No. _____

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON
No. 86762-8-I

IN THE SUPREME COURT OF
STATE OF WASHINGTON

DELAURA NORG, as Litigation Guardian ad Litem for her husband, FRED B. NORG, an incapacitated man, and DELAURA NORG, individually,

Respondents,

v.

CITY OF SEATTLE,

Petitioner.

CITY OF SEATTLE'S PETITION FOR REVIEW

Paul J. Lawrence, WSBA #13557
Jessica A. Skelton, WSBA #36748
W. Scott Ferron, WSBA #61154
PACIFICA LAW GROUP LLP
1191 Second Avenue, Suite 2000
Seattle, WA 98101-3404
(206) 245-1700

ANN DAVISON
Seattle City Attorney
Joseph G. Groshong, WSBA #41593
Tara Gillespie, WSBA #38610
Assistant City Attorneys
701 5th Avenue, Suite 2050
Seattle, WA 98104
206-684-8200

FLOYD, PFLUEGER, KEARNS, NEDDERMAN
& GRESS P.S.
Francis S. Floyd, WSBA #10642
Amber L. Pearce, WSBA #31626
3101 Western Ave, Suite 400
Seattle, WA 98121
206-441-4455

Attorneys for Appellant City of Seattle

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington State Cases

Washington State Statutes

Washington State Rules

Other Authorities

I. INTRODUCTION & IDENTITY OF PETITIONER

Washington courts have long recognized that the voluntary rescue doctrine governs the duty of care owed by a party attempting to rescue a person in need. The doctrine strikes an important balance between encouraging parties to attempt a rescue when they do not have an obligation to do so and holding rescuers liable when they increase the harm to the person rescued. The resulting duty of care is distinct from and narrower than the general negligence duty of care.

The Court of Appeals decision in this case all but eliminates this Court's previous recognition of the voluntary rescue doctrine. The Court of Appeals' error stems from its misinterpretation of this Court's decision in an earlier interlocutory appeal in this case. In that prior appeal, this Court concluded that the public duty doctrine did not apply and that providers of emergency medical services, like the City of Seattle's Fire Department Medic One ("SFD") here, owe a common law duty of reasonable care. *Norg v. City of Seattle*

("*Norg* II"), 200 Wn.2d 749, 755, 522 P.3d 580 (2023). In *Norg* II, however, this Court did not address the scope of that common law duty.

On remand, the superior court interpreted *Norg* II to hold that the common law voluntary rescue doctrine, which recognizes important limitations on liability for rescuers, did not apply to SFD as a matter of law. Instead, the trial court applied the general negligence duty of care. The Court of Appeals affirmed this error, concluding that the law of the case dictated the trial court's ruling. That ruling, however, misapplies this Court's case law regarding the voluntary rescue doctrine, misreads *Norg* II, and conflicts with a recently published Court of Appeals decision.

This appeal also presents the important public issue of the applicability of the voluntary rescue doctrine to entities providing emergency medical services, also known as ambulance services, to the citizens of our state. Hundreds of

entities in Washington provide these important services,[1] including SFD. Clarification of the duty of care owed by these entities is critical to allow voluntary rescuers to understand their potential liability.

Accordingly, review is warranted under Rule of Appellate Procedure ("RAP") 13.4(b)(1), (2), and (4), to resolve these conflicts regarding this issue of substantial public interest.

II. COURT OF APPEALS DECISION

Petitioner the City of Seattle ("City") seeks review of all parts of the Court of Appeals decision issued on November 25, 2024. *See* Appendix A.

III. ISSUES PRESENTED FOR REVIEW

1. This Court and the Court of Appeals have long recognized that the voluntary rescue doctrine serves as both a

---

[1] A list of over 300 licensed emergency medical services providers is maintained by the Department of Health's Office of Community Health Systems. *See EMS and Trauma Publications*, Washington State Department of Health, https://doh.wa.gov/public-health-healthcare-providers/emergency-medical-services-ems-systems/ems-and-trauma/publications#Regional%20EMS%20and%20Trauma%20Documents ("Licensing and Certification Documents").

source of, and limitation on, liability for would-be rescuers, including ambulance service providers. SFD operates a voluntary ambulance service, Medic One, without charge. In a suit against the City alleging negligence on the part of SFD in providing voluntary ambulance services, should negligence be determined by application of the voluntary rescue doctrine or the general negligence standard of liability?

2. Assuming the answer to the first issue is that the voluntary rescue doctrine applies to the claims in this case: Did the trial court commit reversible error by (1) denying the City's motion for summary judgment when there was no evidence that SFD's alleged negligence worsened the harm to the Norgs and that the Norgs did not detrimentally rely on SFD's services, (2) precluding the City from admitting evidence related to the voluntary rescue doctrine, and/or (3) failing to instruct the jury on the elements of negligence liability under the voluntary negligence doctrine as opposed to the general negligence standard of liability?

3. Did the Court of Appeals err in determining that law of the case and *Norg* II precluded the trial court from applying the negligence standard under the voluntary rescue doctrine?

IV. STATEMENT OF THE CASE

The City's appeal presents an important legal question: whether the voluntary rescue doctrine applies to providers of voluntary ambulance services like SFD. This Court is familiar with the facts of this case, having issued an opinion in it last year. *See Norg* II, 200 Wn.2d at 753-55. The City provides a brief overview of the case as well as of the post-remand decisions for which the City now seeks review.

A. The Norgs Allege Negligence Based on the City's Response to an Emergency Medical Incident.

Mr. Norg experienced a heart attack in the early morning hours of February 17, 2017. CP 150-51, 157. Ms. Norg awoke to Mr. Norg "making really loud sounds" with "[h]is eyes [] wide open and glassy." CP 150. By the time she called 911, Ms. Norg determined that Mr. Norg had "taken his last breath" and

"was gone." CP 151. Ms. Norg provided the 911 operator with the Norgs' address and, within one minute of answering Ms. Norg's call, the operator dispatched three SFD responding units. CP 174, 178-79. The operator gave Ms. Norg instructions to provide cardiopulmonary resuscitation ("CPR") to her husband, which she followed. CP 179-82. The units initially passed the Norgs' residence at the Circa Apartments and went to a nursing home three blocks away, before realizing they had gone to the wrong address. CP 201. They reached the Norgs' residence approximately 16 minutes after Ms. Norg began speaking with the 911 operator. CP 218.

