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COURT OF APPEALS, STATE OF WASHINGTON  
DIVISION III

No. 36528-0

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DANIEL LYON,

Plaintiff-Appellant,

v.

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

Defendants-Respondents.

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BRIEF OF RESPONDENT PUD NO. 1 OF DOUGLAS COUNTY'S

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## **I. INTRODUCTION**

Plaintiff-Appellant Daniel Lyon was a fire fighter employed by the United States Forest Service. In August 2015, Lyon was dispatched to fight the Twisp River Fire. While combating the fire, a change of winds and advancement of the wildfire cut off Lyon's escape route and he suffered severe burns and other injuries. Lyon sued Okanagan County Electric Cooperative, the owner of power lines that allegedly caused the fire, and PUD No. 1 of Douglas County, which owned the land where the fire allegedly started.

Under Washington's professional rescuer doctrine, a fire fighter who is injured by something that "is inherently within the ambit of those dangers which are unique to and generally associated with the particular rescue activity" is generally prevented from suing the person who created the dangerous situation. Lyon recognizes that the professional rescuer doctrine, as it currently exists, bars his claims against the PUD. Lyon asks the Court to abandon the professional rescuer doctrine for policy reasons, or to strike down the doctrine as unconstitutional. Alternatively, Lyon asks the Court to recognize a new exception to the professional rescuer doctrine based on his conclusory allegation that the PUD was grossly negligent.

This Court should decline Lyon's invitation to abandon, strike down or modify the professional rescuer doctrine. The professional rescuer

doctrine is necessitated by general tort principles and is consistent with Washington's assumption of risk jurisprudence. Moreover, the professional rescuer doctrine is supported by legitimate policy concerns. The professional rescuer doctrine is also constitutional as it does not involve a suspect class or fundamental right and the doctrine is rationally related to legitimate government interests. Finally, the Court need not reach the question of whether to create a new gross negligence exception to the professional rescuer doctrine (an exception that would be antithetical to the doctrine) because the facts alleged do not support that the PUD acted grossly negligent.

What happened to Lyon is tragic, but does not justify the change of law he seeks. If Lyon's suit is allowed to proceed, the result will be widespread and dramatic. Such a significant change of the law (and public policy) should come from the legislature, not the courts. The trial court recognized as much in dismissing Lyon's claims. The PUD respectfully requests that the Court affirm the dismissal of Lyon's claims against the PUD.

## **II. STATEMENT OF FACTS**

### **A. Lyon's Complaint.**

In his Complaint, Lyon alleged as follows:

In August 2015, Lyon was employed by the United States Forest Service (USFS) as a firefighter. Clerk's Papers (CP) at 20, ln. 2-3; CP at 24, ¶ 2.1. Lyon was sent to "fight the fires known as the Okanogan Complex." CP at 20, ln. 5. On August 19, 2015, Lyon was dispatched to a fire that would come to be known as the Twisp River Fire. *Id.*, ln. 13 – 16. Lyon's crew was assigned to "structure protection operations." *Id.*, ln. 15 – 16. When Lyon was dispatched on that day, the fire was growing and the weather was hot and dry. *Id.*, ln. 11 – 17; CP at 25, ¶ 4.4. Lyon and his crew, consisting of three other firefighters, were endangered when "[a] shift in the wind caused the fire to change directions and magnitude." CP at 20, ln. 18. Lyon and his crew were ordered to evacuate the area. *Id.*, ln. 21 – 22. But, because the smoke was so thick and visibility so poor, the crew's engine drove off the road and crashed down an embankment. CP at 21, ln. 5–10.

The Fire caught up with the disabled engine. CP at 22, ln. 1. Lyon managed to escape the vehicle and ran back to the road looking for help. *Id.*, ln. 2 – 4. Lyon eventually found another fire crew who assisted him; Lyon's crew who stayed with the engine perished. *Id.*, ln. 3 – 5.

On May 30, 2018, Lyon filed suit against Okanogan County Electric Cooperative (OCEC), PUD No. 1 of Douglas County, the Washington State Department of Natural Resources (DNR), and the Washington State Department of Fish and Wildlife (F&W). CP at 3 – 17. Lyon filed a First Amended Complaint (FAC) on June 27, 2018, in which he removed DNR and F&W as defendants, CP at 18-32; the FAC is otherwise identical to Lyon’s original Complaint.

