

No. 96464-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

Respondent,

v.

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

Petitioner,

JUSTIN WARREN REIF, an individual,

Defendant.

**BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF
COUNTY & CITY HEALTH OFFICIALS AND THE BIG CITIES
HEALTH COALITION**

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I. IDENTITY AND INTEREST OF *AMICUS CURIAE*

In 1965, the National Association of Counties and other partners decided to form an association (National Association of County Health Officials or NACHO) to represent the voice of local public health.¹ In 1994, the organization changed its name to the National Association of County and City Health Officials (“NACCHO”). NACCHO is focused on protecting the interest of local public health and serves 3000 local health departments. It is the leader in providing cutting-edge, skill-building, professional resources and programs, seeking health equity, and supporting effective local public health practice and systems. NACCHO’s mission is to improve the health of communities by strengthening and advocating for local health departments.

The Big Cities Health Coalition (“BCHC”) is a forum for the leaders of America’s largest metropolitan health departments to exchange strategies and jointly address issues to promote and protect the health and safety of the nearly 62 million people they serve.² The Coalition was founded in 2002 by health officers in New York City and Los Angeles County based on the idea that there was something unique about big city health

¹ See “Our History”, NACCHO, available online at <https://www.naccho.org/about/naccho-history>.

² See “About Us”, Big Cities Health Coalition available online at <https://www.bigcitieshealth.org/about-us-big-cities-health-coalition-bchc>.

departments – the challenges, systems, and sometimes, decisions, are larger in scale, and the systems in which health departments are operating may be different. Over the past 17 years, BCHC has evolved into an organization with 30 city/county health departments (including Seattle-King County), with members that are locally controlled (i.e. not state employees) health departments of the largest cities in the nation’s most urban areas with a city population of at least 400,000. BCHC’s mission is to advance equity and health for present and future generations, and its vision is to promote healthy, more equitable communities through big city innovation and leadership.

As detailed below, the outcome of this appeal may dramatically alter how public health departments evaluate and provide health advisories to health care providers and the public. Health departments have long possessed the expertise, authority, and discretion to determine when health advisories should be issued to the public to protect public health. As the Washington Supreme Court Commissioner determined, the trial court’s order alters this long-standing authority and discretion by having the practical effect of making health advisories mandatory pursuant to WAC 246-101-505. NACCHO and BCHC (collectively, “Amicus Parties”) have a substantial interest in ensuring that their members retain their longstanding authority and discretion for when health advisories should be

issued so that their members' expertise can fully be utilized in ensuring public health.

The Amicus Parties request that the Court reverse the trial court's order denying summary judgment, hold that the public duty doctrine applies as a matter of law, dismiss the claim against King County, and allow local health authorities continued discretion to take actions that they, given their expertise, deem appropriate in light of the facts of a case and the conditions present.

II. STATEMENT OF THE CASE

The Amicus Parties adopt the Statement of the Case set forth in King County's Opening Brief.

III. ARGUMENT

The trial court's order, if upheld, exposes public health departments to tort liability for failing to automatically issue a public health advisory regarding any notifiable event, irrespective of any statutory or regulatory requirement to do so. The trial court's order turns a discretionary duty of public health professionals into a mandatory one that could have unintended negative consequences to the public's health. Moreover, the trial court's order eviscerates the ability of experts to use their best judgment on if and when public health advisories should be issued.

The outcome of this case could thus substantially re-shape the

manner in which all Washington public health departments³ oversee and issue public health advisories. Exposing public health departments to tort liability when they engage in discretionary decision-making in response to any one of over 80 notifiable conditions will impair the quality of response to such matters. As provided by Washington law, public health decision makers must be able to use their discretion to respond effectively to the specific conditions before them. To remove that discretion from public health departments' professional judgment would negatively impact the public and impede the very purpose of public notifications.

