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Court of Appeals

Division III

Case No. 364534 (consolidated)

State of Washington

No. 364534

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

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DAVID SCHULZ, et al.,

Appellants,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF NATURAL RESOURCES,

Respondent

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APPELLANTS' REPLY BRIEF

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## I. INTRODUCTION

The narrow question presented by this appeal is whether the trial court erred in concluding DNR owed no duty as a landowner to take reasonable steps to prevent the fires from escaping DNR's land. This was the only issue presented by DNR's underlying motion to dismiss: "Does either the common law or RCW 76.04.016 create an actionable duty on DNR's part to the plaintiffs?" DNR's argument to the trial court was based entirely on its erroneous assertion that the Legislature had abrogated any such duty. The trial court adopted DNR's erroneous position and granted its motion for summary judgment.

However, on appeal, DNR has abandoned that argument. Contrary to the position it took in its summary judgment motion, DNR now acknowledges it has both a common law and a statutory duty as a landowner to take reasonable steps to prevent the spread of fire from its land:

The general duty of landowners to prevent the spread of fire from their lands is to exercise 'reasonable effort' and 'ordinary prudence' once they know of the existence of a fire on their land.

DNR Br. at 21-22.

... DNR here acknowledges its status as a landowner could implicate duties to adjoining landowners if, for example, it was aware of a fire on its land and failed to report it to fire suppression agencies.

DNR Br. at 48.

These concessions are fatal to DNR's position because the only basis for the trial court's grant of summary judgment was its erroneous holding that "defendant has no statutory or common law actionable duty to any of the plaintiffs, either in fire suppression responsibilities or as a landowner." CP 450. The trial court was so misled by DNR's underlying briefing that it concluded DNR, the largest landowner in Washington State, is not subject to any actionable duties "for anything related to fire." CP 452.

Having abandoned the original basis for its summary judgment motion, DNR's new argument on appeal is that the allegations of the damaged landowners fall outside any duty of care it owed as a landowner. As explained below, this argument is improper because it was not raised in DNR's underlying motion and was not considered by the trial court. The trial court even acknowledged as much and said DNR's motion would have been denied if made on those grounds because a jury would need to decide whether DNR acted negligently. A jury did not have an opportunity to consider DNR's arguments because the trial court adopted DNR's (now-abandoned) argument that it owes no duties as a landowner "for anything related to fire." The damaged landowners respectfully request the Court disregard DNR's belated argument on appeal, reverse the trial court's order in its entirety, and remand this case for further proceedings consistent with the Court's opinion.

## II. REPLY ARGUMENT

### A. The Only Issue Under Review is a Question of Law Over Whether DNR Owed Any Duties as a Landowner

The sole basis for DNR’s summary judgment motion was that it did not owe the damaged landowners an actionable duty as a matter of law:

### III. STATEMENT OF THE ISSUE

The following issue is presented for resolution by the court: Does either the common law or RCW 76.04.016 create an actionable duty on DNR’s part to the plaintiffs?

CP 32.

In its summary judgment motion, DNR recognized that the damaged landowners’ claims were premised on “DNR’s duty as an owner of forestland to prevent wildfires from spreading from its own land.” CP 30. DNR also acknowledged the Washington Supreme Court in *Oberg* previously held DNR was, in fact, subject to actionable duties as a landowner for negligently allowing fire to spread from its land. CP 37-38. DNR erroneously asserted, however, that the Legislature “overruled the entire basis upon which the *Oberg* Court found the existence of a duty” and, therefore, “eliminate[d] any duty to the plaintiffs in this case.” CP 38-39. DNR did not dispute whether the damaged landowners fell within the foreseeable scope of its duties as a landowner or whether the alleged acts of negligence exceeded its duty of care as a landowner. *See generally* CP 23-

40. The only basis for DNR's motion was its assertion that RCW 76.04.016 abolished any and all of its duties as a landowner. CP 38-39.

As reflected by its order, the trial court only considered the narrow question of law raised in DNR's motion about whether DNR owed any duty as a landowner: "[T]he question for this Court is whether an actionable duty was owed by the defendant to these plaintiffs." CP 449. The trial court acknowledged the issue presented by DNR's motion involved a threshold legal determination to which the factual allegations were irrelevant:

Both parties address the underlying facts to some degree; however, for purposes of this motion the Court need not consider what happened in terms of the fires starting and DNR's resulting efforts to put them out. Rather, whether a duty existed to individual landowners is a preliminary, threshold determination of law appropriate for summary judgement.

