No. 97841-7

SUPREME COURT
OF THE STATE OF WASHINGTON

JEFFREY K. MARKOFF and ALICIA MARKOFF, individually and as a married couple; EDWARD C. NEWELL and TROY-LYNN NEWELL, individually and as a married couple; CHARLES MEYER and JULIE MEYER, individually and as a married couple; JOEY P. HAUGEN and MYUNG K. HAUGEN, individually and as a married couple; NATHAN A. BUCK, individually; MICHAEL S. CAMLIN and CANDACE M. CAMLIN, individually and as a married couple; RICHARD MARTELL-SCOTT, individually; and STEVE ROBERTS, individually,

Appellants,

v.

PUGET SOUND ENERGY, INC., a Washington corporation; PILCHUCK CONTRACTORS, INC., a Washington corporation; MICHELS CORPORATION, a Wisconsin corporation,

Respondents.

RESPONDENTS' JOINT ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Respondents Puget Sound Energy, Inc. ("PSE"), Pilchuck Contractors, Inc. ("Pilchuck"), and Michels Corporation ("Michels") (collectively "Respondents") jointly submit this Answer to Petitioners' Petition for Review ("Petition").

II. COUNTERSTATEMENT OF ISSUES

1. Should the Court deny review under RAP 13.4(b)(1), (2), and (4) where the Court of Appeals' decision on the professional rescuer doctrine follows half a century of consistent Washington precedent?

2. Should the Court deny review under RAP 13.4(b)(1) and (4) where the Court of Appeals decision followed existing case law that properly held RCW 80.04.440 does not create an independent cause of action?

III. STATEMENT OF THE CASE

A. Relevant Facts Alleged in First Amended Complaint ("FAC")[1]

On March 9, 2016, the Seattle Fire Department ("SFD") received a 911 call reporting a natural gas leak on Greenwood Avenue North.[2] SFD arrived at the scene at 1:09 a.m. and PSE was notified about the gas leak at

[1] For purposes of this appeal, Respondents accept as true those facts alleged by Petitioners in their First Amended Complaint ("FAC"). *E.g., Becker v. Community Health Systems, Inc.*, 184 Wn.2d 252, 257-58, 359 P.3d 746 (2015).
[2] Clerk's Papers ("CP") 18.

1:11 a.m.[3] Shortly thereafter, SFD went to a narrow space between the Mr. Gyros and Neptune Coffee buildings where they smelled natural gas and determined it was escaping from a threaded coupling along a steel service line attached to the Mr. Gyros building.[4] As it escaped, the natural gas pooled inside and under the Mr. Gyros building.[5] At 1:43 a.m., while the SFD investigation was ongoing, an unknown source ignited the natural gas, causing an explosion.[6] Petitioners, professional firefighters who responded to the gas leak call, allege injuries from the gas explosion.[7]

B. Relevant Procedural History

1. Petitioners Amended Their Complaint to Avoid CR 11 Sanctions Because the Professional Rescuer Doctrine Bars Their Claims.

On May 12, 2017, Petitioners sued Respondents.[8] Petitioners alleged strict liability for abnormally dangerous operations under RCW 80.04.440; common law negligence, willfulness, and strict liability; outrage; infliction of emotional distress; loss of consortium; punitive damages (under Wisconsin law); and injunctive relief.[9] On May 26, 2017, Petitioners amended their original complaint to add more plaintiffs—and,

[3] CP 18, 20.
[4] CP 18.
[5] CP 22.
[6] CP 18.
[7] CP 22.
[8] CP 1.
[9] CP 9-10.

to avoid CR 11 sanctions, explicitly acknowledged the professional rescuer doctrine was a complete defense to their claims.[10]

2. The Superior Court Dismissed Petitioners' Claims on the Merits.

On August 16, 2017, PSE moved to dismiss Petitioners' FAC.[11] Michels and Pilchuck filed their respective motions to dismiss and joinders in the pending motions.[12] Petitioners opposed dismissal of each claim.[13] On September 29, 2017, the superior court heard oral argument.[14] Relevant to this Petition, the issues before the court were whether it should:

