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COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

DANIEL LYON,

Appellant,

vs.

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

Respondents.

BRIEF OF RESPONDENT
OKANOGAN COUNTY ELECTRIC COOPERATIVE, INC.

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I. INTRODUCTION

“It is the business of professional rescuers to deal with certain hazards.” *Maltman v. Sauer*, 84 Wn.2d 975, 979, 530 P.2d 254 (1975). Recognizing as much, the Washington Supreme Court held that professional rescuers “cannot complain of the negligence which created the actual necessity for exposure to those hazards.” *Id.* The Professional Rescuer Doctrine (the “Doctrine”) bars a professional rescuer’s right of recovery against a party whose alleged negligence (gross or otherwise) caused the need for the rescuer to respond to a scene when “the hazard ultimately responsible for causing injury is inherently within the ambit of those dangers which are unique to and generally associated with the particular rescue activity.” *Id.*

The Doctrine (also known as the Fireman’s Rule) has been settled law in Washington for more than 40 years. It has survived every challenge, including constitutional challenges, and serves a legitimate purpose. There are sound policy reasons in support of the Doctrine. Professional rescuers willingly and knowingly assume certain risks as part of their profession. When Appellant Daniel Lyon (“Appellant”) chose to become a professional firefighter, he understood firefighting was a dangerous profession and assumed a risk he would suffer burns while

fighting fires. The Doctrine also encourages citizens to report fires without fear of being sued by a firefighter injured while fighting the fire.

Respondent Okanogan County Electric Cooperative (“OCEC”) asks the court to affirm the trial court’s dismissal of Appellant’s claims under the Doctrine. Appellant was a U.S. Forest Service Firefighter who knowingly and willingly chose to fight the Twisp River Fire and was injured while doing his job. Although Appellant’s injuries are unfortunate, his duties required him to fight this fire regardless of whether the fire started as a result of negligence.

The trial court held Appellant’s claims against OCEC and Douglas County PUD were barred by the Doctrine, which was recently discussed and reaffirmed by Division I of the Washington Court of Appeals in *Loiland v. State*, 1 Wn. App. 2d. 861, 407 P.3d 377 (2017), *rev. denied* 190 Wn.2d 1013, 415 P.3d 1196 (2018) and even more recently in an August 19, 2019 decision entitled *Markoff v. Puget Sound Energy*, No. 77785-8-I, 2019 WL 3887407, at *1 (Wash. Ct. App. Aug. 19, 2019).

The summary dismissal of Appellant’s claims against OCEC should be affirmed on appeal for the following reasons:

- Appellant was a professional firefighter employed by the U.S. Forest Service at the time of the Twisp River Fire;

- Appellant was injured in the course and scope of his employment as a firefighter while he was fighting the Twisp River Fire; and
- The injuries suffered by Appellant (burns) fall within the “ambit of danger” faced by a professional firefighter fighting a wildland fire.

Based on these undisputed facts, the Doctrine bars Appellant’s claims and the trial court’s dismissal of Appellant’s claims against OCEC should be affirmed.

II. COUNTERSTATEMENT OF ISSUES

Whether the trial court properly dismissed Appellant’s claims against OCEC under the Professional Rescuer Doctrine where:

1. The Doctrine is well-settled law established by the Washington Supreme Court more than 40 years ago, was recently reaffirmed, and is supported by sound public policy rationale;

2. The Doctrine does not violate equal protection because professional rescuers are not similarly situated to lay rescuers, are not members of a suspect class, and the Doctrine is rationally related to a legitimate government interest; and

3. There is no “gross negligence” exception to the Doctrine, which is based on an “ambit of danger” analysis, and not an analysis of the mental state of the actor who created the need for a rescue. Further, there is no evidence in the record of grossly negligent conduct.

III. STATEMENT OF THE CASE

A. Appellant Lyon's First Amended Complaint.

For purposes of its summary judgment motion, OCEC accepted the facts set forth in Appellant's First Amended Complaint. In the underlying litigation, however, OCEC denies liability and strongly disagrees with Appellant's recitation of facts, including its characterization of how the Twisp River Fire started.

The Twisp River Fire started on August 19, 2015 near a small unoccupied house located at 591 Twisp River Road. *CP 491 - Plaintiff Daniel Lyon's First Amended Complaint.*

In his First Amended Complaint, Appellant made the following allegations:

- 2.1 Plaintiff Daniel Lyon was at all times relevant to this action a resident of Stevensville, Montana. At the time of his injury on August 19, 2015, he was working as a wildland firefighter for the U.S. Forest Service. Lyon was injured while fighting a fire in Okanogan County, Washington (*CP 496*).
- 4.1 On August 19, 2015, a wildland fire-urban fire occurred approximately six miles west of Twisp, Washington in Okanogan County. The fire became known as the Twisp River Fire (*CP 497*).
- 4.5 Defendant OCEC owned, operated and maintained high-voltage distribution lines through/above the Douglas County PUD property located at 591 Twisp River Road (*CP 497*).

