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OF THE STATE OF WASHINGTON

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By

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DAVID SCHULZ, et al.,

Appellants,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF NATURAL RESOURCES,

Respondent.

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APPELLANTS' OPENING BRIEF

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## I. INTRODUCTION

During the afternoon of Monday, July 14, 2014, four small brush fires started on forestland in the Methow Valley owned and controlled by respondent Washington State Department of Natural Resources (hereinafter “DNR”). DNR allowed the four fires to escape its land and spread to form the Carlton Complex Fire, the largest wildfire in Washington state history. The Appellants are more than 300 private landowners (“damaged landowners”) who brought suit against DNR for damages caused by its failure to take reasonable steps to prevent the fires from spreading from its land. The damaged landowners’ claims are entirely based on DNR’s breach of its duties as a landowner and are supported by evidence that DNR had ample opportunity to prevent the fires from spreading from its land.

Shortly after the fires started on Monday, a break in weather provided an opportunity to snuff out the fires before strong winds were forecasted to return later in the week. By Monday night, DNR was confident the fires were “buttoned up” and insisted Tuesday would require little more than “mop up.” But through a combination of chronic unpreparedness, gross mismanagement, and a general lack of urgency, DNR wasted the opportunity to contain the fires. On Thursday, the forecasted winds swept across the region causing the four fires to converge and nearly quadruple in size. Over the next two weeks, hundreds watched helplessly

as the newly dubbed “Carlton Complex Fire” destroyed their homes, property, and livelihood. When the smoke finally cleared, the Carlton Complex Fire had consumed more than 250,000 acres of Okanogan County, making it the largest forest fire in state history.

Every landowner in Washington has a duty to exercise reasonable care to prevent the spread of fire from their property. Washington statutes have codified this duty since 1897, and Washington common law has recognized this duty since at least 1905. Following the Washington Legislature’s abolition of sovereign immunity in 1961, state and local governments became subject to these duties just like any other landowner.

In 1990, the Washington Supreme Court decided the case of *Oberg v. Dept. of Natural Resources*, 114 Wn.2d 278, 787 P.2d 918 (1990), which involved claims against DNR for negligently allowing the Barker Mountain fire to spread from DNR land and damage nearby landowners. *Oberg* confirmed that DNR has both common law and statutory duties “as a landowner” to prevent the negligent spread of fire from its land. These holdings from *Oberg* were nothing new, of course, given the longstanding precedent outlined above. However, the Court in *Oberg* went a step further and held that DNR had a third basis for liability that had nothing to do with its status as a landowner. The third basis for liability was based on payments that certain forest landowners paid to DNR for fire suppression services.

Normally the public duty doctrine would prevent claims against DNR based on its status as a government fire suppression agency. However, the Court in *Oberg* concluded the Legislature intended the payments made to DNR by certain landowners to create a special relationship between DNR and those landowners such that DNR owed them a special duty to take reasonable steps to protect their property from fire – an exception to the public duty doctrine. This new, third basis for liability had nothing to do with DNR’s status as a landowner—DNR owed the special duty to any forest landowner who paid DNR to protect their land from fire even if the fire did not spread from DNR’s land.

DNR was concerned that this third duty based on an exception to the public duty doctrine would expose it to liability beyond its common law and statutory duties as a landowner. As a result, in 1993, just three years after *Oberg*, DNR successfully lobbied the Legislature to pass RCW 76.04.016. The new statute addressed the third basis for liability found in *Oberg* based on the Court’s conclusion that the Legislature intended the payments made by some landowners to create an exception to the public duty doctrine. In RCW 76.04.016, the Legislature clarified that no such intent existed and that the payments could not be the basis for a special relationship between those landowners and DNR. Put another way, RCW 76.04.016 states that such payments do not create an exception to the public duty doctrine. While

RCW 76.04.016 eliminated DNR's duty based on payments that some landowners make to DNR to protect their property from fire, the statute expressly preserved DNR's longstanding common law and statutory duties as a landowner: "This section does not alter the department's duties and responsibilities as a landowner."

While the statutory language is plain and unambiguous on its face, the statute's legislative history eliminates any conceivable doubt that it was intended to preserve DNR's duties "as a landowner." For example, the chairman of the legislative committee that vetted the bill stated that RCW 76.04.016 only operates to eliminate the "extra special duty" that *Oberg* held DNR owed to certain forest landowners:

We had some confusion earlier on this bill on whether we were, in essence, exempting the department from any liability and *all we're dealing with in [RCW 76.04.016] is this extra special duty that the Court imposed in that particular case.*

The damaged landowners brought suit against DNR because they allege DNR breached its common law and statutory duties, *as a landowner*, to prevent the fires from spreading. None of their claims are based on payments made to DNR as a fire suppression agency.

DNR moved to dismiss the damaged landowners' claims by erroneously asserting that RCW 76.04.016 abrogated *all* of DNR's duties, including its duties as a landowner. Put another way, DNR asserted that

RCW 76.04.016 immunized DNR, the largest landowner in Washington, for any and all claims, including common law and statutory claims based solely on its status as a landowner. In rebuttal at oral argument, DNR falsely claimed that the damaged landowners had not pled common law claims and that a different statute, RCW 76.04.760, abrogated all common law claims for damage caused by fire that starts on forested land.

The trial court erred and granted DNR's motion. In doing so, the trial court ignored the plain language of RCW 76.04.016, dismissed its legislative history, and misapplied several principles of statutory construction. The trial court also ignored the plain language of RCW 76.04.760 and ignored the fact that DNR failed to present any evidence that the claims of the damaged landowners were covered by that statute. As a result, the trial court's ruling effectively resurrects sovereign immunity whenever DNR negligently allows fire to spread from its land, directly contradicts Washington Supreme Court precedent, and literally eradicates more than a century of Washington common law.

## **II. ASSIGNMENTS OF ERROR**

The trial court erred in entering its order dated October 24, 2018, granting summary judgment dismissal of the damaged landowners' claims based on DNR's common law and statutory duties as a landowner. The trial court further erred in entering its order dated November 9, 2018, denying

the damaged landowners' motion for reconsideration of the prior summary judgment order. The trial court's mistaken rulings invoke a straightforward 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?*

### **III. STATEMENT OF THE CASE**

#### **A. The Carlton Complex Fire**

It is undisputed that DNR owned and controlled the forestland that caught fire and eventually merged to become the Carlton Complex Fire, the largest wildfire in Washington's history. CP 27 n.2. Before they spread from DNR's land, the four fires were labeled by DNR as the Stokes Road, Golden Hike, French Creek, and Cougar Flats fires. *Id.*

All four fires were caused by lightning strikes during the afternoon of Monday, July 14, 2014. CP 252. The Stokes Road and Golden Hike fires were reported within an hour of each other and originated on DNR's land on opposite sides of the Methow Valley, approximately fifteen miles south of Twisp. CP 334, 348. The Cougar Flats fire was reported three hours later and originated on DNR's land several miles due east of Winthrop. CP 358. The French Creek fire originated on DNR's land several miles to the southeast of the Stokes Road fire, but DNR failed to locate it until midday on July 15. CP 369.

Many cannot forget the enormous destruction caused by the Carlton Complex Fire, but few know how four small brush fires from DNR's land were able to grow into the largest forest fire in state history. Based on discovery obtained prior to DNR's summary judgment motion, the damaged landowners allege the Carlton Complex Fire was the result of DNR's failure to take reasonable steps to prepare for the extreme risk of fire that existed in July 2014 and to contain the four small brush fires once they started.

**1. DNR Failed to Provide Adequate Protection Against the Eminent Risk of Fire Spreading from Its Forestland**

Forest fire agencies monitor seasonal weather conditions relentlessly and for good reason—it is impossible to know exactly when or where a fire will start, but weather trends provide vital information about how a fire will behave after it starts. CP 268. This information includes drought conditions, temperature trends, wind patterns, fuel moistures, and relative humidity. *Id.* The data is fed into an “absolute fire danger rating” that predicts fire intensity and spread potential within a region. *Id.* The National Fire Danger Rating System is the benchmark utilized across the country for forest fire planning and response purposes. CP 284.

