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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.

**KING COUNTY'S REPLY IN SUPPORT OF ITS
MOTION FOR DISCRETIONARY REVIEW**

PACIFICA LAW GROUP LLP
Paul J. Lawrence, WSBA #13557
Matthew J. Segal, WSBA #29797
Kymberly K. Evanson, WSBA #39973
Athanasios P. Papailiou, WSBA #47591
Special Deputy Prosecuting Attorneys
1191 Second Avenue, Suite 2000
Seattle, WA 98101
206-245-1700

Attorneys for Petitioner King County

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I. INTRODUCTION

At issue is whether King County Department of Public Health (“Health Department”) owed to the Estate a unique legal duty distinct from its duty to any other member of the public. It did not. Where, as here, the County’s claimed duty arises from the general regulatory mandate in WAC 246-101-505 to “review and determine appropriate action”, the public duty doctrine shields the County from the Estate’s tort claim as a matter of law. The trial court thus committed obvious error rendering further proceedings useless when it ruled that the question of the County’s duty for purposes of the “failure to enforce exception” to the public duty doctrine hinges on a jury trial addressing whether the County’s actions were “appropriate.”

While the Estate argued vigorously below that the applicability of the failure to enforce exception is a question of law and moved for summary judgment arguing no facts were in dispute, the Estate now attempts to avoid discretionary review by claiming the factual record on its own dispositive motion was “hotly disputed”. Resp. at 1. The Estate cites no authority supporting its new and contradictory claim that the existence of a regulatory duty is a jury question. Nor does the Estate attempt to defend the trial court’s unprecedented and procedurally

improper “conditional grant of summary judgment,” and subsequent refusal to entertain the Health Department’s cross motion.

In any event, the failure to enforce exception does not apply. As the Estate concedes, no law compels the Health Department to issue health advisories based on a single case of a non-contagious condition like Hantavirus. Rather, the Department is afforded wide discretion in responding to such conditions. Without a regulatory mandate to take specific corrective action, the public duty doctrine bars the Estate’s claim.

Moreover, the trial court’s order also substantially alters the status quo by injecting a tort liability analysis into the Health Department’s exercise of its discretionary authority and expertise.

Review is thus warranted under either RAP 2.3(b)(1) or (b)(2).

II. ARGUMENT

A. **The Trial Court Committed Obvious Error By Ruling That the Failure to Enforce Exception Hinges On Whether the County’s Actions Were “Appropriate”.**

The Estate does not dispute that the public duty doctrine shields the County from tort liability unless a duty was owed specifically to the Estate. “Where the plaintiff claims the governmental entity has breached a duty owed to the public in general, he or she may not recover in tort for lack of an actionable legal duty.” *Washburn v. City of Fed. Way*, 178 Wn. 2d 732, 754, 310 P.3d 1275 (2013). The Estate alleges the County’s duty

to the Estate arises from WAC 246-101-505, which directs the County to “review and determine appropriate action” regarding over 80 notifiable health conditions. This regulation creates a quintessential duty to the general public, not to specific individuals. *Pierce v. Yakima Cty.*, 161 Wn. App. 791, 798, 251 P.3d 270 (2011) (noting a “duty to the nebulous public ... is not actionable”) (citation omitted).¹ This raises a threshold legal issue not a fact question. The trial court obviously erred ruling otherwise.

Reversing its argument below that duty is a question of law, *see* App. at 398, the Estate now defends the trial court’s order by claiming that “Washington courts routinely treat legal duty as a mixed question of fact and law[.]” Resp. at 13, 15. But the Estate has not cited any authority that would make the requirements of WAC 246-101-505 a jury question. Rather, as the Court of Appeals explained in *Gorman*, “an ordinance creates a statutory duty to take corrective action if it mandates a specific action when the ordinance is violated.” *Gorman v. Pierce Cty.*, 176 Wn. App. 63, 77, 307 P.3d 795 (2013). “To determine whether the ordinance is mandatory, [courts] must apply the rules of statutory construction to the ordinance.” *Id.* at 77-78. This analysis is a question of law. *See id.*

¹ Contrary to the Estate’s claim, the County did not argue that duty was a question of fact below. Resp. at 12. Rather, because the Estate abruptly moved for summary judgment 28 days 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. Resp’t App. at 554-55. As it argued below, the County maintains that the public duty doctrine bars the Estate’s tort claim as a matter of law.