- 4.11 OCEC is and was responsible for vegetation maintenance of their power line corridors (*CP 498*).
- 4.13 OCEC failed to clear the corridor where the Twisp River Fire emanated (*CP499*).
- 4.15 OCEC permitted [a] water birch tree to grow to a height and horizontal distance that it grew until it contacted OCEC's northernmost high-voltage conductor (*CP 499*).
- 4.20 As the water birch tree contacted OCEC's high-voltage lines, enough electrical current between the conductor and the tree branch existed that it caused ignition of the branch or branches in contact (*CP 499*).
- 4.21 The ignited branch or branches fell to the ground and ignited the dry grass and brush under OCEC's high-voltage lines. The Twisp River Fire had been ignited (*CP 500*).
- 4.22 The Twisp River Fire ultimately claimed three lives, numerous homes, and burned 11,220 acres of land (*CP 421*).

Appellant was dispatched to the Twisp River Fire as part of Forest Service fire crew Engine 642 and assigned to structure protection operations. *CP 492*. During the firefighting operation, a shift in the wind caused the fire to change directions and magnitude as the fire began to run directly towards Engine 642. *Id.* FS Engine 642 was signaled to evacuate the area, but the crew was confused because the predetermined escape route would take them to the hottest part of the fire. *CP 492-493*. They were eventually ordered to travel down Woods Canyon Road, but the

smoke was so thick the roadway was completely obscured and the truck left the road and headed down an embankment. *CP 493*. Fire completely overtook the truck and Appellant was able to exit out of the truck and return to the road. *CP 494*. The three remaining firefighters in Engine 642 perished. *Id.* Appellant was burned, but he was able to reach another fire crew and receive medical attention. *Id.*

Based on these allegations, Appellant's First Amended Complaint asserted causes of action against OCEC (and Douglas County PUD) for negligence, gross negligence and willful or wanton conduct, as well as violation of RCW 80.04.440. *CP 500-503*.

The First Amended Complaint sets forth **no** facts that would support a finding of gross negligence or willful or wanton conduct. Appellant did not appeal the dismissal of his claim based on an alleged violation of RCW 80.04.440 because the statute does not create a private cause of action. *See Brief of Appellant; Markoff v. Puget Sound Energy*, No. 77785-8-I, 2019 WL 3887407, at *1 (Wash. Ct. App. Aug. 19, 2019).

B. Procedural History.

On July 13, 2018, OCEC filed its Answer to the First Amended Complaint, denying the factual and legal conclusions made by Appellant in his First Amended Complaint. *CP 506-515*. OCEC alleged multiple

defenses, including the defense that plaintiff's claims were barred by the Professional Rescuer Doctrine. *CP 514*.

On October 31, 2018, OCEC filed a Motion for Summary Judgment Dismissal of All Claims Brought by Plaintiff Daniel Lyon. *CP 470-480*. For purposes of its motion, OCEC did not contest the factual allegations in the First Amended Complaint because Washington's Professional Rescuer Doctrine barred Appellant's claims under the facts as pled.

On November 29, 2018, the trial court entered an Order of Dismissal with Prejudice dismissing all of Appellant's claims against OCEC with prejudice. *CP 610-612*. On November 29, 2018, the trial court also entered an Order of Dismissal with Prejudice dismissing all of Appellant's claims against Douglas County PUD. *CP 426-428*. The trial court believed it was bound by principles of *stare decisis*, and that it was the province of the appellate courts to determine whether the Doctrine was unconstitutional or if new exceptions should be recognized. The trial court also noted that the State Legislature had taken no steps to abolish the Doctrine. *Verbatim Report of Proceedings (VRP) at 29-37*.

Appellant filed a Notice of Discretionary Review appealing the orders dismissing his claims against OCEC and Douglas County PUD. *CP 432-444*. The trial court entered a Stipulation and Order for

Immediate Appeal pursuant to RAP 2.3(b)(4). *CP 445-447*. This appeal ensued.

IV. ARGUMENT

A. The Standard of Review for Summary Judgment Is *de novo*.

The standard of review for a motion for summary judgment is *de novo*. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261, 138 P.3d 943 (2006).

The issue of whether the Professional Rescuer Doctrine bars Mr. Lyon's claims is an issue of law that may be resolved on summary judgment. *Loiland*, 1 Wn. App. 2d at 872-873. An important function of summary judgment is the avoidance of long and expensive litigation that is productive of nothing. *Padron v. Goodyear Tire & Rubber Co.*, 34 Wn. App. 473, 475, 661 P.2d 67 (1983). On summary judgment, the moving party bears the burden of demonstrating an absence of any genuine issue of material fact and entitlement to judgment as a matter of law. *Id.*

B. The Professional Rescuer Doctrine Is Well Settled and Supported by Sound Public Policy.

The Doctrine has been carefully examined by Washington appellate courts in 2017 and 2019. On both occasions, the Doctrine was reaffirmed. In both cases, the appellant made similar arguments to the ones raised by Appellant here. As such, there is no pressing need to

examine the Doctrine again. It is well settled and supported by sound public policy.

1. The Professional Rescuer Doctrine is well settled law.

The Professional Rescuer Doctrine has been recognized and followed in Washington for four decades. It has survived multiple challenges on multiple grounds, including the grounds argued by Appellant in his Opening Brief.

