdf> (last visited May 15, 2019) at 8.

<sup>5</sup> See *id.* at 2.

<sup>6</sup> Hantavirus pulmonary syndrome (HPS) is an acute viral disease in which fever and mild flu-like symptoms are followed by acute respiratory distress syndrome with respiratory

may have been in or around” the patient’s “exposure location, e.g., other” residents, campers, or passengers of “rodent-infested cabins, homes, barns, [or] vehicles[.]”<sup>7</sup> While DOH acknowledges that it “may be appropriate” to “make suggestions about rodent removal” and educate potentially exposed persons about symptoms—such as by “[p]osting a sign in public areas (e.g., campgrounds)”—DOH does not recommend any further outreach, as “it is rare to have multiple cases sharing a common exposure.”<sup>8</sup>

After considering the Guidelines and public health best practices, King County may determine that it is appropriate to share public health information with healthcare providers and/or the general public, including information pertaining to notifiable conditions. When King County wants to share information with healthcare providers for public health purposes, it sends out “Health Advisories” via a listserv of individual healthcare providers who have voluntarily subscribed to receive the notifications.

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failure and shock. Hantavirus is transmitted by the deer mouse. Exposure occurs by inhaling aerosolized virus excreted in deer mouse urine, feces or saliva, particularly during improper cleaning of deer mouse infested areas. Cases are rare in Washington, with 1 to 5 diagnoses per year, mostly in the Eastern counties. *See* <https://www.doh.wa.gov/ForPublicHealthandHealthcareProviders/NotifiableConditions/HantavirusPulmonarySyndrome> (last visited May 15, 2019). Person-to-person spread of Hantavirus has not occurred in this country. <https://www.doh.wa.gov/Portals/1/Documents/5100/420-056-Guideline-Hantavirus.pdf> at 4 (last visited May 16, 2019).

<sup>7</sup> Available at <https://www.doh.wa.gov/Portals/1/Documents/5100/420-056-Guideline-Hantavirus.pdf> (last visited May 15, 2019) at 4, 7.

<sup>8</sup> *See id.* at 7.

App. at 3 ¶ 4. There are approximately 3,000 subscribers to the healthcare provider listserv. App. at 3 ¶ 4. The subscribers are individual licensed healthcare providers (i.e., doctors and nurses), not entire medical institutions such as hospitals. App. at 3 ¶ 4. King County encourages healthcare providers to sign up for the listserv and to share the information posted on it with others in their practice environment, but there is no legal requirement for providers to do so. App. at 3-4 ¶ 4.

Doctor Jeffrey Duchin, King County’s Local Health Officer, or his designee, determines under what circumstances and when to post Health Advisories on the provider listserv. *See generally* RCW 70.05.070; WAC 246-101-505(1)(a)(i); App. at 4 ¶ 5. Health Advisories are generally posted on the listserv when King County seeks to inform providers of things such as (i) infectious disease outbreaks; (ii) unusual infectious disease activity taking place elsewhere that has implications for healthcare providers locally; and (iii) changes to Centers for Disease Control guidelines or recommendations when they are relevant to communicable diseases of local population health significance. CP 386. Because healthcare providers are expected to be familiar with a vast majority of notifiable conditions, the determination of whether to post a Health Advisory on the provider listserv also considers the dangers of “message fatigue,” which would lead healthcare providers to ignore the advisories.

CP 386. Of the thousands of reports of notifiable conditions received every year, King County issues anywhere from ten to thirty Health Advisories (i.e., less than 1% of the time). App. at 4-5 ¶¶ 6-8.<sup>9</sup>

King County also sends out information to the public on a variety of health topics, including certain notifiable conditions. App. at 5 ¶ 8. Notifications to the public are sent via King County's public health website, its blog, and through press releases and social media accounts. App. at 5 ¶ 8. King County's public health communications office, in consultation with Dr. Duchin and his staff, determines when to issue notifications through these channels, again, in consultation with DOH condition-specific guidance and public health best practices. App. at 5 ¶ 8.

**B. King County Followed All Requirements and Recommendations in Responding to Hantavirus in 2016-2017.**

Pursuant to WAC 246-101-101, a commercial diagnostic lab notified King County in December 2016 that a resident of rural Redmond had tested positive for Hantavirus. CP 386-87. Consistent with the Guidelines, King County sent a Public Health Nurse Investigator to, among other things, review the patient's medical records, discuss the case

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<sup>9</sup> More information about the volume of reports King County receives is *available at* <https://www.kingcounty.gov/depts/health/communicable-diseases/disease-control/surveillance-summaries.aspx> (last visited May 15, 2019).

with an infectious disease specialist at the patient’s hospital, interview the patient’s husband to determine where the infection may have been acquired, and determine whether others had been exposed so they could be notified about how to reduce their risk of infection. CP 387.<sup>10</sup> A Health Department epidemiologist also worked with the family to provide information on risk reduction and mitigation of the deer mouse infestation on their property. CP 387-88; *see also* CP 375 (according to the Centers for Disease Control, “eliminat[ing] or minimiz[ing] contact with rodents in [the] home, workplace, or campsite” is “the best way to help prevent” Hantavirus).<sup>11</sup> Due to the noncontagious nature of Hantavirus and the fact that the place of exposure was a private, rural property with only two residents (the patient and her husband) that had not traveled, Dr. Duchin determined that sending out a notice about Hantavirus to the provider listserv, or issuing public/media notifications was not warranted at that point. CP 388.<sup>12</sup>

In February 2017, King County was notified of Brian Ehrhart’s unexplained death. CP 388. Mr. Ehrhart had sought care at Swedish

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<sup>10</sup> *See also* Guidelines for Hantavirus, *supra*, note 7 at 6-7 (recommending reviewing medical records, asking about exposure, and identifying and educating other persons who may have been exposed to the same source).

<sup>11</sup> *See also id.* at 7 (“It may be appropriate to . . . make suggestions about rodent removal.”).

<sup>12</sup> *See also id.* at 3 (“It is extremely rare to see multiple cases with a single common exposure. We have not seen any clustering of cases in Washington.”).

Hospital in Issaquah for flu-like symptoms. CP 6. He was treated and discharged. CP 6. The next day, his condition worsened and he went to Overlake Hospital where he later died. CP 6. To assist healthcare providers in determining the cause of death, King County launched an investigation, which revealed that Mr. Ehrhart died of acute Hantavirus infection. CP 388. Dr. Duchin reviewed the investigation results to determine an appropriate course of action, including whether the public or area healthcare providers should be notified of the second Hantavirus case. CP 388.

Before Mr. Ehrhart's death, only two cases of Hantavirus had ever been confirmed in King County—one in 2003 and the one described above in December 2016. CP 386. Dr. Duchin, therefore, concluded it was appropriate to notify local healthcare providers of the unusual circumstances of having two confirmed cases of such a rare disease within a three-month period. CP 388. Accordingly, in March 2017 and April 2017, Dr. Duchin posted Health Advisories on the local healthcare provider listserv discussing the cases. CP 388-92. King County public health communications staff also sent out public notifications through its blog. CP 391-92.<sup>13</sup>

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<sup>13</sup> The events following Mr. Ehrhart's passing are not relevant to the Estate's claim and are therefore provided for context only.

