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Court of Appeals, Division III, No. 36528-0

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

DANIEL LYON,

Appellant,

v.

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

Respondents.

**AMICUS CURIAE BRIEF OF
WASHINGTON DEFENSE TRIAL
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I. IDENTITY AND INTEREST OF AMICUS

The Washington Defense Trial Lawyers Association (WDTL), established in 1962, includes more than 750 Washington attorneys engaged in civil defense litigation and trial work. The purpose of WDTL is to promote the highest professional and ethical standards for Washington civil defense attorneys and to serve our members through education, recognition, collegiality, professional development and advocacy. One important way in which WDTL represents its member is through amicus curiae submissions in cases that present issues of statewide concern to Washington civil defense attorneys and their clients. The petition in this case implicates applicable concerns for WDTL, whose members have an interest not only in the preservation and reliability of the professional rescuer doctrine, but in the principle of *stare decisis* writ large.

II. ARGUMENT

The professional rescuer doctrine (“PRD”) should be left in place because principles of *stare decisis* mandate that this Court’s precedents remain in place unless they are clearly shown to be both incorrect and harmful. The doctrine is not clearly incorrect because it remains the majority rule nationally and it is supported by public policy and assumption of the risk considerations that remain valid. The alternative

test, suggested by plaintiff — that the Court apply the seldom used “legal underpinnings” analysis — is of no avail because the rule is not founded on an aspect of Washington law that has since become undermined.

While the PRD is the subject of some debate around the country, and is treated differently in different jurisdictions, the doctrine remains the majority rule and is supported by strong public policy arguments founded on assumption of the risk and the role of professional rescuers in society.

A. The Principle of *Stare Decisis* Requires Adherence to the Professional Rescuer Doctrine

The principle of *stare decisis* provides stability in the common law and precludes re-decision of decided issues as if they were cases of first impression:

Stare decisis is a doctrine developed by courts to accomplish the requisite element of stability in court-made law, but is not an absolute impediment to change. Without the stabilizing effect of this doctrine, law could become subject to incautious action or the whims of current holders of judicial office. But we also recognize that stability should not be confused with perpetuity. If the law is to have a current relevance, courts must have and exert the capacity to change a rule of law when reason so requires. The true doctrine of stare decisis is compatible with this function of the courts. The doctrine **requires a clear showing that an established rule is incorrect and harmful before it is abandoned.**

In re Stranger Creek & Tributaries in Stevens Cty., 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (emphasis added).

In its reply brief to this Court, Appellant Lyon argues that in addition to the *Stranger Creek* “incorrect and harmful” test, the Court should also consider the more recent alternative test that inquires whether the “legal underpinnings [of the precedent] have been eroded.” Citing *Pendergrast v. Matichuk*, 186 Wn.2d 556, 565, 379 P.3d 96 (2016). But this alternative test has no place in analyzing the question before the Court because the professional rescuer doctrine is not dependent on any separate “legal underpinning” in the sense required by that test.

The alternative “legal underpinnings” test for reversing precedent was first employed by this Court in *W.G. Clark Const. Co. v. Pac. Nw. Reg’l Council of Carpenters*, 180 Wn.2d 54, 65, 322 P.3d 1207 (2014). In *Clark*, the Court reconsidered its prior decision on the scope of ERISA preemption, a topic ultimately governed by United States Supreme Court precedent. In reversing its prior precedent, this Court noted:

Since the last time we considered the rule in *Trig Electric*, other jurisdictions, including the Ninth Circuit Court of Appeals, have consistently held that these types of state claims are not preempted by ERISA. Not only is their reasoning persuasive, but the existing split encourages litigants to engage in blatant and harmful forum shopping. We take this opportunity to update our approach to ERISA preemption in light of these developments.

W.G. Clark, 180 Wn.2d at 67. In *Clark*, the legal underpinning of the overruled precedent was an interpretation of federal law that had fallen out

of favor among federal courts. Here, by contrast, the validity of the professional rescuer doctrine is not similarly dependent on outside “legal underpinnings” because it is a common law tort doctrine created by this Court. Lyon argues that the underpinnings are eroded because “both jurisdictions upon whose law Washington’s PRD is based have since abrogated the PRD.” But the PRD is not “underpinned” by the legal doctrines of other states in the way that this Court’s interpretation of a federal statute was underpinned by an understating of the prevailing view of federal case law. Rather, this Court’s common law is independent of the common law and statutory law of other states.

Another case that closely examined whether to apply the “legal underpinnings” test was *Deggs v. Asbestos Corp. Ltd.*, 186 Wn.2d 716, 732, 381 P.3d 32 (2016). In declining to reverse on that ground, this Court emphasized the narrowness of *W.G. Clark* by refusing to reconsider a precedent merely because courts across the country were “split” on the issue:

As courts across the country are split on critical issues before us, this case is unlike *W.G. Clark*, where every court interpreted ERISA preemption differently than we had. While reasonable minds might have differed at the time Grant and Calhoun were announced, we find that their underpinnings have not been sufficiently undermined to justify abandoning them.

