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NO. 58515-1-II

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**COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON**

CURTIS A. BEAUPRE, Plaintiff/Respondent

v.

PIERCE COUNTY, Defendant/Appellant

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COURT OF APPEALS  
DIVISION ONE  
MAR 15 2007

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**PIERCE COUNTY'S REPLY BRIEF**

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GERALD A. HORNE  
Prosecuting Attorney

By  
DANIEL R. HAMILTON  
Deputy Prosecuting Attorney  
Attorneys for Pierce County

955 Tacoma Avenue South  
Suite 301  
Tacoma, WA 98402  
PH: (253) 798-7746

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## I. INTRODUCTION

This appeal concerns both the proper application of the professional rescuer/fireman's rule and whether LEOFF suits for "excess damages" must "present sufficient facts to establish that a breach of duty caused his injury ...." App. Br., p. 2. See also id. at pp. 9-10; CP 59-61, 72-3, 101-02; Lynn v. Labor Ready, Inc., 136 Wn.App. 295, 307-08, 151 P.3d 201 (2006) (in reviewing summary judgment on proximate cause "we review the record to determine whether the plaintiff has offered sufficient admissible evidence, which if proved, would support sufficient allegations of material fact that warrant sending the case to a jury.") However, Respondent's Brief nowhere identifies any -- much less "sufficient" -- evidence that would create a jury question on whether some vague County "fail[ure] to provide Deputy Sargent with additional training" somehow caused Sargent's patrol car to allegedly make contact with plaintiff. Resp. Br. at 3.

Though Respondent's Brief does at least address the professional rescuer/fireman's rule, even on that issue it fails to confront much of the actual record and law cited in Appellant's Brief.

## II. ARGUMENT

### A. NO PROCEDURAL BAR TO ASSERTION OF PROFESSIONAL RESCUER/FIREMAN'S RULE

Plaintiff initially argues the “trial court should never even have reached the merits” of the professional rescuer/fireman’s rule because “Pierce County has, for at least three reasons, waived” it. Resp. Br. at 5 & 7. However, Respondent’s Brief actually offers only two arguments for an alleged waiver: 1) the professional rescuer/fireman’s rule supposedly is an affirmative defense and the County Answer’s express assertion of its underlying doctrine of “assumption of risk” somehow did not preserve it; and 2) the County’s discovery response somehow “had hidden” and “conceal[ed]” the professional rescuer/fireman’s rule defense. See Resp. Br. at 6 & 7. As demonstrated below, neither argument has merit.

#### 1. Answer Did Not Waive Professional Rescuer/Fireman’s Rule

Though plaintiff spends much time arguing waiver, see Resp. Br. at 7-16, he ignores that the professional rescuer/fireman’s rule is a form of “assumption of risk,” was expressly pleaded here, and is not an affirmative defense that must be asserted in a complaint.

**a. Professional Rescuer/Fireman's Rule  
Is A "Primary Assumption Of Risk"**

As a matter of law, one form of assumption of risk is "implied primary assumption of risk" which "bars any recovery based on the duty that was negated." Home v. North Kitsap Sch. Dist., 92 Wn.App. 709, 718-19, 965 P.2d 1112 (1998)(emphasis added). This Court long ago recognized that in "[i]n terms of duty" the professional rescuer/fireman's rule dictates that "there is none owed." Sutton v. Shufelberger, 31 Wn.App. 579, 588 n. 2, 643 P.2d 920 (1982). Accordingly, it is well settled that though the professional rescuer/fireman's rule is "stated in terms of 'assumption of risk,'" such is used "in the so-called 'primary' sense of the term and meaning that the defendant did not breach a duty owed." Armstrong v. Mailand, 284 N.W.2d 343, 348 (Minn. 1979). See also Krause v. U.S. Truck Co., 787 S.W.2d 708, 712 (Mo. 1990) ("A fireman assumes, in the primary sense, all risks incident to his fire-fighting activities"); Terry v. Garcia, 109 Cal.App.4th 245, 249 (Cal. Ct. App. 2003)("One application of the primary assumption of the risk doctrine is the firefighter's rule.")

