Supreme Court No. 96459-9
No. 49899-5-II

SUPREME COURT
OF THE STATE OF WASHINGTON

WENDY ANN MURRAY as PERSONAL REPRESENTATIVE OF THE ESTATE OF CARL MURRAY, a deceased career professional firefighter, for and on behalf of the Estate and RCW 4.20.020 beneficiaries,

Appellate,

v.

CITY OF VANCOUVER, a municipal subdivision of the State of Washington,

Respondent.

APPELLANT'S MOTION FOR DISCRETIONARY REVIEW

Ron Meyers WSBA No. 13169
Matthew Johnson WSBA No. 27976
Tim Friedman WSBA No. 37983
Attorneys for Petitioner

Ron Meyers & Associates, PLLC
8765 Tallon Ln. NE, Suite A
Olympia, WA 98516
(360) 459-5600

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authority

I. IDENTITY OF PETITIONER

Wendy Ann Murray as Personal Representative of the Estate of Carl Murray, Appellant, petitions this Court for review of the decision designated in Section II.

II. DECISION

Appellant seeks review of the Division II Court of Appeals decision, filed on September 26, 2018 and attached in the *Appendix A* hereto, which affirmed, in part, the Superior Court's order granting partial summary judgment and dismissing the survival, strict liability and outrage claims.

III. ISSUES PRESENTED FOR REVIEW

1. Did the Appellate and Superior Court's decision to dismiss Murray's survival claims based on the statute of limitations conflict with decisions of the Appellate Courts and Supreme Court and the Supreme Court's pattern jury instruction 12.07?

2. Did the Appellate and Superior Court decision to dismiss Murray's outrage claim conflict with decisions of the Appellate Courts and Supreme Court?

3. Did the Appellate and Superior Court's decision to dismiss Murray's strict liability claim conflict with decisions of the Appellate Courts and Supreme Court?

4. If the Court reverses any issues on appeal is the wrongful death cause of action reinstated, where the dismissal was based upon an agreed condition reinstating the wrongful death cause of action should any issue be reversed on appeal?

5. Are the issues herein of substantial public interest?

IV. STATEMENT OF THE CASE

For over twenty years, Carl Murray ("Murray") was a firefighter for the City of Vancouver ("COV"). In 2010, he was diagnosed with lung cancer.

Prior to Murray's diagnoses, the COV knew (a) that radon was a colorless, odorless radioactive gas that presented a serious health risk (b) that the U.S. EPA ranks indoor radon among the most serious environmental health problems, (c) that indoor radon is the second leading cause of lung cancer in the U.S., and (d) that the Portland and Vancouver area has numerous radon "Hot Spots" *CP 27, 29, Appendix A to Appellant's Opening Brief to Court of Appeals, pgs. 53 and 32.*

Also prior to Murray's diagnosis, the COV was repeatedly informed by a professional radon testing company that "The US EPA action level for an acceptable level of radon is 4.0 pCi/L." *Appendix A to Appellant's Opening Brief to Court of Appeals, pgs. 41, 46, 49.* Prior to Murray's diagnosis, the COV knew that the EPA and the Centers for Disease Control and Prevention recommend that homes with radon levels at 4 pCi/L or higher **should be fixed**. *CP 29.*

During at least the roughly twelve years prior to Murray's untimely death, the COV was **knowingly** exposing Murray at various COV fire stations to levels of radon in excess of 3.9 pCi/L. *Appendix A to Appellant's*

Opening Brief to Court of Appeals, pgs. 33, 36, 37, 38, 41, 42, 45, 48, 59, 62, 72, 77, 78. See Appendix D hereto. During the roughly nine-year period prior to his diagnosis, testing revealed radon levels in the twenties, thirties, forties, eighties, and one result was 172.1 pCi/L. *id, pgs. 33, 36, 37, 38, 41, 42.* Despite the alarmingly high levels of radon to which COV firefighters were being exposed, between September, 2001 and Murray's death, the COV allowed multiple lapses in radon testing at its stations: No testing from: 11/22/2001 to 5/2/2002; from 5/18/2002 to 11/6/2005; from 7/11/2006 to 3/8/2011; from 3/12/2011 to 1/22/2013. *See id, pgs. 33-93.* On July 30, 2013, Murray died from metastatic lung cancer. *id, pg. 106.*

One time, on October 16, 2001, Murray signed a "Hazardous Material Exposure Report" pertaining to a supposed exposure that occurred in 1992, but this document **did not** give any fire station radon test results, **did not** disclose any radon levels in the COV's fire stations, and did not even disclose whether the COV had tested the radon levels. *CP 46-47.*

In 2009 the COV sent materials by email to Murray about **residential** radon which (1) did not **not** give any information on radon in fire stations, (2) did **not** give any fire station radon test results (3) did **not** give any radon levels in the COV's fire stations; (4) did **not** assert whether or not radon had been found in the COV's fire stations, (5) and **did not** even assert that any

firefighter had been exposed to Radon in the COV's fire stations. *CP 27-34.*

In 2011, Division Fire Chief Roxy Barnes had email correspondence with Murray that also did nothing to convey any appreciable radon exposure to Murray at the COV's fire stations. *CP 36-40.*

There is no evidence in the record before the Superior or Appellate Court that the COV ever, even once, informed Murray (a) of any specific radon level to which he was exposed; (b) that the COV had even tested for radon in its fire stations; and (c) that he was exposed to radon at or above the "action-level" of 4 pCi/L. The COV concealed this information from Murray – despite its requirement to disclose exposure information under WAC 296-305-01509(6); WAC 296-841-20020 and other WAC provisions.

The COV, through its inaction and concealment, misled and misrepresented a sense of safety at its fire stations. This is because it was the COV's legal obligation to (a) establish, supervise, maintain and enforce, in a manner which is effective in practice, work surroundings of an employee with minimum exposure to unsafe acts and/or unsafe conditions; (b) furnish to each of its 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, and (c) notify the firefighters of exposures to unsafe levels of radon – the COV never informed Murray of radon at its fire stations at or

above the action level of 4 pCi/L and never informed Murray that he had been repeatedly exposed to radon at or above the 4 pCi/L.

Prior to three years before this action was filed, Murray did not know of the COV's breach, nor that radon was the cause of his cancer. *Appendix A to Appellant's Opening Brief to Court of Appeals, pgs. 103-107.* Nor should Murray have known this. Prior to three years before filing this action, Murray could not have immediately known that his disease was from occupational radon exposure in the COV's fire stations, because the COV concealed exposure information that it was required by law to disclose.

The Appellate Court's decision conflicts with multiple decisions by this Court in the application of the discovery rule, ignores this Court's jury instruction WPI 12.07, conflicts with this Court's "reasonable inquiry" decision in *White v. Johns-Manville Corp.*, 103 Wash. 2d 344, 693 P.2d 687 (1985) improperly narrows the scope of RCW 41.26.281, precludes a firefighter from pursuing a strict liability claim against its government employer, which conflicts with this Court's decision in *Klein v. Pyrodyne Corp.*, 117 Wash. 2d 1, 810 P.2d 917, 920, amended, 117 Wash. 2d 1, 817 P.2d 1359 (1991), ignores this Court's "relationship of the parties" consideration in *Contreras v. Crown Zellerbach Corp.*, 88 Wash. 2d 735, 565 P.2d 1173 (1977), and conflicts with the "reasonable minds" rule quoted by

this Court in *Robel v. Roundup Corp., 148 Wash. 2d 35, 51, 59 P.3d 611(2002).*

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. SURVIVAL CLAIM: The Appellate Court's decision is in direct conflict with this Court's holding in *Matter of Estates of Hibbard* and this Court's Washington Pattern Jury Instruction (6th Ed) 12.07, which state in pertinent part, respectively:

> "Application of the [discovery] rule is limited to claims in which the plaintiffs could not have immediately known of their injuries due to [. . .] occupational diseases, [. . .] or concealment of information by the defendant.
> . . .
> Every person has the right to assume that others will [. . .] comply with the law, and a person has a right to proceed on such assumption until he or she knows, or in the exercise of ordinary care should know, to the contrary."

