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NO. _____

Case #: 1041594

**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,

vs.

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

Petitioners.

PETITION FOR REVIEW

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I. INTRODUCTION

Correct application of the public duty doctrine, which this Court has repeatedly recognized as a focusing tool used to determine whether a defendant owes a duty to the public or to a particular individual, is essential to permit government agencies to perform their statutorily obligated functions protecting Washingtonians without the fear of tort liability. The public duty doctrine precludes liability for the performance of exclusive and inherent government functions without a private analogue.

The Court of Appeals' decision in this matter improperly eviscerates the public duty doctrine, contrary to this Court's opinions in *Norg*, *Mancini*, and *Beltran-Serrano* and published Court of Appeals precedent in *Zorchenko*.¹ The decision also

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); *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 442 P.3d 608 (2019); *Zorchenko v. City of Fed. Way*, 31 Wn. App. 2d 390, 549 P.3d 743 (2024), *review denied*, 3 Wn.3d 1026, 559 P.3d 486 (2024).

threatens to encourage agency inaction in a variety of regulatory contexts to avoid increased liability exposure, consequently diminishing public safety. Review is warranted under RAP 13.4(1), (2), and (4).

Here, the Department of Social and Health Services (DSHS) investigated the improper catheterization of vulnerable adults in two adult family homes (AFHs). As a result of these serious problems, DSHS revoked the AFHs' licenses and removed all residents. The AFHs' owner filed bankruptcy, and an administrative law proceeding ultimately overturned DSHS's revocation.

Thereafter, the bankruptcy trustee sued DSHS for negligence and other torts based solely on DSHS's regulatory conduct. DSHS obtained summary judgment on all claims because the trial court concluded the public duty doctrine barred the trustee's suit. But the Court of Appeals subsequently reversed that outcome, holding that DSHS owes a common law duty of

reasonable care to a regulated entity in the performance of *any* of DSHS's statutory licensing activities.

As a result, and contrary to established precedent, DSHS and other agencies can be subjected to liability for negligence based on allegations that the agency failed to use reasonable care in pursuing its licensing or other regulatory obligations. The erroneous imposition of such liability is more likely when, as here, the agency's decision is overturned in an administrative proceeding and the agency is alleged to have engaged in a lawful act in a wrongful manner. Such expansive tort liability affects not only state agency action, but government regulation at the city and county level as well.

Accordingly, clear guidance from this Court on the application of the public duty doctrine and viability of negligence claims predicated on the performance of government regulatory functions is both needed and warranted. *See* RAP 13.4(b)(1)-(2), (4). The Court of Appeals' decision should be reversed in part, summary judgment reinstated on the trustee's negligence claim,

and the remainder of the trustee's claims remanded for further proceedings in the trial court.

II. IDENTITY OF PETITIONER AND DECISION

DSHS petitions for review of the unpublished decision *James, Trustee for Estate of Lakeru v. State*, No. 86077-1-I, 2025 WL 445070 (Feb. 10, 2025) (App. A). DSHS filed a motion for reconsideration, which the Court of Appeals denied on April 8, 2025. *See* Order (App. B).

III. ISSUES FOR REVIEW

1. Whether the public duty doctrine precludes tort liability against DSHS for its allegedly negligent conduct in performing statutory licensing duties that are owed to the public and not to an individual AFH owner?

2. Whether the public duty doctrine precludes tort liability against DSHS when it engages in exclusive and inherent government functions, such as statutory licensing activities, that have no private analogue?

IV. STATEMENT OF THE CASE

A. DSHS Exercised Its Statutory Licensing Responsibilities by Revoking Two Adult Family Home Licenses and Removing All Residents

Only DSHS is legislatively authorized to license and regulate AFHs. *See, e.g.*, RCW 70.128.005(2) (“It is the legislature’s intent that department rules and policies relating to the licensing and operation of [AFHs] recognize and accommodate the different needs and capacities of the various populations served by the homes.”), .040(1) (“The department shall adopt rules and standards with respect to [AFHs] and the operators thereof to be licensed under this chapter to carry out the purposes and requirements of this chapter.”).

The Legislature obligates DSHS to promote a humane, safe, and residential environment for vulnerable AFH residents, and it provides DSHS with the power to issue, suspend, or revoke an AFH license, among other enforcement actions. *See, e.g.*, RCW 70.128.005(4) (legislative finding that there is “a compelling interest in developing and enforcing standards that

promote the health, welfare, and safety of vulnerable adults residing in [AFHs].”), .007(1) (“The purposes of this chapter are to . . . [e]ncourage the establishment and maintenance of [AFHs] that provide a humane, safe, and residential home environment for persons with functional limitations who need personal and special care[.]”); .160 (authority to impose civil penalties in response to noncompliance or violations). In selecting the appropriate remedy for an AFH’s noncompliance with DSHS regulations, “the health, safety, and well-being of residents must be of paramount importance.” RCW 70.128.160(7).

DSHS licensed Jessica Lakeru to operate two AFHs in Renton, Washington. CP 186. In 2019, DSHS identified non-compliance with regulations at both homes related to the catheterizations of multiple vulnerable adult residents, which DSHS determined placed these individuals at risk of health complications and demonstrated a serious disregard to their health, welfare, and safety. CP 151-84. For example, following

one catheter change, a resident was hospitalized due to blood in his urine. CP 156, 193.

In response to the identified non-compliance, DSHS revoked both AFHs' licenses and removed all residents. CP 193. Lakeru and her husband then filed a Chapter 7 bankruptcy. *E.g.*, CP 33.

B. Administrative Tribunals Reversed DSHS's License Revocations

Lakeru appealed the license revocations to the Office of Administrative Hearings. CP 186. In 2020, an administrative law judge (ALJ) agreed with DSHS that Lakeru had "failed to provide the care and services required under WAC 388-76-10400(4)" at both AFHs. CP 187. However, the ALJ also found that DSHS did not prove that Lakeru had neglected the residents in her care or failed to provide care and services required under WAC 388-76-10400(3)(a) or (b). CP 186-87. Thus, the ALJ reversed DSHS's decision making. CP 211-12.

DSHS sought further review by the Board of Appeals. CP 218-48. In 2021, the Board ruled against DSHS on all issues; it affirmed the ALJ's decision regarding DSHS's lack of proof on neglect and reversed the ALJ's findings against Lakeru for failure to provide care and services as required by WAC 388-76-10400(4), meaning the AFHs could accept residents again without restrictions. CP 146.

C. The Trial Court Granted DSHS Summary Judgment and Concluded the Public Duty Doctrine Barred the Trustee's Claims

The Lakerus' Chapter 7 trustee, Nancy James, subsequently filed a lawsuit against DSHS in King County Superior Court on behalf of the bankruptcy estate and as manager of the AFHs. CP 9-13. The trustee alleged that DSHS committed negligence in the performance of its statutory responsibilities under RCW 70.128, intentionally interfered with a business expectancy and contractual relations, and violated the Consumer Protection Act. CP 9-13. Of note, the trustee, in setting forth her negligence claim, alleged that DSHS "has a statutorily mandated

duty to regulate and manage adult family homes through RCW 70.128 *et seq*” and “has a duty to conduct reasonable investigations and to require such adult family homes to make necessary corrections of any violations pursuant to RCW 70.128.070.” CP 10-11. DSHS denied liability. CP 19-20.

The parties presented cross-motions for summary judgment. CP 24-55, 270-92. In support of her partial motion for summary judgment, the trustee argued that collateral estoppel barred DSHS from raising certain affirmative defenses and that DSHS was not entitled to discretionary immunity or “immunity under the public duty doctrine.” CP 34. The trustee argued that statutory and regulatory duties were owed to Lakeru and her facilities, as opposed to the public at large, i.e.: (1) the duty to provide an appropriate plan of correction, pursuant to WAC 388-76-10930; (2) the duty to conduct a revisit when DSHS orders a stop placement, pursuant to RCW 70.128.160(3); and (3) the duty to impose a sanction commensurate with the violations found, pursuant to WAC 388-76-10940. CP 54-55.

In its cross-motion, DSHS argued the trustee's claims were barred by the public duty doctrine, sovereign immunity, and/or qualified immunity, and even if those doctrines did not bar the suit, the trustee's claims for negligent investigation, tortious interference with business expectations and contractual relations, and Consumer Protection Act violations failed as a matter of law. CP 271. In response to DSHS's cross-motion, the trustee again reiterated her contention that DSHS's statutory duties were not owed to the public, but instead directly owed to Lakeru and the facilities subject to investigation. CP 314-15.

The trial court denied the trustee's motion for partial summary judgment. CP 410. In the same order, the trial court granted DSHS's motion for summary judgment on all claims, reasoning that the public duty doctrine barred recovery. CP 410.