Plaintiff cites no contrary authority holding that the professional rescuer/fireman's rule is anything other than an application of primary

assumption of the risk. Indeed, our Supreme Court expressly held in Maltman v. Sauer, 84 Wn.2d 975, 978-79, 530 P.2d 254 (1975), "[t]hose dangers which are inherent in professional rescue activity, and therefore foreseeable, are willingly submitted to by the professional rescuer when he accepts the position and the remuneration inextricably connected therewith," so that "it is the business of professional rescuers to deal with certain hazards" and they cannot complain if they are later harmed by exposure to them. (Emphasis added). See also e.g. Black Indus., Inc. v. Emco Helicopters, Inc., 19 Wn.App. 697, 699, 577 P.2d 610 (1978) (citing Strong v. Seattle Stevedore Co., 1 Wn.App. 898, 904, 466 P.2d 545 (1970)) (the "the paid professional rescuer has knowingly and voluntarily confronted a hazard and cannot recover from the one whose negligence created the hazard, so long as the particular cause of the rescuer's injury was foreseeable and not a hidden, unknown, or extra hazardous danger which could not have been reasonably foreseen.") Hence, authorities agree that the professional rescuer/fireman's rule in Washington "operates as a form of assumption of risk." DeWolfe and Allen, 16 Wash. Pract. § 1.18 at p. 22 (2nd Ed. 2000).

Here, the County's Answer has always expressly stated in capital

letters and underlined: "ASSUMPTION OF RISK: Plaintiff assumed the risk of the injuries and damages, if any, sustained." See CP 12. If the professional rescuer/fireman's rule had been an affirmative defense, it was pleaded here from the outset. C.f. Malgarini v. Wash. Jockey Club, 60 Wn.App. 823, 826, 807 P.2d 901 (1991)(summary judgment affirmed because pleading affirmative defense of "discretionary immunity" included subcategory of "quasi-judicial immunity.")

**b. Professional Rescuer/Fireman's Rule  
Is Not An Affirmative Defense**

Plaintiff cites no authority for his bald assumption that the professional rescuer/fireman's rule somehow is within CR 8(c)'s requirement that matters "constituting an avoidance or affirmative defense" must be specifically pleaded. Resp. Br. at 10-13. Rather, it is well settled a defendant "need not plead as an affirmative defense those elements which [the plaintiff] must prove." Sprague v. Sumitomo Forestry Co., 104 Wn.2d 751, 757, 709 P.2 1200 (1985). Plaintiff ignores previously cited authority establishing that this Court recognizes that under the professional rescuer/fireman's rule, "[i]n terms of duty, it may be said there is none owed" a professional rescuer. Sutton, 31 Wn.App. at 588 n. 2 (emphasis added). See also App.'s Br. at 35-36. Accord-

ingly, settled law specifically instead holds that the professional rescuer/fireman's rule "is not really an affirmative defense" because "it indicates that the defendant did not even owe the plaintiff any duty of care." Armstrong v. Mailand, 284 N.W.2d 343, 348 (Minn. 1979). See also Krause, supra at 712 ("A fireman assumes, in the primary sense, all risks incident to his firefighting activities" and "[p]rimary assumption of the risk is not really an affirmative defense; rather, it indicates that the defendant did not even owe the plaintiff any duty of care.")

Hence, though it was affirmatively pleaded in the County's Answer by its assertion of "assumption of risk," as a matter of law there was no requirement to plead the professional rescuer/fireman's rule.