- "dismiss Plaintiffs' claims under the professional rescuer doctrine because a gas explosion is within the 'ambit of danger' that firefighters can reasonably anticipate when they respond to a gas leak"; and
- "dismiss Plaintiffs' claims under RCW 80.04.440 because this statute does not create an independent cause of action."[15]

The superior court ultimately dismissed all claims on the merits, with prejudice.[16] Specifically, the superior court found:

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[10] CP 15.
[11] CP 166-79.
[12] CP 231-244, 245-250, 251-256, 259-269, 270-274, 323-336.
[13] CP 275-88. Petitioners do **not** seek review of the superior court's dismissal, and the Court of Appeals' affirmance, of their injunctive relief claims. RAP 13.4(c)(5).
[14] CP 166-79 (PSE's Motion to Dismiss); CP 319 (Clerk's Minutes from Sept. 29, 2017 hearing); CP 497 (granting Motion to Dismiss and noting Sept. 29, 2017 hearing).
[15] CP 170 (PSE's Statement of Issues); CP 279, 280, 283, 285, 286 (Plaintiffs' Response to each issue). Petitioners do not seek this Court's review of the affirmed dismissal of their claims for injunctive relief. Accordingly, those claims are not discussed further.
[16] CP 319; *see also* 3 VRP 1-20 (12/1/17 hearing); CP 494-99 (same; order dismissing each claim).

- Plaintiffs' tort claims are foreclosed by the professional rescue doctrine described in *Maltman v. Sauer*,[17] and its progeny, because the risk that natural gas can explode is "a well-known risk," and injuries to professional rescuers are remedied through the workers' compensation system;[18] and

- Plaintiff's claims under RCW 80.04.440 are foreclosed because the statute does not create a new cause of action or erase available affirmative defenses, *e.g.*, the professional rescue doctrine.[19]

3. The Court of Appeals Affirmed in a Published Opinion.

The Court of Appeals affirmed the trial court decision in all respects in a published opinion.[20] At oral argument on appeal, counsel for Petitioners jettisoned their previous arguments about the professional rescuer doctrine, and offered a new theory that the doctrine did not apply at all because there was no rescue to begin with.[21] Notably, this theory was never presented at any point in the superior court proceedings—not in any of the numerous briefs filed with the superior court, not during any of the three hearings held by the superior court, nor in Petitioners' opening appellate brief.

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[17] 84 Wn.2d 975, 530 P.2d 254 (1975).
[18] 1 VRP 79-80 (elaborating, "It's well known to middle school students, high school students, adults, and professional rescuers. Especially firefighters. Leaking gas can cause an explosion, and that's why our children are taught if you smell the rotten egg smell, call the police, call the firefighters. Get out.").
[19] 1 VRP 82.
[20] *Markoff, et al. v. Puget Sound Energy, et al.*, -- Wn. App.2d --, 447 P.3d 577 (2019), *reconsideration denied* (Oct. 9, 2019) ("Slip Op.").
[21] *Markoff*, No. 777858, 6/12/19 Oral Argument at 1:26-2:06, 5:56-6:01, available at: http://www.courts.wa.gov/appellate_trial_courts/appellateDockets/index.cfm?fa=appellateDockets.showOralArgAudioList&courtId=a01&docketDate=20190612.

This new theory was surprising and difficult to follow, particularly because: (a) Petitioners explicitly acknowledged application of the professional rescuer doctrine in their complaint and sought to change the law within the confines of CR 11;[22] and (b) every merits brief filed by the parties for the prior two years had turned on the application of the doctrine.

