

NO. 35829-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

JILL DOTY-FIELDING,

Plaintiff/Appellant.

vs.

TOWN OF SOUTH PRAIRIE,

Defendant/Respondent.

FILED
COURT OF APPEALS
DIVISION II
07 JUL 13 11:11 AM
STATE OF WASHINGTON
BY [Signature]

APPELLANT JILL DOTY-FIELDING'S REPLY BRIEF

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A. INTRODUCTION

Plaintiff contends that the issue presented in this appeal is what duty of care was owed to Ms. Doty. That is not the central question before this court. The correct question is whether volunteer fire fighters, and Ms. Doty, are covered under the Washington Industrial Safety and Health Act (WISHA). The determination of the standard of care owed to Ms. Doty would therefore be determined by the requirements of WISHA, not by analogous statutory authority or Washington premises liability case law.

B. SUMMARY OF ARGUMENT

Contrary to the Town’s argument, WISHA, RCW Title 49.17 *et seq.*, includes volunteers within its definition of an “employee.”

The definition of “employee” under WISHA is not vague or unclear so there is no reason to look to other statutes.

“Employee,” as defined by Title VII, FLSA or the Washington Minimum Wage Act, are irreconcilable and the court need look no further than the definition of an employee under WISHA to determine whether a volunteer is covered.

WISHA requires that each employer provide a work environment that is as safe as reasonably possible to all workers, including volunteer fire fighters.

The Town’s reliance on premises liability case law to establish the

duty owed to Ms. Doty is misplaced because this is not a premises liability case and Ms. Doty is not suing the landowner, she is suing her employer. Assuming arguendo that premises liability law establishes the duty owed to Ms. Doty, as a licensee or invitee, she was entitled to reasonable care.

The Town fails meet its burden of proof that Ms. Doty assumed the risk of her injury. The rescue doctrine is inapplicable to the facts of this case because Ms. Doty is not a professional fire fighter and she is not suing a negligent rescued party for her injury, she is suing her employer. The law of the case doctrine does not mean that Ms. Doty's status as a volunteer establishes that she voluntarily assumed the risk. The Town fails to prove that Ms. Doty knew of the risk of her injury. Last, proof of the mechanism of Ms. Doty's injury is not proof that she assumed the risk.

The fellow servant doctrine is inapplicable because the pump operator and the fire fighters who trained Ms. Doty were her vice principals, not her fellow servants.

C. ARGUMENT

1. WISHA's definition of an "employee" includes volunteers within its scope.

The Town argues that because Ms. Doty is a volunteer under the Industrial Insurance Act, she cannot under any circumstances be an employee. *See* Town's Response at 5. That is incorrect. Ms. Doty was,

and is, a volunteer as defined by the Industrial Insurance Act. Nevertheless, WISHA, true to its stated purpose of providing “safe and healthful working conditions for every man and woman working in the state of Washington,” adopted the broadest possible definition of “employee.” The only type of worker defined by WISHA is an employee. There are no separate definitions or exclusions for volunteers, independent contractors, day laborers, part-time workers, or any other category of worker because **all** of these persons fall within the definition of an “employee.” Therefore, as a volunteer, Ms. Doty is included within the definition of an “employee” under WISHA.

2. The definition of an “employee” under WISHA is not vague or unclear, so there is no reason to look to other statutes for assistance in its interpretation.

The Town urges this court to apply the definition of an employee as it is defined under Title VII, the Fair Labor Standards Act (FLSA) or the Washington Minimum Wage Act, to WISHA. *Id.* at 7-9. As defined under these statutes, a volunteer like Ms. Doty would not be classified as an “employee.” The Town does not argue that the definition of an “employee” under WISHA does not include volunteers, nor does the Town explain why the definition of an “employee” under WISHA is vague or unclear such that it would require looking to other statutes for

assistance in its interpretation. Absent a showing that an “employee” under WISHA is not defined or its definition is vague or unclear, there is no reason to look at the definitions of an “employee” under Title VII, FLSA or the Washington Minimum Wage Act. *Am. Discount Corp. v. Shepard*, 160 Wn.2d 93, 98, 156 P.3d 858 (2007) (if a statute is unambiguous, its meaning should be determined solely from its language). The definition of an employee under the plain language of WISHA, RCW 49.17.020(5), is well-defined and clearly includes volunteers like Ms. Doty.

