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CLERK

SUPREME COURT OF THE STATE OF WASHINGTON

SUPREME COURT NO. 101119-9
COA DIV. II No. 556634

THE ESTATE OF DANIEL ALEXANDER MCCARTNEY; by and through Personal Representative CIERRA RENAE MCCARTNEY; CIERRA RENAE MCCARTNEY, individually and as the marital community of Cierra Renae and Daniel Alexander McCartney; TYTUS JOHN ALEXANDER MCCARTNEY, minor child of Daniel and Cierra McCartney; TATE DANIEL MCCARTNEY, minor child of Daniel and Cierra McCartney; and TRAXTON LANE MCCARTNEY, minor child of Daniel and Cierra McCartney
Appellants,

v.

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

APPELLANTS' RESPONSE TO CLERK'S MOTION TO STRIKE AND COUNTERMOTION TO FILE AMENDED PETITIONER BRIEF WITH RAP 13.4(c)(7) REFERENCES

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I. Name and Designation of Person Filing the Motion

Appellants McCartney

II. Statement of Relief Sought

Appellants McCartney answer the Clerk's September 12, 2022 Motion to Strike their Reply Brief to their Petition for Supreme Court Review and request the motion be denied. Alternatively, Appellants McCartney counter-move to file the Affixed Amended Petition for Supreme Court Review and permit Respondent time to file an Amended Response.

III. References to the Record

McCartneys rely upon the Clerk's September 12, 2022 Letter affixed at **Appendix A** and their Amended Petition affixed at **Appendix B** as well as Respondent Pierce County's Response to McCartneys' Petition for Review.

IV. Grounds for Relief and Argument

On July 28, 2022, the appellants Estate of Daniel McCartney, his wife and three children petitioned for Supreme

Court review of Division II's opinion that upheld the trial court's dismissal of their wrongful death negligence case against Pierce County on absolute immunity grounds – discretionary immunity and the professional rescuer doctrine. On August 25, 2022, Respondent Pierce County filed its Answer. Pierce County insisted the Court should dismiss McCartney's petition because the petition does not expressly cite RAP 13.4(b). Answer at 1. Pierce County further argues the RAP 13.4 grounds are not argued. *Id.* McCartneys do not concede the grounds were not argued, indeed the constitutional conflict was expressly argued in particular at page 13: "Division II holds otherwise and concludes Pierce County may in its discretion disregard officer safety a concept wholly and completely foreign to Washington's constitutional and statutory scheme." On September 9, 2022, McCartneys addressed Pierce County's RAP 13.4 arguments in their Reply. On September 12, 2022, the Clerk moved to strike the Reply citing RAP 13.4(d) that restricts a Reply to "addressing

only the new issues raised in the answer." The Clerk gave notice that the parties may respond by September 28, 2022.

McCartney's respond to the Clerk's motion in opposition and move for the alternative relief of filing an amended petition for review. With regard to RAP 13.4(d), McCartneys do not read RAP 13.4(c)(7) to dictate citation to the RAP. However, admittedly a specific cite adds certainty that McCartneys are amenable to clarifying. Given the absence of any rule requirement mandating a citation, it appears within RAP 13.4(d) to add the clarity in a Reply because Respondent first raised the issue in its Response. McCartney's would be substantially prejudiced were the Reply stricken and their petition denied because McCartneys did not use the specific verbiage "RAP 13.4(b)(1),(3), and (4)" in its petition.

In the alternative, McCartneys have prepared an amended petition and move here for leave to file the Amended Petition to cure any omission that may otherwise be fatal to Supreme Court review. McCartneys set forth with clarity by amending its

captions and adding content from its Reply into a proposed amended brief that should eliminate entirely Respondents procedural arguments. The amended brief states expressly that the Supreme Court should accept review because Division II's opinion conflicts with Supreme Court decisions on the scope of governmental immunity and the waiver of sovereign immunity and the constitutional duties of an employer to make working conditions reasonably safe. Further, Division II's decision involves significant questions of law under Washington's Constitution, Const. art. II § 35 – Employer's duties to make working conditions safe as well as McCartneys' rights to redress and due process and the waiver of sovereign immunity. Finally, McCartneys' petition involves issues of substantial public interest involving officer safety, employer accountability for officer safety, discretionary immunity, and the professional rescuer doctrines, as well as evidentiary issues regarding hyperlinks and judicial notice of non-specified content not in the record that is otherwise inadmissible under the rules of evidence.

McCartneys have no objection to Respondent amending its Answer to the Amended Petition if the alternative relief is granted.

RESPECTFULLY SUBMITTED this 28th day of September, 2022.

III BRANCHES, PLLC

BY: JOAN K. MELL
LAWYER FOR APPELLANTS MCCARTNEY

I certify that the above response and counter-motion complies with the word count requirements of RAP 18.7 in that the word count is 630, less than the 5,000 word count requirement.

CERTIFICATE OF SERVICE

I, Francis Muniz-Nava, hereby certify that I electronically filed the foregoing APPELLANTS' RESPONSE TO CLERK'S MOTION TO STRIKE AND COUNTERMOTION TO FILE AMENDED PETITIONER BRIEF WITH RAP 13.4(c)(7) REFERENCES with the Clerk of the Clerk and delivered a true and accurate copy by electronic mail to the following:

MARY E ROBNETT
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I certify under penalty of perjury under the laws of the State of Washington that the above information is true and correct.

DATED this 28th day of September, 2022 at Fircrest, WA

Francis Muniz-Nava, Legal Assistant

APPENDIX A

ERIN L. LENNON
SUPREME COURT CLERK

SARAH R. PENDLETON
DEPUTY CLERK/
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THE SUPREME COURT
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September 12, 2022

LETTER SENT BY E-MAIL ONLY

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Re: Supreme Court No. 101119-9 – The Estate of Daniel A. McCartney, et al. v. Pierce County
Court of Appeals No. 55663-4-II

Counsel:

On September 9, 2022, the Court received the Petitioners' "REPLY TO PETITION FOR SUPREME COURT REVIEW."

The Rules of Appellate Procedure only allow for the filing of a reply to an answer "if the answering party seeks review of issues not raised in the petition for review." See RAP 13.4(d). Any such reply "should be limited to addressing only the new issues raised in the answer." See RAP 13.4(d).

In this case, it does not appear that the answer seeks review of issues not raised in the petition for review. Therefore, the reply does not appear to be permitted under the rules.

Accordingly, a clerk's motion to strike the reply will be set for consideration without oral argument by a Department of the Court at the same time that the Court considers the pending petition for review. Any answer to the motion to strike the reply should be served and filed by September 28, 2022.

Sincerely,

Sarah R. Pendleton
Supreme Court Deputy Clerk

SRP:jm

APPENDIX B

SUPREME COURT OF THE STATE OF WASHINGTON

SUPREME COURT NO. 101119-9
COA DIV. II No. 556634

THE ESTATE OF DANIEL ALEXANDER MCCARTNEY; by and through Personal Representative CIERRA RENAE MCCARTNEY; CIERRA RENAE MCCARTNEY, individually and as the marital community of Cierra Renae and Daniel Alexander McCartney; TYTUS JOHN ALEXANDER MCCARTNEY, minor child of Daniel and Cierra McCartney; TATE DANIEL MCCARTNEY, minor child of Daniel and Cierra McCartney; and TRAXTON LANE MCCARTNEY, minor child of Daniel and Cierra McCartney
Appellants,

v.

PIERCE COUNTY, a municipal corporation, located inWashington state,
Respondent.

APPELLANTS MCCARTNEYS' AMENDED PETITION FOR SUPREME COURT REVIEW

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A. PUBLISHED OPINION

INTRODUCTION

The McCartney family seeks reversal of Division II's holding that Pierce County has absolute discretionary immunity for putting Deputy McCartney in harm's way even when Pierce County did not fulfill its duties to make his working conditions reasonably safe. Division II held as a professional rescuer McCartney assumed the risk of his employer's negligence, even when Pierce County ignored its duties as an employer to mitigate known working conditions that were impermissibly unsafe that if corrected would have saved Deputy McCartney's life. With proper recruitment, retention, training, and supervision Deputy McCartney would not have undertaken a solo foot pursuit against fleeing armed assailants. He would still be alive today. Pierce County should be liable for its negligence in causing his untimely death.

I. IDENTITY OF PETITIONER

The Estate of Daniel Alexander McCartney by and through Personal Representative Cierra McCartney,

Cierra McCartney, Deputy Daniel McCartney's spouse, and their three children.

II. COURT OF APPEALS' DECISION

Appellants McCartney petition for Supreme Court review of Division II's published opinion dated June 28, 2022, Appendix A, that dismissed their negligence case against Pierce County under governmental discretionary immunity and the professional rescuer doctrine.

III. ISSUE PRESENTED FOR REVIEW

A. Did Division II erroneously dismiss McCartneys' Complaint?

1. Discretionary Immunity

Whether Pierce County's duties to make patrol reasonably safe for Deputy McCartney were purely discretionary?

2. Professional Rescue Doctrine

a. Whether the professional rescuer doctrine is a defense applicable to a negligent employer?

b. Whether Pierce County's negligence in failing to make working conditions reasonably safe is an intervening act for

which it has no professional rescuer immunity?

c. Whether Deputy McCartney assumed the risk of his employer's negligence?

d. Whether the professional rescuer doctrine is an absolute bar or comparative fault defense when the employer has been negligent with regard to its duties to make working conditions reasonably safe?

B. Did Division II err when considering hyperlink content not in the record?

1. Whether the Court erred when taking judicial notice of hyperlink content without identifying what facts its was judicially noticing?

2. Whether judicial notice of voluminous audio-visual content found via hyperlinks referenced in footnotes is proper when the content would otherwise be inadmissible under the rules of evidence and is not discretely identified the record?

IV. STATEMENT OF THE CASE

A. Pierce County's Unsafe Patrol Practices

When Pierce County deployed deputy Daniel McCartney to patrol remote Pierce County on his own on January 7, 2018, Pierce County knew from repeated advice from its hired

consultants that McCartney was unsafe.[1] Pierce County chose to ignore its consultants and deployed young deputies like McCartney on patrol on their own without sufficient rest and without taking reasonable precautionary steps to make sure its deputies returned home alive.[2] Deputy McCartney did not return home alive as predicted because due to the lack of supervision and training he undertook a solo foot pursuit where he was ambushed and murdered.[3] He was on his own without enough sleep, without a partner, without a supervisor, and without a policy or training to permit him to stand down.[4]

B. Deputy McCartney Did Not Agree to Work Unsafely

McCartneys pointed out Pierce County had a constitutional duty to make Deputy McCartney's working conditions reasonably safe.[5] McCartney was a young officer

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[1] CP 11 (Complaint).
[2] *Id.* at 4-5.
[3] *Id.* at 6.
[4] *Id.* at 4-5.
[5] CP

relatively new to the department.[6] He was not a manager and did not know about the various egregious department deficiencies when he hired on with Pierce County.[7] He did not consent to substandard working conditions, nor were those substandard conditions within his control.[8] Pierce County was operating well below standard.[9] The various deficiencies included inadequate recruiting and hiring practices, poor scheduling and time management practices, inadequate training and supervision, lack of necessary foot pursuit written policies, and instruction on such policies to make sure its deputies did not undertake risky cowboy heroics but rather, were incentivized to take appropriate precautions to include standing down.[10]

C. Pierce County Avoided Discovery Claiming Absolute Immunity

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[6] CP 3.
[7] *Id.*
[8] *Id.* at 13.
[9] *Id.* at 10, 15.
[10] Id. at 14 - 18.