The Court of Appeals affirmed the dismissal of all Petitioners' claims. As relevant here, the Court of Appeals held:

- "Injury from a fire or explosion is a risk inherent in addressing a natural gas leak, given that natural gas is known to be volatile and highly explosive."[23]

- "[T]he firefighters argue for an expansion of the law. They urge that we adopt a new exception to the professional rescuer doctrine excluding from its ambit rescues resulting from willful, wanton, or reckless conduct that places a professional rescuer in harm's way. We decline to do so. The intent of the person whose actions caused the need for the rescue has never been a relevant inquiry in determining whether a professional rescuer assumed a risk."[24]

- "[A] party seeking the benefit of RCW 80.04.440 must demonstrate that the underlying claim is viable and not subject to an affirmative defense. This the firefighters have not done. They assert that the statute's lack of reference to the professional rescuer doctrine implies that said doctrine does not apply, ignoring the fact that statute's enactment predated *Maltman* by 14 years. Nothing in the statute's language evinces an intent to render inapplicable otherwise applicable affirmative defenses."[25]

[22] CP 15.
[23] Slip Op. 11.
[24] Slip Op. 13-14.
[25] Slip Op. 17-18.

4. The Court of Appeals Denied Petitioners' Motion for Reconsideration.

After the Court of Appeals affirmed the dismissal of all Petitioners' claims, Petitioners tried to raise their new theory the first time in written briefing by recasting their prior arguments on the professional rescue doctrine and RCW 80.04.440 in a motion for reconsideration. The Court of Appeals denied the motion.

5. This Case Differs from *Lyon*.

Petitioners now want to adopt novel theories raised by other litigants in a different case, which Petitioners have never before briefed or argued, as a last-ditch effort revive their dismissed claims. Petitioners claim that their unsuccessful appeal should be reviewed by this Court because this Court recently accepted review of *Lyon v. Okanogan County Elec. Coop., Inc.*, which Petitioners characterize as presenting "similar issues."[26] Although this case and *Lyon* involve the professional rescuer doctrine, the similarity stops there. *Lyon* raises constitutional issues never raised by Petitioners; *Lyon* argues for a gross-negligence exception where Petitioners never asserted gross negligence; and *Lyon* does **not** raise the RCW 80.04.440 claim or the parent corporation liability issues Petitioners want this Court to review. The facts of the two cases are also different.

[26] Petition for Review ("Pet.") 3.

IV. ARGUMENT

A. The Court of Appeals Properly Applied Washington's Professional Rescuer Doctrine by Refusing to Create New Exceptions to Well-Established Precedent.

1. The Court of Appeals Properly Refused to Find a *Mens Rea* Exception.

As early as their FAC, Petitioners recognized that, for their claims for damages to survive the professional rescuer doctrine ("PRD"), a court would have to create a *mens rea* exception that has not previously been recognized.[27] Both the trial court and the Court of Appeals refused to do so, with the latter ruling: "The intent of the person whose actions caused the need for rescue has never been a relevant inquiry in determining whether a professional rescuer assumed a risk."[28]

a. The Antecedent Rescue Doctrine Applies to Tortfeasors in General, and Not Just in the Context of Negligence.

Petitioners attempt to create the impression that Washington courts already have limited the application of the PRD to negligent conduct.[29] However, Petitioners make the same mistake that others have made—and Washington courts have corrected—related to the antecedent rescue doctrine. Namely, the rescue doctrine is not limited to instances of

[27] CP 15.
[28] Slip Op. 13-14.
[29] Pet. 6-11.

negligence, even though Washington courts routinely have applied the doctrine to instances of negligence. Washington Courts have previously held (and clarified):

> **[Defendant's] argument that the rescue doctrine applies only in negligence cases is not persuasive.** While many of the cases, like *French*, describe the doctrine in terms of negligence concepts, in *McCoy*, the court applied the doctrine to tortfeasors in general. *McCoy* was a products liability case and the defendant was subject to strict liability and was not a negligent tortfeasor.[30]

The court in *Uribe*[31] recognized that the rescue doctrine applied in the presence of conduct other than mere negligence—it applied to "tortfeasors in general."[32] This is consistent with what the court understood as the two fundamental principles at issue with the rescue doctrine: foreseeability and assumption of the risk.[33]

b. The PRD Extends to Conduct Exceeding Negligence.

