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NO. 58515-1

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

PIERCE COUNTY, Petitioner

v.

CURTIS A. BEAUPRE, Respondent

MOTION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF PETITIONER

Pierce County, defendant in the above-entitled action, seeks review of the decisions designated in part B below.

B. DECISION

Defendant Pierce County asks this Court to accept review of the June 15, 2006, and July 25, 2006, orders denying its Motions for Summary Judgment and Reconsideration respectively. A copy of these decisions of the Honorable Judge John P. Erlick are in the Appendix at A- 131 and A-156.

C. ISSUES PRESENTED FOR REVIEW

1. Should discretionary review be granted where, in denying summary judgment against a deputy sheriff's suit of his County employer for an injury incurred during an emergency operation, the trial court commits obvious or at least probable error by holding that RCW 41.26.281 abolishes the government's right to assert the common law professional rescuer's doctrine/fireman's rule defense? See RAP 2.3(b)(1) & (b)(2).
2. Should discretionary review be granted where, in deny-

ing summary judgment against a deputy sheriff's suit of his County employer for an injury incurred during an emergency operation, the trial court certifies its decision involves "controlling questions of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation ...?" See RAP 2.3(b)(4)

D. STATEMENT OF THE CASE

While a deputy sheriff with Pierce County, plaintiff Curtis Beaupre was injured during an emergency operation when he ran onto the traveled lanes of I-5 and into the path of a backing patrol car. See A-3 ¶s 3.3-3.5; A-48 lns 9-12; A-52. Specifically, as Beaupre was running the wrong way on the freeway at night in a foot pursuit of a fleeing felon's vehicle, plaintiff claims he was bumped by a cruiser that was repositioning itself to stop the felon from colliding head-on with on-coming I-5 traffic. Id.; A-61 ln 3 to A-6 ln 22; A-79 lns 5-15. Allegedly as a result of this contact, Beaupre fell in front of the fleeing vehicle -- which in turn did not stop but instead continued its illegal

flight from police and "ran over his pelvis" before he could get out of the way. A-3 ¶ 3.5; A-86 ln 5 to A-87 ln 1. Plaintiff thereafter brought suit against his municipal employer for damages he claimed were in excess of the amounts Pierce County had provided him in Workers' Compensation benefits. See RCW 41.26.281; A-1. However, because the "professional rescuer doctrine/fireman's rule" precludes such liability, the County moved for summary judgment.

On June 15, 2006, the Honorable Judge John P. Erlick of the King County Superior Court denied summary judgment based on its conclusion that RCW 41.26.281 undermined some of the policy considerations behind allowing municipal employers to assert this common law rule. See A-137 to A-138. In so doing, the trial court candidly admitted its decision involved "controlling questions of law as to which there is substantial ground for a difference of opinion and that immediate review of those orders may materially advance the ultimate termination of the litigation" and entered a certification pursuant to RAP 2.3(b)(4). Id. On July 25, 2006, the trial court denied the

County's motion for reconsideration. A-156. On July 14 and July 27, 2006, notices of discretionary review were filed. See A-152 & A-154.

E. ARGUMENT WHY REVIEW IS WARRANTED

1. Numerous Grounds Under RAP 2.3 Warrant Review

Pursuant to RAP 2.3(b), discretionary review will be accepted where:

1. The superior court has committed an obvious error which would render further proceedings useless;
2. The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
... or;
4. The superior court has certified, . . . , that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

Here, the Superior Court expressly certified that its order "involves controlling questions of law as to which there is substantial ground for a difference of opinion and that immediate review of this order may materially advance the ultimate termina-

tion of this litigation" See A-133. Hence, the requirements of RAP 2.3(b)(4) are clearly met and authorize review.

Further, discretionary review also is warranted independently by RAP 2.3(b)(1) and (b)(2). Just as it is undisputed that review will "materially advance the ultimate termination of the litigation" under RAP 2.3(b)(4), so too it is undisputed that if the Superior Court committed obvious error in denying the County summary judgment because of RCW 41.26.281, such would render "further proceedings useless." See e.g. Maltman v. Sauer, 84 Wn.2d 975, 978, 530 P.2d 254 (1975) (professional rescuer doctrine requires dismissal); Black Indus., Inc. v. Emco Helicopters, Inc., 19 Wn.App. 697, 699-700, 577 P.2d 610 (1978)(same). Second, if it is probable error to hold RCW 41.26.281 imposes a common law duty of care on a County for its deputy's injuries from an emergency operation, such would "substantially alter[] the status quo" under the common law. See e.g. Glass v. Stahl Specialty Co., 97 Wn.2d 880, 883, 652 P.2d 948 (1982) (discretionary review granted because denial of summary judgment based on meaning of statute reflected "ob-

