JUDGE STEPHANIE A. AREND

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

THE ESTATE OF DANIEL ALEXANDER MCCARTNEY; *et al*. Plaintiffs, v. PIERCE COUNTY, a municipal corporation, located in Washington State, Defendant/Third Party Plaintiff, SAMANTHA JONES, individually; FRANK WILLIAM PAWUL, individually; and BRENDA KAY TROYER, individually, Third Party Defendants.	Case No. 21-2-04582-2 MOTION FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE* AND MEMORANDUM IN SUPPORT THEREOF NOTED ON MOTION DOCKET: April 2, 2021

Motion

The National Police Association ("NPA"), a nonprofit entity formed to support law enforcement, moves for leave to participate in this case as amicus curiae. A supporting Declaration of Ed Hutchison is filed herewith. Attached hereto as Exhibits 1 & 2 are the proposed legal memorandum NPA will file if granted leave to participate, and a proposed Declaration of Dr. Joel Shults.

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Memorandum

This case concerns important questions as to the duties of police employers with respect to providing a reasonably safe working conditions in the law enforcement context. It is a core mission of NPA to defend the interests of law enforcement officers and the legal structure regulating their status and conduct.

Washington's Civil Rules do not address *amicus* appearances before the Superior Court. However, the Washington Court of Appeals has explained that the participation NPA seeks herein is perfectly proper:

> "No specific rule permits amicus participation in the trial court, but neither is there any rule prohibiting it. We can see no reason a trial judge should not have discretion to permit such participation if it may be helpful to the court. Other trial courts have allowed amici, and Parsons has presented no authority disapproving the practice. Nor does he present authority that would require an interested party such as WPAS to intervene, as opposed to filing as amicus. As to the propriety of submitting articles and other supporting material, we note that in the appellate courts, amici often provide broad background by way of reference to studies or articles. We are confident the trial courts are equally able to sort out what materials are proper for the court's consideration."

Parsons v. DSHS, 129 Wash. App. 293, 302, (2005).[1] By analogy to Rule 10.6 of the Rules of Appellate Procedure, NPA has filed as exhibits hereto its proposed filings in response to the motion to dismiss. *See* RAP 10.6(b).

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[1]NPA notes that amicus appearances are not uncommon in the United States District Court for the Western District of Washington. *See, e.g., Ctr. for Biological Diversity v. United States EPA*, No. C13-1866JLR, 2014 U.S. Dist. LEXIS 20623 (W.D. Wash. Feb. 18, 2014) (granting amicus status to Western States Petroleum Association and the American Petroleum Institute); *Jewish Family Serv. of Seattle v. Trump*, No. 2:17-CV-01707JLR, 2017 U.S. Dist. LEXIS 199900 (W.D. Wash. Dec. 5, 2017) (granting amicus status to Muslim Advocates and the McArthur Justice Center); *Skokomish Indian Tribe v. Goldmark*, No. C13-5071-JLR, 2013 U.S. Dist. LEXIS 151310, 2013 WL 5720053 (W.D. Wash. Oct. 21, 2013).

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NPA is not seeking to present any private interest of its own, but to present its position as to the correct rules of law to be applied in cases involving the duties of police employers with respect to questions of staffing and training that are presented by Plaintiffs' case. NPA is not aligned with any party in the case but expects to present positions supportive of Plaintiffs.

This case is at an early stage. The complaint was filed February 11, 2021, and the answer and a motion to dismiss has been filed March 12, 2021. This motion, and the proposed response to the County's motion to dismiss, have been filed at the time required for response to the motion, and the motion is timely.

No legally cognizable prejudice to the parties will arise from allowing amicus participation. NPA will not participate in discovery; its participation will be limited to filing one or more legal memoranda. In addition to filing the proposed memorandum and declaration attached hereto as Exhibits 1 & 2, NPA anticipates that after further factual development in the case, these legal issues will arise again in the context of a motion for summary judgment, and NPA may submit further briefing then. Depending on the outcome of such motion, NPA may also propose to file a memorandum before trial. Consistent with RAP 10.2(f), such briefs would be filed reasonably in advance and with time for a response by defendant.

NPA believes that its briefing will benefit the Court by providing a broader perspective concerning the critical issues of understaffing, the impacts on workplace safety and officer health, and the legal duties related thereto.

Conclusion

For the foregoing reasons, NPA's motion for leave to participate amicus curiae should be granted.

