NO. 96459-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

WENDY ANN MURRAY as PERSONAL REPRESENTATIVE OF THE ESTATE OF CARL MURRAY, a deceased career professional firefighter, for and on behalf of the Estate and RCW 4.20.020 beneficiaries,

Petitioner,

vs.

CITY OF VANCOUVER, a municipal subdivision of the State of Washington,

Respondent.

ANSWER TO PETITION FOR REVIEW

CITY ATTORNEY'S OFFICE
VANCOUVER, WASHINGTON

Daniel G. Lloyd, WSBA #34221
Sara Baynard-Cooke
WSBA #35697
Assistant City Attorney
P.O. Box 1995
Vancouver, WA 98668-1995
(360) 487-8500
(360) 487-8501 (fax)
dan.lloyd@cityofvancouver.us
sara.baynard-cooke@cityofvancouver.us

FOLEY & MANSFIELD, PLLP

Melissa K. Roeder, WSBA #30836
999 Third Avenue, Ste. 3760
Seattle, WA 98104
(206) 456-5360
(206) 456-5361 (fax)
mroeder@foleymansfield.com

Attorneys for Defendant/Respondent City of Vancouver

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

CASES

PAGE(S)

CASES (continued)

STATUTES

REGULATIONS

COURT RULES

PAGE(S)

SECONDARY AUTHORITY

I. INTRODUCTION

The Court of Appeals below applied the following "well-established discovery rule" in an unpublished decision: "the statute of limitations on … survival claims started when [the decedent], who would have been the plaintiff for purposes of the survival claims, *should have* known that [an occupational exposure] caused his [occupational disease]." *Murray v. City of Vancouver*, No. 49899-5-II, slip op. at 6 (Sept. 26, 2018) (unpublished) (italics in original). Petitioner Wendy Ann Murray[1] now asks this Court to accept review and set aside this "well-established" principle of law in favor of a rule the Court of Appeals rightly concluded to be an "unsupported statement of the law." *Murray*, slip op. at 5. Logically, an "unsupported statement of the law" does not and cannot conflict with any Supreme Court or Court of Appeals opinion. To be sure, the rule applied by the Court of Appeals finds support in decades of this Court's precedent. *E.g.*, *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 772-73, 733 P.2d 530 (1987).

Obtaining discretionary review in the Supreme Court requires application of demanding criteria, and for good reason. *See* RAP 13.4(b).

[1] The City follows the Court of Appeals' lead and will refer to Carl and Wendy Murray by first name for ease of reference. *See Murray*, slip op. at 1 n.1. In addition, the City will refer to the petitioner/plaintiff as "the Estate." *Accord id.* To this end, the Estate incorrectly designated the Petition for Review as a "Motion for Discretionary Review." RAP 13.3(b)-(c). Because the Estate now seeks discretionary review of a decision terminating review, its designation is now "petitioner" rather than "appellant." RAP 3.4.

This Court's review is reserved for litigating unsettled legal issues or stabilizing Washington law by resolving conflicts in the lower courts. This case involves neither scenario. Rather, the Estate has petitioned for review because it is dissatisfied with how the Court of Appeals applied well-established law to unique facts. RAP 13.4(b) requires more.

The petition for review should be denied.

II. ISSUES PRESENTED

The City rejects the Estate's statements of the issues and presents the following in lieu thereof:

1. Whether the Court of Appeals' affirmance of the trial court's dismissal of the Estate's survival claims need not be reviewed when it was based on a well-established application of the discovery rule and does not conflict with any decision of this Court.

2. Whether the Court of Appeals' affirmance of the trial court's dismissal of the Estate's strict liability claim need not be reviewed when, consistent with this Court's precedent, strict liability is a cause of action that can be advanced without proof of negligence or intentional acts, meaning RCW 41.26.270 abolished it.

3. Whether the Court of Appeals' affirmance of the dismissal of the Estate's outrage claim need not be reviewed because the analysis is consistent with this Court's precedent.

4. Whether the Estate failed to advance sufficient justification that the issues decided in a unanimous, unpublished decision, are of substantial public importance necessitating Supreme Court review.