“Prepositioning” is the most critical planning function that fire agencies undertake in response to fire danger ratings. CP 279-80. Prepositioning refers to the process of supplementing local firefighting

capabilities with resources from outside the immediate area in anticipation of fire activity. CP 281. Prepositioning can include various resources, such as fire engines, aircraft, heavy equipment, and crews. CP 283. Per DNR, prepositioning is akin to moving “chess pieces into position.” *Id.*

Most fire agencies undertake prepositioning in direct response to increases in the fire danger ratings and forecasted weather events. CP 281 Regional fire managers are required to monitor the fire danger ratings and coordinate resource prepositioning in advance of a fire event. CP 279-80. But, at least in 2014, DNR discounted the fire danger rating system for prepositioning purposes: “This is really hard to explain. But we seemingly trail behind some of these systems. ... They weren’t built by DNR, so we are a little bit behind on the use of them.” CP 295-96.

During the Summer of 2014 the Okanogan region was experiencing “severe drought” conditions that had persisted for months. CP 252-53. By early July, the North Cascade Smoke Jumper Base outside Winthrop reported fire danger ratings in the 97th percentile, meaning each day was comparable to the three most dangerous days of an “average” 100-day fire season. *Id.* DNR had all this information at its fingertips. CP 295. But despite the extreme fire danger rating in the area, DNR only placed one prepositioning order for out-of-region resources, and that order was not made until July 12, 2014, just two days before the start of the Carlton

Complex Fire. CP 282. DNR failed to preposition any additional heavy equipment or air support resources. CP 270-71, 292. In short, most of the “chess pieces” were missing because DNR’s regional fire managers neglected to order them when it mattered most. CP 223.

**2. DNR Failed to Exercise Reasonable Care and Negligently Allowed the Fires to Spread from its Forestland**

In virtually every fire scenario, the first 24 to 48 hours are the most critical timeframe for a landowner to suppress a forest fire on their land. CP 267, 290. A landowner’s fire suppression efforts during this period are referred to as “initial attack.” *Id.* The initial attack horizon presents landowners with a window of opportunity to suppress a forest fire while it remains small and most vulnerable to suppression. *Id.* If a landowner fails to suppress a fire during the initial attack, then those fighting the fire are forced to shift to an “extended attack” approach, which is significantly riskier and more dangerous for the firefighters and those they are trying to protect. CP 267-68. The failure of a landowner to contain a fire during initial attack can have disastrous consequences, meaning a landowner’s initial attack efforts must be swift and decisive—time is everything. *Id.*

To aid with initial and extended attack on the massive amount of property it owns in Washington, DNR utilizes the Northeast Washington Interagency Communications Center (“NEWICC”). CP 276-77. NEWICC

is a multi-agency dispatch center created to enable cooperation and sharing of fire suppression resources among federal and state jurisdictions in the region. *Id.* DNR's Northeast Region is divided into four districts and DNR personnel operating out of NEWICC are responsible for dispatching initial attack resources to each district. *Id.*

When NEWICC receives a new fire report on DNR's land, it contacts DNR's "duty officer" for that district and coordinates which initial attack resources to send. CP 224. The first unit on-scene assumes command of the incident and is responsible for communicating conditions and fire behavior to dispatch and to the duty officer. *Id.* If the initial attack commander determines that additional ground resources or air support is necessary, they relay the request through the duty officer or contact dispatch directly. *Id.* Once an incident commander places a request for additional resources it is the responsibility of the duty officer and dispatch to follow-up on the request until it is either filled or cancelled. CP 224-25, 286. The duty officer is also responsible for pre-ordering initial attack resources for the following day. CP 225. Pre-ordering the night before is especially important with respect to air support given the logistical lead-times and pre-flight routines required. CP 301-02.

DNR's lack of prepositioning in July 2014 meant its initial attack capabilities were understrength. Further compounding DNR's

unpreparedness was its failure to dispatch adequate initial attack resources based on increased fire danger. CP 270-71, 282, 292. In 2014, most federal fire agencies strictly adhered to a policy of increasing the amount and capabilities of initial attack resources in lockstep with the fire danger rating. CP 261-63, 284, 295-96. When the fire danger rating is low, fewer initial attack resources are dispatched. CP 261-62. When the fire danger rating is high, as it was in July 2014, more initial attack resources are dispatched to account for the increased risk of fires spreading out of control. *Id.*

Instead of varying its approach to reflect the increased danger, DNR dispatched the same “pre-cut” initial attack resources regardless of the fire danger rating. *Id.* It was not until 2018 that federal fire agencies finally “pushed” DNR into adopting the standard practice of increasing initial attack resources to match the fire danger levels. CP 272-73. But in 2014, DNR dispatched the same “bare bones default minimum order” of pre-cut resources regardless of the fire danger. CP 258. The resulting issues that plagued DNR’s initial attack efforts were hardly a surprise.

Monday, July 14, 2014 – The Stokes Road fire that started on DNR’s land was reported first. CP 334-38. Several engines were dispatched to the fire and air support was requested. *Id.* Given the lack of prepositioning, DNR was forced to request bulldozers from private contractors. CP 338. Around 7:25 p.m., the decision was made to upgrade the fire and a Type 3

Incident Management Team (“IMT3”) was ordered for the next day. CP 339. An IMT3 is typically ordered once it is apparent that fire suppression efforts will last beyond the initial attack phase. CP 266-68. The team comes with a defined command structure and logistical staff. *Id.*

Despite upgrading the severity of the Stokes Road fire just over an hour earlier, by 8:30 p.m. the incident commander reported they were “about to button up the fire.” CP 341. Before leaving the fire, air support informed DNR that all the fire would need in the morning was some helicopter bucket drops and possibly a tanker-drop or two. CP 340. The fire was mostly “dozer lined” except for a stretch along the Northeast corner that required hand crews to complete. CP 341. DNR planned for the night crew to complete the fire line along the Northeast corner and then use bulldozers to strengthen the lines first thing the next morning. CP 342.

Meanwhile, just across the Methow Valley, the Golden Hike fire that started on DNR’s land had been an afterthought. CP 348-49. DNR had assigned a couple of engine crews to work the fire but the firefighters had limited effect because of the difficult terrain. CP 324-25. What was working, however, was a fire-retardant line that had been mistakenly dropped across the ridgeline above the fire. CP 323.

Ethan Freel, the DNR incident commander assigned to the Golden Hike fire, was running out of options on the ground, so he requested air

support from DNR's duty officer, Donny Smith. CP 326, 349. Smith responded to the request for air support by telling Freel that none were available. *Id.* In reality, Freel's request for air support was never passed on to dispatch. CP 291. At 8:22 p.m., the fire began to "crown" into several trees and two helicopters were finally diverted from the Stokes Road fire to provide a few bucket drops. CP 349. Freel testified that the five to ten minutes of air support was "very effective in knocking the spread of the immediate fire down." CP 328. When Freel departed the Golden Hike fire that night he reported the seriousness of the fire to his DNR supervisor, Donny Smith, and made Smith aware that DNR crews would need to be on the fire at "first light." *Id.* When asked whether he told DNR that it would need a lot of "boots on the ground" to contain the fire, Freel quipped that "anyone could have drawn that conclusion" based on his reports to DNR:

Q: And what was the status of the fire that you relayed to the [DNR duty officer]?

A: Status of the fire it was not contained, not controlled. It was laid down, you know, to a point where I thought it was going to hold for the night. Which it did have very little spread over that night. And, you know, it was made aware that the status would be the crews needed to be up there at first light.

Q: Did you convey to the [DNR duty officer] that you felt that they were going to need a lot of boots on the ground to try to contain this fire?

A: In those words, I honestly can't remember. You know, it's not logged anywhere. They could very well, due to my

report of the steepness of the ground, the inability for access of equipment or engines, anyone could have drawn that conclusion, you know, as part of their job.

CP 328-29.