vious or probable error"). Indeed, our Courts hold discretionary review is especially needed for the denial of summary judgment where -- as here -- it involves a statutory interpretation that creates "wide implications for governmental liability." Hartley v. State, 103 Wn.2d 768, 772-74, 698 P.2d 77 (1985)(citing Glass v. Stahl Specialty Co., 97 Wn.2d at 883); Galapo v. City of New York, 95 N.Y.2d 568, 575 (N.Y. 2000) (municipal inability to assert the professional rescuer's doctrine/fireman's rule raises "the specter of massive civil liability").

Here, the denial of summary judgment not only meets RAP 2.3(b)(4), but -- as demonstrated below -- also is "obvious" as well as "probable" error under RAP 2.3 (b)(1) and RAP 2.3(b)(2). Because the instant order easily satisfies numerous independent grounds for review under RAP 2.3, as well as involves legislation that has broad implications for governmental liability and public safety, discretionary review is appropriate.

2. Denial Of Judgment Was Obvious Error

a. RCW 41.26.281 Did Not Abolish Municipal Defenses

Under RCW 41.26.281, plaintiff may bring suit "as otherwise provided by law" against his employer for damages in excess of those received or receivable from his employer under the Workers Compensation Act. In the instant case, the trial court concluded this statute prohibited Pierce County from asserting the common law professional rescuer's doctrine/fireman's rule. See A-137 to A-138. This was obvious error.

It is well settled that RCW 41.26.281 does not bar an employer's legal defenses against "excess damages" suits brought by employees under that statute. Hence, in Hansen v. City of Everett, 93 Wn. App. 921, 925, 971 P.2. 111 (1999), this division holds that the defense of comparative fault "applies to the [plaintiffs'] lawsuit based on fault under LEOFF's 'excess damages' provision" because suits under RCW 41.26.281 are expressly "as otherwise provided by law." Accordingly, the statute's own plain language limiting suits to those "otherwise provided by law," as well as established precedent interpreting that language, confirm that RCW 41.26.281 did not sub silentio bar employers from asserting the professional rescuer doctrine/fireman's rule defense.

This Court's conclusion in Hansen is further supported by the principle that "[s]tatutes in derogation of the common law are always strictly construed." See State ex rel. McDonald v. Whatcom County Dist. Court, 92 Wn.2d 35, 37, 593 P.2d 546 (1979). See also State v. Grant, 89 Wn.2d 678, 683, 575 P.2d 210 (1978) ("This statute, being in derogation of the common law, must be strictly construed."); Marble v. Clein, 55 Wn.2d 315, 318, 347 P.2d 830 (1959). Indeed, under this rule of statutory construction, even enactments in other states that have expressly limited the fireman's rule nevertheless have been narrowly interpreted and found not to abrogate this important common law doctrine. See e.g. Kelly v. Ely, 764 A.2d 1031 (N.J. App. Div. 2001), cert. denied, 772 A.2d 937 (2001)(court "decline[d] to construe the statute [as abrogating the fireman's rule], absent a clearer declaration of the legislative intent to achieve such an end."); Galapo v. City of New York, 95 N.Y.2d 568, 575 (N.Y. 2000)(statute limiting common law fireman's rule narrowly construed, especially considering "the specter of massive civil liability" to municipalities otherwise); Calatayud v. State of California, 959 P.2d 360, 368

(Cal. 1998) (requiring dismissal where officer accidentally shot fellow officer because state Supreme Court "decline[d] to ascribe to the Legislature any intent to generate conflicting duties on the part of peace officers ... or to undermine their primary commitment to the public's essential safety and protection for fear of personal liability for injury to fellow officers.") Such conclusions are especially pertinent because both the Washington Supreme Court and this Division of the Court of Appeals have recognized the persuasiveness of decisions by these same state courts on the issue of the professional rescuer doctrine/fireman's rule. See e.g. Maltman, 84 Wn.2d at 978 (following New Jersey and New York precedent on the fireman's rule); Black Indus., Inc., 19 Wn.App. at 699-700 (following California precedent on fireman's rule).