3. **The definitions of an “employee” under Title VII, FLSA and the Washington Minimum Wage Act are irreconcilable with the definition of an “employee” under WISHA.**
 - a. **The definition of an employee under Title VII is inapplicable to Ms. Doty.**

The Town’s argument that the definition of an employee under Title VII is determinative of the definition of an employee under WISHA is not persuasive. The Town cites the definition of an employee as defined in *O’Connor v. Davis*, 126 F.3d 112 (2nd Cir. 1997) as proof that the definition of an employee under WISHA does not include volunteers. *See* Town’s Response at 7. In *O’Connor*, the court stated:

The definition of the term “employee” provided in Title VII is circular: the Act states only that an “employee” is an “individual employed by an

“employer.” 42 U.S.C. § 2000e(f). However, it is well established that when Congress uses the term “employee” without defining it with precision, courts should presume that Congress had in mind “the conventional master-servant relationship.”

O’Connor, 126 F.3d at 115.

Unlike Title VII, the definition of an employee under WISHA is well-defined and not circular. WISHA defines an employee as one who is:

An employee of an employer who is employed in the business of his employer whether by way of manual labor or otherwise and every person in this state who is engaged in the employment of or who is working under an independent contract the essence of which is his personal labor for an employer under this chapter whether by way of manual labor or otherwise.

RCW 49.17.020(5).

Nor does the definition of an “employer” under Title VII change this determination. The Town cites *Graves v. Women’s Professional Rodeo Ass’n, Inc.*, 907 F.2d 71 (8th Cir. 1990) for the proposition that the Town cannot be Ms. Doty’s employer because it did not compensate her for her services. *See* Town’s Response at 7. Under Title VII, an employer is defined as:

A person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the

current or preceding calendar year, and any agent of such a person.

42 U.S.C. § 2000e(b).

Under WISHA, an employer is:

Any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees or who contracts with one or more persons, the essence of which is the personal labor of such person or persons and includes the state, counties, cities, and all municipal corporations, public corporations, political subdivisions of the state, and charitable organizations.

RCW 49.17.020(4).

In comparing these definitions of an “employer,” it is clear that they were never intended to be synonymous. The definition of an “employer” under WISHA is decidedly more broad and inclusive. Therefore, the Town’s argument that the definition of an “employer” under Title VII supports its proposition that it cannot be considered Ms. Doty’s “employer” under WISHA, fails.

In conclusion, the definition of an “employee” under Title VII is inapplicable to the definition of an “employee” under WISHA because WISHA’s definition of an employee is well-defined and not

circular. Further, the definitions of an “employer” under Title VII and WISHA are incompatible and do not support the Town’s contention that Title VII’s definition of an employer establishes the scope of coverage of WISHA.

b. The definition of an employee under FLSA is inapplicable to Ms. Doty.

The definition of employee under FLSA is inapplicable to the definition of an employee under WISHA because FLSA specifically excludes certain classes of volunteers. Under 29 U.S.C. § 203(e)(1), an employee is defined in part:

(4) (A) The term "employee" does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if—

(i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and

....

(5) The term "employee" does not include individuals who volunteer their services solely for humanitarian purposes to private non-profit food banks and who receive from the food banks groceries.

29 U.S.C. § 203 (emphasis added).

Though the definition of an employee under 29 U.S.C. § 203

is inapposite to the definition under WISHA, it is nonetheless instructive. Under FLSA, certain classes of volunteers are excluded from coverage. Similarly, had the Washington state legislature intended to exclude volunteers from its definition of employees under WISHA, it could certainly have done so. The fact that WISHA contains no exclusions for volunteers within its definition of an employee leads to the conclusion that unlike FLSA, volunteers are employees under WISHA.

- c. **The definition of an “employee” under the Minimum Wage Act, RCW 49.46 *et seq.*, is not analogous to the definition of an employee under WISHA.**

It is axiomatic that the definition of an “employee” under the Minimum Wage Act will not include volunteers. Therefore, the Town’s contention that the definition of an “employee” under RCW 49.46.010(5) should dictate the scope of coverage of WISHA is not persuasive. Further, RCW 49.46.010(5) contains no fewer than fourteen specific exclusions regarding who may be considered an “employee” under the Act. As with the discussion of the applicability of the definition of an “employee” under FLSA, *supra*, had the state legislature intended to exclude volunteers from the

definition of an “employee” under WISHA, it could have done so. The fact that it did not leads to the conclusion that volunteers were intended to be included within the scope of WISHA’s definition of an “employee.”