D. The Court of Appeals Reversed Summary Judgment and Concluded the Public Duty Doctrine Did Not Apply

The trustee appealed from the summary judgment order. CP 412-13. While the Court of Appeals affirmed that collateral

estoppel does not bar DSHS's defenses, it reversed the trial court's ruling "that the public duty doctrine bars Lakeru's common law claims against DSHS." *James*, 2025 WL 445070 at *1 (App. A) (Opinion).

The Court of Appeals reached the latter conclusion after analyzing *Norg* and *Mancini*. *Id.* at *3-4. It focused on the distinction between "misfeasance" and "nonfeasance," and then reasoned—despite failing to reference any specific statutes—that a common law duty of reasonable care arose in *Norg* and *Mancini* "when an entity engaged in wrongful conduct beyond what the relevant statute imposed." *Id.* at *3-4. The court further stated that, "[i]n *Norg*, the city owed a common law duty when it failed to exercise reasonable care in providing emergency medical services[,]" and "[i]n *Mancini*, a duty arose when police officers negligently executed a search warrant." *Id.* at *4.

Ultimately, the Court of Appeals concluded that "DSHS's common law duty arose when it initiated an investigation into Lakeru's AFHs but *failed to adhere to the requirements imposed*

by RCW 70.128 and WAC 388-76-10930.” Id. (Emphasis added).

The court explained that “[b]y failing to comply with its own regulations set forth in RCW 70.128 and WAC 388-76-10930, DSHS performed a lawful act in a wrongful manner, resulting in harm to Lakeru.” *Id.* (Emphasis added). Thus, the court held “DSHS’s affirmative misfeasance gave rise to a common law duty of reasonable care to Lakeru” and “the public duty doctrine does not apply to Lakeru’s claims.” *Id.* (Footnote omitted).

DSHS timely sought reconsideration of the Opinion as to just the negligence claim. The court denied that motion. App. B.

V. REASONS REVIEW SHOULD BE GRANTED

The Opinion erroneously creates a new and expansive path to tort liability based on a government entity’s alleged breach of its licensing and regulatory obligations, contrary to established precedent addressing the public duty doctrine. The Opinion mistakenly relies on *Norg* and *Mancini* for the erroneous proposition that “a common law duty of reasonable care [arises] when an entity engage[s] in wrongful conduct beyond what the

relevant statute require[s].” *James* at *4.

But neither *Norg* nor *Mancini* turned on a government entity’s alleged breach of its statutory duties, as is the case here. Rather, *Norg* and *Mancini* are grounded in established common law duties entirely separate from statutory obligations owed by government agency defendants. No such common law duty supports the trustee’s negligence claim, which should be barred by the public duty doctrine as the trial court correctly determined.

Additionally, the Opinion conflicts with *Mancini*’s reliance on *Robb v. City of Seattle*, 176 Wn.2d 427, 295 P.3d 212 (2013), and *Robb*’s discussion of misfeasance and the duty owed under *Restatement (Second) of Torts* § 302B (1965). See *James* at *3. While § 302B can support a common law duty to protect against the criminal acts of a third party where the actor’s own affirmative act (*i.e.*, misfeasance) creates or exposes another to the recognizable high degree of risk of harm, no such duty exists in this case because there is no alleged misfeasance perpetrated by DSHS. The Opinion mischaracterizes DSHS’s alleged failure

to comply with its own regulations as affirmative misfeasance instead of nonfeasance (i.e., a failure to act).

Moreover, DSHS's alleged misconduct in exercising its statutorily provided discretion in choosing an enforcement remedy cannot amount to executing a lawful act in a wrongful manner. These erroneous holdings threaten to perversely encourage government entities to refrain from taking any action at all in a variety of regulatory contexts on pain of increased tort liability should a misstep allegedly occur or be found later during administrative review.

Finally, the Opinion conflicts with *Norg* and *Zorchenko* because there is no private analogue to DSHS's obligations under RCW 70.128 and WAC 388-76-10930 to license and regulate AFHs. *See* App. C. Thus, the public duty doctrine bars the trustee's negligence claim for this additional reason.

Because the Opinion demonstrates that an ongoing "struggle with the case law" analyzing the public duty doctrine persists in the context of regulatory activities, *see Ehrhart v. King*

Cnty., 195 Wn.2d 388, 396, 460 P.3d 612 (2020), further guidance from this Court on its proper application is needed. Accordingly, this Court should accept review pursuant to RAP 13.4(b)(1), (2), and (4).

A. The Opinion Conflicts with Precedent Applying the Public Duty Doctrine to Regulatory Duties

Numerous appellate cases confirm the continued vitality of the public duty doctrine in the context of state and local government actions. *See, e.g., Norg*, 200 Wn.2d at 755-59; *Mancini*, 196 Wn.2d at 885-86; *Beltran-Serrano*, 193 Wn.2d at 549; *Zorchenko*, 31 Wn. App. 2d at 394-96; *Ghodsee v. City of Kent*, 21 Wn. App. 2d 762, 768-69, 508 P.3d 193 (2022), *review granted, cause remanded*, 526 P.3d 852 (2023).

In *Norg*, this Court reiterated “the public duty doctrine applies only to claims based on an alleged breach of ‘special governmental obligations [that] are imposed by statute or ordinance.’” 200 Wn.2d at 758 (quoting *Beltran-Serrano*, 193 Wn.2d at 549). “When the defendant in a negligence action is a

governmental entity, the public duty doctrine provides that a plaintiff must show the duty breached was owed to him or her in particular, and was not the breach of an obligation owed to the public in general, i.e., *a duty owed to all is duty owed to none.*” *Munich v. Skagit Emergency Commc’n Ctr.*, 175 Wn.2d 871, 878, 288 P.3d 328 (2012) (Chambers, J. concurring) (emphasis added).

“The policy underlying the public duty doctrine is that legislative enactments for the public welfare should not be discouraged by subjecting a governmental entity to unlimited liability.” *Taylor v. Stevens Cnty.*, 111 Wn.2d 159, 170, 759 P.2d 447 (1988).

Courts have repeatedly recognized that the public duty doctrine is a “focusing tool” used to (1) determine whether the defendant owed a duty to the public or a particular individual and (2) “ensure governmental entities may be held liable only ‘to the *same* extent as if they were a private person or corporation.’”

Norg, 200 Wn.2d at 758 (quoting *Ehrhart*, 195 Wn.2d at 396) (emphasis in *Norg*).

Under this doctrine, an agency's regulatory functions that improve public welfare do not create duties to protect individual citizens. *Donohoe v. State*, 135 Wn. App. 824, 833, 142 P.3d 654 (2006). If there is no duty owed to an individual, then "no negligence claim may be supported as a matter of law." *Blackwell v. Dep't of Soc. & Health Servs.*, 131 Wn. App. 372, 379, 127 P.3d 752 (2006).

Accordingly, general licensing provisions or procedural acts required by statutes do not give rise to individualized legal duties actionable in tort. *See, e.g., Honcoop v. State*, 111 Wn.2d 182, 193, 759 P.2d 1188 (1988) ("[r]egulatory control over a third party is not sufficient to establish the necessary control which can give rise to an actionable duty"); *Boone v. State Dep't of Soc. & Health Servs.*, 200 Wn. App. 723, 742, 403 P.3d 873 (2017) ("the Department's general licensing authority does not create an actionable duty"); *Zapotocky v. Dalton*, 166 Wn. App.

697, 706, 271 P.3d 326 (2012), *review denied*, 174 Wn.2d 1011, 281 P.3d 687 (2012) (discretionary ballot recount procedures under statute did not create a duty); *Donohoe*, 135 Wn. App. at 846 (duty to license nursing homes was owed to the public). DSHS’s licensing provisions at issue in this matter likewise do not give rise to an actionable duty of care.

1. DSHS’s duties to license and regulate adult family homes are duties based on generally applicable statutes and regulations

Norg presents a three-step analysis to determine whether the public duty doctrine applies in a particular case. First, the court “must identify the duty . . . allegedly breached;” second, it must “determine whether that duty is based on a generally applicable statute or an individually applicable common law duty”; and third, “if the duty is based on a statute and owed to the public generally, then the public duty doctrine applies and [the court] must determine whether there are any applicable exceptions.” 200 Wn.2d at 759.

Here, the trustee and Court of Appeals both repeatedly identify the duties that DSHS allegedly breached as its duties to license and regulate AFHs that are strictly imposed by RCW 70.128 and regulations promulgated thereunder. *See* CP 10-11, 54-55, 314-15; *James*, at *4. These duties are not common law duties owed to individual AFH owners; rather, they are public duties based on statutes and regulations. *See, e.g.*, RCW 70.128.100 (“The department has the authority to immediately suspend a license if it finds that conditions there constitute an imminent danger to residents”); WAC 388-76-10002 (DSHS authority to act in response to noncompliance or violations); WAC 388-76-10945 (DSHS must impose a remedy when violations “present a threat to the health, safety, or welfare of one or more residents”).