Hence, based on the plain language of the statute, binding Washington precedent, principles of statutory construction and persuasive authority, it was obvious error for the trial court to hold RCW 41.26.281 denies municipalities the benefit of the professional rescuer doctrine/fireman's rule defense.

b. Professional Rescuer Doctrine/Fireman's Rule Bars Plaintiff's Suit

The professional rescuer/fireman's rule is "deeply rooted in the common law," Kreski v. Modern Electric, 415 N.W. 2d 178 (Mich. 1987), and "has been almost universally accepted by jurisdictions confronted with the choice." See Waggoner v. Troutman Oil Co., 320 Ark. 56, 58, 894 S.W. 2d 913 (Ark. 1995). See also Moody v. Delta W., Inc., 38 P.3d 1139, 1140 (Ala. 2002) ("Nearly all of the courts that have considered whether or not to adopt the Firefighter's Rule have in fact adopted it."); Chapman v. Craig, 431 N.W.2d 770, 771 (Iowa 1988) ("the majority of states have either adopted or affirmed the application of the fireman's rule.") As this division of the Court of Appeals explained in Ward v. Torjussen, 52 Wn.App. 280, 286-87, 758 P.2d 1012 (1988):

The professional rescuer doctrine, often called the "fireman's rule," prohibits a fireman, police officer, or other official from recovering damages for injuries sustained when responding in an official capacity from the one whose negligence or conduct brought the injured official to the scene. Sutton v. Shufelberger, 31 Wn.App. 579, 587, 643 P.2d 920 (1982). Our Supreme

Court stated that the test for determining when the doctrine would prohibit recovery includes an evaluation of whether the hazard is generally recognized as being within the scope of the particular rescue operation.

Hence, stated in its most traditional form, the "rule denies recovery by the injured official from the one whose sole connection with the injury is that his act placed the fireman or police officer in harm's way." Sutton, 31 Wn.App. at 587 (emphasis added).

The rule is based on the principle of assumption of risk because, as this Court notes in Black Indus., Inc., 19 Wn. App. at 699 (citing Strong v. Seattle Stevedore Co., 1 Wn.App. 898, 904, 466 P.2d 545 (1970)), "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." In upholding a dismissal on summary judgment under this doctrine, our state Supreme Court emphasizes in Maltman v. Sauer, 84 Wn.2d at 978-79, that the operative principle is that:

Those 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. Stated affirmatively, it is the business of professional rescuers to deal with certain hazards, and such an individual cannot complain of the negligence which created the actual necessity for exposure to those hazards.

As another court has further explained:

[T]he taxpayer who pays the fire and police departments to confront the risks occasioned by his own future acts of negligence does not expect to pay again when the officer is injured while exposed to those risks. Otherwise, individual citizens would compensate police officers twice: once for risking injury, once for sustaining it. [O]ne who does not know the risks inherent in a high speed chase should not engage in high speed chasing.

We perceive more than mere dollars-and-cents considerations underpinning the fundamental justice of the "fireman's rule." There is at work here a public policy component that strongly opposes the notion that an act of ordinary negligence should expose the actor to liability for injuries sustained in the course of a public servant's performance of necessary, albeit hazardous, public duties.

Berko v. Freda, 93 N.J. 81, 459 A.2d 663, 667 (N.J. 1983).

Hence, as this division explains: "Public policy demands that recovery be barred whenever a person, fully aware of a hazard created by another's negligence, voluntarily confronts the risk for

compensation." Black Indus., Inc., 19 Wn.App. at 699-700 (emphasis added). Commentators therefore recognize that Washington bars suits by officers against police agencies for injuries caused when the agency's negligence allegedly creates the necessity for the officer's exposure to a hazard. See 1-1 Premises Liability--Law and Practice § 1.05, n. 1.11 (Mathew Bender, 2006)(citing Lowry v. Auburn, 111 Wn.App. 1026, 2002 WL 844832, rev. denied, 147 Wn.2d 1025 (2002)).

Here, the record is undisputed that plaintiff knew police work entailed taking risks and admitted his past experience made him aware that one of its specific risks is that officers can be hit by patrol cars during foot pursuits. See A-46 ln 7-p. 47 ln 4. Indeed immediately after the injury in question plaintiff acknowledged the obvious -- that, in getting out of his patrol car onto the traveled lanes of I-5 and confronting on foot the escaping suspect vehicle in the dark, he knew he had to take precautions "so that it couldn't easily run over me" See Ex. A-52. Because plaintiff was "fully aware" of the allegedly County caused "hazard" of being hit by a fellow officer's car or run over by the fleeing sus-

pect, yet voluntarily confronted "the risk for compensation," 19 Wn.App. at 699-700, he now "cannot complain of the negligence which created the actual necessity for exposure to those hazards." See Maltman, 84 Wn.2d at 979.