In conclusion, Title VII, FLSA and the Washington Minimum Wage Act have all created specific definitions of an employee based on the scope of persons intended to be covered by the statute. Rather than supporting the Town’s assertion that these alternate definitions are instructive regarding the intended scope of coverage of WISHA, they in fact support the proposition that the sole determinant of whether a volunteer is defined as an “employee” under WISHA is the plain language of the statute. Here, the plain language of the statute clearly demonstrates that volunteers are “employees” for purposes of WISHA.

4. WISHA requires that an employer provide a safe work environment, to the extent possible.

WISHA requires that an employer provide a safe work environment “insofar as may reasonably be possible.” RCW 49.17.010. This directive is echoed by WAC 296-305-01513(1) which requires that an employer of fire fighters “shall do everything

reasonably necessary to protect the safety and health of [its] employees.” Neither WISHA nor the WAC requires that the scene of a fire be absolutely safe, only that it be as safe as reasonably possible.

These statutory provisions are entirely consistent with the statement of Harry Doty, as quoted by the Town. *See* Town’s Brief at 9. The Town was not obligated to make the scene of the fire “completely” safe, just as reasonably safe as possible. Therefore, the dictates of WISHA regarding a safe work environment are not antithetical to the inclusion of volunteer fire fighters within the coverage of WISHA.

5. The Town’s reliance on premises liability case law to establish the duty it owes to Ms. Doty is misplaced.

The Town concedes that premises liability case law has no precedential value with respect to the present case, but nonetheless contends that these cases can be “instructive.” This contention is incorrect. First, premises liability cases address the duty a landowner owes to a volunteer on the owner’s property. In the present case, Ms. Doty has filed suit against her employer, not the

owner of the land on which she was injured. Further, the Town offers no explanation as to why it should be entitled to the same duty of care that a landowner, with absolutely no relationship to the volunteer fire fighters, would presumably owe. The Town and the landowner's relationship to volunteer fire fighters are facially distinguishable.

Second, one of the cases cited by the Town as support for its contention that its duty to Ms. Doty was to avoid willful and wanton conduct, states that a volunteer is owed the same duty as that owed to a trespasser. *Geer v. Sound Transfer Co.*, 88 Wash. 1, 4, 152 P. 691 (1915). Ms. Doty does not believe that the Town's argument that a volunteer fire fighter is analogous to a trespasser, to whom the duty is to avoid only willful and wanton conduct, is well taken.

Third, assuming arguendo that premises liability case law is instructive regarding the duty the Town owed to Ms. Doty, this court should hold that Ms. Doty is most appropriately classified as an invitee or a licensee, and therefore owed the duty of reasonable care. Washington has adopted the definitions of, and duties owed to, licensees and invitees from the Restatement (Second) of Torts §§

342 and 343 (1965). *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 50, 914 P.2d 728 (1996) (adopting § 343); *Memel v. Reimer*, 85 Wn.2d 685, 689, 538 P.2d 517 (1975) (adopting § 342).

An invitee is defined as one who is invited to enter land for a purpose directly or indirectly connected with business dealings with the occupier of the land. Restatement (Second) of Torts § 332 (1965). A landowner owes an invitee the duty to warn of a dangerous condition that is known, or through the exercise of reasonable care, would be known, to the landowner. Restatement (Second) of Torts § 343 (1965).

A licensee is defined as one who is privileged to enter or remain on land only by virtue of the possessor's consent. Restatement (Second) of Torts § 330 (1965). A landowner owes a licensee the duty to warn of a dangerous condition that is known, or through the exercise of reasonable care, would be known, to the landowner. Restatement (Second) of Torts § 342 (1965).

As a volunteer fire fighter, Ms. Doty was a licensee because she was licensed to enter a person's property in response to an emergency call from the Town. As a volunteer firefighter, Ms. Doty

was also an invitee because she was invited by the Town to respond to an emergency call. In either case, the Town owed Ms. Doty the duty to exercise reasonable care to make certain that she was aware of any dangerous condition that was known, or could have been known, to the Town. Here, the Town knew, or would have known through the exercise of reasonable care, of the risk that an over pressurized hose might cause an injury to one of the fire fighters unless that individual was trained to properly handle an over pressurized hose. By failing to train Ms. Doty what to do in the event of an over pressurized hose, the Town failed to exercise reasonable care.