First, the Doctrine comports with current Washington law on express and implied primary assumption of risk. In Washington, a plaintiff's express or implied primary assumption of risk operates as a complete bar to a plaintiff's recovery. *Pellham v. Let's Go Tubing, Inc.*, 199 Wn. App. 399, 408, 398 P.3d 1205 (2017). "[I]mplied primary assumption of risk arises where a plaintiff has impliedly consented (often in advance of any negligence by defendant) to relieve defendant of a duty to plaintiff regarding specific known and appreciated risks." *Gleason v. Cohen*, 192 Wn. App. 788, 795-96, 368 P.3d 531 (2016). In the context of the Doctrine, fire fighters, and other professional rescuers, have implicitly assumed certain risks. By seeking and obtaining employment as a fire fighter, these individuals have elected to engage in an activity that involves known risks, such as the risk of being injured by flames, smoke, and falling debris.

As stated by the Washington State Supreme Court:

Those dangers which are inherent in professional rescue activity, and therefore foreseeable, are willingly submitted to by the professional rescuer when he accepts the position and the remuneration inextricably connected therewith.

Maltman v. Sauer, 84 Wn.2d 975, 977-78, 530 P.2d 254 (1975). In the *Maltman* case, decided 44 years ago, the Washington Supreme Court stated:

. . . 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 [t]hose hazards.

Maltman, 84 Wn.2d at 979.

The Doctrine is also called the “fireman’s rule” because it often applies in cases where firefighters are injured while fighting fires. As one court noted:

The so-called ‘fireman’s rule’ negates liability to the fireman, police officer or other official by the one whose negligence or conduct brought the injured official to the scene. The rule denies recovery by the injured official from the one whose sole connection with the injury is that his act placed the fireman or police officer in harms way.

Sutton v. Shufelberger, 31 Wn. App. 579, 587, 643 P.2d 920 (1982) (quoting *Giorgi v. Pacific Gas & Electric*, 266 Cal. App. 2d 355, 357 (1968)).

The Doctrine is an exception to the general rule that a person injured while attempting to rescue another may recover from the party

whose negligence created the need for the rescue. *Maltman*, 84 Wn.2d at 977. Since *Maltman*, the Washington appellate courts have continued to affirm the Doctrine despite multiple challenges.

In 2017, Division I of the Washington Court of Appeals was asked to set aside **or** modify the Doctrine. *See Loiland v. State*, 1 Wn. App. 2d 861, 407 P.3d 377 (2017). The Court of Appeals, however, declined to do so and once again reaffirmed that the Doctrine barred plaintiff's claims.

The facts in *Loiland* were as follows: Ice and fog created dangerous conditions on a November morning on Interstate Highway 5 ("I-5"). *Id.* at 863. A Ford Ranger pickup truck driven by Pedro Lopez spun across four lanes of southbound I-5 traffic and came to rest in a ditch. *Id.* Sergeant Alexander of the Washington State Patrol stopped to investigate, and saw the Ford Ranger in the ditch. *Id.* Sergeant Alexander called for a tow truck and began to prepare an accident report. *Id.* While working on the report, Sergeant Alexander saw two other cars sliding on the ice. *Id.* Sergeant Alexander determined the roads were unsafe and cancelled the tow truck. *Id.* He left the scene with Mr. Lopez, leaving Mr. Lopez's truck in the ditch. *Id.* An emergency responder, Valley Communications, received multiple 911 calls reporting the Ford Ranger in the ditch. *Id.* at 864. Valley Communications dispatched two fire and rescue engines to the site of the Ford Ranger. *Id.* Firefighter Loiland

arrived at the scene and began to mark the Ford Ranger to show that it was abandoned. *Id.* At the same time, a vehicle driven by Mario Perez spun across the freeway, went off the roadway, struck and injured Mr. Loiland. *Id.* Mr. Loiland sued Lopez, the State Patrol and Perez. *Id.*

The trial court granted summary judgment in favor of the State Patrol and Lopez. Mr. Loiland sought direct review to the Washington Supreme Court arguing that the Doctrine did not apply or, alternatively, that the Supreme Court should abandon the doctrine. *Loiland*, 1 Wn. App. 2d at 864. The Supreme Court declined review and transferred the case to the Court of Appeals. *Id.* at 865.

The Court of Appeals affirmed the trial court's order dismissing the claims made against the State Patrol and Lopez, and endorsed the familiar doctrine that a professional rescuer may not recover from the party whose negligence caused his presence at the scene where he is injured by a hazard that is "inherently within the ambit of those dangers which are unique to and generally associated with the particular rescue activity." *Id.* at 872, *citing Maltman*, 84 Wn.2d at 979. The court concluded:

In sum, Loiland was injured by a known, foreseeable risk while conducting a professional rescue. The State's negligence was a cause of Loiland's presence at the accident site. The trial court did not err in ruling that

Loiland's claim against the State is barred by the professional rescuer doctrine.

Id. at 872-73.