Similar to the rescue doctrine, Washington courts have made it clear the PRD applies to conduct beyond negligence. This is understood by first noting that the PRD is an exception to the rescue doctrine which is itself an

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[30] *French v. Uribe*, 132 Wn. App. 1, 14-15, 130 P.3d 370 (2006) (emphasis added). *See also McCoy v. Am. Suzuki Motor Corp.*, 136 Wn.2d 350, 961 P.2d 952 (1998).
[31] Respondents use the petitioner-defendant's name in *French v. Uribe* in order to avoid confusion with *French v. Chase*, 48 Wn.2d 825, 297 P.2d 235 (1956).
[32] *Id*. at 14-15 (quoting *French*, 48 Wn.2d at 830).
[33] *Id*. at 15.

exception to the assumption of the risk defense, and thus focuses on the same two principles noted above: foreseeability and the risks assumed.

In *Maltman*, Washington's seminal case on the PRD, the Court was not concerned with the culpability of the acts involved, but rather the hazard confronted. *Maltman* recognized that firemen encounter fires, however caused, and thus assume the risks of the hazards reasonably expected to exist in the situation.[34] From its inception, the focus of Washington's PRD was not on the conduct causing the encountered risk, but the foreseeability of the risk encountered. That is why *Maltman*'s discussion of the PRD focuses on the risk assumed—a helicopter crash—and not the underlying conduct or potential cause(s) of the crash.

Similarly, in *Black Indus. v. Emco Helicopters*, the court focused its attention on the risk assumed, and not the underlying conduct.[35] After discussing the multiple possibilities that could have caused the crash—pilot error, mechanical failure, inexperience of personnel—the Court found:

> A danger unique to helicopter rescues is the possibility of a mechanical malfunction in the airplane or pilot error, either of which could cause a crash. Therefore, a helicopter crew is specially trained to meet these known hazards. They are hazards inherently within the ambit of those dangers unique to and generally associated with this particular rescue operation.[36]

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[34] 84 Wn.2d at 978.
[35] 19 Wn. App. 697, 577 P.2d 610 (1978).
[36] *Id*. at 699 (quoting *Maltman*, 84 Wn.2d at 979).

Again, the focus was on the hazard assumed, not the underlying conduct.

Other Washington cases on the PRD maintain this focus. Indeed, there is no Washington case holding that the underlying conduct causing the need for the rescuer's presence at the scene is material to the PRD analysis.

In *Beaupre v. Pierce County*, the only other treatment of the PRD by the Washington Supreme Court outside *Maltman*, the Court discussed its prior ruling in *Maltman*: "We have previously discussed professional rescue doctrine in terms of assumption of risk…the professional rescue doctrine is essentially a type of implied primary assumption of risk."[37] Thus, when this Court has commented on the PRD, the dispositive issue is not the underlying conduct creating the rescue but instead, the foreseeability of the risks assumed by the professional rescuer:

> 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." Under the professional rescue doctrine, a professional rescuer may not recover for injuries stemming from hazards "inherently within the ambit of those dangers which are unique to and generally associated with the particular rescue activity."[38]

Petitioners rely on *Ballou v. Nelson* and its reference to "negligence" in hopes of creating an exception to the PRD such that the doctrine applies only to rescues involving negligence.[39] Petitioners misunderstand the case.

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[37] 161 Wn.2d 568, 577, 166 P.3d 712 (2007).
[38] *Id.* at 572 (citations omitted).
[39] 67 Wn. App. 67, 834 P.2d 97 (1992).

In *Ballou,* police officers responded to a call of drunk patrons causing a disturbance at a hotel.[40] The officers arrived and escorted one of the defendants back to his room "peacefully without placing them under arrest or pressing any charges."[41] This peaceful interaction continued as the officers met one of the defendants in the hotel lobby, escorted him into the elevator, and up the elevator to the fourth floor where they encountered the second defendant.[42] It was only at this point that the two defendants committed a criminal assault.[43]

Ballou ruled not only that there was "no negligence on the part of the defendants" leading to the officers' injuries, but also that the officers had "no reasonably prudent assessment of imminent peril. Indeed, there was not even a rescue in which reasonable care had to be taken."[44] The initial inquiry is first whether there was a rescue. In *Ballou* the answer was "no." As such, *Ballou* is inapplicable to this case. When the PRD applies, the relevant inquiry is the hazard (not the conduct causing the hazard) and whether the hazard was known:

> The professional rescuer doctrine imposes a restriction on the rescue doctrine by denying its benefits to professional rescuers who are paid to assume risks inherent in their work. *Maltman v. Sauer, supra* denied recovery to professional rescuers ***where the hazard***

[40] *Id.* at 68.
[41] *Id*. at 69.
[42] *Id*.
[43] *Id*. at 69, 73.
[44] *Id*.