CP 449 (citing *Munich v. Skagit Emergency Comm'n Ctr.*, 175 Wn.2d 871, 288 P.3d 328 (2012)). The trial court stated DNR's motion would have been denied if it had moved for summary judgment on negligence because of genuine issues of material fact regarding whether DNR acted reasonably:

THE COURT: ... If summary judgment were based on breach of the duty, the court would clearly be denying it, because there are, I think, questions of fact. But today it's a very narrow question about duty and whether or not the duty exists. So I'm really not interested in the facts of the case except that there was a fire, okay? And what I want to focus in and really, and really bear in on is, is there a duty or not? And if so, why? And if not, why not?

RP 14:5-14 (10/11/2018).

The trial court went on to acknowledge that DNR was historically subject to statutory and common law duties as a landowner. CP 450 (citing *Oberg v. Dep't of Nat. Res.*, 114 Wn.2d 278, 289, 787 P.2d 918 (1990)). However, DNR's erroneous assertions that RCW 76.04.016 abrogated all of its duties as a landowner led the trial court to conclude the Legislature completely superseded "any duty owed by the DNR to individuals for anything related to fire." CP 452.

The damaged landowners sought review in this Court and specifically assigned error to the trial court's "threshold determination of law." As set forth in the damaged landowners' opening brief, there is only one legal issue on appeal: "Whether DNR is subject to an actionable duty, under Washington's statutory and/or common law, to prevent the negligent spread of fire from land it owns and controls?" Appell. Br. at 6.

**B. DNR, the Largest Landowner in Washington State, Now Admits It Has a Duty as a Landowner to Take Reasonable Steps to Prevent the Spread of Fire from Its Land**

DNR's sole argument for summary judgment was its assertion that the Legislature "overruled the entire basis upon which the *Oberg* Court found the existence of a duty" and, therefore, "eliminate[d] any duty to the plaintiffs in this case." CP 38-39. DNR has abandoned that argument and admits, for the first time on appeal, that it has a duty as a landowner to take reasonable steps to prevent the spread of fire from its land:

. . . DNR here acknowledges its status as a landowner could implicate duties to adjoining landowners if, for example, it was aware of a fire on its land and failed to report it to fire suppression agencies.

DNR Br. at 48.

DNR further admits that its duties as a landowner include the duty to exercise reasonable care to prevent the spread of fire from its land:

The general duty of landowners to prevent the spread of fire from their lands is to exercise ‘reasonable effort’ and ‘ordinary prudence’ once they know of the existence of a fire on their land.

DNR Br. at 21-22.

These concessions are fatal to DNR’s position because the sole basis of its motion was that no actionable duty existed as a matter of law—a false assertion that led the trial court to conclude that DNR, the largest landowner in Washington State, was immune from liability “for anything related to fire.” CP 450-52.

Having abandoned the sole basis for its summary judgment motion, DNR’s new argument is that it acted reasonably as a landowner. DNR’s belated argument is improper and should be ignored by the Court because it was not presented in DNR’s summary judgment motion and was not ruled on by the trial court—the trial court acknowledged as much and noted it would have denied summary judgment if DNR had tried to move for summary judgment by arguing that it acted reasonably. CP 32, 38-39, 449;

RP 14:5-14 (10/11/2018); *Munich*, 175 Wn.2d at 877 (“In reviewing an order for summary judgment, this Court engages in the same inquiry as the trial court.”); *Admasu v. Port of Seattle*, 185 Wn. App. 23, 40, 340 P.3d 873 (2014) (“[i]t is the responsibility of the moving party to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment”) (citations omitted); RAP 9.12 (“[o]n review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court”); *State v. Gaut*, 111 Wn. App. 875, 881, 46 P.3d 832 (2002) (scope of review is limited to the trial court’s determination of “the issues that were raised by the motion”); *Carlson v. Lake Chelan Cmty. Hosp.*, 116 Wn. App. 718, 744, 75 P.3d 533 (2003) (citing RAP 2.5(a)); *Carrera v. Olmstead*, 189 Wn.2d 297, 302 n.3, 401 P.3d 304 (2017) (declining to address “belatedly raised” arguments on appeal).