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Dated: March 23, 2021.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

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THE ESTATE OF DANIEL ALEXANDER MCCARTNEY; *et al*. Plaintiffs, v. PIERCE COUNTY, a municipal corporation, located in Washington State, Defendant/Third Party Plaintiff, SAMANTHA JONES, individually; FRANK WILLIAM PAWUL, individually; and BRENDA KAY TROYER, individually, Third Party Defendants.	Case No. 21-2-04582-2 *AMICUS CURIAE* MEMORANDUM OF THE NATIONAL POLICE ASSOCIATION NOTED ON MOTION DOCKET: April 2, 2021

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Identity and Interest of Amicus Curiae

The National Police Association ("NPA") is a nonprofit corporation organized under Delaware law, which pursues a general mission of advancing law enforcement interests, including participating in cases as amicus curiae where, as here, the case raises legal questions important to law enforcement interests. The NPA has a powerful interest in ensuring that its members have a safe workplace, and writes to provide the Court with a law enforcement perspective that would otherwise be absent from the litigation.

Summary of Argument

At this stage of the case, NPA assumes as true the allegations that Pierce County has severely understaffed its Sheriff's Department to the point where deputies such as Deputy McCartney were required to work double shifts, and even then were in situations where there would be extended delays in securing backup responding to situations developing within the County. NPA further assumes that Deputy McCartney received inadequate training in responding to these circumstances, and that a trier of fact would be required to determine whether these factors proximately caused Plaintiffs' damages alleged herein.

In this memorandum, NPA briefly summarizes aspects of expert testimony that might be brought to bear on Plaintiffs' claims, with reference to the accompanying Declaration of Dr. Joel Shults. He explains that a large body of scientific research notes high risks arising from overworking law enforcement officers, and the need, if public entities insist on making inadequate provision for public safety, of training officers to overcome their natural (and laudable) tendencies to act as heroes irrespective of risks. He also distinguishes between the operational risks inherent in law enforcement, and the "organizational risks" created through understaffing.

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NPA then summarizes Pierce County's legal duties to keep its employees safe, including law enforcement officers, or to at least minimize risks through adequate training. We then review background aspects of Washington law relevant to the County's staffing and training decisions, particularly its power to levy taxes to fund a budget adequate to meet public needs.

Finally, we review the County's defenses highlighted in the motion for judgment on the pleadings to explain how existing law allows further factual determinations to establish the scope of duties (including the utilization of expert testimony) and potential breaches thereof.

Argument

In a context where Washington law provides that Pierce County "shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation," RCW 4.92.090, Plaintiffs' claims fall well within the sort of circumstances routinely resulting in liability for private employers. Public policy would not be offended by entertaining Plaintiffs' suit, but rather improved.

I. PIERCE COUNTY'S DUTIES TO ITS EMPLOYEES.

A. Workplace Safety.

Plaintiffs allege that "Pierce County had a duty to provide Deputy McCartney a safe workplace". (Cmplt. ¶ 4.4.) This has long recognized to have been a common law duty in Washington:

> In Washington, an employer has an affirmative and continuing duty to provide all employees a reasonably safe place to work. *Guy v. Northwest Bible College*, 64 Wn.2d 116, 118, 390 P.2d 708 (1964); *Myers v. Little Church by the Side of the Road, 37* Wn.2d 897, 901-02, 227 P.2d 165 (1951); *see Ward v. Ceco Corp*., 40 Wn. App. 619, 628-29, 699 P.2d 814, review denied, 104 Wn.2d 1004 (1985). The standard of care to be exercised by the employer is to take the precaution of an ordinarily prudent person in keeping the workplace reasonably safe. *Myers*, at 902.

McCarthy v. Dep't of Soc. & Health Servs., 110 Wash. 2d 812, 818 (1988).

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Indeed, this is not just a common law duty, but one enshrined in the Constitution of the State of Washington. Under Article II, § 35, the People have declared: "The legislature shall pass necessary laws for the protection of persons working in mines, factories and other employments dangerous to life or deleterious to health; and fix pains and penalties for the enforcement of the same." To that end the Washington Legislature has passed the Washington Industrial Safety and Health Act ("WISHA"), Chapter 49.17 RCW, which by its terms applies to the County. RCW 49.17. 020(4) ("employer" "includes the state, counties, cities, and all municipal corporations"). *See also McCarthy*, 110 Wn.2d at 818 (WISHA codifies common law duty to provide a safe workplace).

WISHA requires every employer to "furnish to each of his or her employees a place of employment free from recognized hazards that are causing or likely to cause serious injury or death to his or her employees". RCW 49.17.060. In particular, the regulations issued pursuant to this and other sections of WISHA declare: "You must provide and use safety devices, safeguards, and use work practices, methods, processes, and means that are reasonably adequate to make your workplace safe." WAC 296-800-11010.