On May 2, 2018, the Washington Supreme Court denied Mr. Loiland's Petition for Review. 415 P.3d 1196 (2018). More recently, the Doctrine was reaffirmed on August 19, 2019, when Division I of the Court of Appeals held the Doctrine barred claims by firefighters against an entity that allegedly caused an explosion that injured the firefighters. *Markoff v. Puget Sound Energy*, No. 77785-8-I, 2019 WL 3887407, at *1 (Wash. Ct. App. Aug. 19, 2019).

In *Markoff*, nine firefighters filed suit against Puget Sound Energy ("PSE") and two of its subcontractors after they had responded to a natural gas leak that subsequently caused an explosion injuring the fire fighters in the Greenwood neighborhood of Seattle. *Id.* The firefighters alleged causes of action for negligence and recklessness. The trial court granted PSE's motion for summary judgment, and dismissed the firefighters' claims under the Doctrine. *Id.* Division I of the Court of Appeals affirmed the trial court's dismissal. *Id.*

The facts in *Markoff* are substantially as follows: on March 9, 2016, the Seattle Fire Department received a 911 call reporting a natural gas leak on the 8400 block of Greenwood Avenue N. in Seattle. *Id.* at *2.

Nine firefighters arrived at the scene and notified PSE of the leak. *Id.* PSE did not shut off the gas pipeline that was the source of the leak until much later. *Id.* The firefighters investigated the gas leak and determined gas was escaping from a threaded coupling at the 8411 building. *Id.* The firefighters did not know that gas had also escaped into and underneath the 8411 building. *Id.* As the firefighters continued their investigation, a gas explosion leveled the 8411 building and injured the firefighters. *Id.*

The trial court in *Markoff* applied the Doctrine because the firefighters had been called to the scene to address a gas leak and a well-known and foreseeable danger of gas leaks is that gas may ignite and explode. *Id.* at *4. In addition, gas leaks and gas explosions are within the ambit of danger faced by firefighters who are specially trained and equipped to deal with such hazards. *Id.*

In *Markoff*, the appellants argued for a change in the law asking the Court of Appeals to abrogate the Doctrine. The Court of Appeals noted that the Doctrine is based on a broad policy of assumption of risk and Washington courts broadly apply the Doctrine to bar recovery for anyone who is fully aware of a hazard caused by another's negligence and who voluntarily confronts the risk in exchange for compensation." *Id.*, citing *Black Industries, Inc. v. Emco Helicopters, Inc.* 19 Wn. App. 697, 699-700, 577 P.2d 610 (1978).

In the alternative, the plaintiff firefighters in *Markoff* argued the Court of Appeals should create a new exception to the Professional Rescuer Doctrine for harm arising out of willful, wanton, or reckless conduct. *Id.* at *13. The Court of Appeals declined to do so, stating “the intent of the person whose actions caused the need for rescue has never been a relevant inquiry in determining whether a professional rescuer assumed a risk.” *Id.* Rather, Washington courts have always analyzed whether the professional rescuer assumed a risk inherent in the nature of the rescue at issue. *Id.* Certainly, Appellant assumed the risk of being burned when he responded to the Twisp River Fire. Although Appellant’s injuries are undeniably tragic, the law simply does not support his requested recovery. The Doctrine has been settled law for the last four decades, and Washington state courts have made clear it is here to stay.

2. Sound public policy supports the Professional Rescuer Doctrine.

Washington courts as well as courts from other states recognize sound public policy rationales justifying the Doctrine. The primary policy behind the Doctrine is that professional rescuers willingly and knowingly assume certain risks as part of their profession. *Loiland*, 1 Wn. App. 2d at 862. As stated by the Court of Appeals:

[I]t 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.

Ballou v. Nelson, 67 Wn. App. 67, 71, 834 P.2d 97 (1992).

The Doctrine also encourages people to report fires. For example, a person who forgets to turn off a burner may cause a fire in the kitchen. That person should not hesitate to report the fire for fear of being held responsible for millions of dollars of damages if a fireman putting out the fire is injured when the gas range explodes. Liability in such circumstances would discourage people from seeking assistance from trained professionals because of the fear of personal liability.

The Doctrine also helps achieve fair cost spreading. The public has instituted statutory compensation schemes to ensure these responders are amply compensated in the event of injury. It would be unfair to tax the public a second time for a professional rescuer's injury. In Arizona, the Supreme Court described the rationale for the firefighter's rule as reflecting "a policy decision that that the tort system is not the appropriate vehicle for compensating public safety employees for injuries sustained as a result of negligence that creates the very need for their employment." *White v. State*, 202 P.3d 507, 510, 220 Ariz. 42 (2008) quoting *Espinoza v. Schulenberg*, 212 Ariz. 215, 217, 129 P.3d 937 (2006). In the instant case, Appellant has been compensated and his medical bills have been paid for

by the Department of Labor under the Federal Employees Compensation Act.

