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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,

JUSTIN WARREN REIF, an individual,

Defendant.

PETITIONER KING COUNTY'S REPLY BRIEF

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I. INTRODUCTION

The gravamen of the Estate’s claim is that the Department of Public Health – Seattle and King County (“King County”) should be held liable in tort for its discretionary decision not to issue a Health Advisory after a single reported case of a noncontagious disease. But the Estate has failed to identify any actionable duty to Mr. Ehrhart. Rather than simply applying common tort principles or exceptions to the public duty doctrine, upholding the trial court’s order here would result in a radical expansion of governmental tort liability.

King County’s claimed duty arises from the general regulatory mandate in WAC 246-101-505 to “[r]eview and determine appropriate action” for over 80 various health conditions. It is black letter law that regulatory mandates such as WAC 246-101-505 that protect the general public and involve the exercise of discretion do not create tort duties to individuals. Like any other private defendant, the County can only be liable in tort “if it has a statutory or common law duty of care.” *Osborn v. Mason Cty.*, 157 Wn.2d 18, 27-28, 134 P.3d 197 (2006). Regulatory mandates such as WAC 246-101-505 do not under the public duty doctrine extend governmental liability beyond the liability the government would have as a private party. The trial court thus erred when it denied

the County's motion for summary judgment and instead held that the public duty doctrine presented a jury question.

Acknowledging that no authority supports a tort claim against the County under these circumstances, the Estate urges the Court to abandon the public duty doctrine and over 50 years of precedent, and create a new tort duty arising out of WAC 246-101-505. The Court should reject this request, which is legally unprecedented and would lead to potentially unlimited liability for local health departments across the state.

The decision below should be reversed and the Estate's tort claims against the County dismissed.

II. ARGUMENT

A. The Public Duty Doctrine Bars the Estate's Tort Claim.

The public duty doctrine recognizes that "governments, unlike private persons, are tasked with duties that are not legal duties within the meaning of tort law[.]" *Washburn v. City of Federal Way*, 178 Wn.2d 732, 753, 310 P.3d 1275 (2013). "Thus, where a plaintiff alleges the public entity breached a duty imposed by statute, ordinance, or administrative rule, [Courts] must employ the public duty doctrine as a tool analyzing whether the legislative body intended the duty to extend to the general public or a particular class of individuals." *Mita v. Guardsmark, LLC*, 182 Wn. App. 76, 83, 328 P.3d 962 (2014) (citing

Munich v. Skagit Emergency Commc'ns Ctr., 175 Wn.2d 871, 888, 288 P.3d 328 (2012) (Chambers, J., concurring)). “If the public entity owes this legislatively mandated duty to the general public, it does not owe the duty to any particular person harmed by its breach.” *Mita*, 182 Wn. App. at 83-84. “This limitation ensures the public entity has no greater liability than private entities.” *Id.* at 84; *see* RCW 4.96.010(1).

Here, the Estate has alleged that WAC 246-101-505 created a mandatory duty to issue a Health Advisory after a single case of Hantavirus was discovered on private property. CP 4-5. To the contrary, WAC 246-101-505 is a general regulatory mandate that requires the County to exercise its discretion in response to over 80 different health conditions, but does not mandate any specific action as a result of the exercise of discretion. Thus, WAC 246-101-505 does not create tort duties to individuals like Mr. Ehrhart, nor does it correspond to any analogous common law duty, and the Estate has not alleged otherwise. The public duty doctrine bars the Estate’s claim.

Recognizing the general prohibition on government liability for regulatory actions, the Estate argued below that the failure to enforce or rescue exceptions to the public duty doctrine permitted its claim to survive. CP 51-56. The trial court properly rejected application of the rescue exception, but “splitting the baby,” the trial court erroneously ruled

that the County's threshold legal duty under the failure to enforce exception presented a jury question. VRP (Sept. 28, 2018) at 22:5-24:4. Endeavoring to save this unprecedented ruling, the Estate reverses its argument below, and now claims that the threshold question of a legal duty under WAC 246-101-505 presents a factual issue. The Estate is wrong. As a matter of law, WAC 246-101-505 creates no tort duties to individuals. And no exception to the public duty doctrine applies. The Estate's claims against the County should be dismissed as a matter of law.

1. Whether WAC 246-101-505 Imposes a Mandatory Duty to the Estate Is a Question of Law.

Contradicting its argument below that "duty is a question of law" and is "properly resolvable on summary judgment," CP 50, the Estate now claims that "Washington courts routinely treat legal duty as a mixed question of fact and law[.]" Estate Br. at 22. But the Estate has not cited any authority that would make the requirements of WAC 246-101-505 a jury question. Rather, "construction of a statute is a question of law." *Caldwell v. City of Hoquiam*, 194 Wn. App. 209, 215, 373 P.3d 271 (2016). The trial court's order sending the legal question of the County's duty to the jury should be reversed. *See Sheehan v. Cent. Puget Sound Reg'l Transit Auth.*, 155 Wn.2d 790, 797, 123 P.3d 88 (2005).