## **2. Discovery Response Did Not Waive Professional Rescuer/Fireman's Rule**

Though at one time he more candidly admitted "it is merely a 'make weight' argument," 1/12/07 Ans. to Mot. to Strike, p. 4, plaintiff now argues the County committed "deceptive and dilatory practices" because he served it "with a comprehensive set of Discovery Requests which included interrogatories and requests for production seeking detailed and specific information regarding each of Pierce County's affirmative defenses" and by "intentional deception" or "oversight" its

response “did not mention either the Professional Rescuer Doctrine or the Fireman’s Rule.” Resp. Br. at 4, 9 & 15. However, plaintiff fails to mention that: 1) the discovery document was not presented to the trial court as part of the summary judgment hearing but was placed in the record for the first time after this Court granted discretionary review; and 2) the trial court thereafter ruled under RAP 7.2 and RAP 9.12 that it was not part of its record at time of summary judgment. See e.g. CP 179-212; CP 236-37. See also 1/10/07 & 2/16/07 Mot.’s to Strike.

In any case, a review of the cited interrogatory reveals it neither required defendant to “mention” the professional rescuer/fireman’s rule nor contains the County’s full response. Instead, the discovery request in question asked only that defendant state the “fact, allegation, or legal proposition upon which you base” defendant’s “other affirmative defenses” and any documents relating thereto. See CP 215-18 (emphasis added). To begin with, as explained above, the professional rescuer/fireman’s rule “is not really an affirmative defense; rather, it indicates that the defendant did not even owe the plaintiff any duty of care.” Armstrong, 284 N.W.2d at 348. See also discussion supra at pp. 5-6. Further, the County’s actual discovery response explained that “[t]he

same facts discussed above support the other affirmative defenses,” yet Respondent’s Brief neither mentions nor attaches those “facts” that were “discussed above” in the response.

Indeed, the prior pertinent discovery answers confirm the County clearly had already stated that its defenses included the fact, allegation, or legal proposition that any injury related to being allegedly “struck by another patrol car” was “the result of an unavoidable accident occurring during an emergency law enforcement action.” CP 235 (emphasis added). For this reason, far from being surprised thereafter by defendant’s motion based on the professional rescuer/fireman’s rule, plaintiff -- when discussing that rule at the summary judgment hearing - - admitted to the trial court: “I decided a long time ago that this case was probably going up on a number of issues, and I think this is one of them.” See CP 246 (emphasis added). Plaintiff’s argument therefore not only misstates the nature of the interrogatory and excludes the actual answer, but ignores that he knew the County had disclosed “a long time ago” the “fact, allegation, or legal proposition upon which [the County] base[s]” its assertion of the professional rescuer/fireman’s rule.

Hence, plaintiff can identify neither a discovery violation nor

prejudice. Even if the prohibition against suits for harm caused to fellow officers during an emergency law enforcement action somehow was a factual rather than purely legal issue, in addition to knowing for more than a year that the County's defenses included the assertion the "accident occur[ed] during an emergency law enforcement action," CP 235, after receiving extensive legal briefing and specific case citations on the professional rescuer/fireman's rule plaintiff still had every opportunity to conduct whatever unidentified relevant discovery he felt necessary or move for additional time in which to do so. See CR 56(f); Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 928-929 (9th Cir. 1980)("It is no answer for Hunt to argue that summary judgment should not have been granted before discovery" because it "had available to it the machinery for obtaining information through a proper application under rule 56(f).") However, plaintiff neither attempted nor needed further discovery because, as he admits, the "facts of the present case are not really in dispute." Resp. Br., p. 1 (emphasis added).<sup>1</sup>

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<sup>1</sup> Plaintiff also erroneously claims the "discovery cut off date of April 17, 2006 came and went" and only thereafter was Pierce County's "last minute Motion for Summary Judgment" filed supposedly "after discovery had closed and the final trial date was only a few short weeks away." Resp. Br., pp. 4, 7. In fact, weeks before the County filed its summary judgment motion, the trial court instead extended the discovery cut off to May 5, 2006. See CP

**B. PROFESSIONAL RESCUER/FIREMAN’S RULE  
APPLIES AS A MATTER OF LAW**

As to the professional rescuer/fireman’s rule, plaintiff claims the County does not argue that the rule “would apply to the facts of the present case” but “that this Court should extend these two doctrines to shield ... the rescuer’s co-workers engaged in the same rescue operation or police action.” Resp. Br. at 25-26. Though the courts of our state -- unlike many others -- have never been asked to decide whether the professional rescuer/fireman’s rule protects police from suits by fellow officers for performance of law enforcement activities, it does not follow that this case of first impression somehow requires “an extension” of that rule. Rather, this state’s existing case law and public policy -- as well as that of the numerous courts which have expressly addressed the issue -- show police responding to law enforcement emergencies are protected under current law from suits brought by fellow officers.

