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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,

Petitioner,

SWEDISH HEALTH SERVICES, a non-profit entity; and
JUSTIN WARREN REIF, an individual,

Defendants.

KING COUNTY'S MOTION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION AND IDENTITY OF PETITIONER

King County seeks discretionary review of the “conditional grant” of a motion for summary judgment seeking to strike its defense under the public duty doctrine, and the trial court’s resulting refusal to enter an order on the County’s cross-motion addressing the same issue. King County invoked the public duty doctrine when the plaintiff, the estate of an individual who fatally contracted Hantavirus (“Estate”), sued the Department of Public Health – Seattle & King County (“Health Department”) for failing to issue a public health advisory. The trial court committed obvious error because, although it acknowledged that application of the public duty doctrine is an issue of law, it sent that issue to the jury by its “conditional grant” of the Estate’s motion. Had it properly applied the public duty doctrine, it would have granted the County’s motion. The Department does not (and could not) owe an individual duty to each person in the County who may contract a rare condition, and none of the exceptions to the doctrine apply. The “conditional grant” and the denial of the County’s motion deprives it of a legal defense akin to a threshold immunity, the benefit of which is lost if the case proceeds through trial.

These errors also render further proceedings useless because, as the trial court stated, in light of its unsupportable rulings it must now instruct

the jury on the public duty doctrine, injecting those issues into the trial and tainting the result. The same errors substantially alter the status quo, an independent ground for review, because they will necessitate substantial changes to public health practices here and across the state. If the trial court's rulings stand, the question of issuing health advisories will become a risk management rather than a public health decision, and departments will have no choice but to issue advisories based on the thousands of reports they receive each year of notifiable conditions. Such a drastic change would harm the general public and compromise the independent judgment of health professionals. For all of these reasons, the County respectfully requests that this Court grant its motion, address the merits, and reverse the decisions of the trial court.

II. DECISIONS BELOW

King County seeks direct discretionary review of (1) the Order Striking Defendant King County's Immunity Related Defenses on Summary Judgment (September 28, 2018); and (2) the series of acts of the trial court, including the determination of mootness, culminating in declining to enter an order on King County's Motion for Summary Judgment, as reflected in the transcripts of October 5 and October 12, 2018, the Order on Defendant King County's Summary Judgment Motion

and Plaintiff's Objection to same (October 12, 2018), and the Pretrial Stipulation by Plaintiff filed on October 17, 2018.

III. ISSUES PRESENTED FOR REVIEW

- A.** Did the trial court err in “conditionally” granting a motion for summary judgment on the public duty doctrine dependent on evidence introduced at trial?
- B.** Did the trial court err in basing its conditional grant of summary judgment on the premise that a jury must find King County's actions “appropriate” in order for King County to invoke the public duty doctrine?
- C.** Did the trial court err in declining to enter an order on King County's cross-motion for summary judgment, where the public duty doctrine bars claims against the County as a matter of law?

IV. STATEMENT OF THE CASE

A. The Role of the Health Department in Responding to Notifiable Conditions.

The Health Department is one of the largest metropolitan health departments in the United States, serving a resident population of 1.9 million people. Decl. of Dr. Jeffrey Duchin in Supp. King Cnty. Mot. Disc. Rev. (“Second Duchin Decl.”), ¶ 2. The Health Department's functions are carried out 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. *Id.* The broad functions of the Health Department span from promoting emergency

preparedness and ensuring food safety to analyzing population-level health data and promulgating community health policy. *Id.*

One of the Health Department's many functions is to collect and review information from healthcare providers pertaining to "notifiable conditions." WAC 246-101-505. "Notifiable condition[s]" encompass over 70 diseases or conditions "of public health importance, a case of which, and for certain diseases, a suspected case of which, must be brought to the attention of the local health officer or the state health officer." WAC 246-101-010(31). WAC 246-101-101 sets condition-specific timeframes in which healthcare providers must report diagnosis of these conditions to the local health department and/or the Washington State Department of Health ("DOH").

Under the WACs, the Health Department is primarily the **recipient** of information from healthcare providers about the occurrence of notifiable conditions, and a conduit of that information to DOH. Second Duchin Decl., ¶ 3. There are instances, however, when a component of the Health Department's response to a notifiable condition is to educate the public. *Id.* The Health Department generally follows the DOH Guidelines for Public Health Investigations that sets forth disease-specific recommendations about when information concerning the occurrence of notifiable conditions should be transmitted to healthcare providers, the

general public, or others. *Id.* As detailed in the Guidelines, whether outreach is recommended 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. *Id.* Each of the over 70 notifiable conditions has unique investigation procedures that include differing outreach and education components. *Id.*

For example, the Guidelines for Measles recommend that the Health Department 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.”¹ For a non-contagious condition like Hantavirus, by contrast, the Guidelines recommend that the Health Department “[i]dentify other persons who may have been in or around the presumed . . . case’s exposure location, e.g., other household residents, campground staff or residents, or facility employees. Posting a sign in public areas (e.g., campgrounds) may be appropriate.”²

When the Health Department shares public health information with healthcare providers, it sends Health Advisories via a listserv of

¹ Available at <https://www.doh.wa.gov/Portals/1/Documents/5100/420-063-Guideline-Measles.pdf> (last visited Nov. 13, 2018) at 8.

² Available at <https://www.doh.wa.gov/Portals/1/Documents/5100/420-056-Guideline-Hantavirus.pdf> (last visited Nov. 13, 2018) at 7.

approximately 3,000 individual licensed healthcare providers (i.e., doctors and nurses). Second Duchin Decl., ¶ 4. The listserv does not include medical institutions such as hospitals. *Id.* The Health Department encourages healthcare providers to sign-up for the listserv and to share the information posted on it with others, but there is no legal requirement for providers to join the listserv. *Id.*

Dr. Jeffrey Duchin, the Health Department’s Local Health Officer, or his designee, determines under what circumstances and when to share information concerning notifiable conditions with the healthcare providers on the listserv. *Id.*, ¶ 5. Generally, notices are put on the listserv in the case of (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. *Id.* Because healthcare providers are expected to be familiar with a vast majority of notifiable conditions, health departments must also consider the potential for “message fatigue” in determining whether to issue a Health Advisory. App. at 49.

The Health Department also sends out information to the public on a variety of health topics, including certain notifiable conditions. Second

Duchin Decl., ¶ 8. Notifications to the public are sent via the Health Department's website, its blog, and through press releases and social media accounts. *Id.* The Health Department's 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. *Id.*

B. The Health Department Followed All Requirements in Responding to Hantavirus in 2016-2017.

In December 2016, a commercial diagnostic lab notified the Health Department that a resident of rural Redmond had tested positive for Hantavirus, a noncontagious infection transmitted by the deer mouse. App. at 49-51. The Health Department sent a Public Health Nurse Investigator to, among other things, review the patient's medical records, discuss the case 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. App. at 50. 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. App. at 50. Due to the noncontagious nature of Hantavirus and the fact that the place of exposure was a private, rural

property with only two residents that had not traveled (the patient and her husband), Dr. Duchin determined that sending out notice to the provider listserv, or public/media notifications about the diagnosis was not warranted at that point. App. at 51.

In February 2017, the Health Department was notified of Brian Ehrhart's unexplained death. App. at 51. Mr. Ehrhart had sought care at Swedish Hospital in Issaquah for flu-like symptoms. App. at 61. He was treated and discharged. App. at 61. The next day, his condition worsened and he went to Overlake Hospital where he later died. App. at 61. To assist healthcare providers in determining the cause of death, the Health Department launched an investigation, which revealed that Mr. Ehrhart died of acute Hantavirus infection. App. at 51. 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. App. at 51-52.

Before Mr. Ehrhart's death, only two cases of Hantavirus had ever been confirmed in King County. App. at 49. Dr. Duchin therefore concluded that it was appropriate to notify local healthcare providers of the unusual circumstance of having two confirmed cases of such a rare disease within a three-month period. App. at 49-52. Accordingly, in March 2017 and April 2017, Dr. Duchin posted Health Advisories on the

local healthcare provider listserv discussing the cases. App. at 51-55. The Health Department communications staff also sent out public notifications through its blog. App. at 54-55.

More than a year later, the Estate sued Mr. Ehrhart's treating physician and hospital, and the County for negligence and wrongful death. App. at 57-65. The Estate claims the Health Department should have sent a Health Advisory to area healthcare providers after being notified of the first case of Hantavirus in December 2016. App. at 59-60. The Estate's theory is that if the Department had sent a Health Advisory in December 2016, Mr. Ehrhart's physician at Swedish would have applied different treatment, and Mr. Ehrhart would not have died. App. at 61-62, 88-89.

In its Answer, King County asserted, among other defenses, that the Estate's claims are barred by the public duty doctrine. App. at 74. The Estate moved for partial summary judgment, seeking to strike all of the County's immunity-based defenses. App. at 78-104.³ The Estate argued the public duty doctrine does not apply because two of four exceptions applied: the failure to enforce exception and the rescue exception. App. at 93-97. King County filed a cross-motion for summary judgment, asserting that none of the exceptions applied and the Estate's lawsuit should therefore be dismissed as a matter of law. App. at 120-34.

³ King County later withdrew its discretionary immunity defense. App. at 105 n.1.

The trial court denied King County’s request to hear both cross-motions on the same date and instead held a hearing on the Estate’s motion only. App. at 135-44. 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 the Health Department owed a duty to Mr. Ehrhart “requires some kind of a factual analysis.” App. at 149. The trial court opined that while WAC 246-101 does not require the Health Department to carry out a “specific task,” such as issuing a Health Advisory, it was necessary for the jury to determine whether the Health Department took “appropriate” action in accordance with WAC 246-101-505. App. at 148-49. 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 as being partially legal and partially factual. I’ve not seen any case where there’s been a bifurcation of that.” App. at 149. 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.” App. at 150. 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 the Health Department “acted appropriately.” App. at 149, 154.⁴

The court then declined to enter any order granting or denying King County’s cross-motion.⁵ See App. at 43-45. Given the trial court’s conditional finding of a duty under the failure to enforce exception, the Estate’s case against the County is now proceeding to trial. App. at 156.

V. ARGUMENT

A. The Trial Court Erroneously Applied the Failure to Enforce Exception, Subjecting King County to a Useless Trial.

This Court should grant discretionary review pursuant to RAP 2.3(b)(1). The trial court committed obvious error, first by “conditionally” granting a motion for summary judgment, a procedure found nowhere in the court rules; second because the trial court’s conditional finding that the Health Department owed Mr. Ehrhart a duty of care is contrary to established case law on the failure to enforce exception; and third because the trial court declined to rule at all on the County’s cross-motion for summary judgment. The trial court’s errors denied the County a threshold legal defense that should have resulted in dismissal, and instead compelled the parties to proceed to trial under a ruling the court itself acknowledged was unprecedented both substantively and procedurally.

⁴ The trial court denied the Estate’s motion with regard to the rescue exception, which is not at issue in this motion. App. at 151, 154.

⁵ Rather, at a later hearing, the court instructed the parties to “stipulate” that the remaining exceptions to the public duty doctrine argued in King County’s motion were inapplicable. App. at 38- 40. Before the parties agreed on a stipulation, the Estate unilaterally filed a “pre-trial stipulation” disclaiming those exceptions. App. at 46-47.

1. The trial court committed obvious errors.

a. The trial court's "conditional" finding of a duty is contrary to law.

Discretionary review is appropriate under RAP 2.3(b)(1) where the error raised is a threshold issue such as immunity or a statute of limitations defense. *See Hartley v. State*, 103 Wn.2d 768, 773-74, 698 P.2d 77 (1985) (granting discretionary review in part because case would have “wide implications for governmental liability”); *Walden v. City of Seattle*, 77 Wn. App. 784, 789-90, 892 P.2d 745 (1995) (where “immunity rights” are at issue, court “liberally” applies RAP 2.3(b) and may grant review “**regardless** of whether the error renders ‘further proceedings useless’” (emphasis in original)). The “threshold determination” in a negligence action such as this one is whether a duty of care is owed to the plaintiff. *Taylor v. Stevens Cnty.*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988). Under the public duty doctrine, courts presume the government owes only an obligation “to the public in general (i.e., a duty to all is a duty to no one).” *Id.* (internal quotations & emphasis omitted). The doctrine shields the government from liability in negligence unless “the duty breached was owed to the injured person as an individual.” *Id.* (internal quotations omitted).

The trial court properly acknowledged that “[d]uty is always supposed to be a legal issue,” but committed obvious error when it then

bifurcated the issue so that it was “partially legal and partially factual.” App. at 149. Specifically, the court found that the issue of duty here “hinges on [the] factual determination of what is appropriate” under WAC 246-101-505. App. at 149-50. Such a ruling is contrary to binding Washington case law establishing that the “existence of a duty is a question of law.” *See Taylor*, 111 Wn.2d at 168. Moreover, the trial court’s “conditional” grant of the Estate’s motion is an ad hoc procedure found nowhere in the court rules. *See Civil Rule 56(h)* (summary judgment order must take form of “granting or denying the motion”). The trial court had no authority to enter such a ruling. It committed obvious error for this reason alone.

b. The trial court misapplied the failure to enforce exception to the public duty doctrine.

The trial court also committed obvious error because the failure to enforce exception does not apply as a matter of law. The exception applies only “where governmental agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation, fail to take corrective action despite a statutory duty to do so, and 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). Courts construe

this exception “narrowly.” *Atherton Condo. Apartment-Owners Ass’n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 531, 799 P.2d 250 (1990).

- i. *There was no alleged “statutory violation” for the Health Department to correct.*

The failure to enforce exception first requires that a member of **the public** violated a statute, and the government knew about the violation but failed to take statutorily required action. *Smith v. City of Kelso*, 112 Wn. App. 277, 284, 48 P.3d 372 (2002). The Estate did not allege any member of the public violated any statute or regulation. Rather, the Estate alleged that **the Health Department** violated WAC 246-101-505 when it did not send out public notifications after the first diagnosed case of Hantavirus. App. at 59-60. The trial court ruled that, so long as the jury found the Health Department failed to take “appropriate action,” the Health Department “would have had notice of [its own] failure to follow . . . WAC [246-101-505],” i.e., a statutory violation. App. at 150.

The Health Department’s **own actions** cannot constitute a statutory violation required for purposes of the failure to enforce exception. For example, in *Woods View II, LLC v. Kitsap County*, 188 Wn. App. 1, 352 P.3d 807 (2015), the first element of the exception was not met because the plaintiff 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 27-28 (emphasis in original). Rejecting this theory, the Court of Appeals observed, “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.**” (emphasis in original). Likewise, in *Smith*, the first element of the exception was not satisfied because “a developer or homeowner [could not] violate [the] ordinance” and the city did not “fail to enforce anything.” 112 Wn. App. at 284; *see also McKasson v. State*, 55 Wn. App. 18, 25, 776 P.2d 971 (1989) (distinguishing cases where the government allegedly “violat[ed] a statute” rather than “fail[ed] to enforce” it).

Here, a healthcare provider did report the confirmed case of Hantavirus in December 2016 as required by WAC 246-101-101. App. at 49-50. Thus, there was no regulatory violation by anyone and nothing for the Health Department to enforce. The trial court’s ruling that the first element of the failure to enforce exception was “conditionally” met is obvious error. *See Woods View II*, 188 Wn. App. at 27-28.

ii. *The Health Department is not required to issue Health Advisories.*

Even if there had been a statutory violation (which there was not), the court’s “conditional” ruling on the second element of the failure to enforce exception was also obvious error. The second element is met only

if the government is aware of a statutory violation by a citizen and then fails to take corrective action where “the relevant statute mandates a **specific action** to correct a violation.” *Pierce v. Yakima Cnty.*, 161 Wn. App. 791, 799, 251 P.3d 270 (2011) (emphasis added). “Such a mandate does not exist if the government agent has broad discretion regarding whether and how to act.” *Id.* The second element thus requires “a specific directive to the governmental employee as to what should be done.” *Id.* at 800.

Here, the trial court erroneously ruled that the second element of the exception was “conditionally” satisfied despite acknowledging that WAC 246-101 does not require the Health Department to carry out a “specific task,” such as issuing public notifications to the media or healthcare providers when notified of specific conditions. App. at 148-50. Unlike the relevant statutes in cases finding this element satisfied, where there was a specific directive to the government as to what should be done following a statutory violation by a member of the public, here WAC 246-101-505 merely directs the Health Department to take “appropriate action” generally with respect to over 70 different notifiable conditions. *See, e.g., Bailey*, 108 Wn.2d at 269 & n.1 (requiring police officer to “take[] into protective custody” a publicly incapacitated individual (internal quotations omitted)); *Gorman v. Pierce Cnty.*, 176 Wn. App. 63, 78-79, 307 P.3d 795

(2013) (directing animal control officer to “classify potentially dangerous dogs” (internal quotations omitted)). The language here does not create a mandatory duty because, as the Estate conceded, the provision vests the Health Department with “discretion” as to how to act. *See App.* at 176; *Pierce*, 161 Wn. App. at 799-801; *see also App.* at 148 (distinguishing cases such as *Gorman*, where there was a “very specific task that the county had to take care of. . . .”); WAC 246-101-005 (listing “outbreak investigation, redirection of program activities, or policy development” as possible “appropriate actions”). That the regulations lack specificity makes sense, as an “appropriate” public health response to a particular notifiable condition depends on highly-fact specific circumstances.

Second Duchin Decl., ¶ 3.

That WAC 246-101-505 uses the word “shall” does not elevate the Health Department’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. As explained above, WAC 246-101 is silent on the subject of public notifications, i.e., there is no directive to issue public notifications as to any specified health conditions. Rather, the Health Department issues notifications only when condition-specific facts and circumstances demand, consistent with best public health practices and state guidelines. Second Duchin Decl., ¶¶ 3-4. Indeed, the

only specific notification requirements on the part of the Health Department 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 Health Department’s investigation; and notifying a primary healthcare provider prior to initiating an investigation. *See* WAC 246-101-505(1)(c)-(d), (f).⁶ Nothing in the applicable regulations requires the Health Department to issue specific notifications to the public, the media, or healthcare providers in general about notifiable conditions.

In sum, the trial court erroneously applied the failure to enforce exception; it should have granted King County’s motion, and dismissed the case against the County. *See Honcoop v. State*, 111 Wn.2d 182, 194, 759 P.2d 1188 (1988) (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 plaintiff’s claims).

2. The trial court’s obvious errors rendered further proceedings useless.

Discretionary review of “a denial of summary judgment” is appropriate “to avoid a useless trial.” *Hartley*, 103 Wn.2d at 773-74 (trial

⁶ Even if WAC 246-101-505 somehow constituted a mandatory duty to take corrective action, the trial court erred in refusing to find as a matter of law that the Health Department acted appropriately. *See* App. at 51; *Bailey*, 108 Wn.2d at 269-71 (applying failure to enforce exception only after finding that the defendant failed to take corrective action and noting that the plaintiff would still have to prove breach and causation at trial).

“would be prevented by a decision in favor of dismissing the State and County as defendants”); *see also Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 808-09, 818 P.2d 1362 (1991). Here, the trial court acknowledged the impact these rulings would have on the trial, namely “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.” App. at 150. The court further acknowledged “we’re going to have some really interesting jury instructions and a very interesting verdict form because of my ruling, and I apologize in advance.” App. at 150; *cf. Dunnington v. Virginia Mason Med. Ctr.*, 187 Wn.2d 629, 633, 389 P.3d 498 (2017) (granting joint motion for discretionary review to address instructional error). Because the trial court’s rulings do not allow trial to proceed in the normal course, discretionary review is warranted.

B. The Trial Court’s Errors Will Substantially Alter the Manner in Which the Health Department Responds to Reports of Notifiable Conditions.

Review is also appropriate under RAP 2.3(b)(2). Under this prong, error need only be “probable.” Geoffrey Crooks, *Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure*, 61 Wash. L. Rev. 1541, 1546 (1986) (“‘[W]hen the status quo or the freedom of a party to act is substantially affected,’ the drafters [of RAP 2.3] chose the less restrictive ‘probable error’ test.”).

Construing WAC 246-101-505 to impose a mandatory duty on the Health Department for purposes of the failure to enforce exception substantially impacts the status quo and impairs the Department's freedom to act in the public interest. The Health Department employs condition-specific investigation procedures in deciding how to respond to reports of notifiable conditions, with unique considerations and corresponding procedures for each of the 70 notifiable conditions. *Second Duchin Decl.*, ¶ 3. These procedures rarely call for public notifications (recently about two per month out of thousands of cases, or less than 1% of the time). *Id.*, ¶ 8. If the Health Department were subject to a jury trial to address the "appropriateness" of each decision regarding whether to issue a Health Advisory, the entire process would center on a liability assessment rather than on sound public health rationale and medical judgment. *Id.*, ¶ 9. Such an increase in the issuance of Health Advisories would also be counterproductive and likely lead to substantial detrimental unintended consequences, such as false-positive test results and information saturation. *Id.*, ¶ 10. For these reasons, review is further warranted under RAP 2.3(b)(2).

VI. CONCLUSION

For the foregoing reasons, this Court should grant review.

RESPECTFULLY SUBMITTED this 13th day of November, 2018.

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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 13th day of November, 2018, I caused to be served, via the Washington State Appellate Court's Portal System, and via electronic mail, a true copy of the foregoing document upon the parties listed below:

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Justin Reif, M.D.*

DATED this 13th day of November, 2018.



Sydney Henderson

APPENDIX

No. 96464-5
 Petitioner King County's
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Honorable Shelly K. Speir

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

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

Plaintiff,

v.

KING COUNTY, operating through its
health department, Public Health – Seattle
& King County; SWEDISH HEALTH
SERVICES, a non-profit entity; and
JUSTIN WARREN REIF, an individual,

Defendants.

No. 18-2-09196-4

KING COUNTY’S NOTICE FOR
DIRECT DISCRETIONARY
REVIEW TO THE WASHINGTON
STATE SUPREME COURT

[CLERK’S ACTION REQUIRED]

King County hereby seeks direct discretionary review by the Washington Supreme Court of (1) the attached Order Striking Defendant King County’s Immunity Related Defenses on Summary Judgment entered on September 28, 2018; and (2) the series of acts of the trial court, including the determination of mootness, culminating in declining to enter an order on King County’s Motion for Summary Judgment, as reflected in the attached transcripts of October 5 and October 12, 2018, the Order on Defendant King County’s Summary Judgment Motion and

KING COUNTY’S NOTICE FOR DIRECT
DISCRETIONARY REVIEW TO
THE WASHINGTON STATE SUPREME COURT - 1

10100 00037 hj232x18wj

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1 Plaintiff's Objection to same entered on October 12, 2018, and the Pretrial Stipulation by
2 Plaintiff filed on October 17, 2018.

3 Defendant King County is represented by:

4 Paul J. Lawrence, WSBA #13557
5 Matthew J. Segal, WSBA #29797
6 Kymberly K. Evanson, WSBA #39973
7 Athanasios P. Papailiou, WSBA #47591
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16 Plaintiff Sandra Ehrhart is represented by:

17 Adam Rosenberg, WSBA #39256
18 Daniel A. Brown, WSBA #22028
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KING COUNTY'S NOTICE FOR DIRECT
DISCRETIONARY REVIEW TO
THE WASHINGTON STATE SUPREME COURT - 2

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Defendant Swedish Health Services is represented by:

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KING COUNTY'S NOTICE FOR DIRECT
DISCRETIONARY REVIEW TO
THE WASHINGTON STATE SUPREME COURT - 3

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DATED this 26TH day of October, 2018.

PACIFICA LAW GROUP LLP

By: s/ *Kymerly K. Evanson*
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Matthew J. Segal, WSBA #29797
Kymerly K. Evanson, WSBA #39973
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Special Deputy Prosecuting Attorneys

Attorneys for Defendant King County

KING COUNTY'S NOTICE FOR DIRECT
DISCRETIONARY REVIEW TO
THE WASHINGTON STATE SUPREME COURT - 4

10100 00037 hj232x18wj

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CERTIFICATE 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 26th day of October, 2018, I caused to be served, via the Pierce County E-Service filing system, and via electronic mail, a true copy of the foregoing document including referenced attachments upon the parties listed below:

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DATED this 26th day of October, 2018.



Sydney Henderson

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10/3/2018



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The Honorable Shelly K. Speir

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

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

Plaintiff,

v.

KING COUNTY, operating through its health department, Public Health - Seattle & King County, SWEDISH HEALTH SERVICES, a non-profit entity, and JUSTIN WARREN REIF, an individual,

Defendants.

NO. 18-2-09196-4

~~[PROPOSED]~~

ORDER STRIKING DEFENDANT KING COUNTY'S IMMUNITY RELATED DEFENSES ON SUMMARY JUDGMENT

**Noted for Hearing:
September 28, 2018 at 9:00 a.m.
With Oral Argument**

FILED
DEPT 5
IN OPEN COURT
SEP 28 2018
PIERCE COUNTY Clerk
By *[Signature]*
DEPUTY

THIS MATTER came before the Court on Plaintiff's Motion for Partial Summary Judgment. The Court having considered the record, including:

1. Plaintiff's Motion;
2. Declaration of Dr. Michael Freeman (with Exhibits);
3. Declaration of Dr. Mark Waterbury (with Exhibits);
4. Declaration of Sarah McMorris;
5. Declaration of Adam Rosenberg (with Exhibits);
6. King County's Response;
7. Declaration of Dr. Jeff Duchin;

ORDER STRIKING DEFENDANT KING COUNTY'S IMMUNITY RELATED DEFENSES ON SUMMARY JUDGMENT - 1

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10/3/2018

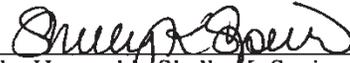
- 1 8. Declaration of Kim Frederick (with Exhibits);
- 2 9. Plaintiff's Reply;
- 3 10. Supplemental Declaration of Adam Rosenberg (with Exhibits);
- 4 11. Declaration of Jeff McMorris (with Exhibits); and
- 5 12. Declaration of Ashley Jones.

6 And having heard oral argument, the Court finds itself fully informed.

7 Partial summary judgment is **GRANTED** ^{conditionally} Defendant King County's immunity-related
 8 defenses, including without limit, ~~the public duty doctrine and~~ discretionary immunity, are
 9 hereby STRICKEN and DISMISSED. *King County's violation of a mandatory duty and actual knowledge of a violation shall be subject*

10 ~~King County's pending cross-motion for summary judgment is stricken as moot.~~ *to a Jury's determination of whether its actions were "appropriate" under*

11 ENTERED this 28th day of September, 2018.

12 
 13 The Honorable Shelly K. Speir

14 PREPARED AND PRESENTED BY:

15 
 16 *s/ Adam Rosenberg*
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FILED
 DEPT 5
 IN OPEN COURT
 SEP 28 2018
 PIERCE COUNTY Clerk
 By  DEPUTY

whether its actions were "appropriate" under WAC 246-101-505. Brian Ehrhart was within the class intended to be protected by the statute. The Court does not grant summary judgment based upon the Rescue Exception.

ORDER STRIKING DEFENDANT KING COUNTY'S IMMUNITY RELATED DEFENSES ON SUMMARY JUDGMENT - 2

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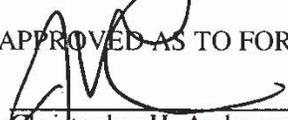
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APPROVED AS TO FORM; NOTICE OF PRESENTATION WAIVED:



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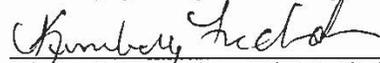
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ORDER STRIKING DEFENDANT KING COUNTY'S IMMUNITY
RELATED DEFENSES ON SUMMARY JUDGMENT - 3

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1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
2 IN AND FOR THE COUNTY OF PIERCE

3
4 SANDRA EHRHART, individually and)
5 as personal representative of the)
6 Estate of BRIAN EHRHART,)

7 Plaintiff,)

8 vs.)

9 KING COUNTY, operating through)
10 Seattle-King County Public)
11 Health, a government agency,)
12 SWEDISH HEALTH SERVICES, a)
13 non-profit entity, and JUSTIN)
14 WARREN REIF, an individual,)

15 Defendants.)

16) Superior Court
17) No. 18-2-09196-4

18 -----
19 **VERBATIM TRANSCRIPT OF PROCEEDINGS**
20 -----

21 October 5, 2018
22 Pierce County Superior Court
23 Tacoma, Washington
24 Before the
25 **HONORABLE SHELLY K. SPEIR**

26 Attorney for Plaintiff - Kimberly Y. Frederick

27 Attorney for Defendant Ehrhart - Daniel Brown

28 Attorney for Defendant Justin Reif - Lauren Martin

29 Jennifer L. Flygare, RPR, CRR #2156
30 930 Tacoma Avenue
31 334 County-City Bldg.
32 Tacoma, Washington 98402
33 253.798.7475

1 BE IT REMEMBERED that on Friday, October 5, 2018,
2 the above-captioned cause came on duly for hearing before
3 the **HONORABLE SHELLY K. SPEIR**, Judge of the Superior Court
4 in and for the County of Pierce, State of Washington; the
5 following proceedings were had, to wit:

6
7 <<<<<< >>>>>>

8
9 THE COURT: This is Judge Speir.

10 MS. FREDERICK: Good morning, Your Honor. Sorry.
11 I did not know that this would happen. I'm so sorry.

12 THE COURT: It's okay. I really feel bad that
13 you're calling from the side of the highway. Let's just cut
14 to the chase and make this as simple as possible.

15 I'd like you to start out because this was your
16 motion originally. I just need to know why we needed the
17 hearing today.

18 MS. FREDERICK: Well, Your Honor, the reason why
19 we needed the hearing, there were two exceptions to the
20 public duty doctrine that were not ruled on last week, and
21 because of that, we needed to have a ruling on that.

22 Once Your Honor rules, I will move to certify
23 those two orders for direct appeal, for interlocutory
24 appeal. So that's why I felt the need to be able to make a
25 record as to that, because, you know, given the Court's

1 ruling on the failure to enforce exception last week, under
2 CR 54(b) and RAP 2.2(b), we are asking that the Court
3 certify this because, you know, not resolving this issue
4 before trial will cause undue burden expenses related to
5 King County. This is a dispositive issue as to King County,
6 and waiting for an entire trial to occur before the legal
7 determination of whether or not the public duty doctrine
8 applies will just cause unnecessary time and expense.

9 So I wanted to be able to present that to the
10 Court at a hearing after the Court made its ruling as to
11 King County's motion for summary judgement and also with
12 regard to the plaintiff's order.

13 THE COURT: Okay. I reviewed all of the materials
14 and I also went back and reviewed King County's answer, and
15 I did not see that the public duty doctrine was alleged as
16 an affirmative defense.

17 MS. FREDERICK: I amended the answer, Your Honor.
18 There is an amended answer where that was alleged.

19 THE COURT: And that brings me to this issue of a
20 proposed stipulation. It was my understanding from the
21 documents that plaintiff's counsel attempted to get an
22 agreement that would have stricken the two remaining public
23 duty doctrine exceptions prior to this hearing.

24 MS. FREDERICK: That's correct, Your Honor, but
25 still there would be the issue of the two orders, which I

1 didn't have an order last week, and the issue of certifying
2 it for interlocutory appeal, which I believe that the
3 parties would want to have oral argument on, so I thought
4 that that would streamline the process.

5 I mean, from the beginning I've been trying to get
6 these two motions heard together in order to save the Court
7 time. You know, so I'm not trying to inconvenience the
8 Court. Plaintiff did not want to have these two hearings
9 together, and I feel like we needed to have this hearing
10 today so that we could bring before the Court this issue of
11 the appeal. It's extremely important to King County and it
12 was something that needed to be addressed.

13 THE COURT: But that issue is not before me today,
14 is it?

15 MS. FREDERICK: Well, once you make an order as to
16 King County's motion, that's what we would be moving for.

17 THE COURT: But that would be a separate hearing
18 anyway, wouldn't it?

19 MS. FREDERICK: I was just going to ask the Court
20 to rule today.

21 THE COURT: Without allowing anyone to respond?

22 MS. FREDERICK: Well, that's why I thought we
23 would have the hearing, so we could have oral argument on
24 that issue, within the Court's discretion to make that
25 determination.

1 THE COURT: Is there a reason that the stipulation
2 couldn't have been signed before today's hearing?

3 MS. FREDERICK: My clients wanted to have a
4 hearing on these issues, you know, that's why.

5 THE COURT: Even though the plaintiff was offering
6 to give you what you wanted --

7 JUDICIAL ASSISTANT: I'm adding another party by
8 phone. CourtCall is tied up, obviously, so I put them on
9 this other line. This is Ms. Ports. I understand she's not
10 presenting any argument. She just wishes to listen.

11 THE COURT: Go ahead, Ms. Frederick.

12 MS. FREDERICK: I didn't hear that, I'm sorry.

13 THE COURT: So even though the plaintiff was
14 offering exactly what you wanted, you still thought you
15 needed a hearing?

16 MS. FREDERICK: Well, Your Honor, under the rules,
17 King County is allowed to present its motion for summary
18 judgement with a hearing. So, you know, my clients wanted
19 to have a hearing and that's what we were going to do.

20 THE COURT: Why would a hearing be necessary if
21 there was no dispute?

22 MS. FREDERICK: Well, there seems to be a dispute
23 as to what the Court had ordered last week so, you know, in
24 order to clarify what the Court had ruled last week on the
25 failure to enforce exception, it seemed necessary to figure

1 that out and also to present oral argument on the two
2 remaining public duty doctrine exceptions.

3 So it was King County's understanding that last
4 week Your Honor had ruled that there was an issue of fact as
5 to whether or not King County's actions were appropriate
6 under the failure to enforce exception -- or whether King
7 County's duties were appropriate before it could rule on the
8 issue of whether or not the failure to enforce exception
9 applies.

10 So there was disagreement -- from the e-mails, it
11 looks like there was disagreement regarding the Court's
12 underlying ruling last week.

