NO. 1011199

SUPREME COURT OF THE
STATE OF WASHINGTON

THE ESTATE OF
DANIEL ALEXANDER MCCARTNEY, *et al*,

Appellants

v.

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

Respondent

PIERCE COUNTY'S *CORRECTED* ANSWER TO NATIONAL POLICE ASSOCIATION AMICUS CURIAE MEMORANDUM

MARY E. ROBNETT
Pierce County Prosecuting Attorney

By Daniel R. Hamilton,
WSBA # 14658
Deputy Prosecuting Attorney
930 Tacoma Ave S, Suite 946
Tacoma, WA 98402
253-798-7746

By Jana R. Hartman
WSBA# 35524
Deputy Prosecuting Attorney
930 Tacoma Ave S, Suite 946
Tacoma, WA 98402
253-798-7748

Table of Contents

Page

Table of Authorities

Page

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION

Amicus "National Police Association"[1] ("NPA") argues discretionary review should be granted because the courts below should have refused to enforce this Court's precedent and its progeny which decades ago settled "discretionary immunity" and the "professional rescuer doctrine" are defenses to negligence claims. *See* NPA Br. 3. This position is factually and legally unsupported, directly contrary to the appellate rules, decades of well-reasoned Supreme Court and Court of Appeals precedent, public policy and *stare decisis*.

II. NPA'S MISCHARACTERIZATIONS AND OMISSIONS

NPA's "Statement of Case" *mischaracterizes* the case. It begins by citing its own improper trial court declaration while omitting it was disallowed by the Superior Court in the *CR 12(c) motion to dismiss on the pleadings. Compare* NPA Br. 2

[1] Despite its chosen name, Amicus apparently is neither "nationally" known by – nor an "association" of – "police." *See* discussion 12/2/21 Resp. Opp. To NPA COA Mot. 1-3, 16.

(citing CP 66, 71-72, 76-84) *with* CP 177 (denying leave to appear as amicus).[2] NPA misleadingly describes the supposed conditions of Deputy McCartney's patrol area (District No. 10) -- despite it being *different from, and differently staffed than,* the location where the events at issue *actually occurred* (District No. 7). *Compare* NPA Br. 2 *with* CP 4; Answer to Pet. 3; *Estate of McCartney by & through McCartney v. Pierce Cnty.*, 513 P.3d 119, 124-125 (2022).

NPA claims the case involves the Sheriff failing "to provide proper training and support that could have prevented the tragedys [sic]," NPA Br. 3, but the Court of Appeal's recognition of the pleadings and documents judicially noticed establish McCartney was properly trained but he did not follow that training. *See* 513 P.3d at 132 n. 9; Ans. to Pet. 5 n. 2. *See*

[2] NPA's declaration of Joel Schultz is singularly unhelpful in reviewing an order on the pleadings since it simply concerns his irrelevant opinions based on a "review of two articles concerning the effects of … staffing decisions" and "their application" by him "to the facts alleged." CP 65, 74-75.

also McIver v. City of Spokane, 182 Wn.App. 1034, *5 (2014)(there is "no authority" a municipal employee "is permitted to bring a negligent supervision claim against her employer for her own personal injury.")

As shown below, when NPA then provides its legal analysis, it likewise misstates the law.

III. ANALYSIS

A. NPA ALONE CITES RAP 13.4(b)(4) AND CLAIMS IT IS MET

Unlike Plaintiffs' Petition, *see* Pet. iii-iv, NPA cites RAP 13.4(b)(4) -- but does so only as to "discretionary immunity." *See* NPA Br. 6. *Every sentence* on that page thereafter NPA repeats its assertion that review to overturn discretionary immunity precedent somehow is required to sustain social "order" and avoid "disorder." *See* NPA Br. I, 1, 4, 6-8, 10, 12, 14. It nowhere identifies how the 911 call involved "social disorder"– much less how "discretionary immunity" caused it. NPA asserts an authoritarian *ipse dixit* that "Maintaining Public

Order Is a Supra Constitutional Imperative" so this Court should "relax traditional rules of law" to prevent some amorphous public "disorder." *Id.* at 4, 7-8.

The Petition itself neither mentions RAP 13.4(b)(4) nor argues it as required by RAP 13.4(c)(7). *See* Pet. iii-iv; Ans. to Pet. 9-11; *Matter of Mines*, 186 Wn.2d 1001, 395 P.3d 997 (2016)(discretionary review denied because Petitioner "does not make this showing" required by RAP 13.4(b) but "argues only that the Court of Appeals erred"). NPA cannot supply what is missing from that Petition. *See e.g. State v. Xiong*, 164 Wn.2d 506, 191 P.3d 1278 (2008) ("Amicus cannot raise an issue not properly raised by a party to the case"); *Madison v. State*, 161 Wn.2d 85, 163 P.3d 757 (2007) ("[t]his court does not consider issues raised first and only by amici").

