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STATE OF WASHINGTON
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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

Petition,

JUSTIN WARREN REIF, an individual,

Defendant.

RESPONDENT EHRHART FAMILY'S RESPONSE TO THE WASHINGTON STATE ASSOCIATION FOR JUSTICE (WSAJ)

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Table of Contents

I. INTRODUCTION.....1

II. WSAJ IS CORRECT THAT THE PUBLIC DUTY DOCTRINE SHOULD BE ABOLISHED.....2

III. THE APPROACH PROPOSED BY WSAJ TO STATUTORY DUTIES IS SOUND.....4

IV. NOTWITHSTANDING *BENNETT*, A WELL-ESTABLISHED COMMON LAW DUTY WAS OWED.....10

V. CONCLUSION 18

Table of Authorities

Cases

Adams v. King County, 164 Wn.2d 640, 192 P.3d 891 (2008) 7, 9

Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc., 170 Wn.2d 442, 243 P.3d 521 (2010) 3, 14

Beggs v. Dep't of Soc. & Health Servs., 171 Wn.2d 69, 247 P.3d 421 (2011) 7

Beltran-Serrano v. City of Tacoma, 193 Wn.2d 537, 442 P.3d 608 (2019) 1, 11

Bennett v. Hardy, 113 Wn.2d 912, 784 P.2d 1258 (1990) ..... *passim*

Centurion Props. III, LLC v. Chi. Title Ins. Co., 186 Wn.2d 58, 375 P.3d 651 (2016) 3, 16

Davis v. Baugh Indus. Contractors, Inc., 159 Wn.2d 413, 150 P.3d 545 (2007) 10

Eastwood v. Horse Harbor Found., Inc., 170 Wn.2d 380, 241 P.3d 1256 (2010) 11

Folsom v. Burger King, 135 Wn.2d 658, 676, P.2d 301 (1998) 17

Funkhouser v. Wilson, 89 Wn. App. 644, 950 P.2d 501 (1998) 16

H.B.H. v. State, 192 Wn.2d 154, 429 P.3d 484 (2018) 2, 11

H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928) 17-18

Haberman v. Wash. Pub. Power Supply Sys., 109 Wn.2d 107, 744 P.2d 1032 (1987) 12

Keller v. City of Spokane, 146 Wn.2d 237, 44 P.3d 845 (2002) 11

Keodalah v. Allstate Ins. Co., No. 95867-0, 2019 Wash. LEXIS 591 (Oct. 3, 2019) 7, 9

Kim v. Lakeside Adult Family Home, 185 Wn.2d 532, 374 P.3d 121 (2016) 7

Lowman v. Wilbur, 178 Wn.2d 165, 309 P.3d 387 (2013) 4

Mason v. Moore, 73 Ohio St. 275, 76 N.E. 932 (1906) 13

Munich v. Skagit Emergency Commc'ns Ctr., 175 Wn.2d 871, 288 P.3d 328 (2012) 11

Savage v. State, 127 Wn.2d 434, 899 P.2d 1270 (1995) 2

State ex rel. Phillips v. State Liquor Control Bd., 59 Wn.2d 565, 369 P.2d 844 (1962) 5

Stewart Title Guar. Co. v. Sterling Sav. Bank, 178 Wn.2d 561, 311 P.3d 1 (2013) 14, 16

Swank v. Valley Christian Sch., 188 Wn.2d 663, 398 P.3d 1108 (2017) 6, 8-10

Transamerica Title Ins. Co. v. Johnson, 103 Wn.2d 409, 693 P.2d 697 (1985) 3

Tyner v. Dep't of Soc. & Health Servs., 141 Wn.2d 68, 1 P.3d 1148 (2000) 7

Webstad v. Stortini, 83 Wn. App. 857, 924 P.2d 940 (1996) 17

Wright v. Lyft, Inc., 189 Wn.2d 718, 406 P.3d 1149 (2017) 7, 9

Statutes

RCW 10.99.070 2

RCW 26.44.056 2

RCW 28A.600.190 6

RCW 4.24.210 2

RCW 4.92.090 2

RCW 4.96.010 ..... *passim*

RCW 72.09.320 2

RCW 86.12.037 2

Rules

RPC 2.3 13

Treatises

2A Sands, Sutherland's Statutes and Statutory Construction § 55.03 (4th ed. 1973) 5