None of the cases cited by the Estate support the trial court's order. First, the Estate incorrectly relies on the court of appeals' decision in *Washburn*, 169 Wn. App. 588, 283 P.3d 567 (2012), *aff'd on other grounds*, 178 Wn.2d 732, 310 P.3d 1275 (2013), to argue that courts have "rejected" deciding questions arising under the public duty doctrine as a matter of law. Estate Br. at 23. This Court, however, supplanted that decision when it explicitly affirmed on "different grounds." 178 Wn.2d at 738. Specifically, this Court held that the city's motion for summary judgment was properly denied because the city, **as a matter of law**, owed the plaintiff a legal duty under the legislative intent exception to the public duty doctrine. *Id.* at 752-57. Contrary to the Estate's assertion, this Court in *Washburn* did not hold that further fact-finding was necessary to determine the legislature's intent in enacting chapter 10.14 RCW. *Id.* at 755-57. Rather, this Court determined the existence of the city's duty by analyzing only the statute's language. *Id.* And having initially found a duty as a matter of law, the question of whether the city had carried out that legal duty negligently was a fact question for the jury. *See id.* at 757. Here, by contrast, the trial court ruled that whether WAC 246-101-505 imposes a legal duty in the first instance presents factual issues. *Washburn* does not support this erroneous ruling.

The Estate's reliance on *Mita* is similarly misplaced. Estate Br. at 22-23. Though Spokane County was a defendant in that case, the public duty doctrine was not at issue because the plaintiff alleged breach of multiple common law duties of care. *Mita*, 182 Wn. App. at 84 (doctrine does not apply where "plaintiff alleges the public entity breached a common law duty it shares in common with private entities."). Accordingly, the court of appeals did not hold that the existence of a duty was a factual question. Rather, the court held that the alleged common law duties existed "[a]s a matter of law," and that the question for the jury was whether those common law duties were breached. *Id.* ("As a matter of law, the public entity owes this common law duty to a person it should reasonably foresee may be harmed by its breach."). Here, the Estate has not alleged the existence of any cognizable common law duty, let alone one that was allegedly breached, nor could it. CP 2-10.

Finally, contrary to the Estate's claim, King County did not argue below that duty was a question of fact, and neither did the Estate. Estate Br. at 22. Rather, the parties agreed it presented a question of law. CP 50, 360. But because the Estate abruptly moved for summary judgment soon after serving the complaint, the County requested a continuance to file a cross-motion on the public duty doctrine because judicial economy supported hearing the motions together. CP 181-85. The Estate

vigorously opposed the requested continuance, arguing that the County was not entitled to more time because the threshold question of duty under the public duty doctrine presented a “discrete legal issue” that would not raise any fact issues. CP 245 n.10, 243, 246-47. The Estate should not be heard to claim otherwise now.

In sum, the initial determination of whether a statute or regulation imposes a nonactionable general duty or a specific duty to an individual is a question of statutory interpretation, which courts determine as a matter of law. The trial court was wrong to send the question to the jury via its “conditional grant” of summary judgment.¹ As detailed below, this Court should hold as a matter of law that WAC 246-101-505 creates no actionable tort duties and dismiss the Estate’s claims.

2. The Failure to Enforce Exception Does Not Apply.

While the Estate nominally cites the applicable case law on the failure to enforce exception, it then misconstrues it, arguing generally that where there is a “known hazard” and a “governmental obligation to address it,” the public duty doctrine “does not apply.” Estate Br. at 25. This merely begs the question.² The very purpose of the public duty

¹ The Estate does not attempt to defend the trial court’s procedurally improper order.

² The Estate does not address several cases relied upon by King County, including *Donohoe v. State*, 135 Wn. App. 824, 142 P.3d 654 (2006), *McKasson v. State*, 55 Wn. App. 18, 776 P.2d 971 (1989), and *Forest v. State*, 62 Wn. App. 363, 814 P.2d 1181 (1991). King Cty. Op. Br. at 29-30.

doctrine and its exceptions is to evaluate whether the government's "obligation to address" a particular situation runs to an individual, or to everyone. Here, there is (1) no statutory violation; (2) no specific statutory obligation to provide broad public notification of an isolated case of a noncontagious condition; and (3) no demonstrated legislative intent to protect a class of persons other than the public in general. In other words, no element of the failure to enforce exception is satisfied. The public duty doctrine thus bars the Estate's claim.

