No. 1004460

SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF OLYMPIA,

Appellant,

v.

STEPHEN T. BRADLEY AND THE WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES,

Respondents.

RESPONDENT'S ANSWER TO APPELLANT'S PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The Respondent is Stephen Bradley ("Bradley").

II. INTRODUCTION

Bradley's bladder cancer is presumed by law to be caused by the occupation of firefighting. *RCW 51.32.185.* The City of Olympia's argument of "no it's not" fails to rebut the presumption.

There is no basis under RAP 13.4 for review. The City chose to ignore what is required to rebut the presumption by RCW 51.32.185, as interpreted by the Supreme Court in *Spivey v. City of Bellevue,* 187 Wash. 2d 716, 389 P.3d 504 (2017).

The City now seeks to change RCW 51.32.185 through the judicial process. That is not a basis for review.

III. STATEMENT OF THE CASE

A. Firefighter Bradley's bladder cancer is presumed to be occupational.

Bradley is a career firefighter who started with the City of Olympia in 1997. He became lieutenant in 2001. *CP 336:22-24.* He has worked at all four of the City's fire stations. *CP 335:19-23.* After repeated exposures to smoke, fumes and toxic substances as a firefighter Bradley was diagnosed with bladder cancer. Bladder cancer is a presumptive occupational disease. *RCW 51.32.185.*

B. The City provided no evidence that proves that non-occupational factors caused Bradley's cancer. Rejecting the presumption fails as a matter of law.

The City failed to produce any evidence from which a reasonable person could conclude that Bradley's bladder cancer was caused by non-occupational factors. Even the Department of Labor & Industries, in response to Bradley's motion for summary judgment, admitted:

(1) "The evidence the City of Olympia presented does not point to an alternate cause for Mr. Bradley's cancer." *CP 1288.*

(2) "The courts have agreed that to rebut an occupational disease presumption, is it is not enough to allege that the cause of the disease is impossible to determine or that there is a lack of studies showing a connection to occupational causes." *CP 1288.*

The City called three medical expert witnesses to testify: Drs. Vanasupa (treating surgeon), Torgerson (non-treating Urologist) and Weiss (Epidemiologist). Not one of these witnesses provided the required evidence to prove that **non-occupational factors** caused Bradley's bladder cancer. The City's strategy was to reject the presumption.

1. Dr. Vanasupa's testimony.

Dr. Vanasupa admitted that other than a history of smoking, he "can only speculate" as to a potential cause of bladder cancer. He then promptly admitted that Bradley was **not a smoker**: *CP 77:12-25.*

He was asked if he knows what Bradley did as a firefighter for the

City of Olympia, and he answered: "No, I do not." *CP 74:9-11.* He was asked if he knows the carcinogens to which firefighters are exposed in fire suppression, and he answered: "I do not know." *CP 74:15-23.*

He was unaware that Bradley could smell diesel exhaust in the recreation area, the sleeping areas and in the offices of the fire station. *CP 89:6-11.* He was unaware that Bradley would cough up black phlegm for one or two days after a fire. *CP 92:3-6.* He testified: "I do not know what Stephen Bradley was exposed to." *CP 74:7-8.*

2. Dr. Torgersen's testimony.

The crux of Dr. Torgersen's testimony was to reject the presumption as to bladder cancer. Dr. Torgerson's opinion is the exact type of testimony that the Court of Appeals held in *Gorre, id,* was insufficient to rebut the presumption. *See Rules No. 10 and 11 below.* Dr. Torgerson's opinion fails to prove causation by non-occupational factors, which fails to meet the *Spivey* Rule. *See Rule No. 8 below.*

Dr. Torgersen also knew almost nothing about the exposures of firefighters. *CP 279:5-25; CP 281:13-19; CP 297:24 - 298:5*; *CP 298:16-21.*

3. Dr. Weiss's testimony.

Dr. Weiss opined that, "[u]nderstanding the assumption of general

causation being true, it's still more likely than not that Mr. Bradley's bladder cancer did not arise from his work as a firefighter." *CP 188:7-10.* That is a rejection of the statute, and fails to meet the *Spivey* Rule (*Rule No. 8 below).* His opinion fell squarely within what the *Gorre* Rules make clear do not rebut the presumption. *See Rules 10 and 11 below.*

