No. 556634

COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION II

THE ESTATE OF DANIEL ALEXANDER McCARTNEY, *et al*.,

Appellants,

v.

PIERCE COUNTY, a municipal corporation, located in Washington state,

Respondent,

BRIEF AMICUS CURIAE OF THE NATIONAL POLICE ASSOCIATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Statutes

State Statutes

Washington Constitution

Other Authority

Introduction

This suit challenges negligent budgeting, staffing and training decisions by Respondent Pierce County with regard to operation of the Pierce County Sheriff's Office, each of which caused the death of Deputy Daniel Alexander McCartney.

Identity and Interest of Amicus

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 raising legal questions important to law enforcement interests as amicus curiae. (CP160-73.) The NPA has a powerful interest in ensuring that adequate resources are devoted to maintaining public order, as well as ensuring that its members enjoy reasonably safe working conditions. The NPA sees this case as an appropriate vehicle for careful reconsideration of traditional tort doctrines concerning immunities, and related limitations on judicial remedies, in a context where more and more governmental

entities are shirking their duties to uphold public order and the rule of law.

Statement of the Case

Notwithstanding a statutory command to "keep and preserve the peace in their respective counties, and quiet and suppress all affrays, riots, unlawful assemblies and insurrections" (RCW 36.28.010(6)), the County's officials here determined to provide two deputies to cover a rural area of approximately 700 square miles with a single sergeant for command support, and work schedules requiring deputies to work double shifts with very little sleep. (CP66.) The adverse effects of these decisions on officer health and safety are well documented. (CP71-72, 76-84.)

The County also failed to provide proper training and support that could have prevented the tragedy (CP14), which was obviously foreseeable insofar as other deputies had been ambushed in the area and even killed (*id.*). All of these risks

could have been, and should be, remedied by better management decisions. (CP70.)

Ultimately, the County's extraordinary decisions resulted in a failure, acknowledged by the Sheriff, to provide adequate protection to County residents (CP14), with crime so open and notorious that the location giving rise to the fatal call was well known for trafficking of methamphetamines and other illegal drugs like heroin (CP5).

Summary of Argument

The County's decisions do not merit deference from this Court, much less the judicial creation of the categorical immunity from suit sought by the County. Where, as here, the natural and inevitable result of County decision making resulted in the most extreme of all damages—death—for its loyal employee, no constitutional problems arise from the establishment of civil liability. Indeed, the Legislature had repeatedly made it clear that the People of Washington seek to establish such liability.

It is difficult to imagine the courts of Washington allowing any other sort of employer to foster such spectacularly dangerous conditions for its employees. Pierce County stands in the shoes of a fishing boat that omits life vests on board, or a trucking company that avoids preventative maintenance on its truck brakes.

NPA believes it is useful to contrast the County's fundamental breach of duty here with the State's failure to provide adequate public education for its children. Both involve highly discretionary choices as to how to implement very general constitutional duties, but the threats from a failure to maintain public order are far greater, and place all other rights and liberties at risk. The Courts of Washington have not hesitated to step forward in the educational context, and, *a fortiori*, should do so here.

Neither doctrines of discretionary liability or the outmoded Professional Rescuer Doctrine are dispositive at this

juncture. The decisions involved are the type for which private entities are routinely held accountable.

Argument

I. THE COUNTY'S CONDUCT IS SUFFICIENTLY EXTREME AS TO REQUIRE THE EXTRAORDINARY REMEDY OF MANDAMUS.

This case cries out for full implementation of the constitutional duties of this Court under the Washington Constitution to uphold public order and protect workers. The Court may do so without "'usurp[ing] the authority of the coordinate branches of government' by dictating how the executive branch must exercise . . . discretionary powers." *Colvin v. Inslee*, 195 Wn.2d 879, 898 (2020) (citations omitted). The Court's power "'to say what the law is,' . . . does not . . . . [require the Court] to dictate 'how the executive, or executive officers, perform duties in which they have a discretion.'" *Id.* The Court may "say what the law is," whether or not it takes the form of specific mandatory injunctive relief, to respond to legislative and executive officers of the State who

have shirked their most fundamental constitutional and statutory duties.