**C. The Trial Court Ruled that the Failure to Enforce Exception Hinges on Whether King County’s Actions Were “Appropriate.”**

The Estate sued Mr. Ehrhart’s treating physician and hospital, and King County for negligence and wrongful death. CP 2-10. The Estate argued King County should have sent a Health Advisory to area healthcare providers after being notified of the first case of Hantavirus in December 2016. CP 4-5, 44-46. The Estate’s theory was that if King County had sent a Health Advisory in December 2016, Mr. Ehrhart’s treating physician at Swedish Hospital would have seen it, and when Mr. Ehrhart sought treatment for flu-like symptoms three months later, his physician would have applied different treatment, and Mr. Ehrhart would not have died. CP 6-7, 46-47.<sup>14</sup>

King County asserted, among other defenses, that the Estate’s claims were barred by the public duty doctrine. CP 32. The Estate moved for partial summary judgment, seeking to strike all of King County’s immunity-based defenses. CP 36-59. The Estate argued that the failure to enforce exception to the public duty doctrine applied, thus authorizing its tort suit against the County. CP 51-54.<sup>15</sup> In particular, the Estate claimed

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<sup>14</sup> There are numerous fatal flaws in this theory, including that “[t]here is no specific treatment, cure, or vaccine for” Hantavirus. CP 375.

<sup>15</sup> At summary judgment, the Estate also argued the rescue exception applies, CP 54-56, but the trial court rejected this claim. *See* VRP (Sept. 28, 2018) at 24:5-13. The Estate later stipulated that it was only pursuing the failure to enforce exception, expressly

that King County had “failed to enforce” its obligations under WAC 246-101-505 to “[r]eview and determine appropriate action” for each “reported case or suspected case of a notifiable condition[.]” CP 52-53. King County opposed the Estate’s motion and filed a cross-motion for summary judgment, asserting that none of the exceptions to the public duty doctrine applied and the Estate’s suit should be dismissed as a matter of law. CP 356-68, 394-406.

The trial court denied King County’s request to hear the cross motions on the same date and instead held a hearing on the Estate’s motion only. CP 181-85, 352-53. In ruling on the failure to enforce exception, the trial court acknowledged that “[d]uty is always supposed to be a legal issue,” but then concluded that whether King County owed a duty to Mr. Ehrhart “requires some kind of a factual analysis.” VRP (Sept. 28, 2018) at 22:8-11. The trial court opined that while WAC 246-101 does not require King County to carry out a “specific task,” including issuing a Health Advisory, it was necessary for the jury to determine whether King County took “appropriate” action in accordance with WAC 246-101-505. VRP (Sept. 28, 2018) at 21:20-22:25. The court acknowledged no authority supported this ruling: “I did research on this, and to my knowledge, there is no case in Washington that discusses duty

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disclaiming the application of any other exception to the public duty doctrine. CP 706-07; VRP (Oct. 12, 2018) at 15:23-18:11.

as being partially legal and partially factual. I’ve not seen any case where there’s been a bifurcation of that.” *Id.* at 22:5-8. The court further observed, “It’s sort of asking the jury to decide two things at the same time, both duty and breach, which we don’t normally give duty to the jury.” *Id.* at 23:1-3. Nonetheless, the court entered what it called a “very odd” order “conditionally” granting the Estate’s motion on the failure to enforce exception, subject to later factual determinations by the jury at trial as to whether King County “acted appropriately.” *Id.* at 22:25-24:4; CP 690-91.<sup>16</sup>

**D. King County Appealed.**

King County sought direct discretionary review by this Court of the trial court’s order striking King County’s public duty doctrine defense and the trial court’s failure to enter an order granting the County’s cross-motion. CP 708-09. This Court’s commissioner granted King County’s request. App. at 10-23. Specifically, the commissioner found that the trial court “likely committed obvious error by applying too broadly the failure to enforce exception” because “[n]othing in the text of WAC 246-101-505 mandates the county to take the specific action of issuing an advisory to health providers or members of the public” once “it receives notification

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<sup>16</sup> Though King County had cross-moved for summary judgment on the public duty doctrine, the court never entered an order granting or denying King County’s motion. *See* CP 690-91, 703-04.

of a single notifiable” condition. App. at 19, 21. Rather, as the commissioner correctly observed, King County has “discretion to determine an ‘appropriate’ action in response to the facts surrounding a reported case of a notifiable condition.” App. at 19. The commissioner also found that the trial court’s order left King County “potentially liable for not automatically issuing a public [H]ealth [A]dvisory in response to any report of a notifiable” condition, thus leading to the issuance of more Health Advisories and “diluting the effectiveness of a system intended to warn health care providers and the public of serious public health risks.” App. at 22.

## **V. ARGUMENT**

There is no statutory or regulatory requirement to issue Health Advisories in general, let alone after King County receives notice of a single case of Hantavirus. Rather, WAC 246-101-505 imposes general duties on local health departments to take “appropriate action” in response to over 80 different notifiable conditions. Exercising its discretion and applying its expertise, King County determined that issuing a Health Advisory after a single case of Hantavirus was not “appropriate action” nor consistent with public health best practices.

King County’s mandate is a general, discretionary obligation running to the public at large, and creates no actionable tort duty to Mr.

Ehrhart specifically. As such, the public duty doctrine bars the Estate’s suit. *See Honcoop v. State*, 111 Wn. 2d 182, 188, 759 P.2d 1188 (1988) (“[R]egulatory statutes impose a duty on public officials which is owed to the public as a whole . . . such [] statute[s] do[] not impose any actionable duty that is owed to a particular individual.”). The trial court should have dismissed the claims against King County. *See id.* at 188, 194.

The trial court compounded its error by “conditionally” granting the Estate’s motion for summary judgment and sending the **legal** question of whether King County owed the decedent a duty of care to the jury. The court itself acknowledged its ruling was unprecedented both substantively and procedurally. Because WAC 246-101-505 imposes only general discretionary duties on King County, and there is no statutory or regulatory requirement to issue a Health Advisory, King County was entitled to summary judgment. The trial court’s order effectively sending the question of duty to the jury should be reversed and summary judgment should be granted in favor of King County.

**A. Standard of Review.**

An order of summary judgment is reviewed de novo. *Washburn v. City of Federal Way*, 178 Wn.2d 732, 752, 310 P.3d 1275 (2013). The “appellate court performs the same inquiry as the trial court.” *Id.* (internal

quotations omitted). Moreover, this Court reviews “de novo the existence of a duty as a question of law.” *Id.* at 753.

**B. As a Matter of Law, King County Has No Duty to the Estate to Issue a Health Advisory.**

The “threshold determination” in a negligence action is whether the defendant owes a duty of care to the plaintiff. *Taylor v. Stevens Cty.*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988). The *Taylor* Court noted: “Whether the defendant is a governmental entity or a private person, to be actionable, the duty must be one owed to the injured plaintiff, and not one owed to the public in general.” *Id.* As to a governmental entity, “[t]his basic principle of negligence law is expressed in the ‘public duty doctrine.’” *Id.*

Under the public duty doctrine, “no liability may be imposed for a public official’s negligent conduct unless” it is proven “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).” *Id.* (internal quotations and emphasis omitted). “Because governments, unlike private persons, are tasked with duties that are not legal duties within the meaning of tort law, [courts] carefully analyze the threshold element of duty in negligence claims against governmental entities.” *Washburn*, 178 Wn.2d at 753. “The

policy underlying the public duty doctrine is that legislative enactments for the public welfare should not be discouraged by subjecting a governmental entity to unlimited liability.” *Taylor*, 111 Wn.2d at 170.

The Estate alleges that King County’s duty to Mr. Ehrhart arises from WAC 246-101-505, which directs King County to “[r]eview and determine appropriate action” regarding over 80 notifiable health conditions. The trial court held that whether King County owes the Estate a duty “hinges on [the] factual determination of what is appropriate.” VRP (Sept. 28, 2018) at 23:11-13. This holding is error.