Dr. Weiss admitted that Bradley was a non-smoker and had no family history of bladder cancer. *CP 164:19 - 165: 5.* Dr. Weiss was read an excerpt from an article in the American Journal of Industrial Medicine, Mortality in Florida Professional Firefighters, 1972-1999:

> Q. "Other substances found more recently to be associated with an increased risk of bladder cancer include polycyclic aromatic hydrocarbons, diesel exhaust, and paint substances. Exposure to such chemical agents may occur through absorption by the skin, or inhalation by the lungs. Once processed in the body, such chemical agents may cumulate in the bladder and induce carcinogenic processes." Do you agree with that statement? *CABR 1647.*

Dr. Weiss admitted that he cannot contradict that. *CP 197:15 - 198:1.*

Dr. Weiss admitted that he does not know how many times, or for how long during Bradley's calls, Bradley was exposed to the carcinogen benzene, benzo[a]pyrene, or polycyclic aromatic hydrocarbons, in the 21 years that firefighter Bradley was a firefighter. *CP 178:7 - 179:1*

In the context of whether firefighters breathe smoke or have dermal exposures that contain benzene, polycyclic aromatic hydrocarbons,

benzo[a]pyrene, formaldehyde, chlorophenols, dioxins, ethylene oxide, orthotoluidine, polychlorinated biphenyl, vinyl chloride, methylene chloride, trichloroethylene, diesel fumes, arsenic or asbestos, Dr. Weiss admitted: "[I] don't known enough about firefighting to know how much of the skin is covered or uncovered, so I can only speculate." *CP 193:19 - 194:10*

Dr. Weiss's testimony was helpful in highlighting the **speculative** nature of the City's attempt to rebut the presumption. This is why: Dr. Weiss admitted that **he does not know all of the causes of bladder cancer**. *CP 180:2-6.* Dr. Weiss admitted that in **any** given sample of 100 cases of bladder cancer, **he cannot know all** of the causes of that bladder cancer **in any** of those 100 people. *CP 162:12-25*

Dr. Weiss testified that, "Our knowledge right now is quite incomplete, compared to what we hope it might be in the future." *CP 163:12-14.* He also testified that "There are many [risk factors] which we haven't identified. I'm not sure if we'd ever get to identifying them all, but it's developing." *CP 163:20-22.*

C. The Board incorrectly applied RCW 51.32.185.

The Board stated that, "The preponderance of the evidence was **NOT** persuasive that Bradley's bladder cancer arose naturally and proximately out of exposure from **other unknown activities, exposures and or his genetic**

makeup." [Bold added]. *CP 18:43 - CP 19:3; CP 5.*

Bradley should have prevailed at that point, because it was City's burden, per RCW 51.32.185 as interpreted by the Supreme Court in *Spivey, id.,* to, "[p]rovide evidence from which a reasonable trier of fact could conclude that the firefighter's disease was, more probably than not, caused by nonoccupational factors." *See Spivey Rule (Rule No. 8 below).*

Despite finding that the City **failed** to prove that Bradley's cancer was caused by non-occupational factors, the Board misapplied the presumption and decided that the City rebutted the presumption. *CP 19.* Because of the Board's error, Bradley appealed to the Superior Court.

D. The Superior Court correctly applied the law.

Bradley filed a motion for summary judgment in the Superior Court, as the City's case was built on rejecting the presumption – a strategy that the Appellate Court in *Gorre, id.,* had already determined was legally **insufficient** to rebut the presumption.

In response to Bradley's motion for summary judgment, the City argued that there are three "conceivable" non-occupational causes of bladder cancer: genetics, cigarette smoke and radiation. *CP 1278.* Each of these did not apply to Bradley, and were therefore irrelevant.

