No. 1041594

Court of Appeals No. 86077-1

SUPREME COURT
OF THE STATE OF WASHINGTON

NANCY JAMES, CHAPTER 7 TRUSTEE FOR THE BANKRUPTCY ESTATE OF MS. JESSICA I. LAKERU AND MR. AKINWALE A. LAKERU,

and

VIEW POINTE ADULT FAMILY HOME, LLC, A WASHINGTON LIMITED LIABILITY COMPANY, UBI #603 584 188,

Respondents,

v.

STATE OF WASHINGTON, STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Petitioners.

ANSWER TO PETITION FOR REVIEW

MASTERS LAW GROUP, P.L.L.C.

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INTRODUCTION

The Court of Appeals correctly followed all existing precedents, including ***Norg***, ***Mancini***, ***Robb***, ***Zorchenko***, and ***Coffel***.[1] ***Norg*** recently reaffirmed that the public duty doctrine did not bar common law negligence claims based on 911-operator *misfeasance*. In 1987, ***Coffel*** held that the doctrine did not bar common law negligence claims based on a county's regulatory-enforcement *misfeasance*. ***Mancini***, ***Robb***, and ***Zorchenko*** are in accord: DSHS may be sued in tort for its arbitrary and capricious *misfeasance*.

No conflicts exist. This Court need not again rehash a settled issue resolved nearly 40 years ago in ***Coffel*** and so recently reaffirmed in ***Norg***. Review is unwarranted.

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[1] ***Norg v. City of Seattle***, 200 Wn.2d 749, 522 P.3d 580 (2023); ***Mancini v. City of Tacoma***, 196 Wn.2d 864, 479 P.3d 656 (2021); ***Robb v. City of Seattle***, 176 Wn.2d 427, 295 P.3d 212 (2013); ***Zorchenko v. City of Fed. Way***, 31 Wn. App. 2d 290, 549 P.3d 743, *rev. denied*, 3 Wn.3d 1026 (2024); ***Coffel v. Clallam Cnty.***, 47 Wn. App. 397, 735 P.2d 686 (1987).

RESTATEMENT OF ISSUES

1. Where a Review Administrative Law Judge's 83-page Findings & Conclusions found that DSHS arbitrarily and capriciously shut down two adult family homes and drove their owners – who literally did *nothing* wrong – into bankruptcy, is the public duty doctrine inapplicable to the bankruptcy Trustee's common law negligence claims based on DSHS's misfeasance?

2. Is the answer still yes under all of this Court's precedents, including ***Norg***, ***Mancini***, and ***Robb***?

3. Is the answer still yes under other appellate decisions like ***Coffel*** and ***Zorchenko***?

4. Is it thus unnecessary to rehash that the public duty doctrine does not apply to common law negligence claims as this Court so recently reaffirmed in ***Norg***?

5. Should this Court therefore deny review?

FACTS RELEVANT TO ANSWER

A. The Court of Appeals correctly states some of the relevant facts, but DSHS does not.

The Court of Appeals' brief decision correctly states some of the relevant facts. App. A at 1-5. To the extent that they depart from that decision, DSHS's fact-claims are largely irrelevant, misleading, or inaccurate. PFR at 5-12. This Court should not rely on them.

For instance, DSHS fails to discuss – or even to cite – the Review ALJ's 83-page Findings & Conclusions, which determined that DSHS's misfeasance was arbitrary and capricious. *Compare* PFR 8 *with* CP 63, 65-149 (*see* BA Appendix). The most relevant specifics of those Findings are quoted at BA 9-11. Suffice it to say here that contrary to DSHS's misleading "facts" at PFR 6-7,

> medical personnel . . . including one of the resident's treating physicians, and a registered nurse providing that same resident with catheter services, were of the opinion that it was safe and routine for caregivers to provide such limited assistance, such as balloon inflation, after being trained to do so;

> . . . the "record did not show that [Lakeru] failed to provide 'care and services' or failed to provide that care and service by 'appropriate professionals'; and
>
> . . . the remedies or sanctions chosen were arbitrary and capricious in light of the law and facts"; so
>
> [DSHS] had an obligation to revisit the facilities to check on compliance prior to its imposition of the Draconian sanctions it did impose here, sanctions that were tantamount to capital punishment. These alternatives underline why the imposed remedies [*sic*] were arbitrary and capricious.