The Washington judiciary has stepped forward in similar circumstances, and has been vigilant in addressing legislative failures to provide adequate funding of basic services. *See, e.g.*, *McCleary v. State*, 173 Wn.2d 477, 484 (2012); *Seattle Sch. Dist. v. State*, 90 Wn.2d 476, 482 (1978) (same). The *McCleary* and *Seattle School District* cases involved Article IX, § 1 of the Washington Constitution, which declares: "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex."

The Supreme Court in both *McCleary* and *Seattle School District* did not attempt to interfere with the discretion of coordinate branches of government by "specify[ing] standards for staffing ratios, salaries, and other program requirements". *McCleary*, 173 Wn.2d at 486. However, the Supreme Court

upheld a declaratory judgment that the State has not upheld its duties under Article IX, § 1, "defer[rred] to the legislature's chosen means of discharging its article IX, section 1 duty," and "retain[ed] jurisdiction over the case to help facilitate progress in the State's plan to fully implement the reforms by 2018." *Id.* at 484.

While Appellants sought injunctive relief here rather than specifically seeking declaratory relief of the type sought in *McCleary*, the complaint asks for "such other and further relief as the Court deems just and appropriate" (Complaint: CP19). Whether or not this Court regards it as within the realm of possibility that Appellants will prove circumstances so severe as to require further judicial remedies (as proved to be the case in unpublished further proceedings in *McCleary*), there is every reason for this Court to uphold the State's commitment to law and order through a declaratory judgment or the requested injunctive relief.

A. The Duty to Maintain Public Order Is the Most Fundamental Duty of the State.

The State's duty to maintain public order is the oldest of duties; what defines a government body is its monopoly on the use of force to preserve order. The "police power . . . is inherent in all governments". *Lonas v. State*, 50 Tenn. 287, 309 (Tenn. 1871). Indeed, "[m]aintaining peace and public order is the most fundamental duty of government and is the primary justification for the existence of State police power." *Commonwealth v. Stotland*, 214 Pa. Super. 35, 44, 251 A.2d 701, 706 (1969).

Recognition of this primary duty is a longstanding feature of American jurisprudence:

> "the government is bottomed upon the fundamental principle of the promotion of the peace, safety, happiness and security of its citizens. Therefore, any surrender of its power to protect the public health, the public morals, the public peace, the public safety of the citizen, would violate this fundamental principle, and tend to revolution and anarchy."

City of Louisville v. Wible & Willinger, 84 Ky. 290, 295, 1 S.W. 605, 607 (Ky. Ct. App. 1886).

And the preservation of order is of course essential for the protection of all fundamental constitutional rights. As the Supreme Court has explained, "[t]he constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy." *Cox v. Louisiana*, 379 U.S. 536, 554, 85 S. Ct. 453, 464 (1965).

Washington law imposes these vital and fundamental 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 . . . they may call to their aid such persons, or power of their county as they may deem necessary."

From this perspective, abdication of the duty to protect the public from rising anarchy cries out for judicial response in a way far more critical that the abdication of the other, subsidiary duties (such as public education) that were added by

states only slowly over the Nation's history. Appellants should be entitled to prove the County's decision effectively to abandon rural areas of Washington and allow the development of known "trap houses" trafficking methamphetamines with only single officers available for emergency situations is such an extreme departure from public duties as to merit judicial response.

B. The Duty to Protect Workers Is Fundamental.

The duty of Washington State to provide safe working conditions is so fundamental as to be enshrined in the Washington Constitution. 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”); s*ee also McCarthy v. Dep’t of Soc. & Health Serv.*, 110 Wn.2d 812, 818 (1988) (WISHA codifies common law duty to provide a safe workplace).

The County objects that the location to which Officer McCartney was called does not qualify as a “workplace”, but the duty imposed under the Washington Constitution addresses “employments dangerous to life” without any such crabbed limitations. So too has the Executive Branch broadly implemented Chapter 49.17 to declare to all employers: “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. In addition, employers, including the County, are commanded: “You must establish, supervise, and enforce rules that lead to a safe and healthy work environment that are effective in practice.” WAC 296-800-11035.