The question of the existence of a legal duty is a “question of law.” *Taylor*, 111 Wn.2d at 168; *Fishburn v. Pierce Cty. Planning & Land Servs. Dep’t*, 161 Wn. App. 452, 464, 250 P.3d 146 (2011) (same). To determine whether a statute, ordinance, or regulation creates a duty that could result in tort liability for a public entity, courts “must apply the rules of statutory interpretation[.]” *Gorman v. Pierce Cty.*, 176 Wn. App. 63, 77-78, 307 P.3d 795 (2013); *see also Caldwell v. City of Hoquiam*, 194 Wn. App. 209, 214-16, 373 P.3d 271 (2016). This is a legal analysis. *Caldwell*, 194 Wn. App. at 214-16; *see also Sheehan v. Cent. Puget Sound Reg’l Transit Auth.*, 155 Wn.2d 790, 797, 123 P.3d 88 (2005). The plain language of the regulations at issue demonstrate that King County owed no duty to the decedent and was entitled to assert the public duty doctrine.

King County’s obligations with respect to notifiable conditions under WAC 246-101-505 do not create an actionable duty to the Estate. First, King County’s duties are to “[r]eview and determine appropriate action” when the County receives notice of a notifiable condition. That obligation is to the public at large, not to the Estate or any individual. Second, the direction to take “appropriate action” obligates King County to exercise its discretion. No specific action is required. Where a statute vests a public official with broad discretion, no actionable duty exists. *See Campbell v. City of Bellevue*, 85 Wn.2d 1, 9-10, 530 P.2d 234 (1975) (“[N]egligent performance of a governmental or discretionary police power duty enacted for the benefit of the public at large imposes no liability on the part of a municipality running to individual members of the public.”); *Halleran v. Nu W., Inc.*, 123 Wn. App. 701, 714, 98 P.3d 52 (2004), *review denied*, 154 Wn.2d 1005, 113 P.3d 481 (2005) (“[A] duty does not exist if the government agent has broad discretion about whether and how to act.”); *Forest v. State*, 62 Wn. App. 363, 369-70, 814 P.2d 1181 (1991) (same); *see also* App. at 17-18 (collecting cases). No statute or regulation requires issuance of a Health Advisory after a single case of Hantavirus is discovered on rural private property. *See generally* WAC 246-101. King County exercises broad discretion to respond appropriately to notifiable conditions based on a variety of factors. Such general

obligations of government do not create tort duties to individuals. *See Ravenscroft v. Washington Water Power Co.*, 136 Wn.2d 911, 930-31, 969 P.2d 75 (1998) (collecting cases applying public duty doctrine to bar tort suits based on general regulatory mandates to protect the public).

The DOH Guidelines definitively establish that King County had no mandatory duty here to issue a Health Advisory. In the event of a reported case of Hantavirus, the Guidelines recommend reviewing the patient's medical records, asking the patient about exposure to rodent droppings, identifying and educating other persons who may have been exposed to the same source, and making suggestions about rodent removal.<sup>17</sup> After King County received notice of the Hantavirus case in December 2016, it sent both a nurse investigator and an epidemiologist to interview the patient and her husband, review the medical files, examine the property, and help mitigate the deer mouse infestation on their property and in their vehicle. CP 387-88. These actions are entirely consistent with the Guidelines. That the Estate believes that King County should have taken different actions than required by the regulations or Guidelines does not warrant imposing tort liability where, as here, the County has discretion as to how to act. *See, e.g., Smith v. City of Kelso*, 112 Wn. App. 277, 284, 48 P.3d 372 (2002) ("Although the homeowners

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<sup>17</sup> *See* Guidelines for Hantavirus, *supra*, note 7 at 6-7.

contend [the city engineer] should have [conducted site-specific studies], the ordinance creates no duty to enforce any specific requirements.”); *see also Margitan v. Spokane Reg’l Health Dist.*, No. 34606-4-III, 2018 WL 3569972, at \*6 (Wash. Ct. App. July 24, 2018), *as amended* (Sept. 13, 2018), *review denied*, 192 Wn.2d 1018, 433 P.3d 817 (2019) (refusing to apply failure to enforce exception because the plaintiff failed “to point to any statute, regulation, or decisional authority” requiring immediate enforcement action).

The trial court should have ruled as a matter of law that no duty to issue a Health Advisory exists and that King County was entitled to rely on the public duty doctrine as a matter of law as a defense to the Estate’s tort claims.

**C. The Trial Court Misapplied the Failure to Enforce Exception to the Public Duty Doctrine.**

Recognizing that tort claims against the government are generally barred, the Estate argued that one of the four exceptions to the public duty doctrine applied to permit its claim. CP 49-50. Specifically, the Estate claimed that under the “failure to enforce” exception, King County could be liable in tort for not issuing a Health Advisory after the 2016 Hantavirus case. CP 51-54.

As noted above, the trial court erroneously ruled that the application of the doctrine would ultimately depend upon factual determinations by the jury. The trial court's order should be reversed because the failure to enforce exception does not apply as a matter of law. *See Caldwell*, 194 Wn. App. at 214-16 (application of failure to enforce exception is legal question). Under the failure to enforce exception (the only exception the Estate has pursued), the Estate must show King County has a mandatory statutory duty to take a specific corrective action for the benefit of the Estate. *See Donohoe v. State*, 135 Wn. App. 824, 849, 142 P.3d 654 (2006) ("This exception applies only where there is a mandatory duty to take a specific action to correct a known statutory violation."); *Forest*, 62 Wn. App. at 369-70 (same).

Specifically, a plaintiff must prove (1) "governmental agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation," (2) the government agents "fail to take corrective action despite a statutory duty to do so," and (3) "the plaintiff is within the class the statute intended to protect." *Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987). The Estate has the burden of establishing the elements of the exception, which courts construe "narrowly." *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 531, 799 P.2d 250 (1990); *Margitan*, 2018 WL 3569972, at \*6

(“This exception is construed narrowly to avoid dissuading governmental officials from carrying out public duties.”). The Estate did not and cannot establish a statutory violation or a mandatory duty. Thus, the public duty doctrine bars the Estate’s claim and its claim should have been dismissed. *See Halleran*, 123 Wn. App. at 716-18 (where the plaintiff fails to prove any element of the failure to enforce exception, dismissal is the proper remedy).

**1. There Was No Alleged “Statutory Violation” for King County to Correct.**

The failure to enforce exception to the public duty doctrine requires that a member of the public violated a statute (or other law), and the government knew about the violation but failed to take statutorily required action. *Smith*, 112 Wn. App. at 284. The Estate did not allege that any member of the public violated any statute or regulation. Rather, the Estate alleged that King County violated WAC 246-101-505 when it did not send out a Health Advisory after the lone case of Hantavirus in December 2016. CP 4-5, 44-46, 52-53. The trial court ruled that, so long as the jury found King County failed to take “appropriate action,” King County “would have had notice of [its own] failure to follow . . . WAC [246-101-505],” i.e., a statutory violation. VRP (Sept. 28, 2018) at 23:11-

15. The trial court’s formulation of the first prong of the exception is unsupported by any case law.

As a threshold matter, there is no statutory (or regulatory) requirement to issue a Health Advisory in the case of King County receiving notice of a notifiable condition.<sup>18</sup> As noted above, King County is only required to exercise discretion and take “appropriate action.” It did so by deciding it was not appropriate to issue a Health Advisory, but to take other actions such as sending an investigator and epidemiologist, evaluating the circumstances surrounding the exposure, and providing guidance to the patient and her husband for risk reduction and rodent mitigation. As such, the County’s decisions about when to notify physicians or the public of certain public health events cannot create the basis for tort liability. Without a “statutory violation,” the exception does not apply. *See, e.g., Fishburn*, 161 Wn. App. at 472.