Here plaintiff alleges he was exposed to the hazard of being injured by the suspect vehicle because a patrol car supposedly bumped him into the path of the fleeing car which thereafter refused to stop and ran over him causing his injuries. See A-3 ¶3.5. However, plaintiff's own experts expressly agree the County's sole connection to plaintiff's injury was that its patrol car allegedly put plaintiff "in harms way" of the escaping suspect. See A-62 lns 9-22; A-86 ln 22 to A-87 ln 1. As a matter of law, under the professional rescuer doctrine/fireman's rule, no duty was owed plaintiff or breached by defendant. See e.g. McElroy v. State of California, 122 Cal.Rptr.2d 612 (Cal. App. 2002)(affirming summary judgment where officer's patrol car collided with another during a pursuit); Farnam v. State of California, 101 Cal. Rptr.2d 642 (Cal App. 2000); Soto v. Ortiz, 680 N.Y.S. 2d 552 (N.Y. App. 1998)(affirming dismissal of suit for

injury caused by driving of fellow officer); Woods v. Warren, 482 N.W. 2d 696 (Mich. 1992) (fireman's rule prevents officer's suit of city for accident during pursuit); McGhee v. Michigan State Police Dept., 459 N.W. 2d 67, 68 (Mich. App. 1990)(state not liable for suspect vehicle's collision with officer because an "officer's injury resulting from a high-speed chase constitutes a foreseeable occurrence stemming from the performance of the officer's police duties").

c. Pierce County Is Not A Third Party Intervener

In Sutton v. Shufelberger, 31 Wn.App. at 580, a policeman sued the driver of a truck that struck him while the officer was ticketing another vehicle on the roadway. This Court -- relying on 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) -- held the professional rescuer doctrine did not bar the suit against the truck driver that struck and injured the officer because it "does not apply to the third party whose intervening negligence injures the official

while he is in the performance of his duty." Id. at 587-588.

Though Washington Courts have never addressed whether fellow officers in an emergency operation can be "third party interveners," the common law elsewhere is settled that professional rescuers are not "intervenors." Hence California courts -- citing the same California cases of Giorgi and Walters as did this Court in Sutton -- recognize that "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 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) (reversing denial of summary judgment and dismissing lifeguard's suit against other lifeguards for injury caused during a rescue)(emphasis added). See e.g. also Calatayud v. State of California, 959 P.2d 360, 362-370 (Cal. 1998) (reversing and requiring summary judgment dis-

missal where officer was accidentally shot by fellow officer during arrest attempt); Hamilton v. Martinelli & Associates, 2 Cal. Rptr. 3d 168, 178 (Cal. App. 2003)("the independent acts exception does not apply" where plaintiff officer was injured by fellow officer during training because she "assumed the risk that she would be injured during the course of the training."); Seibert Security Services, Inc. v. Superior Court, 22 Cal. Rptr.2d 514, 522 (Cal. App. 1993) ("Unless the police officer or firefighter has come to a specific location to perform a specific immediate duty, and the defendant's unrelated negligent or intentional conduct increases the risks inherent in performing that duty [citations omitted], this exception is similarly inapplicable.") (emphasis added).

Indeed, the common law professional rescuer doctrine/fireman's rule nationally has been held to bar suit where an officer is injured by the negligence of a fellow officer during an emergency operation. See e.g. also McElroy, *supra* (affirming summary judgment where officer's patrol car collided with another during a pursuit); Farnam v. State of California, 101 Cal.Rptr.2d 642 (Cal

App. 2000) (affirming summary judgment dismissing policeman's suit against fellow officer and his employer for dog bite during attempted arrest); Galapo v. City of New York, 744 N.E.2d 685, 688 (NY 2000) (affirming dismissal of suit against fellow policeman); Cooper v. New York, 619 N.E.2d 369 (N.Y. 1993) (affirming dismissal of suit for fellow police officer's negligence related to the dangers in responding to emergency call); Woods, *supra* (fireman's rule precluded officer's suit of city for accident during pursuit); McGhee v. Michigan State Police Dept., 459 N.W. 2d 67, 68 (Mich. App. 1990) (state not liable for suspect vehicle's collision with officer because "a police officer's injury resulting from a high-speed chase constitutes a foreseeable occurrence stemming from the performance of the officer's police duties").