III. STATEMENT OF THE CASE

A. Factual background

The factual background is adequately set forth in the Court of Appeals opinion. *Murray*, slip op. at 2-4. As relevant here, Carl Murray was hired as a firefighter for Vancouver on May 26, 1992. CP 47.

In September 2001, the City received a report from an environmental engineering firm advising that radon in two fire stations—Stations 82 and 86—were abnormally high in both weight rooms. Br. of Appellant, App. A at Ex. G.[2] The report "recommend[ed] that further testing be conducted." *Id.* Roughly a month later, Carl completed a Health Hazards Material Exposure Report, in which he was to state "[i]n [his] own words" and in "as much detail as possible…the circumstances of [his] exposure" and identify "the substance involved." CP 46. He did by attaching a narrative that he prepared, which read in its entirety:

[2] The documents on which the Estate relied at the trial court and on appeal were filed under the wrong case number. The Estate never attempted to correct the misfilings at the superior court level, and also never asked the Court of Appeals to correct the record. *Cf.* RAP 9.10. For this reason, the documents submitted by the Estate in opposition to partial summary judgment appear only as appendices to its opening brief at the Court of Appeals, not anywhere in the clerk's papers. Nevertheless, the trial court did consider them when deciding partial summary judgment. *See* II VRP (June 10, 2016) at 32-33. For this reason, the City has not objected to their consideration on appeal, but the disjointed nature of the record is another reason this case is a poor vehicle for this Court's review.

CMurray Exposure to Radon

The first year of my career I was assigned to St. 82. Thereafter, various assignment at St. 82 and St. 86 since my hire date of 5.26.92

Carl Murray

CP 47. In short, a month after the September 2001 report of elevated radon levels, Carl prepared a document that he had been "[e]xpos[ed] to [r]adon" while working at the two stations referenced in the report. *Id.*

The Estate's summary judgment evidence shows that the City tested again in 2001 and levels in both stations reached acceptable levels by May 2002. Br. of Appellant, App. A at Ex. H.[3] The City tested both stations again in 2006. *Id.*, App. A at Ex. I. All rooms in Station 86 tested below threshold, though five canisters in Station 82 were slightly above. *Id.* (Report of 2/21/06–Table). By July 2006, all rooms in Station 82 tested at normal levels. *Id.* (Report of 7/18/06–Table).

Three years later, in 2009, Carl and every member of the fire department received an email containing "health information … about Radon and potential or possible exposures." CP 23, 27.

[3] A May 13, 2002 report shows that all rooms in Station 82 had returned to levels below the 4.0 pCi/L level except for the weight room, but that was corrected within nine days. Br. of Appellant, App. A at Ex. H. As for Station 86, the lone room with an elevated level in September 2001—the workout room—was tested again and yielded a result of 1.3 pCi/L. *Id.* (Oct. 19, 2001, letter from PBS Eng'g). The "crawlspace" still had levels in excess of 4.0 pCi/L, but the record is silent as to what extent, if any, Carl worked there. Courts do not presume missing facts on summary judgment. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990); *see also Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226-27, 770 P.2d 182 (1989).

Carl was diagnosed with lung cancer in December 2010. CP 53. On January 5, 2011, Carl received an email from Division Chief Roxy Barnes. CP 36. The Estate characterizes Barnes's email exchange as "d[oing] nothing to convey any appreciable radon exposure to [Carl] Murray at the COV's fire stations." Mot. for Disc. Rvw. at 4. What Barnes wrote speaks for itself:

> I have been doing some research and believe it would be very helpful to you carl to identify how many shifts you worked at station 1 or 2[4] *since radon is one major cause of several types of lung cancer*.

