No. 76096-3-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

WYNN LOILAND and SUZANNE LOILAND,

Petitioners,

v.

STATE OF WASHINGTON; PEDRO LOPEZ and
JANE DOE LOPEZ, and the marital community composed thereof,

Respondents,

and

MARIO A. JIMENEZ PEREZ and JANE DOE PEREZ, and
the marital community comprised thereof,

Defendants.

PETITION FOR REVIEW

Francisco Duarte, WSBA #24056
Scott David Smith, WSBA #48108
Fury Duarte PS
710 10th Avenue East
PO Box 20397
Seattle, WA 98102
(206) 726-6600

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorneys for Petitioners Loiland

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Other Cases

Statutes

Other Statutes

Codes, Rules and Regulations

Other Authorities

A. IDENTITY OF PETITIONER

Wynn and Suzanne Loiland seek review of the published Court of Appeals opinion set forth in Part B.

B. COURT OF APPEALS DECISION

The Court of Appeals issued its published opinion on December 26, 2017. It is in the Appendix at pages A-1 through A-13.

C. ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in applying the professional rescuer exception to the rescue doctrine, a general rule of liability to rescuers, where the WSP's negligence occasioned by a trooper improperly responding to an accident caused by icy conditions on Interstate 5 post-dated the actions of a driver who operated his vehicle negligently under the conditions, and WSDOT continually failed to de-ice the site for hours, both before and after the original driver's negligence, and the plaintiff firefighter later dispatched to a deserted accident scene was struck by a vehicle affected by the icy conditions?

2. Should this Court abandon the common law professional rescuer exception to the rescue doctrine as contrary to present Washington law and harmful for the dedicated professional rescuers of our State?

D. STATEMENT OF THE CASE

The facts in this case are largely undisputed.[1] Division I's opinion sets forth the facts in this case, op. at 2-4, and Loiland will not repeat them here. However, several facts bear emphasis.

[1] The record contains an extensive Washington State Patrol ("WSP") investigation team report as well as Sgt. Alexander's own accident report. CP 27-74.

The Washington State Department of Transportation ("WSDOT") was long aware that there were icy conditions on the roads in south King County during the night of November 20, 2011. CP 37. WSDOT first received a request for a de-icer on SR 167 at 3:30 a.m. CP 207. WSDOT received a call at 3:30 a.m. from the WSP that there were hazardous, slippery conditions on I-5 near the 272nd Street overpass in Federal Way. CP 37, 110-11, 113.

WSP Sergeant Johnny Alexander responded at 4:35 a.m. to a call concerning a one-car accident involving Pedro Lopez and a passenger that occurred at 4:30 a.m. CP 35, 104. Allegedly concerned for the safety of Lopez and his passenger, Alexander decided to transport them off the freeway. CP 73.[2] Alexander did not mark the scene[3] or arrange for traffic control at the site of the hazard; he did not call in to WSDOT to de-ice the roadway or to send an incident response team; he did not call the crash into Valley Com, the emergency dispatcher for the area, as having been cleared. CP 101-02. Alexander knew the deserted crash site was a nuisance for the motoring public. CP 98-99. Alexander left Lopez's

[2] Loiland's expert, Charles Lewis, a former Alaska state trooper, was critical of this decision; he opined that Alexander should have remained at the scene: "The trooper is supposed to stay on the scene until relieved." CP 314.

[3] To "mark' the accident site means to indicate that authorities had responded to the crash. Alexander's failure to do so was tantamount to having no WSP response.

vehicle unmarked and on its side with its lights illuminated, CP 73, 98, and transported Lopez and Ortiz to a nearby Denny's restaurant at around 5:09 a.m. CP 73, 104.

After Valley Com dispatched Engine 66 from South King County Fire 8 and Rescue and Engine 73 from the Kent Fire Department to the I-5 Lopez accident scene, CP 182, Wynn Loiland, a South King County Fire & Rescue firefighter and member of Engine 66's crew, CP 38, marked the accident scene. *Id*. Mario Perez's Chevrolet Blazer lost control and struck Loiland on the right shoulder of the road. CP 31, 38. The impact nearly killed Loiland, who sustained serious personal injuries including head injuries, a collapsed lung, and a broken arm from the collision. CP 32.

WSDOT failed to de-ice the I-5 roadway in question until 7:15 a.m., approximately four hours after WSP initially advised it of icy conditions there. CP 34.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED[4]

(1) The Rescue Doctrine and Its Professional Rescuer Exception in Washington

[4] This case was resolved on summary judgment. The State is obliged to demonstrate that there is no genuine issue of material fact for resolution by the trier of fact and that it is entitled to judgment as a matter of law. CR 56(c). A court must consider the evidence, and all reasonable inferences from that evidence, in a light most favorable to Loiland as the non-moving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate only if reasonable persons could reach but one conclusion from the evidence. *Id.*; *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). This Court reviews order on summary judgment de novo. *Dowler v. Clover Park School Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

Washington law has recognized for more than 80 years that a person who is injured in rescuing another person may have a cause of action in tort against the party whose conduct created the need for such a rescue. *Highland v. Wilsonian Inv. Co.*, 171 Wash. 34, 17 P.2d 631 (1932); *French v. Chase,* 48 Wn.2d 825, 830, 297 P.2d 235 (1956).[5] In *McCoy v. American Suzuki Motor Corp.*, 136 Wn.2d 350, 355-56, 961 P.2d 952 (1998), this Court noted that it is foreseeable that a rescuer will come to the aid of a person's imperiled by a tortfeasor's conduct, and negates any presumption that the rescuer assumed the risk of undertaking the rescue. The doctrine is not a separate theory of recovery but, rather, "it is shorthand for the idea that rescuers are to be anticipated and is a reflection of a societal value judgment that rescuers should not be barred from brining suit for knowingly placing themselves in danger to undertake a rescue." *Id.* at 356.

---

[5] Washington's formulation of the rescue doctrine derives from then-Judge Benjamin Cardozo's classic formulation of its rationale in *Wagner v. Int'l Ry.*, 133 N.E. 437 (N.Y. 1921) where he stated:

> Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the naturel and probable. The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer. . . . The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had.

Id. at 437-38.