Ms. Norg testified in her deposition that she would not have done anything differently had she known that the responders would take up to seventeen minutes to arrive. CP 113-17 (collecting deposition testimony), CP 152-153. Mr. Norg survived but suffered severe injuries as a result of his heart attack. *See, e.g.*, CP 234. The Norgs filed suit against the

City, seeking damages based on the alleged negligence of the City. CP 1-12.

B. This Court Affirms Dismissal of the City's Public Duty Defense and Holds that a Common Law Duty of Care Applies.

The parties filed cross motions for summary judgment regarding the City's affirmative defense under the public duty doctrine. CP 26-43; CP 107-27. The trial court granted the Norgs' motion for summary judgment and denied the City's motion, striking the City's affirmative defense under the public duty doctrine. CP 373-74. The trial court then granted the City's motion to certify the summary judgment ruling for interlocutory review. CP 476-77.

The Court of Appeals affirmed the trial court's ruling. *Norg v. City of Seattle* ("*Norg* I"), 18 Wn. App. 2d 399, 413, 491 P.3d 237 (2021), *aff'd,* 200 Wn.2d 749. In so doing, it recognized that "[t]he sole issue on appeal is whether the public duty doctrine bars the Norgs' negligence claim as a matter of law." *Id.* at 403.

This Court granted discretionary review and affirmed. *Norg* II, 200 Wn.2d at 755, 766. As in *Norg* I, the *Norg* II Court addressed one narrow issue: "Whether the public duty doctrine bars the Norgs' negligence claim against the City." *Id.* at 755. The Court explained that "[i]f the duty is based on common law and owed to the Norgs individually, then the public duty doctrine does not apply, our analysis ends, and we must affirm." *Id.* at 759.

Accordingly, in *Norg* II, this Court's analysis was limited to the determination that the public duty doctrine did not apply and that the City owed the Norgs a common law duty. *See id.* This Court did not, however, determine the scope of the common law duty owed to the Norgs or explicitly discuss the applicability of the common law voluntary rescue doctrine. *See id.* This Court did, however, rely on two voluntary rescue doctrine cases to support the conclusion that "a common law duty of reasonable care 'arises when one party voluntarily begins to assist an individual needing help.'" *Id.* at 763 (quoting

Folsom v. Burger King, 135 Wn.2d 658, 674-75, 958 P.2d 301 (1998); then citing *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 299, 545 P.2d 13 (1975)).

C. On Remand, the Trial Court Incorrectly Concludes That This Court Rejected the Voluntary Rescue Doctrine.

On remand following the *Norg* II decision, the City moved for summary judgment on the basis that the common law voluntary rescue doctrine applied to this case. Specifically, the City argued that the Norgs could not establish that the City had taken any affirmative action that increased the harm to Mr. Norg or that the Norgs had detrimentally relied on the City such that they were deprived of help from other sources as required by that doctrine. CP 626-35. The trial court denied the motion, concluding that the question of whether the voluntary rescue doctrine applied "was fully before the Supreme Court," and that "[t]he fact that it wasn't specifically analyzed . . . in a way that would have perhaps given more clarity doesn't change . . . my

outlook." CP 695-97; Verbatim Report of Proceedings ("VRP") (June 2, 2023) at 26:16–23.

Before trial, the Norgs served motions in limine that included a request to exclude evidence or statements related to the voluntary rescue doctrine. *See* CP 2159-73. The trial court granted these motions pursuant to a stipulation, which included that the City could make an offer of proof regarding the voluntary rescue doctrine. CP 2159-60.

The City's agreement to the motions in limine was premised on its understanding that the trial court already had ruled that the voluntary rescue doctrine did not apply in this case. *See* CP 2104. Upon further review of the summary judgment order, however, the City determined the trial court did not expressly state that the doctrine was inapplicable as a matter of law. *Id*. Accordingly, the City moved for clarification. CP 2108-16.

While the motion for clarification was pending, the City submitted its first set of proposed jury instructions, including

five based on the voluntary rescue doctrine. CP 2124-49. The trial court subsequently ruled on the City's motion for clarification, stating that its order on summary judgment "is construed such that the common law duty of reasonable care provided in the Voluntary Rescue Doctrine does not apply as a matter of law." CP 2156 (emphasis in original).

The case proceeded to trial with the City unable to present arguments or evidence based on the voluntary rescue doctrine. During the course of the trial, the City filed an offer of proof regarding the voluntary rescue doctrine. CP 2213-17. The City stated its position that "the only common law duty of care it owed Mr. Norg was that of a voluntary rescuer." CP 2214. As such, the City stated that "the jury should be permitted to determine whether the City increased the risk of harm to Plaintiffs beyond what it would have otherwise been, or whether the harm occurred because of the Plaintiff's reliance on the City's efforts." CP 2216; *see also* VRP (Vol. X) at 220:13-226:17. The City's offer of proof detailed the evidence it would

have presented had the trial court permitted the introduction of evidence regarding the voluntary rescue doctrine. CP 2216-17.

When the trial court instructed the jury, it did not include instructions on the voluntary rescue doctrine or any limitations on liability that flow from that doctrine. CP 2250-84. Rather, the trial court instructed the jury regarding a general negligence duty of care. For example, Instruction No. 5 stated that the plaintiffs had the burden of proving "that the defendant acted, or failed to act, in one of the ways claimed by the plaintiffs and that in so acting, or failing to act, the defendant was negligent." CP 2257; *see also* CP 2265 (Instruction No. 13 defining negligence in terms of failure to exercise ordinary care).

The jury returned a verdict in favor of the Norgs and assessed damages in the amount of $3 million for Mr. Norg and $275,000 for Ms. Norg. CP 2276-77. The City appealed. CP 2283-2300.