CP 36 (emphasis added). Three days later, Carl sent out a mass e-mail advising his colleagues of his prognosis and expected treatment. CP 38. This prompted a response from Chief Barnes later that day, in which she asked "to know the types of cancer [with which Carl was diagnosed] *so I can connect it to your radon exposure* for presumption." *Id*. (emphasis added). She then asked Carl whether he "remember[ed] … the paperwork *for radon exposure*," and that she "plan[ned] on writing a supportive paper to nail your presumption connection for the city." *Id.* (emphasis added). Carl responded the following day (January 9, 2011), stating that he "remember[ed] filling out the paperwork" for the radon exposure. CP 40. Barnes and Carl continued to email each other on January 9, which ended

[4] The summary judgment record, *see* RAP 9.12, does not clearly reflect this, but other portions of the record confirm that "Station 82" was later renamed "Station 1" and "Station 86" was later renamed "Station 2." *See* CP 387.

with Barnes stating her "goal is to write a paper *to connect this [cancer] to radon* so there will be no question." *Id.* (emphasis added).

Tragically, Carl passed away on July 30, 2013. Br. of Appellant, App. B ¶ 14. On October 4, 2013, the Estate's lawyers submitted a request for public records under chapter 42.56 RCW that sought documentation regarding radon in Vancouver's fire stations. *Id.*, App. A at Ex. C. The City timely acknowledged the request and then formally responded on October 28, 2013, by producing, *inter alia*, the same test results and correspondence from 2001 through 2013 that the Estate would file in opposition to summary judgment. *Id.*, App. A at Exs. D-E. According to Wendy Murray's declaration, it was these documents "provided by the City of Vancouver on October 28, 2013" that first made her "aware of the high levels of radon in City of Vancouver Fire Stations." *Id.*, App. B ¶ 15.

To be clear, it is undisputed that (1) a public records request was sufficient to acquire all information that the Estate would need to pursue a civil action, (2) these records were produced to the Estate's lawyers within a month of the request, and (3) the record is devoid of any suggestion that either Carl or Wendy were inhibited in any way from requesting and receiving these same records in January 2011 after Carl openly discussed with Chief Barnes a perceived link between his cancer and radon in the fire stations where he worked.

B. Procedural history

The Estate filed the underlying lawsuit on February 2, 2016. CP 1-10. The City moved for partial summary judgment on the following issues:

- That all claims advanced under Washington's survival statutes, RCW 4.20.046(1) and RCW 4.20.060, be dismissed as barred under the three-year statute of limitations;
- That all causes of action and/or theories other than negligence or intentional torts be dismissed as statutorily abolished by RCW 41.26.270 as modified by RCW 41.26.281;
- That Plaintiffs' outrage claim (intentional infliction of emotional distress) be dismissed for insufficient evidence; and
- That any award be limited to only "any excess of damages over the amount received or receivable under" LEOFF, as provided in RCW 41.26.281.

CP 56-70. The trial court granted the motion. CP 81-83. The order left the RCW 4.20.010-.020 wrongful death claim under a negligence theory as the only remaining cause of action. CP 83.

After Murray unsuccessfully sought discretionary review in the Court of Appeals, CP 84-88, 487-92, the City sought clarification of the partial summary judgment order vis-à-vis what damages were still recoverable. CP 485-86, 493-99. This ultimately resulted in a stipulation enabling the Estate to seek immediate review of the partial summary judgment order. CP 519-21. As relevant here, the stipulation and order "dismissed with prejudice" "Plaintiff's remaining claim [which was] a negligence theory under the wrongful death statutes, RCW 4.20.010-

.020," but noted that the lone "remaining claim" was "subject to reinstatement if the [trial court's] Order Granting Defendant City of Vancouver's Motion for Partial Summary Judgment *dismissing the survival claims (RCW 4.20.046 & 4.20.060) and survival damages (WPI 31.01.01) is reversed on appeal as outlined below*." CP 520 (emphasis added). The stipulation and order further provided that if the dismissal of the survival claim was reversed, the "the wrongful death cause of action … will be reinstated along with any other cause(s) of action the appellate court may reinstate." CP 520-21. The stipulation and order concluded by stating "[i]f the June 10, 2016, Order is affirmed, all of Plaintiff's claims will remain dismissed with prejudice." CP 520-21.