A. The Purpose of Notifiable Conditions Reporting is to Protect the Public at Large.

The Washington State Department of Health's ("DOH") and local health departments' programs and services are designed to help prevent illness and injury, promote healthy places to live and work, provide information to help people make good health decisions, and to prepare for emergencies. See <https://www.doh.wa.gov/AboutUs/PublicHealthSystem>. DOH partners with and issues licenses to healthcare professionals to investigate disease outbreaks and prepare for emergencies. *Id.*

One aspect of responding to health care matters is for public health

³ This case could also impact local health departments across the country to the extent states looked to Washington and see tort liability exposure for discretionary decision-making in public health matters.

departments, such as Seattle-King County, to collect and review information provided from healthcare providers pertaining to “notifiable conditions.” WAC 246-101-005. The purpose of “notifiable conditions” reporting is for healthcare providers to provide the information necessary for public health officials to protect the public’s health by tracking communicable diseases and other conditions. *Id.* Over 80 diseases or conditions are included in “notifiable conditions,” ranging from autism to the Zika virus. WAC 246-101-101. Healthcare providers and laboratories transmit this information to local health departments according to schedules established by DOH. *Id.* With this information, public health departments must “[r]eview and determine appropriate action” for each report. WAC 246-101-505(1). Appropriate action is not defined as a specific action, but instead may include, but is not limited to, outbreak investigations, redirection of program activities, or policy development. *See* WAC 246-101-005, 246-101-505. The public health department’s primary goal in evaluating the appropriate response to a notifiable condition is to protect the health of the public at large. A public health department must consider and balance multiple factors in making that decision.

B. Public Health Departments' Policies, Guidelines, and Practices for When Health Advisories Are Issued.

Effective public health administration routinely involves gathering details and facts, developing different response strategies, exercising crisis management, and developing risk communications that mitigate negative impacts to the public's health. At times, the facts and the existing science or evidence base result in ambiguity that calls for public health departments to use their discretion. Events in a crisis situation can change rapidly, which may force public health departments to make decisions with information that is at times incomplete or subject to change. For example, the nature and means of transmission of an illness may be uncertain, as was the case with AIDS for many years, Lyme disease, Legionnaires disease, or Zika. While it is important to address these gaps with the best evidence available, professional judgment, risk assessment, risk management, and the subject matter expertise of public health practitioners are critically important tools for responding to health situations as more information is gathered. Indeed, factors that also can be weighed and could be changing include the mode a disease is spread (i.e. direct or indirect contact), the climate of the locale, the size of the population of opportunity, the number of days a person may be contagious, and/or the probability of another person contacting the illness from contact with an infected person.

These factors apply when communicating with healthcare providers and the public regarding public health matters. A basic tenant of public health practice is that “[t]he basis for responsible public health communication is scientific knowledge and consensus. ... Practitioners have a responsibility to examine the quality of the available scientific information *prior to performing any communication activity.*” David E. Nelson et al., *Communicating Public Health Information Effectively: A Guide for Practitioners* 609 (Kindle ed. 2002) (emphasis added).

Sometimes public disclosure is important because the means of transmission is known and is largely preventable with simple precautionary measures. An example of this would be the Zika virus and mosquito control. Other times, especially in a crisis, the means of transmission and proper precautions are unknown. If there is no or little public health justification for informing the public of a problem that has no identified source and no identified precautions for the public to take, notification of the public may be unnecessary or even harmful, causing hysteria, false reports of additional cases, and other counterproductive reactions. There are also notifiable conditions for which health care providers report, such as autism, for which no public notification is warranted. Effective communication in all scenarios and how/if it will impact the public is a critically important component of a successful response. *See* The Centers

for Disease Control and Prevention Manual and Tools, <http://emergency.cdc.gov/cerc/index.asp>.

Given the evolution of health issues in which they are dealing, and the multiple scenarios they must address, public health departments thus have historically had a great amount of discretion in how they fulfill their mission to protect the public's health. Public health departments must make difficult decisions in their responses that require the balancing of many factors.

1. There Are No Specific Rules for When Public Agencies Issue Public Health Advisories.

There are no specific rules, protocols, or explicit criteria for decision-making as it relates to public health advisories. *See* WAC 246-101-505. Guidelines and recommendations are suggested, but no fixed or definitive rule exists. *Id.* As addressed above, this is because science and situations are always evolving and changing, and many situations have unique circumstances that argue for or against a public notification at any given point in time. Instead, public health department guidelines stress the importance of transparency and open communications and assert that they must balance competing interests of matters such as the risk of acting prematurely based on limited information and the risk of delaying action until additional information is made; the need to protect the privacy of

infected individuals; the risk of doing harm (for example creating unnecessary hysteria); the impact of too many notices; and the need to withhold information regarding an ongoing investigation. See Denise Chrysler, *Public Health Decision-Making Tool*, The Network for Public Health, March 13, 2019, https://www.networkforphl.org/resources_collection/2017/12/15/949/public_health_decision-making_tool; Press Release, Association of State and Territorial Health Officials, ASTHO Statement on Public Notification of *Legionella* Outbreaks (Nov. 8, 2018), <http://www.astho.org/Press-Room/ASTHO-Statement-on-Public-Notification-of-Legionella-Outbreaks/11-08-18/>. Because of these issues, the overall guidance is that public health departments must have the discretion to use their expertise and decide the amount and manner in which information is released, if at all. *Id.*