D. The Court of Appeals Affirms the Trial Court.

The Court of Appeals affirmed the trial court's ruling that the voluntary rescue doctrine did not apply as a matter of law. Specifically, the court ruled that, under the law of the case doctrine, both the Court of Appeals and the trial court were bound to conclude that the voluntary rescue doctrine did not apply in this case because this Court had so concluded in *Norg* II. *See* Appendix A at 5. The Court of Appeals also concluded that the City had misconstrued the voluntary rescue doctrine, which, according to the court, serves only as a source of liability, and not a limitation. *Id.* at 7-9, 11. Accordingly, it concluded that the trial court had not erred by (1) ruling that the voluntary rescue doctrine did not apply; (2) denying the City's motion for summary judgment; (3) granting the Norgs' motions in limine prohibiting voluntary rescue doctrine evidence; and (4) failing to instruct the jury on the doctrine, and instead instructing them regarding the general negligence standard of care. *See id.* at 10-11.

V. GROUNDS FOR REVIEW

The Court of Appeals decision distorts the voluntary rescue doctrine and expands potential liability for ambulance service providers (and other voluntary rescuers) across Washington. It reached its conclusion by misreading this Court's precedent. The decision further conflicts with other appellate decisions. The court's decision disregards the careful balancing of interests that have undergirded the voluntary rescue doctrine for over fifty years. Because the decision conflicts with decisions of this Court and the Court of Appeals, and presents an issue of substantial public importance, review is warranted under three independent bases. *See* RAP 13.4(b)(1), (2), (4).

A. The Court of Appeals Decision Eliminates the Important Limitation on Liability in the Voluntary Rescue Doctrine in Conflict with Decisions of This Court and the Court of Appeals.

The voluntary rescue doctrine governs the scope of the common law duty of care when a person or entity undertakes a voluntary rescue. When determining the nature of a duty in a

negligence action, Washington courts "weigh[], 'considerations of logic, common sense, justice, policy, and precedent.'" *See Barlow v. State*, 2 Wn.3d 583, 589, 540 P.3d 783 (2024) (quoting *Stalter v. State*, 151 Wn.2d 148, 155, 86 P.3d 1159 (2004)). By treating the voluntary rescue doctrine as a blunt on-off switch that serves only as a source of liability, the Court of Appeals ignored the careful weighing of interests central to the doctrine. In doing so, the Court of Appeals misapplied the precedents of this Court and the Courts of Appeals, and created confusion about the potential liability of hundreds of providers of ambulance services in Washington. This distortion of the voluntary rescue doctrine provides grounds for review under RAP 13.4(b)(1), (2), and (4).

1. The Court of Appeals Ignored the Careful Balancing of Interests Undergirding the Voluntary Rescue Doctrine.

The voluntary rescue doctrine is set forth in the Restatement of Torts and serves as an important source of, and limitation on, liability for persons and entities that voluntarily

choose to rescue persons in need. The Restatement provides that:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
> a. his failure to exercise such care increases the risk of such harm, or
> b. the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts §323; *see also id.*, §324A (following the framework above for "liability to [a] third person" where the rescuer also "has undertaken to perform a duty owed by the other to the third person").

For more than 50 years, Washington courts have applied the voluntary rescue doctrine in appropriate negligence cases. *See, e.g.*, *Brown*, 86 Wn.2d at 299 (1975) (citing cases and Restatement (Second) of Torts §323); *Folsom*, 135 Wn.2d at 675-76 (quoting Restatement (Second) of Torts §324A at length); *Osborn v. Mason Cnty.*, 157 Wn.2d 18, 28, 134 P.3d

197 (2006) (recognizing that "the rescue doctrine" applies to both public and private entities); *Meneely v. S.R. Smith, Inc.*, 101 Wn. App. 845, 856, 5 P.3d 49 (2000) ("The voluntary rescue doctrine is a well established liability concept.").

Consistent with the Restatement, Washington courts have applied the voluntary rescue doctrine as both a source of, and a limitation on, liability in negligence claims. On the one hand, Washington courts have recognized that there generally is no duty to rescue under Washington law. *See Folsom*, 135 Wn.2d at 674 ("Under traditional tort law, absent affirmative conduct or a special relationship, no legal duty to come to the aid of a stranger exists."). On the other hand, courts have recognized that where a rescuer takes affirmative action that increases the harm to the person in need, liability may arise. *See id*. (identifying "affirmative conduct" or "a special relationship" as the source of the duty); *Brown*, 86 Wn.2d at 299 (noting that where a rescuer "increases the risk of harm to those he is trying to assist, he is liable for any physical damages he causes"). The

Folsom Court summarized the circumstances where liability exists for a voluntary rescue as follows:

> Typically, liability for attempting a voluntary rescue has been found when the defendant makes the plaintiff's situation worse by: (1) increasing the danger; (2) misleading the plaintiff into believing the danger had been removed; or (3) depriving the plaintiff of the possibility of help from other sources.

135 Wn.2d at 676 (citing W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*, § 56 (5th ed. 1984)). Washington courts have applied the voluntary rescue doctrine to determine the duty of care owed in voluntary rescues by both public and private parties. *See Brown*, 86 Wn.2d at 295 (discussing voluntary rescue doctrine in analysis of plaintiff's "common-law theories of the State's liability"); *Folsom*, 135 Wn.2d at 673-74 (discussing doctrine in context of private security company's liability).

Importantly, because the voluntary rescue doctrine recognizes that there is no duty to rescue, liability attaches to affirmative acts, not omissions. *See Folsom*, 135 Wn.2d at 674

(there is no duty to rescue "absent affirmative conduct or a special relationship"); *Brown*, 86 Wn.2d at 299 (rescuer is liable where he "increases the risk of harm to those he is trying to assist"). Thus, a failure to rescue, or a delay in arriving to rescue, cannot alone create the basis for negligence unless the rescuer also has made the plaintiff's situation worse such as by increasing the harm or inducing reliance. *Id.* at 300-01 (observing that while tort law traditionally has refused to impose liability for omissions, it has done so in circumstances where a party's promises induce reliance that causes "the promisee to refrain from seeking help elsewhere and thereby worsening his or her situation").