Freel's concern that DNR was failing to appreciate the dangerous potential of the Golden Hike fire was shared by others. Greg Saltsman, a long-time DNR duty officer and DNR fire manager in the region, called NEWICC dispatch that night to express his concern that the Golden Hike fire had dangerous potential. CP 286-88. Saltsman repeated his concerns the next morning to another DNR employee, Steve Harris. CP 299-300.

Farther north, the Cougar Flats fire that started on DNR's land was reported at 3:39 p.m. CP 358. A Forest Service Ranger was the first on-scene and informed DNR that the fire only needed three people, some chainsaws, and water bags to put out. CP 359. Three DNR engine crews hiked into the fire at 6:46 p.m. but departed less than two hours later. *Id.*

Earlier Monday, a helicopter transporting smokejumpers to another incident reported smoke several miles to the southeast of the Stokes Road fire. CP 293-94. DNR declined the smokejumpers' offer to investigate the smoke. *Id.* Instead, DNR briefly diverted an engine to the vicinity but failed to identify the fire that was the source of the smoke. CP 366-67. Based on the coordinates from the two smoke reports, it is apparent that what the

smokejumpers observed was the smoldering French Creek fire that had started on DNR's land. *Cf.* CP 369 with CP 366-67.

By the end of Monday, DNR was optimistic that the fires that had started on its land were nearly buttoned up. CP 341. Ironically, the thunderstorms that ignited the fires provided a silver lining in the form of higher humidity and calmer winds, presenting DNR with a critical window of opportunity to suppress the fires quickly before gusty winds were forecasted to return on Thursday. CP 379-80. The Golden Hike and Cougar Flats fires had not spread much beyond their original footprint on DNR's land. CP 350, 359. While the Stokes Road fire was much larger, it was nearly contained with fire retardant and dozer lines. CP 341. The incoming IMT3 anticipated the next day would only entail improving the dozer line and routine "mop up." CP 386-87. DNR chose to staff only the Stokes Road fire overnight and left the other fires unattended. CP 342, 350, 359.

Tuesday, July 15, 2014 – What happened Tuesday morning is hard to comprehend given the severe fire danger rating and strong winds forecasted to return Thursday. CP 379-80. Daybreak was at 5:15 a.m., but instead of attacking at first light, DNR delayed re-engaging the fires until nearly midday. CP 342, 350, 359. Despite the reported shortage and pleas by firefighters, DNR failed to request additional air support. CP 289. Specifically, DNR failed to contact NEWICC on Monday night to ensure

that aircraft would be ready for operations first thing Tuesday morning. CP 332. And no ground resources were requested Monday night to deploy first thing Tuesday morning. CP 264, 285. A vivid illustration of DNR's oversight is that the bulldozers were requested to be "double-shifted" and redeployed early Tuesday morning to improve the fire lines, but DNR neglected to notify the crews of that assignment. CP 342.

It was not until 9:14 a.m., almost four hours after daybreak, that air support was first requested for the Golden Hike fire, but the requesting firefighters were told they would have to wait more than an hour for air crews to finish their morning briefing. CP 350. The first helicopter did not arrive on scene until 10:29 a.m., more than five hours after daybreak, followed by the second an hour later. CP 351. Firefighters desperately requested air support throughout the day but DNR's failure to place orders the night before meant many aircraft were unavailable. CP 343, 352, 360.

Back on the ground, the night resources assigned to the Stokes Road fire departed at 7:30 a.m., leaving the fire virtually unattended. CP 342. Replacement crews and bulldozers did not arrive until around 11:00 a.m., nearly three-and-a-half hours later and almost six hours after daybreak. *Id.* Because the fire lines constructed the previous day were not improved overnight as planned, at 11:33 a.m. the Stokes Road fire began to escape from DNR land along the Northeast corner. *Id.*

Across the valley at the Golden Hike fire, DNR failed to reengage the fire until after 12:00 p.m., almost seven hours after daybreak. CP 352. By then the fire had grown from DNR's land and consumed another 30 acres. *Id.* Meanwhile, nothing was dispatched to the Cougar Flats fire until 10:07 a.m.—almost five hours after daybreak—and even then, DNR only sent a single engine crew that did not arrive at the fire until 11:53 a.m. CP 359. By 4:42 p.m., the lone crew reported that the Cougar Flats fire had “run all the way up and we aren't going to catch it – it is going to take heavy air and crews to get this one.” *Id.* The overlooked French Creek fire was eventually identified at 12:01 p.m. but by the time crews caught up with it at 2:41 p.m., the fire had grown to 100 acres. CP 369, 372.

Tuesday afternoon, DNR decided to “complex” the four fires and ordered a Type 2 Incident Management Team (known as an “IMT2”). CP 343. An IMT2 is an interstate command team with significant overhead and logistical support. CP 266-67. Over six hours later, at 9:00 p.m., DNR informed the original IMT3 that it would need to take over management of all four fires until the IMT2 arrived the following afternoon. CP 303-04. The IMT3 staff expressed concern that the move would spread their resources too thin and render suppression efforts ineffective. CP 306. The IMT3 staff had been focused on the Stokes Road fire and had very little knowledge of the other three fires. CP 310-13. Making matters worse,

DNR provided the IMT3 staff with no information regarding what additional resources were available. CP 317-18. And like the previous day, it was too late to pre-order any resources for the next morning. CP 307-09.

Wednesday, July 16, 2014 – The IMT3 attempted to engage the fires but were unable to coordinate suppression efforts – they largely had no idea what resources were on scene until they arrived. CP 319-20. For example, a crucial component of coordinating fire suppression is the issuance of an Incident Action Plan (“IAP”). CP 314-16. The IAP details the resources assigned and provides “special instructions” from commanders to firefighters regarding tactics, priorities, and concerns. CP 314. The IAP for July 16 was a copy-and-paste from Tuesday and did not contain “realistic” instructions or an accurate list of resources. CP 315-16. Instead, firefighters were provided the same “mop up” instructions despite the deteriorating situation and the “significant differences” between each fire. *Id.*

The small fires that started on DNR’s land were supposed to be “buttoned up” sometime Tuesday. Instead, DNR allowed the fires to slowly escape from its land and to begin burning the property of adjacent landowners. By Wednesday afternoon the opportunity to contain the fires on DNR’s land had slipped away and on Thursday, as forecasted, the winds returned. The consequence was the Carlton Complex Fire, the largest wildfire in state history.

**B. DNR's Motion to Dismiss Misrepresented the Scope of *Oberg* and the Limited Effect of RCW 76.04.016**

The damaged landowners were initially divided into five separate lawsuits that were then consolidated for discovery. CP 15-24. The underlying complaints are indistinguishable in terms of the alleged liability against DNR—namely, each complaint alleged that DNR breached both its common law duty and its statutory duty as a landowner to take reasonable steps to prevent the spread of fire from its land. CP 4-5.

On October 11, 2018, DNR moved for summary judgment. CP 20-21. DNR acknowledged 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. Nevertheless, DNR insisted that “as a matter of law, it owed no duty to plaintiffs under the public duty doctrine.” CP 33. DNR's sole legal argument was to assert the Legislature intended for RCW 76.04.016 to immunize the largest landowner in Washington (DNR) from all forms of liability if the plaintiff seeks damages as a result of a fire. CP 37-38. To get there, DNR relied on RCW 76.04.016 to argue the public duty doctrine applies to all of DNR's duties regarding fire, including its common law and statutory duties as a landowner. *Id*

In response, the damaged landowners explained that DNR's motion fundamentally misrepresented the three separate duties that the Court

recognized in *Oberg*. CP 234. The first two duties are based on the common law and statute and apply to DNR as a landowner. CP 235-36. Those two landowner duties have absolutely nothing to do with DNR's status as a fire suppression agency and the payments that some Washington landowners make to DNR for fire suppression support – the public duty doctrine is simply irrelevant to duties arising from common law or statute that apply to Washington's citizens, entities, and the state itself. *Id.* Only the third duty that the Court recognized in *Oberg* is based on DNR's status as a fire suppression agency and its duties in that capacity that do not exist for Washington's citizens and entities. CP 236-37. More specifically, *Oberg* recognized an exception to the public duty doctrine and concluded that DNR owed a "special" duty, in its capacity as a fire suppression agency, to certain landowners who paid DNR to fight fire on their land, regardless of where the fire originated. CP 236-37.

