

NO. 58515-1-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

Curtis A. Beaupre, Plaintiff/Respondent

v.

Pierce County, Defendant/Appellant

BRIEF OF APPELLANT PIERCE COUNTY

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I. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred by denying summary judgment and refusing to dismiss plaintiff's negligent training claim.

2. The trial court erred by denying summary judgment and refusing to dismiss plaintiff's respondeat superior claim.

B. Issues Pertaining to Assignments of Error

1. Where plaintiff Sheriff's deputy claims a fellow deputy caused him injury while both were participating in an emergency operation, may plaintiff sue the governmental employer despite the professional rescuer/fireman's rule? (Assignments of Error 1 & 2); Minton v. Ralston Purina Co., 146 Wn.2d 385, 389, 47 P.3d 556 (2002) ("court reviews the denial of a summary judgment motion de novo").

2. By authorizing a deputy to sue his Sheriff's Department for negligence "as otherwise provided by law," did RCW 41.26.281 somehow abolish the professional rescuer/fireman's rule? (Assignments of Error 1 & 2); Homeowners Ass'n v. Ltd. P'ship, 156 Wn.2d 696, 698, 131 P.3d 905 (2006) ("Statutory interpretation is a

question of law which we review de novo.")

3. If the professional rescuer/fireman's rule does not bar a claim for negligent training of a fellow deputy, must plaintiff still show sufficient facts to establish that a breach of duty caused his injury? (Assignment of Error 1); Minton, supra.

II. STATEMENT OF THE CASE

While serving as a deputy sheriff with Pierce County, plaintiff Curtis Beaupre was injured during an emergency operation after he ran onto the traveled lanes of I-5 at night and into the path of his subordinate's backing patrol car. CP 4-5, 23. Specifically, as Beaupre ran the wrong way on the freeway in foot pursuit of a fleeing felon's vehicle, plaintiff claims he supposedly was bumped in the dark by a cruiser that Deputy Winthrop Sargent was repositioning to stop the felon's car before it collided head-on with on-coming I-5 traffic. Id.; CP 28-29, 37-38, 55, 62-63, 83. After this contested contact by Deputy Sargent, Beaupre claims he fell in front of the fleeing vehicle -- which in turn did not stop but instead continued its illegal flight from police and "ran over his pelvis" before he could get out of the way. CP 5, 55, 62-63. Plaintiff then brought a negli-

gence action against his employer for damages he alleges were in excess of the significant and continuing pension and disability benefits already paid him by the County for his injury under the Law Enforcement Officers And Fire Fighters Retirement System (hereinafter "LEOFF"). See RCW 41.26.281; CP 3, 11, 83.

As discovery progressed, plaintiff narrowed his claims to allege the Sheriff's Department supposedly had negligently trained Deputy Sargent and also was vicariously liable for Sargent's driving. CP 85. Because there was no evidence that negligent training caused plaintiff's injury and -- in any case -- the "professional rescuer/fireman's rule" precluded the existence of any duty to plaintiff as a matter of law, the County moved for summary judgment. CP 69. The Honorable John P. Erlick of the King County Superior Court denied dismissal of the complaint by sua sponte holding that some of the policy considerations supporting the professional rescuer/fireman's rule had been undermined and the rule itself abolished by statute. CP 119-124. It also summarily concluded that unidentified genuine issues of material fact existed as to negligent training. CP 124. In so ruling, the trial court admitted its order involved

"controlling questions of law as to which there is substantial ground for a difference of opinion and that immediate review of this order may materially advance the ultimate termination of the litigation" and entered a certification pursuant to RAP 2.3(b)(4). *Id.* The trial court then denied reconsideration. CP 137.

Thereafter, the Commissioner of this Court granted the County's timely motion for discretionary review. CP 139.

III. SUMMARY OF ARGUMENT

The professional rescuer/fireman's rule is part of Washington common law, and that of almost every other court that has considered the matter, because it is soundly based in the law and serves important purposes. Numerous courts across the nation have applied that rule to dismiss suits for injuries caused by fellow officers during pursuits and other emergencies because the "considerations underpinning the fundamental justice of the 'fireman's rule'" are "more than mere dollars-and-cents" conclusions that the "taxpayer who pays the fire and police departments to confront the risks occasioned by his own future acts of negligence does not expect" to "compensate police officers twice: once for risking injury, once for sustain-

ing it." Berko v. Freda, 93 N.J. 81, 459 A.2d 663, 667 (N.J. 1983). Rather, as our Supreme Court explained in Maltman v. Sauer, 84 Wn.2d 975, 978-79, 530 P.2d 254 (1975), the rule is a form of assumption of risk because "[t]hose 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," so that "it is the business of professional rescuers to deal with certain hazards" and they cannot complain if they are later harmed by exposure to them.

In the instant narrow context of a policeman's suit over the emergency response of a fellow officer, an additional policy served by the rule is that of protecting public safety. The record is undisputed that this suit for a fellow deputy's emergency response has impaired discipline and the teamwork values that are vital to effective law enforcement. By rejecting the existence of an actionable duty between rescuers during an emergency, the common law not only prevents such adverse effects but avoids "generat[ing] conflicting duties on the part of peace officers" and "undermin[ing] their pri-

mary commitment to the public's essential safety and protection for fear of personal liability for injury to fellow officers." Calatayud v. State of California, 959 P.2d 360, 368 (Cal. 1998). Indeed, creating an enforceable duty to fellow officers for emergency responses would not only impair an officer's ability to make split-second judgment calls in a rapidly developing crisis, but ensure that the public's safety would be subordinated in such decision making. For such reasons courts across the nation have declined to recognize a duty between rescuers during emergency operations. Such a holding is consistent with Washington decisional and statutory law and necessitates dismissal of the instant action.

IV. ARGUMENT

A. Professional Rescuer/Fireman's Rule Bars Suit

The professional rescuer/fireman's rule is "deeply rooted in the common law," Kreski v. Modern Electric, 415 N.W.2d 178 (Mich. 1987), and "has been almost universally accepted by jurisdictions confronted with the choice." Waggoner v. Trout-man Oil Co., 320 Ark. 56, 58, 894 S.W. 2d 913 (Ark. 1995). See also Moody v. Delta W., Inc., 38 P.3d 1139, 1140 (Ala. 2002) ("Nearly all of the

courts that have considered whether or not to adopt the Firefighter's Rule have in fact adopted it."); Chapman v. Craig, 431 N.W.2d 770, 771 (Iowa 1988) ("the majority of states have either adopted or affirmed the application of the fireman's rule.")

