97841-7

No. 77785-8-I

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

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

Petitioners,

vs.

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

Respondents

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONERS

Petitioners Jeffrey K. Markoff and Alicia Markoff, individually and as a married couple; Edward C. Newell and Troy-Lynn Newell, individually and as a married couple; Charles Meyer and Julie Meyer, individually and as a married couple; Joey P. Haugen and Myung K. Haugen, individually and as a married couple; Nathan A. Buck; Michael S. Camlin and Candace M. Camlin, individually and as a married couple; Richard Martell-Scott; and Steve Roberts ask this Court to accept review of the decision designated in Part II below and attached as **Appendix A**.

II. THE DECISION OF THE COURT OF APPEALS

The Petitioners consist of Seattle Fire Department firefighters and their spouses (collectively, the "firefighters") who asserted tort and statutory causes of action against Puget Sound Energy ("PSE"); PSE's contractor responsible for maintaining PSE's natural gas pipelines, Pilchuck Contractors; and Pilchuck's parent company, Michels Corporation (collectively, the "corporations"). Clerk's Papers at 16-17, 21, 36.

The firefighters' claims arose from the massive March 2016 natural gas explosion in Seattle's Greenwood neighborhood. They alleged that the corporations willfully, wantonly, or recklessly abandoned the gas pipeline in question by falsely claiming to have "cut-and-capped" it and failing to take corrective action in response to years of subsequent reports of gas smells in the area. Because of the corporations' coverup, the firefighters alleged they did not know they were responding to a scene

with a fully-active gas pipeline capable not only of leaking gas into the air but also pooling gas underneath a nearby building and the positions the firefighters had taken for safety.

In dismissing the firefighters' complaint under CR 12(b)(6), the trial court concluded that, even taking all of their allegations as true, the "professional rescuer" doctrine ("PRD") barred all their claims.

In affirming the trial court, the Court of Appeals held that the PRD extends to injuries "resulting from willful, wanton, or reckless conduct that places a professional rescuer in harm's way." *Markoff v. Puget Sound Energy, Inc.*, ___ Wn. App. ___, 447 P.3d 577, 585 (2019), *reconsideration denied* (Oct. 9, 2019). It concluded that "[t]he intent of the person whose actions caused the need for rescue has never been a relevant inquiry in determining whether a professional rescuer assumed a risk." *Markoff*, 447 P.3d at 585.

The Court of Appeals also held that the trial court properly dismissed the firefighters' claims because their allegations failed to create an inference that they were injured by harms falling within the PRD's "hidden, unknown, or extrahazardous" exception. *Id.* at 584. It reasoned that (1) the firefighters failed to "allege facts that they would have responded differently to the leak had they known of the improper cutting and capping of the line or the previous reports of gas leaks" and (2) the "circumstances of this leak" only showed a risk of a type "inherent in the danger of responding to a natural gas leak." *Id.*

Finally, the Court of Appeals held that RCW 84.04.440 merely

"preserves" existing causes of action, does not create a cause of action independent from other tort or statutory causes of action, and does not impose liability on "contractors" like Pilchuck or Michels. *Id.* at 586-87, n. 5.

For the following reasons, these holdings conflict with numerous decisions of this Court and the Court of Appeals and raise multiple issues of substantial public interest, requiring review by this Court. RAP 13.4(b)(1), (b)(2), (b)(4). Indeed, inherently recognizing the substantial public importance of these issues, ***yesterday*** this Court accepted Division Three's transfer of *Lyon v. Okanogan County Elec. Coop., Inc.*, No. 97826-3, a case presenting similar issues of whether the PRD should be extended beyond negligently caused hazards to more culpable types of conduct. Appendix C, D.

III. ISSUES PRESENTED FOR REVIEW

A. Should review be granted under RAP 13.4(b)(1) and (b)(2) because the Court of Appeals' holding that the PRD bars injury claims arising from willfully, wantonly, or recklessly caused hazards conflicts with decisions of this Court and the Court of Appeals limiting the PRD to injuries arising from negligence and rejecting its application to injuries arising from more culpable misconduct?

B. Should review be granted under RAP 13.4(b)(4) because numerous states have refused to extend the PRD beyond negligently caused hazards or have abandoned the PRD entirely since Washington adopted it 49 years ago, and this Court already has accepted review of a case raising the same issue?

C. Should review be granted under RAP 13.4(b)(1), (b)(2), and (b)(4) because the Court of Appeals' holding that the PRD's exception for "hidden, unknown, and ultrahazardous" dangers does not apply to risks that are "inherent" in the type of hazard to which professional

rescuers are responding and the Court of Appeals could envision unpled hypothetical facts under which the exception could apply completely subsume the exception, conflicts with well-settled CR 12(b)(6) standards, and this Court has little opportunity to define or apply the exception?

D. Should review be granted under RAP 13.4(b)(4) because the Court of Appeals' holding that RCW 80.04.440 does not create an independent cause of action against a "public utility company" and does not apply to contractors conflicts with express statements by this Court recognizing such a cause of action and the scope of liability under the statute is substantially important to the public given the hazardous, potentially devastating activities in which such companies engage?

IV. STATEMENT OF THE CASE

A. Factual Allegations

On March 9, 2016, at 1:04 a.m., the Seattle Fire Department ("SFD") received an emergency call reporting a natural gas leak in the Greenwood neighborhood. Clerk's Papers ("CP") at 18. SFD arrived at the scene at 1:09 a.m. *Id.* After being escorted to a narrow space between two buildings, SFD firefighters observed that gas was escaping into the air from a threaded coupling along the above-ground portion of a steel service line attached to one of the buildings. *Id.* Unknown to them, this was no mere residual leak into the air; instead, this still-active pipeline had caused gas to pool inside or underneath the buildings. *Id.* at 20-21. Nor did the firefighters know the amount of gas that had leaked and pooled from this presumably safe, inactive line. CP at 21-22. At 1:43 a.m., the gas ignited and caused a massive explosion, completely leveling the building and nearly killing the firefighters. CP at 18-19.

On September 20, 2016, the Washington State Utilities and

Transportation Commission ("WUTC") released a report finding "the leak and explosion would not have occurred but for Defendant PSE's improper abandonment of the service line in September 2004." CP at 20; 191-92. The service line had not been "cut and capped" by the corporations, even though Michels and Pilchuck documented completion of that work in 2004. CP at 18-19. Subsequently, for over seven years the corporations responded to multiple complaints of "gas smells" in the area but failed to take any corrective action or even acknowledge they had not in fact deactivated the pipeline. CP at 21.

B. Procedural History

The firefighters' first amended complaint asserted five causes of action for damages: (1) strict public service statutory liability under RCW 80.04.440; (2) "all common law forms of negligence"; (3) outrage; (4) negligent infliction of emotional distress; and (5) loss of consortium. CP at 24-25. They expressly based their claims on allegations of "intentional," "willful," "wanton," "reckless," and grossly negligent conduct. CP at 15, 24-25. Additionally, they asserted a request for injunctive relief enjoining PSE to inspect and remediate its abandoned pipes "to protect the public from a grave foreseeable harm." CP at 26.

PSE moved to dismiss the firefighters' damages claims under CR 12(b)(6) and their request for injunctive relief under CR 12(b)(1). CP at 166-68. On December 1, 2017, the trial court entered a written order dismissing the firefighters' claims. CP at 494-500.

After the Court of Appeals' October 9, 2019 order denying

reconsideration of its August 19, 2019, opinion affirming the trial court, the firefighters timely petitioned for review. Appendix B.

C. This Court's Acceptance of Review in *Lyon*

On November 7, 2019, this Court accepted Division Three's transfer of *Lyon*, No. 97826-3. Appendix C. The appellant in *Lyon*, a firefighter, appeals from the dismissal under the PRD of his injury claims arising from a wildfire allegedly caused by grossly negligent conduct. Appendix D at 1. As in this case, *Lyon* asks this Court to hold that the PRD does not extend beyond negligently caused hazards. *Id.* at 28-36. Additionally, *Lyon* asks the Court to abandon the PRD altogether as outdated and undermined by modern tort law or to strike it down as an equal protection violation. *Id.* at 8-28.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

A. Review is required under RAP 13.4(b)(1) and (b)(2) because the Court of Appeals' holding that the PRD extends to injuries caused by willfully, wantonly, or recklessly created hazards conflicts with Washington appellate precedent limiting the PRD to negligently created hazards and rejecting its application to more culpable misconduct

Division One's holding that the PRD extends beyond injuries caused by negligently-caused hazards is in conflict with decisions of this Court or the Court of Appeals, requiring review under RAP 13.4 (b)(1) and (b)(2).

The PRD is an exception to the common law "rescue doctrine." *Loiland v. State*, 1 Wn. App. 2d 861, 865, 407 P.3d 377 (2017). Under the rescue doctrine, the general rule is that a person injured while 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). The doctrine originates from Justice Cardozo's observation that "'danger invites rescue.'" *Maltman*, 84 Wn.2d at 976-77 (quoting *Wagner v. Int'l Ry.*, 232 N.Y. 176, 133 N.E. 437 (1921)). 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 bringing suit for knowingly placing themselves in danger to undertake a rescue." *McCoy v. Am. Suzuki Motor Corp.*, 136 Wn.2d 350, 356, 961 P.2d 952 (1998). Functionally, the doctrine "provide[s] a source of recovery to one who is injured while reasonably undertaking the rescue of a person who has ***negligently*** placed himself in a position of imminent peril." *Maltman*, 84 Wn.2d at 976–77.

In turn, the PRD is an exception to this "general rule" and bars professional rescuers from recovering under the rescue doctrine. *Loiland*, 1 Wn. App. 2d at 865. Washington's PRD is premised on the principle that professional rescuers assume risks inherent in the hazards they voluntarily encounter in exchange for compensation.[1] *Loiland*, 1 Wn. App. at 865. Washington first adopted the doctrine in *Maltman*, 84 Wn.2d at 978-79, formulating it as:

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[1] Courts in Washington and around the country often refer to the PRD as the fireman's or firefighters' rule. *Beaupre v. Pierce Cty.*, 161 Wn.2d 568, 572 n.1, 166 P.3d 712 (2007). The firefighters' rule is "nearly identical in nature" but has "a separate history and theoretical basis," *Beaupre*, 161 Wn.2d at 572 n.1, namely premises liability law. *Ballou v. Nelson*, 67 Wn. App. 67, 71, 834 P.2d 97 (1992). Washington has never adopted the firefighters' rule. *Ballou*, 67 Wn. App. at 72.

> the proper test . . . is whether 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. Consistent with the rescue doctrine's underlying "societal value judgments," *Maltman* concluded that adopting the PRD was justified because "it is the business of professional rescuers to deal with certain hazards." *Id.* In the same breath, however, it imposed an express limitation on the PRD's scope: "[a professional rescuer] cannot complain of ***the negligence*** which created actual necessity for exposure to those hazards." *Id.* In other words, "the nature of the risk confronted . . . is only part of the public policy equation." *Mahoney v. Carus Chem. Co.*, 102 N.J. 564, 577, 510 A.2d 4 (1986). Since its adoption in Washington, the underlying culpability of the conduct causing the hazard—negligence—***always*** has been the other part of that equation.

Consistent with *Maltman*'s limitation of the PRD to negligently-caused hazards, the Court of Appeals subsequently observed that the public policy justifying the PRD includes "encouraging citizens to summon help regardless of ***negligence*** . . . ." *Ballou v. Nelson*, 67 Wn. App. 67, 73, 834 P.2d 97 (1992) (emphasis added). And consistent with *Maltman* and *Ballou*, Washington courts repeatedly have recognized that the PRD bars recovery ***only*** from ***negligent*** tortfeasors responsible for causing the hazard creating the need for rescue. *Black Indus., Inc. v. Emco Helicopters, Inc.*, 19 Wn. App. 697, 699, 577 P.2d 610 (1978) (emphasis added) (PRD barred recovery because professional rescuers "cannot

recover from the one whose ***negligence*** created the hazard" and "[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"); *Ballou*, 67 Wn. App. at 71 (second emphasis in original) (fireman's rule applies "where the situation requiring [rescuers'] presence was caused by ***negligence***"; PRD inapplicable where rescuers "were not injured by the defendants' *negligence*" but by intentional conduct).[2]

Indeed, the sole Washington case to consider whether the PRD extends beyond injuries from negligently caused hazards held that it does not. In *Ballou*, police officers responded to a call regarding a disturbance at a hotel Christmas party. 67 Wn. App. at 68. Specifically, the hotel's employees reported that two intoxicated attendees were abusing other guests, threatening them, refusing to leave, and "creating such a disturbance that the hotel management was fearful for peoples' safety." *Id.* The responding officers both admitted that they always anticipated the

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[2] Indeed, the Court of Appeals' opinion in this case expressly recognized this principle:

> Professional rescuers assume certain risks inherent in their jobs and may not collect damages from those whose ***negligence*** brings about such risks . . . . A professional rescuer may not collect damages from a ***negligent*** imperiled person when the "hazard ultimately responsible for causing the [rescuer's] injury is inherently within the ambit of those dangers which are unique to and generally associated with the particular rescue activity" . . . . Washington courts broadly apply this doctrine to bar recovery for anyone who is fully aware of a hazard caused by another's ***negligence*** and who voluntarily confronts the risk in exchange for compensation.