Pierce County moved to dismiss the case on the Complaint well in advance of any discovery that would have fleshed out the various employer deficiencies or substandard practices more completely.

In short, Division II decided that absolute immunity was good public policy because Counties would otherwise hesitate to send "law enforcement officers into dangerous situations." McCartneys point out law enforcement officers should never be sent out into dangerous situations without the support and training they need to survive and come back home. The Division II decision should be reversed.

V. ARGUMENT

A. RAP 13.4(b)(1) and (3). Division II's Holding Conflicts with Supreme Court Decisions on Scope of Government Liabilities Given Waiver of Sovereign Immunity and Basic Negligence Principles and Raises Significant Questions of Law Under Well Established Constitutional Principles

With regard to conflicts in the law, in *Beaupre v. Pierce County*, 161 Wn. 2d 568 (2007), this Court recognized public safety officers may sue their employer for negligence to address

lack of training or safety in the field. Division II's McCartney decision holds that despite lack of training and disregard of standard safety precautions, local governments have absolute immunity when deploying a public safety officer. Division II's holding is wholly inconsistent with *Beaupre* and cases like *Fray v. Spokane County*, 134 Wn. 2d 637, 952 P.2d 601 (1996) and *Alfoa v. Port of Seattle*, 176 Wn. 2d 460, 296 P.3d 800 (2013), and *Dept. of L&I v. Tradesmen International, LLC*, 198 Wn. 2d 524, 497 P.3d 353 (2021).

With regard to questions of legal significance, state statute expressly authorizes law enforcement officers and their loved ones to bring civil action against a public employer who is negligent, RCW 41.26.281. The Supreme Court has not previously held that its common law doctrines of discretionary immunity and the professional rescuer doctrine apply as an absolute bar to the unsafe deployment of patrol officer given the

Constitutional protections of Art. II Sec. 35.[11] The Supreme Court has not historically permitted its common law doctrine to stray so far, leaving an outcome that is untenable and public safety officers with no remedy. Courts are required to weigh "mixed considerations of logic, common sense, justice, policy, and precedent." *Stalter v. State*, 151 Wn. 2d 148, 155, 83 P.3d 1159 (2004). Yet, Division II adopted Pierce County's argument that law enforcement officers are expendable, an obviously unjust outcome. Division II decided a police department has the discretion to deploy its patrol officers unsafely when this Court has repeatedly said no employer has such discretion, Dept. *L&I v. Tradesmen International, LLC*, 198 Wn. 2d 524, 497 P. 3d 353 (2021). With regard to dangerous professions, the Constitution

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[11] "**SECTION 35 PROTECTION OF EMPLOYEES.** The legislature shall pass necessary laws for the protection of persons working in mines, factories, and other employments dangerous to life or deleterious to health; and fix pains and penalties for the enforcement of the same."

compels the employer to take precautions, and by statute promises a cause of action in negligence to enforce it.

Division II summarily decided Pierce County is absolutely immune from suit because everything Pierce County did or did not do when deploying Deputy McCartney to the deadly call was a discretionary decision of the Council and Sheriff: "law enforcement funding, staffing, and implementation decisions are discretionary decisions of the Council and the elected Pierce County Sheriff…".[12] The McCartneys disagree and point out Pierce County has no discretionary authority to ignore safety standards that minimize the risk of death while on patrol. Pierce County did not act to protect Deputy McCartney from known risks that were correctable. Experts Pierce County hired as consultants explained Pierce County should take action to improve officer safety, but Pierce County chose to ignore the consultants' recommendations.[13] Because Pierce County had

[12] Op. 11.
[13] CP 14 - 17, (Complaint.)

identified known risks that it should have mitigated, but did not, Pierce County should be liable to the McCartney family for Deputy McCartney's premature death.

Division II recognized discretionary immunity is a narrow exception to waiver of sovereign immunity.[14] Then relied upon *Walters v. Hampton*, 14 Wn. App. 548, 553, 543 P.2d 648 (1975) for the proposition that "The allocation of limited police resources "is neither a traditional nor appropriate role for the courts to assume". The problem with Division II's reliance on *Walters* is that Walters was not a County employee to whom the County owed a duty to provide him safe working conditions. The *Walters* court found the City of Port Orchard did not guarantee public safety. It did not find that law enforcement may be deployed on a dangerous call without safety precautions. *Walters* cannot control the outcome here where Washington's constitution establishes a duty owed to employees undertaking

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[14] Op. 11.

known dangerous professions. Pierce County had to take safety precautions before deploying Deputy McCartney to a life-threatening call. Wash. CONST. art. II, § 35 requires it. Division II dispensed with this dictate as direction to the Legislature, not Pierce County.[15] But, Division II's analysis fell short because there was Legislative action that establish safe working conditions as a fundamental duty of an employer.[16] RCW 49.12.020 provides as follows:

> "It shall be unlawful to employ any person in any industry or occupation within the state of Washington under conditions of labor detrimental to their health."

This statute and others have been interpreted by the Courts to mean Washington workers have a fundamental right to safe working conditions.[17] Pierce County adopted local ordinances in accord that prioritized its duties to provide workplace safety:

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[15] Op. at 13.
[16] Op. at 13 -15.
[17] *Bayley Const. v. Washington State Department of Labor and Industries*, 10 Wn. App. 2d 768, 458 P.3d 788 (2019); *Martinez-Cuevas v. DeRuyter Brothers Dairy, Inc.*, 196 Wn. 2d 506, 475 P.3d 164 (2020); *See*, Title 49 in its entirety to include RCW 49.12.010 "The welfare of the state of Washington demands that all employees be protected from conditions of labor which have a pernicious effect on their health."; Alan S. Paja, *The*

> "The safety and security of the employees of Pierce County and members of the public seeking or receiving County services or using County facilities is of the utmost importance." PCC 3.15.010.

Workplace safety encompasses field work. PCC 3.15.020(E).

Division II mistakenly accepted Pierce County's insistence that the deployment of Deputy McCartney was a "public safety" decision without workplace safety implications. The fallacy and danger of that holding is self-evident. Working conditions on patrol are within Pierce County's control and it knows it because its consultants have explained it to the Council and Sheriff repeatedly.[18]

Division II misapplied the *Evangelical* test for discretionary immunity because it analyzed this case as a

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Washington Industrial Safety and Health Act: WISHA's Twentieth Anniversary, 1973-1993, University of Puget Sound Law Review Vol. 17: 259; *Stevens v. Brink's Home Security, Inc*., 162 Wn.2d 42, 169 P.3d 473 (2007)(Driving company trucks from home to work were "on duty" at a "prescribed work place" for purposes of compensation"); Alan S. Paja, *The Washington Industrial Safety and Health Act: WISHA's Twentieth Anniversary, 1973-1993*, University of Puget Sound Law Review Vol. 17: 259 at 261-262 ftnt 30, *citing*, RCW 49.17.010 (1992).

[18] CP 10 – 14, (Complaint).

challenge to Pierce County's public safety duties, rather than the duties of an employer to provide reasonably safe of working conditions for patrol officers. The first prong of the test is whether the complained of act is a basic governmental policy.[19] Division II reasoned the case was about Pierce County "providing officers to enforce laws."[20] That reasoning is incomplete. This case is about Pierce County failing to take safety measures to protect its patrol officers who enforce the law. Providing safe working conditions for employees doing dangerous work is not a purely governmental function and therefore the first prong of the *Evangelical* test should have been decided in the negative, not the affirmative.

With regard to the second prong, whether the questioned act is essential to the realization of the policy, was similarly misapplied. Division II framed the issue as a staffing question related solely to public safety rather than employee safety

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[19] Op. at 13, citing *Evangelical United Brethern Church v. Adna v. State*, 67 WN. 2d 246, 407 P.2d 440 (1965).
[20] Op. at 13.

ignoring the workplace safety component to Pierce County's negligence: "the County's staffing of the Sheriff's Department to enforce the law". The court went on to say workplace safety was "beside the point."[21] But workplace safety is never off point. McCartneys seek to enforce Deputy McCartney's fundamental right that his employer make his working conditions reasonable safe knowing the County asks him to undertake a dangerous job function. He was not compensated to take unmitigated risks. Division II finds in error that the County's only objective was public safety when deploying McCartney. Not true. The County had no choice but to prioritize officer safety over public safety because it has no discretionary authority to disregard safety protocols and put its deputies in harm's way without mitigating those risks it controls or creates by operating below standard. Division II's holding is completely foreign to Washington's constitutional and statutory scheme. Washington allows civil lawsuits against employers like Pierce County who put its public

[21] Op. at 14.

safety officers in harm's way due to its own negligence. Unlike other employers who have statutory immunity under Washington's worker's compensation scheme for negligence claims, employers of public safety officers have not been afforded the same protection. RCW 41.26.281 expressly permits suits against law enforcement employers by law enforcement officers and their family. Division II acknowledged this statute creates a statutory duty for local governments not to injure employee police officers by negligent acts or omissions. But then Division II summarily concluded that nothing in the work-place safety statutes change the discretionary nature of high-level policy decisions. Division II relied upon the absence of a specific statute compelling a county to ensure a certain number of sheriff's deputies are assigned to patrol certain areas. The problem with Division II's analysis is that it mischaracterizes the nature of Pierce County's negligence and supposes that work-place safety may be dictated with definiteness for all known hazards by the Legislature. Workplace safety laws do not work

that way. The Legislature has never been that specific. The obvious example being COVID-19 protocols. There is no workplace safety standard that mandates face masks or standing six feet apart. Yet the State has considered the failure to do either a violation of Labor and Industries non-specific standard WAC 296-800-11005.