Moreover, all the cases applying the failure to enforce exception involve a statutory violation by a member of the public, not the government entity at issue. And courts have repeatedly refused to apply

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<sup>18</sup>As noted above, for some conditions, the DOH Guidelines recommend contacting healthcare providers or issuing press releases, particularly where the source of exposure to a highly contagious condition is unknown, or where a patient may have visited a healthcare facility during a period of contagion. *See* Guidelines for Measles, *supra*, note 4, at 8. No such recommendations exist for Hantavirus. *See* Guidelines for Hantavirus, *supra*, note 7 at 6-7. In any event, neither the Guidelines nor WAC 246-101 create tort duties to individuals.

the exception when public conduct is not at issue. For example, in *Woods View II, LLC v. Kitsap County*, 188 Wn. App. 1, 352 P.3d 807 (2015), a developer brought tort claims against a county arising out of alleged delay in issuing permits for a development project. *Id.* at 7-10. The developer asserted the failure to enforce exception enabled her suit to proceed. *Id.* at 26. Rejecting this claim, the court applied the public duty doctrine. *Id.* at 29. Specifically, the developer had failed to make out the first element of the failure to enforce exception because she asserted “the unusual theory that the statutory requirement that the County failed to enforce was its **own** mandate to issue a timely permit.” *Id.* at 27 (emphasis in original). The court went on to observe, “We found no Washington case that has applied the failure-to-enforce exception where the defendant government entity fails to take corrective action against **itself.**” *Id.* (emphasis in original).

Likewise, in *Smith*, plaintiff homeowners sued a city following a landslide, alleging that the city negligently approved their subdivision plat and building permit applications. 112 Wn. App. at 279. The court held that neither an ordinance obligating the city engineer to prepare design and construction standards nor a building code provision requiring submission of soil investigation reports created an actionable duty on the part of the city to the homeowners. *Id.* at 284-86. Reviewing “previous failure to

enforce cases” the court noted that in each case, the relevant statute or ordinance first “prohibited specific conduct” by members of the “public” and then required a government “official to take specific action to correct” any violation. *Id.* at 282-84. The ordinance relied on by the homeowner plaintiffs in *Smith*, however, “require[d] nothing of developers or homeowners,” and as a result did “not regulate public conduct” or set any “requirements that the City [could] enforce[.]” *Id.* at 284. The court thus held that the first element of the failure to enforce exception was not met because “a developer or homeowner [could not] violate [the] ordinance” and the city could not (and did not) “fail to enforce anything.” *Id.*

By contrast, courts have applied the exception and found an actionable duty where the government has failed to carry out specific corrective actions meant to regulate public conduct. *See, e.g., Bailey*, 108 Wn.2d at 269 (state statute “prohibit[ed] and establish[ed] criminal sanctions for driving or being in physical control of a motor vehicle while under the influence of alcohol”); *Gorman*, 176 Wn. App. at 80-81 (requiring “animals in violation of the code” to be impounded).

Here, like *Woods View II* and *Smith*, there was no regulatory violation by anyone and nothing for the County to enforce. *See Woods View II*, 188 Wn. App. at 27-28; *Smith*, 112 Wn. App. at 284.

Accordingly, the failure to enforce exception to the public duty doctrine

does not apply. The Court could reverse on this ground alone. *See, e.g., Honcoop*, 111 Wn.2d at 190-91 (failure to enforce exception did not apply, and state owed no actionable duty to plaintiffs, because the state did not have actual knowledge of a statutory violation at the time the plaintiffs suffered damages).

## **2. No Law Requires King County to Issue a Health Advisory.**

The second element of the failure to enforce exception applies only where “the relevant statute mandates a specific action to correct a violation.” *Pierce v. Yakima Cty.*, 161 Wn. App. 791, 799, 251 P.3d 270 (2011); *Forest*, 62 Wn. App. at 369-70. “Such a mandate does not exist if the government agent has broad discretion regarding whether and how to act.” *Pierce*, 161 Wn. App. at 799. To hold the government liable in tort thus requires “a specific directive to the governmental employee as to what should be done.” *Id.* at 800; *Fishburn*, 161 Wn. App. at 469-70 (“There is no specific action required to correct a violation when standards for implementing corrections are at the discretion of the government agent, and thus, there is no duty to the individual.”). No such specific mandate exists in this case.

For example, in *Smith*, an ordinance directed the city engineer to prepare “development standards based on the topography, soil conditions, and geology” of the subdivision. 112 Wn. App. at 282. Owners of homes

that had been damaged by a landslide argued that the city failed to enforce its ordinance because the engineer had not ordered soil and geology studies before preparing the standards specific to their subdivision. *Id.* at 279, 282. The court rejected the homeowners’ argument and found that the ordinance required only that the city engineer prepare standards—the manner in which the standards were prepared was “within the city engineer’s discretion.” *Id.* at 284. Because the ordinance did not create a duty “to enforce any specific requirements,” the court held the failure to enforce exception did not apply. *Id.*

Likewise, in *Pierce*, the plaintiff was injured in a gas explosion and argued the county building official who had inspected his home observed gas code violations but failed to correct them. 161 Wn. App. at 795-96. In reviewing the county gas code, the court noted that the relevant code did not contain a “specific enforcement obligation.” *Id.* at 799-801. Rather, the inspector had “authority to authorize disconnection” in the event of a violation and the code did not create a mandatory duty, but “merely vest[ed] discretion” in the inspector. Therefore, the exception did not apply. *Id.* at 801.

Washington appellate courts have repeatedly reiterated this principle. *See McKasson v. State*, 55 Wn. App. 18, 24, 776 P.2d 971 (1989) (second element of failure to enforce exception not met where

relevant statute vested the governmental entity with “broad discretion”); *Woods View II*, 188 Wn. App. at 27 (no tort liability for delay in permitting where no “mandatory duty to take specific action to correct a violation” (internal quotations omitted)); *Caldwell*, 194 Wn. App. at 216-22 (refusing to apply the failure to enforce exception because neither the municipal code nor the state statute relied on by the plaintiff imposed a duty on the city to immediately impound a dangerous dog); *Fishburn*, 161 Wn. App. at 469-70 (neither statute nor code created “a mandatory duty to take specific action to correct a septic system violation”); *Donohoe*, 135 Wn. App. at 849 (second element of exception not met because department defendant had “broad discretionary authority to take a wide variety of enforcement actions” in response to a statutory violation); *Forest*, 62 Wn. App. at 369-70 (similar); *Halleran*, 123 Wn. App. at 716-18 (similar); *see also* App. at 17-18 (collecting additional cases).

Similarly, this Court has found an actionable tort duty only where statutes or regulations mandate specific corrective action by a government official. For example, in *Campbell*, this Court permitted a tort suit to proceed against a city where an ordinance required the city electrical inspector to “immediately sever any unlawfully made connection of electrical equipment[.]” 85 Wn.2d at 5, 13. While the inspector warned the homeowner of the unlawful wiring, he did not sever the connection

and the plaintiff suffered severe injuries. *Id.* at 2-5.<sup>19</sup> The city’s duty was actionable because the inspector did not take the expressly mandated corrective action of severing the unlawful electrical connection. *Id.* at 13. Similarly, this Court in *Bailey* found an actionable duty because the statute at issue required a police officer to “take[] into protective custody” a publicly incapacitated individual. 108 Wn.2d at 269 & n.1 (internal quotations omitted). Where the officer observed the intoxicated driver but failed to take action, and the plaintiff sustained injuries as a result, the tort case against the municipality could proceed. *Id.* at 269-71.

Here, the Estate alleges King County’s obligation arises from WAC 246-101-505, but that regulation requires only that the County “[r]eview and determine appropriate action” regarding over 80 health conditions. No source of law—including the non-binding DOH Guidelines—requires King County to issue a Health Advisory upon receiving notice of a single reported case of Hantavirus. As the Estate conceded, WAC 246-101-505 vests King County with “discretion” as to how to act and is silent on the subject of public notifications.<sup>20</sup> *See* CP 507. King County issues Health Advisories only when condition-specific

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<sup>19</sup> Although the *Campbell* court did not explicitly apply the failure to enforce exception, courts in later cases have relied on it in interpreting the second element to the exception. *See, e.g., Pierce*, 161 Wn. App. at 800.

