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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.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION OF COUNTIES

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I. IDENTITY AND INTEREST OF *AMICUS CURIAE*

WSAC is a non-profit association that serves all 39 counties in the State of Washington. Its membership includes elected county commissioners, council members, and executives. WSAC provides a variety of services to its member counties, including advocacy, training, workshops, and a forum to network and share best practices. WSAC also serves as an umbrella organization for affiliate organizations representing local public health officials, county road engineers, administrators, emergency managers, human service administrators, clerks of county boards, and others. Created in 1906, WSAC provides a forum for networking and sharing best practices, and importantly, provides a single voice for and on behalf of counties.

WSAC has a strong interest in the outcome of this appeal for two principal reasons. First, Washington counties perform hundreds of duties pursuant to statute and regulation. Under current Washington law, the counties' myriad duties are to the public at large, and are generally not actionable in tort suits by individuals. The trial court's order, if affirmed, would change this settled law and create widespread potential liability for counties arising from their daily work promoting the health and safety of their citizens. Counties would be subject 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. The cost and delay occasioned by such potential liability would undermine counties' ability to carry out their mission to serve the public.

Second, every county is part of a local health jurisdiction. Thus, given its membership, WSAC has a unique perspective on the importance of appropriate communication to the public by local health authorities. The one-size-fits-all mandatory advisory scheme advanced by the Estate is not consistent with best public health practices or the needs and capabilities of individual counties. As detailed below, like King County, all counties exercise their discretion and expertise to make appropriate determinations about when and how to issue health advisories.

Accordingly, WSAC offers this amicus brief in support of Petitioner King County, and asks this Court to reverse the trial court's order and dismiss the Estate's claims against King County.

II. STATEMENT OF THE CASE

WSAC adopts the Statement of the Case set forth in King County's Opening Brief.

III. ARGUMENT

Unlike private parties, governmental entities have numerous statutory and regulatory obligations stemming from their role as providers of benefits and services that members of the public otherwise could not

obtain on their own. But the mere fact that a county has statutory or regulatory obligations does not give rise to distinct legal duties to particular individuals. Rather, Washington courts “have weighed in on the importance of limiting liability for the government under the public duty doctrine,” holding that “[the doctrine] 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 v. Stevens Cty.*, 111 Wn.2d 159, 170, 759 P.2d 447 (1988)). “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 v. City of Federal Way*, 178 Wn.2d 732, 753, 310 P.3d 1275 (2013) (citation omitted). Courts purposely construe exceptions to the public duty doctrine “narrowly in order to avoid dissuading public officials from carrying out their public duty.” *Woods View II, LLC v. Kitsap Cty.*, 188 Wn. App. 1, 27, 352 P.3d 807 (2015) (quoting *Taylor*, 111 Wn.2d at 171 (internal quotations omitted)).

As this Court’s commissioner determined, the trial court’s “conditional grant” of summary judgment alters this long-standing authority, effectively making health advisories pursuant to WAC 246-101-

505 mandatory where no mandate now exists. Petitioner Br. at APP.22.

As detailed below, if affirmed, the trial court's order would reach far beyond the public health context to create potential tort liability out of the hundreds of other statutory and regulatory directives that define county functions. Moreover, the mandatory advisory scheme urged by the Estate is contrary to informed county practices and would undermine, not promote, public health. The trial court should be reversed, and the claims against King County dismissed.

A. The Trial Court's Order Would Create Tort Duties Out of Hundreds of County Functions Meant to Serve the Public's Interest.

The Estate has asked the Court to abolish the public duty doctrine and impose a new tort liability standard on counties for their discretionary responses to over 80 health conditions. While catastrophic to responsible public health practices in and of itself, the reach of such an order would extend far beyond county obligations under WAC 246-101-505. Rather, affirming the trial court could create new actionable tort duties to individuals out of hundreds of county functions that benefit the public at large. Washington counties would be subject to jury trials (at public expense) every time an individual disagrees with a county's exercise of a discretionary function. If counties faced jury trials second-guessing the appropriateness of each discretionary decision, it is axiomatic that such

decisions would devolve from those based on the particular facts and circumstances into a mere liability reduction tool. This result would undermine the very purpose of county statutory and regulatory duties: serving the public's interest.