**1. Rule Protects Fellow Officers Not Criminals**

Plaintiff argues the professional rescuer/fireman’s rule here only

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238-39. Though King County Court Rules specifically provide for the filing of dispositive motions after the discovery deadline, see KCLR 4(e)(2), the County’s April 20, 2006, motion actually was filed over two weeks before the May 5, 2006 discovery deadline.

protects “the driver of the suspect vehicle” and not fellow responding officers or their agency because Ballou v. Nelson, 67 Wn.App. 67, 834 P.2d 97 (1992); Ward v. Torjussen, 52 Wn.App. 280, 758 P.2d 1012 (1988); and Sutton v. Shufelberger, supra., articulated the rule as supposedly protecting only “the one whose conduct is responsible for bringing the rescuer to the scene.” Resp. Br. at 18-22.

First, even such a superficial analysis would bar plaintiff’s suit because it was above all the County’s conduct that brought him to the scene in question. Beaupre was present only because the County hired him and provided him the means, authority and responsibility to be there and guide the pursuit as its shift Sergeant. Further, after making the statement cited by plaintiff, both Ballou, 67 Wn. App. at 72, and Sutton, 31 Wn. App. at 587, went on to explain that the rule specifically protects those “whose sole connection with the injury is that his act placed the ... police officer in harm’s way.” Here, Beaupre's own experts testify Deputy Sargent's sole connection to the injury was that he allegedly put plaintiff "in harms way" of the escaping suspect who then actually caused his injury. CP 38, 62-63.

Second, a closer examination of plaintiff’s artificially narrow

application of the rule shows it is not supported by his cited Washington cases, decisions from other jurisdictions, or the authority upon which both are based. Instead, Sutton, Ward, and Ballou<sup>2</sup> all concerned only the negligent or intentional acts of third parties that were not in furtherance of any rescue operation. Indeed, those three cases all expressly recognized that the stated limitation on the rule applied to “independent acts of misconduct” where a “third party[‘s] ... intervening negligence injures the official while he is in the performance of his duty.” Ballou, 67 Wn. App. at 71; Ward, 52 Wn.App. at 288; Sutton, 31 Wn.App. at 588. Plaintiff ignores numerous decisions from other jurisdictions holding this professional rescuer/fireman’s rule clearly does bar suits when fellow officers act negligently in an emergency because -- as a matter of law -- they are not “third parties” whose conduct is an “inde-

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<sup>2</sup> In fact Ballou never applied the test cited by plaintiff but found the rule inapplicable because in that case “there was no rescue” and because there defendants committed a “criminal assault.” 67 Wn.App. at 73-74. For this latter reason, the fleeing felon here clearly would not be relieved of liability for his assault on plaintiff. Further, plaintiff cites but then ignores that Ballou characterized the exception to the fireman’s rule as “not provid[ing] protection to one who commits independent acts of misconduct after [rescuers] have arrived on the premises.” 67 Wn. App. at 70-71 (emphasis added); Resp. Br. at 21. Plaintiff’s omission is perhaps explained by the fact his alleged but unproven additional claim of negligent training also did not occur “after [he] arrived on the premises” and therefore would be protected from suit under that articulation of the rule. Concern for undermining his claim that negligent training helped create a hazard also explains why plaintiff ignores that the professional rescuer/fireman’s rule expressly bars recovery “from the one whose negligence created the hazard.” Black Indus., Inc., 19 Wn.App. at 699 (emphasis added).

pendent” or “intervening act.” See cases listed App. Br. at 14-19.