NPA's argument tries to link "discretionary immunity" and the "professional rescuer doctrine" to "social disorder" – simply through repetition of an appeal to fear. This does not meet the RAP 13.4(b)(4) burden of showing the decision below

regarding discretionary immunity is "an issue of *substantial public interest.*" That rule requires a showing such as the "decision … has the potential to affect a number of proceedings in the lower courts" and that "review will avoid unnecessary litigation and confusion on a common issue." *See e.g. In re Flippo*, 185 Wn.2d 1032, 380 P.3d 413, 414 (2016) (citing *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005)). Neither the Petition, nor NPA, make such a showing.

This Court has rejected a suit contesting a county's legislative decision that actually *reduced* the number of sheriff's deputies – rather than, as here, merely did not increase them to the extent a plaintiff wished.[3] Even when this Court recognized a County legislature's *reduction* of sheriff's staff "was improvident and ill considered" and "the sheriff's office will be hampered by the reduction in force," it held in *Farmer*

[3] The police funding at issue is the Council's discretionary decisions to *increase* the Sheriff's Department expenditures. *See* CP 3.

v. Austin, 186 Wn.577, 583, 59 P.2d 379 (1936) the "remedy lies with the electors rather than in the courts" because "the harm will not be nearly as great as would be the consequences of the interference by the courts with the executive duties of the board of county commissioners, in whom is reposed the financial management of the county's affairs."

NPA neither complies with the appellate rules nor provides a basis for holding "traditional doctrines limiting judicial intervention" in immune discretionary decisions should be "relaxed." *See* NPA Br. 4, 8.

B. REQUIREMENTS FOR DISCRETIONARY REVIEW AND ABOLITION OF PROFESSIONAL RESCUER DOCTRINE ARE NEITHER ACKNOWLEDGED NOR MET

1. NO SHOWING RAP 13.4 REQUIREMENTS MET FOR DISCRETIONARY REVIEW OF PROFESSIONAL RESCUER DOCTRINE

Though not citing RAP 13.4(b)(4), *see* NPA Br. 10-15, NPA repeats its earlier assertion the professional rescuer doctrine also somehow is "inimical" to the Court's supposed

"overarching duty to maintain public order." NPA Br. 12. NPA speculates there must be "substantial public interest … whether or not the judiciary should, on its own initiative, *immunize local governments* from the consequences of their decisions to hire so few police as to *create significant public disorder*, going so far as to create circumstances where officers should (according to the County's Answer) apparently be trained to 'shelter in place' notwithstanding screaming victims until some sort of backup can arrive." NPA Br. 14-15 (emphasis added).

NPA fails to identify any "significant public disorder" at issue, much less how the County's allocation of scarce resources "create[d]" it. *See also supra*. n. 4. The professional rescuer doctrine does not "immunize local governments" - it is a defense available to *any* defendant when its test is met. *See e.g. also Maltman v. Sauer*, 84 Wn.2d 975, 981, 530 P.2d 254 (1975). Plaintiffs under RCW 41.26.281 are allowed to bring tort claims against a deputy's employer *only* "as otherwise provided by law," and the professional rescuer doctrine is such

a defense "otherwise provided by law." *See e.g. Hansen v. City of Everett*, 93 Wn.App. 921, 924-25, 971 P.2d 111 (1999).

The "County's answer" nowhere agrees its deputies were trained to "shelter in place notwithstanding screaming victims until some sort of back up can arrive." *See* CP 20-33. Plaintiffs' complaint establishes: 1) Deputy McCarthy was trained "to wait for back-up on dangerous calls;" 2) he pursued armed intruders alone *after* they were *running away* from the victims while someone was yelling *at* the fleeing suspects to "get out of here," and 3) backup arrived less than 3½ minutes after he broadcast he had begun his solo pursuit. *See* CP 6, 17.

The requirements for discretionary review of the professional rescuer doctrine have not been met.

2. NO SHOWING THAT REQUIREMENTS FOR ABOLITION OF PROFESSIONAL RESCUER DOCTRINE ARE MET

NPA asserts this Court should "[a]bolish" the professional rescuer doctrine" as "outmoded" because "[m]odern tort law has evolved away from the professional rescuer doctrine as

being patently inconsistent with general rules for assumption of risk in torts." NPA Br. 10-11. Petitioners have not expressly requested this Court overturn its precedent, much less made this particular argument, *see* Pet. at 2-3, 20-27, and a "case must be made by the parties' litigant, and its course and the issues involved cannot be changed or added to by friends of the court." *Long v. Odell*, 60 Wn.2d 151, 154, 372 P.2d 548 (1962)(quotation marks and citation omitted).

