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Inside this Issue

1. Public Duty Doctrine Case
2. Responsible Bidder
3. Annual Retreats
4. HB 1621: Possible Changes to the Bid Laws on the way

Norg v. Seattle: Washington Supreme Court Says EMS is Not a Governmental Function

On January 12, 2023, the Supreme Court of Washington[1] affirmed the Court of Appeals decision holding that the public duty doctrine did not insulate the City of Seattle from a common law negligence claim based on a slow response time that led to enhanced injuries to the patient. See our discussion of the Court of Appeals decision in the same case, in the *Firehouse Lawyer*,[2] that decision being entirely consistent with this 5-4 decision of the state's Supreme Court.

Having reviewed the majority decision and the dissent, we will provide our reaction to both opinions—majority and dissent.

The Court held in *Norg* that the public duty doctrine does not apply under the facts in the record, so the trial court need not address whether the facts might fit within one of the exceptions to the doctrine, such as the "special relationship" exception. So let's briefly set out the essential facts that led to this legal action in the first place.

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[1] https://caselaw.findlaw.com/wa-supreme-court/2160712.html

[2] https://www.firehouselawyer.com/Newsletters/July2021FINAL.pdf

Mrs. Norg, who resided with her husband three blocks from the nearest Seattle fire station, called 911 for her husband. She gave the dispatcher her correct address. The responding medical personnel of the Seattle Fire Department wrongly assumed the response was to a local nursing home, which apparently was a common destination for such EMS calls. They did not verify the Norg's address and the response time was 15 minutes, once they figured out their error. Mr. Norg's injuries or condition were significantly worsened due to the delay. The Norgs sued the city of Seattle for negligence.

In essence, all three courts that looked at the issue—whether Seattle owed the Norgs a duty of reasonable care (a common law negligence kind of duty)—concluded that the duty existed. The trial court, the Court of Appeals, and the state Supreme Court all agreed that the public duty doctrine was no defense. The high Court remanded to the trial court for further proceedings, now that the duty issue was resolved in favor of plaintiffs.

In this article, we examine the various assumptions and principles that support the courts' decisions on this issue—and present a different viewpoint. Although you will find that we agree with the dissenting opinion in this 5-4 (as close as it gets) decision, you will see that we even disagree with some of the minority's assumptions.

For purposes of the discussion, we are going to assume that our readers know about the public duty doctrine (defense), in which courts have held that "a duty owed to all is a duty to no one" in particular.[3] While there are at least four exceptions to the public duty doctrine (meaning that no duty exists to allow legal actions) over the years the doctrine has survived as a potential defense. The question now is, after *Norg*, whether the doctrine is viable at all, since there is often no problem for a creative plaintiffs' lawyer in finding a way to plead common law negligence.

The first concept (or misconception) is that the doctrine cannot apply unless there is a statute or ordinance *mandating action* by the government entity. We question that statement of the law. As pointed out by the dissent, no Washington appellate court has ever held that an actionable duty of a governmental agency can only be traced to a statute or ordinance. We find it hard to believe that no municipal duty may ever arise from the common law—case law, as opposed to positive statutes. In any event, no court here has ever held that; as pointed out by the dissent, the proposition is based strictly on the much-discussed concurring opinion of Justice Chambers in the case of *Munich v. Skagit Emergency Communications Center,* 175 Wn. 2d 871, 886, 288 P.3d 328 (2012) which was also covered in the *Firehouse Lawyer.*

Again, as pointed out by the dissent, even the *Munich* opinion acknowledged that some common law duties have been addressed in prior public duty doctrine cases.

The next questionable concept or misconception in the *Norg* opinion is that if

[3] See the link to various articles we have written on the subject:

https://www.firehouselawyer.com/NewsletterResults.aspx?Topic=Civil+Actions&Subtopic=Public+Duty+Doctrine

private parties performing essentially the same functions could be liable for negligence, then a governmental entity performing that service should not be immune from liability for negligence. These judges have concluded that a fire department providing emergency medical services is no different than a private ambulance company, which can clearly be held liable in a negligence case for violating an applicable standard of care.

First, we wish to point out that the precise duty in question is one to respond in a timely manner when 911 is called for a medical emergency. There are two parts to this timeliness question, when one actually analyzes it, closely. It starts with a rapid acceptance of the call and then quickly dispatching it properly to the right address with the right unit. Clearly, this duty falls upon the dispatching agency, which in this particular case is the same as the responding fire department—the City of Seattle. (Please note that in Washington this is not universally true, because in many places the dispatch agency is *not* part of the same agency.)