<sup>20</sup> That WAC 246-101-505 uses the word “shall” does not elevate King County’s discretion to “determine appropriate action” into a mandatory duty to issue a Health Advisory. *See Smith*, 112 Wn. App. at 284; *Pierce*, 161 Wn. App. at 799-801.

facts and circumstances demand, consistent with public health best practices and state guidelines. App. at 2-4 ¶¶ 3-4. Indeed, the only specific notification requirements on the part of King County as detailed in WAC 246-101-505 include notifying healthcare providers, facilities, and laboratories of **their obligations** under WAC 246-101; notifying DOH of specific identified notifiable conditions upon completion of the public health department’s investigation; and notifying a primary healthcare provider prior to initiating an investigation. See WAC 246-101-505(1)(c)-(d), (f). Nothing in the applicable regulations (or any other law) requires King County to issue specific notifications to the public, the media, or healthcare providers in general about notifiable conditions. See *Margitan*, 2018 WL 3569972, at \*6 (refusing to apply failure to enforce exception because the plaintiff failed “to point to any statute, regulation, or decisional authority” requiring immediate enforcement action).

As the trial court acknowledged, WAC 246-101-505 does not require King County to carry out a “specific task.” VRP (Sept. 28, 2018) at 21:20. Indeed, the trial court correctly observed that “nothing in a WAC” requires King County “to put out a notice or tell or warn other healthcare providers about an infectious outbreak.” *Id.* at 21:21-23. As a result, WAC 246-101-505 does not mandate a specific “corrective action”

and is therefore not actionable. *See Pierce*, 161 Wn. App. at 799-801.

This Court should reverse.

In sum, the trial court erroneously applied the failure to enforce exception to the public duty doctrine. The trial court should have ruled that the public duty doctrine applied, that the failure to enforce exception did not, and dismissed the Estate's claims as a matter of law. *See Honcoop*, 111 Wn.2d at 194 (holding that because none of the exceptions to the public duty doctrine applied, the state was entitled to summary judgment as a matter of law and dismissal of the plaintiffs' claims).

**D. The Trial Court's Order Significantly Expands the Potential Liability of Public Health Departments.**

This Court should reverse for the additional reason that the trial court's ruling guts the public duty doctrine and instead imposes unlimited tort liability on a governmental entity's discretionary public health decisions. Washington courts "have weighed in on the importance of limiting liability for the government under the public duty doctrine" and have held "that it reflects the policy that legislation meant to improve the public welfare should not be discouraged by subjecting a governmental entity to unlimited liability." *Oliver v. Cook*, 194 Wn. App. 532, 542, 377 P.3d 265 (2016) (quoting *Taylor*, 111 Wn. 2d at 170). Accordingly, "[t]he public duty doctrine provides that regulatory statutes impose a duty on

public officials which is owed to the public as a whole, and that such a statute does not impose any actionable duty that is owed to a particular individual.” *Honcoop*, 111 Wn. 2d at 188; *see also Margitan*, 2018 WL 3569972, at \*5 (no legislative intent sufficient to create tort duty where the purpose of a statute or regulation is to protect the health, safety, and welfare of the general public, and not a particular person or class).

“Washington courts have reinforced this policy” by construing “the failure to enforce exception narrowly.” *Oliver*, 194 Wn. App. at 542; *see also Woods View II*, 188 Wn. App. at 27 (courts “purposely dr[a]w the scope of the public duty doctrine narrowly in order to ‘avoid dissuad[ing] public officials from carrying out their public duty’” (quoting *Taylor*, 111 Wn.2d at 171)). The trial court should have rejected the Estate’s request to “expand the reach of the [failure to enforce] exception.” *Oliver*, 194 Wn. App. at 542.

Instead, the trial court’s order exposes King County and every other local health department to tort liability based on highly fact and condition-specific public health decisions. If King County (and other departments across the state) were subject to a jury trial to address the “appropriateness” of each decision regarding whether to issue a Health Advisory, public health decisions would become a form of government liability risk assessment rather than a decision based on sound public

health rationale and medical judgment. App. at 5-6 ¶ 9. As a precaution, public health officers likely would increase the issuance of Health Advisories even when not warranted from a public health perspective. Such an increase in the issuance of Health Advisories would be counterproductive and likely to lead to substantial detrimental unintended consequences, such as false-positive test results and information saturation. App. at 6 ¶ 10.

Finally, the trial court’s ruling also undermines the public health purposes of notifiable conditions reporting. “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. To further this end, under WAC 246-101, local healthcare departments and DOH use the information provided by healthcare providers to “take steps to protect the public” and to “assess broader patterns, including historical trends and geographical clustering.” *Id.* “By analyzing the broader picture, [public health] officials are able to take appropriate actions, including outbreak investigation, redirection of program activities, or policy development.” *Id.* Nothing in this regulatory framework supports imposition of tort duties to individuals. *See, e.g., Honcoop*, 111 Wn.2d at 188-89 (statutes and regulations aimed at preventing spread of brucellosis protected health

of general public and did not create duty to dairy operators). To the contrary, as discussed above, injecting tort liability into the notifiable conditions reporting scheme would undermine the public health purposes of the regulations.

## **VI. CONCLUSION**

The trial court erred by punting King County's threshold legal defense under the public duty doctrine to the jury. There is nothing for the jury to decide here because the public duty doctrine analysis is a question of law. Nor does any exception to the public duty doctrine apply, as WAC 246-101-505 does not compel King County to take any specific action in response to a notifiable condition, let alone require issuance of public notice after a single Hantavirus case. By injecting tort liability analysis into the County's exercise of discretionary authority, the trial court's ruling significantly expands the potential liability of all health departments across the state. King County thus respectfully requests that the Court reverse, hold that the public duty doctrine applies as a matter of law, and dismiss the Estate's claim.

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of May, 2019.

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PROOF OF SERVICE

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 16<sup>th</sup> day of May, 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 and referenced Appendix upon the parties listed below:

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Sydney Henderson

# **APPENDIX**

No. 96464-5  
Petitioner King County's  
Index to Appendix

<b>DATE</b>	<b>DOCUMENT</b>	<b>PAGE NO.</b>
11/13/2018	Declaration of Jeffrey Duchin, M.D., In Support of King County's Motion for Discretionary Review	APP. 1-9
1/14/2019	Ruling Granting Direct Discretionary Review, Granting Petitioner's Motion to Strike In Part, and Denying Respondent's Motion to Strike	APP. 10-23

96464-5

Sandra Ehrhart v. King County, et al.

APPENDICES PAGES 1 – 9  
(The Declaration of Jeffrey Duchin, M.D.)  
OF “PETITIONER KING COUNTY’S OPENING BRIEF”  
ARE STRICKEN.  
SEE DEPUTY CLERK’S 10-11-2019 RULING

**FILED**  
JAN 14 2018  
WASHINGTON STATE  
SUPREME COURT

**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  
and King County,  
  
Petitioner,  
  
SWEDISH HEALTH SERVICES, non-  
profit entity; and JUSTIN WARREN  
REIF, an individual,  
  
Defendants.