Pierce County has no immunity for doing nothing to protect Deputy McCartney from its negligence. If public safety was too risky given staffing shortages Pierce County created from its own negligent acts, the County had to stop deploying deputies County wide at all hours to dangerous calls until it could mitigate those risks associated with single deputy responses. Pierce County caused its staffing issues by its failures with recruitment, retention, and time management, and its training and supervision that were below standard. Not all of Pierce County's staffing problems related to lack of funding or approval for more deputies by the Council. When deputy McCartney was killed, Pierce County was deploying deputies County wide even though

it had not hired or retained enough deputies into the approved positions to patrol County wide. The Sheriff requested a specified number of deputies, the County approved a specified number of deputies, the County did not hire the specified deputies, but it continued to send deputies like McCartney out to patrol despite the shortages that made his job unsafe. He needed to be trained and directed to stand down and not engage in a solo foot pursuit against armed suspects. The second prong should have been found in the negative.

With regard to the third *Evangelical* prong, requiring the exercise of policy evaluation and expertise, Division II held the case was about hiring and allocation decisions, not supervisory oversight. It distinguished *Mason*, a car pursuit case cited by McCartneys on the grounds that a car pursuit case concerns immediate operational issues while staffing is an administrative analysis predating the pursuit.[22] Division II ignored the fact that this case is a pursuit case, it was a foot pursuit case where

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[22] *Mason v. Bitton*, 85 Wn. 2d 321, 534 P.2d 1360 (1975).

situationally a solo foot pursuit in response to an armed home invasion should have been prohibited by written policy, just like in a car pursuit case where high speed pursuits in certain situations are prohibited. The challenged inaction here concerned operational decisions that were not discretionary. Division II distinguished *Estate of Jones*, a parolee supervision case, on grounds that "day-to-day supervision of a criminal assigned to a rehabilitation facility is a far cry from decisions made by elected officials regarding staffing."[23] That criticism is inadequate. This case does not exclusively involve elected officials. And, Pierce County through its officials and employees had supervisory duties over its patrol officers. Those supervisory duties included real time availability and proper training protocols that made sure its deputies would stand down. Pierce County could not opt to put its law enforcement officers out on the streets to chase down armed gunmen without protection. Division II inappropriately discounted McCartneys' concerns

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[23] *Estate of Jones v. State*, 107 Wn. App. 510, 15 P.3d 180 (2000).

about training and supervising its patrol deputies to stand down. This case is not fairly characterized solely as a challenge to decisions by elected officials regarding high level staffing decision like approving enough deputies. Deputy McCartney died because no one permitted him to stand down. There was no express policy to stand down. The "wait-for-back-up" idea or theoretical concept the County relied upon was not realistic because back-up was miles and minutes away and it was never enforced anyway. He was never trained to stand down, nor was he directed to do so in that deadly instance. Deputy McCartney was left on his own to react without a supervisor available to direct him to stand down or the training he needed to know he should stand down. The third prong should have been answered in the negative.

With regard to the fourth *Evangelical* prong, lawful authority to make the decision, Division II relied upon RCW 36.28.010 and RCW 36.16.070 as statutory authority to deploy deputy McCartney without controlling the risks. Division II

discounts McCartneys' workplace safety argument as a "disguised argument that the decision was a poor one." But McCartneys have no hidden agenda. Pierce County's failures leading up to McCartneys untimely death were not just a poor decision, but rather a series of serious oversights and inaction where action was required to eliminate the risk that Deputy McCartney would undertake a solo foot pursuit against armed suspects. The deployment of deputy McCartney to an armed home invasion without enough sleep without active supervision and without backup was not a poor policy choice it was a complete operational failure with fatal consequences that were preventable, and Pierce County knew it. Division II failed to consider the operational inaction that preceded Deputy McCartneys' death that would have saved him. The fourth prong should have been decided in the negative.

In sum, Division II erred in affirming the dismissal of McCartneys' negligence case on discretionary immunity grounds.

B. RAP 13.4 (b)(4) Whether Professional Rescuers Assume the Risks of Employer Negligence Regarding Safe Working Conditions of Substantial Public Interest

The Supreme Court previously granted review when Pierce County petitioned in *Beaupre v. Pierce County*, 161 Wn. 2d 568 (2007), one of the seminal cases cited by Division II and distinguished on the grounds that intervening causes must arise "after" the rescue was initiated. McCartneys maintain Division II misapplied that holding here where the negligence of the County was not based upon one discrete act that preceded any rescue. Instead, Pierce County's negligence was ongoing up to and including the time Deputy McCartney responded to the scene. There should be no bar based upon timing to preclude application of the intervening cause exception. A review of Pierce County's briefing in *Beaupre* shows that Pierce County grounded its petition on officer and public safety being a matter of public importance. Officer safety remains a matter of significant public concern here. Law enforcement officers are

not expendable as Pierce County insists and Division II affirmed. That holding is intolerable and puts at issue public safety because it is fundamentally wrong and because of its deterrent effect on potential candidates. A law enforcement career looks highly unattractive when the dangers of the position may be heightened without correction despite the statute that was intended to deter employer negligence by preserving the officer's rights to sue the employer, RCW 41.26.281. Now even if working conditions are unreasonably unsafe the officer has no available remedy when deployed unsafely. There would be no teeth to the Constitutional dictate for reasonably safe working conditions for dangerous jobs.

Whether or not the courts should clarify that the professional rescuer doctrine operates as comparative fault rather than absolute immunity has been briefed in various cases. *See, Lowry v. City of Auburn*, 111 Wn. App. 1026 (2002); *Markoff v. Puget Sound Energy, Inc.,* 9 Wn. App. 2d 833, 447 P.3d 577 (2019). Abolishing the professional rescuer doctrine as an

absolute immunity has been a policy objective of the trial lawyer's historically indicating the broader public interest in this issue. Here the employer's duties of employer safety are juxtaposed against the common law doctrines that would provide ample justification to clarify the doctrines as comparative fault defenses to ensure employers may not shirk absolute their non-delegable duties to deploy officers reasonably safely.

The professional rescuer doctrine is a common law defense created judicially as an exception to the "rescue doctrine" that provides a source of recovery to one who is injured while reasonably undertaking the rescue of a person who has negligently placed himself in a position of imminent peril.[24] The professional rescuer doctrine derives from assumption of risk policy.[25] Professional rescuers assume risks other volunteer rescuers do not. This theory presupposes professional rescuers

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[24] Op. at 22, citing *Maltman v. Sauer*, 84 Wn. 2d 975, 979, 530 P.2d 254 (1975).
[25] Op. at 23, citing *Markoff v. Puget Sound Energy, Inc.,* 9 Wn. App. 2d 833, 840, 447 P.3d 577 (2019).

control the risks they assume to include averting death because they have developed their expertise to perform rescues safely. There is no assumption that professional rescuers agree to get themselves killed because the work they do more probably than not will kill them as if that is permissible employment. But, that is what Division II holds. Division II holds Deputy McCartney undertook the job of patrol officer, which means he assumes the risks of getting murdered. Not so, and to reach such a conclusion is a deplorable public policy. Division II wholly misses the point that well led law enforcement officers deploy safety precautions to avoid line of duty deaths to include preventing a foot pursuit when the risks of death are so great as to warrant use of different public safety tactics. The fact that law enforcement officers may sue their employer for their employer's negligence is consistent with assumption of risk as a comparative defense not an absolute bar. The application of the professional rescuer doctrine here as an absolute bar vitiates waiver of sovereign immunity and the McCartneys' rights to pursue a negligence recovery against

Pierce County, Deputy McCartney's employer, that put him on patrol without the training and supervision he needed to survive.

Division II reasoned that McCartneys' reliance upon workplace safety standards for law enforcement is an attempt to "sidestep the professional rescuer doctrine by ignoring the distinction between the risk assumed in an inherently dangerous rescue operation – that happens to be a part of the job – and those risks created by a workplace that is improperly unsafe." Division II reasoned that workplace safety requirements should not "trump" the professional rescuer doctrine or the exception would consume the rule. But the application of the professional rescuer doctrine as a comparative fault doctrine would prevent that bad outcome and still hold departments accountable that do not adhere to safety standards. Rather than reconciling the competing interests, Division II immunized law enforcement employers from negligence claims in contravention to state statute, RCW 41.26.281. The better outcome consistent with assumption of risk doctrine from which the professional rescue

doctrine was fashioned would be to allow the case to proceed and allow the trier of fact to apportion fault as expected with claims brought under RCW 41.26.281. The doctrine should not apply as an absolute bar in cases of employer negligence.

Division II insists McCartney undertook a "rescue" because he responded to a home invasion where occupants were held at gunpoint. But, McCartney was not in the home. McCartney died when ambushed in a foot pursuit chasing the fleeing suspects far away from any victims inside the home. He did not die rescuing anyone. The application of the professional rescuer doctrine to this case is entirely misplaced because there was no rescue. He was engaging with fleeing suspects not victims.

Division II presupposes that it is within law enforcement standards to put patrol deputies on a dangerous call solo and without the training and supervision needed to stand down. Division II suggests it would be bad policy to stand down and not respond. McCartneys allege that it is below standard to put

a deputy on patrol solo without training or supervision that would prevent him from undertaking a solo foot pursuit and that would allow him to stand down. It is permissible and within standard to not give chase. Division II references Pierce County's position that it "instructed deputies to wait for backup in these situations" as evidence that McCartney knew what he was getting into. Division II misunderstands how an unwritten "instruction" was insufficient to mitigate the risks or bring the risk within the risks inherent to the job. Given Pierce County's staffing issues and lack of training and supervision, the "instruction" was insufficient as McCartneys pled in their Complaint. Pierce County did not train and supervise Deputy McCartney to stand down. Pierce County allowed its deputies to assume deadly risks and rewarded heroic pursuits that were unnecessary to fulfill its public safety function and were indeed below standard as its consultants explained.

The Division II opinion broadly expands the professional rescuer doctrine so that an employer may be negligent with

immunity. McCartneys relied upon *Ballou* and *Beaupre* that reject the professional rescuer doctrine where there is intervening negligence by a third party. *Ballou* was a case brought by a law enforcement officer against his assailant who assaulted him when the officer responded to a bar fight. The assailant was the instigator in the bar fight. Division II distinguished the case because Ballou was not suing his employer and the assailant acted intentionally, not negligently. In *Beaupre*, Pierce County was not immune where its officer was injured by another officer driving negligently in a high-speed pursuit. Division II confines the third-party intervention exception to acts and omissions that occur *after,* rather than before the so-called rescue occurs. Obviously from this limited viewpoint, the acts and omissions of Pierce County that predated the foot pursuit would never come into play regardless of the egregiousness. Whether an employer's negligence with regard to safe working conditions is an intervening cause and excepted from the professional rescuer defense is a question of first impression that should not be finally

decided by a decision that disregards the employer's callous disregard to make working conditions reasonably safe.