The case of *Rios v. Wash. Dep't of Labor & Indus.*, 145 Wn.2d 483, 486 (2002), illustrates the degree to which Washington courts will issue affirmative relief in the workplace safety context in a fashion that remedies the failure of legal duties without interfering with the discretion of a coordinate branch of government. In that case, farm workers sued the Department of Labor and Industry for failure to mandate pesticide exposure testing. Referring to Article II, § 35 and WISHA,[1] the Supreme Court accepted the argument that "the Department underregulated the significant risk of pesticide exposure—more specifically, that the Department did not set the standard that regulated the risk 'to the extent feasible.'". *Id.* at 496.

While the case was against an Executive Branch agency, proceeding under the Administrative Procedure Act, the same general principles applied: the Court could and did "order an agency to exercise discretion required by law" (RCW 34.05.574(1)(b)), rejecting agency complaints about lack of

[1] *Rios*, 145 Wn.2d at 493 & n.4.

funding, the separation of powers, and other issues similar to those raised by the County. It is well within the bounds of judicial propriety to issue, upon appropriate and further findings of fact, a finding that the County has run so roughshod over its fundamental duties with respect to worker safety that it must devise a program to remedy its breaches—just as the Department was ordered to commence rulemaking.

C. The Fundamental Nature of the Duties Breached by the County Enhances the Need for Judicial Action.

The facts pleaded in the complaint permit this Court to allow Appellants an opportunity to prove that the Respondent has breached fundamental duties to uphold public order and protect workers, without the Court usurping local officials by specifying the precise or only means by which Respondent can come into compliance with its duties. As in *McCleary*, the fundamental duties of preserving order in a reasonably safe manner are not mandates "to a single branch of government, but

to the entire state" and this Court should not "abdicate its judicial role". *McCleary*, 173 Wn.2d at 541.

This Court has taken an expansive view of mandamus authority where fundamental rights are concerned. Despite a statute directing a clerk not to file papers until statutory fees were paid, this Court intervened on behalf of an indigent civil plaintiff to issue a writ of mandamus compelling acceptance of the complaint. *O'Connor v. Matzdorff*, 76 Wn.2d 589 (1969). In response to the objection that the question of fee waiver involved the exercise of discretion, this Court declared that "mandamus will lie to direct an officer to exercise a discretion, which it is his duty to exercise." *Id.* at 606-07.

In a context such as this, involving "significant and continuing matters of public importance that merit judicial resolution," ordinary standing requirements are relaxed. *Am. Traffic Sols., Inc. v. City of Bellingham*, 163 Wn.App. 427, 433 (2011). Deputy McCartney's survivors are exemplary plaintiffs

for bringing judicial attention and resolution to the County's appalling public and worker safety decisions.

II. DISCRETIONARY IMMUNITY CANNOT DEFEAT APPELLANTS' CLAIMS AS A MATTER OF LAW.

A. Washington's Unique Statutory Waivers of Immunity Protect Appellants.

At common law as it developed under the British Crown, of course, sovereign immunity would have barred Appellants' suit. But the legislature has expressly and repeatedly abolished that common law doctrine in Washington. RCW 41.26.281 provides:

> If injury or death results to a member from the intentional or negligent act or omission of a member's governmental employer, the member, the widow, widower, child, or dependent of the member shall have the privilege to benefit under this chapter *and also have cause of action against the governmental employer as otherwise provided by law*, for any excess of damages over the amount received or receivable under this chapter.

(Emphasis added.) As the Supreme Court has explained, this provision "abrogates" any sovereign immunities claimed by local governments. *Locke v. City of Seattle*, 162 Wn.2d 474, 478 (2007), providing evidence of an even greater intent to

waive immunities for police officers beyond the general waivers of sovereign immunity contained in RCW 4.96.010(1) (local government liable "to the same extent as if they were a private person or corporation"). *See also Beaupre v. Pierce Cty.*, 161 Wn.2d 568, 574 (2007).

