

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
10/29/2019 3:25 PM  
BY SUSAN L. CARLSON  
CLERK

NO. 96464-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

Respondent,

v.

KING COUNTY, operating through its health department, Public Health –  
Seattle & King County

Petition,

JUSTIN WARREN REIF, an individual,

Defendant.

---

**RESPONDENT EHRHART FAMILY'S ANSWER TO *AMICI*  
WASHINGTON STATE ASSOCIATION OF COUNTIES (WSAC),  
THE NATIONAL ASSOCIATION OF COUNTY & CITY HEALTH  
OFFICIALS (NACCHO), AND THE BIG CITIES HEALTH  
COALITION (BCHC)**

---

Adam Rosenberg, WSBA #39256  
Melissa D. Carter, WSBA # 36400  
Richard Adler WSBA # 10961  
**ADLER GIERSCH, PS**  
333 Taylor Ave N  
Seattle, WA 98109  
Telephone: (206) 682-0300  
Facsimile: (206) 224-0102  
[arosenberg@adlergiersch.com](mailto:arosenberg@adlergiersch.com)  
[mdcarter@adlergiersch.com](mailto:mdcarter@adlergiersch.com)  
[radler@adlergiersch.com](mailto:radler@adlergiersch.com)

*Counsel for the Ehrhart family*

**Table of Contents**

**I. INTRODUCTION..... 1**

**II. *AMICUS* BRIEFS ARE FOR FRIENDS OF THE COURT, ALTER-EGO’S OF THE PARTIES ..... 2**

**III. ANSWER TO *AMICI* ..... 4**

**A. Almost The Entirety Of The *Amicus* Brief Is A Staggering Distortion Of The Estate’s Position And The Civil Justice System Generally ..... 4**

**B. The Sky Will Not Fall Were The Court To Hold The County to a Professional Standard of Care, As The Illustrative Examples Provided By *Amici* Prove ..... 8**

**C. What *Amici* Are Really Seeking— Without Stating It Directly—Is A Drastic Expansion Of *Discretionary Immunity*, Which King County Voluntarily Withdrew Because It Was Inapplicable..... 11**

**D. This Case Is A Perfect Illustration Of Why Self-Governance, Untethered From External Accountability, Does Not Adequately Protect People Like The Ehrhart Family..... 15**

**IV. CONCLUSION ..... 18**

## Table of Authorities

### Cases

<i>Acosta v. City of Mabton</i> , 2 Wn. App. 131, 408 P.3d 1095 (2018) .....	10
<i>Andrus v. State</i> , 541 P.2d 1117 (Utah 1975).....	15
<i>Bailey v. Forks</i> , 108 Wn.2d 262, 737 P.2d 1257 (1987).....	4
<i>Beltran-Serrano v. City of Tacoma</i> , 193 Wn.2d 537, 442 P.3d 608 (2019).....	10
<i>Davis v. Baugh Indus. Contractors</i> , 159 Wn.2d 413, 150 P.3d 545 (2007).....	12
<i>Evangelical United Brethren Church of Adna v. State</i> , 67 Wn.2d 246, 407 P.2d 440 (1965).....	1, 15
<i>Munich v. Skagit Emergency Comm.</i> , 175 Wn.2d 871, 288 P.3d 328 (2012).....	10
<i>Ryan v. Commodity Futures Trading Comm'n</i> , 125 F.3d 1062 (7th Cir. 1997).....	3
<i>State v. Gonzalez</i> , 110 Wn.2d 738, 757 P.2d 925 (1988).....	17
<i>Stewart v. State</i> , 92 Wn.2d 285, 597 P.2d 101 (1979).....	14
<i>Taggart v. State</i> , 118 Wn.2d 195, 822 P.2d 243 (1992).....	13
<i>United States v. State of Mich.</i> , 940 F.2d 143 (6th Cir. 1991).....	4
<i>Wood v. Mason County</i> , 174 Wn. App. 1018 (Div. II 2013).....	11
<i>Woods View II, LLC v. Kitsap Cty.</i> , 188 Wn. App. 1, 352 P.3d 807 (2015).....	4
<i>Xiao Ping Chen v. City of Seattle</i> , 153 Wn. App. 890, 223 P.3d 1230 (2009).....	10

## **Constitutional Provisions**

Wash. Const. Art. I, § 21 .....	7
---------------------------------	---

## **Statutes**

42 U.S.C. § 1983.....	9
RCW 4.92.090 .....	13, 15
RCW 4.96.010 .....	11
RCW 42.56.030 .....	18
RCW 70.41.200 .....	18
RCW 19.27.031 .....	9

## **Other Authorities**

WPI 105.01 .....	5
WPI 107.04 .....	5
WPI 110.02 .....	5
WPI 120.06 .....	9
WPI 140.01 .....	9
WPI 342.03 .....	5

## **Rules**

RAP 9.12.....	14
---------------	----

## **Treatises**

4 Am.Jur.2d, Am.Cur. §§ 1, 2 at 109–10) .....	3
Robert A. Hillman, THE RHETORIC OF LEGAL BACKFIRE, 43 B.C. L. Rev. 819, 821 (2002).....	8

## I. INTRODUCTION

Respondent, the Ehrhart family (“the Estate”), respectfully submits this Answer to *amici* Washington State Association of Counties’ (“WSAC”), the National Association of County and City Health Officials, and the Big Cities Health Coalition (collectively “NACCHO”).