1. Genetics: No genuine issue. Bradley had no genetic predisposing disease.

Drs. Vanasupa, Weiss and Torgerson admitted that Bradley had **no history of bladder cancer in his family**. *CP 77:23-25; 164:25 - 165:2; and 298:19-21, respectively.*

2. Cigarette smoking. No genuine issue. Bradley is a non-smoker.

Dr. Weiss admitted that he reviewed Bradley's medical records and noted that in that record, Bradley was a nonsmoker. *CP 163:19-24.* Dr. Vanasupa admitted that Bradley "was not a smoker." *CP 77:20-22.* Dr. Torgeson admitted that Bradley was a nonsmoker. *CP 298:16-18.*

Bradley moved out of his family's house at age nineteen – almost **fifty years** before he was diagnosed with bladder cancer at age sixty-seven. *CP 376:17-18; 397:9-11;40:16-18.* Bradley was diagnosed with bladder cancer after consistently working amongst smoke, fumes and toxic substances as a firefighter.

The City did not create a question of fact as to causation by second-hand smoke with evidence that almost 50 years prior to Bradley's diagnosis he was exposed to second-hand smoke. *See Rule 11 below.* Even the Board found that, "The evidence of the claimant's history of exposure to secondhand smoke from other employment and non-employment activities **was insufficient**." [Bold added]. *CP 16:24-25; CP 5.*

The City failed to point to any place in the record where any one of its three experts claim that second-hand smoke caused Bradley's bladder cancer.

3. Radiation: No genuine issue. No evidence of non-occupational radiation exposure.

There is **no** evidence in the record that Bradley ever had any non-occupational radiation exposure. To simply testify that radiation exposure is a "potential cause" of cancer is irrelevant where, as here, there is no evidence of Bradley having had non-occupational radiation exposure. The City knows this, and does not cite to any testimony anywhere that Bradley actually had non-occupational radiation exposure.

In summary, the three "conceivable" non-occupational causes of bladder cancer argued by the City do not factually apply to Bradley. But, after years of exposures to smoke, fumes and toxic substances, Bradley got bladder cancer. *CP 1278.*

4. The Superior Court's decision was correct.

The Superior Court reviewed over 1,300 pages of the Board-record, considered the arguments of the parties and reviewed the applicable case law – and then entered an order granting summary judgment. *RP 21:16-25.*

E. The City appealed, and its arguments were not supported by the law.

Unable to prove that a non-occupational factor caused Bradley's cancer, the City sought (and seeks) to change the law. The Superior Court and Appellate Court upheld and properly applied the law.

F. Bradley's exposures to smoke, fumes and toxic substances.

Even though RCW 51.32.185 puts the burden of proof is on the City, and Bradley need not provide any evidence to support the presumption, Bradley provided overwhelming evidence to support that his bladder cancer is occupational. *CP 364:19-22, 364:23 - 365:9, 365:10-13, 365:14-25, 365:25 - 366:2, 367:8-14, 367:15-22,* 366:3-8, *366:23 - 367:1, 331-415, 265:16 - 267:6, 267: 4-6, 267:8-22, CP 439:13 - 440:2, 442:7-11, 443:1-17; 444:10-20, 445:17, 447:7-16, 449:8-13, 450:23 - 451:3, 452:2-13, 452:25 - 451:3, 263:1 - 264:1, 340:5-9, 342:3-5, 342:9-12, 431-432, 458:10-25.*

None of that evidence is necessary for Bradley to prevail because the presumption in RCW 51.32.185 already establishes that Bradley's bladder cancer is occupational and the City failed as a matter of law to rebut the presumption.

Because there is no competent, admissible evidence that any of the City's "three conceivable causes of bladder cancer" apply to Bradley, the City forces the fact finder to speculate to answer the ultimate question: If not his

occupation, what non-occupational factor in general, caused his bladder cancer? The presumption was never rebutted.

IV. LEGAL ARGUMENT

A. Introduction.

The City ignored the statute and the case law and hinged its defense around a rejection of the statute – a defense that even had the Board state: "[T]he preponderance of the evidence was **NOT** persuasive that Bradley's bladder cancer arose naturally and proximately out of exposure from other unknown activities, exposures and or his genetic makeup." (i.e. non occupational factors). [emph added]. *CP 18:43 - CP 19:3; CP 5.* The City did not appeal the Board's order.

The City cannot prove by a preponderance of evidence that Bradley's bladder cancer was caused by non-occupational factors. It fails to rebut the presumption because rebutting the presumption requires proof of causation by non-occupational factors.