Washington counties serve the people of the state through the provision of numerous services promoting the general health and welfare. For example, among other things, counties oversee local health departments (RCW 70.05.010-.035); construct and maintain county roads (RCW 36.75.020); house and maintain the county judicial system (RCW 2.08; RCW 3.30); enforce local and state laws (RCW 36.28); supervise elections and voter registration (RCW 29A.04.025, .055); provide coroner services (RCW 36.24); license vehicles and vessels (RCW 46.01.130-140); fix tax levies (RCW 84.52.010); establish and enforce regional growth management plans (RCW 36.70A.040); and provide treasurer services for county school districts (RCW 28A.510.270), fire districts (RCW 52.16.010), water districts (RCW 57.20.135-.140), and other units of local government (e.g., RCW 53.36.010; RCW 54.24.010). Inherent in these duties is the expectation that county officials will exercise their professional expertise and discretion when carrying out the day-to-day operations of the "people's business." See *Munich v. Skagit Emergency Commc'ns Ctr.*, 175 Wn.2d 871, 886, 288 P.3d 328 (2012) (Chambers, J.,

concurring). With limited exceptions, these duties are to the public at large and not to specific individuals. Under long-standing Washington law, such obligations to the public do not create tort duties to individuals. *See, e.g., Osborn v. Mason Cty.*, 157 Wn.2d 18, 27, 134 P.3d 197 (2006) (no tort liability where statutory duty to “nebulous public”); *Pierce v. Yakima Cty.*, 161 Wn. App. 791, 798, 251 P.3d 270 (2011) (same) (citations omitted).

Moreover, the great majority of county duties performed in the interest of the public require the exercise of discretion and expertise by county officials, from decisions involving public health to land use to local development to agriculture. The discretion required for counties to fulfill their statutory and regulatory duties further counsels against creating actionable torts out of those duties. *Pierce*, 161 Wn. App. at 799 (“Such a mandate does not exist if the government agent has broad discretion regarding whether and how to act.”).

Even where a statute or regulation provides that counties “shall” perform some duty, counties often retain discretion as to how they carry out the statutory mandate. For example, RCW 36.70A.040 provides that counties of a certain population level “shall conform to the requirements” of the Growth Management Act (“GMA”), including adopting a comprehensive plan and development regulations. RCW 36.70A.040(1),

(3). Notwithstanding the use of the word “shall,” this Court has recognized that the GMA confers “broad . . . discretion” on counties to “make choices within [the GMA’s] confines.” *Lewis Cty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 503, 139 P.3d 1096 (2006) (internal quotations omitted); *see also Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 430, 166 P.3d 1198 (2007) (“Under the GMA, counties . . . have broad discretion in developing development regulations tailored to local circumstances.” (internal quotations and alterations omitted)).

Similarly, while RCW 19.27.031 provides that several state building codes “shall be in effect in all counties,” courts have held that counties nonetheless possess discretion in the application of the codes. *See Fox v. Skagit Cty.*, 193 Wn. App. 254, 269-70, 372 P.3d 784 (2016) (county had discretion to consider the legal availability of water beyond its own local definition of “adequate water supply” when deciding whether to issue a building permit pursuant to RCW chapter 19.27); *see also Pierce*, 161 Wn. App. at 801 (county that had adopted state residential code as local ordinance did not have a mandatory duty to enforce code because county inspector had “authority to authorize disconnection” in the event of a code violation).

Moreover, similar to WAC 246-101-505, other statutory and regulatory mandates direct county agencies to exercise their discretion to make rules or determine appropriate actions. For example, RCW 70.05.060(3) states that a local health department “shall . . . [e]nact . . . local rules and regulations” to “preserve, promote and improve the public health[.]” Similarly, RCW 36.78.070 provides that the county road administration board “shall” establish “standards of good practice for the administration of county roads and the efficient movement of people and goods over county roads.” Washington courts have interpreted such language to provide local governments with discretion in carrying out their duties. *See Smith v. City of Kelso*, 112 Wn. App. 277, 282, 284, 48 P.3d 372 (2002) (municipal engineer had “discretion” in preparing “development standards based on the topography, soil conditions, and geology” of the subdivision even though ordinance stated engineer “shall” prepare said standards). The same is true with respect to WAC 246-101-505. Such broad directives for the public welfare should not be converted into tort duties to individuals.

Here, WAC 246-101-505 states that the local health department “shall review and determine appropriate action” for over 80 different health conditions. The Estate puts undue emphasis on the word “shall,” arguing it creates a mandatory duty on the part of the county to issue a

health advisory. Estate Br. at 1. But the plain language of WAC 246-101-505 does not support the Estate’s claim. No specific action is required. To the contrary, the regulation merely requires counties to exercise their discretion in determining the appropriate course of action. In undertaking its review and investigation—and determining not to issue an advisory after the single case discovered on rural private property—King County did precisely what the regulation requires. Petitioner Br. at 10-12.