While it is obviously impossible to provide law enforcement personnel working in the community a workplace free from the hazards posed by criminals, Plaintiffs' complaint makes it clear that Pierce County's work-related budgeting and scheduling practices are in violation of the regulatory requirement to use "work practices, methods, processes and means that are reasonably adequate" to make the workplace safe.

Plaintiffs have alleged, and NPA believes they should have an opportunity to prove, that budgeting additional patrol officers would appreciably increase officer and public safety. Courts across the nation have routinely held entities accountable for financially driven understaffing decisions resulting in personal injury. *See, e.g., Hatfield v. Allenbrooke Nursing & Rehab. Ctr.,*

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LLC, No. W2017-00957-COA-R3-CV, 2018 Tenn. App. LEXIS 450, at *92 (Ct. App. Aug. 6, 2018) (tort involving "understaffing and negligence by Allenbrooke [nursing home] against Mrs. Pierce"); *Green v. Mgmt. & Training Corp.,* No. 3:17-cv-149 MPM-JMV, 2019 U.S. Dist. LEXIS 130153, at *23 (N.D. Miss. Aug. 5, 2019) ("plaintiffs plainly allege that MTC [prison] negligently failed to provide adequate staffing for its prison on the morning of Green's death"); *Holt v. Wesley Med. Ctr.,* No. 00-1318-JAR, 2004 U.S. Dist. LEXIS 13814, at *25 (D. Kan. July 19, 2004) ("plaintiffs have adduced sufficient evidence on the issue of causation on plaintiffs' claim of negligence due to [nurse] understaffing"); *Heavner v. Nutrien Ag Sols.,* No. 4:20-cv-00370-KGB, 2020 U.S. Dist. LEXIS 158637, at *10 (E.D. Ark. Sep. 1, 2020) ("it is specifically alleged that Mr. Heavner's injuries were caused by the understaffing of the St. Francis facility and the failure to keep the premises safe for business invitees"). While most of these cases involve duties by institutions toward their customers or patrons, the legal duties for employee safety here require no different analysis.

B. The Training Issue.

Plaintiffs also allege that Pierce County "did not have a training plan to ameliorate the danger of short staffing" (Cmplt. ¶ 3.85) and that Pierce County owed Deputy McCartney "the duties of adequate training" (Cmplt. ¶ 4.6). It is well established in Washington that "[a]n employer may be liable for negligently training or supervising an employee". *Anderson v. Soap Lake Sch. Dist.,* 191 Wash. 2d 343, 360 (2018).

Discovery in this action is required to ascertain whether the County made a conscious choice to operate with extraordinarily low staffing levels associated that would inevitably produce very long response times, and times to secure backup for officers in dangerous situations. As the NPA understands Plaintiffs' complaint, even to the extent that such a choice was not itself tortious, the tort then arose from the training necessary to protect officers from the

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inevitable consequences of such a choice. Dr. Shults' testimony explains that in such a context, additional training is needed to overcome the natural heroic tendences of officers to rush in without backup.

II. PIERCE COUNTY COULD PROVIDE A REASONABLY SAFE WORKPLACE.

Chapter 36.40 RCW provides a detailed process for Pierce County to provide for Sheriff's department work practices, methods, processes and means reasonably adequate to protect employees like Deputy McCartney. RCW 36.40.010 directs the Sheriff to provide "detailed and itemized estimates, both of the probable revenues from sources other than taxation, and of all expenditures required by such office, department, service, or institution for the ensuing fiscal year". "Upon receipt of the estimates the county auditor or chief financial officer designated in a charter county *shall prepare* the county budget which shall set forth the complete financial program of the county for the ensuing fiscal year." RCW 36.40.040 (emphasis added). After a budget hearing, a final budget is devised, and then the County must "fix the amount of the levies necessary to raise the amount of the estimated expenditures as finally determined, less the total of the estimated revenues from sources other than taxation, including such portion of any available surplus as in the discretion of the board it shall be advisable to so use, and such expenditures as are to be met from bond or warrant issues". RCW 36.40.090.

In short, the County cannot, as a matter of law, claim insufficient funds necessary to meet estimated expenditures. Washington law even provides express authority for courts to step in and order expenditures, where appropriate, that are in excess of the County's approved budget. *Ass'n Collectors v. King County*, 194 Wash. 25, 35 (1938) (discussing statute presently codified as RCW 37.40.130).

While the issues raised by this case may be of first impression in Washington, other courts have not hesitated to step in where the safety of police officers and the public is at issue.