In *Maltman v. Sauer*, 84 Wn.2d 975, 530 P.2d 254 (1975), this Court first articulated a limitation on the ability of professional rescuers to recover under the rescue doctrine. Citing to New Jersey and Oregon authority, *id.* at 978,[6] the Court restricted the ability of professional rescuers to recover *on principles of assumption of the risk*, stating: "In the case of a professional rescuer certain hazards are assumed which are not assumed by a voluntary rescuer. The professional rescuer, however, does not assume all the hazards that may be present in a particular rescue operation." *Id.*[7] Thus, this Court concluded, there must be "special

[6] Both New Jersey and Oregon have since rejected this exception to the general principle of the rescue doctrine. It is also ironic that the first seeds to the elimination of the doctrine were planted in an extensive dissent in the New Jersey Supreme Court in *Berko v. Freda*, 459 A.2d 663 (N.J. 1983), a case that post-dated the 1960 New Jersey case cited in *Maltman*. That dissent attacked the public policy considerations underlying the firefigher's rule, questioning why other public employees with inherent risks in their professions, but not police officers or firefighters, have been allowed to recover from negligent tortfeasors—especially when "workers compensation standing alone is rarely adequate redress," and noting the similarities between police officers and other public employees in many of their job functions. Police officers and highway workers are exposed to identical risks when they are called to perform traffic patrol on a busy highway. However, the highway worker is allowed to recover if injured by a negligent driver, while the police officer is held to assume those risks. *Id.* at 670-71 (Handler, J., dissenting). The dissent further stated that there was no good reason for police officers and firefighters not to fall under the rescue doctrine because with professional rescuers like firefighters and police officers, the predicate of "foreseeability of rescue" underlying this rule should actually increase the duty of care owed by the negligent party because of "the certainty of the foreseeability that rescue will be a consequence of the negligence." *Id.* at 673. The dissent concluded that the firefighter's rule "runs counter to the principles of justice upon which our system of tort law is based." *Id.* at 674. *See also, Walters v. Sloan*, 142 Cal. Rptr. 152, 157-63 (Cal. 1977) (Tobriner, J., dissenting).

[7] In *Maltman,* the Court concluded that the defendant motorist was not liable to the estates of the crew of an Army helicopter dispatched to the scene of a motor vehicle accident to medi-vac an injured motorist to the hospital where the helicopter crashed en route. The Court found no liability both because no duty was present because the crash

criteria for assessing the applicability of the doctrine in a given case to a professional rescuer." *Id*. at 979. The Court did not eliminate the ability of professional rescuers to recover under the rescue doctrine but it limited that ability: "When the injury is the result of a hazard generally recognized as being within the scope of dangers identified with the particular rescue operation, the doctrine will be unavailable to that plaintiff." *Id.*[8]

The *Maltman* rationale for the professional rescuer exception based on assumption of the risk is not only inconsistent with *McCoy*, it is inconsistent with this Court's more recent analyses of assumption of the risk, as will be noted *infra*.

Additionally, the professional rescuer exception is so patently unfair that in *all* the subsequent reported cases in Washington since *Maltman*, with *one* exception,[9] Washington courts have applied exceptions

---

was essentially unforeseeable and the rescue doctrine was unavailable to the crew as professional rescuers. *Id.* at 983.

[8] This exception has sometimes been described as the fireman's rule. To be precise, however, the fireman's rule had its origin as a defense to premises liability. The professional rescuer exception is broader, a defense by tort claims from any professional rescuer.

[9] In *Black Indus. v. Emco Helicopters, Inc.*, 19 Wn. App. 697, 577 P.2d 610 (1978), Division I held that the owner of a helicopter that crashed while fighting a fire did not state a claim against the corporation whose negligence caused the fire. The rescuer there was clearly responding to the specific hazard created by the tortfeasor.

to the professional rescuer exception to hold that a professional rescuer stated a claim against the tortfeasor that caused his or her injuries.

The Court of Appeals[10] and this Court have found that a professional rescuer stated a claim against the tortfeasor. In *Beaupre v. Pierce County*, 161 Wn.2d 568, 166 P.3d 712 (2007),[11] this Court determined that the professional rescuer exception was inapplicable in a case where a deputy sheriff sued his county employer after he was struck by a fellow deputy's patrol car while in hot pursuit of a domestic violence suspect. Citing the Court of Appeals cases referenced above, this Court reaffirmed that "the professional rescue doctrine does not apply when an independent or intervening act causes the professional rescuer's injury." *Id.* at 572.[12]

---

[10] *E.g.*, *Sutton v. Shufelberger*, 31 Wn. App. 579, 643 P.2d 920 (1982) (police officer struck by defendant's truck after dismounting from his motorcycle after stopping a vehicle in a traffic stop to issue a citation; the professional rescuer exception was inapplicable to a third party whose intervening negligence injures the rescuer while in the performance of his or her duties); *Ward v. Torjussen*, 52 Wn. App. 280, 758 P.2d 1012 (1988) (police officer stated a claim against driver who struck her vehicle while on the way to investigate a call regarding a prowler); *Ballou v. Nelson*, 67 Wn. App. 67, 834 P.2d 97 (1992) (police officers injured while removing intoxicated guests from a hotel stated a claim where there was no actual rescue and the guests assaulted the officers, an intentional tort).

[11] *See* Note, *Tort Law — Professional Rescue Doctrine — Washington Supreme Court Declines to Apply Professional Rescue Doctrine in suit by Policeman Against Fellow Officer — Beaupre v. Pierce County*, 166 P.3d 712 (Wash. 2007), 121 Harv. L. Rev. 1644 (2008).

[12] The Court noted that an officer's fellow officers were "intervening parties," particularly where the Legislature had provided for a specific statutory basis for such officers suing their public employers, notwithstanding the usual employer immunity in the worker compensation setting. *Id.* at 573-75. *See* RCW 41.26.281; *Fray v. Spokane*

The cases referenced above involved independent third-party negligence that caused rescuer injuries. They certainly did not address the situation where an original tortfeasor continued his or her negligent conduct and injured a rescuer after the rescuer was dispatched and arrived at the scene. Where the negligence is continuing in nature, the professional rescuer exception should not apply. Central to the analysis is the fact that the professional rescuer is injured at the scene after arriving there for reasons distinct from those that compelled the professional rescuer to be present at the rescue scene.[13]

In *Ballou*, Division I found the exception did not apply to bar police officers' actions against tavern patrons who assaulted the officers

---

County, 134 Wn.2d 637, 952 P.2d 601 (1998) (invalidating legislation that eliminated ability of police officers and firefighters to sue their public employers); *Locke v. City of Seattle*, 162 Wn.2d 474, 172 P.3d 705 (2007) (upholding constitutionality of right to sue against sovereign immunity, state constitution privileges and immunities challenge).