Markoff v. Puget Sound Energy, Inc., 447 P.3d at 583 (emphases added).

possibility of a physical altercation in such situations. *Id.* at 69. True to those expectations, the intoxicated attendees physically assaulted the officers when attempting to get them to leave. *Id.*

Despite the officers' admissions of these inherent risks of injury, on review the Court of Appeals held that the PRD "does not apply to the facts of this case." *Id.* at 70. It expressly rested this holding on the fact that there was "no negligence on the part of the defendants that proximately caused a rescuer's injury." *Id.* at 73 (emphasis added). Indeed, *Ballou* reiterated: "Here, the officers were not injured by the defendants' *negligence*; rather, they were injured by the defendants' criminal assaults." *Id.* Accordingly, *Ballou* concluded that "[t]he policy for the [PRD] . . . are not present where a [rescuer] is injured by an unintentional, unlawful assault." *Id.*

Despite express statements to the contrary in *Maltman*, *Ballou*, and *Black*, however, here the Court of Appeals held that "[t]he intent of the person whose actions caused the need for rescue has never been a relevant inquiry in determining whether a professional rescuer assumed a risk." *Markoff*, 447 P.3d at 586. Specifically, the Court of Appeals attempted to distinguish *Ballou* on the basis that the "assault in that case was an independent act of active misconduct that occurred after the officers' arrival." *Id.* In doing so, it completely elided the fact that *Ballou* expressly found the PRD inapplicable for another reason: that the officers were injured by conduct ***more culpable*** than negligence. Indeed, the Court of Appeals notably avoided even addressing *Ballou*'s holding that

the PRD's underlying public policy of "encouraging citizens to summon help regardless of negligence" is "not present" when a rescuer is injured by more culpable conduct. 67 Wn. App. at 73. Finally, the Court of Appeals further attempted to distinguish *Ballou* on the basis that "the officers did not arrive at the scene to rescue the patrons but, rather, to restrain them from committing further acts of assault against others at the hotel." *Markoff*, 447 P.3d at 586. But under the Court of Appeals' own reading of *Ballou*, the PRD should not apply in this case; here, the firefighters did not arrive at the scene to rescue the corporations (the tortfeasors responsible for their injuries). Rather, they arrived at the scene to eliminate the risk that their willful, wanton, and recklessly caused hazard posed to others.

Accordingly, because the Court of Appeals' opinion is in conflict with *Maltman*, *Black*, and *Ballou*, review is required under RAP 13.4(b)(1) and (b)(2).

B. Review of the Court of Appeals' opinion is required under RAP 13.4(b)(4) because this Court already has accepted review of the issue of whether the PRD extends beyond negligently created hazards when numerous other states have refused to extend the PRD or have abandoned it entirely

Review in this case also is warranted under RAP 13.4(b)(4) because this Court already has determined that the issues raised in *Lyon* are of substantial enough public importance to accept Division Three's transfer of that case. As discussed above, *Lyon* raises the same issues raised by the firefighters in this case: whether the PRD extends beyond

negligently created hazards to more culpable conduct. Moreover, where *Lyon* argues that the PRD does not extend to hazards caused by gross negligence, this case also raises the issues of whether it extends to hazards caused by willful, wanton, or reckless conduct. To be sure, the firefighters' argument is that the PRD does not apply to any of these forms of conduct, as it does not extend beyond mere negligence. However, acceptance of this case as well as *Lyon* will provide the Court with an excellent, judicially efficient opportunity to address the PRD's application to multiple types of conduct.

Moreover, review is warranted under RAP 13.4(b)(4) to reassess the PRD's scope and continued existence in Washington in light of modern developments in tort law in other states—including those *Maltman* relied on in 1975 when it adopted the PRD. As the Court has recognized, the rescue doctrine and the PRD are premised on the "societal value judgment" that it is "the firefighters' business . . . to deal with certain hazards." *Maltman*, 84 Wn.2d at 979.

But as both the firefighters and the appellant in *Lyon* have argued, that value judgment has changed in many states since *Maltman* was decided, leading them to refuse to apply the PRD to bar recovery for injuries from hazards caused by conduct more culpable than negligence. Appendix D at 28-36. For example, *Maltman* relied on *Krauth v. Geller*, 31 N.J. 270, 157 A.2d 129 (1960). However, the New Jersey Supreme Court subsequently rejected the PRD's extension to injuries from hazards caused by intentional, willful, or wanton conduct, reasoning:

> It follows that in the extreme case in which the hazard is not created by ordinary negligence but by conduct decidedly more culpable-either intentional acts, or willful and wanton misconduct-the public policy balance that supports immunity in the case of ordinary negligence has been fundamentally altered. The risk may be the same but the conduct causing the risk is extraordinarily culpable. In such cases, as a matter of fairness, deterrence, and sound public policy, the burden sought to be avoided by the fireman's rule for the ordinary citizen who commits ordinary negligence should be visited upon the extraordinary wrongdoer.

Mahoney, 102 N.J. 564, 577, 510 A.2d 4, 11 (1986). Likewise, Louisiana has rejected the PDR's application to injuries caused by "wanton or reckless" and other "blameworthy" conduct, reasoning that a different societal value judgment is required:

> "'[A] blameworthy risk, will arise in either of two circumstances: (1) where a citizen's conduct varies from the standard of reasonable care to such a degree that society's needs to punish or prevent the conduct exceeds the benefits gained from other tort goals; or (2) where the conduct varies from the standard of reasonable care to such a degree that it cannot be said that the professional rescuer consented to relieve the defendant of the duty of that standard of care. For example, it has been recognized that intentional torts against professional rescuers create liability even when the risk that causes injury is created by the emergency that the professional rescuer seeks to relieve. The concept of recklessness provides a threshold level of blameworthiness that will permit more certain and consistent judicial action while eliminating an increase in unmeritorious claims. Moreover, it is common in tort law to impose liability for aggravated conduct in instances where ordinary negligence will not create liability.'"

Sayes v. Pilgrim Manor Nursing Home, Inc., 536 So. 2d 705, 711 (La. Ct. App. 1988) (quoting *Chinigo v. Geismar Marine, Inc.*, 512 So. 2d 487,

488-89, 492 (La. Ct. App.) (1987)) (quoting *Negligence Actions by Police Officers and Firefighters: A Need for a Professional Rescuers Rule,* 66 Cal. L. Rev. 585, 598-602 (1978))). Thus, *Sayes* held that a professional rescuer should be allowed recovery in a situation where the conduct of the defendant is "so blameworthy that liability is imposed in order to deter future acts of repeated negligence." 536 So. 2d at 711.

New Jersey and Louisiana are far from alone. At least 17 other states and U.S. territories have rejected extending the PRD or firefighters' rule to injuries caused by conduct more culpable than negligence.[3] And at least 8 states have ***abolished*** the PRD or firefighters' rule entirely through cases[4] or statutes[5], including Oregon[6]—the only other jurisdiction

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[3] *Nowicki v. Pigue*, 2013 Ark. 499, 6, 10, 430 S.W.3d 765, 769 (2013) (willful and wanton conduct); *Gibb v. Stetson*, 199 Cal. App. 3d 1008, 1014, 245 Cal. Rptr. 283 (1988) (intentional); *Bates v. McKeon*, 650 F. Supp. 476, 480 (D. Conn.1986) (intentional); *Carpenter v. O'Day*, 562 A.2d 595, 601-02 (Del. Super. Ct. 1988) (intentional); *Rishel v. E. Airlines, Inc.*, 466 So, 2d 1136, 1138 (Fla. Ct. App. 1985) (willful and wanton); *Fox v.Hawkins*, 594 N.E.2d 493, 498 (Ind. Ct. App.1992) (willful, wanton, or intentional); *Rennenger v. Pacesetter Co.*, 558 N.W.2d 419, 421 (Iowa 1997) (intentional); *State Farm Mut.Auto. Ins. Co. v. Hill*, 139 Md. App. 308, 319, 775 A.2d 476, 482 (2001) (intentional); *Wilde v. Gilland*,189 Mich. App. 553, 473 N.W.2d 718, 719 (1991) (intentional); *Lambert v.Schaefer*, 839 S.W.2d 27, 29 (Mo. Ct. App. 1992) (intentional, willful, reckless, and wanton); *Diaz v. Salazar*, 924 F. Supp. 1088, 1100 (D.N.M. 1996) (intentional); *Migdal v.Stamp*,132 N.H. 171, 564 A.2d 826, 828 (1989) (wanton or reckless and "positive" acts of misconduct); *Phalen v. Kane*,192 A.D.2d 186, 600 N.Y.S. 2d 988, 989 (4th Dep't 1993) (intentional); *Alvarado v. United States*,798 F. Supp. 84,87 (D.P.R. 1992) (intentional); *Carson v. Headrick*, 900 S.W.2d 685, 690–91 (Tenn. 1995) ("intentional, malicious, or reckless acts of a citizen"); *Juhl v. Airington*, 936 S.W.2d 640, 648 (Tex.1996) (Gonzalez, J., concurring) (intentional, malicious, or reckless); *Benefiel v. Walker & Nationwide Ins. Co.*, 25 Va. Cir. 130, 131-32 (1991) (willful and wanton and conduct creating an "undue risk").

[4] *Wills v. Bath Excavating & Constr. Co.*, 829 P.2d 405, 408 (Colo App. 1991); *Baldonado v. El Paso Nautral Gas Co.*, 143 N.M. 297, 299, 176 P.3d 286 (Ct. App. 2006); *Minnich v. Med-Waste, Inc.*, 349 S.C. 567, 575, 564 S.E.2d 98 (2002).

[5] FLA. STAT. § 112.182; 425 ILL. COMP. STAT. §25/9f; MASS. GEN. LAWS, ch.41, § 111F and MASS. GEN. LAWS, ch.41 ,§ 100 (as stated in *Flaherty v. Walgreen E. Co.*, 18 Mass. L. Rep. 661, 2005 Mass. Super. LEXIS 18, *6 n.3 (2005); MINN. STAT. § 604.06; N.J. STAT. ANN. § 2A:62A-21 (as stated in *Ruiz v. Mero*, 189 N.J. 525, 530, 917 A.2d

Maltman relied on in adopting the doctrine. 84 Wn.2d at 978.

Accordingly, because numerous states—including those on whom *Maltman* relied—subsequently have concluded that the "societal value judgments" justifying the PRD require limiting it to negligently-caused hazards or abolishing it entirely, this case warrants review under RAP 13.4(b)(4).[7]

C. Review of the Court of Appeals' holding that the PRD's "hidden, unknown, and extrahazardous" exception excludes risks "inherent" in the "type" of hazard warranting rescue and that the firefighters failed to plead hypothetical facts under which the Court of Appeals reasoned the exception could apply is necessary under RAP 13.4(b)(1), (b)(2), and (b)(4)

Review in this case is warranted under RAP 13.4(b)(1), (b)(2)and (b)(4) because (1) it conflicts with numerous Washington appellate decisions regarding the PRD's "hidden, unknown, and ultrahazardous" exception and the CR 12(b) (6) standard of review and (2) to provide necessary clarity regarding the exception.

Maltman first recognized this exception: "'It does not follow that a fireman must be deemed as a matter of law to have voluntarily assumed all hidden, unknown, and extrahazardous dangers which in the existing conditions would not be reasonably anticipated or foreseen.'" 84 Wn.2d

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239 (2007); N.Y. GEN. MUN. LAW § 205.

[6] *Christensen v. Murphy*, 296 Or. 610, 678 P.2d 1210 (1984).

[7] At a minimum, the Court should accept review of and stay this case because it has accepted review in *Lyon*. If the Court abandons or strikes down the PRD in *Lyon*, the Court of Appeals would have to reconsider its decision affirming the dismissal of all of the firefighters' claims under the PRD in light of such an opinion.

at 978 (quoting *Jackson v. Velveray Corp.*, 82 N.J. Super. 469, 198 A.2d 115 (1964)). However, no Washington case since *Maltman* has addressed the exception until this case.

Here, the Court of Appeals held that the exception did not apply because: (1) "[t]he firefighters do not allege facts indicating that they would have responded differently to the leak" had they known any of the information unknow; and (2) they did "not show that the circumstances of this leak created a 'new or unknown risk' of a type not inherent in the danger of responding to a natural gas leak." *Markoff*, 447 P.3d at 584 (quoting *Loiland*, 1 Wn. App. at 872).

But neither *Maltman* nor its progeny contain the "would have acted differently" requirement created whole cloth by the Court of Appeals as a prerequisite for invoking the exception, conflicting with those cases. Moreover, it is well-settled that a court may consider "hypothetical facts not part of the record" in determining a complaint's sufficiency under CR 12(b)(6), as a "complaint . . . survives if *any* set of facts could exist that would justify recovery." *Hoffer v. State*, 110 Wn.2d 415, 421, 755 P.2d 781, 785 (1988), *on reconsideration in part*, 113 Wn.2d 148, 776 P.2d 963 (1989); *see also M.H. v. Corp. of Catholic Archbishop of Seattle*, 162 Wn. App. 183, 189, 252 P.3d 914 (2011) (same). Thus, because the Court of Appeals itself hypothesized facts under which the exception could apply to this case but nonetheless affirmed the dismissal of the firefighters' claims, its decision conflicts with *Hoffer*, *M.H.*, and the many other Washington cases applying CR 12(b)(6)'s standards.