The Supreme Court of Arkansas described the policy behind the Doctrine as follows: the party that negligently started a fire has no legal duty to protect the firefighter from the very danger the firefighter was employed to confront. *See Nowixki v. Pigue*, 430 S.W.3d 765, 768 (Ark. 2013). Fighting a fire is a known risk the fireman was engaged to encounter by virtue of his employment and one which it was his duty to accept. *Id.* Therefore, the person who negligently started the fire did not breach a duty owed to the fireman because the fireman was required to fight the fire as part of his employment. *Id.*

In *Fox v. Hawkins*, 594 N.E.2d 493, 496 (Ind. Ct. App. 1992), the Indiana Court of Appeals discussed the policy rationale behind the professional rescuer doctrine as follows:

Simply stated, it is all of us, as the general public, who hire, train, and pay public safety officers. It is all of us who ask and expect public safety officers to confront hazardous situations, and it is all of us who benefit from fire and disaster protection, safe neighborhoods and highways, and the apprehension of criminals. Therefore, it is all of us, through public policy sponsored medical, disability, and pension schemes, who compensate public safety officers for the negligently caused injuries they suffer in the discharge of their duties. Indeed, it would be a breach of the social contract for all of us to say to any of us ‘fire and police protection are available only at your own peril.’ In that event, the poor or underinsured, even though tax

dollars go to pay for fire and police protection, might well hesitate to summon public safety officers for fear of being assessed damages. At the same time, public safety officers, fearful of exposure to uncompensated harm, might well spend their time protecting people of means. It is not the function of courts to foster such disparity.

Id.

Likewise, the Supreme Court of Utah held that a person does not owe a duty of care to a professional rescuer for an injury that was sustained by the very negligence that occasioned the rescuer's presence so long as it is within the scope of hazards inherent in the rescuer's duties. *Fordham v. Oldroyd*, 171 P.3d 411, 416 (Utah 2007). The public policy supporting the Professional Rescuer Doctrine is that firefighters and police officers have a relationship with the public that calls on them to confront certain hazards as part of their professional responsibilities. *Id.* at 413.

As the Supreme Court of Hawaii stated:

The very purpose of the firefighting profession is to confront danger. Fire fighters are hired, trained, and compensated to deal with dangerous situations that are often caused by negligent conduct or acts. '[I]t offends public policy to say that a citizen invites private liability merely because he happens to create a need for those services.'

Thomas v. Pang, 811 P.2d 821, 825, 72 Haw. 191 (Haw. 1991) (quoting *Pottebaum v. Hinds*, 347 N.W.2d 642, 645 (Iowa 1984)). Members of the public who find themselves in need should be encouraged to summon

assistance without fear of exposing their assets to compensate the rescuer in the event of injury. *Id.* at 413.

3. This Court should not ignore controlling precedent.

Appellant asks this court to ignore controlling precedent on constitutional grounds. This is inappropriate. Washington law makes clear that lower courts are obligated to follow the common law as interpreted by the Washington Supreme Court.

Because controlling precedent held that a claim arising out of a contract accrued on breach and not on discovery, the Court of Appeals lacked authority to adopt the discovery rule in *Architectonics*. A decision by this court is binding on all lower courts in the state. When the Court of Appeals fails to follow directly controlling authority by this court, it errs.

1000 Virginia Ltd. Partnership v. Vertecs Corp., 158 Wn.2d 566, 578, 146 P.3d 423 (2006) (internal citations omitted) (emphasis added).

Division III of the Washington Court of Appeals is in accord with this view, and has issued numerous decisions obligating both trial courts and its own panels to uphold decisions issued by the Supreme Court.

Under *vertical stare decisis*, courts are required to follow decisions handed down by higher courts in the same jurisdiction. For example, trial and appellate courts in Washington must follow decisions handed down by our Supreme Court and the United States Supreme Court. Adherence is mandatory, regardless of the merits of the higher court's decision. *State v. Gore*, 101 Wash.2d 481, 487, 681 P.2d 227 (1984).

Matter of Arnold, 198 Wn. App. 842, 846, 396 P.3d 375 (2017) (*rev'd on other grounds*, 190 Wn.2d 136, 410 P.3d 1133 (2018)) (emphasis added).

We particularly refuse to abandon *State v. Hickman* and its application of the law of the case doctrine to jury instructions because such abandonment is the prerogative of the state Supreme Court, not the Court of Appeals. This appellate court remains bound by a decision of the Washington Supreme Court. We must follow Supreme Court precedence, regardless of any personal disagreement with its premise or correctness.

State v. Jussila, 197 Wn. App. 908, 931, 392 P.3d 1108 (2017) (internal citations omitted) (emphasis added).

The Estate asks this court to abandon the public duty doctrine as a method of analyzing governmental liability. We decline. As recently held in *Johnson*, “Until such time as our Supreme Court overrules itself, we are bound by its holding that the public duty doctrine applies in the State of Washington.” We affirm summary judgment in favor of Spokane County.

Weaver v. Spokane County, 168 Wn. App. 127, 143, 275 P.3d 1184 (2012) (internal citations omitted) (emphasis added).