[13] *E.g., Ballou*, 67 Wn. App. at 72; *Ward*, 52 Wn. App. at 287 (noting it "only relieves the perpetrator of the act that caused the rescuer to be at the scene"); *Sutton*, 31 Wn. App. at 587-88; *Black Indus.*, 19 Wn. App. at 699 (noting a rescuer "cannot recover from the one whose negligence created the hazard"). It also relieves the defendant only for the specific negligent conduct that created the need for the rescuer's presence. *E.g., Maltman*, 84 Wn.2d at 979 (noting a rescuer "cannot complain of the negligence which created the actual necessity for exposure to *those* hazards"); *Sutton*, 31 Wn. App. at 587-88; *Black Indus.*, 19 Wn. App. at 699 (noting a rescuer "cannot complain of negligence in the creation of the very occasion for his engagement" quoting *Krauth v. Geller*, 31 N.J. 270, 273-74, 157 A.2d 129 (N.J. 1960)). The doctrine also does not apply to prevent a rescuer's recovery "against someone who intentionally injures the [rescuer] or causes injury by his active negligence after the [rescuer] arrives on the scene." *Ballou*, 67 Wn. App. at 71-72. Nor does it apply "when an independent or intervening act causes the professional rescuer's injury." *Beaupre*, 161 Wn.2d at 572. In theory, the exception exists in part to encourage citizens to call for assistance, despite their negligence. *Ballou*, 67 Wn. App. at 73. It does not entitle the initial tortfeasor to continue its negligent conduct simply because its actions already caused a crash.

after they arrived. In so holding, the court relied in part on *Lang v. Glusica*, 393 N.W.2d 181, 183 (Minn. 1986), for the proposition that the exception does not apply "to prevent recovery by a [rescuer] against someone who intentionally injures the [rescuer] or causes injury by his active negligence after the [rescuer] arrives on the scene." *Ballou*, 67 Wn. App. at 71-72. *Lang* in turn relied on *Kaiser v. N. States Power Co.*, 353 N.W.2d 899 (Minn. 1984), *overruled on other grounds by Tyroll v. Private Label Chems. Inc.*, 505 N.W.2d 54 (Minn. 1993), which issued an opinion under similar facts to the current action.[14]

Notwithstanding the foregoing authority, Division I misapplied the professional rescuer exception.

(2) Division I's Application of the Professional Rescuer Exception Does Not Apply Here as to the State Is Contrary to Decisions of this Court and the Court of Appeals

Review is merited here because Division I's published opinion contravenes decisions of this Court and the Court of Appeals. RAP 13.4(b)(1)-(2). The professional rescuer exception was arguably

[14] In *Kaiser*, Northern States Power's ("NSP") gas equipment caused an explosion at a hotel. *Id.* at 902. Firefighters responded. *Id.* However, NSP failed to cut-off the gas after the explosion, leading to a second explosion, causing injuries to the firefighters responding to the first explosion. *Id.* Among other reasons, the court held "that NSP may be liable to these firefighters if its employees were causally negligent after the firefighters arrived at the scene of the fire." *Id.* at 906. Based on the limited record, the court found that it presented a jury question. *Id.*

applicable here as to Lopez;[15] but not otherwise. Loiland was called to the scene because Lopez operated his vehicle unsafely under the conditions. He was cited for such action by Sgt. Alexander.

First, it is clear that the exception is inapplicable to the WSP. WSP's conduct constituted independent negligence, as discussed in the cases of the Court of Appeals and this Court, *supra*, to which the exception does not apply. Its negligence neither created the Lopez crash nor caused Loiland's presence;[16] had WSP's Sgt. Alexander properly marked and cleared the Lopez crash, it would have *prevented* Loiland from needing to travel to the deserted scene, and he would not have been injured. Further, had Sgt. Alexander properly marked the scene, even if Loiland had been required to respond, Loiland would not have needed to exit the fire apparatus to mark the scene himself, and would not have been in harm's way. Because WSP did not cause Loiland's presence, the exception does not apply; WSP's negligence was independent of any negligence that caused the rescue operation or Loiland's dispatch.

---

[15] If the Court abolishes the professional rescuer exception, as Loiland asserts it should, Lopez could also be liable to Loiland on traditional tort principles and the summary judgment in his favor should be reversed.

[16] It is noteworthy that Lopez never averred that WSP's negligence caused the Lopez crash or that WSP's negligence caused Loiland's presence. CP 3-6, 228-31.

Moreover, WSP's negligence occurred after the Lopez crash; it did not cause the Lopez crash. Loiland would have responded to the Lopez crash even in the absence of WSP's negligence. In fact, later passing drivers, after WSP abandoned the scene, reported the crash. Loiland was dispatched to the crash because of these reports, and would have been at the scene, regardless of WSP's conduct. As such, WSP's negligence was independent of the reason for which Loiland was present at the accident scene, and the professional rescuer exception does not apply to his claims against WSP.

Division I's rationale for the application of the exception to WSP, op. at 10-13, simply fails to hold water. In fact, its notion that independent negligence may fall within the "ambit" of the dangers associated with the risk that brought the professional rescuer to the scene undercuts all the case law on the exceptions to the professional rescuer exception.

Second, the exception is also inapplicable to WSDOT's continuing negligence. WSDOT's ongoing failure to de-ice I-5 after the Lopez crash and after Loiland's response was independent, continuing negligence to which the exception also does not apply. WSDOT's ongoing failure to de-ice I-5 after the Lopez crash caused Perez to lose control of his vehicle and slide into Loiland as he attended to the Lopez crash.

Finally, the exception's policy also does not support permitting the State to claim its benefits.[17]

The State's failure to de-ice I-5 on November 26, 2011 prior to the Lopez crash was a proximate cause of that crash. But Loiland's claims against WSDOT do not focus on that negligence. Rather, despite hours of prior ice warning for the area where Loiland was injured, the Lopez crash itself, and Sgt. Alexander's witnessing other crashes at that location after the Lopez crash, the State *continued* to fail to de-ice I-5.

WSDOT's duty to de-ice I-5 was *ongoing*. WSDOT's continued inexplicable failure to de-ice I-5 after the Lopez crash, after additional crashes, and after Loiland arrived at the Lopez crash did not cause Loiland's dispatch, but its continuing, post-Lopez-crash failure to de-ice I-5, while aware of hours of ice accumulation and further accidents, including the Lopez crash, constituted continued negligence to which the

[17] Division I gave scant attention to the policy rationale for the professional rescuer exception. As Division I itself stated in *Ballou*, the exception is meant to encourage citizens to summon help regardless of negligence, avoiding too heavy a burden on owners to keep their premises safe for firefighters, and spreading foreseeable risk of injuries to the public through salary and workers' compensation. 67 Wn. App. at 73. The State is not an average citizen that would be placed in the untenable position of ensuring its premises are safe for firefighters who, in a rare circumstance for the citizen, have been called to the premises for an emergency. Rather, WSDOT and WSP must protect citizens who are using public roads like I-5, especially in emergencies. This includes protecting *its own employees*, and other government officers, all of whom the State knows regularly respond to emergencies. Unlike an average citizen, the State is aware, and it is foreseeable, that its employees and local government employees regularly attend to emergencies on the very roads it has a duty to maintain, and the State is specifically equipped to deal with such hazards.

professional rescuer exception does not apply. In fact, the Lopez crash should have made WSDOT's response more urgent. Because the exception does not apply to negligent acts *after* the original negligence, *Ballou*, 67 Wn. App. at 71 (noting the doctrine "does not provide protection to one who commits independent acts of misconduct after fire fighters have arrived on the premises"); *see also*, *Ward*, 52 Wn. App. 280; *Sutton*, 31 Wn. App. at 579, the exception does not apply here.