The Court of Appeals failed to reckon with this key distinction between acts and omissions present in the voluntary rescue doctrine and with the different bases for asserting liability in the case of a voluntary rescue as opposed to acts of general negligence. In doing so, it disrupts the careful balance

struck by *Brown*, *Folsom*, and the Restatement. This conflict merits review under RAP 13.4(b)(1) and (2).

2. It Is Critical that the Numerous Voluntary Emergency Medical Responders in Washington Understand Their Potential Liability.

Review is also warranted under RAP 13.4(b)(4) because the balance the voluntary rescue doctrine strikes is important and serves as a potential limit on the common law liability of the many public and private entities that provide vital rescue services supporting public health and safety. The Court of Appeals decision calls into question the applicability of the voluntary rescue doctrine to all voluntary ambulance service providers in Washington. The trial court's determination, affirmed by the Court of Appeals, that the voluntary rescue doctrine does not apply to SFD *as a matter of law*, CP 2156, sweeps beyond this one ambulance response and will reverberate across fire departments and public health agencies throughout the state. Moreover, in light of the *Norg* II holding that the City is subject to the same liability as private entities

when providing emergency medical services, the trial court's ruling will also give pause to private ambulance providers. *See Norg* II, 200 Wn.2d at 758 (affirming the policy goal "that governmental entities be held liable only 'to the same extent as if they were a private person or corporation.'" (internal quotation omitted)).

Whether or not the voluntary rescue doctrine is applicable to ambulance service providers in Washington will undoubtedly affect whether these services are provided and how they operate. As this Court made clear in *Norg* II, providing ambulance services is not statutorily mandated or a governmental duty owed to the general public. 200 Wn.2d at 764–65. Accordingly, knowing whether and how liability arises in the provision of these services will affect the many public and private entities that do so. That knowledge could lead to changes in how public and private entities provide or contract for these services. These changes will be felt directly by

Washingtonians who rely on emergency medical services, often in their moments of greatest need.

This issue affects all Washingtonians for another reason—cost of services. Many of the providers of ambulance services, like SFD, are operated by cities and counties, some with far fewer resources than the City (which currently provides Medic One services at no cost to those receiving services). Even when ambulance services are provided by private companies, taxpayers still often foot portions of the bill, with localities contracting with private companies or neighboring localities for those services. *See* RCW 35.21.768 (permitting cities to levy excise taxes specifically to pay for contracted ambulance services). If the voluntary rescue doctrine's limitations on liability are not applicable to ambulance service providers—as the Court of Appeals decision suggests—this will almost certainly increase costs to taxpayers in addition to potentially reducing services. Accordingly, review of this important public issue is warranted.

B. The Court of Appeals Decision Conflicts with This Court's Decision in *Norg* II.

The Court of Appeals decision misreads *Norg* II and, thus, incorrectly applies the law of the case. The superior court concluded the law of the case was "that the common law duty of reasonable care provided in the Voluntary Rescue Doctrine does not apply as a matter of law." CP 2156 (emphasis in original). The Court of Appeals affirmed that this ruling was supported by binding law of the case. *See* Appendix A. That decision is in conflict with this Court's ruling in *Norg* II.

The law of the case doctrine is a judge-made rule that provides that once there is an appellate court ruling, its holding must be followed in all of the subsequent stages of the same litigation. "Where there has been a determination of the applicable law in a prior appeal, the law of the case doctrine ordinarily precludes re-deciding the same legal issues in a subsequent appeal." *Folsom v. Cnty. of Spokane*, 111 Wn.2d 256, 263, 759 P.2d 1196 (1988). Application of law of the case is discretionary. *Id*.; *see also* RAP 2.5(c)(2) (restricting the law

of the case doctrine to allow review of earlier decision of appellate court in the same case).[2]

Norg II's holding addressed one narrow issue: the applicability of the public duty doctrine. The initial appeal stemmed from cross-motions seeking partial summary judgment regarding the City's affirmative defense based on the public duty doctrine. *See Norg* II, 200 Wn.2d at 752. This Court framed the only issue as: "Whether the public duty doctrine bars the Norgs' negligence claim against the City." *Id.* at 755. This Court broke its analysis into two sections: one on the

---

[2] The Court of Appeals also incorrectly suggested that there are *only* two bases under which a court may exercise its discretion not to apply the law of the case doctrine. *See* Appendix A at 7 ("[RAP 2.5(c)(2)] codifies 'two historically recognized exceptions to the law of the case doctrine.'") (quoting *Roberson v. Perez*, 156 Wn.2d 33, 42, 123 P.3d 844 (2005)). But the full, unedited statement from this Court is that "RAP 2.5(c)(2) codifies *at least* two historically recognized exceptions to the law of the case doctrine that operate independently." *Roberson*, 156 Wn.2d at 42 (emphasis added). Washington courts have long recognized that RAP 2.5(c)(2) operates alongside common law to afford courts broad discretion. *See State v. Schwab*, 163 Wn.2d 664, 674, 185 P.3d 1151 (2008) ("Application of RAP 2.5(c)(2) is ultimately discretionary.").

background of the public duty doctrine and one concluding that the doctrine did not apply in this case. *See generally id.* This Court concluded that, "based on the undisputed facts, the public duty doctrine does not apply to the Norgs' claim as a matter of law. We need not consider whether any of the doctrine's exceptions apply." *Id.* at 766.

Accordingly, the law of the case doctrine does not apply here, because the applicability of the voluntary rescue doctrine is not "the same legal issue" as the applicability of the public duty doctrine. *Folsom*, 111 Wn.2d at 264; *see also Sambasivan v. Kadlec Med. Ctr.*, 184 Wn. App. 567, 576–77, 338 P.3d 860 (2014) (declining to apply law of the case because it is appropriate only when "a second appeal [] revisit[s] an issue that was squarely presented and decided in the first").