The Court's primary duty is "to ascertain the intent of the legislature within the statutory guidelines provided for us: the language and purpose of the statute." *Costanich v. Dep't of Soc. & Health Servs.*, 164 Wn.2d 925, 931 (2008) (construing EAJA waiver of sovereign immunity). Accordingly, there is only a "narrow category of discretionary governmental immunity [which] 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 Wn.2d 1, 12 (1994). RCW 41.26.281 makes it clear that negligence by employers of law enforcement personnel is not to be protected by this Court.

The statutory framework in Washington is unique, and does not support extending discretionary immunity to the negligence alleged by Appellants. Oregon, for example, has a statute declaring that every public body is "immune from liability for . . . [a]ny claim based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused." ORS 30.265(6)(c). The United States, in its waiver of sovereign immunity for tort actions, declares that "the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled." 28 U.S.C. § 2874. Washington has no such statute; to the contrary, its statutes boldly claim that the governmental entities are liable to the same extent as private ones, especially employers of law enforcement personnel.

B. The Decisions Involved Are Not the Sort that Require Extraordinary Judicial Protection.

As Respondent recognizes, underlying the discretionary immunity doctrine is the idea that some "discretionary acts or activities . . . can be omitted at the discretion of the state" based upon a judicial determination that the type of act or activity is one that negligence doctrine should not apply. (Resp. Corr. Br. 30 (citing *Loger v. Wash. Timber Prods.*, 8 Wn.App. 921, 929 (1973)). Thus even a negligent failure to enforce laws by government, and even laws concerning worker safety, will not support an action for negligence—where government is not the employer. *Loger*, 8 Wn.App. at 930.

But this case does not involve the State's duty to enforce laws on other persons or entities as in *Loger,* where a worker was injured in a sawmill operating without required safety measures and alleged the State's failure to inspect the mill proximately caused his injuries. This case involves the State's employment relationship and its corresponding duties directly to a protected class of employees.

Loger found no expression of any legislative intent voluntarily to assume liability for injuries resulting from a failure to inspect (*id*.); here the Legislature's specific intent to afford a negligence remedy for this class of employees fairly leaps from RCW 41.26.281. As the Court explained on *Loger*, the very statute invoked by plaintiff stated: ". . . all civil causes of actions for personal injuries are abolished except as provided in Title 51. A civil cause of action against the state for negligence in the performance of safety inspections has not been provided in that title." *Loger*, 8 Wn.App. at 928. A law enforcement officer may, however, sue his employer for negligence in the performance of its duties as an employer.[2]

The precise nature of the negligence alleged, though it relates to governmental functions, is not so uniquely governmental (as in the decisions whether or not to inspect particular workplaces), that the court must "preserve the integrity of our system of government by ensuring that each

[2] *Fray v. Spokane County*, 134 Wn.2d 637, 952 P.2d 601 (1998).

coordinate branch of government may freely make basic policy decisions." *Chambers-Castanes v. King County*, 100 Wn.2d 275, 282 (1983). It is plainly "analogous, in some degree at least, to the chargeable misconduct and liability of a private person or corporation." *Evangelical United Brethren Church v. State*, 67 Wn.2d 246, 262 (1963).

In Washington, employers have a duty to prevent harm to employees from third party criminal acts. *Bartlett v. Hantover*, 9 Wn.App. 614 (1973). This is the rule throughout the country. *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—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).

More specifically, courts across the land have repeatedly held private employers accountable for financially driven understaffing decisions resulting in personal injury. *See, e.g.*, *Hatfield v. Allenbrooke Nursing & Rehab. Ctr., 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.

Under the particular system of public budgeting in Washington, there is even greater reason to hold the County liable for negligence in staffing than a private entity, which may or may not generate revenues sufficient to support any particular level of staffing. 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 . . . of all expenditures required by such office, department, service, or institution for

the ensuing fiscal year"—those being the resources reasonable required to maintain public order.

"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. 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 (emphasis added).