Washington premises liability case law does not establish the duty an employer owes to its workers. Ms. Doty is suing the Town, not the landowner. Ms. Doty's status as a volunteer is not analogous to a trespasser. Assuming arguendo that premises liability case law is analogous to the case at bar, Ms. Doty is more accurately defined as an invitee or licensee, and the Town would therefore owe her the duty of reasonable care.

6. The Town’s argument that Doty assumed the risk of her injury fails as a matter of law.

Assumption of risk is an affirmative defense. *See* WPI 13.03. Therefore, the Town has the burden of proving all elements of its defense by a preponderance of the evidence. *Id.* Only if the Town has successfully proven every element of assumption of risk, does the burden of proof switch to Ms. Doty to show that there is a genuine issue of material fact. Ms. Doty’s acceptance of the risk is **not voluntary** if she is left with no reasonable alternative course of conduct to avoid the harm because of the Town’s negligence. *Id.* (Emphasis added).

To prove assumption of risk, the Town must show Ms. Doty (1) had knowledge of the risk; (2) appreciated it and understand its nature; and (3) voluntarily chose to incur it. *Home v. North Kitsap School Dist.*, 92 Wn. App. 709, 720, 965 P.2d 1112 (1998). “Knowledge and voluntariness are questions of fact for the jury, unless reasonable minds would not differ.” *Id.*

a. The Rescue Doctrine is not applicable to the facts of this case.

The Town’s suggestion that this court should apply the rescue doctrine to the facts of this case is not persuasive. The rescue

doctrine provides damages recovery for a voluntary rescuer who is injured while saving a person who has negligently placed himself or herself in a position of “imminent harm.” *Maltman v. Sauer*, 84 Wn.2d 975, 976-77, 530 P.2d 254 (1975). Under the rescue doctrine, a professional rescuer assumes some of the risks that a voluntary rescuer does not, limiting or preventing the professional rescuer’s damages recovery in certain circumstances. The Town’s contention appears to be that Ms. Doty’s ability to recover damages should be limited under the same rules that apply to professional fire fighters. This argument fails for the following reasons.

First, the Town’s central argument throughout its motion for summary judgment and this appeal has been that Ms. Doty may not recover for her injuries from the Town because she is a volunteer fire fighter and therefore not entitled to the same remedies as a professional fire fighter. The Town cannot argue that Ms. Doty’s volunteer status restricts her ability to recover for the Town’s negligence, but then argue that under the rescue doctrine she should be held to the same standard as a professional fire fighter, effectively precluding her right to recover.

Second, even for professional rescuers recovery is still permitted where the injury to the rescuer is caused by a harm that is not reasonably anticipated or known. *Id.* at 978. As the court in *Maltman* stated:

It is contemplated that a [professional] fireman in the performance of his duty shall endeavor to extinguish fires however caused and encounter those risks and hazards which are ordinarily incidental to such an undertaking and which may be reasonably expected to exist in the situation in which he places himself. *It does not follow that a [professional] 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.*

Id. (emphasis in original).

Finally, the rescue doctrine permits recovery for a professional or volunteer rescuer from the person whose negligence necessitated the rescue. In the present case, the Town's liability is based on its failure to properly train Ms. Doty, not on its having been rescued as a result of its own negligence. For this reason, the rescue doctrine is inapplicable.

The Town's argument that the rescue doctrine bars Ms. Doty's recovery is inconsistent with its contention that Ms. Doty is a

volunteer, not a professional fire fighter. All fire fighters may recover for dangerous conditions that are not reasonably anticipated or foreseen. The Town's liability is based on its failure to provide a safe work environment, not on its negligence necessitating its rescue. Therefore, this court should hold that the rescue doctrine does not bar Ms. Doty's right to recovery for the Town's negligence.

b. The law of the case doctrine does not establish that Ms. Doty voluntarily assumed the risk of her injury.

The Town conflates Ms. Doty's status as a volunteer under the Industrial Insurance Act (IIA) with the legal conclusion that she voluntarily assumed the risk of her injury. The law of the case doctrine states that once there is an appellate decision that makes a determination on a principle of law, that decision will be followed in later stages of the same litigation. *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). In *Doty v. Town of S. Prairie*, 155 Wn.2d 527, 547, 120 P.3d 941 (2005), the Supreme Court held that Ms. Doty met the definition of a "volunteer" under the IIA. Therefore, under the law of the case doctrine, in all subsequent litigation Ms. Doty is precluded from arguing that she is not a volunteer under the IIA.