Further, the very language cited from Sutton, Ward, and Ballou was taken from other jurisdictions, and that underlying precedent has never been an obstacle to applying the rule in suits such as this because those jurisdictions hold fellow rescuers at emergencies are not third party interveners. For example, the Sutton language<sup>3</sup> relied upon by plaintiff came from the California decisions of Giorgi v. Pacific Gas & Elec. Co., 266 Cal.App. 2d 355, 72 Cal.Rptr. 119 (1968) and Walters v. Sloan, 142 Cal.Rptr. 152, 571 P.2d 609 (1977). See 31 Wn.App. at 587-88. Both Walters and Giorgi are also cited in numerous decisions holding that where defendants instead are fellow rescuers no liability exists because "the common law exception for independent [intervening] acts ... is inapplicable and does not allow a personal injury action by a public safety officer against a fellow safety officer for actions taken in furtherance of a joint public safety operation" because the intervening negligence exception "should apply only to negligent and

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<sup>3</sup> Ward relied upon the earlier Sutton decision for the language cited by plaintiff, 52 Wn.App. at 287, while the still later Ballou cited Ward, Sutton and Walters. 67 Wn.App. at 71-72. Indeed, even plaintiff notes that both Sutton and Ballou cite to “a California case” -- i.e. Walters -- where an officer “was struck by a speeding vehicle while placing a ticket” and was held not barred by the rule from suing the driver who injured him. Resp. Br. at 22.

intentional acts of the victim and other third parties that are not in furtherance of a rescue operation." City of Oceanside v. Superior Court, 96 Cal.Rptr. 2d 621, 624-25 & 631 (Cal. App. 2000)(citing Giorgi and Walters)(emphasis added). See also e.g. Calatayud v. State of California, 959 P.2d 360, 362-370 (Cal. 1998)(citing Giorgi and Walters in dismissing fellow officer for shooting during arrest attempt); Farnam v. State of California, 84 Cal.App.4<sup>th</sup> 1448, 101 Cal. Rptr. 2d 642, 644 (Cal.App. 2000)(citing Giorgi in dismissing a suit against a fellow officer and his employer for a dog bite during an arrest); Santangelo v. New York, 129 Misc.2d 898, 494 N.Y.S.2d 49, 54-55 (1985)(citing Walters and dismissing officer's suit against state for escape of mental patient).

Third, plaintiff offers no policy rationale for his strained reading. Indeed, such is directly contrary to the basis for the rule given by our own Supreme Court in Maltman, 84 Wn.2d at 978-79, wherein it explained suits by rescuers are barred because "[t]hose dangers which are inherent in professional rescue activity, and therefore foreseeable, are willingly submitted to by the professional rescuer when he accepts the position and the remuneration inextricably connected therewith." See also Black Indus., Inc., 19 Wn.App. at 699-700 ("[p]ublic policy de-

mands that recovery be barred whenever a person, fully aware of a hazard created by another's negligence, voluntarily confronts the risk for compensation." )(citing inter alia Walters). The distinction plaintiff seeks to apply serves "neither the rationale underlying the public-policy considerations for the fireman's rule nor the assumption of risk." Rosa v. Dunkin Donuts, 122 N.J. 66, 583 A.2d 1129, 1133 (1991) (rejecting "artificial distinctions between the negligence that occasioned one's presence and the negligence defining the scene at which one arrives and with which one has been commissioned and empowered to deal.") Hence, courts hold that though the "language in some cases ... appears to restrict the firefighter's rule to conduct that necessitated summoning an officer ... a review of the applications of the rule to specific facts in other cases demonstrates it is not so limited." See Farnam, 101 Cal. Rptr. 2d at 644-45 (citing Giorgi).