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 Wn.25, 35 (1938) (discussing statute presently codified as RCW 37.40.130).

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 Assoc. of Fire Fighters, Local Union 1052 v. Pub. Emp't Relations Com, 113 Wn.2d 197, 204 (1989). The relief sought by Appellants can be similarly crafted to force reasoned consideration of staffing levels without dictating the outcome.

C. The County's Decision Making *Should* Be Affected by the Specter of Civil Liability.

A key purpose of the discretionary immunity 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 precisely, protecting choices where the discretion has been abused. It is well-established that "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 Wn.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 v. State*, 118 Wn.2d 195, 215 (1992).

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 Wn.2d 275, 282 (1983), but gross failure to provide

adequate staffing are not the sort of choices the judiciary should work to foster. As NPA's expert attempted to explain to the trial court, those who manage police have a long history of taking reasonable steps to improve officer safety:

> "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 gear. . . . The risks about which plaintiffs complain may also be remedied through management decisions, particularly adequate staffing levels."

(CP70.) It is apparent that the risk of civil liability is a contributing factor driving these improvements in safety, and there is no reason the powerful engine of civil liability should be applied to protect only private sector workers and not public sector ones.

III. THE PROFESSIONAL RESCUER DOCTRINE IS INAPPLICABLE AND OUTMODED.

Appellants have adequately addressed the inapplicability of the policy for want of a "rescue". (Appellants' Br. at 34-38.)

NPA writes separately to advise the Court of the historical underpinnings of the doctrine as they relate to its application here, and developments in other states.

Like all doctrines involving the assumption of risk, this County defense should be construed narrowly. *See, e.g.*, *Lascheid v. City of Kennewick*, 137 Wn.App. 633, 641 (2007) ("We construe the doctrine narrowly because implied primary assumption of risk is a complete bar to recovery"). A narrow construction is particularly important given the County's attempt to push the Professional Rescuer doctrine far beyond its common law roots.

The 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).

Beyond the lack of a "rescue," the Doctrine is supposed to bar recovery "from the party whose negligence cause the rescuer's presence at the scene". *Markoff v. Puget Sound Energy, Inc.*, 9 Wn.App.2d 833, 840 (2019) (citation omitted). 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 Wn.2d 568, 575 (2007).

Put another way, Appellants do not "complain of the negligence which created the actual necessity for exposure to those hazards," *Maltman v. Sauer*, 84 Wn.2d 975, 979 (1975); Appellants 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 Appellants 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". *Id*.

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. *Maltman* relied upon New Jersey and Oregon cases in establishing the Professional Rescuer Doctrine. *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?"

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* also confirms that the duty analysis should be regarded as controlling. *Maltman* explained that "the harm sustained must be reasonably perceived as being

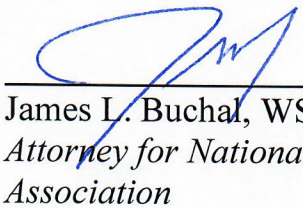
within the general field of danger covered by the specific duty owed by the defendant". *Maltman*, 84 Wn.2d at 981. Because the "defendant's duty only encompassed those hazards which were legally attributable to that conduct which initiated the rescue activity," rather than the dangers of a helicopter crash, the Court invoked the doctrine. *Id.* at 981.

Conclusion

For the foregoing reasons, the NPA urges this Court to give greater weight to the fundamental duties of the County to preserve order and the safety of its officers than the trial court did, and allow further factual development of these important claims.

Dated: November 23, 2021.

MURPHY & BUCHAL LLP



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CERTIFICATE OF COMPLIANCE

Pursuant to RAP 18.17(b), I certify that this Amicus Curiae Brief contains 4,970 words in compliance with the length limitations of RAP 18.17(c)(6) (5000 words or less).

Dated this 23rd day of November, 2021 at Portland, OR.

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CERTIFICATE OF SERVICE

I, Carole A. Caldwell, hereby certify that I electronically filed the foregoing Brief Amicus Curiae of the National Police Association with the Clerk of the Court and delivered a true and accurate copy by electronic mail and U.S. Mail to the following:

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