The damaged landowners explained that DNR's effort to re-brand itself as immune from suit based on its duties as a landowner was contrary to the plain language of RCW 76.04.016—specifically, how it maintains DNR's "duties and responsibilities as a landowner." CP 237-39. The damaged landowners cited the statute's legislative history to buttress its plain language. CP 239-41. Finally, the damaged landowners confirmed their claims are based solely on DNR's duties as a landowner, not the

“special duty” found in *Oberg* for landowners who pay DNR to fight the fire on their land, regardless of where the fires start. CP 241-43.

At oral argument, DNR asserted in its rebuttal argument that the damaged landowners had not pled a common law duty against DNR. RP 45:25-46:4. DNR in rebuttal also claimed for the first time that any common law duty that may have existed was abolished in 2014 by the passage of RCW 76.04.760. RP 45:16-25. The damaged landowners promptly filed a sur-reply to address DNR’s new and improper arguments. CP 441. The damaged landowners reiterated they had, in fact, properly pled causes of action based on DNR’s common law duty as a landowner. CP 442-43. The damaged landowners also confirmed that RCW 76.04.760 only created an exclusive cause of action for property damage “to public or private *forested land* . . . resulting from a fire that started on or spread from public or private *forested lands*.” CP 443-44. The damaged landowners asked the Court to deny DNR’s untimely argument because DNR failed to meet its burden of showing that the damaged landowners sought compensation for property that was from “forested lands.” CP 444.

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**C. The Trial Court's Order Ignores the Plain Language and Legislative History of RCW 76.04.016 and Effectively Abolished Over a Century of Washington Law**

On October 24, 2018, the trial court granted DNR's motion. CP 448-54. The order acknowledged that DNR was traditionally subject to "statutory and common law duties as a landowner." CP 450. But it then ruled that DNR "has no statutory or common law actionable duty to any of the plaintiffs, either in fire suppression responsibilities or as a land owner." *Id.* To arrive at its holding, the trial court misconstrued both the intent and meaning of RCW 76.04.016. Without any evidence, the trial court concluded that the Legislature intended to absolve DNR from "any duty ... for anything related to fire." CP 452. The trial court admitted the final sentence of RCW 76.04.016, which states "[t]his section does not alter the department's duties and responsibilities as a landowner," was inconsistent with its unsupported assumption that the Legislature intended to immunize DNR from all liability. CP 451. Despite the lack of any evidence and despite plain language in the statute to the contrary, the trial court nevertheless concluded "the legislature is clear in its intent" and concluded DNR's duties as a landowner no longer include the duty to take reasonable steps to prevent the spread of fire from its land. CP 451-52, 465-66.

At the heart of the trial court's ruling was its unquestioning acceptance of DNR's false premise that the Legislature intended to overturn

all of *Oberg* and not just the special duty based on an exception to the public duty doctrine: “It makes no sense that the legislature would go to great lengths to effectively overturn *Oberg* but then add back in some actionable duty to individuals.” CP 452. Neither DNR nor the trial court cited any evidence or Washington law to support the conclusion that the Legislature was going to “great lengths to effectively overturn *Oberg*” because none exists. CP 465-66. Instead, the trial court adopted DNR’s unsupported mantra that the Legislature intended to abrogate the three separate duties that the Court recognized in *Oberg* despite the fact that RCW 76.04.016 specifically states that it “does not alter the department’s duties and responsibilities as a landowner.” CP 452.

The trial court also accepted DNR’s untimely argument that RCW 76.04.760 superseded any and all causes of action based on the spread of fire. CP 452-53. The trial court did so despite the fact that DNR provided no evidence that the damaged landowners’ claims were exclusively for property damage to “forested land.” CP 23-47, 411-25, 443-44, 463, 476-78. The trial court did not even attempt to address the language of RCW 76.04.760, which states the statute only applies to claims for property damage to “forested land.” CP 452-53. Instead, without any evidence that the damaged landowners were pursuing such claims, the trial court concluded that RCW 76.04.760 applied and “operates to preclude other

possible avenues of recovery.” *Id.*

The damaged landowners timely moved for reconsideration. CP 458-80. A focus of the motion was the trial court’s misunderstanding of the public duty doctrine – it made the relatively common mistake of conflating a public agency’s duties when acting as a public agency (not actionable) with a public agency’s duties when acting in the same capacity as a private citizen or entity (actionable). CP 466-71. The damaged landowners explained the public duty doctrine simply *does not apply* to claims based on the common law or statute if the duties at issue are duties owed by private citizens or entities. CP 466-73. For that reason, the Legislature with RCW 76.04.016 was only focused, and could only be focused, on the third duty in *Oberg* that was based on an exception to the public duty doctrine for those landowners who paid DNR to fight the fire on their land. CP 471-73. The trial court denied the motion for reconsideration. CP 481-82.

#### IV. ARGUMENT

The trial court erred by granting DNR summary judgment based on its erroneous conclusion that DNR owed no duty to the damaged landowners. CP 450. The trial court’s conclusions regarding DNR’s duties are legal questions that are reviewed de novo. *Munich v. Skagit Emergency Commc’n Ctr.*, 175 Wn.2d 871, 877, 288 P.3d 328 (2012).

**A. The Trial Court Erred by Concluding RCW 76.04.016 Abrogated DNR's Duties as a Landowner**

**1. *Oberg* Recognized Two Duties Based on DNR's Status as a Landowner and One Duty Based on an Exception to the Public Duty Doctrine**

The genesis of the trial court's erroneous ruling is the misguided presumption, touted by DNR without any evidence or legal authority, that the Washington Legislature went "to great lengths to effectively overturn *Oberg*." This unfounded paradigm led the trial court to ignore the plain language of RCW 76.04.016 and issue an order that abolishes more than a century of Washington's common law and statutory law regarding landowners. Correcting the trial court's error begins with a proper understanding of what the Washington Supreme Court held in *Oberg*.

The *Oberg* case bears a striking resemblance to this case. Just like the fires in this case, the fire in *Oberg* began as a "small lightning strike fire" on forestland owned by DNR. 114 Wn.2d at 279. Just like DNR's actions in this case, DNR initially engaged the fire but backed-off and allowed the fire to escape, spread, and grow into what eventually became known as the Barker Mountain fire. *Id.* at 280. Just like in this case, DNR's neighboring landowners sued DNR for property damage caused by DNR's negligence in allowing the fire to escape. *Id.* And just like in this case, DNR insisted it was immune under the public duty doctrine. *Id.* at 280-81.

The Washington Supreme Court rejected DNR's argument and held DNR was subject to liability for breaching three separate, "concomitant" duties it owed the plaintiff landowners. *Id.* at 285. At the outset, the Court confirmed that DNR, as a forest landowner, owed a statutory duty to prevent the spread of fire from its forestland. This conclusion did not require legal gymnastics—the Court simply noted that DNR fell within the statutory definition of "forest landowner." *Id.* at 282 (citing RCW 76.04.005). As a forest landowner, the Court held that DNR "has a positive duty to provide adequate protection against the spread of fire." *Id.* at 283 (citing RCW 76.04.600). And just like any other forest landowner, DNR may be held liable when it breaches this duty by "negligently allow[ing] fire ... to spread to the property of another." *Id.* (citing RCW 76.04.730). The Court rejected DNR's argument that its duties as a landowner were subsumed by its duties as a government agency: "DNR not only has a mandatory duty to suppress fires ... it has a concomitant duty as a landowner[.]" *Id.* at 285.