In Sutton v. Shufelberger, 31 Wn.App. 579, 587, 643 P.2d 920 (1982), this Court recognized that "based upon public policy" the professional rescuer/fireman's rule denies "recovery by the injured official from the one whose sole connection with the injury is that his act placed the fireman or police officer in harm's way." See also Ballou v. Nelson, 67 Wn. App. 67, 73, 834 P.2d 97 (1992) (same). The rule is a form of assumption of risk because, as our state Supreme Court emphasized in affirming a dismissal under that doctrine:

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. Stated affirmatively, it is the business of professional rescuers to deal with certain hazards, and such an individual cannot complain of the negligence which created the actual necessity for exposure to those hazards.

Maltman v. Sauer, 84 Wn.2d 975, 978-79, 530 P.2d 254 (1975). In similarly affirming a dismissal under this rule, Division One in Black Indus., Inc. v. Emco Helicopters, Inc., 19 Wn. App. 697, 699, 577 P.2d 610 (1978) (citing Strong v. Seattle Stevedore Co., 1 Wn.App. 898, 904, 466 P.2d 545, rev. denied, 77 Wn.2d 963 (1970)), recognized that "the paid professional rescuer has knowingly and voluntarily confronted a hazard and cannot recover from the one whose negligence created the hazard, so long as the particular cause of the rescuer's injury was foreseeable and not a hidden, unknown, or extra hazardous danger which could not have been reasonably foreseen." Therefore "[p]ublic policy demands that recovery be barred whenever a person, fully aware of a hazard created by another's negligence, voluntarily confronts the risk for compensation." Black Indus., Inc., 19 Wn.App. at 699-700.

Such is even more appropriate when the professional rescuers are police or firemen because:

[T]he taxpayer who pays the fire and police departments to confront the risks occasioned by his own future acts of negligence does not expect to pay again when the officer is injured while exposed to those risks. Otherwise, individual citizens would compensate police officers twice: once for risking injury, once for

sustaining it. [O]ne who does not know the risks inherent in a high speed chase should not engage in high speed chasing.

We perceive more than mere dollars-and-cents considerations underpinning the fundamental justice of the "fireman's rule." There is at work here a public policy component that strongly opposes the notion that an act of ordinary negligence should expose the actor to liability for injuries sustained in the course of a public servant's performance of necessary, albeit hazardous, public duties.

Berko v. Freda, 93 N.J. 81, 459 A.2d 663, 667 (N.J. 1983).

1. Professional Rescuer/Fireman's Rule Applies Here

Plaintiff alleges that long before he arrived at the scene the Sheriff's Department failed to adequately train Deputy Sargent and that such caused him to be bumped into the path of the fleeing vehicle. CP 4. Though there is in fact no evidence that any duty to train Deputy Sargent was breached or actually caused plaintiff's harm,¹ under the professional rescuer/fireman's rule he "cannot recover

¹ Plaintiff -- as Deputy Sargent's supervisor -- not only testified Sargent was a "safe driver" but admitted he had evaluated the deputy's driving as reflecting "excellence" just prior to the accident. CP 20-21. Likewise, plaintiff's expert on police training admitted Deputy Sargent had attended numerous driver's courses that would have evaluated and trained him on the maneuvers involved and could not testify that more training would have prevented the injury in question. CP 59-61. See e.g. Gurno v. Town of LaConner, 65 Wn.App. 218, 229, 828 P.2d 49 (1992) (Division One affirmed dismissal of city because plaintiff "failed to present any evidence as to the standard of care for training police officers, a breach of that standard, or that such a breach proximately caused" her harm.)

from the one whose negligence created the hazard" in question. See Black Indus., Inc., 19 Wn. App. at 699. Similarly, whether characterized as negligent training or respondeat superior, Beaupre's own experts affirmatively agree Sargent's sole connection to causing plaintiff's injury was that he allegedly put plaintiff "in harms way" of the escaping suspect. CP 38, 62-63; Sutton, 31 Wn.App. at 587. Case law is well settled that the professional rescuer/fireman's rule bars suits in precisely this situation – i.e., injuries caused by fellow officials during a pursuit. See e.g. McElroy v. State of California, 122 Cal.Rptr.2d 612 (Cal. App. 2002) (officer's patrol car collided with another during a pursuit); Farnam v. State of California, 101 Cal.Rptr. 2d 642 (Cal App. 2000) (police dog bit officer at scene of pursuit); Soto v. Ortiz, 680 N.Y.S.2d 552 (N.Y. App. 1998) (injury caused by driving of fellow officer); Woods v. Warren, 482 N.W. 2d 696 (Mich. 1992) (officer sued city for accident during pursuit); McGhee v. Michigan State Police Dept., 459 N.W. 2d 67, 68 (Mich. App. 1990) (state not liable for suspect vehicle's collision with officer because an "officer's injury resulting from a high-speed chase constitutes a foreseeable occurrence stemming from the performance

of the officer's police duties").

Further, the record confirms "the hazard ultimately responsible for causing the injury [was] inherently within the ambit of those dangers which are unique to and generally associated with the particular rescue activity." Maltman, 84 Wn.2d at 979. Though it is disputed whether Deputy Sargent's cruiser actually made contact with plaintiff, the record is undisputed plaintiff knew from prior experience that a specific risk of foot pursuit is that an officer can be hit by a patrol car. CP 22-23. Similarly, immediately after the injury in question plaintiff acknowledged the obvious -- that, in running onto the traveled lanes of I-5 and confronting on foot the escaping suspect vehicle in the dark, he knew he had to take precautions "so that it couldn't easily run over me" See CP 28. Because plaintiff was "fully aware" of the alleged County-caused "hazard" of being bumped by the car of a fellow deputy or run over by the fleeing suspect, yet voluntarily confronted "the risk for compensation" by running in the traveled lanes of I-5 in the dark among numerous other patrol cars also attempting to stop the suspect vehicle, Black Indus., Inc., 19 Wn.App. at 699-700; CP 28, 55, plaintiff "willingly

submitted to" those risks as a matter of law. Maltman, 84 Wn.2d at 978.

2. Third Party Intervener Exception Does Not Apply

Plaintiff opposed summary judgment by arguing that an exception to the doctrine exists for acts of third party interveners occurring after a plaintiff arrives at the scene. CP 96; Ballou, 67 Wn.App. at 71 ("the fireman's rule ... does not provide protection to one who commits independent acts of misconduct after fire fighters have arrived on the premises.") Because he nowhere argued -- nor could he -- that prior "negligent training" somehow was an "intervening act" after he arrived at the scene, plaintiff apparently argued this exception at least prevented the dismissal of his respondeat superior claim.