**2. Plaintiff Knew That Being Run Over Was A Risk Of Foot Pursuit On A Freeway**

Citing Maltman for the principle that "the professional rescuer ... does not assume all the hazards that may be present in a particular rescue operation," Resp. Br. at 23, plaintiff claims Ballou, Ward, and Sutton also supposedly used this principle to reject the application of

the professional rescuer/fireman's rule and this court should do the same. Id. at 22-25. However the scope of the hazard assumed by an officer responding to an emergency was not the basis for the decisions in Ballou, 67 Wn. App. at 73-74, or Sutton, 31 Wn. App. at 587-88, and Ward actually demonstrates how the application of Maltman's test -- never actually quoted or applied by plaintiff -- supports this appeal.

Applying the Maltman test, Ward concluded that the "hazard ultimately responsible for causing the injury" was a collision with an uninvolved citizen before arriving at the call, and under Maltman such was not "inherently within the ambit of those dangers which are unique to and generally associated with the particular rescue activity" of confronting a prowler assist call. 52 Wn.App. at 287 (quoting 84 Wn. 2d at 979)(emphasis added). See also Ballou, 67 Wn.App. at 72 (Ward "concluded that a prowler assist call does not inherently involve the hazard of being broadsided while going through an intersection ... on her way to a prowler call"). In contrast, here the "hazard ultimately responsible for causing the injury" allegedly was that of being bumped by another pursuing patrol car or run over by the very fleeing felon being pursued on foot on a darkened freeway. Unlike Ward, such a hazard is "inher-

ently within the ambit of those dangers which are unique to and generally associated with the particular rescue activity" of pursuing on foot and trying to arrest a suspect eluding patrol cars on a freeway. Indeed, unlike Ward, here plaintiff testified he knew from prior experience that a specific risk of foot pursuit is that an officer can be hit by a patrol car, CP 22-23, and that when he left his own vehicle in the middle of I-5 to confront on foot the suspect's car in the dark he also knew he had to take precautions "so that it couldn't easily run over me ...." CP 28. Because plaintiff beforehand was "fully aware" of the "hazard" of being bumped by other patrol cars he knew were also attempting to stop the suspect vehicle or ran over by the fleeing felon, CP 28, 55, yet voluntarily confronted "the risk for compensation," he as a matter of law "willingly submitted to" those risks and therefore is barred from suit. See Maltman, 84 Wn. 2d at 978; Black Indus., Inc., 19 Wn.App. at 699-700.

Plaintiff candidly admits that under his standardless analysis of the scope of the hazard "it is very difficult, indeed, to imagine what risks are inherent in police work." Resp. Br. at 24. Fortunately Washington's courts have had no similar difficulty dismissing suits where -- like here -- professional rescuers have assumed the risk. See e.g. Malt-

man, supra.; Black Indus., Inc., supra.; Strong, supra. Similarly, numerous decisions of other courts cited by defendant but ignored by plaintiff have specifically addressed injuries occurring during pursuits, while at the scene of attempted arrests or caused by other emergency vehicles during an emergency and likewise have no problem barring suit against fellow responding officers. See e.g. Boulton v. Fenton Township, 272 Mich.App. 456, 726 N.W.2d 733, 737 (2007)(officer struck by fire truck at scene “is a normal, inherent, and foreseeable risk of the police officer’s profession”); Santangelo, 494 N.Y.S.2d at 54-55 (barring officer’s suit of state for injury caused by restraining an escapee). See also case law listed in App. Br. at 16-17.

**C. WASHINGTON’S POLICY AND STATUTES  
SUPPORT THE COMMON LAW**

**1. California Precedent Is Neither Unique Nor  
Distinguishable**

Plaintiff next claims the “County relies almost exclusively on California case law” but our state’s “statutory scheme is quite different” because we have “no equivalent of [California’s] §1714.9(a)(1)” and our worker’s compensation law is not the “exclusive remedy” for police injured by their employer or its officers. Resp. Br. at 26-29. Suppos-

edly, then, California's "different statutory scheme gives rise to different public policy considerations." Id. 29-33. The truth is otherwise.