Consequently, the Opinion errs in concluding that, “by failing to comply with its own regulations set forth in RCW 70.128 and WAC 388-76-10930 . . . DSHS’s affirmative misfeasance gave rise to a common law duty of reasonable care

to [the AFH owner] Lakeru. Therefore, the public duty doctrine does not apply” *James*, 2025 WL 445070 at *4. This error conflicts with Supreme Court and published Court of Appeals precedent. *See* RAP 13.4(b)(1), (2).

2. DSHS’s licensing and regulatory activities are not law enforcement

The Opinion reached the extraordinary and incorrect conclusion that the public duty doctrine is inapplicable to DSHS’s licensing activities, in part, by conflating statutory licensing functions with common law duties found in the context of law enforcement. In doing so, the Opinion is contrary to established Supreme Court and published Court of Appeals precedent. RAP 13.4(b)(1), (2).

First, in *Mancini*, this Court considered whether a negligence claim could exist based on police officers’ conduct while executing a search warrant. 196 Wn.2d at 864. The Court recognized that “a [common law] duty of reasonable care to refrain from causing foreseeable harm in interactions with others . . . applies in the context of law enforcement” *Id.* at 879

(quoting *Beltran-Serrano*, 193 Wn.2d at 550); *see also* *Restatement (Second) of Torts* § 281 cmt. e (1965) (a duty to refrain from negligent conduct exists to protect others from an unreasonable risk created by limited hazards). The *Mancini* Court analyzed cases involving trespass and false imprisonment to conclude that a plaintiff may “raise a claim of negligent execution of the search warrant” based on “the officers’ duty to exercise reasonable care in executing the warrant and in detaining her.” *Id.* at 883.

Second, in *Beltran-Serrano*, this Court likewise addressed unreasonable law enforcement encounters with others. There, a police officer shot a homeless mentally ill person. 193 Wn.2d at 540-41. The *Beltran-Serrano* Court observed an officer’s duty to act with reasonable care dates to a case that involved the exercise of deadly force. *Id.* at 550 (citing *Jahns v. Clark*, 138 Wash. 288, 296-97, 244 P. 729 (1926)).

By comparison, in *Donohoe*, DSHS advised the family of an elderly client that she needed to be placed in a nursing home.

135 Wn. App. at 842. Despite complaints against the facility, DSHS took no remedial action, and eventually the family transferred the client to a different nursing home where she later died. *Id.* at 830-31. The *Donohoe* Court concluded that DSHS's regulatory activities do not establish a duty of care to vulnerable adults, stating:

That the legislature has empowered DSHS to protect the public by assuming control of, or even closing down, nursing homes chronically unwilling or unable to comply with these standards does not create an actionable special duty owing personally to Mrs. Donohoe.

Id. at 847.

Here, the Opinion found that *Mancini* was an illustrative case even though the common law duty of reasonable care arose strictly from criminal law enforcement activities and conduct by police akin to the torts of trespass and false imprisonment. The statutory licensing framework found in RCW 70.128 grants due process through an administrative proceeding, a feature that is absent from the law enforcement scenarios found in *Mancini* and

Beltran-Serrano. See, e.g., RCW 70.128.160(5) (“Chapter 34.05 RCW applies to department actions under this section”).

A state agency’s licensing role, including DSHS’s mandate to act under RCW 70.128, is simply not the same as the exercise of police power by law enforcement in serving a warrant or discharging a weapon. See, e.g., *State v. Gaddy*, 152 Wn.2d 64, 71, 93 P.3d 872 (2004) (“the regulation of motor vehicle drivers’ licenses [is separate] from the law enforcement functions that the state patrol carries out”); cf. *Spokane Police Guild v. Wash. State Liquor Control Bd.*, 112 Wn.2d 30, 37 n.15, 769 P.2d 283 (1989) (citing RCW 66.44.010(2)) (“[t]he Liquor Board is an agency that exercises the State’s *police power* in administering and enforcing the law and regulations pertaining to alcoholic beverage control”) (emphasis added).

Moreover, contrary to *Donohoe*, the Opinion concludes that DSHS has a duty of care in carrying out its licensing functions and extends such duty to an AFH owner. Because the

Opinion conflicts with such precedent, this Court should accept review to correct that error. RAP 13.4(b)(1), (2).

3. DSHS did not commit misfeasance

The Opinion also incorrectly based its conclusion that DSHS owes a common law duty to an AFH owner on the concept of misfeasance, e.g., performing a lawful act in an unlawful manner. *James*, 2025 WL 445070 at *3 (citing *Robb*, 176 Wn.2d at 435; *Norg v. City of Seattle*, 18 Wn. App. 2d 399, 412, 491 P.3d 237 (2021), *reversed*, 200 Wn.2d 749, 522 P3d 580 (2023)).

The *Robb* Court considered whether police owed a duty to a victim who was murdered by shotgun shells that officers had failed to retrieve following a *Terry*² stop. *Id.* at 429-30. Following the principle in *Restatement (Second) of Torts* § 302B, *Robb* held that “a duty to third parties may arise in the limited circumstances that the actor’s own affirmative act creates a recognizable high degree of risk of harm.” *Id.* at 433.

² *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

The *Robb* Court drew a distinction between misfeasance, which “necessarily entails the creation of a new risk of harm to the plaintiff,” and nonfeasance, where “the risk is merely made no worse.” *Id.* at 437. A duty to protect another exists in situations of misfeasance where one’s actions “may have created a situation of peril” *Id.* at 436. Conversely, “[l]iability for nonfeasance (*or omissions*) . . . is largely confined to situations where a special relationship exists.” *Id.* (Emphasis added.)

In *Martinez v. Washington State University*, the Court of Appeals declined to expand a common law duty to refrain from taking affirmative acts that expose others to a risk of harm to a defendant who “did not instantly create a new, recognizable risk.” 33 Wn. App. 2d 431, 475, 562 P.3d 802 (2025); *see also Restatement (Second) of Torts* § 302B (1965). The *Martinez* Court described § 302B misfeasance as applying to “specific incidents in which a defendant’s affirmative acts (1) immediately created a new, highly recognizable risk of harm and (2) resulted in dire consequences within minutes or several hours later, giving

rise to an exception from the general rule that a party has no duty to protect others from acts of third parties.” *Id.* at 475.

In this case, the Opinion erroneously concludes that DSHS engaged in affirmative misfeasance when it “did not provide Lakeru with a plan of correction or conduct a mandatory site revisit.” *See James*, 2025 WL 445070 at *4 (citing RCW 70.128.160(3); WAC 388-76-10930). But the *failure* to issue an attestation with a required corrective plan pursuant to WAC 388-76-10930(2) is neither an affirmative act, nor an act with a high risk leading to sudden dire consequences, nor an act that led to harm committed by a third party. *Cf. Robb*, 176 Wn.2d at 433; *Martinez*, 33 Wn. App. 2d at 475.

The Court of Appeals was also mistaken about what steps DSHS must undertake when sanctioning an AFH owner. DSHS did not act in a wrongful manner because it is not required to provide an AFH owner with the opportunity to correct deficiencies; rather, the agency is granted discretion to immediately revoke an AFH license. RCW 70.128.160(2)(f).

DSHS can elect to utilize one form of sanction during or immediately after an investigation, and then later decide that an additional or more severe sanction is appropriate. *See* RCW 70.128.160(1); *see also* WAC 388-76-10930 (available remedies).

Calling DSHS's conduct "misfeasance" hinders its ability to close an AFH or remove vulnerable residents even in the most egregious circumstances of a licensing violation. Consequently, the Opinion conflicts with Supreme Court and published Court of Appeals precedent in its analysis of misfeasance, and review is appropriate on that basis as well. RAP 13.4(b)(1), (2).

B. The Opinion Conflicts with Precedent that Precludes Liability when There is No Private Analogue to Government Action

The Opinion also conflicts with Supreme Court and published Court of Appeals precedent stating that tort liability does not accrue in the performance of exclusive and inherent government actions. RAP 13.4(b)(1), (2).

Norg is controlling on this issue. The *Norg* Court held that governmental entities “shall be liable for damages arising out of their tortious conduct . . . to the same extent as if they were a private person or corporation.” 200 Wn.2d at 756 (citing RCW 4.92.090). But to be found liable in tort, the government entity must engage in activity that is “analogous in some degree at least, to the chargeable misconduct and liability of a private person or corporation.” *Id.*

The *Norg* Court recognized that emergency medical assistance is not a unique function of government, stating that, “[p]rivate ambulance service providers, providing emergency medical services, have historically been subjected to civil suit for negligence.” *Id.* at 765 (citations omitted). Therefore, the *Norg* plaintiffs could bring a negligence claim against the City of Seattle in the same manner as against a comparable private entity. *Id.*

The *Mancini* Court likewise held that law enforcement owes a duty of reasonable care in its interactions with others

because the conduct in question (an unwarranted detention) was not an inherent government function. 196 Wn.2d at 883 n.10 (citing, *e.g.*, *Alonzo v. United States*, 2017 WL 1483366 at *6 (D.N.H. Apr. 24, 2017) (government owed a duty analogous to that of private citizen who owns guns and is required to use due care))).