2. Varying Actions May Be Appropriate for Different Medical Diseases and Conditions.

Unfortunately, each day, people suffer from different illnesses or conditions which may or may not result in death. Many diseases that cause illness and death are tracked by health authorities, but in most cases, do not require special announcements or public health advisories. In fact, healthcare providers routinely treat patients with notifiable conditions without intervention or advisories from the health department.

Animal bites and birth defects are two examples of notifiable conditions under WAC 246-101-101 that are not publicly reported. *See*, <https://www.doh.wa.gov/ForPublicHealthandHealthcareProviders/NotifiableConditions/ListofNotifiableConditions>. Diseases such as the Zika virus and/or measles would cause a public health department to exercise much different action to notify health care providers and the public due to different treatment options, risk to the public and other matters that experts take into consideration. To address these varying medical diseases and conditions, and to adapt to specific cases, local circumstances and local regulations, public health authorities are intentionally flexible to allow for discretion in risk communication and public messaging. In general, health advisories are issued in only a very small fraction of the cases for which a local health department receives notification from healthcare providers.

The World Health Organization (“WHO”), the U.S. Centers for Disease Control and Prevention (“CDC”) and DOH have released various guidelines related to disease control, prevention, and communication. These guidelines include: World Health Organization Outbreak Communication Planning Guide (2008), <https://www.who.int/ihr/elibrary/WHOOutbreakCommsPlanngGuide.pdf>; CDC, Public Health Emergency Response Guide for State, Local, and Tribal Public Health Directors, (April, 2011),

<https://emergency.cdc.gov/planning/responseguide.asp>; DOH, Guidelines for Public Health Investigation, <https://www.doh.wa.gov/ForPublicHealthandHealthcareProviders/NotifiableConditions/ListofNotifiableConditions>. None of the guidelines, however, include a mandated protocol for when to inform the public about an occurrence of a specific condition. Each guideline recognizes numerous medical conditions and illness and a wide variety of actions that may be appropriate. *Id.* Instead, the guidelines focus on the discretionary nature of the process and the need for experts to consider multiple factors (i.e., how can people use the information to protect themselves from harm; what is the nature of the medical disease/illness; is a major epidemic or novel illness emerging, or is the condition likely an isolated case; what is the risk of injury from a natural disaster or other major event; what are the risks and benefits of sharing information, if limited, with the public;). *Id., see also*, Association of Healthcare Journalists, Guidance on the Release of Information Concerning Deaths, Epidemics or Emerging Diseases, <http://healthjournalism.org/secondarypage-details.php?id=965>. This approach is appropriate because as the Washington Supreme Court Commissioner noted, not every medical or health issue is the same or requires the same response.

3. Considerations Generally Made When Determining If and How to Issue Public Health Advisories.

Considering the medical disease or health condition present and the facts surrounding a report, a public health department must use its expertise to determine what information to share with health providers, the public and the media, as well as the timing of such disclosures. As noted above, when making such an evaluation, the public health department will need to determine the risk that public disclosure might jeopardize an investigation or response, expose private or sensitive information, or threaten security. *Public Health & Information Sharing Tool Kit*, ASTHO (2010). In short, no “one-size-fits-all” response is appropriate.

Indeed, CDC guidelines list a variety of factors that should be considered when making the determination of whether a public health advisory is appropriate, and if so, what type. These factors include, but may not be limited to:

- Is the event a legitimate public health emergency requiring swift and widespread public education to prevent further morbidity and mortality?
- Is the event acute?
- Is the event evolving?
- Is this the first, worst, biggest, etc.?
- Is the interest generated because of the event’s novelty or is it a legitimate public health concern?

- Where is the event occurring?
- Does the event involve children or special populations?
- Is the human outcome of the disease uncertain, such as long-term health effects?

CDC, *CERC: Crisis Communication Plans* (2014). Public health professionals consider these (and possibly other) factors in determining what action to take in response to a notifiable condition.