No. 9 6 4 6 4 - 5  
  
RULING GRANTING DIRECT  
DISCRETIONARY REVIEW,  
GRANTING PETITIONER’S MOTION  
TO STRIKE IN PART, and DENYING  
RESPONDENT’S MOTION TO  
STRIKE

King County, operating through its public health department, Public Health-Seattle and King County (the county), seeks direct discretionary review of a Pierce County Superior Court order striking the county’s public duty doctrine affirmative defense against an action brought by Sandra Ehrhart, individually and as personal representative of the estate of her late husband, Brian Ehrhart (the estate). The question of whether the estate can validly rely on the failure to enforce exception to the public duty doctrine based on the county’s response to a prior nonfatal case of Hantavirus pulmonary syndrome (Hantavirus) occurring within the county is one on

which the superior court debatably erred to a degree warranting discretionary review under RAP 2.3(b). It is also an issue of sufficient importance and urgency worthy of direct review in this court under RAP 4.2(a)(4). Thus, for reasons explained below, the motion for discretionary review is granted and the case is retained in this court. The county's motion to strike a two-page appendix to the estate's answer is granted, the other part of the county's motion to strike is denied without prejudice, and the estate's motion to strike a declaration appended to the motion for discretionary review is denied without prejudice.

An appellate court reviews summary judgment orders de novo. *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993). A moving party is entitled to summary judgment if it establishes that there are no genuine issues of material fact and it is entitled to judgment as a matter of law. CR 56(c); *Green v. A.P.C.*, 136 Wn.2d 87, 100, 960 P.2d 912 (1998). Only when reasonable minds could reach solely one conclusion on the evidence is it appropriate to grant summary judgment. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485, 78 P.3d 1274 (2003). Here, the substantive facts, and reasonable inferences arising from those facts, are recounted in a light most favorable to the county, the nonmoving party in relation to the estate's motion for partial summary judgment to strike affirmative defenses. *City of Lakewood v. Pierce County*, 144 Wn.2d 118, 125, 30 P.3d 446 (2001).<sup>1</sup>

Mr. Ehrhart was a 34-year-old resident of Issaquah who presented flu-like symptoms to Dr. Justin Reif, a physician at Swedish Health Services. Dr. Reif treated Mr. Ehrhart and sent him home, but his condition worsened and he died on February 24, 2017.

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<sup>1</sup> The county apparently filed a motion for summary judgment that has not been ruled upon. Since the only superior court order before me for consideration is the order on the estate's motion for partial summary judgment, the county is treated as the nonmoving party for purposes of this ruling.

The cause of Mr. Ehrhart's death was initially considered to be undetermined, but a subsequent medical investigation determined that he succumbed to Hantavirus, a rare noncontagious disease that results from contact with deer mice, their feces, or other materials contaminated with Hantavirus. It has a mortality rate of 30 to 38 percent.

Washington State's Department of Health requires health care providers to notify local public health authorities of the occurrence of more than 80 diseases and medical conditions, including Hantavirus, designated as "notifiable conditions." WAC 246-101-101. The regulation sets a notification time frame for each of the listed conditions: immediately (*e.g.*, anthrax and rabies), within 24 hours (*e.g.*, Brucellosis and Hantavirus), within three business days (*e.g.*, AIDS and West Nile virus), and monthly (*e.g.*, occupational Asthma and Birth Defects). Mr. Ehrhart's medical providers notified the county of Mr. Ehrhart's Hantavirus case pursuant to this regulation.

When the county received notice of Mr. Ehrhart's tragic death, it was already aware of a nonfatal episode of Hantavirus that a woman had contracted in Redmond in late November or early December 2016. It was only the second confirmed Hantavirus case contracted in King County, the first confirmed case occurring in 2003.

After receiving notice of the woman's Hantavirus diagnosis in December 2016, the county investigated the matter. The county learned that the patient and her husband resided on an isolated farm (which was later determined to be located about 10 miles from Mr. Ehrhart's residence). The county further determined, among other things, that deer mice lived on the farm property, left feces on the property, and burrowed into the air conditioning system of the patient's automobile. The county also determined that the patient had not travelled anywhere.

Relying on its investigation, the county, through its director of public health, Dr. Jeffrey Duchin, deemed the Hantavirus exposure to be an isolated incident. As

indicated, the patient, who had become seriously ill, recovered. The county advised the patient and her husband of contamination control measures and recommended that they consult a rodent control professional. The patient's husband expressed to the county his concerns about the potential for a wider outbreak, but the county deemed the episode to be isolated to the patient's property. The county did not issue an advisory to health care professionals within its jurisdiction or the public, and there is no statute or regulation that specifically required the county to do so.

After receiving notification of Mr. Ehrhart's subsequent and fatal Hantavirus case, the county issued public health advisories on March 23 and April 4, 2017. The advisories were issued in the midst of emerging media coverage of Mr. Ehrhart's death, the previous Hantavirus case, and the potential of a Hantavirus outbreak.

The estate sued Dr. Reif, Swedish Medical Services, and the county for wrongful death and negligence. Of specific concern here, the estate alleged that the county failed to issue a public health advisory after the previous Hantavirus case, and therefore Mr. Ehrhart's medical provider defendants were not aware of the Hantavirus danger when they treated him.

The county asserted various affirmative defenses, including the public duty doctrine. The estate filed a motion for partial summary judgment, urging the superior court to dismiss the public duty doctrine defense under the failure to enforce exception to the doctrine. In particular, the estate relied on language in a Department of Health regulation stating that a local health officer or local health department shall "[r]eview and determine appropriate action for . . . [e]ach reported case or suspected case of a notifiable condition." WAC 246-101-505(1). As indicated, Hantavirus is one of the notifiable conditions listed in WAC 246-101-101. The department opposed the motion, arguing that it did not fail to enforce a statute as contemplated under the failure to enforce exception, and that it complied with WAC 246-101-505 in any event when it

reviewed the previous Hantavirus case and determined what it believed to be the appropriate course of action in that instance.

The superior court “conditionally” granted the estate’s motion for partial summary judgment, ruling that the failure to enforce exception applied was dependent on the jury determining whether the county’s actions in relation to the nonfatal Hantavirus case were “appropriate” under WAC 246-101-505.

The county now seeks discretionary review directly in this court, filing both a motion for discretionary review with appendices and a statement of direct grounds for review. RAP 2.3(b); RAP 4.2(b), (c). The estate opposes discretionary and direct review and has attached various appendices. The county moved to strike certain of these appendices. The estate’s answer to that motion contained a motion to strike Dr. Duchin’s declaration in support of the motion for discretionary review. The motion for discretionary review proceeded to telephonic oral argument on January 10, 2019.

As a preliminary matter, the county moves to strike two appendices to the estate’s answer to the motion for discretionary review. The first appendix is a two-page document entitled “CLARIFICATION OF THE FACTUAL RECORD.” It consists of side-by-side comparisons between factual statements made in the county’s motion for discretionary review and contrary factual assertions by the estate, accompanied by argument. The county is correct that this appendix constitutes briefing beyond the 20-page page limit to the estate’s answer to the motion for discretionary review. RAP 17.4(g)(1). The estate did not move for leave to file an overlength brief, and it may not expand the text of its brief by way of this argumentative appendix. The two-page appendix is therefore stricken.<sup>2</sup>

The county also seeks to strike the first 75 pages of the estate’s Appendix A in support of its answer, arguing that they do not contain records considered by the

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<sup>2</sup> Even if I do not strike the appendix, it would not affect my decision to grant review.

superior court when it made its summary judgment determination. RAP 9.12. The superior court entered the challenged summary judgment order on September 28, 2018. The appendix to the estate's answer to the county's motion for discretionary review consists of the declaration of the estate's counsel, and numerous attachments thereto, in support of the estate's answer to the county's motion for a protective order in connection with a discovery dispute not presently before me. These papers were filed in the superior court on October 30, 2018, and therefore, the county is correct that they were not before the trial court when it considered the summary judgment motion. RAP 9.12.