The Appellate Court's decision is also in direct conflict with this Court's decision that under the discovery rule, **all** of the essential elements of the cause of action must be known or constructively known by the Plaintiff before the cause of action accrues. *White v. Johns-Manville Corp., id at 348.* In Murray's case, there was no evidence in the record before the trial or Appellate Court of actual or constructive notice by Murray prior to three years before he filed suit, that he was being exposed to unacceptable levels of radon [breach], or that radon exposure caused his cancer [causation]. The

COV actually blamed firefighting.

A1. APPELLATE COURT CONFLICTS WITH THIS COURT'S DECISION TO APPLY THE DISCOVERY RULE WHEN PLAINTIFFS CANNOT HAVE IMMEDIATELY KNOWN OF THEIR INJURIES DUE TO CONCEALMENT OF INFORMATION BY THE DEFENDANT

It is the employer, not the firefighter, who bears responsibility for **identifying** health hazards, performing an **investigation of** exposure to occupational disease-causing chemicals or physical agents, ensuring **record-keeping** of exposures, **and documenting** the findings of the preliminary investigation after incidents resulting in exposure to occupational disease-causing chemicals or physical agents. See WAC 296-305-01507, WAC 296-305-01507(3), WAC 296-305-01503(1). When exposure occurs, the employer **must disclose to its firefighters** all relevant information, which will **provide information to all employees relative to hazardous chemicals or substances to which they are exposed**, or may routinely be exposed to, in the course of their employment." WAC 296-901-14010, [emp added] *See WAC 296-305-01509(6).*

Within five (5) business days after the employee's exposure results is known to the employer, the employer is required by law to **notify employees of any exposure result**, to an airborne hazard, above a permissible exposure level ("PEM"). *See WAC 296-841-20020.*

Murray asks this Court to take judicial notice under Evidence Rule

201 that radon is listed in the National Institute for Occupational Safety and Health (NIOSH) Registry of Toxic Effects of Chemical Substances (RTECS), RTECS No. VE3750000. *See Appendix B hereto.* And so radon is a "toxic substance" under WAC 296-841-099 and an "airborne contaminant that may become an airborne hazard in some workplaces" under WAC 296-841-100.

The COV's fire stations were tested for radon in 2001, 2002, 2005, 2006, 2011 and 2013. Each year produced radon levels well above 3.9 pCi/L. *Appendix A to Appellant's Opening Brief to Court of Appeals, pgs. 33, 36, 37, 38, 41, 42, 45, 48, 59, 62, 72, 77, 78.*

The COV concealed exposure information from Murray – despite its requirement to disclose under provisions in WAC 296-305 and WAC 296-841-20020. The Appellate Court's opinion conflicts with this Court's decisions extending the accrual of the statue of limitations to account for the concealment of information by the defendant.

A2. THE APPELLATE COURT VIOLATES THIS COURT'S DECISION THAT UNDER THE DISCOVERY RULE, ALL OF THE ESSENTIAL ELEMENTS OF THE CAUSE OF ACTION MUST BE KNOWN OR CONSTRUCTIVELY KNOWN BY THE PLAINTIFF BEFORE THE CAUSE OF ACTION ACCRUES

Information conveyed to Murray via documentation sent to him from the COV in 2009 indicates that average indoor radon level is about 1.3 pCi/L in the U.S., and that the EPA recommends that Americans consider fixing

their homes when the radon level is between 2 pCi/L and 4 pCi/L. *CP 29.* In 2009 the COV sent Murray a document via email that represented that the EPA and the Centers for Disease Control and Prevention recommend that homes with radon levels **at** 4pCi/L **or higher** should be **fixed**. *CP 29.* The inference from this information sent to Murray by COV in 2009 is that certain amounts of radon are permissible and thus not harmful.

In fact, the legislature found that "[iI]n **some** circumstances" (it does not say "all circumstances") exposure to radon may cause adverse health effects, including respiratory illness. [Emp added]. *See RCW 70.162.005.* And so, even if Murray had been informed that he was exposed to radon in the COV fire stations, that alone is not providing adequate (or appreciable) information "relative to" the exposure levels. Information "relative to" exposure would include at a minimum, the level and frequency of the radon exposure and whether the exposure posed a safety or health risk. This is especially so, given the implication from the COV to Murray that certain levels of radon are permissible.

There is **NO** evidence in the record that the COV **ever** notified Murray that he was exposed to radon at any specific level, or even in more general terms, that he was exposed to "unacceptable" levels of radon.

This Court was clear: "[. . .] under Washington's discovery rule, a

cause of action does not accrue until a party knew or should have known the essential elements of the cause of action—duty, breach, causation, and damages." *Green v. A.P.C. (Am. Pharm. Co.),* 136 Wash. 2d 87, 95, 960 P.2d 912 (1998).

Murray knew he had lung cancer in 2010. CP 59, 72. But at no point prior to three years before filing this action, did Murray know, nor should he have known, that (a) the COV was exposing him to unacceptable levels of radon [breach of the COV's duties], and (b) that exposure to radon in the fire stations caused his cancer [i.e. causation]. The COV blamed firefighting.

A2(i) NO NOTICE OF THE COV'S BREACH OR OF CAUSATION

According to information provided to Murray from the COV in 2009, **testing is the only way to know** if the "home" is under the EPA action level of 4 pCi/L or the "only way to know if you are at risk." *CP 28, 38, respectively.* It was COV's duty to test, not Murray's.

There is **no** evidence in the record that the COV ever, even once, informed Murray that it had **tested** its fire stations for radon, nor is there any evidence in the record that the COV ever disclosed the test results to Murray. And so if **testing** is the only way to know, and because the record has no evidence that testing results were conveyed to Murray, then as a matter of law he could not have had actual knowledge.

It is the responsibility of **management** to establish, supervise, maintain and enforce, in a manner which is effective in practice, a "safe and healthful working environment," as it applies to both nonemergency and emergency conditions. *See WAC 296-305-01509(1)(a).* "Safe and healthful working environment" is defined as "The work surroundings of an employee with minimum exposure to unsafe acts and/or unsafe conditions." *WAC 296-305-01005. See also, RCW 49.17.060; WAC 296-305-01513.*

This Court's Jury Instruction 12.07 states: "**Every person has the right to assume that others will [. . .] comply with the law**, and a person has a right to proceed on such assumption until he or she knows, or in the exercise of ordinary care should know, to the contrary." *[emp added]. WPI 12.07.* "The jury had to be informed of the law governing defendants' conduct in order to evaluate Crawford's actions, because Crawford was entitled to act on the assumption that defendants would follow the law." *Yurkovich v. Rose,* 68 Wash. App. 643, 654-655, 847 P.2d 925 (1993).

Murray had the legal right to assume that if he were being exposed to impermissible levels of radon, or if there were exposure results known to the COV above the acceptable radon level, the COV would comply with the law (WAC 296-305-01509(6); WAC 296-841-20021) **by notifying him**.