Here, WSDOT's continuing failure to de-ice I-5, even after early icing notifications, after the Lopez crash, after Sgt. Alexander witnessed several other drivers lose control on the ice, and after Loiland arrived on scene, precludes the exception's applicability.

Division I's explanation of why it chose to apply the professional rescuer exception to continuing negligence, op. at 6, is inconsistent with the cases discussed *supra*. Citing foreign authorities and disregarding this Court's decision in *Beaupre,* the court determined that *multiple* negligent parties caused Loiland to be at the scene. *Id.* This analysis creates only yet another layer of confusion regarding the exception, and defeats the alleged public policy behind the exception, discussed *supra*. Division I's opinion, by excluding professional rescuers from suing WSDOT or WSP merely encourages those agencies to delay responding to maintenance/de-icing requests or to properly perform vital accident scene duties.

In sum, the trial court erred in applying the professional rescuer exception to immunize both the WSP and WSDOT for their negligence. Review is merited. RAP 13.4(b)(1)-(2).

(3) The Professional Rescuer Exception to the Rescue Doctrine Should Be Abandoned

This Court should also grant review to simply abolish the professional rescuer doctrine, an issue of substantial public importance. RAP 13.4(b)(4). The rationale for the professional rescuer exception to the rescue doctrine no longer applies in Washington, the exception has been criticized by legal scholars as confusing, and it is riddled with exceptions to ameliorate its harsh, discriminatory treatment of police officers, fire fighters and other professional rescuers injured while addressing emergency situations. Other states have abolished the exception judicially or statutorily in favor of more traditional tort principles. Washington should join its sister jurisdictions in abolishing the exception.

While this Court applies common law principles on the grounds of *stare decisis*, it is within this Court's authority to abandon outworn common law doctrines that have outlived their usefulness. This Court applies the protocol outlined in *In re Stranger's Creek,* 77 Wn.2d 649, 653, 466 P.2d 508 (1970) to assess whether a common law principle

should be abandoned. *Stare decisis* is an important judicial policy in Washington, but it is not absolute. This Court should abandon a common law rule if it is incorrect and harmful. *Id*. More specifically, this Court has held that a common law principle should be abandoned if its legal underpinnings have changed or disappeared. *State v. Otton*, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016); *W.G. Clark Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 180 Wn.2d 54, 66, 322 P.3d 1207 (2014). Here, as will be noted *infra*, the legal underpinning to the professional rescuer exception – assumption of the risk – is no longer viable, and the exception is indeed harmful.

This Court has not been reluctant to abandon outmoded common law tort principles where necessary. *E.g., Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 358 P.3d 1139 (2015) (strict adequacy requirement for claim of wrongful discharge in violation of public policy); *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 150 P.3d 545 (2007) (abolishing contractor's completion and acceptance defense); *Wyman v. Wallace*, 94 Wn.2d 99, 615 P.2d 452 (1980) (abolishing tort of alienation of affections); *Freehe v. Freehe*, 81 Wn.2d 183, 500 P.2d 771 (1972) (abandoning interspousal tort immunity).

The professional rescuer exception is rife with exceptions making its principled application difficult and confusing for trial courts addressing

it. The entire discussion above of the application of the exceptions to the professional rescuer exception, itself an exception to a general rule of liability, the rescue doctrine only illustrates why this Court should abandon the professional rescuer exception to rescue liability entirely in favor of more traditional tort principles of duty and causation. Ultimately, that exception is incorrect and harmful.

That the professional rescuer exception is incorrect and harmful is evidenced by the fact that the exception has been the subject of scathing academic criticism.[18] Courts in other jurisdictions have abandoned it.[19] The exception has also been legislatively overturned.[20]

---

[18] *E.g.,* Jack W. Fischer, *The Connecticut Fireman's Rule: "House Arrest" for a Police Officer's Tort Rights*, 9 U. Bridgeport L. Rev. 143 (1988); Louie A. Wright, *The Missouri "Fireman's Rule": An Unprincipled Rule in Search of a Theory*, 58 UMKC L. Rev. 329 (1990); Jay Berger, *Has the Michigan Firefighter's Rule Gone Up in Smoke? An Analysis of the Willful and Wanton Exception*, 44 Wayne L. Rev. 1555 (1998); Christen C. Handley, *Back to the Basics: Restoring Fundamental Tort Principles by Abolishing the Professional - Rescuer's Doctrine*, 68 Ark. L. Rev. 489 (2015); Margo R. Casselman, *Re-Examining the Firefighter's Rule in Arizona*, 59 Ariz. L. Rev. 263 (2017).

[19] Indeed, Oregon did so in 1984. *Christensen v. Murphy*, 678 P.2d 1210, 1214 (Or. 1984). In *Christensen*, the wife of a slain police officer brought suit against a night matron at a youth detention center whose negligence resulted in a minor's escape from custody and the eventual fatal stabbing of her husband. The court reexamined the rule in light of the statutorily-abolished assumption of risk doctrine in Oregon and found that "its major theoretical underpinning is gone." *Id.* at 1217. The court then rejected the principal policy concerns underlying the professional rescuer exception in many states: landowner burden, cost-spreading, inhibiting public calls for help, and increased litigation. *Id. Mull v. Kerstetter,* 540 A.2d 951, 954, *appeal denied,* 520 Pa. 606 (Pa. 1988); *Wills v. Bath Excavating*, 829 P.2d 405, 409 (Colo. App. 1991), *judgment aff'd and remanded by* 847 P.2d 1141 (1993); *Banyai v. Arruda*, 799 P.2d 441 (Colo. App. 1990) (The court held that "employment as a firefighter or police officer [is not] legal acceptance of the negligence of others who expose the officer to injury…." *Id.* at 443); *Hopkins v. Medeiros,* 724 N.E.2d 336 (Mass. App. 2000). The Connecticut Supreme

The application of this exception is also incorrect under Washington law because it is ostensibly predicated upon principles of assumption of risk.[21] This Court has *curtailed* the application of assumption of risk in Washington law. *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 244 P.3d 924 (2010).

In first adopting the professional rescuer exception to the rescue doctrine, the *Maltman* court was not precise as to the nature of the risks "assumed" by professional rescuers. 84 Wn.2d at 978. Indeed, the *McCoy* court's analysis of the rescue doctrine seemed to undercut the very premise that a rescuer, professional or otherwise, assumes the risk of harm in rescuing another person imperiled by the tortfeasor's fault. 136 Wn.2d at 355-56. If, as the *McCoy* court stated, the very rationale of the rescue

---

Court recently confined the rule to premises liability only in *Sepega v. DeLaura,* 167 A.3d 916 (Conn. 2017).