13 THE COURT: That's a completely different issue
14 than what was noted before me today.

15 MS. FREDERICK: Well, Your Honor, if you're
16 relying on the ruling from last week in order to rule on the
17 first two public duty doctrines exceptions for King County's
18 order, which would be, you know, we would be appealing, we
19 need to know what the actual ruling is regarding the failure
20 to enforce exception.

21 THE COURT: But that's not the other two
22 exceptions that we were going to be talking about today; is
23 that correct?

24 MS. FREDERICK: That's correct.

25 THE COURT: I'm going to let the other parties put

1 any arguments they need to make on the record.

2 MR. BROWN: Daniel Brown for the plaintiff, Your
3 Honor. You've read our objections, Your Honor.

4 THE COURT: Yes.

5 MR. BROWN: It's obvious you have by your
6 questions. So I'm still confused after hearing
7 Ms. Frederick that we're going to argue about the appeal,
8 which was not before the Court. 54(b) certification is not
9 before the Court. You told her we're going to argue about
10 -- you only wanted to hear about the two exceptions that we
11 had already told her in writing that we were not pursuing
12 and that we would stipulate.

13 After your e-mail came out from the Court saying
14 this is it, we wrote her back and said, we'll sign an order
15 to this effect. This is a waste time. Now, you've read the
16 objection. I won't say anymore.

17 But I want to make a personal note, 1990 when I
18 started practicing in the courts here, new Seattle firm from
19 Portland, I went to court every chance I got. Didn't matter
20 what it was. I would just love to go to court. I wanted to
21 go to court. I've been in court probably a thousand times,
22 Your Honor. I don't need to go to court for no reason. I
23 don't need to be dragged down here for something that's not
24 at issue.

25 I don't know what Ms. Frederick is talking about

1 that she has a right to have an order. You granted our
2 motion. Very clearly she got your transcript. She ordered
3 it and it says, I'm going to grant condition of summary
4 judgement on the failure to enforce exception and will have
5 to leave it to the jury to determine appropriateness. We
6 understood that and my e-mails indicate that.

7 And to be honest, when you have an affirmative
8 defense that has like I call them affirmative defense
9 defenses, right, the exceptions. I only need to make one
10 to win. We made it. The other ones you can't have them at
11 the same time. They're kind of mutually exclusive. You
12 ruled on the rescue doctrine. You can't have both. We said
13 we're not pursuing the other ones.

14 I don't need to be in here defending proximate
15 liability defenses. I don't need to be in here defending
16 other exceptions. I don't need to be in here on a breach of
17 contract claim. None of those things are in this case. We
18 told her that. She had all day yesterday and this morning
19 to get back to us and say, don't drive all the way down in
20 this weather, great, we'll sign an order. No. She wants to
21 drag us in here and I don't know why.

22 (Music starts playing on telephone.)

23 So that's my cue to stop, Your Honor, so I'll stop
24 there.

25 THE COURT: Thank you. Go ahead.

1 MS. MARTIN: Your Honor, Lauren Martin on behalf
2 of Dr. Reif. I'm not arguing today. I'm just here for
3 attendance purposes, Your Honor.

4 THE COURT: I am only going to talk about the two
5 issues that were not discussed last week. I think that's
6 the only issues that I felt needed to have oral argument.
7 Last week when the parties were here, I specifically asked,
8 now, are you going to strike the motion for next Friday.
9 The parties told me, well, Your Honor, we're going to work
10 on it. It would be likely.

11 In reading the plaintiff's objection, it was clear
12 the parties did continue to discuss today's motion. There
13 was a clear offer to do a stipulation that would have just
14 taken those two exceptions to the public duty doctrine off
15 the table. I don't understand why that stipulation wasn't
16 signed.

17 The other issues that Ms. Frederick wants to talk
18 about are not related to those issues other than for the
19 fact of making an appeal. But I still don't understand why
20 we had to have this hearing on two exceptions that are not
21 being argued by the plaintiff.

22 I feel like my time has been wasted here. I don't
23 know how the other attorneys in the room feel. But this is
24 the kind of conduct that does affect the integrity of the
25 Court. I'm here being paid by the tax payers of Pierce

1 County to address issues that are in dispute. If there's no
2 dispute, I don't understand why the parties can't resolve
3 things privately. I don't think that our justice system has
4 the resources to accommodate people who want to fight for
5 the sake of fighting. I don't think that this sort of
6 gamesmanship is good for the reputation of lawyers or the
7 justice system in general.

8 And so I am going to find that there was bad faith
9 here, and I'm going to grant the request for terms. I just
10 need to know a little bit more about how much it cost to be
11 here today.

12 MR. BROWN: Well, assuming I get back, Your Honor,
13 and out of here in ten minutes, I'll probably be back on a
14 Friday afternoon by 1:30. So I left at about 9:45, 1:30,
15 four-and-a-quarter hours plus the objection, I'd say we're
16 at five or six hours, Your Honor.

17 THE COURT: And what's the hourly rate?

18 MR. BROWN: My standard rate, Your Honor, is \$495.
19 It's been approved in every court on the west side and many
20 courts on the east side.

21 THE COURT: I'm trying to do some quick math, but
22 double check me. Using five hours, \$2,475.

23 MR. BROWN: I think that is right. Yep.

24 THE COURT: And, Ms. Martin, are you requesting
25 fees for today?

1 MS. MARTIN: We are not, Your Honor.

2 THE COURT: So I am going to order that King
3 County pay attorney's fees incurred by the plaintiff in
4 responding to today's motion. And again, the amount is
5 \$2,475. That needs to be paid within ten business days
6 directly to plaintiff's counsel's office. So I will sign an
7 order if you can prepare one.

8 MR. BROWN: I have one, Your Honor. Since
9 Ms. Frederick is on the phone, do you want me to read what
10 it says right now?

11 THE COURT: Actually, let me say one other thing.
12 With respect to the motion that was set for today, I am not
13 going to sign an order. What's going to happen is,
14 Mr. Brown, your office is going to complete the stipulation
15 and agreed order. You're going to forward it to the other
16 parties. It's going to be signed, and then it needs to be
17 noted in LINX through the ex parte proces so that we don't
18 have to have another hearing just to get that signed.

19 MR. BROWN: All right. With Ms. Frederick on the
20 phone, perhaps it would be best for me just to start over
21 with a new order and give it to her, let her have a chance
22 to review it. I can do them separate. If she can't agree
23 to form when we're done, I'll separate them out and do the
24 stipulation. I'm sure she can agree to if we're getting rid
25 of the two exceptions. And then I'll leave the terms on the

1 other. If she can agree to form without waiving any rights,
2 then we'll leave it as one document and submit it;
3 otherwise, I'll submit the other one. And I would waive
4 oral argument on the sanction order as well, Your Honor,
5 because I don't want to come down here for that either. So
6 that's how I propose to do it because it's difficult without
7 her here to review and get her piece in. Is that acceptable
8 to the Court?

9 THE COURT: Well, here in Pierce County we have
10 oral argument for everything.

11 MR. BROWN: I know.

12 THE COURT: So the way local attorneys usually do
13 it is the signature line indicates that this is form only.

14 MR. BROWN: Approve as to form.

15 THE COURT: So if she doesn't sign that, that's
16 fine, but my order will stand.

17 MR. BROWN: So if we can't reach an agreement on
18 the form, I can submit it also to Your Honor ex parte and we
19 can avoid the hearing or am I going to have to come down?

20 THE COURT: If you submit it via ex parte, there's
21 no hearing because that's the procedure LINX understands
22 that there's not going to be an oral argument.

23 MR. BROWN: I assume you will interlineate based
24 on your order today if I don't have it right or
25 Ms. Frederick can submit her own proposed order, I guess. I

1 just don't want to come down here again for this, Your
2 Honor.

3 THE COURT: LINX will accept proposed orders ex
4 parte, so that's fine.

5 MS. FREDERICK: And, Your Honor, as to the failure
6 to enforce exception, can you please clarify your ruling
7 from last week? Did you find a question of fact with regard
8 to whether or not King County's actions were appropriate or
9 did you find that the failure to enforce exception applies?

10 MR. BROWN: Your Honor, there's a process for this
11 as well; it's called motion for reconsideration or a motion
12 to clarify. I'm not really prepared to argue on the failure
13 to enforce again today. I only saw and heard part of it
14 last time. I read your transcript.

15 THE COURT: I ruled that the failure to enforce
16 exception applies conditionally because I felt that the way
17 that the regulation is drafted, it creates an issue of fact
18 that must be answered by the jury. And that's on the term
19 appropriate.

20 So I did find that there was a legal duty inasmuch
21 as the regulation requires the County to -- I think it's
22 review and determine I think are the terms that are used. I
23 just don't know if what King County did was appropriate,
24 because that's the next word in that regulation.

25 MS. FREDERICK: Thank you, Your Honor.

1 THE COURT: I think the transcript probably is
2 more helpful.

3 Anything else?

4 (No response.)

5 Thank you. This will terminate the hearing.

6 MS. FREDERICK: Thank you, Your Honor.

7 MR. BROWN: Thank you.

8 MS. MARTIN: Thank you, Your Honor.

9 (Proceedings at recess.)

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1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
2 IN AND FOR THE COUNTY OF PIERCE
3

4
5 SANDRA EHRHART, individually and)
6 as personal representative of the)
Estate of BRIAN EHRHART,)

7 Plaintiff,)

8 vs.)

9 KING COUNTY, operating through)
10 Seattle-King County Public)
Health, a government agency,)
11 SWEDISH HEALTH SERVICES, a)
non-profit entity, and JUSTIN)
12 WARREN REIF, an individual,)

13 Defendants.)

Superior Court
No. 18-2-09196-4

14 REPORTER'S CERTIFICATE
15

16 STATE OF WASHINGTON)
17 COUNTY OF PIERCE) ss

18
19 I, Jennifer Flygare, Official Court Reporter in the
20 State of Washington, County of Pierce, do hereby certify
21 that the forgoing transcript is a full, true, and accurate
transcript of the proceedings and testimony taken in the
matter of the above-entitled cause.

22 Dated this 8th day of October 2018

23
24 

25 JENNIFER FLYGARE, RPR
Official Court Reporter

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
2 IN AND FOR THE COUNTY OF PIERCE

3
4 SANDRA EHRHART, individually and)
5 as personal representative of the)
6 Estate of BRIAN EHRHART,)

7 Plaintiff,)

8 vs.)

9 KING COUNTY, operating through)
10 Seattle-King County Public)
11 Health, a government agency,)
12 SWEDISH HEALTH SERVICES, a)
13 non-profit entity, and JUSTIN)
14 WARREN REIF, an individual,)

15 Defendants.)

16 Superior Court
17 No. 18-2-09196-4

18
19 **VERBATIM TRANSCRIPT OF PROCEEDINGS**

20 October 12, 2018
21 Pierce County Superior Court
22 Tacoma, Washington
23 Before the
24 **HONORABLE SHELLY K. SPEIR**

25 Attorney for Plaintiff Ehrhart - Adam Rosenberg

 Attorney for Defendant King County - Kymberly Evanson

 Attorney for Defendant SHS - James Blankenship

 Jennifer L. Flygare, RPR, CRR #2156
 930 Tacoma Avenue
 334 County-City Bldg.
 Tacoma, Washington 98402
 253.798.7475

1 BE IT REMEMBERED that on Friday, October 12, 2018,
2 the above-captioned cause came on duly for hearing before
3 the **HONORABLE SHELLY K. SPEIR**, Judge of the Superior Court
4 in and for the County of Pierce, State of Washington; the
5 following proceedings were had, to wit:

6
7 <<<<<< >>>>>>

8
9 THE COURT: Sandra Ehrhart versus King County.
10 This is Cause No. 18-2-09196-4.

11 We have, I believe, two motions before the Court
12 and then maybe some loose ends to tie up from last week.

13 MR. ROSENBERG: And I think it's actually one
14 motion. We reached agreement on amendment yesterday late
15 afternoon.

16 THE COURT: Great. Why don't you introduce
17 yourself for the record.

18 MR. ROSENBERG: Adam Rosenberg for the plaintiff,
19 Your Honor.

20 MS. FREDERICK: Good morning, Your Honor.
21 Kymberly Evanson for King County.

22 THE COURT: Welcome to the case.

23 MS. EVANSON: Thank you.

24 MR. BLANKENSHIP: Morning, Your Honor. James
25 Blankenship for Swedish.

1 THE COURT: Thank you. So let's take care of the
2 stipulation first. Does anybody have a hard copy or should
3 we print it out?

4 MR. ROSENBERG: I think we e-mailed it in. I
5 don't have a hard copy.

6 THE COURT: There are photographs contained in the
7 complaint. They look great on my computer, but he's
8 printing a black and white so it's not probably going to
9 look really good when it gets filed.

10 MR. ROSENBERG: I think we'll probably file a
11 clean one, not because of the photos but because I think
12 what we submitted with it has red lines on it just so people
13 could see what we changed.

14 THE COURT: So I've signed the stipulation and
15 agreed order allowing amendment, so that's that.

16 And that leaves us with the motion to compel by
17 Mr. Rosenberg.

18 MR. ROSENBERG: Thank you, Your Honor. May it
19 please the Court, this is our motion to compel. And as far
20 as discovery goes, I've just never seen a government agency
21 kind of behave this way. And this is nothing to do with
22 Ms. Evanson; she's been in the case for a very short time.
23 I get that. I'm not throwing stones. But, you know, this
24 isn't a dispute between the attorneys; this is a dispute
25 between real parties, and the County's responsible for its

1 discovery conduct no matter how many times it swaps
2 attorneys.

3 We're dealing with discovery that was propounded
4 in June. They wanted an extension; we gave them an
5 extension. They wanted another one; we had a conference. I
6 said, you can pick a day; they picked a day. That day came
7 and went. We got boilerplate objections and a commitment to
8 sort of, well, we'll keep production rolling with no
9 timeline discerned. I tried to self-cure so we wouldn't
10 have to be in court with a document deposition to a 30(b)(6)
11 to basically figure out what's been produced, what's been
12 withheld, certify completion.

13 They wanted a different date. I let them pick the
14 date on that. Then that date comes around, now it's
15 September, the day before they just send an e-mail saying,
16 we're not showing up. Under the rules, that's a failure to
17 appear.

18 They've committed to produce dates for two
19 witnesses: Dembowski and Lambert. That was, I think, back
20 in August. When that didn't happen, we had a conference
21 about that, CR 26(i), and they remained non-committal.

22 So with all of this going on, we go to the trouble
23 of briefing a motion, filing it, getting a non-response.
24 And I mean, I get that they're switching attorneys. We want
25 to be reasonable, so we're fine with reserving sanctions,

1 whether they're deserved or not. But we're at the point, I
2 think, where we need some guardrails up. We need some dates
3 certain where we know this is going to happen. Because if
4 it doesn't happen, the party that's going to get burned is
5 us. We've been trying to get this done since June. We've
6 been trying to diligently get this stuff and it's been a lot
7 of broken promises. I think our deadline to disclose
8 witnesses is December. And I've got to get this stuff done
9 because we got to get it to the experts and they have to
10 form opinions. And we have every intention of complying
11 with the case schedule and trying this case in June, and
12 it's a tight timeline for us. And there's really -- I mean,
13 there wasn't a response because there really isn't a
14 response. I mean, this is very basic discovery and we're
15 trying to get to the merits and we're asking that the Court
16 enter an order saying some time certain so we know what'll
17 happen. That's our position. Thank you, Your Honor.

18 THE COURT: Okay. Thank you.

19 MS. FREDERICK: Good morning, Your Honor.
20 Kymberly Evanson for the County.

21 So I was retained on Wednesday, and the first
22 thing that I did was I sent an e-mail to opposing counsel
23 and said, I understand you have these motions pending. I
24 don't have the file, don't have the record. What can I do
25 to get you the documents and information that you need. I

1 said I'll stipulate to amending the complaint. The County
2 said they had a production that was almost ready, so I
3 actually have it on a disk that I'm giving Mr. Rosenberg
4 now. I said, I'll give you 700 documents on Friday. I'll
5 update our discovery responses by next Friday. We'll
6 produce a 30(b)(6) witness within two weeks. And we have
7 another production that I'm told is coming of documents from
8 the council members' offices.

9 And when I sent this proposal, I asked actually
10 for a phone conference on Wednesday and was told they
11 weren't available, and I said I'll send on an e-mail, which
12 was fine. My understanding on Wednesday was that those
13 council member documents were being collected and could be
14 produced by November 2nd. When I spoke to Mr. Rosenberg
15 yesterday, I clarified that's actually probably going to be
16 more like the end of next week; they're actually ahead of
17 schedule. So those are on their way.

18 So really the only issue that remains in this
19 motion to compel, because we've agreed in writing to provide
20 everything that they've asked for, is they want the Court to
21 compel the depositions of two members of the King County
22 Council. In response to that, I said, we've got these
23 documents coming from the council members' offices. I
24 haven't seen them yet. Actually, I haven't seen any of the
25 documents yet, but we're collecting them and we're going to

1 get them to you. Can we table the issue of council member
2 depositions just for a brief time so we can see what those
3 documents say before we go to court on a motion to compel
4 when really that's the only thing left in this motion, and
5 unfortunately, counsel said, no.

6 And the problem we have are three-fold. One,
7 we're here on a motion that's procedurally improper because
8 those depositions haven't been noted. The rule says you
9 can't move to compel depositions that haven't been noted.
10 The federal cases hold that. I haven't seen any Washington
11 authority. I was looking late last night to find it. But
12 generally the Washington courts follow the federal authority
13 on that rule.

14 But even setting aside that procedural objection,
15 that's not our main objection, the main objection is, I
16 said, I'm not saying we're never going to produce these
17 witnesses; what I would like is a reasonable short amount of
18 time to evaluate the documents so both sides can determine
19 is there a basis to depose these council members. And maybe
20 we'll agree there is and maybe we'll agree there isn't. Or
21 if we disagree, then the County can properly file a motion
22 for protective order, and that issue can be determined.

23 And the reason the basis is important is because
24 in Washington law, high ranking and elected officials, their
25 depositions are disfavored. And I brought the *Clarke* case,

1 which I'm happy to pass up, which I have copies for counsel,
2 which says if you can get that information from other
3 sources, then elected officials shouldn't be deposed without
4 an extraordinary showing.

5 And so I'm not saying we've made that showing
6 because I don't know the facts at this point, but neither do
7 they. I'm just asking for a brief amount of time to see
8 what the council member documents say and then we can make a
9 determination with a full picture.

10 I'd presented that option yesterday;
11 unfortunately, it was rejected. But I can pass up the
12 *Clarke* case and the federal cases that say a motion to
13 compel a non-noted deposition is not properly before the
14 Court.

15 So for that reason, we would ask the Court to deny
16 the motion to compel. We've made a good faith effort really
17 within hours of taking over this case. I understand they've
18 experienced some discovery frustration in the past. I'm not
19 disputing that. I'm not excusing that. But we have said we
20 are prepared to offer you everything that you've asked for
21 in your motion on a more aggressive timeline than you've
22 asked for and just a reasonable pause to evaluate these
23 council member depositions before we make an informed
24 decision.

25 THE COURT: Thank you. Would you like to add

1 anything?

2 MR. BLANKENSHIP: We don't have a position, Your
3 Honor.

4 THE COURT: Thank you.

5 MS. EVANSON: And, Your Honor, I do have the
6 *Clarke* case if you want to hand it up.

7 THE COURT: Sure, I'll take a look. And there's a
8 highlighted page; I'm assuming this is the part you want me
9 to read. It's a long opinion, but that's the part that
10 discusses depositions of elected officials.

11 MR. ROSENBERG: Is my copy highlighted?

12 MS. EVANSON: I'm sorry. It's not highlighted but
13 I can show you where.

14 THE COURT: If you look at paragraph 45, that's
15 where she's got the highlighted started, page 781.

16 And for the court reporter, this is *Clarke*,
17 C-1-a-r-k-e, at 133 Wn.App reports, page 767. It's a 2006
18 case.

19 I've briefly reviewed this highlighted portion.
20 And the rule appears to be that if there's another way to
21 get information, high ranking government officials should
22 not be burdened with deposition. So I'm bound to follow
23 case law, but I'll give Mr. Rosenberg a chance to respond
24 and then I'll give my ruling.

25 MR. ROSENBERG: I mean, I agree that new counsel

1 showed up and made a series of agreements. But let's be
2 very clear, they gave us the sleeves off their vest. There
3 was the amendment. I think the Court probably reviewed the
4 motion to amend. I mean, the opposition was CR 11 worthy.
5 There's not a response to why don't we have stuff we
6 requested in June now in October. I mean, they committed to
7 what had already been committed to twice and still not done.
8 So I always appreciate an agreement in lieu of motions
9 practice, but I mean, there wasn't another move, if we're
10 honest.

11 As far as these depositions go, I mean, these were
12 committed to in August. I mean, they were requested and
13 committed to by the County and, yeah, we'll get you dates.
14 And, you know, now they're walking it back. I mean, you
15 want to talk about procedurally improper, these arguments
16 weren't even made in the briefs. I'm seeing this case for
17 the first time. I have no idea. I can't shepardize it. I
18 can't take any kind of meaningful look at it.

19 I certainly would have made a record around a need
20 if that were an argument that were made in the briefing, but
21 there wasn't. I mean, this is a representation and a
22 commitment that we were strung along on for months that's
23 being reneged on the day before the hearing. You want to
24 talk about procedural impropriety, I mean, as far as that we
25 needed to note the depositions, I am not aware of that rule.

1 If that's going to be the new ruled order, then we'll just
2 unilaterally note everything. That's not how anyone
3 practices here. We requested them. We CR 26(i) conferred
4 on them; none of these points were ever made.

5 And this idea that, well, we're not saying yes,
6 we're not saying no, we'll kick it out some weeks and then
7 we'll kind of come back to it and come back to court and
8 fight about it it again, that can't be how this works. I
9 mean, we followed all of the right steps. We've gone along
10 with this for months. We've briefed this. It's ripened.
11 It's properly before the Court.

12 I mean, as far as the relevancy, I mean, this is a
13 group -- and we're not deposing them in their legislative
14 capacity. We're not challenging a law that they've made.
15 They're operating in an operational capacity. Ms. Lambert,
16 Mr. Dembowski, they're the vice chair and chair of the
17 Department. They define the policies and practices of the
18 Department. There was an investigation of Brian's death.
19 They were reported to about that. We want to ask questions
20 about that.

21 In a public meeting in April, Ms. Lambert
22 indicated that hospitals had reached out to her and said, I
23 wish that someone had given us notice. Why can't we just
24 give FYI's about this stuff. That's exactly our theory. I
25 mean, that's admissible on its face and it certainly steps

1 over the reasonably calculated question. I mean, that's all
2 public record. It's transcript and a video online.

3 Again, had they made this argument in briefing, I
4 would have made a record of it. But for kicking the can
5 down the road again when we're under time constraints and I,
6 I'd submit, have done everything the right way, that's just
7 not a fair outcome. We'd ask the Court grant our motion,
8 set some guardrails. We're not asking for sanctions. It's
9 just so we know that we're going to get this done. Thank
10 you.

11 MS. EVANSON: Your Honor, may I make one point?

12 THE COURT: Sure.

13 MS. EVANSON: I'm asking for the opportunity to
14 brief the issue. I'm not trying to sandbag him. I offered
15 this authority last night. He said he was familiar with it
16 and there was no basis to delay. I'm just asking for a
17 reasonable opportunity to look at the record, that's all.

18 THE COURT: Here's what I'm going to do. And
19 please don't take this as any sort of criticism on you,
20 Counsel, I know that you are brand new on the case. But my
21 concern is the swiftly approaching cutoffs, and so what I
22 want to do is set some deadlines. And I will leave room for
23 people to come back to court and further flesh out, if some
24 of these depositions are appropriate, at a later time. I'm
25 not going to preclude that today.

1 But I am going to grant the motion to compel. I
2 believe that the discovery requests have been proper. I'm
3 not ruling on admissibility of everything right now, but I
4 recognize that the CR 26 standard allows for discovery of
5 things that are reasonably calculated to lead to admissible
6 evidence. And it looks like we are headed in that direction
7 with the requests that were provided.

8 So what I'm going to do is order King County to
9 provide complete responses to any outstanding written
10 discovery within two weeks. I understand it's under way,
11 but I just want to say that on the record so that there is a
12 hard deadline for King County to follow.

13 If there is going to be a CR 30(b)(6) deposition,
14 it needs to occur by November 1st. And if plaintiff decides
15 that they get all the documents they need and they don't
16 need that deposition, great, you don't have to have it. But
17 if it's going to occur, it's going to be by November 1st.

18 The depositions of the two council members, if
19 they are going to occur, should occur no later than
20 November 15th. So that gives the parties a little more than
21 a month to figure out do we need another motion to come back
22 and determine if those are appropriate, do we have enough
23 just by way of the written discovery, et cetera.

24 So I think I'm giving both parties what they're
25 asking for. The plaintiff has some guardrails, as it's been

1 described. King County has a little bit more time and some
2 wiggle room to figure out what are we actually supposed to
3 do here. So I'll call it a granting of the motion.

4 With respect to sanctions, I will reserve on that.
5 However, I did note that Ms. Frederick filed response to the
6 first motion, the one regarding the amendment, at 11:35 a.m.
7 and then suddenly in the response to the second motion, the
8 motion to compel, that was filed at 11:53 on the same day.
9 Suddenly she was unavailable because of FMLA, and that just
10 looked really odd to the Court, just a few minutes apart but
11 suddenly a completely different tactical turn in the case.
12 And so I'm just letting the parties know I would be
13 considering that in a motion for sanctions.

14 So if the parties can maybe take a few minutes to
15 prepare a proposed order, I'll sign that this morning.

16 MR. ROSENBERG: And so I have mine, and what I've
17 added...

18 MS. FREDERICK: Thank you, Your Honor.

19 MR. ROSENBERG: "It is further ordered the County
20 may return and seek further protective orders with regard to
21 Mr. Dembowski and Ms. Lambert if well-founded." Is that an
22 accurate memorialization?

23 THE COURT: Read that last sentence one more time.

24 MR. ROSENBERG: So it has the deadlines that
25 you've given and "It is further ordered the County may

1 return and seek further protective orders with regard to
2 Mr. Dembowski and Ms. Lambert if well-founded."

3 THE COURT: Yes. Thank you.

4 MS. EVANSON: Your Honor, one question on this.
5 In the first paragraph it says, "The County's stated
6 objections to discovery are overruled."

7 Is the Court blanket ruling on every objection of
8 discovery?

9 THE COURT: It sounded as if those had been
10 retracted, so I'm not ruling on any objections today. I
11 think you can probably strike that.

12 MR. ROSENBERG: Well, this was the boilerplate
13 objections to written discovery, which I think we did
14 highlight and discuss.

15 MS. EVANSON: But sometimes --

16 THE COURT: I am ordering that they provide
17 complete responses.

18 MS. EVANSON: We will provide complete responses.

19 MR. ROSENBERG: Thank you.

20 THE COURT: I haven't gone through question by
21 question and ruled on each thing.

22 MS. EVANSON: I haven't either.

23 THE COURT: And while you're finishing your
24 signatures, last week we had the other motion and at the end
25 of the day, I think what my instruction to Mr. Brown was,

1 was to prepare a stipulation on the County's remaining two
2 defenses. And instead of doing a stipulation, he prepared a
3 proposed order, which is a little different.

4 What I was trying to do is put the parties back
5 into the position they would have been if they had
6 cooperated and signed off on the stipulation. So I was
7 going to let you know that that's what my intent had been.
8 And if you could go back and prepare that stipulation -- you
9 may have already done it at some point, but if not, it needs
10 to be a stipulation that the parties would sign off on.
11 That way I was trying to avoid you having to come back for
12 another appearance.

13 With regard to the sanctions, if you wanted to
14 prepare another order separately for just that, we could
15 also do that ex parte.

16 MR. ROSENBERG: And I think both of those things
17 were in one order.

18 THE COURT: Yeah.

19 MR. ROSENBERG: But we can potentially strike out
20 the summary judgement piece of it.

21 THE COURT: And get that entered today?

22 MR. ROSENBERG: I think that was e-mailed
23 yesterday, and I understand the County might want to have
24 input and we can hopefully get that done today.

25 THE COURT: Okay. When you file those things,

1 also e-mail them to Mr. Shanstrom because LINX will think
2 that you want a hearing. It will expect you to be noting
3 something for my motion docket. And I know that you've
4 already been here on it and I don't want to have the parties
5 have to come back again. So if you give it to him, we can
6 take care of it without oral argument.

7 MR. ROSENBERG: So is that the proposed from last
8 week?

9 THE COURT: This is the one that Mr. Brown
10 prepared.

11 MR. ROSENBERG: And I have the same one and what I
12 did was just cross out basically the first paragraph about
13 the summary judgement.

14 MS. EVANSON: It sounds like we need to do a
15 stipulation on that. Is that what the Court's saying?

16 THE COURT: Right. Because my understanding was
17 that the plaintiffs had proposed a stipulation to the County
18 essentially agreeing that those two exceptions would not be
19 argued. For whatever reason, Ms. Frederick did not want to
20 sign off on that. And so what I'm saying is, now we need to
21 sign off on that.

22 MS. EVANSON: Okay.

23 MR. ROSENBERG: So I think it's an accurate order.
24 I think we sent it with the transcript. We tried to track
25 the Court's language. And if we just excise that first

1 paragraph, which we'll replace with a stipulation, I think
2 we're probably good.

3 THE COURT: Do you want to do the striking or do
4 you want me to do it?

5 MR. ROSENBERG: Either or. I've done it.

6 THE COURT: All right. We'll go with your copy.

7 I'm just crossing out the "proposed" language in
8 the caption. I've signed that, and I signed the order on
9 the motion to compel. So all you have left is the
10 stipulation and that should take care of everything that has
11 come before me so far.

12 MR. ROSENBERG: We appreciate your time. I hope
13 we're not back for a little bit.

14 THE COURT: Well, it sounds like you've got a lot
15 more important issues to take care of.

16 MR. ROSENBERG: We have a few.

17 MS. EVANSON: Thank you very much, Your Honor.

18 MR. ROSENBERG: Thank you.
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1 And having heard oral argument, the Court finds itself fully informed.

2 The Court FINDS that the “legislative intent” and “special relationship” exceptions to the
3 public duty doctrine do not apply in light of this Court’s Order dated September 28, 2018
4 coupled with the plaintiff’s representations in writing to both King County prior to this hearing
5 and on the record before this Court that plaintiff it is not pursuing either of these exceptions in
6 light of the Court’s Order dated September 28, 2018 entered previously. As such, and because
7 of the plaintiff’s representations referenced above and this Court’s Order dated September 28,
8 2018, King County’s motion is denied as MOOT.

9 The Court FURTHER FINDS that that, despite plaintiff’s multiple offers to stipulate to
10 or otherwise confirm that the above-two exceptions were not at issue and this Court’s Order
11 dated September 28, 2018, the hearing on October 5, 2018 was unnecessary, a waste of both the
12 parties’ counsels’ time and the Court’s time, improper gamesmanship by King County, and was
13 otherwise interposed in bad faith. Accordingly, based upon its inherent authority, *see, e.g., State*
14 *v. S.H.*, 102 Wn. App. 468, 475-76 (2000), the Court hereby awards terms against King County
15 in favor of the plaintiff in the following amount: \$2,475 (which is counsel’s reasonable rate of
16 \$495/hour for five hours of time in preparing plaintiff’s objection and attending the hearing
17 before the Court on October 5, 2018, which the Court also finds reasonable). King County shall
18 pay said terms within 10 days of the date of this order directly to plaintiff’s counsel, Williams
19 Kastner & Gibbs PLLC c/o Daniel A. Brown. The Court finds that such an award of terms is
20 appropriate both to compensate the plaintiff and deter such conduct in the future.

21 DATED this 12th day of October, 2018.

22
23 **FILED**
DEPT 5
IN OPEN COURT

22 
23 _____
24 Judge Shelly K. Speir

24
25 **OCT 12 2018**

PIERCE COUNTY, Clerk
By  _____
DEPUTY

ORDER ON DEFENDANT KING COUNTY’S SUMMARY
JUDGMENT MOTION AND PLAINTIFF’S OBJECTION - 2

Williams, Kastner & Gibbs PLLC
601 Union Street, Suite 4100
Seattle, Washington 98101-2380
(206) 628-6600

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PREPARED AND PRESENTED BY:


s/ Daniel A. Brown
Adam Rosenberg, WSBA #39256
Daniel A. Brown, WSBA #22028
Kathleen X. Goodman, WSBA #46653
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Theron A. Buck, WSBA # 22029
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Attorneys for Plaintiff

APPROVED AS TO FORM

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*Attorneys for Defendant
King County*

ORDER ON DEFENDANT KING COUNTY'S SUMMARY
JUDGMENT MOTION AND PLAINTIFF'S OBJECTION - 3

Williams, Kastner & Gibbs PLLC
601 Union Street, Suite 4100
Seattle, Washington 98101-2380
(206) 628-6600

October 17 2018 3:53 PM

KEVIN STOCK
COUNTY CLERK
NO: 18-2-09196-4

The Honorable Shelly K. Speir

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

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

Plaintiff,

v.

KING COUNTY, operating through its health
department, Public Health - Seattle & King
County, SWEDISH HEALTH SERVICES, a
non-profit entity, and JUSTIN WARREN REIF,
an individual,

Defendants.

NO. 18-2-09196-4

**PRETRIAL STIPULATION BY
PLAINTIFF**

STIPULATION

Plaintiff stipulates as follows:

1. As requested by the Court on October 5, 2018, plaintiff has tried diligently to reach an acceptable stipulation with King County with respect to the outcome of that day's proceedings, including the fact that plaintiff was no longer pursuing the "legislative intent" and "special relationship" exceptions to the public duty doctrine. Unfortunately, no mutually agreeable stipulation could be reached. Accordingly, to make the record clear, plaintiff stipulates that the "legislative intent" and "special relationship" exceptions to the public duty doctrine are moot. They do not apply relative to plaintiff's claims or King County's defense

PRETRIAL STIPULATION BY PLAINTIFF - 1

Williams, Kastner & Gibbs PLLC
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Seattle, Washington 98101-2380
(206) 628-6600

6637600.1

1 herein as a result of the above-representations and those previously made by the plaintiff both in
2 writing, on the record, and in light of the Court's Order dated September 28, 2018 entered
3 previously.