Because Murray was not so notified, he had the right to assume and

proceed with the assumption that he was not being exposed to impermissible levels of radon in the COV's fire stations. Murry also had the right to assume and proceed with the assumption (because he was not notified otherwise) that the COV was complying with the law by maintaining, in a manner which was effective in practice, a safe and healthful working environment (WAC 296-305-01509(1)(a)), and that the COV was furnishing him with fire stations free from recognized hazards that are causing or likely to cause serious injury or death to him. RCW 49.17.060.

Nonetheless, the Appellate Court decided that in 2011 the statute of limitations began to accrue. The Appellate Court's decision not only conflicts with this Court's Jury Instruction 12.07 and this Court's discovery rule, but also with this Court's decision in *White, id* at page 355 that:

> "It is unreasonable to expect or require, as a matter of law, the ordinary wrongful death claimant to initiate and conduct the massive research necessary to prove the causal link between occupational exposure and resulting cancer; such research takes numerous years and vast resources. This may be particularly true in cases of occupational diseases where information relevant to asbestos related deaths sometimes is not available to the claimants but is in the exclusive control of the defendant corporation."

"**Legislative findings—1987 c 515:** "The legislature finds that the employment of firefighters exposes them to smoke, fumes, and toxic or chemical substances." *Appendix C hereto.* "Up until the time of his death, no

cause other than his exposures responding to calls was even been [sic] mentioned by any of Carl's doctors as the causes of his lung cancer. None of them ever even mentioned radon." *Appendix A to Appellant's Opening Brief to Court of Appeals, pgs. 107.*

Murray had no legally triggered duty at any time prior to three years before he filed suit to make inquiry to whether radon was the cause of his cancer, because the COV never notified him of any appreciable radon exposure. The COV did have such a duty.

The COV's failures to comply with the exposure laws should not be used against the firefighter to pre-maturely start the SOL clock. "One should not be allowed to benefit from his or her wrongdoing, [. . .]" *In re Marriage of Murphy,* 48 Wash. App. 196, 203, 737 P.2d 1319 (1987).

The Appellate Court's decision conflicts with this Court's decision regarding the discovery rule that the notice to the Plaintiff must be of "appreciable" harm occasioned by another's "wrongful" conduct. *See 1000 Virginia Ltd. P'ship v. Vertecs Corp.,* 158 Wash. 2d 566, 581, 146 P.3d 423, 431 (2006), as corrected (Nov. 15, 2006). "Appreciable" means "[c]apable of being **measured** or **perceived**." Black's Law Dictionary 117 (9th ed. 2009). [emp added]. *Proctor v. Huntington,* 169 Wash. 2d 491, 508, 238 P.3d 1117 (2010).

B. STRICT LIABILITY

RCW 41.26.270 does not abolish civil causes of actions by firefighters against their government employers for personal injuries or sickness provided for in RCW 41.26. *See RCW 41.26.270.*

RCW 41.26.281 states "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." [emp added]. Common law provides for a cause of action for strict liability. *See Klein v. Pyrodyne Corp., id* at page 6.

In this case, the Appellate Court decided: "Because a claim for strict liability permits liability for acts that are neither intentional nor negligent, a claim for strict liability is outside the scope of RCW 41.26.281."

Permitting strict liability for acts that are not intentional or negligent does not **preclude** strict liability for acts that are negligent or intentional. In proving strict liability, there is **no** requirement that the actor's actions be non-negligent and unintentional. Rather, strict liability is imposed on a party who carries on an "abnormally dangerous activity" from which damages ensue.

Klein v. Pyrodyne Corp., at page 6. Negligence and common law strict liability are not mutually exclusive. *See Arnold v. Laird,* 94 Wash. 2d 867, 870–71, 621 P.2d 138 (1980).

The Superior and Appellate Court's decisions are in conflict with this Court's decision in *Klein v. Pyrodyne Corp., supra.* The Appellate Court improperly narrowed the scope of RCW 41.26.281 by precluding a cause of action for death to a firefighter caused by an employer's abnormally dangerous acts or omissions.

Strict liability applies to the COV knowingly exposing its firefighters to high levels of a lethal radioactive gas in its fire stations for years, failing to protect its firefighters from this deadly gas, and then concealing information relative to radon exposure that the COV was required by law to disclose.

C. OUTRAGE

The COV sent information to Murray in 2009 pertaining to radon and **households**, telling him to "Choose Life in 2009!" and that radon "can be controlled easily and cost-effectively." *CP 29.* Yet as it pertained to Murray's **workplace**, the COV had repeatedly violated mandatory Safety Standards for Firefighters – WAC 296-305 – while exposing firefighters to a radioactive killing gas known as radon, the second leading cause of lung cancer in the

United States. Smoking is the leading cause. Murray did not smoke.

There are three elements to the tort of outrage. *See Reid v. Pierce Cty.*, 136 Wash. 2d 195, 202, 961 P.2d 333 (1998). One of those elements is extreme and outrageous conduct. *id.* This is the element upon which Murray's outrage claim was dismissed. The Superior and Appellate Court erred in deciding that there was no genuine issue of material fact as to whether the COV's conduct was extreme and outrageous – a decision that is ordinarily for the jury.

Indeed, the case law holds that the conduct in question must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. *Snyder v. Med. Serv. Corp. of E. Washington,* 145 Wash. 2d 233, 242, 35 P.3d 1158 (2001). That is exactly the conduct of the COV, for years, resulting in the radon poisoning, cancer and the death of Carl Murray.

The Appellate Court improperly found that the COV did not try to conceal the radon. As shown above, this is simply incorrect, and it was error to conclude as a matter of law.

Prior to Murray's diagnosis, the COV was repeatedly informed in writing by a radon testing company it hired that "The US EPA action level for

an acceptable level of radon is 4.0 pCi/L." *Appendix A to Appellant's Opening Brief to Court of Appeals, pgs. 41, 46, 49.*

Here, the COV holds a position of authority over its firefighters, including Murray. He worked when and where he was told to work. He was at the mercy of the working environment that the COV provided and was responsible for establishing and maintaining. This was not **his home** in which **he** could conduct timely and ongoing tests and remedy any lethal radon levels. It was the **COV's** legal duty to investigate for and remedy deadly radioactive gas inside its fire stations. It was not Murray's duty.

Murray was unknowingly being killed by a scentless, tasteless, invisible radioactive gas that the COV **allowed** to be pervasive and exist at lethal levels in its fire stations – for almost a decade before Murray was diagnosed with lung cancer.

The COV sent information to Murray in 2009 that stated: "If your **home** has a radon problem, you can take steps to fix it to protect yourself and your family." [emp added]. *CP 28.*

Firefighters are like a family. The fire stations are where they eat meals, sleep, shower, exercise, and spend down time. The COV knew that radon was a serious health risk and knew that it had stations (firefighter's work-homes) with unacceptable and hazardous pCi/L radon levels. Yet the

COV did not fix it, and in fact, let years go by on multiple occasions without even testing for radon. COV fire stations had more than a "radon problem" – they had radon exposure at impermissible levels for almost a decade, and likely longer, before Murray's cancer diagnosis. The COV did not "choose life." It allowed inexcusable lapses in radon testing and failed to "protect its firefighter family."

In removing this issue from the jury and dismissing the outrage claim, the Appellate Court gave no regard this Court's holding that "[t]he relationship between the parties is a significant factor in determining whether liability should be imposed." *Contreras v. Crown Zellerbach Corp., id* at 741.

