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

DANIEL LYON,
Appellant,

v.

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

BRIEF OF APPELLANT

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INTRODUCTION

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

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

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

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

ASSIGNMENTS OF ERROR

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

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

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

1. Should this Court hold that the PRD is unnecessary and unjust under modern tort, and reject the doctrine?
2. Alternatively, should this Court hold that the PRD is unconstitutional where it singles out professional rescuers as a class, denying them equal protection under the law?
3. If this Court declines to abandon the PRD, then should it hold that the PRD does not bar relief where, as here, the plaintiff is injured by a defendant's conduct exceeding ordinary negligence?

STATEMENT OF CASE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Procedural history.

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

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

In October 2018, PUD and OCEC moved to dismiss Lyon’s claims, arguing they were barred by the PRD. CP 60-76, 470-83. In November, the court granted both motions over Lyon’s objection. CP 426-31, 610-12. Following the court’s ruling, the parties stipulated that this Court should take interlocutory review. The court agreed to certify the case for immediate appeal pursuant to RAP 2.3(b)(4). RP 35.¹ This Court accepted review on January 10, 2019.

ARGUMENT

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

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

Beaupre, 161 Wn. 2d at 571 (quoting CR 56(c)).

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

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

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

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

As a general rule, a person injured while attempting to rescue another may recover from the party whose negligence created the need for rescue. *Maltman*, 84 Wn.2d at 977 (citing *French v. Chase*, 48 Wn.2d 825, 830, 297 P.2d 235 (1956)). The doctrine derives from Justice Cardozo's statement that "danger invites rescue." 84 Wn. 2d at 976-77 (quoting *Wagner v. Int'l Ry.*, 232 N.Y. 176, 133 N.E. 437 (1921)). This "rescue doctrine is not a common law remedy [but] is shorthand for the idea that rescuers are to be anticipated and is a reflection of a societal value judgment that rescuers should not be

barred from bringing suit for knowingly placing themselves in danger to undertake a rescue.” **McCoy v. Am. Suzuki Motor Corp.**, 136 Wn.2d 350, 356, 961 P.2d 952 (1998).

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

The PRD² “is a limitation to this general rule,” barring professional rescuers from recovering under the rescue doctrine. **Loiland v. State**, 1 Wn. App. 2d 861, 865, 407 P.3d 377 (2017) (citing **Maltman**, 84 Wn. 2d at 978). The PRD’s rationale is twofold: (1) professional rescuers assume hazards voluntary rescuers do not assume; and (2) they are compensated for accepting those risks.

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

Loiland, 1 Wn. App. 2d at 865 (citing **Maltman**, 84 Wn. 2d at 978).

A professional rescuer currently may not recover for injuries caused by hazards “inherently within the ambit of those dangers which are unique to and generally associated with the particular rescue activity.” 1 Wn. App. 2d at 865 (quoting **Maltman**, 84 Wn.2d at 979).

As **Maltman** put it (84 Wn.2d at 978-79):

We conclude that the proper test for determining a professional rescuer’s right to recovery under the “rescue doctrine” is whether the hazard ultimately responsible for causing the injury is inherently within the ambit of those dangers which are unique to and generally associated with the particular rescue activity. Stated affirmatively, it is the business of professional rescuers to deal with certain hazards, and such an individual cannot complain of the negligence which created the actual necessity for exposure to *those* hazards. When the injury is the result of a hazard generally recognized as being within the scope of dangers identified with the particular rescue operation, the doctrine will be unavailable to that plaintiff.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[T]hose jurisdictions which have adopted the firefighter's rule offer no uniform justification therefor, nor do they agree on a consistent application of the rule. The legislatures in many jurisdictions which adhere to the rule have found it necessary to modify or abolish the rule. The rule is riddled with exceptions, and criticism of the rule abounds.

Against this backdrop, we answer the certified question in the negative. South Carolina has never recognized the firefighter's rule, and we find it is not part of this state's common law. In our view, the tort law of this state adequately addresses negligence claims brought against non-employer tortfeasors arising out of injuries incurred by firefighters and police officers during the discharge of their duties.

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

3. This Court should abandon the PRD.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The argument, in essence, is that the fireman or policeman, in accepting the salary and fringe benefits offered for his job, assumes all normal risks inherent in his employment as a matter of law, and thus may not recover from one who negligently creates such a risk. (See, e.g., ***Maltman*** [*supra*].)

The fallacy in this argument is simply that it proves too much. Under this analysis, an employee would routinely be barred from bringing a tort action whenever an injury he suffers at the hands of a negligent tortfeasor could be characterized as a normal inherent risk of his employment. Yet, as noted above, past California cases have regularly permitted highway workers -- whose jobs obviously subject them to the ‘inherent risk’ of being injured by a negligent driver -- to recover for damages inflicted by such third party negligence, and have permitted construction workers -- whose employment poses numerous risks of injury at the hands of another -- to recover tort damages for work-related injuries so long as the negligent tortfeasor is not their employer.

As these and countless other cases demonstrate, while policemen and firemen regularly face substantial hazards in the course of their employment and are, theoretically at least, compensated for such risks, a host of other employees -- highway repairmen, high rise construction workers, utility repairmen and the like -- frequently encounter comparable risks in performing their jobs and, again theoretically, also receive compensation for such risks.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Washington currently recognizes numerous exceptions to the PRD.

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

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

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

In **Ward**, a police officer sustained injuries when a car hit her patrol car when she was *en route* to a prowler assist call. 52 Wn. App. at 281. Refusing to apply the PRD to bar her recovery, the appellate court held that the risk of the collision was not inherent in responding to the call. 52 Wn. App. at 287. The court reasoned that the PRD "relieves the perpetrator of the act that caused the rescuer to be at the scene; it does not relieve a party whose intervening negligence injures the rescuer." *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

RESPECTFULLY SUBMITTED this 15th day of July 2019.

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