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For example, in *State ex rel. Vescovo v. Clay Cty.,* 589 S.W.3d 575, 584 (Mo. Ct. App. 2019), the Court considered a Missouri statute, § 50.550 of the Revised Statutes of Missouri, under which "[t]he annual budget [for the County] shall present a complete financial plan for the ensuing budget year". The Court noted that in Missouri, like Washington, the County Sheriff was given statutory duties to keep the peace, and concluded: "we thus read § 50.550 as requiring the County to adopt a budget adequately providing for those expenditures which are necessary for Sheriff Vescovo to carry out those duties prescribed by statute." *Vescovo*, 589 S.W.3d at 585. Accordingly, after a trial highlighting the arbitrariness of the County's budgeting process, the Missouri Court of Appeals upheld the trial court's grant of a writ of mandamus, which required the County to transfer funds within the County's total budget. *Id*. at 588 & n.11.

Washington law imposes the same vital duties on the Pierce County Sheriff. Under RCW 36.28.010(6), the Sheriff and his officers "[s]hall keep and preserve the peace in their respective counties, and quiet and suppress all affrays, riots, unlawful assemblies and insurrections, for which purpose, and for the service of process in civil or criminal cases, and in apprehending or securing any person for felony or breach of the peace, they may call to their aid such persons, or power of their county as they may deem necessary."

In other circumstances, the Washington Supreme Court has expressly rejected the idea that staffing levels set by public employers are beyond legal review. In particular, the Court has declared:

> "When staffing levels have a demonstratedly direct relationship to employee workload and safety, however, we believe that, under appropriate circumstances, requiring an employer to bargain over them will achieve the balance of public, employer and union interests that best furthers the purposes of the public employment collective bargaining laws."

Int'l Asso. of Fire Fighters, Local Union 1052 v. Pub. Emp't Relations Com, 113 Wash. 2d 197,

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204 (1989).[1]

By analogy, when staffing levels and the resulting scheduling decisions have such extreme effects upon workplace safety as may be demonstrated here, they can and should be held to be a violation of the common law, statutory and constitutional duties to provide workplace safety. Judgment in this case can only assist in vindication of Washington State public policy of constitutional significance.

III. THE COUNTY'S DEFENSES TO ACCOUNTABILITY ARE NOT WELL-FOUNDED IN WASHINGTON LAW.

A. That the County Exercised Discretion to Create the Danger Need Not Prevent Relief.

Washington was a leader in abolishing sovereign immunity in 1961, flatly declaring that "[t]he state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation." RCW 4.92.090.

Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 253(1965), the case that, in the words of the dissent, "engraft[ed] upon RCW 4.92.090, the statute abolishing sovereign immunity in the state of Washington, the chimerical words, 'discretionary act,'" *id*. at 262 (Finley, J., dissenting), was careful to adhere to the language of the statute. Its holding: "the official conduct giving rise to liability must be tortious, and it must be analogous, in some degree at least, to the chargeable misconduct and liability of a private person or corporation." *Id.* at 262.

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[1] More generally, the courts of Washington have been vigilant in addressing legislative failures to provide adequate funding of basic services. *See, e.g., McCleary v. State*, 173 Wash. 2d 477, 484 (2012) (The State has not complied with its article IX, section 1 duty to make ample provision for the education of all children in Washington")l *Seattle Sch. Dist. v. State,* 90 Wash. 2d 476, 482 (1978) (same). The failures alleged in Plaintiffs' complaint strike at an even more fundamental duty of the State: the preservation of law and order.

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The cases cited herein provide that analogy: private entities that engage in severe understaffing are liable to those injured, even when there are other causes of the injury—such as malpractice by overworked staffers.

In particular, numerous cases have upheld liability for those employing security guards injured by the criminal acts of third parties where the employer's negligence contributed to the injury. *See, e.g., Pucalik v. Holiday Inns, Inc.*, 777 F.2d 359, 362 (7th Cir. 1985) ("the jury determined that Holiday Inns, Inc. had undertaken to take certain steps—including the maintenance of the security locks—to reduce the danger to the security guards and had failed to live up to that undertaking"); *Robertson v. Sixpence Inns of Am*., 163 Ariz. 539, 545 (Ariz. 1990) ("reasonable people could disagree about whether defendant took adequate precautions to protect Officer Robertson). These cases arise in the context of duties owed to security guards as independent contractors; here, the County owed even greater duties to its employee Deputy McCartney.

In such cases, expert testimony is generally permitted to assist the trier of fact in assessing whether or not the defendant owes a duty to the plaintiff and breached it. *See, e.g., Robertson* 163 Ariz. at 542 (expert testified that "the motel owed a duty to warn Robertson immediately of the armed robbery and the failure to warn fell below the required standard of conduct"). As set forth above, there is at the least issues of fact as to whether the County lacked resources to utilizing staffing levels or training that would have prevented Deputy McCartney's death.