Lyon alleged that the Fire was started by vegetation coming into contact with power lines owned and operated by OCEC. CP at 25-28. Lyon alleged that OCEC was negligent because it failed to maintain its right of way and allowed trees to grow into its power lines. *Id.* Lyon alleged that the PUD is liable because the Fire started on property owned by the PUD. *Id.* at 25. Lyon pleaded causes of action including “all forms of common law negligence,” i.e. negligence, gross negligence, recklessness, “willful and/or wanton” misconduct, and intentional infliction of emotional distress. CP at 28, ¶ 5.1; CP at 29, ¶ 5.4.

**B. Procedural history.**

On October 23, 2018, the PUD filed its Answer and Affirmative Defenses to Lyon’s FAC. CP at 46-59. The PUD alleged that Lyon’s claims were barred by the professional rescuer doctrine. CP at 54.

On October 30, 2018, the PUD filed its Motion for Judgment on the Pleadings, pursuant to CR 12(c). CP at 60-76; *see also* CP at 366-400 (Lyon’s Response); CP at 401-25 (PUD’s Reply). The trial court granted the PUD’s Motion and dismissed Lyon’s Complaint with prejudice. CP at 426-27. The trial court concluded that dismissal was required because it was bound by principles of stare decisis, it was the province of the appellate courts to determine whether the professional rescuer doctrine was unconstitutional or if new exceptions should be recognized, and the state legislature had taken no action to abolish the doctrine. Verbatim Report of Proceedings (VRP) at 29-37.

### **III. COUNTERSTATEMENT OF ISSUES**

A. Should this Court abandon the professional rescuer doctrine when Lyon fails to clearly show that the doctrine is incorrect and harmful?

B. Should this Court strike down the professional rescuer doctrine as unconstitutional when (1) professional rescuers are not a suspect or semi-suspect class, (2) the right to sue certain people for one’s injuries is not a fundamental right, and (3) the doctrine is rationally related to legitimate government interests?

C. Should this Court recognize an unprecedented exception to the professional rescuer doctrine that applies when the person creating the

injury-causing-situation was grossly negligent despite (1) such exception risks swallowing the doctrine itself, and (2) Lyon being unable to allege facts supporting that the PUD was grossly negligent in this case.

#### **IV. STANDARD OF REVIEW**

An appellate court reviews dismissal under CR 12(c) de novo. *P.E. Sys., LLC v. CPI Corp.*, 176 Wn.2d 198, 203, 289 P.3d 638 (2012). Dismissal is appropriate under CR 12(c) “when it appears beyond a doubt that the claimant can prove no set of facts consistent with the complaint that justifies recovery.” *Yeakey v. Hearst Communications, Inc.*, 156 Wn. App. 787, 791, 234 P.3d 332 (2010).

In evaluating the adequacy of the allegations, the trial court must only accept as true any well-pled factual allegations, but not legal conclusions. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1987). “While a court must consider any hypothetical facts when entertaining a motion to dismiss for failure to state a claim [(which employs the same legal standard as a CR 12(c) motion)], the gravamen of a court’s inquiry is whether the plaintiff’s claim is legally sufficient.” *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 215, 118 P.3d 311 (2005).

## V. ARGUMENT

- A. **Lyon fails to show that the professional rescuer doctrine is incorrect and harmful; the Court should not abandon the doctrine because such a profound change in social policy should come from the legislature, not the courts.**

Lyon argues that the professional rescuer doctrine is “unnecessary,” “unjust,” and “outdated,” and urges this Court to abandon the doctrine. App. Br. at 3, 8.

The Washington Supreme Court and Court of Appeals, however, have applied the professional rescuer doctrine for over 40 years. Before precedent is modified or abandoned, “[t]he doctrine of stare decisis requires a clear showing that an established rule is incorrect and harmful.” *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (internal quotation marks omitted) *abrogated on other grounds by Mikkelsen v. Public Utility District No. 1 of Kittitas County*, 189 Wn.2d 516, 404 P.3d 464 (2017). The purpose of case law and principles of stare decisis is to provide lower courts and litigants with predictable rules of law. *See State ex rel. State Fin. Comm. v. Martin*, 62 Wn.2d 645, 665–66, 384 P.2d 833 (1963) (“Without stare decisis, the law ceases to be a system; it becomes instead a formless mass of unrelated rules, policies, declarations and assertions—a kind of amorphous creed yielding to and wielded by them

who administer it. Take away stare decisis, and what is left may have force, but it will not be law.”).

