No. 1032196

SUPREME COURT
OF THE STATE OF WASHINGTON

ALEKSEY ZORCHENKO AND NINA ZORCHENKO,

Petitioners,

v.

CITY OF FEDERAL WAY, a municipal corporation, DERRICK BOWERS, individually, DANICA BOWERS, individually, and SHIPT, INC., an Alabama company,

Respondents.

RESPONDENT CITY OF FEDERAL WAY'S ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page(s)

Washington Cases

Page(s)

Constitutional Provisions, Statutes and Court Rules

I. INTRODUCTION

An unlicensed and partially blind driver crossed the fog line, hit a police car, and then struck and injured Aleksey Zorchenko while he stood beyond the road's shoulder. The Zorchenkos[1] alleged that the City of Federal Way breached a duty to prevent such third-party harm after Aleksey's wife, Nina Zorchenko, called police to the scene of a non-injury accident. But Nina did not request, nor did the City undertake to provide, emergency assistance. And the Zorchenkos alleged only nonfeasance—the City undisputedly did nothing to cause or increase the risk of harm. So, absent a special relationship, the City had no duty to protect. *See Robb v. City of Seattle*, 176 Wn.2d 427, 439, 295 P.3d 212 (2013).

The Zorchenkos argued that this Court in *Norg v. City of Seattle*, 200 Wn.2d 749, 522 P.3d 580 (2023), held that a special

[1] The City follows Division One's example in referring to Aleksey and Nina Zorchenko by their first names and will collectively refer to them as "the Zorchenkos."

relationship exists between the government and every 911 caller. That is wrong. Although the petition broadly frames the issue presented, it really presents only this narrow question: Did *Norg* impose a new common-law duty to protect every 911 caller from third-party harm, no matter the circumstances? Division One correctly answered "no." *See Zorchenko v. City of Fed. Way*, _ Wn. App. 2d _, 549 P.3d 743, 747–48 (2024).

Norg applied existing common law. After receiving a 911 call for emergency-medical aid, the city undertook to provide it. *Norg*, 200 Wn.2d at 764–65. This Court held that the city had a duty to exercise reasonable care in providing aid—a duty the city allegedly breached when its responders initially went to the wrong address. *Id.* at 752, 765–66.

No such breach of duty is alleged here. Instead, the Zorchenkos alleged breach of a duty to protect Aleksey from third-party harm. But *Norg* had nothing to do with third-party harm. It thus does not apply. *See Zorchenko*, 549 P.3d at 747–

48 (explaining the many ways that *Norg* differs from this case). And the Zorchenkos' misreading of *Norg* does not merit review.

But if this Court grants the Zorchenkos' petition, it should also consider an alternative ground to affirm not reached by Division One—the Zorchenkos' failure to present sufficient evidence supporting causation. Because their expert only speculated that Aleksey would have been unharmed, summary judgment was appropriate on that ground, as well.

II. RESTATEMENT OF THE ISSUES

A. The Zorchenkos' Petition

1. No conflict with Norg. *Norg* neither involved third-party harm nor any alleged duty to protect 911 callers from such harm. Did Division One correctly conclude that *Norg* does not control?

2. No issue of substantial public interest. Without their reading of *Norg*, the Zorchenkos fear that courts must consider the facts of each case in determining whether a duty was owed. But that *is* the court's role. Do the Zorchenkos fail to raise an issue of substantial public interest?

B. The City's Conditional Cross-Petition

No causation. Alternatively, the Zorchenkos cannot establish causation. No admissible evidence supports avoidance of injury in their alternate scenario. If this Court grants the Zorchenkos' petition, should it also consider this alternative ground to affirm?

III. RESTATEMENT OF THE CASE[2]

A. The first accident: Defendant Ostrom rear-ended the Zorchenkos' SUV. Though nobody was injured, police were called to the scene.