Restatement (Second) of Torts § 874A (1979) 5

Restatement (Second) of Torts, § 552 (1977) 13

W. Page Keeton, et al., PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 357 (5th ed. 1984) 3

William L. Prosser, HANDBOOK OF THE LAW OF TORTS § 53, at 331 (3d ed. 1964) 3

Regulations

WAC 246-101-005 ..... 9, 14, 15

WAC 246-101-505 ..... *passim*

I. INTRODUCTION

The Washington State Association for Justice Foundation (WSAJ)'s *amicus* submission articulately explains why the public duty doctrine is both incorrect and harmful. The doctrine is at odds with the abolition of sovereign immunity, and has led to unpredictable holdings—which often have little to do with right and wrong. The Ehrhart family concurs that its continued vitality should be critically re-examined.

The Estate further agrees that the *Bennett* test is a helpful way to discern whether a public entity owes a duty by virtue of a statute or regulation. This is the test applied to private defendants, and thus, better comports with the Legislature's mandate in RCW 4.96.010. Applied here, WAC 246-101-505, evidences a clear intention to grant an enforcement mechanism to people, like Brian Ehrhart's family, when counties mishandle dangerous, notifiable conditions.

However, in final analysis, there is no need to formally reach *Bennett*. As this Court recently explained in *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 549-50, 442 P.3d 608 (2019), the public duty doctrine does not negate government's existing common law duties. As here, the duty of parties (both public and private) charged with furnishing correct information to the public is well-established. It has existed for over a century, and is recognized in Washington, other jurisdictions, and even in

the Restatement. While WAC 246-101 certainly reiterates this legal duty, that is not its only source. It fully and fairly guides the resolution of this case, regardless of *Bennett*.

II. WSAJ IS CORRECT THAT THE PUBLIC DUTY DOCTRINE SHOULD BE ABOLISHED

The Estate strongly agrees that the public duty doctrine's continued vitality should be re-evaluated. As WSAJ ably points out, this doctrine has served only to confuse jurists and commentators, while adding a layer of immunity the Legislature never intended. *See* RCW 4.92.090; RCW 4.96.010. This statute is "one of the broadest waivers of sovereign immunity in the country" and makes government "presumptively liable for its alleged tortious conduct in all instances in which the Legislature has not indicated otherwise." *H.B.H. v. State*, 192 Wn.2d 154, 179, 429 P.3d 484 (2018) (citing *Savage v. State*, 127 Wn.2d 434, 444-45, 899 P.2d 1270 (1995)).[1]

To the extent that there is no explicit immunity, the presumption is that government is accountable for the harm it causes. But this is not to say that government lacks safeguards. Far from it. It will never be liable in a

[1] Notably, the Legislature knows how to grant government immunity or define an elevated legal standard, when it wishes to do so. *See, e.g.*, RCW 86.12.037 (noncontractual acts and omissions related to flood protection); RCW 10.99.070 (good faith immunity for peace officers); RCW 4.24.210 (immunity for owners of public lands made available to the recreating public); RCW 26.44.056(3) (child protection good faith immunity); RCW 72.09.320 (elevating liability standard of community corrections officers to "gross negligence").

negligence case unless "logic, common sense, justice, policy, and precedent, as applied to the facts of the case" dictate that it should be. *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wn.2d 442, 449, 243 P.3d 521 (2010). These common law factors "trac[ing] back for more than 100 years," *Centurion Props. III, LLC v. Chi. Title Ins. Co.*, 186 Wn.2d 58, 65, 375 P.3d 651 (2016), essentially ask whether "plaintiff's interests are entitled to legal protection against the defendant's conduct." W. Page Keeton, et al., PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 357 (5th ed. 1984). If the answer is no, there is no cause of action.