This is consistent with:

(1) *The Spivey* Rule; *See Rule No. 8 below;*

(2) The *Gorre* Rules in the Appellate Court's written opinion, that if the cause cannot be identified or if there is no known association between the disease and firefighting then the firefighter maintains the presumption. *See*

Rules No. 10 and 11 below;

(3) The presumptive disease statute itself, which gives several examples of rebuttal evidence – and although not an exhaustive list, the rebuttable factors in RCW 51.32.185 all have one commonality: they are all identifiable non-occupational factors. *See RCW 51.32.185(1)(d).* Disagreeing with the presumption is not an identifiable, non-occupational factor.

The Supreme Court, as a general rule, reviews summary judgment orders de novo and engages in the same analysis as the trial court. *Borton & Sons, Inc. v. Burbank Properties, LLC,* 196 Wn.2d 199, 205, 471 P.3d 871, (2020). The Appellate Court followed the statute and this Court's decision in *Spivey, id.*

B. There is no basis for Supreme Court review of this case.

RCW 51.32.185 and the case law interpreting RCW 51.32.185 all point to one conclusion: The government does not rebut the presumption by rejecting the presumption. The rules for analyzing and applying the presumptive disease statute are best road-mapped as follows:

Rule No. 1: Bradley's bladder cancer is presumed by law (RCW 51.32.185) to be occupational. *See RCW 51.32.185.*

Rule No. 2: Because Bradley's bladder cancer is presumed by

RCW 51.32.185 to be occupational, the burden shifts to the City to rebut the presumption by a preponderance of the evidence. *See* RCW 51.32.185(1)(d).

Rule No. 3: The presumption in RCW 51.32.185 shifts both the burden of production and persuasion to the City. *Spivey, id.,* at 728.

Rule No. 4: "[R]CW 51.32.185 reflects a strong social policy, and thus we must accord it the strength intended by our legislature. The presumption does not vanish on the production of contrary evidence; it shifts both the burden of production and persuasion to the employer." *Spivey, id.,* at 731.

Rule No. 5: "We [the Washington State Supreme Court] note that RCW 51.32.185 reflects a strong social policy in favor of the worker [. . .]". *Spivey, id., at 721.*

Rule No. 6: "RCW 51.32.185 reflects the legislature's intent to relieve a firefighter of unique problems of proving that firefighting **caused** his or her disease." [bold added]. *Spivey, id.,* at 741–42.

Rule No. 7: The burden of proof to rebut the presumption is not met by merely rejecting the presumption. In *Spivey,* the Supreme Court pointed out that New Hampshire has an analogous firefighter statute. *id.,* at 733. In that vein, the Supreme Court proceeded to discuss the New Hampshire Supreme Court's opinion in *Cunningham,* 129 N.H. at 235, 525 A.2d 714,

and, referring to the NH Supreme Court, stated:

> The court reviewed the statute's legislative history and determined that its apparent purpose was to implement a social policy of providing compensation to firefighters in circumstances where medical evidence fails to establish the definitive cause of the plaintiff's heart disease. *id.,* at 733.

In *Spivey,* the Supreme Court also noted that, "New Hampshire and other courts have also noted that analogous presumptions serve the purpose of relieving firefighters of the "nearly impossible burden of proving firefighting actually caused their disease."" [citation omitted]. *id.,* at 734.

In *Spivey, id.,* the Supreme Court concluded that, "[t]he apparent purpose of adding melanoma to the list of covered diseases was to compensate firefighters even in circumstances when there may not be strong medical or scientific evidence establishing a definitive causal relationship between firefighting and the disease." *id., at 735.*

Here, Dr. Weiss admitted that " Our knowledge right now is quite incomplete, compared to what we hope it might be in the future." And "There are many risk factors which we have not identified."

The burden to rebut the presumption is not met merely by presenting witnesses to reject the presumption. The City must prove what non-occupational factor, in general, caused the disease. This leads to Rule No. 8 - the *Spivey* Rule.

Rule No. 8 (the *Spivey* Rule): The standard for rebutting the presumption "[r]equires that the employer provide evidence from which a reasonable trier of fact could conclude that the firefighter's disease was, more probably than not, **caused by nonoccupational factors.**" [Bold added]. *Spivey, id, at 735.*

In the *Spivey* Rule, the Supreme Court did **not** couch the City's burden as having to prove "[firefighting] **did not cause [the disease]**". [Bold added]. Instead, the burden is on the City to prove that "[the disease is] **caused by nonoccupational factors**". [bold added]. *Spivey, id., at 735.*

Rule No. 9 (the *Gorre,* Rule): If the cause of the disease cannot be identified by a preponderance of the evidence, the firefighter maintains the presumption. *See Gorre, id.,* at 758.