The negligence of an employer that reduces the safety preparedness of its deputies should be deemed intervening and an exception to the absolute bar whether the omissions occurred on the day of rescue or prior. For example, if the employer fails to fit test respirators, then deploys rescuers who inhale deadly contaminants that a fit respirator would have prevented, the employer should be held accountable even though the omission occurred prior to the rescue where the respirator was deployed. Similarly, Pierce County cannot put deputies on patrol without protecting them from the mitigatable and known risks of patrol, which would include sufficient training or a written policy prohibiting solo foot pursuits to ensure the deputy does not give chase or a real time supervisor directing the deputy stand down. A ban on liability for employer negligence that precedes the rescue is not just and should not be allowed to stand as precedent.

C. RAP 13.4(b)(3) Judicial Notice of Hyperlinks Not In Record and Not Otherwise Admissible A Significant Evidentiary Legal Question

McCartneys seek reversal of Division II's consideration of hyperlink content because it is highly prejudicial for a court to consider hyperlinked content that is not in the record by judicial notice under ER 201 as if the rules of evidence have no application under judicial notice. McCartneys remain uninformed about what exactly Division II or the trial court judicially noticed. There is no fact identified in the opinion and the trial court was silent. McCartneys dispute that the hyperlinked content referenced actual resolutions or other policies adopted by Pierce County.

Division II concluded that that Pierce County was not offering the hyperlinked evidence into evidence therefore the evidence laws like RCW 5.44.040 and .080 and ER 1005 did not apply. That holding is untenable because it obliterates the rules of evidence and opens the door to motions to dismiss based upon

anything that may be found on the internet even when irrelevant and otherwise inadmissible.

VI. CONCLUSION

For the reasons previously stated, the Supreme Court should grant McCartneys' Petition for Judicial Review to reinstate their wrongful death case against Pierce County.

RESPECTFULLY SUBMITTED this 28th day of SEPTEMBER, 2022.

III BRANCHES, PLLC

BY: JOAN K. MELL
LAWYER FOR APPELLANTS MCCARTNEYS

I certify that the above petition complies with the word count requirements of RAP 18.7 in that the word count is 4,946, less than the 5,000 word count requirement.

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

June 28, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

THE ESTATE OF DANIEL ALEXANDER MCCARTNEY; by and through Personal Representative CIERRA RENAE MCCARTNEY; CIERRA RENAE MCCARTNEY, individually and as the marital community of Cierra Renae and Daniel Alexander McCartney; TYTUS JOHN ALEXANDER MCCARTNEY, minor child of Daniel and Cierra McCartney; TATE DANIEL MCCARTNEY, minor child of Daniel and Cierra McCartney; and TRAXTON LANE MCCARTNEY, minor child of Daniel and Cierra McCartney, Appellants, v. PIERCE COUNTY, a municipal corporation, located in Washington State, Respondent.	No. 55663-4-II PUBLISHED OPINION

WORSWICK, J. — The Estate of Daniel McCartney, by and through its personal representative, Cierra McCartney, and other members of the McCartney family (hereinafter, McCartneys), appeal the trial court's dismissal of their complaint for wrongful death and for a writ of mandamus. Daniel McCartney, a Pierce County sheriff's deputy, was killed in the line of duty. The McCartneys filed a wrongful death lawsuit against Pierce County (County), seeking damages for alleged failures of the County to properly staff and train the Pierce County Sheriff's

Department (Sheriff's Department). The McCartneys further sought a writ of mandamus ordering the County to provide the Sheriff's Department with "sufficient staffing." The County moved for judgment on the pleadings, seeking dismissal under CR 12(c), arguing discretionary governmental immunity, the professional rescuer doctrine, and that a writ of mandamus was not proper. The trial court granted the motion.[1]

We hold that (1) the trial court properly took judicial notice of public records, (2) discretionary immunity bars the McCartneys' suit, (3) the professional rescuer doctrine also bars the McCartneys from recovering, (4) a writ of mandamus is inappropriate because the County's decisions on staffing are discretionary, and (5) the public records did not create a genuine issue of material fact. Thus, we hold that the trial court did not err when it entered judgment on the pleadings. We affirm.

FACTS

I. BACKGROUND: PIERCE COUNTY'S SHERIFF DEPUTY HIRING AND ALLOCATION

Pierce County covers 1,806 square miles of land.[2] For patrol purposes, the county is divided into districts, to which sheriff deputies are assigned. The Sheriff's Department also contracts with several cities and towns in the county to provide police forces. The districts vary in both geographic size and the number of deputies assigned. For example, in 2018, the

[1] The National Police Association filed an amicus curiae brief in support of the McCartneys.

[2] Because this is an appeal from a CR12(c) motion for judgment on the pleadings, we take the facts from the pleadings. *Aji P. v. State*, 16 Wn. App. 2d 177, 187, 480 P.3d 438, *review denied*, 198 Wn.2d 1025, 497 P.3d 350 (2021).

department had allocated 13 officers to University Place duty, covering 8.42 square miles, while district 10 was allocated 15 officers to cover 700 square miles.[3]

Between 2001 and 2018, the Pierce County Council (Council) hired outside consultants to conduct three separate audits of the Sheriff's Department. Each determined that the department was understaffed in terms of deputies. Between 2009 and 2018, the department had added a net of 11 deputies. However, a 2018 staffing assessment determined the department had 40 fewer deputies than the audits recommended to patrol the county. The consultants opined that the department was a "'lean' organization," and that its' staffing "present[ed] challenges to organizational effectiveness and create[d] a higher level of risk and liability. While the deputy sheriffs are dedicated to delivering high-quality police services, there are simply not enough of them assigned to the patrol function." Clerk's Papers (CP) at 26.

Between 2004 and 2009, the County increased the Sheriff's Department's budget by $2 million each year. However, this was less than enough funding to increase the department's staff to the levels recommended by the Council's consultants. Further complicating the staffing challenge was the department's inability to find qualified candidates to fill all the budgeted positions and months-long hiring, vetting, and training programs.

Because of the lean staffing and large areas some of the patrols experienced, deputies knew that backup could be "many miles and many minutes" away. CP at 4. Accordingly, the department instructed deputies to wait for backup on dangerous calls.

The Sheriff's Department hired Deputy McCartney in 2014. McCartney was a veteran lateral hire from the Hoquiam Police Department, with which he had served since 2009, and he

[3] The record is silent as to the population of each district.

had at least four months of law enforcement academy training. The department assigned McCartney to district 10, in which deputies were assigned to patrol alone.

II. Deputy McCartney's Murder

On January 6, 2018, McCartney worked back-to-back shifts from 3:00 PM overnight until 6:00 AM the next morning. On January 7, he volunteered to take a shift for another deputy who was ill. After less than six hours of sleep, McCartney returned to work that evening to cover the absent deputy's overnight shift.

At around 11:00 PM on January 7, six sheriff deputies responded to a house fire with an active shooter in Tacoma, to back up the Tacoma police. While deputies were on scene in Tacoma, a 911 call came in at 11:23 PM from the Frederickson area of unincorporated Pierce County and reported a home invasion was in progress. The 911 operator could hear screaming, glass breaking, and loud banging during the call. The Frederickson area is within sheriff district 7, which is adjacent to district 10.

Although outside of his assigned patrol area, dispatch sent McCartney to respond to the Frederickson call. He arrived at the scene at 11:29 PM, requested backup, was given a description of the suspects, and informed that children may be inside the home. At 11:33 PM, McCartney reported to dispatch that he saw the suspects running on foot. Within a minute, McCartney began to give chase on foot, reported shots were fired, and then his radio fell silent.

A sheriff sergeant ordered that McCartney's radio microphone be opened so that two-way communications could take place without interruption, but the open-microphone program did not function because of the amount of other simultaneous radio traffic on the same channel. At 11:37 PM, other responding deputies arrived and discovered McCartney with a gunshot wound.

He was not transported to a hospital until after midnight, and medical professionals pronounced him dead in the early hours of January 8.

In the aftermath of the shooting, police arrested Frank Pawul, Samantha Jones, and Brenda Troyer, and discovered the body of their accomplice, Henry Carden, at the scene of the shooting. Pawul, Carden, Jones, and Troyer had broken into a home at which Jones had previously conducted a drug deal to demand money from its residents. They had held three adults and two children at gunpoint while they searched the home. Pawul pleaded guilty to aggravated first degree murder with a firearm for the death of McCartney. Jones also pleaded guilty to first degree murder, and Troyer pleaded guilty to first degree rendering criminal assistance for having provided Pawul with information as to the location of law enforcement in order that he could avoid apprehension.

III. Procedural History

The McCartneys filed a complaint for damages against the County in February 2021. The first cause of action was for wrongful death–negligence. The McCartneys alleged that the County had a duty to provide McCartney with a safe workplace, proper supervision, adequate training, and sufficient support. They alleged that the County was negligent for not hiring sufficient deputies such that McCartney would not have had to face "unreasonably unsafe working conditions." CP at 13. They further alleged that the County negligently created unsafe working conditions through understaffing, that the Council failed to properly staff the Sheriff's Department, that the department was negligently slow in hiring additional deputies, and that the County had no written policy on when a supervisor or multiple deputies needed to be called in

for backup. Thus, the McCartneys alleged that "[b]ut for Pierce County's failure to properly staff and train its deputies, Daniel McCartney would likely still be alive." CP at 17.

In their second cause of action, the McCartneys requested the court issue a writ of mandamus to the County, "mandating sufficient staffing or other equitable relief that will prevent a repeat of another wrongful deputy death." CP at 18. The McCartneys did not provide further detail on what such mandatory staffing or equitable relief would entail. Instead, the McCartneys asked the court to compel Pierce County to either provide "sufficient" staffing or "stop responding to calls when sufficient staffing is not possible." CP at 19.

The County filed an answer to the complaint on March 12. In it, the County raised multiple defenses, including discretionary immunity for the exercise of governmental authority of elected public officials. The County also filed a third party complaint against Pawul, Jones, and Troyer as the proximate cause of McCartney's death.

That same day, the County filed a motion to dismiss under CR 12(c). In its motion, the County included information from the public record, including Council resolutions, committee meeting minutes, and committee meeting recordings in which the Council was presented with emergency statistics, response times, recruiting efforts, and hiring and training information. Although referenced in the text, the records themselves were hyperlinked in a footnote. The County argued that discretionary governmental immunity and the professional rescuer doctrine barred the McCartneys' suit. The County also argued that a writ of mandamus was not proper because the issues that the McCartneys raised were within the legislative discretion of the Council.