Common sense dictates this result because "the same public policy considerations underlying the application of the firefighter's rule to exonerate the victim should also apply to exonerate a fellow [safety official] whose presence and actions are in furtherance of the joint rescue operation." City of Oceanside, 96 Cal.Rpt. at 631. Because this Court -- again following California

precedent -- recognizes that those who cause an emergency are protected because "[p]ublic policy demands that recovery be barred whenever a person, fully aware of a hazard created by another's negligence, voluntarily confronts the risk for compensation," Black Indus., Inc., 19 Wn.App. at 699-700 (citing inter alia Walters, supra), this same policy also demands protection in Washington of a fellow officer who responds to assist in an emergency. Indeed, it "would be anomalous to exonerate the victim but not the fellow [official] from a personal injury action by an injured [official]." See 96 Cal.Rpt. at 631.

Nevertheless, here the trial court refused to follow this principle and precedent, asserting: 1) it was based on an interpretation of a California statute that "has no corollary" in Washington and would be an "anomaly;" 2) two of the four listed public policy reasons for applying the rule to such suits were absent in Washington; and 3) a dissent in a New York case argued the doctrine should not apply to two "equally trained" officers where the plaintiff officer "had no more opportunity than a member of the general public would have had to employ any special skills to

avoid injury." See A-137 to 139. However, none of these rationales support the denial of summary judgment here.

1) Acts of Fellow Officers in An Emergency Are Protected From Liability Regardless of California's statute.

First, California precedent does not support the trial court's conclusion that its rule for emergency responders supposedly has "focused largely on interpretation of a California statute, section 1714.9(a)(1)" A-136. Rather, California courts expressly state that the "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." City of Oceanside v. Superior Court, 96 Cal. Rptr. 2d 621, 630 (Cal. Ct. App. 2000). See also Farnam v. California, 101 Cal.Rptr.2d 642, 647 (Cal. App. 2000)("[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)(emphasis added). Indeed, courts in states other than California -- which like Washington are

not subject to that state's legislation -- likewise have found the common law professional rescuer doctrine/fireman's rule precludes the existence of a duty between emergency responders. See e.g. Galapo, 744 N.E.2d at 688; Cooper, 619 N.E.2d 369; Woods, supra; McGhee, 459 N.W.2d at 68.

Second, that "Washington has no corollary to California Civ. Code, 1714.9" actually supports -- not undermines -- the availability to municipalities of the professional rescuer doctrine/fireman's rule for emergency operations. As the trial court correctly noted, California's §1714 actually "reimposes a duty of ordinary care ..., which would otherwise be abrogated by the firefighter's rule." A-136. Despite California's specific statutory attempt to limit the fireman's rule, its courts nevertheless hold it "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." City of Oceanside, supra. Where legislation from California and other states expressly limiting the professional rescuer doctrine do not expose police agencies to

liability in emergency operations,¹ such a statute certainly does not support a conclusion that Washington's statutes -- which contain no such express limit -- somehow do. This is especially so where, as noted above, Washington's RCW 41.26.281 expressly provides "excess damages" suits instead are available only "as otherwise provided by law" and is held to impose no special barrier to an employer asserting its legal defenses to such employee suits. See Hansen, supra.

Third, contrary to the trial courts' observation, a statutory scheme that makes liability dependent on the existence or absence of an emergency is not an "anomaly in this state." See A- 138. For example, emergency vehicles are expressly privileged from complying with rules of the road only "when responding to an emergency call or when in the pursuit of an actual or suspected violator of the law" RCW 46.61.035. Similarly, "except as provided" under the Emergency Management Act, an emergency worker "shall have no right to receive compensation ... from the

¹ See also discussion of similar statutes from other states supra at pp. 8-9.

agency ... for an injury or death arising out of and occurring in the course of his activities as an emergency worker." RCW 38.52.190 (emphasis added). Indeed, RCW 38.52.190 not only illustrates that an absence of liability based on the existence of an emergency operation is no aberration in Washington, but itself provides a separate and independent statutory basis for dismissing plaintiff's claim.²

2) Assumption Of Risk And Public Policy Requires Protection of Emergency Responders

The trial court also concluded the professional rescuer doctrine/fireman's rule was inapplicable to injuries allegedly caused