**C. The Damaged Landowners Alleged DNR Failed to Take Reasonable Steps, as a Landowner, to Prevent the Spread of Fire from DNR’s Land**

It is unclear why DNR suggests the damaged landowners did not allege DNR acted negligently as a landowner when its brief acknowledges those allegations:

Plaintiffs contend DNR, in its capacity as a landowner, was negligent in failing to (1) pre-position more out-of-region fire suppression resources before the fires even started, and

(2) respond to the fires with more suppression resources, more quickly.

DNR Br. at 14.

[I]n response to DNR's motion for summary judgment, and on appeal here, Plaintiffs claim DNR was negligent in failing to "pre-position" additional outside fire suppression resources in anticipation of fire activity, pre-order additional initial attack resources the nights before they were needed, and generally allocate resources to the various fires DNR was attacking in accordance with the priority Plaintiffs believe should have been afforded.

DNR Br. at 40.

It is also beyond dispute that the damaged landowners opposed DNR's summary judgment motion by explaining some of the ways that a jury could find that DNR failed to take reasonable steps to prevent the spread of fire from its land. For example, the damaged landowners alleged that DNR failed to take reasonable steps to ensure it could effectively respond to an outbreak of fire on its land. CP 222-23. The damaged landowners alleged DNR was particularly negligent in this regard given the extreme fire danger that existed at the time. CP 223. The damaged landowners alleged that DNR failed to respond to the fires in a reasonable manner by initially sending too few resources given the extreme fire danger rating in effect at the time. CP 224-25. The damaged landowners alleged DNR failed to engage the fires with a reasonable degree of urgency and thoroughness given the extreme fire danger and the strong winds that were

forecasted to return three days later. CP 225-31. Specifically, they alleged DNR failed to take reasonable steps to coordinate its resources to ensure the fires were re-engaged the second morning and instead left the fires unattended until midday. CP 228-30. They further alleged DNR failed to take reasonable steps to communicate its need for additional resources, including air support. CP 227, 229-30. These and other acts of negligence, the damaged landowners allege, caused the four fires to spread from DNR's land and eventually form the Carlton Complex fire. CP 231.

Although DNR acknowledges some of these allegations, it attempts to dodge liability by self-servingly categorizing the allegations as the acts of a "fire suppression agency." DNR Br. at 39. Essentially, DNR claims that the damaged landowners' allegations of negligence exceed DNR's self-imposed standard of reasonable care as a landowner. DNR further claims it would be unfair to subject it "to a standard far beyond that required of any other landowner, and far beyond that required in the exercise of ordinary care." DNR Br. at 42 (quotation omitted). The problem with DNR's new argument, as noted by the trial court, is that the standard of reasonable care applicable to DNR, and whether DNR breached that standard of care, are questions of fact for the jury to decide. RP 14:5-14 (10/11/2018). This is black-letter law: "Whether one charged with negligence has exercised reasonable care is a question of fact for the jury." *Hoffman v. Gamache*, 1

Wn. App. 883, 888, 465 P.2d 203 (1970) (citing *Gordon v. Deer Park Sch. Dist.*, 71 Wn.2d 119, 426 P.2d 824 (1967)).

DNR is also mistaken in asserting the damaged landowners are trying to hold DNR to a standard “far beyond that required of any other landowner” and “far beyond that required in the exercise of ordinary care.” To the contrary, and as the trial court properly recognized, the determination of whether a landowner has exercised reasonable care “must in each case necessarily depend upon the surrounding circumstances.” *Bodin v. City of Stanwood*, 130 Wn.2d 726, 734, 927 P.2d 240 (1996) (quotation omitted). In *Bodin*, the Washington Supreme Court provided a detailed explanation of the factual inquiry undertaken by a jury in assessing negligence:

For conduct to be negligent, it must be unreasonable in light of a recognizable danger. The “ordinary” or “reasonable” care which a municipality must exercise is “that care which an ordinarily reasonable person would exercise under the same or similar circumstances.” In assessing the standard of reasonable care, a risk-benefit analysis is usually part of the determination. The analysis involves balancing the risk of harm, “in the light of the social value of the interest threatened, and the probability and extent of the harm, against the value of the interest which the actor is seeking to protect, and the expedience of the course pursued.” Among other things, consideration must be given to alternative courses open to the actor. Further, “[w]hile mere inconvenience or cost are often insufficient in themselves to justify proceeding in the face of danger, they will justify taking some risks which are not too extreme.”