Finally, because this Court has left the exception undefined since its inception, this case presents a necessary opportunity to provide guidance and clarity on its meaning and application. For example, a Louisiana court observed that an extrahazardous risk could arise because of the nature or quantity of a "'risk-generating object.'" *Chinigo*, 512 So. 2d at 491 (quoting 66 Cal. L. Rev. at 598-602). Thus, "'a reactive chemical such as potassium" could present an ultrahazardous risk regardless of quantity. *Id.* In contrast, "'fuel oil,'" though generally presenting an "'ordinary'" risk, could be ultrahazardous "'if it were stored in excessive quantity or in an open container in a basement.'" *Id.*

However, the Court of Appeals' holding that the PRD applies to injuries caused by any risk "inherent in the type of danger" to which rescuers are responding obviates the exception. The Court of Appeals' reductive holding was that there is always a risk of explosion inherent in responding to a gas leak. That holding would always apply regardless of the nature, quantity, location, or other relevant circumstances of any highly volatile, explosive substance, or ultrahazardous substance.[8] Accordingly, review is necessary to give needed meaning and clarification to this PRD exception.

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[8] This Court has recognized natural gas as both highly volatile and explosive in nature. *New Meadows Holding Co. by Raugust v. Wash. Water Power Co.*, 102 Wn.2d 495, 501, 687 P.2d 212 (1984). The Court of Appeals' logic is contrary to this Court's holdings that even if a highly volatile substance on its own is not sufficiently dangerous enough to impose strict liability, the "storage of a highly volatile substance in sufficient quantities" or the transportation of such substances is so ultrahazardous to warrant such liability. *New Meadows*, 102 Wn.2d at 502-03.

D. Review of the Court of Appeals' holdings that RCW 80.04.440 does not create an independent cause of action and does not apply to contractors is required under RAP 13.4(b)(1) and (b)(4)

Finally, review of the Court of Appeals' holdings that RCW 80.04.440 does not create an independent cause of action and does not apply to contractors is necessary under RAP 13.4(b)(1) and (b)(4).

First, RCW 80.04.440 provides:

> In case any public service company shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done, either by any law of this state, by this title or by any order or rule of the commission, such public service company shall be liable to the persons or corporations affected thereby for all loss, damage or injury caused thereby or resulting therefrom . . . .

The statute also allows fee-shifting for "willful" acts or omissions. *Id.*

Contrary to the Court of Appeals' holding that this statute merely "preserves" other existing causes of action, this Court has twice described the statute as creating a "private cause of action" and a "cause of action." *Tanner Elec. Co-op v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 684, 911 P.2d 1301 (1995); *Zamora v. Mobil Corp*, 104 Wn.2d 199, 209, 704 P.2d 584 (1985) (observing elements of cause under RCW 80.04.440 and holding that it resembles a negligence-per se type of claim rather than strict liability). Because the Court of Appeals' holding conflicts with these decisions, review is necessary under RAP 13.4(b)(1).

Second, a "public service company" includes "***every*** gas company." RCW 80.04.010(23) (emphasis added). In turn, a "gas

company" includes "***every*** corporation . . . owning, controlling, operating or managing any gas plant within this state." RCW 80.04.010(14) (emphasis added). And "gas plant" includes "***all*** . . . real estate, fixtures and personal property . . . used or to be used with the transmission, distribution, sale or furnishing of natural gas." RCW 80.04.010(15) (emphasis added).

Here, the firefighters' allegations at a minimum raised the inference that the natural gas pipeline at issue was a "gas plant" because it was "fixture" or "personal property" "used or to be used for or in connection with the transmission, distribution, sale, or furnishing of natural gas." Further, the pleadings established that Pilchuck "conducted pipeline maintenance . . . on behalf of PSE," was responsible for inspecting PSE's pipelines, and that its business included "pipeline operations." CP at 17, 21, 36. These allegations created an inference that Pilchuck was a "corporation . . . controlling, operating, or managing any gas plant," and, thus, a "gas company" and "public service company" subject to liability under RCW 80.04.440.[9] Likewise, the firefighters' allegations that Pilchuck was Michels's agent at minimum raised the inference that Michels could be liable for Pilchuck's actions under the statute. *Chicago Title Ins. Co. v. Washington State Office of Ins. Com'r,*

[9] In considering a CR 12(b)(6) motion to dismiss, courts presume the truth of the complaint's allegations and all reasonable inferences therefrom, viewing them in the light most favorable to the nonmoving party. *Trujillo v. Nw. Tr. Servs., Inc.*, 183 Wn.2d 820, 830, 355 P.3d 1100 (2015).

178 Wn.2d 120, 127, 309 P.3d 372 (2013) (principal could be vicariously liable for agent's violations of statutes and regulations if acts were within the agent's authority)

Despite the legislature's inclusion of "***every*** corporation" engaged in such activities as a "gas company" and "public service corporation" liable under RCW 80.04.440, the Court of Appeals held that neither Pilchuck nor Michels could be liable because they were "contractors." Review is necessary to determine the scope of corporate liability under the statute particularly, whereas here, public utility companies are engaged in extremely hazardous activities that can bear devastating consequences to the public.

VI. CONCLUSION

For the above reasons, the firefighters respectfully request the Court accept review of the Court of Appeals' decision in this case.

RESPECTFULLY SUBMITTED this 8th day of November, 2019.

PFAU COCHRAN VERTETIS AMALA, PLLC

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CERTIFICATE OF SERVICE

Sarah Awes, being first duly sworn upon oath, deposes and says:

I am a citizen of the United States of America and of the State of Washington, over the age of twenty-one years, not a party to the above-entitled matter and competent to be a witness therein.

That on November 8, 2019, I delivered via Email a true and correct copy of the above document, directed to:

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DATED this 8th day of November, 2019.

/s/ Sarah Awes_____
Sarah Awes
Legal Assistant

APPENDIX A

FILED
8/19/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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

Appellants,

v.

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

Respondents.

DIVISION ONE

No. 77785-8-I

PUBLISHED OPINION

FILED: August 19, 2019

DWYER, J. — Nine firefighters responded to a report of a natural gas leak. Gas from a pipeline ignited, causing an explosion and injuring the firefighters. The firefighters sued Puget Sound Energy Inc. (PSE) and its contractors,

alleging, among their causes of action, that negligence or recklessness in the decommissioning of the leaking pipeline was a cause of the explosion. The trial court granted PSE's motion to dismiss on the basis that the professional rescuer doctrine barred all of the firefighters' claims. We affirm.

I

On March 9, 2016, the Seattle Fire Department received a 911 telephone call reporting a natural gas leak on the 8400 block of Greenwood Avenue North in Seattle. Nine firefighters arrived on the scene at 1:09 a.m. and notified PSE of the leak at 1:11 a.m. PSE did not take action to shut off the natural gas pipeline that was the source of the leak until much later. After notifying PSE of the leak's existence, the firefighters inspected a narrow passageway between 8411 and 8415 Greenwood Avenue North and determined that the gas was escaping from a threaded coupling along a steel service line attached to the building at the 8411 address. The firefighters were unaware that gas had also escaped into and underneath this building. As the firefighters continued investigating, an unknown source ignited the gas at 1:43 a.m., causing an explosion that leveled both buildings and injured the firefighters.

A subsequent investigation by the Washington Utilities and Transportation Commission (WUTC) culminated in a report detailing the explosion's causes. WUTC found that the gas leak and subsequent explosion would not have occurred but for an improper decommissioning of the gas service line in 2004. This work had been performed by an independent contractor, Pilchuck Contractors Inc. Pilchuck had recorded the line as being cut and capped despite

failing to actually cut and cap the line. However, WUTC also determined that the immediate cause of the leak was external damage to the threaded coupling, likely the result of individuals storing personal property in (and using the narrow space) between the two buildings. WUTC's subsequent administrative proceeding against PSE concluded in a settlement pursuant to which PSE was to pay a $2.75 million fine, with the contingency that $1.25 million of the fine would be suspended if PSE completed inspection and remediation of its deactivated gas lines. There was no appeal from this final agency determination, and WUTC is not a party to this case.

Not long after, on May 12, 2017, Jeffrey Markoff, one of the injured firefighters, along with his wife Alicia, sued PSE, Pilchuck Contractors, and Michels Corporation, Pilchuck's parent company. The complaint alleged strict liability under the public utility statute; common law negligence, willfulness, and strict liability; outrage; infliction of emotional distress; loss of consortium; punitive damages; and a right to injunctive relief.[1] Subsequently, Markoff amended his complaint to add other injured firefighters as plaintiffs and to advocate for a change in the existing law governing liability to professional rescuers.

PSE moved to dismiss the firefighters' first amended complaint, arguing that the negligence and intentional tort claims were barred by the professional rescuer doctrine, that the injunctive relief claim was both subject to the primary jurisdiction of the WUTC's administrative proceeding and was also moot due to

[1] The firefighters, recognizing that Washington law does not allow for the assessment of punitive damages, nonetheless sought them under Wisconsin law. Michels Corporation is a Wisconsin corporation.

PSE's settlement with the WUTC, and that there was no independent cause of action to assert under the pertinent section of the public utility statute. The trial court dismissed all of the firefighters' common law, statutory, and strict liability claims with prejudice, but reserved ruling on the injunctive relief claim to allow for further briefing.

Applying the professional rescuer doctrine was appropriate, the trial court reasoned, because the firefighters had been called to the scene to address a gas leak, and a well-known and foreseeable danger of gas leaks is that the gas may ignite and explode. The court also accepted PSE's reasoning that the pertinent section of the public utility statute, RCW 80.04.440, did not create an independent cause of action or revive causes of action otherwise barred by an affirmative defense such as the professional rescuer doctrine. The trial court pointed to the state's workers' compensation fund as an existing system of accounting for the risk of injury assumed by professional rescuers.

Subsequently, PSE submitted the requested supplemental briefing in support of its motion to dismiss the firefighters' injunctive relief claim. The firefighters, however, did not submit supplemental briefing on the issue and instead moved to voluntarily dismiss the injunctive relief claim without prejudice. The firefighters' motion for voluntary dismissal was premised on their perception that the trial court had not, in fact, held a hearing on the injunctive relief issue or otherwise exercised its discretion to address it. The trial court disagreed, explaining,

> I think it's worth noting that in my opinion I have exercised discretion on the issue that is noted for a hearing today in front of me with regard to the injunctive relief.
>
> I heard that first hearing. I read all the briefing, and then I exercised discretion to have another hearing to delay, to say I need to do more research, I need the parties to educate me more through their briefing. . . .
>
> And I needed that in order to go forward. And I didn't have to. That's the definition of discretion.
>
> I could have said I will decide it. I will let you know in two weeks. I'm going to do the research. That's my discretion.
>
> I could have said we'll decide it in 90 days, but I want more briefing. That's what I did.
>
> I could have also just decided it right then that day in September, but I didn't. I exercised that discretion.
>
> That hearing [on PSE's Motion to Dismiss] had started. In my view, there's no question about that. There's always shades of gray. It's nice to think of things in black and white, but the reality is between when the first brief is filed and when the final decision is entered, there's a lot of shades of gray [on] when a [CR] 41 [motion] can or cannot be filed.
>
> In my view, this case crosses that line because we had a hearing, there was briefing on it, and I was cued up to make a decision, and I did make a decision, and I did exercise discretion, and that was to make the decision at a later date after more briefing and more education for the Court.

The trial court also gave an alternative ground for ruling in favor of PSE:

> I am going to grant Puget Sound the defense's motion on the merits based on the lack of response and the fact, frankly, that I am convinced that their position is correct in light of all of the facts and law that have been presented to me over the course of two substantive hearings.

Accordingly, the trial court dismissed the firefighters' claim for injunctive relief with prejudice. The firefighters appeal from the orders of dismissal, averring that the professional rescuer doctrine should not bar their common law

and statutory tort claims and that dismissal without prejudice was the proper remedy for their injunctive relief claim.[2]

II

A

A trial court's ruling on a motion to dismiss under CR 12(b)(6) is a question of law that we review de novo. Cutler v. Phillips Petrol. Co., 124 Wn.2d 749, 755, 881 P.2d 216 (1994). A CR 12(b)(6) motion questions only the legal sufficiency of the allegations in a pleading, asking whether there is an insuperable bar to relief. Contreras v. Crown Zellerbach Corp., 88 Wn.2d 735, 742, 565 P.2d 1173 (1977). The purpose of CR 12(b)(6) is to weed out complaints where, even if that which plaintiff alleges is true, the law does not provide a remedy. McCurry v. Chevy Chase Bank, FSB, 169 Wn.2d 96, 101, 233 P.3d 861 (2010).

Under the generous standard of CR 12(b)(6), a complaint survives a motion to dismiss unless "'it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.'" Hoffer v. State, 110 Wn.2d 415, 420, 755 P.2d 781 (1988) (internal quotation marks omitted) (quoting Orwick v. City of Seattle, 103 Wn.2d 249, 254, 692 P.2d 793 (1984)). The "court may consider hypothetical facts not part of the formal record." Hoffer, 110 Wn.2d at 420.

B

The general rule in Washington is that a person who is injured while rescuing another may recover from the party whose

[2] The firefighters do not appeal the trial court's ruling that strict liability did not apply.

> 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.

Loiland v. State, 1 Wn. App. 2d 861, 862, 407 P.3d 377 (2017), review denied, 190 Wn.2d 1013 (2018).

The professional rescuer doctrine is based on a broad policy of assumption of risk. Professional rescuers assume certain risks inherent in their jobs and may not collect damages from those whose negligence brings about such risks. Maltman v. Sauer, 84 Wn.2d 975, 978, 530 P.2d 254 (1975). A professional rescuer may not collect damages from a negligent imperiled person when the "hazard ultimately responsible for causing the [rescuer's] injury 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. Washington courts broadly apply this doctrine to bar recovery for anyone who is fully aware of a hazard caused by another's negligence and who voluntarily confronts the risk in exchange for compensation. Black Indus., Inc. v. Emco Helicopters, Inc., 19 Wn. App. 697, 699-700, 577 P.2d 610 (1978).