4 DATED this 17th day of October, 2018.

5
6 s/ Daniel A. Brown
7 Adam Rosenberg, WSBA #39256
8 Daniel A. Brown, WSBA #22028
9 Kathleen X. Goodman, WSBA #46653
10 **WILLIAMS KASTNER & GIBBS PLLC**
11 601 Union Street, Suite 4100
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13 Tel: (206) 628-6600
14 Email: arosenberg@williamskastner.com
15 dbrown@williamskastner.com
16 kgoodman@williamskastner.com

17
18 Theron A. Buck, WSBA # 22029
19 **FREY BUCK, P.S.**
20 1200 5th Ave., Suite 1900
21 Seattle, WA 98101
22 Tel: (206) 486-8000
23 Email: tbuck@freybuck.com

24 *Attorneys for Plaintiff*

25
PRETRIAL STIPULATION BY PLAINTIFF - 2

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6637600.1

1 2. I am a medical doctor and am a licensed physician in the State of Washington. I
2 am also board certified in Infectious Disease and Internal Medicine by the American Board of
3 Internal Medicine. I have been a practicing physician for over 30 years.

4 3. I have worked for Public Health since 1998 and have been the Health Officer
5 since June 2015. I am also chief of the Communicable Disease Epidemiology and Immunization
6 Section of Public Health and have served in that capacity since 1998.

7 4. Health Advisories are not issued every time a notifiable condition is reported.
8 Health Advisories are issued in certain limited circumstances when specific actions are requested
9 of health care providers, for example in order to make the medical community aware of such
10 things as infectious disease outbreaks, unusual infectious disease activity elsewhere that had
11 implication for health care provider practice locally, and changes to CDC guidelines or
12 recommendations when they are relevant to local communicable diseases of population health
13 significance. Healthcare providers are expected to be familiar with the vast majority of notifiable
14 conditions, so sending Health Advisories for every notifiable condition would be unnecessary
15 and redundant. It would also result in message fatigue and lead healthcare providers to ignore
16 Health Advisories.

17 5. Hantavirus is a serious infection transmitted by the deer mouse. In 2016, there
18 were over forty reported cases of Hantavirus in Washington, with the majority of them being
19 reported in Eastern Washington. It is extremely uncommon to acquire Hantavirus in King
20 County. Prior to Mr. Ehrhart's death, there had been only two other confirmed Hantavirus cases
21 acquired in King County—one in 2003 and one in December 2016.

22 6. In December of 2016, Public Health was notified by a commercial diagnostic lab
23 that a King County resident had a positive Hantavirus serology test consistent with an acute

DECLARATION OF DR. JEFFREY DUCHIN, MD IN
SUPPORT OF DEFENDANT KING COUNTY'S
MOTION FOR SUMMARY JUDGMENT - 2

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION, Litigation Section
900 King County Administration Building
500 Fourth Avenue
Seattle, Washington 98104
(206) 296-0430 Fax (206) 296-8819

1 infection. A Public Health nurse was assigned to conduct an investigation. The patient's medical
2 records were reviewed and the case was discussed with an infectious disease specialist at the
3 hospital where the patient was hospitalized. The patient resided in rural Redmond with her
4 husband and had denied any recent travel. The medical records noted that the patient's husband
5 was concerned that their car may have harbored rodents, including mice and rats. Based on the
6 concern of rodent exposure, the patient's healthcare team conducted Hantavirus serology testing.

7 7. The Public Health nurse also interviewed the patient's husband in order to
8 determine where the infection may have been acquired, whether others may have been exposed
9 to the same source as the patient, and to notify others who may have been exposed to the same
10 source as the patient about how to reduce their risk of infection. Information provided by the
11 husband during that interview indicated that the patient had likely contracted Hantavirus on their
12 property. The patient's husband stated that he and the patient lived together on their rural
13 property and that he regularly saw deer mice on their property. He also indicated that the patient
14 had not traveled out of the area during her exposure period. The husband was particularly
15 concerned that the patient's vehicle air filter showed evidence of rodent infestation. The Public
16 Health nurse provided information from the Centers for Disease Control and Prevention (CDC)
17 website regarding Hantavirus and its symptoms, deer mice, and how to minimize his risk of
18 contracting Hantavirus.

19 8. Serum samples of the patient were sent to the CDC to confirm the diagnosis of
20 Hantavirus and results from the CDC indicated the serology testing on the patient was consistent
21 with acute Hantavirus infection. A Public Health epidemiologist also worked with the patient's
22 husband. He was provided with the CDC test results confirming his wife's Hantavirus diagnosis
23 and was advised to consult with a professional extermination company to address the possible

DECLARATION OF DR. JEFFREY DUCHIN, MD IN
SUPPORT OF DEFENDANT KING COUNTY'S
MOTION FOR SUMMARY JUDGMENT - 3

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(206) 296-0430 Fax (206) 296-8819

1 deer mouse infestation on his property. Information available on the CDC's website was also
2 discussed in detail regarding how he could best protect himself from contracting Hantavirus
3 when cleaning, especially in areas known to have a rodent infestation.

4 9. I reviewed the information gathered during the investigation. The patient had not
5 traveled out of the area and lived on her private property with her husband. The likely source of
6 the Hantavirus exposure was known--deer mice and other rodent activity had been observed on
7 the patient's property and evidence of rodents were also present in the patient's vehicle.
8 Hantavirus is not contagious, so other than her husband, there were no other likely exposures. I
9 determined that a residential environmental assessment was not necessary. The couple had been
10 provided with information regarding Hantavirus symptoms to watch for, how to minimize the
11 risk of contracting Hantavirus, proper cleaning methods, and was advised to utilize a commercial
12 exterminator in order to address the rodents on their property. The source of the Hantavirus
13 exposure was a private property with two residents. The last known case of Hantavirus acquired
14 in King County had occurred in 2003. I determined that a Health Advisory was not warranted.

15 10. On February 24, 2017, Public Health was notified of the unexplained death of
16 Brian Ehrhart. An investigation was initiated to assist health care providers in determining the
17 cause of his death. It was determined that Mr. Ehrhart had died as a result of an acute Hantavirus
18 infection. After the investigation of Mr. Ehrhart's case I issued a Health advisory due to the
19 unusual nature of having two confirmed cases of Hantavirus acquired in King County within a
20 three month period. Attached hereto as Exhibit A is a true and correct copy of that Health
21 Advisory. In April 2017, I issued another Hantavirus related Health Advisory due to another
22 suspected case of Hantavirus, which was later confirmed through test results. Given the third
23

DECLARATION OF DR. JEFFREY DUCHIN, MD IN
SUPPORT OF DEFENDANT KING COUNTY'S
MOTION FOR SUMMARY JUDGMENT - 4

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Hantavirus case within a relatively short period of time, I determined that heightened awareness was warranted. Attached hereto is a true and correct copy of the April 2017 Health Advisory.

SIGNED and DATED at Seattle, WA this 7th day of September, 2018.



JEFFREY DUCHIN

DECLARATION OF DR. JEFFREY DUCHIN, MD IN SUPPORT OF DEFENDANT KING COUNTY'S MOTION FOR SUMMARY JUDGMENT - 5

Daniel T. Satterberg, Prosecuting Attorney
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Seattle, Washington 98104
(206) 296-0430 Fax (206) 296-8819

The Honorable Shelly K Speir

EXHIBIT A

DECLARATION OF DOCTOR JEFFREY DUCHIN IN SUPPORT DEFNEDANT KING
COUNTY'S MOTION FOR SUMMARY JUDGMENT

EXHIBIT A

Health Advisory – Hantavirus Cases, King County, 23 March 2017

Action requested:

- Be aware that there have been 2 cases of Hantavirus Pulmonary Syndrome (HPS) reported in King County since December, 2016.
- Be familiar with, and take a history for, risk factors for hantavirus exposure in patients with a compatible clinical presentation. The incubation period for HPS ranges from several days to 8 weeks.
- Nonspecific prodromal symptoms last 3-5 days and can include fatigue, fever, myalgias (especially in the large muscle groups), headache, dizziness, chills, nausea, vomiting, diarrhea, and abdominal pain. Four to 10 days after the initial phase of illness, late symptoms and signs of HPS may appear, with cough, and/or shortness of breath, interstitial infiltrates, rapidly progressive non-cardiogenic edema/ARDS, and hemodynamic compromise (see, <https://www.cdc.gov/hantavirus/technical/hps/clinical-manifestation.html>). Consider consultation with an ID specialist.
- Risk factors include exposure to areas with rodent (deer mouse in the WA State) infestation, nesting materials, and excrement, including in the home, through recreational or occupational activities, and, possibly through infested automobiles (including potentially cabin air filters, vents, ducts & interiors).
- Commercial hantavirus serology (IgM and IgG) testing should be obtained. Report suspected and confirmed HPS cases within 24 hours to Public Health at (206) 296-4774.
- If HPS is suspected, a CBC and blood chemistry should be repeated every 8-12 hours. A fall in serum albumin and a rise in hematocrit may indicate a fluid shift from the patient's circulation into the lungs. The WBC count tends to be raised with a marked left shift and atypical lymphocytes are frequently present, usually at the time of onset of pulmonary edema.
- In about 80% of individuals with HPS, the platelet count is <150,000 units. A dramatic fall in the platelet count may herald a transition from the prodrome to the pulmonary edema phase of the illness.

Background

Hantavirus infections are rare in King County, with 6 total cases reported since 1997. One case, diagnosed in December 2016, resided in a wooded residential area of Redmond, the second recent case, diagnosed earlier this month, resided in Issaquah. Prior to these 2 recent cases, only one previous case acquired in King County has been reported (in 2003). It is not known whether the current cluster represents an increase risk for our area potentially related to environmental conditions or changing deer mouse ecology. One of the recent cases is reported to have had an infestation of the cabin air filter of her automobile; the other had reported rodent infestation in and around the home. Health care providers should be aware of risk factors for hantavirus exposure, including infested homes, cabins, workspaces and automobiles (and potentially their air handling system [filters, vents, ducts]). Some patients may not report exposure to rodent infestation or nesting materials.

Resources

- **CDC hantavirus information for clinicians:** <https://www.cdc.gov/hantavirus/technical/index.html>
- **Identification and Care of Patients with Hantavirus Disease (CDC COCA FREE CME),** https://emergency.cdc.gov/coca/calls/2016/callinfo_063016.asp
- **Public Health hantavirus information and fact sheet:** <http://www.kingcounty.gov/depts/health/communicable-diseases/disease-control/hantavirus.aspx>
- **WA State Department of Health hantavirus information:** <http://www.doh.wa.gov/YouandYourFamily/IllnessandDisease/Hantavirus>

Health Advisory – Hantavirus Update, King County, 4 April 2017

Action requested:

- Be aware that there is an increased risk for hantavirus infection in areas of King County, with 2 recently confirmed cases and one new suspected case of locally-acquired Hantavirus Pulmonary Syndrome (HPS) reported since December, 2016. **Maintain a high index of suspicion** in patients with a compatible clinical syndrome and risk factors for exposure.
- **Take a history for potential hantavirus exposure** risk factors in patients with a compatible clinical presentation. The **incubation period for HPS is typically about 12 days (range: several days to 8 weeks)**.
- **Risk factors** include exposure to areas with rodent or deer mouse infestation, nesting materials, and excrement, including in the home, through recreational or occupational activities, and, possibly through infested automobiles (including potentially cabin air filters, vents, ducts & interiors). Because many HPS patients do not report exposure to rodents, **living or working in a rural/wooded area should also be considered a potential exposure risk**.
- A **nonspecific prodrome** last 3-5 days and can include fever, headache, myalgias, malaise, nausea, vomiting, diarrhea, and abdominal pain. Four to 10 days later, **cardiopulmonary phase** of HPS may develop with cough, shortness of breath, interstitial infiltrates, rapidly progressive non-cardiogenic edema/ARDS, and hemodynamic compromise (see, <https://www.cdc.gov/hantavirus/technical/hps/clinical-manifestation.html>).
- Commercial hantavirus serology (IgM and IgG) testing should be obtained. Report suspected and confirmed HPS cases within 24 hours to Public Health at (206) 296-4774.
- **If HPS is suspected, a CBC with platelet count and blood chemistry** should be repeated every 8-12 hours. **A platelet count <150,000 units is seen during the prodromal period in 80-85% of cases, although it may be normal early in the prodrome.** The WBC count tends to be raised with a marked left shift and immature precursor cells, usually at the time of onset of pulmonary edema.
- Treatment is supportive (see resources, below), there is no specific antiviral therapy available.

Background: Hantavirus infections are rare in King County, with 6 total cases reported since 1997. One case, reported in December 2016, resided in a wooded residential area of Redmond, the second case and the third suspected case resided in different areas of Issaquah near Squak Mountain. Prior to these recent cases, only one previous case acquired in King County has been reported, in 2003. The increase in cases suggests an increased risk potentially related to environmental conditions promoting an increase in the number of infected deer mice and/or their proximity to humans. This risk may persist for months. One of the recent cases reported an infestation of the cabin air filter of her automobile; the others reported rodent infestation in and around the home. Health care providers should be aware of risk factors for hantavirus exposure, including infested homes, cabins, workspaces and vehicles (including, potentially, their air handling system [filters, vents, ducts]). Some HPS patients may not report exposure to rodent infestation or nesting materials.

Resources

- **CDC hantavirus information for clinicians:** <https://www.cdc.gov/hantavirus/technical/index.html>
- **Identification and Care of Patients with Hantavirus Disease (CDC COCA FREE CME),** https://emergency.cdc.gov/coca/calls/2016/callinfo_063016.asp
- **Public Health hantavirus information and fact sheet:** <http://www.kingcounty.gov/depts/health/communicable-diseases/disease-control/hantavirus.aspx>

- **WA State Department of Health hantavirus information:**
<http://www.doh.wa.gov/YouandYourFamily/IllnessandDisease/Hantavirus>

June 21 2018 11:33 AM

KEVIN STOCK
COUNTY CLERK
NO: 18-2-09196-4

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

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

Plaintiff,

v.

KING COUNTY, operating through its health
department, Public Health – Seattle & King
County; SWEDISH HEALTH SERVICES, a
non-profit entity; and JUSTIN WARREN REIF,
an individual,

Defendants.

NO.
**COMPLAINT FOR NEGLIGENCE
AND WRONGFUL DEATH**



BRIAN G. EHRHART
June 6, 1982 - February 24, 2017

COMPLAINT FOR NEGLIGENCE AND WRONGFUL DEATH - 1

Williams, Kastner & Gibbs PLLC
601 Union Street, Suite 4100
Seattle, Washington 98101-2380
(206) 628-6600

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THE PARTIES

1. Brian and Sandra Ehrhart were married on September 10, 2005. They resided together in Issaquah, where they were raising their two minor children, Elijah and Emma, ages 6 and 4, respectively, as of 2017.

2. Brian died unexpectedly on February 24, 2017. On May 23, 2017, Sandra was appointed Personal Representative of Brian’s estate. She brings this action individually and on behalf of the estate and all statutory beneficiaries under RCW 4.20 et seq.

3. Defendant, King County, acted through its sub-department, Public Health – Seattle-King.

4. Defendant, Swedish Health Services, operates three hospitals and a network of more than 100 specialty-care and primary-care clinics.

5. Defendant, Dr. Justin Reif, was performing services on behalf of Swedish Medical Center, in its emergency room at the Swedish Medical Center in Issaquah.

JURISDICTION AND VENUE

6. Pierce County Superior Court has original jurisdiction over the parties and subject matter pursuant to RCW 2.08.010. This action is originally venued in Pierce County Superior Court, pursuant to RCW 36.01.050(1), because King County is a defendant.

FACTUAL BACKGROUND

The Defendant County

7. Public Health – Seattle & King County (“the County”) is a large and well-resourced government agency. It enjoys a budget of over \$200 million per year, which supports over 875 full time employees. It has broad authority to enter premises, issue fines, and withhold permits.

1 8. The County is the repository of information related to rare diseases. Doctors
2 and hospitals in King County *must* advise the County of all “notifiable conditions,” as
3 identified under Washington law, sometimes called “Zebras.”

4 9. When Zebras—for example, the Ebola virus—are discovered in King County,
5 Public Health is promptly made aware pursuant to both state law and its own internal Code. It
6 then has an obligation to review and take appropriate action under WAC 246-101-505. This
7 includes notifying the medical community of what may be present, so local doctors and nurses
8 can anticipate it.

9 10. Often, this comes from the County in the form of electronically transmitted
10 “Health Advisories,” which are prominently posted in emergency rooms.

11 11. In the ordinary course, this system works well. Doctors and hospitals across the
12 county have become reliant on the County to disseminate the information they need in order to
13 effectively treat patients with atypical conditions. In the context of healthcare, forewarning is
14 important when possible.

15 12. Just prior to Thanksgiving, in 2016, a nurse in the Issaquah/Redmond area
16 became ill with what appeared to be severe flu symptoms. Equipped with a unique knowledge
17 of her own physiology, and married to a Ph.D.-level scientist, they discerned that this was not
18 an ordinary flu-bug. They sought out help before the local nurse slipped into a coma.

19 13. Fortunately her treatment was timely. Doctors were able to intervene, and the
20 nurse survived.

21 14. An investigation confirmed that the nurse had contracted Hantavirus, a
22 respiratory disease transmitted by deer mice. The cold, damp weather in 2016-2017 had led to
23 environmental conditions that increased the mouse population in the area, as well as their
24 likelihood of carrying the virus.

25

1 15. Hanta is rare and potentially lethal. The last reported case in King County
2 occurred in 2003. Aggressive medical intervention is of the utmost importance early in the
3 diseases' progression.

4 16. For this reason, Hantavirus a mandatory "reportable condition" under
5 WAC 246.101.101. When confirmed, healthcare providers "must notify public health." Kaiser
6 Permanente complied following the nurse's diagnosis, promptly notifying the County.

7 17. On top of that, the nurse's husband—a sophisticated advocate—repeatedly
8 impressed upon the County the gravity of the situation. He correctly pointed out that
9 environmental conditions were going to lead to more Hanta cases; he encouraged the County to
10 act, and notify the public so that what happened to his wife would not happen to anybody else.
11 the County's medical director, Dr. Duchin, "lost track of this conversation," and ultimately
12 made a conscious decision to do nothing (other than suggest "rodent control"):

13 **From:** [Duchin, Jeff](#)
14 **To:** [Kawakami, Vance](#)
15 **Cc:** [McKeirnan, Shelly](#); [Rietberg, Krista](#); [Lloyd, Jenny](#); [Serafin, Lauri](#); [Kay, Meagan](#)
 Subject: RE: poss HPS case with exposure in King County
 Date: Friday, December 16, 2016 3:24:26 PM

16 Thanks, Vance. I'd be happy to review the clinical info on Monday. I'm open to an environmental
17 investigation if there is a good PH reason, but in sporadic cases with exposures in areas where Deer Mice
18 are endemic, I'm not sure of the value. Rodents like to colonize autos, might have been interesting to
19 have sampled from the air filter, but short of that, I don't see a reason based on the info in these emails.
20 If, for example, this was a place of employment with other potential exposures and unknown source,
21 might be more useful. The family should engage a rodent control agency that is familiar with hantavirus
22 mitigation, and be informed of the appropriate risk reduction steps they can take.

23 Jeff

24 Jeffrey S. Duchin, MD
25 Health Officer and Chief, Communicable Disease Epidemiology & Immunization Section
 Public Health - Seattle and King County

 18. And so it went. The County violated its duties under WAC 246.101, and the
23 Issaquah/Redmond area remained in the dark.

1 Defendants Swedish and Reif

2 19. In February, 2017, Brian Ehrhart began developing flu-like symptoms. When
3 things did not improve, he had a friend bring him to the Emergency Room at Swedish Hospital
4 in Issaquah, a few miles from his home.

5 20. Brian was treated by Dr. Reif, an emergency room doctor. At the time, Dr. Reif
6 was operating on behalf of Swedish Hospital – exercising both actual and apparent authority.
7 On information and belief, Swedish knew or should have known that Dr. Reif lacked
8 competency to perform the medical services required of him.

9 21. Brian’s oxygen and lab work indicated a chest x-ray, and ultimately admission
10 into the hospital. This would have saved Brian’s life by ensuring him the early intervention
11 and oxygen therapy he needed. But Dr. Reif and Swedish breached the standard of care by
12 failing to provide that care, saying nothing about it, and ultimately discharging Brian with a
13 diagnosis of “gastritis.” Nobody from Swedish intervened.

14 22. Without treatment, Brian’s condition deteriorated. He was subsequently
15 brought to Overlake, where he was treated. But it was too late. Brian died that night.

16 Epilogue

17 23. Around this time, word began spreading through the Issaquah area that there
18 were two confirmed cases of Hantavirus. The local neighborhoods were in an understandable
19 panic. They sought help from the City of Issaquah, which reached out to the County for
20 guidance. Remarkably, the County’s employees thought the whole thing was funny:

21 **From:** [Linton, Beth](#)
22 **To:** [Kay, Meagan](#)
Subject: Re: Hantavirus follow-up information
Date: Friday, March 10, 2017 9:37:36 AM

23 Oh I love the limelight! Ha ha, from me too.

24 On Mar 10, 2017, at 9:04 AM, Kay, Meagan <Meagan.Kay@kingcounty.gov> wrote:

25 I'm just imagining a neighborhood in panic and the media showing up - the lights the cameras.
hahaha. oh yeah - this is Issaquah.

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JURY DEMAND

Plaintiff demands a jury on all issues so triable.

CAUSES OF ACTION

Negligence – Swedish and Dr. Reif

28. Plaintiff incorporates all of the above-allegations as if stated herein in full.

29. Defendants owed a duty to plaintiff, which it breached through objectively unreasonable conduct, carelessness, negligence, and recklessness as indicated above.

30. On information and belief, Swedish knew or should have known that the care administered by Defendant Reif would proximately harm patients such as Brian Ehrhart.

31. Defendants failed to inform Mr. Ehrhart of materials facts relating to his treatment.

32. Defendants’ conduct fell well-below the accepted standard of care.

33. As a direct and proximate result of the tortious conduct, as described above, Plaintiff suffered past and future economic and non-economic damages in an amount to be proven at trial.

34. The Estate of Brian Ehrhart, by and through Sandra Ehrhart as Personal Representative, suffered economic and non-economic damages, including pre-death pain and suffering, fear of death, loss of future potential earnings, and loss of enjoyment of life, in an amount to be proven at trial, including all damages as provided under RCW 4.20.010, RCW 4.20.046, RCW 4.20.060, and the common law.

35. The minor children, Eli and Emma, as Brian’s natural children and according to RCW 4.20.020, suffered damages in an amount to be proven at trial, including the destruction of the parent/child relationship and all other damages as provided under RCW 4.20.010, RCW 4.20.046, RCW 4.20.060, and the common law.

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Loss of a Chance – All Defendants

43. Plaintiff incorporates all of the above-allegations as if stated herein in full.

44. In the alternative, due to their objectively unreasonable conduct, carelessness, negligence, and recklessness, defendants deprived plaintiff of a chance at a more successful outcome, which is a compensable injury under Washington law for which Plaintiff seeks past and future economic and non-economic damages in an amount to be proven at trial.

RELIEF REQUESTED

Plaintiff prays the following relief:

- A. General and special damages in an amount to be proven at trial.
- B. Attorneys' fees and costs as permitted by law and equity.
- C. All other relief the Court deems just and proper.

RESPECTFULLY SUBMITTED this 21st day of June, 2018.

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knowledge sufficient to form a belief as to the truth or falsity of the remaining allegations in this paragraph, and therefore, deny the same.

2. Answering paragraph 2, King County admits that Brain Ehrhart died on February 24, 2017. King County is without knowledge sufficient to form a belief as to the truth or falsity of the remaining allegations in this paragraph, and therefore, deny the same.

3. Answering paragraph 3, King County admits that King County is a home rule charter county operating under the laws of the State of Washington and that Public Health – Seattle & King County is a department of King County. All other allegations are denied.

4. Answering paragraph 4, King County makes no response to these allegations, as they pertain to another defendant. To the extent a response is required, King County is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and, therefore, deny the same.

5. Answering paragraph 5, King County makes no response to these allegations, as they pertain to another defendant. To the extent a response is required, King County is without sufficient information to form a belief as to the truth or falsity of the allegations contained therein and, therefore, deny the same.

JURISDICTION AND VENUE

6. Answering paragraph 6, King County leaves the matters of jurisdiction and venue to the Court.

FACTUAL BACKGROUND

The Defendant King County

7. Answering paragraph 7, King County admits only that Public Health – Seattle & King County is a department of King County, but deny the remaining allegations in the paragraph.

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8. Answering paragraph 8, King County admits that healthcare providers are required by law to notify King County of notifiable conditions and that King County is a repository of information regarding notifiable conditions which are actually reported to King County. King County admits that the term “zebra” is sometimes used as a term for a rare disease. Any remaining allegations are denied.
9. Answering paragraph 9, King County admits that healthcare providers are required to notify King County of notifiable conditions. King County admits that it is required to review and take appropriate action for reported notifiable conditions under WAC 246-101-505. Any remaining allegations are denied.
10. Answering paragraph 10, King County admits that it issues electronically transmitted Health Advisories to disseminate information to healthcare providers regarding notifiable conditions in certain situations. King County is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and therefore deny the same.
11. Answering paragraph 11, King County admits that in certain healthcare circumstances, forewarning is important. King County is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and therefore deny the same.
12. Answering paragraph 12, King County admits that in mid-November 2016 a Redmond area nurse became ill with Hantavirus Pulmonary Syndrome (“Hantavirus”). King County is without sufficient information to form a belief as to the truth or falsity of the remaining allegations contained therein and therefore deny the same.

DEFENDANT KING COUNTY'S AMENDED ANSWER TO
PLAINTIFF'S COMPLAINT FOR NEGLIGENCE AND
WRONGFUL DEATH- 3

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- 1 13. Answering paragraph 13, King County admits that doctors intervened and the nurse
2 survived. King County is without sufficient information to form a belief as to the truth or
3 falsity of the remaining allegations contained therein and therefore deny the same
- 4 14. Answering paragraph 14, King County admits that it was confirmed that the nurse had
5 contracted Hantavirus, which is a respiratory disease transmitted by deer mice.
- 6 15. King County is without sufficient information to form a belief as to the truth or falsity of
7 the remaining allegations contained therein and therefore deny the same.
- 8 16. Answering paragraph 15, King County admits that Hantavirus is rare and potentially
9 lethal. King County admits that last reported case of Hantavirus in King County occurred
10 in 2003. King County admits that in severe cases, medical attention is important early in
11 the disease's progression. Any remaining allegations are denied.
- 12 17. Answering paragraph 16, King County admits that Hantavirus is a reportable condition
13 under WAC 246.101.101, and that healthcare providers that encounter it must report it to
14 King County. King County admits that Overlake Hospital notified King County of the
15 nurse's Hantavirus diagnosis on or about December 7, 2016. King County is without
16 sufficient information to form a belief as to the truth or falsity of the remaining
17 allegations contained therein and therefore deny the same.
- 18 18. Answering paragraph 17, King County admits that the nurse's husband was in
19 communication with King County and that he expressed concerns that her automobile
20 was the source of her infection. King County admits that given the unique circumstances
21 of this private exposure, an environmental investigation was not warranted. Any
22 remaining allegations are denied.
- 23 19. Denied.

DEFENDANT KING COUNTY'S AMENDED ANSWER TO
PLAINTIFF'S COMPLAINT FOR NEGLIGENCE AND
WRONGFUL DEATH- 4

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1 Defendants Swedish and Reif

2 20. Answering paragraph 19, King County makes no response to these allegations, as they
3 pertain to another defendant. To the extent a response is required, King County is
4 without sufficient information to form a belief as to the truth or falsity of the allegations
5 contained therein and, therefore, deny the same.

6 21. Answering paragraph 20, King County makes no response to these allegations, as they
7 pertain to another defendant. To the extent a response is required, King County is
8 without sufficient information to form a belief as to the truth or falsity of the allegations
9 contained therein and, therefore, deny the same.

10 22. Answering paragraph 21, King County makes no response to these allegations, as they
11 pertain to another defendant. To the extent a response is required, King County is
12 without sufficient information to form a belief as to the truth or falsity of the allegations
13 contained therein and, therefore, deny the same.

14 23. Answering paragraph 22, King County makes no response to these allegations, as they
15 pertain to another defendant. To the extent a response is required, King County is
16 without sufficient information to form a belief as to the truth or falsity of the allegations
17 contained therein and, therefore, deny the same.

18 Epilogue

19 24. Answering paragraph 23, King County admits that King County and the City of Issaquah
20 hosted an informative town hall forum on or about March 16, 2017 in order for
21 community members to ask questions and receive information regarding Hantavirus.
22 Any remaining allegations are denied.
23

1 25. Answering paragraph 24, King County admits that it informed the community about the
2 risk factors of Hantavirus and appropriate prevention measures. King County admits that
3 King County and the City of Issaquah notified the community about the town hall forum.
4 Any remaining allegations are denied.

5 26. Answering paragraph 25, King County admits that the public was notified about two
6 Hantavirus cases reported in King County since December, 2016 in a blog posted on
7 Public Health Insider on March 21, 2017. King County admits that it sent out a Health
8 Advisory on March 23, 2017 and that there were subsequent public notifications
9 regarding Hantavirus. Any remaining allegations are denied.

10 27. Answering paragraph 26, King County admits that a third Hantavirus case was reported
11 on or about March 31, 2017. Any remaining allegations are denied.

12 Losses and Harm

13 28. Answering paragraph 27, King County is without sufficient information to form a belief
14 as to the truth or falsity of the allegations contained therein and therefore deny the same.

15 **JURY DEMAND**

16 King County also requests that this matter be tried by a jury.

17
18 **CAUSES OF ACTION**

19 Negligence- Swedish and Dr. Reif

20 29. Answering Plaintiff's "CAUSES OF ACTION: King County re-alleges its previous
21 responses to the Complaint as if fully set forth herein.

22 30. Answering paragraph 29, King County makes no response to these allegations, as they
23 pertain to another defendant. To the extent a response is required, King County is

1 without sufficient information to form a belief as to the truth or falsity of the allegations
2 contained therein and, therefore, deny the same.

3 31. Answering paragraph 30, King County makes no response to these allegations, as they
4 pertain to another defendant. To the extent a response is required, King County is
5 without sufficient information to form a belief as to the truth or falsity of the allegations
6 contained therein and, therefore, deny the same.

7 32. Answering paragraph 31, King County makes no response to these allegations, as they
8 pertain to another defendant. To the extent a response is required, King County is
9 without sufficient information to form a belief as to the truth or falsity of the allegations
10 contained therein and, therefore, deny the same.

11 33. Answering paragraph 32, King County makes no response to these allegations, as they
12 pertain to another defendant. To the extent a response is required, King County is
13 without sufficient information to form a belief as to the truth or falsity of the allegations
14 contained therein and, therefore, deny the same.

15 34. Answering paragraph 33, King County makes no response to these allegations, as they
16 pertain to another defendant. To the extent a response is required, King County is
17 without sufficient information to form a belief as to the truth or falsity of the allegations
18 contained therein and, therefore, deny the same.

19 35. Answering paragraph 34, King County makes no response to these allegations, as they
20 pertain to another defendant. To the extent a response is required, King County is
21 without sufficient information to form a belief as to the truth or falsity of the allegations
22 contained therein and, therefore, deny the same.

23

1 36. Answering paragraph 35, King County makes no response to these allegations, as they
2 pertain to another defendant. To the extent a response is required, King County is
3 without sufficient information to form a belief as to the truth or falsity of the allegations
4 contained therein and, therefore, deny the same.

5 37. Answering paragraph 36, King County makes no response to these allegations, as they
6 pertain to another defendant. To the extent a response is required, King County is
7 without sufficient information to form a belief as to the truth or falsity of the allegations
8 contained therein and, therefore, deny the same.

9 Negligence – King County Public Health

10 38. Answering Plaintiff's "CAUSES OF ACTION: King County re-alleges its previous
11 responses to the Complaint as if fully set forth herein.

12 39. Answering paragraph 38, King County makes no response as it appears to contain legal
13 conclusions for which no response is required. However, to the extent Plaintiff purports
14 to make factual allegations or allege legal conclusions contrary to law, they are denied.

15 40. Denied as to King County.

16 41. Denied as to King County.

17 42. Denied as to King County.

18 43. Denied as to King County.

19 Loss of a Chance – All Defendants

20 44. Answering paragraph 43, King County re-alleges its previous responses to Plaintiff's
21 Complaint as if fully set forth herein.

22 45. Denied as to King County.

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RELIEF REQUESTED

King County denies that Plaintiff is entitled to recover from King County any of the relief sought in Plaintiffs' Relief Requested on page 9 of the Complaint.

King County denies any remaining allegations contained in Plaintiffs' Complaint not expressly admitted herein.

BY WAY OF FURTHER ANSWER and AFFIRMATIVE DEFENSES, and without admitting anything previously denied, King County states as follows:

1. Plaintiffs have failed to state a claim against the King County upon which relief may be granted.
2. King County asserts the defenses of good faith, qualified immunity, and/or discretionary immunity for any and all actions alleged by Plaintiffs.
3. Plaintiffs' claims are barred by the public duty doctrine.
4. The injuries and damages alleged in the Complaint were caused solely by the fault of a third party not within the control of King County.
5. All actions of King County herein alleged as negligence, manifest a reasonable exercise of judgment and discretion by authorized public officials made in the exercise of governmental authority entrusted to them by law and are neither tortious nor actionable.
6. The injuries and damages, if any, claimed by Plaintiff were proximately caused or contributed to by the negligence or fault of Brian Ehrhart.