The McCartneys responded to the County's motion, first arguing that the professional rescuer doctrine does not bar suit because McCartney was not rescuing anyone. Next, the McCartneys argued that the County had no discretionary immunity because it had not made a "considered decision" on deputy staffing and that the Council's actions, or lack thereof, created a genuine issue of material fact requiring trial. CP at 138. The McCartneys also argued that a writ of mandamus was appropriate to compel the County to staff deputy positions.

At the hearing on the motion, the County asked the court to take judicial notice of the County records provided in its motion to dismiss to support its argument that staffing decisions were high level policy decisions. The McCartneys objected to the court's taking judicial notice of the public records, arguing that the records could be considered only if admitted as evidence under RCW 5.44.040[4] and .080.[5]

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[4] RCW 5.44.040 provides:

> Copies of all records and documents on record or on file in the offices of the various departments of the United States and of this state or any other state or territory of the United States or any federally recognized Indian tribe, when duly certified by the respective officers having by law the custody thereof, under their respective seals where such officers have official seals, must be admitted in evidence in the courts of this state.

[5] RCW 5.44.080 provides:

> All ordinances passed by the legislative body of any city or town shall be recorded in a book to be kept for that purpose by the city or town clerk, and when so recorded the record thereof so made shall be received in any court of the state as prima facie evidence of the due passage of such ordinance as recorded. When the ordinances of any city or town are printed by authority of such municipal corporation, the printed copies thereof shall be received as prima facie evidence that such ordinances as printed and published were duly passed.

The trial court granted the County's motion to dismiss, noting that it considered the records and files, and that it took judicial notice of the public records under ER 201.[6] The court dismissed the McCartneys' complaint with prejudice and entered judgment in favor of the County.

The McCartneys appeal.

ANALYSIS

The McCartneys argue that the trial court erred when it granted the County's CR 12(c) motion for judgment on the pleadings. They argue that the trial court erred in taking judicial notice of the public records the County submitted. The McCartneys also argue that the County has no discretionary immunity because the decisions made regarding staffing were operational decisions and not policy decisions. To support this argument, the McCartneys argue that the County failed to provide a safe workplace for Deputy McCartney as required by workplace safety laws, and that the workplace standards are nondiscretionary. The McCartneys further argue that the professional rescuer doctrine does not bar relief. The McCartneys then argue that we should remand for the trial court to issue a writ of mandamus to compel the County to "mitigate the safety hazards its serious staffing shortages cause," and that the public records the court took notice of created genuine issues of material fact. Br. of Appellant at 45.

We hold trial court did not err when it took judicial notice of the public records under ER 201. We also hold that police staffing decisions are a legislative, discretionary decision, and that the professional rescuer doctrine also bars the McCartneys from recovering. Likewise, the

[6] ER 201 governs judicial notice of adjudicative facts.

discretionary nature of the County's decisions make a writ of mandamus inappropriate. Finally, we hold that the public records did not create a genuine issue of material fact.

I. STANDARD OF REVIEW

We review CR 12(c) motions for judgment on the pleadings de novo. *Aji P.*, 16 Wn. App. 2d at 187. Our review is identical to that which we use for a CR 12(b)(6) motion to dismiss. *Wash. Trucking Ass'ns v. Emp't Sec. Dep't*, 188 Wn.2d 198, 207, 393 P.3d 761 (2017). Dismissal under CR 12(c) is appropriate when it appears beyond doubt the plaintiff cannot prove any set of facts that would justify recovery. *Aji P.*, 16 Wn. App. 2d at 187. We take all facts alleged in the complaint as true, and we may consider hypothetical facts that support the plaintiff's claim that are not in the record. *Aji P.*, 16 Wn. App. 2d at 187.

II. JUDICIAL NOTICE OF PUBLIC RECORDS

The McCartneys argue that the trial court erred when it took judicial notice of the online county records the County linked to in its motion to dismiss. We disagree.

We review the trial court's decision to consider evidence for an abuse of discretion. *Salas v. Hi–Tech Erectors*, 168 Wn.2d 664, 668, 230 P.3d 583 (2010). A trial court abuses its discretion when it renders a decision that is manifestly unreasonable or based upon untenable grounds or reasons, or when the court applies the wrong legal standard. *Salas*, 168 Wn.2d at 669.

ER 201(b) provides: "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." On a ruling on a motion to dismiss, the trial court may take judicial

notice of public documents if their authenticity cannot be reasonably disputed. *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 725-26, 189 P.3d 168 (2008). "Documents whose contents are alleged in a complaint but which are not physically attached to the pleading may also be considered in ruling on a CR 12(b)(6) motion to dismiss." *Rodriguez*, 144 Wn. App. at 726. And as noted above, our review under CR 12(c) is identical to that in CR 12(b)(6). *Wash. Trucking*, 188 Wn.2d at 207.

In its motion to dismiss, the County included information from the public record, including Council resolutions, committee meeting minutes, and committee meeting recordings in which the Council was presented with emergency statistics, response times, recruiting efforts, and hiring and training information. The records themselves were hyperlinked in a footnote and not physically attached to the motion. The links were all to the official Pierce County website. The authenticity of the records cannot be reasonably disputed, and the McCartneys do not raise such a dispute.

The McCartneys argue that the County was required to submit its records into evidence under ER 1005, and certify the records and submit them as evidence under RCW 5.44.040 and .080. We disagree because those statutes do not compel parties to submit public records as evidence, but rather mandate that if a party does submit certified public records, they "must be admitted in evidence." RCW 5.44.040. Likewise, "city or town" ordinances "shall be received in any court of the state as prima facie evidence of the due passage of such ordinance as recorded." RCW 5.44.080. These statutes have no bearing on what a court may take judicial notice of. This argument fails.

The record here shows that the trial court took judicial notice of the County's public records after oral argument and supplemental briefing examining the law surrounding ER 201 and the above statutes. Accordingly, we hold that the trial court made a reasoned decision and did not abuse its discretion when it took judicial notice of the public records.

III. Discretionary Immunity

The McCartneys argue that the County does not have discretionary immunity from suit here because the County's staffing decisions were not discretionary. The County argues that law enforcement funding, staffing, and implementation decisions are discretionary decisions of the Council and the elected Pierce County Sheriff (Sheriff) that are immune from suit. We agree with the County.

A. *Legal Principles*

Our legislature has waived sovereign immunity for local governmental entities. RCW 4.96.010; *see Mancini v. City of Tacoma*, 196 Wn.2d 864, 883, 479 P.3d 656 (2021). However, our Supreme Court has created the "very narrow exception of discretionary governmental immunity" to "prevent the courts from passing judgment on basic policy decisions that have been committed to coordinate branches of government." *Mancini*, 196 Wn.2d at 883-84 (quoting *Bender v. City of Seattle*, 99 Wn.2d 582, 587-88, 664 P.2d 492 (1983)) (internal quotation marks omitted). High level, executive discretionary acts fall within the exception. *Chambers-Castanes v. King County*, 100 Wn.2d 275, 281, 669 P.2d 451 (1983). Discretionary acts at an operational level do not. *Chambers-Castanes*, 100 Wn.2d at 282.

Thus, "police lack discretionary governmental immunity for their investigative and other 'everyday operational level' acts." *Mancini*, 196 Wn.2d at 884. However, a police department's

determinations on how to use law enforcement resources available to it are legislative-executive decisions. *Walters v. Hampton*, 14 Wn. App. 548, 553, 543 P.2d 648 (1975). The allocation of limited police resources "is neither a traditional nor appropriate role for the courts to assume." *Walters*, 14 Wn. App. at 553. To hold otherwise would "make the [county] an insurer against every harm imposed by a criminal act." *Walters*, 14 Wn. App. at 553.

To determine whether the County's deputy staffing decisions fall within the discretionary immunity exception, we apply the four-part test our Supreme Court set out in *Evangelical United Brethren Church of Adna v. State*, 67 Wn.2d 246, 255, 407 P.2d 440 (1965). "The *Evangelical* test determines whether a particular discretionary act is so rooted in governing that it cannot be tortious, no matter how 'unwise, unpopular, mistaken, or neglectful [it] might be.'" *Gorman v. Pierce County*, 176 Wn. App. 63, 76, 307 P.3d 795 (2013) (quoting *Evangelical*, 67 Wn.2d at 253) (alteration in original).

The *Evangelical* test asks:

> (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

67 Wn.2d at 255. If these questions can clearly be answered in the affirmative, then the challenged government decision falls within the exception, "regardless of its unwisdom." *Evangelical*, 67 Wn.2d at 255.

In *King v. City of Seattle*, our Supreme Court added a fifth factor to the *Evangelical* test: to be entitled to immunity the defendant must show that the policy decision was made after consciously balancing risks and advantages in a "considered decision." 84 Wn.2d 239, 246, 525 P.2d 228 (1974), *overruled on other grounds by City of Seattle v. Blume*, 134 Wn.2d 243, 947 P.2d 223 (1997).

B. *Application of the* Evangelical *Test*

1. *Basic Governmental Policy, Program, or Objective*

Providing officers to enforce laws is a uniquely governmental objective. It is axiomatic that local governments "provide for and . . . further the general health, order, peace, and morality, and . . . provide justice for those governed. The creation and maintenance of police departments is basic to the accomplishment of those purposes." *Walters*, 14 Wn. App. at 551 (citation omitted). The funding relating to the staffing of the Sheriff's Department and the department's decision on where to allocate officers are basic governmental policy decisions.

The McCartneys appear to argue that the Washington Constitution provides that professions that are "dangerous to life or deleterious to health" require nondiscretionary protections. CONST. art. II, § 35. But the full text of the constitutional section states, "*The legislature shall pass* necessary laws for the protection of persons working in mines, factories and other employments dangerous to life or deleterious to health; and fix pains and penalties for the enforcement of the same." CONST. art. II, § 35 (emphasis added). This is a mandate on the legislature, not local governments. And the McCartneys cite to no source where it applies in the law enforcement context. The first *Evangelical* question is answered in the affirmative.

2. *Decision Essential to Accomplishing Government Objective*

The second *Evangelical* question asks, "Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective?" 67 Wn.2d at 255. This, too, is answered in the affirmative.

Here, the questioned decision was the County's staffing of the Sheriff's Department to enforce the law. The hiring, retention, training, and regional allocation of sheriff deputies are all essential to the basic government objective of providing law enforcement. "[M]aintenance of police departments is basic to the accomplishment of" the basic government function of providing peace, morality, and justice. *Walters*, 14 Wn. App. at 551. Moreover, decisions regarding the hiring and allocation of law enforcement officers would change the course of the government's objective of public safety. For example, hiring too many deputies could financially strain the county, and putting too many deputies in areas with low populations could result in a dearth of law enforcement response in highly populated areas.