BA 9-11 (quoting CP 66-67, 145; emphases removed).

Moreover, DSHS fails to acknowledge the Review ALJ's finding that the Lakerus literally did *nothing* wrong. *See* BA 9-10 (quoting CP 130):

> Everyone seemed to agree that inserting the polyurethane drainage tube into the external end of the catheter was a permitted, non-sterile procedure. Therefore, it is difficult to see how inserting a syringe with saline solution into the other side of the V-shaped external catheter to inflate the balloon at the other end was a prohibited, sterile procedure.

The Lakerus thus did *nothing* to justify sanctions (CP 146):

> The Department's determination that this Appellant ***neglected*** two vulnerable adults in her AFH is ***reversed***; its finding that Appellant failed to provide "care and services" and to provide them by

> "appropriate professionals" to four residents based on their care assessments and NCP's is ***reversed.***
>
> Its imposition of summary suspension of admissions and summary suspension or revocation of Appellant's licenses to operate the homes, in light of the entire record and the law, was ***arbitrary and capricious***. [Paragraphing & final emphases added.]

B. The appellate decision precisely and carefully follows this Court's precedents and those of other appellate courts.

Contrary to DSHS's rampant hyperbole, the very brief appellate decision (its public-duty-doctrine analysis covers just five double-spaced pages in 14 pt type) precisely and carefully follows this Court's precedents. *See* App. A at 6-10 (citing and discussing, *inter alia*, ***Norg***, ***Mancini***, and ***Robb***). It in no way expands – much less departs from – those precedents. *Id.* It similarly cites and properly applies several other Court of Appeals decisions. *Id*. (citing*, inter alia*, ***Boone v. Dep't of Soc. & Health Servs.***, 200 Wn. App. 723, 403 P.3d 873 (2017)).

There is nothing new in this correct and efficient unpublished opinion. Review is thus unwarranted.

REASONS THIS COURT SHOULD DENY REVIEW

A. DSHS's apparent unlabeled summary of argument is baseless.

DSHS begins its Argument with an apparent attempt at a summary, albeit not labeled as such. PFR at 12-15. Virtually nothing in that summary is accurate. The actual law is addressed *infra*.

B. The appellate decision is wholly consistent with this Court's precedent. RAP 13.4(b)(1).

In ***Norg***, this Court recently reiterated that "the public duty doctrine is inapplicable to common law negligence claims, even if a governmental entity is the defendant." 200 Wn.2d at 759. Specifically, "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." *Id*. at 752. Since the Norgs' claim was "based on the City's alleged breach of this common law duty," it was "not subject to the . . . doctrine as a matter of law." *Id*.

This Court's holding was based at least in part on its holding in ***Mancini*** that, in "a case of affirmative misfeasance,[2] ***all individuals*** have a duty to exercise reasonable care." ***Mancini***, 196 Wn.2d at 885-86 (emphasis added). Thus, while four exceptions to the doctrine may sometimes apply, "'an enumerated exception is not always necessary to find that a duty is owed to an individual and not to the public at large' because . . . [***the***] ***doctrine does not apply to every tort claim against a governmental entity***." ***Norg***, 200 Wn.2d at 758 (emphasis added) (quoting ***Beltran-Serrano v. City of Tacoma***, 193 Wn.2d 537, 549, 442 P.3d 608 (2019)). Rather, where (as here) a governmental entity undertakes to act, negligently commits misfeasance, and its acts cause harm, the public duty doctrine does not apply to the common law claim.

[2] "**Misfeasance** . . . **1.** A lawful act performed in an unlawful manner." BLACK'S LAW DICTIONARY 1194 (12th Ed. 2024).

Remarkably – or perhaps predictably – DSHS fails to directly confront this Court's holdings that the public duty doctrine has *never* applied to common law negligence claims like this one. It also (again) misstates the Trustee's negligence claim, which does not challenge DSHS's breaches of its own regulations (that is just *evidence* of its misfeasance) but rather asserts that once it decided to act, DSHS had a common law duty to exercise reasonable care. It breached *that* duty – by arbitrarily and capriciously ***imposing Draconian sanctions*** on the Lakerus – causing the Lakerus very substantial harm. That is not significantly different from the City's negligence in responding to a 911 call in ***Norg***, which is directly on point and controlling.