The Court also recognized DNR's separate common law duty as a landowner "to use due care in preventing the spread of fire." *Id.* at 283 (citing *Jordan v. Spokane, P&S Ry.*, 109 Wn. 476, 186 P. 875 (1920)). The Court cited the longstanding precedent under Washington common law of holding landowners liable for failing to take reasonable steps to prevent the spread of fire from their land, including government agencies who own land:

[I]t is the law of Washington, as it is the law generally, that a land occupier has an affirmative obligation to use care to confine any fire on his premises, regardless of its origin, in favor of all persons off his premises who are subjected thereby to an unreasonable risk of damage due to escape of the fire.

*Id.* (quoting *Arnhold v. United States*, 284 F.2d 326, 328 (9th Cir. 1960), *cert. denied*, 368 U.S. 876 (1961)).

Nothing about these two holdings was remarkable—DNR even admitted that it was subject to both common law and statutory duties as a landowner. *Id.* at 281, 284. Still, DNR insisted that the public duty doctrine applied. *Id.* at 284. The Court chose to address DNR’s argument in two parts: “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.” *Id.*

Under the first part, “the fundamental inquiry is whether the governmental unit owed a duty to this particular plaintiff as contrasted to a duty owed to the public in general.” *Id.* The Court held that DNR’s duties as a landowner did, in fact, “identify a particular and circumscribed class of persons, including these plaintiffs, to whom multiple duties were owed by DNR.” *Id.* at 285. For example, the statutory duties applicable to landowners were “designed to protect adjacent landowners because its purpose is to prevent the “spread [of fire] to the property of another.” *Id.* DNR’s

landowner duties were not (and are not) owed to the public in general, they were (and are) owed to specific individuals (*i.e.*, nearby landowners). *Id.*

Under the second part, the Court flatly rejected DNR's argument that "it has no liability because its landowner duty is 'subsumed' into its public duty to prevent and suppress forest fires." *Id.* at 287. The Court remarked that "[t]his distinction defies logic" and noted the utter lack of precedent to support such an argument. *Id.* The Court went so far as to call-out DNR for trying to resurrect sovereign immunity: "This argument highlights the uncontrovertible [sic] fact that what defendant actually wants is for this court to resurrect sovereign immunity." *Id.* at 289.

To be very clear, the foregoing analysis is directly on-point for this case. The trial court erred because the public duty doctrine simply *does not apply* to the damaged landowners' claims based on DNR's common law and statutory duties as a landowner. *Oberg* held exactly that.

The Court could have stopped its opinion with DNR's statutory and common law duties as a landowner, but the facts in *Oberg* presented the Court with an opportunity to address a third basis for liability that had nothing to do with DNR's status as a landowner. The third basis for liability was premised on DNR's status as a fire suppression agency to the extent that DNR had a special relationship with some of the plaintiffs in *Oberg* such that the public duty doctrine did not apply. The Court noted that some of the

plaintiffs in *Oberg* were among a group of forest landowners who were statutorily required to pay DNR a special fire-protection assessment. *Id.* at 285-86 (citing RCW 76.04.610(1)). DNR, in turn, was statutorily required to provide fire protection services to these assessment-paying forest landowners “for their special benefit.” *Id.* at 286 (emphasis in original). The Court concluded this was “telling evidence of legislative intent to benefit adjoining landowners.” *Id.* at 285. In short, the Court held that a “legislative intent” exception to the public duty doctrine existed between DNR and the forest landowners who paid DNR to protect their land from fire regardless of where the fire originated. *Id.*; see also *Honcoop v. State*, 111 Wn.2d 182, 188, 759 P.2d 1188 (1988) (discussing “legislative intent” exception).

Unlike DNR’s landowner duties, this third basis of liability was entirely detached from DNR’s status as a landowner and arose *solely* from DNR’s status as a fire suppression agency. As a result, DNR could be sued for failing to take reasonable steps to prevent the spread of fire from land that was *not* owned by DNR if the fire damaged the property of an owner who paid DNR a special assessment to protect their property from fire. Normally the public duty doctrine would have prevented such a claim, but *Oberg* recognized an exception to the public duty doctrine based on its conclusion that the Legislature intended to allow the assessment-paying landowners to sue DNR for failing to protect their land from fire.

**2. RCW 76.04.016 Abrogated DNR's Duty Based on an Exception to the Public Duty Doctrine but Expressly Preserved DNR's Duties as a Landowner**

While *Oberg* recognized a third duty based on an exception to the public duty doctrine, there is no factual or legal support for the trial court's conclusion that the Legislature went "to great lengths" to overturn the entirety of *Oberg*, CP 452, let alone any support for concluding RCW 76.04.016 was intended to abrogate DNR's duties as a landowner.

The plain language of RCW 76.04.016 makes clear the Legislature only intended to abrogate the third duty in *Oberg* that was based on an exception to the public duty doctrine for landowners who paid DNR to protect their land from fire. The trial court's conclusion simply ignores the plain language of the statute, including the last sentence that says the statute "does not alter the department's duties and responsibilities as a landowner":

The department when acting, in good faith, in its statutory capacity as a fire prevention and suppression agency, is carrying out duties owed to the public in general and not to any individual person or class of persons separate and apart from the public. Nothing contained in this title, including but not limited to any provision dealing with payment or collection of forest protection or fire suppression assessments, may be construed to evidence a legislative intent that the duty to prevent and suppress forest fires is owed to any individual person or class of persons separate and apart from the public in general. *This section does not alter the department's duties and responsibilities as a landowner.*

RCW 76.04.016 (emphasis added).

The first sentence of the statute merely recites the public duty doctrine—DNR’s duties as a fire suppression agency are duties “owed to the public in general.” *Oberg*, 114 Wn.2d at 284. As a result, the public duty doctrine prevents DNR from being sued solely for breaching those duties. *See* RCW 76.04.610, .750. However, as recognized in *Oberg*, the fact that DNR acts as both a fire suppression agency *and* as a landowner does not mean that DNR’s duties as a landowner are “subsumed” by its public duty as a fire suppression agency. 114 Wn.2d at 289.

The second sentence of RCW 76.04.016 addresses and rejects the conclusion from *Oberg* that the Legislature intended to create an exception to the public duty doctrine for landowners who paid DNR to protect their land from fire. *Id.* at 285-86. The Legislature is stating, in no uncertain terms, that it did not intend to create an exception to the public duty doctrine based on those payments. As a result, the Legislature eliminated the sole basis that *Oberg* relied upon to conclude DNR owed a third duty to some landowners based on an exception to the public duty doctrine. *Id.* at 286.

The Legislature could have stopped there and the meaning and effect of RCW 76.04.016 would not impact DNR’s duties as a landowner. But to eliminate any doubt, the Legislature included the final sentence: “This section does not alter the department’s duties and responsibilities as a landowner.” RCW 76.04.016.

**3. The Trial Court's Interpretation of RCW 76.04.016 Violates "Well-Established Principles of Statutory Construction"**

The trial court erred by ignoring the last sentence of RCW 76.04.016 and concluding the statute abrogated DNR's duties as a landowner. There is no way to reconcile the trial court's conclusion that RCW 76.04.016 altered DNR's duties and responsibilities as a landowner with the statute's plain language that "[t]his section does not alter the department's duties and responsibilities as a landowner." While the trial court's conclusion is contrary to the plain language of the statute, it also violates well-established principles of statutory construction.

First, the trial court concluded the second sentence of the statute—specifically, the word “nothing”—somehow “limits the meaning of the final sentence that otherwise on its face contradicts the prior language of the section.” CP 451-52. But the trial court's analysis was backwards. “It is a well-established principle of statutory construction that provisos and exceptions remove something from the enacting clause that would otherwise be contained therein.” *Tyler Pipe Indus., Inc. v. State Dept. of Revenue*, 96 Wn.2d 785, 788, 638 P.2d 1213 (1982); *In re Marriage of Tahat*, 182 Wn. App. 655, 672, 334 P.3d 1131 (2014) (“specific words or terms modify and restrict the interpretation of general words or terms where both are used in sequence”). Relatedly, “[a] general statutory provision

must yield to a more specific statutory provision.” *Ass’n of Wash. Spirits & Wine Distributors v. Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 356, 340 P.3d 849 (2015) (citations omitted).