The Appellate Court affirmed removal of the outrage claim from the jury, asserting that the COV "conducted regular radon testing and attempted mitigation when high levels of radon were identified at the COV's fire stations." This is simply incorrect. See *Appendix D.*

First, the COV did **not** conduct "regular radon testing." In fact, there were multiple multi-year gaps between testing. Second, conducting "regular testing" and "attempted mitigation" woefully falls short of this Court's threshold for deciding the "extreme and outrageous conduct" element as a matter of law: (i.e. only if **reasonable minds could differ** on whether the conduct was sufficiently extreme to result in liability). *Robel v. Roundup*

Corp., 148 Wash. 2d 35, 51, 59 P.3d 611(2002).

This repeated exposure to levels of radon at and above 4 pCi/L, known to the COV, but unlawfully concealed from Murray by the COV for years, goes beyond all possible bounds of decency. This case is not about insults and indignities, causing embarrassment and humiliation. This case is about an employer violating firefighter safety laws, knowingly exposing its firefighter to **high levels of cancer-causing radioactive gas**, and then concealing it from the firefighter in further knowing violation of the law.

D. WRONGFUL DEATH CLAIM AND OTHER CLAIMS

After the Superior Court dismissed Murray's survival claim, outrage claim and strict liability claim, the parties entered into a conditional stipulation and order dismissing the remaining claim – its negligence claim under the wrongful death statutes. *CP 519-521.* That conditional stipulation and order, signed by the trial judge, states in part "Because this order dismisses all remaining claims, it constitutes a final judgment as defined under RAP 2.2(a)(1)." *id.* Murray did not waive, and expressly preserved his *res ipsa loquitor* theory of negligence, as well as all other theories of negligence made at the trial court and/or Appellate Court.

E. SUBSTANTIAL PUBLIC INTEREST

The issues presented are of substantial public interest, warranting

determination by this Court. Firefighters and citizens across this state have a substantial interest in (a) whether the government can escape liability under the firefighter right-to sue statute by concealing lethal exposure information, (b) not having "notice" of breach attributed to them when their government employer fails to notify them of an appreciable exposure harm; (c) that the Safety Standards for Firefighters *WAC 296-305, et seq*,. are not weakened such that now firefighter's **must verify** that their employers are upholding their duties thereunder; and (d) whether RCW 41.26.270 and 41.26.281 grant immunity from strict liability to their government employers who injure or kill firefighters by abnormally dangerous activities, regardless of whether the government's actions were negligent or intentional. This is an incorrect reading of the "right to sue" law. Conditional agreements are also of substantial public interest because they create efficiency in the appellate process, condense issues and shorten litigation time for Court and parties.

V. CONCLUSION

Because the Appellate Court's decision is in conflict with this Court's decisions, this Courts Jury Instruction 12.07, this Court's rules, and because the issues presented are matters of substantial public interest, this Court should accept review pursuant to RAP 13.4(b)(1) and (b)(4).

///

DATED: October 26th, 2018

RON MEYERS & ASSOCIATES PLLC

By: _____

Ron Meyers, WSBA No. 13169
Tim Friedman, WSBA No. 37983
Matt Johnson, WSBA No. 277976
Attorneys for Firefighter Murray

Appendix A

Filed
Washington State
Court of Appeals
Division Two

September 26, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

WENDY ANN MURRAY as PERSONAL REPRESENTATIVE OF THE ESTATE OF CARL MURRAY, a deceased career professional firefighter for and on behalf of the Estate and RCW 4.20.020 beneficiaries, Appellant, v. CITY OF VANCOUVER, a municipal subdivision of the State of Washington, Respondent.	No. 49899-5-II UNPUBLISHED OPINION

SUTTON, J. — Wendy Murray, as the personal representative of Carl Murray's estate (Estate), appeals the superior court's order dismissing the Estate's tort claims against the City of Vancouver.[1] The Estate claimed that Carl's death was the result of radon exposure during his career as a firefighter for the City. The superior court granted partial summary judgment in favor of the City and (1) dismissed the Estate's survival claims as barred by the statute of limitations; (2) dismissed the Estate's strict liability and loss of consortium claims as barred by the Law Enforcement Officers and Fire Fighter's Retirement System Act (LEOFF), chapter 41.26 RCW; (3) dismissed the Estate's outrage claim; and (4) limited damages on the Estate's wrongful death

[1] For clarity, we refer to the Estate as the plaintiff/appellant in this action, and we refer to Wendy and Carl individually by their first names. We intend no disrespect.

claim to amounts exceeding the amount received or receivable under LEOFF.[2] We affirm, in part, the superior court's order granting partial summary judgment and dismissing the survival, strict liability, and outrage claims. However, we hold the trial court erred in dismissing the loss of consortium claim, and we decline to review the court's ruling limiting damages on the wrongful death claim.

FACTS

Carl was a fire fighter with the City for over 20 years. Carl was diagnosed with lung cancer on December 22, 2010. On July 30, 2013, Carl died from metastatic lung cancer.

On February 2, 2016, the Estate filed a complaint for damages against the City alleging that Carl's cancer was caused by exposure to radon while working in the City's fire stations. The complaint alleged a wrongful death action under RCW 4.20.010 and survival actions under RCW 4.20.046. The complaint also alleged strict liability and outrage. And the complaint alleged damages for loss of consortium.

The City filed a motion for partial summary judgment seeking dismissal of the survival claims for strict liability, loss of consortium, outrage, and for limitations on the damages sought for the wrongful death claim. The City argued that the Estate's survival claims were barred by the statute of limitations. The City also argued that the Estate's strict liability and loss of consortium claims were abolished by LEOFF. And the City argued that the Estate's outrage claim should be

[2] The Estate also argues that the City "rush[ed] to summary judgment, before the discovery was completed, before the discovery was reviewed by Plaintiff's counsel and before the discovery could be provided to experts . . . ." Br. of Appellant at 27. Because the Estate did not seek to continue the hearing under CR 56(f), we do not address the Estate's arguments regarding discovery related to the partial summary judgment motion.

dismissed as a matter of law. Finally, the City argued that LEOFF required that any damages that may be awarded based on Murray's wrongful death claim must be limited to "excess damages over the amount received or receivable" under LEOFF. Clerk's Papers (CP) at 68.

In support of its partial summary judgment motion, the City submitted several emails Carl wrote or received while working for the City as a fire fighter. One email Carl received in January 2009 was an announcement about "Radon Action Month" including facts linking radon to causing cancer. CP at 27. On January 5, 2011, after Carl was diagnosed with cancer, he received an email from Vancouver Fire Department (VFD) Division Chief Roxy Barnes:

> I have been doing some research and believe it would be very helpful to you [C]arl to identify how many shifts you worked at station 1 or 2 since radon is one major cause of several types of lung cancer.

CP at 36. On January 8, Barnes sent Carl another email that read,

> Big hug to you Carl. I am there with you whenever you need t[he] help of a nurse. I do need to know types of cancer so I can connect it to your radon exposure for presumption. Do you remember when I had everyone fill out the paperwork for radon exposure? Do you remember filling it out? I plan on writing a supportive paper to nail your presumption connection for the city. Joe went through that process so we can help you there. Big hug to you[.]

CP at 38. Carl responded to Barnes's email and stated that he remembered filling out the paperwork. The City also provided a copy of a Hazards Material Exposure Report that Carl filled out in 2001, which documented Carl's exposure to radon in fire stations 82 and 86.