- 1 7. The injuries and damages, if any, claimed by Plaintiff, arise out of a condition of
2 which Brian Ehrhart had knowledge and to which Brian Ehrhart voluntarily subjected
3 himself.
4 8. If Plaintiffs suffered any damages, recovery is barred by Plaintiffs' failure to mitigate
5 said damages.
6 9. King County is not liable for pre-judgment interest because the State of Washington,
7 of which King County is a political subdivision, has not consented to such
8 prejudgment interest. RCW 4.56.115.
9 10. The conduct of King County was privileged and therefore not subject to liability.
10 King County reserves the right to amend this Amended Answer, including these
11 affirmative defenses, if and when additional facts are discovered which support such
12 amendments.

13 WHEREFORE, King County prays as follows:

14 That Plaintiffs take nothing by their Complaint, that the Complaint be dismissed with
15 prejudice, that King County be awarded its costs and reasonable attorneys' fees incurred herein,
16 and for such other and further relief as the Court deems just and equitable.

17 DATED this 26th day of July, 2018 at Seattle, Washington.

18 DANIEL T. SATTERBERG
19 King County Prosecuting Attorney

20 By: /s/ Kimberly Frederick
21 KIMBERLY FREDERICK, WSBA #37857
22 Senior Deputy Prosecuting Attorney
23 500 Fourth Avenue, Suite 900
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DEFENDANT KING COUNTY'S AMENDED ANSWER TO
PLAINTIFF'S COMPLAINT FOR NEGLIGENCE AND
WRONGFUL DEATH- 10

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DECLARATION OF FILING AND SERVICE

I hereby certify that on July 26, 2018, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, sending a copy via email to the following:

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DEFENDANT KING COUNTY'S AMENDED ANSWER TO
PLAINTIFF'S COMPLAINT FOR NEGLIGENCE AND
WRONGFUL DEATH- 11

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Attorneys for Dr. Warren Justin Reif

I declare under penalty of perjury under the laws of the United States and the State of Washington that the foregoing is true and correct.

DATED this 26th day of July, 2018 at Seattle, Washington.

/s/ Shanna Josephson
SHANNA JOSEPHSON
Legal Secretary
King County Prosecuting Attorney's Office

DEFENDANT KING COUNTY'S AMENDED ANSWER TO
PLAINTIFF'S COMPLAINT FOR NEGLIGENCE AND
WRONGFUL DEATH- 12

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July 27 2018 3:26 PM

The Honorable Shelly K. Speir
Department 5
KEVIN STOCK
COUNTY CLERK
NO: 18-2-09196-4

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SUPERIOR COURT OF WASHINGTON
IN THE COUNTY OF PIERCE

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

Plaintiffs,

v.

KING COUNTY, operating though Seattle-
King County Public Health, a government
agency, SWEDISH HEALTH SERVICES, a
non-profit entity, and JUSTIN WARRANT
REIF, an individual

Defendants.

NO. 18-2-09196-4

**PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT ON
DEFENDANT KING COUNTY'S
IMMUNITY-BASED DEFENSES**

NOTED FOR HEARING: August 24, 2018

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT
ON DEFENDANT KING COUNTY'S IMMUNITY-BASED
DEFENSES - i

6441055.3

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PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT
ON DEFENDANT KING COUNTY’S IMMUNITY-BASED
DEFENSES - iii

6441055.3

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1 **1. INTRODUCTION AND RELIEF REQUESTED**

2 Plaintiff, Sandra Ehrhart, on behalf of herself, her minor children and the Estate of
3 Brian Ehrhart, seeks a summary judgment Order striking all of King County’s immunity-based
4 defenses. Consistent with the state’s statutory framework and the facts of this case, there is no
5 basis for immunity of any kind in this case. It should rise or fall on its merits.¹

6 In 2016, Seattle-King County Public Health (“the County”) became aware, through
7 multiple avenues, that rural Issaquah/Redmond was seeing the beginnings of a Hantavirus
8 cluster. A local hospital, having just treated the first Hantavirus victim, advised the County,
9 consistent with its reporting obligations under WAC 246.101.101. Then, the County received
10 additional information from a Ph.D.-level scientist, who warned that additional infections in
11 the area were a “near-certainty.” See Declaration of Mark Waterbury (“Waterbury Decl.”) ¶ 8.
12 When, as here, a “notifiable condition” like Hantavirus is reported, the County’s duty is clear:
13 “[it] *shall* [r]eview and determine appropriate action for [e]ach reported case or suspected case
14 of a notifiable condition.” WAC 246-101-505 (emphasis added).

15 Courts uniformly construe this to impose a duty under tort law. See, e.g., *Livingston v.*
16 *City of Everett*, 50 Wn. App. 655, 659, 751 P.2d 1199 (1988) (rejecting public duty doctrine
17 defense); *Gorman v. Pierce Cty.*, 176 Wn. App. 63, 78, 307 P.3d 795 (2013) (same). There is
18 no dispute that the local healthcare community expects and relies upon the County to
19 disseminate this crucial information about rare and deadly diseases. See Declaration of
20 Michael Freeman (“Freeman Decl.”); Declaration of Sarah McMorris (“McMorris Decl.”). A
21 duty was owed; the public duty doctrine cannot, and does not, apply.

22 Nor does discretionary immunity—another defense recently pled by the County—
23 apply. This “narrow” doctrine immunizes high-level policy and legislation, not the day-to-day
24

25 ¹ This motion is being brought early in the case, consistent with the general principal that immunity questions
“should be resolved at the earliest possible stage in litigation.” *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)
(citing *Hunter v. Bryant*, 502 U.S. 224, 227 (1991)).

1 work of sending out of health notices.² Such operational decision-making is outside of
2 discretionary immunity.

3 In the end, the County sat on its knowledge of the Hantavirus cluster, leaving hospitals
4 in the dark. And when Brian Ehrhart got sick and reported to Swedish, he was sent away—
5 which cost him his life. County personnel found the aftermath funny:

6
7 From: Linton, Beth
To: Kay, Meagan
Subject: Re: Hantavirus follow up information
Date: Friday, March 10, 2017 9:37:26 AM

8 Oh I love the limelight! Ha ha, from me too.

9 On Mar 10, 2017, at 9:04 AM, Kay, Meagan <Meagan.Kay@kingcounty.gov> wrote:

10 I'm just imagining a neighborhood in panic and the media showing up - the lights the cameras.
11 hahaha. oh yeah - this is Issaquah.

12 Rosenberg Decl., Ex. A. If the County wishes to argue that it was not negligent, it can. But it
13 is not entitled to immunity as a matter of law. This matter should proceed to a trial on the
14 merits.

15 2. EVIDENCE RELIED UPON

16 In support of this motion, plaintiff relies upon:

- 17 • The Declaration of Mark Waterbury, Ph.D.;
- 18 • The Declaration of Sarah McMorris, R.N.;
- 19 • The Declaration of Michael Freeman, Med.Dr., Ph.D.; and
- 20 • The Declaration of Adam Rosenberg.

21 3. FACTUAL BACKGROUND

22 3.1. King County Public Health's Role As The Repository Of Information 23 About Rare, Reportable Diseases

24 Public Health – Seattle & King County is a department of King County³ with a nine
25 figure budget and over 800 full time employees. Rosenberg Decl., Ex. E. It has broad

² The County disseminates numerous public health advisories every year, for all manner of things. In 2016, for example, there were notifications about increased instances of syphilis (Rosenberg Decl., Ex. B), people poisoning themselves with camping stoves (*id.* Ex. C), and bad Tilapia (*id.* Ex. D).

1 authority to enter premises, issue fines, and withhold permits. Rosenberg Decl., Ex. F (Board
2 of Health Code).

3 Significant to this case, the County is the repository of information related to rare and
4 deadly diseases. By operation of law, doctors and hospitals⁴ *must* advise the County of all
5 “notifiable conditions” as defined by Washington law. *See* WAC 246.101.101 (listing “the
6 conditions that Washington’s health care providers must notify public health authorities of on a
7 statewide basis”). The County itself reaffirms this requirement on its website:
8 [https://www.kingcounty.gov/depts/health/communicable-diseases/health-care-providers/
9 disease-reporting.aspx](https://www.kingcounty.gov/depts/health/communicable-diseases/health-care-providers/disease-reporting.aspx) (last visited May 1, 2018).⁵ The state regulations confirm why:

10 The purpose of notifiable conditions reporting is to provide the information
11 necessary for public health officials to protect the public's health by tracking
12 communicable diseases and other conditions. *These data are critical to local
13 health departments and the departments of health and labor and industries in
14 their efforts to prevent and control the spread of diseases and other
15 conditions... Treating persons already ill, providing preventive therapies for
16 individuals who came into contact with infectious agents*, investigating and
17 halting outbreaks, and removing harmful health exposures are key ways public
18 health officials protect the public...

19 WAC 246-101-005 (emphasis added).

20 **3.2. The Medical Community Relies Upon Public Health To Do Its Job When
21 Actual Knowledge Of Certain Conditions Is Developed**

22 As Dr. Michael Freeman, who holds a Masters and Ph.D. in Public Health and
23 Epidemiology, explains:

24 Fundamentally, the relationship between the public health agency and health
25 care community works optimally when there is two-way communication. That
is, when a disease is reported to the County by the health care community, the
County will report back to the health care community after evaluating

26 ³ The Seattle Department of Health merged with the King County Department of Health in 1951, though, the
27 respective agencies continued to administer their respective geographic regions. In 1981, the department was
28 placed under county administration (with the City retaining policy and funding control over the Seattle Services
29 Division). *See* Frantilla, GUIDE TO THE SEATTLE AND KING COUNTY DEPARTMENT OF PUBLIC HEALTH ANNUAL
30 REPORTS 1894-1983, Northwest Digital Archives (NWDA) (last visited May 1, 2018).

31 ⁴ As well as laboratories, veterinarians, food service establishments, child day care facilities, and schools.

32 ⁵ *See* Rosenberg Decl., Ex. G (screenshot).

1 information... allowing for the health care community to act on the information.
2 In order to function as designed, the medical community must provide
3 information to the agency, and the agency must provide digested and augmented
4 information back to the medical community.

5 Freeman Decl. ¶ 4.

6 In other words, it is not—and cannot be—a one-way street. From the standpoint of the
7 medical community, “it is anticipated that the County will disseminate important and
8 actionable public health information and announcements in a timely fashion, and one that is
9 appropriate to the seriousness of the threat.” Freeman Decl. ¶ 5. If the County were not
10 occupying this role, health care providers would presumably seek this crucial information
11 elsewhere. *See* McMorris Decl. ¶ 5. But they do not, because the County, utilizing public
12 resources, has taken it on.

13 Explicitly acknowledging this “reliance-based relationship” (*id.* ¶ 3), the state
14 regulatory framework does not afford the County a right to simply opt-out when it receives
15 notice of a “notifiable condition.” In fact, it must “take appropriate action”:

16 **Duties of the local health officer or the local health department**

17 (1) Local health officers or the local health department *shall*:

18 (a) Review and determine appropriate action for:

- 19 (i) Each reported case or suspected case of a notifiable
20 condition;
- 21 (ii) Any disease or condition considered a threat to public
22 health; and
- 23 (iii) Each reported outbreak or suspected outbreak of disease,
24 requesting assistance from the department in carrying out
25 investigations when necessary.

WAC 246-101-505 (emphasis added).

And rightly so. When this system works, it can save lives. *See generally* WAC
246.101.005 (referring to notifiable condition data as “critical” to “treating persons already ill

1 [and] providing preventative therapies for individuals who came into contact with infectious
2 agents”). This is especially true in the context of highly improbable or unlikely conditions. It is
3 the County that, by law, receives and disseminates notifications about these conditions. *See*
4 *also* McMorris Decl. ¶ 4 (emergency medicine nurse: notices from public health “give us
5 notice of unusual conditions, which we might not otherwise anticipate, and an opportunity to
6 act on them.”). Indeed, many facilities post public health notifications on the walls of their
7 emergency rooms so that personnel can act upon them. McMorris Decl. ¶ 5.

8 **3.3. Hantavirus Pulmonary Syndrome**

9 Hantavirus Pulmonary Syndrome is a rare condition, especially in this part of the world.
10 As of 2016, the last reported case in King County occurred in 2003. Waterbury Decl., ¶ 10,
11 Ex. A. Early on, Hantavirus presents similarly to the flu. It includes fever, chills, body-aches,
12 and cough. Rosenberg Decl., Ex. I (Data from the Mayo Clinic). When diagnosed early,
13 Hantavirus is often a treatable event with intervention and oxygen therapy. *Id.* As the disease
14 progresses, however, it becomes more acute and difficult to treat. *Id.* There is a mortality rate
15 of approximately 30%.

16 Therefore, it is not surprising that Hantavirus, while rare, is a mandatory reportable
17 condition, *i.e.*, “within 24 hours.” *See* WAC 246-101-101.⁶ That is, when a case is confirmed,
18 the treating provider must advise the County within 24 hours (*id.*), so public health can “take
19 appropriate action.” WAC 246-101-505; *see also* Freeman Decl., ¶ 3-6. Hantavirus is spread
20 largely by deer mice droppings. Waterbury ¶ 6-8. Consequently, it is driven by predictable
21 environmental conditions impacting the deer mice population—often in clusters. *Id.*

22 **3.4. Maureen Waterbury Contracts Hantavirus And Nearly Dies**

23 Shortly before Thanksgiving, in the rural Issaquah/Redmond area, Maureen Waterbury,
24 a longtime nurse, felt herself getting sick. Waterbury Decl., ¶ 5. Being uniquely attuned to her

25 ⁶ For reference, Malaria must be reported within 3 business days, while Hepatitis and Autism are reported monthly. *Id.*

1 physiology, she recognized relatively early on that this was something different than the flu.
2 *Id.* She was admitted as a patient to Overlake Hospital, in Bellevue, where she spent several
3 days in a coma. *Id.* But she survived Hantavirus, because her infection was caught early. *Id.*

4 Consistent with its obligations under state law, Overlake dutifully reported the case to
5 public health. Rosenberg Decl., Ex. J. A public health nurse at the County found the case
6 “interesting,” noting the rural context and presence of deer mice. *Id.* The State Department of
7 Health queried whether “others are suspected of being exposed” and a CDC representative
8 posited a “homesite environmental assessment.” Rosenberg Decl. Ex. K.

9 3.5. County Declines To Share What It Knows With Healthcare Community

10 All of this ended up on the desk of Dr. Jeff Duchin. Within a couple hours, he rejected
11 all proposals in favor of doing nothing:

12 From: [Duchin, Jeff](#)
13 To: [Kawakami, Vance](#)
14 Cc: [McKeirnan, Shelly](#); [Rietberg, Krista](#); [Lloyd, Jenny](#); [Serafin, Lauri](#); [Kav, Meagan](#)
15 Subject: RE: poss HPS case with exposure in King County
16 Date: Friday, December 16, 2016 3:24:26 PM

17 Thanks, Vance. I'd be happy to review the clinical info on Monday. I'm open to an environmental
18 investigation if there is a good PH reason, but in sporadic cases with exposures in areas where Deer Mice
19 are endemic, I'm not sure of the value. Rodents like to colonize autos, might have been interesting to
20 have sampled from the air filter, but short of that, I don't see a reason based on the info in these emails.
21 If, for example, this was a place of employment with other potential exposures and unknown source,
22 might be more useful. The family should engage a rodent control agency that is familiar with hantavirus
23 mitigation, and be informed of the appropriate risk reduction steps they can take.

24 Jeff

25 Jeffrey S. Duchin, MD
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26 *Id.* His directive—amounting to “get an exterminator”—was objectively wrong, inconsistent
27 with other jurisdictions, and violated the standard of care. Freeman Decl., ¶ 6-7; Waterbury
28 Decl., ¶ 8.

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1 Even still, the County got a second-chance to do the right thing. Dr. Mark Waterbury,
2 Maureen’s husband, happened to be a scientist and Ph.D. He reached out to the County
3 *repeatedly* to share his research and (objectively correct) conclusions:

4 Knowing this, it was important to me to share what I viewed as a near-certainty
5 of additional infections with King County Public Health. The first time I called,
6 however, I was dismissed by Public Health’s representatives. Their response
7 amounted to “thank you, bye.” This was surprising to me because, according to
8 my research, other jurisdictions take action (*i.e.*, give notice) after one
9 confirmed case.

10 I reached out a second time, and was more assertive. I advised Public Health of
11 my background, education, and research. I was a scientist, just like them.
12 Ultimately, I spoke to Dr. Duchin, the head of the agency, but hit a brick wall.
13 He and other Public Health officials continued to dismiss my wife’s case as
14 “fluky,” and insisted that “we don’t know that there will be another one.” I
15 responded that another was, in fact, likely—both practically and statistically. I
16 impressed upon Public Health the importance of giving broad public notice to
17 communities and health care providers. Dr. Duchin was unmoved, and did not
18 seem to believe Hanta was statistically significant unless 7-8 people were
19 infected. Public Health neither responded, nor put out a public health advisory.

20 I was both surprised and dismayed. At times, it seemed like King County
21 Public Health was going out of its way to hush the condition in the area.

22 Waterbury Decl., ¶ 8-10. The County, unfortunately, continued to sit on the information.

23 Indeed, the County even went so far as to hush the condition. Despite knowing that
24 Hantavirus occurred very recently, staff continued to represent that there had been no
25 infections “since 2003.” Maureen Waterbury, while still recovering, had to email the County
to correct the erroneous claim. Waterbury Decl., ¶ 10, Ex. A. Notwithstanding that, the same
misinformation remains on the County’s website to this day:

Communicable disease surveillance summaries

Number of cases by year in King County

- Select a disease name to learn more about that condition.
- Select a linked year at the top of each column to view an annual Communicable Disease Surveillance Summary.
- For annual data about HIV/STD and tuberculosis cases, visit their program websites.

Disease	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Animal bites and potential rabies exposures	102	127	142	124	91	68	68	115	93	98
Arboviral disease	3	6	7	9	9	7	7	9	14	18
Botulism, Infant	0	0	0	0	0	0	1	0	0	1
Botulism, Foodborne	1	0	0	1	1	1	1	0	0	0
Botulism, Wound	0	1	0	1	0	2	0	0	0	0
Brucellosis	0	2	0	0	0	1	0	0	1	3
Campylobacteriosis	258	262	296	274	306	399	389	403	412	598
Cholera	0	0	0	0	0	0	0	0	0	0
Cryptosporidiosis	45	46	35	31	16	16	24	18	18	26
Cyclosporiasis	1	1	0	0	1	3	0	0	1	3
Diphtheria	0	0	0	0	0	0	0	0	0	0
Giardiasis	117	151	114	100	130	161	174	202	182	218
Haemophilus influenzae invasive disease (under age 5 years)	3	2	2	1	4	1	0	4	2	2
Hantavirus Pulmonary Syndrome	1	0	0	0	0	0	0	0	0	0
Hepatitis A	17	17	16	15	7	16	10	14	5	9

Communicable Disease Summaries, <https://www.kingcounty.gov/depts/health/communicable-diseases/disease-control/surveillance-summaries.aspx> (last visited May 1, 2018).

In the end, the County took no action. It performed no environmental analysis, it disregarded Dr. Waterbury's accurate assessment, and it furnished zero notice to the local healthcare community. Freeman Decl., ¶ 6-8.

3.6. Brian Ehrhart Contracts Hantavirus And The Local Hospital—Knowing Nothing Of The Emerging Cluster—Sends Him Away Diagnosing the Flu

Later that season, in February 2017—about ten miles from the Waterburys—Brian Ehrhart (age 34) began to get sick. He reported to the Emergency Room at Swedish-Issaquah at around 9:15 pm. Rosenberg Decl., Ex. L. His symptoms included fever, vomiting and cough. *Id.* His oxygen levels were down, as were his platelets. *Id.* Had the ER been armed with the knowledge that the County was refusing to share, it would have been in a position to

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1 (1) ask Brian about his contacts with deer mice; (2) perform a chest X-ray; and/or (3) begin
2 oxygen therapy. None of this happened, however.

3 Brian was basically given some anti-nausea medications and sent away with a diagnosis
4 of “gastroenteritis.”⁷ *See id.* This missed opportunity deprived Brian of critical early
5 hospitalization and therapy (Freeman Decl., ¶ 7), which amounted to a death sentence.

6 **3.7. Plaintiff’s Condition Deteriorates, And He Dies Without Early Intervention**

7 Brian continued to deteriorate as his lungs filled with fluid. He was brought back to
8 Urgent Care, which sent him by ambulance to Overlake Hospital. At this point, Brian was in
9 acute respiratory failure, and his organs were beginning to shut down. Rosenberg Decl.,
10 Ex. M. Despite Overlake Hospital’s efforts, which were now too late, Brian Ehrhart died on
11 February 24, 2017—leaving behind a wife and two very young children.

12 **3.8. What Went Wrong and Why It Mattered**

13 The County received notice of this second Hantavirus infection. And again, for reasons
14 passing understanding, the County continued to resist telling anybody. Waterbury Decl., ¶ 12.
15 At this point, however, Dr. Waterbury advised that if the County remained silent, he would go
16 to the press. *Id.* Betraying a stronger interest in media relations than safety, the County
17 abruptly gave notice, just hours before stories ran. *Id.* This saved the life of another resident, a
18 woman named Samantha King, who lived near the Ehrharts. She contracted Hantavirus, but,
19 unlike Brian Ehrhart, benefitted from early diagnosis and oxygen therapy. Waterbury Decl., ¶
20 13.

21 Reflecting on what happened—and, presumably, why the County got this one so
22 wrong—Dr. Duchin acknowledged that he “lost track of the conversation” with Dr. Waterbury.
23 *See* Rosenberg Decl., Ex. N.

24
25 _____
⁷ This is medical jargon for “tummy bug.”

1 The Issaquah/Redmond community was, meanwhile, in a panic. This condition was
2 occurring in their neighborhood, and had now claimed the life of at least one resident (their
3 neighbor and friend). At the request of the mayor, county representatives agreed to speak to
4 the neighborhood about the condition. Their internal emails—shortly after communicating
5 with the Ehrhart family—speak for themselves:

6 From: [Linton, Beth](#)
7 To: [Kay, Meagan](#)
8 Subject: Re: Hantavirus follow-up information
9 Date: Friday, March 10, 2017 9:37:36 AM

10 Oh I love the limelight! Ha ha, from me too.

11 On Mar 10, 2017, at 9:04 AM, Kay, Meagan <Meagan.Kay@kingcounty.gov> wrote:

12 I'm just imagining a neighborhood in panic and the media showing up - the lights the cameras.
13 hahaha. oh yeah - this is Issaquah.

14 Rosenberg Decl., Ex. A.

15 The Ehrhart family served the County with a claim for damages, which was essentially
16 ignored. Rosenberg Decl., Ex. O. This suit followed and plaintiff now moves for partial
17 summary judgment—to confirm what the law already says: County personnel have an
18 obligation to do better than this.

19 **4. STATEMENT OF THE ISSUE**

20 Whether the County—operating through Seattle-King County Public Health—owes a
21 duty of care when it develops actual knowledge of a deadly condition, and state regulatory
22 (reflecting reliance-based framework) imposes a duty to act.

23 Whether the County can prove a “clear entitlement” to the “narrow” doctrine of
24 discretionary immunity when it negligently fails to circulate a public health advisory.

25 **5. AUTHORITY AND ARGUMENT**

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers
to interrogatories, and admissions on file, together with the affidavits, if any, show that there is

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1 no genuine issue as to any material fact and that the moving party is entitled to a judgment as a
2 matter of law. CR 56(c); *Guile v. Ballard Comnty. Hosp.*, 70 Wn. App. 18, 21, 851 P.2d 689,
3 *rev. denied*, 122 Wn.2d 1010 (1993). In the context of affirmative defenses, at summary
4 judgment, the burden of proof is on the defendant. *See August v. U.S. Bancorp*, 146 Wn. App.
5 328, 343, 190 P.3d 86 (2008).

6 **5.1. The Legal Standard**

7 Immunity is the exception, not the rule. In 1967, in adopting RCW 4.96.010, the
8 Legislature determined that local government “shall be liable for damages arising out of their
9 tortious conduct, or the tortious conduct of their officers... to the same extent as if they were a
10 private person or corporation...” Sovereign immunity for government was abolished.

11 The limited issue now is whether a legal duty was owed by government to the injured
12 plaintiff. If not, the public duty doctrine bars the claim. But that is rare, as Washington courts
13 confirm. *See, e.g., See, e.g., Bailey v. Town of Forks*, 108 Wn.2d 262, 266-68, 737 P.2d 1257
14 (1987) (noting that courts “have almost universally found it unnecessary to invoke the public
15 duty doctrine to bar a plaintiff’s lawsuit” and that the exceptions “have virtually consumed the
16 rule”). Municipal corporations are liable for damages arising out of their tortious conduct, or
17 the tortious conduct of their employees, to the same extent as if they were a private person or
18 corporation. RCW 4.96.010(1); *Munich v. Emergency Commc’n Ctr.*, 175 Wn.2d 871, 878, 288
19 P.3d 328 (2012).⁸

20 Discretionary immunity is even more limited. This is a judicially-created rule, created
21 in 1965. It was narrow at the time, *Evangelical United Brethren Church v. State*, 67 Wn.2d
22 246, 407 P.2d 440 (1965), and has been narrowed further since, *see Taggart v. State*, 118
23 Wn.2d 195, 214–15, 822 P.2d 243 (1992) (citing *King v. Seattle*, 84 Wn.2d 239, 525 P.2d 228
24

25 ⁸ This is not so much an immunity, but rather, “a focusing tool” to determine whether the individual claimant was
owed a duty. *Id.* at 878; *Cummins v. Lewis County*, 156 Wn.2d 844, 866, 133 P.3d 458 (2006).

1 (1974) (arbitrary decisions not subject to immunity); *Chambers–Castanes v. King Cy.*, 100
2 Wn.2d 275, 282, 669 P.2d 451 (1983) (must be a basic, high-level *policy* decision)). The
3 question ultimately comes down to whether separation of powers is implicated. *Taggart*, 118
4 Wn.2d at 214-15. As discussed in more detail below, day-to-day operational work by
5 government employees never triggers immunity—even if “discretion” is exercised.⁹

6 For the reasons that follow, neither is applicable to the facts of our case.

7 **5.2. The Public Duty Doctrine Does Not Apply**

8 The general rule is that professionals owe a duty to “exercise the degree of skill, care,
9 and learning possessed by members of their profession in the community.” *Michaels v. CH2M*
10 *Hill, Inc.*, 171 Wn.2d 587, 606, 257 P.3d 532 (2011) (citing 16 DeWolf and Allen,
11 WASHINGTON PRACTICE § 15.51, at 504–05 (3d ed. 2006)). Thereafter, concepts of
12 foreseeability serve to define the scope of the duty owed. *Schooley v. Pinch's Deli Mkt., Inc.*,
13 134 Wn.2d 468, 475, 951 P.2d 749 (1998). The existence of a legal duty is a question of law.
14 *Hansen v. Friend*, 118 Wn.2d 476, 479, 824 P.2d 483 (1992). Accordingly, this issue is
15 properly resolvable on summary judgment.

16 In negligence actions involving government, courts analyze the government’s duty
17 under the “public duty doctrine” to ensure that a duty was actually owed to the plaintiff (or his
18 class of individuals). This is less an immunity than a “focusing tool.” *Munich v. Skagit*
19 *Emergency Comm’n Ctr.*, 175 Wn.2d 871, 878, 288 P.3d 328 (2012); *Cummins v. Lewis*
20 *County*, 156 Wn.2d 844, 866, 133 P.3d 458 (2006).

21 For at least two independent reasons, a legal duty was plainly owed.

22
23
24 ⁹ As the Supreme Court rightly pointed out, “it would be difficult to conceive of any official act, no matter how
25 directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved
only the driving of a nail.” *King v. City of Seattle*, 84 Wn.2d 239, 245–46, 525 P.2d 228 (1974) (citing *Johnson v. State*,
69 Cal.2d 782, 788, 447 P.2d 352 (1968)). Thus, the “semantic inquiry into the meaning of ‘discretionary’”
was rejected. *Id.*

1 5.2.1. The County Owed A Duty Under The Failure To Enforce Exception

2 As the courts have recognized, when, as here, there is a known hazard and a
3 governmental obligation to address it, the public duty doctrine does not apply. At least twice,
4 in evaluating comparable—albeit, less compelling—facts, courts had no trouble applying the
5 “failure to enforce” exception. This exception provides that a government’s obligation to the
6 general public becomes a legal duty owed to the plaintiff when (1) government agents, who are
7 responsible for enforcing statutory requirements, actually know of a violation, (2) the
8 government agents have a statutory duty to take corrective action but fail to do so, and (3) the
9 plaintiff is within the class the statute intended to protect. *Bailey v. Town of Forks*, 108 Wn.2d
10 262, 268, 737 P.2d 1257 (1987); *Gorman v. Pierce Cty.*, 176 Wn. App. 63, 77, 307 P.3d 795
11 (2013). The burden is on the plaintiff to prove applicability. *Id.*

12 *Livingston v. City of Everett*, 50 Wn. App. 655, 657, 751 P.2d 1199 (1988), provides a
13 helpful illustration. There, the City of Everett became aware that two dogs in the jurisdiction
14 were potentially dangerous. Under its City Code:

15 Any impounded animal shall be released to the owner or his authorized
16 representative upon payment of impoundment, care and license fees if, in the
17 judgment of the animal control officer in charge, such animal is not dangerous
18 or unhealthy.

19 *Id.* at 659 (citing EMC § 6.04.140(E)(1)). The statute was couched in terms of “shall,” but did
20 not mandate any particular result, other than that the government exercise discretion. When the
21 City took no action to address the dogs, and they injured a young boy, the family brought suit.

22 The City of Everett raised the public duty doctrine as a defense. As in our case, there
23 was no dispute about its actual knowledge of the potential hazard. The City merely argued that
24 its code was discretionary, and thus, could not form the basis for a legal duty. The Court of
25 Appeals rejected the argument, reasoning: that “the Animal Control officers *had a duty to*
exercise their discretion when confronted with a situation which posed a danger to particular
persons or a class of persons.” *Id.* at 659 (emphasis added). Nor was there any dispute that the

1 injured boy was within the class the ordinance was intended to protect. *See id.* at 659 (noting
2 “duty of care to all persons and property who come within the ambit of the risk created by the
3 officer's negligent conduct”) (citing *Campbell v. Bellevue*, 85 Wn.2d 1, 530 P.2d 234 (1975)
4 (finding municipal liability); *Mason v. Bitton*, 85 Wn.2d 321, 534 P.2d 1360 (1975) (same)).
5 The trial court’s application of the public duty doctrine was reversed.

6 Subsequently, in *Gorman v. Pierce Cty.*, 176 Wn. App. 63, 307 P.3d 795 (2013),
7 Division II was presented with a similar set of facts. Over a period of time, the county
8 developed knowledge of a dangerous local pit bull. An ordinance provided that the county *had*
9 *discretion to classify* a dog as ‘potentially dangerous’ based upon its knowledge. *Id.* at 70.
10 Again, the county admitted knowledge but denied a “statutory duty to take corrective action”
11 because classifying the dog was left to its discretion. *Id.* at 77. Division II also rejected this
12 argument:

13 While some of the steps in the process are discretionary, *the code did require*
14 *Pierce County to take action if certain conditions existed.* If the county was
15 made aware of a likely potentially dangerous dog, it had a duty to evaluate the
16 dog to determine if it was potentially dangerous.

17 *Id.* at 81 (emphasis added) (citing *Livingston*).

18 These principles apply perforce to this case. There is, first, no dispute about the
19 County’s actual knowledge of the hazard. The confirmed case of Hantavirus was furnished to
20 County personnel, who acknowledged and corresponded about it. *See Waterbury Decl.*;
21 *Freeman Decl.* Ex. B; *Rosenberg Decl.*, Ex. K,N. And even beyond the mandatory reporting,
22 Dr. Waterbury undisputedly called the County’s officers, repeatedly, and advised them of the
23 “near-certainty” of additional cases, based upon the predictable environmental patterns. *See*
24 *Waterbury Decl.*, ¶ 8-10.

25 By law, the County had a “duty to act”:

Duties of the local health officer or the local health department

(1) Local health officers or the local health department *shall*:

1 (a) Review and *determine appropriate action for*:

2 (i) *Each reported case or suspected case of a notifiable*
3 *condition;*

4 (ii) Any disease or condition considered a threat to public
5 health; and

6 (iii) Each reported outbreak or suspected outbreak of disease,
7 requesting assistance from the department in carrying out
8 investigations when necessary.

9 WAC 246-101-505 (emphasis added). As in *Gorman* and *Livingston*, “certain conditions”
10 were met, triggering WAC 246-101-505’s mandate to “take action” (*see Gorman*, 176 Wn.
11 App. at 81, even if the particular path remained discretionary.

12 This deliberate was consistent with both state law under WAC 246-101 and the
13 County’s own statements about it:

14 Disease reporting requirements

15 For King County health care professionals

16 Washington Administrative Code (WAC) Chapter 246-101: Notifiable conditions rule
17 In Washington state, health care professionals, health care facilities, laboratories, veterinarians, food service
18 establishments, child day care facilities, and schools are legally required to notify public health authorities at their local
19 health jurisdiction of suspected or confirmed cases of selected diseases or conditions. These are referred to as notifiable
20 conditions. Washington’s notifiable conditions rule was revised on February 5, 2011.