Moreover, the purpose of the doctrine is to protect the ability of government officials to make choices where the exercise of discretion would be adversely affected by the threat of civil liability—"to provide sufficient breathing space for making discretionary decisions". But there is no public interest in protecting choices outside a reasonable range of discretion, or more

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precisely, protecting choices where the discretion has been abused. "Discretionary" immunity does not protect a city from liability for their arbitrary and capricious acts. *King v. City of Seattle*, 84 Wn.2d 239, 247(1974); *Greensun Grp., LLC v. City of Bellevue*, 7 Wash. App. 2d 754, 779 (2019). In addition, the "State [or City] is immune only if it can show that the decision was the outcome of a conscious balancing of risks and advantages." *Taggart*, 118 Wn.2d at 215.

Put another way, Washington courts take care to "preserve the integrity of our system of government by ensuring that each coordinate branch of government may freely make basic policy decisions," *Chambers-Castanes v. King County*, 100 Wash. 2d 275, 282 (1983), but gross failure to provide adequate staffing are not the sort of choices the judiciary should work to foster.

Subsequent cases have made it clear that the "discretionary act" exception to RCW 4.92.090 is a "narrow category of discretionary governmental immunity exists as a court-created exception to the general rule of governmental tort liability," and "limited to high-level discretionary acts exercised at a truly executive level". *McCluskey v. Handorff-Sherman*, 125 Wash. 2d 1, 12 (1994). Where the funding of particular public improvements or services is involved, the County may be able to present evidence concerning the issue, but the fact that a decision to fund (or not fund) is involved is simply not a categorical defense, as the County claims. *See generally Bodin v. City of Stanwood*, 79 Wash. App. 313, 317 (1995) (reviewing cases concerning "a liberal standard of relevance that would allow introduction of evidence of funding availability or priority").

Finally, the Washington courts have made it clear that questions of immunity for assertedly tortious conduct by public entities should not be decided upon motions for judgment on the pleadings. Thus, where a prison inmate sued for an attack by a fellow inmate he alleged the prison should have isolated, the Supreme Court declared:

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> "The essential disputed fact in this case, which the trial court in its memorandum opinion took it upon itself to decide, is whether the defendant officials' allegedly negligent acts may be characterized as discretionary. It is obviously improper to resolve factual issues in a motion for judgment on the pleadings."

Barnum v. State, 72 Wash. 2d 928, 931 (1967).

B. The Professional Rescuer Doctrine Need Not Prevent Relief.

It should be remembered that what the County calls the "professional rescuer doctrine" began as the "fireman's rule," intended to protect ordinary citizens (not governmental bodies) from liability when their own negligence caused a fire, and they called for assistance. *Krauth v. Geller*, 31 N.J. 270, 274, 157 A.2d 129, 131 (1960) ("Probably most fires are attributable to negligence, and in the final analysis the policy decision is that it would be too burdensome to charge all who carelessly cause or fail to prevent fires with the injuries suffered by the expert retained with public funds to deal with those inevitable, although negligently created, occurrences"). The doctrine is a limited exception to the general rule that "a person who is harmed while rescuing or attempting to rescue another may recover from the party whose negligence created the need for rescue". *Loiland v. State*, 1 Wn. App.2d 861, 865 (2017), *review denied*, 190 Wn.2d 1013 (2018).

The first problem with application of the doctrine is, as explained in the County's lead case, it bars recovery "from the party whose negligence cause the rescuer's presence at the scene". *Markoff v. Puget Sound Energy, Inc*., 9 Wash. App.2d 833, 840 (2019) (quoting *Loiland v. State*, 1 Wn. App.2d 861, 862 (2017), *review denied*, 190 Wn.2d 1013 (2018)). The County did not generate the disturbance that brought Deputy McCartney to the scene, and the doctrine "does not apply to negligent or intentional acts of intervening parties not responsible for bringing the rescuer to the scene". *Beaupre v. Pierce Cty.,* 161 Wash.2d 568, 575 (2007).

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Put another way, Plaintiffs do not "complain of the negligence which created the actual necessity for exposure to those hazards," *Maltman v. Sauer*, 84 Wash.2d 975, 979 (1975); they complain of an entirely different species of negligence: the negligence that left Deputy McCartney with the horrible choice of waiting indefinitely for backup, or responding individually and heroically to the ongoing criminal action. Pierce County did not cause the danger that required the "rescue;" it caused a different sort of danger arising from extreme understaffing and the lack of training to operate safely in such conditions.