The sole arguable authority DSHS appears to rely upon (but nowhere discusses) is ***Honcoop v. State***, 111 Wn.2d 182, 759 P.2d 1188 (1988), which is inapposite. PFR at 17. There, dairy owners sued the state for failing to enforce its brucellosis regulations. ***Honcoop***, 111 Wn.2d

at 184-88. Unlike here, those owners argued a *failure to enforce* the law; by contrast, here the Trustee argues that DSHS's arbitrary and capricious *misfeasance* caused the harm. ***Honcoop*** is thus inapposite. Moreover, ***Honcoop*** held that the public duty doctrine applied and that none of its exceptions permitted the owners to sue the State. 111 Wn. at 188-94. Here, the doctrine does not apply, so the exceptions are irrelevant. ***Norg*** did not, of course, exist when ***Honcoop*** was decided. No conflict exists.

C. The appellate decision is also consistent with all apposite Court of Appeals decisions–particularly *Coffel*, which DSHS once cited, but now continues to ignore on appeal. RAP 13.4(b)(2).

In the trial court, **DSHS admitted** that the public duty doctrine "does not prevent liability where the regulators act and their actions cause an injury." CP 278 (citing ***Coffel***, 47 Wn. App. 397). ***Coffel*** held that liability could attach where governmental officers took affirmative action to prevent plaintiffs from protecting their own property, in part

because the public duty doctrine applies only when such officers *fail to act*. ***Coffel***, 47 Wn. App. 403 ("Certainly if the officers do act, they have a duty to act with reasonable care"). DSHS has precisely the same duty, it acted negligently, and it caused harm.

Yet here – as in the Court of Appeals – DSHS simply ignores ***Coffel***, which again is longstanding, directly on point, and controlling authority. It is perhaps troubling that DSHS fails to even cite – much less to distinguish – this apposite authority that is directly contrary to its position argued at PFR 24-27. Yet that may be even less troubling than its assertions that it has no duty to exercise reasonable care when destroying adult family homes that provide essential medical services to vulnerable spinal-cord-injury patients. ***Norg*** and ***Coffel*** hold otherwise.

Further ignoring ***Coffel***, DSHS cites ***Donohoe*** for the proposition that its regulations "do not establish a duty of care to vulnerable adults." PFR 22 (citing and quoting

Donohoe v. State, 135 Wn. App. 824, 142 P.3d 654 (2006)). This is correct, but irrelevant here. *No one* has asserted that DSHS regulations create a duty of care owed to the Lakerus. Rather, the Trustee and the appellate court affirm that when DSHS chose to enforce its regulations by imposing arbitrary, capricious, and Draconian sanctions – casting aside its own regulatory processes – it owed the targets of its volatile and imprudent actions a duty of reasonable care. ***Donohoe*** says nothing to the contrary.

Yet DSHS argues for a new – highly expanded – public duty doctrine, claiming that this Court's clear precedents holding that the doctrine does not apply in common law negligence actions should be limited solely to suits involving "law enforcement." PFR 20-24 (citing, *inter alia*, ***Mancini***, ***Beltran-Serrano*** & ***Donohoe***). None of these cases – much less ***Norg***, which did not involve law enforcement – limits this Court's holdings that the public duty doctrine does not apply to *any* common law

negligence claims. Nor does DSHS offer any principled basis for making such a distinction. And as noted *supra*, ***Norg*** and ***Coffel*** are to the contrary.

Moreover, the "core of [Beltran-Serrano's] negligence claim [was] that [an officer] unreasonably failed to follow police practices" by *escalating* (rather than *deescalating*) a dangerous situation, resulting in the officer shooting him. ***Beltran-Serrano***, 193 Wn.2d at 544. The core of the Trustees' claim is that DSHS agents unreasonably (indeed, arbitrarily and capriciously) ignored its own regulatory guidelines designed to *deescalate* rather than to *escalate* perceived conflicts, sidestepping them to reach the harshest possible sanctions, and abruptly terminating the Lakerus' businesses. Again, DSHS fails to proffer any principled basis on which to distinguish this case from ***Beltran-Serrano***.