21 Notifiable condition reporting: Q&A

22 Including HIPAA considerations and why reporting is important.

23 Reporting of other conditions: Acute flaccid myelitis (AFM): Health advisory online.

- 24 • October 29, 2016: Increase in Suspected Cases of Acute Flaccid Myelitis, King County and Was.
- 25 • July 29, 2016: CDC Recommends Increased Vigilance for Acute Flaccid Myelitis

- 26 1. Where to report a notifiable condition in King County
- 27 2. Reporting requirements for health care providers
- 28 3. Conditions notifiable to the Washington State Department of Health
- 29 4. Requirements for health care facilities, schools, child care programs, veterinarian
30 establishments
- 31 5. What information to include in a report
- 32 6. Reporting requirements for laboratories

33 Last Updated December 22, 2017

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35 Purpose of notifiable conditions reporting

36 “These data are critical to local health departments and
37 the departments of health and labor and industries in
38 their efforts to prevent and control the spread of
39 diseases and other conditions. Public health officials
40 take steps to protect the public based on these
41 notifications. Treating persons already ill, providing
42 preventive therapies for individuals who came into
43 contact with infectious agents, investigating and halting
44 outbreaks, and removing harmful health exposures are
45 key ways public health officials protect the public.”

WAC 246.101.005 (emphasis supplied)

36 Disease Reporting Requirements, [https://www.kingcounty.gov/depts/health/communicable-](https://www.kingcounty.gov/depts/health/communicable-diseases/health-care-providers/disease-reporting.aspx)
37 [diseases/health-care-providers/disease-reporting.aspx](https://www.kingcounty.gov/depts/health/communicable-diseases/health-care-providers/disease-reporting.aspx) (last visited May 1, 2018) (callout
38 citation added).

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1 The reason for this, as expressed above, is to protect people in exactly Brian Ehrhart’s
2 position. *See* WAC 246-101-005 (Purpose of notifiable conditions reporting is to “treat[]
3 persons already ill, provid[e] preventative therapies for individuals who came into contact with
4 infectious agents, [and] investigating and halting outbreaks”). Conversely, when the County
5 developed actual knowledge and did *nothing*, Brian—who was suffering from Hantavirus, yet
6 needlessly slipped through the cracks—obviously fell “within the ambit of the risk created.”
7 *See Livingston*, 50 Wn. App. at 659.

8 The County owes a duty under settled case law, which precludes application of the
9 public duty doctrine.

10 5.2.2. The County Owed A Duty By Virtue Of The Rescue Doctrine

11 The public duty doctrine is also foreclosed by more traditional principles. Under the
12 well-established “Rescue Doctrine,” once undertaken, a rescue requires reasonable care by the
13 rescuer (regardless of whether a duty was owed in the first place). This exception has been
14 recognized in situations where a governmental entity or its agent undertakes to warn or aid a
15 person in danger, and the offer to render aid is relied upon by either the person to whom the aid
16 is to be rendered *or by another who, as a result of the promise, refrains from acting on the*
17 *victim's behalf*. DeWolf and Allen 16 WASHINGTON PRACTICE, § 15:11 (4th ed. 2017)
18 (emphasis added).

19 Ordinarily, liability will be based upon allegations that the defendant made the
20 plaintiff’s situation worse by: “(1) increasing the danger; (2) misleading the plaintiff into
21 believing the danger had been removed; or (3) depriving the plaintiff of the possibility of help
22 from other sources.” DeWolf and Allen, 16 Washington Practice § 2:10 (4th ed. 2017). This
23 principle is reaffirmed in scores of cases, across all of the Divisions and Supreme Court. *See,*
24 *e.g., Mita v. Guardsmark, LLC*, 182 Wn. App. 76, 328 P.3d 962 (2014) (county owed a duty of
25 care when personnel indicated they would send an officer and file a missing person report

1 related to missing elderly person); *Munich v. Skagit Emergency Commc'n Ctr.*, 175 Wn.2d 871,
2 288 P.3d 328 (2012) (county owed a duty when it indicated an officer would be sent to
3 shooting incident); *Chambers–Castanes v. King County*, 100 Wn.2d 275, 286 n. 3, 669 P.2d
4 451 (1983) (public entity has a duty under the rescue doctrine when an injured party reasonably
5 relies on a third party who “refrains from acting” as a result of the public entity’s conduct).
6 “[A] duty to act” is “created by reliance not by the person to whom the aid is to be rendered,
7 but by another who, as a result of the promise, refrains from acting on that person’s behalf.”
8 *Brown v. MacPherson’s, Inc.*, 86 Wn.2d 293, 301, 545 P.2d 13 (1975); *see also Meneely v. S.R.*
9 *Smith, Inc.*, 101 Wn. App. 845, 859–60, 5 P.3d 49 (2000) (trade association “voluntarily
10 assumed the duty to warn” because “manufacturers relied upon” assurances).

11 Here, the reliance is on the part of the medical community, which ultimately led to
12 increased risk of harm to Mr. Ehrhart. Treaters anticipate that the County—based upon its own
13 representations and regulations—will notify them of rare and exotic diseases in the area.¹⁰ *See*
14 *McMorris Decl.*, ¶ 3-5 (explaining “reliance based relationship” and probability that “if county
15 did not provide this service, [treaters] would pursue this information from elsewhere”);
16 *Freeman Decl.*, ¶ 8 (“the reciprocal communication system that is the rationale for public
17 health agencies did not perform as it is designed to function. The result was increased risk of
18 harm...”).

19 The County made itself the repository of this information, and local treaters expect that
20 it will follow through. It is, therefore, not free to change its mind, mid-stream, leaving people
21 like the Ehrharts worse off than had government done nothing in the first place. This, under
22 settled principles, furnishes a second basis for liability. *Cf. Borden v. City of Olympia*, 113
23

24 ¹⁰ A person may reasonably rely on explicit or implicit assurances. “Even where an offer to seek or render aid is
25 implicit and unspoken, a duty to make good on the promise has been found by most courts if it is reasonably relied
upon.” *Brown v. MacPherson’s, Inc.*, 86 Wn.2d 293, 301, 545 P.2d 13 (1975); *Osborn v. Mason Cty.*, 157 Wn.2d
18, 26, 134 P.3d 197 (2006).

1 Wn. App. 359, 370, 53 P.3d 1020 (2002) (2002) (“If it is proven at trial that the County
2 participated in creation of the problem, it may participate in the solution.”).

3 5.2.3. It Would Be Anomalous—And Dangerous—If The County Is Permitted
4 To Engender Broad Medical Reliance, And Then Do Nothing

5 Though settled law guides the Court’s analysis to a conclusion, it bears emphasis that
6 finding a legal duty is just plain right in this case. The existence of a legal duty is a question of
7 law and depends on mixed considerations of “logic, common sense, justice, policy, and
8 precedent.” *Christensen v. Royal Sch. Dist. No. 160*, 156 Wn.2d 62, 67, 124 P.3d 283 (2005).

9 It is difficult to know how logic, common sense, justice or policy would be served by
10 giving the County a license to negligently hurt people, by doing precisely the opposite of what
11 state law requires of it. The County, by conduct and statute, occupies a unique space—and it is
12 heavily relied upon to do its job right. And if it does not, a circumscribed class of people,
13 which the law itself acknowledges (*see* WAC 246-101-005), will die.

14 The County cannot have it both ways. It cannot hold authority over doctors and
15 nurses—mandating that they all give timely notice of all “notifiable conditions”—while
16 remaining wholly unaccountable for harm it causes by its own negligent conduct vis-à-vis that
17 same “critical information” (*id.*).

18 Nor is this an opening of the proverbial floodgates for County liability. WAC 246-101-
19 550 has been in existence for many years, and even revisited recently. In doing so, its
20 drafters—while presumptively aware of cases like *Livingston* and *Gorman*, which hold that this
21 language imposes a duty of care under tort law—have declined to change it. This strongly
22 infers an intention to maintain that duty. *See generally Buchanan v. Int’l Bd. Of Teamsters,*
23 *Chauffeurs, Warehousemen & Helpers*, 94 Wn.2d 508, 511, 617 P.2d 1004 (1980)) (“[W]here
24 [the legislature] does not change the statute, the legislature is deemed to have acquiesced to the
25 judicial interpretation.”). Further, there has been no out-of-control increase in the County’s
liability.

1 And finding a duty *here* will not expose the County to broad liability for *everything* it
2 does. This case has nothing to do with it issuing permits, providing technical assistance, or
3 enacting regulations. The narrow focus of this motion is on its negligent handling of “critical
4 information” after developing actual knowledge of a potentially lethal condition. This is both
5 well-established and circumscribed. The County’s liability is then further bounded by
6 questions of actual negligence and proximate cause. In other words, legal duty is only relevant
7 inasmuch as the County was *actually* negligent, and *actually* hurts someone.

8 Sound policy, including the importance of ensuring a remedy for people harmed by
9 negligence—like the Ehrhart family—supports a duty of care.

10 **5.3. Discretionary Immunity Does Not Apply**

11 As indicated above, and consistent with RCW 4.96.010(1), “local governmental
12 entities, whether acting in a governmental or proprietary capacity, shall be liable for damages
13 arising out of their tortious conduct, or the tortious conduct of their past or present officers,
14 employees, or volunteers while performing or in good faith purporting to perform their official
15 duties, to the same extent as if they were a private person or corporation...”

16 In *Evangelical United Brethren Church of Adna v. State*, 67 Wn.2d 246, 407 P.2d 440
17 (1965), the Supreme Court carved out a “narrow exception” to this rule, involving “high-level
18 governmental policy decisions” that implicate the separation of powers. The test requires the
19 government to prove that: (1) the decision “necessarily involves a basic governmental policy,
20 program or objective”; the decision is “essential to the realization or accomplishment of that
21 policy, program, or objective as opposed to one which would not change the course or
22 direction of the policy, program, or objective”; (3) that the decision involves the exercise of
23 basic policy evaluation, judgment, and expertise on the part of the governmental; and (4) the
24 government has lawful authority to make the challenged decision. *Id.* at 255. These questions
25

1 *all* must be “*clearly and unequivocally* answered in the affirmative” for immunity to apply. *Id*
2 (emphasis added).

3 Equally important, courts draw a sharp distinction between implementing a program,
4 and *effectuating* it. The former may be subject to immunity, but the latter is *not*. For example,
5 in *Stewart v. State*, 92 Wn.2d 285, 597 P.2d 101 (1979), the plaintiff alleged that the state
6 negligently designed a section of freeway and the accompanying lighting system where an
7 accident occurred. *Id.* at 294. The court acknowledged that decisions such as whether to build
8 a freeway in the first place, or how big it should be, might satisfy some of the *Evangelical*
9 factors. *Id.* But negligently designing that same freeway is not subject to immunity, because
10 that work is operational. *Id.* In other words, while the initial decision may be protected by
11 discretionary immunity, negligent implementation of that decision is not. *Id.*; *see also Riley v.*
12 *Burlington Northern, Inc.*, 27 Wn. App. 11, 17–18, 615 P.2d 516 (1980) (failing to place
13 adequate signs at railroad crossing was not protected by discretionary immunity).

14 This is true even when the decision is difficult, complex, high-stakes, and completely
15 “discretionary.” *See, e.g., Taggart v. State*, 118 Wn.2d 195, 215, 822 P.2d 243 (1992) (parole
16 placement decisions are not “basic policy decisions... however much discretion they may
17 require”); *Chambers–Castanes v. King Cy.*, 100 Wn.2d 275, 282, 669 P.2d 451 (1983)
18 (decision whether to dispatch a police officer to the scene of a crime was not protected under
19 discretionary immunity); *Mason v. Bitton*, 85 Wn.2d 321, 534 P.2d 1360 (1975) (“If [day to
20 day, operational decisions] type of conduct were immune from liability, the exception would
21 surely engulf the rule [abrogating sovereign immunity], if not totally destroy it.”); *Estate of*
22 *Jones v. State*, 107 Wn. App. 510, 514, 15 P.3d 180 (2000) (immunity did not apply to
23 decision-making vis-à-vis probationer’s parole decisions).

24 As here, plaintiff is not challenging the County’s decision to maintain a public health
25 department. This is a case about how the employees of that department carried out their

1 responsibilities. This is eminently operational in nature, and no more entitled to immunity than
2 a 911 operator's decision not to send an officer, a parole department's decision to place an
3 offender, or a traffic department's decision to place a stop sign. These decisions—like a public
4 health announcements—are important, discretionary, and *rightly* subject to accountability if
5 made negligently.

6 Discretionary immunity does not apply and should be stricken as a defense.

7 **5.4. The Case Should Proceed On The Question Of Whether The County's**
8 **Negligent Conduct Led To Brian Ehrhart's Death**

9 To be clear, Plaintiff is not seeking an Order on the County's ultimate liability. The
10 only Order sought is one confirming that the County *can* be liable, to the extent that its
11 negligence was a cause of Brian's death. As the Court of Appeals explained in a similar
12 context, this is a relatively constrained ruling:

13 Liability will not attach unless the governmental agent failed to take care
14 "commensurate with the risk involved." Forks has only the limited duty of care
15 to act reasonably within the framework of the laws governing the municipality
16 and the economic resources available to it. In determining whether a
17 municipality's act or failure to act was unreasonable, the trier of fact can take
18 into account the municipality's available resources and its resource allocation
19 policy. Thus, under the instant facts, Forks would be subject to liability only if
20 the police officer's failure to detain Medley was unreasonable under the
21 circumstances.

22 *Livingston*, 50 Wn. App. at 659–60 (citing *Bailey*, *supra*, at 270–71).

23 The County should be held accountable to the extent of its negligence – nothing more,
24 nothing less. The Ehrhart family should get their day in Court.

25 **6. CONCLUSION**

For the foregoing reasons, plaintiff respectfully requests that the Court enter an Order
striking the County's immunity-based defenses, a copy of which accompanies this
memorandum.

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PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT
ON DEFENDANT KING COUNTY'S IMMUNITY-BASED
DEFENSES - 21

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RESPECTFULLY SUBMITTED this 27th day of July, 2017.

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PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT
ON DEFENDANT KING COUNTY'S IMMUNITY-BASED
DEFENSES - 22

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date we caused to be served upon certain counsel of record at the address and in the manner indicated below a copy of the foregoing:

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PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT
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DEFENSES - 23

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DATED this 27th day of July, 2018.



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II. STATEMENT OF FACTS

The facts presented in Plaintiff’s motion present an emotionally compelling story, and there is no dispute that the death of Brian Ehrhart is tragic. Therefore, it is understandable that the Plaintiff would like to try to persuade the Court with facts that have nothing to do with the limited legal question of whether the public duty doctrine applies. For the purposes of this motion, King County will not contest the nonmaterial facts contained in the declarations in support of Plaintiff’s motion because they are comprised of speculation and opinion, rather than the information necessary to make the legal determination.

Hantavirus is a serious infection transmitted by the deer mouse. *See* Dkt. 42, Declaration of Jeffrey Duchin at ¶5. In 2016, there were over forty reported cases of Hantavirus in Washington, with the majority of them being reported in Eastern Washington. *Id.* It is extremely uncommon to acquire Hantavirus in King County. *Id.* Hantavirus is also not transmitted person to person. *See* Dkt. 41, Declaration of Kimberly Frederick at ¶3, Ex. A, p. 1. Rather, it is contracted when people inhale Hantavirus infected rodent urine and droppings that are stirred up into the air. *Id.* There is also no specific vaccine, cure, or treatment for Hantavirus. *Id.* at ¶3, Ex. A, p. 2. Prior to Mr. Ehrhart’s death, there had been only two other confirmed Hantavirus cases acquired in King County—one in 2003 and one in December 2016. *See* Dkt, 42, Dec. of Duchin at ¶5.

In December 2016, King County was notified by a commercial diagnostic lab that a King County resident had a positive Hantavirus serology test consistent with an acute infection. *Id.* at ¶6. A Public Health nurse was assigned to conduct an investigation. *Id.* The patient’s medical records were reviewed and the case was discussed with an infectious disease specialist at the hospital where the patient was hospitalized. *Id.* The patient resided in rural Redmond with her

1 husband and had denied any recent travel. *Id.* The medical records noted that the patient's
2 husband was concerned that their car may have harbored rodents, including mice and rats. *Id.*
3 Based on the concern of rodent exposure, the patient's healthcare team conducted Hantavirus
4 serology testing. *Id.*

5 The Public Health nurse also interviewed the patient's husband in order to determine
6 where the infection may have been acquired, whether others may have been exposed to the same
7 source as the patient, and to notify others who may have been exposed to the same source as the
8 patient about how to reduce their risk of infection. *Id.* at ¶7. Information provided by the
9 husband during that interview indicated that the patient had likely contracted Hantavirus on their
10 property. *Id.* The patient's husband stated that he and the patient lived together on their rural
11 property and that he regularly saw deer mice there. *Id.* He also indicated that the patient had not
12 traveled out of the area during her exposure period. *Id.* The husband was particularly concerned
13 that the patient's vehicle air filter showed evidence of rodent infestation. *Id.* The Public Health
14 nurse provided information from the Centers for Disease Control and Prevention (CDC) website
15 regarding Hantavirus, deer mice, and how to minimize his risk of contracting Hantavirus. *Id.*

16 Serum samples of the patient were sent to the CDC to confirm the diagnosis of
17 Hantavirus and results from the CDC indicated the serology testing on the patient was consistent
18 with acute Hantavirus infection. *Id.* at ¶8. The patient's husband was provided with the CDC test
19 results confirming his wife's Hantavirus diagnosis and was advised to consult with a professional
20 extermination company to address the possible deer mouse infestation on his property. *Id.*
21 Information available on the CDC's website was also discussed in detail regarding how he could
22 best protect himself from contracting Hantavirus when cleaning, especially in areas known to
23 have a rodent infestation. *Id.*

1 On February 24, 2107, Public Health was notified of the unexplained death of Brian
2 Ehrhart. *Id.* at ¶10. An investigation was initiated to assist health care providers in determining
3 the cause of his death. *Id.* It was determined that Mr. Ehrhart had died as a result of an acute
4 Hantavirus infection. *Id.*

5 **III. STATEMENT OF ISSUE**

6 Under the public duty doctrine, a government duty to the public in general does not create
7 a legal duty toward any particular individual except in narrow circumstances. Should this Court
8 deny Plaintiff's motion under the public duty doctrine when: 1) King County did have notice of a
9 statutory violation nor fail to meet a statutory duty to take corrective action, and 2) King County
10 did not volunteer to rescue Brian Ehrhart nor cause a third party to refrain from acting as a result
11 of King County's promised assistance?

12 **IV. EVIDENCE RELIED UPON**

13 The evidence upon which this motion is based includes the pleadings on file with the
14 Court and each of the following documents which have been previously filed and are
15 incorporated by reference:

- 16 1. King County's Motion for Summary Judgment (Dkt. 40);
- 17 2. Declaration of Kimberly Frederick in support of King County's Motion for
18 Summary Judgment, with attached exhibit (Dkt. 41); and
- 19 3. Declaration of Jeffrey Duchin in support of King County's Motion for Summary
20 Judgment, in support of King County's Motion for Summary Judgment, with
21 attached exhibits (Dkt. 42).

1 **V. AUTHORITY AND ARGUMENT**

2 **A. SUMMARY JUDGMENT STANDARD**

3 A motion for summary judgment should be granted if there are no genuine issues of
4 material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). “A
5 material fact is one upon which the outcome of the litigation depends in whole or in part.”
6 *Atherton Condo. Apartment–Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516,
7 799 P.2d 250 (1990). The moving party bears the burden of showing there is no issue of material
8 fact. *Id.* Plaintiff cannot meet this burden and the material facts show that the public duty
9 doctrine applies in this case.

10 **B. PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT SHOULD BE**
11 **DENIED BECAUSE THE PUBLIC DUTY DOCTRINE APPLIES**

12 As a threshold matter, to maintain a negligence claim, a plaintiff must prove that the
13 defendant owed him/her a legal duty. *Johnson v. State*, 164 Wn.App. 740, 747 (2011). Whether
14 a duty exists is a question of law for this Court to decide. *Osborn v. Mason County*, 157 Wn.2d
15 18, 22, 134 P.3d 197, 201 (2006). Under the public duty doctrine, a plaintiff must show more
16 than a broad duty owed to the public in general. In essence, a duty to all is a duty to no one.
17 *Taylor v. Stevens County*, 111 Wn.2d 159, 163 (1988). It is well-settled that there is a distinction
18 between the duties of government which run to the public generally for which there is no
19 recovery in tort, and those which run to individuals who may recover in tort for their breach. *See,*
20 *e.g., Baerlein v. State*, 92 Wn.2d 229, 595 P.2d 930 (1979); *Halvoron v. Dahl*, 89 Wn.2d 673,
21 574 P.2d 1190 (1978).

22 Under the public duty doctrine, no liability may be imposed upon a governmental entity
23 unless the plaintiff can show that “the duty breached was owed to the injured person as an

1 individual and was not merely the breach of an obligation owed to the public in general.”
2 *Cummins v. Lewis Cnty.*, 156 Wn.2d 844, 852-53, 133 P.3d 458 (2006). The policy underlying
3 the public duty doctrine is to not discourage government action for the public welfare by
4 subjecting an entity to unlimited liability. *Taylor v. Stevens County*, 111 Wn.2d 159, 170-171,
5 759 P.2d 447 (1988). There are four exceptions to the public duty doctrine: (1) legislative
6 intent; (2) failure to enforce; (3) the rescue doctrine, and (4) a special relationship. *Cummins*,
7 156 Wn.2d at 855. Plaintiff mistakenly claims that the failure to enforce and rescue exceptions
8 apply, however, none of the exceptions to the public duty doctrine apply in this case.²

9 **C. THE FAILURE TO ENFORCE EXCEPTION TO THE PUBLIC DUTY**
10 **DOCTRINE DOES NOT APPLY**

11 The failure to enforce exception does not apply unless a government agent responsible
12 for enforcing statutory requirements: 1) has actual knowledge of a statutory violation, 2) is under
13 a statutory duty to take corrective action, 3) fails to meet this duty, and 4) the plaintiff falls
14 within the class of individuals the statute is intended to protect. *Gorman v. Pierce County*, 176
15 Wn.App. 63, 77, 307 P.3d 795 (2013). The plaintiff bears the burden of establishing each
16 element of the exception and the Court must construe the exception narrowly. *Id.*

17 **1. Plaintiff mischaracterizes the legal standard**

18 In arguing that the failure to enforce exception applies, Plaintiff appears to
19 mischaracterize the elements necessary for the exception. Instead of focusing on whether King
20 County knew of a statutory violation, as required under the legal standard, and which would be
21 material to the determination of whether the failure to enforce exception applies, Plaintiff instead

22 _____
23 ² King County only examines the failure to enforce and rescue exceptions in this response, as
those are the two upon which Plaintiff focuses. The other two exceptions are briefed in King
County’s Motion for Summary Judgment. *See* Dkt.40.

1 focuses on King County’s “actual knowledge of the potential hazard” - presumably the December
2 2016 Hantavirus case. *See* Dkt. 21 at p. 13 and 14. Although actual knowledge of a potential
3 hazard may be relevant to the determination of whether the failure to enforce exception applies,
4 it is not a material fact unless that potential hazard was in violation of a statute, which was
5 precisely the situation in the cases upon which Plaintiff relies. *See Gorman v. Pierce County*,
6 176 Wn.App. 63, 77, 307 P.3d 795 (2013); and *Livingston v. City of Everett*, 50 Wn.App. 655,
7 751 P.2d 1199(1988). The *Gorman* and *City of Everett* cases were both dog bite cases that
8 addressed the issue of whether the failure to enforce exception applied. *Id.* In both of those
9 cases, the government entities were aware of “potential hazards”, specifically, aggressive dogs,
10 and the dogs’ behavior violated the applicable animal control ordinances. *Id.* Thus, in those
11 cases actual knowledge of the potential hazard was material because the hazards were in direct
12 violation of the statutes. Our case is distinguishable because King County’s knowledge of the
13 existence of the December 2016 Hantavirus case did not violate any statutory regulation, as
14 discussed below.

15 **2. There was no statutory violation**

16 In order for the failure to enforce exception to apply, the government agent responsible
17 for enforcing statutory requirements must know of an actual statutory violation. *Gorman v.*
18 *Pierce County*, 176 Wn.App. 63, 77, 307 P.3d 795 (2013). There is no such violation in this
19 case. Chapter 246-101 of the WAC contains the regulations regarding Notifiable Conditions.
20 WAC 246-101-101 requires healthcare providers to report Notifiable Conditions to Public
21 Health. In December 2016, Public Health was properly notified of positive Hantavirus serology
22 test results consistent with an acute Hantavirus infection. *See* Dkt. 42, Dec. of Duchin at ¶6.
23 Also, in February 2017, the hospital where Brian Ehrhart died properly notified Public Health of

1 his unexplained death. *Id.* at ¶10. Accordingly, the first element of the failure to enforce
2 exception has not been met.

3 In her motion, Plaintiff mistakenly argues that the statutory violation necessary for the
4 failure to enforce exception to apply was King County’s failure to issue a Health Advisory
5 notifying the public after being notified of the confirmed Hantavirus case in December 2016.
6 She argues that after being so notified a “mandate to take action” was triggered, as set forth in
7 WAC 246-101-505. *See* Dkt. 21 at p. 15. King County does not dispute that after being notified
8 of a Notifiable Condition WAC 246-101-505 requires action on King County’s part. WAC 246-
9 101-505 states in relevant part:

10 **Duties of the local health officer or the local health department.**

11 (1) Local health officers or the local health department *shall*:

12 (a) *Review and determine appropriate action for:*

13 (i) *Each reported case or suspected case of a notifiable condition;*

14 (ii) *Any disease or condition considered a threat to public health; and*

15 (iii) *Each reported outbreak or suspected outbreak of disease, requesting
16 assistance from the department in carrying out investigations when
17 necessary.*

18 *Emphasis added.*

19 Plaintiff mischaracterizes the holding in *Gorman*, arguing that the failure to enforce
20 exception applies whenever there are both discretionary and mandatory duties under a statute or
21 regulation. *See* Dkt. 21 at p. 13-15. In *Gorman*, once the county was aware that the dog in
22 question had violated the animal control ordinances, the ordinances mandated that the county
23 apply classification criteria to the dog in question in order to determine whether it qualified as a
“potentially dangerous dog”. *Gorman*, 176 Wn.App. at 77. The court found that although the
final determination of whether the dog qualified as potentially dangerous was discretionary under
the ordinance, which would not implicate the failure to enforce exception, the act of applying the

1 classification criteria was mandatory under the ordinance. *Id.* at 79. The court found that the
2 failure to enforce exception applied because the county did not apply the classification criteria as
3 mandated. *Id.* at 81.

4 WAC 246-101-505 has a similar mixture of mandatory and discretionary duties. From
5 the plain language of the regulation, it is clear that the mandated action is to “[r]eview and
6 determine appropriate action for” reported Notifiable Conditions. The duty to review and
7 determine is similar to the duty to apply the classification criteria in *Gorman*. Other than the acts
8 of reviewing and determining, there are no other mandatory actions and there is certainly no
9 requirement that King County issue a Health Advisory for every reported case of a Notifiable
10 Condition. There are over seventy notifiable conditions listed in WAC 246-101-101, listing
11 conditions as common as influenza and encompassing conditions as rare as Ebola virus. *See*
12 Dkt. 41, Dec. of Frederick at ¶ 5, Ex. C. A requirement that a Health Advisory be issued for
13 every instance a Notifiable Condition was reported would result in thousands of Health
14 Advisories being issued in flu season alone. This would dilute the effectiveness of Health
15 Advisories and make it more likely that healthcare providers and facilities would miss important
16 information. It would also become resource prohibitive, with public health agencies doing little
17 more than issuing Health Advisories. Depending on the Notifiable Condition at issue, it could
18 also incite unnecessary speculation and panic on the part of the public. Health Advisories are
19 issued in certain limited circumstances in order to make the medical community aware of such
20 things as infectious disease outbreaks, unusual infectious disease activity, and changes to CDC
21 guidelines or recommendations. *See* Dkt. 42, Dec. of Duchin at ¶4. Therefore, it makes sense
22 that the regulation does not require Health Advisories for every reported Notifiable Condition,
23 rather, it leaves the appropriate action at the discretion of the public health official.

1 In this case when King County was notified of the December 2016 Hantavirus case, an
2 investigation was conducted in order to determine where the infection may have been acquired,
3 whether others may have been exposed to the same source as the patient, and to notify others
4 who may have been exposed to the same source as the patient about how to reduce their risk of
5 infection. See Dkt. 42, Dec. of Duchin at ¶¶6-7. The investigation revealed that the patient had
6 not traveled out of the area, the Hantavirus exposure had occurred on private property with
7 known deer mouse activity, and the only likely people exposed were the two residents. *Id.* The
8 couple was provided with information regarding Hantavirus symptoms to watch for, how to
9 minimize the risk of contracting Hantavirus, and proper cleaning methods. *Id.* at ¶¶7-8. They
10 were also advised to utilize a commercial exterminator in order to address the rodents on their
11 property. *Id.* at ¶8. Given this information, the fact that the last known case of Hantavirus
12 acquired in King County had occurred in 2003, and the fact that Hantavirus is not contagious,
13 Dr. Duchin, the King County Health Officer, determined that a Health Advisory was not
14 warranted. *Id.* at ¶9. Accordingly, the failure to enforce exception does not apply in this case
15 because the mandatory “review and determine” criteria were met.

16 **3. There was no duty to take specific corrective action, nor a failure to do so**

17 There are also no facts to support the third element of the failure to enforce exception,
18 which is a statutory duty to take a specific corrective action for a known statutory violation, and
19 a failure to do so. See *Gorman v. Pierce County*, 176 Wn.App. 63, 77, 307 P.3d 795 (2013). As
20 previously discussed, there was no statutory violation, but even if there was the statute must
21 create a mandatory duty to take specific corrective action, and this exception does not apply
22 where the government official has broad discretion. *Fishburn v. Pierce County Planning & Land*
23 *Serv. Dept.*, 161 Wn. App. 452, 469-70 (2011) (statutes at issue did not create a mandatory duty

1 to correct a septic system violation). A statute creates a mandatory duty to take corrective action
2 if it requires a specific action when the statute is violated. *Gorman*, 176 Wn.App. at 77. For
3 example, in *Gorman*, upon receiving reports of aggressive dog behavior in violation of county
4 code provisions, the county was required to determine whether the dog should be classified as
5 “potentially dangerous”. *Id.* at 78-9. Although the court found the county had discretion as to
6 whether or not to classify the dog as potentially dangerous, the act of applying the classification
7 process was required for any valid report of a dangerous dog. *Gorman*, 176 Wn.App. at 79. No
8 such duty to take corrective action exists in this case. Chapter 246-101, the Notifiable
9 Conditions Chapter of the WAC, does not contain any mandatory corrective action that the
10 Health Officer or local health department must take when a healthcare provider fails to report a
11 Notifiable Condition. Therefore, the failure to enforce exception is inapplicable.

12 **D. THE RESCUE EXCEPTION TO THE PUBLIC DUTY DOCTRINE DOES**
13 **NOT APPLY**

14 Plaintiff contends that the rescue exception to the public duty doctrine applies in this
15 case. *See* Dkt. 21 at p.16-17. Generally, there is no duty for an actor to rescue a stranger.
16 *Folsom v. Burger King*, 135 Wn.2d 658, 674, 958 P.2d 301 (1998). However, under the rescue
17 exception to the public duty doctrine an actor owes a duty to a person he or she knows is in need
18 if he or she 1) undertakes a duty to aid or warn a person in danger and 2) fails to exercise
19 reasonable care, and 3) the offer to render aid is relied upon by either the person to whom the aid
20 is to be rendered or by another who, as a result of the promise, refrains from acting on the
21 victim's behalf.” *Johnson v. State*, 164 Wn. App. 740, 750-51 265 P.3d 199, 206 (2011). Integral
22 to this exception is that the rescuer, including a state agent, gratuitously assumes the duty to warn
23 the endangered parties of the danger and breaches this duty by failing to warn them.” *Babcock v.*

1 *Mason County Fire District No. 6*, 101 Wn. App. 677, 685-86 (2000), *affirmed*, 144 Wn.2d 774
2 (2001). Division Two has repeatedly emphasized that the offer of aid must be *gratuitous*. *Id.*

3 In *Babcock*, the court held the rescue exception did not apply because the volunteer fire
4 district had a duty to protect the property of all citizens, including, but not limited to the property
5 of the plaintiffs. 101 Wn.App. at 686. The Court noted that the fire district was established for
6 “for the protection of life and property” and that fire districts were to protect “all citizens”,
7 including the plaintiffs in the case. *Id.* In *Johnson*, Division Two held that the general police
8 powers statutes created a duty to all citizens, so that the State Patrol's indication to caller Trimble
9 that it would "notify troopers" did not amount to a gratuitous offer of aid. 164 Wn. App. at 751-
10 52. Similarly in this case, as clearly specified in the legislative purpose for the Notifiable
11 Conditions regulations, the regulations are intended for the benefit of “the public’s health”,
12 including Plaintiff. *See* WAC 246-101-005. There is no evidence that King County made any
13 gratuitous offers of aid to the Ehrharts prior to Brian Ehrhart’s death or that King County made
14 any gratuitous offers to warn the public of every instance of a reported Notifiable Condition,
15 therefore the rescue exception does not apply.