Assuming a duty to refrain from harming the plaintiff, government is then protected by the standard of care itself. Assuming the government officials conform their conduct to a standard of ordinary professional care—which takes into account their attendant facts and circumstances—there will again, by definition, be no liability. *See, e.g., Transamerica Title Ins. Co. v. Johnson*, 103 Wn.2d 409, 413, 693 P.2d 697 (1985) (citing William L. Prosser, HANDBOOK OF THE LAW OF TORTS § 53, at 331 (3d ed. 1964)).

And finally, it must be proven that the government's conduct was the factual and legal cause of harm. This includes a second public policy-driven analysis concerning "how far the consequences of a defendant's acts should extend." *Lowman v. Wilbur*, 178 Wn.2d 165, 171, 309 P.3d 387

(2013). If the harm is not sequentially connected, or too attenuated, there will be no liability—no matter how negligent government was.

In other words, government is free to raise questions about whether "the plaintiff's interests are entitled to protection"; whether there was negligence; and whether the harm caused is sufficiently connected to conduct. These questions are adjudicated in courts every day. And a claimant, like Sandra Ehrhart, can only prevail by carrying her burden to answer to each and every one of these questions in the affirmative.

WSAJ is correct that the public duty doctrine adds a second, inappropriate layer of protection when there is a government defendant—and that a critical examination is long overdue, particularly because the doctrine has transmogrified itself into a modified form of immunity (*see* Br. at 11). This is not what the Legislature intended, nor is it consistent with the justice-seeking function of courts—as it often reduces important disputes to semantic exercises that are untethered from right and wrong. *See* Br. at 11 (collecting cases urging the repeal of the doctrine).

For all of the reasons articulated by WSAJ, the Estate agrees that the public duty doctrine should be abolished.

III. THE APPROACH PROPOSED BY WSAJ TO STATUTORY DUTIES IS SOUND

The Estate further agrees with WSAJ's analysis of the public duty doctrine, which proposes to simplify a needlessly complex area of law—

and further harmonize it with the Legislature's mandate. *See* RCW 4.96.010(1) ("…the same extent as if they were a private person or corporation") (emphasis added). To the extent that a duty may arise out of "special obligations imposed by statute," WSAJ's proposed approach makes sense.

The test outlined in *Bennett v. Hardy*, which applies to public and private parties alike, asks:

> [F]irst, whether the plaintiff is within the class for whose 'especial' benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly, supports creating or denying a remedy and third, whether implying a remedy is consistent with the underlying purpose of the legislation.

113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990). This is consistent with the weight of the case law, and well-defined tort principles. *See* 2A Sands, Sutherland's Statutes and Statutory Construction § 55.03 (4th ed. 1973) (when a "statute… [has] provided a right of recovery, it is incumbent upon the court to devise a remedy"); *State ex rel. Phillips v. State Liquor Control Bd.*, 59 Wn.2d 565, 570, 369 P.2d 844 (1962) ("[c]ourts have consistently held that when a statute gives a new right and no specific remedy, the common law will provide a remedy"); Restatement (Second) of Torts § 874A (1979) (the court may accord injured party a "suitable existing tort action or a new cause of action" when legislative provision protects a class

of persons but does not proscribe a civil remedy for violations). This is a matter of judicial judgment and discretion. *See id.*

In *Bennett*, the Legislature articulated its intention to protect persons of a certain age from discrimination, but there was no "explicit intent to create a remedy." *Bennett*, 113 Wn.2d at 921. This Court, however, pointed out that it "may rely on the assumption that the Legislature would not enact a statute granting rights to an identifiable class without enabling members of that class to enforce those rights." *Id.* at 921. And entire purpose of the statute—confronting discrimination—would be frustrated without an enforcement mechanism. Therefore, "according a private right of action to persons within the protected class [was] consistent with this underlying legislative purpose." *Id.*

Similarly, in *Swank v. Valley Christian Sch*., 188 Wn.2d 663, 674, 398 P.3d 1108 (2017), the issue was whether RCW 28A.600.190—the Lystedt Law—included an implied cause of action. This Court identified the protected class (young athletes who sustain concussions), and considered the Legislature's intent. Not unlike WAC 246-101-505, there was clear concern about the class to be protected, but "[d]espite this clear concern, there [was] no mechanism in the Lystedt law to enforce the requirements intended to address the risks of youth athlete concussions."