² By definition, plaintiff was an "emergency worker" under RCW 38.52.190 because he was "an employee of the state of Washington or any political subdivision thereof who is called upon to perform emergency management activities," RCW 38.52.010(4), was involved in "emergency management" activities at the time of his injury because he was "carrying out ... emergency functions, ... to ... respond to ... emergencies," RCW 38.52.010(1), and is now suing the "public agency" of a "county ... which provides or may provide fire fighting, police, ... or other emergency services." RCW 38.52.010(14). Accordingly, he has "no right to receive compensation" from Pierce County "for an injury ... arising out of and occurring in the course of his activities as an emergency worker" other than "as otherwise provided" by the Emergency Management Act. RCW 38.52.190. Hence, the County's liability for plaintiff's injuries is statutorily limited to worker's compensation. See RCW 38.52.290. Whether this statute applies to emergency responders actually employed by municipalities has yet to be addressed by our Court however. See Hauber v. Yakima County, 147 Wn.2d 655 (2002)(plaintiff's status as a volunteer for another agency precluded need to determine if he may have had a LEOFF "excess damages" claim).

by fellow officers during emergency operations because two out of the four listed policy reasons for such an application were supposedly absent in Washington -- i.e. "cost spreading" and the exclusivity of the worker's compensation remedy. A-138. However, an examination of this state's case law and statutory scheme reveals the contrary is true.

First, though the professional rescuer's doctrine is supported by numerous public policy grounds, it is also independently based on the legal doctrine of assumption of risk. See e.g. Maltman, 84 Wn.2d at 978-79; Black Indus., Inc., 19 Wn.App. at 699 (citing Strong v. Seattle Stevedore Co., supra). As previously noted and as is especially true for injuries during emergency responses, the taxpayer who pays police to confront risks does not expect to pay again when an officer is injured while exposed to those very risks because the public would be compensating police officers twice: once for risking injury in an emergency, once for sustaining it. Hence, the professional rescuer's doctrine/fireman's rule as a matter of law is independently supported by the separate "[p]ublic policy [that] demands that recov-

ery be barred whenever a person, fully aware of a hazard created by another's negligence, voluntarily confronts the risk for compensation." See Black Indus., Inc., 19 Wn.App. at 699-700. Because the legal principle of assumption of the risk independently exists without the need of any other policy basis, such alone makes the trial court's conclusion obvious error.

Second, it does not follow that unless every public policy rationale for a doctrine is present in a case, the underlying doctrine cannot apply. Here, it is uncontested that at least two out of the four independent policies supporting the application of this defense to fellow officers in emergency operations -- public safety and efficient judicial administration -- are present here. See e.g. Calatayud, 959 P.2d at 369 ("difficult problems" of causation would be "multiplied in cases turning on the propriety of chosen police tactics or emergency procedures" when what is at issue is often simply a "judgment call on the part of an officer who inadvertently inflicts injury"). See also A-137 to A-138. Indeed, of all the policies served by applying the doctrine to fellow officers, it has been recognized that "[t]he primary public

policy reason for barring such actions is public safety" because a "peace officer's primary duty is to protect the public and imposing a duty of care as to other officers creates the potential for conflicting duties ... and the threat of lawsuits could 'seriously compromise public safety.'" Terry v. Garcia, 109 Cal. App. 4th 245, 253 (Cal. Ct. App. 2003) (emphasis added). See also McElroy, 100 Cal.App. 4th 546, 548 (Cal. Ct. App. 2002)("The rationale for the decision is that liability would needlessly impair ...the individual officers involved to make 'judgment calls when responding to a rapidly developing emergency or crisis'" and therefore dismissal was upheld because the underlying policy was met by the fact defendants were "satisfying 'their primary commitment to the public's essential safety and protection") Indeed, California's Supreme Court refuses to apply a statutory abolition of the professional rescuer's doctrine/fireman's rule to municipalities precisely because it "decline[s] to ascribe to the Legislature any intent to generate conflicting duties on the part of peace officers ... or to undermine their primary commitment to the public's essential safety and protection for fear of personal liability for injury to

fellow officers." Calatayud, 959 P.2d at 368.

The most important policy rationale of "public safety" is undeniably present here. A peace officer's primary duty is to protect the public and the "discharge of these duties takes precedence over avoiding injury to fellow officers, particularly when responding to a rapidly developing emergency or crisis." Calatayud, 959 P.2d at 367-68. See also McElroy, 100 Cal. App. 4th at 548 (Cal. Ct. App. 2002)(absence of the fireman's rule "would needlessly impair ...the individual officers involved to make 'judgment calls when responding to a rapidly developing emergency or crisis'"). Hence imposing liability to other responding officers in such situations creates the potential for conflicting duties. Id. Here it is uncontested the injury in question occurred at the precise moment when the rapidly developing emergency had reached its most critical stage and dictated that the suspect be stopped before his car collided with on-coming I-5 traffic and killed or seriously injured members of the public. See A-61 ln 7 to A-62 ln 8; A-79 lns 5-22. Similarly, Courts recognize it would "seriously compromise public safety during joint operations if the