Both briefs reflect the same “King Can Do No Wrong” hubris that prompted the Legislature to abolish sovereign immunity decades ago. They also misstate the Estate’s legal position, repeatedly, and falsely equate the concepts of “discretion” and “immunity.” While it is true that government is entitled to discretion *to govern*, it does not follow—as *amici* claim—that every discretionary decision made by government is entitled to immunity. This Court struck that balance over 50 years ago in *Evangelical United Brethren Church v. State*, 67 Wn.2d 246, 407 P.2d 440 (1965), reserving discretionary immunity for high level policy and operational decisions—not decisions that are simply hard or multifaceted.

Indeed, the reality is that both private and public officials are commonly held to a professional standard of care—including virtually all of the examples cited in WSAC’s brief. And professionals in both the public and private sectors must often consider the best available data, and work in contexts where the right answer is not always clear. A reasonable decision in a gray area may well be the winning argument on the issue of

*liability* in a negligence case. But the fact of gray areas, in some cases, does not broadly negate the reality of a legal duty. If it did, that would mean police officers, surgeons, traffic engineers, lawyers, and architects (to name only a few) would owe duties to nobody, based upon the discretion they sometimes exercise. Yet no court has held that a duty of care “eviscerate[s] the ability of [these] experts to use their best judgment,” (NACCHO Br. at 3), as *amici* claim.

But perhaps more to the point, not even King County believes the fact of “discretion” entitled it to immunity. It initially alleged this as an affirmative defense, but promptly withdrew it in the face of a motion; and the trial court went out of its way to reject it on the record, on the merits, and without objection or appeal.

WSAC and NACCHO’s submissions only underscore the need for accountability in this context. The trial court should be affirmed.

## **II. AMICUS BRIEFS ARE FOR FRIENDS OF THE COURT, ALTER-EGO’S OF THE PARTIES**

By way of threshold observation, King County is the largest member of WSAC, the largest Washington member of NACCHO, and one of 30 members of BCHC. Historically, “amicus curiae” had at “[i]ts purpose [ ]to provide impartial information on matters of law about which there was doubt, especially in matters of public interest.” *United States v. State of Mich.*, 940 F.2d 143, 164 (6th Cir. 1991) (citing *Miller–Wohl Co. v.*

*Commissioner of Labor & Indus., State of Montana*, 694 F.2d 203, 204 (9th Cir.1982); 4 Am.Jur.2d, Am.Cur. §§ 1, 2 at 109–10). They were never intended to be “filed by allies [or alter-egos] of litigants to duplicate the arguments made in the litigants’ briefs, in effect merely extending the length of the litigant’s brief. Such amicus briefs should not be allowed. They are an abuse. The term ‘amicus curiae’ means friend of the court, not friend of a party.” *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997).

Here, it is difficult to see what new or helpful information is being offered. *Amici* are simply accepting the County’s brief as the exclusive source of facts (WSAC Br. at 2), and badly distorting both the underlying record<sup>1</sup> and law.<sup>2</sup>

---

<sup>1</sup> *Amici* claim that exploring and disseminating infectious disease information is something “the public otherwise could not [do] on their own.” WSAC Br. at 2-3. The record is to the contrary. *See, e.g.*, CP 178 (ER nurse testimony that but for reliance on County, hospitals would seek the information elsewhere).

<sup>2</sup> *Amici* claim that “exceptions to the public duty doctrine are narrowly construed.” WSAC Br. at 3 (citing *Woods View II, LLC v. Kitsap Cty.*, 188 Wn. App. 1, 27, 352 P.3d 807 (2015)). The cited case in no way says that. *Woods View* was speaking about “building codes,” which, the court reasoned, were not designed “to protect individuals from economic loss.” There was no mandate to construe all exceptions narrowly; nor would such a mandate harmonize with contrary precedent. *See Bailey v. Forks*, 108 Wn.2d 262, 267, 737 P.2d 1257 (1987) (observing that “the exceptions [to the public duty doctrine] have virtually consumed the rule”).

*Amici* should be “an impartial friend of the court—not an adversary party,” *see United States v. State of Mich.*, 940 F.2d 143, 164–65 (6th Cir. 1991), a proposition which rings particularly true, here.

### III. ANSWER TO *AMICI*

#### A. **Almost The Entirety Of The *Amicus* Brief Is A Staggering Distortion Of The Estate’s Position And The Civil Justice System Generally**

The Rules of Appellate Procedure require *amici* to “review all briefs on file and avoid repetition of matters in other briefs.” RAP 10.3(e). Either this step was not taken,<sup>3</sup> or *amici* are willfully ignoring the record. Regardless, and contrary to the persistent distortions, the Estate is *not* “push[ing] for mandatory public health advisories” (WSAC Br., Sect. III, B) or asking the Court to recognize a “mandatory duty” to issue an advisory every time there is a diagnosed case of autism in Washington (NACCHO Br. at 3-4). Indeed, the Estate could not have been clearer:

To be clear, this does not mean issuing an advisory every time someone reports a diagnosis of flu or autism. Only that the County must exercise ordinary care when addressing this crucial, mandatory task. And in this case, a rational fact-finder could find that this did not occur by virtue of the County’s decision to play favorites among populations; ignore its own standards and policies; violate the standard of care in Washington and elsewhere; all while maintaining no discernible methodology; was not “appropriate” or “reasonable.”

---

<sup>3</sup> Which is entirely possible, given its face-value adoption of “the Statement of the Case set forth in King County’s Opening Brief.” WSAC Br. at 2.

Estate’s Op. Br. at 31. The issue is reasonable care. The only ones oversimplifying are the County and *amici*—who are drawing the false dichotomy of (1) no liability or (2) health advisories, *en masse*, for everything.