NPA does not cite any tort law precedent, but instead relies on its *mischaracterizations* of *legislative enactments* from *two* states. *See id. (citing* N.J. Stat. Ann. § 2A:62A-21 (allowing officers to sue for negligence, with the express exception the right applies only to those "*other than* that law enforcement officer's… *employer or co-employee")*(emphasis added); *Christensen v. Murphy*, 296 Or. 610, 678 P.2d 1210, 1218 (1984) (holding "firemans' rule" was abolished "[*a]s a result* of *statutory* abolition of implied assumption of risk")). NPA cites no Washington legislation abolishing the professional rescuer

doctrine or implied assumption of risk.

As this Court has noted, there are "*four types* of assumption of risk" and held the professional rescuer doctrine instead "is a type of *implied primary* assumption of the risk defense." *Beaupre v. Pierce County*, 161 Wn.2d 568, 572, 166 P.3d 712 (2007) (citing *Scott By & Through Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 499, 834 P.2d 6 (1992)(emphasis added). In its earlier S*cott* decision, this Court had confirmed that "*unreasonable* assumption of the risk is assumption in the secondary sense which *does not bar all recovery,*" but that "*primary implied* assumption of risk should *continue to be an absolute bar* after the adoption of comparative fault because in this form it is a principle of 'no duty' and hence no negligence, thus negating the existence of any underlying cause of action." *Id*. at 495, 497-499 (emphasis added).

NPA's citation to *Anderson* does not support its argument because it expressly addressed the *different* "implied

unreasonable assumption of risk," and cited *Scott* for the principle which NPA misinterprets. *Anderson v. Akzo Nobel Coatings, Inc*., 172 Wn.2d 593, 260 P.3d 857 (2011). After *Anderson* this Court reaffirmed that "(express or implied) assumption of risk operates as a *bar to recovery*." *Stout v. Warren*, 176 Wn.2d 263, 279, 290 P.3d 972 (2012)(emphasis added). *See also Maltman*, 84 Wn.2d at 979 (affirming *dismissal of suit* estate of decedents because a "professional rescuer *may not collect damages"* when the "hazard ultimately responsible for causing the [rescuer's] injury is inherently within the ambit of those dangers which are unique to and generally associated with the particular rescue activity.")

Almost 50 years of our state's professional rescuer precedent after *Maltman* cannot be overturned by NPA asserting it thinks this Court should "update and refocus Washington tort law …." NPA Br. 5. *Stare decisis* instead requires precedent be *followed* unless it "has been shown to be incorrect and harmful," or "the legal underpinnings of our

precedent have changed or disappeared altogether." *Deggs v. Asbestos Corp*., 186 Wn. 2d 716, 728-730, 381 P.3d 32 (2016) (quoting *W.G. Clark Constr. Co. v. P. NW Reg'l Council of Carpenters*, 180 Wn.2d 54, 66, 322 P.3d 1207 (2014)) (emphasis added). The County has shown the professional rescuer's doctrine *is not* "incorrect and harmful," and that "the legal underpinnings" of that precedent has neither "changed [n]or disappeared altogether." *See e.g.* Cy's Corrected Resp. Br. 53-55.

Adherence to precedent "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *See State v. Johnson*, 188 Wn.2d 742, 756, 399 P.3d 507 (2017)(quoting *Keene v. Edie*, 131 Wn.2d 822, 831, 935 P.2d 588 (1997); *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). The law must be reasonably certain, consistent, and predictable so as to allow citizens to guide their conduct in society, *see In re Matter of*

Mercer, 108 Wn.2d 714, 720–21, 741 P.2d 559 (1987), and to allow trial judges to make decisions with a measure of confidence. *See State v. Stalker*, 152 Wn.App. 805, 810–11, 219 P.3d 722 (2009). Accordingly, this Court does "not lightly set aside precedent," *id*. (citing *State v. Kier*, 164 Wn.2d 798, 804, 194 P.3d 212 (2008)), but requires the above described showing to avoid the law being seen as "subject to incautious action or the whims of current holders of judicial office." *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)).

3. NO SHOWING COURT OF APPEALS ERRED IN APPLYING PROFESSIONAL RESCUER DOCTRINE

NPA argues the Court of Appeals "[m]isconstrues the Doctrine" because the latter bars recovery "from the party whose negligence cause [sic] the rescuer's presence at the scene," yet the "County did not generate the disturbance that brought Deputy McCartney to the scene" and the doctrine "does

not apply to negligent or intentional acts of intervening parties not responsible for bringing the rescuer to the scene." NPA Br. at 13. *See also* Pet. at 25-26.