C

The professional rescuer doctrine was first recognized by our Supreme Court in Maltman, 84 Wn.2d at 979. The court therein also recognized the existence of an exception to the rule when 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)). Since Maltman, the court has also recognized an exception to the doctrine that applies when "negligent or intentional acts of intervening parties not responsible for bringing the rescuer to the scene" cause the rescuer's injury. Beaupre v. Pierce County, 161 Wn.2d 568, 575, 166 P.3d 712 (2007).

We recently applied the doctrine to bar recovery when a firefighter alleged that negligence on the part of multiple parties placed him in harm's way. See Loiland, 1 Wn. App. 2d 861. Therein, Lopez, a driver, lost control of his vehicle on an icy highway with low visibility. The vehicle rolled onto its side in a ditch. A Washington State Patrol trooper stopped to assist and called for a tow truck. However, while awaiting the tow truck's arrival, the trooper observed several other vehicles slide or stall on the ice. Loiland, 1 Wn. App. 2d at 863. The trooper determined that the tow truck would be of limited use in the prevailing conditions and that waiting for one to arrive was dangerous. Hence, the trooper left the scene with Lopez, but without marking the vehicle to indicate that he had responded to the accident. Loiland, 1 Wn. App. 2d at 863-64.

Subsequently, Wynn Loiland, a firefighter, arrived on the scene in response to a 911 call. Loiland, 1 Wn. App. 2d at 864. Unaware that a trooper had already responded, Loiland had begun marking the abandoned vehicle when he was struck by a vehicle driven by Perez, who lost control on the ice. Loiland, 1 Wn. App. 2d at 864.

Loiland later filed suit against Lopez and the State, alleging that negligence on the part of Lopez, Perez, and the State (through the Department of

Transportation and the State Patrol) had caused his injuries. Loiland, 1 Wn. App. 2d at 864.

The trial court, invoking the professional rescuer doctrine, granted summary judgment to Lopez and the State. Loiland, 1 Wn. App. 2d at 864. We affirmed, reasoning that the claim was premised upon the assertions that the Department of Transportation was negligent in failing to deice the road, the State Patrol was negligent in failing to mark the abandoned vehicle, and Lopez was negligent in driving off the road—all acts or omissions that resulted in Loiland, a professional rescuer, appearing at the scene. Loiland, 1 Wn. App. 2d at 866. We held that "where the negligent acts of multiple parties cause the public safety issue that necessitates the [professional] rescuer's presence, the professional rescuer doctrine bars recovery from each of these parties." Loiland, 1 Wn. App. 2d at 867.

We also rejected Loiland's assertions that the doctrine could not apply to his claim because of intervening negligence on the part of the State.

> In Beaupre, Sutton [v. Shufelberger, 31 Wn. App. 579, 587, 643 P.2d 920 (1982)], and Ward [v. Torjussen, 52 Wn. App. 280, 287, 758 P.2d 1012 (1988)], 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 [Department of Transportation (DOT)] nor [Washington State Patrol] injured Loiland while he was responding to a roadside accident. The agencies' alleged negligence occurred before Loiland responded to the scene. And, as discussed above, the agencies' failures were not independent of the public safety issue to which Loiland responded.
>
> 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. We reject the assertion that DOT's failure to deice after the Lopez accident amounts to the independent negligence of an intervening party.

Loiland, 1 Wn. App. 2d at 869-70 (footnotes omitted). Thus, we give significance to the distinction between ongoing negligence and intervening negligence.

Here, the firefighters aver that PSE's negligence created a hidden, unknown or extrahazardous danger of the type that would bring it within the ambit of the doctrine's recognized exception. The "hidden" danger, they argue, was that the firefighters did not know of PSE's and its contractors' negligence and that gas leaks had previously been reported in the same area, or that gas was escaping not only into the alley where the firefighters could perceive it but also into an underground space beneath the 8411 building. Further, they argue that PSE's alleged negligence in failing to deactivate the line between 1:11 a.m., when it was notified of the leak, and 1:43 a.m., when the explosion occurred, created an additional unforeseeable risk.

The firefighters do not allege facts indicating that they would have responded differently to the leak than they did had they known of the improper cutting and capping of the line or the previous reports of gas leaks. Nor do they allege that they would have responded differently had they known of the pooling of gas underneath the 8411 building.

All of the dangers created by the past negligence of PSE and its contractors, created by those who misused the narrow space between the buildings, and of the gas leaking into an underground space, were part of the same hazard that the firefighters were called to the scene to address: a gas leak.[3] Injury from a fire or explosion is a risk inherent in addressing a natural gas leak, given that natural gas is known to be volatile and highly explosive. See New Meadows Holding Co. by Raugust v. Wash. Water Power Co., 102 Wn.2d 495, 501, 687 P.2d 212 (1984). The firefighters do not show that the circumstances of this leak created a "new or unknown risk" of a type not inherent in the danger of responding to a natural gas leak. Loiland, 1 Wn. App. 2d at 872.

The firefighters next allege that PSE's negligence created a risk that did not exist at the time of the firefighters' arrival at the scene: the risk that the escaped gas would build up to dangerous levels due to PSE's failure to deactivate the line after being notified of the leak. In response, PSE asserts that this claim is akin to the assertion of the firefighter in Loiland that DOT's continuing failure to deice the road after the first crash enhanced the risk of another collision such that the buildup of ice and moisture created a "new or unknown risk." 1 Wn. App. 2d at 872. That claim failed, PSE points out, because ongoing negligence does not constitute an intervening act or "independent negligence." Loiland, 1 Wn. App. 2d at 870. Moreover, the rule at

[3] The International Association of Fire Fighters, as amicus curiae, argues that a question of fact exists as to whether these hazards were hidden, unknown, or extrahazardous, and that the existence of this fact question precludes dismissal. For the reasons stated, the pleadings do not support the inference that these dangers were not inherent in any gas leak situation. Thus, no genuine issue of material fact exists.

issue is that "[t]he doctrine does not apply to negligent or intentional acts of intervening parties not responsible for bringing the rescuer to the scene." Beaupre, 161 Wn.2d at 575. Here, of course, PSE's negligence *was* responsible for bringing the firefighters to the scene.

In support of their argument, the firefighters rely on Kaiser v. Northern States Power Co., 353 N.W.2d 899 (Minn. 1984). Therein, eight firefighters responded to a gas explosion and notified the gas company. The gas company did not deactivate the gas line before a second explosion occurred, injuring the firefighters. Kaiser, 353 N.W.2d at 902. The Minnesota Supreme Court, determining whether the firefighters' suit against the company was barred, stated that the professional rescuer doctrine did not apply when a party's active negligence at the scene "materially enhances the risk or creates a new risk of harm." Kaiser, 353 N.W.2d at 905. Because there was a question of fact as to whether the utility's active negligence at the scene had this effect, the court ruled that denial of the utility's motion for summary judgment was called for. Kaiser, 353 N.W.2d at 906.

This decision provides no comfort to the firefighters. The opinion recognized only that the professional rescuer doctrine might not apply when a party's *active* negligence at the scene materially enhanced the risk that brought professional rescuers on site. Kaiser, 353 N.W.2d at 905. PSE's negligence after the firefighters' arrival, as the firefighters allege it to have occurred, was passive negligence (failing to shut off natural gas in the already-leaking pipe). There was no new negligent act or omission after the firefighters' arrival; PSE

simply allowed the condition that brought the firefighters to the premises to continue.[4]

In addition, the Kaiser court declined to apply the professional rescuer doctrine because it perceived there to be a question of fact as to what, if anything, the firefighters in that case would have done differently had they known of the risk of a second explosion from the still-escaping gas. 353 N.W.2d at 905-06. However, the firefighters herein do not allege that they would have addressed the situation any differently had they known that PSE would not deactivate the line within 30 minutes.

The hazards faced by the firefighters, while significant, were inherent in the risks associated with responding to a natural gas leak. The trial court correctly applied the professional rescuer doctrine in dismissing all of the firefighters' common law tort claims.

D

In the alternative, the firefighters argue for an expansion of the law. They urge that we adopt a new exception to the professional rescuer doctrine excluding from its ambit rescues resulting from willful, wanton, or reckless conduct that places a professional rescuer in harm's way. We decline to do so. The intent of the person whose actions caused the need for rescue has never

[4] The law in Minnesota is that "[a] landowner or person in control owes firefighters a duty 'to exercise ordinary care to avoid imperiling [them] by any active conduct.'" Kaiser, 353 N.W.2d at 905 (alteration in original) (quoting Mulcrone v. Wagner, 212 Minn. 478, 482, 4 N.W.2d 97, 99 (1942)). When such active "misconduct at the fire scene materially enhances the risk or creates a new risk of harm and causes injury to firefighters," the professional doctrine does not apply. Kaiser, 353 N.W.2d at 905. We can decide this case without deciding if the law in Washington is identical.

been a relevant inquiry in determining whether a professional rescuer assumed a risk. Washington courts have not looked to the conduct of a person in creating a hazard to establish whether the professional rescuer doctrine applies. Rather, our courts have always analyzed whether the professional rescuer assumed a risk inherent in the nature of the rescue at issue. Maltman, 84 Wn.2d at 979; Black Indus., 19 Wn. App. at 699.

The firefighters point to Ballou v. Nelson, 67 Wn. App. 67, 834 P.2d 97 (1992), to support their advocacy for an intent exception. Therein, we held that the professional rescuer doctrine did not bar police officers from recovering against two hotel patrons who assaulted them. Ballou, 67 Wn. App. at 70. While the police officers had been dispatched to detain these patrons, the assault was an independent act of active misconduct that occurred after the officers' arrival. Ballou, 67 Wn. App. at 69. Further, the officers did not arrive at the scene to rescue the patrons but, rather, to restrain them from committing further acts of assault against others at the hotel. Ballou, 67 Wn. App. at 73. Thus, we ruled, the professional rescuer doctrine did not apply. This is in sharp contrast to the situation herein, in which the firefighters *were* called to the scene to protect others from danger, and were not injured as a result of independent acts of active misconduct. Ballou does not militate in favor of the adoption of the new proposed rule.

The firefighters also point to authority from other states in which an intent exception is recognized, chiefly a Louisiana Court of Appeals case, Chinigo v. Geismar Marine, Inc., 512 So. 2d 487 (La. Ct. App. 1987). Therein, a sheriff's

deputy responded to a report that a tank truck was leaking unknown fluid onto a road. Chinigo, 512 So. 2d at 488. The truck did not possess the required placard designating the substance being transported, and its driver did not inform the deputy that the fluid was a volatile and toxic chemical. Chinigo, 512 So. 2d at 489. The deputy, experiencing serious side effects of exposure to the chemical, sued the trucking company, which raised the professional rescuer doctrine as a defense. Chinigo, 512 So. 2d at 489-90. The court held that the risk confronted by the deputy, created by improper handling of a hazardous chemical in a wanton manner, was "extraordinary and one which was beyond the training and experience of [the deputy] to remedy," precluding application of the professional rescuer doctrine. Chinigo, 512 So. 2d at 492. This is inapposite to the case before us for the simple reason that the explosion was not an unanticipated risk of the gas leak.

Further, to the extent that the Louisiana court's recognition of an exception was not based on the hidden, unknown, or extrahazardous danger created by the unknown fluid—a situation already accounted for in our state's law—it was based on the desire to impose punitive damages. Chinigo, 512 So. 2d at 491. This is not a concern in Washington. We decline to adopt a new exception to the professional rescuer doctrine employing an intent component.

III

The firefighters next assign error to the trial court's dismissal of their claims against all three defendants for liability under RCW 80.04.440. The trial court dismissed these statutory liability claims on the basis that RCW 80.04.440

does not create a private cause of action for the firefighters to assert. This subsection of Washington's public utility statute provides that:

> In case any public service company shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done, either by any law of this state, by this title or by any order or rule of the commission, such public service company shall be liable to the persons or corporations affected thereby for all loss, damage or injury caused thereby or resulting therefrom, and in case of recovery if the court shall find that such act or omission was willful, it may, in its discretion, fix a reasonable counsel or attorney's fee, which shall be taxed and collected as part of the costs in the case. An action to recover for such loss, damage or injury may be brought in any court of competent jurisdiction by any person or corporation.

RCW 80.04.440.

"Significantly, liability under [RCW 80.04.440] is *predicated* upon a finding of a violation of law or safety regulation." Zamora v. Mobil Corp., 104 Wn.2d 199, 209, 704 P.2d 584 (1985). Neither party disputes the requirement of a predicate violation; however, the firefighters aver that the statute creates a private cause of action separate and independent of their common law claims.

Employing a plain language reading, the statute does nothing more than preserve causes of action for private claims related to utility misconduct while adding the potential for recovery of attorney fees by successful claimants.[5] It

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[5] RCW 80.04.440 supports causes of action against "any public service company." "Public service company" is defined, for purposes of the statute, as "every gas company, electrical company, telecommunications company, wastewater company, and water company." RCW 80.04.010(23). In turn, a "[g]as company" is defined inclusively as "every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receiver appointed by any court whatsoever, and every city or town, owning, controlling, operating or managing any gas plant within this state." RCW 80.04.010(14). Independent contractors performing maintenance work on behalf of a gas company are not included in this definition.