The Estate argues that *Livingston v. City of Everett*, 50 Wn. App. 655, 751 P.2d 1199 (1988), and *Gorman v. Pierce Cty.*, 176 Wn. App. 63, 307 P.3d 795 (2013), present "comparable" circumstances, but neither case supports imposing tort liability here. Estate Br. at 25. Unlike the general directive to the County in WAC 246-101-505 to "[r]eview and determine appropriate action" in response to over 80 different health conditions, the government entities in *Livingston* and *Gorman* were mandated to take specific, corrective measures in dealing with dangerous animals under applicable municipal codes. The animal control officers in *Livingston* had a mandatory duty to "release[]" an "impounded animal" if "such animal is not dangerous or unhealthy." 50 Wn. App. at 658 (internal quotations omitted). In *Gorman*, the county had a duty to apply certain criteria to "classify potentially dangerous dogs." 176 Wn. App. at

78 (internal quotations omitted). In each case, liability turned on the specific and mandatory nature of the government’s obligation to respond to a statutory violation.

Here, by contrast, the County is not required to take any specific mandatory action when notified of a single case of Hantavirus. Rather, the County is directed to “[r]eview and determine appropriate action” for all notifiable conditions, and does so based on the circumstances of each individual reported case. As the Estate concedes, WAC 246-101-505 vests King County with discretion in taking any number of actions in response to notifiable conditions and does not require issuance of Health Advisories. Estate Br. at 29. Indeed, the State Department of Health Guidelines (the “DOH Guidelines”) detail hundreds of different actions King County could appropriately take in response to a reported condition.³ Imposing tort liability is inconsistent with a regulatory scheme where the government has “broad discretion” regarding “whether and how to act.” *Pierce v. Yakima Cty.*, 161 Wn. App. 791, 799, 251 P.3d 270 (2011); *see also* King Cty. Op. Br. at 20. In such cases, courts have repeatedly

³ The “Guidelines for Public Health Investigations” are available at <https://www.doh.wa.gov/ForPublicHealthandHealthcareProviders/NotifiableConditions/ListofNotifiableConditions> (last visited Sept. 19, 2019). The Estate misrepresents the record in several respects. Contrary to the Estate’s claim, the County has not misstated the Guidelines. Nowhere in the Hantavirus Guidelines is a public advisory recommended in conjunction with an exposure on private property. Moreover, the Estate is wrong that the County “did nothing” in response to the first case, rather the County conducted a full investigation. *See* CP 386-87. Finally, the “timeline” cited by the Estate was not prepared by the Health Department, but a friend of the decedent. Estate Br. at 20.

refused to apply the failure to enforce exception. King Cty. Op. Br. at 28-30 (collecting cases); *see also* App. at 17-18 (commissioner’s order granting review and collecting cases).⁴

The Estate is also wrong that neither *Livingston* nor *Gorman* involved a statutory violation by a member of the public. Estate Br. at 27-29. In each, the dog owners violated relevant ordinances prohibiting certain conduct relating to dogs. *See Livingston*, 50 Wn. App. at 658 (“The Code provides that it is unlawful to permit any animal to become at large[.]”); *Gorman*, 176 Wn. App. at 81 (county “required to act if it observes a violation of the potentially dangerous dog restrictions”). Here, by contrast, there was no regulatory violation by anyone and nothing for the County to enforce. King Cty. Op. Br. at 24-28.⁵

While exceptions to the public duty doctrine must be narrowly construed, the Estate asks the Court to expand the exception beyond statutory violations to include “‘formally promulgated’ mandate[s]” that

⁴ “App.” citations refer to the appendix attached to King County’s Opening Brief.

⁵ The Estate’s attempt to distinguish the other cases relied upon by the County also fails. Estate Br. at 28 n.22. Those cases establish that the relevant inquiry is whether the County was aware of a statutory violation by a member of the public. Here, no such violation occurred. *See Smith v. City of Kelso*, 112 Wn. App. 277, 284, 48 P.3d 372 (2002) (rejecting failure to enforce exception precisely because, like here, the regulation in question did not “regulate public conduct” and therefore the city could not “fail to enforce anything”); *Pierce*, 161 Wn. App. at 801 (failure to enforce exception did not apply in part because the county did not observe a code violation by the homeowner or his contractor); *Honcoop v. State*, 111 Wn.2d 182, 189-91, 759 P.2d 1188 (1988) (failure to enforce exception did not apply because the state did not have knowledge of violations at the time the plaintiffs suffered damages).