Accepting the Estate’s argument that WAC 246-101-505 imposes a mandatory duty on King County to issue a health advisory after a single reported case of a noncontagious condition would subject all Washington counties to tort liability for their discretionary decisions related to a host of obligations, including public health, land use, and development, among others. In turn, imposing liability here would contradict the entire purpose behind the public duty doctrine, which recognizes the multitudes of governmental obligations imposed by statute and regulation that are not comparable to private action. *See Munich v. Skagit Emergency Comm’n Ctr.*, 175 Wn.2d 871, 894-95, 288 P.3d 328, 340 (2012) (Chambers, J. concurring) (“We must recognize that some governmental functions are not meaningfully analogous to anything a private person or corporation might do.”); *see also Taylor*, 111 Wn.2d at 170 (policy of public duty doctrine is that “legislative enactments for the public welfare should not

be discouraged by subjecting a governmental entity to unlimited liability”).

Accordingly, this Court should reaffirm the long-standing rule that Washington counties can only be held liable in tort to the same extent as private persons. *Washburn*, 178 Wn.2d at 753-54; *Munich*, 175 Wn.2d at 887 (Chambers, J., concurring) (“Private 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.”). Here, King County appropriately exercised its discretion under WAC 246-101-505 and its actions were in no way analogous to any duty imposed on private individuals. The Estate’s claims against King County should be dismissed.

B. The Estate’s Push for Mandatory Health Advisories Would Undermine, not Promote, Public Health.

County health departments have existed in some form since before Washington became a state.¹ “Legislation was enacted in 1887 designating each board of county commissioners as the board of health for the county, authorizing counties to appoint public health officers, and granting counties broad authority to adopt public health regulations.” *Id.*

¹ Washington became a state in 1889. See STEVE LUNDIN, THE CLOSEST GOVERNMENTS TO THE PEOPLE: A COMPLETE REFERENCE GUIDE TO LOCAL GOVERNMENT IN WASHINGTON STATE at 19 (2007).

at 98. Every Washington county is part of a local health jurisdiction. Some such jurisdictions consist of single county governments, some are multi-county, two are city-county, and some are special government districts to which counties contribute.² Local boards of health have been granted “supervision over all matters pertaining to the preservation of the life and health of the people within its jurisdiction” and are required to “[p]rovide for the control and prevention of any dangerous, contagious or infectious disease within” their jurisdictions. RCW 70.050.060(4). These broad statutory directives to advance public health have repeatedly been held to be inconsistent with tort liability to individuals. *See e.g., Honcoop v. State*, 111 Wn.2d 182, 189, 759 P.2d 1188, 1193 (1988) (brucellosis statutes and regulations enacted to further general public health, not create a damages action for dairy operators); *Fishburn v. Pierce Cty. Planning & Land Servs. Dep’t*, 161 Wn. App. 452, 466, 250 P.3d 146 (2011) (RCW 70.188 pertaining to septic tanks intended to promote health of public, not just septic tank owners).

Counties have been granted (and in fact exercise) broad discretion regarding how to achieve their statutory public health goals. For example,

² Two or more counties may create a health district under RCW 70.46. A city with a population of 100,000 or more, and the county in which it is located, may create a combined city-county health department under RCW 70.08. *See also* RCW chapter 70.05 (“Local Health Departments, Boards, Officers – Regulations”).

WAC 246-101-505 directs local health jurisdictions to “review and determine appropriate action” for “each reported or suspected case of a notifiable condition.” While one component of “appropriate” action may include issuing some type of public notification of a health-related event (whether to medical providers, media, or other interested groups), no law or regulation requires the county to issue health advisories for any particular case, let alone based on a single case of a non-contagious illness like Hantavirus.³

The lack of a specific mandate makes sense, as the need for, and use of, public health advisories varies based on the nature of the event, as well as any number of other factors that may depend on characteristics specific to the county issuing the advisory. Washington counties demonstrate extraordinary diversity in size, population, topography, climate, economy, and resources.⁴ Thus, the discretion authorized in WAC 246-101-505 is essential, due in part to the fact that the unique characteristics of each county may necessitate divergent methodology in determining when and how to communicate with the public about

³ As this Court’s Commissioner recognized, WAC 246-101-101 requires healthcare providers to send notice to local health jurisdictions regarding myriad conditions ranging from alcohol-related birth defects to rabies. It would be illogical to expect a department to then issue a health advisory whenever a child is born with alcohol-related birth defects, when such notice would do nothing to protect the general public.

⁴ See Washington State Office of Financial Management County and City Data, *available at* <https://www.ofm.wa.gov/washington-data-research/county-and-city-data> (last visited September 27, 2019).

significant health-related events. Indeed, as the Estate acknowledges, health advisories are not issued every time a notifiable condition is reported by a health provider.