The firefighters' first amended complaint did not allege that either Pilchuck Contractors or Michels Corporation was a public service company as would be necessary to bring them within the ambit of the statute. Instead, it stated that Pilchuck "conducted pipeline maintenance and

does not allow for such claims to be asserted free of the limitations to which they are subject when otherwise asserted. See Fisk v. City of Kirkland, 164 Wn.2d 891, 896, 194 P.3d 984 (2008) (cause of action pursuant to RCW 80.04.440 not viable in the absence of underlying duty on part of utility); Citoli v. City of Seattle, 115 Wn. App. 459, 479-80, 61 P.3d 1165 (2002) (utility's alleged violation of regulation requiring minimization of service interruptions did not support RCW 80.04.440 claim due to city ordinance limiting utility's liability).

Hence, a party seeking the benefit of RCW 80.04.440 must demonstrate that the underlying claim is viable and not subject to an affirmative defense.[6] This the firefighters have not done. They assert that the statute's lack of reference to the professional rescuer doctrine implies that said doctrine does not apply, ignoring the fact that the statute's enactment predated Maltman by 14

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other general contracting business throughout the State on behalf of PSE and others," and that Michels "is a company incorporated in the State of Wisconsin and bought Pilchuck Contractors in or around 1999 to conduct business in Washington State."

In their reply brief, the firefighters point to RCW 80.04.010(15), defining "[g]as plant" to include "all real estate, fixtures and personal property, owned, leased, controlled, used or to be used for or in connection with the transmission, distribution, sale or furnishing of natural gas, or the manufacture, transmission, distribution, sale or furnishing of other type gas, for light, heat or power." They contend that, because Pilchuck was contracted by PSE to maintain the "fixture" of the pipeline, it was in fact "controlling, operating or managing any gas plant." However, even taking all of the firefighters' allegations as true, as we must, they do not raise the inference that Pilchuck was "controlling, operating or managing" a gas plant except on behalf of PSE—as explicitly stated in the firefighters' first amended complaint. Thus, Pilchuck was and is not a "gas company" as would be necessary to make it a "public service company" to bring it within the meaning of the statute.

Because the pleadings did not support an inference that Pilchuck was a public service company, they in turn do not support the inference that Michels, the parent company of Pilchuck, could be held liable under the utility statute. Thus, dismissal of the RCW 80.04.440 claim against Pilchuck and Michels was proper even if the statute *did* create the firefighters' proposed independent cause of action.

[6] Nowhere in their opening or reply briefs do the firefighters point to the specific WUTC regulations, the violation of which would give rise to a cause of action under RCW 80.04.440. An enumeration of these regulations is contained in their first amended complaint. However, to the extent that the firefighters rely on specific findings of the WUTC to support their cause of action, they are asserting a claim "involving" an order of the WUTC without serving notice to the same in contravention of RCW 80.04.420.

years. Nothing in the statute's language evinces an intent to render inapplicable otherwise applicable affirmative defenses. The trial court did not err in dismissing the firefighters' claims pursuant to RCW 80.04.440.

IV

The trial court gave alternative reasons for dismissal of the firefighters' injunctive relief claim with prejudice: first, that the firefighters had not responded to the assertions contained in PSE's motion to dismiss that claim and, second, that there was no reason to grant a voluntary dismissal *without* prejudice. The trial court did not specify the assertion it was adopting in granting PSE's motion to dismiss, stating at oral argument only that the motion would be granted "on the merits based on the lack of response and the fact, frankly, [because] I am convinced that their position is correct in light of all of the facts and law that have been presented to me over the course of two substantive hearings." We may affirm a trial court ruling on any ground supported in the record. LaMon v. Butler, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

"One who seeks relief by permanent injunction must show: (1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in, or will result in, actual and sustained injury to him." Tyler v. Van Aelst, 9 Wn. App. 441, 443, 512 P.2d 760 (1973) (citing Port of Seattle v. Int'l Longshoremen's & Warehousemen's Union, 52 Wn.2d 317, 319, 324 P.2d 1099 (1958)). "The complainant must make out a *prima facie* case." Isthmian S. S. Co. v. Nat'l Marine Eng'rs' Beneficial Ass'n, 41 Wn.2d 106, 118, 247 P.2d 549 (1952). "'An

injunction will not issue to protect a right not in esse and which may never arise.'" State ex rel. Hays v. Wilson, 17 Wn.2d 670, 673, 137 P.2d 105 (1943) (quoting 32 C.J. Injunctions § 14, at 35 (1923)).

The firefighters' first amended complaint gives the following basis for requesting an injunction:

> 24. Injunctive Relief. Based on the paragraphs set forth and alleged above, and in light of their reckless and wanton misconduct, Defendant PSE should be enjoined under RCW 7.40 et seq. and Washington law be required to perform a comprehensive inspection of its Washington State gas pipes, especially abandoned pipes, and engage in immediate remediation to protect the public from a grave foreseeable harm.

The "paragraphs set forth and alleged above" asserted rights of action arising from PSE, Pilchuck and Michels's alleged negligence. The trial judge properly dismissed the substantive claims on which the request for injunctive relief was based. At that point, the firefighters no longer had a right that could be vindicated or protected by the injunction. In short, an injunction is a remedy, not an independent cause of action. Dismissal with prejudice was proper.

Affirmed.

WE CONCUR:

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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

Appellants,

v.

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

Respondents.

DIVISION ONE

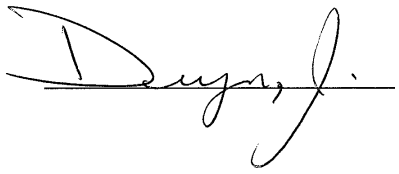
No. 77785-8-I

ORDER DENYING MOTION FOR RECONSIDERATION

The appellants having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

For the Court:



APPENDIX C

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DANIEL LYON, Appellant, v. OKANOGAN COUNTY ELECTRIC COOPERATIVE, INC., et al., Respondent.	No. 97826-3 Court of Appeals No. 36528-0-III RULING ACCEPTING CERTIFICATION

Division Three of the Court of Appeals certified the above-captioned direct appeal for review in this court in accordance with RCW 2.06.030 and RAP 4.4. Having reviewed the matter, it is agreed that transfer to this court is justified.

Accordingly, certification of the above-referenced appeal is accepted and the case is filed under the above-referenced cause number. The clerk of the court will notify the parties regarding further proceedings in this court.

Michael E. Johnston
COMMISSIONER

November 7, 2019

APPENDIX D

No. 36528-0

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION III

DANIEL LYON,

Appellant,

v.

OKANOGAN COUNTY ELECTRIC COOPERATIVE, INC., a Washington corporation; and PUBLIC UTILITY DISTRICT NO. 1 OF DOUGLAS COUNTY, a public utility district,

Respondents.

BRIEF OF APPELLANT

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INTRODUCTION

Plaintiff Daniel Lyon was one of the many fire fighters who responded to the devastating Twisp River Fire. When Lyon and his three crew mates attempted to evacuate as the fire quickly grew out of control, they were engulfed in smoke and flame. Lyon's crew perished – he escaped with burns over 70 percent of his body.

The trial court ruled that Lyon's claims were barred by the Professional Rescue Doctrine ("PRD"). The PRD is an exception to the rule that rescuers may recover for injuries negligently caused during the rescue, on the basis that professional rescuers assume risk ordinary rescuers do not assume and are compensated for doing so. The first rationale is false and the second does not warrant the gross inequity and injustice the PRD creates. This Court should abandon the PRD as unnecessary and unjust.

Alternatively, this Court should strike down the PRD as constitutionally infirm. The PRD singles out professional rescuers as a class, denying them the fundamental right of redress for personal injury. This Court cannot countenance this equal-protection violation.

At a minimum, this Court should hold that the PRD does not bar claims based on gross negligence. In any case, this Court should reverse and remand for trial.

ASSIGNMENTS OF ERROR

1. The court erred in finding that the Professional Rescue Doctrine bars Plaintiff Daniel Lyon's claims against Defendant Public Utility District No. 1 of Douglas County, and in dismissing those claims accordingly. CP 427-31.
2. The court erred in finding that the Professional Rescue Doctrine bars Plaintiff Daniel Lyon's claims against Defendant Okanogan County Electric Cooperative, Inc., and in dismissing those claims accordingly. CP 610-12.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The PRD is an exception to the rescue doctrine, which allows rescuers to bring suit against those whose negligence creates the needed rescue. Currently, since professional rescuers assume certain risks as part of their profession, the exception applies. But many jurisdictions have abandoned the PRD, recognizing that it is inconsistent with modern tort law, lacks sound policy justification, and singles out professional rescuers as a class. Many others, including Washington, recognize multiple exceptions to the PRD. ***Maltman v. Sauer***, 84 Wn.2d 975, 978-79, 530 P.2d 254 (1975); ***Ballou v. Nelson***, 67 Wn. App. 67, 70, 834 P.2d 97 (1992); ***Ward v. Torjussen***, 52 Wn. App. 280, 287, 758 P.2d 1012 (1988).

1. Should this Court hold that the PRD is unnecessary and unjust under modern tort, and reject the doctrine?

2. Alternatively, should this Court hold that the PRD is unconstitutional where it singles out professional rescuers as a class, denying them equal protection under the law?

3. If this Court declines to abandon the PRD, then should it hold that the PRD does not bar relief where, as here, the plaintiff is injured by a defendant's conduct exceeding ordinary negligence?

STATEMENT OF CASE

A. The Twisp River Fire started on property owned by Douglas County Public Utility District No. 1 by high-voltage distribution lines owned, operated, and maintained by Okanogan County Electric Cooperative.

The Twisp River Fire started on property owned by Respondent Douglas County Public Utility District No. 1 ("PUD"). CP 25. Respondent Okanogan County Electric Cooperative, Inc. ("OCEC") owned, operated, and maintained high-voltage distribution lines through and above the property that started the fire. CP 25-28.

OCEC is responsible for maintaining the vegetation in the corridors surrounding the power lines. CP 26. It uses employees and agents to perform this maintenance. *Id*. It claimed that in three-year cycles, it cleared vegetation and debris to 10 feet on either side of its power-line corridors. CP 27. But there is no record that OCEC even

inspected its corridor in the area where the fire started any time after the winter of 2012/2013. *Id*.

Instead, OCEC allowed trees known to be "fast-growing" to grow over and onto its high-voltage power lines. CP 27-28. These trees grew leaning toward the power lines from a steep slope adjacent to the lines. *Id*. They completely invaded the power-line corridor and contacted the lines. *Id*. A branch estimated to be four-and-one-half years old caught fire and fell to the ground, igniting the dry grass and brush below. CP 28. So began the Twisp River Fire that took two weeks to contain, burned 11,220 acres, destroyed numerous homes, and ultimately claimed three lives. *Id*.

B. Daniel Lyon suffered severe disfiguring and disabling burn injuries while fighting the Twisp River Fire.

On August 19, 2015, Appellant Daniel Lyon, a firefighter for the United States Forest Service, suffered severe disfiguring and disabling burns while fighting the Twisp River Fire. CP 19. At the time, it was hot and dry, a "Red Flag" warning signaled extreme fire danger, and multiple other wildfires already burned nearby. CP 25.

Just after noon, calls came in to 911 reporting smoke along Twisp River Road. CP 20. The fire quickly spread, racing off the road up the hill and threatening nearby homes. *Id*. Local firefighters were

dispatched immediately, and multiple agencies were called to assist. *Id*. Lyon was dispatched as part of a Forest Service fire crew assigned to structure-protection operations. *Id*.

When the wind shifted, the fire suddenly changed magnitude and direction, heading directly toward Lyon's engine and crew. *Id*. They scrambled into the truck, retreating from the rapidly-approaching flames. *Id*. The noise was deafening, smoke and flames obscured everything, and trees exploded in flames. *Id*. Almost immediately, Lyon's crew was signaled to evacuate to their predetermined escape route and safety zone, even though it took them directly into the path of the hottest part of the fire. CP 20-21.

Attempting to evacuate, Lyon's crew discovered that the fire had overtaken the road. CP 21. They were driving through the fire. *Id*. The truck lurched as one or more tires blew, melted by the intense heat. *Id*. Smoke completely obscured the road. *Id*. The truck went off the road and down an embankment, stopping when the front axle became high-centered on a rock. *Id*. Within minutes fire completely overtook the engine. CP 22.

Although Lyon managed to escape the burning truck, the three others in his crew perished in the fire. *Id*. Without even a shirt or hardhat, Lyon made it far enough down the road to encounter

another fire crew who radioed ahead for medics and took him to the staging area. *Id*. There, medics cut away Lyon's remaining clothing, wrapped him in burn sheets, and administered oxygen and fluids. *Id*. After ambulance transport to a helistop, Lyon flew directly to Harborview Medical Center's burn unit where he spent the next three months. CP 22-23.

Lyon suffered severe burns over 70% of his body, including his entire face. CP 23. He underwent numerous skin-graft surgeries and doctors amputated the tips of several fingers. *Id*. When Lyon awoke at Harborview and could not even recognize himself, a wave of grief, sadness, and fear came over him. *Id*.

After being released, Lyon wore a plastic mask and a special jacket and gloves to protect his healing skin and fragile grafts. *Id*. He endured five-to-six hours of therapy each day. *Id*.

C. Procedural history.

Lyon sued PUD and OCEC in May 2018, alleging they "acted with gross negligence, recklessness, wantonly, and/or willful conduct, proximately causing the fire which catastrophically injured plaintiff Daniel Lyon and took the lives of his three co-workers." CP 28-31. For discovery purposes, the court consolidated Lyon's lawsuit

with a pre-existing lawsuit pursuing numerous other claims. CP 445-47. None of the other claims involve personal injuries. *Id*.