Specifically, plaintiff relied on Sutton v. Shufelberger, 31 Wn.App. at 580, where a policeman sued the driver of a truck that struck him while the officer was ticketing another vehicle on the roadway. CP 94-96. There this Court -- relying on the California decisions of Giorgi v. Pacific Gas & Elec. Co., 266 Cal. App. 2d 355, 72 Cal. Rptr. 119 (1968) and Walters v. Sloan, 142 Cal. Rptr.

152, 571 P.2d 609 (1977) -- held the professional rescuer doctrine did not bar the officer's suit against the truck driver because it "does not apply to the third party whose intervening negligence injures the official while he is in the performance of his duty." Sutton, 31 Wn.App. at 587-588. Though Washington courts have never addressed whether fellow officers in an emergency operation can be "third party interveners," where there "is an issue of first impression in Washington, we may look to guidance from cases from other jurisdictions." Lamas v. State (In re M.J.L.), 124 Wn.App. 36, 40, 96 P.3d 996 (2004). See also In re Parentage of L.B., 155 Wn.2d 679, 702, 122 P.3d 161 (2005) ("As this remains a case of first impression in this state, a review of decisions of other jurisdictions is instructive."). Indeed, unless that common law is inconsistent with our state or federal law, it "shall be the rule of decision in all the courts of this state." RCW 4.04.010.

a. **Other Emergency Responders are not Third-Party Interveners**

The overwhelming weight of authority from courts that recognize the professional rescuer/fireman's rule and that have addressed the question holds professional rescuers responding to the

same emergency are not third party interveners and are protected by the rule. For example, citing the same California cases of Giorgi and Walters as did this Court in Sutton, California's courts hold that "the common law exception for independent [intervening] acts ... is inapplicable and does not allow a personal injury action by a public safety officer against a fellow safety officer for actions taken in furtherance of a joint public safety operation" because the intervening negligence exception "should apply only to negligent and intentional acts of the victim and other third parties that are not in furtherance of a rescue operation." City of Oceanside v. Superior Court, 96 Cal. Rptr. 2d 621, 624-25 & 631 (Cal. App. 2000) (reversing denial of summary judgment and dismissing suit against fellow lifeguards for injury caused during a rescue) (emphasis added). See e.g. also Catalayud v. State of California, 959 P.2d 360, 362-370 (Cal. 1998) (reversing and requiring summary judgment dismissal where officer was accidentally shot by fellow officer during arrest attempt); Seibert Security Services, Inc. v. Superior Court, 22 Cal. Rptr. 2d 514, 522 (Cal. App. 1993) ("Unless the police officer or firefighter has come to a specific location to perform a specific immediate duty,

and the defendant's unrelated negligent or intentional conduct increases the risks inherent in performing that duty [citations omitted], this exception is similarly inapplicable") (emphasis added).

Indeed, in California as well as other states, the common law professional rescuer/fireman's rule repeatedly has been held to bar suit where a police officer is injured by the negligence of a fellow officer during an emergency operation. See e.g. id; McElroy, supra (affirming summary judgment where officer's patrol car collided with another during a pursuit); Farnam, supra. (affirming summary judgment dismissing policeman's suit against fellow officer and his employer for dog bite during attempted arrest); Galapo v. City of New York, 744 N.E.2d 685, 688 (NY 2000) (affirming dismissal of suit against fellow policeman); Cooper v. New York, 619 N.E.2d 369 (N.Y. 1993) (affirming dismissal of suit for fellow police officer's negligence related to the dangers in responding to emergency call); Sexton v. City of New York, 32 A.D.3d 535, 819 N.Y.S.2d 838 (N.Y. App. Div. 2006) (affirming dismissal of suit for injury caused by fellow fireman's driving); Soto v. Ortiz, 680 N.Y.S. 2d 552 (N.Y. App. 1998) (affirming dismissal of suit for injury caused

by driving of fellow officer); Smullen v. City of New York, 625 N.Y.S. 2d 545 (N.Y. App. 1995) (reversing failure to dismiss where officer hit by car as result of partner's negligence); Dimiani v. City of Buffalo, 603 N.Y.S.2d 1006 (N.Y. App. 1993) (affirming dismissal of suit for shooting by fellow officers); Morrisey v. County of Erie, 603 N.Y.S.2d 1009 (N.Y. App. 1993) (reversing failure to dismiss suit for correctional officer's accidental shooting of policeman); Woods, supra (fireman's rule precluded officer's suit of city for accident during pursuit); McGhee v. Michigan State Police Dept., 459 N.W. 2d 67, 68 (Mich. App. 1990) (state not liable for fleeing vehicle's collision with officer because "a police officer's injury resulting from a high-speed chase constitutes a foreseeable occurrence stemming from the performance of the officer's police duties").

Though courts have provided numerous grounds for this outcome under the common law, two policies are of particular importance here. First, it has been held "the same public policy considerations underlying the application of the firefighter's rule to exonerate the victim should also apply to exonerate a fellow [professional rescuer] whose presence and actions are in furtherance of the joint res-

cue operation." City of Oceanside, 96 Cal.Rpt. at 631. Because Division One -- again following California precedent -- recognizes that those who cause an emergency are protected because "[p]ublic policy demands that recovery be barred whenever a person, fully aware of a hazard created by another's negligence, voluntarily confronts the risk for compensation," Black Indus., Inc., 19 Wn. App. at 699-700 (citing inter alia Walters, supra), this same policy also warrants protection in Washington of a fellow officer who responds to assist in an emergency. Indeed, it "would be anomalous to exonerate the victim but not the fellow [official] from a personal injury action by an injured [official]." See 96 Cal.Rpt. at 631.