These dangers, which Plaintiffs allege were created by the County's negligence, are simply not those "inherently with the ambit of those dangers which are unique to and generally associated with the particular rescue activity". *Maltman*, 84 Wash.2d at 979. Plaintiffs seek relief premised on hazards that are not inherently within the ambit of dangers faced by police officers, but arise by reason of breaches of the duties set forth in Point I.

While the "professional rescuer" doctrine is not applicable to this case by reason of the breaches of duty alleged, NPA notes that law is evolving away from the doctrine as being patently inconsistent with general rules for assumption of risk in torts. *Cf. Scott v. Pac. W. Mt. Resort*, 119 Wash.2d 484, 498 (1992) ("Although the plaintiff in Kirk did assume the risks inherent in the sport of cheerleading, she did not assume the risks caused by the university's negligent provision of dangerous facilities or improper instruction or supervision.")

Maltman relied upon New Jersey and Oregon cases in establishing the rule. *Id.* at 978. In New Jersey, the rule has been abolished by statute (*see* N.J. Stat. Ann. § 2A:62A-21), and Oregon Supreme Court has declared:

> "The proper analysis of recovery by public safety officers for negligently caused injuries is shifted from the officers' implied assumption of risks inherent in their occupations, to the defendant's duty in the circumstances. The inquiry thus should be in each case: Did the defendant breach a legal duty causing the plaintiff's injury?"

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Christensen v. Murphy, 296 Or. 610, 621 n.11 (1984). There is simply no policy ground for any implication that officers assume risks such as those created by the County here; the ultimate question is whether or not the County owed a duty to Deputy McCartney, like any employer, to provide safe working conditions.

A careful reading of *Maltman* confirms that the duty analysis should be regarded as controlling. *Maltman* explained that "the harm sustained must be reasonably perceived as being within the general field of danger covered by the specific duty owed by the defendant". *Maltman,* 84 Wash.2d at 981. Because the "defendant's duty only encompassed those hazards which were legally attributable to that conduct which initiated the rescue activity," rather than the dangers of a helicopter crash, the Court invoked the doctrine. *Id*. at 981.

The fundamental question for this Court is did the County owe Deputy McCartney a duty to set adequate staffing levels, or if not, a duty to provide training adequate to protect him and fellow officers in operating in the extraordinary environment created by the County's funding choices. Here, unlike the cases cited by the County, the County's duties do encompass the hazards arising from understaffing and lack of training.

Conclusion

For the foregoing reasons, the County's motion to dismiss on the pleadings should be denied.

Dated: March 23, 2021.

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THE ESTATE OF DANIEL ALEXANDER MCCARTNEY; *et al*. Plaintiffs, v. PIERCE COUNTY, a municipal corporation, located in Washington State, Defendant/Third Party Plaintiff, SAMANTHA JONES, individually; FRANK WILLIAM PAWUL, individually; and BRENDA KAY TROYER, individually, Third Party Defendants.	Case No. 21-2-04582-2 DECLARATION OF JOEL F. SHULTS, Ed.D IN SUPPORT OF NPA'S MOTION FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE* NOTED ON MOTION DOCKET: April 2, 2021

Joel F. Shults, Ed.D, declares:

1. I make this Declaration in support of the motion of proposed amicus National Police Association for leave to participate as amicus curiae in this case, and in support of the opposition of plaintiffs to defendant Pierce County's motion to dismiss.

2. I have a wide-ranging background in law enforcement, including serving as a Chief of Police for a rural institution, and have earned a traditional doctorate in education and

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policy analysis with research in police training. I am an experienced writer and commentator on law enforcement matters. Attached as Exhibit 1 hereto, is a copy of my resume.

3. This case involves the impact of decisions by Pierce County concerning the staffing of deputies by the Pierce County Sheriff's Department, and plaintiffs' allegations that the County set staffing levels requiring two deputies to cover a rural area of approximately 700 square miles with a single sergeant for command support, and in addition, set work schedules requiring deputies to work double shifts with very little sleep.

4. Scholarly research concerning the effects of such staffing decisions may help the Court in evaluating plaintiffs' claim. In this declaration, I review two such articles (attached hereto as Exhibits 2 & 3), and then discuss their application to the facts alleged.

Article # 1

5. In an academic paper by Dr. Bryan Vila, "Impact of Long Work Hours on Police Officers and the Communities They Serve," Vila concludes: "Long work hours and shift work threaten police officer health, safety, and performance. This situation is aggravated by understaffing associated with demographic shifts and new threats to homeland security."

6. Vila's meta-analysis references multiple studies on the effect of sleep deprivation and excessive work hours on human performance across several highly demanding occupations. These studies universally conclude that fatigue resulting from overwork and inadequate rest cycles lead to increased likelihood of bad decisions. Vila concludes that, given the high stakes decisions made by police officers, fatigued officers can present a clear danger to public safety and lead to counterproductive behavior.