[20] *E.g.,* Mich. Comp. Laws Ann. § 60.2965 (West 2015) ("The common law doctrine that precludes a firefighter or police officer from recovering damages for injuries arising from the normal inherent, and foreseeable risks of his or her profession is abolished."). Minn. Stat. § 604.06 (West 1984); N.Y. Gen. Mun. Law § 205-a (McKinney 1996); N.Y. Gen. Oblig. Law § 11-106 (McKinney 1996); Fla. Stat., ch. 112.182 (1990). Ironically, the seminal case on the fireman's rule, *Krauth*, 157 A.2d 129, has been abrogated by statute in New Jersey, as that state's Supreme Court recognized in *Ruiz v. Mero*, 917 A.2d 239 (N.J. 2007). *See* N.J. Stat. Ann. § 2A.62A-21 (West 1993).

[21] The state argued assumption of the risk to the trial court. RP 63-64. The trial court believed that the specific risk of being struck by an "errant" vehicle was a "general risk" assumed by first responders such as firefighters or police officers. RP 56. ("It seems to me that being hit by a vehicle when you are responding to a situation on the highway is certainly within the ambit of the risk of a firefighter…").

doctrine is that it *negates* "the presumption that the rescuer assumed the risk of injury when he knowingly undertook the dangerous rescue, so long as he does not act rashly or recklessly," *id.* at 355, the professional rescuer exception, predicated upon assumption of risk, cannot stand.

In *Gregoire*, this Court noted the *four* aspects of assumption of risk present in Washington law. 170 Wn.2d at 636. Two are damaging – reducing principles, and two exonerate a defendant from liability – express assumption of the risk and implied primary assumption of the risk. *Id*. The former entails an agreement such as an exculpatory clause or release, while the latter involves conduct. Both share the following requirements: the plaintiff must have a full subjective understanding of the presence and nature of the specific risk and then must voluntarily choose to encounter that very risk. *Id*. In a concurrence, Justice Chambers pointedly noted: "Because the evidentiary standard is so high, this court has never applied implied primary assumption of risk to bar recovery in any case. Implied primary assumption of risk should accordingly be applied with caution and with a proper understanding of the principles underlying the doctrine." *Id*. at 646. The Court rejected the view that a jail inmate assumed the risk of his suicide while incarcerated.[22]

[22] *See also*, *Barrett v. Lowe's Home Centers, Inc.*, 179 Wn. App. 1, 324 P.3d 688 (2013), *review denied,* 180 Wn.2d 1016 (2014) (long haul truck driver did not assume risk of employees of store to which driver delivered cargo would negligently

Division I's ostensible belief that a professional rescuer can assume a risk generally associated with his/her work, op. at 1, 5 ("A professional rescuer assumes certain risks as part of his or her job and is compensated for accepting those risks."), is fully contrary to this Court's articulation of when assumption of the risk defeats a plaintiff's claim in *Gregoire*.

Here, Loiland did not assume the specific risk that Lopez would negligently operate his vehicle, that Perez would hit him while performing his rescue duties compelled to be undertaken by WSP's failure to perform them, that WSDOT would continue to fail to de-ice I-5 in the face of warnings to it, or that a seasoned WSP trooper would abandon a crash site and fail to properly perform his duty to clear the incident scene.[23]

---

unload his trailer); *Gleason v. Cohen*, 192 Wn. App. 788, 368 P.3d 531 (2016) (barterer who traded firewood for landowner's trees assumed the risk of landowner's employees negligently cutting down the trees, but not for other risks associated with that activity); *O'Neill v. City of Port Orchard*, 194 Wn. App. 759, 375 P.3d 709 (2016), *review denied*, 187 Wn.2d 1003 (2017) (bicyclist did not assume enhanced risks of city's failure to repair roadway; implied primary assumption of risk inapplicable when defendant creates additional risk encountered by plaintiff); *Edwards v. Colville Motor Sports, Inc.*, 2017 WL 6507242 (2017) (court erred in instructing jury on implied assumption of risk).

[23] Of course, if professional rescuers knowingly encounter specific risk while rescuing those in peril, there may be occasions where assumption of the risk principles can pertain. *E.g.*, *Jessee v. City Council of Dayton*, 173 Wn. App. 410, 293 P.3d 1290 (2013) (city employee assumed the risk of injury by using a stairway in an old firehouse known to her to be hazardous).

In sum, the professional rescuer exception is ultimately contrary to the trend in the law nationally, abolishing it or similar common law exceptions to the rescue doctrine.

Finally, the exception is positively harmful as well. It is a disservice to the men and women who are professional rescuers. Their ability to recover for injuries occasioned by wrongful conduct of a tortfeasor should not be artificially restricted when *any other Washington citizen* would have a claim under the rescue doctrine against the tortfeasor. It is truly anomalous that a citizen good Samaritan who comes to a person's rescue and is injured can sue the tortfeasor responsible for putting the rescued person in harm's way, but a professional rescuer, merely because of her/his employment status, is barred from doing so. Their tort claims should be analyzed consistent with general tort principles, including the rescue doctrine.

This Court should abolish the professional rescuer exception to the rescue doctrine.

F. CONCLUSION

This Court should grant review of Division I's published opinion. RAP 13.4(b). This Court should reverse the trial court's orders dismissing Loiland's claims against the State and Lopez. Costs on appeal should be awarded to Loiland.

DATED this 16th day of January, 2018.

Respectfully submitted,

Philip A. Talmadge

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Francisco Duarte, WSBA #24056
Scott David Smith, WSBA #48108
Fury Duarte PS
710 10th Avenue East
PO Box 20397
Seattle, WA 98102
(206) 726-6600

Attorneys for Appellants Loiland

APPENDIX

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

WYNN LOILAND and SUZANNE LOILAND, Appellants, v. STATE OF WASHINGTON, PEDRO LOPEZ and JANE DOE LOPEZ, and the marital community thereof, Respondent. and MARIO A. JIMENEZ PEREZ and JANE DOE PEREZ, and the marital community comprised thereof, Defendants.	No. 76096-3-I DIVISION ONE PUBLISHED OPINION FILED: December 26, 2017

SPEARMAN, J. — The general rule in Washington is that a person who is injured while rescuing another may recover from the party whose negligence created the need for rescue. However, because professional rescuers assume certain risks as part of their profession, the general rule does not apply. When a professional rescuer is injured by a known hazard associated with a particular rescue activity, the rescuer may not recover from the party whose negligence caused the rescuer's presence at the scene.

Firefighter Wynn Loiland contends the trial court erred in dismissing his claims against the State as barred by the professional rescuer doctrine. But because the State's alleged negligence was a cause of Loiland's presence at the scene, we affirm.[1]

FACTS

Ice and fog created dangerous driving conditions early one November morning. At about 4:40 a.m., driver Pedro Lopez lost control of his Ford Ranger pickup truck while he was driving southbound on I-5. The Ranger spun across four lanes, crossed the right shoulder, and came to rest on its side in a ditch. Another motorist stopped to assist. The motorist parked on the shoulder with his hazard lights activated.