This hyperbole explicitly assumes that the civil justice system has no way of sorting out right from wrong, a demonstrably false proposition—as illustrated by the fact that professionals are held to a professional standard of care every day, in courts across the state. Even in professions where officials work in gray areas and exercise substantial discretion, fact-finders apply a apply an applicable standard of care—which, by its very nature, takes factual context into account. *See, e.g.*, WPI 105.01; 02 (medical standard of care); WPI 107.04 (defining standard of care); WPI 342.03 (police officer excessive force standard of care); WPI 110.02 (product design standard of care); WPI 320.02 (insurer’s standard of care). Even motorists who are forced to make hard, split-second decisions get to mount a defense based upon the Emergency Doctrine and “ordinary care” standard, which, again, takes their factual circumstances into account.

Public health officials are not unique. They are no different than surgeons, police officers, lawyers, and police officers, all of whom “must consider and balance multiple factors” (*see* NACCHO Br. at 5) and make

“evidence based decisions calling for the exercise of discretion” (*id.* at 6) in various contexts. Indeed, many of these are life-and-death:

- A doctor evaluating the risks and benefits of chemotherapy for a pregnant woman;
- A police officer seeing an erratic man with a knife, in obvious mental health crisis, wandering through a crowd; or
- A criminal defense attorney evaluating whether to put her client on the stand to articulate a tenable defense.

These scenarios, like the issuance of a health advisory, undoubtedly require “gathering details and facts, developing different response strategies” and attempting to “mitigate negative impacts.” *See* NACCHO Br. at 6. But it does not follow that doctors, police officers, or attorneys owe no duty to the people who rely upon them. They certainly do.

The scope of professional discretion, complexity of the facts, and lack of an absolute right answer may well bear on the element of liability. Thus, if the County wishes to argue that it made a good faith mistake in its handling of the Hantavirus outbreak, but nonetheless exercised a degree of care commensurate with a reasonable public health agency, it certainly can.<sup>4</sup>

The County can also theoretically argue that no reasonable public health

---

<sup>4</sup> The ultimate success of this argument is dubious, as the County did not get it slightly wrong in a close case. Government officials viewed their own citizens with disdain, ignored people begging them to act, violated their own internal standards, and were transparently political about it. CP 475-487.

officer would have done things differently.<sup>5</sup> Assuming compliance with the professional standard of care, there will be no liability, regardless of how tragic the outcome.

But *amici* presuppose that the civil justice system is incapable and arbitrary. This is evident in their cynical claim that there will be a lawsuit “every time an individual disagrees with a county’s exercise of a discretionary function” (WSAC Br. at 4), and their refusal to even refer to jury trials without parenthetically tacking on, “at public expense” (*id.* at 1; 4).<sup>6</sup> But, like science, Washington’s civil justice system works, whether it is believed in or not. And its framework exists to ensure that *no* agency will ever be liable unless a fact-finder determines—following full discovery and due process—that (1) the agency was provably negligent; and (2) that negligence was a provable cause of harm.

At bottom, the Court can take it at face value that there are some instances where public health staff exercise discretion and sometimes make hard decisions—like various other professionals. This is, at most, an

---

<sup>5</sup> This, too, will be a tough sell. *See* CP 431-62 (advisories issued by other counties and jurisdictions related to Hantavirus); Estate’s Br. App. at 12 (press releases issued in 13 out of 14 counties).

<sup>6</sup> Trial by jury is a sacred constitutional right; not a luxury or gift furnished by local government. *See* Wash. Const. Art. I, § 21.

argument bearing on liability. It is not a basis to negate a party's otherwise-existing duty to refrain from negligently hurting people.

**B. The Sky Will Not Fall Were the Court to Hold The County to a Professional Standard of Care, As Both The Lack Of Evidence And Illustrative Examples Provided By *Amici* Prove**

The gist of the County's argument—which *amici* essentially reiterate—is that discretion is somehow mutually exclusive with accountability—and *any* duty in tort would “devolve into a mere liability reduction tool” and “undermine service of the public's interest.” WSAC Br. at 5. In other words, accountability will make local governments do a *worse* job. This claim is fundamentally inconsistent with the Legislature's express waiver of sovereign immunity, and one that should be met with extreme skepticism. *See* Robert A. Hillman, THE RHETORIC OF LEGAL BACKFIRE, 43 B.C. L. Rev. 819, 821 (2002) (“True [instances of a law producing results directly contrary to those intended] may be so infrequent and use of the rhetoric so common that backfire allegations should be met presumptively with suspicion rather than credence.”).

Piercing the alarmist language, however, *amici*'s silence with respect to data, evidence, studies, statistics, or any quantitative information at all, is the truly interesting part. If the situation were as dire, and the consequences as certain, as their briefs suggest, one might expect *a* piece of evidence supporting the viewpoint. None is forthcoming.

This is likely so, because the argument proves far too much. Government is subject to various legal duties for all manner of discretionary conduct. For example, it is true, as WSAC claims, that counties exercise discretion to “construct and maintain county roads.” WSAC Br. at 5. It is also true that they are subject to liability when they exercise that discretion negligently. *See* WPI 140.01; *Xiao Ping Chen v. City of Seattle*, 153 Wn. App. 890, 898, 223 P.3d 1230 (2009). Counties have an obligation to “enforce[e] local and state laws.” And they are subject to liability if they do so negligently. *See Munich v. Skagit Emergency Comm.*, 175 Wn.2d 871, 288 P.3d 328 (2012); *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 442 P.3d 608 (2019).<sup>7</sup> Water districts are subject to tort liability when they flood people. *Acosta v. City of Mabton*, 2 Wn. App. 131, 140, 408 P.3d 1095 (2018) (sewer systems); *Wood v. Mason County*, 2013 WL 1164437, 174 Wn. App. 1018 (Div. II 2013) (storm systems) (unpublished). Courthouses are subject to premises liability laws. WPI 120.06. Fire districts enjoy no special immunity if a fire engine runs someone over. In short, government remains accountable to people—and this has been the case for decades.<sup>8</sup>

---

<sup>7</sup> Counties that hurt people while enforcing laws may also be subject to 42 U.S.C. § 1983.