The estate answers that RAP 9.12 does not apply in the context of a motion for discretionary review of a summary judgment order, and therefore it may append papers the estate believes will be of assistance to this court, including records not considered by the court when it entered the summary judgment order. RAP 17.3(b)(8). That is a dubious proposition in relation to a summary judgment order. While the estate is correct that RAP 17.4(f) exempts RAP 9.11, a rule pertaining to the taking of new evidence, with respect to affidavits and attachments in support of a motion and answer thereto, there is no stated exemption for RAP 9.12, a special rule applicable solely to review of summary judgment orders. The purpose of RAP 9.12 is to ensure that an appellate court engages in the same inquiry as the trial court. *Wash. Fed'n of State Emps., Council 28 v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 157, 849 P.2d 1201 (1993). While the estate is correct that I have not yet decided whether to grant discretionary review of the summary judgment order in this case, as commissioner of this court, I must necessarily conduct a preliminary review of the order before determining whether review on the merits is warranted in this court or the Court of Appeals. RAP 2.3(b); SAR 15(b). Submitting materials that were not considered by the trial court when it entered the summary judgment order does not help me complete this task.

In light of the foregoing considerations, grounds exist to grant the motion to strike the challenged pages to the estate's Appendix A. But since the offending pages do not affect my decision to grant review in any event, I have decided to deny the motion to strike these pages without prejudice so that the county may, if it wishes to do so, renew the motion to the full court when the court considers this case on the merits.

As a final preliminary matter, the estate, in its answer to the county's motion to strike, moves to strike Dr. Duchin's declaration in support of the county's motion for discretionary review. The estate only made this motion after the county moved to strike its appendices. As with the estate's challenged appendices, Dr. Duchin's declaration does not affect my decision to grant review. The estate's motion to strike is therefore denied, also without prejudice.

Now before me is whether to grant discretionary review under RAP 2.3(b), and if so, whether to retain the matter in this court or transfer it to the Court of Appeals pursuant to RAP 4.2(e)(2).<sup>3</sup> Here, the county contends that discretionary review is justified because the superior court committed either obvious error that renders further proceedings useless or probable error that substantially alters the status quo or that substantially limits the county's freedom to act. RAP 2.3(b)(1) and (2). The county further asserts that direct review in this court is justified because this case involves a fundamental and urgent issue of broad public importance that requires this court's prompt and ultimate determination. RAP 4.2(a)(4).

A superior court commits "obvious error" under RAP 2.3(b)(1) when its decision is clearly contrary to statutory or decisional authority with no discretion involved. *See I Washington Appellate Practice Deskbook*, § 4.4(2)(a) at 4-34-4-35 (4th ed. 2016). The error also must render further proceedings "useless." *See id.* at 4-36. Or stated more simply, the court "made a plain error of law that markedly affects the course of the

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<sup>3</sup> If I deny discretionary review, the transfer/retain question becomes moot.

proceedings.” II Washington Appellate Practice Deskbook, § 18.3 at 18-14 (4th ed. 2016) (discussing the analogous rule under RAP 13.5(b)(1)). A reviewable error arguably occurred in this instance.

In this action, the estate must prove that the county breached a duty owed to the late Mr. Ehrhart and that the breach proximately caused his death. *Sheikh v. Choe*, 156 Wn.2d 441, 447-48, 128 P.3d 574 (2006). Whether a duty exists is a question of law reviewed de novo. *Id.* at 448. Because the estate seeks recovery from a government entity, the public duty doctrine comes into play: the county is not liable for a duty owed to the public unless the estate can show that the duty was owed to Mr. Ehrhart individually. *Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988).

The estate relies on the so-called “failure to enforce” exception to the public duty doctrine; therefore, the estate must establish (1) government agents responsible for enforcing a statute possessed actual knowledge of a statutory violation, (2) those agents failed to take corrective action, (3) there is a statutory duty to do so, and (4) the plaintiff is within the class the statute is intended to protect. *Honcoop v. State*, 111 Wn.2d 182, 189-90, 759 P.2d 1188 (1988). The estate has the burden of establishing all four elements of this exception. *Atherton Condo. Apt. Owners Ass’n Bd. Of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 531, 799 P.2d 250 (1990). Furthermore, the exception is narrowly construed. *Id.* Therefore, it applies only if the relevant statute mandates a specific action to correct a violation. *Donohoe v. State*, 135 Wn. App. 824, 849, 142 P.3d 654 (2006). Such a mandate does not exist if the government agent has broad discretion on whether and how to act. *Id.* Washington appellate courts analyzing the failure to enforce exception have uniformly required the existence of a directive based on statute, ordinance, or agency regulation requiring the government agent to take specific corrective or enforcement action. *See Oliver v. Cook*, 194 Wn. App. 532, 540-41, 377 P.3d 265 (2016); *Caldwell v. City of Hoquiam*, 194 Wn. App. 209, 215,

373 P.3d 271, *review denied*, 186 Wn.2d 1015 (2016); *Woods View II v. Kitsap County*, 188 Wn. App. 1, 27-28, 352 P.3d 807 (2015); *Gorman v. Pierce County*, 176 Wn. App. 63, 77-81, 307 P.3d 795 (2013); *Pierce v. Yakima County*, 161 Wn. App. 791, 799-801, 251 P.3d 270 (2011); *Donohoe*, 135 Wn. App. at 849-50; *Halleran v. Nu W., Inc.*, 123 Wn. App. 701, 714-16, 98 P.3d 52 (2004); *Smith v. City of Kelso*, 112 Wn. App. 277, 284, 48 P.3d 372 (2002); *Ravenscroft v. Wash. Water Power Co.*, 87 Wn. App. 402, 415, 942 P.2d 991 (1997), *aff'd*, 136 Wn.2d 911, 969 P.2d 75 (1998); *Forest v. State*, 62 Wn. App. 363, 369, 814 P.2d 1181 (1991); *McKasson v. State*, 55 Wn. App. 18, 25, 776 P.2d 971 (1989); *Waite v. Whatcom County*, 54 Wn. App. 682, 687, 775 P.2d 967 (1989); *Livingston v. City of Everett*, 50 Wn. App. 655, 658-59, 751 P.2d 1199 (1988); *Bailey v. Forks*, 108 Wn.2d 262, 269, 737 P.2d 1257 (1987); *Campbell v. Bellevue*, 85 Wn.2d 1, 13, 530 P.2d 234 (1975).

As indicated, the estate relies on a Department of Health regulation that states in relevant part that the local health department shall “[r]eview and determine appropriate action for . . . [e]ach reported case or suspected case of a notifiable condition.” WAC 246-101-505(1). Whether this regulatory provision is a valid basis for invoking the failure to enforce exception turns on its meaning, a question of law. *See Tingey v. Haisch*, 159 Wn.2d 652, 657, 152 P.3d 1020 (2007) (meaning of statute is issue of law reviewed de novo). A reviewing court interprets administrative regulations generally in the same way as statutes, seeking to ascertain and give effect to underlying policy and intent. *Cannon v. Dep’t of Licensing*, 147 Wn.2d 41, 56, 50 P.3d 627 (2002). Where the meaning of statutory language is plain on its face, the court must give effect to that plain meaning as an expression of legislative intent. *City of Spokane v. Spokane County*, 158 Wn.2d 661, 673, 146 P.3d 893 (2006). Plain language does not require construction. *Koenig v. City of Des Moines*, 158 Wn.2d 173, 181, 142 P.3d 162 (2006). The court will also avoid absurd results when interpreting a statute. *Tingey*, 159 Wn.2d at 664.