16 Plaintiff next argues that Brian Ehrhart died because the healthcare providers in this case
17 failed to act based on King County’s promise to warn them of reported Notifiable Conditions and
18 its failure to notify the public of the December 2016 Hantavirus case. *See* Dkt. 21 at p. 16-17.
19 Under the rescue doctrine, a governmental entity has a duty when an injured person reasonably
20 relies on, or a third party who is in privity with such injured person, reasonably relies on its
21 promise to aid or warn. *Osborne v. Mason County*, 157 Wn.2d 18, 26, 134 P.3d 197, 201 (2006).
22 However, this duty to warn only arises if the governmental entity “makes assurances that could
23 give rise to justifiable reliance”. *See Honcoop v. State*, 111 Wn.2d 182, 192-93, 759 P.2d 1188

1 (1988). No such assurances were made in this case. As discussed above, there is no regulatory
2 duty to issue Health Advisories, nor are they issued for every reported Notifiable Condition. *See*
3 Dkt. 42, Dec. of Duchin at ¶4. Rather, they are issued in certain limited circumstances. *Id.* To
4 argue that healthcare facilities do not act without Public Health issuing a Health Advisory is
5 disingenuous. Medical providers are presumed to be familiar with the vast majority of Notifiable
6 Conditions, and do not need a Health Advisory in order to do their job. Notably, even without a
7 Health Advisory, the healthcare facility treating the December 2016 Hantavirus case successfully
8 diagnosed and treated their Hantavirus patient without a Health Advisory. Given the limited
9 number of Health Advisories issued versus the number of Notifiable Conditions reported to
10 Public Health, it is clear that the majority of the time, medical facilities successfully diagnose
11 and treat Notifiable Conditions without the issuance of a Health Advisory. Justifiable reliance is
12 a necessary element for the rescue doctrine, and it would not be justifiable for medical providers
13 to provide treatment for Notifiable Conditions only in situations where a Health Advisory has
14 been issued. Because the necessary elements of the rescue doctrine have not been met, this
15 exception is inapplicable.

16 VI. CONCLUSION

17 King County respectfully requests that this Court dismiss the Plaintiff motion the material
18 facts show that the public duty doctrine applies in this case and King County owed Plaintiff no
19 individual legal duty.

20 DATED this 17th day of September, 2018 at Seattle, Washington.

21 DANIEL T. SATTERBERG
22 King County Prosecuting Attorney
23 By: /s/ Kimberly Frederick
KIMBERLY FREDERICK, WSBA #37857
Senior Deputy Prosecuting Attorney
Attorney for Defendant King County

DEFENDANT KING COUNTY'S RESPONSE IN
OPPOSITION TO PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT - 13

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DECLARATION OF FILING AND SERVICE

I hereby certify that on September 17, 2018, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, sending a copy via email to the following:

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I declare under penalty of perjury under the laws of the United States and the State of Washington that the foregoing is true and correct.

DATED this 17th day of September, 2018 at Seattle, Washington.

/s/ Shanna Josephson _____

SHANNA JOSEPHSON

Legal Secretary

King County Prosecuting Attorney's Office

1 **II. STATEMENT OF FACTS**

2 Hantavirus is a serious infection transmitted by the deer mouse. *See* Declaration of Jeffrey
3 Duchin at ¶5. In 2016, there were over forty reported cases of Hantavirus in Washington, with
4 the majority of them being reported in Eastern Washington. *Id.* It is extremely uncommon to
5 acquire Hantavirus in King County. *Id.* Hantavirus is also not transmitted person to person. *See*
6 Declaration of Kimberly Frederick at ¶3, Ex. A, p. 1. Rather, it is contracted when people inhale
7 Hantavirus infected rodent urine and droppings that are stirred up into the air. *See* Dec. of
8 Frederick at ¶3, Ex. A, p. 1. There is also no specific vaccine, cure, or treatment for Hantavirus.
9 *Id.* at ¶3, Ex. A, p. 2. Prior to Mr. Ehrhart’s death, there had been only two other confirmed
10 Hantavirus cases acquired in King County—one in 2003 and one in December 2016. *See* Dec. of
11 Duchin at ¶5.

12 In December 2016, King County was notified by a commercial diagnostic lab that a King
13 County resident had a positive Hantavirus serology test consistent with an acute infection. *Id.* at
14 ¶6. A Public Health nurse was assigned to conduct an investigation. *Id.* The patient’s medical
15 records were reviewed and the case was discussed with an infectious disease specialist at the
16 hospital where the patient was hospitalized. *Id.* The patient resided in rural Redmond with her
17 husband and had denied any recent travel. *Id.* The medical records noted that the patient’s
18 husband was concerned that their car may have harbored rodents, including mice and rats. *Id.*
19 Based on the concern of rodent exposure, the patient’s healthcare team conducted Hantavirus
20 serology testing. *Id.*

21 The Public Health nurse also interviewed the patient’s husband in order to determine where
22 the infection may have been acquired, whether others may have been exposed to the same source
23 as the patient, and to notify others who may have been exposed to the same source as the patient

1 about how to reduce their risk of infection. *Id.* at ¶7. Information provided by the husband
2 during that interview indicated that the patient had likely contracted Hantavirus on their property.
3 *Id.* The patient's husband stated that he and the patient lived together on their rural property and
4 that he regularly saw deer mice there. *Id.* He also indicated that the patient had not traveled out
5 of the area during her exposure period. *Id.* The husband was particularly concerned that the
6 patient's vehicle air filter showed evidence of rodent infestation. *Id.* The Public Health nurse
7 provided information from the Centers for Disease Control and Prevention (CDC) website
8 regarding Hantavirus, deer mice, and how to minimize his risk of contracting Hantavirus. *Id.*

9 Serum samples of the patient were sent to the CDC to confirm the diagnosis of Hantavirus
10 and results from the CDC indicated the serology testing on the patient was consistent with acute
11 Hantavirus infection. *Id.* at ¶8. The patient's husband was provided with the CDC test results
12 confirming his wife's Hantavirus diagnosis and was advised to consult with a professional
13 extermination company to address the possible deer mouse infestation on his property. *Id.*
14 Information available on the CDC's website was also discussed in detail regarding how he could
15 best protect himself from contracting Hantavirus when cleaning, especially in areas known to
16 have a rodent infestation. *Id.*

17 On February 24, 2107, Public Health was notified of the unexplained death of Brian
18 Ehrhart. *Id.* at ¶10. An investigation was initiated to assist health care providers in determining
19 the cause of his death. *Id.* It was determined that Mr. Ehrhart had died as a result of an acute
20 Hantavirus infection. *Id.*

21 III. STATEMENT OF ISSUES

22 Under the public duty doctrine, a government duty to the public in general does not create
23 a legal duty toward any particular individual except in narrow circumstances. Should this Court

1 dismiss Plaintiff's claims under the public duty doctrine when: 1) King County did not fail to
2 meet a statutory duty to take corrective action, 2) King County did not volunteer to rescue Brian
3 Ehrhart, 3) King County did not have direct contact or privity with the Ehrharts before Brian's
4 death, and 4) the legislative purpose of the notifiable conditions regulations are for the benefit of
5 the public as a whole?

6 **IV. EVIDENCE RELIED UPON**

7 The evidence upon which this motion is based includes the pleadings on file with the
8 Court and each of the following documents accompanying this motion:

- 9 1. Declaration of Kimberly Frederick, with attached exhibits.
- 10 2. Declaration of Jeffrey Duchin, with attached exhibits.

11 **V. AUTHORITY AND ARGUMENT**

12 **A. SUMMARY JUDGMENT STANDARD**

13 Summary judgment is appropriate if the pleadings, admissions, answers to interrogatories
14 and affidavits, if any, "show that there is no genuine issue as to any material fact and that the
15 moving party is entitled to a judgment as a matter of law." CR 56(c); *see also Clements v.*
16 *Travelers Indem. Co.*, 121 Wn.2d 243, 249 (1993). In response to a motion for summary
17 judgment, the nonmoving party may not rely solely on his pleadings, but must set forth specific
18 facts showing that there is a genuine issue for trial. CR 56(e). The facts submitted and all
19 reasonable inference from them must be considered in the light most favorable to the nonmoving
20 party. *Clements*, 121 Wn.2d at 249. The motion should be granted if, from all the evidence,
21 reasonable persons could reach but one conclusion. *Scott v. Blanchet High School*, 50 Wn. App.
22 37, 41 (1987), *review denied*, 110 Wn.2d 1016 (1988). A summary judgment motion should not
23 be denied on the basis of an unreasonable inference. *Scott*, 50 Wn. App. at 47. There are no

1 genuine issues of material fact in the case at bar and, as discussed below, King County is entitled
2 to judgment as a matter of law.

3 **B. PLAINTIFF’S CLAIMS ARE BARRED BY THE PUBLIC DUTY DOCTRINE**

4 As a threshold matter, to maintain a negligence claim, a plaintiff must prove that the
5 defendant owed him/her a legal duty. *Johnson v. State*, 164 Wn.App. 740, 747 (2011). Whether
6 a duty exists is a question of law for this Court to decide. *Osborn v. Mason County*, 157 Wn.2d
7 18, 22, 134 P.3d 197, 201 (2006). Here the Plaintiff’s claims fail because she cannot establish
8 that King County owed her a legal duty to issue a Health Advisory after the first case of
9 Hantavirus was confirmed.

10 Under the public duty doctrine, a plaintiff must show more than a broad duty owed to the
11 public in general. In essence, a duty to all is a duty to no one. *Taylor v. Stevens County*, 111
12 Wn.2d 159, 163 (1988). It is well-settled that there is a distinction between the duties of
13 government which run to the public generally for which there is no recovery in tort, and those
14 which run to individuals who may recover in tort for their breach. *See, e.g., Baerlein v. State*, 92
15 Wn.2d 229, 595 P.2d 930 (1979); *Halvoron v. Dahl*, 89 Wn.2d 673, 574 P.2d 1190 (1978).

16 Under the public duty doctrine, no liability may be imposed upon a governmental entity unless
17 the plaintiff can show that “the duty breached was owed to the injured person as an individual
18 and was not merely the breach of an obligation owed to the public in general.” *Cummins v. Lewis*
19 *Cnty.*, 156 Wn.2d 844, 852-53, 133 P.3d 458 (2006). The policy underlying the public duty
20 doctrine is to not discourage government action for the public welfare by subjecting an entity to
21 unlimited liability. *Taylor v. Stevens County*, 111 Wn.2d 159, 170-171, 759 P.2d 447 (1988).

22 There are four exceptions to the public duty doctrine: (1) legislative intent; (2) failure to
23 enforce; (3) the rescue doctrine, and (4) a special relationship. *Cummins*, 156 Wn.2d at 855.

1 None of these apply here, but we examine each in turn. Based on her motion for summary
2 judgment, the Plaintiff appears to be claiming that the failure to enforce or volunteer rescuer
3 exceptions apply, so King County will examine those exceptions first.

4 **C. THE FAILURE TO ENFORCE EXCEPTION TO THE PUBLIC DUTY**
5 **DOCTRINE DOES NOT APPLY**

6 The failure-to-enforce exception does not apply unless a government agent responsible
7 for enforcing statutory requirements: 1) has actual knowledge of a statutory violation, 2) is under
8 a statutory duty to take corrective action, 3) fails to meet this duty, and 4) the plaintiff falls within
9 the class of individuals the statute is intended to protect. *Gorman v. Pierce County*, 176
10 Wn.App. 63, 77, 307 P.3d 795 (2013). The plaintiff bears the burden of establishing each
11 element of the exception and the Court must construe the exception narrowly. *Id.*

12 **1. There was no statutory violation**

13 In order for the failure to enforce exception to apply, the government agent responsible
14 for enforcing statutory requirements must know of an actual statutory violation. *Gorman v.*
15 *Pierce County*, 176 Wn.App. 63, 77, 307 P.3d 795 (2013). For example, in *Gorman*, a dog bite
16 case, the county had received several previous complaints of aggressive behavior by the same
17 dog who had bitten the plaintiff. *Id.* at 69-73. Because such behavior was in violation of
18 applicable county ordinances, the court found that the first element of the failure to enforce
19 exception had been fulfilled. *Id.* at 79.

20 There is no such violation in this case. Chapter 246-101 of the Washington
21 Administrative Code contains the regulations regarding notifiable conditions. WAC 246-101-
22 101 requires healthcare providers to report notifiable conditions to Public Health. In December
23 2016, Public Health was properly notified of positive Hantavirus serology test results consistent
with an acute Hantavirus infection. *See* Dec. of Duchin at ¶6. Also, in February 2017, the

1 hospital where Brian Ehrhart died properly notified Public Health of his unexplained death. *Id.*
2 at ¶10. Accordingly, the first element of the failure to enforce exception has not been met.

3 In her Motion for Partial Summary Judgment, Plaintiff mistakenly argues that the
4 statutory violation necessary for the failure to enforce exception to apply was King County's
5 failure to issue a Health Advisory after being notified of the confirmed Hantavirus case in
6 December 2016. However, making the determination not to issue a Health Advisory was not a
7 regulatory violation. WAC 246-101-505 states in relevant part:

8 **Duties of the local health officer or the local health department.**

9 (1) Local health officers or the local health department *shall*:

10 (a) *Review and determine appropriate action for:*

11 (i) *Each reported case or suspected case of a notifiable condition;*

12 (ii) *Any disease or condition considered a threat to public health; and*

13 (iii) *Each reported outbreak or suspected outbreak of disease, requesting*
14 *assistance from the department in carrying out investigations when necessary.*

15 *Emphasis added.* From the plain language of the regulation, it is clear that there is no
16 requirement that the Health Officer issue a Health Advisory for every reported case of a
17 notifiable condition because that would be illogical. There are over 70 notifiable conditions
18 listed in WAC 246-101-101, listing conditions as common as influenza and encompassing
19 conditions as rare as Ebola virus. *See* Dec. of Frederick at ¶ 5, Ex. C. A requirement that a
20 Health Advisory be issued for every instance a notifiable condition was reported would result in
21 thousands of Health Advisories being issued in flu season alone. This would dilute the
22 effectiveness of Health Advisories and make it more likely that healthcare providers and
23 facilities would miss important information. It would also become resource prohibitive, with
public health agencies doing little more than issuing Health Advisories. Health Advisories are
issued in certain limited circumstances in order to make the medical community aware of such
things as infectious disease outbreaks, unusual infectious disease activity, and changes to CDC

1 guidelines or recommendations. *See* Dec. of Duchin at ¶4. Therefore, it makes sense that the
2 regulation does not require Health Advisories for every reported notifiable condition.

3 **2. There was no duty to take specific corrective action, nor a failure to do so**

4 In order for the failure to enforce exception to apply, there must be a statutory duty to
5 take a specific corrective action for a known statutory violation, and a failure to do so. *See*
6 *Gorman v. Pierce County*, 176 Wn.App. 63, 77, 307 P.3d 795 (2013). As previously discussed,
7 there was no statutory violation, but even if there was the statute must create a mandatory duty to
8 take specific corrective action, and this exception does not apply where the government official
9 has broad discretion. *Fishburn v. Pierce County Planning & Land Serv. Dept.*, 161 Wn. App.
10 452, 469-70 (2011) (statutes at issue did not create a mandatory duty to correct a septic system
11 violation). A statute creates a mandatory duty to take corrective action if it requires a specific
12 action when the statute is violated. *Gorman*, 176 Wn.App. at 77. For example, in *Gorman*, upon
13 receiving reports of aggressive dog behavior in violation of county code provisions, the county
14 was required to determine whether the dog should be classified as “potentially dangerous”. *Id.* at
15 78-9. Although the court found the county had discretion as to whether or not to classify the dog
16 as potentially dangerous, the act of applying the classification process was required for any valid
17 report of a dangerous dog. *Gorman*, 176 Wn.App. at 79. No such duty to take corrective action
18 exists in this case. Chapter 246-101, the Notifiable Conditions Chapter of the Washington
19 Administrative Code, does not contain any mandatory corrective action that the Health Officer or
20 local health department must take when a healthcare provider fails to report a notifiable
21 condition. Therefore, the failure to enforce exception is inapplicable.

22 The Plaintiff erroneously claims that King County failed to enforce WAC 246-101-505
23 by not issuing a Health Advisory after the first Hantavirus case was confirmed, however, as

1 previously discussed, there is no mandatory duty to issue a Health Advisory under WAC 246-
2 101-505. See Dec. of Frederick, ¶6, Ex. D. Although there was a mandatory duty for the health
3 officer or local health department to “review and determine appropriate action for” the
4 November 2016 Hantavirus case, the regulation does not create a mandatory duty to take the
5 specific action of issuing a Health Advisory, nor does it create a mandatory duty to take any
6 specific corrective action for violation of the Notifiable Conditions regulations, as required for
7 the failure to enforce exception. *Id.* Rather, it requires the health officer or health department to
8 “review” the case of the reported notifiable condition and “determine” what appropriate action is
9 necessary based on the unique circumstances of the case. *Id.*

10 In this case when King County was notified of the December 2016 Hantavirus case, an
11 investigation was conducted in order to determine where the infection may have been acquired,
12 whether others may have been exposed to the same source as the patient, and to notify others
13 who may have been exposed to the same source as the patient about how to reduce their risk of
14 infection. See Dec. of Duchin at ¶6-7. The investigation revealed that the patient had not
15 traveled out of the area, the Hantavirus exposure had occurred on private property with known
16 deer mouse activity, and the only likely people exposed were the two residents. *Id.* The couple
17 was provided with information regarding Hantavirus symptoms to watch for, how to minimize
18 the risk of contracting Hantavirus, and proper cleaning methods. *Id.* at ¶7-8. They were also
19 advised to utilize a commercial exterminator in order to address the rodents on their property. *Id.*
20 at ¶8. Given this information as well as the fact that the last known case of Hantavirus acquired
21 in King County had occurred in 2003, Dr. Duchin, the King County Health Officer, determined
22 that a Health Advisory was not warranted. *Id.* at ¶9. Accordingly, the failure to enforce
23 exception does not apply in this case.

1 **D. THE RESCUE EXCEPTION TO THE PUBLIC DUTY DOCTRINE DOES**
2 **NOT APPLY**

3 Generally, there is no duty for an actor to rescue a stranger. *Folsom v. Burger King*, 135
4 Wn.2d 658, 674, 958 P.2d 301 (1998). However, under the rescue exception to the public duty
5 doctrine an actor owes a duty to a person he or she knows is in need if he or she [1] undertakes a
6 duty to aid or warn a person in danger and [2] fails to exercise reasonable care, and [3] the offer
7 to render aid is relied upon by either the person to whom the aid is to be rendered or by another
8 who, as a result of the promise, refrains from acting on the victim's behalf.” *Johnson*, 164 Wn.
9 App. at 750-51 citing *Chambers–Castanes*, 100 Wn.2d at 285 n. 3. “Integral to this exception is
10 that the rescuer, including a state agent, gratuitously assumes the duty to warn the endangered
11 parties of the danger and breaches this duty by failing to warn them.” *Babcock v. Mason County*
12 *Fire District No. 6*, 101 Wn. App. 677, 685-86 (2000), *affirmed*, 144 Wn.2d 774 (2001).
13 Division Two has repeatedly emphasized that the offer of aid must be *gratuitous*. *Id.*

14 In *Babcock*, the court held the rescue exception did not apply because the volunteer fire
15 district had a duty to protect the property of all citizens, including, but not limited to the property
16 of the plaintiffs. 101 Wn.App. at 686. The Court noted that the fire district was established for
17 “for the protection of life and property” and that fire districts were to protect “all citizens”,
18 including the plaintiffs in the case. *Id.* Similarly, in *Johnson*, Division Two held that the general
19 police powers statutes created a duty to all citizens, so that the State Patrol's indication to caller
20 Trimble that it would "notify troopers" did not amount to a gratuitous offer of aid. 164 Wn. App.
21 at 751-52. Similarly in this case, as clearly specified in the legislative purpose for the Notifiable
22 Conditions regulations, the regulations are intended for the benefit of “the public’s health”,
23 including Plaintiff. *See* WAC 246-101-005. Also, King County did not have any contact with
 Plaintiff until after Brian Ehrhart’s death on February 24, 2017, so no gratuitous offer of aid was

1 rendered to Plaintiff that set her or Brian Ehrhart apart from the public in general. For these
2 reasons the rescue exception does not apply.

3 Nor can Plaintiff show a third party's failure to act based on the representation that King
4 County promised to take some action, as Plaintiff argues in her Motion for Summary Judgment.

5 Under the rescue doctrine, a governmental entity has a duty when an injured person reasonably
6 relies on, or a third party who is in privity with such injured person, reasonably relies on its
7 promise to aid or warn. *Osborne v. Mason County*, 157 Wn.2d 18, 26, 134 P.3d 197, 201 (2006).

8 However, this duty to warn only arises if the governmental entity "make assurances that could
9 give rise to justifiable reliance". *See Honcoop v. State*, 111 Wn.2d 182, 192-93, 759 P.2d 1188
10 (1988). However, no such assurances were made in this case. As discussed above, there is no

11 regulatory duty to issue Health Advisories, nor are they issued for every reported notifiable
12 condition. *See* Dec. of Duchin at ¶4. Rather, they are issued in certain limited circumstances.

13 *Id.* To argue that healthcare facilities will not act without Public Health issuing a Health
14 Advisory is unreasonable. Medical providers are presumed to be familiar with the vast majority
15 of notifiable conditions, and do not need a Health Advisory in order to do their job. Notably,
16 even without a Health Advisory, the healthcare facility treating the December 2016 Hantavirus
17 case successfully diagnosed and treated Hantavirus without a Health Advisory. Given the
18 limited number of Health Advisories issued versus the number of notifiable conditions reported
19 to Public Health, it is clear that the majority of the time, medical facilities successfully diagnose
20 and treat notifiable conditions without the issuance of a Health Advisory.

21 //

22
23 //

1 **E. NONE OF THE OTHER EXCEPTIONS TO THE PUBLIC DUTY DOCTRINE**
2 **APPLY**

3 **1. The legislative intent exception does not apply**

4 The legislative intent exception to the public duty doctrine applies if there is a regulatory
5 statute that evidences a clear legislative intent to protect a particular circumscribed class of
6 persons, as opposed to the general public. *Washburn v. City of Federal Way*, 178 Wn.2d 732,
7 754, 310 P.3d 1275, 1287 (2013). Courts typically look to the legislature’s purpose statement in
8 order to determine its intent. *Id.* at 754-55. The purpose of the Notifiable Conditions section of
9 the Washington Administrative Code is stated in WAC 246-101-005 as follows:

10 **Purpose of notifiable conditions reporting.**

11 The purpose of notifiable conditions reporting is to provide the information
12 necessary for public health officials *to protect the public's health* by tracking
13 communicable diseases and other conditions. These data are critical to local
14 health departments and the departments of health and labor and industries in their
15 efforts to prevent and control the spread of diseases and other conditions. Public
16 health officials take steps *to protect the public*, based on these notifications.
17 Treating persons already ill, providing preventive therapies for individuals who
18 came into contact with infectious agents, investigating and halting outbreaks, and
19 removing harmful health exposures *are key ways public health officials protect*
20 *the public*. Public health workers also use these data to assess broader patterns,
21 including historical trends and geographic clustering. By analyzing the broader
22 picture, officials are able to take appropriate actions, including outbreak
23 investigation, redirection of program activities, or policy development.

17 *Emphasis Added.* It is clear from the plain language of the statute that the legislative purpose
18 when enacting the notifiable conditions regulations was to protect the public as a whole, not a
19 particular circumscribed class of persons. As a result, this Court should find that the legislative
20 intent exception does not apply.

21 **2. The special relationship exception does not apply**

22 The “special relationship” exception to the public duty doctrine applies when (1) there is
23 direct contact or privity between the public official and the injured plaintiff which sets the latter

1 apart from the general public, and (2) there are express assurances given by a public official,
2 which (3) gives rise to justifiable reliance on the part of the plaintiff. *Cummins*, 156 Wn.2d at
3 854 (quoting *Beal v. City of Seattle*, 134 Wn.2d 769, 785, 954 P.2d 237 (1998)). A “plaintiff can
4 establish privity without having to prove the plaintiff herself communicated with the government
5 entity.” *Id.* at 854. “But the plaintiff must specifically seek and the government must expressly
6 give assurances indicating the government would act in a specific manner.” *Johnson v. State*, 164
7 Wn. App. 740, 752-53, 265 P.3d 199 (2011). When analyzing the question of government duty
8 based upon a special relationship, Washington courts “look to the *manner* and *extent* of contact
9 between the government official and the member of the public and also look to how *explicit* were
10 the *assurances* of aid allegedly created thereby.” *Cummins*, 156 Wn.2d at 860 (emphasis in
11 original). In this case there was no direct contact or privity between King County and the
12 Plaintiff until after the County was notified of Brian Ehrhart’s death. *See* Dec. of Duchin at ¶10.
13 Neither did King County make any assurances to the Ehrharts that it would act in a specific
14 manner. Accordingly, the special relationship exception to the public duty doctrine is
15 inapplicable.

16 VI. CONCLUSION

17 King County respectfully requests that this Court dismiss the Plaintiff’s case against is
18 with prejudice because, pursuant to the public duty doctrine, King County owed Plaintiff no
19 individual legal duty and no exception to the public duty doctrine applies.

20 Dated this 7th day of September, 2018.

21 DANIEL T. SATTERBERG
King County Prosecuting Attorney

22 By: /s/ Kimberly Frederick
23 KIMBERLY FREDERICK, WSBA #37857
Senior Deputy Prosecuting Attorney
Attorney for Defendant King County

DEFENDANT KING COUNTY’S MOTION FOR
SUMMARY JUDGMENT - 13

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DECLARATION OF FILING AND SERVICE

I hereby certify that on September 7, 2018, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, sending a copy via email to the following:

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Attorneys for Dr. Warren Justin Reif

I declare under penalty of perjury under the laws of the United States and the State of Washington that the foregoing is true and correct.

DATED this 7th day of September, 2018 at Seattle, Washington.

/s/ Shanna Josephson _____

SHANNA JOSEPHSON

Legal Secretary

King County Prosecuting Attorney's Office

1 Doctrine. Finally, undersigned counsel is unavailable for the currently scheduled hearing date
2 due to a preplanned family vacation and requests that the current hearing date be stricken.

3 **II. STATEMENT OF FACTS**

4 King County was served with Plaintiffs' lawsuit on June 25, 2018. *See* Declaration of
5 Kimberly Frederick, ¶ 3, Ex A. At the same time, Plaintiffs also served King County with
6 Interrogatories, Requests for Production, and Requests for Admission. *Id.* at ¶4, Ex. B, C. King
7 County answered the complaint on July 16, 2018. *Id.* at ¶5; LINX Dkt. 15. King County filed
8 an amended answer on July 26, 2018. *Id.* at ¶5; LINX Dkt. 20. The next day, July 27, 2018,
9 Plaintiffs filed their Motion for Partial Summary Judgment. *Id.* at ¶6; LINX Dkt. 21-25.

10 Since the case was filed, King County's time has been spent answering the complaint and
11 gathering information and documents for Plaintiffs' discovery requests. *Id.* at ¶7. King County
12 has not had an opportunity to conduct any discovery on its own behalf; nor has King County yet
13 retained an expert. *Id.* Plaintiff's motion discloses an expert, Michael D. Freeman, and two
14 other fact witnesses, none of whom have been deposed. *Id.* at ¶7-8; LINX Dkt. 23-25.

15 On August 7, 2018, undersigned counsel contacted Plaintiffs' counsel in order to inform
16 them of her unavailability for the scheduled hearing date, to try to reach an agreement with
17 regard to timing of the summary judgment motion, and to try to set a briefing schedule for cross
18 motions for summary judgment, however, this effort was unsuccessful. King County now files
19 this motion to obtain a continuance under CR 56(f) and CR 6(b).

20 **III. STATEMENT OF ISSUES**

21 1. Whether the Court should grant King County a continuance under CR 56(f) in
22 order to obtain necessary discovery, or under CR 6(b) for good cause in order for King County to
23 meaningfully respond to Plaintiffs' Motion for Partial Summary Judgment?

1 wishes to file its own motion for summary judgment on the same issues and, for judicial
2 economy, it makes sense for the Court to hear both motions together. Accordingly, King County
3 respectfully requests a continuance of two months.

4 **Prejudice if 56(f) Continuance Denied.** King County would be greatly prejudiced if it
5 were not allowed its due process right to explore and refute the allegations made in Plaintiffs'
6 premature motion in discovery. On the other hand, King County's request comes a mere 45 days
7 after Plaintiffs served it with their complaint. According to the case scheduling order entered in
8 this case, the deadline for hearing dispositive motions is May 23, 2019 and the trial date is June
9 20, 2019. *See* LINX Dkt. 2; *c.f. Keck*, 181 Wn. App. at 87 (holding that where trial was over
10 three months away, there was no prejudice to moving party associated with CR 56(f)
11 continuance).

12 **B. The Hearing Scheduled for August 31, 2018 Should be Stricken Due to King County
13 Counsel's Unavailability.**

14 The hearing for Plaintiff's motion is currently set for a date that counsel for King County
15 cannot attend due to a preplanned family vacation. In order to argue King County's opposition
16 to Plaintiffs' motion, it is requested that the hearing be set on a date that counsel can attend. It
17 also makes sense for Plaintiffs' motion to be heard at the same time as King County's motion for
18 summary judgment, which is yet to be filed. Accordingly, King County requests that the hearing
19 be scheduled for October 26, 2018.

20 **VI. CONCLUSION**

21 For these reasons King County respectfully requests that the Court strike the hearing set
22 for August 31, 2018. Additionally, King County requests that the Court grant a two month
23

1 continuance in order for King County to conduct necessary discovery and to file a cross motion
2 for summary judgment. Without such relief, King County will be greatly prejudiced.

3
4 Dated this 9th day of August, 2018.

5 DANIEL T. SATTERBERG
6 King County Prosecuting Attorney

7 By: /s/ Kimberly Frederick
8 KIMBERLY FREDERICK, WSBA #37857
9 Senior Deputy Prosecuting Attorney
10 500 Fourth Avenue, Suite 900
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12 (206) 296-8820 Fax (206) 296-8819
13 Kimberly.Frederick@kingcounty.gov
14 Attorney for Defendant King County

11 **DECLARATION OF FILING AND SERVICE**

12 I hereby certify that on August 9, 2018, I electronically filed the foregoing document with
13 the Clerk of the Court using the CM/ECF system, sending a copy via email to the following:

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Attorneys for Dr. Warren Justin Reif

I declare under penalty of perjury under the laws of the United States and the State of Washington that the foregoing is true and correct.

DATED this 9th day of August, 2018 at Seattle, Washington.

/s/ Shanna Josephson _____

SHANNA JOSEPHSON

Legal Secretary

King County Prosecuting Attorney's Office

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8/21/2018



The Honorable Frank E. Cuthbertson
Special Set: Friday August 17, 2018 at 9:00 am

FILED
DEPT 21
IN OPEN COURT

AUG 17 2018

PIERCE COUNTY, Clerk
By [Signature] DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

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

NO. 18-2-09196-4

Plaintiff,

GRANTING
**ORDER DENYING DEFENDANT
KING COUNTY'S CR 56(f) MOTION
TO CONTINUE**

v.

KING COUNTY, operating through its health
department, Public Health - Seattle & King
County, SWEDISH HEALTH SERVICES, a
non-profit entity, and JUSTIN WARREN REIF,
an individual,

Defendants.

THIS MATTER came before the Court on Defendant King County's Motion for
Continuance Pursuant to CR 56(f). The Court having considered the record, including:

1. Defendant King County's Motion to Continue Summary Judgment;
2. Declaration of Kimberly Y. Frederick with Exhibits attached thereto;
3. Plaintiff's Response in Opposition;
4. Declaration of Adam Rosenberg with Exhibits attached thereto;
5. KING COUNTY'S REPLY;
6. SUPP DECLARATION OF FREDERICK (w/ exhibits) and
7. _____

Granting In Part

ORDER DENYING CONTINUANCE - 1

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601 Union Street, Suite 4100
Seattle, Washington 98101-2380
(206) 628-6600

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8/21/2018

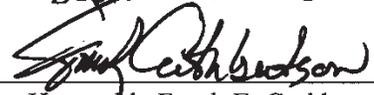
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Having also considered the pleadings and papers before the Court and heard oral argument, the Court finds itself informed.

IT IS HEREBY ORDERED that Defendant King County's Motion is ~~DENIED~~

GRANTED, IN PART.

Plaintiff's motion for summary judgment shall be re-noted
DATED this 17th day of August, 2018. to September 28th.


The Honorable Frank E. Cuthbertson

Prepared and Presented By:

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FILED
DEPT 21
IN OPEN COURT
AUG 17 2018
PIERCE COUNTY, Clerk
By 
DEPUTY

GRANTING AND
ORDER DENYING CONTINUANCE - 2

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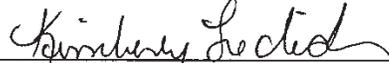
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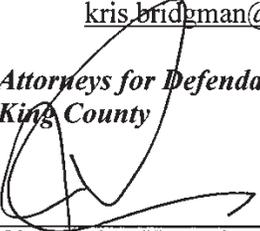
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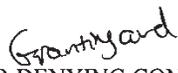
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ORDER DENYING CONTINUANCE - 3

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Dr. Justin Warren Reif

Granting

ORDER DENYING CONTINUANCE - 4

6586226.1

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1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
2 IN AND FOR THE COUNTY OF PIERCE

3
4 SANDRA EHRHART, individually and)
5 as personal representative of the)
6 Estate of Brian Ehrhart,)

7 Plaintiff,)

8 vs.)

) Superior Court
) No. 18-2-09196-4

9 KING COUNTY, operating through)
10 Seattle-King County Public)
11 Health, a government agency,)
12 SWEDISH HEALTH SERVICES, a)
13 non-profit entity, and JUSTIN)
14 WARREN REIF, an individual,)

15 Defendants.)

16 **VERBATIM TRANSCRIPT OF PROCEEDINGS**

17 September 28, 2018
18 Pierce County Superior Court
19 Tacoma, Washington
20 Before the
21 **HONORABLE SHELLY K. SPEIR**

22 Attorney for Plaintiff - Kimberly Y. Frederick
23 Attorney for Defendant Ehrhart - Adam Rosenberg
24 Attorney for Defendant Swedish Health - Joseph Gardner
25 Attorney for Defendant Justin Reif - Jonathan Litner

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1 than a reckless motorist is liable, no different than a
2 reckless corporation is liable.