This Court should not abandon the professional rescuer doctrine because Lyon fails to meet his burden to clearly show that it is incorrect and harmful.

1. Overview of the professional rescuer doctrine.

It is axiomatic that to recover under a theory of negligence, a plaintiff must prove that a defendant owes the plaintiff a duty that defendant breached and proximately caused damage to plaintiff. Under a strict application of elements of negligence, however, a wrongdoer who endangers another person is not necessarily liable to a person who attempts to rescue the endangered person. For instance, the wrongdoer might argue that he or she did not owe the rescuer a duty, that the wrongdoer was not the proximate cause of the rescuer’s injuries, or the rescuer was contributorily negligent in undertaking the rescue.

Recognizing this unfairness, and desiring to encourage good Samaritan efforts, courts created the “rescue doctrine,” modifying the common law to allow the rescuer to recover against the wrongdoer. *E.g.*, *Loiland v. State*, 1 Wn. App.2d 861, 862, 407 P.3d 377 (2017), *review denied*, 190 Wn.2d 1013, 415 P.3d 1196 (2018) (“[A] person who is injured while rescuing another may recover from the party whose negligence

created the need for rescue.”); *Wagner v. Int'l Ry. Co.*, 133 N.E. 437, 437 (N.Y. 1921) (Cardozo, J.) (“Danger invites rescue.”). *See also Lowery v. Illinois Cent. Gulf R.R. Co.*, 891 F.2d 1187, 1194 (5th Cir. 1990) (noting that the rescue doctrine is “nothing more than a negligence doctrine addressing the problem of proximate causation”); *Baldonado v. El Paso Nat. Gas Co.*, 176 P.3d 277, 281 (2007) (“Because there is no general duty to rescue, the rescue doctrine imposes a duty of care owed to rescuers.”).

When it comes to professional rescuers such as fire fighters and police officers, however, a different rule—the professional rescuer doctrine—applies due to the unique position of professional rescuers in our society and their relationship with the public. Under the professional rescuer doctrine, “A professional rescuer may not collect damages from a negligent imperiled person when the ‘hazard ultimately responsible for causing the [rescuer’s] injury is inherently within the ambit of those dangers which are unique to and generally associated with the particular rescue activity.’” *Markoff v. Puget Sound Energy, Inc.*, (Slip Op. 77785-8-I), 2019 WL 3887407, at \*3 (Wash. Ct. App. Aug. 19, 2019) (citing *Maltman v. Sauer*, 84 Wn.2d 975, 978, 530 P.2d 254 (1975)).

The professional rescuer doctrine is a narrow and necessary limitation of the rescue doctrine, and, like the rescue doctrine, is deeply rooted in the common law. *See Baldonado*, 176 P.3d at 281 (“The rescue

doctrine creates the need for a firefighter’s rule.”<sup>1</sup>); *Fox v. Hawkins*, 594 N.E.2d 493, 495 (Ind. App. Ct. 1992) (describing professional rescuer doctrine as “a venerable doctrine of tort law”); *Hawkins v. Sunmark Indus., Inc.*, 727 S.W.2d 397, 399-400 (Ky. 1968) (describing professional rescuer doctrine as “an ancient, longstanding rule of law”). The professional rescuer doctrine is more than an exception to the rescue doctrine. *See Fox*, 594 N.E.2d at 497 (“[T]he Fireman’s Rule does not exist solely as an exception to the rescue doctrine.”); *Apodaca v. Willmore*, 392 P.3d 529, 550-55 (Kan. 2017) (Stegall, J., dissenting) (suggesting that the professional rescuer doctrine is a “legal standard” rather than a legal “rule”).