Danica Ostrom rear-ended the Zorchenkos' SUV on a two-lane road. CP 124, 321. Nobody was injured. CP 176; *Zorchenko*, 549 P.3d at 745.

The Zorchenkos and Ostrom positioned their vehicles safely on the roadway's shoulder. CP 31–32. Nina Zorchenko called 911 and reported the accident as a nonemergency. CP 177. She confirmed nobody was injured and asked for "assistance obtaining a police report" and permission to move the vehicles from the scene. *Zorchenko*, 549 P.3d at 745; CP 177. The

[2] For additional factual background, see Division One's opinion. *Zorchenko*, 549 P.3d at 745–46.

Zorchenkos lived nearby. CP 33. Their son arrived and drove Nina home. *Id.*

Aleksey and Ostrom waited on a grassy area beyond the shoulder, their vehicles shielding them from traffic. CP 34, 39–40, 54, 89; *Zorchenko*, 549 P.3d at 745.

When Officer Giger arrived at the scene, she angle-parked her vehicle on the northbound shoulder, behind Ostrom's car. CP 98; *Zorchenko*, 549 P.3d at 745. This was the standard position for parking behind a vehicle on the shoulder, turning the wheels to the left so that the vehicle's front end was near the road's edge striping, with the rear located further onto the shoulder. CP 98–99. She activated the vehicle's rear-flashing lights to alert traffic of her presence. CP 99.

B. The second accident: Defendant Bowers, an unlicensed and partially blind driver, crashed his van into Officer Giger's vehicle and then struck Aleksey.

Officer Giger met with Aleksey and Ostrom in the grassy area. CP 91, 100. After gathering information, she returned to her vehicle to generate an accident report. CP 100.

Seconds later, Derrick Bowers' van crashed into Officer Giger's vehicle. CP 100, 322. A following driver saw Officer Giger's vehicle and its flashing lights on the shoulder and slowed as he approached. CP 75–77. But Bowers' van never slowed. CP 76–77. The following driver estimated the van's speed at 40 miles per hour. CP 76–77.

Bowers has right-eye blindness that conceals objects in his right peripheral vision, so he could not see anything on the roadside, including the emergency flashers and the parked vehicles. *See* CP 64–65. Bowers' impaired vision has caused several accidents, including this one, and his driver's license has been suspended since the 1990s. CP 63–65.

Bowers does not remember his driving after hitting Officer Giger's vehicle. CP 71. Here's what happened: Bowers' airbag deployed on impact with Officer Giger's vehicle. CP 68–70. The van veered back into the roadway and then turned sharply right, striking the left rear side of the Zorchenkos' SUV. CP 101, 126–27, 131–35; *Zorchenko*, 549 P.3d at 745. Then the van

struck Aleksey where he stood, drove over him, and trapped him underneath. CP 94, 101.

Officer Giger radioed for assistance and administered emergency aid to Aleksey. CP 101–02.

C. The Zorchenkos sued the City for allegedly breaching a duty to protect Aleksey from Bowers' reckless driving—and cited *Norg* as creating the duty.

The Zorchenkos sued Bowers, Ostrom, and the City. *Zorchenko*, 549 P.3d at 745.[3] They sought liability against the City for not protecting Aleksey from third-party harm. *Id.* For breach, they alleged that Officer Giger should have (1) instructed Aleksey to remain his vehicle, and (2) positioned her vehicle to prevent or mitigate the accident.[4] *Id.*

[3] Although not part of the record on review, a second-amended complaint, dated May 18, 2023, added Nina Zorchenko as a plaintiff.

[4] Officer Giger did, in fact, angle-park her vehicle, but the Zorchenkos' expert opined, without foundation, that a different vehicle position would have changed the collision with Aleksey in an unspecified way. CP 98–99, 110, 112; CP 148–49; *Zorchenko*, 549 P.3d at 745.

For the City's purported duty to protect, they cited only *Norg*. *Amended Opening Br*. at 5–7; CP 138–39; *see also Zorchenko*, 549 P.3d at 747.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. The Zorchenkos allege that the City committed nonfeasance, not misfeasance. At common law, one has no duty to protect another from third-party harm absent a special relationship.