Id. The Court, therefore, found it "logical to infer that the legislature intended that there be some sort of enforcement mechanism." *Id.*[2]

There are instance where this Court has declined to find an implied cause of action, to be sure. But crucially, this is usually because there is *already* an enforcement mechanism. In *Keodalah v. Allstate Ins. Co.*, No. 95867-0, 2019 Wash. LEXIS 591, at *12 (Oct. 3, 2019), no implied cause of action was found because the "legislature's purpose was to support the insurance code's specific enforcement mechanisms and the existing common law cause of action for insurance bad faith." In *Wright v. Lyft, Inc.*, 189 Wn.2d 718, 727, 406 P.3d 1149 (2017), the Court found it unnecessary to imply a cause of action in CEMA in light of the "legislature's intent that the recipient of unsolicited text messages bring a CPA claim." And in *Adams v. King County*, 164 Wn.2d 640, 656, 192 P.3d 891 (2008), This Court emphasized that "the common law provides remedies" for violations of the UAGA.

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[2] *See also Kim v. Lakeside Adult Family Home*, 185 Wn.2d 532, 374 P.3d 121 (2016) (finding an implied cause of action in the abuse of vulnerable adults act, ch. 74.34 RCW); *Beggs v. Dep't of Soc. & Health Servs*., 171 Wn.2d 69, 247 P.3d 421 (2011) (finding an implied cause of action against persons required to report child abuse in RCW 26.44.030); *Tyner v. Dep't of Soc. & Health Servs*., 141 Wn.2d 68, 1 P.3d 1148 (2000) (finding that parents have an implied cause of action against the state under RCW 26.44.050); *Krystad v. Lau*, 65 Wn.2d 827, 846, 400 P.2d 72 (1965) (implying right of action under state's labor relations act);

What this Court has *not* presumed is that when enacting a statute, the Legislature intended no effectuation its intent. After all, "[w]ithout an implicit creation of a remedy, the statute is meaningless."[3] *Swank*, 188 Wn.2d at 676-77.

Our case presents the same, straightforward issue. As for the first *Bennett* factor, Judge Speir rightly found that the regulation was intended to protect an identifiable class of people:

> On the third element, I think I can answer that as a matter of law. I'm looking specifically to WAC 246-101-005, which sets forth the purpose of this whole notice policy, and I'm finding that 505 was intended to protect individuals who were at risk of contracting or who had already contracted infectious diseases, especially those that are unusual or rare. And so because Brian Ehrhart had contracted Hantavirus, he would fall within the class of persons meant to be protected.

VRP at 23 (Sept. 28, 2018); s*ee also* CP 714 (Order: "Brian Ehrhart was within the class intended to be protected by the statute"). The County has never seriously contested this finding, nor, realistically, could it.

Instead, the County's position—at least in substance—is that the drafters inexplicably intended guns with no bullets. There are various, detailed "duties" imposed upon the County for the benefit of a specific group of people. Indeed, that is the name of the regulation. *See* WAC 246-

[3] It is further presumed that the Legislature is certainly "aware of the doctrine of implied statutory causes of action." *Id.* at 676-77.

101-505 ("Duties of the local health officer or the local health department"). Yet if the County violates those duties, according to the County, it does not matter. There is no redress or consequence. This is not like *Keodalah*, *Wright*, or *Adams*, where there were other remedies available to injured people within the protected class. The County's proposed outcome would make WAC 246-101 purely "advisory"—no matter how staggeringly or recklessly the duty is breached. This is precisely the opposite inference courts draw when analyzing a statute. *See Bennett*, 113 Wn.2d at 921; *Swank*, 188 Wn.2d at 676-77.