require the County to “act [reasonably] in the face of a physical danger[.]” Estate Br. at 30. But generalized obligations of government, even in the form of “formal mandates,” do not create tort liability to individuals. *Washburn*, 178 Wn.2d at 753-54. Moreover, there is no limiting principle to the Estate’s formulation of the exception. While the Estate concedes that the County need not issue a Health Advisory “every time someone reports a diagnosis of flu or autism,” Estate Br. at 31, the Estate does not explain why the County was required to do so after a single confirmed case of a noncontagious disease like Hantavirus was discovered on private rural property. Accepting the Estate’s argument would effectively require the County to issue a Health Advisory in response to any report of a notifiable condition, which would likely lead to substantial detrimental unintended consequences, such as false-positive results and information saturation. *See* CP 386; App. at 22; App. at 6, ¶ 10.

In sum, the Estate cannot prove that there was a regulatory violation, a specific regulatory mandate for corrective action, or any duty beyond that owed to the general public. Accordingly, the failure to enforce exception does not apply.

3. The Rescue Exception Does Not Apply.

Though rejected by the trial court, and not raised in opposition to the County’s Motion for Discretionary Review or Opposition to Statement

of Grounds for Direct Review,⁶ the Estate now argues that the rescue exception applies “[t]o the extent that the failure to enforce [exception] does not apply[.]” Estate Br. at 31. In short, the Estate’s theory is that the County gratuitously undertook to rescue Mr. Ehrhart through its discretionary practice of periodically posting Health Advisories on its listserv when deemed appropriate. Though not remotely supported by the record, the Estate’s theory is that the healthcare community at large relies on the County to “notify them of rare and exotic diseases in the area” such that they otherwise forego providing appropriate medical care in every case where notifications are not provided. *Id.* at 35.

The Estate’s theory lacks support in either law or logic. “[A] public entity has a duty under the rescue doctrine when an injured party reasonably relies, or is in privity with a third party that reasonably relies, on its promise to aid or warn.” *Osborn*, 157 Wn.2d at 26. Washington courts have consistently held that, as with the failure to enforce exception, the government’s promise must be to a “particular plaintiff” and cannot be based on the government’s obligations to the general public. *See id.* at 25

⁶ The Court can refuse to consider the Estate’s assertion of the rescue exception on this ground alone. “It is a well-established maxim that this court will generally not address arguments raised for the first time in a supplemental brief and not made originally by the petitioner or respondent within the petition for review or the response to petition.” *Cummins v. Lewis Cty.*, 156 Wn.2d 844, 851, 133 P.3d 458 (2006).

(internal quotations omitted); 16 Wash. Practice, Tort Law & Practice § 15:11 (4th ed. updated Oct. 2018).

As the trial court correctly ruled, and the Estate concedes, King County did not undertake to warn or render aid to Mr. Ehrhart. VRP (Sept. 28, 2018) at 24:5-13.⁷ Rather, the Estate’s rescue theory is that by periodically issuing Advisories of serious threats to public health as a component of its work under WAC 246-101-505, the County has prevented healthcare providers from appropriately treating their patients in all cases in which the County does not issue Advisories. In other words, the Estate’s claim is that by virtue of issuing any Advisories at all, the County has engendered reliance by the healthcare community at large, such that any person who contracts a fatal disease in the County has an actionable tort claim for a failed “rescue.” No authority supports this notion. The Estate fails to show any promise to warn at all, let alone one that was made to a particular person in privity with Mr. Ehrhart. Moreover, the alleged “reliance” by the “healthcare community” at large is both too attenuated and too nebulous to be reasonable.⁸

⁷ Contrary to the Estate’s assertion, Estate Br. at 34 n.29, the trial court substantively ruled on the rescue exception to the public duty doctrine and rejected it. See VRP (Sept. 28, 2018) at 24:5-13; *Gabelein v. Diking Dist. No. 1 of Island Cty. of State*, 182 Wn. App. 217, 239, 328 P.3d 1008 (2014) (“Trial courts do not make dicta.”).