Washington appellate courts “will not overturn precedent without a clear showing that an established rule is incorrect and harmful” or without “a clear showing that the legal underpinnings of the precedent have been eroded.” *Pendergrast v. Matichuk*, 186 Wn.2d 556, 565, 379 P.3d 96 (2016) (citations omitted). Here, Appellant does not argue there should be a change in the law in Washington because the professional rescuer doctrine is “incorrect and harmful.” Furthermore, any argument

suggesting the legal underpinnings of the precedent have been eroded falls short as the Doctrine was reaffirmed earlier this year. *Markoff v. Puget Sound Energy*, No. 77785-8-I, 2019 WL 3887407, at *1 (Wash. Ct. App. Aug. 19, 2019). As Appellant fails to make a clear showing of either requirement, the Doctrine should not be overturned. The law is settled and the facts are undisputed in this appeal. Appellant concedes that the Doctrine is the law of Washington, and that application of the law to the undisputed facts demands dismissal. If a change is to be made, it is up to the Washington Supreme Court or the State Legislature to make that change. To date, neither institution has shown any inclination to do so.

C. **The Doctrine Is Not Subject to Strict Scrutiny and Does Not Violate Equal Protection.**

The Doctrine was adopted by the Supreme Court more than 40 years ago. It has been challenged on multiple occasions, including twice in the last two years. The courts have had ample time to address challenges to the Doctrine, and it is folly to believe our Supreme Court simply “overlooked” constitutionality issues when twice rejecting review of the Doctrine in 2016 and again in 2018.¹ However, even if constitutionality issues are analyzed, it is clear that the Doctrine should be upheld.

¹ *Loiland v. State*, 1 Wn. App. 2d. 861, 407 P.3d 377 (2017), *rev. denied* 190 Wn.2d 1013, 415 P.3d 1196 (2018). In *Loiland*, the appellant first petitioned for direct review to the Supreme Court of the trial court’s decision upholding the Doctrine.

Under the Equal Protection clause of the Fourteenth Amendment, no State shall “deny to any person within its jurisdiction the equal protection of the laws,” which is essentially a direction that all persons similarly situated should be treated alike.” *State Dept. of Social and Health Services v. Nix*, 162 Wn. App. 902, 917, 256 P.3d 1259 (2011) (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L.Ed.2d 313 (1985)) (quoting *Plyler v. Doe*, 457 U.S. 202, 216, 102 S. Ct. 2382, 72 L.Ed.2d 786 (1982)). Washington’s Constitution also guarantees such protections. Wash. Const. Art. 1, § 12. “To state an equal protection claim of any stripe, whatever the level of scrutiny it invites, a plaintiff must show that the defendant treated the plaintiff differently from similarly situated individuals” quoting *Pimental v. Dreyfus*, 670 F.3d 1096, 1106 (2012); (citing *Aleman v. Glickman*, 217 F.3d 1191, 1195 (9th Cir. 2000)).

Here, Appellant cannot establish the “similarly situated” requirement. Professional rescuers and lay rescuers are not similarly situated for the purposes of an equal protection analysis. Professional rescuers benefit from specialized training and techniques paid for by the public that allow them to make informed decisions when rescuing individuals. Lay rescuers receive no such training. While lay rescuers

That was rebuffed. Following the Court of Appeals’ decision, appellant sought review again, and that request was rejected as well.

may be just as aware of the risks inherent in a rescue effort, professional rescuers are actually trained to combat these risks. Furthermore, professional rescuers are compensated for their rescue efforts, and are often called to engage in such efforts on a daily basis. The same cannot be said for lay rescuers. It is clear professional and lay rescuers are not “similarly situated.” Because Appellant cannot establish this threshold requirement, an equal protection analysis is inappropriate under the circumstances.

Even if the Court finds that an equal protection analysis is appropriate under these circumstances, Appellant’s equal protection analysis is flawed because the Doctrine is **not** subject to strict scrutiny. Rather, rational basis is the appropriate standard of review. Strict scrutiny only applies in an equal protection challenge when a classification affects a suspect class or threatens a fundamental right. *Fusat v. Washington Interscholastic Activities Ass’n*, 93 Wn. App. 762, 970 P.2d 774 (1999).

Here, there is neither a suspect classification, nor a fundamental right at issue. The right of access to courts is not a fundamental right and the right to be indemnified for personal injury is not a fundamental right. *See Miranda v. Sims*, 98 Wn. App. 898, 907, 991 P.2d 681 (2000). Fundamental rights are limited and include things such as the right to marry, to have children, to direct the education and upbringing of one’s

children, and to marital privacy. *American Legion Post #149 v. Washington State Dep't of Health*, 164 Wn.2d 570, 600, 192 P.3d 306 (2008). The U.S. Supreme Court has made it clear that courts should be reluctant to identify new fundamental rights. *Id.*, citing *Washington v. Glucksberg*, 531 U.S. 702, 720, 117 S. Ct. 2258 (1997).