When determining whether one has a duty to protect another from third-party harm, the common law distinguishes between misfeasance and mere nonfeasance. *Robb*, 176 Wn.2d at 435–37. Only if a special relationship existed will nonfeasance support liability for third-party harm. *Id*. at 439; *see also Barlow v. State*, 2 Wn.3d 583, 589–90, 540 P.3d 783 (2024); *Mancini v. City of Tacoma*, 196 Wn.2d 864, 885, 479 P.3d 656 (2021).

"Misfeasance" is conduct that creates a new risk of harm to the plaintiff. *Robb*, 176 Wn.2d at 437. Liability for misfeasance follows from the general principle that everyone—

including law enforcement—owes a duty of reasonable care to refrain from *causing* harm to others. *Mancini*, 196 Wn.2d at 879, 885–86. In contrast, nonfeasance is passive inaction or the failure to take steps to protect others from harm. *Robb*, 176 Wn.2d at 437. Nonfeasance generally does not result in liability. *See id.*

For example, in *Robb*, police officers did not affirmatively create a new risk when they failed to pick up nearby shotgun shells after stopping a suspect. *Id.* at 437–38. The officers provided neither the shells nor the shotgun that the suspect later used to kill the plaintiff. *Id.* at 438. The suspect would have presented the same degree of risk had the officers never stopped him, and the peril remained unchanged by the officers' action. *Id.* So, absent a special relationship—which did not exist—the city had no duty to protect the plaintiff.

On appeal, the Zorchenkos conceded that Officer Giger's alleged negligence was mere nonfeasance.[5] And rightly so. Officer Giger did not place Aleksey in peril. Before she arrived, Aleksey exited his vehicle and placed himself in the grassy area beyond the shoulder. Officer Giger's actions did not increase the risk to Aleksey. Had Officer Giger not arrived, the same peril would have existed. The same holds true for Bowers' reckless driving.

Thus, to impose liability for third-party harm—resulting from Bowers' driving—the Zorchenkos needed to identify a special relationship. *See Robb*, 176 Wn.2d at 439.

B. Division One's decision does not conflict with *Norg*: *Norg* did not create a new special relationship between law enforcement and 911 callers at nonemergency accident scenes.

The only "special relationship" the Zorchenkos identified comes from their misreading of *Norg*—ostensibly creating a protective relationship between law enforcement and every 911

[5] *Amended Opening Br.* at 11.

caller. They present one issue for review: Did *Norg* impose a new common-law duty to protect every 911 caller from third-party harm, no matter the circumstances?[6] Their appeal hinged on the answer being "yes." But Division One correctly answered "no."

Norg does not establish the expansive duty that the Zorchenkos have sought to apply. Recognizing that duty would have made no sense under *Norg*'s facts. *Norg* did not involve third-party harm; it involved an allegedly negligent provision of emergency assistance. *See Norg*, 200 Wn.2d at 752, 765–66.

And *Norg* did not, in fact, recognize any new duty, let alone one protecting 911 callers from third-party harm. It applied existing common law. *See id.* at 763. After receiving a 911 call for emergency-medical aid, the city undertook to provide it. *Id.* at 764–65. This triggered the city's duty to

[6] The Zorchenkos steadfastly maintained a one-argument appeal: *Norg* created this duty, and the trial court erred by not recognizing it. They thus concede that if *Norg* did not create this duty, then the trial court correctly granted summary judgment.

exercise reasonable care in providing aid. *Id.* The city allegedly breached this duty when its responders went to the wrong address. *Id.* at 752, 765–66.

Norg is inapposite. *See Zorchenko*, 549 P.3d at 747–48 (explaining the many ways that *Norg* differs from this case). The Zorchenkos allege breach of a duty to prevent third-party harm—not breach of a duty to exercise reasonable care in providing emergency assistance. The Zorchenkos have thus failed to identify a conflict under RAP 13.4(b)(1).