In response to the City's partial summary judgment motion, the Estate filed hundreds of pages of documents related to the history of radon testing and mitigation in the City's fire stations. On behalf of the Estate, Wendy provided a declaration in which she stated that Carl believed his cancer was caused by chemical exposure responding to fires and neither she nor Carl knew that

radon exposure may have caused his cancer. Wendy also stated that she did not know the extent of the radon exposure until she received the October 2013 response to her public records request seeking the City's records related to radon testing at the City's fire stations.

The superior court granted the City's motion for partial summary judgment. In its order granting partial summary judgment, the superior court dismissed the Estate's survival, strict liability, loss of consortium, and outrage claims with prejudice. The superior court also ruled that the "[City's] Motion for Partial Summary Judgment limits Plaintiff's damages to the total damages reduced by amounts paid by [the City] under LEOFF, reduced further by the present value of the amounts payable by LEOFF." CP at 82-83.

The Estate filed a notice for discretionary review of the superior court's partial summary judgment order with this court. A commissioner of this court denied the Estate's motion for discretionary review. Then, the Estate stipulated to an order dismissing its wrongful death claim subject to reinstatement if we reverse the superior court's partial summary judgment order. The Estate appeals both the stipulated order and the superior court's partial summary judgment order.

ANALYSIS

I. STANDARDS OF REVIEW

We review a superior court's summary judgment order de novo, performing the same inquiry as the superior court and viewing all facts and reasonable inferences in the light most favorable to the nonmoving party. *Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 164, 273 P.3d 965 (2012). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

The moving party bears the initial burden of showing that there are no genuine issues of material fact. *Pacific Northwest Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 350, 144 P.3d 276 (2006). To establish a genuine issue of material fact, the nonmoving party may not rely on speculation or argumentative assertions that unresolved factual issues remain; instead, it must set forth specific facts that sufficiently rebut the moving party's contentions. *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 601-02, 200 P.3d 695 (2009).

We review questions of statutory interpretation de novo. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). When interpreting a statute, we first look to the statute's plain meaning. *Lake*, 169 Wn.2d at 526. We discern the statute's plain meaning by looking at the ordinary meaning of the language at issue, the context of the statute, and the statutory scheme as a whole. *Lake*, 169 Wn.2d at 526. "If the statute is unambiguous after a review of the plain meaning, the court's inquiry is at an end." *Lake*, 169 Wn.2d at 526.

II. SURVIVAL CLAIMS

The Estate argues that the statute of limitations does not bar its survival claims, contending that the "statute of limitations does not run in Washington until the Plaintiff knows of the cause of his occupational disease."[3] Br. of App. at 32. Based on this unsupported statement of the law, the Estate argues that the statute of limitations did not begin running because there "was never

[3] The Estate also addresses the wrongful death claim in the section of its brief addressing the statute of limitations. However, the superior court did not grant summary judgment on the wrongful death claim. Rather, the Estate stipulated to dismissal of the wrongful death claim to obtain appellate review of the superior court's order granting partial summary judgment. Because the wrongful death claim was not decided as part of the superior court's partial summary judgment order and the Estate stipulated to its dismissal, we do not address whether the statute of limitations bars the Estate's wrongful death claim.

adequate notice of the ongoing lethal radon exposures, failed mitigation, and the strongest relationship between radon and lung cancer to start the statute of limitations." Br. of Appellant at 33. However, under the well-established discovery rule, the statute of limitations on the survival claims started when Carl, who would have been the plaintiff for purposes of the survival claims, *should have known* that the radon exposure caused his cancer. The City established that this date was in January 2011. Therefore, the superior court properly granted the City's motion for partial summary judgment on the survival claims.

Survival actions are created by RCW 4.20.046 and 4.20.060. "Unlike Washington's wrongful death statutes, the survival statutes do not create new causes of action for statutorily named beneficiaries but instead preserve causes of action for injuries suffered prior to death." *Est. of Otani v. Broudy*, 151 Wn.2d 750, 755, 92 P.3d 192 (2004). Under RCW 4.16.080(2), the relevant statute of limitation for survival actions is three years. The discovery rule applies to survival and wrongful death actions:

> The [discovery] rule delays accrual of the cause of action only until the claimant knew *or reasonably should have known* of the facts necessary to establish the cause of action. It does not delay accrual until the claimant knows that she has a legal cause of action, and the claimant must exercise reasonable diligence in pursuing a legal claim.

Allen v. State, 60 Wn. App. 273, 275, 803 P.2d 54 (1991) (emphasis added).

Here, the City presented undisputed evidence that Carl received and responded to emails that specifically identified a link between his exposure to radon at the fire stations and his lung cancer when he was first diagnosed in December 2010. The City presented two emails from January 2011 in which VFD Division Chief Barnes referred to proving a connection between Carl's exposure to radon in the City's fire stations and his lung cancer.

The record does not contain evidence that Carl exercised due diligence at that time. Had he done so, he could have obtained all the information regarding radon testing and mitigation efforts that Wendy later received when the City responded to her public records request. Therefore, Carl reasonably should have known of the facts necessary to establish all of the essential elements of his claims against the City in January 2011. Based on this date, the three year statute of limitations for personal injury claims would have expired in January 2014. The Estate did not file the current cause of action until February 2016, more than two years after the statute of limitations had expired. Accordingly, the superior court properly granted partial summary judgment on the survival claims based on the statute of limitations.

III. STRICT LIABILITY AND LOSS OF CONSORTIUM CLAIMS

The City argued that partial summary judgment was proper as to the Estate's strict liability and loss of consortium claims because the legislature abolished these causes of action under LEOFF. The superior court agreed and granted the City's motion for partial summary judgment on these grounds. The superior court properly dismissed the Estate's strict liability claim. Although the superior court improperly treated the loss of consortium claim separately rather than as an element of damages, for the reasons explained below we affirm the superior court's partial summary judgment order and dismissal of the strict liability claim but we hold that the trial court erred in dismissing as a separate clam the loss of consortium claim.

LEOFF explicitly abolishes "all civil actions and civil causes of actions by such law enforcement officers and firefighters against their governmental employers" except as otherwise provided by LEOFF. RCW 41.26.270. Additionally, RCW 41.26.281 states,

> 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.

The City argues that the claims for strict liability and loss of consortium are separate causes of action that have been abolished by RCW 41.26.270.

A. STRICT LIABILITY

The plain language of RCW 41.26.281 specifically limits the City's liability for intentional or negligent acts. The Estate pleaded a strict liability claim based on the assertion that the City engaged in abnormally dangerous activities. Washington courts have adopted the theory of strict liability for abnormally dangerous activities as set forth in the *Restatement (Second) of Torts*. *Hurley v. Port Blakely Tree Farms L.P.*, 182 Wn. App. 753, 761, 332 P.3d 469 (2014). "'One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent harm.'" *Hurley*, 182 Wn. App. at 761 (quoting RESTATEMENT (SECOND) OF TORTS § 519(1) (AM. LAW INST. 1977)). Therefore, strict liability allows for liability regardless of the defendant's intent or negligence in carrying out the abnormally dangerous activity.

Because a claim for strict liability permits liability for acts that are neither intentional nor negligent, a claim for strict liability is outside the scope of RCW 41.26.281. Therefore, the legislature has abolished claims for strict liability by firefighters against their government under RCW 41.26.270. Thus, the superior court did not err by granting the City's motion for partial summary judgment on the Estate's strict liability claim.