The Estate timely appealed, CP 522-24, and the Court of Appeals affirmed the dismissal of all causes of action. *Murray*, slip op. at 5-13. The court held that the January 2011 emails telling Carl that his cancer might have been caused by radon was sufficient to trigger the "well-established discovery rule," which barred the survival claims that were not advanced until 2016. *Id.* at 5-7. The court also held that the Estate's strict liability claim, which was premised on Washington law allowing liability independent of proving negligence or intentional acts, were barred by RCW 41.26.270, which abolished "all civil causes of action" other than those based on negligent or intentional acts. *Murray*, slip op. at 7-8. And

the court held that the Estate did not advance sufficient evidence to prove outrage. *Id.* at 9-11.

The Court of Appeals concluded the trial court erred by dismissing loss of consortium as a separate cause of action because, in its view, the Estate advanced loss of consortium only as "an element of damages for the Estate's the wrongful death claim." *Id.* at 9. But the Court of Appeals refused to reinstate the wrongful death claim "because the Estate stipulated to" the order dismissing it. *Id.* at 12 (citing *Fite v. Lee*, 11 Wn. App. 21, 25-26, 521 P.2d 964 (1974)). Accordingly, the wrongful death claim remains dismissed with prejudice.

On October 16, 2018, the City moved for reconsideration/ clarification under RAP 12.4 as to whether further proceedings were needed vis-à-vis loss of consortium. The court called for a response two days later, and on November 26, 2018, decided not to clarify its opinion.

IV. ARGUMENT

The Estate relies on only two bases from RAP 13.4(b) to support its petition, namely its claim that the Court of Appeals' opinion "is in conflict with a decision of the Supreme Court," and that this case involves "an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(1), (b)(4). The Estate does not contend that review is warranted under RAP 13.4(b)(2) or RAP 13.4(b)(3).

The Estate's petition falls far short of meeting RAP 13.4(b)'s demanding standards. The petition for review should be denied.

A. The Estate cites no authority that conflicts with the Court of Appeals' analysis on the statute of limitations, or shows that review is otherwise justified.

To justify review as it relates to the survival claims, the Estate needs to demonstrate the Court of Appeals' unpublished opinion "is in conflict with a decision of the Supreme Court." RAP 13.4(b)(1). The Estate here advances the same rule that the Court of Appeals found to be an "unsupported statement of law," namely that "the statute of limitations did not begin running because there 'was never adequate notice of the ongoing lethal radon exposures, failed mitigation, and the strongest relationship between radon and lung cancer.'" *Murray*, slip op. at 5-6 (quoting Br. of Appellant at 33); *cf.* Mot. for Disc. Rvw. at 9. The Estate builds off of this premise by citing various disclosure provisions in the Washington Administrative Code relating to fire departments. Mot. for Disc. Rvw. at 7-8. In essence, the Estate argues that unless a municipality complies with every regulatory requirement,[5] firefighters owe no duty to exercise reasonable diligence under the discovery rule. This is an incorrect statement of the law. As the Court of Appeals correctly found:

[5] The City does not now, nor has it ever, conceded that its actions fell short of what chapter 296-305 WAC requires. Regardless, where the Estate's argument misses the point is its assumption that these regulatory provisions alter the common law discovery rule and are therefore material to the statute of limitations issue. They are not.

> The [discovery] rule delays accrual of the cause of action only until the claimant knew *or reasonably should have known* of the facts necessary to establish the cause of action. It does not delay accrual until the claimant knows that she has a legal cause of action, and *the claimant must exercise reasonable diligence in pursuing a legal claim.*

Murray, slip op. at 6 (quoting *Allen v. State*, 60 Wn. App. 273, 275, 803 P.2d 54 (1991), *aff'd*, 118 Wn.2d 753, 826 P.2d 200 (1992) (first italics added by *Murray*, second italics added).