The second part of timeliness rests upon the responding unit, which needs to comply with a provable standard of care that is determinable by resort to NFPA standards, response time standards deriving from RCW 52.33, or elsewhere by expert opinion. Apparently, that is where the problem lies in the *Norg* fact pattern, as the responders made a faulty assumption about their destination rather than verifying the address. It appears that the dispatcher did everything according to the book.

But let us go back to the courts' assumption. Is the service provided one that private ambulance companies similarly provide in Washington? No. Not at all. The judges do not seem to acknowledge that the 911 emergency response system is controlled, pursuant to Washington statutes, by the local government having jurisdiction. Indeed, each local government has a *monopoly* over the dispatching of both police and fire in the State of Washington. We learned that years ago in an antitrust lawsuit brought by Shepard Ambulance Company in the federal district court in the Western District of Washington, when the trial court held that a public agency is not in competition with a private ambulance company and therefore can monopolize emergency medical services in a region.

To us, the difference between private and public emergency medical services, at least in Washington State, is obvious. Only the public EMS service is dispatched to emergencies in most jurisdictions as the "first due" responding agency. Private ambulances are used for non-emergencies such as interhospital transfers. They also respond—especially in rural areas—to emergencies after (or simultaneously with) the public agency personnel who respond, assess and stabilize the patient, and then transfer the patient to the private company for transporting the patient to the hospital. We disagree with the majority in *Norg* because we believe that the emergency medical services provided by fire departments in this state are <u>essential governmental functions</u>.

It is as simple as this: ask yourself: is the fire department a governmental function or service? Clearly yes. Then ask yourself: what percentage of the local fire department's calls are for EMS? It seems that everywhere in Washington state 75-85% of the fire departments' calls or responses are for EMS.

We agree with the dissenting opinion by Justice Madsen who pointed out that the fire department

owes a general duty to all to respond to 911 calls.[4] Plainly, the public takes that for granted; when they call 911 the public expects a response, and a prompt response at that. Unlike the private ambulance companies, the public agencies do not do this for profit. (Incidentally, their transport prices, when they do transport, are significantly less than private ambulance companies' fees, as they are tasked with recovering costs, not to make a profit.) They cannot realistically withhold their services when an appropriate emergency call is placed to 911 in a bona fide emergency.

The dissenting opinion does a very good job of arguing that providing EMS services is a governmental function. Because of the involvement of the 911 system, for purposes of this case at least, the EMS function is indistinguishable from that of the police; it is clearly a governmental service. Justice Madsen wrote succinctly that: "Government services evolve as society's needs evolve." It is well past time for the state to recognize, in a legal sense, that EMS is provided as a basic service (80% of the call volume!) of a fire department—at least here in Washington.

The judges also did not seem to realize that certain statutes relating to establishment of an ambulance *utility* are basically irrelevant to what is happening out there in the field. A municipal fire department, fire district, or regional fire authority can provide EMS without establishing a formal utility. Although there are statutes such as RCW 35.21.766 and RCW 36.01.100, these laws have not provided a significant obstacle to municipal fire departments providing EMS to their citizens.

Based upon the arguments brought forth by the dissent and the misconceptions of both the majority and the dissent, to me there is no doubt that the better course for the high Court would have been to hold that the duty in question is clearly a duty owed to the public at large and the public duty doctrine applies unless an applicable **exception** applies. The Court should have remanded to the trial court for further litigation about the **exceptions**. Based on the facts of the case, it may well be that the "special relationship" exception, embodied in cases such as *Chambers-Castanes v. King County,* 100 Wn. 2d 275, 284, 669 P.2d 451 (1983) would in any event have led to a partial summary judgment. It may well be that these facts lead to a conclusion that an exception to the public duty doctrine applies.

Unfortunately, by not doing that and by not abolishing the doctrine entirely (but instead implying that the doctrine may have some vitality), the high Court majority has simply encouraged more litigation on the subject.

We have to say we agree with the first sentence of Justice Madsen's dissent, which was concurred in by three other justices: "Performing ambulance and emergency medical services (EMS) is, as Washington lawmakers have recognized, essential for the health, safety, and welfare of the people—the embodiment of a governmental function to which the public duty doctrine applies."

RESPONSIBLE BIDDER COLUMN

We are often asked about contractor's bonds in a public works setting. This short article is intended to provide a brief overview of this deceptively complex subject.

[4] The Attorney General seems to agree that the fire department has a duty to respond to 911 calls within its service boundaries: https://www.atg.wa.gov/ago-opinions/provision-fire-and-emergency-services-persons-and-property-within-reservation-federally

RCW 39.08.010 requires a contractor to obtain a surety bond in most public works projects to secure the performance of the work and to provide a money source for both laborers who work on the job and those providing materials for the job. In addition, the bond is there to pay as needed any taxes, increases or penalties under Titles 50 (unemployment), 51 (workers compensation) and 82 (excise taxes, such as sales and use taxes).