⁸ To that end, the Estate has the notice requirements exactly backwards. WAC 246-101 requires **healthcare providers to notify the County** of certain conditions, not the other way around. As Dr. Jeffrey Duchin testified, Advisories to healthcare providers are issued via the County’s voluntary provider listserv in only a small fraction of the

This Court’s decision in *Osborn* is on point. There, a registered sex offender raped and murdered a county resident after another concerned resident requested that the county post flyers or otherwise notify the community of the sex offender’s release. 157 Wn.2d at 21. The victim’s parents sued and this Court rejected the parents’ argument that the county had a duty to warn them of the sex offender’s presence because an officer merely promised to warn “the community” and then failed to do so. *Id.* at 28. The Court explained that “no general duty to warn exists in the absence of a known danger to a **specific individual**[.]” *Id.* (internal quotations omitted and emphasis added). Although the county had a “‘duty’ to protect its citizens in a colloquial sense,” the Court held that the county did “not have a **legal** duty[.]” *Id.* (emphasis in original). According to the Court, notification to “the public at large” of the release of each sex offender with a history of violence would “produce a cacophony of warnings that by reason of their sheer volume would add little to the effective protection of the public.” *Id.* at 29 (internal quotations omitted). These same concerns are present here.

Multiple other decisions illustrate the failure of the Estate’s rescue theory. For example, in *Babcock v. Mason Cty. Fire Dist. No. 6*, 101 Wn.

thousands of cases for which the County receives notice of reportable conditions. App. at 5, ¶ 7 (16 Advisories issued in 2017). Notification decisions are made in consultation with state guidelines and public health best practices. App. at 4-6. The Estate concedes these decisions are discretionary and that Advisories are not required.

App. 677, 5 P.3d 750 (2000), *aff'd on other grounds*, 144 Wn.2d 774, 30 P.3d 1261 (2001), the court held that the district did not owe the property owners a duty under the rescue doctrine in part because the district was created to “protect the property of **all** citizens[.]” *Id.* at 686 (emphasis in original); *see also Johnson v. State*, 164 Wn. App. 740, 751-52, 265 P.3d 199 (2011) (911 operator’s statement that it would “notify troopers” of erratic driver on highway did not amount to a gratuitous offer to render aid to “specific citizens,” “as opposed to a general promise to render aid that the State made as part of its duty to **all** citizens” (internal quotations omitted and emphasis in original)); *Weaver v. Spokane Cty.*, 168 Wn. App. 127, 142, 275 P.3d 1184 (2012) (rescue doctrine did not apply because deputy’s “advice to walk facing traffic was not a gratuitous promise of safety but a recitation of the law”). Like the general government obligations in *Babcock* and *Osborn*, the regulations here are intended for the benefit of the “public’s health,” not a specific individual. *See* WAC 246-101-005; Estate Br. at 35 (alleging the County’s “representations and regulations” concern “people like the Ehrharts”). The County’s efforts to “[r]eview and determine appropriate action” under WAC 246-101-505 therefore do not constitute gratuitous offers to aid Mr. Ehrhart sufficient to satisfy the rescue exception.

None of the cases cited by the Estate are on point. *See* Estate Br. at 33-34. As explained above, *Mita* did not address the public duty doctrine because the plaintiffs relied only on a common law duty which does not exist and has not been alleged here. 182 Wn. App. at 84.⁹ Regardless, like the other cases the Estate cites, *Mita* involved a specific promise to a particular plaintiff. *See id.* at 86-87.¹⁰ Here, by contrast, the County never promised Mr. Ehrhart or his healthcare providers that it would issue a Health Advisory after a single case of Hantavirus.

Finally, the Estate’s alleged “reliance” theory is unreasonable on its face. The Estate cannot show a gratuitous promise from the County on which Mr. Ehrhart’s physicians relied such that they “refrained from acting” on his behalf. *See Johnson*, 164 Wn. App. at 750. Moreover, healthcare providers are expected to be familiar with the vast majority of notifiable conditions and routinely treat patients without Health Advisories. CP 386. In fact, the December 2016 nonfatal case of

⁹ *Brown v. MacPherson’s, Inc.*, 86 Wn.2d 293, 295, 545 P.2d 13 (1975), and *Meneely v. S.R. Smith, Inc.*, 101 Wn. App. 845, 856, 5 P.3d 49 (2000) also concerned common law, not regulatory, duties. *Munich*, 175 Wn.2d at 879-84, and *Chambers-Castanes v. King Cty.*, 100 Wn.2d 275, 285-87, 669 P.2d 451 (1983), involved the special relationship, not the rescue, exception.

¹⁰ *See also Munich*, 175 Wn.2d at 875 (911 operator assured caller a deputy was “already . . . headed toward [caller]”); *Chambers-Castanes*, 100 Wn.2d at 277, 279-80, 286-87 (multiple callers, including plaintiffs, were repeatedly assured by a 911 operator that an officer was “on the way”); *Brown*, 86 Wn.2d at 298-300 (real estate division assured expert that it would “convey [expert’s] warning” that property owners were in a “high-risk avalanche area”); *Meneely*, 101 Wn. App. at 849, 859-60 (trade association represented to consumers in its “industry wide safety standards” that specific model of diving board was “safe to use” with specific type of pool).