The regulation at issue plainly mandates the county to “[r]eview and determine appropriate action” in instances of notifiable conditions. WAC 246-101-505(1). The evidence submitted indicates that the county did so. The county reviewed the prior Hantavirus case and determined what it deemed to be appropriate actions in response to what it perceived to be an isolated case. Nothing in the text of WAC 246-101-505 mandates the county to take the specific action of issuing an advisory to health providers or members of the public within its jurisdiction after it receives notification of a single notifiable event.

Nor does WAC 246-101-505, or any related provision of the administrative code, define what an “appropriate action” would be. The provision at issue thus gives the county discretion to determine an “appropriate” action in response to the facts surrounding a reported case of a notifiable condition. The estate agreed with this general proposition at oral argument, but in a practical sense its interpretation of WAC 246-101-505 produces an absurd result when applied logically: for example, every suspected case of Autism Spectrum Disorder or Tetanus, both notifiable conditions, would require issuance of a countywide advisory. The better interpretation is that the local health authority has discretion to take actions it deems appropriate in light of the actual facts of the case and the local conditions. But nothing in the text of WAC 246-101-505 contains a specific directive to take enforcement or corrective action in the form of issuing a countywide notice in response to an individual Hantavirus case. The estate reinforced this notion at oral argument when I asked whether the county would have a duty to issue an advisory if a child in Renton was born with the notifiable condition of Cerebral Palsy. The estate replied that it would not, elaborating that the county would exercise its discretion in light of the individual case to determine an appropriate response pursuant to WAC 246-101-505. The estate’s position that it can base the failure to enforce exception on this discretionary act conflicts with a central

premise of exception: the existence of a clear statutory duty to take a specific enforcement action. *See, e.g., Cook*, 194 Wn. App. at 540-41.

The estate urges that whether the county's discretionary decision was "reasonable" under WAC 246-101-505 is a genuine issue of material fact the superior court properly directed to the jury. In so arguing, the estate relies mainly on two dangerous dog cases, *Livingston v. City of Everett*, 50 Wn. App. 655, and *Gorman v. Pierce County*, 176 Wn. App. 63. Neither of these decisions aids the estate's cause.

In *Livingston*, a city animal control officer failed to carry out a mandatory duty, expressly stated in the municipal code, to determine whether a dog was dangerous before releasing it to its owner. *Livingston*, 50 Wn. App. at 657-58. The Court of Appeals held that the failure to enforce exception applied because the animal control officer violated an express mandatory duty to exercise discretion. *Id.* at 659. The decision did not turn on whether the officer properly exercised discretion, which is the primary basis of the estate's argument here.

The Court of Appeals decision in *Gorman* is based on the same principle. There, county animal control officers failed to carry out a mandatory duty, explicitly stated in the county code, to classify allegedly dangerous dogs in response to a citizen's complaints. *Gorman*, 176 Wn. App. at 78-79. The Court of Appeals reasoned that while the county had discretion as to a dog's classification, "it had a duty to at least apply the classification process to any apparently valid report of a dangerous dog. The county had a duty to act." *Id.* at 79 (footnote omitted). Nothing in *Gorman* supports the notion that the failure to enforce exception turns on the perceived reasonableness of a government official's discretionary act under a statutorily imposed duty to exercise that discretion.

Since the estate relies heavily on these dangerous dog cases, it should be mentioned that the estate's claim is more analogous to a more recent case where a dog bite victim obtained a partial summary judgment and then a jury verdict in her favor on

a claim that a municipality breached a duty to immediately impound the animal that bit her. *See Caldwell*, 194 Wn. App. 209. In that decision, the Court of Appeals, applying the public duty doctrine and the failure to enforce exception to the doctrine, reversed the partial summary judgment order and the jury verdict, holding that neither the relevant municipal code provision nor a state animal control statute imposed a duty on the municipality to immediately impound an allegedly dangerous dog. *See id.* at 216-222. In this instance, nothing in the text of WAC 246-101-505 imposes a duty on the county to issue a countywide advisory when it receives notification of an individual nonfatal Hantavirus case.

The summary judgment order in this case has the practical effect of importing into WAC 246-101-505 a mandatory advisory requirement where none exists. While one may argue that Department of Health regulations should explicitly require issuance of an advisory whenever the local health authority receives notice of an actual or suspected notifiable condition, including Hantavirus, that policy argument is better made to the department in its rulemaking capacity, not to a trial or appellate court.

The estate has not identified any authority applying the failure to enforce exception in such a sweeping fashion. And on this record, I am not persuaded that the county violated, had actual knowledge of, or failed to correct a violation of WAC 246-101-505 as interpreted in accordance with its plain meaning for purposes of the failure to enforce exception. Thus, the superior court likely committed obvious error by applying too broadly the failure to enforce exception to the public duty doctrine and sending the “reasonableness” question to a jury. If that is so, the error renders further proceedings useless: if the error is left uncorrected, the county could be found liable after a jury trial and the resulting judgment would be reversed on appeal. RAP 2.3(b)(1). The estate’s contention that further proceedings would not be useless in light of other causes of action, such as a Public Records Act claim against the county, is unpersuasive.

Interlocutory review of the public duty doctrine issue will definitively answer this dispositive issue of first impression and avoid a potential waste of judicial resources.

If the superior court's order is viewed in the alternative as probable error for purposes of RAP 2.3(b)(2), the result does not substantially alter the status quo or substantially limit the county's freedom to act in relation to the instant litigation. See Geoffrey Crooks, *Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure*, 61 WASH. L. REV., 1541, 1546 (1986) (interpreting meaning of "probable error" standard); see also *State v. Howland*, 180 Wn. App. 196, 207, 321 P.3d 303 (2014) (interpreting probable error standard under RAP 2.3(b)(2)). However, while recognizing that the summary judgment order ordinarily would not have a binding effect outside this case, the continued existence of the order may substantially limit the county's discretion in responding to reportable conditions going forward. So long as the county is potentially liable for not automatically issuing a public health advisory in response to any report of a notifiable event, it makes no sense for it to do anything other than issue such an advisory anytime it becomes aware of an actual or probable notifiable event, regardless of the lack of any specific mandate in Department of Health regulations. The result could be a flood of public health advisories that may lead to a "sky is falling" effect, ultimately diluting the effectiveness of a system intended to warn health care providers and the public of serious public health risks.<sup>4</sup> Thus, even if review is not warranted for obvious error under RAP 2.3(b)(1), it is arguably justified for probable error under RAP 2.3(b)(2).

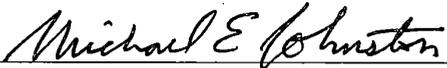
As for whether to retain this case or transfer it to the Court of Appeals, the lower appellate court is capable of reviewing this case in the first instance, but the public duty

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<sup>4</sup> The ramifications of the summary judgment order are so apparent I found it unnecessary to consider Dr. Duchin's declaration in support of the motion for discretionary review, in which he asserts various ways the summary judgment order adversely affects the county. As indicated, the estate moved to strike the declaration but I denied the motion without prejudice.

doctrine issue concerns interpretation of an administrative rule applicable to all counties in Washington; therefore, resolution of this case has statewide public policy implications. Even if the Court of Appeals were to decide this issue, it seems inevitable that the aggrieved party will file a petition for review, which this court is likely to grant as a matter of substantial public interest pursuant to RAP 13.4(b)(4). In light of these observations, and profoundly mindful of Mr. Ehrhart's tragic death, I conclude that this case involves a "fundamental and urgent issue of broad public import" that requires this court's prompt and ultimate determination. RAP 4.2(a)(4).

Accordingly, the motion for discretionary review is granted and the case is retained in this court for a decision on the merits. The Clerk is requested to set a schedule for perfecting the record and briefing by the parties.

  
COMMISSIONER

January 14, 2019

# PACIFICA LAW GROUP

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### Comments:

Petitioner King County's Opening Brief with Appendix.

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