*Id.* at 733–34 (internal citations omitted). In short, this factual inquiry

compares “the risk apparent to [DNR]” against the “alternative course open to DNR” to determine whether DNR exercised reasonable care under the circumstances. *Id.* at 736.

In applying the above principles to the present case, the trial court correctly acknowledged a jury would be charged with determining whether DNR reasonably balanced the “risk of harm” against the “alternative courses open to [DNR].” The alternative courses of action available to DNR—the largest landowner in Washington State—probably exceed those available to a homesteader who owns only a half-acre of forestland. But the same holds true for any large commercial landowner (*e.g.*, Weyerhaeuser Company, Evans Fruit Company, etc.). Similarly, DNR’s dual role as a landowner and a fire suppression agency most likely means the alternative course of action available to it exceed those available to other landowners. DNR fails to cite any authority barring a jury from considering these factors in its analysis of negligence.

DNR attempts to analogize itself with a municipal fire chief whose home catches fire. *See* CP 45. A slight adjustment to the analogy brings the real issue into focus. Assume the fire chief is not on vacation, she is instead at home when the fire begins. It is late summer and the weather has been unseasonably dry. When she first notices the fire, it is small—maybe a yard in diameter. She immediately calls 9-1-1 and reports the fire, but the

operator informs her it will take 30 minutes for help to arrive. She hangs up and looks back at the fire, it is slowly creeping across her lawn towards her neighbors' vacant house and she estimates it will reach the home in 15 minutes. Her fire command vehicle is parked a few steps away in the driveway. Inside are two fire extinguishers—one is a small handheld extinguisher she bought at the store and the other is a large, professional-grade extinguisher issued through her department. She knows the professional-grade extinguisher would make quick work of the fire, but she likes a challenge and retrieves the smaller extinguisher instead. She nearly puts the fire out, but the small extinguisher eventually runs out of flame retardant. Dejected, she spends the next several minutes watching as the fire spreads over the property line and ignites her neighbors' house. The first fire engine arrives shortly thereafter, but the crews are unable to save her neighbors' house from burning to the ground.

DNR now admits that the fire chief, as a landowner, had a duty to exercise reasonable care to prevent the fire from spreading from her land and damaging her neighbors' house. But under DNR's new theory, all the fire chief was required to do was call 9-1-1 because the act of trying to prevent the spread of the fire "is the act of a fire suppression agency." According to DNR, the fire chief cannot be held personally liable for neglecting to use the professional-grade fire extinguisher because the only

reason she had the fire extinguisher was her status as a fire-fighter and it would be unfair to hold her to a higher standard than a normal homeowner. In addition, under DNR's theory, the fire chief cannot be held personally liable because the moment she started extinguishing the fire her duties as a landowner were "subsumed" into her public duties as a fire chief.

Of course, the fire chief in the above hypothetical could be held liable, as a landowner for failing to take reasonable steps to prevent the spread of fire from her land. The fact that she is a fire chief does not eliminate her duty as a landowner, and the fact that she may have responded to the fire in both her personal capacity and her official capacity does not mean her efforts were solely the act "of a fire suppression agency."

Returning to the present case, DNR's new arguments involve questions of fact for the jury to decide because reasonable minds could differ over whether DNR took reasonable steps to prevent the spread of the fires from its land. DNR is free to argue that it only needs to call 9-1-1. If the jury is persuaded by this argument, then it will conclude DNR was not liable. On the other hand, a reasonable jury could conclude that the largest landowner in Washington State needed to do more—such as (1) positioning sufficient resources where the fire danger was greatest; (2) increasing the amount of resources initially sent to suppress dangerous fires; (3) communicating requests for additional resources through the appropriate

channels instead of ignoring them; (4) ensuring the fires were staffed in a timely manner instead of left unattended for hours; and (5) providing managers with critical information regarding what resources were available.

Given DNR presumably owns land next to some of the other largest landowners in Washington State, such as Weyerhaeuser and industrial farms, it would presumably expect those landowners to do more than just call 9-1-1. Either way, the question of whether DNR acted reasonably, as a landowner, is a question of fact for the jury to decide, not DNR.