Hantavirus was successfully diagnosed and treated at Overlake Medical Center without a Health Advisory.¹¹ CP 386-88, 497-98. Given the limited number of Advisories issued as compared to the number of notifiable conditions reported to the County, healthcare providers ably treat notifiable conditions without the issuance of a Health Advisory all the time. CP 386; App. at 4-5, ¶¶ 6-8. The Estate thus cannot demonstrate “reasonable reliance” by Mr. Ehrhart’s healthcare providers, which is the “linchpin of the rescue doctrine.” *Osborn*, 157 Wn.2d at 25, 28.

In sum, the Estate cannot prove any element of the rescue doctrine exception. The Estate’s tort claim against the County must be dismissed.

4. None of the Other Exceptions to the Public Duty Doctrine Apply.

Though the Estate affirmatively disclaimed application of all but the failure to enforce and rescue exceptions to the public duty doctrine, a footnote in the Estate’s response brief suggests it intends to later pursue the other exceptions if the County’s appeal is successful. Estate Br. at 31 n.28. Judicial estoppel prevents this tactical endeavor, which would regardless fail on the merits.

¹¹ Mr. Ehrhart was also treated at Overlake Hospital, which was obviously on notice of the prior case of Hantavirus. CP 500. Nothing in the record supports the Estate’s claim that it was “too late” for treatment when Mr. Ehrhart arrived at Overlake. Rather, despite that hospital’s prior experience with a Hantavirus case, his diagnosis of Hantavirus was not confirmed until weeks after his death. This is because Hantavirus presents like many other illnesses and testing for the virus takes weeks in a laboratory. *See, e.g.*, CP 43, 391-92, 431, 598. Moreover, there is no evidence that Mr. Ehrhart’s physician at Swedish received County Advisories, let alone withheld certain treatment in the absence of one.

As a threshold matter, contrary to the Estate’s assertion, it expressly disclaimed application of the special relationship and legislative intent exceptions before the trial court. *See* VRP (Oct. 5, 2018) at 8:7-13 (discussing rulings on the failure to enforce and rescue doctrine exceptions and stating it was “not pursuing the other ones”).¹² The County reasonably relied on the Estate’s position and therefore, like the Estate, did not address the other exceptions in its direct review or merits briefing. Accordingly, this Court should prevent the Estate from changing its position at this stage in the litigation.¹³ *See Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (judicial estoppel precludes inconsistent position in later judicial proceeding).

Even on the merits, however, the special relationship exception does not apply and the Estate has never alleged any facts that support it. A special relationship imposing an actionable duty exists only where (1) there is “direct contact or privity” between the public official and the

¹² The Estate even went so far as to seek sanctions against the County for attempting to secure a ruling on those exceptions. *See* VRP (Oct. 12, 2018) at 16:13-15. What the Estate mischaracterizes in its brief as “needless motions practice” was in fact the County seeking a ruling on its own motion for summary judgment, which the Estate argued should not be heard in light of the trial court’s “conditional grant” of the Estate’s motion.

¹³ As the Estate itself argued, the purpose of early adjudication of the public duty doctrine is to prevent protracted and expensive litigation against the government where no actionable duty ultimately exists. CP 248. The Estate should not be permitted multiple bites at the apple by attempting to raise new potential theories of liability for the first time on appeal or returning to the trial court to try again on theories it expressly disavowed. Moreover, the Court can reject these theories because they were not raised in opposition to the County’s request for review. *Cummins*, 156 Wn.2d at 851.

plaintiff “which sets the [plaintiff] apart from the general public,” and (2) there are “express assurances given by a public official,” which (3) gives rise to “justifiable reliance on the part of the plaintiff.” *Cummins v. Lewis Cty.*, 156 Wn.2d 844, 854, 133 P.3d 458 (2006) (internal quotations omitted). Here, King County never had direct contact with, nor made any express assurances to, Mr. Ehrhart or anyone else on which he could justifiably rely. *Id.* at 855 (“A government duty cannot arise from implied assurances.”); *see also Honcoop v. State*, 111 Wn.2d 182, 191-93, 759 P.2d 1188 (1988) (“Mere allegations that the [government] failed to provide adequate information or that the [government] failed to explore every possible risk or contingency is not sufficient to satisfy the assurance prong[.]”).

Similarly, the legislative intent exception does not apply and the Estate has never alleged otherwise. That exception applies only where the plain language of a statute “evidences a clear legislative intent to identify and protect a particular and circumscribed class of persons.” *Id.* at 188. Here, “[t]he purpose of notifiable conditions reporting is to provide the information necessary for public health officials to **protect the public’s health** by tracking communicable diseases and other conditions.” WAC 246-101-005 (emphasis added); *see Honcoop*, 111 Wn.2d at 188-89

(legislature did not intend to protect individual class of dairy operators where statutes referenced only “public welfare” and “public health”).