3 They have discretion; there's no doubt about that.
4 But that discretion is clearly in the Washington
5 Administrative Code cabined probably because that work is
6 important and we want them to take reasonable steps. They
7 agree that they have a mandatory duty to act, and duty of
8 ordinary care is not just implied but explicit in that
9 language.

10 So consistent with the case law, we're asking the
11 Court strike this affirmative defense and let us proceed
12 with discovery in the merits in this case. Thank you.

13 THE COURT: Thank you. I have this sense of
14 forboding. I don't think anyone is going to like my
15 decision today, so I'm going to apologize upfront.

16 The public duty doctrine has frustrated me for
17 years. I mean, the reason is because originally I think the
18 statute was passed in 1967 where the State abolished
19 sovereign immunity and said that public entities will be
20 liable to the same extent as an individual person, a private
21 citizen.

22 The cases that came out right after that statute,
23 including *Evangelical*, had this analysis of looking at
24 discretionary immunity. And so the court set forth that
25 you're supposed to look at things like was the governmental

1 actor a high level official, was the actor doing policy
2 making, or was he simply following orders, things like that.
3 So that was originally what courts were supposed to look at
4 in determining if a governmental entity was liable for its
5 acts.

6 The public duty doctrine was essentially adopted
7 without any analysis; it was almost a footnote, in fact,
8 from another jurisdiction. And ever since then, there has
9 been nothing but inconsistency in the case law. The best
10 that practitioners, both lawyers and courts, can do is to
11 try and find a case that's factually similar and hope
12 there's a reasoning that makes sense in that decision.

13 There's never really been a good case where the
14 Supreme Court or any other court of appeals has shown us how
15 to meld the original discretionary immunity analysis with
16 the public duty doctrine. And I know from my research that
17 there are multiple decisions out there where judges have
18 done it differently. And so there's really no good answer
19 in our case law.

20 So I know that the County has withdrawn its
21 discretionary immunity defense, but just for purposes of
22 today, I'm going to go through the analysis on that just for
23 comparison purposes. So I'll create a dicta, I guess.

24 In this case, Dr. Duchin was not a high level
25 official creating policy. He was a doctor, granted, but he

1 had a WAC that he was supposed to carry out and follow. He
2 was merely effectuating policy that had already been
3 determined.

4 So under the *Evangelical* case I think that that
5 alone would be enough to subject the County to liability
6 because there would be no discretionary immunity in that
7 situation. So if that defense were still at issue, I would
8 be granting summary judgement on that defense.

9 Again, it's already been withdrawn, but for
10 purposes of comparison now, I'll go through the failure to
11 enforce exception to the public duty doctrine.

12 I think this case is a little distinguishable from
13 *Gorman* because we have a very different WAC that we're
14 dealing with. In *Gorman* there was a specific directive to
15 the county to determine if a dog was dangerous, a very
16 specific task that the county had to take care of, and the
17 Court of Appeals felt that that instruction was a
18 discretionary kind of a thing because there was no
19 predetermined answer for that question.

20 In this case, we don't have a specific task.
21 There's nothing in a WAC that says that the County has to
22 put out a notice or tell or warn other healthcare providers
23 about an infectious outbreak. Instead, we have the
24 mandatory "shall," so that's there, but then under WAC
25 246-101-505(1)(a), the "shall" is followed by "review and

1 determine..." So that is the mandatory portion of the WAC.

2 After that, we have the word "appropriate," and
3 that's where I think we really have a completely different
4 type of WAC here.

5 I did research on this, and to my knowledge, there
6 is no case in Washington that discusses duty as being
7 partially legal and partially factual. I've not seen any
8 case where there's been a bifurcation of that. Duty is
9 always supposed to be a legal issue. But what we have in
10 this WAC is the word "appropriate," that necessarily
11 requires some kind of a factual analysis. We don't know
12 what is appropriate. And so the Court is left trying to
13 figure out what is the duty, if there is one in this case.
14 And it's important because if the County did not determine
15 an appropriate action, then I think that would be a
16 statutory violation for purposes of the failure to enforce
17 exception. If there was not an appropriate action
18 determined, then the County would have been on notice of a
19 violation and there would have been a duty to take
20 corrective action. It all hinges on what is appropriate.

21 What I'm going to rule, I am concluding that there
22 is a mandatory duty to review and determine. However,
23 because the word "appropriate" is included in the WAC, I
24 think the jury needs to decide whether what the County did
25 was or was not appropriate. And I know that's very odd.

1 It's sort of asking the jury to decide two things at the
2 same time, both duty and breach, which we don't normally
3 give duty to the jury.

4 So my ruling is going to have to be conditional in
5 some respects. I'm concluding that the first element of the
6 failure to enforce exception is met conditioned on a finding
7 by the jury that the County's action was not appropriate.
8 And I understand we're going to have some really interesting
9 jury instructions and a very interesting verdict form
10 because of my ruling, and I apologize in advance.

11 The second element of the failure to enforce
12 exception also kind of hinges on this factual determination
13 of what is appropriate. I'm concluding today that, again,
14 based on the jury's finding of inappropriateness, the County
15 would have had notice of failure to follow this WAC. So the
16 second element is met, conditioned on the jury's finding.

17 On the third element, I think I can answer that as
18 a matter of law. I'm looking specifically to WAC
19 246-101-005, which sets forth the purpose of this whole
20 notice policy, and I'm finding that 505 was intended to
21 protect individuals who were at risk of contracting or who
22 had already contracted infectious diseases, especially those
23 that are unusual or rare. And so because Brian Ehrhart had
24 contracted hantavirus, he would fall within the class of
25 persons meant to be protected.

1 Based on all of that, I am going to grant
2 conditionally summary judgement on the failure to enforce
3 exception and, again, we'll have to leave it to the jury to
4 determine appropriateness.

5 With respect to the rescue doctrine, at its core
6 this exception requires an undertaking. And because the
7 County chose not to give notice, I think that there was no
8 undertaking in the sense that the plaintiff is requesting.
9 The County did do a number of things; it's just a question
10 of were those appropriate. I don't think there was an
11 undertaking to warn, which is what would have been necessary
12 to find liability under this exception. So I'm not going to
13 grant summary judgement on the rescue doctrine.

14 I hope the parties can come up with an order that
15 encapsulates all of that.

16 MR. ROSENBERG: I'm working on that now and we can
17 circle back.

18 THE COURT: Do the parties who are bystanders need
19 to put anything on the record?

20 MR. GARDNER: I don't believe so, Your Honor.

21 MR. LITNER: No, Your Honor.

22 THE COURT: I will let you step aside and work on
23 the order. When you're ready, just come forward and hand it
24 to Mr. Shanstrom and I can sign that, unless you have
25 objections that need to go on the record.

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
2 IN AND FOR THE COUNTY OF PIERCE
3

4
5 SANDRA EHRHART, individually and)
6 as personal representative of the)
Estate of Brian Ehrhart,)

7 Plaintiff,)

8 vs.)

9 KING COUNTY, operating through)
10 Seattle-King County Public)
Health, a government agency,)
11 SWEDISH HEALTH SERVICES, a)
non-profit entity, and JUSTIN)
12 WARREN REIF, an individual)

13 Defendant.)

Superior Court
No. 18-2-09196-4

14 REPORTER'S CERTIFICATE
15

16 STATE OF WASHINGTON)
17 COUNTY OF PIERCE) ss

18
19 I, Jennifer Flygare, Official Court Reporter in the
20 State of Washington, County of Pierce, do hereby certify
21 that the forgoing transcript is a full, true, and accurate
transcript of the proceedings and testimony taken in the
matter of the above-entitled cause.

22 Dated this 3rd day of October 2018

23
24 
25 JENNIFER FLYGARE, RPR
Official Court Reporter

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10/3/2018



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The Honorable Shelly K. Speir

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

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

Plaintiff,

v.

KING COUNTY, operating through its health department, Public Health - Seattle & King County, SWEDISH HEALTH SERVICES, a non-profit entity, and JUSTIN WARREN REIF, an individual,

Defendants.

NO. 18-2-09196-4

~~[PROPOSED]~~

ORDER STRIKING DEFENDANT KING COUNTY'S IMMUNITY RELATED DEFENSES ON SUMMARY JUDGMENT

**Noted for Hearing:
September 28, 2018 at 9:00 a.m.
With Oral Argument**

FILED
DEPT 5
IN OPEN COURT
SEP 28 2018
PIERCE COUNTY Clerk
By *[Signature]*
DEPUTY

THIS MATTER came before the Court on Plaintiff's Motion for Partial Summary Judgment. The Court having considered the record, including:

1. Plaintiff's Motion;
2. Declaration of Dr. Michael Freeman (with Exhibits);
3. Declaration of Dr. Mark Waterbury (with Exhibits);
4. Declaration of Sarah McMorris;
5. Declaration of Adam Rosenberg (with Exhibits);
6. King County's Response;
7. Declaration of Dr. Jeff Duchin;

ORDER STRIKING DEFENDANT KING COUNTY'S IMMUNITY RELATED DEFENSES ON SUMMARY JUDGMENT - 1

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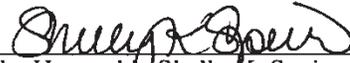
- 1 8. Declaration of Kim Frederick (with Exhibits);
- 2 9. Plaintiff's Reply;
- 3 10. Supplemental Declaration of Adam Rosenberg (with Exhibits);
- 4 11. Declaration of Jeff McMorris (with Exhibits); and
- 5 12. Declaration of Ashley Jones.

6 And having heard oral argument, the Court finds itself fully informed.

7 Partial summary judgment is **GRANTED** ^{conditionally} Defendant King County's immunity-related
 8 defenses, including without limit, ~~the public duty doctrine and~~ discretionary immunity, are
 9 hereby STRICKEN and DISMISSED. *King County's violation of a mandatory duty and actual knowledge of a violation shall be subject*

10 ~~King County's pending cross-motion for summary judgment is stricken as moot.~~ *to a Jury's determination of whether its actions were "appropriate" under*

11 ENTERED this 28th day of September, 2018.

12 
 13 The Honorable Shelly K. Speir

14 PREPARED AND PRESENTED BY:

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FILED
 DEPT 5
 IN OPEN COURT
 SEP 28 2018
 PIERCE COUNTY Clerk
 By  DEPUTY

WAC 246-101-505. Brian Ehrhart was within the class intended to be protected by the statute. The Court does not grant summary judgment based upon the Rescue Exception.

ORDER STRIKING DEFENDANT KING COUNTY'S IMMUNITY RELATED DEFENSES ON SUMMARY JUDGMENT - 2

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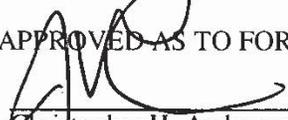
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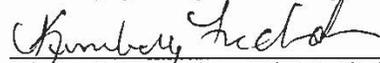
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ORDER STRIKING DEFENDANT KING COUNTY'S IMMUNITY
RELATED DEFENSES ON SUMMARY JUDGMENT - 3

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6564022.1

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY**

June 21 2018 11:33 AM

EHRHART SANDRA
Plaintiff(s)

Vs.

KING COUNTY
Defendant(s)

No. 18-2-09196-4

KEVIN STOCK
COUNTY CLERK
NO: 18-2-09196-4

ORDER SETTING CASE SCHEDULE

Type of case: PIN
Estimated Trial (days):
Track Assignment: Standard
Assignment Department: 13
Docket Code: **ORSCS**

Confirmation of Service	7/19/2018
Confirmation of Joinder of Parties, Claims and Defenses	10/18/2018
Jury Demand	10/25/2018
Plaintiff's/Petitioner's Disclosure of Primary Witnesses	12/13/2018
Defendant's/Respondent's Disclosure of Primary Witnesses	1/10/2019
Disclosure of Rebuttal Witnesses	2/28/2019
Deadline for Filing Motion to Adjust Trial Date	3/28/2019
Discovery Cutoff	5/2/2019
Exchange of Witness and Exhibit Lists and Documentary Exhibits	5/16/2019
Deadline to file Certificate or Declaration re: Alternative Dispute Resolution	5/23/2019
Deadline for Hearing Dispositive Pretrial Motions	5/23/2019
Joint Statement of Evidence	5/23/2019
Pretrial Conference	Week of 6/6/2019
Trial	6/20/2019 9:00

Unless otherwise instructed, ALL Attorneys/Parties shall report to the trial court at 9:00 AM on the date of trial.

NOTICE TO PLAINTIFF/PETITIONER

If the case has been filed, the plaintiff shall serve a copy of the Case Schedule on the defendant(s) with the summons and complaint/petition: Provided that in those cases where service is by publication the plaintiff shall serve the Case Schedule within five (5) court days of service of the defendant's first response/appearance. If the case has not been filed, but an initial pleading is served, the Case Schedule shall be served within five (5) court days of filing. See PCLR 3.

NOTICE TO ALL PARTIES

All attorneys and parties shall make themselves familiar with the Pierce County Local Rules, particularly those relating to case scheduling. Compliance with the scheduling rules is mandatory and failure to comply shall result in sanctions appropriate to the violation. If a statement of arbitrability is filed, PCLR 3 does not apply while the case is in arbitration.

Dated: June 21, 2018



Judge KATHRYN J. NELSON
Department 13

September 24 2018 3:59 PM

The Honorable Shelly K. Speltz
KEVIN STOCK
COUNTY CLERK
NO: 18-2-09196-4

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SUPERIOR COURT OF WASHINGTON
IN THE COUNTY OF PIERCE

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

Plaintiffs,

v.

KING COUNTY, operating though Seattle-
King County Public Health, a government
agency, SWEDISH HEALTH SERVICES, a
non-profit entity, and JUSTIN WARREN REIF,
an individual

Defendants.

NO. 18-2-09196-4

**PLAINTIFF'S RESPONSE TO KING
COUNTY'S MOTION FOR SUMMARY
JUDGMENT**

**Noted for Hearing:
October 5, 2018 at 9:00 a.m.**

PLAINTIFF'S RESPONSE TO KING COUNTY'S MOTION FOR
SUMMARY JUDGMENT - i

6620533.1

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1 **1. INTRODUCTION AND RELIEF REQUESTED**

2 Plaintiff, Sandra Ehrhart, on behalf of herself, her minor children and the Estate of
3 Brian Ehrhart, submits this memorandum in opposition to summary judgment. With the
4 exception of some sparse legal argument, this is a motion directed at the wrong element of
5 negligence. Whether the County was *actually negligent* is for another day. Whether the
6 County can *ever* be liable for negligence—in the context of crucial healthcare information and
7 explicit regulations—when its conduct hurts or kills someone, is the issue today. Consistent
8 with the law, record and legitimate public policy concerns, this motion should be denied.

9 *Legally*, the County “does not dispute that after being notified of a Notifiable
10 Condition, WAC 246-101-505 requires action on King County’s part.” Opp. at 8. Nor could
11 it. *See* WAC 246-101-505 (“*shall* [r]eview and determine appropriate action...” (emphasis
12 added). Both Divisions I and II, analyzing nearly-identical language, found a duty of care
13 owed in the context of—as here—actual knowledge of a known safety hazard. *See Livingston*
14 *v. City of Everett*, 50 Wn. App. 655, 659, 751 P.2d 1199 (1988); *Gorman v. Pierce Cty.*, 176
15 Wn. App. 63, 307 P.3d 795 (2013). This was so, regardless of the government’s “discretion”
16 to act in one way or another—so long as *ordinary care* was exercised. No different in this
17 case, the County does not deny that Hantavirus is a “serious infection,” (Duchin ¶ 5, Ex. A) nor
18 that it had actual knowledge of the hazard prior to Brian Ehrhart’s death. Whether it took *the*
19 *right* steps is a factual issue for another day. The question today is only whether it had a duty
20 to do something in the first place—which the County concedes it did. Thus, the public duty
21 doctrine cannot serve as a defense in this matter.

22 *Factually*, the County argues that it took “action,” so it cannot be liable. This
23 misunderstands both WAC 246-101-505, as well as negligence generally. The regulation
24 requires “appropriate action,” which is by its own terms a factual issue. And even though
25 plaintiff has no obligation to prove actual negligence—in order to establish she was owed a

1 legal duty—she certainly can, even at this early stage. As it turns out, King County has no
2 policies or procedures whatsoever with respect to how it handles “critical” public health
3 information. *See* WAC 246-101-005.¹ And unlike virtually every other county in Washington,
4 which issues advisories after *one* confirmed case of Hantavirus, King County was sending
5 internal emails mocking “small town Issaquah.” Rosenberg Decl., Ex. 1 (“the lights the
6 cameras. hahaha. oh yeah – this is Issaquah.”) [sic]. And when King County did eventually
7 act—it was *not* because of the “unusual nature of having two confirmed cases,” as Dr. Duchin
8 claims—but rather, because of a forthcoming Seattle Times exposé.² A rational jury could
9 conclude that this did not constitute “appropriate action” under WAC 246-101.

10 Finally, as a *policy* matter, the County *should* answer for this. Setting aside that its
11 interpretation of WAC 246-101 renders the regulation completely meaningless and
12 unenforceable, the County is occupying a space involving life-and-death. But instead of
13 discharging this awesome responsibility with care, it is playing favorites among communities,
14 and demonstrating no interest in policing its own conduct. *See* McMorris Decl. ¶ 3-6. Legal
15 duty is based upon “mixed considerations of logic, common sense, justice, policy, and
16 precedent,” *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 479, 951 P.2d 749 (1998), and
17 none support immunizing this conduct, in this context.

18 Plaintiff’s claims should proceed on their merits. This motion should be denied.

19 **2. EVIDENCE RELIED UPON**

20 In support of this motion, plaintiff relies upon:

21
22 ¹ Dr. Duchin’s claims about “notification fatigue” do not line up with the County’s conduct. In reality,
23 it disseminates numerous public health advisories every year, for all manner of things. In 2016, for
24 example, there were notifications about increased instances of syphilis (Rosenberg Decl., Ex. 4), people
poisoning themselves with camping stoves (Ex. 5), and bad Tilapia fish (Ex. 6).

25 ² *See* Declaration of Ashley Jones in Support of Motion ¶ 4-5 (**March 10**: Public Health denied any
intention of issuing an advisory); McMorris Decl., Ex. A (**March 20**: Seattle Times inquiry); Ex. B-C
(**March 21**: issued several advisories); Ex. D (**March 21**: internally bragging that they got notice out
“an hour or so prior [to the Seattle Times piece]”).

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- The Declaration of Mark Waterbury, Ph.D.;
- The Declaration of Sarah McMorris, R.N.;
- The Declaration of Michael Freeman, Med.Dr., Ph.D.;
- The Declaration of Ashley Jones;
- The Declaration of Jeff McMorris;
- The Declaration of Adam Rosenberg.

3. CLARIFICATION OF FACTUAL BACKGROUND

3.1. King County Public Health’s Role as the Repository of Information About Rare, Reportable Diseases

Public Health – Seattle & King County is a department of King County with a nine figure budget and over 800 full time employees. Rosenberg Decl., Ex. 7. It has broad authority to enter premises, issue fines, and withhold permits. Rosenberg Decl., Ex. 8 (Board of Health Code). Significant to this case, the County is the repository of information related to rare and deadly diseases. By operation of law, doctors and hospitals³ *must* advise the County of all “notifiable conditions” as defined by Washington law. *See* WAC 246.101.101 (listing “the conditions that Washington’s health care providers must notify public health authorities of on a statewide basis”).

The County itself reaffirms this requirement on its website: <https://www.kingcounty.gov/depts/health/communicable-diseases/health-care-providers/disease-reporting.aspx>.⁴ The state regulations confirm why:

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. *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... Treating persons already ill, providing preventive therapies for*

³ As well as laboratories, veterinarians, food service establishments, child day care facilities, and schools.

⁴ *See* Rosenberg Decl., Ex. 9.

1 *individuals who came into contact with infectious agents*, investigating and
2 halting outbreaks, and removing harmful health exposures are key ways public
3 health officials protect the public....

4 WAC 246-101-005 (emphasis added).

5 **3.2. The Medical Community Relies Upon Public Health To Do Its Job When
6 Actual Knowledge of Certain Conditions Is Developed**

7 As Dr. Michael Freeman, who holds a Masters and Ph.D. in Public Health and
8 Epidemiology, explains:

9 Fundamentally, the relationship between the public health agency and health
10 care community works optimally when there is two-way communication. That
11 is, when a disease is reported to the County by the health care community, the
12 County will report back to the health care community after evaluating
13 information... allowing for the health care community to act on the information.
14 In order to function as designed, the medical community must provide
15 information to the agency, and the agency must provide digested and augmented
16 information back to the medical community.

17 Freeman Decl., ¶ 4. In other words, it is not—and cannot be—a one-way street. From the
18 standpoint of the medical community, “it is anticipated that the County will disseminate
19 important and actionable public health information and announcements in a timely fashion, and
20 one that is appropriate to the seriousness of the threat.” Freeman Decl., ¶ 5. Many facilities
21 post public health notifications on the walls of their emergency rooms so that personnel can act
22 upon them. McMorris Decl., ¶ 5.

23 If the County were not occupying this role, health care providers would seek this
24 crucial information elsewhere. *See id.* But they do not, because the County has taken it on.
25 Thus, for obvious reasons—and contrary to Dr. Duchin’s claims—the state regulatory
framework specifically requires the County to act when it learns of a Notifiable Condition. It
cannot “opt-out”:

Duties of the local health officer or the local health department

(1) Local health officers or the local health department *shall*:

(a) Review and determine appropriate action for:

PLAINTIFF’S RESPONSE TO KING COUNTY’S MOTION FOR
SUMMARY JUDGMENT - 4

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- (i) Each reported case or suspected case of a notifiable condition;
- (ii) Any disease or condition considered a threat to public health; and
- (iii) Each reported outbreak or suspected outbreak of disease, requesting assistance from the department in carrying out investigations when necessary.

WAC 246-101-505 (emphasis added). And rightly so. When this system works, it can save lives. *See generally* WAC 246.101.005 (referring to notifiable condition data as “critical” to “treating persons already ill [and] providing preventative therapies for individuals who came into contact with infectious agents”). This is especially true in the context of highly improbable or unlikely conditions. It is the County that, by law, receives and disseminates notifications about these conditions. *See also* McMorris Decl., ¶ 4 (emergency medicine nurse: notices from public health “give us notice of unusual conditions, which we might not otherwise anticipate, and an opportunity to act on them.”).

3.3. The County’s Haphazard Relationship with Public Health Advisories

The County lacks any formalized documentation regarding under what circumstances Public Health Advisories are issued (*see* Rosenberg Decl. ¶ 2.4), nor are there even any consistent practices within the Department. On the one hand, Dr. Duchin confirms that “Health Advisories are not issued every time a notifiable condition is reported. Health Advisories are issued in certain limited circumstances when specific actions are requested of health care providers...” *See* Duchin Decl., ¶ 4. What constitutes “certain limited circumstances” and what “specific actions” are contemplated remain, as yet, undefined.

In this case, as discussed in more detail below, the only variable was media attention. Brian Ehrhart died on February 24, 2016, and the County was advised a week or so later. There had already been several previous cases known to the County as of that point. *See* Waterbury Decl.; Duchin Decl. ¶ 5 (“In 2016, there were over forty reported cases...”). Yet as

1 of March 10, 2016, County personnel were literally laughing about the impact on the local
2 community. Rosenberg Decl. Ex. 1. There was *no* intention of giving broader notice. Jones
3 Decl. ¶ 4-5. It was only after the media began asking hard questions that the County finally
4 acted, rushing blogs, tweets, and advisories out within 24 hours. *See* Jeff McMorris Decl. Ex.
5 A-D (bragging that they had published “an hour or two” ahead of the Seattle Times).

6 To the extent the County suggests that health advisories are driven by “unique
7 circumstances” or complex medical considerations (*see* Mot. at 7-9), there is **zero** evidence to
8 substantiate that. The only driving forces are media and public relations. *See generally* Jeff
9 McMorris Decl. ¶ 4-6.

10 **3.4. Hantavirus Pulmonary Syndrome**

11 Hantavirus Pulmonary Syndrome is a rare condition, especially in this part of the world.
12 As of 2016, the last reported case in King County occurred in 2003. Waterbury Decl., ¶ 10,
13 Ex. A. Early on, Hantavirus presents similarly to the flu. It includes fever, chills, body-aches,
14 and cough. Rosenberg Decl., Ex. 10 (Data from the Mayo Clinic). When diagnosed early,
15 Hantavirus is often a treatable event with intervention and oxygen therapy. *Id.* As the disease
16 progresses, however, it becomes more acute and difficult to treat. *Id.* There is a mortality rate
17 of approximately 30%.

18 Therefore, it is not surprising that Hantavirus, while rare, is a mandatory reportable
19 condition, *i.e.*, “within 24 hours.” *See* WAC 246-101-101.⁵ That is, when a case is confirmed,
20 the treating provider must advise the County within 24 hours (*id.*), so public health can “take
21 appropriate action.” WAC 246-101-505; *see also* Freeman Decl., ¶ 3-6. Hantavirus is spread
22 largely by deer mice droppings. Waterbury ¶ 6-8. Consequently, it is driven by predictable
23 environmental conditions impacting the deer mice population—often in clusters. *Id.*

24
25

⁵ For reference, Malaria must be reported within 3 business days, while Hepatitis and Autism are reported monthly. *Id.*

1 Also, due to its combination of rarity and lethality, counties—and even other states—
 2 give notice immediately upon learning of a confirmed case. For example:

JURISDICTION	ACTION
Kittitas County	Issued a notice after first confirmed case in the county. Rosenberg Decl., Ex. 11.
Benton-Franklin County	Issued a notice after first confirmed case in the county. Rosenberg Decl., Ex. 12.
Skagit County	Issued a notice after first confirmed case in the county. Rosenberg Decl., Ex. 13.
Adams/Spokane County	Issued a notice after first confirmed case in the county. Rosenberg Decl., Ex. 14.
Whatcom County	Issued a notice after first confirmed case in the county. Rosenberg Decl., Ex. 15.
California (entire state)	Consistently issues notice after first confirmed case in the state. Rosenberg Decl., Ex. 16.
Montana (entire state)	Consistently issues notice after first confirmed case in the state. Rosenberg Decl., Ex. 17.
New Mexico (entire state)	Consistently issues notice after first confirmed case in the state—even if it is the first <i>ever</i> case in a given county. Rosenberg Decl., Ex. 18.

21 **3.5. Maureen Waterbury Contracts Hantavirus And Nearly Dies**

22 Shortly before Thanksgiving, in the rural Issaquah/Redmond area, Maureen Waterbury,
 23 a longtime nurse, felt herself getting sick. Waterbury Decl., ¶ 5. Being uniquely attuned to her
 24 physiology, she recognized relatively early on that this was something different than the flu.
 25

1 *Id.*⁶ She was admitted as a patient to Overlake Hospital, in Bellevue, where she spent several
2 days in a coma. *Id.* But she survived Hantavirus, because her infection was caught early. *Id.*

3 Consistent with its obligations under state law, Overlake dutifully reported the case to
4 public health. Rosenberg Decl., Ex. 19. A public health nurse at the County found the case
5 “interesting,” noting the rural context and presence of deer mice. *Id.* The State Department of
6 Health queried whether “others are suspected of being exposed” and a CDC representative
7 posited a “homesite environmental assessment.” Rosenberg Decl., Ex. 20.

8 3.6. The County Declines to Share What It Knows with the Healthcare 9 Community

10 All of this ended up on the desk of Dr. Jeff Duchin. Within a couple hours, he rejected
11 all proposals in favor of doing nothing:

12 **From:** [Duchin, Jeff](#)
13 **To:** [Kawakami, Vance](#)
Cc: [McKeirnan, Shelly](#); [Rietberg, Krista](#); [Lloyd, Jenny](#); [Serafin, Lauri](#); [Kay, Meagan](#)
Subject: RE: poss HPS case with exposure in King County
Date: Friday, December 16, 2016 3:24:26 PM

14 Thanks, Vance. I'd be happy to review the clinical info on Monday. I'm open to an environmental
15 investigation if there is a good PH reason, but in sporadic cases with exposures in areas where Deer Mice
16 are endemic, I'm not sure of the value. Rodents like to colonize autos, might have been interesting to
17 have sampled from the air filter, but short of that, I don't see a reason based on the info in these emails.
18 If, for example, this was a place of employment with other potential exposures and unknown source,
19 might be more useful. The family should engage a rodent control agency that is familiar with hantavirus
20 mitigation, and be informed of the appropriate risk reduction steps they can take.

21 Jeff

22 Jeffrey S. Duchin, MD
23 Health Officer and Chief, Communicable Disease Epidemiology & Immunization Section
24 Public Health - Seattle and King County
25 Professor in Medicine, Division of Infectious Diseases, University of Washington
Adjunct Professor, School of Public Health
401 5th Ave, Suite 900, Seattle, WA 98104
Tel: (206) 296-4774; Direct: (206) 263-8171; Fax: (206) 296-4803
E-mail: jeff.duchin@kingcounty.gov

22 *Id.* His directive—amounting to “get an exterminator”—was objectively wrong, inconsistent
23 with other jurisdictions, and violated the standard of care. Freeman Decl., ¶ 6-7; Waterbury
24 Decl., ¶ 8.

25 ⁶ To the extent the County suggests that this is “proof” healthcare providers do not need advisories, the
argument only works if everyone getting sick happens to be a veteran nurse, capable of self-diagnosis.

1 Even still, the County got a second-chance to do the right thing. Dr. Mark Waterbury,
2 Maureen’s husband, happened to be a scientist and Ph.D. He reached out to the County
3 *repeatedly* to share his research and (objectively correct) conclusions:

4 Knowing this, it was important to me to share what I viewed as a near-certainty
5 of additional infections with King County Public Health. The first time I called,
6 however, I was dismissed by Public Health’s representatives. Their response
7 amounted to “thank you, bye.” This was surprising to me because, according to
8 my research, other jurisdictions take action (*i.e.*, give notice) after one
9 confirmed case.

10 I reached out a second time, and was more assertive. I advised Public Health of
11 my background, education, and research. I was a scientist, just like them.
12 Ultimately, I spoke to Dr. Duchin, the head of the agency, but hit a brick wall.
13 He and other Public Health officials continued to dismiss my wife’s case as
14 “fluky,” and insisted that “we don’t know that there will be another one.” I
15 responded that another was, in fact, likely—both practically and statistically. I
16 impressed upon Public Health the importance of giving broad public notice to
17 communities and health care providers. Dr. Duchin was unmoved, and did not
18 seem to believe Hanta was statistically significant unless 7-8 people were
19 infected. Public Health neither responded, nor put out a public health advisory.

20 I was both surprised and dismayed. At times, it seemed like King County
21 Public Health was going out of its way to hush the condition in the area.

22 Waterbury Decl., ¶ 8-10. The County, unfortunately, continued to sit on the information.

23 Indeed, the County even went so far as to hush the condition. Despite knowing that
24 Hantavirus occurred very recently, staff continued to represent that there had been no
25 infections “since 2003.” Maureen Waterbury, while still recovering, had to email the County
26 to correct the erroneous claim. Waterbury Decl., ¶ 10, Ex. A.

27 Notwithstanding that the same misinformation remains on the County’s website today,
28 [https://www.kingcounty.gov/depts/health/communicable-diseases/disease-control/surveillance-](https://www.kingcounty.gov/depts/health/communicable-diseases/disease-control/surveillance-summaries.aspx)
29 [summaries.aspx](https://www.kingcounty.gov/depts/health/communicable-diseases/disease-control/surveillance-summaries.aspx) (Communicable Disease Summaries) (last visited May 1, 2018). In the end,
30 the County took no action. It performed no environmental analysis, it disregarded Dr.

31

1 Waterbury’s accurate assessment, and (in contrast to counties statewide) it furnished zero
2 notice to the local healthcare community. Freeman Decl., ¶ 6-8.

3 **3.7. Brian Ehrhart Contracts Hantavirus and the Local Hospital—Knowing**
4 **Nothing of the Emerging Cluster—Sends Him Away Diagnosing the Flu**

5 Later that season, in February 2017—about ten miles from the Waterburys—Brian
6 Ehrhart (age 34) began to get sick. He reported to the Emergency Room at Swedish-Issaquah
7 at around 9:15 pm. Rosenberg Decl., Ex. 21. His symptoms included fever, vomiting and
8 cough. *Id.* His oxygen levels were down, as were his platelets. *Id.* Had the ER been armed
9 with the knowledge that the County was refusing to share, it would have been in a position to
10 (1) ask Brian about his contacts with deer mice; (2) perform a chest X-ray; and/or (3) begin
11 oxygen therapy. None of this happened, however.

12 Brian was basically given some anti-nausea medications and sent away with a diagnosis
13 of “gastroenteritis.”⁷ *See id.* This missed opportunity deprived Brian of critical early
14 hospitalization and therapy (Freeman Decl., ¶ 7), which amounted to a death sentence.

15 **3.8. Plaintiff’s Condition Deteriorates and He Dies without Early Intervention**

16 Brian continued to deteriorate as his lungs filled with fluid. He was brought back to
17 Urgent Care, which sent him by ambulance to Overlake Hospital. At this point, Brian was in
18 acute respiratory failure, and his organs were beginning to shut down. Rosenberg Decl.,
19 Ex. 22. Despite Overlake Hospital’s efforts, which were now too late, Brian Ehrhart died on
20 February 24, 2017—leaving behind a wife and two young children.

21 **3.9. What Went Wrong and Why It Mattered**

22 The County received notice of this second Hantavirus infection. And again, for reasons
23 passing understanding, the County continued to resist telling anybody. Waterbury Decl., ¶ 12.;
24 *see also* Jones Decl. ¶ 4-6. Meanwhile, the Issaquah/Redmond community was in a panic. At
25 the request of the mayor, county representatives agreed to speak to the neighborhood about the

⁷ This is medical jargon for “tummy bug.”