The Estate incorrectly relies on the Court of Appeals' decision in *Washburn* to argue that courts have "rejected" deciding the public duty doctrine as a matter of law. Resp. at 14. But the Washington Supreme Court supplanted that decision by determining that Federal Way had a threshold duty to the plaintiff as a matter of law under the legislative intent exception to the public duty doctrine. Contrary to the Estate's claim, the Supreme Court in *Washburn* did not hold that further fact-finding was necessary to determine whether the legislative intent of chapter 10.14 RCW imposed a duty on police officers to serve anti-harassment orders. Rather, the Court determined the existence of Federal Way's duty by analyzing only the statutory language. *Washburn*, 178 Wn.2d at 755-56. The Supreme Court affirmed on the basis that having initially found a duty as a matter of law, the question whether Federal Way had carried out that legal duty negligently was a fact question for the jury. *See id.* at 757.

The Estate's reliance on *Mita v. Guardsmark, LLC*, 182 Wn. App. 76, 83, 328 P.3d 962 (2014), is similarly misplaced.² Resp. at 13. There, the Court of Appeals found "a duty of care imposed by common law, specifically the voluntary rescue doctrine and a special relationship." *Mita*, 182 Wn. App. at 82. But here, the Estate has disclaimed both of

² *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 625, 818 P.2d 1056 (1991) is also not on point. That case concerns common law duties, not obligations imposed by statute, and does not address the public duty doctrine at all.

those theories and has not alleged the existence of any similar common law duty.³ Rather, the Estate alleges only that WAC 246-101-505 imposed a mandatory duty on the Health Department to issue a public notification after a single case of Hantavirus was discovered on private property. Whether the regulation imposes such a mandatory duty to the Estate is a question for the court. *Gorman*, 176 Wn. App. at 77-78. The trial court committed obvious error in sending this legal issue to the jury.

Finally, the Estate does not dispute the trial court's order "conditionally granting" the Estate's motion contravenes the civil rules. By ruling that the question of the County's duty under the regulation raised a jury question, App. at 154, but still granting the motion, the trial court acted outside its CR 56 authority. *See Pierce*, 161 Wn. App. at 797 (citing CR 56(c)). Discretionary review is warranted.

B. The Failure to Enforce Exception Does Not Apply Because No Law Required the County to Issue a Health Advisory.

The Estate contends WAC 246-101-505 creates a duty to the Estate because the regulation is a "'formally promulgated mandate' that requires the County 'to act [reasonably] in the face of danger[.]'" Resp. at 18. But

³ Instead, the Estate points to the "general rule [] that professionals owe a duty to 'exercise the degree of skill, care, and learning possessed by members of their profession in the community.'" Resp. at 15 (citing *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 606, 257 P.3d 532 (2011)). Even assuming a professional common law duty applicable to health care providers extends to the Health Department (which it does not), a health care provider has no common law obligation to issue health advisories. As such, the Estate cannot rely on any common law duty owed by healthcare providers to establish a duty owed to the Estate.

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 (“Because governments, unlike private persons, are tasked with duties that are not legal duties within the meaning of tort law, we carefully analyze the threshold element of duty in negligence claims against governmental entities.”) (citations omitted). It is the Estate’s burden to show that each element of an exception to the public duty doctrine applies before a tort case against the County can proceed. *Atherton Condo. Apartment-Owners Ass’n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 531, 799 P.2d 250 (1990). The Estate cannot do so.