Sergeant Johnny Alexander of the Washington State Patrol (WSP) was patrolling I-5 when he saw hazard lights on the shoulder. Alexander stopped to investigate and saw the Ranger in the ditch. After ascertaining that Lopez and his passenger, Ortiz, were uninjured, Alexander called for a tow truck and began preparing an accident report. As he prepared the report, Alexander saw two cars slide on the ice then regain control. He saw a third car spin, strike the center barrier, and briefly stall. A fourth car slid and narrowly avoided the stalled vehicle.

Alexander determined that the lights from his patrol car distracted approaching motorists, a tow truck would exacerbate the unsafe conditions, and

[1] Loiland also appeals the grant of summary judgment to Lopez, but concedes that that the professional rescuer doctrine "arguably" applied to him. Appellant's Brief at 16. Loiland's only argument as to Lopez is that the professional rescuer doctrine should be abandoned. We decline to consider the argument because the Supreme Court has adopted the professional rescuer doctrine and its decision is binding on this court. See 1000 Virginia Ltd. Partnership v. Vertecs

it was not safe to remain on the side of the road. He cancelled the tow truck and advised dispatch to remove the truck when conditions improved. Alexander left the scene with Lopez and Ortiz. He did not turn off the Ranger's lights or mark the truck to show he had responded. Alexander later cited Lopez for driving too fast for conditions.

The emergency dispatcher, Valley Communications, received several 9-1-1 calls reporting an incident at the site of the Lopez accident. Valley Communications dispatched two fire and rescue engines. Firefighter Wynne Loiland arrived at the scene a few minutes later. The firefighters were unaware that WSP had already responded to the Ranger. After determining the truck was unoccupied, Loiland began marking the Ranger with tape to show it was abandoned.

Meanwhile, Mario Perez was driving southbound in the left lane. Perez lost control of his Chevy Blazer at the same spot where Lopez earlier lost control. The Blazer spun across the freeway in approximately the same path that Lopez's Ranger traveled. The Blazer left the road, crossed the right shoulder, and struck Loiland where he stood next to the Ranger. Loiland suffered serious injuries.

Loiland filed a claim against Lopez, Perez, and the State. Loiland alleged that his injuries were caused by the negligent driving of Lopez and Perez, the Department of Transportation's (DOT) negligent failure to deice the road, and

---

Corp., 158 Wn.2d 566, 578, 146 P.3d 423 (2006) (citing Fondren v. Klickitat County, 79 Wn. App. 850, 856, 905 P.2d 928 (1995)).

WSP's negligent failure to mark the accident. The trial court granted summary judgment for Lopez and the State based on the professional rescuer doctrine.[2]

Loiland sought direct review by the Supreme Court, arguing that the professional rescuer doctrine did not bar recovery in this case or, alternatively, the Supreme Court should abandon the doctrine.[3] The Supreme Court denied direct review and transferred the case to this court.[4]

DISCUSSION

Loiland contends the trial court erred in granting the State's motion for summary judgment based on the professional rescuer doctrine. We review a decision on summary judgment de novo, engaging in the same inquiry as the trial court. Dowler v. Clover Park School Dist. No. 400, 172 Wn.2d 471, 484, 258 P.3d 676 (2011) (citing Harris v. Ski Park Farms, Inc., 120 Wn.2d 727, 737, 844 P.2d 1006 (1993)). Summary judgment is appropriate only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Id. (citing CR 56(c)).

In general, a person who is harmed while rescuing or attempting to rescue another may recover from the party whose negligence created the need for rescue. Maltman v. Sauer, 84 Wn.2d 975, 977, 530 P.2d 254 (1975) (citing

---

[2] Loiland's claim against Perez is not at issue in this appeal.

[3] The Washington Fire Chiefs, Washington Fire Commissioners Association, and the Washington State Council of Firefighters jointly filed an amicus curie brief in support of direct review, arguing that the professional rescuer doctrine should be abolished.

[4] Loiland sought review of the grants of summary judgment to both the State and Lopez, but he failed to timely serve Lopez with the notice of appeal. Lopez asked the court to dismiss the appeal based on untimely service. The Supreme Court denied Lopez's request to dismiss. Because the Supreme Court has ruled on the issue, we do not address Lopez's argument that this appeal should be dismissed based on the untimely service.

French v. Chase, 48 Wn.2d 825, 830, 297 P.2d 235 (1956)). The professional rescuer doctrine is a limitation to this general rule. Id. at 978. A professional rescuer assumes certain risks as part of his or her job and is compensated for accepting those risks. Id. at 978. The professional rescuer may not recover where "the hazard ultimately responsible for causing the injury is inherently within the ambit of those dangers which are unique to and generally associated with the particular rescue activity." Id. at 979. See also Ballou v. Nelson, 67 Wn. App. 67, 71, 834 P.2d 97 (1992). ("[I]t 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.").

The professional rescuer doctrine does not bar a professional from recovering in all cases where he or she is injured in the line of duty. The doctrine does not apply where a professional rescuer is injured by a "'hidden, unknown, [or] extrahazardous'" danger that is not inherently associated with the particular rescue activity. Maltman, 84 Wn.2d at 978 (quoting Jackson v. Velveray Corp., 82 N.J.Super. 469, 198 A.2d 115, 119 (1964)). Similarly, the professional rescuer doctrine does not bar recovery where the rescuer is injured by the act of an intervening third party. Ballou, 67 Wn. App. at 70; Ward v. Torjussen, 52 Wn. App. 280, 287, 758 P.2d 1012 (1988). The doctrine "'relieves the perpetrator of the act that caused the rescuer to be at the scene. . . . '" Beaupre v. Pierce County, 161 Wn.2d 568, 573, 166 P.3d 712 (2007) (quoting Ward, 52 Wn. App. at 287). It "does not apply to negligent or intentional acts of intervening parties not responsible for bringing the rescuer to the scene." Id. at 575.

The issue in this case is whether the State's alleged negligence was responsible for bringing Loiland to the scene. Loiland's position is that Lopez, DOT, and WSP were each negligent: Lopez in driving too fast for conditions, DOT in failing to timely deice the road, and WSP in failing to mark the accident when Alexander responded. But Loiland asserts that the event that caused his presence at the scene was the Lopez accident. He asks us to make clear that the professional rescuer doctrine bars recovery only from "the tortfeasor whose initial fault was the occasion for the rescue." App. Br. at 15-16.