Second, and most important, of all the policies served by applying the doctrine to fellow officers in emergencies, "[t]he primary public policy reason for barring such actions is public safety" because a "peace officer's primary duty is to protect the public and imposing a duty of care as to other officers creates the potential for conflicting duties ... and the threat of lawsuits could 'seriously compromise public safety.'" Terry v. Garcia, 109 Cal. App. 4th 245, 253 (Cal. Ct. App. 2003). See also McElroy, 100 Cal.App. 4th at 548

("The rationale for the decision is that liability would needlessly impair ... the individual officers involved to make 'judgment calls when responding to a rapidly developing emergency or crisis'" and therefore dismissal of suit was affirmed because the underlying policy was met where defendants were "satisfying 'their primary commitment to the public's essential safety and protection'"") In fact, California's Supreme Court rejected a claim that a statutory abolition of the professional rescuer/fireman's rule applied to municipalities precisely because it "decline[s] to ascribe to the Legislature any intent to generate conflicting duties on the part of peace officers ... or to undermine their primary commitment to the public's essential safety and protection for fear of personal liability for injury to fellow officers." Calatayud, 959 P.2d at 368.

b. Public Safety is at Stake Here

A peace officer's primary duty is to protect the public and the "discharge of these duties takes precedence over avoiding injury to fellow officers, particularly when responding to a rapidly developing emergency or crisis." Id., at 367-68. Imposing liability on other responding officers in such situations not only creates the "potential"

for conflicting duties, id., but would ensure public safety is the subordinate interest. For example, if Deputy Sargent avoided risking harm to fellow officer Beaupre by not attempting to stop the recklessly fleeing vehicle despite the greater risk to the public -- and a citizen was harmed by the felon's car as a result of that choice -- Sargent and his employer would be protected by the "public duty doctrine" because the "general obligation to provide police protection does not create tort liability for failure to make an arrest or keep the peace." Hartley v. State, 103 Wn.2d 768, 782, 698 P.2d 77 (1985). See also Hostetler v. Ward, 41 Wn.App. 343, 361, 363-64 (1985); Rodriguez v. Perez, 99 Wn.App. 439, 443, 994 P.2d 874 (2000) ("the duty of police officers to investigate crimes is a duty owed to the public at large and is therefore not a proper basis for an individual's negligence claim."); Torres v. City of Anacortes, 97 Wn.App. 64, 74, 981 P.2d 891 (1999), rev. denied, 140 Wn.2d 1007 (2000) ("Courts frequently deny recovery for injuries caused by the failure of police personnel to . . . investigate properly or to investigate at all."); Fondren v. Klickitat County, 79 Wn.App. 850, 853 & 863, 905 P.2d 928 (1995) (a "claim for negligent investigation is not

cognizable under Washington law.") Hence, applying a third party intervener exception to a fellow officer responding to an emergency "undermine[s] their primary commitment to the public's essential safety and protection for fear of personal liability for injury to fellow officers." Calatayud, 959 P.2d at 368.

Further, the Courts recognize applying the third party intervener exception to fellow officers "would needlessly impair ...the individual officers involved to make 'judgment calls when responding to a rapidly developing emergency or crisis.'" See McElroy, 100 Cal.App.4th at 548. Here it is uncontested the injury in question occurred at the precise moment when the rapidly escalating emergency had reached its most critical stage and compelled Deputy Sargent to try to stop the felon's car before it collided with on-coming I-5 traffic and killed or seriously injured members of the public. See CP 28-29, 37-38, 55. For this reason courts recognize it would "seriously compromise public safety during joint operations if the threat of a lawsuit accompanied every failure to exercise due care in effecting an arrest, quelling a disturbance, extinguishing a fire, or handling any of the other functions public safety members routinely dis-

charge." Calatayud, 959 P.2d at 368.

Finally, it has been noted the application of the exception to fellow officers during an emergency carries "the potential for impairing discipline and the teamwork values that are vital to effective firefighting and law enforcement." See Galapo, 744 N.E.2d at 688 (affirming dismissal of suit against fellow policeman). The instant case confirms this reality; plaintiff expressly admits that his bringing suit over the actions of another officer caused him to fear that fellow deputies would not "back me up" in the field.² See CP 148, 150, 158. Accordingly, as was explained in a similar case:

Here, there was an attempt to apprehend a felon, an activity that poses danger not only to the officer but also to the public. Plaintiff and defendant shared the objective to effect an arrest under these dangerous conditions. The duty of care the officers owed to the public under these circumstances precludes their owing a duty of care to each other. The hazard posed ... is inherent in the activity the public hired plaintiff to perform.

Farnam, 101 Cal.Rptr.2d at 647 (emphasis added).

² Though plaintiff has also alleged this suit resulted in discrimination and demotion by the Sheriff's Department, such claims have been ruled outside the instant complaint, CP 159, and -- in any case -- a final unappealed decision of the Civil Service Commission determined Beaupre's demotion was independently well founded. CP 163-69.

3. No Countervailing Policy Supports Rejection of Rule

The trial court asserted the above analysis and precedent should not apply because: 1) it was based on an interpretation of a California statute that "has no corollary" in Washington and therefore would be an "anomaly;" 2) two additional policy reasons for rejecting fellow officers as third party interveners are absent in Washington; and 3) a dissent in a New York case argued another exception should exist where there are two "equally trained" officers and the plaintiff officer "had no more opportunity than a member of the general public would have had to employ any special skills to avoid injury." CP 122-24. However, none of these rationales support rejection of the common law rule for fellow officers during an emergency.

a. No Duty is Owed Fellow Emergency Responders Regardless of California's Statute.

First, California precedent does not support the conclusion that its rule for fellow officers in an emergency supposedly has "focused largely on interpretation of a California statute, section 1714.9(a)(1)" CP 121. Rather, that state's courts expressly hold that the "rationale for holding the section 1714.9 (a)(1) statu-

tory exception inapplicable to actions between safety officers engaged in a joint operation applies equally to the common law independent acts exception." City of Oceanside, 96 Cal. Rptr. 2d at 621 (emphasis added). See also Farnam, 101 Cal.Rptr. 2d at 647 ("[a]ll of the policy reasons advanced to support the court's refusal to apply the statutory exception [of §1714] to the firefighter's rule support with equal force to a determination that the rule applies in the first instance" under the common law). Indeed, it has been noted that courts in states other than California -- which like Washington are not subject to California's statutes -- also find the common law professional rescuer/fireman's rule precludes the existence of a duty between emergency responders. See e.g. decisions cited supra at 14-17.

Second, that "Washington has no corollary to California Civ. Code, 1714.9" actually supports -- not undermines -- the application to this state's municipalities of the professional rescuer/fireman's rule for emergency operations. As the trial court correctly noted, California's §1714 actually "reimposes a duty of ordinary care ..., which would otherwise be abrogated by the firefighter's rule." CP 121.