The McCartneys attempt to redefine the County's objective in staffing the Sheriff's Department as one to further workplace safety. In this vein, the McCartneys cite to workplace safety statutes to argue that the County made no decision on deputies' safety in the workplace when it made staffing decisions.[7] But this is beside the point. When deciding how to properly

[7] "The welfare of the state of Washington demands that all employees be protected from conditions of labor which have a pernicious effect on their health. The state of Washington, therefore, exercising herein its police and sovereign power declares that inadequate wages and unsanitary conditions of labor exert such pernicious effect." RCW 49.12.010. "It shall be unlawful to employ any person in any industry or occupation within the state of Washington under conditions of labor detrimental to their health." RCW 49.12.020.

staff Sheriff's deputies, the County's objective was public safety. The McCartneys' complaint tied *officer* safety directly to staffing decisions. But the County's discretionary decision here involved *public* safety. Providing a law enforcement presence to the county, and the manner in which to accomplish that presence through the allocation of resources, is the government decision that was made here.

Likewise, the McCartneys further argue that correcting deputies' workplace safety would not change the course or direction of workplace safety. But as explained above, workplace safety was not the objective the County was attempting to realize when it made its decisions on deputy staffing and allocation. Therefore, the second *Evangelical* question is answered in the affirmative.

3. *Requiring the Exercise of Policy Evaluation, Judgment, and Expertise*

The County's decisions on Sheriff's Department funding and staffing is a basic policy judgment that requires the evaluation, judgment, and expertise of county officials. To make such decisions, the Council and Sheriff must make budget considerations and have knowledge of hiring trends, criminal statistics, population densities, and other factors. We will not place ourselves in a position of "having to determine how limited police resources are to be allocated," but instead we leave these decisions to local government. *Walters*, 14 Wn. App. at 553.

Here the McCartneys' complaint makes it clear that the County considered multiple audits from outside consultants and that Sheriff's Department leadership had a large geographic area with a range of enforcement needs. This shows that county officials had to use their judgment to make policy evaluations based on their expertise in the law enforcement needs of their local government.

The McCartneys cite *Mason v. Bitton*, 85 Wn.2d 321, 534 P.2d 1360 (1975), to argue that the County was acting outside of its discretionary functions. *Mason* involved a high-speed chase where Bitton, the subject of the pursuit, crashed into an innocent bystander's car, killing its occupants. 85 Wn.2d at 323. The victim's estate sued Bitton, the State, and Seattle, alleging the manner of pursuit was negligent. *Mason*, 85 Wn.2d at 323. But, as the *Mason* court held, the decisions made during an active law enforcement pursuit of a suspect are operational. 85 Wn.2d at 328. The decision that led to the killing in *Mason* bears little resemblance to the decisions county officials made months and years removed from the incident which caused McCartney's death. Indeed, the *Mason* court distinguished such decisions from those that are "administrative." 85 Wn.2d at 328. Decisions made by the elected Sheriff and Council on hiring staff are administrative. *Mason* is inapt.

Next, the McCartneys cite *Estate of Jones v. State*, 107 Wn. App. 510, 522, 15 P.3d 180 (2000), to argue that the County did not have discretionary immunity because there is no such immunity for inadequate supervision. In *Jones*, a convict escaped from juvenile rehabilitation housing, broke into a home, and raped and murdered a 12 year old girl. 107 Wn. App. at 514-17. The girl's estate sued, and Division One of this court held that the State was not immune from suit for negligent supervision of the parolee. *Estate of Jones*, 107 Wn. App. at 522-23. The *Jones* court determined the *Evangelical* factors did not apply because supervision of the parolee was a low level, operational matter, not a policy decision. 107 Wn. App. at 522-23. But the day-to-day supervision of a criminal assigned to a rehabilitation facility is a far cry from the decisions made by elected officials regarding staffing. The decisions the County made regarding deputy

hiring and allocation, though supervisory, are not the same as the low-level supervision of a parolee. The third *Evangelical* question is answered in the affirmative.

4. *The Lawful Authority to Make the Decision*

The fourth *Evangelical* question asks whether the governmental agency involved possesses the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged decision. 67 Wn.2d at 255. The County and Sheriff's Department do so here.

The Sheriff's duties are provided in RCW 36.28.010, and give the Sheriff discretion to "call to their aid such persons, or power of their county as they may deem necessary." RCW 36.16.070 provides that county officers may employ deputies to perform acts the officer is authorized to perform. Accordingly, the County and Department's decisions on law enforcement staffing are provided by statute.

The McCartneys argue that the County's staffing decisions were outside its lawful authority because it created an unsafe workplace. But this is just a disguised argument that the decision was a poor one; it is clear that the County had the authority to make staffing decisions. The fourth *Evangelical* question is answered in the affirmative.

5. *Considered Decision*

Finally, for discretionary immunity to apply, the County must have made a "considered decision" that was made after consciously balancing risks and advantages. *King*, 84 Wn.2d at 246. The County did so here.

As explained above, the County considered multiple audits from outside consultants, and that the Sheriff's Department leadership had a large geographic area with a range of enforcement needs. Furthermore, in its motion, the County included information from the public record,

including Council resolutions, committee meeting minutes, and committee meeting recordings in which the Council was presented with emergency statistics, response times, recruiting efforts, and hiring and training information relevant to staffing. This all shows that the County had ample information before it, and made staffing decisions based on a wide variety of factors. This was a considered decision.

Each factor from *Evangelical* and its progeny shows that the County's staffing resource and implementation decisions are discretionary acts rooted in governing.

C. *Workplace Safety Laws*

The McCartneys argue that discretionary immunity is not applicable because the County's staffing decisions are workplace safety issues. Thus, the McCartneys argue, the County's decisions on staffing are not immune from suit because workplace safety standards are not discretionary. Although it is true that workplace safety standards are not discretionary, we disagree that those standards remove the County's discretion to staff the Sheriff's Department as the elected officials see fit.

1. *Employer Immunity*

Under the worker compensation laws, law enforcement organizations are exempt from employer immunity. The Law Enforcement Officers' and Firefighters' Retirement System provides a cause of action, stating:

> If injury or death results to a member from the intentional or negligent act or omission of a member's governmental employer, the member, the widow, widower, child, or dependent of the member shall have the privilege to benefit under this chapter and also have cause of action against the governmental employer as otherwise provided by law, for any excess of damages over the amount received or receivable under this chapter.

RCW 41.26.281. Although this statute creates a statutory duty for local governments not to injure employee police officers by negligent acts or omissions, it does not change the discretionary nature of a governmental entity's high level policy decisions. The McCartneys cite to no workplace safety law that changes the discretionary nature of these decisions, nor do they cite to any workplace safety law that compels counties to ensure a certain number of sheriff deputies are assigned to certain patrols in certain areas. Moreover, the County did not allege in its motion that it was immune from suit under the worker's compensation scheme; it argued discretionary immunity.

Not only does no statute remove the County's discretion to allocate funding resources and to staff employees of the Sheriff's Department, our courts have long held that they will not interfere in such decisions. *See, e.g.*, *State ex rel. Farmer v. Austin*, 186 Wash. 577, 583-84, 59 P.2d 379 (1936) (holding courts will not issue mandamus to prevent county commissioners from reducing sheriff's department staff); *Walters*, 14 Wn. App. at 553 (holding it is inappropriate for courts to provide relief in tort to a citizen who sued the city for its negligence to protect him from a criminal attack).

The McCartneys argue that courts have not barred claims by officers against a law enforcement employer when officers were injured on the job. However, the cases the McCartneys cite did not involve high level policy decisions but rather involved officers who were injured by other responding officers. *Beaupre v. Pierce County*, 161 Wn.2d 568, 570, 166 P.3d 712 (2007) (officer injured when fellow officer struck him with a patrol car); *Elford v. City of Battle Ground*, 87 Wn. App. 229, 231, 941 P.2d 678 (1997) (officer bitten by police dog); *Strachan v. Kitsap County*, 27 Wn. App. 271, 272, 616 P.2d 1251 (1980) (officer accidentally

shot by fellow officer). And in *Fray v. Spokane County*, 134 Wn.2d 637, 641-42, 952 P.2d 601 (1998), our Supreme Court held that the Law Enforcement Officers' and Firefighters' Retirement System created a cause of action for an officer injured by a criminal assailant such that the suit was not barred by the Industrial Insurance Act, but the court did not address the county's discretionary acts.

2. *Workplace Safety Standards*

The McCartneys further argue that workplace safety laws create non-discretionary standards that the County must follow to provide deputies with a safe workplace. Although the County is subject to workplace safety standards, and must ensure law enforcement employees have a safe workplace, such standards do not define what amounts to "safe" staffing levels or allocations of law enforcement officers. These decisions are discretionary. RCW 36.28.010(6) (the Sheriff "*may* call to their aid such persons . . . as they may deem necessary" (emphasis added)).

The McCartneys cite multiple statutes and regulations that mandate a safe workplace.[8] But the allegations in the McCartneys' complaint regarding deputy safety are tied to staffing shortages. None of the statutes or regulations the McCartneys cite provide any standard for law

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[8] The McCartneys cite the following statutes: RCW 49.12.010 states, "The welfare of the state of Washington demands that all employees be protected from conditions of labor which have a pernicious effect on their health. The state of Washington, therefore, exercising herein its police and sovereign power declares that inadequate wages and unsanitary conditions of labor exert such pernicious effect." RCW 49.12.020 states, "It shall be unlawful to employ any person in any industry or occupation within the state of Washington under conditions of labor detrimental to their health." WAC 296-126-094 states, "It shall be the responsibility of every employer to maintain conditions within the work place environment that will not endanger the health, safety or welfare of employees. All facilities, equipment, practices, methods, operations and procedures shall be reasonably adequate to protect employees' health, safety and welfare." *See also* WAC 296-800-110 et seq.–Employer Responsibilities: Safe Workplace.

enforcement staffing, let alone a non-discretionary standard. The McCartneys' arguments invite court interference as to how much backup, supervision, or how many patrol officers assigned to a given area would be "reasonably adequate to protect" deputies' health, safety, and welfare. These questions are within the discretion of the County and the Sheriff, not the courts. *Farmer*, 186 Wash. at 583-84. Workplace safety laws are not specific enough to remove the County's discretion on law enforcement staffing. *See Colvin v. Inslee*, 195 Wn.2d 879, 893, 467 P.3d 953 (2020) (holding mandamus is appropriate only where "'the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment'" (quoting *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 599, 229 P.3d 774 (2010))).