Washington courts have apparently not considered the application of the professional rescuer doctrine to multiple negligent parties. Other jurisdictions, however, have concluded that the doctrine bars recovery from all parties whose negligence caused or contributed to the emergency that necessitated the professional's presence. See, e.g., Moody v. Delta Western, Inc., 38 P.3d 1139, 1140-43 (Alaska 2002) (officer injured in car accident involving stolen car could not recover from owner who negligently left car keys in the ignition); White v. State, 220 Ariz. 42, 47, 202 P.3d 507 (2008) (rescuers were injured while responding to a shooting; the professional rescuer doctrine barred the rescuers' claims against the State and county for negligence in treating the shooter's mental health); Young v. Sherwin-Williams Co., Inc., 569 A.2d 1173, 1179 (D.C. 1990) (firefighter injured while responding to an accident involving a commercial truck driven by an intoxicated employee could not recover from company that negligently failed to conduct a background check); Wietecha v. Peoronard, 102 N.J. 591, 595-96, 510 A.2d 19 (1986) (officer could not state a claim against

drivers of cars 1, 2, and 3, whose negligence caused his presence at the scene, but could state a claim against the drivers of cars 4 and 5 whose independent negligence directly injured the officer after he arrived).[5]

We agree with our sister jurisdictions and hold that, where the negligent acts of multiple parties cause the public safety issue that necessitates the rescuer's presence, the professional rescuer doctrine bars recovery from each of these parties. The key question, then, is whether the State's negligence in this case caused the public safety issue to which Loiland responded. We conclude that it did.

Loiland alleges that DOT's failure to deice caused both the Lopez and the Perez accidents.[6] In other words, if DOT had deiced before the Lopez accident, that accident would not have occurred and required Loiland's response. Thus, even under Loiland's theory of liability as to DOT, its alleged failure to deice was a cause of Loiland's presence.

Loiland also claims that WSP was negligent in failing to mark the Lopez accident when Sergeant Alexander responded. He argues that if Alexander had marked the accident, Loiland would not have been called to the scene. Alternatively, he asserts that even if Loiland had been dispatched to the accident, he would not have needed to exit the fire engine to check for occupants and mark the truck. In either case, however, WSP's alleged negligence was a cause

---

[5] New Jersey later abolished the professional rescuer doctrine by statute. See Ruiz v. Mero, 189 N.J. 525, 527, 917 A.2d 239 (2007).

[6] Loiland asserts that his claim against DOT is based on its failure to deice after the Lopez accident, not before. We address this argument below.

of Loiland's presence because, had Alexander marked the scene, Loiland would not have been in harm's way.

DOT and WSP are thus in exactly the position addressed by the professional rescuer doctrine. The doctrine bars recovery from "the one whose sole connection with the injury is that his act placed the fireman or police officer in harms [sic] way." Sutton v. Shuffelberger, 31 Wn. App. 579, 587, 643 P.2d 920 (1982). Here, the alleged negligent acts of DOT and WSP placed Loiland in harm's way, and he may not recover from them.

Loiland raises several theories to argue against this result. The heart of his argument is that the State's failures amounted to independent or intervening negligence to which the professional rescuer doctrine does not apply.

The Supreme Court considered intervening negligence in Beaupre. In that case, an officer was injured while in pursuit of a fleeing suspect. Beaupre, 161 Wn.2d at 570. Sergeant Beaupre was running alongside the suspect's vehicle when a car driven by another officer struck him. Id. Beaupre sought to recover from Pierce County, alleging negligent training of the officer who hit him. Id. at 571. The County argued that the professional rescuer doctrine barred the claim. Id. The Beaupre court rejected this argument, holding that "[t]he doctrine does not apply to negligent or intentional acts of intervening parties not responsible for bringing the rescuer to the scene." Id. at 575.

In reaching this conclusion, the Beaupre court relied on this court's opinions in Sutton, 31 Wn. App. 587-88 and Ward, 52 Wn. App. 280. Id. at 572. In Sutton, a police officer was ticketing a driver for a traffic violation when another

car hit the officer. Sutton, 31 Wn. App. at 580. The driver of the car that struck the officer raised the professional rescuer doctrine as a bar to recovery.[7] Id. at 587. We rejected the argument because the driver's negligence did not cause the officer to be at the scene. Id. at 587-88. Rather, the driver was a "third party whose intervening negligence injure[d] the official while he [was] in the performance of his duty." Id. at 588.

Similarly, in Ward, an officer was responding to a report of a prowler when a vehicle struck the officer's patrol car. Ward, 52 Wn. App. at 281. In the ensuing negligence action, the driver contended the officer's suit was barred by the professional rescuer doctrine. Id. at 286. We rejected the argument because "the professional rescuer rule only relieves the perpetrator of the act that caused the rescuer to be at the scene; it does not relieve a party whose intervening negligence injures the rescuer." Id. at 287 (citing Sutton, 31 Wn. App. at 588).

In Beaupre, Sutton, and Ward, a negligent third party injured a professional rescuer while the rescuer was responding to a public safety issue. The intervening negligence was unrelated to the act that caused the professional to be at the scene. The same is not true in this case. Neither DOT nor WSP injured Loiland while he was responding to a roadside accident. The agencies' alleged negligence occurred before Loiland responded to the scene. And, as

---

[7] In Sutton, Ward, and Ballou, this court considered both the professional rescuer doctrine and the fireman's rule. Sutton, 31 Wn. App. at 587; Ward, 52 Wn. App. at 286-87; Ballou, 67 Wn. App. at 70-71. The doctrines are similar but developed independently. Ballou, 67 Wn. App. at 71. The professional rescuer doctrine articulated by the Supreme Court encompasses the traditional fireman's rule. Beaupre, 161 Wn.2d at 573-75.

discussed above, the agencies' failures were not independent of the public safety issue to which Loiland responded.[8]

Loiland asserts, however, that his claim against DOT is not based on the agency's failure to deice before the Lopez crash but on its continuing failure to deice after the Lopez crash. He contends that DOT had an ongoing duty to deice and its failure to deice after the Lopez crash was separate and independent from its failure to deice before the Lopez crash.

Loiland provides no support for the proposition that ongoing negligence is the equivalent of independent, intervening negligence.[9] We reject the assertion that DOT's failure to deice after the Lopez accident amounts to the independent negligence of an intervening party.

Loiland next contends the professional rescuer doctrine does not apply to WSP because, by failing to mark the accident, Sergeant Alexander failed to prevent Loiland's presence but did not cause Loiland's presence. Loiland asserts that the Lopez crash caused his presence and he would have responded to that crash even in the absence of State negligence.

---

[8] In addition to the Washington cases, Loiland relies on Kaiser v. Northern States Power Co., 353 N.W.2d 899, 902 (Minn. 1984). In that case, an equipment failure caused a natural gas explosion. Kaiser, 353 N.W.2d at 902. Several minutes after firefighters responded to the scene, a second explosion occurred. Id. In determining whether the firefighters' lawsuit was barred, the court noted that the fireman's rule does not bar recovery where a party's active negligence at the scene of the fire "materially enhances the risk or creates a new risk of harm." Id. at 905. The Kaiser court held that there was a question of fact as to whether the utility company was "causally negligent after the firefighters arrived at the scene of the fire." Id. at 906.