**D. DNR’s Dual Status as a Fire Suppression Agency Does Not “Subsume” its Duties and Responsibilities as a Landowner**

At the heart of DNR’s belated argument is an effort to create a false dichotomy between its duties as a landowner versus its duties as a fire suppression agency. DNR repeatedly asserts that its public fire suppression duties are “completely distinct” from its duties as a landowner. DNR Br. at 18-22. DNR claims this distinction is so severe that it is impossible for it to simultaneously perform duties as both a fire suppression agency and a landowner. *Id.* at 46. According to DNR, whenever it performs its duties as a fire suppression agency, it does so to the exclusion of any duties it may also have as a landowner. Although DNR avoids using the term, its new “distinction” argument is functionally identical to the “subsume” argument that was flatly rejected by the Washington Supreme Court in *Oberg*. This

exact “subsume” argument was also rejected by the Legislature when it enacted RCW 76.04.016.

**1. DNR’s “Subsume” Argument Was Rejected in *Oberg* Because it “Defies Logic” and Effectively “Resurrects Sovereign Immunity”**

In *Oberg*, DNR argued “that its duty as a landowner was ‘subsumed into its public duty *as a matter of fact.*” *Oberg*, 114 Wn.2d at 289 (emphasis in original). Similarly, DNR is now arguing to this Court that its duties as a landowner to prevent the spread of fire from its land are voided whenever its duties as a fire suppression agency are also triggered. It follows, then, that if a fire started on DNR land but did *not* trigger DNR’s duties as a fire suppression agency, then DNR’s duties as a landowner would still apply. As stated in *Oberg*, “[t]his distinction defies logic.” *Id.* at 287. And further, in the 29 years that have passed, there is “no precedent, either direct or by analogy, which has even considered [DNR’s] on-again/off-again theory of liability/no liability, much less adopted it.” *Id.*

To repeat, DNR now admits it has a duty as a landowner to take reasonable steps to prevent the spread of fire from its land, but it claims that its public duty as a fire suppression agency overrides its landowner duty. As stated in *Oberg*, “DNR’s argument confuses the public duty doctrine, which negates the *existence* of a duty to a particular plaintiff, with sovereign immunity, which admits the existence of a duty and a tort for its breach, but

denies liability because of immunity.” *Id.* at 289 (emphasis in original) (citing *J & B Dev. Co. Inc. v. King County*, 100 Wn.2d 299, 669 P.2d 468 (1983)). In short, “[DNR’s] argument highlights the uncontrovertible fact that what [DNR] actually wants is for this court to resurrect sovereign immunity.” *Id.*

DNR has abandoned its earlier argument that the Legislature “overruled the entire basis upon which the *Oberg* Court found the existence of a duty” and now concedes that *Oberg* was “not entirely abrogated.” *Cf.* CP 38 with DNR Br. at 32. Still, DNR attempts to distinguish *Oberg* by citing bits of the opinion out of context. Most notably, DNR represents that “the *Oberg* decision did not specifically address whether DNR’s landowner duties, on their own, could encompass the types of allegations at issue in this case.” DNR Br. at 34. This is demonstrably false—the *Oberg* decision held that DNR was subject to liability for breaching its duties as a landowner alone:

*We have concluded that DNR had statutory and common law duties as a landowner. It is liable for its established negligence unless the public duty doctrine precludes liability. As noted above, it is only in “rare instances” that the total waiver of sovereign immunity by RCW 4.92.090 is not applicable.*

DNR argues that this is one of those “rare instances” because its duties as a fire fighter are protected by the public duty doctrine. DNR can escape its liability as a landowner only if (1) the public duty doctrine is applicable here and (2) its

landowner duty is “subsumed” into its claimed public duty.

*We conclude that the public duty doctrine is not applicable here so DNR is liable for its negligence as to these plaintiffs.*

*Id.* at 284 (emphasis added). The Court reached this holding *before* it began its analysis of the special-relationship duty that existed between DNR and forestland owners who paid fire-protection assessments. *See id.* at 284–85.