B. LOSS OF CONSORTIUM

The City also argues that RCW 41.26.270 abolished Murray's loss of consortium claim. The superior court erroneously treated loss of consortium as a separate cause of action, rather than as an element of damages for the Estate's wrongful death claim. Although, as explained below, we decline to review the stipulated order dismissing the wrongful death claim, we address this discrete issue for purposes of judicial economy.

"Loss of consortium is not, in and of itself, a cause of action but rather an element of damages." *Long v. Dugan*, 57 Wn. App. 309, 313, 788 P.2d 1 (1990). The wrongful death statute, RCW 4.20.020, governs "post[-]death loss of consortium as well as other aspects of post[-]death damages" for the benefit of the surviving spouse. *Hatch v. Tacoma Police Dept.*, 107 Wn. App. 586, 588-89, 27 P.3d 1223 (2001). Here, loss of consortium was not a separate claim, but rather an element of damages for the Estate's wrongful death claim. Therefore, the superior court erred by ruling that the Estate's claim for damages resulting from loss of consortium should be dismissed as a separate cause of action under RCW 41.26.270. For that reason, we reverse the superior court's partial summary judgment order to the extent of that ruling.

IV. OUTRAGE

The Estate also argues that the superior court erred by dismissing the outrage claim against the City. We disagree.

To establish the tort of outrage, or intentional infliction of emotional distress, a plaintiff must show (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) severe emotional distress as a result. *Reid v. Pierce County*, 136 Wn.2d 195, 202, 961 P.2d 333 (1998). To prove extreme and outrageous conduct, it is not enough to show that the

defendant acted with tortious or criminal intent, intended to inflict emotional distress, or even acted with malice. *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975). The conduct must be "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Grimsby*, 85 Wn.2d at 59 (emphasis omitted) (quoting RESTATEMENT (SECOND) OF TORTS § 46 CMT. D (1965)). The question of whether certain conduct is sufficiently outrageous is ordinarily for the jury, but the court must initially determine if reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability. *Dicomes v. State*, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989).

The City argues that summary judgment was appropriate because the Estate failed to establish that the City engaged in extreme and outrageous conduct. Here, the Estate submitted hundreds of pages of documents in response to the City's partial summary judgment motion showing that the City regularly engaged in radon testing and engaged in mitigation efforts to reduce high levels of radon. Whether, and to what extent, the City was successful and, more importantly, whether the City's conduct was negligent is not at issue here. Instead, we need only decide whether reasonable minds could differ on whether the City's conduct is atrocious and utterly intolerable in a civilized community. The City's conduct was not extreme and outrageous because the City conducted regular radon testing and attempted mitigation when high levels of radon were identified at the City's fire stations.

Similarly, the City's alleged failure to warn firefighters of the elevated levels of radon is not sufficiently outrageous to support an outrage claim. Here, although the City may not have actively disclosed the elevated levels of radon, it was performing regular radon testing and making

mitigation efforts. The City did not affirmatively mislead firefighters or try to conceal the radon. For example, the City did not alter test results or refuse to disclose information regarding the radon testing. Therefore, reasonable minds would not differ in concluding that the City's failure to warn fire fighters of the elevated levels of radon was beyond all possible bounds of decency or utterly intolerable in a civilized community.

Because the Estate has failed to establish a genuine issue of material fact as to whether the City's conduct was extreme and outrageous, the superior court's order granting partial summary judgment and dismissal of the Estate's outrage claim was proper.

V. DAMAGES—WRONGFUL DEATH CLAIM

Finally, the Estate argues that the superior court erred by granting the City's motion for partial summary judgment limiting damages for the Estate's wrongful death claim under LEOFF. However, the superior court's ruling limiting damages is not properly before this court because the final judgment prejudiced by the ruling is not appealable. Accordingly, we do not address the Estate's argument regarding the limitation of damages under LEOFF.

RAP 2.2(a) provides, in relevant part, that a party may only appeal from either a final judgment or an order determining the action. A "final judgment" is the "final judgment entered in any action or proceeding, regardless of whether the judgment reserves for future determination an award of attorney fees or costs." RAP 2.2(a)(1). And an order determining the action is defined as any "written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action." RAP 2.2(a)(3). The order or orders being appealed should be designated in the notice of appeal. RAP 2.4(a).

The Estate designated both the order granting the City's motion for partial summary judgment and the stipulated order dismissing the wrongful death claim in its notice of appeal. However, neither order provides an avenue for our review of the superior court's ruling limiting damages on the wrongful death claim.

The order granting partial summary judgment is not a final judgment or an order determining the action in regard to the damages ruling because the damages ruling related to the wrongful death claim, which survived partial summary judgment. Therefore, the superior court's ruling limiting damages on the wrongful death claim would be reviewed under the final judgment or order determining the action on the wrongful death claim.

However, in this case, the order determining the action on the wrongful death claim—the stipulated order dismissing the wrongful death claim—is not reviewable because the Estate stipulated to its entry and effect. *Fite v. Lee*, 11 Wn. App. 21, 25-26, 521 P.2d 964 (1974) ("The order of dismissal thereafter entered was in the nature of a judgment by consent, which, in the absence of fraud or mistake or want of jurisdiction, will not be reviewed on appeal."). Moreover, the Estate stipulated to an order dismissing its wrongful death claim subject to reinstatement if we reverse the superior court's partial summary judgment order, and we decline to do so here. Because we will not review the stipulated order dismissing the wrongful death claim, there is no final judgment or order determining the action that pertains to the superior court's ruling limiting damages on the wrongful death claim. Accordingly, we do not review the superior court's ruling limiting damages on the wrongful death claim.

CONCLUSION

We affirm the superior court's order granting partial summary judgment and dismissing the survival, strict liability, and outrage claims. However, we hold that the trial court erred in dismissing the loss of consortium claim.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.
SUTTON, J.

We concur:

Worswick, J.
WORSWICK, P.J.

Bjorgen, J.
BJORGEN, J.

Appendix B

Registry of Toxic Effects of Chemical Substances (RTECS)

Radon

RTECS

VE3750000

CAS

10043-92-2

Updated

October 2016

Molecular Weight

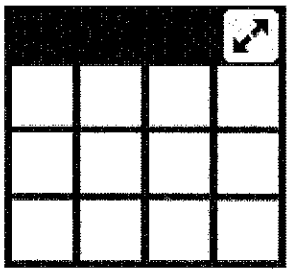
N/R

Molecular Formula

N/R

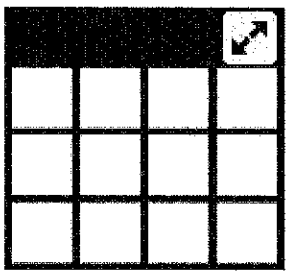
Synonyms

Reviews



Organization	Standard	Reference
TOXICOLOGY REVIEW		TOLED5 (reference.html#TOLED5) 140-141,311,2003
TOXICOLOGY REVIEW		ENTOX* (reference.html#ENTOX*) -,617,2005
TOXICOLOGY REVIEW		MUREAV (reference.html#MUREAV) 658,124,2008
TOXICOLOGY REVIEW		MUREAV (reference.html#MUREAV) 544,313,2003
TOXICOLOGY REVIEW		MUREAV (reference.html#MUREAV) 608,157,2006
TOXICOLOGY REVIEW		MUREAV (reference.html#MUREAV) 767,67,2016