DSHS also fails to confront the key distinction between nonfeasance and misfeasance, as it did in the

Court of Appeals. *See, e.g.*, Reply at 7-8 (citing ***Mancini***, 196 Wn.2d at 885-86; ***Robb***, 176 Wn.2d at 439). As another appellate court recently recognized, this crucial distinction is dispositive:

> In the public duty doctrine context, Washington cases distinguish between "misfeasance" and "nonfeasance." [***Robb***, 176 Wn.2d at 439; ***Mancini***, 196 Wn.2d at 885-86.] Zorchenko concedes that the City did not owe a duty based on affirmative misfeasance because Officer Giger's actions did not directly cause the harm to him. [*See* ***Mancini***, 196 Wn.2d at 885-86.]

Zorchenko, 31 Wn. App. 2d at 397 & n.6 (citations altered). This Court's denial of review reconfirms that ***Zorchenko*** properly follows its precedents.

But here, DSHS argues (for the first time anywhere) that it did not *commit* misfeasance. PFR at 24-27. It focuses on the *evidence* of its negligence (failing to employ its own regulations) rather than on its *actions* giving rise to its duty: arbitrarily and capriciously imposing the severest possible sanctions, eschewing its own processes,

destroying the Lakerus' businesses, and recklessly placing their vulnerable spinal-cord-injury patients at grave risk. Its duty arose from its harmful *actions*, not from a failure to act.

As ***Coffel*** makes clear – and DSHS admitted in the trial court – the public duty doctrine "does not prevent liability where the regulators act and their actions cause an injury." CP 278 (relying upon ***Coffel***, 47 Wn. App. at 403). Whether DSHS failed to exercise reasonable care is a question of fact for the jury to decide on remand. *See, e.g.*, ***Gordon v. Deer Park Sch. Dist. No. 414***, 71 Wn.2d 119, 122, 426 P.2d 824 (1967) ("Whether one who is charged with negligence has exercised reasonable care is a question of fact for the jury"). The remand was appropriate.

DSHS also incorrectly claims there must be a "private analogue" to the governmental *actor*, relying on ***Norg***, ***Mancini***, and ***Zorchenko***. PFR 27-30. ***Norg*** instead says that the *activity* must be "analogous, in some degree at least" to private *actions*. 200 Wn. 2d at 756. And ***Mancini***

is *contrary to* DSHS's claim, as the officers there were *serving a warrant*, as to which there *is no* private analog. But of course, a private analog does exist here: private regulators (in many business contexts) may misperceive that their private contractor's or franchisee's actions failed to comply with required protocols, arbitrarily impose terminal sanctions on them, and then suffer a lawsuit.[3]

As for ***Zorchenko***, it does not support this claim either. ***Zorchenko*** applied the public duty doctrine because that plaintiff alleged nonfeasance, not misfeasance. 31 Wn. App. 2d at 397 & n.6. It is thus inapposite where, as here, misfeasance is alleged.

Moreover, ***Zorchenko*** does not *hold* what DSHS claims. PFR at 29-30. Rather, that court noted in *dicta* that the plaintiffs *did not dispute* that responding to a motor

[3] Perhaps more importantly, this Court's doctrine does not and should not depend on anyone's ability to conjure up a private analog. Mere imagination is no substitute for applying the rule of law in a principled fashion.

vehicle collision is an exclusive and inherent governmental function or that "no law authorizes private entities to perform comparable functions." 31 Wn. App. 2d at 401. Of course, private actors do respond to car accidents, and tow-truck operators in particular are statutorily required to activate their lights and protect the scene. The *concession* was thus incorrect. But no such "holding" exists: precise private analogs may be common, but they are not required.

D. DSHS challenges this Court's own settled law rather than presenting an issue of substantial public interest that this Court should determine.

The State lines up the same old Parade of Horribles it trots out every time this Court says it has a duty of reasonable care, just like every other Washington citizen. PFR 30-31. The sky is falling! The sky is falling!

No, the Court of Appeals has not "expanded" anything, *contra id.* Rather, it carefully followed ***Norg*** and this Court's other precedents. It also followed ***Coffel***, which has existed for nearly 40 years. Review is unwarranted.

CONCLUSION

This Court should deny review.

The undersigned hereby certifies under RAP 18.17(2)(b) that this document contains **2,627** words.

RESPECTFULLY SUBMITTED this 3rd day of June 2025.

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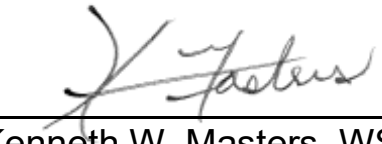

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