Every Supreme Court case cited by the Estate adheres to this same principle. *In re Estate of Hibbard*, 118 Wn.2d 737, 826 P.2d 690 (1992), reaffirmed that "this court continues to emphasize the exercise of due diligence by the injured party." *Id.* at 746. Applying that emphasis, the Court reinstated summary judgment in favor of the State against a rape victim who claimed negligent supervision of a probationer. *Id.* at 752-53. Rejecting the same argument the Estate advances here, the Court upheld the dismissal of the claim against the State because of the absence "in the record [of anything] to indicate that prior to [the expiration of the statute of limitations] that any attempt was made by respondents or plaintiff to determine the liability of the State." *Id.* at 750. In short, the Court of Appeals' analysis is fully consistent with *Hibbard.*

The next case cited, *White v. Johns-Manville Corp.*, 103 Wn.2d 344, 693 P.2d 685 (1985), does not aid the Estate. The issue in *White* was whether the discovery rule could apply after a decedent passes away. *Id.*

at 345. The case came to this Court on certification from the federal district court on "stipulated facts." *Id.* Importantly, it was "stipulated" for purposes of that case "that the decedent *never knew that he was suffering from any adverse effects* of exposure to asbestos-containing materials," and that the personal representative "did not learn until [over four years after the decedent's death] that his death *may have been due to asbestos exposure*." *Id.* (emphasis added) In fact, the Court there stressed that it was "*not faced with … a case in which the deceased is alleged by the defendant to have known the cause of the disease which subsequently caused his death*." *Id.* at 347 (emphasis added). Here, the decedent (Carl) knew he was suffering from a disease (lung cancer), and—five years before the lawsuit was filed—discussed with a colleague the perceived link between his cancer and radon. CP 36-40. Thus, the Court of Appeals' conclusion is fully consistent with *White*'s holding: "The statute of limitation pertinent to a survival action commences at the *earliest* time *at which the decedent* or his personal representatives knew, *or should have known*, the causal relationship between the decedent's exposure to asbestos and his ensuing disease." *Id.* at 360 (emphasis added).

The final case cited as a RAP 13.4(b)(1) basis for review is *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 146 P.3d, 423 (2006), where this Court equated a construction defect case to medical

malpractice lawsuits in which "a surgical instrument is left in the plaintiff's body during surgery." *Id.* at 579. But in so doing, the Court reaffirmed that "a plaintiff cannot ignore notice of possible defects," and is under a duty to "'make further diligent inquiry to ascertain the scope of the actual harm'" the instant he or she "'is placed on notice by some appreciable harm occasioned by another's wrongful conduct.'" *Id.* at 581 (quoting *Green v. A.P.C.*, 136 Wn.2d 87, 96, 960 P.2d 912 (1998)). In other words, when a person suffers appreciable harm, a duty of due diligence arises. As the authority on which *1000 Virginia Ltd.* relied said, "One who has notice of facts sufficient to put him upon inquiry is deemed to have notice of *all* acts which reasonable inquiry would disclose." *Green*, 136 Wn.2d at 96 (citation and internal quotation marks omitted).

The Court of Appeals' analysis below conflicts with none of these authorities. It correctly held that "the City presented undisputed evidence that Carl received and responded to emails that specifically identified a link between his exposure to radon at the fire stations" by January 2011 at the latest. *Murray*, slip op. at 6. The Court of Appeals then noted that if Carl had "exercised due diligence at that time, … [he] could have obtained all the information regarding radon testing and mitigation efforts that Wendy later received when the City responded to her public records request." *Id.* at 7. Not only does this analysis fully comport with *Hibbard*,

White, and *1000 Virginia Ltd. P'ship*, it also adheres to other precedent from this Court that the Estate overlooks entirely. *E.g.*, *Reichelt*, 107 Wn.2d 772-73 (in occupational disease case, rejecting contention that discovery rule would toll statute of limitations until plaintiff meets with lawyer and is advised of possible civil claim). The Estate's argument that the Court of Appeals' opinion is inconsistent with this Court's precedent is unpersuasive and simply incorrect. Given that the Estate has advanced no other case from this Court with which the Court of Appeals' opinion even arguably conflicts, review is plainly unwarranted under RAP 13(b)(1).[6]