1 condition. Their internal emails—shortly after communicating with the Ehrhart family—speak
2 for themselves:

3 **From:** [Lipton, Beth](#)
4 **To:** [Kay, Meagan](#)
5 **Subject:** Re: Hantavirus follow-up information
6 **Date:** Friday, March 10, 2017 9:37:36 AM

7 Oh I love the limelight! Ha ha, from me too.

8 On Mar 10, 2017, at 9:04 AM, Kay, Meagan <Meagan.Kay@kingcounty.gov> wrote:

9 I'm just imagining a neighborhood in panic and the media showing up - the lights the cameras.
10 hahaha. oh yeah - this is Issaquah.

11 Rosenberg Decl., Ex. 1; *see also* McMorris Decl., ¶ 4.

12 Fortunately, Dr. Waterbury went to the press, which began asking questions on March
13 20th. Waterbury Decl., ¶ 12; Jeff McMorris Decl. Ex. A. In the face of a Seattle Times
14 exposé, the County finally rushed notice out the door within 24 hours. Jeff McMorris Decl.
15 Ex. A-D. Thereafter, Dr. Duchin falsely told his superiors that, at most, they could have saved
16 “a day or two in our process,” graciously acknowledging that “we are not currently always able
17 to meet our own expectations for excellence.” *Id.* Ex. E. In reality, the County sat on the
18 information for closer to a month⁸—with no end in sight, but for the media inquiry.⁹

19 Jeff McMorris, the Chief of Staff to King County councilmember, Kathy Lambert (and
20 Vice Chair of the Board of Directors of King County Public Health), was skeptical. McMorris
21 Decl., ¶ 6. He pulled together documents and created a timeline in an effort to help the County
22 improve for the future. *Id.* Nobody would meet with him, nor were any actions taken in

23 ⁸ Reflecting on what happened, Dr. Duchin privately acknowledged that he “lost track of the
24 conversation” with Dr. Waterbury. *See* Rosenberg Decl., Ex. 23.

25 ⁹ It was better late than never, however, for Samantha King. She living in the same area, and contracted
Hantavirus in late March of 2016. She benefitted from early diagnosis and lived. *See* Waterbury Decl.
¶ 13.

1 response to Brian’s death. *Id.* On the contrary, it appears that the County wiped his computer
2 (McMorris Decl. ¶ 7), and failed to produce it in public records.

3 The Ehrhart family served the County with a claim for damages, which was generally
4 ignored. Rosenberg Decl., Ex. 24. This suit followed, and Plaintiff moved for partial summary
5 judgment. After three continuances of the hearing (two voluntary; one pursuant to CR 56(f)),
6 the County filed its own cross-motion, noting it one week *after* the date the Court set for
7 hearing. Plaintiff respectfully submits its opposition argument, and requests that the Court
8 deny the County’s Motion.

9 **4. STATEMENT OF THE ISSUE**

10 Whether the County—operating through Seattle-King County Public Health—owes a
11 duty of care when it develops actual knowledge of a deadly condition, and state regulatory
12 (reflecting reliance-based framework) imposes a duty to act.

13 **5. AUTHORITY AND ARGUMENT**

14 The judgment sought shall be rendered forthwith if the pleadings, depositions, answers
15 to interrogatories, and admissions on file, together with the affidavits, if any, show that there is
16 no genuine issue as to any material fact and that the moving party is entitled to a judgment as a
17 matter of law. CR 56(c); *Guile v. Ballard Commt. Hosp.*, 70 Wn. App. 18, 21, 851 P.2d 689,
18 *rev. denied*, 122 Wn.2d 1010 (1993). All facts submitted and all reasonable inferences from
19 them are to be considered in the light most favorable to the nonmoving party. *Clements v.*
20 *Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993). “The motion should be
21 granted only if, from all the evidence, reasonable persons could reach but one conclusion.” *Id.*
22 (citing *Wilson v. Steinbach*, 98 Wn.2d 434, 656 P.2d 1030 (1982)).

23 **5.1. The Legal Standard**

24 In 1967, in adopting RCW 4.96.010, the Legislature determined that local government
25 “shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their

1 officers... to the same extent as if they were a private person or corporation...” Sovereign
2 immunity for government was abolished.

3 The limited issue now is whether the public duty doctrine bars the claim. But
4 application of this doctrine is rare, as Washington courts confirm. *See, e.g., See, e.g., Bailey v.*
5 *Town of Forks*, 108 Wn.2d 262, 266-68, 737 P.2d 1257 (1987) (noting that courts “have almost
6 universally found it unnecessary to invoke the public duty doctrine to bar a plaintiff’s lawsuit”
7 and that the exceptions “have virtually consumed the rule”). Municipal corporations are liable
8 for damages arising out of their tortious conduct, or the tortious conduct of their employees, to
9 the same extent as if they were a private person or corporation. RCW 4.96.010(1); *Munich v.*
10 *Emergency Commc’n Ctr.*, 175 Wn.2d 871, 878, 288 P.3d 328 (2012).¹⁰

11 For the reasons that follow, the County is not entitled to rely on this doctrine here.

12 **5.2. The Public Duty Doctrine Does Not Apply**

13 Contrary to the County’s argument, the Public Duty Doctrine does not apply in the
14 current case. The general rule is that professionals owe a duty to “exercise the degree of skill,
15 care, and learning possessed by members of their profession in the community.” *Michaels v.*
16 *CH2M Hill, Inc.*, 171 Wn.2d 587, 606, 257 P.3d 532 (2011) (citing 16 DeWolf and Allen,
17 WASHINGTON PRACTICE § 15.51, at 504–05 (3d ed. 2006)). Thereafter, concepts of
18 foreseeability serve to define the scope of the duty owed. *Schooley v. Pinch's Deli Mkt., Inc.*,
19 134 Wn.2d 468, 475, 951 P.2d 749 (1998).

20 In negligence actions involving government, courts analyze the government’s duty
21 under the “public duty doctrine” to ensure that a duty was actually owed to the plaintiff (or his
22 class of individuals). *Munich v. Skagit Emergency Commc’n Ctr.*, 175 Wn.2d 871, 878, 288
23 P.3d 328 (2012); *Cummins v. Lewis County*, 156 Wn.2d 844, 866, 133 P.3d 458 (2006).

24 _____
25 ¹⁰ This is not so much an immunity, but rather, “a focusing tool” to determine whether the individual
claimant was owed a duty. *Id.* at 878; *Cummins v. Lewis County*, 156 Wn.2d 844, 866, 133 P.3d 458
(2006).

1 There are at least two exceptions to the public duty doctrine that apply—and, given the
2 County’s own reasoning, if one does not, the other certainly does. This motion should be
3 denied.

4 **5.3. The County Owed a Duty Under the Failure to Enforce Exception**

5 At least twice, in evaluating comparable—albeit, less compelling—facts, courts had no
6 trouble applying the “failure to enforce” exception, which applies when there is knowledge of a
7 statutory violation, a duty to take corrective action, and the plaintiff is within the class the
8 statute is intended to protect. *Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257
9 (1987); *Gorman v. Pierce Cty.*, 176 Wn. App. 63, 77, 307 P.3d 795 (2013). Here, even the
10 County admits that it is under a mandatory duty to act. *See* Mot. at 9 (“King County does not
11 dispute that after being notified of a Notifiable Condition WAC 246-101-505 requires action
12 on King County’s part.”). And further, “actual knowledge,” as well as “the class to be
13 protected” are wholly undisputed. This exception undisputedly applies.

14 5.3.1. Washington Law Imposes a Duty of Care.

15 The County half-heartedly argues that there is no “statutory violation,” badly
16 misinterpreting the case law. The issue, according to the courts that have analyzed it, is the
17 failure to discharge a statutory duty to protect the public from a *known source of harm*.
18 *Livingston v. City of Everett*, 50 Wn. App. 655, 657–58, 751 P.2d 1199 (1988) (framing the
19 issue as “whether the city was negligent in that [it] either failed to discharge or did negligently
20 discharge a duty to protect the public from vicious animals causing injury to James Anthony
21 and Mitzi Livingston.”); *Gorman v. Pierce Cty.*, 176 Wn. App. 63, 70, 307 P.3d 795 (2013)
22 (duty to classify triggered by information about dangerous dogs). The “statutory violation”
23 comes in the form of government failing to take proper action in the face of a known harm.

24 In *Livingston*, for example, the Code at issue was:

25 Any impounded animal shall be released to the owner or his authorized
representative upon payment of impoundment, care and license fees if, in the

1 judgment of the animal control officer in charge, such animal is not dangerous
2 or unhealthy.

3 *Id.* at 658. The “violation” was “permit[ting] any dangerous animal to become at large.” *Id.*
4 Accordingly, when such an animal was already “impounded” with the City of Everett, there
5 was no violation yet. It came when the city failed to properly exercise its discretion by letting
6 the animal go, as the Court of Appeals went on to explain:

7 First, the Animal Control Department is a governmental agency of the City with
8 a duty to enforce statutory requirements, ***including not releasing dangerous***
9 ***animals***. Like the government employees in *Campbell v. Bellevue, supra*, and
10 *Mason v. Bitton, supra*, ***the Animal Control officers had a duty to exercise***
11 ***their discretion when confronted with a situation which posed a danger to***
particular persons or a class of persons. Second, the Department had reason to
believe that at least one of the dogs was dangerous. Third, the child came within
the class the ordinance was intended to protect.

12 *Id.* at 659 (emphasis added); *see also Gorman*, 176 Wn. App. at 78 (triggering issue was the
13 county receiving certain reports, testimony or statements). The statutory violation occurred
14 when government officials failed to properly exercise discretion when “confronted with a
15 situation which posed a danger to particular persons, ” *ibid*, no different than the County
16 violated WAC 246-101-505 by failing to take appropriate action in the face of a serious
17 reportable condition endangering rural Issaquah.

18 This has been the law since at least the mid-1970’s. In *Mason v. Bitton*, 85 Wn.2d 321,
19 534 P.2d 1360 (1975), the Supreme Court considered RCW 46.61.035, which gave police
20 officers the right to exceed speed limits, but imposed a duty to do so “with due regard for the
21 safety of all persons...” *Mason* involved a collision between two vehicles arising out of a
22 police chase. On appeal, the officers suggested—like King County—that because they were
23 not physically involved in the accident, there was no duty. The Supreme Court flatly
24 disagreed, explaining that “[w]henever a duty is imposed by statutory enactment, a question of
25 law arises as to which class of persons is intended to come within the protection provided by

1 the statute.” *Id.* at 325 (citing *Wells v. Vancouver*, 77 Wn.2d 800, 467 P.2d 292 (1970)).
2 Accepting the officers’ (and County’s) interpretation “would impose only half a duty and
3 would disregard the intended purpose underlying the statute; *i.e.*, to provide for the safety of all
4 persons and property from *all consequences* resulting from negligent behavior...” *Id.*
5 (emphasis added). The fact that this duty was broadly owed to “all persons” did not defeat the
6 negligence claim.

7 And it makes sense, as a practical matter, that the law would develop this way. The
8 issue is how government officials should act when confronted with a hazard endangering a
9 certain class of people. The legislature is of course free to *not* speak, in which case there
10 would be no duty. But when, as here, there is a duty imposed by a “formally promulgated
11 agency-regulation,”¹¹ common sense dictates that there must be some mechanism to enforce it.

12 Indeed, the County cites not a single case in which courts disregarded clear language
13 requiring that government *shall* take certain action.¹² See *DeHeer v. Seattle Post-Intelligencer*,
14 60 Wn.2d 122, 126, 372 P.2d 193 (1962) (where authority is not cited in support of a
15 proposition, the court is not required to search out authorities, but may assume that counsel,
16 after diligent search, has found none). Nor is plaintiff aware of such a case, presumably,
17 because “the legislature does not engage in unnecessary or meaningless acts, and [courts]
18 presume some significant purpose or objective in every legislative enactment.” *John H. Sellen*
19 *Const. Co. v. State Dep’t of Revenue*, 87 Wn.2d 878, 883, 558 P.2d 1342 (1976).

20 A duty was owed by virtue of the plain language of WAC 246-101-505. The County’s
21 affirmative defense fails as a matter of law.

22
23

24 ¹¹ So long as the rule is promulgated “pursuant to legislative delegation,” it has force of law for present purposes.
25 *Mills v. W. Wash. Univ.*, 170 Wn.2d 903, 911, 246 P.3d 1254 (2011); *Oliver v. Cook*, 194 Wn. App. 532, 541, 377
P.3d 265, 270 (2016). The County does not argue otherwise.

¹² Such as “the local health department *shall*...” WAC 246-101-505 (emphasis added).

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5.3.2. The County Does Not Avoid a Legal Duty by Claiming It Did Things Right.

The County next argues that the failure to enforce exception does not apply because the mandatory ‘review and determine’ criteria were met. Mot. at 9. This misrepresents WAC 246-101-505 and conflates two different elements of negligence.

WAC 246-101-505, in fact, requires that the County shall “review and determine appropriate action...for each reported case or suspected case of notifiable condition.” *Id* (emphasis added). Whether the County’s actions were “appropriate” is presently (at best) an issue of fact for a later date. Dr. Duchin is not entitled to absolve himself from a legal duty by insisting that he did things right—especially when there is substantial evidence that he did not. *See* Rosenberg Decl. Ex. 1; 4-25; Waterbury Decl.; J. McMorris Decl.; S. McMorris Decl.; Freeman Decl. ¶ 6 (explaining that County “breached the standard of care for public health”). The parties can have their day in court to decide whether the County’s conduct was “appropriate.” But Dr. Duchin’s self-serving (and provably false) declaration does not negate the existence of a legal duty at issue in this motion.

Nor does the fact of “discretion” change anything. While it is true that there is discretion under the regulation, the legislature—rightly—saw fit to cabin that discretion, mandating that the County “shall” act and that its actions be “appropriate.” The County admits as much. *See* Mot. at 9 (“...there was a mandatory duty for the health office or local health department to ‘review and determine appropriate action for’the November 2016 Hantavirus case...”).¹³ Indeed, discretion under WAC 246-101 no more forecloses a legal duty here than it did in *Livingston* or *Gorman*, where government had substantial leeway to classify or release dogs as it deemed appropriate. The issue there, and here, is the duty to exercise that discretion reasonably. *See, e.g., Livingston*, 50 Wn. App. at 659.

¹³ This sets our case apart from *Fishburn v. Pierce Cty. Planning & Land Servs. Dep’t*, 161 Wn. App. 452, 469, 250 P.3d 146 (2011), where the statute “explicitly state[d] that implementing corrections is discretionary.”

1 The County is certainly free to argue at trial that it did so. But its say-so now does
2 nothing to carry its burden to prevail on an affirmative defense and the legal question posed.

3 5.3.3. The County Does Not Win the “Policy Debate”.

4 Finally, the County falls back on the usual “limitless liability” argument,
5 mischaracterizing plaintiff’s claim as a request for health advisories to be issued “for every
6 instance of a Notifiable Condition.” Mot. at 7. Setting aside that this has *never* been plaintiff’s
7 position, there are numerous reasons that this generic policy argument rings hollow.

8 First, consistent with the language in the Washington Administrative Code, the only
9 duty at issue is a *duty to exercise ordinary care* in handling crucial health information.
10 Obviously this does not mean issuing advisories for every case of flu or runny nose. But when,
11 as here, there is an admittedly “serious infection” (Duchin Decl., ¶ 5), which presents just like a
12 flu in early stages—and there is reliable information suggesting a budding cluster—ordinary
13 care dictates that an advisory be issued. *See* Freeman Decl., ¶¶ 6-7. This is consistent with the
14 County’s own publications (*see* Rosenberg Decl., Ex. 9), as well as what is done in **virtually**
15 **every other county and jurisdiction** that has reported Hantavirus cases. *See* Rosenberg Decl.,
16 Exs. 11-18 (Kittitas, Benton-Franklin, Skagit, Adams/Spokane, and Whatcom Counties all
17 issuing a notice after first confirmed case in the county; and the states of California, Montana,
18 New Mexico consistently issuing notice after first confirmed case in the state). *See also*
19 Waterbury Decl., ¶ 8 (“other jurisdictions take action (i.e., give notice) after one confirmed
20 case”).

21 Instead of taking this reasonable step, the County chose to ignore the hazard, chose to
22 make fun of Issaquah-residents (Rosenberg Decl., Ex. 1), and only issued a notice in an effort
23 to get ahead of the media. McMorris Decl. Ex. D (“Here’s our blog, which went up an hour or
24 so prior [to the Seattle Times story about Hantavirus]”). Then public health officials attempted
25 to cover it up and destroyed documents. J. McMorris Decl. ¶ 7, Ex. E.

1 This presents a perfect illustration of *why* the drafters had the foresight to craft WAC
2 246-101 the way they did. Its purpose is manifest in the regulation:

3 The purpose of notifiable conditions reporting is to provide the information
4 necessary for public health officials to protect the public's health by tracking
5 communicable diseases and other conditions. These data are critical to local
6 health departments and the departments of health and labor and industries in
7 their efforts to prevent and control the spread of diseases and other conditions.

8 Treating persons already ill, providing preventive therapies for individuals who
9 came into contact with infectious agents, investigating and halting outbreaks,
10 and removing harmful health exposures are key ways public health officials
11 protect the public.

12 WAC 246-101-005. “It is the duty of th[e] Court to construe legislation so as to make it
13 purposeful and effective.” *Mason v. Bitton*, 85 Wn.2d 321, 326, 534 P.2d 1360 (1975)
14 (quoting *O’Connell v. Conte*, 76 Wn.2d 280, 287, 456 P.2d 317 (1969)).

15 Indeed, this clear concern about limited classes within the public, including “persons
16 already ill with reportable conditions” and “individuals who came into contact with infectious
17 agents” independently satisfies the “legislative intent” exception to the public duty doctrine.
18 *See Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978) (Seattle held liable for
19 failure to enforce the provisions of the city’s “building, housing, and safety codes,” which were
20 for the benefit of the individuals living in the buildings in addition to the benefit of the general
21 public); *Washburn v. City of Fed. Way*, 178 Wn.2d 732, 755–56, 310 P.3d 1275 (2013) (anti-
22 harassment laws enacted for the benefit of people subject to domestic violence).¹⁴

23 The County’s interpretation renders WAC 246-101 meaningless. The County gets to
24 play politics with peoples’ lives and is subject to no consequence. There is quite literally, it
25 claims, no mechanism to enforce WAC 246-101’s objectives which the County admits are

¹⁴ The fact that WAC 246-101-005 mentions “the public” does not take it out of the legislative intent exception. On the contrary, the leading case involved an ordinance with no less than four references to “the public.” *Halvorson v. Dahl*, 89 Wn.2d 673, 677 n.1, 574 P.2d 1190 (1978) (acknowledging concern about particular class of people “and of the public”).

1 “mandatory” (Mot. at 9). In contrast, a legal duty—no different than what is imposed on every
2 property owner, driver, corporation, and manufacturer in the state—ensures both redress and
3 accountability. This certainly serves those injured by the County, as well as the public as a
4 whole. *See Jackson v. City of Seattle*, 158 Wn. App. 647, 657, 244 P.3d 425 (2010)
5 (“underlying purpose of tort law is to provide for public safety through deterrence...”).

6 If the County does not believe it was negligent, it can prove it on the merits. But the
7 Court need not engage with that analysis right now. The only question, when considering
8 whether a legal duty is owed, is whether the County can *ever* be liable for its negligent
9 conduct. That is, should the County be subject to liability in cases when: (1) it *is* negligent,
10 (2) in the face of *actual knowledge* of a hazard, and (3) that negligence *actually* hurts
11 someone. *See Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985) (negligence must be
12 both the “but for” and “legal” cause of damages).

13 This comes down to “mixed considerations of logic, common sense, justice, policy, and
14 precedent.” *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 479, 951 P.2d 749 (1998).
15 The County, however, checks none of those boxes. It cites no precedent in which the public
16 duty doctrine was applied under comparable circumstances. There is no logic or policy-based
17 reason to immunize the County from the consequences of its misconduct. It is, after all,
18 difficult to see how public health will be made *better* by making it accountable to nobody—
19 especially when it has no apparent interest in policing itself or otherwise improving. *See*
20 Declaration of Jeff McMorris ¶ 4-7, Ex. A - E (actual animus toward Issaquah;
21 misrepresentation of events; destruction of relevant documents). There is no “common sense”
22 reason to afford the County immunity. We hold bad drivers, bad doctors, bad companies and
23 bad contractors accountable. It would be anomalous to give the County—particularly in the
24 context of life-and-death health information—a free pass, given what is at stake. Indeed, if a
25

1 free pass were intended, the legislature knows how to furnish it.¹⁵ That did not occur here, and
2 the presumption is to the contrary. *See Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 600, 257
3 P.3d 532 (2011) (immunity is in derogation of the common law).

4 And finally, there certainly is no justice in immunizing the County when it negligently
5 hurts someone, like the Ehrhart family. “The cornerstone of tort law is the assurance of full
6 compensation to the injured party.” *Pac. Nw. Life Ins. Co. v. Turnbull*, 51 Wn. App. 692, 700,
7 754 P.2d 1262 (1988) (*Seattle-First Nat. Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 236,
8 588 P.2d 1308, 1312 (1978)). Justice dictates that plaintiff get her day in Court, at which point
9 her allegations can rise and fall on their relative merit. If plaintiff proves her case, she should
10 be compensated. If not, she will at least have been heard. Turning plaintiff away at this stage,
11 in contrast, would represent marked *injustice*.

12 In short, nobody is telling the County or Dr. Duchin how to exercise discretion; only
13 that they must do so commensurate with the level of care exercised by a reasonable agency in
14 the same or similar circumstances. *See* WPI 10.02. The public duty doctrine defense fails.

15 **5.4. The County Owed A Duty By Virtue Of The Rescue Doctrine**

16 To the extent that the failure to enforce doctrine does not apply, the rescue exception
17 necessarily does. In its motion, the County attempts to have it both ways: on the one hand
18 disavowing any duty or obligation to issue health advisories, while on the other claiming that
19 the rescue doctrine cannot apply because it *has a duty* to issue public health advisories (*i.e.*,
20 they are not “gratuitous”). It is one, or it is the other. But it cannot be both.

21 5.4.1. Clarification of the Case Law

22 In arguing that the Rescue Doctrine does not apply, the County misstates the law when
23 it claims that the rescue the rescue exception “only arises if the governmental entity makes
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25 ¹⁵ *See, e.g.*, RCW 4.24.210 (recreational land use immunity); RCW 10.99.070 (immunity for good faith intervention in suspected domestic violence); RCW 48.180.065 (whistleblower immunity); RCW 16.52.330 (veterinarian immunity).

1 assurances...” Mot. at 11 (citing *Honcoop v. State*, 111 Wn.2d 182, 759 P.2d 1188 (1988)).
2 This is just plain wrong. While that is generally true of the “special relationship” exception—
3 which was at issue in *Honcoop*—the rescue exception is different. It applies even “where an
4 offer to seek or render aid is implicit and unspoken.” *Brown v. MacPherson’s, Inc.*, 86 Wn.2d
5 293, 301, 545 P.2d 13, 18 (1975).¹⁶

6 This exception has been recognized in situations where a governmental entity or its
7 agent undertakes to warn or aid a person in danger, and the offer to render aid is relied upon by
8 either the person to whom the aid is to be rendered *or by another* who, as a result of the
9 promise, refrains from acting on the victim's behalf. DeWolf and Allen 16 WASHINGTON
10 PRACTICE, § 15:11 (4th ed. 2017). Under this exception, the governmental entity may be liable
11 whether it is the plaintiff, or a would-be rescuer (*e.g.*, the doctor) who relies upon the
12 defendant. *See id.*; *see also Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 301, 545 P.2d 13
13 (1975) (holding that “a duty to act” is “created by reliance not by the person to whom the aid is
14 to be rendered, but by another who, as a result of the promise, refrains from acting on that
15 person's behalf”); *Meneely v. S.R. Smith, Inc.*, 101 Wn. App. 845, 859–60, 5 P.3d 49 (2000)
16 (holding trade association “voluntarily assumed the duty to warn” because “manufacturers
17 relied upon” assurances); *Mita v. Guardsmark, LLC*, 182 Wn. App. 76, 328 P.3d 962 (2014)
18 (county owed a duty of care when personnel indicated they would send an officer and file a
19 missing person report related to missing elderly person).

20 The question, then, is whether the County’s conduct increased the danger or deprived
21 plaintiff of the possibility of help from other sources.” DeWolf and Allen, 16 WASHINGTON
22 PRACTICE § 2:10 (4th ed. 2017).

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¹⁶ *Hancoop* did not even mention the rescue exception, much less alter Supreme Court precedent.

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5.4.2. A Duty Was Owed Under the Rescue Exception

To be clear, the County owed a duty under the rescue exception. The gist of the County’s argument is that the rescue exception does not apply because issuing health advisories is not gratuitous. But it *is* gratuitous, according to the County. The County denies that WAC 246-101 imposes any kind of obligation on it to *ever* issue an advisory, and further, denies that the case law requires a contrary result. This is even consistent with the County’s internal code (Board of Health), which nowhere mentions anything about issuing public health advisories. *See Rosenberg Decl., Ex. 25.*

If anything, this is consistent with *Babcock v. Mason Cty. Fire Dist. No. 6*, 101 Wn. App. 677, 686, 5 P.3d 750, 755 (2000).¹⁷ As the Court of Appeals pointed out, the fire district was established for one purpose: “to fight fires.” *Id.* at 686. By contrast, the County was created to do all manner of things, including law enforcement, planning, and legislating. Even within the subdivision of public health, it address food service, issue permits, and generate public awareness campaigns. There is nothing (according to the County) requiring them to advise anybody of anything. *See Rosenberg Decl., Ex. 25.* Public health advisories are, according to it, “gratuitous.”

Accordingly, the **undisputed** facts in the record establish the rescue exception. *See Freeman Decl., ¶ 5* (explaining the “reciprocal relationship of reliance” between the County and medical community; and how the medical community “anticipates that the County will disseminate important public health announcements”); *McMorris Decl., ¶ 5* (“if the county did not provide this service, we would pursue this information from elsewhere”). At a minimum, this is an issue of fact, incapable of resolution at summary judgment.

¹⁷ The County’s reliance upon the Division II opinion is dubious to begin with, since *Babcock* was actually appealed to the Supreme Court (something the County neglects to discuss); and even more dubious is the fact that the Supreme Court made it eminently clear that “[o]nly the special relationship exception is at issue in this case.” *Babcock v. Mason Cty. Fire Dist. No. 6*, 144 Wn.2d 774, 786, 30 P.3d 1261 (2001) (emphasis in original). This was not a rescue exception case.

1 But again, a legal duty, in this context, is fundamentally the right result. The County
2 cannot insist on being the repository of infectious disease information, compel the medical
3 community to report to it, engender broad reliance, and then abruptly opt-out. Even if
4 gratuitous at the outset, by undertaking this role, the County was “required by Washington law
5 to exercise reasonable care in [its] efforts.” See *Folsom v. Burger King*, 135 Wn.2d 658, 676,
6 958 P.2d 301 (1998). This is consistent with “ancient” principles:

7 It is ancient learning that one who assumes to act, even though gratuitously,
8 may thereby become subject to the duty of acting carefully, if he acts at all...
9 The 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....

10 If conduct has gone forward to such a stage that in action would commonly
11 result, not negatively merely in withholding a benefit, but positively or actively
12 in working an injury, there exists a relation out of which arises a duty to go
forward.

13 *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 167–68, 159 N.E. 896 (1928) (internal
14 citations omitted) (relied upon by *Campbell v. City of Bellevue*, 85 Wn.2d 1, 10, 530 P.2d 234
15 (1975). Or, stated another way, the County cannot command all of the authority, while
16 remaining subject to no responsibility for exercising it reasonably.¹⁸ To the extent no duty was
17 owed under the promulgated regulations, one was owed under the rescue exception.

18 **6. CONCLUSION**

19 For the foregoing reasons, Plaintiff requests that the County’s Motion be denied.
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¹⁸ “With great power comes great responsibility.” *Montpelier US Ins. Co. v. Collins*, CIV. 11-141-ART, 2012 WL 588799, at 1 (E.D. Ky. Feb. 22, 2012) (attributing to Voltaire and Spider-Man).

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RESPECTFULLY SUBMITTED this 24th day of September, 2018.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date we caused to be served upon certain counsel of record at the address and in the manner indicated below a copy of the foregoing:

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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,

SWEDISH HEALTH SERVICES, a
non-profit entity; and
JUSTIN WARREN REIF, an
individual,

Defendants.

DECLARATION OF
JEFFREY DUCHIN, M.D.,
IN SUPPORT OF KING
COUNTY'S MOTION FOR
DISCRETIONARY REVIEW

I, Jeffrey Duchin, declare as follows:

1. I am the Health Officer for Public Health – Seattle & King County (“Public Health”), a department of King County. I am over eighteen years of age and am otherwise competent to testify to the matters set forth in this declaration. I base this declaration on personal knowledge or documents upon which I regularly rely in the course and scope of my duties as Health Officer.

2. Public Health is one of the largest metropolitan health departments in the United States and serves a resident population of 1.9 million people. The Department's functions are carried out in a variety of ways including core disease prevention and health promotion programs, environmental health programs, community-oriented personal health care services, emergency medical services, correctional facility health services, Public Health emergency preparedness programs, vital statistics community-based public health assessment and practices, and through the office of the King County Medical Examiner. The broad functions of Public Health span from promoting emergency preparedness and ensuring food safety; to assessment, investigation and outbreak response for notifiable conditions; to analyzing population-level health data and promulgating community health policy.

3. Public Health is primarily the recipient of information from healthcare providers about the occurrence of notifiable conditions (as defined in WAC 246-101-101), and a conduit of that information to Washington State Department of Health ("DOH"). In some instances, however, a component of Public Health's response to a notifiable condition is to educate the public. Though they are not binding on us, Public Health generally follows the DOH Guidelines for Public Health Investigations for disease-specific recommendations, including about when information

concerning the occurrence of notifiable conditions should be transmitted to healthcare providers, the general public or to others. Whether outreach to specific groups such as healthcare providers, healthcare facilities (for example, hospitals or laboratories) or the general public or others is recommended depends on several condition-specific factors, including the type of condition, the level of contagion, the type, place and timing of exposure, the number of cases, and the nature and extent of risk to the public. Each of the over 70 notifiable conditions has unique investigation considerations and corresponding procedures that include differing outreach and education components. The DOH Guidelines for the investigation of notifiable conditions are available here:

<https://www.doh.wa.gov/ForPublicHealthandHealthcareProviders/NotifiableConditions/ListofNotifiableConditions>.

4. When Public Health 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. I created the listserv about 15 years ago, and it is hosted by the University of Washington. There are approximately 3,000 subscribers to the listserv. The subscribers are individual licensed healthcare providers (i.e. doctors and nurses), not entire medical institutions. We encourage healthcare providers to sign-up

for the listserv and to share the information posted on it with others in their practice environments, but there is no requirement for them to do so.

5. Either I or a member of my staff that I designate when I am not available determines under what circumstances and when to share information concerning notifiable conditions with the healthcare providers on the listserv. Generally, we put notices on the listserv when we want to inform providers of (i) infectious disease outbreaks where there is potential for ongoing transmission risk to the general public; (ii) unusual infectious disease activity taking place elsewhere that has implications for healthcare providers locally; and (iii) changes to Centers for Disease Control (“CDC”) guidelines or recommendations when they are relevant to local communicable diseases of population health significance.

6. The Department has nowhere near the resources necessary to thoroughly investigate and issue a health advisory regarding each individual report it receives, nor would such a policy make sense from a public health or medical perspective. For example, we may receive in a year over 700 reports of campylobacteriosis infections; over 200 cases of salmonella infection, 300 of giardia; 1000 of chronic hepatitis B, 2,800 of chronic hepatitis C, and, approximately 100 cases of active tuberculosis. All of these are theoretically transmittable, and we must rely on our investigation criteria to determine what if any further action is necessary

and appropriate from a public health standpoint. For more information about the volume of reports we receive, see <https://www.kingcounty.gov/depts/health/communicable-diseases/disease-control/surveillance-summaries.aspx>.

7. To put this in further perspective, in 2016, the Department issued 26 provider health advisories, several of which were information about the Zika virus. In 2017, we issued 16 health advisories to providers. We carefully consider and limit the issuance of these types of notices because healthcare providers are expected to be familiar with, and are familiar with, a vast majority of notifiable conditions.

8. The Department also sends out information to the public on a variety of health topics, including certain notifiable conditions. Notifications to the public are sent via the Department's website, its blog (the Public Health Insider), other forms of social media, and also through press releases. Public Health's Communications office, in consultation with my staff and me, determines when to issue public notifications through these channels, again, referring to the DOH condition-specific guidance. With respect to public notices, the Department issues roughly two per month out of thousands of cases (i.e. less than 1% of the time).

9. If the Department, and other public health departments across the State, were subject to legal liability for each decision they made

whether or not to issue a health advisory (to providers or the public), the entire process would become a form of risk management rather than a public health exercise based on sound public health rationale and medical judgment. Moreover, determining whether to issue a health advisory must also consider the dangers of issuing a high volume of messages of low relevance and utility for our health care providers and related “message fatigue,” which could lead healthcare providers to ignore the advisories and/or unsubscribe from the listserv.

10. A substantial increase in the issuance of health advisories would be counterproductive and logistically impossible to carry out with any effectiveness, and would likely lead to substantial detrimental unintended consequences, including increased false-positive test results from testing of persons unlikely to have the condition in question. In my experience, DOH, healthcare providers, insurers, and public health associations would all be concerned about this type of substantial change to the way in which public health departments operate and carry out their missions.

I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

Executed this 13th day of November, 2018, at Seattle, Washington.

A handwritten signature in black ink, appearing to read 'J. Duchin', with a stylized flourish at the end.

Jeffrey Duchin, M.D.

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 13th day of November, 2018, I caused to be served, via the Washington State Appellate Court's Portal System, and via electronic mail, a true copy of the foregoing document upon the parties listed below:

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