Despite California's specific statutory attempt to limit the fireman's rule by reimposing a duty, its courts nevertheless hold the statute "does not allow a personal injury action by a public safety officer against a fellow safety officer for actions taken in furtherance of a joint public safety operation." City of Oceanside, supra. Where legislation from California and other states expressly limiting the professional rescuer doctrine do not expose police agencies to liability in emergency operations, such a statute certainly cannot support a conclusion that Washington's statute -- which contains no such express limit -- somehow does undermine it. This is especially so where, as noted below, Washington's RCW 41.26.281 expressly provides that "negligent acts" create municipal liability to police only "as otherwise provided by law" and RCW 41.26.270 expresses a clear intent to protect municipalities from such liability. See discussion infra at 34-46.

Third, contrary to the trial courts' assertion, a legal principle that makes liability dependent on the existence or absence of an emergency is far from an "anomaly in this state." See CP 123. For example, under both statute and common law, emergency vehicles

are expressly privileged from complying with the rules of the road "when responding to an emergency call or when in the pursuit of an actual or suspected violator of the law" RCW 46.61.035. See also State v. Gorham, 110 Wash. 330, 333, 188 P. 457 (1920) (similar common law rule based on "principle of public necessity"). Likewise, "except as provided" under the Emergency Management Act, an emergency worker "shall have no right to receive compensation ... from the agency ... for an injury or death arising out of and occurring in the course of his activities as an emergency worker." RCW 38.52.190. (Emphasis added.)

Hence, both in California and elsewhere, the common law professional rescuer/fireman's rule applies to bar suits by fellow officers for injuries during an emergency despite California's unique statute -- not because of it.

b. Numerous Public Policy Grounds Require Protection of Emergency Responders From Suits by Fellow Officers

The trial court next concluded the professional rescuer/ fireman's rule was inapplicable to injuries allegedly caused by fellow officers during emergency operations because two out of the four policy reasons it listed were supposedly absent in Washington -- i.e.,

"cost spreading" and the exclusivity of the worker's compensation remedy. CP 123. However, this state's case law and statutory scheme shows otherwise.

First, it does not follow that a doctrine will not apply unless every possible policy rationale favoring it is present in a case. Here it was uncontested that two of the policies cited by the trial court as supporting the application of this defense to fellow officers in emergency operations -- "public safety" and "efficient judicial administration" -- are present. See e.g. Calatayud, 959 P.2d at 369 ("difficult problems" of causation would be "multiplied in cases turning on the propriety of chosen police tactics or emergency procedures" when what is at issue is often simply a "judgment call on the part of an officer who inadvertently inflicts injury"). See also CP 121-22. Indeed, "[t]he primary public policy reason for barring such actions is public safety," Terry, supra (emphasis added), and public safety is central here. See discussion supra at 19-23.

Second, the claim that two policy grounds given for the doctrine are absent in Washington -- i.e., "cost spreading" and the exclusivity of worker's compensation remedy, see CP 123 -- is mistaken.

Instead, rejecting a duty of care between officers during emergencies is part of "cost spreading" in Washington. In exchange for assuming the risks of firefighting or law enforcement, a LEOFF member already receives at public expense a higher salary, better retirement, increased worker's compensation benefits, and such other unprecedented privileges as the right to sue employers "as otherwise allowed by law" (i.e., for negligence unrelated to emergency operations). Further, such benefits are in addition to the right held by every citizen to sue responsible tortfeasors who are not their employer or its agents. Hence, the cost-spreading policy supports municipal assertion of the professional rescuer/fireman's rule because yet another publicly paid benefit -- i.e., a right to sue police agencies for injuries officers incur in the very emergencies for which they are paid to respond -- "would only increase the cost ultimately borne by the public fisc." See City of Oceanside, 96 Cal.Rptr. 2d at 281. See also Galapo, 95 N.Y.2d at 575 (statute limiting common law fireman's rule not apply to government because of "the specter of massive civil liability"). That plaintiff has "only" the rights of other citizens and the aforementioned other numerous special statutory benefits -- but not

the additional unprecedented right to sue for acts of fellow officers during an emergency -- is not a public policy basis for ignoring the common law and judicially imposing yet another publicly financed benefit. Indeed, if it was somehow claimed as a result that LEOFF members would not be adequately compensated, an allegation of "[i]nadequate compensation is not a sufficient reason to preclude application of the firefighter's rule" City of Oceanside, 96 Cal.Rptr.2d at 285.

As to the "exclusivity" of the worker's compensation remedy, it is true that in California police may not sue employers for any form of negligence. Hence, without the fireman's rule the ability to sue other law enforcement agencies would have created in California the "anomaly of being allowed to sue when the negligent officer was employed by another agency but not by his own employer." See CP 123. Though in Washington no such "anomaly" would exist because our state's "worker's compensation" scheme is not always an officer's exclusive remedy, the failure to apply the common law rule in this situation creates its own far more serious "anomaly." Specifically, the anomaly purposefully avoided in California, but created by the

trial court's decision here, is that the professional rescuer/fireman's rule would exonerate the person creating an emergency but not "the fellow [safety official] whose presence and actions are in furtherance of the joint rescue operation." City of Oceanside, 96 Cal.Rpt. at 631. See also CP 95 (Plaintiff admits his limited interpretation of the rule would protect only "the driver of the suspect vehicle" that actually ran over plaintiff). However, as previously noted, "[t]he same public policy considerations underlying the application of the firefighter's rule to exonerate the victim should also apply to exonerate a fellow [rescuer]" City of Oceanside, *supra*.

Third, though the professional rescuer doctrine is supported by numerous public policy grounds -- all but one of which apply here -- it has been noted above that the rule also is independently based on the legal doctrine of assumption of risk and the attendant policy rationales thereof. See e.g. Maltman, 84 Wn.2d at 978-79; Black Indus., Inc., 19 Wn. App. at 699 (citing Strong, *supra*).

Hence, this Court recognizes the professional rescuer/fireman's rule as a matter of law is independently supported by the separate "[p]ublic policy [that] demands that recovery be barred whenever a

person, fully aware of a hazard created by another's negligence, voluntarily confronts the risk for compensation." See Black Indus., Inc., 19 Wn.App. at 699-700. The policy behind assumption of the risk independently necessitates application of the professional rescuer/fireman's rule even if other policy grounds -- such as the clearly present issue of public safety -- somehow did not.

c. **New York Dissent Advocating Liability for Fellow Officers is Unprecedented, Factually Inapplicable and Violates Washington's Statute and Public Policy**

The trial court also asserted that "an equally compelling policy reason" for not applying the common law rule to emergency operations was the dissent in Cooper v. City of New York, 619 N.Ed.2d 369, 376-77 (N.Y. 1993) (Titone, J., dissenting), which argued the fireman's rule should not apply as between two "equally trained" officers where the plaintiff officer was a "passenger in a negligently driven car, [who] had no more opportunity than a member of the general public would have had to employ any special skills to avoid injury." See CP 123-24. However, such is neither a policy reason nor a compelling argument under the uncontested facts here.