Turning to RCW 76.04.016, the second sentence is a general, enacting provision whereas the third sentence is a specific, restrictive provision. The language “[n]othing under this title” means that the second sentence applies generally with broad reference to the entirety of chapter RCW 76.04. In contrast, the third sentence operates as a “proviso” applicable specifically to “this section” (*i.e.*, just RCW 76.04.016). By law, the third sentence operates to “modify and restrict the interpretation” of the second sentence, not the other way around. *See Tahat*, 182 Wn. App. at 672. Based on the rules of statutory construction, DNR’s duties as a fire suppression agency fall within the public duty doctrine but DNR’s duties and responsibilities as a landowner remain unaltered.

The trial court then employed its misconstruction of RCW 76.04.016 to erroneously whittle-down DNR’s duties as a landowner:

[T]his Court reads the last sentence to impose those duties typical of landowners in general, for example, road maintenance, erosion control, weed control, nuisance control, etc. By using “nothing” in the second sentence, the legislature rejects the idea of any duty owed by the DNR to individual for anything related to fire.

CP 452. Not only does this violate the rules of statutory construction, there

is simply no factual or legal support for the trial court's conclusion that the Legislature intended for the largest landowner in Washington to remain liable for negligent "weed control" but not for failing to take reasonable steps to prevent the spread of fire from its land.

The trial court's presumption of what the Legislature meant to include within the gambit of "typical" landowner duties violates another principle of statutory construction: "[t]he legislature is presumed to enact laws with full knowledge of existing laws." *Jametsky v. Olsen*, 179 Wn.2d 756, 766, 317 P.3d 1003 (2014) (quoting *Thurston Cty. v. Gorton*, 85 Wn.2d 133, 530 P.2d 309 (1975)). Accordingly, the trial court was required to assume the Legislature knew full well that DNR's duties as a landowner included the common law and statutory duty to prevent the spread of fire. By including the last sentence, the Legislature meant to maintain those duties, all of them. A trial court does "not have the power to read into a statute that which [it] may believe the legislature has omitted" or to otherwise "create judicial fixes." *State v. Reis*, 183 Wn.2d 197, 214–15, 351 P.3d 127 (2015) (citation omitted). But that is exactly what the trial court did as a result of DNR's unsupported assertion that the Legislature intended to overturn all of *Oberg*, which the trial court plainly relied on given its unsupported conclusion that the Legislature went "to great lengths to effectively overturn *Oberg*." CP 452.

Taken together, the trial court was required to (1) assume the Legislature was aware of DNR's duties as a landowner to prevent the spread of fire from its land, and (2) interpret the final sentence of the statute as preserving *all* of DNR's duties as a landowner—including the duty to prevent the spread of fire from its land. Instead, the trial court committed reversible error by ignoring the plain language of the third sentence and curtailing its interpretation in violation of its plain meaning.

**4. The Legislative History of RCW 76.04.016 Confirms Its Plain Language—DNR's Duties as a Landowner Remain**

The trial court erred by considering the legislative history of RCW 76.04.016 because the plain language of the statute is subject to only one reasonable interpretation. CP 238-39; *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001) (“A statute that is clear on its face is not subject to judicial construction.”). No two reasonable minds could differ as to the plain meaning of “[t]his section does not alter the department’s duties and responsibilities as a landowner.”

The trial court’s improper effort to ignore that plain language by picking-and-choosing what legislative history to rely on illustrates why Washington law prevents trial courts from judicially constructing legislation. There can be no doubt that the trial court was misled by DNR’s unsupported assertion regarding what the Legislature was supposedly trying

to do because it admits as much: “It makes no sense that the legislature would go to great lengths to effectively overturn *Oberg* but then add back in some actionable duty to individuals.” CP 452. There is absolutely no evidence to support this conclusion.

To the contrary, the evidence of legislative intent cited by the trial court shows that RCW 76.04.016 was intended to abrogate *Oberg* to the extent it found the Legislature intended to create an exception to the public duty doctrine for landowners who paid fire-protection assessments to DNR. CP 451. The first bill report cited by the trial court referenced the original amendment introduced in 1991. CP 389-90. Notably, the original draft of the proposed statute did not include the final clarifying sentence regarding DNR’s duties as a landowner. *Id.* But legislators quickly inserted new language to clarify that DNR’s duties as a landowner were “not altered”:

Substitute Bill Compared to Original Bill: The substitute bill clarifies that the department’s duties and responsibilities as a private landowner are not altered by the creation of the public duty doctrine.

CP 390.

The second bill report accompanied the final version of the amendment that was enacted and makes clear it is only intended to abrogate the “special duty” holding from *Oberg*:

Background: In 1990, a group of landowners sued [DNR] for damages to the landowners’ properties as a result of fire which began on DNR land and subsequently escaped.

Central to the arguments made in court, and to DNR's liability, was *the issue of whether DNR owed a special duty to the landowners, sperate from its duty to the public in general*. The Washington State Supreme Court concluded that DNR did owe such a duty and found in favor of the landowners.

....

Summary of Amended Bill: The Department of Natural Resources, when acting in good faith as a fire prevention and suppression agency, is carrying out duties owed to the public in general, and not to any individual person or class of persons separate and apart from the public. *In particular, DNR owes no special duty to persons who pay forest protection or fire suppression assessments.*

CP 393-95 (emphasis added).

The bill reports vividly illustrate that the Legislature was not going to “great lengths to effectively overturn *Oberg*.” The only portion of *Oberg* the Legislature intended to overturn was the third duty based on the Court’s conclusion that the Legislature intended to create an exception to the public duty doctrine for those landowners who paid fire suppression assessments to DNR to protect their land, which is why the last sentence plainly states that the statute “does not alter” DNR's duties as a landowner.

The trial court ignored additional evidence the damaged landowners presented if the trial court chose to go down the path of considering the legislative history . For example, they provided the trial court with excerpts from the House Committee on Natural Resources & Parks, which took the lead in drafting and vetting the bill. CP 389, 393. Over the course of the

Committee's hearings, legislators and DNR repeatedly assured stakeholders that the new statute only abrogated the "special duty" component from *Oberg* that was based on the fire suppression assessments. This point was made abundantly clear by Representative Wes Pruitt, Chairman of the House Committee, during several committee hearings on the bill:

Representative Pruitt (Committee Chair): ... We had some confusion earlier on this Bill on whether we were, in essence, exempting the department from any liability and *all we're dealing with in that section is this extra special duty that the [Oberg] Court imposed in that particular case.* So, I appreciate you letting us know. Any questions on that, everyone clear? Thank you.<sup>1</sup>

Just six days later, the Committee Chair reiterated that DNR would not be exempt from liability based on its duties as a landowner:

Representative Pruitt (Committee Chair): The primary focus of this Bill is in Section I, which reverses the effect of a court ruling [*Oberg*] that said if you pay an assessment there's a duty above and beyond what there would normally be. That is certainly not a situation that applies to regular fire districts. It is an extraordinary situation that came about as a result of a very unusual case. *This bill is intended to return to what would be the normal rule.*

*We are not limiting [or] making the department exempt from liability in this Bill.* But I think we would have a very absurd situation if the department had to run around and carry a map with it to see who is paying an assessment and who isn't and

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<sup>1</sup> *March 24th Hearing on S.S.B. 5025 Before the H. Comm. on Nat. Res. & Parks, 53rd Leg., 1993 Reg. Sess., at 1:21:36-1:23:06 (statement by Rep. Pruitt, Chairman, H. Comm. on Nat. Res. & Parks), available at <https://www.digitalarchives.wa.gov/Record/View/8BCA7673DE62FA74320EB4DC92933EB4>, Washington State Digital Archives (ref. no. H-NRP-03-24-1993.wav).* The Committee's entire March 24th discussion of S.S.B. 5025 begins at 0:42:45 and concludes at 1:29:12 of the recording; *see also* CP 240.

who they have a greater duty to. It's just not a way to control forest fires and protect citizens.<sup>2</sup>

The trial court dismissed this evidence based on its unsupported conclusion that the Committee Chair “did not understand what his colleague intended or did not accurately state what the committee intended.” CP 452. This conclusion illustrates why trial courts are not allowed to divine the intent of the Legislature – the trial court adopted DNR’s unsupported paradigm of what the Legislature intended, and as a result, it ignored the plain language of the statute and the plain evidence of its intent.