The Court of Appeals recently reaffirmed the private analogue principle in *Zorchenko*, when it considered a negligence claim based on a police officer's actions taken while investigating a motor vehicle collision. 31 Wn. App. 2d at 399-401. The *Zorchenko* Court held the absence of a private analogue precluded liability, stating: “[t]he statutory mandates involved in responding to the scene of a collision apply only to governmental actors and no law authorizes private entities to perform comparable functions.” *Id.* at 401.

Unlike the failure to provide reasonable care in emergency medical services in *Norg*, or the unwarranted detention of the plaintiff in *Mancini*, there is no private analogue comparable to

DSHS's licensing and regulation of AFHs in Washington. *See* RCW 70.128. Thus, DSHS's statutory licensing responsibilities are more like the exclusive and inherent form of governmental authority found in *Zorchenko* .

The Opinion erroneously treats DSHS like the dispatch service in *Norg* and the officer in *Mancini*, while not employing the private analogue analysis found in either those cases or the published *Zorchenko* decision. This Court should accept review to correct that error. RAP 13.4(b)(1), (2).

C. Because the Opinion Affects the Potential Liability of Every Licensing and Regulatory Governmental Entity in Washington, it Presents an Issue of Substantial Public Interest

Finally, this case presents an issue of substantial public interest because the Opinion places an expansive new common law duty on government agencies in the exercise of their licensing and regulatory functions. RAP 13.4(b)(4).

The Opinion arguably makes not only DSHS liable in tort when an ALJ overturns its decision making or when a licensee

disagrees with a denied application or sanction, but the Opinion also creates liability for state agencies such as the Department of Natural Resources, Department of Licensing, Department of Health, Department of Children, Youth and Families, and Liquor and Cannabis Board, among many others. County and city agencies including sheriffs' departments, public health departments, and assessors' offices do not escape the broad sweep of the Opinion's common law duty to exercise reasonable care. The normal course of administrative review will be supplanted by extensive litigation against government entities. This Court should accept review to address that issue of substantial public interest. RAP 13.4(b)(4).

VI. CONCLUSION

For all the above reasons, this Court should grant review.

This document contains 4,996 words, excluding the parts of the document exempted from the word count by RAP 18.17.

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RESPECTFULLY SUBMITTED this 9th day of May,
2025.

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CERTIFICATE OF SERVICE

I certify that on the date below I electronically filed the PETITION FOR REVIEW TO THE WASHINGTON STATE SUPREME COURT with the Clerk of the Court using the electronic filing system which caused it to be served on the following electronic filing system participant as follows:

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I certify under penalty of perjury under the laws of the
State of Washington that the foregoing is true and correct.

DATED this 9th day of May 2025, at Seattle, Washington.

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APPENDIX

**APPENDIX
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

NANCY JAMES, Chapter 7 Trustee
for the Bankruptcy Estate of Ms.
Jessica Lakeru and Mr. Akinwale A.
Lakeru; and VIEW POINTE ADULT
FAMILY HOME, LLC, A Washington
Limited Liability Company, UBI #603
584 188,

Appellants,

v.

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

Respondent.

No. 86077-1-I

DIVISION ONE

UNPUBLISHED OPINION

SMITH, C.J. — Jessica Lakeru’s two adult family homes were shut down after an investigation by the Department of Social and Health Services (DSHS). Lakeru challenged DSHS’s findings and sanctions in an administrative hearing. The administrative law judge found that, while Lakeru had committed a regulatory violation, she was not negligent and the sanctions imposed by DSHS (revocation of Lakeru’s licenses) were arbitrary and capricious. DSHS requested review and the review judge affirmed.

Lakeru then initiated a complaint against DSHS, alleging various common law claims. In its answer, DSHS raised multiple affirmative defenses, including immunity under the public duty doctrine. Both parties moved for summary

judgment. The court granted DSHS's motion for summary judgment as to immunity under the public duty doctrine. The court denied Lakeru's motions and dismissed her claims. The court also rejected Lakeru's argument that DSHS's affirmative defenses of comparative fault, nonparty at fault, good faith, and mitigation of damages are barred because issue preclusion prohibits relitigation of issues. Lakeru appeals.

We affirm the trial court's ruling that issue preclusion does not apply, but reverse its ruling that the public duty doctrine bars Lakeru's common law claims against DSHS and remand for further proceedings.

FACTS

Jessica Lakeru owned two adult family homes (AFH), licensed by DSHS. In July 2019, DSHS opened an investigation into Lakeru's homes after receiving an anonymous complaint that raised concerns about the care of a patient. Specifically, allegations were made that Lakeru performed, and taught her staff to perform, catheter changes in violation of nursing regulations, which were dangerous and posed a threat to patients in her care. An investigator from DSHS first went to Lakeru's Fairwood Park AFH. They stayed for about four hours, interviewing staff and residents. A week later, the DSHS investigator visited Lakeru's other AFH, View Pointe, and spent about three hours interviewing residents and staff.

The day after the investigator visited each facility, DSHS imposed a "stop placement," requiring Lakeru to cease admitting new patients. DSHS also

imposed “verbal conditions” on both facilities, requiring Lakeru to have registered nurses in the facilities daily to administer certain services. Lakeru complied with the conditions. DSHS did not conduct a revisit. In August 2019, less than a month after the initial investigation, DSHS suspended Lakeru’s licenses for both View Pointe and Fairwood Park, essentially closing down both facilities. The letter sent from DSHS to Lakeru stated she had shown “an inability to comply with regulations and . . . limited ability to safely operate the home.” Attached to the sanctions letter was a “Statement of Deficiencies/Plan of Correction,” but it did not actually include a plan of correction. After receiving the notices of closure, Lakeru requested an administrative hearing to contest DSHS’s findings and sanctions.

In May 2020, a four-day hearing was held. Both DSHS and Lakeru presented evidence and examined witnesses. The administrative law judge found that Lakeru failed to provide care and services as required by WAC 388-76-10400(4), but also found that Lakeru had not negligently cared for the residents and the revocation of her AFH’s licenses should be reversed. DSHS petitioned for review of the decision.

In March 2021, a review judge issued an 83-page review decision and final order largely affirming the initial review order but reversing the finding that Lakeru had failed to provide care and services as required by WAC 388-76-10400(4). The review judge found DSHS failed to provide Lakeru with a plan of correction and never completed the statutorily required revisit after issuing the

stop placement orders. The judge also noted DSHS “jumped to the most severe sanctions,” which were unnecessary in this case. The review judge concluded DSHS’s sanctions were “arbitrary and capricious.”

After the decision from the review judge, Lakeru¹ initiated a complaint against DSHS alleging four causes of action: (1) intentional interference with contractual relations, (2) intentional interference with business expectancy, (3) negligence, and (4) violation of the Washington Consumer Protection Act.² In its answer, DSHS raised the affirmative defenses of comparative fault, statute of limitations, nonparty at fault, discretionary immunity, mitigation of damages, failure to state a claim, statutory immunity, good faith, public duty doctrine, and reservation of rights.

Lakeru then moved for summary judgment requesting the court bar defendant’s affirmative defenses of comparative fault, nonparty at fault, good faith, and mitigation of damages because issue preclusion prohibits relitigating of issues.³ In her motion, Lakeru also requested the court grant summary judgment on the defendant’s affirmative defenses of discretionary immunity and the public duty doctrine, stating the defenses were inapplicable. In its response, DSHS requested the court deny Lakeru’s motion because issue preclusion does not

¹ Between the time DSHS shut down Lakeru’s facilities and the review judge issued its order, Lakeru filed for bankruptcy. Nancy James was appointed trustee of the bankruptcy proceedings and initiated the complaint on behalf of Lakeru. James is the named appellant in the case.

² Prior to presentation of the evidence, Lakeru voluntarily dismissed her claim under the Consumer Protection Act.

³ DSHS subsequently withdrew its affirmative defenses of nonparty fault and discretionary immunity.

apply. DSHS also cross-moved for summary judgment seeking dismissal of Lakeru's complaint with prejudice. DSHS claimed Lakeru's lawsuit was barred by sovereign immunity and/or qualified immunity and the public duty doctrine. DSHS also argued that, even if these doctrines did not bar the suit, Lakeru's claims for negligent investigation, tortious interference with business expectations, tortious interference with contractual relations, and Consumer Protection Act violations would fail as a matter of law.

Lakeru made a second motion for summary judgment, requesting the court find DSHS was negligent, intentionally interfered with her contractual relations, and intentionally interfered with her business expectations. The court granted DSHS's motion for summary judgment as to immunity under the public duty doctrine. The court denied Lakeru's motions and dismissed her claims. Lakeru appeals.