<sup>8</sup> It is unclear what point WSAC is attempting to make with citations to the Growth Management Act and RCW 19.27.031. The Estate agrees that counties have authority and discretion to create and enforce zoning codes consistent with state and federal law.

Yet the proverbial floodgates have not opened. Nor is there any credible evidence (or even a meaningful argument), that roads have somehow become less safe, or stormwater infrastructure has become less sound, on account of tort law. The opposite is, in fact, true. Government now holds itself to a higher standard in these areas.<sup>9</sup> This is not happenstance or good fortune; it is “[a]n underlying purpose” of tort law, which is “to provide for public safety through deterrence.” *Davis v. Baugh Indus. Contractors*, 159 Wn.2d 413, 420, 150 P.3d 545 (2007). This cannot, however, be accomplished when parties are “insulated” from liability. *Id.*

As here, recognizing a common law tort duty to provide citizens accurate information when mandated by reasonable professional judgment—a duty that has been in existence for over 100 years, published in the Restatement,<sup>10</sup> and clearly intended by the drafters of WAC 246-101-505—will not lead to “catastrophe” (*see* WSAC Br. at 4). It will only lead to the avoidance of devastating grief and loss for families like the Ehrharts. If

---

<sup>9</sup> *See, e.g.*, Stormwater Manuals, Washington Department of Ecology, <https://ecology.wa.gov/Regulations-Permits/Guidance-technical-assistance/Stormwater-permittee-guidance-resources/Stormwater-manuals> (last visited October 18, 2019); Publications – Design Manual, Washington Department of Transportation, <https://www.wsdot.wa.gov/Publications/Manuals/M22-01.htm> (last visited October 18, 2019).

<sup>10</sup> “The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.” Restat 2d of Torts, § 552(3) (citing *Mulroy v. Wright*, 185 Minn. 84, 240 N.W. 116 (1931), and *Pearson v. Purkett*, 32 Mass. (15 Pick.) 264 (1834), as illustrations).

*amici* wish to re-implement sovereign immunity, they can petition the Legislature. But they are not entitled to subvert RCW 4.96.010 by fiat, and certainly not without empirical evidence.

**C. What *Amici* Are Really Seeking—Without Stating It—Is A Drastic Expansion Of *Discretionary Immunity*, Which King County Voluntarily Withdrew Because It Was Inapplicable**

The governmental liability arguments advanced by *amici* are neither novel nor unresolved in Washington jurisprudence. On the contrary, this Court has consistently rejected them. The arguments typically exist in the “discretionary immunity” case law, where, as here, agencies often argue that they need “discretion without tort exposure” (*see* NACCHO Br. at 13), and that “the threat of litigation” will “hamper” government’s willingness to engage in new analyses (*id.*).

By way of illustration, almost identical arguments were made in *Taggart v. State*, 118 Wn.2d 195, 215, 822 P.2d 243 (1992), with respect to “discretionary” and “difficult” parolee decisions. Not unlike public health staff, parole officers consider multifaceted information that is not always a perfect predictor of what will happen in the future. *Id.* at 200-01. Unfortunately, the State’s decision in *Taggart* failed to meet a standard of reasonable professional judgment, and a parolee committed atrocities against a third party. *Id.* Like the County and *amici*, the State argued that

it had substantial discretion and owed no particular responsibility to the injured party. This Court disagreed:

... we hold that the discretionary immunity exception does not shield parole officers from claims alleging negligent supervision. ***We recognize that parole officers' supervisory decisions require the exercise of discretion.*** The crucial point, however, is that the discretionary immunity exception applies only to basic policy decisions. ***Parole officers' supervisory decisions, however much discretion they may require, are not basic policy decisions.***

*Id.* at 215 (emphasis added). Turning to the scope of the duty, the Court had no problem defining it by reference to “the standards of the profession” and “foreseeable dangers to others.” *Id.* at 223. The trigger point was—exactly as the trial court held in our case—the violation of a statutory duty “in compliance with the directives of superiors and relevant guidelines.” *Id.* at 216.<sup>11</sup>

Similarly, in *Stewart v. State*, 92 Wn.2d 285, 294, 597 P.2d 101 (1979), the issue was a negligently designed highway. The State again argued that “adoption of a design necessarily involves a judgmental choice,” *id.*, such that it should be insulated from liability. And this Court again declined to expand the concept of “discretion” into a broad-brush immunity, explaining that discretion lent itself to a *limited* immunity.

---

<sup>11</sup> This duty was, in large part, predicated on common law principles governing “take charge” relationships and duties to third parties. *See Id.* at 218 (quoting Restatement (Second) of Torts § 315 (1965)). Our case has a common law-based tort duty, too. *See supra* Note 10 (citing Restat 2d of Torts, § 552(3)).

“Immunity for ‘discretionary’ activities serves no purpose except to assure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government.” *Id.* at 293. And the fact that an employee normally engages in “discretionary activity” is not, in and of itself, relevant. *Id.* Moreover, the manner in which the overriding policy [*i.e.*, “prevent[ing] and control[ing] the spread of disease”<sup>12</sup>] is ultimately carried out [*i.e.*, the actual issuance of advisories] “cannot be labeled discretionary functions.” *Id.* at 295 (quoting *Andrus v. State*, 541 P.2d 1117, 1120 (Utah 1975)).