> ***which caused the injury*** was within the ambit of those dangers which are unique to and generally associated with the particular rescue effort.[45]

Ballou answers that the hazard (a subsequent and independent act occurring only ***after*** the officers arrived to the scene) was not a risk assumed by the officers in relation to a rescue.[46] This is distinct from the allegations made by Petitioners in this case: firefighters who responded to a report of a natural gas leak and faced the known risk that natural gas could explode.

Petitioners' argument that Washington courts have restricted application of the PRD to negligence also fails here because Washington courts, even in *Ballou*, readily accept that the PRD precludes recovery even when the conduct causing the need for the professional rescuer's presence rises to the level of willfulness. In *Ward v. Torjussen* (which also focuses on the hazard, not underlying conduct), the court stated that, if officers were injured when responding to the acts of a criminal prowler (intentional conduct), that prowler could be relieved of liability under the PRD.[47] *Ballou* confirmed the ruling in *Ward*.[48]

In short, while some courts have used the word "negligence" to describe conduct covered by the PRD, they have also made clear that the

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[45] *Id*. at 70 (emphasis added).
[46] *Id*. at 71. This emphasis on the unrelated, post-arrival criminal conduct further distinguishes *Ballou* from the instant case.
[47] 52 Wn. App. 280, 287-88, 758 P.2d 1012 (1988).
[48] *Ballou*, 67 Wn. App. at 72-73.

application of the PRD is not tied exclusively to negligence. *Ballou* stated that the PRD could prevent firefighters from recovering for injuries sustained in a "negligently *or recklessly* caused fire."[49] *Ward* stated that, "The professional rescuer doctrine . . . prohibits a fireman . . . from recovering damages for injuries sustained when responding in an official capacity from the one whose negligence *or conduct* brought the injured official to the scene."[50] As stated in *Ward* and quoted in both *Beaupre* and *Loiland*, "The [professional rescuer] doctrine 'relieves the perpetrator of the *act* that caused the rescuer to be at the scene.'"[51]

As demonstrated above, Petitioners' attempts to demonstrate a conflict between the decision of the Court of Appeals and previous decisions of Washington courts regarding the PRD collapse under scrutiny, and thus no basis for review exists under RAPs 13.4(b)(1) or (2).

c. Limiting the PRD to Only Negligence Cases Is Inconsistent with the Fundamental Principles of the Doctrine Recognized by Washington Courts.

As discussed above, Washington courts consistently have held the PRD extends to conduct exceeding negligence. This is not only consistent with the application of the antecedent rescue doctrine to "tortfeasors in

[49] *Id*. at 71 (emphasis added).
[50] 52 Wn. App. at 286 (emphasis added).
[51] *Loiland v. State*, 1 Wn. App.2d 861, 866, 407 P.3d 377 (2017) (emphasis added) (quoting *Beaupre*, 161 Wn.2d at 573; *Ward*, 52 Wn. App. at 287)).

general (i.e. *Uribe*)," it is consistent with both the rescue doctrine's and the PRD's fundamental bases—foreseeability and assumption of the risk.

"Those dangers which are inherent in professional rescue activity, and therefore foreseeable, are willingly submitted to by the professional rescuer when he accepts the position and the remuneration inextricably connected therewith."[52] The *mens rea* behind the conduct bringing the professional rescuer to the scene does not change the analyses of either the foreseeability of the danger or the professional rescuer's assumption of the risk. For instance, when firefighters respond to a confirmed natural gas leak, the risk of explosion is manifest regardless of whether the line was broken intentionally, recklessly or negligently; the dangers of a building fire are the same whether caused by accident or arson. Professional firefighters assume these risks and other dangers, however caused, and accept compensation to do so.