ANALYSIS

This court reviews an order on summary judgment de novo. *Donohoe v. State*, 135 Wn. App. 824, 833-34, 142 P.3d 824 (2006). Summary judgment is appropriate only when no issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Donohoe*, 135 Wn. App. at 833. We view all facts and reasonable inferences in the light most favorable to the nonmoving party. *Donohoe*, 135 Wn. App. at 834.

DSHS is statutorily mandated to license adult family homes and promulgate rules and regulations governing the homes. RCW 70.128.005;

RCW 70.128.010. The purpose of DSHS's regulatory oversight is to encourage the development and maintenance of adult family homes, as well as establish standards for regulating the homes and protecting residents.

RCW 70.128.007(1), (2). DSHS has broad authority when determining whether to issue a license, suspend or revoke a license, and take other licensing actions.

RCW 70.128.005(4).

Public Duty Doctrine

Lakeru contends the public duty doctrine does not apply because DSHS owed her a common law duty to exercise reasonable care. DSHS asserts the court did not err by granting its motion for summary judgment because it is a government regulatory program that improves the welfare of the public generally and, therefore, the public duty doctrine bars Lakeru's claims. We agree with Lakeru.

Under the public duty doctrine, government regulatory programs for the public benefit generally do not create a duty to protect individual citizens.

Donohoe, 135 Wn. App. at 834. "The policy behind the public duty doctrine is that legislation for the public benefit should not be discouraged by subjecting the government to unlimited liability for individual damages." *Donohoe*, 135 Wn. App. at 834. But the government is not completely immune from liability. *Norg v. City of Seattle*, 200 Wn.2d 749, 756, 522 P3d 580 (2023). If a duty is owed to a particular individual, rather than the public as whole, the government may be held liable for the tortious conduct. *Munich v. Skagit Emergency Commc'n Ctr.*, 175

Wn.2d 871, 878, 288 P.3d 328 (2012). But if the duty is owed to the public, then “no claim for negligence may be supported as a matter of law.” *Blackwell v. Dep’t of Soc. & Health Servs.*, 131 Wn. App. 372, 379, 127 P.3d 752 (2006). In this way, “[t]he public duty doctrine is a ‘focusing tool’ used to determine whether a governmental entity owes a duty to the public as a whole or to a particular individual.” *Boone v. Dep’t of Soc. & Health Servs.*, 200 Wn. App. 723, 740, 403 P.3d 873 (2017) (quoting *Munich*, 175 Wn.2d at 878).

Washington courts “recognize a difference in the public duty doctrine context between ‘misfeasance’ and ‘nonfeasance.’ ” *Mancini v. City of Tacoma*, 196 Wn.2d 864, 885-86, 479 P.3d 656 (2021) (quoting *Robb v. City of Seattle*, 176 Wn.2d 427, 439, 295 P.3d 212 (2013)). “ ‘Misfeasance’ ” is “ ‘[a] lawful act performed in a wrongful manner.’ ” *Norg v. City of Seattle*, 18 Wn. App. 2d 399, 412, 491 P.3d 237 (2021) (alteration in original) (quoting Black’s Law Dictionary 1197 (11th ed. 2019)). When an individual engages in misfeasance that results in positive injury to another, that individual has a duty to exercise reasonable care. *Robb*, 176 Wn.2d at 435.

Here, Lakeru asserts that because she is bringing common law claims, the public duty doctrine does not apply. Lakeru does not allege that an implied statutory cause of action against DSHS exists or that any of the exceptions to the public duty doctrine apply;⁴ Lakeru only contends DSHS has an “actionable, common law duty to use reasonable care.”

⁴ The four exceptions to the public duty doctrine are special relationship, legislative intent, failure to enforce, and volunteer rescue. *Donohoe*, 135 Wn.

While there are times when DSHS's actions are protected by the public duty doctrine, when DSHS fails to follow its own statutory guidelines and engages in wrongful conduct, the public duty doctrine is no longer a shield from liability. Two Washington Supreme Court cases—*Norg*, 200 Wn.2d 749, and *Mancini*, 196 Wn.2d 864—are illustrative.

In *Norg*, Delaura Norg called 911 when she woke up and found her husband unresponsive. 200 Wn.2d at 401. Within a minute of answering the call, the 911 dispatcher assigned emergency medical units to respond. *Id.* at 401. Despite giving the units Norg's correct address, the units mistakenly assumed the call was for a nearby nursing home where they frequently received calls. *Id.* at 401-02. Because of this mistake, they didn't arrive at the Norg's house until nearly twenty minutes after Norg placed the call to 911. *Id.* at 402. Norg sued the city, claiming the city owed a "common law duty to exercise reasonable care in providing emergency medical services." *Id.* at 403. The Supreme Court held that "responding to a call for emergency medical help but doing so in a negligent manner is performing a lawful act in a wrongful manner" and results in a common law duty to exercise reasonable care. *Id.* at 413.

In *Mancini*, officers executing a search warrant received no response after knocking on the apartment door for about thirty seconds. 196 Wn.2d at 871.

The officers broke open the door using a battering ram and entered the

App at 834. Because Lakeru does not rely on any of these exceptions for her claim, we need not address them here. The State addresses the exceptions in its reply brief.

apartment with guns drawn. *Id.* When Kathleen Mancini came out of the bedroom, the officer's pushed her to the floor and cuffed her. *Id.* It was only when the officers took Mancini outside and questioned her did they realize that they had entered the wrong apartment. *Id.* Mancini sued the city for negligence, claiming the actions of the police officers "fell below the standard of care in the performance of their duties." *Id.* at 872. The Court agreed with Mancini and held that police officers "owe a duty to exercise reasonable care when executing a search warrant." *Id.* at 888. The Court noted that "this is not a case where the City's duty ran solely to the public at large. . . . [T]he police in this case personally caused the harm of which Mancini complains. In such a case of affirmative misfeasance, all individuals have a duty to exercise reasonable care." *Id.* at 885-86 (citations omitted).

In both *Norg* and *Mancini*, a common law duty of reasonable care arose when an entity engaged in wrongful conduct beyond what the relevant statute imposed. In *Norg*, the city owed a common law duty when it failed to exercise reasonable care in providing emergency medical services. In *Mancini*, a duty arose when police officers negligently executed a search warrant.

Here, DSHS's common law duty arose when it initiated an investigation into Lakeru's AFHs but failed to adhere to the requirements imposed by RCW 70.128 and WAC 388-76-10930. Under WAC 388-76-10930(2), when DSHS finds an AFH out of compliance, it is required to provide the AFH with an inspection report that includes an "attestation of correction statement" for each

cited deficiency. These statements provide the AFH with a plan of correction, including how to rectify the deficiencies and maintain compliance. WAC 388-76-10930(4). The AFH must complete each attestation of correction, indicating the date when the deficiency has been/will be corrected, and return the statements to DSHS. WAC 388-76-10930(5)-(7). DSHS is also required revisit a facility that it has imposed a stop placement upon to assure compliance. RCW 70.128.160(3).

In this case, DSHS did not provide Lakeru with a plan of correction or conduct a mandatory site revisit. While DSHS did serve Lakeru with a “Statement of Deficiencies/Plan of Correction,” the statement did not include attestation of correction statements. Without providing Lakeru with a plan of correction or conducting a revisit, DSHS had no way of knowing whether Lakeru failed to comply with the regulations imposed. Instead, based only on preliminary findings, DSHS imposed the most severe sanction available: closing Lakeru’s facilities and requiring all residents to vacate the homes.

By failing to comply with its own regulations set forth in RCW 70.128 and WAC 388-76-10930, DSHS performed a lawful act in a wrongful manner, resulting in harm to Lakeru. DSHS’s affirmative misfeasance gave rise to a common law duty of reasonable care to Lakeru. Therefore, the public duty doctrine does not apply to Lakeru’s claims.⁵

⁵ We emphasize that the facts of this case are unusual and our holding is a direct result of these facts.

Issue Preclusion

Lakeru contends issue preclusion (collateral estoppel)⁶ bars relitigating of any of the issues in the administrative proceedings and DSHS's affirmative defenses. Because none of the issues in Lakeru's claims or DSHS's affirmative defenses are identical to those determined in the administrative proceedings, issue preclusion does not apply.

Issue preclusion bars relitigating of an issue that has already been decided in a previous proceeding. *Christensen v. Grant County Hosp. Dist.* No. 1, 152 Wn.2d 299, 306, 96 P.3d 957 (2004). In order for issue preclusion to apply, the following four elements must be met:

1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied.

Christensen, 152 Wn.2d at 307. Washington courts apply issue preclusion to issues previously adjudicated in administrative proceedings. *Id.*

Here, the parties agree the administrative hearing ended in a judgment on the merits and the parties are the same, but disagree about the similarity of the issues litigated and whether applying issue preclusion would result in injustice.