In October 2018, PUD and OCEC moved to dismiss Lyon's claims, arguing they were barred by the PRD. CP 60-76, 470-83. In November, the court granted both motions over Lyon's objection. CP 426-31, 610-12. Following the court's ruling, the parties stipulated that this Court should take interlocutory review. The court agreed to certify the case for immediate appeal pursuant to RAP 2.3(b)(4). RP 35.[1] This Court accepted review on January 10, 2019.

ARGUMENT

A. This Court reviews summary judgment *de novo*.

This Court reviews summary judgment *de novo*, engaging in the same inquiry as the trial court. ***Beaupre v. Pierce Cnty.***, 161 Wn.2d 568, 571, 166 P.3d 712 (2007). Summary judgment is appropriate when "there is no genuine issue as to any material fact and … the moving party is entitled to a judgment as a matter of law." ***Beaupre***, 161 Wn. 2d at 571 (quoting CR 56(c)).

[1] Although the court orally agreed to certify this matter for immediate review, and although it intended to enter the parties' stipulated order, the order was not filed after the parties' signed it. When Lyon realized this during the process of writing his opening brief, he immediately contacted the trial court, who directed the parties to present the order for the court's signature and filing. The court filed the stipulated order on June 24, 2019, and transmitted it directly with this Court on June 28.

B. This Court should abandon the PRD, as have those jurisdictions upon whose law Washington's PRD is based.

Many jurisdictions, including those two upon whose law Washington's PRD is based, have abandoned the rule on the basis that it is unnecessary and unjust. Professional rescuers assume the same risk as ordinary rescuers attempting to help others in danger. And while they may possess skills, training, and experience others do not, modern tort law can handle those intricacies without barring recovery. This Court should abandon this outdated and unjust exception to the rule.

1. Washington's PRD is itself an exception to the general rule that injured rescuers may recover from the party whose negligence caused the need for the rescue.

As a general rule, a person injured while attempting to rescue another may recover from the party whose negligence created the need for rescue. ***Maltman***, 84 Wn.2d at 977 (citing ***French v. Chase***, 48 Wn.2d 825, 830, 297 P.2d 235 (1956)). The doctrine derives from Justice Cardozo's statement that "'danger invites rescue.'" 84 Wn. 2d at 976-77 (quoting ***Wagner v. Int'l Ry.***, 232 N.Y. 176, 133 N.E. 437 (1921)). This "rescue doctrine is not a common law remedy [but] 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 bringing suit for knowingly placing themselves in danger to undertake a rescue." ***McCoy v. Am. Suzuki Motor Corp.***, 136 Wn.2d 350, 356, 961 P.2d 952 (1998).

The rescue doctrine serves two functions: (1) informing a tortfeasor that rescue is foreseeable, such that the tortfeasor owes the rescuer a duty similar to the duty owed to the person imperiled by the tortfeasor's conduct; and (2) negating the presumption that the rescuer assumed the risk of injury. ***McCoy***, 136 Wn.2d at 356. Thus, the doctrine "encourages efforts to save imperiled persons despite a rescuer's voluntary (though not reckless) exposure to danger." ***Ballou***, 67 Wn. App at 70.

The PRD[2] "is a limitation to this general rule," barring professional rescuers from recovering under the rescue doctrine. ***Loiland v. State***, 1 Wn. App. 2d 861, 865, 407 P.3d 377 (2017) (citing ***Maltman***, 84 Wn. 2d at 978). The PRD's rationale is twofold: (1) professional rescuers assume hazards voluntary rescuers do not assume; and (2) they are compensated for accepting those risks.

[2] Courts in Washington and around the country often refer to the PRD as the fireman's' or firefighters' rule. ***Beaupre***, 161 Wn.2d at 572 n.1. It is "nearly identical in nature," but has different theoretical underpinnings. 161 Wn.2d at 572 n.1. The firefighters' rule has never been applied in Washington. ***Ballou***, 67 Wn. App. at 69-70.

Loiland, 1 Wn. App. 2d at 865 (citing ***Maltman***, 84 Wn. 2d at 978). A professional rescuer currently may not recover for injuries caused by hazards "'inherently within the ambit of those dangers which are unique to and generally associated with the particular rescue activity.'" 1 Wn. App. 2d at 865 (quoting ***Maltman***, 84 Wn.2d at 979). As ***Maltman*** put it (84 Wn.2d at 978-79):

> We conclude that the proper test for determining a professional rescuer's right to recovery under the "rescue doctrine" is whether 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. 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. 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.

2. Many states, including those upon whose law *Maltman* is based, have abandoned the PRD altogether as unsound under modern tort law.

New Jersey adopted the "firefighter rule" (it's version of the PRD) in the 1960 case ***Krauth v. Geller***, cited in ***Maltman*** and around the country by courts subsequently adopting the rule. ***Ruiz v. Mero***, 189 N.J. 525, 530, 917 A.2d 239 (2007) (citing 31 N.J. 270, 272-78, 157 A.2d 129 (1960)); 84 Wn. 2d at 978. The rationale was primary assumption of risk: "the defendant did not breach a duty

owed, rather the fireman was guilty of contributory fault in responding to his public duty." ***Krauth***, 31 N.J. at 273-74. ***Krauth*** "allowed claims for intentional wrongs, and for intervening, independent and subsequent acts of negligence." ***Ruiz***, 189 N.J. at 531. Over the years, New Jersey added more exceptions to the firefighter rule for willful or wanton conduct. *See, e.g.,* ***Mahoney v. Carus Chem. Co.***, 102 N.J. 564, 510 A.2d 4 (1986).

In 1993, New Jersey adopted a statute allowing firefighters (and other first responders) to recover for injuries incurred in the line of duty "directly or indirectly" caused by another's "neglect, willful omission, or willful or culpable conduct." ***Ruiz***, 189 N.J. at 534 (quoting N.J. STAT. ANN. § 2A:62A-21). For years, the New Jersey appellate courts were split as to whether that statute abrogated the firefighters' rule entirely or simply clarified that the rule allowed firefighters to recover based on negligence that was not inevitable or unavoidable in the emergency response. 189 N.J. at 532, 534.

In 2007, New Jersey's highest court held that the statute abrogated the firefighters' rule in its entirety. *Id*. at 537-38. In so holding, the court noted that the rule has come under criticism around the country for failing to "comport with notions of redress and equal treatment underlying modern tort law." *Id*. at 533 (citing ***Christensen***

v. Murphy, 296 Or. 610, 619-21, 678 P.2d 1210 (1984) ("rejecting theories underlying firefighters' rule as inconsistent with modern tort law"); ***Banyai v. Arruda***, 799 P.2d 441, 443 (Colo. Ct. App. 1990) ("finding firefighters' rule departure from general duty of care for safety of others")). The court also noted the rationale of one of its judges, who had repeatedly called for the rule's complete abolition on the basis that it is unnecessary and unjust:

> The rule, as currently formulated, is obtuse and abstruse. It needlessly extends an immunity that has a dubious value. … I do not see how the beneficent purposes of the law would be undermined if claims based on such ordinary work-related negligence were to be addressed and resolved by the application of generally-understood and accepted tort principles. … The creativity and flexibility of the [common law] surely can devise standards defining duty, proximate cause, and comparative negligence that suitably address all the circumstances that surround an officer [or firefighter] who must respond to an emergency on behalf of a private citizen.

Id. at 243-44 (quoting ***Rosa v. Dunkin Donuts***, 122 N.J. 66, 85, 583 A.2d 1129 (1991) (Handler, J., dissenting)).

In addition to the now-overturned ***Krauth***, ***Maltman*** relied on ***Spencer v. B.P. John Furniture Corp.***, first adopting the firefighters' rule in Oregon. ***Maltman***, 84 Wn.2d at 978; ***Christensen***, 296 Or. at 614 (citing 255 Or. 359, 467 P.2d 429 (1970)). But Oregon too has now abolished the firefighters' rule. 296 Or. at 620-21 ("the 'fireman's rule' is abolished in Oregon as a rule of law and no longer can bar

recovery of damages for personal injuries sustained by a public safety officer, in the course of his or her employment, as a result of a defendant's negligent conduct").

Spencer presented the firefighters' rule in its "prototypical form": a paid, public firefighter was killed responding to a fire at the defendant's premises, caused by his negligence, and the risk was "naturally inherent in such a fire." *Id.* at 615. ***Spencer***, like ***Maltman***, relied on ***Krauth***. 255 Or. at 362-64 (citing 31 N.J. at 272). After ***Spencer***, Oregon's highest court did not revisit the application of the firefighters' rule before abolishing it in ***Christensen***. 296 Or. at 614.

Christensen abolished the firefighters' rule because it was based largely on implied primary assumption of risk, since abolished in Oregon. 296 Or. at 618. With "its major theoretical underpinning … gone," the court examined whether policy considerations amply supported the firefighters' rule, rejecting each one often sighted to support the rule (*id*. at 619-20):

- The consideration to "avoid placing too heavy a burden on premises owners to keep their premises safe from the unpredictable entrance of fire fighters" improperly focuses on firefighters "as a class … ." Creating a bar only for that class is "a veiled form of assumption of risk analysis … ."
- The consideration to "spread the risk of firefighters' injuries to the public through workers' compensation, salary and fringe benefits" treats firefighters differently than "other public employees who are injured when confronting

dangers on their jobs. The latter can recover workers' compensation and salary benefits from the public, but are also allowed additional tort damages from the third-party tort-feasors. Under the 'fireman's rule' the injured public safety officer must bear a loss which other public employees are not required to bear."

- The argument that allowing firefighters to bring suit might discourage landowners from calling for help in emergencies is "preposterous rubbish." (*id*., quoting Prosser, William L., *Law of Torts* § 68, 397 (4th ed. 1971)).
- The consideration to "avoid increased litigation" had previously been rejected in Oregon as a reason for denying substantive liability.

In short, following ***Christensen***, both states upon whose law ***Maltman*** is based abandoned the firefighters' rule altogether.

Colorado also abandoned its firefighters' rule, first adopted in 1910, on the basis that firefighters are licensees so are "owed only the duty to refrain from inflicting injury willfully or wantonly." ***Wills v. Bath Excavating & Constr. Co.***, 829 P.2d 405, 408 (Colo. App. 1991) (citing ***Lunt v. Post Printing & Publ'g, Co.***, 48 Colo. 316, 329-31, 110 P. 203 (1910)). Decades later, the Colorado Supreme Court overruled ***Lunt***, holding that the "*status* or *classification* of one who is upon the property of another is not to be determinative of the occupant's responsibility or the degree of care which he owes to that person." ***Mile High Fence Co. v. Radovich***, 175 Colo. 537, 548, 480 P.2d 308 (1971) (emphasis original). The appellate court later held that ***Mile High Fence Co***. effectively rejected the firefighters' rule,

holding that when "liability is limited solely because plaintiff is a fireman, policemen, or public safety officer, it is based on status or classification. Such a result is rejected in ***Mile High Fence Co.***" ***Wills***, 829 P.2d at 409.

The court went on to note that the firefighters' rule is an "'unwarranted departure from the general duty to exercise due care for the safety of others.'" 829 P.2d at 409 (quoting ***Banyai***, 799 P.2d at 409). The court explained that while a firefighter's skills, training, and experience may be relevant to comparative negligence, granting immunity to one who negligently created the fire is unwarranted. *Id*.

New Mexico similarly "disavow[ed]" the firefighters' rule. ***Baldonado v. El Paso Natural Gas Co.***, 143 N.M. 297, 299, 176 P.3d 286 (Ct. App. 2006, *published* 2008) (overruling ***Moreno v. Marrs***, 102 N.M. 373, 695 P.2d 1322 (Ct. App. 1984)). As in Washington, New Mexico's firefighters' rule was based on assumption of risk, and operated as an exception to the general rule that rescuers may recover for their injuries. ***Baldonado***, 143 N.M. at 301-02 (citing ***Moreno***, 102 N.M. at 376-77).

Questioning the rationale for denying recovery to firefighters only, the court recognized that many "occupations--e.g., oil field roustabout, construction worker, convenience store clerk--require

employees to confront an appreciable risk of physical injury or death in order to carry out their jobs." 143 N.M. at 302. The court noted too that the firefighters' rule was at odds with current state law: (1) rejecting "the application of primary assumption of risk to rescuers as a class"; (2) subsuming "secondary assumption of risk under contributory negligence"; and (3) abrogating "distinctions in the standard of care applicable to licensees versus invitees." *Id*. at 302-03. Holding that "policy rationales" did not adequately support the rule, the court abandoned it, stating: we "decline to perpetuate a rule that unjustly singles out firemen and denies them the benefit of generally applicable principles of tort liability." *Id*. at 303-04.

Many more states have abrogated the firefighters' rule, or the PRD, by statute, including Florida, Illinois, Massachusetts, Minnesota, and New York. FLA. STAT. § 112.182; 425 ILL. COMP. STAT. § 25/9f; MASS. GEN. LAWS, ch. 41, § 111F and MASS. GEN. LAWS, ch. 41, § 100 (as stated in ***Flaherty v. Walgreen E. Co.***, 18 Mass. L. Rep. 661, 2005 Mass. Super. LEXIS 18, *6 n.3 (2005); MINN. STAT. § 604.06; N.Y. GEN. MUN. LAW § 205. And South Carolina expressly rejected the rule without having previously rejected or accepted it, detailing the rule's tortured history:

> [T]hose jurisdictions which have adopted the firefighter's rule offer no uniform justification therefor, nor do they agree on a consistent application of the rule. The legislatures in many jurisdictions which adhere to the rule have found it necessary to modify or abolish the rule. The rule is riddled with exceptions, and criticism of the rule abounds.
>
> Against this backdrop, we answer the certified question in the negative. South Carolina has never recognized the firefighter's rule, and we find it is not part of this state's common law. In our view, the tort law of this state adequately addresses negligence claims brought against non-employer tortfeasors arising out of injuries incurred by firefighters and police officers during the discharge of their duties.