On contracts of one hundred fifty thousand dollars or less, at the option of the contractor, the bond may be dispensed with, and the agency may retain 10% of the contract amount instead, for the same purposes. The retention is held for 30 days or until all necessary releases are obtained, whichever is later. It is always critical and necessary to obtain releases from the Department of Labor and Industries and the Department of Revenue.

Another type of bond, less commonly used in public construction contracts, is known as a "completion bond." This is a contract that guarantees monetary compensation if the construction project in question is not finished. It provides recourse, for example, if the contractor goes bankrupt or out of business.

Another instance of the use of the words "contractor's bond" relates to the bonds required by statute for all general contractors and specialty contractors (who are often subcontractors). RCW 18.27 requires all general contractors to file a surety bond in the sum of twelve thousand dollars ($12,000) and all specialty contractors to file a surety bond in the amount of six thousand dollars ($6,000). The state shall be the obligee on these bonds, but the statute makes it clear that the purpose is similar to that of a performance and payment bond on a particular public works project, i.e. to protect laborers, material suppliers and ensure payment of money due to any state agencies.

Another use of the word "bond" arises in another bid law context. In many public works projects, the specifications require bidders to provide a "bid bond." This is actually a device to provide security to ensure that the bid is bona fide and not going to be summarily withdrawn, i.e. that if awarded, the bidder will enter into a contract with the "owner". The amount of the bid bond, or some other form of security (such as a cashier's check) is typically 5% of the bid amount.

RETREATS – AN ANNUAL NECESSITY

Eric Quinn recently finished facilitating a retreat for a fire department client over a period of two days. This reminded me that, over the years, many of our fire department clients used to hold retreats regularly—if not annually—to engage in detailed discussions about issues facing the department in a way that is difficult to accomplish at a regular monthly meeting, when routine business takes up most of the agenda time.

An annual retreat can be used as a vehicle for in-depth revisiting of the Master Plan or Strategic Plan. It can be used for discussion of the relationship between the Chief (and his/her staff) and the Board of Commissioners. It can be used for the preliminary brainstorming about consolidation of departments or even mergers or annexations. Or the formation of a regional fire authority! The issues are as unique and varied as the fire departments in our state.

All departments should consider whether the board and staff retreat is an annual tradition worth establishing or continuing, if you already do it. Eric Quinn would be happy to facilitate your

annual retreat, which may be done at some venue away from the district's headquarters station, as a special meeting of the board. It often ends up being handy to have that legal mind present, so that your facilitator can wear "two hats." Think about it.

LEGISLATIVE UPDATE – HB 1621

We do not often report on legislation this early in the session, and in fact we usually wait until after bills have been approved by the legislature and signed into law by the Governor to report on them. But HB 1621[5] is certainly a bill of interest to many local government entities, because it would significantly amend the bid laws. Section 5 of the bill would amend RCW 52.14.110 to increase the threshold for purchase of materials, supplies or equipment from the current forty thousand dollars to $75,500. Below that there would be no necessity for sealed bidding. Moreover, between $75,500 and $150,000, by resolution a district could use the vendor list process of RCW 39.04.190 for such purchases.

Similarly, with respect to public works projects such as construction of fire stations, the threshold of $30,000 would be changed. If only a single craft or trade is involved with the project, the new threshold is $75,500, but if the project involves more than a single craft or trade the new threshold is $150,000. Of course, the small works roster process set out in RCW 39.04.155 would still be available for projects that do not exceed an estimated $350,000.

A second major change in this bill would create a new RCW 52.14.110(2). This new subsection would address a long-standing controversy caused when districts use their own regularly employed personnel to do relatively small public works projects, i.e. without hiring a general contractor.

This new subsection would allow a district to use their regularly employed personnel to perform work which is an "accepted industry practice under prudent utility management without a contract." In this context, "prudent utility management" means performing work with regularly employed personnel utilizing material of a worth not exceeding $300,000 in value, without a contract. To us, this is a very significant development, should this bill actually become law during or after this legislative session. WFCA certainly supports it.

The new subsection also includes clarifying language that the $300,000 limit does not include the value of individual items of equipment. "Equipment" is defined broadly enough so that cabling, wire, pipe or lines used for electrical, water, fiber optic, or telecommunications also do not count toward the $300,000 limit. Thus, for example, if you wanted to do an HVAC project with your own employees (assuming qualifying expertise) much of the equipment would not even count toward that $300,000 limit.

The bill makes identical changes for port districts, certain classes of cities, water and sewer districts as well as fire districts. Stay tuned to see if this bill becomes law, in this form, or with changes.

[5] See the bill here: https://app.leg.wa.gov/billsummary?BillNumber=1621&Year=2023&Initiative=false