As authorities have observed, "in passing upon petitions for review" this Court "is *not operating as a court of error*" but "functioning as the highest policy-making judicial body of the state," so discretionary review requires showing "there is a *compelling need* to have the issue or issues presented decided generally" so the issues "*transcend the particular application of the law in question*." Ans. to Pet. 10 (quoting Washington Appellate Practice Deskbook, 27-8 to 27-9 (Wash. State Bar Assoc. 1993 & Supp. 1998)(emphasis added). NPA does not allege the error in the Court of Appeal's application of the doctrine meets any of these requirements.

NPA also makes no attempt to refute the Court of Appeals analysis that rejected its argument because the alleged "negligence on the part of the County took place *before* McCartney began his rescue attempt, and there was no such

intervening act by the County," while the intervening negligence exception to the doctrine "applies only where the employer is 'guilty of some negligence toward the rescuer *after* he, the rescuer, has begun to attempt the rescue.'" *See McCartney* 513 P.3d at 135 (citing *Maltman*, 84 Wn.2d at 982; quoting *Beaupre*, 161 Wn.2d at 571-72) (emphasis added). NPA makes no attempt to rebut the County's response to the Petition that further noted the supposed "negligent funding, hiring, recruiting, deployment or other policy decisions made years earlier cannot be intervening since such 'alleged negligence occurred before [the rescuer] responded" and had not "created a new or unknown risk' as the exception requires." *See* Ans. to Pet. 24-25 (quoting *Loiland v. State*, 1 Wn.App.2d 861, 869, 407 P.3d 377 (2017), *rev. denied*, 190 Wn.2d 1013 (2018); *Markoff v. Puget Sound Energy, Inc*., 9 Wn.App.2d 833, 845, 447 P.3d 577 (2019).

Because NPA refuses to acknowledge these identified and fully briefed defects in the alleged alternative professional

rescuer claim of error, it fails to meet the requirements for discretionary review. Deciding the Petition's alternative professional rescuer issue would not avoid dismissal since the suit was properly dismissed on the independent ground of discretionary immunity.

IV. CONCLUSION

It is requested this Court deny discretionary review.

I certify that this brief contains 2,499 words and is in compliance with the length limitations of RAP 18.17(c).

DATED this 17th day of OCTOBER 2022.

MARY E. ROBNETT
Pierce County Prosecuting Attorney

s/ DANIEL R. HAMILTON
DANIEL R. HAMILTON, WSBA # 14658
Deputy Prosecuting Attorney / Civil
930 Tacoma Avenue South, Suite 946
Tacoma, WA 98402-2160
Ph: 253-798-7746 / Fax: 253-798-6713
dan.hamilton@co.pierce.wa.us
Attorneys for Respondent Pierce County

s/ JANA R. HARTMAN
JANA R. HARTMAN, WSBA # 35524
Deputy Prosecuting Attorney / Civil
930 Tacoma Avenue South, Suite 946

Tacoma, WA 98402-2160
Ph: 253-798-7748 / Fax: 253-798-6713
jana.hartman@piercecountywa.gov

CERTIFICATE OF SERVICE

On October 17, 2022, I hereby certify that I electronically filed the foregoing PIERCE COUNTY'S *CORRECTED* ANSWER TO NATIONAL POLICE ASSOCIATION AMICUS CURIAE MEMORANDUM with the Clerk of the Court which will send notification of such filing to the following:

- **Joan Mell:** joan@3brancheslaw.com

s/ URSULA JOHNSON
URSULA JOHNSON
Legal Assistant / Civil
930 Tacoma Avenue South, Suite 946
Tacoma, WA 98402-2160
Ph: 253-798-6257/Fax: 253-798-6713
ursula.johnson@piercecountywa.gov

PIERCE COUNTY PROSECUTING ATTORNEY CIVIL DIVISION

October 17, 2022 - 3:33 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,119-9
Appellate Court Case Title:	The Estate of Daniel A. McCartney, et al. v. Pierce County
Superior Court Case Number:	21-2-04582-2

The following documents have been uploaded:

- 1011199_Answer_Reply_20221017151611SC067877_1263.pdf
  This File Contains:
  Answer/Reply - Other
  The Original File Name was Pierce Countys CORRECTED Answer to SCt Amicus Curiae filed by NPA.pdf

A copy of the uploaded files will be sent to:

- TorTacEF@atg.wa.gov
- ccaldwell@mbllp.com
- jana.hartman@piercecountywa.gov
- jbuchal@mbllp.com
- joan@3brancheslaw.com

Comments:

Sender Name: Ursula Johnson - Email: ursula.johnson@piercecountywa.gov
Filing on Behalf of: Daniel Ray Hamilton - Email: dhamilt@co.pierce.wa.us (Alternate Email: pcpatvecf@piercecountywa.gov)

Address:
930 Tacoma Ave S Ste 946
Tacoma, WA, 98402-2160
Phone: (253) 798-6732

Note: The Filing Id is 20221017151611SC067877