threat of a lawsuit accompanied every failure to exercise due care in effecting an arrest, quelling a disturbance, extinguishing a fire, or handling any of the other functions public safety members routinely discharge." 959 P.2d at 368. See also Galapo v. City of New York, 744 N.E.2d 685, 688 (NY 2000) (affirming dismissal of suit against fellow policeman because failure to apply fireman's rule to fellow officers during emergency carries "the potential for impairing discipline and the teamwork values that are vital to effective firefighting and law enforcement.") Indeed, here plaintiff expressly admits that as a direct result of this suit he feared fellow deputies thereafter would not "back him up" in the field. See A-17 lns 15-18; A-19 lns 24-25; A-27 ln 4-7. As was explained in a similar case:

Here, there was an attempt to apprehend a felon, an activity that poses danger not only to the officer but also to the public. Plaintiff and defendant shared the objective to effect an arrest under these dangerous conditions. The duty of care the officers owed to the public under these circumstances precludes their owing a duty of care to each other. The hazard posed ... is inherent in the activity the public hired plaintiff to perform.

Farnam, 101 Cal.Rptr.2d at 647.

Third, the trial court's belief that two policy grounds are absent in Washington -- i.e. "cost spreading" and the exclusivity of worker's compensation remedy, see A-138 -- is mistaken. Recognizing the absence of a duty of care between officers in emergency operations is part of "cost spreading" in Washington. In exchange for assuming the risks of a dangerous job, a LEOFF member already receives at public expense a higher salary, better retirement, increased worker's compensation benefits and such other unprecedented privileges as the right to sue employers for injuries unrelated to emergency operations "as otherwise allowed by law." Further, such benefits are in addition to the right held by every citizen to sue responsible tortfeasors who are not their employers. Hence, the cost spreading policy supports municipal assertion of the professional rescuer doctrine/fireman's rule because yet another publicly paid benefit of a right to sue police agencies for injuries professional rescuers incur for duties they are hired to perform "would only increase the cost ultimately borne by the public fisc." See City of Oceanside, 96 Cal.Rptr.2d at 281. See

also Galapo, 95 N.Y.2d at 575 (statute limiting common law fireman's rule not apply to government because of "the specter of massive civil liability"). That plaintiff has only the rights of other citizens and the aforementioned other numerous special benefits -- but not the additional special right to sue for the acts of fellow officers during an emergency -- is not a public policy basis for ignoring the common law and judicially imposing still another publicly financed benefit. Indeed, allegations of "[i]nadequate compensation is not a sufficient reason to preclude application of the firefighter's rule" 96 Cal.Rptr.2d at 285.

Finally, it is true California Courts gave as an additional policy basis for the doctrine's application the "exclusivity of worker's compensation" -- which in that state otherwise would create the "anomaly of being allowed to sue when the negligent officer was employed by another agency but not by his own employer." See A-138. Though in Washington there is no need to avoid this "anomaly" because under our state's statutory scheme "worker's compensation" is not always an officer's exclusive remedy, the failure to apply the fireman's rule even to the narrow situation of

an emergency operation creates its own far more serious "anomaly" that the California courts recognize also requires its application to emergency responses. Specifically, the anomaly avoided in California, but created by the trial court's decision here, is that the professional rescuer's doctrine/fireman's rule would exonerate the person creating an emergency but not "the fellow [safety official] whose presence and actions are in furtherance of the joint rescue operation." City of Oceanside, 96 Cal.Rpt. at 631. See also A-106 lns 11-14 (Plaintiff admits his interpretation of the professional rescuer/fireman's rule would protect only "the driver of the suspect vehicle" that actually ran over plaintiff). However, as previously noted, "[t]he same public policy considerations underlying the application of the firefighter's rule to exonerate the victim should also apply to exonerate a fellow [rescuer]" City of Oceanside, supra.

3) Cooper Dissent Creating Liability For Fellow Officers Is Unprecedented, Factually Inapplicable And Violates Washington's Statute And Public Policy

The trial court asserted that "an equally compelling policy

reason" for not applying the common law rule to emergency operations was the dissent in Cooper v. City of New York, 619 N.Ed.2d 369, 376-77 (N.Y. 1993)(Titone, J., dissenting), which argued the fireman's rule should not apply as between two "equally trained" officers where the plaintiff officer was a "passenger in a negligently driven car, [who] had no more opportunity than a member of the general public would have had to employ any special skills to avoid injury." See A-138 to A-139. However, such is neither a policy reason nor a compelling argument.