Contrary to the Town's assertion, the law of the case doctrine does not stand for the proposition that Ms. Doty's status as a volunteer fire fighter establishes that she voluntarily assumed the risk of her injury. Nor does the Supreme Court's holding in *Doty* establish any of the elements the Town must show in order to prevail on its assumption of risk defense. Even where an individual participates in an activity that entails a degree of risk, that individual does not, as a matter of law, assume the risk for harms not known or voluntarily encountered. *Alston v. Blythe*, 88 Wn. App. 26, 34, 943 P.2d 692 (1997). Ms. Doty volunteered to fight the fire. Her volunteer employment status does not mean that she voluntarily waived the Town's duty to properly train her.

c. The Town presents no evidence that Ms. Doty knew of the risk that hitting the bale with her open hand might cause her injury.

The Town presents no proof that Ms. Doty knew of the specific risk of injury to her hand when she attempted to close the nozzle of the over pressurized hose by slapping the bale with her open hand. The test of whether a plaintiff knowingly assumes a risk is:

Whether the plaintiff in fact understood the risk; not whether the reasonable person of ordinary prudence would comprehend the risk. The plaintiff must “be aware of more than just the generalized risk of his or her activities; there must be proof he or she knew of and appreciated the specific hazard which caused the injury.” And a plaintiff, “appreciates a specific hazard” or risk only if he or she actually and subjectively knows all facts that a reasonable person in the defendant’s shoes would know and disclose, or, concomitantly, all facts that a reasonable person in the plaintiff’s shoes would want to know and consider when making the decision at issue.

Home, 92 Wn. App. at 720-721. Generally, knowledge and voluntariness are questions of fact for the jury, unless reasonable minds could not differ. *Home*, 92 Wn. App. at 720; *Alston*, 88 Wn. App. at 34.

The Town provides the testimony of Daryl Flood to establish that he told “many people” that shutting the nozzle quickly could damage the equipment. *See* Town’s Response at 15. Mr. Flood did not testify that he gave that specific instruction to Ms. Doty. Further, Mr. Flood testified that he told people to shut the nozzle slowly so as to avoid damaging the equipment, not because it might cause injury. CP 38-39. This testimony does not establish that Ms. Doty “knew of and appreciated the specific hazard” that she might

injure her hand if she shut the bale of an over pressurized hose too quickly.

The Town's contention that a "reasonable person of 'ordinary prudence'" would know that striking the bale with an open hand could cause injury is also not relevant to the question of whether Ms. Doty knowingly assumed the risk of her injury. The correct test is whether Ms. Doty knew, understood and appreciated the risk. *Home*, 92 Wn. App. at 720-721. Nor is Ms. Doty's prior fire fighting experience determinative because Ms. Doty testified that this was the first time that she was unable to shut the bale of the hose simply by pushing on it with her fist. CP 74.

Thus, the Town has provided no proof that Ms. Doty knew of the risk that she could be injured if she struck the bale with her open hand. Mr. Flood's testimony does not establish that Ms. Doty was specifically instructed not to close the bale quickly. Further, the Town has presented no evidence that even if Ms. Doty was instructed not to close the bale quickly, the reason was that shutting the bale quickly could cause damage to the equipment **and** personal injury. The proper test of a plaintiff's knowledge is subjective and is

not based on what a reasonable person of ordinary prudence would understand. Finally, Ms. Doty's fire fighting experience is not determinative because she had never had to deal with an over pressurized hose prior to the date of her injury.

d. The mechanism of Ms. Doty's injury is not proof that she assumed the risk.

The Town argues that the mechanism of Ms. Doty's injury, slapping the bale with her open hand, requires that Ms. Doty present evidence that she did not know that hitting the bale would cause her injury. *See* Town's Response at 17.

The Town has presented no evidence demonstrating that Ms. Doty knew the correct method to shut the bale of an over pressurized hose, that she understood and appreciated that slapping the bale with her open hand could lead to injury, or that she voluntarily chose to slap the bale of the nozzle knowing that she might be injured. In fact, all of the evidence is to the contrary. Ms. Doty stated that she had never been in a situation where she could not close the nozzle by applying pressure with her fist. CP 74. Though Mr. Flood testified that he had informed "many people" not to hit the bale to close the nozzle, he did not say that he had specifically told that to Ms. Doty.