Minnich v. Med-Waste, Inc., 349 S.C. 567, 575, 564 S.E.2d 98 (2002) (citations omitted).

3. This Court should abandon the PRD.

When the Washington Supreme Court adopted the PRD in ***Maltman*** it relied exclusively on the early cases from New Jersey and Oregon addressed above. 84 Wn.2d at 978; *Supra*, Argument § B 2. Like Washington, both New Jersey and Oregon premised their firefighters' rule (or here, the PRD) on assumption of risk. *Compare* ***Maltman***, 84 Wn.2d at 979, *with* ***Krauth***, 31 N.J. at 273-74, *and* ***Spencer***, 255 Or. at 362-63. After years spent reading more and more exceptions into the firefighters' rule (itself an exception to the rescue doctrine) both states abrogated it entirely, finding that it unjustly singled out firefighters as a class, was impossible to reconcile with modern tort law, and was unsupported by policy

considerations. ***Ruiz***, 189 N.J. at 537-38; ***Christensen***, 296 Or. at 619-21. Nine more states have done the same, or declined to adopt the rule in the first instance. *Supra*, Argument § B 2. This Court should abolish this outdated, unnecessary, and unjust rule.

The rescue doctrine is premised on the "societal value judgment" that rescuers should be permitted to seek redress for their injuries sustained during a rescue, even though they knowingly put themselves in danger. ***McCoy***, 136 Wn.2d at 356. The rationale behind denying firefighters this right is that: (1) they assume hazards ordinary rescuers do not assume; and (2) they are compensated accordingly. ***Loiland***, 1 Wn. App. 2d at 865. Put another way, it is the firefighter's "business … to deal with certain hazards." ***Maltman***, 84 Wn.2d at 979.

As to the first, it is simply untrue that professional rescuers necessarily assume risks ordinary rescuers do not. ***Loiland***, 1 Wn. App. 2d at 865. Simply stated, an ordinary rescuer who runs into a burning building to help a friend or neighbor escape assumes the same risk as a professional firefighter arriving at the scene. Take for example a skier injured in an avalanche – the fellow skier attempting to dig him out assumes the same risk as the professional ski patrol who arrive at the scene. Or take a hiker attempting to rescue her

fallen friend, versus the forest ranger hiking the same trail. Why is it that only the nonprofessional may recover for her injuries?

If the difference between an ordinary and professional rescuer is skill, training, and experience, Washington's body of tort law can address the issue adequately without a complete bar for professionals only. As the New Jersey court stated when abrogating its firefighters' rule:

> The creativity and flexibility of the [common law] surely can devise standards defining duty, proximate cause, and comparative negligence that suitably address all the circumstances that surround an officer [or firefighter] who must respond to an emergency on behalf of a private citizen

Ruiz, 189 N.J. at 532-33 (quoting ***Rosa***, 122 N.J. at 85 (Handler, J., dissenting) (citing ***Mahoney***, 102 N.J. at 590-91 (Handler, J. dissenting))). As Colorado stated in abrogating its firefighters' rule, "while a public safety officer's special skills, training, and experience may be considered with reference to any comparative negligence involved, a per se grant of immunity to those whose negligence created a dangerous situation for the officer is unwarranted." ***Wills***, 829 P.2d at 409.

If the difference between ordinary and professional rescuers is that professionals are paid, the answer is twofold: (1) they are not paid enough; and (2) others regularly encounter risk in their paid

professions, but may still bring negligence claims to seek redress for their personal injuries. Lyon suffered severe burns over 70% of his body, including his entire face. CP 23. He required numerous surgeries for skin grafts and finger-tip amputations. *Id*. He has endured countless hours of physical therapy, and immense grief, sadness, and fear. *Id*. The average annual firefighter's salary in Washington is estimated to be about $54,000 a year, nowhere near enough to warrant the kind of risk involved here.[3]

As to the second, many professionals encounter risk on the job, but are permitted to recover for injuries negligently caused. New Mexico recognized as much when striking down its firefighters' rule:

> Many occupations--e.g., oil field roustabout, construction worker, convenience store clerk--require employees to confront an appreciable risk of physical injury or death in order to carry out their jobs; yet, New Mexico courts have not recognized special no-duty rules shielding defendants who injure employees engaged in these inherently risky occupations.

Baldonado, 143 N.M. at 302. These workers, like firefighters, assume work-related risks, yet unlike firefighters, are permitted to

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[3] https://www.ziprecruiter.com/Salaries/What-Is-the-Average-Firefighter-Salary-by-State; https://www.indeed.com/salaries/Firefighter-Salaries,-Washington-State; https://www.salary.com/research/salary/benchmark/fire-fighter-salary/wa.

recover. 143 N.M. at 302. Thus, the rule "'proves too much.'" *Id.* (citation omitted).

An earlier California dissent reached the same conclusion, noting that ***Maltman***'s reliance on assumption of risk to underpin the PRD is flawed, where many employees assume on-the-job risk, but are permitted to recover for injuries caused by negligence:

> The argument, in essence, is that the fireman or policeman, in accepting the salary and fringe benefits offered for his job, assumes all normal risks inherent in his employment as a matter of law, and thus may not recover from one who negligently creates such a risk. (See, e.g., ***Maltman*** [,*supra*].)
>
> The fallacy in this argument is simply that it proves too much. Under this analysis, an employee would routinely be barred from bringing a tort action whenever an injury he suffers at the hands of a negligent tortfeasor could be characterized as a normal inherent risk of his employment. Yet, as noted above, past California cases have regularly permitted highway workers -- whose jobs obviously subject them to the 'inherent risk' of being injured by a negligent driver -- to recover for damages inflicted by such third party negligence, and have permitted construction workers -- whose employment poses numerous risks of injury at the hands of another -- to recover tort damages for work-related injuries so long as the negligent tortfeasor is not their employer.
>
> As these and countless other cases demonstrate, while policemen and firemen regularly face substantial hazards in the course of their employment and are, theoretically at least, compensated for such risks, a host of other employees -- highway repairmen, high rise construction workers, utility repairmen and the like -- frequently encounter comparable risks in performing their jobs and, again theoretically, also receive compensation for such risks.

Walters v. Sloan, 20 Cal. 3d 199, 212-13, 571 P.2d 609 (Acting C.J. Tobriner, dissenting) (1977) (some citations omitted). Both New Mexico and Oregon relied on this dissent in abolishing their firefighters' rules. ***Baldonado***, 143 N.M. at 304," ***Christensen***, 296 Or. at 620 & n.9.

Denying firefighters the right to redress for personal injuries, available to ordinary rescuers and to other professionals, is to deny them a right based on their class. ***Wills***, 829 P.2d at 408-09; ***Baldonado***, 143 N.M. at 303-04. As Oregon stated when striking down it's firefighters' rule:

> Contrast [firefighters] with other public employees who are injured when confronting dangers on their jobs. The latter can recover workers' compensation and salary benefits from the public, but are also allowed additional tort damages from the third-party tort-feasors. Under the "fireman's rule" the injured public safety officer must bear a loss which other public employees are not required to bear.

Christensen, 296 Or. at 620. As addressed below, denying firefighters the fundamental right to redress for personal injuries violates the equal protection clause. *Infra*, Argument § C 2.

In sum, the policies underlying Washington's PRD are outdated and unjust. This Court should abandon the doctrine and allow professional rescuers to seek recovery for those injuries caused by negligence encountered during the rescue.

C. Alternatively, this Court should strike down the PRD as constitutionally infirm.

If this Court declines to abandon the PRD as unnecessary and unjust, then it should strike down the doctrine as unconstitutional. The PRD singles out professional rescuers as a class, denying them those protections due to other rescuers and to other professionals. This plainly violates the equal protection clause.

1. Since the PRD burdens fundamental rights, this Court applies strict scrutiny.

Equal protection under the law, required by both the 14th Amendment to the U.S. Constitution and Article 1, Section 12 of the Washington State Constitution, requires that all similarly-situated persons receive like treatment. ***Am. Legion Post No. 149 v. Dep't of Health***, 164 Wn.2d 570, 608, 192 P.3d 306 (2008) (citing ***O'Hartigan v. State Dep't of Pers.***, 118 Wn.2d 111, 121, 821 P.2d 44 (1991) (quoting ***City of Cleburne v. Cleburne Living Ctr., Inc.***, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985))). The "equal protection clause is aimed at 'securing equality of treatment by prohibiting hostile discrimination.'" ***Am. Legion***, 164 Wn.2d at 608 (quoting ***Andersen v. King Cnty.***, 158 Wn.2d 1, 15, 138 P.3d 963 (2006)).

The level of scrutiny this Court applies in an equal-protection-clause-analysis depends on the classification of rights involved. 164 Wn.2d at 608. Strict scrutiny applies to suspect classifications and to laws burdening fundamental rights or liberties. *Id*. at 608-09. Intermediate scrutiny applies to laws burdening an "'important right and a semi-suspect class not accountable for its status.'" *Id*. (quoting ***Madison v. State***, 161 Wn.2d 85, 103, 163 P.3d 757 (2007) (quoting ***Pers. Restraint of Runyan***, 121 Wn.2d 432, 448, 853 P.2d 424 (1993))). Rational basis review applies when there is no suspect classification or fundamental right at issue. ***Am. Legion***, 164 Wn.2d at 609 (citing ***Andersen***, 158 Wn.2d at 18).

Since redress for personal injury is a fundamental right, this Court applies strict scrutiny review. 164 Wn.2d at 608-09. A "claim for personal injury [is] afforded the constitutional right of equal protection." ***John Doe v. Puget Sound Blood Ctr.***, 117 Wn.2d 772, 782, 819 P.2d 370 (1991) (citing ***Hunter v. N. Mason High Sch.***, 85 Wn.2d 810, 814, 539 P.2d 845 (1975)). This is so because "the right to be indemnified for personal injuries" is not only a substantial property right, but often is also "fundamental to the injured person's physical well-being and ability to continue to live a decent life." ***Hunter***, 85 Wn.2d at 814.

2. The PRD violates the equal protection clause by denying professional rescuers redress for personal injuries.

Under strict scrutiny review, this Court will uphold the PRD only if it is "necessary to accomplish a compelling state interest." ***State v. Schaaf***, 109 Wn.2d 1, 17, 743 P.2d 240 (1987). Where, as here, the complaining party demonstrates that strict scrutiny applies, then the burden shifts to the party defending the rule "to show the restrictions serve a compelling state interest and are the least restrictive means for achieving the government objective." ***First United Methodist Church v. Hearing Exam'r***, 129 Wn.2d 238, 246, 916 P.2d 374 (1996)). If there is no compelling state interest, then the restrictions are unconstitutional. *Id*.

There is no question that the PRD denies professional rescuers the right to be indemnified for personal injuries caused by negligence inherent in the rescue, while leaving that fundamental right in-tact for ordinary rescuers. ***Maltman***, 84 Wn.2d at 977-79. Professional rescuers are not just treated differently than ordinary rescuers – they are also treated differently than all professionals who regularly encounter danger on the job, but may nonetheless recover for injuries resulting from negligence. ***Baldonado***, 143 N.M. at 304; ***Christensen***, 296 Or. at 620 & n.9. Thus, the burden shifts to PUD

and OCEC to identify a compelling state interest in singling out professional rescuers from other rescuers, *and* from other professionals. ***First United Methodist Church,*** 129 Wn.2d at 246. There is none.

Indeed, no Washington case addressing the PRD even suggests that there is a compelling state interest in denying firefighters the same protections offered to ordinary rescuers and to other professionals who regularly encounter risk on the job. Oft-cited "policy" rationales for the firefighters' rule fall short. "1) To avoid placing too heavy a burden on premises owners to keep their premises safe from the unpredictable entrance of fire fighters; 2) To spread the risk of fire fighters' injuries to the public through workers' compensation, salary and fringe benefits; 3) To encourage the public to call for professional help and not rely on self-help in emergency situations; 4) To avoid increased litigation." ***Christensen***, 296 Or. at 619.

The first has no bearing in Washington, whose PRD is based on assumption of risk, not premises liability. Moreover, the premises owner owes firefighters no greater duty than they owe the public. Nor is a firefighter's entrance "unpredictable" – their "business" is to respond to fires and premises owners certainly want them to.

Nor does the PRD spread the risk of firefighter injuries to the public. By denying firefighters the right to recover from a negligent tortfeasor, the PRD does not shift the firefighter's recovery to the public at large, but completely precludes his recover altogether. ***Walters***, 20 Cal. 3d at 216 (Acting C.J. Tobriner, dissenting). While he may recover worker's compensation benefits from the public, other injured workers are entitled to recover worker's compensation *and* to obtain additional tort damages. 20 Cal. 3d at 216 (Acting C.J. Tobriner, dissenting). Thus, the PRD does not spread risk at all – it requires injured firefighters to shoulder a loss that others are not required to bear. *Id*.