Under the failure to enforce exception, (the only exception the Estate has pursued), the Estate must show the Health Department has a statutory duty to take specific action for the benefit of the Estate. While the Estate nominally cites the applicable case law, 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. Resp. at 15. This merely begs the question. The Estate ignores the requirements that there be some statutory violation that creates a mandatory statutory duty for the Health Department to take specific corrective action, and that the statutory duty is intended for the benefit of the Estate as opposed to the general public. See *Gorman*, 176 Wn. App. at 77 (citing *Bailey v. Town of*

Forks, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987)).⁴ The very purpose of the public duty 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 statutory obligation to provide broad public notification of an isolated case of a non-contagious 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 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*, 176 Wn. App. 63, present “comparable circumstances”, but neither case supports tort liability here. Resp. at 16-17. Unlike the general directive to the County in WAC 246-101-505 to “review and determine appropriate action” in response to over 80 different health conditions, the governmental entities in *Livingston* and *Gorman* were mandated to take specific, corrective measures in dealing with dangerous animals under applicable municipal codes. The animal

⁴ Contrary to the Estate’s claim, the Court of Appeals rejected the failure to enforce exception in *Woods View II, LLC v. Kitsap Cty.*, 188 Wn. App. 1, 27, 352 P.3d 807 (2015) in part because “no Washington case [] has applied the failure-to-enforce exception where the defendant government entity fails to take corrective action against *itself*.” (emphasis in original). The Estate’s attempt to distinguish this case as limited to land use permits is without support. Resp. at 17, n. 12. Similarly, the Estate ignores that *Smith v. City of Kelso*, 112 Wn. App. 277, 284, 48 P.3d 372, 375 (2002) rejects the failure to enforce exception precisely because, like here, the regulation in question does not “regulate public conduct” and therefore the City could not “fail to enforce anything.”

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. In *Gorman*, the county had a duty to apply certain criteria to “classify potentially dangerous dogs”. 176 Wn. App. at 78. In each case, liability turned on the specific and mandatory nature of the government’s obligation to respond to a specific hazard.⁵

Here, by contrast, the County is not required to take any specific and mandatory action when notified of a single case of Hantavirus; rather, the Health Department is directed to “review 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 the Health Department with discretion in taking any number of actions in response to notifiable conditions and does not require issuance of health advisories.⁶ *See* App. at 176. Indeed, the State Department of Health guidelines detail hundreds of different actions the Health Department could appropriately take in response to a reported

⁵ The Estate is also wrong that neither case involved a statutory violation by a member of the public. In each, the dog owners violated relevant ordinances prohibiting certain conduct relating to dogs. *See Gorman*, 176 Wn. App. at 81 (“[T]he County here is required to act if it observes a violation of the potentially dangerous dog restrictions.”); *Livingston*, 50 Wn. App. at 658 (“The Code provides that it is unlawful to permit any animal to become at large...”).

⁶ Moreover, the Estate wrongly claims the Health Department “did nothing” in response to the first Hantavirus case. The Health Department in fact sent both a nurse investigator and epidemiologist to interview the Waterburys, review the medical files, examine the property, and help mitigate their deer mouse infestation. App. at 50.

condition.⁷ Imposing tort liability is inconsistent with a regulatory scheme where the government “has broad discretion regarding whether and how to act.” *Pierce*, 161 Wn. App. at 799 (refusing to apply failure to enforce exception). In such cases, courts have repeatedly refused to apply the failure to enforce exception. *See id.* at 801; *Smith*, 112 Wn. App. at 284(2002); *McKasson v. State*, 55 Wn. App. 18, 25, 776 P.2d 971 (1989).

In sum, the trial court obviously erred in “conditionally” striking the public duty doctrine defense, creating a useless trial on a purely legal issue. The Court should grant discretionary review on this ground alone.