Deggs, 186 Wn.2d at 732. The PRD is still the majority rule nationally (PUD at 13 n.2.) and the legislature has not intervened to overrule it as it has in New Jersey and indirectly in Oregon. If anything, legislative actions by some states simply serve as a reminder that the Washington legislature has not seen fit to take similar action despite its presumed awareness of PRD.

In short, the only “legal underpinning” of the PRD is this Court’s recognition of it as a common law limitation to the common law rescuer rule. In considering whether to maintain it, the Court should focus only on whether it is both “incorrect and harmful.” To rely on a vague conception of the “legal underpinnings” doctrine to overturn the PRD would dangerously erode¹ this Court’s *stare decisis* jurisprudence.

¹ The very first justices of the United States Supreme Court inserted (or permitted the insertion of) a Preface to the 1 U.S. (Cranch) reporter. The preface is instructive on how vital it is to our system of government that judges publish their decisions and that future judges adhere to those decisions:

In a government which is emphatically styled a government of laws, the least possible range ought to be left for the discretion of the judge. Whatever tends to render the laws certain, equally tends to limit that discretion; and perhaps nothing conduces more to that object than the publication of reports. Every case decided is a check upon the judge: he cannot decide a similar case differently, without strong reasons. . . .

1 U.S. (Cranch) at iii (1801).

B. The Professional Rescuer Doctrine is Justified by Sound Public Policy

The parties have pointed out that the professional rescuer doctrine is justified in part by the fact that rescuers, in advance of any specific emergency, have made it their profession to respond to emergencies, have specialized training, and that society makes provision for compensating and caring for injured professional rescuers. (PUD at 15-25.) But it is also significant that the professional rescuer's performance of their duty will, in the vast majority of cases, *be occasioned by someone's negligence*. This further differentiates professional rescuers even from those in other professions that routinely encounter danger.

Almost the entire workload of fire responses consists of emergencies brought about by negligence. According to the U.S. Fire Administration, 1.6% of structure fires are caused by "natural" events while a further 4.2% are intentionally set. The remainder are fires that will either always (52% caused by cooking) or usually be the result of negligence.² To recognize a tort duty to emergency responders to avoid negligently creating emergencies would be saying that the public has a duty to prevent professional rescuers from having to carry out their own chosen duty to the public.

² U.S. Fire Administration, Residential building fire causes in 2017, <https://www.usfa.fema.gov/data/statistics/#causesR> (last visited Dec. 20, 2019).

By contrast, amateur rescuers find themselves, by circumstances created by another, forced to choose between their own safety and their moral imperative to assist those in danger. An amateur rescuer is therefore wronged by the party who created the need for the rescue. Professional rescuers, by contrast, have decided that their calling, their profession, over any other profession they could have chosen, is to rescue those same people, as well as people who are in danger not caused by negligence.

The tort system is not a good way to compensate or care for professional rescuers precisely because their job is, in large part, to respond to negligence-caused emergencies. When it is a person's business to deal with hazards created by the mistakes of others, it makes no sense to incentivize such a person to hope, that if and when they get injured by those hazards, it will be under circumstances caused by a wealthy, or well-insured person. Rather, just as all other costs of professional rescue are socialized; the costs of caring for firefighters injured by the inherent hazards of firefighting are properly handled by benefits packages planned for in advance rather than through the tort system.

As the parties have pointed out, one of the traditional rationales for the doctrine is concern over whether the threat of liability will cause citizens to hesitate to summon aid. (PUD at 18.) But perhaps of greater

concern is the effect that tort recovery would have on the perceived incentives of professional rescuers. Under the PRD, a wealthy person is in the same position as a person of limited means needing to be rescued from a burning home after negligently leaving a stove unattended. But without the PRD, the wealthy person implicitly offers more favorable terms of employment to the firefighter in the form of potential additional compensation in the event of injury or death. The PRD thus reinforces our shared value that emergency services are available to all residents on the same terms.

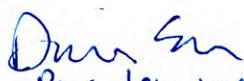
III. CONCLUSION

This Court should continue to recognize the professional rescuer doctrine because it is a sound doctrine supported by the inherent nature of the professions it covers as well as by assumption of the risk principles and sound public policy consideration. Even if the Court would not be inclined to adopt the rule if it were considering it on first impression, principles of *stare decisis* mandate that the Court continue to recognize it because it has not been shown to be both incorrect and harmful.

RESPECTFULLY SUBMITTED this 20th day of December,
2019.

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per telephonic authority
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CERTIFICATE OF SERVICE

I, Valerie D. Marsh, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts Patterson & Mines, One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on December 20, 2019, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

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

DATED this 20th day of December, 2019.



Valerie D. Marsh

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