In short, immunity based upon “discretion” is “an extremely limited exception” to the rule that government is liable to the same extent as a private party. *Id.* at 293 (citing RCW 4.92.090). Discretionary immunity is reserved for “basic governmental policy decisions” and subject to the analytical approach laid out in *Evangelical United Brethren Church of Adna v. State*, 67 Wn.2d 246, 407 P.2d 440 (1965), which balances the competing objectives of accountability and separation of powers.

The County acknowledged this below, eventually. It alleged discretionary immunity in its Answer, but it immediately withdrew it when

---

<sup>12</sup> WAC 246-101-005.

put to proof.<sup>13</sup> The trial court nonetheless went out of its way to explain why the defense was inapplicable:

So I know that the County has withdrawn its discretionary immunity defense, but just for purposes of today, I'm going to go through the analysis on that just for comparison purposes...

In this case, Dr. Duchin was not a high level official creating policy. He was a doctor, granted, he had a WAC that he was supposed to carry out and follow. He was merely effectuating policy that had already been determined. So under the *Evangelical* case I think that that alone would be enough to subject the County to liability because there would be no discretionary immunity in that situation. So if that defense were still at issue, I would be granting summary judgement on that defense.

VRP 20-21.

To the extent that *amici* are arguing that the issuance of health advisories is an important activity, or involves discretion, the Estate does not disagree. But to the extent they are suggesting these considerations are a basis for immunity, they are wrong—as confirmed by decades of case law, the trial court decision, and even King County’s unwillingness to advance the argument below. *Amici*’s argument should be rejected, if reached at all. *Cf.* RAP 9.12; *State v. Gonzalez*, 110 Wn.2d 738, 752 n.2, 757 P.2d 925 (1988) (arguments raised only by *amici curiae* need not be considered).

---

<sup>13</sup> CP 394 (“King County hereby withdraws it (sic) discretionary immunity affirmative defense.”).

**D. This Case Is A Perfect Illustration Of Why Self-Governance, Untethered From External Accountability, Does Not Adequately Protect People Like The Ehrhart Family**

By footnote, NACCHO acknowledges that health departments do “at times make mistakes.” Br. at 14, n. 4. But then NACCHO goes on to suggest that there are “adequate institutional means to address such errors,” like “hot washes.” From context, this appears to be a candid assessment by agency of what it did wrong, so it can improve next time. NACCHO’s argument that litigation will somehow disrupt this process, should be rejected.

First, self-regulation only works when there is some meaningful degree of commitment to it. The County’s action in this case flunks that test on every conceivable level. NACCHO cites no national, state or local standard requiring investigations, or “hot washes.” Nor is there any apparent consequence when an agency does *not* engage in a self-reflective investigation following a bad outcome. As here, there is no evidence that the County participated in this process here, or ever. Indeed, the opposite is true. Instead of making a sober assessment about why Brian Ehrhart had to die before a belated advisory was issued, government officials were focused on beating the Seattle Times to the press, and having a laugh at his neighborhood’s grief:

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

---

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

On Mar 10, 2017, at 9:04 AM, Kay, Meagan <[Meagan.Kay@kingcounty.gov](mailto:Meagan.Kay@kingcounty.gov)> wrote:

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

---

CP 80. The County made no systemic improvements whatsoever.

Nor were these officials held accountable internally by superiors, here or ever. Rather, the Chair and Vice Chair of King County's Board of Health—Public Health's governing body—disavowed any role in operations or oversight:

- “As Chair of the Board of Health, I am not involved in decisions pertaining to whether to issue health advisories...” (Dembowski Decl. ¶ 4)
- “I do not, nor have I ever, inserted myself into the day-to-day operating decisions of the Department of Health.” (Lambert Decl. ¶ 8)
- “I am not involved in decisions concerning when and how to issue health advisories... nor am I consulted when such advisories are issued.” (Lambert Decl. ¶ 8)
- “The decision to issue health advisories is exclusively a staff decision, not a Board decision...” (Dembowski Decl. ¶ 4)
- “I do not have personal knowledge of the decision-making process... I only learned of department action on this matter from publicly issued documents and public health briefing...” (Dembowski Decl. ¶ 5)
- “All of the information I have pertaining to Mr. Ehrhart's death was provided to me by other people...” (Lambert Decl. ¶ 10)

App. 1-9. These individuals also declined to participate in the judicial process below, due to their “very busy schedules.” *Id.* ¶ 13.

Stated plainly, there is no oversight, no consequence, and certainly no “culture” (NACCHO Br. at 14, n. 4) of self-improvement. Thus, it is difficult to understand *amici*’s reasoning that *external* accountability should be dismantled, too.

The answer is that it should not be—because external accountability, in tort, works. Our case presents a perfect illustration. In 2016, Maureen Waterbury nearly died of Hantavirus. The County took no action and engaged in no self-reflection. In 2017, Brian Ehrhart died of Hantavirus. The County took no action and engaged in no self-reflection. In 2018, Sandra Ehrhart courageously filed this lawsuit. **Only then** did County officials *start* a dialogue with the Department of Health to learn what other competent agencies do in response to a confirmed case of Hantavirus. *See* Estate’s Br. App. at 12 (County official: “So the majority of hanta cases in WA are acquired locally... [a]nd it is more common than not to have a press release issued... Just want to make sure I understand the results.”).<sup>14</sup>

If the *amici* were genuinely concerned about a confidential space for self-improvement, they could seek a privilege or protective order, just like

---

<sup>14</sup> Compare CP 36-62 (Complaint, July 27, 2018) with CP App. 12-13 (August 28, 2018).

others in the medical professional.<sup>15</sup> But, tellingly, they are not asking for that. They are asking for a broad, self-serving immunity, which completely untethers them from accountability for the harm they do. The Court should decline to solve a nonexistent problem, by broadly creating others.