This logic also ignores a risk-sharing factor typically at play – insurance. *Id*. Both commercial and residential policies often include coverage for negligent acts. *Id*. While hardly a "compelling" state interest, any desire to spread the single negligent tortfeasor's risk is amply handled by insurance policies spreading risk amongst the policy holders. *Id*.

In abolishing its firefighters' rule, Oregon correctly dismissed as "preposterous rubbish" the notion that the rule is necessary to encourage the public to seek help. ***Christensen***, 296 Or. at 620 (quoting Prosser, *Law of Torts* § 68 at 397). It strains credulity, at the

very least, to suggest that a negligent tortfeasor in the midst of an emergency pauses to think about his own potential liability, much less that he comprehends the PRD, so is compelled by it not to seek help he would have otherwise sought. This legal fiction cannot withstand strict scrutiny.

Finally, it cannot seriously be suggested that avoiding litigation is a compelling state interest. Washington courts exist to provide access to justice for those injured by violations of Washington law. Denying public servants that access to decrease litigation violates the very principals upon which access to justice rest.

In sum, the PRD plainly singles out professional rescuers as a class, denying them the fundamental right to seek redress for their personal injuries. This Court should strike down the PRD.

D. If this Court declines to abandon the PRD or strike it down as constitutionally infirm, then it should hold that gross negligence is an exception to the PRD.

If this Court declines to abandon the PRD as unnecessary and unjust, or to or strike it down as constitutionally infirm, then it should interpret the PRD to allow professional rescuers to seek redress for injuries caused by gross negligence. It is unreasonable and unjust to conclude that professional rescuers assume the risk of gross

negligence and are compensated sufficiently to protect them from the devastating injuries gross negligence can cause. The PRD, itself an exception to the rule that rescuers may recover, already has numerous exceptions. At the barest minimum, it is time for another.

1. Washington currently recognizes numerous exceptions to the PRD.

The PRD "does not bar a professional from recovering in all cases where he or she is injured in the line of duty," but has many exceptions. ***Loiland***, 1 Wn. App. 2d at 866. The PRD "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." 1 Wn. App. 2d at 866 (quoting ***Maltman***, 84 Wn.2d at 978 (quoting ***Jackson v. Velveray Corp.***, 82 N.J. Super. 469, 198 A.2d 115 (1964))). The PRD also does not bar recovery when a third-party intervenor injures the professional rescuer. *Id.* (citing ***Ballou***, 67 Wn. App. at 70; ***Ward***, 52 Wn. App. at 287; ***Sutton v. Shufelberger***, 31 Wn. App. 579, 588, 643 P.2d 920 (1982)). Nor does the doctrine apply to intentional acts. ***Beaupre***, 161 Wn.2d at 573.

In ***Sutton***, for example, a police officer was struck by a passing car after dismounting his motorcycle during a traffic stop. 31

Wn. App. at 580. When Sutton sued the driver for his injuries, the driver asserted that the PRD barred Sutton's claim, arguing that the risk of being hit by a passing car during a traffic stop was "inherent in [Sutton's] work." 31 Wn. App. at 587. Rejecting that argument, the appellate court held that the PRD did not apply "to forgive negligent or intentional injury to the official by an intervenor." *Id*. at 588.

In ***Ward***, a police officer sustained injuries when a car hit her patrol car when she was *en route* to a prowler assist call. 52 Wn. App. at 281. Refusing to apply the PRD to bar her recovery, the appellate court held that the risk of the collision was not inherent in responding to the call. 52 Wn. App. at 287. The court reasoned that the PRD "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*.

In ***Ballou***, two police officers responded to a call from hotel employees who feared that two intoxicated patrons, David Nelson and Ronald Pearsall, posed a safety risk to others in the hotel. 67 Wn. App. at 68. As the officers attempted to peacefully remove them from the hotel, Nelson and Pearsall assaulted them. 67 Wn. App. at 68-69. One officer acknowledged he always anticipates a physical altercation when attempting to remove an intoxicated person from a

bar. *Id*. at 69. Yet the appellate court held that the PRD did not bar the officers' suit against Nelson and Pearsall, reasoning that "the officers were not injured by the defendants' *negligence*; rather, they were injured by the defendants' criminal assaults." *Id*. at 73-74.

Citing ***Sutton***, ***Ward***, and ***Ballou*** with approval, the Washington Supreme Court held that the PRD does not apply when the rescuer is injured by the negligence of other rescuers responding to the scene. ***Beaupre***, 161 Wn.2d at 573-75. There, Pierce County police sergeant Curtis Beaupre and several other officers blocked Interstate 5, deployed spike strips, and attempted other intervention techniques to stop a domestic-violence suspect driving the wrong direction. 161 Wn.2d at 570. Beaupre ran next to the suspect's car, gun drawn and pointed at the suspect, ordering him to stop. *Id*. A patrol car then struck Beaupre from behind, throwing him into the air and in front of the suspect's moving car that struck him. *Id*.

Beaupre sued Pierce County, asserting that his fellow-officer's negligence caused his injuries. *Id*. at 571. The Washington Supreme Court held that the PRD did not bar Beaupre's claim, reasoning that the fellow officer was an intervenor who was not responsible for bringing Beaupre to the scene. *Id*. at 575.

2. Many other jurisdictions basing their PRD on assumption of risk (as in Washington) recognize exceptions for gross negligence and/or willful, wanton, or reckless conduct.

Many more states whose PRD is premised on assumption of risk have enacted exceptions for gross negligence, or willful, wanton, or reckless conduct. In Louisiana, for example, professional rescuers may recover for injuries caused by risks independent of those they assumed, injuries caused by "particularly blameworthy conduct," and injuries caused by "gross or wanton negligence." ***Meunier v. Pizzo***, 696 So. 2d 610, 613 (La. Ct. App. 1997); ***Sayes v. Pilgrim Manor Nursing Home, Inc.***, 536 So. 2d 705, 711 (La. Ct. App. 1988) (quoting Zimmerman, Richard D., *Negligence Actions by Police Officers and Firefighters: A Need for a Professional Rescuers Rule*, 66 CAL. L. REV. 585, 598-602 (1978)).

Virginia too always excepted from its firefighters' rule (also premised on assumption of risk) negligence creating an "undue risk," and willful and wanton conduct. ***Benefiel v. Walker & Nationwide Ins.***, ***Co.***, 25 Va. Cir. 130, 131-32 (1991). Although Virginia's Legislature has not abrogated its firefighters' rule entirely, in 2001 it adopted a statute providing: (1) that owners and occupiers of premises normally open to the public owe firefighters a duty to

maintain those premises in a reasonably safe condition; and (2) that owners and occupiers of premises not normally open to the public "owe the same duty to firefighters … who he knows or has reason to know are upon, about to come upon or, imminently likely to come upon that portion of the premises not normally open to the public." VA. CODE ANN. § 8.01-226.

In ***Lambert v. Shaefer***, Missouri's highest court identified the following exceptions to the firefighters' rule: "(1) acts involving reckless or wanton negligence or willful conduct; (2) separate and independent acts; and (3) intentional torts." 839 S.W.2d 27, 29 (Mo. Ct. App. 1992), *as amended* (citing ***Anderson v. Cinnamon***, 365 Mo. 304, 307, 282 S.W.2d 445 (Mo. banc 1955)). There, the firefighters' rule provides that a "'fireman brought in contact with an emergency situation solely by reason of his status as a fireman who is injured while performing fireman's duties may not recover against the person whose ordinary negligence created the emergency.'" ***Lambert***, 839 S.W.2d at 28 (quoting ***Krause v. U.S. Truck Co., Inc.***, 787 S.W.2d 708, 711 (Mo. banc 1990)).

Florida, Indiana, Maryland, and New Hampshire, all refuse to apply the firefighters' rule to willful or wanton negligence. ***Rishel v. E. Airlines Inc.***, 466 So. 2d 1136, 1138 (Fla. Ct. App. 1985); ***Fox v.***

Hawkins, 594 N.E.2d 493, 498 (Ind. Ct. App. 1992); ***Flood v. Attsgood Realty Co.***, 92 Md. App. 520, 526-27, 608 A.2d 1297 (Ct. Spec. App. 1992); ***Migdal v. Stamp***, 132 N.H. 171, 175-76, 564 A.2d 826 (1989) (also recognizing an exception for positive acts of misconduct); *see also* ***Wilde v. Gilland***, 189 Mich. App. 553, 555-56, 473 N.W.2d 718 (1991) (declining to apply the rule to willful or wanton conduct related to resisting arrest). In Tennessee and Texas, the rule does not apply to reckless, malicious, or intentional conduct. ***Carson v. Headrick***, 900 S.W.2d 685, 690-91 (Tenn. 1995); ***Juhl v. Airington***, 936 S.W.2d 640, 648 (Tex. 1996). Minnesota recognizes an exception for active negligence occurring after the firefighter arrives at the scene. ***Lang v. Glusica***, 393 N.W.2d 181, 183 (Minn. 1986). Nevada similarly carves out willful acts and negligent acts occurring after the person who caused the injury knew or should have known the firefighter had arrived at the scene. NEV. REV. STAT. ANN. § 41.139. California goes further, carving out negligence occurring after the firefighter arrives at the scene, negligence violating a statute, and negligence independent of the reason the firefighter was called to the scene. CAL. CIVIL CODE § 1714.9; ***Terhell v. Am. Commonwealth Assocs.***, 172 Cal. App. 3d 434, 441, 218

Cal. Rptr. 256 (1985) (firefighter fell through an unguarded hole in the roof while fighting the fire).[4]

3. This Court should hold that the PRD does not bar redress for injuries caused by gross negligence.

As addressed above, there is no sound reason for denying professional rescuers the same rights and remedies afforded to ordinary rescuers and to other professionals who regularly encounter risk on the job. Professional rescuers assume the same risks as ordinary rescuers, but are currently denied recovery. Professional rescuers encounter risk as part of their profession, like many other professionals, but are currently denied recovery.

Assuming arguendo that this obvious inequity passes constitutional muster, then at the barest minimum it demands an exception for gross negligence. It is unreasonable and unjust to conclude that professional rescuers assume the risk of gross

[4] Few if any states, including those addressed above, allow the firefighters' rule to bar claims for injuries based on intentional acts. ***Diaz v. Salazar***, 924 F. Supp. 1088, 1100 (D.N.M. 1996); ***Alvarado v. United States***, 798 F. Supp. 84, 87 (D.P.R. 1992); ***Bates v. McKeon***, 650 F. Supp. 476, 480 (D. Conn. 1986); ***Gibb v. Stetson***, 199 Cal. App. 3d 1008, 1014, 245 Cal. Rptr. 283 (1988); ***Carpenter v. O'Day***, 562 A.2d 595, 601-02 (Del. Super. Ct. 1988); ***Rennenger v. Pacesetter Co.***, 558 N.W.2d 419, 421 (Iowa 1997); ***State Farm Mut. Auto. Ins. Co. v. Hill***, 139 Md. App. 308, 327, 775 A.2d 476 (Ct. Sp. App. 2001); ***Wilde*** 189 Mich. App. at 555-56; ***Lambert***, 839 S.W.2d at 29-30.

negligence and that they are compensated sufficiently to assume the risk of devastating injury gross negligence can cause.

In sum, the PRD is outdated and unjust. If this Court does not see fit to abandon it or to strike it down, then it should interpret it to allow recovery for injuries caused by gross negligence.

CONCLUSION

The PRD singles out professional rescuers as a class, denying them the right to recover for personal injuries sustained on the job, on the theory that they are paid to encounter risk. But they encounter no more risk than ordinary rescuers and are paid no more than many who also encounter risk in their professions. The PRD simply cannot be reconciled with modern tort law, nor with the equal protection clause.

This Court should abandon the PRD or strike it down. If the Court declines to do so, then it should interpret the PRD to allow claims from gross negligence. Either way, this Court should reverse and remand for trial.

RESPECTFULLY SUBMITTED this 15th day of July 2019.

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CERTIFICATE OF SERVICE

I certify that I caused to be filed and served a copy of the foregoing **BRIEF OF APPELLANT** on the 15th day of July 2019 as follows:

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Subject:	RE: Markoff, et al. v. PSE, et al.
Date:	Tuesday, November 12, 2019 8:21:31 AM
Attachments:	image001.png

Received 11-8-19.

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Subject: Markoff, et al. v. PSE, et al.

Clerk of the Court,

Please see attached courtesy copy of Plaintiffs' Petition for Review filed with the Court today. The e-filing portal is currently down so this was filed in-person.

Thank you,
Sarah

From: Sarah Awes
Sent: Wednesday, June 13, 2018 3:54 PM
To: Wojcik, Matt <matt.wojcik@bullivant.com>; Brauchli, Holly <holly.brauchli@bullivant.com>; Dennis Woods <DWoods@scheerlaw.com>; Andrew G. Tingkang <ATingkang@scheerlaw.com>; Mark A. Wilner <mwilner@gordontilden.com>; Jeffrey M. Thomas <jthomas@gordontilden.com>; Mark Scheer <MScheer@scheerlaw.com>; Waters, Veronica <veronica.waters@bullivant.com>
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Subject: Markoff, et al. v. PSE, et al.

Counsel,

Please see attached Appellant's Opening Brief.

Thank you,
Sarah

This message and the documents attached to it, if any, contains confidential information from PFAU COCHRAN VERTETIS AMALA PLLC and is intended only for the use of the addressee and may contain

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From: Sarah Awes
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Subject: Markoff, et al. v. PSE, et al.

Counsel,

Please see attached Notice of Appeal.

Thank you,
Sarah

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