4. Discretion of Public Health Experts Without Tort Exposure to Health Departments Is Necessary.

As noted above, public health departments must, and do, focus their energy and resources on interventions with goals for reducing risks and protecting as many people as possible. However, there are different factors that must be weighed when taking different approaches and often, the specific conditions at that time will impact the actions taken. *See e.g.* The Council for Outbreak Response Healthcare-Associated Infections and Antimicrobial-Resistant Pathogens, Resources and Products, <https://corha.org/resources-and-products/>. Health departments typically develop “after-action” reports to review the responses taken and identify opportunities for improvement. Imposing potential tort liability for such actions, as the trial court does here, likely would be tainted by information discovered after the fact, when information may be more complete. And

could have a chilling effect on the after-action reporting that is critical to response quality improvement.⁴

The scientific basis for public health theory and practice, which requires exploration and elimination of potential answers through research and analysis, would also be hampered by the threat of litigation, and subjecting public health departments to tort liability for engaging in this necessary and invaluable analysis would be patently unjust. Governments, unlike private persons, are tasked with duties that are not legal duties within the meaning of tort law. *Washburn v. City of Federal Way*, 179 Wn.2d 732, 753, 310 P.3d 1275 (2013). If a public entity owes a legislatively mandated duty to the general public, it does not owe the duty to any particular person harmed by its breach. *Mita v. Guardsmark, LLC*, 182 Wn. App. 76, 83, 328 P.3d 962 (2014) (citing *Munich v. Skagit Emergency Commc'ns Ctr.*, 175 Wn.2d 871, 888, 288 P.3d 328 (2012) (Chambers, J., concurring)). Indeed, the policy underlying the public duty doctrine in Washington is that

⁴ Health departments at times make mistakes. This is inevitable, and there are adequate existing institutional means to address such errors. Among other things, there is a culture within the public emergency response system pursuant to which, following an emergency, a “hot wash” does or should occur to assess what could have been done better, as there will always be room for improvement. This framework has historically supported positive evolution in public health response. It preserves the discretion needed during a crisis while recognizing the need to identify lessons learned to inform future responses. Potentially imposing tort liability, post hoc, for decisions that occurred in the middle of a crisis, by contrast, would not improve decision-making, but will chill effective response and undermine the type of honest and candid post-event analysis that is both commonplace and essential to improving our public health systems.

legislative enactments for the public welfare should not be discouraged by subjecting a government entity to unlimited liability. *Taylor v. Stevens Cty.*, 111 Wn.2d 159, 170, 759 P.2d 447 (1998); *Oliver v. Cook*, 194 Wn. App. 532, 542, 377 P.3d 265 (2015); *Woods View II, LLC v. Kitsap Cty.*, 118 Wn. App. 1, 27, 352 P.3d 807 (2015) (court “purposely dr[a]w the scope of the public duty doctrine narrowly in order to ‘avoid dissuad[ing] public officials from carrying out their public duty’”).

The process of investigating the occurrence of a notifiable condition and determining whether and what type of public engagement is appropriate is fundamental to managing the public’s health. Deciding how best to communicate with the public requires a careful balance of numerous considerations, with one overriding objective: protecting public health. If the trial court’s decision is not overturned, it will have an immediate effect on public health officials and the health of the public. Public health officials will need to notify the public of any and all public health conditions regardless of whether such communication is advisable or beneficial. There are numerous risks to the public inherent in subjecting public health departments to tort liability for exercising their judgment in performing this crucial analysis.

First, for public health messages to be effective, they must be accurate. Otherwise, there is a risk of eroding the public trust in public

health information and public health officials. But the messages often will be inaccurate when information is lacking or when public health departments are unable to use their skills and judgment without fear of liability exposure. *ASTHO Statement on Public Notification of Legionella Outbreaks*, Arlington VA (Nov. 8, 2018). The investigatory process will not occur effectively when there is a mandatory public notice requirement. Without proper investigation, the risk of error is significant.

Second, public health messages must be credible. As identified by the Washington Supreme Court Commissioner and as noted in more detail below, inundating the public with premature warnings will diminish the effect of truly urgent information. Accordingly, public health departments must be given wide latitude to determine what needs to be said publicly, and when.