Next, the McCartneys' cite published Sheriff's Department standards to argue that the County did not adequately provide the resources to create a safe workplace under those standards. But the Council is not obligated to fund everything that might be inferred from a given standard.[9]

We hold that governmental discretionary immunity applies. The County's decisions on funding allocation for staffing and sheriff deputy allocation fall within the discretionary

[9] To the extent the McCartneys argue that the County created an unsafe workplace by insufficiently training him, the McCartneys admits in their complaint that deputies were asked to wait for backup on dangerous calls. The complaint also states numerous times that deputies assigned to district 10 knew that backup could be "many miles and many minutes" away. CP at 4. McCartney was a veteran officer with 4 years' experience in Pierce County and another 5 years' previous police experience. Even though the incident here was in district 7, McCartney was familiar with working in the remote district 10 area and knew backup could take time to arrive. He chose to pursue a suspect on foot, in the dark. He was shot by a fleeing criminal. Nothing the McCartneys cite create a nondiscretionary standard that could alleviate such a "pernicious effect." *See* RCW 49.12.010.

exemption provided in *Evangelical* and its progeny. Workplace safety laws do not define with specificity how local law enforcement staffing decisions can ameliorate such risks. We will not impose our judgment as to how the County allocates resources to staff the Sheriff's Department.[10]

IV. Professional Rescuer Doctrine

The McCartneys argue that the professional rescuer doctrine does not bar relief. The County argues that the professional rescuer doctrine is not limited to parties being rescued, and that McCartney's death was "inherently within the ambit of those dangers which are unique to and generally associated with the particular rescue activity." *Maltman v. Sauer*, 84 Wn.2d 975, 979, 530 P.2d 254 (1975); Br. of Resp't at 53-54. We agree with the County and hold that the professional rescuer doctrine applies.

A. *Legal Principles*

"[T]he 'rescue doctrine' is intended to provide a source of recovery to one who is injured while reasonably undertaking the rescue of a person who has negligently placed himself in a position of imminent peril." *Maltman*, 84 Wn.2d at 976-77. Under the rescue doctrine, a person who negligently placed themselves in peril can be liable for damages incurred by the rescuer. *Maltman*, 84 Wn.2d at 976-77. The *professional* rescuer doctrine is an exception to this general rule. *Loiland v. State*, 1 Wn. App. 2d 861, 865, 407 P.3d 377 (2017).

[10] Public policy supports this holding. To hold otherwise would invite lawsuits against the County for every officer injured by a criminal act of violence outside of the County's control. We will not "make the [County] an insurer against every harm imposed by a criminal act." *Walters*, 14 Wn. App. at 553. Beyond having the result of holding County taxpayers liable for individual criminal acts against police officers, allowing such negligence claims to proceed would dissuade local governments, ex ante, from sending law enforcement professionals into dangerous situations.

"The professional rescuer doctrine is based on a broad policy of assumption of risk." *Markoff v. Puget Sound Energy, Inc.*, 9 Wn. App. 2d 833, 840, 447 P.3d 577 (2019). "The professional rescue doctrine bars professional rescuers from recovering under the rescue doctrine because a professional rescuer assumes certain hazards 'not assumed by a voluntary rescuer.'" *Beaupre*, 161 Wn.2d at 572 (quoting *Maltman*, 84 Wn.2d at 978).

"A professional rescuer assumes certain risks as part of his or her job and is compensated for accepting those risks." *Loiland*, 1 Wn. App. 2d at 865. The professional rescuer may not recover where "the hazard ultimately responsible for causing the injury is inherently within the ambit of those dangers which are unique to and generally associated with the particular rescue activity." *Loiland*, 1 Wn. App. 2d at 865 (quoting *Maltman*, 84 Wn.2d at 979) (internal quotation marks omitted). We broadly apply this doctrine to bar recovery for anyone who is fully aware of a hazard caused by another's negligence and who voluntarily confronts the risk for compensation. *Black Indus., Inc. v. Emco Helicopters, Inc.*, 19 Wn. App. 697, 699-700, 577 P.2d 610 (1978). However, the professional rescuer doctrine does not bar a professional from recovering in all cases where he or she is injured in the line of duty. *Loiland*, 1 Wn. App. 2d at 866.

In *Loiland*, Division One explained the rules courts in this state have employed to determine whether the professional rescuer doctrine applies:

> The doctrine does not apply where a professional rescuer is injured by a "'hidden, unknown, [or] extrahazardous'" danger that is not inherently associated with the particular rescue activity. *Maltman*, 84 Wn.2d at 978 (quoting *Jackson v. Velveray Corp.*, 82 N.J. Super. 469, 198 A.2d 115, 119 (1964)). Similarly, the professional rescuer doctrine does not bar recovery where the rescuer is injured by the act of an intervening third party. *Ballou* [*v. Nelson*], 67 Wn. App. [67,] 70, 834 P.2d 97 [(1992)]; *Ward v. Torjussen*, 52 Wn. App. 280, 287, 758 P.2d 1012 (1988). The doctrine "'relieves the perpetrator of the act that caused the rescuer to be at the

> scene. . . .'" *Beaupre v. Pierce County*, 161 Wn.2d 568, 573, 166 P.3d 712 (2007) (quoting *Ward*, 52 Wn. App. at 287, 758 P.2d 1012). It "does not apply to negligent or intentional acts of intervening parties not responsible for bringing the rescuer to the scene." [*Beaupre*, 161 Wn.2d] at 575, 166 P.3d 712.

1 Wn. App. 2d at 866.

B. *Professional Rescuer Doctrine Applies*

We examine each rule associated with the professional doctrine, and conclude that the doctrine applies here to bar the McCartneys' claims.

1. *Hidden, Unknown, or Extrahazardous Danger Not Inherently Associated with the Particular Rescue Activity*

The McCartneys argue that the professional rescuer doctrine does not apply because the County created an unknown and extrahazardous risk by creating an unsafe workplace not inherent to law enforcement. The County argues the danger was not unknown and that it was inherently associated with McCartney's rescue activity. We agree with the County.

McCartney quickly and readily responded to the scene of an apparently violent crime. He confronted an armed suspect, at night, on a solo patrol. This was a risk "'inherently within the ambit of those dangers which are unique to and generally associated with'" law enforcement, and was especially inherent in responding to a violent crime. *Loiland*, 1 Wn. App. 2d at 865 (quoting *Maltman*, 84 Wn.2d at 979). The danger of facing an armed suspect was inherently associated with McCartney's rescue activity.

The McCartneys cite *Ballou v. Nelson*, 67 Wn. App. at 73, to argue that the professional rescuer doctrine does not apply because McCartney was not conducting a "rescue." Br. of Appellant at 35. In *Ballou*, Division 1 of this court held that a criminal who injured a police officer was not shielded by the professional rescuer doctrine for two reasons: first, because the

defendants intentionally assaulted the officer, and the doctrine applies to negligence; and second, because the officers were not conducting a rescue but instead responding to a bar fight. 67 Wn. App. at 70. But *Ballou* is distinguishable.

First, the defendant here is the officer's employer, and has no relation to the criminal who committed the crime against the officer. And the McCartneys allege that the County is negligent, not that it intentionally killed McCartney; it is apparent that Pawul and his accomplices were responsible for the intentional act. Second, officers responding to break up a bar fight may not be rescuing someone, but an officer responding to a family, with children, in a home being held at gunpoint while their home is robbed certainly is. The McCartneys' arguments to the contrary strain credulity. Accordingly, this exception to the professional rescuer doctrine does not apply.

2. *Injury to Rescuer Caused by the Negligent Act of an Intervening Third Party*

The professional rescuer doctrine does not apply to a third party where the rescuer is injured by the negligent or intentional acts of that intervening third party. *Ballou*, 67 Wn. App. at 70, 72. This exception does not apply here.

Pawul and his accomplices were an intervening third party. Thus, the professional rescuer doctrine does not bar the McCartneys from recovering against *them*. But this dispute is not between the McCartneys and Pawul and his accomplices. Moreover, "to invoke the doctrine the defendant must be guilty of some negligence toward the rescuer after he, the rescuer, has begun to attempt the rescue." *Maltman*, 84 Wn.2d at 982 (quoting *Hawkins v. Palmer*, 29 Wn.2d 570, 575, 188 P.2d 121 (1947)) (internal quotation marks omitted). Put another way, for this exception to the professional rescuer doctrine to apply, the County must have committed a

negligent, intervening act *after* McCartney began the rescue attempt. Here, however, the County's negligent act that the McCartneys alleged caused the injury—its staffing decisions regarding the Sheriff's Department—took place well before McCartney began the rescue. Accordingly, the County is not an intervening party.

The McCartneys cite *Beaupre*, 161 Wn.2d at 575, to argue that the doctrine does not apply to "intervening parties not responsible for bringing the rescuer to the scene." Br. of Appellant at 38. Although the doctrine does not apply to intervening parties, as explained above, the County was not one.

In *Beaupre*, Pierce County sheriff's deputies took part in a high-speed chase. 161 Wn.2d at 570. When the suspect slowed, Sheriff's Sergeant Beaupre exited his vehicle and was subsequently struck and injured by another Pierce County sheriff patrol car. 161 Wn.2d at 570. Beaupre sued the county for negligence. 161 Wn.2d at 571. Our Supreme Court held "as a matter of law that the professional rescue doctrine does not bar Beaupre's suit against his employer." 161 Wn.2d at 570. The county argued that the county was not an intervening party. *Beaupre*, 161 Wn.2d at 573. The court rejected this argument and held that the professional rescue doctrine did not bar Beaupre's lawsuit, stating, "The doctrine does not apply to negligent or intentional acts of intervening parties not responsible for bringing the rescuer to the scene." *Beaupre*, 161 Wn.2d at 575.

Here, the McCartneys alleged that Deputy McCartney taking on the extra shift was due in part to the County's negligent understaffing of the deputy ranks. CP at 5 ("with the agency understaffed, Deputy McCartney agreed to cover the fellow deputy's graveyard shift"). Thus, any 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. *Beaupre* applies only where the employer is "guilty of some negligence toward the rescuer after he, the rescuer, has begun to attempt the rescue." *Maltman*, 84 Wn.2d at 982; *cf. Beaupre*, 161 Wn.2d at 571-72. Accordingly, this exception to the professional rescue doctrine does not apply and does not allow the McCartneys to recover.

3. *Relief for the Perpetrator of the Act that Caused the Rescuer to Be at the Scene*

The McCartneys argue that the only party that may be relieved under the professional rescuer doctrine is the party who caused the rescuer, McCartney, to be at the scene. We disagree because the doctrine is broader than what the McCartney's argue.

Under the original application of the professional rescuer doctrine, the "perpetrator of the act that caused the rescuer to be at the scene" meant the person being rescued. For example, a firefighter may not recover from the victim of a fire he rescued, barring unforeseeable hidden, unknown, or extrahazardous dangers. *See Maltman*, 84 Wn.2d at 978. Likewise, a police officer who has pulled over a car, then was injured by a different passing motorist, may recover against the passing motorist but not the driver of the stopped car. *See Sutton v. Shufelberger*, 31 Wn. App. 579, 587-88, 643 P.2d 920 (1982). Using these examples as an analogy, the "perpetrator" who caused McCartney to be at the scene was the victim of the burglary.