The final *Bennett* factor—whether implying a remedy is consistent with the underlying purpose of the legislation—is equally self-evident. The stated purpose of the regulations are, in relevant part:

> … to protect the public's health by tracking communicable diseases and other conditions. These data are critical to local health departments and the departments of health and labor and industries in their efforts to prevent and control the spread of diseases and other conditions. Public health officials take steps to protect the public, based on these notifications. Treating persons already ill, providing preventive therapies for individuals who came into contact with infectious agents, investigating and halting outbreaks, and removing harmful health exposures are key ways public health officials protect the public.

WAC 246-101-005. As the *Swank* court emphasized, when finding an implied cause of action in the Lystedt law, "[o]ne of the major purposes of tort law is to encourage people to act with reasonable care for the welfare

of themselves and others." *Swank*, 188 Wn.2d at 679-80 (citing *Davis v. Baugh Indus. Contractors, Inc*., 159 Wn.2d 413, 420, 150 P.3d 545 (2007) ("[a]n underlying purpose of tort law is to provide for public safety"). It logically followed that "[i]mplying a cause of action [was] consistent with the law's purpose because… [a] cause of action encourages people to act with due care for the welfare of youth athletes and gives youth athletes recourse when they suffer injury or death due to improper management of their concussions." *Id*. No different here, the accountability and deterrent features of tort law animate the drafters' desire for public health officials reasonably carry out their duties. Conversely, if those officials *do not* take appropriate action when they learn of a dangerous, infectious disease, *do not* establish a system, *do not* communicate with the Department of Health, or *do not* collaborate with healthcare providers, *see* WAC 246-101-505, the above-objectives are ill-served. Diseases will be less controlled and vulnerable people will be needlessly put in harm's way.

The analysis proposed by WSAJ is appropriate, equally applicable to public and private parties, and, yields the correct result. It should be adopted.

IV. NOTWITHSTANDING *BENNETT*, A WELL-ESTABLISHED COMMON LAW DUTY WAS OWED

As discussed above, WAC 246-101 implies an enforcement mechanism in tort. But that is not the only organic basis for a legal duty.

And to the extent WSAJ is suggesting otherwise, the Estate respectfully differs.

As Justice Chambers observed in *Munich v. Skagit Emergency Commc'ns Ctr*., 175 Wn.2d 871, 886-87, 288 P.3d 328 (2012), and was reiterated in *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 549-50, 442 P.3d 608 (2019), "[t]his Court has never held that a government did not have a common law duty solely because of the public duty doctrine." That would "lead to a partial restoration of immunity by carving out an exception to ordinary tort liability for government entities" and "undermine the value of tort liability to protect victims, deter dangerous conduct, and provide a fair distribution of risk." *Id.* (quoting *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380 241 P.3d 1256 (2010)).

Accordingly, "an enumerated exception [to the public duty doctrine] is not always necessary." *Id.* at 549. This is true in various contexts, for example, road design,[4] protection of foster children,[5] police interactions,[6] and even negligent operation of a government fleet vehicle.

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[4] *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002).

[5] *H.B.H. v. State*, 192 Wn.2d 154, 429 P.3d 484 (2018).

[6] *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537 442 P.3d 608 (2019).

The first sequential step in the analysis, then, is to determine whether a common law duty was owed with respect to the activity. RCW 4.96.010 mandates that this step be unaffected by the public status of the defendant.

Here, the activity is furnishing information for foreseeable use and reliance by others.[7] This is a well-established duty owed by professionals across Washington, especially when their conduct carry with it a larger footprint. In *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 161, 744 P.2d 1032 (1987), for example, following the default of a large public power company, investors filed suit against the various professionals who issued annual reports (which omitted the company's true financial condition). The professionals successfully argued to the trial court that they owed no duty to the third party investors. This Court reversed, citing Restatement (Second) Sect. 552. In doing so, the Court explained that "it is not necessary that the maker [of the communication] should have any particular person in mind as the intended, or even the probable, recipient of the information." *Id.* at 163. The issue is simply foreseeability of the way the information is acted upon. The professionals' omission of the company's actual financial position was actionable. *Id.* at 448.