The case is distinguishable. In Kaiser, there was a question of fact as to whether the utility company was negligent after the rescuers arrived. In this case, DOT's and WSP's alleged negligence occurred before Loiland arrived at the scene.

[9] The authority Loiland does cite, Ballou, is inapposite. In that case, we held the professional rescuer doctrine inapplicable to intentional misconduct that occurred after the rescuer was at the scene. Ballou, 67 Wn. App. at 71.

Loiland points to no authority distinguishing negligence that fails to prevent an event from negligence that causes an event. Loiland's presence at the Lopez crash was only necessary because WSP failed to mark the crash to show the truck was unoccupied. WSP's negligence was a cause of Loiland's presence.

Loiland also argues that the professional rescuer doctrine does not apply to WSP because Alexander's negligence occurred after the Lopez crash and did not cause that crash. In effect, Loiland seeks a rule stating that the doctrine does not bar recovery from a party whose negligence occurs after the original accident but before the professional responds.

The Supreme Court of Kansas considered a similar argument in Apodaca v. Willmore, 306 Kan. 103, 126, 392 P.3d 529 (2017). In that case, a pickup truck crossed the center line and came to rest on its side in an oncoming lane. Id. at 104. The driver turned off the truck's headlights and got out of the truck. Id. A police officer responding to the accident struck the truck and was injured. Id. In the ensuing litigation, the officer contended that the firefighter's rule did not bar recovery. Id. at 106. Among other arguments, the officer asserted that the driver's negligence in turning off the headlights was independent of his negligence in causing the accident. Id. at 126.

The court rejected this argument. Id. at 127. Drawing on the principle that a professional assumes those hazards that are known and reasonably anticipated, the court reasoned that the relevant inquiry is not whether a separate negligent act occurred before the professional responded, "but rather whether the firefighter or officer is injured by an independent risk created by the separate

negligent act." Id. Thus, "even if a subsequent act of negligence occurred, it must also have created a wholly independent risk that did not form the basis for the officer's presence." Id. at 126. The Apodaca court held that "the nature of the risk caused by [leaving the pickup truck lights unlit] was the same as the risk created by the accident the officers were in the process of responding to." Id. at 127.

We agree with the Apodaca court. Because Loiland assumed the risk of hazards that are inherently within the ambit of a roadside rescue, the relevant inquiry is whether WSP's negligence in failing to mark the accident created a new or unknown risk. The hazard Loiland was exposed to from WSP's failure to mark the accident was the same as the hazard created by Lopez's accident. We reject Loiland's argument that WSP committed independent negligence to which the professional rescuer doctrine does not apply.[10]

Having failed to establish that he was injured by independent negligence, Loiland next asserts that the professional rescuer doctrine does not apply because, in the circumstances of this case, he did not assume the risk of being struck by a car. He asserts that Sutton and Ward indicate that a professional performing a duty on the road does not necessarily assume the risk of being struck by a car.

Loiland misconstrues those cases. A professional rescuer may not recover from the party whose negligence caused his presence at the scene where he is

[10] In a related argument, Loiland asserts that WSP's negligence in failing to mark the accident amounted to a hidden, unknown, or extrahazardous risk that Loiland would not have reasonably anticipated. But, as discussed above, leaving the accident unmarked did not create a new or different risk.

injured by a hazard that is "inherently within the ambit of those dangers which are unique to and generally associated with the particular rescue activity." Maltman, 84 Wn.2d at 979. The issue in Sutton and Ward was not whether being struck by a car was a hazard "inherently within the ambit" of performing professional duties on the road, but whether the professional was injured by the negligence of an intervening party. It is beyond dispute that being struck by a car is a risk generally associated with responding to a roadside accident. Loiland conceded this point below.

In sum, Loiland was injured by a known, foreseeable risk while conducting a professional rescue. The State's negligence was a cause of Loiland's presence at the accident site. The trial court did not err in ruling that Loiland's claim against the State is barred by the professional rescuer doctrine.

Affirmed.

WE CONCUR:

Spearman, J.

Mann, J.

Trickey, ACJ

DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the ***Petition for Review*** in Court of Appeals, Division I Cause No. 76096-3-I to the following:

Francisco Duarte
Scott David Smith
Fury Duarte PS
1606 – 148th Avenue SE, Suite 102
Bellevue, WA 98007

Garth Ahearn, AAG
Office of the Attorney General
1250 Pacific Avenue, Suite 105
P.O. Box 2317
Tacoma, WA 98401

Paul L. Crowley
Richard Lockner
Lockner & Crowley, Inc., P.S.
524 Tacoma Avenue South
Tacoma, WA 98403

Steve C. Franklin
Becker Franklin Rovang PLLC
1730 Pottery Avenue, Suite 210
Port Orchard, WA 98366-2565

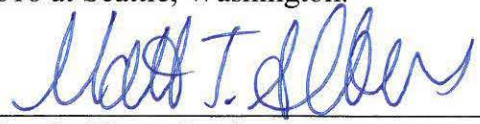
Joseph F. Quinn, P.S.
20 Forest Glen Lane SW
Lakewood, WA 98498-5306

Lee Stewart Thomas
Harpold Thomas, P.C.
8407 S 259th Street, Suite 101
Kent, WA 98030-7356

Original E-filed with:
Court of Appeals, Division I
Clerk's Office
600 University Street
Seattle, WA 98101

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: January 16, 2018 at Seattle, Washington.



Matt J. Albers, Paralegal
Talmadge/Fitzpatrick/Tribe

TALMADGE/FITZPATRICK/TRIBE

January 16, 2018 - 1:30 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	76096-3
Appellate Court Case Title:	Wynn Loiland and Suzanne Loiland, Appellants v. State of Washington, et al., Respondent
Superior Court Case Number:	14-2-25244-7

The following documents have been uploaded:

- 760963_Petition_for_Review_20180116131017D1669491_2293.pdf
  This File Contains:
  Petition for Review
  The Original File Name was PFR.pdf

A copy of the uploaded files will be sent to:

- Franklin@bfrinjurylaw.com
- TorTacEF@atg.wa.gov
- atgmitortacef@atg.wa.gov
- crowley@524law.com
- fad@furyduarte.com
- firelaw@comcast.net
- gartha@atg.wa.gov
- lee@harpoldlaw.com
- lockner@524law.com
- matt@tal-fitzlaw.com
- scott@furyduarte.com

Comments:

Petition for Review (the PFR filing fee will be sent directly to the Supreme Court)

Sender Name: Matt Albers - Email: matt@tal-fitzlaw.com
Filing on Behalf of: Philip Albert Talmadge - Email: phil@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

Address:
2775 Harbor Avenue SW
Third Floor Ste C
Seattle, WA, 98126
Phone: (206) 574-6661

Note: The Filing Id is 20180116131017D1669491