C. The Zorchenkos identify no other special relationship.

Beyond *Norg*, the Zorchenkos identify no basis for finding a special relationship.

This Court has found special relationships in limited circumstances based on the nature of the relationship between the defendant and the victim. *See Kim v. Budget Rent A Car Sys., Inc.*, 143 Wn.2d 190, 196, 15 P.3d 1283 (2001) (providing examples, including innkeeper and guest, business and business invitee, and party entrusted with care of a dependent). These

special relationships result "in a heightened duty where a person is helpless, totally dependent, or under the complete control of someone else for decisions relating to their safety." *Turner v. Washington State Dep't of Soc. & Health Servs.*, 198 Wn.2d 273, 286–87, 493 P.3d 117 (2021).

The Zorchenkos have not argued that such a protective special relationship existed.

In the law-enforcement context, as an exception to the public-duty doctrine, this Court has recognized that a special relationship may be created when three elements are established: (1) direct contact or privity between the public official and the plaintiff that sets the plaintiff apart from the general public; (2) an express assurance given by the public official; and (3) justifiable reliance on the assurance by the plaintiff. *Munich v. Skagit Emergency Commc'n Ctr.*, 175 Wn.2d 871, 879, 288 P.3d 328 (2012).

This analysis is akin to the rescue doctrine. *See id.* at 894 (Chambers, J., concurring) ("Because the special relationships in

these 911 cases are in the nature of rescue doctrine cases, assurances and reliance are appropriate measures of whether a duty arose."); *Norg*, 200 Wn.2d at 756–57 (citing Justice Chambers' *Munich* concurrence as precedential). The duty is circumscribed by what is promised. *See Cummins v. Lewis County*, 156 Wn.2d 844, 867–68, 133 P.3d 458 (2006) (Chambers, J., concurring).

The Zorchenkos do not argue that a special relationship formed from express assurances. Indeed, Division One noted that the Zorchenkos did not argue that a "special relationship" existed based on public-duty-doctrine decisions. *Zorchenko*, 549 P.3d at 749 n.8.

D. The petition involves no issue of substantial public interest. Division One simply—and correctly—rejected the Zorchenkos' misreading of *Norg*.

The Zorchenkos cite RAP 13.4(b)(4), implying that their petition involves an issue of substantial public interest. They never directly explain how. But they express concern about the absence of a categorical rule that triggers a duty every time

someone calls 911. *Petition* at 10–11. And they lament that courts must determine the existence of a duty based on the facts in each case. *See id.*

But such determinations are necessary and within the court's proper role. The existence of a duty is a question of law and depends on mixed considerations of logic, common sense, justice, policy, and precedent. *Snyder v. Med. Serv. Corp. of E. Washington*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001). "In a negligence action, in determining whether a duty is owed to the plaintiff, a court must decide not only who owes the duty, but also to whom the duty is owed, and what is the nature of the duty owed." *Keller v. City of Spokane*, 146 Wn.2d 237, 243, 44 P.3d 845 (2002). Where a duty depends on a special relationship or an undertaking to provide emergency assistance, then the court must determine if the facts support the existence of a duty. *See, e.g., Barlow*, 2 Wn.3d at 589–92 (special relationship); *Norg*, 200 Wn.2d at 764–65 (emergency assistance).

The Zorchenkos' imagined categorical rule—which has no basis in existing law—strips away these considerations. It would require law enforcement to protect every 911 caller from third-party harm, no matter the circumstances. Although that rule would be easy to apply—the only point the Zorchenkos make in the rule's favor—such a rule ignores all other considerations, including the consequences.

For instance, Nina Zorchenko called 911 to "obtain a police report and clear direction about when we could move the vehicles and further leave the scene." CP 177. Aleksey then placed himself in the alleged peril. He exited the vehicle to stand in the grassy area. Under the Zorchenkos' bright-line rule, if Bowers had hit Aleksey immediately after the 911 call, then the City would face potential liability for failing to protect him—even before Officer Giger arrived.