Not only is the right to seek redress for personal injuries not a fundamental right, but Appellant mistakenly identifies this right as the right he is seeking to advance. In actuality Appellant is seeking to advance an economic right – the right to recover damages from an alleged tortfeasor. The elimination of such rights rarely violates equal protection. In reality, the Doctrine is quite analogous to Washington's workers' compensation statutory scheme, which eliminates an employee's cause of action against his or her employer. RCW 51.04.010; *see also State v. Mountain Timber Co.*, 75 Wash. 581, 590, 135 P. 645, 649 (1913), *aff'd sub nom. Mountain Timber Co. v. State of Washington*, 243 U.S. 219, 37 S. Ct. 260, 61 L. Ed. 685 (1917) (concluding that worker's compensation statute does not violate equal protection). Just as an employee cannot sue his or her employer for an on-the-job injury, the professional rescuer may not sue the tortfeasor that caused the need for the rescue. When a law involving neither a suspect classification, nor a fundamental right is challenged on equal protection grounds the court applies a rational basis

test. *Campos v. Dep't of L&I*, 75 Wn. App. 379, 880 P.2d 543 (1994). A law passes the rational basis test when it applies equally to all members within the designated class, there are reasonable grounds to distinguish between those within and those without the class, and the classification is rationally related to its purpose. *Id.*

In *Campos*, the court applied the rational basis test to reject a constitutional challenge to the workers compensation statutory scheme, which prevents an injured worker – no matter how severely injured – from suing his employer. *Id.* While this may seem unfair for many of the same reasons argued by Appellant, the scheme passed constitutional muster as it involved neither a suspect class nor a fundamental right, and was grounded in a rational basis. *Id.* The same reasoning applies in this case.

Washington courts considering the Doctrine have consistently identified a reasonable, rational basis for application of the Doctrine. Our Supreme Court explained:

Those dangers which are inherent in professional rescue activity, and therefore foreseeable, are willingly submitted to by the professional rescuer when he accepts the position and the remuneration inextricably connected therewith.

Maltman v. Sauer, 84 Wn.2d 975, 977-78, 530 P.2d 254 (1975).

Subsequent decisions echo this reasoning, and reassert the rational basis for the Doctrine:

[I]t 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.

Ballou v. Nelson, 67 Wn. App. 67, 71, 834 P.2d 97 (1992).

Appellant willingly and knowingly chose to enter a dangerous profession where he faced the risk of being burned while fighting wildland fires. His rights are fully protected. Appellant also has a remedy as an injured U.S. Forest Service worker under the Federal Employees' Compensation Act, which is similar to state workers compensation laws. *See TerKeurst v. United States*, 549 F. Supp. 455, (W.D. MI 1982). The Act represents the exclusive remedy for federal employees injured or killed while in the scope of their employment. *Id.* Other courts have also addressed the same issue raised by Appellant, *i.e.*, whether the Doctrine violates the equal protection clause. *Meunier v. Pizzo*, 696 So.2d 610 (La. App. 4th Cir. 1997). The court in *Meunier* examined the Doctrine under the rational basis test because there was no fundamental right involved. The court held that the Doctrine served a legitimate purpose and found no constitutional violation in treating professional rescuers differently than non-professional rescuers. The court concluded, "there is no constitutional violation in treating the class of professional rescuers differently from non-professional rescuers. We find that the classification serves a

legitimate purpose.” *Id.* at 615. Even if the Court finds that an equal protection analysis is appropriate under the circumstances, rational basis is the correct standard of review, and the Doctrine passes constitutional muster as there is a clear basis to support the Doctrine.

D. This Court Should Not Create a Gross Negligence Exception to the Doctrine Because the Intent of the Person Who Caused the Need for a Rescue is Not Relevant.

Washington does not recognize an exception to the Doctrine for an act of gross negligence that brings a professional rescuer to the scene of a rescue operation. Washington courts have consistently recognized that the intent of the person whose actions caused the need for a rescue is not a relevant inquiry in determining whether a professional rescuer assumed the risk at issue. *Markoff, supra*, 2019 WL 3887407. Washington courts focus on nature of the risk created, *i.e.*, whether the risk falls within the “ambit of dangers” inherent in the professional rescue activity. *Maltman, supra*, 84 Wn.2d at 979.

The Doctrine applies regardless of whether the nature of the conduct bringing the rescuer to the scene was negligent or reckless. *See Ballou v. Nelson*, 67 Wn. App. 67, 71, 834 P.2d 97 (1992). The Court of Appeals recently refused to recognize an exception based on the level of the conduct of the person who caused the need for a rescue. *Markoff v. Puget Sound Energy*, No. 77785-8-I, 2019 WL 3887407, at *1 (Wash. Ct.

App. Aug. 19, 2019). Washington courts have never held that gross negligence negates application of the Doctrine. In addition, Appellant makes no credible factual allegations that could lead to a finding of gross negligence.

Appellant is asking this court to abandon the nature of the risk analysis it has used for more than 40 years, which focuses on whether the act falls within the ambit of danger, and adopt a totally new analysis that focuses on the intent of the actor. This would be inconsistent with the policy behind the Doctrine, which is to encourage people to seek assistance from professionals who are trained and compensated to deal with certain risks when needed.

The Washington Supreme Court has recognized a limited exception to the Doctrine for negligent or intentional acts of intervening parties not responsible for bringing the professional rescuer to the scene. *Beaupre v. Pierce County*, 168 Wn.2d 568, 166 P.3d 712 (2007). That exception does not support Appellant's claims because it involves an independent act of an intervening party who had no involvement in the initial conduct that required a rescue activity.