Far from relying "almost exclusively on California case law," the County has provided a wealth of cited decisions from outside California all likewise holding -- without "benefit" of its "different" statutes -- that the common law professional rescuer/fireman's rule bars suit where an officer is injured by a fellow rescuer during an emergency. See e.g. Santangelo, supra; cases listed in App. Br. at 16-17. Indeed, even as to California, its courts expressly hold that "[a]ll of the policy reasons advanced to support the court's refusal to apply the statutory exception [of §1714] to the firefighter's rule support with equal force to a determination that the rule applies in the first instance" under the common law. Farnam, 101 Cal.Rptr.2d at 647 (emphasis added). See also City of Oceanside, 96 Cal.Rptr.2d at 621 ("rationale for holding the section 1714.9(a)(1) statutory exception inapplicable to actions between safety officers engaged in a joint operation applies equally to the common law independent acts exception.") Further, the County already has shown how California's §1714.9 is an obstacle to the professional rescuer/fireman's rule and the absence from Washington of its "equivalent" makes

the rule's application here far easier. App. Br. at 24-26, 39-40.

Likewise as to California precedent, that its worker's compensation scheme is its exclusive remedy for police injured by fellow employees is a distinction without a difference. Plaintiff offers no reason why the common law would apply the professional rescuer/fireman's rule to California suits against fellow rescuers in different agencies but not apply it also to Washington suits against fellow rescuers in the same agency. Resp. Br. at 28-29. The real question is not whether California's well settled precedent reflects the common law rule -- because clearly it does -- but whether Washington's LEOFF statute somehow abolishes this common law defense in the actions it authorizes. Case law, plain statutory language, statutory history and public policy all confirm no such obstacle to the professional rescuer/fireman's rule exists in this state. App. Br. at 17-23, 34-50. See also infra at 22-3.

Finally, though plaintiff claims public policy considerations offered by California's courts to support the rule "do not hold up" outside that state, Resp. Br. at 29-32, such is refuted both by the similar application of the professional rescuer/fireman's rule elsewhere and a review of his own policy analysis. Though plaintiff correctly notes that the minor

factor of “litigation over subrogated interests” is not a consideration in Washington, he admits the problem of “efficient judicial administration” created by such suits is just as a much a problem here. Id. at 30-31. As to creating a supposed “anomaly” by applying the rule in actions against fellow emergency employees, id. at 32, it is instead plaintiff’s analysis that would create the anomaly: i.e. plaintiff would allow suits against rescuers from the same agency while the common law would continue to bar them against rescuers from different agencies. Likewise, plaintiff continues to ignore that it also “would be anomalous to exonerate” the wrongdoer “but not the fellow [official] from a personal injury action by an injured [official].” City of Oceanside, 96 Cal.Rpt. at 631. Lastly, plaintiff provides neither authority nor cogent argument disputing the most important and well documented policy of all -- that allowing police to sue fellow rescuers seriously endangers public safety, especially under the facts here. Compare Resp. Br. at 30 with App. Br. at 18-23.

**2. Washington Statutes Support Application of Professional Rescuer/Fireman’s Rule Here**

Plaintiff ends his opposition with the claim that because “RCW 41.26.281 provides a limited cause of action against a negligent public employer” which somehow “benefits the[] employers, as well,” apply-

ing the common law rule would “take away what the legislature has seen fit to grant.” Resp. Br. at 33-36.

First, plaintiff nowhere explains how his “limited cause of action” somehow gives him greater rights in a suit against his employer than he would have in a common law action against any other tortfeasor who allegedly caused him harm -- such as the fleeing felon here. It does not follow that a legislative intent to allow officers to sue their employers in certain situations somehow reflects an intent to exempt such suits from common law principles applicable to every tort action. Indeed, plaintiff nowhere confronts the fact that: 1) this Court holds a LEOFF suit actually is subject to common law defenses and must prove a breach of “duty,” see Hansen v. City of Everett, 93 Wn.App. 921, 925, 971 P.2d 111 (1999)(LEOFF suit against employer was subject to common law defense of comparative fault); Locke v. City of Seattle, 133 Wn.App. 696, 709, 137 P.3d 52 (2006) (“To establish a claim, LEOFF members must ... prove that their employers acted negligently ...”); 2) the legislature in RCW 41.26.281 expressly provided that LEOFF suits are limited to those actions “otherwise allowed by law;” and 3) statutory history shows the legislature before the enactment and amendment of

RCW 41.26.281 is presumed to have known of the professional rescuer/fireman's rule and intended to preserve it. See App. Br. at 42-50. Plaintiff's choice to remain silent on such issues speaks volumes.