The two recognized exceptions turn on foreseeability and assumption of the risk. The exception for independent and intervening conduct recognizes that such conduct is not foreseeable and therefore not assumed by the professional rescuer; in such case, recovery is not barred by the PRD.[53] Similarly, when a professional rescuer is injured by a hidden or

[52] *Maltman*, 84 Wn.2d at 978.
[53] *Beaupre*, 161 Wn.2d at 575.

unknown hazard not inherently associated with the particular rescue activity, the danger is not foreseen and not assumed, and therefore the PRD does not bar recovery.[54] These two exceptions are consistent with the principles of the PRD and are sufficient to provide the professional rescuer with recovery in such circumstances. A *mens rea* exception need not be created.

2. The Court of Appeals Properly Followed Washington Precedent in Ruling That Petitioners Could Not Recover for Confronting a Risk Inherent to the Rescue Activity.

Petitioners take issue with the Court of Appeals' holding:

> All of the dangers created by the past negligence of PSE and its contractors, created by those who misused the narrow space between the buildings, and of the gas leaking into an underground space, were part of the same hazard that the firefighters were called to the scene to address: a gas leak. Injury from a fire or explosion is a risk inherent in addressing a natural gas leak, given that natural gas is known to be volatile and highly explosive.[55]

This holding is consistent with Washington precedent. As the hidden danger exception was stated in *Maltman* (and affirmed in *Loiland*), "It does not follow that a fireman must be deemed as a matter of law to have voluntarily assumed all hidden, unknown, and extrahazardous dangers *which in the existing conditions would not be reasonably anticipated or foreseen.*"[56] The trial court and Court of Appeals properly ruled a gas

[54] *Loiland*, 1 Wn. App. 2d at 866.
[55] Slip Op. at 11.
[56] *Maltman*, 84 Wn.2d at 978; *Loiland*, 1 Wn.2d at 866 (emphasis added).

explosion ***is*** inherently associated with responding to a gas leak.[57] Accordingly, there is no basis to review the Court of Appeal's decision under RAPs 13(b)(1) or (2) concerning its ruling on the hidden danger exception to the PRD.

B. The Court of Appeals' Application of RCW 80.04.440 Is Consistent with Existing Washington Appellate Decisions.

1. Petitioners Miscite Two Supreme Court Cases and Fail to Address Two Others Upon Which the Court of Appeals Relied.

Following established precedent and the plain language of the statute, the Court of Appeals held RCW 80.04.440 does not create an independent cause of action.[58] Petitioners claim that holding conflicts with this Court's precedent and presents an issue of public interest.[59] Petitioners' RAP 13.4(b)(1) argument is based on an erroneous recitation of this Court's opinions in *Zamora v. Mobil Corp.*[60] and *Tanner Elec. Co-op v. Puget Sound Power & Light Co.*[61], and ignores the cases and analysis relied upon

[57] *New Meadows Holding Co. by Raugust v. Wash. Water Power Co*., 102 Wn.2d 495, 501, 687 P.2d 212 (1984).
[58] Slip Op. 16 (providing following string cite: "*Fisk v. City of Kirkland*,164 Wn.2d 891, 896, 194 P.3d 984 (2008) (cause of action pursuant to RCW 80.04.440 not viable in the absence of underlying duty on part of utility); *Citoli v. City of Seattle*, 115 Wn. App. 459, 479-80, 61 P.3d 1165 (2002) (utility's alleged violation of regulation requiring minimization of service interruptions did not support RCW 80.04.440 claim due to city ordinance limiting utility's liability)").
[59] Pet. 18 (citing RAP 13.4(b)(1) & 13.4(b)(4)).
[60] 104 Wn.2d 199, 704 P.2d 584 (1985).
[61] 128 Wn.2d 656, 911 P.2d 1301 (1995).

by the Court of Appeals. Petitioners offer no cognizant argument in support of their RAP 13.4(b)(4) claim.