Rule No. 10 (the other *Gorre* Rule): Evidence that there is no known association between the disease and firefighting fails to rebut the presumption. *See Gorre, id.,* at 758.

The burden of rebutting the presumption was analyzed by the Appellate Court in *Gorre, id,* with the understanding that Gorre sought reversal in part due to the City's evidence failing to rebut the presumption. Analysis of the burden of rebutting the presumption was an essential part of the Appellate Court's written decision in *Gorre, id.* The *Gorre* Rules are not

dictum.

The Supreme Court in *Gorre* focused entirely on whether Lieutenant Gorre's disease (coccidioidomycosis) was a presumptive disease under RCW 51.32.185 and ultimately concluded that his disease did not apply to RCW 51.32.185. *id., at 34.* The Supreme Court had no need to and did not analyze the issue of the burden of proof to rebut the presumption.

Because the Appellate Court in *Gorre* determined that Lieutenant Gorre's disease was a RCW 51.32.185 presumptive disease, it analyzed the statute with respect to the burden of rebutting the presumption. The Appellate Court in *Gorre* gave specific rules about what evidence does **not** rebut the presumption (referred herein as the *Gorre* Rules), and nowhere does the Supreme Court reject or overturn those rules.

The *Spivey* Rule (Rule No. 8 above) works with, not against, the *Gorre* Rules.

Consider the first *Gorre* Rule, which is if the cause of the disease cannot be identified by a preponderance of the evidence, the firefighter maintains the presumption. This is consistent with the *Spivey Rule,* because where, as here, the City cannot identify the cause, it cannot prove what non-occupational factor, in general, caused Bradley's disease.

Consider the second *Gorre* Rule, which is that evidence that there is no known association between the disease and firefighting fails to rebut the

presumption. This is consistent with the *Spivey Rule,* because presenting witnesses who reject the presumption does nothing to prove what non-occupational factor, in general, caused Bradley's disease.

B1. Speculation does not rebut the presumption.

The City claims that it proved that firefighting activities do not cause bladder cancer, but the City relies on speculation to reach that conclusion. Here is why: Dr. Weiss was the City's "causation" expert. He admitted:

1. He does not know all of the causes of bladder cancer; *CP 180:3-6.*

2. That in **any** given sample of 100 cases of bladder cancer, he cannot know **all of the causes** of that bladder cancer **in any** of those 100 people. *CP 180 and 162, respectively.*

3. That the knowledge, with respect to the causes of cancer, are evolving over time, and that there are "many [risk factors] which we haven't identified." *CP 163:15-17; 163:20.*

4. All carcinogens have not yet been identified. *CP 163:23-25.*

5. "There are not data, among the firefighter studies, that address different types of exposures, in relation to cancers." *CP 180:15-17.*

It is speculation to claim that Bradley's exposure to carcinogens, smoke, fumes and toxic substances over years working for the City as a firefighter is not a cause, given these admissions.

There is a second layer of speculation within the City's argument.

Here is why: Bradley's bladder cancer has one or more causes. If Bradley's exposures as a firefighter did not cause his cancer, and because the City's supposed three "conceivable" causes did not cause Bradley's cancer, then it is **speculation** to claim that the cause is non-occupational – because the cause is unknown.

Rule No. 11: Speculation does not rebut the presumption. Where (as here) firefighting is presumed a cause of Bradley's bladder cancer, and where (as here) all causes of bladder cancer are unknown, it is speculation to claim that firefighting is not a cause.

Rule no. 12: "Importantly, speculation and conclusory statements will not preclude summary judgment." *Volk v. DeMeerleer,* 187 Wash. 2d 241, 277, 386 P.3d 254, 273 (2016). "The concern about speculative testimony is that the trier of fact will be forced to speculate as to causation without an adequate factual basis." *Id.*

"As this Court has stated, "it is well established that conclusory or speculative expert opinions lacking an adequate foundation will not be admitted." "In addition, when ruling on somewhat speculative testimony, the court should keep in mind the danger that the jury may be overly impressed with a witness possessing the aura of an expert."" [footnote/citations omitted]. *Miller v. Likins,* 109 Wn. App. 140, 148, 34 P.3d 835 (2001).