**B. The Trial Court Erred in its Construction and Application of the Public Duty Doctrine**

The legal error undermining the trial court’s order is a fundamental misunderstanding of what the public duty doctrine actually is and how it applies. The trial court’s order repeatedly states that the Legislature somehow “created” or otherwise “established” the public duty doctrine for DNR when acting in its capacity as a fire suppression agency. CP 451, 482. The trial court’s order also implies that DNR’s duties as a landowner are somehow “subsumed” by its public duties as a fire suppression agency. Both conclusions are directly contrary to well-established Washington law.

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<sup>2</sup> *March 30th Hearing on S.S.B. 5025 Before the H. Comm. on Nat. Res. & Parks*, 53rd Leg., 1993 Reg. Sess., at 0:51:36–0:52:40 (statement by Rep. Pruitt, Chairman, H. Comm. on Nat. Res. & Parks), available at <https://www.digitalarchives.wa.gov/Record/View/AC9D7F0EDC7F75DCFFFA944CA1BDFBCD>, Washington State Digital Archives (ref. no. H-NRP-03-30-1993.wav). The Committee’s entire March 30th discussion of S.S.B. 5025 begins at 0:46:45 and concludes at 1:30:05 of the recording; see also CP 241.

The public duty doctrine is purely “a judicial creation,” not a legislative one. *Donohoe v. State*, 135 Wn. App. 824, 851, 142 P.3d 654 (2006). Following Washington’s abolition of sovereign immunity, government entities were subject to liability “to the same extent as if they were a private person or corporation.” *Munich*, 175 Wn.2d at 878 (citing RCW 4.96.010(1)). Because the duties of private persons and corporations arise from common law or statute, the duty of the government “must be one owed to the injured plaintiff, and not one owed to the public in general.” *Cummins*, 156 Wn.2d at 852. The Washington Supreme Court created the public duty doctrine as a “focusing tool” to decide whether a duty of care was owed to a particular plaintiff (actionable) or to the public at large (not actionable). *Id.* Put another way, “[t]he public duty doctrine simply reminds us that a public entity—like any other defendant—is liable for negligence only if it has a statutory or common law duty of care.” *Osborn v. Mason Cty.*, 157 Wn.2d 18, 27, 134 P.3d 197 (2006). But “the public duty doctrine does not serve to bar a suit in negligence against a government entity.” *Cummins*, 156 Wn.2d at 853; *Osborn* 157 Wn.2d at 27.

For example, “the public duty doctrine does not apply where ... a plaintiff alleges the public entity breaches a common law duty it shares in common with private entities.” *Mita v. Guardsmark, LLC*, 182 Wn. App. 76, 84, 328 P.3d 968 (2014) (citing *Munich*, 175 Wn.2d at 888, 894

(Chambers, J., concurring for the majority)). This is because, “as a matter of law, the public entity owes this common law duty to a person [or persons] it should reasonably foresee may be harmed by its breach.” *Id.* Likewise, the public duty doctrine does not apply when a public entity’s statutory duty is owed to particular persons within the foreseeable range of harm. *Munich*, 175 Wn.2d at 888–89.

The Legislature’s only role in connection with the public duty doctrine is to clarify whether a particular statutory duty is intended to create a cause of action against the government. *See, e.g., Honcoop*, 111 Wn.2d at 188 (discussing “legislative intent” exception to the public duty doctrine). Passage of RCW 76.04.016 did nothing more than clarify that the Legislature did not intend to create an actionable duty on behalf of assessment-paying forest landowners when DNR is suppressing fire *solely* in its capacity as a fire agency. In other words, the Legislature eliminated the “legislative intent” exception to the public duty doctrine that provided the third basis for liability in *Oberg*. But the Legislature did not (because it could not) “establish” the public duty doctrine to immunize DNR from liability arising out of its common law and statutory duties as a landowner. The Legislature recognized as much in the last sentence of RCW 76.04.016 that the trial court simply ignored.

The trial court's misunderstanding of the public duty doctrine is reflected by its failure to recognize that DNR can be held liable even if it was simultaneously acting in its capacity as a public agency and in its capacity as a landowner. *Okeson v. City of Seattle*, 150 Wn.2d 540, 550-51, 78 P.3d 1279 (2003). Under Washington law, a government entity is not immune from suit for breaching its private duties (e.g., landowner duties) just because it simultaneously breached its public duties (e.g., fire-suppression duties). For example, in *DiBlasi v. City of Seattle*, 136 Wn.2d 865, 969 P.2d 10 (1998), an adjacent landowner sued the city for property damage caused by runoff from the city's street running along her property. *Id.* at 867. The plaintiff alleged the street had caused surface water to artificially collect and channel onto her property resulting in water damage to her property. *Id.* at 871. The plaintiff also alleged the city had failed to repair a "tension crack" in the road surface that eventually lead to a mudslide causing more damage to her property. *Id.* The Washington Supreme Court noted that all "[m]unicipalities have a duty to use reasonable care to keep streets and roads safe for travel." *Id.* at 880. But, citing the public duty doctrine, the Court held that damages caused by the mudslide were barred because the duty to maintain and repair city streets is owed to "the general public" and not specifically to adjoining landowners. *Id.* at 881-82. With respect to the water runoff, however, the Court held the city

was subject to liability, *as a landowner*, for artificially collecting and channeling surface water onto the plaintiff's adjacent property. *Id.* at 879.

In *Johnson v. State*, 77 Wn. App. 934, 894 P.2d 1366 (1995), a Washington State University student was abducted and raped outside her dormitory. *Id.* at 936. The woman sued, alleging the university was negligent in failing to provide for her safety. *Id.* at 937. The trial court granted the state's motion for summary judgment under the public duty doctrine. *Id.* The Court of Appeals reversed. *Id.* The Court held the university did not owe the plaintiff a duty based solely on her status as a student because the university's responsibility for students was "a general duty of care owed to the public at large." *Id.* at 937–40. However, the Court held that the university did owe the plaintiff an actionable duty of care based on her status as an invitee—a duty "owed generally by land possessors to persons on their land." *Id.* at 940–41.

The *DiBlasi* and *Johnson* cases demonstrate how a government entity can simultaneously act in both its governmental and private capacities. Under Washington law, DNR is subject to liability for breaching its private duties as a landowner even if it cannot be sued for its public duties that it was carrying out at the same time. The trial court completely ignored DNR's private duties as a landowner, likely because DNR asserted that its private duties were subsumed by its public duties. But this argument was

specifically and unequivocally rejected in *Oberg*, which stated DNR's argument "defies logic":

The third policy argument advanced by defendant for its claim of immunity is that its duty as a landowner was "subsumed into its public duty as a matter of fact." Defendant argues that it was acting in its governmental capacity in fighting these fires. RCW 4.92.090 renders meaningless that distinction. This argument highlights the uncontrovertible [sic] fact that what defendant actually wants is for this court to resurrect sovereign immunity.

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. In other words, defendant is presenting the public duty doctrine as a defense to liability, not to negate the existence of a duty. Sovereign immunity is a defense to liability, but the public duty doctrine is not.

In summary, we hold that DNR is liable as a landowner under Washington's statutory and common law and that the public duty doctrine does not negate the jury's unchallenged finding that it was negligent.

*Id.* at 289 (internal citations omitted).

The damaged landowners are suing DNR for breaching its common law and statutory duties *as a landowner*. The public duty doctrine is irrelevant to those duties, as is the fact that DNR may have been acting as both a landowner and a fire suppression agency.