7. Vila reviewed four major studies on police performance and fatigue. In the first, Philadelphia Police surveyed officers before and after shift adjustments to improve initial

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performance, and there were statistically significant improvements in alertness, health, and safety, exemplified by a 40% reduction in vehicle accidents.

8. The second major study referenced a National Institute of Justice funded project undertaken by Vila and others. Biometric measures and surveys scored sleep quality and effects of fatigue. Statistically significant numbers of officers scored on various tasks performed in a range equivalent of those under the intoxicating influence of alcohol.

9. The third study compared fatigue in non-emergency careers with police officers exposed to critical incidents and organizational stressors. The findings showed a strong association between post-traumatic stress disorder, other somatic ill health, and sleep disturbances.

10. The fourth study reviewed by Vila showed increased mortality rates in a retrospective study of deaths associated with law enforcement officers in Buffalo, NY, with links to shift work and sleep disruption.

11. Vila concludes: " *First, it appears that police agencies can do a better job of meeting both demands for service and the needs of officers and their families if they employ flexible approaches to staffing and work scheduling* (italics for emphasis are mine) that take circadian factors into account. Based on a cross-sectional study, it appears that sleep plays an important role in mediating links between stress arising from traumatic, life-threatening experiences, and somatic symptoms. Those sorts of critical incidents add to the burden of long work hours by disrupting sleep, but routine job stressors detract even more from the quality of officers' sleep. Finally, in addition to safety issues associated with the immediate threats officers encounter throughout their careers from dealing with dangerous people and hazardous situations, a 40-year cohort study indicates that we also should be very concerned about the long-term health consequences of employment in this occupation—consequences that arise at least in part

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from daily exposure to a complex mix of environmental, physical, and emotional insults", followed by an impressive list of validating references."

Article # 2

12. I next review findings of Ricciardelli, R. (2018). "Risk It Out, Risk It Out": Occupational and Organizational Stresses in Rural Policing. Police Quarterly, 21(4), 415–439.

13. Ricciardelli first states that it is a given that rural law enforcement officers "experience unique work-related health and safety risks" including lack of backup. She notes that other research has shown that a major stressor of policing are "niggling aspects of the work environment that pervade police organizations because of the structural arrangements and social life inside the organization", meaning that there are unwritten expectations that rule when policy does not.

14. Ricciardelli notes that most research on policing has been done with urban policing in mind, disregarding the unique pressures of rural law enforcement and culture. In particular, research on staffing "tend to focus on recruitment, retention, and attrition." She notes that staffing needs can be calculated by call demands, population, and geography but that in reality, authorization for staffing is likely based on available resources. "Concerns arise, however, if the authorization level becomes confused with actual need especially if the number of staff is below the authorized level thus resulting in understaffing". Significantly, Ricciardelli points to research that shows officers' expectations for performance are partly due to paramilitary structures that make saying "no" to demands near impossible.

15. Ricciardelli's framework examines stress in multiple contexts, with the most relevant to the issue at hand is the nature of avoidable versus unavoidable risk:

> "Some risks are operational and thus unavoidable, like that of responding to a call for service, while others, such as organizational risks, are described as preventable. Organizational risks include being at risk because of inadequate

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> human resources (e.g., being understaffed), lengthy waits for backup and inadequate material resources (e.g., vehicles or weapons in poor working order).

The clear implication in her analysis is that to make a statement that risk is unavoidable in policing is not true and management has a level of control over those risks. When officers must decide whether to proceed without backup or ignore their original call or the subsequent concurrent call, "the paramount fact was that such decisions are avoidable with more staff."

16. Among her conclusions is that officers report "operational risk as an inherent part of the job but see organizational risks as derivatives of their conditions of work (e.g., being understaffed, compromised equipment) that are largely preventable."

Observations for the Court

17. Law enforcement operations are a blend of highly regulated behavior and individual decision making in rapidly changing and often dangerous circumstances. Evolving from the early ethos of the beginning of formal community law enforcement, with a general mandate to officers to use common sense and good judgment with that officer's understanding that they will be supported in their decisions unless clearly legally or ethically wrong, to modern considerations of layers of laws and policies whose purpose is to take away the burden of individual decision making to be replaced by policy and procedure templates, the profession still relies ultimately on decisions made by individual officers in unique situations.