⁶ "Issue preclusion" is the modern term for "collateral estoppel." *Scholz v. Wash. State Patrol*, 3 Wn. App. 2d 584, 594, 416 P.3d 1261 (2018).

1. Similarity of Issues

For issues to be identical in subsequent proceedings, the causes of action or claims asserted do not need to be the same, but the issues must be identical. *Rains v. State*, 100 Wn. 2d 660, 665, 674 P.2d 165 (1983). Mere identity of similar evidence is not enough to establish identical issues for purposes of issue preclusion. *Est. of Sly v. Linville*, 75 Wn. App. 431, 437, 878 P.2d 1241 (1994).

Here, Lakeru asserts issue preclusion should apply to DSHS's affirmative defenses of comparative fault, good faith, and mitigation of damages because the issues have already been litigated. Lakeru contends the administrative findings stating she was not negligent and did not fail to provide reasonable care vitiate DSHS's affirmative defenses of comparative fault and mitigation of damages. But Lakeru's error is assuming that, because the findings from the administrative hearings reported she was not negligent, the judges impliedly addressed the issues of comparative fault or mitigation of damages. Lakeru's negligence may be relevant in determining comparative fault and mitigation of damages, but it does not encompass the entirety of the issues. Neither comparative fault nor mitigation of damages were decided, or even addressed, in the administrative hearings.

Lakeru also contends, because the Board of Appeals Review Judge found DSHS acted "arbitrarily and capriciously," DSHS could not have possibly acted in good faith and, therefore, "no genuine issue of material fact" exists concerning whether DSHS intentionally interfered with Lakeru's contractual obligations and

business expectancies. Again, Lakeru is inferring evidence from one issue precludes the litigation of a different issue with similar evidence. While Lakeru may have a viable argument, the issues presented in Lakeru's complaint require findings the administrative proceedings did not address.⁷ The issues before the administrative law judge were limited to whether Lakeru violated licensing requirements under WAC 388-76-10400 and whether DSHS's summary suspensions were appropriate. Because essential elements to Lakeru's claims and DSHS's defenses were not addressed in the previous proceedings, issue preclusion does not apply.

2. Injustice on the parties

Even if the issues are similar in both proceedings, a court may still decline to apply issue preclusion if its application would work an injustice against a party. *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 513, 745 P.2d 858 (1987). One such injustice is when disparity in relief between the two proceedings provides different litigation incentives for the parties. *Reninger v. Dep't of Corrections*, 134 Wn.2d 437, 453, 951 P.2d 782 (1998). Courts look to disparity of relief between what one can recover in the first action compared to the second action "to determine whether sufficient incentive existed for the concerned party to litigate vigorously in the administrative hearing." *Reninger*, 134 Wn.2d at 453.

⁷ For example, intentional interference with contractual relations requires, among other things, the existence of a valid contract and an intentional breach of that contract. Neither of the proceedings discussed the existence of a contract.

Here, the maximum potential relief available to Lakeru in the administrative forum was reinstatement of her licenses. The administrative court could not assess lost revenue and profits, determine loss of consortium, or provide for any form of monetary damages—all of which Lakeru claimed as damages suffered in her complaint. Because the amount Lakeru could recover in the administrative hearing is significantly less than the potential recovery at trial, DSHS may not have had the same incentive to litigate the issues at the administrative hearing. Therefore, applying issue preclusion would constitute an injustice against DSHS. Accordingly, issue preclusion does not apply to the issues determined in the administrative hearings.

We affirm the trial court's denial of summary judgment concerning issue preclusion, but reverse the ruling that the public duty doctrine applies and remand for further proceedings consistent with this ruling.

Smith, C.G.

WE CONCUR:

Seldman, J.

Mann, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

NANCY JAMES, Chapter 7 Trustee
for the Bankruptcy Estate of Ms.
Jessica Lakeru and Mr. Akinwale A.
Lakeru; and VIEW POINTE ADULT
FAMILY HOME, LLC, A Washington
Limited Liability Company, UBI #603
584 188,

Appellants,

v.

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

Respondent.

No. 86077-1-I

ORDER DENYING
MOTION FOR
RECONSIDERATION

Respondent Department of Social and Health Services has moved for reconsideration of the opinion filed on February 10, 2025. The appellant Nancy James has filed an answer. The panel has considered the motion pursuant to RAP 12.4 and has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:


Judge

West's Revised Code of Washington Annotated
Title 70. Public Health and Safety (Refs & Annos)
Chapter 70.128. Adult Family Homes (Refs & Annos)

West's RCWA 70.128.005

70.128.005. Findings--Intent

Currentness

(1) The legislature finds that:

(a) Adult family homes are an important part of the state's long-term care system. Adult family homes provide an alternative to institutional care and promote a high degree of independent living for residents.

(b) Persons with functional limitations have broadly varying service needs. Adult family homes that can meet those needs are an essential component of a long-term system. Different populations living in adult family homes, such as persons with developmental disabilities and elderly persons, often have significantly different needs and capacities from one another.

(c) There is a need to update certain restrictive covenants to take into consideration the legislative findings cited in (a) and (b) of this subsection; the need to prevent or reduce institutionalization; and the legislative and judicial mandates to provide care and services in the least restrictive setting appropriate to the needs of the individual. Restrictive covenants which directly or indirectly restrict or prohibit the use of property for adult family homes (i) are contrary to the public interest served by establishing adult family homes and (ii) discriminate against individuals with disabilities in violation of [RCW 49.60.224](#).

(2) It is the legislature's intent that department rules and policies relating to the licensing and operation of adult family homes recognize and accommodate the different needs and capacities of the various populations served by the homes. Furthermore, the development and operation of adult family homes that promote the health, welfare, and safety of residents, and provide quality personal care and special care services should be encouraged.

(3) The legislature finds that many residents of community-based long-term care facilities are vulnerable and their health and well-being are dependent on their caregivers. The quality, skills, and knowledge of their caregivers are the key to good care. The legislature finds that the need for well-trained caregivers is growing as the state's population ages and residents' needs increase. The legislature intends that current training standards be enhanced.

(4) The legislature finds that the state of Washington has a compelling interest in developing and enforcing standards that promote the health, welfare, and safety of vulnerable adults residing in adult family homes. The health, safety, and well-being of vulnerable adults must be the paramount concern in determining whether to issue a license to an applicant, whether to suspend or revoke a license, or whether to take other licensing actions.

Appendix C

Credits

[2011 1st sp.s. c 3 § 201, eff. Aug. 24, 2011; 2009 c 530 § 2, eff. July 26, 2009; 2001 c 319 § 1; 2000 c 121 § 4; 1995 c 260 § 1; 1989 c 427 § 14.]

OFFICIAL NOTES

Finding--Intent--2011 1st sp.s. c 3: “The legislature finds that Washington's long-term care system should more aggressively promote protections for the vulnerable populations it serves. The legislature intends to address current statutes and funding levels that limit the department of social and health services' ability to promote vulnerable adult protections. The legislature further intends that the cost of facility oversight should be supported by an appropriate license fee paid by the regulated businesses, rather than by the general taxpayers.” [2011 1st sp.s. c 3 § 101.]

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West's RCWA 70.128.005, WA ST 70.128.005

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West's Revised Code of Washington Annotated
 Title 70. Public Health and Safety (Refs & Annos)
 Chapter 70.128. Adult Family Homes (Refs & Annos)

West's RCWA 70.128.007

70.128.007. Purpose

Currentness

The purposes of this chapter are to:

- (1) Encourage the establishment and maintenance of adult family homes that provide a humane, safe, and residential home environment for persons with functional limitations who need personal and special care;
- (2) Establish standards for regulating adult family homes that adequately protect residents;
- (3) Encourage consumers, families, providers, and the public to become active in assuring their full participation in development of adult family homes that provide high quality and cost-effective care;
- (4) Provide for appropriate care of residents in adult family homes by requiring that each resident have a care plan that promotes the most appropriate level of physical, mental, and psychosocial well-being consistent with client choice; and
- (5) Accord each resident the right to participate in the development of the care plan and in other major decisions involving the resident and their care.

Credits

[2001 c 319 § 5; 1995 1st sp.s. c 18 § 19; 1989 c 427 § 15.]

OFFICIAL NOTES

Conflict with federal requirements--Severability--Effective date--1995 1st sp.s. c 18: See notes following [RCW 74.39A.030](#).

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West's RCWA 70.128.007, WA ST 70.128.007

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West's Revised Code of Washington Annotated
 Title 70. Public Health and Safety (Refs & Annos)
 Chapter 70.128. Adult Family Homes (Refs & Annos)

West's RCWA 70.128.040

70.128.040. Adoption of rules and standards--Negotiated rule making--Specialty license

Currentness

(1) The department shall adopt rules and standards with respect to adult family homes and the operators thereof to be licensed under this chapter to carry out the purposes and requirements of this chapter. The rules and standards relating to applicants and operators shall address the differences between individual providers and providers that are partnerships, corporations, associations, or companies. The rules and standards shall also recognize and be appropriate to the different needs and capacities of the various populations served by adult family homes such as but not limited to persons who are developmentally disabled or elderly. In developing rules and standards the department shall recognize the residential family-like nature of adult family homes and not develop rules and standards which by their complexity serve as an overly restrictive barrier to the development of the adult family homes in the state. Procedures and forms established by the department shall be developed so they are easy to understand and comply with. Paper work requirements shall be minimal. Easy to understand materials shall be developed for applicants and providers explaining licensure requirements and procedures.