First, commentators note that Washington's courts do apply the professional rescuer doctrine to dismiss claims for acts of fellow officers. See 1-1 Premises Liability--Law and Practice § 1.05, n. 1.11. Second, in the more than 10 years since the dissent to the majority's holding in Cooper, that dissent has never been cited or relied upon by any court to bar emergency responders the benefit of the fireman's rule -- including the courts of the dissent's own state of New York. See e.g. Galapo, 744 N.E.2d at 688 (affirming dismissal of wrongful death suit against fellow policeman for accidental shooting); Soto v. Ortiz, 680 N.Y.S. 2d 552 (N.Y. App.

1998)(affirming dismissal of suit for injury caused by driving of fellow officer); Smullen v. City of New York, 625 N.Y.S. 2d 545 (N.Y. App. 1995)(reversing failure to dismiss where officer hit by car as result of partner's negligence); Dimiani v. City of Buffalo, 603 N.Y.S.2d 1006 (N.Y. App. 1993)(affirming dismissal of suit for shooting by fellow officers); Morrisey v. County of Erie, 603 N.Y.S.2d 1009 (N.Y. App. 1993)(reversing failure to dismiss suit for correctional officer's accidental shooting of policeman). See also e.g. Woods, supra (precluding officer's suit of city for accident during pursuit); McGhee, supra (barring suit against state police where it caused suspect vehicle to collide with officer); Calatayud, supra (officer accidentally shot by fellow officer during arrest attempt); McElroy, supra (patrol car collided with that of another officer during pursuit); Farnam, supra. (dog bite during an arrest).

Third, the adoption of the Cooper dissent for the first time here would not assist plaintiff because he was not injured as a passive "passenger in a negligently driven car, [who] had no more opportunity than a member of the general public would have had

to employ any special skills to avoid injury." Cooper, 619 N.Ed.2d at 376-77 (dissent). Rather, the face of the complaint confirms plaintiff was injured precisely while he was exercising his "special skills" as an officer and placing himself in harm's way running the wrong way on foot on I-5 at night as an emergency responder. A-3 ¶'s 3.3-3.5. See also A-48 lns 9-12; A-52.

Common law assumption of risk and the public policies served by applying the fireman's rule to emergency operations -- especially its "primary public policy reason [of] public safety" -- cannot be overcome by a more than decade old dissent from another state that has not been followed by its own or any other court. Instead, our state recognizes and enforces both assumption of the risk and its implementation through the professional rescuer's doctrine/fireman's rule. See e.g. Maltman, supra.; Black Indus., Inc., supra; Strong, supra. As demonstrated above, such required dismissal of the instant case as a matter of law and the failure to do so was obvious as well as probable error and warrants discretionary review.

F. CONCLUSION

The Superior Court candidly conceded and has certified that its order denying dismissal "involves controlling questions of law as to which there is substantial ground for a difference of opinion and that immediate review of those orders may materially advance the ultimate termination of the litigation." See A-133. Further, it also has been demonstrated above that this order is obvious error that renders further proceedings useless, probable error that substantially alters the common law and a statutory interpretation that creates "wide implications for governmental liability" and public safety. Accordingly, discretionary review is independently appropriate under RAP 2.3(b)(1), RAP 2.3(b)(2), RAP 2.3(b)(4) and Hartley v. State.

Pierce County therefore respectfully requests this Court accept review of the Superior Court's orders of June 15 and June 25, 2006, in order to determine whether the professional

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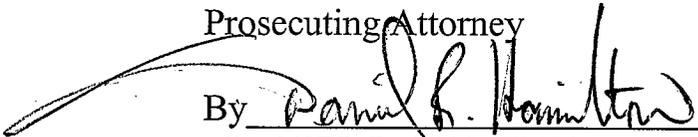
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rescuer's doctrine/fireman's rule makes it unnecessary for the parties to further litigate this action.

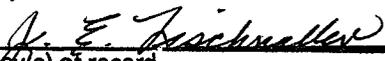
DATED: July 28th, 2006.

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CERTIFICATE

I hereby certify on 7-28-06
I delivered a true and accurate
copy of the attached document
to ABC LEGAL MESSENGERS, INC. for
delivery to:


attorney(s) of record


Prosecutor's Office