#### IV. CONCLUSION

It is not surprising that WSAC and NACCHO advocate a rule that makes life slightly easier for government. But government is not an end in and of itself. “The people of this state do not yield their sovereignty to the agencies that serve them.” RCW 42.56.030. The issue is whether people are better off with government immunity in this arena. The answer is no.

The trial court’s decision should be affirmed.

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of October, 2019

ADLER GIERSCH PS



Adam Rosenberg, WSBA #39256  
Melissa D. Carter, WSBA # 36400  
Richard Adler, WSBA # 10961  
ADLER GIERSCH PS  
333 Taylor Ave N  
Seattle, WA 98109  
Telephone: (206) 682-0300  
FAX: (206) 224-0102  
[mdcarter@adlergiersch.com](mailto:mdcarter@adlergiersch.com)  
[arosenberg@adlergiersch.com](mailto:arosenberg@adlergiersch.com)  
[radler@adlergiersch.com](mailto:radler@adlergiersch.com)

---

<sup>15</sup> RCW 70.41.200(3) provides for a quality improvement privilege, which is how medical doctors candidly assess their own decision-making. The County never asked the trial court to shield its investigation from discovery, because there was no self-reflection to shield.

**CERTIFICATE OF SERVICE**

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 29th day of October, 2019, I caused a true and correct copy of the foregoing document, to be delivered via the court e-filing system to:

Matthew J. Segal  
Kymberly Katheryn Evanson  
Paul J. Lawrence  
PACIFICA LAW GROUP, LLP  
1191 Second Ave., Suite 2000  
Seattle, WA 98101  
*Attorneys for King County*

Christopher H. Anderson  
Todd W. Reichert  
Joseph V. Gardner  
FAIN ANDERSON  
701 5<sup>th</sup> Avenue, Suite  
4750  
Seattle, WA 98104  
*Attorneys for Swedish  
Hospital Services*

Evan Barialt  
FREY BUCK, P.S.  
1200 5<sup>th</sup> Ave., Suite 1900  
Seattle, WA 98101  
*Attorneys for Sandra Ehrhart*

Elizabeth Leedon  
Lauren M. Martin  
BENNETT, BIGELOW &  
LEADON  
601 Union St., Suite 1500  
Seattle, WA 98101  
*Attorneys for Justin Reif, M1*

DATED this 29th day of October, 2019.

  
\_\_\_\_\_  
Kody Friedrich, Paralegal

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

Honorable Shelly K. Speir  
Motion for Protective Order  
Noted for Hearing: November 2, 2018 at 9:00 a.m.

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

DECLARATION OF ROD  
DEMBOWSKI IN SUPPORT OF  
MOTION FOR PROTECTIVE  
ORDER

I, Rod Dembowski, declare under penalty of perjury under the laws of the State of  
Washington as follows:

1. I serve as the elected representative of District 1 on the King County Council. I  
am over the age of 18 and competent to testify to the matters set forth in this declaration. I base  
this declaration on my personal knowledge.

2. I have served on the King County Council representing District 1 since 2013.  
Prior to that time, I practiced law at the law firm of Foster Pepper PLLC after passing the  
Washington State Bar exam in 2001.

DECLARATION ROD DEMBOWSKI IN SUPPORT OF  
MOTION FOR PROTECTIVE ORDER - 1

App - 001

1           3.       I currently serve as Chair of the King County Board of Health. I have served in  
2 this position since February 18, 2016. The functions of the Board of Health are to set county-  
3 wide public health policy, enact and enforce local public health regulations, and carry out other  
4 duties of local boards of health specified in state law. As Chair, my focus has been on promoting  
5 cancer prevention and reducing disparities in health outcomes.  
6

7           4.       As Chair of the Board of Health, I am not involved in decisions pertaining to  
8 whether to issue health advisories to hospitals or the public. The decision to issue health  
9 advisories is exclusively a staff decision, not a Board decision and is made without consultation  
10 with or prior notice to the Board or its members.

11           5.       I do not have personal knowledge of the decision-making process for the issuance  
12 of health advisories concerning hantavirus. I only learned of department action on this matter  
13 from publicly issued documents and the public briefing at a Board of Health meeting. I have no  
14 other knowledge beyond what was publicly issued and presented by the Department.  
15

16           6.       I have been made aware of the claims in the Ehrhart litigation and understand that  
17 the Plaintiff has requested my deposition. Sitting for a deposition in the Ehrhart matter would be  
18 a hardship for me, given my very busy schedule as an elected official, and my lack of personal  
19 knowledge of the issues alleged.  
20

21           Executed this 24 day of October, 2018, at Seattle, Washington.



22           \_\_\_\_\_  
23           Councilmember Rod Dembowski

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

**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 24th 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 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](mailto:arosenberg@williamskastner.com)  
[dbrown@williamskastner.com](mailto:dbrown@williamskastner.com)  
[kgoodman@williamskastner.com](mailto:kgoodman@williamskastner.com)  
[jhager@williamskastner.com](mailto:jhager@williamskastner.com)  
[sblair@williamskastner.com](mailto:sblair@williamskastner.com)  
*Attorneys for Plaintiff*

Theron A. Buck  
Evan Bariault  
FREY BUCK P.S.  
1200 5<sup>th</sup> Ave, Suite 1900  
Seattle, WA 98101  
[tbuck@freybuck.com](mailto:tbuck@freybuck.com)  
[ebariault@freybuck.com](mailto:ebariault@freybuck.com)  
[lfulgaro@freybuck.com](mailto:lfulgaro@freybuck.com)  
*Attorneys for Plaintiff*

Christopher H. Anderson  
Todd W. Reichert  
Joseph V. Gardner  
FAIN ANDERSON  
701 Fifth Ave, Suite 4750  
Seattle, WA 98104  
[chris@favros.com](mailto:chris@favros.com)  
[todd@favros.com](mailto:todd@favros.com)  
[joe@favros.com](mailto:joe@favros.com)  
[carrie@favros.com](mailto:carrie@favros.com)  
[kellie@favros.com](mailto:kellie@favros.com)  
[Shannon@favros.com](mailto:Shannon@favros.com)  
*Attorneys for Defendant Swedish Health Services*

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

DATED this 24th day of October, 2018.