DNR’s efforts to distinguish the *Okeson*, *DiBlasi*, and *Johnson* cases are equally misguided. *DiBlasi* and *Johnson* demonstrate that when a government entity acts in a dual capacity, it remains subject to liability for breaching its proprietary duties notwithstanding the public-duty doctrine. *DiBlasi v. City of Seattle*, 136 Wn.2d 865, 879–81, 969 P.2d 10 (1998) (holding city liable for breaching its landowner duties but declining liability based on city’s breach of its public duties); *Johnson v. State*, 77 Wn. App. 934, 894 P.2d 1366 (1995) (holding university liable for breaching duty based on student’s status as an invitee but declining liability based on university’s duty to keep campus safe). Likewise, *Okeson* reinforces the holding from *Oberg* that a public entity cannot engage in an “on-again/off-again” theory of liability. *Okeson v. City of Seattle*, 150 Wn.2d 540, 550–51, 78 P.3d 1279 (2003) (“[w]e find Seattle’s attempt to differentiate the context unpersuasive. Providing streetlights cannot be a proprietary function for some purposes, but a governmental function for others.”).

**2. RCW 76.04.016 Expressly Maintains DNR's  
Concurrent Duties as a Landowner**

The Legislature also rejected DNR's argument that its duties as a fire suppression agency are completely separate from its duties as a landowner, such that the former "subsumes" the latter. This is evident from the plain language of the statute—specifically, the final sentence: "This section does not alter the department's duties and responsibilities as a landowner." As DNR acknowledges, "courts must presume the Legislature enacts laws with full knowledge of existing law." DNR Br. at 30 (citing *Maziar v. Dep't of Corr.*, 183 Wn.2d 84, 88, 349 P.3d 826 (2015)). At the time RCW 76.04.016 was enacted, the existing law was that DNR had both statutory and common law duties, as a landowner, to prevent the spread of fire from its land. *See, e.g.*, RCW 76.04.600, .730; *Arnhold v. United States*, 284 F.2d 326, 328 (9th Cir. 1960). This existing law was augmented by the Washington Supreme Court's decision in *Oberg*, holding that DNR's failure to suppress and prevent a fire from spreading off its land subjected it to liability for breaching its landowner duties. 114 Wn.2d at 284. The Washington Supreme Court made this holding despite the fact that DNR was also acting in its capacity as a fire suppression agency, and the Court expressly rejected DNR's argument that its landowner duties are somehow "subsumed" by its fire suppression duties. *Id.* at 289.

As a matter of law, then, it is presumed the Legislature was fully aware of DNR's existing duties as a landowner. *Maziar*, 183 Wn.2d at 88. It is also presumed that the Legislature drafted the language of RCW 76.04.016 knowing full well the ramifications and potential civil liability attached to DNR's duties as a landowner. *Id.* at 89 (“we presume the legislature knows the existing legal framework when it enacts new law”). Yet, despite this knowledge, the Legislature still included that last sentence of RCW 76.04.016: “This section does not alter the department’s duties and responsibilities as a landowner.” Given the existing law at the time, the meaning and effect of the last sentence is unambiguous—RCW 76.04.016 “does not alter” DNR’s pre-existing duties as a landowner to prevent the spread of fire from its land and DNR remains responsible for damages caused when it breaches these duties.

Even more fundamentally, DNR’s position contradicts the bedrock principle that Washington and its public agencies are liable for their tortious conduct:

The state of Washington, *whether acting in its governmental or proprietary capacity*, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

RCW 4.92.090 (emphasis added); *see also* RCW 4.96.010(1). The only requirement is that the state’s “conduct giving rise to liability must be

*tortious*, and it must be analogous, in some degree at least, to the chargeable misconduct and liability of a private person or corporation.” *H.B.H. v. State*, 192 Wn.2d 154, 180, 429 P.3d 484 (2018) (emphasis in original, quotation omitted).

The damaged landowners allege that DNR failed to take reasonable steps to prevent the spread of fire from its land. It makes no difference whether DNR is also required to suppress fires on its land in its capacity as a fire suppression agency. The Washington Supreme Court recently reiterated as much when it rejected a similar argument that the public duty doctrine applies if there is no “private analog” in the private sector:

The State cannot shield itself from liability by simply asserting that its role [as a fire suppression agency] has no direct counterpart in the private sector. Under our waiver statute, there is no “private analog” requirement.

*H.B.H.*, 192 Wn.2d at 180 (holding that state cannot avoid its tortious conduct of failing to protect children by claiming its foster care system has no sizeable private counterpart).

DNR’s argument that its public duties as a fire suppression agency are “distinct from” or otherwise “subsume” its duties as a landowner has been repeatedly rejected by Washington courts and the Legislature. The Court should reject DNR’s attempt to resurrect sovereign immunity.