**C. The Trial Court Erred in Ruling RCW 76.04.760 Supersedes All Common-Law Causes of Action for Fire Spread**

The trial court erred in accepting DNR's belated argument that RCW 76.04.760 excludes every common law cause of action for the negligent spread of fire because its conclusion ignores the plain, limiting language of the statute. CP 452-53. The trial court further erred because DNR failed to meet its burden of showing that every damaged landowner was pursuing a claim for property damage to forested land. *Schaaf v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 665 (1995) (moving party bears initial burden of demonstrating entitlement to summary judgment).

RCW 76.04.760 created the exclusive cause of action for property damage "to public or private forested lands" caused by fire that "started on or spread from public or private forested lands":

*This section provides the exclusive cause of action [1] for property damage to public or private forested lands, including real and personal property on those land, [2] resulting from a fire that started on or spread from public or private forested land.*

RCW 76.04.760(4) (emphasis added). Per its plain language, the statute only creates an exclusive cause of action over claims that meet both conditions. The statute goes on to provide an exceedingly narrow definition of what constitutes "public or private forested lands":

Public or private forested lands means any lands used or biologically capable of being used for growing forest tree species regardless of the existing use of the land except when

the predominant physical use of the land at the time of the fire is not consistent with the growing, conservation, or preservation of forest tree species. Examples of inconsistent uses include, but are not limited to, buildings, airports, parking lots, mining, solid waste disposal, cropfields, orchards, vineyards, pastures, feedlots, communication sites, and home sites that may include up to ten acres.

RCW 76.04.760(5)(e).

Both the trial court and DNR failed to cite any evidence establishing that each of the damaged landowner's claims are exclusively for property damage to "forested lands," likely because the damaged landowners seek a host of property damages that fall outside the narrow definition of "forested lands." CP 4 (¶¶ 4.11-12, 5.4, 5.8).

Washington law also does not support the trial court's conclusion that RCW 76.04.760 supersedes every conceivable cause of action based on a property owner's failure to take reasonable steps to prevent the spread of fire from their land. As noted above, the common law duty of a landowner "to use reasonable care to prevent the spread of fire" has existed in Washington uninterrupted since at least 1905. *Wick v. Tacoma Eastern R.R. Co.*, 40 Wn. 408, 412, 82 P. 711 (1905). The statutory duty of a landowner "to prevent [fire] from spreading and doing damage to other persons' property" has existed even longer – since at least the late 1890s. *See Kuehn v. Dix*, 42 Wash. 532, 534, 85 P. 43 (quoting Bal. Code § 3138, circa 1897).

Causes of action based on either duty encompass claims for *all* “damages done by fires” and have never been limited to damages to “public or private forested lands.” *See, e.g., Jongeward v. BNSF Ry. Co.*, 174 Wn.2d 586, 599, 278 P.3d 157 (2012). Likewise, a cause of action for breach of these duties extends to fires spreading from any type of land, not just “public or private forested lands.” *See, e.g., Broughton Lumber Co. v. BNSF Ry. Co.*, 174 Wn.2d 619, 624, 278 P.3d 173 (2012) (fire spread from railroad right-of-way owned by defendant). Both *Broughton* and *Jongeward* involved a fire that spread from a railroad right-of-way. *Broughton*, 174 Wn.2d at 624; *Jongeward*, 174 Wn.2d at 591. But under RCW 76.04.760(5)(e), “railroad rights-of-way” are excluded from the definition of “public or private forested lands.” Under the trial court’s construction, however, the plaintiffs’ causes of action in *Jongeward* or *Broughton* are forever barred because they did not involve “forested lands.”

More broadly, the trial court’s conclusion that RCW 76.04.760 provides the exclusive remedy for damage caused by fire means that *only* the owners of forested land can pursue claims for such damage. If a timber company notices a small fire and chooses to ignore it, the neighboring town that is damaged by the resulting fire has no claim, whether the claim is brought by the town for damage to the municipal buildings or the claim is brought by homeowners in the town for damage to their homes.

Despite this absurd implication, the trial court concluded the Legislature intended RCW 76.04.760 to supersede the damaged landowners' causes of action entirely. CP 452. Once again, the trial court's assumptions regarding legislative intent were misplaced. "It is a general rule of interpretation to assume that the legislature was aware of the established common-law rules applicable to the subject matter of the statute when it was enacted." *Ballard Square Condo. Owners Ass'n v. Dynasty Const. Co.*, 158 Wn.2d 603, 621, 146 P.3d 914 (2006). The common law is superseded only if "the provisions of a statute are so inconsistent with and repugnant to the prior common law that both cannot simultaneously be in force." *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 77, 196 P.3d 691 (2008). The trial court was required to assume the Legislature was aware of the broad range of claims under Washington law and should have concluded that the Legislature's narrow definition of "forested lands" meant that it only intended to supersede a small subset of the common law—namely, it intended to supersede only causes of action available "for property damage to public or private forested lands." Instead, the trial court made a giant leap in the wrong direction and concluded that RCW 76.04.760 was intended to abolish all claims except those "for property damage to public or private forested lands." There is no evidence and no law that supports the trial court's holding.

## V. CONCLUSION

The Court should reverse the trial court's dismissal of the damaged landowners' claims and remand their claims for further proceedings because the trial court erred by concluding DNR owed them no common law or statutory duty. The trial court's order is directly contrary to the Washington Supreme Court's holding in *Oberg*, which recognized DNR has a common law and statutory duty to take reasonable steps to prevent the spread of fire from its land. Both the plain language and the legislative history of RCW 76.04.016 show that DNR's duties as a landowner were not abrogated by statute: "This section does not alter the department's duties and responsibilities as a landowner." Simply put, the damaged landowners are pursuing claims against DNR for the breach of its duties as a landowner, not its duties as a fire suppression agency.

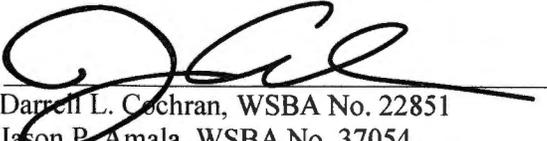
The only duty from *Oberg* that was abrogated by RCW 76.04.016 was DNR's special duty to landowners who pay DNR a fire protection assessment. The Court in *Oberg* concluded the Legislature intended for those payments to create an exception to the public duty doctrine such that DNR had a special duty to those landowners to protect their land from fire. The Legislature in RCW 76.04.016 clarified that no such intent existed, which eliminated the foundation in *Oberg* for a third, special duty based on an exception to the public duty doctrine.

Just like nothing in RCW 76.04.016 abrogated DNR's common law and statutory duties to the damaged landowners, nothing in RCW 76.04.760 abrogated DNR's duties to the damaged landowners. At most, RCW 76.04.760 provides the exclusive statutory remedy for a very narrow set of forested landowners, but even then, DNR failed to meet its burden of showing that the statute applies to any of the damaged landowners.

Respectfully submitted this 6th day of March 2019.

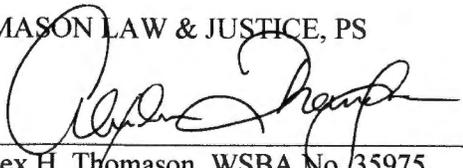
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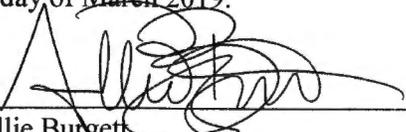
  
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**CERTIFICATE OF SERVICE**

THIS IS TO CERTIFY that on this 6th day of March 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 6th day of March 2019.

  
\_\_\_\_\_  
Allie Burgett  
Legal Assistant



March 6, 2019

Washington State Court of Appeals – Division III  
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500 N. Cedar Street  
Spokane, WA 99201

**RE: SCHULZ, ET AL. V. STATE OF WASHINGTON DEPARTMENT OF NATURAL  
RESOURCES, CASE NO. 364534**

Dear Ms. Townsley,

Enclosed for filing, please find the following:

1. Appellants' Opening Brief.

If you have any questions, please do not hesitate to contact our office. Thank you.

Sincerely,

Allie Burgett  
Legal Assistant to  
ALEX THOMASON  
Attorney at Law