First, commentators note that Washington's courts have in fact applied the professional rescuer doctrine to dismiss claims for acts of fellow officers in emergencies. See 1-1 Premises Liability-- Law and Practice § 1.05, n. 1.11. Second, in the more than 10 years since the majority's holding in Cooper, its dissent has never been cited or relied upon by any court to bar emergency responders the benefit of the fireman's rule -- including the courts of the dissent's own state. See e.g. Galapo, supra.; Sexton, supra.; Soto, supra.; Smullen, supra.; Dimiani, supra.; Morrisey supra. See also e.g. Woods, supra; McGhee, supra; Calatayud, supra; McElroy, supra; Farnam, supra.

Third, the adoption of the Cooper dissent for the first time here would not assist plaintiff because he was not injured as a passive "passenger in a negligently driven car, [who] had no more opportunity than a member of the general public would have had to employ any special skills to avoid injury." Cooper, 619 N.Ed.2d at 376-77 (Titone, J., dissenting). Rather, the record is undisputed that plaintiff was injured precisely while he was exercising his "special skills" as an officer and placing himself in harm's way as an emer-

gency responder running the wrong way on foot at night in the traveled lanes of I-5 while patrol cars around him were attempting to pin the fleeing vehicle. CP 24, 28-29, 37-38, 55, 62-63, 83.

Common law assumption of risk and its policies, as well as those policies served by applying the fireman's rule to emergency operations -- especially the "primary public policy reason [of] public safety" -- cannot be overcome by a more than decade old inapplicable dissent from another state that has not been followed by its own or any other court. Rather, our state recognizes and enforces the professional rescuer/fireman's rule. See e.g. Maltman, supra.; Black Indus., Inc., supra.; Strong, supra.

B. No Statutory Basis for Rejection of Common Law

Under RCW 41.26.281 plaintiff may bring suit against the Sheriff's Department for "negligent acts" as "otherwise provided by law" to recover damages in excess of benefits received or receivable from it under LEOFF. In the instant case, the trial court sua sponte concluded this statute prohibited the County from asserting the common law professional rescuer/fireman's rule for the acts of Deputy Sargent, and therefore, it could be directly liable for negligent

training and vicariously liable under respondeat superior. See CP 122-23. This violated not only the aforementioned public policy but also RCW 41.26.281 itself.

1. All Defenses to LEOFF "Excess Damages" Suits are Retained by the Plain Language of RCW 41.26.281

Though plaintiff never raised RCW 41.26.281 in opposition to summary judgment, CP 82-99, the trial court ruled the statute abolished the professional rescuer/fireman's rule for LEOFF "excess damages" suits because such allegedly was what "the intent of our Legislature appears to be" See CP 123. However, "[i]n order to determine legislative intent, we begin with the statute's plain language and ordinary meaning." Koenig v. City of Des Moines, 158 Wn.2d 173, 181, ___ P.3d ___ (2006) (quoting Nat'l Elec. Contractors Ass'n v. Riveland, 138 Wn.2d 9, 19, 978 P.2d 481 (1999)). Indeed, "[i]f a statute is clear on its face, its meaning is to be derived from the language of the statute alone." Cerrillo v. Esparza, 158 Wn.2d 194, 200, ___ P.3d ___ (2006) (quoting Kilian v. Atkinson, 147 Wn.2d 16, 20, 50 P.3d 638 (2002) (emphasis added)). Here, the trial court nowhere addressed the actual language of RCW 41.26.281. CP 119-124.

Even a cursory examination of the statute's plain language confirms that it retains a governmental employer's defenses in LEOFF negligence suits. On its face the statute states:

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 (emphasis added). The plain language and ordinary meaning of requiring proof of a "negligent act" and authorizing suit only "as otherwise provided by law" -- as well as the language of a related LEOFF statute expressly describing the Legislature's intent -- require application of the professional rescuer/fireman's rule in such suits.

a. **Suit for "Negligent Act" Requires Proof of Negligence and Application of Professional Rescuer/Fireman's Rule**

Because RCW 41.26.281 expressly authorizes suits for "negligent acts," it requires LEOFF members bringing suit against their employers to prove the necessary elements of common law negligence. See Locke v. City of Seattle, 133 Wn. App. 696, 709, 137

P.3d 52 (2006) ("To establish a claim, LEOFF members must ... prove that their employers acted negligently ..."). Negligence actions require a determination of "whether a duty of care is owed by the defendant to the plaintiff," Alexander v. County of Walla Walla, 84 Wn.App. 687, 692-693, 929 P.2d 1182 (1997), and the professional rescuer/ fireman's rule determines whether such a duty of care exists.

Specifically, as repeatedly noted, the professional rescuer/fireman's rule "operates as a form of assumption of risk." DeWolfe and Allen, 16 Wash. Pract. § 1.18 at p. 22 (2nd Ed. 2000). See also e.g. Maltman, 84 Wn.2d at 978-79; Black Indus., Inc., 19 Wn.App. at 699; Strong, 1 Wn.App. at 904; 1-1 Premises Liability--Law and Practice § 1.05. More specifically, the rule is a form of "primary assumption of risk" so that "[i]n terms of duty, it may be said there is none owed." Sutton, 31 Wn.App. at 588 n. 2. (emphasis added). See also Armstrong v. Mailand, 284 N.W.2d 343, 348 (Minn. 1979) (fireman's rule is a form of "primary assumption of the risk ... meaning that the defendant did not breach a duty owed" so that "[p]rimary assumption of the risk is not really an affirmative de-

fense; rather, it indicates that the defendant did not even owe the plaintiff any duty of care."); Krause v. U.S. Truck Co., 787 S.W.2d 708, 712 (Mo. 1990) ("A fireman assumes, in the primary sense, all risks incident to his firefighting activities" and "[p]rimary assumption of the risk is not really an affirmative defense; rather, it indicates that the defendant did not even owe the plaintiff any duty of care"). Hence, a LEOFF member's "negligence" action against an employer necessarily requires applying common law principles analyzing the existence of "duty" -- and "[i]n terms of duty" the professional rescuer/fireman's rule dictates that "there is none owed." Sutton, 31 Wn.App. at 588 n. 2.