In short, WAC 246-101-505 does not create an actionable duty to the Estate. The trial court’s order “conditionally” granting the Estate’s motion should be reversed, and the claims against the County dismissed.

B. The Court Should Not Overrule its Public Duty Doctrine Jurisprudence and Doing So Would Not Create County Liability Here.

Recognizing that the Estate cannot identify an actionable duty owed to the Estate or otherwise defend the trial court’s erroneous order, the Estate argues for the first time on appeal that this Court should throw out the public duty doctrine all together, requiring reversal of hundreds of cases. Estate Br. at 3, 36-42. The Estate does not approach the standard for overturning precedent, which requires a “clear showing” that the “established rule” is “both incorrect **and** harmful.” *State v. Otton*, 185 Wn.2d 673, 678, 687-88, 374 P.3d 1108 (2016) (internal quotations omitted and emphasis in original).

Rather, the Estate enumerates multiple cases in which a plaintiff failed to hold the government liable in tort, and without attempting to distinguish their holdings on legal grounds, casts the decisions as “form [over] substance.” Estate Br. at 37-38. The Estate then points to other decisions, where a plaintiff has prevailed, and designates these cases as a

“trend” that this Court should follow. *Id.* at 38-39. Based on these characterizations, the Estate then urges the Court to return to the “traditional” rule whereby the government is liable to the extent of a private person. *Id.* at 40. Beyond failing to satisfy the criteria for overturning well-established precedent, the Estate’s argument reveals a fundamental misunderstanding of the public duty doctrine.

The “traditional rule” urged by the Estate **is the definition of the public duty doctrine.** *Munich*, 175 Wn.2d at 888 (“According to the traditional rule, municipal ordinances impose a duty upon municipal officials which is owed to the public as a whole, so that a duty enforceable in tort is not owed to any particular individual.” (Chambers, J., concurring)). Municipal liability for duties imposed by statute or regulation is limited because, as this Court has observed, “[p]rivate persons do not govern, pass laws, or hold elections.... [they] are not required by statute or ordinance to issue permits, inspect buildings, or maintain the peace and dignity of the State of Washington.” *Id.* In other words, the public duty doctrine recognizes “some governmental functions are not meaningfully analogous to anything a private person or corporation might do.” *Id.* at 894-95. As such, the public duty doctrine does not create additional governmental immunity, it merely ensures that the legislature’s intent in equating private and public tort liability is carried

out. *See Cummins*, 156 Wn.2d at 853. The central purpose of the public duty doctrine is to ensure that governments do not bear greater tort liability than private persons. *See Washburn*, 178 Wn.2d at 753-54 (citing *Munich*, 175 Wn.2d at 887) (Chambers, J., concurring)); *see also Caldwell*, 194 Wn. App. at 215 n.8.

Accordingly, abolishing the doctrine as urged by the Estate would not create liability for the County here, because no private person would be liable under the facts alleged. The County’s decision not to issue a Health Advisory after a single case of Hantavirus was not tortious in and of itself, and there is no common law duty to issue Health Advisories at all, let alone after a single case of a noncontagious disease.¹⁴ The Estate claims the “trend” has been to impose tort liability on governments based on policy reasons, but in all of the cases upon which the Estate relies, the courts in fact based their holdings on common law duties or legislative enactments. *See Estate Br.* at 38-39.¹⁵

¹⁴ The Estate also erroneously claims that the court in *Margitan v. Spokane Reg’l Health Dist.*, No. 34606-4-III, 2018 WL 3569972, (Wash. Ct. App. July 24, 2018), *as amended* (Sept. 13, 2018), *review denied*, 192 Wn.2d 1018, 433 P.3d 817 (2019), suggested a public health risk alone would be sufficient to impose an actionable legal duty on a public entity. *Estate Br.* at 39-40. Rather, the public health risk was inextricably linked to the issue of whether there was a regulatory violation for purposes of the failure to enforce exception, i.e., whether the neighboring property owners’ drain field was within 5 feet of the plaintiffs’ easement and thus whether there was a public health risk.

¹⁵ *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 549-52, 442 P.3d 608 (2019) (discussing common law duties); *H.B.H. v. State*, 192 Wn.2d 154, 164, 429 P.3d 484 (2018) (detailing precedent related to the “State’s role as *parens patriae* in the child welfare system”); *Christensen v. Royal Sch. Dist. No. 160*, 156 Wn.2d 62, 67, 124 P.3d

What the Estate really wants the Court to do is adopt a new expanded scope of tort liability for the government in which a statutory or regulatory obligation enacted to benefit the public provides the basis for tort liability to any member of the public. There is no precedent or public policy rationale for such an expansion of governmental liability. The government is not the insurer against crime although it has policing obligations nor against adverse health conditions although it has public health obligations.

