Supreme Court No. 1011199
Court of Appeals No. 556634-II

SUPREME COURT OF THE STATE OF WASHINGTON

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

Appellants,

v.

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

Respondent,

MOTION OF THE NATIONAL POLICE ASSOCIATION FOR LEAVE TO FILE MEMORANDUM IN SUPPORT OF THE PETITION FOR REVIEW FILED BY THE ESTATE OF DANIEL ALEXANDER MCCARTNEY *ET AL.*

treated as the Amicus Memorandum

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September 22, 2022.

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Identity of Amicus National Police Association

The National Police Association ("NPA") is a nonprofit corporation organized under Indiana 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, and was granted leave to appear amicus curiae by the Court of Appeals.

Court of Appeals Decision

The NPA supports Appellants' petition for Supreme Court review of Division II's published opinion dated June 28, 2022, dismissing Appellants' negligence case against Pierce County under governmental discretionary immunity and the professional rescuer doctrine. *Estate of McCartney v. Pierce County*, 513 P.3d 119 (2022).

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 NPA writes to address the doctrines of sovereign immunity and the "professional rescuer" doctrine upon which the Court of Appeals grounded its decision. Sovereign immunity involves the creation, by judicial fiat, of doctrines limiting the general statutory command that Pierce County is to

be liable for its negligence "to the same extent as if [it] were a private person or corporation" (RCW 4.96.010(1).)

However, the duties of Pierce County implicated in this case are fundamental and of even supra-constitutional dimension: the duty to maintain public order and the duty to protect workers. Where there has a been a serious failure to discharge such duties, this Court has properly relaxed traditional doctrines limiting judicial intervention, and should do so in this case. Appellants should be allowed the opportunity to prove that the County's decisions here were so patently inconsistent with its duties as to be arbitrary, capricious, and outside any protectable zone of discretion.

The second ground upon which the Court of Appeals dismissed the complaint was the "professional rescuer" doctrine, mechanically invoked on the basis of Officer McCartney's status as a police officer. When this Court invoked that rule in *Maltman v. Sauer*, 84 Wn.2d 975 (1975), it relied significantly upon New Jersey and Oregon decisions—

both of which jurisdictions (and others) have abandoned the rule as insufficiently nuanced, as part of a general evolution away from doctrines of implied assumption of risk as a bar to tort liability. This Court should accept the Petition to update and refocus Washington tort law upon the fundamental question whether the County breached a duty owing to Officer McCartney.

It is also the case that because the risks challenged by Appellants, in the nature of gross understaffing and lack of training, were not those "inherently with the ambit of those dangers which are unique to and generally associated with the particular rescue activity" (*id*. at 979), the professional rescuer doctrine should not have been invoked at all. Whether or not this Court joins the modern trend of limiting doctrines of implied assumption of risk, this case provides an important and needed opportunity to clarify application of the professional rescuer doctrine.

Argument

I. THE PETITION INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DETERMINED BY THE SUPREME COURT.

The Petition involves an issue of substantial public interest that should be determined by the Supreme Court within the meaning of RAP 13.4(b)(4): the degree to which the judiciary should depart from the general command that to protect budgetary decisions that place public employees (and the public) at serious risk from social disorder. In a climate of rising public disorder, it is incumbent upon the judiciary to review the degree to which judge-made law, here doctrines of sovereign immunity, should insulate decisions to tolerate such disorder. The "professional rescuer" doctrine, also protects local governments from the consequences of decisions tolerating disorder, and is properly subject to reexamination in light of the modern trend toward eliminating assumption of risk as a defense to tort liability.

A. Maintaining Public Order Is a Supra-Constitutional Imperative that Counsels Against Judicial Rulemaking Protecting Respondent Pierce County.

"Maintaining 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).

The preservation of order is essential for the protection of all fundamental constitutional rights. As the United States 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).

The doctrine of discretionary immunity upon which the Court of Appeals relied is well-grounded in a desire 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). The duty to preserve public order, however, like the fundamental constitutional duty of public education, is so fundamental that courts may relax traditional rules of law that would otherwise prevent them from addressing profound legislative failures to provide adequate funding of basic services. *Cf. McCleary v. State*, 173 Wn.2d 477, 484 (2012); *Seattle Sch. Dist. v. State*, 90 Wn.2d 476, 482 (1978) (same); *see also Int'l Assoc. of Fire Fighters, Local Union 1052 v. Pub. Emp't Relations Com*, 113 Wn.2d 197, 204 (1989)

(requiring collective bargaining over "staffing levels [because they have] have a demonstratedly direct relationship to employee workload and safety").

Appellants should be given the opportunity to prove that the County's choices were here so arbitrary and capricious that they were outside the range of any lawful discretion the exercise of which should be protected by sovereign immunity. After all, private businesses are routinely held liable for the consequences of inadequate staffing, notwithstanding the discretionary nature of staffing level decisions.[1] Here, the failure to provide adequate staffing is even more egregious than a private sector failure insofar as Washington law requires the

[1] *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").

County to set tax levies sufficient to cover a budget meeting public order needs. RCW 36.28.010(6); RCW 36.40.090.

B. This Court Should Accept the Petition and Abolish the Outmoded Professional Rescuer Doctrine.

The "professional rescuer" doctrine has grown far beyond its initial rationale. It 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").

Modern tort law has evolved away from the professional rescuer 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).

Here the most obvious duty breached is the duty to provide a safe workplace, a duty of constitutional dimensions. Wash. Const. Art. II. § 35 ("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."). All employers, including the County, are under a general duty to "use work practices, methods, processes, and means that are reasonably adequate to make your workplace

safe." WAC 296-800-11010. A judicial doctrine that police officers voluntarily assume risks such as those created by the County here, creating a complete bar to liability by judicial fiat, is poor public policy. It is inimical to the fundamental duties to protect workers and to the overarching duty to maintain public order.

While the doctrine of assumption of risk has not yet been abolished in the State of Washington, this Court has taken a step in that direction by characterizing "implied unreasonable assumption of the risk [a]s comparative negligence under our comparative fault system". *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wash. 2d 593, 613 (2011). This Court should accept the Petition as an appropriate vehicle for updating Washington tort law to focus on whether the alleged tortfeasor has breached legal duties to the victim—unquestionably the case here.

C. The Court of Appeals Decision in any Event Misconstrues the Doctrine and the Public Interest Requires Clarification.

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*, 84 Wn.2d at 979; 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*.

It is difficult to imagine legal questions more obviously fraught with substantial public interest than whether or not the judiciary should, on its own initiative, immunize local governments from the consequences of their decisions to hire so few police as to create significant public disorder, going so far as to create circumstances where officers should (according to the County's Answer) apparently be trained to "shelter in

place" notwithstanding screaming victims until some sort of backup can arrive.[2]

Conclusion

For the foregoing reasons, and the reasons expressed in Appellants' Petition, this Court should accept the Petition for Review.

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Dated: September 22, 2022.

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[2] The NPA notes that the County's repeated claims that Deputy McCartney "was informed that his backup was *en route*" is incorrect and not supported by the County's record citations. (Answer at 5 n.2 & 16 n.8; *see also id.* at 4; 16 n.

CERTIFICATE OF SERVICE

On September 22, 2022, I certify that I electronically filed the Memorandum of National Police Association in Support of the Petition for Review filed by the Estate of Daniel Alexander McCartney *et al.* with the Clerk of the Court which will send notification to the following:

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