[7] This is an undisputed fact established in the record. CP 178 (ER nurse testimony that but for reliance on County, hospitals would seek the information elsewhere); CP 137 (expert testimony noting the "reliance-based relationship" with respect to the County's dissemination of actionable information).

This applies perforce to officials furnishing information for the consumption of the general public, as the above-cited Restatement excerpt explains:

> The liability of one who is under a **public duty** to give the information extends to loss suffered by any class of the persons for whose benefit the duty is created, in any transactions in which it is intended to protect them

Restatement (Second) of Torts, § 552(3) (emphasis added). The illustrations include a government food inspector who performs his or her job negligently, and a citizen who purchases contaminated beef is harmed. Restatement (Second) of Torts, § 552 cmt. K, illus. 18 (citing *Mason v. Moore*, 73 Ohio St. 275, 76 N.E. 932 (1906)) (collecting cases).[8]

In other words, the fact of a duty to the public is not a reason to negate liability, but rather, a reason *to impose it*—which makes perfect sense. This is not an instance where presumptively self-interested (and self-protecting) professionals are entering into discrete transactions with one another. It is an instance where broad reliance on the information furnished to the healthcare community—by a perceived neutral—is not just probable, it is inevitable. It is not too much to ask that the official undertaking this awesome responsibility carry it out with ordinary care.

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[8] The scope of the duty will depend upon the purpose for which the information is required to be furnished" and "who may reasonably be expected to rely on the information and suffer loss as a result." Restatement (Second) of Torts, § 552 cmt. K.

This is true in both a private or public context. Attorneys can owe duties to third parties who are foreseeably impacted by information they disseminate, *see* RPC 2.3; *Stewart Title Guar. Co. v. Sterling Sav. Bank*, 178 Wn.2d 561, 311 P.3d 1 (2013), as can engineers, *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc*., 170 Wn.2d 442, 243 P.3d 521 (2010). The six-part test defining the scope of the duty a professional may owe is illustrative, here:

> 1. The extent to which the transaction was intended to benefit the plaintiff;
>
> 2. The foreseeability of harm to the plaintiff;
>
> 3. The degree of certainty that the plaintiff suffered injury;
>
> 4. The closeness of the connection between the defendant's conduct and the injury;
>
> 5. The policy of preventing future harm; and
>
> 6. The extent to which the profession would be unduly burdened by a finding of liability.

Sterling, 178 Wn.2d at 565-66.

The first factor is fairly clear in our case; Brian Ehrhart was undoubtedly an "intended beneficiary" of the health advisory process. *See* WAC 246-101-005 (purpose of notifiable condition regulations; identifying intended beneficiaries).

The second factor is also met, as the harm was foreseeable. Indeed, the foreseeability of this harm is why WAC 246-101-505 exists in the first

place, and, as a factual matter, was firmly established in the record below. *See* CP 129-30 ("I impressed upon Public Health the importance of giving broad public notice to communities and health care providers [about the Hantavirus outbreak]. Dr. Duchin was unmoved… Public Health neither responded, nor put out a public health advisory.").

As for the third factor, there is no doubt that the Ehrhart family "suffered injury," and to an extraordinary degree.

The fourth factor—the closeness of the conduct and injury—is, again, established one-sidedly in the record. *See* CP 138-39 ("The result was increased risk of harm, which manifested as a delay in diagnosis of Hantavirus and associated death of Mr. Ehrhart").

The fifth factor is self-evident, as there is certainly a "policy of preventing harm." This is true of tort law, the stated objective of WAC 246-101-005, and the First Principle of the Public Health Code of Ethics. *See* https://www.apha.org/apha-communities/member-sections/ethics (last visited October 23, 2019) ("Humans have a right to the resources necessary for health").