Moreover, even if *Norg* II does address the voluntary rescue doctrine, the decision endorses, rather than forbids, application of the doctrine. On remand, the Norgs' based their law-of-the-case argument on this Court's conclusion that "the

City owed [the Norgs] an individualized, actionable duty of reasonable care when it undertook to respond to their 911 call." *See* CP 642 (quoting *Norg* II, 200 Wn.2d at 766). As explained above, however, the determination that a common law duty of care applies does not foreclose application of the voluntary rescue doctrine. Indeed, in reaching its conclusion, this Court stated that "although generally there is 'no legal duty to come to the aid of a stranger,' a common law duty of reasonable care 'arises when one party voluntarily begins to assist an individual needing help.'" *Norg* II, 200 Wn.2d at 763 (quoting *Folsom*, 135 Wn.2d at 674-75; then citing *Brown*, 86 Wn.2d at 299).

Although *Norg* II determined that the City owed the Norgs a common law duty, it did not additionally rule on the scope of the common law duty owed by the City. The implication of the Court's statement that a duty arises when a person voluntarily assists an individual needing help is that the duty is defined by the voluntarily rescue doctrine. The trial court and Court of Appeals' conclusion that this Court ruled the

voluntary rescue did not apply at all is inconsistent with this Court's words and makes no sense.

As discussed above, the cases *Norg* II relies on analyze the voluntary rescue doctrine as limiting the common law duty owed in a voluntary rescue. *See Folsom*, 135 Wn.2d at 675-76 (describing the duty as "an exception to the traditional 'no duty to rescue' rule" where "a defendant takes steps to assist a person in need and acts negligently in rendering that assistance"); *Brown*, 86 Wn.2d at 299 (describing the duty as "if a rescuer fails to exercise such care and consequently *increases the risk of harm to those he is trying to assist*, he is liable for any physical damages he causes" (emphasis added)).

Read properly, *Norg* II supports application of the voluntary rescue doctrine. Accordingly, the Court of Appeals determination that the law of the case bars application of the voluntary rescue doctrine conflicts with this Court's decision in *Norg* II. Review should be granted under RAP 13.4(b)(1) on this additional basis.

C. The Court of Appeals Decision Conflicts with Another Recent Published Court of Appeals Decision.

Finally, the Court of Appeals decision conflicts with another recently published Court of Appeals decision, *Zorchenko v. City of Federal Way*, 31 Wn. App. 2d 390, 549 P.3d 743 (2024). In *Zorchenko,* the Court of Appeals discussed *Norg* II at length. *Id*. at 397-99. After summarizing the facts, it concluded that in *Norg* II: "Th[o]se facts gave rise to a duty of reasonable care *under the rescue doctrine*, which **"**arises when one party voluntarily begins to assist an individual needing help." *Id.* at 399 (quoting *Norg* II, 200 Wn.2d at 763) (emphasis added).[3] This is in direct conflict with the Court of Appeals ruling here, which concludes that it was the law of the case,

[3] The Court of Appeals summarized *Norg* II similarly in a recent unpublished decision. *See Ghodsee & Ghodsee*, 29 Wn. App. 2d 1044, 2024 WL 550344, at *4 (Feb. 12, 2024) ("the court determined that the City owed the Norgs, individually, a common law duty of reasonable care *pursuant to the rescue doctrine*, which 'arises when one party voluntarily begins to assist an individual needing help.") (quoting *Norg* II, 200 Wn.2d at 763) (emphasis added) (unpublished).

under *Norg* II, that the voluntary rescue doctrine did not apply. *See* Appendix A at 5.

Zorchenko was decided after the City filed its Opening Brief at the Court of Appeals, but the City discussed the new case at length in its Reply Brief. Tellingly, the Court of Appeals decision does not even mention *Zorchenko* or address the conflict between its decision that the voluntary rescue doctrine did not apply and the *Zorchenko* court's decision that it did apply. *See generally* Appendix A. Review is warranted under RAP 13.4(b)(2) for this additional reason.

VI. CONCLUSION

The Court of Appeals decision conflicts with this Court's and the Court of Appeals' previous recognition of the voluntary rescue doctrine, misreads *Norg* II, and risks dramatically expanding liability to ambulance service providers across Washington. The City respectfully requests that this Court accept review, reverse the Court of Appeals, and remand this

case to the trial court with instructions to correctly apply the voluntary rescue doctrine.

This document contains 4,997 words, excluding the parts of the document exempted from the word count by RAP 18.17

RESPECTFULLY SUBMITTED this 20th day of December, 2024.

PACIFICA LAW GROUP LLP

s/ Jessica A. Skelton
Paul J. Lawrence, WSBA #13557
Jessica A. Skelton, WSBA #36748
W. Scott Ferron, WSBA #61154

ANN DAVISON
Seattle City Attorney
Joseph G. Groshong, WSBA #41593
Tara Gillespie, WSBA #38610
Assistant City Attorneys

FLOYD, PFLUEGER, KEARNS,
NEDDERMAN & GRESS P.S.
Francis S. Floyd, WSBA #10642
Amber L. Pearce, WSBA #31626

Attorneys for Appellant City of Seattle

On the 20th day of December, 2024, I caused to be served, via the Washington State Appellate Court's Portal System, a true copy of the foregoing document upon the parties listed below:

Janis Mary Nevier
Simon H. Forgette PS
jan@forgettelaw.com

William Leedom
Bennett Bigelow Leedom PS
wleedom@bbllaw.com

Tara Gillespie
Seattle City Attorney's Office
Tara.gillespie@seattle.gov

Howard Goodfriend
Smith Goodfriend PS
howard@washingtonappeals.com

Francis Floyd
Floyd, Pflueger, Kearns
ffloyd@NWTrialAttorneys.com

Catherine Smith
Smith Goodfriend PS
cate@washingtonappeals.com

Amber Pearce
APearce@NWTrialAttorneys.com

Joseph Groshong
Joseph.groshong@seattle.gov

Dated this 20th day of December, 2024.

Sydney Henderson

EXHIBIT A

FILED
11/25/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DELAURA NORG, as Litigation Guardian ad Litem for her husband, FRED B, NORG, an incapacitated man, and DELAURA NORG, individually,

Respondent,

v.

CITY OF SEATTLE,

Appellant.