Finally, public health messages must prospectively consider the public's reaction and how to reduce the likelihood that the response will overshadow the message. Public notifications can have tremendous costs to public health even if the notice is correct. From AIDS to Ebola to Zika, we have seen repeated examples where public fear of the unknown impedes sound public health decision-making and intervention. The reality of public health decision-making is that members of the public may become angry about public health decisions or fearful of the implications. Sometimes,

public health officials must limit individual freedom (such as limiting travel to or from areas of extreme concentration of a disease), cause financial harm (such as when a restaurant or public attraction must be closed for health violations), or make strategic use of resources (such as determining where to concentrate testing or vaccinations). For example, if a public health department warns that a particular hospital is the source of a contagious disease outbreak, patients may refuse to receive care there, even though the outbreak has been safely contained. Although some patients may be able to obtain care elsewhere, others will not be able to do so, risking further negative outcomes (perhaps even greater than those posed by the original threat). Public health officials already face challenges in balancing political influence or popular demands without having to consider whether civil liability will be used to punish them for their decisions. Potential tort liability will further polarize the issues by adding the threat of litigation in an atmosphere already thick with intense public scrutiny, heated emotions, and, at times, life-or-death consequences. This would send a chilling effect throughout the public health community.

C. Mandated Notification Without Consideration of Specific Threats Could Result in a “Sky is Falling” Or a “Cry-Wolf” Effect That Dilutes Public Health Advisories’ Effectiveness.

Consistent with public agency guidelines, the Washington State Supreme Court Commissioner recognized that mandatory public health

advisories could lead to a flood of notices that may lead to a “sky is falling” effect, ultimately diluting the effectiveness of a system intended to warn health care providers and the public of serious public health risks. Ruling Granting Discretionary Review at 13. This effect is also known as the cry-wolf effect or warning fatigue, which results from over-warning. *Information Risk Communications in the Context of Zika Virus: A Plot Study*, Talebi, Rao, Rao – Twenty-third Americas Conference on Information Systems, Boston, 2017. When individuals are exposed to frequent warning messages about disaster, they get tired of hearing the warnings, and becoming apathetic. *Id.* Indeed, studies show that after sending many messages, people spend less time thinking about and preparing for the threat and responding to uncertain disasters. *Id.*

The trial court’s ruling exposing health departments to tort liability for failing to automatically issue a public health advisory regarding any notifiable event will logically result in a significant increase in public health advisories and increased likelihood of warning fatigue. This Court recognized these dangers in *Osborn v. Mason Cty.*, 157 Wn. 2d 18, 29, 134 P.3d 197, (2006) (“Notification to the public at large of the release [of all violent sex offenders] would produce a cacophony of warnings that by reason of their sheer volume would add little to the effective protection of the public.”).

D. Mandated Notifications Could Negatively Impact Patient Confidentiality.

Patient confidentiality may also be at risk if the trial court's order is allowed to stand. Indeed, when evaluating whether to issue a public health advisory, departments often balance the benefit to public health with the risk of patient confidentiality. Often, releasing health information that may include gender, age, residence, or other geographic identifiers may be enough for the media or the public to identify a specific person or patient. Certainly, the media can be very quick to identify individuals and their families when public statements are given. Public health officials have ethical considerations and legal obligations regarding disclosing information that could reasonably lead to the identification of individuals. *See* WAC 246-101-230. For this reason, too, discretion should be allowed for determining whether a public health advisory should be issued.

IV. CONCLUSION

None of these considerations set forth by the Amicus Parties seek to diminish or obstruct the public's right to know about public health issues. Rather, the consideration and necessary discretion appropriately afforded to public health departments seek to ensure that the public is informed and educated in the most effective way possible, with the least amount of harm to other essential variables, such as individual privacy, personal freedom,

or public health resources. Ignoring these issues harms the public and ultimately distracts from the critical information public health officials need to convey.

For all of these reasons, the trial court's order exposing health departments to tort liability for failing to automatically issue a public health advisory regarding any notifiable condition is at direct odds with basic tenets of public health regarding whether and when the public should be informed of matters impacting a community's health. Tort liability exposure is not the proper means of policing public health departments whose decisions apply core principles to guide public health administration. Moreover, tort liability exposure for health departments exercising their professional judgment to protect public health is inappropriate and inconsistent with Washington law. For these and all of the reasons set forth above, the Amicus Parties respectfully request that the trial court's order be reversed and the claim against King County dismissed.

RESPECTFULLY SUBMITTED this 4th day of October, 2019.

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PROOF OF SERVICE

I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, and not a party to this action. On the 4th day of October, 2019, I caused to be served, via the Washington State Appellate Court's Portal System, a true copy of the foregoing document upon the parties listed below:

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

DATED this 4th day of October, 2019.

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