Thus, there is no basis to follow the Estate's suggestion that the Court judicially create an actionable tort duty arising out of the general mandate of WAC 246-101-505. As noted above, consistent with WAC 246-101-505, the County responds to the over 80 diverse notifiable conditions by exercising its medical expertise, consulting the DOH Guidelines and employing public health best practices. *See* CP 386. "Appropriate action" is not defined under the regulations, but may include "outbreak investigation, redirection of program activities, or policy development." *See* WAC 246-101-005. As detailed in the Guidelines, DOH's recommended approach to any given condition depends on several

283 (2005) (relying on "well-established" Washington law that "a school district has an enhanced . . . duty to protect minor students in its care"); *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wn.2d 442, 454, 243 P.3d 521 (2010) (basing holding in part on fact that the "engineers' common law duty of care has long been acknowledged in this state").

condition-specific factors, including type of condition, level of contagion, type and place of exposure, number of cases, and the extent of risk to the public. App. at 3, ¶ 3. The Estate fails to recognize these considerations and offers no meaningful guidance on what its newly created tort duty would entail.

Finally, this Court has already rejected the Estate’s argument that the public duty doctrine is incompatible with the Legislature’s abrogation of sovereign immunity. See Estate Br. at 40; *Chambers-Castanes*, 100 Wn.2d at 288 (“Abrogation of the doctrine of sovereign immunity did not **create** duties where none existed before. It merely permitted suits against governmental entities that were previously immune from suit.” (emphasis in original)); see *Edgar v. State*, 92 Wn.2d 217, 228, 595 P.2d 534 (1979) (similar).¹⁶ The Estate has thus failed to identify any basis on which to depart from, let alone overrule, the public duty doctrine.

III. CONCLUSION

Contrary to the Estate’s assertion, a decision in the County’s favor would not “immunize” the County for any alleged misconduct in all

¹⁶ The Estate’s argument that the public duty doctrine has become “untethered” from “justice,” Estate Br. at 5 n.4, is also without merit. The purpose of the public duty doctrine has always been to ensure that public entities, like any other defendants, are “liable for negligence only” if they have a “statutory or common law duty of care.” See *Osborn*, 157 Wn.2d at 27-28; *Washburn*, 178 Wn.2d at 753-54 (similar); *Taylor v. Stevens Cty.*, 111 Wn.2d 159, 170, 759 P.2d 447 (1988) (“The policy underlying the public duty doctrine is that legislative enactments for the public welfare should not be discouraged by subjecting a governmental entity to unlimited liability.”).

circumstances. Rather, such a decision would be consistent with the long line of cases holding that a government may only be liable in tort if a statutory or common law duty to an individual exists. Moreover, common sense counsels against finding the County owed Mr. Ehrhart a duty to issue a Health Advisory because, as this Court's commissioner correctly acknowledged, doing so would lead to a "flood" of Health Advisories, "ultimately diluting the effectiveness of a system intended to warn providers and the public of serious public health risks." App. at 22; 5-6. Finally, the Estate may still have its day in court independent of the outcome of this case because it also named Mr. Ehrhart's treating physician and hospital as defendants. Estate Br. at 5 n.4, 28 n.21, 42.

In sum, this Court should hold that the County's decisions arising under WAC 246-101-505 pertaining to the issuance of Health Advisories evidence the County's duties to the public as a whole, and create no actionable tort duty to the Estate.¹⁷

For the foregoing reasons, this Court should reverse, hold that the public duty doctrine applies as a matter of law, and dismiss the Estate's claim against the County.

¹⁷ The record does not support the Estate's assertion, Estate Br. at 14-15, that "virtually every jurisdiction in Washington and elsewhere" issue notices after the first confirmed case of Hantavirus. Moreover, even if true, the Estate fails to explain how the discretionary decisions of a handful of Washington counties and states is relevant to the outcome of this case, which involves a general obligation to respond to notifiable conditions in a manner consistent with public health best practices.

RESPECTFULLY SUBMITTED this 20th day of September, 2019.

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I am and at all times hereinafter mentioned was a citizen of the United States, over the age of 21 years, and not a party to this action. On the 20th day of September, 2019, I caused to be served, via the Washington State Appellate Court's Portal System, and via electronic mail, a true copy of the foregoing document upon the parties listed below:

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