No. 86762-8-I

DIVISION ONE

UNPUBLISHED OPINION

FELDMAN, J. — For the second time, the City of Seattle (City) appeals from a summary judgment ruling in which the trial court concluded, as a matter of law, that the City owed Delaura and Fred Norg a duty of reasonable care in responding to their 911 call. Because the law of the case doctrine precludes consideration of the City's challenge to our Supreme Court's corresponding determination in the first appeal, and its remaining arguments are without merit, we affirm.

I

In its prior opinion in this case, our Supreme Court concisely recounted the essential facts, relevant procedural history, and disposition of the appeal as follows:

> Delaura Norg called 911, seeking emergency medical assistance for her husband, Fred. She gave the 911 dispatcher her correct address, which the dispatcher relayed to emergency

> responders from the Seattle Fire Department (SFD). The Norgs' apartment building was three blocks away from the nearest SFD station, but it took emergency responders over 15 minutes to arrive. This delay occurred because the SFD units failed to verify the Norgs' address and, instead, went to a nearby nursing home based on the mistaken assumption that the Norgs lived there. The Norgs sued the City for negligence, alleging that SFD's delayed response aggravated their injuries.
>
> The City pleaded the public duty doctrine as an affirmative defense, and both parties moved for summary judgment on the question of duty. The trial court granted partial summary judgment in the Norgs' favor and struck the City's affirmative defense. The Court of Appeals affirmed on interlocutory review. We granted review and now affirm.

Norg v. City of Seattle, 200 Wn.2d 749, 752, 522 P.3d 580 (2023). The court then summarized its reasoning as to the dispositive issue of duty, noting:

> The undisputed facts establish that once the City undertook its response to the Norgs' 911 call, the City owed the Norgs an actionable, common law duty to use reasonable care. The Norgs' claim is based on the City's alleged breach of this common law duty and is therefore not subject to the public duty doctrine as a matter of law. As a result, we hold that the trial court properly granted partial summary judgment to the Norgs on the question of duty. In doing so, we express no opinion on the remaining elements of the Norgs' claim (breach, causation, and damages). We thus affirm the Court of Appeals and remand to the trial court for further proceedings.

Id. Lastly, the Court reiterated its holding in the concluding paragraph of its opinion: "The Norgs have established that the City owed them an individualized, actionable duty of reasonable care when it undertook to respond to their 911 call." *Id.* at 766.

On remand, the City once again filed a motion for summary judgment regarding the dispositive issue of duty. This time, the City asserted it "had no legal duty" to the Norgs under the voluntary rescue doctrine. The trial court denied the City's motion, noting that it had considered both the City's arguments and "the

subsequent appellate decisions in this case by the Court of Appeals . . . and the Washington State Supreme Court . . . both finding as a matter of law that the City owed the Norgs a duty of reasonable care in responding to the Norgs' 911 call." The City subsequently filed a motion for reconsideration, which the trial court denied, and a motion for clarification, which the trial court granted, clarifying that its previous summary judgment ruling "is construed such that the common law duty of reasonable care provided in the Voluntary Rescue Doctrine does not apply as a matter of law."

Consistent with its summary judgment ruling, the court granted two of the Norgs' motions in limine, relevant here, excluding evidence relating to the City's defense based on the voluntary rescue doctrine. Also consistent with its summary judgment ruling, and in accordance with the Supreme Court's prior opinion, the court instructed the jury that the "Seattle Fire Department owed the Norgs a duty of reasonable care when it undertook to respond to the Norgs' 911 call." The jury returned a special verdict finding the City was negligent and its negligence was a proximate cause of injury or damage to Fred and Delaura Norg, and it awarded the Norgs $3,275,000 in damages. This timely appeal followed.

II

The City argues that the trial court erred in denying its motion for summary judgment regarding the threshold issue of duty, granting the Norgs' related motions in limine, and declining to instruct the jury regarding the voluntary rescue doctrine. We disagree.

The trial court rejected the City's arguments regarding the voluntary rescue doctrine—and the subsumed issue of duty—on summary judgment. "On appeal

of summary judgment, the standard of review is de novo, and the appellate court performs the same inquiry as the trial court." *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). Also, whether a party owes a duty in tort to another party is a question of law. *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 128, 875 P.2d 621 (1994). We review questions of law, including duty, de novo. *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 597, 257 P.3d 532 (2011).

"The threshold question in a negligent tort cause of action is whether a duty exists in the first instance. Absent a duty, there can be no breach of that duty." *In re Marriage of J.T.*, 77 Wn. App. 361, 363, 891 P.2d 729 (1995). In determining that threshold issue, our Supreme Court has recognized in both this and previous cases that "[a]t common law, every individual owes a duty of reasonable care to refrain from causing foreseeable harm in interactions with others." *Norg*, 200 Wn.2d at 763 (quoting *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 550, 442 P.3d 608 (2019)). "Moreover, although generally there is 'no legal duty to come to the aid of a stranger,' a common law duty of reasonable care 'arises when one party voluntarily begins to assist an individual needing help.'" *Id.* (quoting *Folsom v. Burger King*, 135 Wn.2d 658, 674-75, 958 P.2d 301 (1998), and citing *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 299, 545 P.2d 13 (1975)). This doctrine dates back over a century. As Justice Cardozo explained, "It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully . . . ." *Glanzer v. Shepard*, 233 N.Y. 236, 239, 135 N.E. 275, 276 (N.Y. 1922).

The trial court below denied the City's motion for summary judgment based on this court's and the Supreme Court's previous opinions in this case. Such a

ruling invokes the law of the case doctrine, which "refers to 'the binding effect of determinations made by the appellate court on further proceedings in the trial court on remand'" and "'the principle that an appellate court will generally not make a redetermination of the rules of law which it has announced in a prior determination in the same case or which were necessarily implicit in such prior determination.'" *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 113, 829 P.2d 746 (1992) (quoting 15 LEWIS H. ORLAND & KARL B. TEGLAND, WASHINGTON PRACTICE: JUDGMENTS § 380, at 55-56 (4th ed. 1986)). "The doctrine serves to 'promote[ ] the finality and efficiency of the judicial process by protecting against the agitation of settled issues.'" *State v. Harrison*, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003) (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988)).