Although not technically an exception, the Washington Supreme Court held that the Doctrine did not apply to a case where police officers were assaulted because there was no rescue and the fireman's rule did not

protect defendants from suits by police officers who have been intentionally and criminally assaulted. *Ballou v. Nelson*, 67 Wn. App. 67, 70, 834 P.2d 97 (1992). This situation is distinguishable from that of Appellant.

During the Doctrine's 44-year existence in the State of Washington, the appellate courts have only carved out the two narrow exceptions discussed above. No appellate court in Washington has ever created exception for "gross negligence" and no Washington court has recognized an exception based on the level of the conduct of the person who created the need for a professional rescuer. Moreover, an exception for gross negligence is unnecessary because firefighters are trained to fight fires regardless of whether they were allegedly started by a negligent act or a grossly negligent act.

In his opposition to OCEC's motion for summary judgment, Appellant presented a chart identifying nine states that have recognized a gross negligence exception to the Doctrine. However, that same chart identifies 14 states that do not recognize the exception. *CP 101-105*. What this chart shows is that the majority of states that recognize the Doctrine do not recognize an exception for gross negligence. Appellant argues for new law (by promoting the minority view) in the State of

Washington. Appellant's argument is not only flawed, but it must be made to the Washington Supreme Court.

Appellant also argues the Doctrine is unreasonable and unjust. Washington appellate courts have consistently upheld the Doctrine because it is reasonable and fair. Professional rescuers are trained and willingly volunteer to fight fires regardless of whether the fire was started by a negligent act or a grossly negligent act. The Doctrine is working well and there is no need to change it.

The cases cited by Appellant in support of his argument for a gross negligence exception have not been adopted by Washington courts. For example, Appellant states that Louisiana courts recognize an exception that permits professional rescuers to recover for injuries caused by gross or wanton negligence, citing *Meunier v. Pizzo*, 696 So. 2d 610, 613 (La. App., 4th Cir. 1997). *Brief of Appellant*, p. 32. However, *Meunier* has never been cited outside of Louisiana. Furthermore, several of the states cited by Appellant as recognizing willful or wanton negligence as an exception to the Doctrine have abolished the Doctrine altogether. Of course, these states do not apply the Doctrine in the context of willful or wanton negligence as these Courts do not recognize the Doctrine at all.

Appellant also cites *Benefiel v. Walker & Nationwide Ins.*, 25 Va. Cir. 130, 131-132 (1991), to support its argument for a willful and wanton

exception to the Doctrine. *Brief of Appellant*, p. 32. The *Benefiel* decision was an unreported Virginia trial court ruling that was reversed by the Virginia Supreme Court. *See Benefiel v. Walker*, 244 Va. 488, 422 S.E.2d 773 (1992). It offers no support for Appellant's argument.

Other states have held the Doctrine bars recovery even when the conduct responsible for bringing the rescuer to the scene is willful, wanton, reckless or grossly negligent because the purpose of professional rescuers is to confront danger and the public should not be liable for injuries occurring in the performance of the very function police officers and firefighters were intended to fulfill. *See McCaw v. T&L Operations, Inc.*, 230 Mich. App. 413, 418, 584 N.W.2d 363, 365 (1998). The rationale is that professional rescuers are trained to deal with the inherent hazards of their respective professions and workers compensation benefits are available if they are injured in the scope and course of their employment. *Id.* The hazards inherent in the professions of police officers and firefighters necessarily include willful, wanton, reckless or grossly negligent conduct and that is not a sufficient reason to except such conduct from the purview of the professional rescuers doctrine. *Id.*

Appellant's allegations are also factually insufficient. Respondent OCEC's motion was a motion for summary judgment dismissal under CR 56 and Appellant did not allege any specific facts that would support a

jury finding of constitute gross negligence. Appellant was injured more than four years ago. He has had ample opportunity to produce facts establishing substantial evidence of “gross negligence.” Yet, he submitted no facts to support a claim of willful, wanton or gross negligence conduct by OCEC. *See, e.g., Waggoner v. Troutman Oil Co., Inc.*, 894 S.W.2d 913, 915 (Ark. 1995) (declining to adopt exception to professional rescuer doctrine for willful, wanton, or reckless conduct when plaintiffs “failed to make these allegations part of their complaint against defendants”). Lacking evidence of any kind on this issue, Appellant’s gross negligence argument must be dismissed because it is factually and legally insufficient.

V. CONCLUSION

OCEC is fully aware Appellant was badly burned while fighting the Twisp River Fire. However, the risk of being burned while fighting a wildland fire is inherent in the job of a professional firefighter. Fortunately, the federal workers compensation program has covered all of his medical treatment and rehabilitation and provided wage loss benefits as well. The Doctrine is settled law in the State of Washington and it mandates dismissal of Mr. Lyon’s claims. Only the Washington Supreme Court or the State Legislature can overturn the Doctrine and so far both institutions have consistently refused to do so.

RESPECTFULLY SUBMITTED this 16th day of September, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2019, I electronically filed the foregoing with the Clerk of the Court for the Court of Appeals of the State of Washington, Division III, by using the appellate CM/ECF system.

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Lynda T. Ha

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