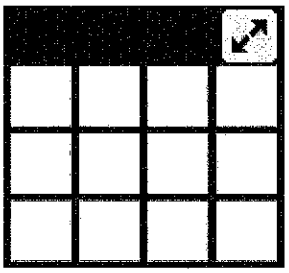
Standards and Regulations



Organization	Standard	Reference

Occupational Exposure Limit-SWEDEN	Carcinogen, JUN2005	(reference.html#)
Occupational Exposure Limit-SWEDEN	time-weighted average 400 Bq/m^3 (other work), Carcinogen, JUN2005	(reference.html#)

Status in Federal Agencies



Organization	Reference
EPA TSCA TEST SUBMISSION (TSCATS) DATA BASE, JANUARY 2001 .	(reference.html#)
NTP 11th Report on Carcinogens,2004:Known to be human carcinogen	(reference.html#)

Page last reviewed: March 7, 2014

Page last updated: November 8, 2017

Content source: National Institute for Occupational Safety and Health (NIOSH) (/niosh/) Education and Information Division

RADON

ICSC: 1322

Rn Atomic mass: 222 ICSC # 1322		CAS # 10043-92-2 RTECS # VE3750000 UN # 2982 November 03, 2001 Validated

TYPES OF HAZARD/ EXPOSURE	ACUTE HAZARDS/ SYMPTOMS	PREVENTION	FIRST AID/ FIRE FIGHTING
FIRE	Not combustible.		In case of fire in the surroundings: all extinguishing agents allowed.
EXPLOSION			
EXPOSURE		STRICT HYGIENE!	
•INHALATION	See EFFECTS OF LONG-TERM OR REPEATED EXPOSURE.	Ventilation, local exhaust, or breathing protection.	
•SKIN			
•EYES			
•INGESTION		Do not eat, drink, or smoke during work.	

SPILLAGE DISPOSAL	STORAGE	PACKAGING & LABELLING
Ventilation. (Extra personal protection: self-contained breathing apparatus.)		UN Hazard Class: 7

ICSC: 1322 Prepared in the context of cooperation between the International Programme on Chemical Safety & the Commission of the European Communities (C) IPCS CEC 1994. No modifications to the International version have been made except to add the OSHA PELs, NIOSH RELs and NIOSH IDLH values.

RADON

I M P O R T A N T D A T A	**PHYSICAL STATE; APPEARANCE:** COLOURLESS GAS **PHYSICAL DANGERS:** **CHEMICAL DANGERS:** **OCCUPATIONAL EXPOSURE LIMITS:** TLV not established. **ROUTES OF EXPOSURE:** The substance can be absorbed into the body by inhalation. **INHALATION RISK:** **EFFECTS OF SHORT-TERM EXPOSURE:** **EFFECTS OF LONG-TERM OR REPEATED EXPOSURE:** This substance is carcinogenic to humans. See Notes.
PHYSICAL PROPERTIES	Boiling point: -62°C Melting point: -71°C Density: 9.73 g/l Solubility in water, ml/100 ml at 20°C: 22.2
ENVIRONMENTAL DATA	Radon is a common source of natural radiation. 

NOTES

Radon is derived from the radioactive decay of uranium to radium then radon. The effects of radon are largely attributed to the inhalation of its radioactive decay products. The pattern of their deposition in the respiratory tract is dependent on whether they are attached to particles or not. Depending on the degree of exposure, periodic medical examination is indicated.

ADDITIONAL INFORMATION

ICSC: 1322	RADON

IMPORTANT LEGAL NOTICE:	Neither NIOSH, the CEC or the IPCS nor any person acting on behalf of NIOSH, the CEC or the IPCS is responsible for the use which might be made of this information. This card contains the collective views of the IPCS Peer Review Committee and may not reflect in all cases all the detailed requirements included in national legislation on the subject. The user should verify compliance of the cards with the relevant legislation in the country of use. The only modifications made to produce the U.S. version is inclusion of the OSHA PELs, NIOSH RELs and NIOSH IDLH values.

Page last reviewed: July 22, 2015
Content source: National Institute for Occupational Safety and Health (https://www.cdc.gov/NIOSH/)

Appendix C

RCW 51.32.185

Occupational diseases—Presumption of occupational disease for firefighters—Limitations—Exception—Rules.

(1)(a) In the case of firefighters as defined in *RCW **41.26.030**(16) (a), (b), and (c) who are covered under this title and firefighters, including supervisors, employed on a full-time, fully compensated basis as a firefighter of a private sector employer's fire department that includes over fifty such firefighters, there shall exist a prima facie presumption that: (i) Respiratory disease; (ii) any heart problems, experienced within seventy-two hours of exposure to smoke, fumes, or toxic substances, or experienced within twenty-four hours of strenuous physical exertion due to firefighting activities; (iii) cancer; and (iv) infectious diseases are occupational diseases under RCW **51.08.140**.

(b) In the case of firefighters as defined in *RCW **41.26.030**(16) (a), (b), (c), and (h) and firefighters, including supervisors, employed on a full-time, fully compensated basis as a firefighter of a private sector employer's fire department that includes over fifty such firefighters, and law enforcement officers as defined in *RCW **41.26.030**(18) (b), (c), and (e), who are covered under this title, there shall exist a prima facie presumption that posttraumatic stress disorder is an occupational disease under RCW **51.08.140**.

(c) This presumption of occupational disease established in (a) and (b) of this subsection may be rebutted by a preponderance of the evidence. Such evidence may include, but is not limited to, use of tobacco products, physical fitness and weight, lifestyle, hereditary factors, and exposure from other employment or nonemployment activities.

(2) The presumptions established in subsection (1) of this section shall be extended to an applicable member following termination of service for a period of three calendar months for each year of requisite service, but may not extend more than sixty months following the last date of employment.

(3) The presumption established in subsection (1)(a)(iii) of this section shall only apply to any active or former firefighter who has cancer that develops or manifests itself after the firefighter has served at least ten years and who was given a qualifying medical examination upon becoming a firefighter that showed no evidence of cancer. The presumption within subsection (1)(a)(iii) of this section shall only apply to prostate cancer diagnosed prior to the age of fifty, primary brain cancer, malignant melanoma, leukemia, non-Hodgkin's lymphoma, bladder cancer, ureter cancer, colorectal cancer, multiple myeloma, testicular cancer, and kidney cancer.

(4) The presumption established in subsection (1)(a)(iv) of this section shall be extended to any firefighter who has contracted any of the following infectious diseases: Human immunodeficiency virus/acquired immunodeficiency syndrome, all strains of hepatitis, meningococcal meningitis, or mycobacterium tuberculosis.

(5) The presumption established in subsection (1)(b) of this section only applies to active or former firefighters as defined in *RCW **41.26.030**(16) (a), (b), (c), and (h) and firefighters, including supervisors, employed on a full-time, fully compensated basis as a firefighter of a private sector employer's fire department that includes over fifty such firefighters, and law enforcement officers as defined in *RCW **41.26.030**(18) (b), (c), and (e) who have posttraumatic stress disorder that develops or manifests itself after the individual has served at least ten years.

(6) If the employer does not provide the psychological exam as specified in RCW **51.08.142** and the employee otherwise meets the requirements for the presumption established in subsection (1)(b) of this section, the presumption applies.

(7) Beginning July 1, 2003, this section does not apply to a firefighter who develops a heart or lung condition and who is a regular user of tobacco products or who has a history of tobacco use. The department, using existing medical research, shall define in rule the extent of tobacco use that shall exclude a firefighter from the provisions of this section.

(8) For purposes of this section, "firefighting activities" means fire suppression, fire prevention, emergency medical services, rescue operations, hazardous materials response, aircraft rescue, and

training and other assigned duties related to emergency response.