Our Supreme Court squarely held in its prior opinion in this case "[t]he undisputed facts establish that once the City undertook its response to the Norgs' 911 call, the City owed the Norgs an actionable, common law duty to use reasonable care." *Norg*, 200 Wn.2d at 752. Later in its opinion, the Court reiterated, "[t]he Norgs have established that the City owed them an individualized, actionable duty of reasonable care when it undertook to respond to their 911 call." *Id.* at 766. Under the law of the case doctrine, as set forth above, the Supreme Court's holding regarding this issue is binding on further proceedings in the trial court on remand. And just as the trial court is bound by that prior determination, so too are we. *See Buck Mountain Owner's Ass'n v. Prestwich*, 174 Wn. App. 702, 716, 308 P.3d 644 (2013) ("We are bound by the decisions of our state Supreme Court and err when we fail to follow it.").

The City argues the law of the case doctrine does not apply here because our Supreme Court's decision in *Norg* "dealt solely with the applicability of the public duty doctrine." The City reads the opinion too narrowly. The Supreme Court recognized, "'To establish a duty in tort against a governmental entity, a plaintiff must show that the duty breached was owed to an individual and was not merely a general obligation owed to the public.'" *Norg*, 200 Wn.2d at 757 (quoting *Beltran-Serrano*, 193 Wn.2d at 549). The Court ultimately concluded that the Norgs had properly alleged and established an actionable common law duty of reasonable care owed to the Norgs individually, adding, "The City does not point to any statute supplanting this common law duty." *Id.* at 765-66. Also significant here, the Court in *Norg* cited both *Folsom* and *Brown*—two cases that squarely address the voluntary rescue doctrine—in concluding, "a common law duty of reasonable care 'arises when one party voluntarily begins to assist an individual needing help.'" *Id.* at 763 (quoting *Folsom*, 135 Wn.2d at 674-75, and citing *Brown*, 86 Wn.2d at 299). It is therefore inaccurate to state, as the City does, that the Supreme Court solely addressed the applicability of the public duty doctrine. While the Court did not mention the voluntary rescue doctrine by name, its determination regarding the issue is "necessarily implicit in such prior determination," which is sufficient to establish law of the case. *Lutheran Day Care*, 119 Wn.2d at 113.

But even if the City could establish that the Supreme Court limited its analysis to issues relating to the public duty doctrine, that would not matter here because the law of the case doctrine bars "successive reviews of issues that a party raised, *or could have raised*, in an earlier appeal in the same case." *In re Estate of Langeland v. Drown*, 195 Wn. App. 74, 82, 380 P.3d 573 (2016)

(emphasis added). Not only is the voluntary rescue doctrine an issue that the City could have raised in the prior appeal, it in fact raised the issue in the supplemental brief that it filed in the Supreme Court, where it devoted an entire section to the issue, cited both *Folsom* and *Brown* (which the Court then cited in its opinion, as noted above), and argued, "The Norgs failed to satisfy the elements of the voluntary rescue doctrine as a matter of law." Under the law of the case doctrine, the City could not properly relitigate on remand whether, as the Supreme Court ruled, it owed the Norgs a duty of reasonable care when it responded to their 911 call.

The City also argues that this court's application of the law of the case doctrine is discretionary under RAP 2.5(c)(2), which states:

> The following provisions apply if the same case is again before the appellate court following a remand . . . The appellate court may . . . review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

This rule codifies "two historically recognized exceptions to the law of the case doctrine." *Roberson v. Perez*, 156 Wn.2d 33, 42, 123 P.3d 844 (2005). The first applies "where the prior decision is clearly erroneous, and the erroneous decision would work a manifest injustice to one party," and the second "where there has been an intervening change in controlling precedent between trial and appeal." Id. The City has not established the applicability of either exception.

Next, the City claims even if the Supreme Court concluded (as it did) that the City owed the Norgs an individualized, actionable duty of reasonable care when it responded to their 911 call, "[t]he voluntary rescue doctrine is set forth in

the Restatement of Torts and serves as an important source of, and limitation on, liability for persons and entities that voluntarily choose to rescue persons in need." In support of this argument, the City cites Restatement (Second) of Torts § 323 (Am. Law Inst. 1965), which states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

Contrary to the City's attempt to repurpose section 323 as a substantive limitation on liability for entitles that undertake a voluntary rescue, it merely sets forth the test for determining whether a party's voluntary undertaking gives rise to a duty to exercise reasonable care in the performance of the undertaking.

Much the same applies to the City's argument that "[c]onsistent with the Restatement, Washington courts have applied the voluntary rescue doctrine as both a source of, and a limitation on, liability in negligence claims." In *Folsom*, cited by the City in support of this argument, our Supreme Court stated:

> Typically, liability for attempting a voluntary rescue has been found when the defendant makes the plaintiff's situation worse by: (1) increasing the danger; (2) misleading the plaintiff into believing the danger had been removed; or (3) depriving the plaintiff of the possibility of help from other sources.

135 Wn.2d at 676 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS, 56 (5th ed. 1984)). Like section 323 of the Restatement, discussed above, the three-part test in *Folsom* merely sets forth a test for determining whether a party's

voluntary rescue gives rise to a duty to exercise reasonable care in the performance of the rescue. Here, whether the City owed the Norgs a duty of reasonable care was conclusively resolved in the prior appeal.