B2. There is no conflict with *Raum v. City of Bellevue.*

The City claims that the Appellate Court's opinion conflicts with *Raum v. City of Bellevue,* 171 Wn. App. 124, 286 P.3d 695, 710 (2012), and argues that in *Raum,* the city rebutted the presumption by disproving "general causation." That is objectively incorrect. Firefighter Raum lost his case, despite the presumption, because of the "concrete medical testimony that specific factors other than employment" caused his coronary artery disease. This is an excerpt from the Appellate Court's holding in Raum, id:

> And regardless of Raum's assertions regarding the medical literature, the City rebutted the presumption with concrete medical testimony that **specific factors other than employment—including genetic predisposition, high blood pressure**, and **high cholesterol**—caused Raum's coronary artery disease.

[Bold added]. Id., at 153. In *Raum,* the Appellate Court noted that:

- Dr. Thompson testified on a more probable than not basis that Raum's cardiovascular disease was related to high cholesterol and family history. *Id., at* 154.

- Dr. Maidan testified that Raum was a young man with very early coronary artery disease caused by high cholesterol, high blood pressure, and family history. *Id.*

- Dr. Yang testified that more probably than not, a variety of non-employment-related factors contributed to his cardiovascular disease. *Id.*

- Dr. Kim specifically testified that Raum's high cholesterol and family

history contributed to his coronary artery disease. *Id.*

This case is not analogous to *Raum*, because here, the City's own experts admit that the three conceivable causes did even not apply to Bradley. The City simply claims that the legislature is wrong. Unable to rebut the presumption, the City now proceeds to use the Court to rewrite legislation.

Immediately before the *Spivey* Rule, the Supreme Court states that, "this standard does not impose on the employer a burden of providing the specific cause [. . .]". *id.* Here, the Supreme Court could have stated that the employer has no burden to "provide the cause" or no burden to "provide a cause" or no burden to "provide a [or the] cause in general" – but it did not. That would have weakened the burden placed on the City by the legislature in RCW 51.32.185.

Rather, the Supreme Court only relieved the City of having to prove the *specific* cause. Immediately after that statement, the Supreme Court issued its rule, using the phrase "caused by nonoccupational factors" (rather than the phrase "disease was not caused by firefighting"). *Spivey, id.,* at 735.

The Supreme Court's qualification (that the City need not provide the *specific* cause) is the *Intalco* rule, but for employers. In *Intalco Aluminum v. Dep't of Labor & Indus.*, 66 Wash. App. 644, 833 P.2d 390 (1992), the Court of Appeals held that there is no requirement in the worker's compensation

statute that the claimant identify the *specific* toxic agent responsible for his disease or disability. *id,. at 656.*

Even though not required to prove the *specific* toxic agent that caused his or her disease, the non-firefighter worker (in a regular, non-presumptive worker's comp claim) still has the burden to prove that the disease arose from distinctive conditions of employment. *Intalco, id.* at 656.

In summary, in a regular (non RCW 51.32.185 presumptive) worker's compensation case, the worker need not identify the *specific* occupational agent that caused his disease, but he must still prove that his disease was caused by his occupation.

Similarly, in a RCW 51.32.185 presumptive disease case (where the burden is flipped onto the employer) although the City need not prove the *specific* non-occupational cause to rebut the presumption (e.g. the exact chemical or toxin), the City still must still prove by a preponderance of evidence that Bradley's bladder cancer was caused by (to use some of the examples in RCW 51.32.185(1)(d)) his lifestyle, or hereditary factors, or exposure from other employment or non employment activities – but in any case an actual non-occupational factor. There are none in this case.

The worker in *Intalco* had the burden of proving that his disease was occupational. The physicians could not identify the specific occupational

toxin that caused the worker's disease. *Intalco, id., at* 655. The Court of Appeals still ruled in the worker's favor. *id.,* at 647. The Court of Appeals noted that the physicians firmly concluded that "a toxin" (a non-specific factor) or "a combination of toxins" (a non-specific factor) present in the atmosphere of the Intalco pot room more probably than not caused the claimants' neurologic disease. *id.,* at 655.