And the sixth factor supports a legal duty as well. There is minimal "burden" to the profession if they are held accountable when negligent. Every other medical professional in the state is held to a professional standard of care, and there is no defensible public policy-based reason to

permit public health officials to do their work carelessly. If anything, the opposite is true, inasmuch as the practical difficulties of imposing duties on attorneys[9] or title companies[10] are absent here.

The Estate would add, this Court suggested that a "substantial risk to public safety or property damage," in and of itself, would support a legal duty, **regardless of the above factors**. *See Centurion Props. III, LLC v. Chi. Title Ins. Co*., 186 Wn.2d 58, 74-75, 375 P.3d 651 (2016) ("Absent a substantial risk to public safety…"); *see also id.* at 74-75 (reiterating that "[t]here is no significant interest in public safety at issue and no concerns for physical safety" when factors did not support a duty). This carve-out language was not by accident. "[T]he severity of the risk" and "gravity of the harm that may result" have been long-established factors considered in the legal duty analysis. *See ,e g., Funkhouser v. Wilson*, 89 Wn. App. 644, 661, 950 P.2d 501 (1998). In our case, there is an obvious, if not definitional, public safety issue. That is the entire purpose of notifiable

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[9] When attorneys owe duties to nonparties, it often leads to demonstrable conflicts of interest. *Sterling*, 178 Wn.2d at 567. County officials, unlike attorneys, are not fiduciaries who must hold one party's interest above others.

[10] Apart from the various other remedies a jilted buyer might have following a title error property, the title insurer is doing a service for a single purchaser of its services. This Court found a significant "logic and common sense" problem with affording third parties the "the benefit of a bargain" they never entered into. *See Centurion Props. III, LLC v. Chi. Title Ins. Co.*, 186 Wn.2d 58, 83, 375 P.3d 651 (2016). By contrast, the Ehrhart family, like all King County citizens, paid for the benefit of the County's protection against dangerous, diagnosable conditions, in the form of Public Health's <u>$800 million</u> annual budget. CP 87 (emphasis added).

conditions and health advisories; and why precious taxpayer dollars are spent on this process. Recognizing a duty is entirely consistent with the Restatement, as well as the common law.

Wholly apart from any of this—and accepting the County's insistence that it had *no duty to issue public health advisories* at face value—another, independent duty arose under the Rescue Doctrine, which likewise applies to public and private parties. *See Folsom v. Burger King*, 135 Wn.2d 658, 676, P.2d 301 (1998) (even if gratuitous at the outset, by virtue of an undertaking, parties are "required by Washington law to exercise reasonable care in their efforts"). This common law duty arises out of the "ancient learning" that "[t]he hand once set to a task may not always be withdrawn with impunity though liability would fail if it had never been applied at all." *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 167-68, 159 N.E. 896 (1928); *see also Webstad v. Stortini*, 83 Wn. App. 857, 877-78, 924 P.2d 940 (1996) ("Stortini did not have a duty to aid his romantic partner… A duty did arise, however, when he demonstrated to Webstad that he appreciated the gravity of her peril and undertook to render services… ") (citing Restatement (Second) of Torts § 323 (1965)).

As here, the County cannot routinely issue public health advisories, engender broad (undisputed) reliance within the medical community—such that medical professionals forego other avenues of obtaining the crucial

information—and then "withdraw with impunity." *See Moch*, 247 N.Y. at 168. This duty, too, exists wholly separate from the statute-based obligations.

In short, from virtually every perspective and based upon almost any analysis, a legal duty was owed—because it *should* be owed. And though the *Bennett* test is certainly sufficient, it is by no means necessary.

V. CONCLUSION

For the reasons stated above, the Estate largely agrees with WSAJ's briefing and analysis—with the slight caveat that the common law duty owed by the County applies, regardless of *Bennett*.

RESPECTFULLY SUBMITTED this 29 day of October, 2019

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