The same can be said about RAP 13.4(b)(4). By way of illustration, this provision justified review in a case that could have affected "every sentencing proceeding in Pierce County … where a [drug offender sentencing alternative] sentence was or is at issue." *State v.*

[6] Highlighting the Estate's misguided legal analysis is its reliance on a quotation from *In re Marriage of Murphy*, 48 Wn. App. 196, 737 P.2d 1319 (1987), and its claim that an alleged conflict with a pattern jury instruction is sufficient to justify Supreme Court review. First, *Murphy* examined a statute relating to modification of parenting plans, and the quotation on which the Estate relies actually comes from Judge Green's dissent relating to whether "an innocent party [should] lose custodial privileges because of a situation created by [a different parent's] wrongful acts." *Murphy*, 48 Wn. App. at 203 (Green, J., dissenting). An out-of-context quotation from a Court of Appeals dissent having nothing to do with the statute of limitations or discovery rule hardly qualifies as uncertainty in the law sufficient to justify Supreme Court review.

Second, RAP 13.4(b) does not authorize review based upon a perceived conflict with a pattern jury instruction, particularly in case such as this that involved no jury instructions at all. To that end, there is no authority interpreting or applying WPI 12.07 or the principle of law it conveys in the context of the statute of limitations. *Cf. Hopkins v. Seattle Pub. Sch. Dist. No. 1*, 195 Wn. App. 96, 102 & n.2, 380 P.3d 584, *review denied*, 186 Wn.2d 1029 (2016) (reversing jury verdict in favor of school district alleged to have negligently supervised students, noting trial court's failure to instruct jury on special relationship between school and student was reversible error).

Watson, 155 Wn.2d 574, 577, 122 P.3d 903 (2005). This is not that case here. The opinion below is unpublished, meaning it does "not … have precedential value." RCW 2.06.040. To be sure, the entire section the Estate devotes to RAP 13.4(b)(4) contains only conclusory statements having no bearing on the statute of limitations. Put simply, the Estate's petition does not "involve[] an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4).

B. The Court of Appeals' adherence to the legislative abolition of all civil causes of action other than negligence and intentional torts is fully consistent with the lone Supreme Court case cited by the Estate.

The Court of Appeals next followed the plain language of RCW 41.26.270 to explain: "LEOFF explicitly abolishes 'all … civil causes of actions by … firefighters against their governmental employers' except as otherwise provided by LEOFF.'" *Murray*, slip op. at 7 (quoting RCW 41.26.270). The Estate mentions RCW 41.26.270 only in passing, and then attempts to twist its language to assert the statute "does not abolish civil causes of actions by firefighters against their government employers for personal injuries or sickness." Mot. for Disc. Rvw. at 14. The Court of Appeals correctly held that the legislature's directive was explicit.

Building off of its mistaken paraphrasing of RCW 41.26.270, the Estate then contends that because the "[c]ommon law provides for a cause of action for strict liability," that cause of action was salvaged by RCW

41.26.281. Mot. for Disc. Rvw. at 14. Not so. As the Court of Appeals correctly found, "The plain language of RCW 41.26.281 specifically limits the City's liability [to its employed firefighters] for *intentional* or *negligent* acts." *Murray*, slip op. at 8 (emphasis added). As is confirmed in the Estate's petition, the theory of strict liability advanced by the Estate was for an alleged "abnormally dangerous activity," which Washington employs to allow plaintiffs to recover without proof of either intentional or negligent conduct. *Hurley v. Port Blakely Tree Farms L.P.*, 182 Wn. App. 753, 761, 332 P.3d 469 (2014), *cited and followed in Murray*, slip op. at 8.

The Estate claims this conclusion conflicts with *Klein v. Pyrodyne Corp.*, 117 Wn.2d 1, 810 P.2d 917 (1991), but it does not. *Klein* concluded that the discharge of fireworks was an abnormally dangerous activity for which a defendant could be strictly liable to spectators injured thereby. *Id.* at 7-8. In so doing, *Klein* emphasized that such a defendant would be liable "'even though [the activity] is carried on with all reasonable care.'" *Id.* at 7 (quoting RESTATEMENT (SECOND) OF TORTS § 520, cmt. f (1977)). Nothing in *Klein* suggested that what RCW 41.26.270 and 41.26.281 require—proof of negligence or intentional acts—was needed to recover under strict liability. More fundamentally, nothing in *Klein* speaks to an employer's liability to its employees, thereby undermining the Estate's reliance entirely.