The evidence in *Intalco* showed that the workers were exposed to known neurotoxins in the employer's pot room and that extensive investigations of the worker's medical and work histories revealed no other likely cause their disease. *id at 656.* In our case, the burden is flipped to the City, and the City has failed to show any relevant non-occupational exposure, either through Bradley's medical history, "other work" or otherwise.

RCW 51.32.185, *Raum*, *Gorre*, *Spivey* and now *Bradley* all work as a harmonious manual for the interpretation and application of the presumptive disease statute.

Because the City failed to show that any non-occupational factor caused Bradley's disease (even the Department admits this), the City claims that it has no such burden. The City argues a "general causation" theory. The legislature decided that bladder cancer was presumed to be an occupational disease. Presenting defense witnesses to reject that is nothing more than

attacking the legislature's policy decisions.

There is no **genuine** issue of fact that each of the supposed three "conceivable causes" have been proven not applicable to Bradley. The Court is left to speculate: Since the cause of Bradley's bladder cancer is not genetics, smoking or radiation, what is it? Speculation does not rebut the presumption.

Consider the City's epidemiologist's testimony: "There are many [risk factors] which we haven't identified. I'm not sure if we'd ever get to identifying them all, but it's developing." *CP 163:15-22.* "Our knowledge right now is quite incomplete, compared to what we hope it might be in the future." *CP 163:7-14.*

The City chose to ignore the case law and now seeks to use the Court to change the law.

C. There is no constitutional issue.

The City devoted one paragraph to its claim that there exists a Constitutional issue – making a fleeting reference to due process violations.

The City has not produced any authority that disagreements over the causal-connection between the toxic exposures to which firefighters are routinely exposed and bladder cancer is subject to a due process challenge. Instead, the City throws naked castings into the constitutional sea.

Rule 13: RAP 10.3(a)(6) requires that for any issue presented, the Petitioner must provide argument in support of the issue, together with citations to legal authority and references to relevant parts of the record. *RAP 10.3(a)(6).*

Rule 14: "Appellate courts should not be placed in a role of crafting issues for the parties; thus, mere " 'naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.' " " *Matter of Rhem,* 188 Wn.2d 321, 328, 394 P.3d 367 (2017), quoting *Williams,* 111 Wash.2d at 365, 759 P.2d 436 (internal quotation marks omitted) (quoting *In re Rosier,* 105 Wash.2d 606, 616, 717 P.2d 1353 (1986)).

Rule 15: "Constitutional arguments should not be addressed when they have not been adequately briefed." *City of Spokane v. Taxpayers of City of Spokane,* 111 Wn.2d 91, 96, 758 P.2d 480 (1988).

Second, there is overwhelming evidence supporting the causal-connection between bladder cancer and firefighting. *See section F above.*

Without any argument, authority and developed record, there can be no manifest error.

Rule 16: "The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the

defendant's rights; it is this showing of actual prejudice that makes the error "manifest", allowing appellate review. [. . .] If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." *State v. McFarland,* 127 Wn.2d 322, 333, 899 P.2d 1251 (1995), as amended (Sept. 13, 1995).

D. Attorney fees on appeal.

This request for fees is made under authority of RAP 18.1, RCW 51.52.130, and RCW 51.32.185(9). RCW 51.52.130(2) states: "In an appeal to the superior or appellate court involving the presumption established under RCW 51.32.185, the attorney's fee shall be payable as set forth under RCW 51.32.185." RCW 51.32.185 permits attorney fees here, as this is an appeal to Supreme Court from a decision involving the presumption established in RCW 51.32.185. Fees under RCW 51.32.185(9) apply to fees before the Board **and all** courts. *See Spivey, id.*

V. CONCLUSION

The Appellate Court interpreted and applied the law correctly. There is no basis for review. The City's argument is with the legislature.

The word count for the foregoing, excluding the Cover Page, Table of Contents and Table of Authority, is 4,999.

DATED: January 6, 2021

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Superior Court Case Number:	18-2-04848-3

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