The Estate asserts that “virtually every jurisdiction in Washington and elsewhere” issues notices after the first confirmed case of Hantavirus. Estate Br. at 14-15. It references a handful of advisories from five jurisdictions, some of which date back to 2006. CP 431-445. As a threshold matter, five jurisdictions is certainly not “virtually every” one of Washington’s local health departments or 39 counties. Moreover, with the exception of one Kittitas County advisory from 2008, it is unclear if any were directed to medical providers, as the Estate alleges King County should have done after the single case in 2016. *See* CP 431. The 2006 press release from Whatcom County was announcing a death from the first *ever* probable case of Hantavirus in that county since the disease was identified in 1993. CP 445. Further, from the face of these advisories, it is impossible to know the conditions surrounding the exposures, and what other considerations each jurisdiction took into account in making notification decisions.

Counties recognize that different types of conditions warrant different responses. This is apparent in the Washington State Department of Health’s recommended protocols for treatment of notifiable conditions,

which guides local health jurisdictions in evaluating their options for responding to over 80 different health conditions. The guidelines for Hantavirus are based on the fact that the disease is not transmitted person-to-person and is dependent on the inhalation of a virus that is excreted by a deer mouse, with exposure occurring in rodent-infested cabins, barns, and vehicles.⁵ By contrast, Hepatitis A, which can be transmitted person-to-person, often through fecal contamination of food by an infected restaurant food handler, can be infectious for at least one month at room temperature on environmental surfaces.⁶ Accordingly, the guidelines for Hepatitis A include a sample press release and a sample alert, while the Hantavirus guidelines include neither. *Id.* at 13-14. Since the recognition of Hantavirus in 1993, only 53 cases were reported through 2017, with zero to five cases reported each year and most exposures occurring in eastern Washington.⁷ For Hepatitis A, 3,273 cases were reported in 1989, but increased vaccination rates have lessened that number to fewer than

⁵ The Washington State Department of Health Reporting and Surveillance Guidelines for Hantavirus can be found at <https://www.doh.wa.gov/Portals/1/Documents/5100/420-056-Guideline-Hantavirus.pdf> (last visited September 25, 2019).

⁶ The Washington State Department of Health Reporting and Surveillance Guidelines for Hepatitis A can be found at <https://www.doh.wa.gov/Portals/1/Documents/5100/420-039-Guideline-HepatitisA.pdf> (last visited September 25, 2019).

⁷ Specific details regarding Hantavirus can be found in the 2017 Washington State Communicable Disease Report found at <https://www.doh.wa.gov/Portals/1/Documents/5100/420-004-CDAnnualReport2017.pdf> (last visited September 25, 2019).

100 per year; for example, 28 cases were reported in 2017.⁸ If health advisories were universally required, notification of highly contagious conditions like Hepatitis A, which an infected food handler could transmit to any number of restaurant customers, could easily get lost in the flood of thousands of notifications that would result.

As stated by this Court's commissioner in his ruling granting discretionary review, eliminating county discretion around public notifications could result in 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 healthcare providers and the public of serious public health risks." Petitioner Br. at APP.22. This Court has previously recognized these concerns. In a case regarding the release of sex offenders, this Court noted that notification to the "public at large . . . would . . . produce a cacophony of warnings that by reason of their sheer volume would add little to the effect of protection of the public." *Osborn*, 157 Wn.2d at 29 (internal quotations and citations omitted). In order to separate truly critical advisories from the noise of interesting (but not critical) messages, counties must be able to exercise

⁸ Specific details regarding Hepatitis A can be found in the 2017 Washington State Communicable Disease Report found at <https://www.doh.wa.gov/Portals/1/Documents/5100/420-004-CDAnnualReport2017.pdf> (last visited September 25, 2019).

independent decision-making in determining when and how to communicate with the public. Respondent's arguments to the contrary should be rejected.

IV. CONCLUSION

Counties play a vital role in advancing the welfare of all Washington residents through myriad statutory and regulatory functions aimed at promoting public health, safety, travel, agriculture, and economic well-being. The trial court's order, if upheld, would effectively eliminate the public duty doctrine, subjecting Washington's counties to the uncertainty and expense of litigation whenever aggrieved parties disagree with the manner in which a county exercises a discretionary function. That is an untenable result. The trial court's order should be reversed.

RESPECTFULLY SUBMITTED this 27th day of September, 2019.

WASHINGTON STATE
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PROOF OF SERVICE

I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, and not a party to this action. On the 27th day of September, 2019, I caused to be served, via the Washington State Appellate Court's Portal System, a true copy of the foregoing document upon the parties listed below:

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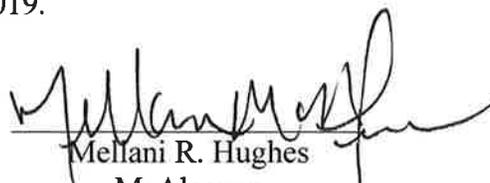
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DATED this 27th day of September, 2019.


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WASHINGTON STATE ASSOCIATION OF COUNTIES

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