---

Sydney Henderson

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

DECLARATION OF KATHY  
LAMBERT IN SUPPORT OF  
MOTION FOR PROTECTIVE  
ORDER

I, Kathy Lambert, declare under penalty of perjury under the laws of the State of  
Washington as follows:

1. I serve as the elected representative of District 3 on the King County Council. I  
am over the age of 18 and otherwise competent to testify to the matters set forth in this  
declaration. I base this declaration on my personal knowledge.

2. I have served on the King County Council representing District 3 since 2002.  
Prior to that time, I served from 1995-2002 as a Washington State Representative, representing  
District 45.

1           3.       In my role as a King County Councilmember, I currently serve on numerous  
2 committees and boards, including:

- 3
- 4           •     Washington State Association of Counties Legislative Steering Committee,
- 5           •     Vice-Chair, Budget and Fiscal Management Committee
- 6           •     Budget Leadership Team
- 7           •     Chair, Regional Water Quality Committee
- 8           •     Chair, Planning, Rural Service and Environment Committee
- 9           •     Vice-Chair, Mobility Committee
- 10          •     Vice-Chair, Law and Justice Committee
- 11          •     Vice-Chair, King County Board of Health
- 12          •     Vice-Chair, Budget and Fiscal Management Committee
- 13          •     Committee of the Whole
- 14          •     King County Flood Control Zone Executive Committee
- 15          •     Eastside Transportation Partnership
- 16          •     Snoqualmie Watershed Forum
- 17          •     Criminal Justice Council
- 18          •     Strategic Advisory Council for Technology
- 19          •     Regional Law, Safety and Justice Council
- 20          •     Forecast Council
- 21          •     Growth Management Planning Council
- 22          •     Washington State Office of Public Defense Advisory Committee
- 23          •     Washington State Association of Counties Audit and Finance Committee
- 24          •     Washington State Association of Counties Board of Directors, Alternate
- 25          •     Washington State Association of Counties Legislative Steering Committee
- 26          •     Puget Sound Regional Council Executive Board, Alternate
- 27          •     Puget Sound Regional Council Operations Committee
- Puget Sound Regional Council Transportation Policy Board
- Suburban King County Coordinating Council on Gangs (LINC)
- Children and Family Justice Center Project Oversight Committee
- Mountains to Sound Greenway Advisory Council
- Northshore Parks and Recreation Service Area Board
- King County Search and Rescue Advisory Board
- National Association of Counties Justice and Public Safety Steering Committee
- National Association of Counties Large Urban County Caucus

23           4.       I have previously served on the following committees and boards:

- 24           •     Chair, Law, Justice, Health and Human Services Committee
- 25           •     Employment and Administration Committee
- 26           •     Regional Policy Committee
- 27           •     National Association of Counties Cyber Security Task Force

DECLARATION OF KING COUNTY COUNCILMEMBER  
KATHY LAMBERT IN SUPPORT OF MOTION FOR  
PROTECTIVE ORDER - 2

- Transportation, Economy and Environment Committee
- Eastside Human Services Forum
- Committee To End Homelessness
- Hopelink Board of Directors

5. As noted above, I currently serve as Vice-Chair of the King County Board of Health. I have served in this position since approximately 2002. The Board is a federated body made up of ten voting members and one nonvoting member. Eight of the ten voting members are elected officials, including three from the Metropolitan King County Council, three from the Seattle City Council, and two from the Suburban Cities of King County. The functions of the Board of Health are to set county-wide public health policy, enact and enforce local public health regulations, and carry out other duties of local boards of health specified in state law.

6. My duties as Vice-Chair of the Board include attending briefings, analyzing and passing Rules and Regulations that provide general policy guidance for the county.

7. The majority of the Board's work involves passing Rules and Regulations pertaining to county-wide health policy. For example, so far this year the Board has passed two Regulations pertaining to the use of smokeless tobacco at parks and professional sporting events. In 2017, the Board passed regulations pertaining to food safety ratings for general food service establishments, farmers markets permits and fees, rabies vaccination requirements, and limited service pregnancy centers.

8. I do not, nor have I ever, inserted myself into the day-to-day operating decisions of the Department of Public Health. For example, I am not involved in decisions concerning when and how to issue health advisories pertaining to diseases, nor am I consulted when such advisories are issued.