18. Even where policy and procedure exist, the ethos of those drawn to or ultimately enculturated into police work will supersede policy. Where no policy and procedure exist, the value of policing will guide an officer's response and behavior. In particular, in a call such as one faced by Officer McCartney on January 7, 2018 in Pierce County, the embedded ideals of law enforcement will prevail. Those ideals compel dedicated officers like Officer McCartney to

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set aside the risks of harm to themselves in order to complete the mission they undertake. It is the very purpose of policy, procedure, and resources to avoid putting officers in a position to push the limits of their personal heroism and capacity so that dangerous and criminal activity can be halted in the safest way possible for the officer, suspect, and public at large.

19. As clearly evidenced in the research cited above, the reduction of risk need not begin with an officer's arrival and split-second decision making. Many risks can be precluded by policy, training, and staffing. Part of the culture of law enforcement is the truism that one never knows what they may encounter in a day's work.

20. While this is accurate in the immediate, it is not accurate from a management perspective. Experience and statistical evidence reveal that there is a possibility of an officer suffering a gunshot wound. Agencies began issuing ballistics vests, then mandating them to be worn. Evidence shows that there is a risk of being struck by a motor vehicle while attending a traffic stop or crash investigation. Officers began wearing higher visibility outer wear. Multiple studies on the risk and benefits of emergency lighting on patrol cars has changed the types and placement of flashing red and blue lights used on police cars. The risks about which plaintiffs complain may also be remedied through management decisions, particularly adequate staffing levels.

21. The contrary approach of accepting well known risks, associated with low performance and efficiency, and relying on individual officers' resilience and tenacity is not reasonable in light of the information available on the impacts of understaffing on risk. Officers cannot reasonably be expected to overcome biological realities by force of character and will. They can and will walk into large disturbances alone, working 48 hours straight, or sleep next to a phone that will ring at any time with an order to go to work, but it is apparent that this cavalier

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attitude of management that a good cop will become a superhero on demand is a not a reasonable means by which to manage a police agency.

22. For the individual officer, whose ethos-driven behavior precludes standing and waiting when they feel they should be in the fray, only strong policy and indoctrination will guide their decision. Americans love their heroes and the narrative of the hero almost always involved beating the odds and overcoming obstacles. As tacticians in many emergency operations, be it law enforcement, the military, the fire service, or emergency medicine, it is effective fast action rather than mere fast action that wins. It is entirely appropriate that an agency that is well aware of manpower limitations develop enforceable policy to guide a lone responding officer in assessing the wisdom of waiting until an effective strategy with sufficient resources is available to accomplish a mission. Tactical disengagement and redeployment is a standard consideration in combat, firefighting, and EMS operations. It is entirely reasonable that a law enforcement agency would establish policy and procedure guidelines for this response strategy.

23. Staffing considerations are also a risk calculation. With the biological realities of human performance known more substantially than ever before, the idea that a post must be filled or a mission must be completed with utter disregard for human factors is outmoded thinking. Certainly law enforcement officers will continue to push their limits, go without sleep in order to find a lost child, and wade into a fight with no back up in sight. Most of the time they will succeed by some measure. Other measures tell us that sleep-deprived heroism is significantly less effective and efficient than rested heroism. Stressed heroism is more costly

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than heroism with a healthy functioning brain. Those costs include injury, accidents, long term disability, absenteeism, and low productivity.

24. Inaction on researching staffing needs, failing to use data on both public service expectations and human performance limits to establish work schedules, and relying on officer heroism, dedication, and overtime budgets to permanently address chronic staffing needs are all inexcusable in today's law enforcement workplace. Cases such as Officer McCartney's where some objective calculations of staffing level needs had been documented and ignored should serve as an example of management failure to apply known risks and needs to staffing decisions.

25. If, indeed, public service demands outpace available staffing and they cannot be addressed creatively using volunteers, reserves, more accurate call screening, non-law enforcement response, and other means of service delivery where a full-time armed government agent may not be required, then agencies must adapt policy, procedure, and training to single officer response protocols. This could include staging until additional resources are available, establishing clear mutual aid agreements with other agencies, communication policy that increases clarity about the situation an officer is facing, and establishing clearer policy for when single officer response is allowable in exigent circumstances. These positive, risk-assessment based management tools are among rational approaches to incident management that do not rely on cultural expectations based on the superhero model.

26. From the law enforcement perspective, it is not the individual officer's ultimate responsibility to individually assume the organizational-level risks created by their employer. In particular, an individual officer has no control over the gap between adequate staffing and safety considerations. Danger and uncertainty are part of the law enforcement officer's daily chores, but the work should be done within the safest, most predictable environment reasonably possible. A danger created by poor staffing, inadequate training, and failure to establish policy regarding

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predictable types of encounters, is not something the individual officers can address in the heat of one of those encounters.

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

DATED: March 23, 2021.

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