Second, plaintiff nowhere explains how LEOFF's supposed abolition of common law defenses such as the professional rescuer/fireman's rule -- otherwise available to any other defendant -- somehow "benefits the[] employers, as well." Indeed, RCW 41.26.270, enacted on the same day as RCW 41.26.281, expressly states LEOFF was intended to provide "protection for the governmental employer from actions at law." (Emphasis added). Plaintiff's interpretation instead would re-move the protection municipal employers had under the common law prior to the statute. The benefits LEOFF intended to provide both police and the law enforcement agencies that employ them -- as well as the overriding public policy of protecting the public -- can exist only by allowing officers to sue their employers for those personal injuries that are not caused by fellow emergency responders. Cf e.g. Locke, supra (injury during training); Hansen, supra (fall in city stairway).

### III. CONCLUSION

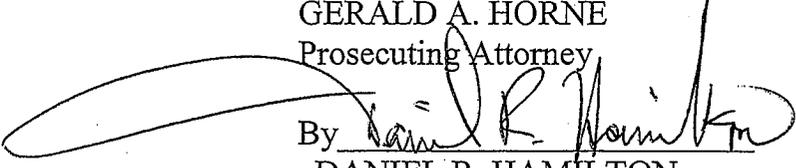
For good reason, plaintiff apparently abandons his baseless neg-

ligent training claim. Plaintiff likewise offers neither factual nor legal grounds to overcome dismissal of his claim of vicarious liability for the acts of Deputy Sargent. Indeed, for Beaupre's fellow officers to continue to be willing to "lay their lives on the line for us," Resp. Br. at 34, they should not be restrained from acting during an emergency out of fear their decisions to protect the public will be the basis for later suits by fellow officers who -- like them -- chose to respond to the same emergency they were all hired and well paid to confront.

There is no basis for claiming that other courts confronting this same issue are somehow mistaken or that Washington's public is somehow exempt from the harms the professional rescuer/fireman's rule was intended to prevent. Rather, the common law, binding precedent, plain statutory language, legislative history and public policy all support reversal of the trial court and an order of dismissal.

DATED: March 14, 2007.

GERALD A. HORNE  
Prosecuting Attorney

By   
DANIEL R. HAMILTON

Deputy Prosecuting Attorney  
Attorneys for Pierce County  
Ph: (253)798-7746 / WSB # 14658

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of Pierce County's Reply Brief was delivered this 14<sup>th</sup> day of March, 2007, on the following counsel of record and/or individuals in the manner indicated:

Respondent Beaupre

J. E. Fischnaller, Esq.

ABC Legal Messengers, Inc.

Law Offices of J.E. Fischnaller  
14136 NE Woodinville-Duvall Rd., Suite 220

Via Regular Mail

Woodinville, WA 98072

Via Facsimile

Respondent Beaupre

M. Scott Dutton, Esq.

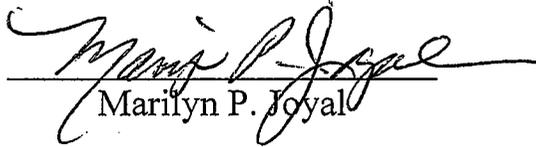
ABC Legal Messengers, Inc.

2423 E. Valley Street  
Seattle, WA 98112

Via Regular Mail

Via Facsimile

RECEIVED  
COURT OF APPEALS  
DIVISION ONE  
MAR 15 2007

  
Marilyn P. Joyal