Despite this, the Estate contends that "[**p**]**ermitting** strict liability for acts that are not intentional or negligent does not **preclude** strict liability for acts that are negligent or intentional." Mot. for Disc. Rvw. at 14 (boldface in original). This argument misses the point because the trial court did not limit the Estate's ability to pursue a negligence theory with its June 10, 2016, partial summary judgment order. CP 83. What it actually did—and what the Court of Appeals properly affirmed—was preclude the Estate from establishing liability *without* proof of negligence or an intentional act. *Murray*, slip op. at 8. That is exactly what RCW 41.26.270 and 41.26.281 require. Review is not warranted on this issue.

C. Not one case cited by the Estate even arguably conflicts with the Court of Appeals' affirmance of the trial court's order dismissing the outrage claim.

The Court of Appeals upheld the trial court's dismissal of the Wendy Murray's outrage claim "because the City conducted regular radon testing and attempting mitigation when high levels of radon were identified at the City's fire stations," and because the City "was performing regular radon testing and making mitigation efforts." *Murray*, slip op. at 10-11. Drawing a distinction to case law that did find a genuine issue as to outrage, the Court of Appeals further noted that "the City did not alter test results or refuse to disclose information regarding radon testing." *Id.* at 11; *cf. Birklid v. Boeing Co.*, 127 Wn.2d 853, 867-68, 904

P.2d 278 (1995) (employer could be liable for outrage by engaging in "human experimentation," "cleaning and ventilating the workplace immediately before testing by government agencies to skew the test results," and "oppressive behavior by Boeing supervisors").

The Court of Appeals' conclusion is sound and supported by case law. Under *Birklid*, when a worker is statutorily barred from pursuing liability on anything other than intentional acts, outrage cannot be premised on alleged reckless conduct. *Birklid*, 127 Wn.2d at 872. That is the case with RCW 41.26.281. Consequently, the Estate could not advance Wendy's outrage claim past summary judgment without proof that the City acted *intentionally* to cause severe emotional distress. The Court of Appeals rightly concluded the Estate lacked such evidence.

None of the cases cited by the Estate hold to the contrary. *Snyder v. Medical Service Corp.*, 145 Wn.2d 233, 35 P.3d 1158 (2001), upheld the dismissal of a plaintiff-employee's outrage claim against her employer, reasoning that the plaintiff's supervisor acted outside the scope of employment when she threatened force against the plaintiff. *Id.* at 242-43. *Snyder* does not aid the Estate.

The second case cited, *Reid v. Pierce County*, 136 Wn.2d 195, 961 P.2d 222 (1998), also supports dismissal of Wendy's outrage claim. The Court there held the plaintiffs could not advance an outrage claim against

a coroner's display of their loved one's autopsy photographs because they were not present when the alleged outrageous conduct occurred. *Id.* at 203-04. That is the case here: there is no evidence Wendy Murray ever spent time at any Vancouver Fire Station alleged to have had elevated radon levels. *Reid* bolsters the Court of Appeals' decision.

The last case cited, *Robel v. Roundup Corp.*, 148 Wn.2d 35, 59 P.3d 61 (2002), also does not compel review. *Robel* reinstated a plaintiff's verdict based on unchallenged findings of fact following a bench trial. *Id.* at 40-42. The specific conduct found to be outrageous did not involve any allegation of workplace exposure, but rather constant harassment of the plaintiff's disability and multiple defamatory statements. *Id.* at 40-41, 52-53. *Robel* does not stand for the rule that the Estate desires, namely that each and every outrage claim is immune to summary judgment. Were that the case, the Court would need to overrule cases such as *Dicomes v. State*, 113 Wn.2d 612, 631, 782 P.2d 1002 (1989), which the Estate makes no effort to distinguish. In short, the Estate has shown only that the lower court's opinion conflicts with the Estate's desired outcome, as opposed to the requisite showing of a conflict with precedent.