9. I became aware of the death of Brian Ehrhart in March 2017 through my former

1 staff member Jeff McMorris, who was Mr. Ehrhart's friend. As noted in emails produced in  
2 conjunction with this matter, I was deeply saddened by the death, especially because of the  
3 impact it had on one of my employees. As a result, I emailed Patty Hayes at the Department of  
4 Public Health to find out what steps could be taken to educate the public about proper procedures  
5 for dealing with rodent infestations when cleaning personal property, as my understanding was  
6 that Mr. Ehrhart contracted Hantavirus from cleaning his garage without taking proper  
7 precautions relating to a deer mice infestation. Though my intent was to share my concerns and  
8 ideas, I do not have authority over whether a health advisory or other information is disseminated  
9 from the Department to the public. Those decisions are made by Public Health staff, not the  
10 Board.  
11

12 10. All of the information I have pertaining to Mr. Ehrhart's death was provided to  
13 me by other people, and only after his death occurred. I was not involved with the Department  
14 of Public Health's decision-making process or its actions related to this incident.  
15

16 11. In March of 2017, I also became aware that a Redmond resident had survived a  
17 Hantavirus infection in December of 2016.

18 12. I was not involved in the decisions pertaining to whether to issue a health  
19 advisory to hospitals after the Redmond resident case or the Ehrhart case, nor would it have been  
20 my practice to participate in such decisions. As an elected official, I have opinions and have  
21 reacted to Department of Health decisions and actions, but again: I was not involved with the  
22 Department's processes. I understand that an information sheet for the public regarding  
23 Hantavirus was posted on the County's website on March 15, 2007, and health advisories to  
24 hospitals and the public relating to Hantavirus were issued on March 23, 2017 and April 4, 2017.  
25

26 13. I have been made aware of the claims in the Ehrhart litigation and understand that  
27

1 the Plaintiff has requested my deposition. Sitting for a deposition in the Ehrhart matter would be  
2 a hardship for me, given my very busy schedule as an elected official, and my lack of personal  
3 involvement in the decision-making process of the Department of Health of the actions taken.

4 Executed this 23<sup>rd</sup> day of October, 2018 at Seattle, WA.

5  
6   
7  
8 \_\_\_\_\_  
9 Councilmember Kathy Lambert

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

**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 24th 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 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](mailto:arosenberg@williamskastner.com)  
[dbrown@williamskastner.com](mailto:dbrown@williamskastner.com)  
[kgoodman@williamskastner.com](mailto:kgoodman@williamskastner.com)  
[jhager@williamskastner.com](mailto:jhager@williamskastner.com)  
[sblair@williamskastner.com](mailto:sblair@williamskastner.com)  
*Attorneys for Plaintiff*

Theron A. Buck  
Evan Bariault  
FREY BUCK P.S.  
1200 5<sup>th</sup> Ave, Suite 1900  
Seattle, WA 98101  
[tbuck@freybuck.com](mailto:tbuck@freybuck.com)  
[ebariault@freybuck.com](mailto:ebariault@freybuck.com)  
[lfulgaro@freybuck.com](mailto:lfulgaro@freybuck.com)  
*Attorneys for Plaintiff*

Christopher H. Anderson  
Todd W. Reichert  
Joseph V. Gardner  
FAIN ANDERSON  
701 Fifth Ave, Suite 4750  
Seattle, WA 98104  
[chris@favros.com](mailto:chris@favros.com)  
[todd@favros.com](mailto:todd@favros.com)  
[joe@favros.com](mailto:joe@favros.com)  
[carrie@favros.com](mailto:carrie@favros.com)  
[kellie@favros.com](mailto:kellie@favros.com)  
[Shannon@favros.com](mailto:Shannon@favros.com)  
*Attorneys for Defendant Swedish Health Services*

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

DATED this 24th day of October, 2018.



---

Sydney Henderson

**ADLER GIERSCH, PS**

**October 29, 2019 - 3:25 PM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 96464-5  
**Appellate Court Case Title:** Sandra Ehrhart v. King County, et al.  
**Superior Court Case Number:** 18-2-09196-4

**The following documents have been uploaded:**

- 964645\_Answer\_Reply\_20191029152255SC553475\_3732.pdf  
This File Contains:  
Answer/Reply - Other  
*The Original File Name was Answer to Amici WSAC and NACCHO - FINAL.pdf*

**A copy of the uploaded files will be sent to:**

- KGoodman@williamskastner.com
- abarnes@aretelaw.com
- arosenberg@adlergiersch.com
- athan.papailiou@pacificallawgroup.com
- bjenson@williamskastner.com
- chris@favros.com
- cphillips@bblaw.com
- danhuntington@richter-wimberley.com
- dashbaugh@aretelaw.com
- dawn.taylor@pacificallawgroup.com
- dbrown@williamskastner.com
- ebariault@freybuck.com
- eledom@bblaw.com
- ffusaro@bblaw.com
- jhager@williamskastner.com
- joe@favros.com
- jroller@aretelaw.com
- kfriedrich@adlergiersch.com
- kymberly.evanson@pacificallawgroup.com
- lmartin@bblaw.com
- matthew.segal@pacificallawgroup.com
- mellanim@comcast.net
- mmcaleenan@wsac.org
- mriley@freybuck.com
- paul.lawrence@pacificallawgroup.com
- radler@adlergiersch.com
- sydney.henderson@pacificallawgroup.com
- tbuck@freybuck.com
- todd@favros.com
- valeriamcomie@gmail.com

**Comments:**

RESPONDENT EHRHART FAMILY'S ANSWER TO AMICI WASHINGTON STATE ASSOCIATION OF COUNTIES (WSAC), THE NATIONAL ASSOCIATION OF COUNTY & CITY HEALTH OFFICIALS (NACCHO), AND THE BIG CITIES HEALTH COALITION (BCHC)

---

Sender Name: Kody Friedrich - Email: kfriedrich@adlegiersch.com

**Filing on Behalf of:** Melissa D Carter - Email: mdcarter@adlegiersch.com (Alternate Email: )

Address:

333 Taylor Ave. N.

Seattle, WA, 98109

Phone: (206) 682-0300 EXT 103

**Note: The Filing Id is 20191029152255SC553475**