**E. RCW 76.04.760 Does Not Supersede All Common-Law Causes of Action for Fire Spread**

DNR appears to concede the trial court erred in ruling that RCW 76.04.760 supersedes all common law causes of action based on the negligent spread of fire. DNR Br. at 49. As detailed in the damaged landowners' opening brief, the trial court erroneously ruled that the statute supersedes all common law causes of action despite the plain, limiting language of the statute. *See* Appell. Br. at 45-48. Specifically, RCW 76.04.760 serves as the exclusive cause of action only for property damage to "forested lands" caused by fire that "started on or spread from . . . forested lands." RCW 76.04.760(4). Because the damaged landowners are not just alleging claims for damage to their "forested land," the statute clearly did not apply. *See* Appell. Br. at 45-46.

DNR now claims it "mistakenly" raised the issue during oral argument and insists that it "did not argue that the [trial court] should dismiss Plaintiffs' common law negligence claim because it is superseded by RCW 76.04.760." DNR Br. at 49 n.10. The transcript from the oral argument tells a different story:

MR. GIMPLE: As I understood Mr. Amala, he believes no matter what this motion should be denied, because they still have a claim for a common law duty on the part of DNR as a landowner. If I understood that correctly, he's mistaken.

They sued under 76.04.760. That is a duty to pay for damage to public or private forested lands in a civil action caused by

your mismanagement of your own land, if you will. If he had read further into section 4, it states, “This section provides the exclusive cause of action for property damage to public or private forested lands, including real and personal property on those lands resulting from a fire that started on, or spread from public or private forested lands.” Hence they did not plead a common law duty and they were right not to plead one, because they don’t have one by virtue of the very statute they pled this case under.

So this common law duty issue is moot. It doesn’t exist. It’s wrong. We did not miss it. It never existed. In fact, it stopped existing on June 12 of 2014 when that particular statute was adopted, it stopped existing a month before this fire.

RP 45:11-46:9 (10/11/2018). It is unclear what DNR could have possibly meant when it stated that the common law duty “stopped existing” on June 12, 2014—the date RCW 76.04.760 was enacted—other than that the statute superseded the damaged landowners’ common law claims.

DNR is correct, however, in terms of its argument being a mistake. The issue over whether RCW 76.04.760 superseded the damaged landowners’ common law claims was not properly before the trial court because it was not raised in DNR’s summary judgment briefing. CP 23-47, 411-25. The damaged landowners quickly filed a sur-reply objecting to DNR’s untimely argument and explaining to the trial court that RCW 76.04.760 did not, in fact, supersede all common law causes of action. CP 440-47. The trial court ruled otherwise and, by doing so, eradicated over 100 years of Washington law. *See* Appell. Br. at 46-48. The damaged

landowners tried again in their motion for reconsideration to explain the error in the trial court's ruling, but the trial court dismissed the damaged landowners' points as "largely technical issues." *See* CP 476-79, 482.

Finally, DNR has no basis to argue that the issue is not "ripe" or that it represents an error raised for the first time on review under RAP 2.5(a). The damaged landowners raised this issue below in both their sur-reply and their motion for reconsideration, which were necessitated by DNR raising the argument for the first time in its rebuttal during oral argument. CP 440-47, 476-79. The trial court's erroneous ruling is properly within the scope of review because, if repeated on remand, it would result in the damaged landowners only being able to recover for damage to their "forested land" and nothing else. *See* RAP 2.4(a).

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### III. CONCLUSION

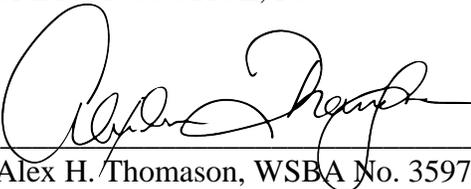
The trial court erred in granting summary judgment to DNR based on its erroneous conclusion that DNR owed no common law or statutory duty as a landowner. The Court should reverse the trial court's decision and remand this case for further proceedings.

Respectfully submitted this 24th day of June 2019.

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**CERTIFICATE OF SERVICE**

THIS IS TO CERTIFY that on this 24th day of June 2019, I, Allie Burgett, did serve via email (or other method indicated below), a true and correct copy of the foregoing by addressing and directing for delivery to the following:

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DATED this 24th day of June 2019.

  
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**THOMASON JUSTICE, PS**

**June 25, 2019 - 1:16 PM**

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