C. The Trial Court’s Ruling Alters the Status Quo By Exposing the Government To Suit for Discretionary Acts.

Review is also warranted under the second prong of RAP 2.3(b). The Estate ignores the consequences that would result from imposing tort liability on the discretionary decision to issue health advisories, including false-positive announcements and information saturation. Mot. at 20. The Estate contends this change to the status quo is “manufacture[d]”, erroneously suggesting that Dr. Duchin “will begin issuing advisories in a way that does not serve the public.” Resp. at 19. But Dr. Duchin’s declaration says no such thing. Instead, he correctly cautions that the court’s order may “turn decisions over whether or not to issue a health

⁷ *See* Wash. State Dep’t of Health, List of Notifiable Conditions (Jan. 3, 2019), <https://www.doh.wa.gov/ForPublicHealthandHealthcareProviders/NotifiableConditions/ListofNotifiableConditions>.

advisory into a form of risk management[.]” Second Duchin Decl. ¶ 9.

Here, the trial court erroneously ruled that the failure to enforce exception hinges on whether a jury finds the County’s actions “appropriate.” App. at 154. The ruling is not only a probable (and in fact obvious) error, but would effectively abrogate the public duty doctrine altogether. Anyone impacted by a government’s discretionary decision could sue in tort. In turn, every discretionary decision by the Department would invariably include an added calculation of risk. This dramatic shift in exposure to liability for governmental entities substantially alters the status quo and further warrants discretionary review. RAP 2.3(b)(2).

III. CONCLUSION

The trial court obviously erred by punting the County’s threshold legal defense under the public duty doctrine to the jury. There is nothing for the jury to decide here because the County owes the Estate no legal duty. Nor has the Estate carried its burden of establishing that an exception to the public duty doctrine should apply. WAC 246-101-505 confers the County with broad discretion and does not compel the Health Department to take any specific action in response to a notifiable condition, let alone require issuance of public notice after a single Hantavirus case. Accordingly, the County respectfully asks this Court to grant review and reverse.

RESPECTFULLY SUBMITTED this 4th day of January, 2019.

PACIFICA LAW GROUP LLP

By: s/ *Kyberly K. Evanson*
Paul J. Lawrence, WSBA #13557
Matthew J. Segal, WSBA #29797
Kyberly K. Evanson, WSBA #39973
Athanasios P. Papailiou, WSBA #47591

*Special Deputy Prosecuting Attorneys
Attorneys for Petitioner King County*

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 4th day of January, 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:

Adam Rosenberg
Daniel A. Brown
Kathleen X. Goodman
WILLIAMS KASTNER & GIBBS PLLC
601 Union Street, Suite 4100
Seattle, WA 98101
arosenberg@williamskastner.com
dbrown@williamskastner.com
kgoodman@williamskastner.com
jhager@williamskastner.com
sblair@williamskastner.com
bjenson@williamskastner.com
Attorneys for Sandra Ehrhart

Theron A. Buck
Evan Bariault
FREY BUCK P.S.
1200 5th Ave, Suite 1900
Seattle, WA 98101
tbuck@freybuck.com
ebariault@freybuck.com
lfulgaro@freybuck.com
Attorneys for Sandra Ehrhart

Elizabeth A. Leedom
Lauren M. Martin
BENNETT BIGELOW & LEEDOM
601 Union Street, Suite 1500
Seattle, WA 98101
eleedom@bblaw.com
lmartin@bblaw.com
ffusaro@bblaw.com
fpolli@bblaw.com
cphillips@bblaw.com
*Attorneys for
Justin Reif, M.D.*

DATED this 4th day of January, 2019.



Sydney Henderson

PACIFICA LAW GROUP

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- chris@favros.com
- cphillips@bblaw.com
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- matthew.segal@pacificallawgroup.com
- paul.lawrence@pacificallawgroup.com
- tbuck@freybuck.com
- todd@favros.com

Comments:

Sender Name: Sydney Henderson - Email: sydney.henderson@pacificallawgroup.com

Filing on Behalf of: Kymberly Kathryn Evanson - Email: kymberly.evanson@pacificallawgroup.com (Alternate Email: sydney.henderson@pacificallawgroup.com)

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1191 Second Avenue, Suite 2100
Seattle, WA, 98101
Phone: (206) 245-1700

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