(2)(a) In developing the rules and standards, the department shall consult with all divisions and administrations within the department serving the various populations living in adult family homes, including the division of developmental disabilities and the aging and adult services administration. Involvement by the divisions and administration shall be for the purposes of assisting the department to develop rules and standards appropriate to the different needs and capacities of the various populations served by adult family homes. During the initial stages of development of proposed rules, the department shall provide notice of development of the rules to organizations representing adult family homes and their residents, and other groups that the department finds appropriate. The notice shall state the subject of the rules under consideration and solicit written recommendations regarding their form and content.

(b) In addition, the department shall engage in negotiated rule making pursuant to [RCW 34.05.310\(2\)\(a\)](#) with the exclusive representative of the adult family home licensees selected in accordance with [RCW 70.128.043](#) and with other affected interests before adopting requirements that affect adult family home licensees.

(3) Except where provided otherwise, chapter 34.05 RCW shall govern all department rule-making and adjudicative activities under this chapter.

(4) The department shall establish a specialty license to include geriatric specialty certification for providers who have successfully completed the University of Washington school of nursing certified geriatric certification program and testing.

Credits

[[2009 c 530 § 1](#), eff. July 26, 2009; [2007 c 184 § 8](#), eff. July 22, 2007; [1995 c 260 § 3](#); [1989 c 427 § 18](#).]

OFFICIAL NOTES

Part headings not law--Severability--Conflict with federal requirements--2007 c 184: See notes following [RCW 41.56.029](#).

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West's RCWA 70.128.040, WA ST 70.128.040

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West's Revised Code of Washington Annotated
Title 70. Public Health and Safety (Refs & Annos)
Chapter 70.128. Adult Family Homes (Refs & Annos)

West's RCWA 70.128.070

70.128.070. License--Inspections--Correction of violations

Currentness

- (1) A license shall remain valid unless voluntarily surrendered, suspended, or revoked in accordance with this chapter.
- (2)(a) Homes applying for a license shall be inspected at the time of licensure.
- (b)(i) Homes licensed by the department shall be inspected at least every eighteen months, with an annual average of fifteen months. However, an adult family home may be allowed to continue without inspection for two years if the adult family home had no inspection citations for the past three consecutive inspections and has received no written notice of violations resulting from complaint investigations during that same time period.
- (ii) For adult family homes applying to increase bed capacity under [RCW 70.128.066](#) prior to January 1, 2026, the department may:
- (A) Complete the first inspection upon receipt of an application to increase bed capacity if the home has otherwise met the requirements of [RCW 70.128.066](#).
- (B) Complete a second inspection upon receipt of an application to increase bed capacity if at least six months have passed since the first inspection.
- (c) The department may make an unannounced inspection of a licensed home at any time to assure that the home and provider are in compliance with this chapter and the rules adopted under this chapter.
- (d) If a pandemic, natural disaster, or other declared state of emergency prevents the department from completing inspections according to the timeline in this subsection, the department shall adopt rules to reestablish inspection timelines based on the length of time since last inspection, compliance history of each facility, and immediate health or safety concerns.
- (i) Rules adopted under this subsection (2)(d) are effective until the termination of the pandemic, natural disaster, or other declared state of emergency or until the department determines that all facility inspections are occurring according to time frames established in (b) of this subsection, whichever is later. Once the department determines a rule adopted under this subsection (2)(d) is no longer necessary, it must repeal the rule under [RCW 34.05.353](#).

(ii) Within 12 months of the termination of the pandemic, natural disaster, or declared state of emergency, the department shall conduct a review of inspection compliance with (b) of this subsection and provide the legislature with a report.

(3) If the department finds that the home is not in compliance with this chapter, it shall require the home to correct any violations as provided in this chapter.

Credits

[[2024 c 147 § 2](#), eff. June 6, 2024; [2021 c 203 § 13](#), eff. May 10, 2021; [2011 1st sp.s. c 3 § 204](#), eff. Aug. 24, 2011; [2004 c 143 § 1](#), eff. June 10, 2004; [1998 c 272 § 4](#); [1995 1st sp.s. c 18 § 22](#); [1989 c 427 § 22](#).]

OFFICIAL NOTES

Effective date--Retroactive application--2021 c 203: See note following [RCW 43.43.832](#).

Finding--Intent--2011 1st sp.s. c 3: See note following [RCW 70.128.005](#).

Findings--Severability--Effective date--1998 c 272: See notes following [RCW 18.20.230](#).

Conflict with federal requirements--Severability--Effective date--1995 1st sp.s. c 18: See notes following [RCW 74.39A.030](#).

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West's RCWA 70.128.070, WA ST 70.128.070

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Appendix C

West's Revised Code of Washington Annotated
Title 70. Public Health and Safety (Refs & Annos)
Chapter 70.128. Adult Family Homes (Refs & Annos)

West's RCWA 70.128.100

70.128.100. Immediate suspension of license when conditions warrant

[Currentness](#)

The department has the authority to immediately suspend a license if it finds that conditions there constitute an imminent danger to residents.

Credits

[1989 c 427 § 32.]

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West's RCWA 70.128.100, WA ST 70.128.100

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West's Revised Code of Washington Annotated
Title 70. Public Health and Safety (Refs & Annos)
Chapter 70.128. Adult Family Homes (Refs & Annos)

West's RCWA 70.128.160

70.128.160. Department authority to take actions in response to
noncompliance or violations--Civil penalties--Adult family home account

Currentness

(1) The department is authorized to take one or more of the actions listed in subsection (2) of this section in any case in which the department finds that an adult family home provider has:

- (a) Failed or refused to comply with the requirements of this chapter or the rules adopted under this chapter;
- (b) Operated an adult family home without a license or under a revoked license;
- (c) Knowingly or with reason to know made a false statement of material fact on his or her application for license or any data attached thereto, or in any matter under investigation by the department; or
- (d) Willfully prevented or interfered with any inspection or investigation by the department.

(2) When authorized by subsection (1) of this section, the department may take one or more of the following actions:

- (a) Refuse to issue a license;
- (b) Impose reasonable conditions on a license, such as correction within a specified time, training, and limits on the type of clients the provider may admit or serve;
- (c) Impose civil penalties of at least one hundred dollars per day per violation;
- (d) Impose civil penalties of up to three thousand dollars for each incident that violates adult family home licensing laws and rules, including, but not limited to, chapters 70.128, 70.129, 74.34, and 74.39A RCW and related rules. Each day upon which the same or substantially similar action occurs is a separate violation subject to the assessment of a separate penalty;
- (e) Impose civil penalties of up to ten thousand dollars for a current or former licensed provider who is operating an unlicensed home;

(f) Suspend, revoke, or refuse to renew a license; or

(g) Suspend admissions to the adult family home by imposing stop placement.

(3) When the department orders stop placement, the facility shall not admit any person until the stop placement order is terminated. The department may approve readmission of a resident to the facility from a hospital or nursing home during the stop placement. The department shall terminate the stop placement only after: (a) The violations necessitating the stop placement have been corrected; and (b) the provider exhibits the capacity to maintain correction of the violations previously found deficient. However, if upon the revisit the department finds new violations that the department reasonably believes will result in a new stop placement, the previous stop placement shall remain in effect until the new stop placement is imposed. In order to protect the home's existing residents from potential ongoing neglect, when the provider has been cited for a violation that is repeated, uncorrected, pervasive, or presents a threat to the health, safety, or welfare of one or more residents, and the department has imposed a stop placement, the department shall also impose a condition on license or other remedy to facilitate or spur prompter compliance if the violation has not been corrected, and the provider has not exhibited the capacity to maintain correction, within sixty days of the stop placement.

(4) Nothing in subsection (3) of this section is intended to apply to stop placement imposed in conjunction with a license revocation or summary suspension or to prevent the department from imposing a condition on license or other remedy prior to sixty days after a stop placement, if the department considers it necessary to protect one or more residents' well-being. After a department finding of a violation for which a stop placement has been imposed, the department shall make an on-site revisit of the provider within fifteen working days from the request for revisit, to ensure correction of the violation. For violations that are serious or recurring or uncorrected following a previous citation, and create actual or threatened harm to one or more residents' well-being, including violations of residents' rights, the department shall make an on-site revisit as soon as appropriate to ensure correction of the violation. Verification of correction of all other violations may be made by either a department on-site revisit or by written or photographic documentation found by the department to be credible. This subsection does not prevent the department from enforcing license suspensions or revocations. Nothing in this subsection shall interfere with or diminish the department's authority and duty to ensure that the provider adequately cares for residents, including to make departmental on-site revisits as needed to ensure that the provider protects residents, and to enforce compliance with this chapter.