(9)(a) When a determination involving the presumption established in this section is appealed to the board of industrial insurance appeals and the final decision allows the claim for benefits, the board of industrial insurance appeals shall order that all reasonable costs of the appeal, including attorney fees and witness fees, be paid to the firefighter or his or her beneficiary by the opposing party.

(b) When a determination involving the presumption established in this section is appealed to any court and the final decision allows the claim for benefits, the court shall order that all reasonable costs of the appeal, including attorney fees and witness fees, be paid to the firefighter or his or her beneficiary by the opposing party.

(c) When reasonable costs of the appeal must be paid by the department under this section in a state fund case, the costs shall be paid from the accident fund and charged to the costs of the claim.

[2018 c 264 § 3; 2007 c 490 § 2; 2002 c 337 § 2; 1987 c 515 § 2.]

NOTES:

***Reviser's note:** RCW **41.26.030** was amended by 2018 c 230 § 1, changing subsections (16) and (18) to subsections (17) and (19), respectively.

Legislative findings—1987 c 515: "The legislature finds that the employment of firefighters exposes them to smoke, fumes, and toxic or chemical substances. The legislature recognizes that firefighters as a class have a higher rate of respiratory disease than the general public. The legislature therefore finds that respiratory disease should be presumed to be occupationally related for industrial insurance purposes for firefighters." **[1987 c 515 § 1.]**

Appendix D

Date	Station(s)	Radon Results in pCi/L	Amount of pCi/L in excess of U.S. EPA Action Level
Sept, 2001	82	11.2 weight rm	185% above remediation level
Sept, 2001	86	172.1 crwlsp wr 9 power rm	4200% above remediation level 125% above remediation level
Oct 5, 2001	81	0.6 equip svcs	
Oct 15, 2001	86	5.1 crawlspace	27.5% above remediation level
Nov 3-5, 2001	82	16.5 se rduct mr 20.7 w rduct mr 23.4 se rduct mr 84.1 w rduct mr	312% above remediation level 417% above remediation level 485% above remediation level 2002% above remediation level
Nov 8-12, 2001	82	37.2 rr duct mr 26.1 tv duct mr 33.5 mech rm 25.1 weight rm	830% above remediation level 552% above remediation level 737% above remediation level 527% above remediation level
Nov 19-21, 2001	82	32.3 tv duct mr 17 weight rm 10.4 day rm 31.8 mech rm 13.2 dorm rm	707% above remediation level 325% above remediation level 160% above remediation level 695% above remediation level 230% above remediation level
5 month lapse			
May 3-6, 2002		4.7 mechanical 4.2 dorm 4.8 reception 5.5 day rm	17.5% above remediation level 5% above remediation level 20% above remediation level 37.5% above remediation level
May 17, 2002	82	0.9 workout rm	
3yr 5 mnth lapse			
Nov 7, 2005 - Feb 13, 2006	82	7.6 mach rm act 6.1 excsise rm 4.8 front office 7.5 day rm offc 7.5 dorm	90% above remediation level 50% above remediation level 20% above remediation level 87.5% above remediation level 87.5% above remediation level

April 3 - July 10, 2006	82	1.6 mach rm ina 1.9 front office 1.6 day rm offc 1.6 or 1.4 dorm	
4yr 7 mnth lapse			
March 9-11, 2011		5.4 4.3	35% above remediation level 7.5% above remediation level
1yr 10 mth lapse			
Jan 23 - 25, 2013	1	11.8	195% above remediation level
Feb 4, 2013	1	5.7	42.5% above remediation level
Feb 26-28, 2013	3,8,9,4	not over 4	

Supreme Court No. _____
No. 49899-5-II

WASHINGTON STATE SUPREME COURT

ESTATE OF CARL MURRAY, WENDY MURRAY, Appellant, v. CITY OF VANCOUVER, Respondent.	DECLARATION OF SERVICE OF APPELLANT'S MOTION FOR DISCRETIONARY REVIEW

I declare under penalty of perjury under the laws of the State of Washington that on the date stated below I caused the documents referenced below to be served in the manners indicated below on the following:

DOCUMENTS:
1. Appellant's Motion for Discretionary Review
2. Declaration of Service.

ORIGINALS TO: Washington State Supreme Court

[✓]Via e-filing

COPIES TO:
Melissa Kay Roeder
Foley & Mansfield
999 3rd Ave., Ste 3760
Seattle, WA 98104-4009

[✓]Via e-mail per Agreement - mroeder@foleymansfield.com; swalker@foleymansfield.com

Daniel G. Lloyd
Vancouver City Attorney's Office
415 W. 6th St.
Vancouver, WA 98668

[✓]Via e-mail per Agreement - dan.lloyd@cityofvancouver.us; deborah.hartsoch@cityofvancouver.us

DATED this 26th day of October, 2018, at Olympia, Washington.

Mindy Leach, Litigation Paralegal

RON MEYERS & ASSOCIATES PLLC

October 26, 2018 - 8:44 AM

Filing Motion for Discretionary Review of Court of Appeals

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Estate of Carl Murray, Wendy Murray, Appellant v City of Vancouver, Respondent (498995)

The following documents have been uploaded:

- DCA_Cert_of_Service_20181026084344SC239814_9644.pdf
  This File Contains:
  Certificate of Service
  The Original File Name was Decl of Service Mtn for Disc Rev.pdf
- DCA_Motion_Discretionary_Rvw_of_COA_20181026084344SC239814_0444.pdf
  This File Contains:
  Motion for Discretionary Review of Court of Appeals
  The Original File Name was Mtn for Discretionary Review.pdf

A copy of the uploaded files will be sent to:

- dan.lloyd@cityofvancouver.us
- deborah.hartsoch@cityofvancouver.us
- matt.j@rm-law.us
- mroeder@foleymansfield.com
- tim.f@rm-law.us

Comments:

Sender Name: Mindy Leach - Email: mindy.l@rm-law.us
Filing on Behalf of: Ronald Gene Meyers - Email: ron.m@rm-law.us (Alternate Email: mindy.l@rm-law.us)

Address:
8765 Tallon Ln NE, Ste A
Olympia, WA, 98516
Phone: (360) 459-5600

Note: The Filing Id is 20181026084344SC239814

RON MEYERS & ASSOCIATES PLLC

October 26, 2018 - 8:44 AM

Filing Motion for Discretionary Review of Court of Appeals

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Estate of Carl Murray, Wendy Murray, Appellant v City of Vancouver, Respondent (498995)

The following documents have been uploaded:

- DCA_Cert_of_Service_20181026084344SC239814_9644.pdf
  This File Contains:
  Certificate of Service
  The Original File Name was Decl of Service Mtn for Disc Rev.pdf
- DCA_Motion_Discretionary_Rvw_of_COA_20181026084344SC239814_0444.pdf
  This File Contains:
  Motion for Discretionary Review of Court of Appeals
  The Original File Name was Mtn for Discretionary Review.pdf

A copy of the uploaded files will be sent to:

- dan.lloyd@cityofvancouver.us
- deborah.hartsoch@cityofvancouver.us
- matt.j@rm-law.us
- mroeder@foleymansfield.com
- tim.f@rm-law.us

Comments:

Sender Name: Mindy Leach - Email: mindy.l@rm-law.us
Filing on Behalf of: Ronald Gene Meyers - Email: ron.m@rm-law.us (Alternate Email: mindy.l@rm-law.us)

Address:
8765 Tallon Ln NE, Ste A
Olympia, WA, 98516
Phone: (360) 459-5600

Note: The Filing Id is 20181026084344SC239814