In both *Zamora* and *Tanner*, the alleged causes of action were "*predicated* upon" claims under the Washington Administrative Code and Consumer Protection Act.[62] In *Zamora*, the plaintiffs sued after a propane explosion in their home.[63] This Court held the RCW 80.04.440 claim was properly dismissed on summary judgment because the plaintiffs could not show a violation of law or safety regulation.[64] This Court stated, "liability under this law [RCW 80.04.440] is *predicated* upon a finding of a violation of law or safety regulation," and the plaintiffs could not establish an issue of material fact to support the alleged WAC violation.[65]

Similarly, in *Tanner*, the plaintiff argued the exemption of utility companies from liability under Washington's Consumer Protection Act was unfair.[66] This Court rejected the argument, noting "remedies for egregious conduct on the part of public utilities remain," citing RCW 80.04.440.[67] As this Court said, "[t]his statute allows a private cause of action for anyone

[62] *Zamora*, 104 Wn.2d at 209 (emphasis in original); *Tanner*, 128 Wn.2d at 683.
[63] 104 Wn.2d at 201.
[64] *Id.* at 209.
[65] *Id.* (emphasis in original).
[66] 128 Wn.2d at 683.
[67] *Id.* at 683-84.

affected by a utility's violation of state law or commission order."[68] But there must first be a "violation of state law or commission order."[69]

The Court of Appeals' ruling in this case follows this Court's precedent, citing pertinent language from *Zamora* and subsequent consistent holdings from this Court and the Court of Appeals, like *Fisk v. City of Kirkland* and *Citoli v. City of Seattle*,[70] both conspicuously absent from Petitioners' petition—for good reason. *Fisk* held that nothing in the statute or precedent supported a claim that RCW 80.04.440 created an independent duty; *Citoli* notes RCW 80.04.440 operates to make a utility "liable for its acts and omissions in violation of law."[71] Petitioners' claim for review under RAP 13.4(b)(1) lacks merit and should be rejected.

Finally, Petitioners' claim review of the RCW 80.04.440 holding is warranted under RAP 13.4(b)(4) but offer no associated argument.[72] This Court need not consider that claim further.[73]

2. Petitioners Mischaracterize Pilchuck and Michels as Public Utility Providers.

Petitioners strain language and logic in arguing that the Court of Appeals erred holding that Pilchuck and its parent company, Michels, could

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[68] *Id.* at 684.
[69] *Id*.
[70] *Fisk*, 164 Wn.2d at 896; *Citoli*, 115 Wn. App. at 479-80.
[71] *Fisk*, 164 Wn.2d at 896-97; *Citoli*, 115 Wn. App. at 478.
[72] Pet. 18-20.
[73] RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

not be held liable under the utility statute because they were maintenance contractors and not utility providers. Petitioners' argument contradicts the allegations of their own complaint.

Petitioners contend that because the definition of a "public service company" includes every "gas company,"[74] including "every corporation … owning, controlling, operating or managing … any gas plant …," and "all … fixtures and personal property … used or to be used with the transmission, distribution, sale or furnishing of natural gas," the gas pipeline at issue must be considered a "gas plant" and Pilchuck considered a "public service company." Petitioners' mischaracterization is unsupported and does not create an inference in favor of Petitioners.

First, Petitioners concede in their FAC that Pilchuck was not a public service company, but rather a "general contracting business" that conducted "pipeline maintenance" in Washington and that Michels was its parent company.[75]

Second, even if Pilchuck could conceivably be considered a "gas company" within the definition of "public service company," the statute further defines "gas company" as "every corporation … owning, controlling, operating or managing any gas plant." The definition does not

[74] RCW 80.04.010(23).
[75] CP 17.

include, and makes no suggestion of including, private contractors performing maintenance work on behalf of a gas company.

Third, even if Pilchuck were construed as "controlling, operating or managing a gas plant," by maintaining a "fixture" of the pipeline, Pilchuck did so only as a contractor hired by and on behalf of PSE. Accordingly, review is not warranted under RAP 13.4(b)(4).

V. CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny the Petition for Review.

Respectfully submitted this 9th day of December, 2019.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the below date, I caused a true and correct copy of this document to be delivered, via the method indicated, to counsel of record:

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DATED this 9th day of December, 2019, at Seattle, Washington.

Carol Hudson

Carol Hudson, Legal Assistant
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December 09, 2019 - 2:33 PM

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