CP 38-39. Further, his instruction not to hit the bale to close the nozzle was given to prevent damage to the equipment, not because it might cause injury to the person hitting the bale. *Id.*

The Town's contention that "ordinary common sense" would lead Ms. Doty to know that she could be injured by slapping the bale with her open hand is irrelevant. *See* Town's Response at 17-18. The correct test is whether Ms. Doty knew of the risk of injury if she hit the bale with an open hand, not would a person of ordinary common sense know. *Home*, 92 Wn. App. at 720-721.

Assumption of risk is an affirmative defense. *Ang v. Martin*, 154 Wn.2d 477, 488, 114 P.3d 637 (2005). Defendant must prove by a preponderance of the evidence all of the elements of its defense. *Id.* The Town has offered no explanation of why it believes the burden of proof is shifted to the plaintiff to present evidence "that the only way to close the bale was by slapping it with her open hand." *See* Town's Response at 17. Even if the Town had met its burden of proof on all the elements of assumption of risk, Ms. Doty overcomes the Town's defense merely by pointing out that she had no reasonable alternative but to slap the bale of the fire hose nozzle

in order to close it. CP 70-71; *see* WPI 13.03.

In conclusion, because the Town failed to prove a single element of its affirmative defense of assumption of risk, its argument that Ms. Doty assumed the risk of her injury fails as a matter of law.

7. The fellow servant doctrine is inapplicable to the facts of this case.

The fellow servant rule, as stated in the Town's brief, "generally provides non-liability for an employer whose employee, while acting within the scope of his employment, is injured by the actions of a fellow servant." Citing *Garcia v. Brulotte*, 25 Wn. App. 818, 820, 609 P.2d 976 (1980). The Supreme Court has noted that the fellow servant rule is not popular with courts because its proscription against claims is too broad and bars too many plaintiffs from recovery. *Buss v. Wachsmith*, 190 Wash. 673, 678, 70 P.2d 417 (1937). For that reason, the Supreme Court has created an exception to the fellow servant rule permitting recovery where the workers are vice principals to each other, not fellow servants.

Workers are vice principals to each other, not fellow servants, where the master has given to the party causing the injury exclusive control of the means by which the injury was caused to the plaintiff

and the plaintiff had no voice in directing the defendant. *Id.* at 679.

Though it is true that Ms. Doty instructed the pump operator when to turn on the water, the mechanism for controlling the pressure and flow of the water was in the sole control of the pump operator. Therefore, Ms. Doty and the pump operator are vice principals to each other, not fellow servants, and Ms. Doty's claim is not barred by the fellow servant doctrine.

The Town also argues that under the fellow servant doctrine, it cannot be held liable for the failure of its staff to properly train Ms. Doty. It is a question of fact whether the Town gave complete control of the method and substance of Ms. Doty's training to its agents, other fire fighters. If the Town exercised no control over Ms. Doty's training, and did not dictate how or when that training was given, the trainers and Ms. Doty were vice principals to each other, not fellow servants.

Therefore, because the Town exercised no control over the pump operator or the fire fighters who trained Ms. Doty, Ms. Doty and the pump operator and the fire fighters are vice principals, not fellow servants and the fellow servant doctrine does not bar her

claims.

D. CONCLUSION

The definition of an “employee” under WISHA includes volunteers, including Ms. Doty. The Town had a duty to provide Ms. Doty with a safe working environment, to the extent possible. The Town owed Ms. Doty the duty of reasonable care, not the duty to simply avoid willful and wanton conduct. Ms. Doty did not assume the risk of her injuries merely because she is a volunteer fire fighter. The fellow servant doctrine is inapplicable to the facts of this case and Ms. Doty and the other fire fighters were vice principals, not fellow servants.

RESPECTFULLY SUBMITTED this 12th day of July, 2007.

LEE, SMART, COOK, MARTIN &
PATTERSON, P.S., INC.

By: _____


John W. Schedler, WSBA No. 8563
Eric L. Lewis, WSBA No. 35021
Of Attorneys for Plaintiff/Appellant
Jill Doty-Fielding

DECLARATION OF SERVICE

I declare that on the date below, I served a copy the foregoing APPELLANT JILL DOTY-FIELDING REPLY BRIEF on each and every attorney of record herein:

VIA US MAIL

Michael B. Tierney, PC
2955 80th Ave. SE, Suite 205
Mercer Island, WA 98040

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

DATED this 12th day of July, 2007, in Seattle, Washington.



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