D. The remaining arguments in favor of the petition are unsupported and are insufficient to justify review.

The last two sections of the petition for review contain no authority from this Court, thereby undermining any contention that the Court of

Appeals' analysis conflicts with Supreme Court precedent. *Cf.* RAP 13.4(b)(1). The Estate's last resolve is to summarily claim, without support, that this case involves issues of substantial public interest. *Cf.* RAP 13.4(b)(4). As explained above, the Court of Appeals' unpublished analysis does not. Unlike cases involving all alternative sentencing in one of Washington's largest counties, *e.g.*, *Watson*, 155 Wn.2d at 577, this case involves a single fire department and one plaintiff. That falls far short of RAP 13.4(b)(4)'s demanding test.

V. CONCLUSION

The Court of Appeals' analysis is a sound and practical application of well-established law. It does not conflict with any decision of this Court, and the Estate falls far short of its burden to demonstrate that this case is of such substantial interest to warrant this Court's review.

For all of the foregoing reasons, the petition should be denied.

RESPECTFULLY SUBMITTED this 28th day of January, 2019.

CITY ATTORNEY'S OFFICE
VANCOUVER, WA

By: /s/ Daniel G. Lloyd
Daniel G. Lloyd, WSBA #34221
Sara Baynard-Cooke
WSBA #35697
P.O. Box 1995
Vancouver, WA 98668-1995
(360) 487-8500
dan.lloyd@cityofvancouver.us
sara.baynard-cooke@cityofvancouver.us

FOLEY & MANSFIELD, PLLP

By: Melissa K. Roeder
Melissa K. Roeder
WSBA #30836
999 Third Avenue, Ste. 3760
Seattle, WA 98104
(206) 456-5360
mroeder@foleymansfield.com

CERTIFICATE OF SERVICE

I certify that on or before the date referenced below I served by electronic service (per all parties' written consent, *see* CP at 530-34) a copy of the foregoing document to all counsel of record as listed below:

COUNSEL FOR PLAINTIFF/ APPELLANT	**CO-COUNSEL FOR DEF./RESP'T**
Mr. Ron Meyers ron.m@rm-law.us; matt.j@rm-law.us; tim.f@rm-law.us; shana.p@rm-law.us; lena.u@rm-law.us; mindy.l@rm-law.us	Ms. Melissa Roeder mroeder@foleymansfield.com

I accomplished said service by uploading the document through the Washington State Appellate Courts' Portal on the date specified below, and also by emailing the same to counsel's designated email addresses as specified above.

DATED this 31st day of January, 2019.

CITY ATTORNEY'S OFFICE
VANCOUVER, WASHINGTON

By: /s/ Daniel G. Lloyd
Daniel G. Lloyd, WSBA No. 34221
Assistant City Attorney
Attorney for Defendant/Respondent
City of Vancouver
dan.lloyd@cityofvancouver.us

VANCOUVER CITY ATTORNEY'S OFFICE

January 28, 2019 - 2:16 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	96459-9
Appellate Court Case Title:	Estate of Carl Murray, et al. v. City of Vancouver
Superior Court Case Number:	16-2-05058-5

The following documents have been uploaded:

- 964599_Answer_Reply_20190128141603SC026644_6440.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was Answer to PRV.pdf

A copy of the uploaded files will be sent to:

- matt.j@rm-law.us
- mindy.l@rm-law.us
- mroeder@foleymansfield.com
- ron.m@rm-law.us
- sara.baynard-cooke@cityofvancouver.us
- tim.f@rm-law.us

Comments:

Sender Name: Daniel Lloyd - Email: dan.lloyd@cityofvancouver.us
Address:
PO BOX 1995
415 W 6TH ST
VANCOUVER, WA, 98668-1995
Phone: 360-487-8500

Note: The Filing Id is 20190128141603SC026644