Had the legislature intended to abolish this common law principle for determining the existence of a "duty," it would have imposed strict liability rather than expressly required proof of "negligence." Further, "[s]tatutes in derogation of the common law are always strictly construed." State ex rel. McDonald v. Whatcom County Dist. Court, 92 Wn.2d 35, 37, 593 P.2d 546 (1979). See also State v. Grant, 89 Wn.2d 678, 683, 575 P.2d 210 (1978) ("This statute, being in derogation of the common law, must be strictly con-

strued"); Marble v. Clein, 55 Wn.2d 315, 318, 347 P.2d 830 (1959). This rule of strict construction has led courts in California, New Jersey, and New York to interpret enactments that expressly limited the fireman's rule to hold this important common law doctrine was not abrogated -- especially in suits against municipalities because of the dire effect on public policy. See e.g. Kelly v. Ely, 764 A.2d 1031 (N.J. App. Div. 2001), cert. denied, 772 A. 2d 937 (2001) (court "decline[d] to construe the statute [as abrogating the fireman's rule], absent a clearer declaration of the legislative intent to achieve such an end"); Galapo, 95 N.Y.2d at 575 (statute limiting common law fireman's rule narrowly construed, especially considering "the specter of massive civil liability" to municipalities otherwise); Calatayud, 959 P.2d at 368 (requiring dismissal where officer accidentally shot fellow officer because state Supreme Court "decline[d] to ascribe to the Legislature any intent to generate conflicting duties on the part of peace officers ... or to undermine their primary commitment to the public's essential safety and protection for fear of personal liability for injury to fellow officers"). These decisions are especially pertinent for Washington jurisprudence because both our Supreme Court

and this Court have found decisions from these state courts persuasive on the issue of the professional rescuer/fireman's rule. See e.g. Maltman, 84 Wn.2d at 978 (following New Jersey and New York fireman's rule); Sutton, 31 Wn.App. at 588 (applying California and New Jersey fireman's rule); Black Indus., Inc., 19 Wn.App. at 699-700 (following California precedent on fireman's rule).

Accordingly, the requirement that a LEOFF member prove a "negligent act or omission" necessarily requires exactly what the trial court here rejected -- i.e. application of the professional rescuer/fireman's rule to Pierce County and that plaintiff actually prove his injury was caused by its breach of a duty.

b. Limitation That Suits be "as Otherwise Provided by Law" Also Requires Application of Rule

On its face RCW 41.26.281 expressly requires that a "cause of action against the governmental employer" for "negligent acts or omissions" be "as otherwise provided by law." Because negligence actions otherwise by law are subject to the professional rescuer/fireman's rule, such requires actions under RCW 41.26.281 be subject to it as well. Though "[s]tatutes must be interpreted and construed so that all the language used is given effect, with no portion

rendered meaningless or superfluous," Cobra Roofing v. Labor & Indus., 157 Wn.2d 90, 99, 135 P.3d 913 (2006) (emphasis added); see also Lamont Ridge Homeowners Ass'n v. Ltd. P'ship, 156 Wn.2d 696, 699, 131 P.3d 905 (2006); State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003); Locke, 133 Wn.App. at 710, here the trial court gave no meaning to the statutory term "as otherwise provided by law."

Indeed, it did so despite Hansen v. City of Everett, 93 Wn.App. 921, 925, 971 P.2. 111 (1999), wherein this Court unambiguously holds such a defense as comparative fault "applies to the [plaintiffs'] lawsuit based on fault under LEOFF's 'excess damages' provision" because suits under RCW 41.26.281 are expressly "as otherwise provided by law." The trial court's contrary ruling ignored both the language of the statute and this Court's binding precedent interpreting it.

c. **LEOFF was Intended also to "Protect Governmental Employers from Actions at Law"**

The trial court concluded the professional rescuer/fire-man's rule nevertheless was abolished as to municipal employers of LEOFF members because "the intent of our Legislature appears to

be to provide broader protection to law enforcement officers by expanding recovery beyond the workers' compensation limitation." See CP 123. However, a conclusion that benefiting LEOFF members is the only purpose of the statute not only ignores the plain language of RCW 41.26.281 but also that of another "related statute" -- one that expressly states the legislature also intends LEOFF to "protect[] ... the governmental employer from actions at law." This expression of intent cannot be ignored because "all that the Legislature has said in the statute and related statutes should be part of plain language analysis." See Cerrillo v. Esparza, 158 Wn.2d at 202 (quoting Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 11, 43 P.3d 4 (2002)) (emphasis added).

On the same day RCW 41.26.281 was enacted, a related LEOFF statute -- RCW 41.26.270, see Laws of 1971, 1st Ex. Sess., ch. 257, §§ 14 & 15 -- was also enacted and provides in pertinent part:

The legislature ... declares that removal of law enforcement officers and fire fighters from workers' compensation coverage under Title 51 RCW necessitates the (1) continuance of sure and certain relief for personal injuries incurred in the course of employment or occupational disease, which the legislature finds to

be accomplished by the provisions of this chapter and (2) protection for the governmental employer from actions at law; and to this end the legislature further declares that the benefits and remedies conferred by this chapter upon law enforcement officers and fire fighters covered hereunder, shall be to the exclusion of any other remedy, proceeding, or compensation for personal injuries or sickness, caused by the governmental employer except as otherwise provided by this chapter; and to that end all civil actions and civil causes of actions by such law enforcement officers and fire fighters against their governmental employers for personal injuries or sickness are hereby abolished, except as otherwise provided in this chapter.

(Emphasis added).

One of the benefits of RCW 41.26.270 to municipal police and fire departments is that they at least are "protected from product liability claims vis-a-vis their employees since those are not based on negligence." See Locke, 133 Wn.App. at 709. However, it would have been meaningless to "protect[] ... the governmental employer" only from product liability for which no municipal fire or police department in Washington or elsewhere ever has been – or

likely ever will be -- found liable to their employees.³ Rather, our courts "presume that the legislature did not engage in vain and use-
less acts and that some significant purpose or object is implicit in every legislative enactment." Roberts v. Dudley, 140 Wn.2d 58, 82, 140 Wn.2d 58 (2000) (quoting Oak Harbor Sch. Dist. v. Oak Harbor Educ. Ass'n, 86 Wn.2d 497, 500, 545 P.2d 1197 (1976)) (emphasis added). Similarly, "a statute should be construed as a whole in order to ascertain legislative purpose, and thus avoid unlikely, strained or absurd consequences" Roberts, 140 Wn.2d at 82-83 (quoting Alderwood Water Dist. v. Pope & Talbot, Inc., 62 Wn.2d 319, 321, 382 P.2d 639 (1963)). Far from providing "protection for the governmental employer from actions at law" as expressly intended by LEOFF, the trial court's reading turned the statute on its head and

³ A diligent search of Washington and national precedent reveals no case in which a fire or police department was found liable to its employees or anyone else on a products liability claim. This is understandable because neither of these entities is a "product manufacturer" that produces items "not reasonably safe as designed." See RCW 7.72.030(1); Soproni v. Polygon Apt. Partners, 137 Wn.2d 319, 326, 971 P.2d 500 (1999). See also Delzotti v. American LaFrance, 179 A.D.2d 497, 498, 579 N.Y.S.2d 33 (N.Y. App. Div. 1992) ("The City, as purchaser, is outside the manufacturing or retailing chain" of its fire engines and therefore there is "no theory of strict products liability or negligence under which the City may be held liable for the injuries alleged" by a fireman).

removed the protection municipal employers had under the common law before the enactment.