The City's policy argument also fails. The City claims that imposing a duty to exercise reasonable care in the circumstances presented here "will reverberate across fire departments and public health agencies throughout the state" and "will also give pause to private ambulance providers." In so arguing, the City overlooks the pattern instructions regarding causation and damages. Consistent with Washington Pattern Jury Instruction 15.01, the trial court instructed the jury that "'proximate cause' means a cause in which a direct sequence produces the injury complained of and without which such injury would not have happened." WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: 15.01 (7th ed. 2019). And consistent with Washington Pattern Jury Instruction 30.01.01, the trial court further instructed the jury that any damage award should "fairly compensate the plaintiffs for the total amount of such damages as you find were proximately caused by the negligence of the defendant." These instructions effectively limit a defendant's liability to the harm caused by its breach of the common law duty of reasonable care in the performance of a voluntary rescue. When applied to the alleged breach (here, SFD's delayed response to the Norgs' 911 call), these instructions provide the protection from excessive liability that the City claims is missing here. The jury was so instructed, and we presume that the jury followed these instructions and awarded damages accordingly. *See Coogan v. Borg-Warner Morse Tec Inc.*, 197 Wn.2d 790, 808, 490 P.3d 200, 212 (2021) ("jurors

are presumed to follow the court's instructions," quoting *State v. Emery*, 174 Wn.2d 741, 766, 278 P.3d 653 (2012)).

For similar reasons, the trial court did not abuse its discretion in declining to instruct the jury regarding the voluntary rescue doctrine. *See Fergen v. Sestero*, 182 Wn.2d 794, 802, 346 P.3d 708 (2015) ("Whether to give a certain jury instruction is within a trial court's discretion and so is reviewed for abuse of discretion."). The City, for example, proposed that the trial court instruct the jury, "There is no general duty to come to the aid of others" and "a rescuer or promisor is only liable [in rendering aid] when others have reasonably relied on the promise or efforts." The City's proposed instructions are contrary to our Supreme Court's holding that "once the City undertook its response to the Norgs' 911 call, the City owed the Norgs an actionable, common law duty to use reasonable care." *Norg*, 200 Wn.2d at 752. The instructions also misconstrue the voluntary rescue doctrine as a limitation of liability rather than a test for determining whether a party's voluntary rescue gives rise to a duty to exercise reasonable care in the performance of a rescue. *See supra* at 7-9 (addressing City's argument regarding Section 323 of the Restatement (Second) of Torts and *Folsom*). The trial court correctly rejected these instructions. *See Griffin v. W. RS, Inc.*, 143 Wn.2d 81, 90, 18 P.3d 558 (2001) ("no duty to give an incorrect instruction").

Nor did the trial court abuse its discretion in granting the Norgs' motions in limine regarding the voluntary rescue doctrine, both of which were contested solely on legal grounds. *See Gunn v. Riley*, 185 Wn. App. 517, 531, 344 P.3d 1225 (2015) ("We review a trial court's grant of a motion in limine for an abuse of discretion."). The first such motion sought to "[e]xclude evidence or statements

that the Seattle Fire Department (SFD) responders to the Norg emergency were 'volunteers' or 'conducting a voluntary rescue' or any mention of the 'voluntary rescue doctrine' (VRD)." The second motion likewise sought to "[e]xclude evidence or statements involving terms associated with the VRD." The City stipulated to both motions, noting that the trial court had previously ruled on this issue on summary judgment. Because the City has not established that the trial court erred in denying its summary judgment motion on the voluntary rescue doctrine, its argument regarding these motions in limine likewise fails.

In sum, because the City misconstrues and misapplies the voluntary rescue doctrine and contradicts our Supreme Court's controlling opinion in this matter, the trial court correctly denied the City's motion for summary judgment, correctly denied its motion for reconsideration, and correctly concluded in response to the City's motion for clarification that the voluntary rescue doctrine, *as misconstrued by the City as a limitation rather than a source of liability*, does not apply here as a matter of law. For similar reasons, the trial court did not abuse its discretion, nor did it err, in granting the Norgs' stipulated motions in limine to exclude evidence related to the voluntary rescue doctrine and declining to instruct the jury regarding the City's misconceived application of the doctrine.

III

Lastly, the Norgs argue they should be awarded their attorney fees in responding to the City's appeal under RAP 18.9(a). RAP 18.9(a) permits an award of attorney fees as a sanction for filing a frivolous appeal. "An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there was no reasonable possibility of reversal."

Fay v. Nw. Airlines, Inc., 115 Wn.2d 194, 200-01, 796 P.2d 412 (1990). "All doubts as to whether the appeal is frivolous should be resolved in favor of the appellant." *Advocates for Responsible Dev. v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 170 Wn.2d 577, 580, 245 P.3d 764 (2010). The Norgs have not demonstrated that the appeal had no debatable issues on which reasonable minds might differ and is so totally devoid of merit that there is no reasonable possibility of reversal. Because we resolve all doubts as to whether the appeal is frivolous in favor of the City, we decline to award fees under RAP 18.9.

We affirm.

Feldman, J.

WE CONCUR:

Coburn, J.

Mann, J.

PACIFICA LAW GROUP

December 20, 2024 - 4:29 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	86762-8
Appellate Court Case Title:	Delaura Norg et al. v. City of Seattle

The following documents have been uploaded:

- 867628_Petition_for_Review_20241220162818D1793238_6697.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Petition for Review.pdf

A copy of the uploaded files will be sent to:

- APearce@NWTrialAttorneys.com
- andrienne@washingtonappeals.com
- autumn.derrow@seattle.gov
- carol@forgettelaw.com
- cate@washingtonappeals.com
- dawn.taylor@pacificalawgroup.com
- denise@forgettelaw.com
- ecampbell@nwtrialattorneys.com
- ffloyd@NWTrialAttorneys.com
- howard@washingtonappeals.com
- jan@forgettelaw.com
- joseph.groshong@seattle.gov
- kcalkins@bbllaw.com
- paul.lawrence@pacificalawgroup.com
- scott.ferron@pacificalawgroup.com
- simon@forgettelaw.com
- sklotz@nwtrialattorneys.com
- tara.gillespie@seattle.gov
- wleedom@bbllaw.com

Comments:

Sender Name: Sydney Henderson - Email: sydney.henderson@pacificalawgroup.com
Filing on Behalf of: Jessica Anne Skelton - Email: Jessica.skelton@pacificalawgroup.com
(Alternate Email: sydney.henderson@pacificalawgroup.com)

Address:
1191 Second Avenue, Suite 2100
Seattle, WA, 98101

Phone: (206) 245-1700

Note: The Filing Id is 20241220162818D1793238