Even if the supposed duty did not trigger until Officer Giger arrived, no basis exists to impose liability on the City when Aleksey placed himself where he did, the Zorchenkos did not

seek protection from the City for their physical safety, and the City did nothing to increase the risk.

But the Zorchenkos' petition does not ask this Court to create their imagined rule, let alone wrestle with the sweeping consequences for municipalities across Washington that would flow from it.[7] As explained, the Zorchenkos' appeal presented a one-issue challenge: the trial court failed to apply their reading of *Norg*. And Division One affirmed, answering simply—and correctly—that the Zorchenkos misread *Norg*. The petition thus raises no issue of substantial public interest.

E. The Zorchenkos cite RAP 13.4(b)(3) but present no argument supporting this basis for review.

Although petition also cites RAP 13.4(b)(3), it omits argument explaining how it raises a "significant question" under either the federal or state constitution. Indeed, "constitution"

[7] Had Division One adopted the Zorchenkos' reading of *Norg*, this case would certainly present an issue of substantial public interest. Cities across Washington would face potential liability for third-party harm to every 911 caller.

appears nowhere in the petition. Thus, this ground provides no basis for review.

V. ARGUMENT FOR CONDITIONAL CROSS-REVIEW

This Court can affirm a summary judgment on any ground within the pleadings and supported by evidence in the record. *LaMon v. Butler*, 112 Wn.2d 193, 200–01, 770 P.2d 1027 (1989).

Here, causation presents an additional ground to affirm. The evidence on summary judgment and reconsideration was insufficient to support proximate cause—that Officer Giger's alleged breaches would have prevented Aleksey's injuries.

The Zorchenkos submitted two declarations from Casey Johnson, a former King County Sheriff's Office deputy. CP 143–50, 340–42. Johnson opined about causation had Officer Giger positioned her vehicle differently and instructed Aleksey to remain in his. CP 340–42.

Johnson's opinion has at least three flaws. First, Johnson purported to testify as an expert in accident reconstruction, but

he lacks any reconstruction experience or necessary qualifications. *See* ER 702; CP 275–77.

Second, Johnson's opinion lacks foundation. For example, he conducted no measurements or calculations. CP 275–77, 340–42. Without foundation, his testimony constitutes inadmissible speculation. *See Moore v. Hagge*, 158 Wn. App. 137, 155–56, 241 P.3d 787 (2010) (affirming exclusion of expert testimony lacking proper foundation, such as quantitative analysis, for opinion that accident would have been avoided had the city taken certain actions).

Finally, in deposition, Johnson testified only that the outcome *may* have been different in the alternative scenario. CP 277. Testimony that something may have prevented an injury is insufficient to create a question of fact on causation. *See Moore*, 158 Wn. App. at 151–52. On summary judgment, Johnson's certainty increased. He declared the alternative scenario would have prevented injuries with "absolute certainty." CP 340–42. But this contradiction cannot create an issue of fact. *See*

Marshall v. AC & S Inc., 56 Wn. App. 181, 185, 782 P.2d 1107 (1989) (holding witness cannot create an issue of fact by contradicting clear deposition testimony with a declaration that does not explain the contradiction).

Because Division One held that a duty was not owed, it did not address causation. If this Court grants the Zorchenkos' petition, then it should also consider this alternative ground to affirm.

VI. CONCLUSION

Review is unwarranted because Division One correctly concluded that *Norg* does not control. *Norg* did not create an expansive duty requiring law enforcement to protect all 911 callers from third-party harm. But if this Court grants the Zorchenkos' petition, then it should also consider the causation issue as an alternative ground to affirm.

This document contains 3,238 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted: August 30, 2024.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the state of Washington that I am an employee at Carney Badley Spellman, PS, over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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