The "significant purpose" of both "continu[ing] ... sure and certain relief for personal injuries incurred in the course of employment ... and ... protecti[ng] ... the governmental employer from actions at law" is given meaning and effect only if police and firemen at least are prohibited from suing their employers for "negligent acts" where there is a defense "as otherwise allowed by law" -- e.g., a defense such as the professional rescuer/fireman's rule. The statute's plain language and this Court's Hansen decision confirm RCW 41.26.281 did not sub silentio bar employers from asserting the professional rescuer/fireman's rule.

2. Legislative History Confirms Intent to Retain All Legal Defenses in LEOFF "Excess Damages" Suits

Though the meaning of RCW 41.26.281 has been shown as clear on its face and therefore "only a plain language analysis of a statute is appropriate," see Cerrillo v. Esparza, 158 Wn.2d at 201, an analysis of the statute's legislative history reinforces the aforementioned conclusion dictated by its plain language.

In 1970 Strong v. Seattle Stevedore Co., supra, affirmed the dismissal of a wrongful death action by a fireman's family because there was "no breach of duty owed to the decedent fireman" when the hazards of the fatal fire were "within a fireman's expert knowledge." This Court thereafter acknowledged that Strong established in our state the principle that where "the paid professional rescuer has knowingly and voluntarily confronted a hazard" he or she "cannot recover from the one whose negligence created the hazard, so long as the particular cause of the rescuer's injury was foreseeable and not a hidden, unknown, or extrahazardous danger which could not have been reasonably foreseen." Black Indus., 19 Wn.App. at 699 (citing Strong, supra). See also Katherine A. Adams, The Kentucky Law Survey: Torts, 73 Ky. L.J. 481, 512 (1984) (citing Strong for the principle that the "fireman's rule is applied in the majority of states, regardless of whether the fireman is considered an invitee or a licensee"). But see Ballou v. Nelson, 67 Wn.App. at 71 (stating that Strong "could have utilized the fireman's rule in denying recovery, but reached the same result on the ground that the fireman was an

invitee who possessed more knowledge than the owner regarding the dangers of heavy creosote smoke").

The next year "in 1971 the Legislature removed all LEOFF members from coverage under the Industrial Insurance Act, Title 51 RCW, and abolished all civil causes of action for personal injury against their governmental employers 'except as otherwise provided in this chapter.'" Fray v. Spokane County, 134 Wn.2d 637, 644, 952 P.2d 601 (1998). See also Laws of 1971, 1st Ex. Sess., ch. 257, § 14; RCW 41.26.270. Contemporaneously, the Legislature also "provided in this chapter" -- as codified in RCW 41.26.281 -- that negligence suits could be brought for "excess ... damages" against employers by LEOFF members "as otherwise provided by law." Laws of 1971, 1st Ex. Sess., ch. 257, § 15. Because "the legislature is presumed to know the existing state of the case law in those areas in which it is legislating," Personal Restraint of Quackenbush, 142 Wn.2d 928, 936, 16 P.3d 638 (2001) (quoting Woodson v. State, 95 Wn.2d 257, 261-62, 623 P.2d 683 (1980)), the legislature is presumed to have known of Strong's application of the fireman's rule and to have intended its inclusion in RCW 41.26.281's language

adopting those limitations that are "otherwise provided by law" for suits against LEOFF employers.

Thereafter, in 1975 our state Supreme Court in Maltman v. Sauer, supra. -- and in 1978 this Court in Black Indus. v. Emco Helicopters, supra. -- again dismissed negligence suits of professional rescuers by reaffirming that under the professional rescuer doctrine 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." Thereafter the legislature amended what is now RCW 41.26.281, see Laws of 1991, ch. 35, § 28, and repeatedly amended RCW 41.26.270, see Laws of 1989, ch. 12, § 13; Laws of 1987, ch. 185, § 13; Laws of 1985, ch. 102, § 4, without any attempt to exclude the professional rescuer doctrine or fireman's rule from the limitations "as otherwise provided by law" in LEOFF member "negligence" suits against their employers. Hence in "the absence of an indication from the Legislature that it intended to overrule the common law, new legislation will be presumed to be in line with prior judicial decisions in a field of law." See Glass v.

Stahl Specialty Co., 97 Wn.2d 880, 887-888, 642 P.2d 948 (1982).

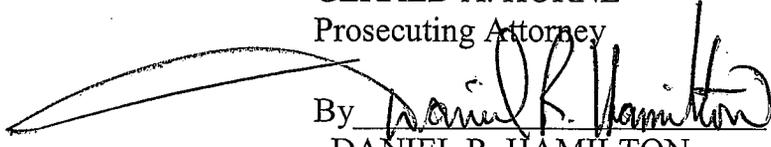
See also State v. Davis, 47 Wn.App. 91, 99, 734 P.2d 500 (1987) ("it must be presumed that the Legislature's failure to address the precise issue before this court indicates its intention to preserve prior precedent in that area.")

V. CONCLUSION

Based on the common law, plain statutory language, binding precedent, and legislative history, the trial court erred in denying summary judgment on plaintiff's negligent training and respondeat superior claims. Therefore, as both a matter of law and public policy, Pierce County respectfully requests this Court reverse the trial court and direct that the complaint in this case be dismissed.

DATED: December 7th, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that I delivered a true copy of the foregoing Brief of Appellant Pierce County this 7th day of December, 2006, to ABC-Legal Messengers, Inc., with appropriate instruction to forward the same to J.E. Fischnaller, 14136 NE Woodinville Duvall Rd Ste 220, Woodinville, WA 98072-8551, attorney for Plaintiff.

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