But as the *Loiland* court explained, the professional rescuer doctrine applies both when the injury is not caused by an intervening third party, and where a party's negligence caused the professional rescuer's presence at the scene but the rescuer "is injured by a hazard that is 'inherently within the ambit of those dangers which are unique to and generally associated with the particular rescue activity.'" 1 Wn. App. 2d at 865 (quoting *Maltman*, 84 Wn.2d at 979).

Thus, assuming without deciding that the County's negligence brought McCartney to the scene, McCartney's response to the home invasion call was inherently associated with the hazard he encountered. *Cf. Ward*, 52 Wn. App. at 287 (holding an officer's response to a prowler assist call does not inherently involve the hazard of being struck in a traffic collision). Accordingly, this argument fails.

C. *The McCartneys' Additional Arguments*

The McCartneys make two additional arguments to why the professional rescuer doctrine should not apply. Both fail.

1. *Workplace Safety and the Professional Rescuer Doctrine*

The McCartneys argue that the professional rescuer doctrine does not apply because the County created unsafe working conditions that McCartney could not have assumed. We disagree.

The very basis of the professional rescuer doctrine is that certain professions come with inherent risks that employees assume in exchange for compensation. *Loiland*, 1 Wn. App. 2d at 865; *Black Indus.*, 19 Wn. App. at 699-700. Law enforcement is a dangerous profession. *State v. Flores*, 186 Wn.2d 506, 523 n.6, 379 P.3d 104 (2016) (listing statistics demonstrating the dangers police officers face).[11] Enforcing the law requires officers to take certain risks in order to provide for public safety. Responding to the scene of an armed home invasion is no exception.

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[11] "The majority's . . . footnote's statistics certainly show that law enforcement in general is a dangerous profession." *Flores*, 186 Wn.2d at 535 (McCloud, J., dissenting).

The McCartneys attempt to frame this as a workplace safety issue, citing *Siragusa v. Swedish Hosp.*, 60 Wn.2d 310, 320, 373 P.2d 767 (1962), for the general rule that an employee does not assume risks arising from the employer's negligence. But this attempts to sidestep the professional rescuer doctrine by ignoring the distinction between the risk assumed in an inherently dangerous rescue operation—that happens to be a part of the job—and those risks created by a workplace that is improperly unsafe. Indeed, if workplace safety were to trump the professional rescuer doctrine, then the professional rescuer doctrine could never apply; the workplace that involves a dangerous rescue that employees volunteer to undertake is unsafe in spite of these rules. McCartney assumed this risk when he responded to the 911 dispatch.

2. *Spontaneous Risks*

The McCartneys then argue that Deputy McCartney could not assume the risk here because he reacted spontaneously. We disagree.

The McCartneys cite *Kirk v. Wash. State Univ.*, 109 Wn.2d 448, 453, 746 P.2d 285 (1987), to argue that to show McCartney assumed the risk, the evidence must show "(1) had full subjective understanding (2) of the presence and nature of the specific risk, and (3) voluntarily chose to encounter the risk." *Kirk* was a case where a cheerleader fell during an unsanctioned practice and broke her elbow. 109 Wn.2d at 450. But, as explained above, the professional rescuer doctrine is more than assumption of risk, and *Kirk* has never been applied to the doctrine. To the extent *Kirk* applies at all, the *Kirk* elements are satisfied, and the McCartneys' argument fails.

McCartney was an experienced officer. He had worked for nine years in two police departments. Dispatch informed McCartney of what kind of call he was responding to. He knew

that backup could be "many miles and many minutes" away. CP at 4. The County also instructed deputies to wait for backup in these situations. This was not a spontaneous reaction. This was a professional law enforcement officer deliberately responding to a crime and doing his duty.

Accordingly, we hold that McCartney, as a professional rescuer, assumed the risk when he went to the scene of the crime as a law enforcement officer in an attempt to rescue a family held at gunpoint. Thus, this argument fails.

V. WRIT OF MANDAMUS

The McCartneys argue that we should remand to the trial court to issue a writ of mandamus to compel the County to "correct unsafe workplace conditions." Br. of Appellant at 44. The County argues that mandamus is inappropriate when a government entity makes discretionary decisions about police officer staffing. We agree with the County.

A. *Legal Principles*

A writ of mandamus is a "rare and extraordinary remedy" that requires courts to order another branch of government to take a specific action. *Colvin*, 195 Wn.2d at 890. "A writ of mandamus can only command what the law itself commands. If the law does not require a government official to take a specific action, neither can a writ of mandamus." *Colvin*, 195 Wn.2d at 893. Thus, as our Supreme Court explained, "[M]andamus may not be used to compel the performance of acts or duties which involve discretion on the part of a public official." *SEIU Healthcare*, 168 Wn.2d at 599 (quoting *Walker v. Munro*, 124 Wn.2d 402, 410, 879 P.2d 920 (1994)) (internal quotation marks omitted).

A court may issue a writ of mandamus only where three elements are satisfied: (1) There is a clear duty for a governmental official to act such that "the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Colvin*, 195 Wn.2d at 893. (2) The party seeking the writ has no "plain, speedy and adequate remedy in the ordinary course of law." RCW 7.16.170; *Colvin*, 195 Wn.2d at 894. And (3) the party seeking the writ must be "beneficially interested" such that the party has an interest in the writ beyond that shared in common with other citizens. *Retired Pub. Emps. Council of Wash. v. Charles*, 148 Wn.2d 602, 616, 62 P.3d 470 (2003).

B. *Application of Mandamus Requirements*

The McCartneys argue that they qualify for a writ of mandamus by fulfilling all three elements. We disagree.

On the first element, the McCartneys argue that workplace safety laws create mandates that remove the County's discretion. We disagree. As explained in Part III, *supra*, there is no workplace safety law that states with specificity exact staffing and personnel allocation requirements for county sheriff's departments such that it "leave[s] nothing to the exercise of discretion or judgment." *Colvin*, 195 Wn.2d at 893.

Our courts will not issue mandamus to order counties to adjust the staffing of their sheriff's departments. *Farmer*, 186 Wash. at 583-84. "Courts will not by mandamus attempt to control the discretion of subordinate bodies acting within the limits of discretion vested in them by law." *Farmer*, 186 Wash. at 583-84.

The *Farmer* court held that the staffing of sheriff's departments is not a decision for the courts.

> If it be assumed that the business of the sheriff's office will be hampered [by] the reduction in force, 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.

Farmer, 186 Wash. at 588. Likewise, the *SEIU Healthcare* court explained that the allocation of funds in a budget necessarily involves the discretion of an elected official. 168 Wn.2d at 600 ("the allocation of limited state funds in order to achieve the statutorily required balanced budget necessarily involves the exercise of the governor's discretion"); *see also Smith v. Bd. of Walla Walla County Comm'rs*, 48 Wn. App. 303, 305, 738 P.2d 1076 (1987) (reversing a writ of mandate ordering county commissioners to reinstate and fund an employee position).

Though *Farmer* was decided long ago, the statutes providing counties and sheriff's departments with the authority to hire deputies and delegate the sheriff's responsibilities still include such discretionary language. *See State v. Bartholomew*, 104 Wn.2d 844, 848, 710 P.2d 196 (1985) (use of "may" and "shall" in a statute indicates that the legislature intended the two words to have different meanings: "may" being directory, while "shall" being mandatory).

Under RCW 36.16.070, a county officer "may employ deputies" and the county board "shall fix their compensation." This does not create a requirement that eliminates county officials' discretion. Similarly, RCW 36.28.010(6) provides that county sheriffs "*[s]hall* keep and preserve the peace in their respective counties . . . and in apprehending or securing any person for felony or breach of the peace, they *may* call to their aid such persons, or power of their county as they may deem necessary." (Emphasis added). This provides the Sheriff with the discretion to call up deputies and other support staff, but it stops short of mandating such staffing with "precision and certainty."

The McCartneys argue that the County has a "clear duty to maintain a safe workplace, but has taken no corrective action to prevent" McCartney's death. Br. of Appellant at 45. But as explained above, workplace safety laws do not define with specificity the number of sheriff deputies, type of training, or provide precise mandates on how to ameliorate the risks law enforcement officers face. The McCartneys do not fulfill the first element.

The McCartneys cannot fulfill the first element necessary for a court to issue a writ of mandamus. All three are required. *Colvin*, 195 Wn.2d at 894. Thus, we need not reach the remaining elements. Accordingly, we hold that the trial court did not err when it denied the writ.

VI. Factual Dispute: Public Records

The McCartneys argue that the county public records the trial court took judicial notice of created genuine issues of material fact such that judgment on the pleadings under CR 12(c) was improper. We disagree.

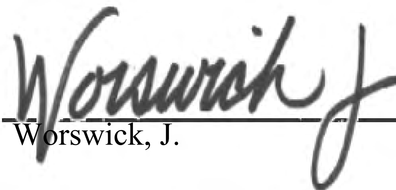
As stated above, we review the trial court's ruling on a CR 12(c) motion de novo. *Aji P.*, 16 Wn. App. 2d at 187. We assume the truth of the facts alleged in the complaint and view them in the light most favorable to the nonmoving party. *Howell v. Dep't of Soc. & Health Servs.*, 7 Wn. App. 2d 899, 910, 436 P.3d 368 (2019).

The McCartneys do not argue that information in the public record contains disputed facts, but rather that the trial court improperly interpreted those records in the light most favorable to the County. But the McCartneys make no showing of this claim. The McCartneys once again argue that these records reveal that the County's decisions were not discretionary, high level policy determinations, but rather operational decisions not subject to discretionary immunity. However, the McCartneys do not cite examples of where such operational decisions

were made, and such claims are absent from the McCartneys' pleadings. This argument fails. Accordingly, we hold that the public records that the trial court took judicial notice of created no genuine issue of material fact.

CONCLUSION

First, we hold that the trial court did not abuse its discretion when it took judicial notice of public records of undisputed authenticity. Next, we hold that the McCartneys' claims are barred under governmental discretionary immunity and the professional rescuer doctrine. We further hold that a writ of mandamus is not appropriate because Pierce County's decisions on allocation of funds for sheriff deputy staffing and geographic allocation are discretionary, and not mandated with specificity in statute. Finally, we hold that the public records created no issue of material fact. Thus, we hold that the trial court did not err when it entered judgment on the pleadings. We affirm.



Worswick, J.

We concur:

Lee, J.

Cruser, A.C.J.

III BRANCHES LAW, PLLC

September 28, 2022 - 3:12 PM

Transmittal Information

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