(5) Chapter 34.05 RCW applies to department actions under this section, except that orders of the department imposing license suspension, stop placement, or conditions for continuation of a license are effective immediately upon notice and shall continue in effect pending a hearing, which must commence no later than sixty days after receipt of a request for a hearing. The time for commencement of a hearing may be extended by agreement of the parties or by the presiding officer for good cause shown by either party, but must commence no later than one hundred twenty days after receipt of a request for a hearing.

(6) A separate adult family home account is created in the custody of the state treasurer. All receipts from civil penalties imposed under this chapter must be deposited into the account. Only the director or the director's designee may authorize expenditures from the account. The account is subject to allotment procedures under chapter 43.88 RCW, but an appropriation is not required for expenditures. The department shall use the special account only for promoting the quality of life and care of residents living in adult family homes. During the 2015-2017 fiscal biennium, the account may be expended for funding costs associated with the adult family home program.

(7) The department shall by rule specify criteria as to when and how the sanctions specified in this section must be applied. The criteria must provide for the imposition of incrementally more severe penalties for deficiencies that are repeated, uncorrected,

Appendix C

pervasive, or present a threat to the health, safety, or welfare of one or more residents. The criteria shall be tiered such that those homes consistently found to have deficiencies will be subjected to increasingly severe penalties. The department shall implement prompt and specific enforcement remedies without delay for providers found to have delivered care or failed to deliver care resulting in problems that are repeated, uncorrected, pervasive, or present a threat to the health, safety, or welfare of one or more residents. In the selection of remedies, the health, safety, and well-being of residents must be of paramount importance.

Credits

[2016 sp.s. c 36 § 944, eff. April 18, 2016; 2015 c 266 § 1, eff. July 24, 2015; 2013 c 300 § 4, eff. July 28, 2013; 2011 1st sp.s. c 3 § 208, eff. Aug. 24, 2011; 2001 c 193 § 5; 1995 1st sp.s. c 18 § 28; 1989 c 427 § 31.]

OFFICIAL NOTES

Effective date--2016 sp.s. c 36: See note following [RCW 18.20.430](#).

Finding--Intent--2011 1st sp.s. c 3: See note following [RCW 70.128.005](#).

Conflict with federal requirements--Severability--Effective date--1995 1st sp.s. c 18: See notes following [RCW 74.39A.030](#).

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Washington Administrative Code

Title 388. Social and Health Services, Department of

Aging and Adult Services

Chapter 388-76. Adult Family Home Minimum Licensing Requirements (Refs & Annos)

Definitions

WAC 388-76-10002

388-76-10002. Department authority.

Currentness

Under chapter 70.128 RCW, the department is authorized to take actions in response to adult family home noncompliance or violations of requirements of this chapter or rules adopted under chapters 70.128, 70.129, and 74.34 RCW.

Credits

Statutory Authority: [RCW 70.128.040](#). WSR 10-03-064, S 388-76-10002, filed 1/15/10, effective 2/15/10.

Current with amendments adopted through the 25-06 Washington State Register, dated March 19, 2025. Some sections may be more current. Please consult the credit on each document for more information.

WAC 388-76-10002, WA ADC 388-76-10002

Washington Administrative Code

Title 388. Social and Health Services, Department of

Aging and Adult Services

Chapter 388-76. Adult Family Home Minimum Licensing Requirements (Refs & Annos)

Care and Services

WAC 388-76-10400

388-76-10400. Care and services.

Currentness

The adult family home must ensure each resident receives:

- (1) The care and services identified in the negotiated care plan.
- (2) The necessary care and services to help the resident reach the highest level of physical, mental, and psychosocial well-being consistent with resident choice, current functional status and potential for improvement or decline.
- (3) The care and services in a manner and in an environment that:
 - (a) Actively supports, maintains or improves each resident's quality of life;
 - (b) Actively supports the safety of each resident; and
 - (c) Reasonably accommodates each resident's individual needs and preferences except when the accommodation endangers the health or safety of the individual or another resident.
- (4) Services by the appropriate professionals based upon the resident's assessment and negotiated care plan, including nurse delegation if needed.

Credits

Statutory Authority: [RCW 70.128.040](#) and chapters 70.128 and 74.34 RCW. WSR 07-21-080, S 388-76-10400, filed 10/16/07, effective 1/1/08.

Current with amendments adopted through the 25-06 Washington State Register, dated March 19, 2025. Some sections may be more current. Please consult the credit on each document for more information.

WAC 388-76-10400, WA ADC 388-76-10400

Washington Administrative Code

Title 388. Social and Health Services, Department of

Aging and Adult Services

Chapter 388-76. Adult Family Home Minimum Licensing Requirements (Refs & Annos)

Inspections-Complaint Investigations-Monitoring Visits

WAC 388-76-10930

388-76-10930. Plan of correction (POC)-Required.

Currentness

- (1) The adult family home must comply with all applicable licensing laws and regulations at all times.
- (2) When the department finds the adult family home out of compliance with any licensing law or regulation, the department will send the home an inspection report with an attestation of correction statement for each cited deficiency.
- (3) The adult family home must complete an attestation of correction for any inspection report as the department requires.
- (4) For the purposes of this section an 'attestation of correction statement' means a statement, developed by the department and signed and dated by the home, that the home:
 - (a) Has or will correct each cited deficiency; and
 - (b) Will maintain correction of each cited deficiency.
- (5) The home must be able to show to the department, upon request, that, for each deficiency cited, the home has:
 - (a) A plan of correction and maintaining correction;
 - (b) Corrected or is correcting each deficiency; and
 - (c) Maintained or is maintaining compliance.
- (6) On each attestation of correction statement, the home must:
 - (a) Give a date, approved by the department, showing when the cited deficiency has been or will be corrected; and
 - (b) By signature and date show that the home has or will correct, and maintain correction, of each deficiency.

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(7) The home must return the inspection report, with completed attestation of correction statements, to the department within ten calendar days of receiving the report.

Credits

Statutory Authority: [RCW 70.128.040](#). WSR 09-03-029, S 388-76-10930, filed 1/12/09, effective 2/12/09. Statutory Authority: [RCW 70.128.040](#) and chapters 70.128 and 74.34 RCW. WSR 07-21-080, S 388-76-10930, filed 10/16/07, effective 1/1/08.

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WAC 388-76-10930, WA ADC 388-76-10930

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Washington Administrative Code

Title 388. Social and Health Services, Department of

Aging and Adult Services

Chapter 388-76. Adult Family Home Minimum Licensing Requirements (Refs & Annos)

Remedies

WAC 388-76-10940

388-76-10940. Remedies-Generally.

Currentness

The department may take one or more of the following actions in any case which the department finds that an adult family home failed or refused to comply with the applicable requirements of chapters 70.128, 70.129, or 74.34 RCW or this chapter:

- (1) Denial of an application for a license;
- (2) Impose reasonable conditions on a license;
- (3) Impose civil penalties;
- (4) Order stop placement; and/or
- (5) Suspension or revocation of a license.

Credits

Statutory Authority: [RCW 70.128.040](#) and chapters 70.128 and 74.34 RCW. WSR 07-21-080, S 388-76-10940, filed 10/16/07, effective 1/1/08.

Current with amendments adopted through the 25-06 Washington State Register, dated March 19, 2025. Some sections may be more current. Please consult the credit on each document for more information.

WAC 388-76-10940, WA ADC 388-76-10940

Washington Administrative Code

Title 388. Social and Health Services, Department of

Aging and Adult Services

Chapter 388-76. Adult Family Home Minimum Licensing Requirements (Refs & Annos)

Remedies

WAC 388-76-10945

388-76-10945. Remedies-Imposition of remedies.

Currentness

The department must impose a remedy or remedies listed in [WAC 388-76-10940](#) when violations of chapter 70.128, 70.129 and 74.34 RCW and this chapter are:

- (1) Repeated;
- (2) Uncorrected;
- (3) Pervasive; or
- (4) Present a threat to the health, safety, or welfare of one or more residents.

Credits

Statutory Authority: Chapter 70.128 RCW. WSR 12-01-004, S 388-76-10945, filed 12/7/11, effective 1/7/12. Statutory Authority: [RCW 70.128.040](#) and chapters 70.128 and 74.34 RCW. WSR 07-21-080, S 388-76-10945, filed 10/16/07, effective 1/1/08.

Current with amendments adopted through the 25-06 Washington State Register, dated March 19, 2025. Some sections may be more current. Please consult the credit on each document for more information.

WAC 388-76-10945, WA ADC 388-76-10945

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Filing Petition for Review

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