The rationale for the professional rescuer doctrine has shifted over time. Initially, courts grounded the doctrine in premises liability theories based on the professional rescuer’s status as an invitee, licensee, or some

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<sup>1</sup> The *Baldonado* court goes on to explain:

Because there is no general duty to rescue, the rescue doctrine imposes a duty of care owed to rescuers. However, when the rescuer has a duty to rescue—as is the case with firefighters—the underlying rationale for imposing a duty on the public changes, and the doctrine must change along with the policy. The firefighter’s rule accomplishes that change by limiting the scope of the rescue doctrine. In other words, the rescue doctrine creates an exception to traditional tort duties, and the firefighter’s rule limits that exception.

176 P.3d at 281 (footnote omitted).

other status (i.e., sui generis). This rationale fell out of favor due to confusion about the classification of fire fighters for premises liability purposes and the fact that many jurisdictions abandoned common law premises liability classifications. Even after the shift away from a premises liability basis for the professional rescuer doctrine, however, courts continued to find the rule justified under an assumption of risk theory. In addition, courts found that sound public policy supported the professional rescuer doctrine; namely, that the doctrine (1) encourages citizens to summon professional aid, (2), accounts for the special training and compensation received by rescue professionals (3) achieves fair cost spreading. *E.g., Maltman*, 84 Wn.2d at 978.

Again, the professional rescuer doctrine is a narrow limitation to the rescue doctrine. The doctrine only proscribes a professional rescuer's claim for injuries that were "inherently within the ambit of those dangers which are unique to and generally associated with the particular rescue activity." *Id.* When the professional rescuer is not injured by the very hazard that occasioned his or her presence at the scene, the professional rescuer doctrine does not prevent the professional rescuer from bring a claim against the tortfeasor causing the rescuer's injuries. For instance, when the professional rescuer is injured by an extra-hazardous or hidden danger, an intervening cause, or an intentional act, the professional rescuer may assert a claim

against the alleged wrongdoer. *Loiland*, 1 Wn. App.2d at 381; *Ballou v. Nelson*, 67 Wn. App. 67, 70, 834 P.2d 97 (1992).

The professional rescuer doctrine has been consistently applied and upheld by Washington courts. As recently as August 19, 2019, the Court of Appeals refused to abandon the professional rescuer doctrine. *See Markoff, supra*. As recently as May 2018, the Washington Supreme Court declined review of a Court of Appeals decision applying the professional rescuer doctrine. *See Loiland, supra*.

2. Lyon fails to meet his burden to show that the professional rescuer doctrine is clearly incorrect.

Lyon does not argue that the professional rescuer doctrine is incorrect; rather, he recognizes that the doctrine represents a “societal value judgment,” but one that is “outdated, unnecessary, and unjust.” App. Br. at 18, 22. Numerous courts have rejected such challenges, and a majority of states continue to apply the professional rescuer doctrine. Washington courts also continue to recognize the doctrine of assumption of risk and the policy bases supporting the professional rescuer doctrine. To the extent Lyon seeks a change in policy, his arguments are best addressed to the legislature, which, in this state, has taken no action to abolish or modify the professional rescuer doctrine, despite having ample opportunity to do so.

- i. *A majority of states continue to recognize the professional rescuer doctrine as a necessary limitation of the rescue doctrine.*

Although a few states have decided to move away from the professional rescue doctrine, the doctrine continues to be applied in nearly 30 American jurisdictions.<sup>2</sup> These jurisdictions (like Washington) find the professional rescuer doctrine to be a necessary rule based on general tort principles, assumption of risk, and public policy. At least three states have

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<sup>2</sup> See *Moody v. Delta W., Inc.*, 38 P.3d 1139 (Alaska 2002); *Grable v. Varela*, 564 P.2d 911 (Ariz. Ct. App. 1997); *Waggoner v. Troutman Oil Co., Inc.*, 894 S.W.2d 913 (Ark. 1995); *Neighbarger v. Irwin Indus., Inc.*, 882 P.2d 347 (Cal. 1994); *Fournier v. Battista*, CV 96472570S, 1996 WL 456295 (Conn. Super. Ct. July 16, 1996); *Gillespie v. Washington*, 395 A.2d 18 (D.C. 1978); *Carpenter v. O'Day*, 562 A.2d 595 (Del. Super. Ct. 1988), *aff'd*, 553 A.2d 638 (Del. 1988); *Kapherr v. MFG Chem., Inc.*, 625 S.E.2d 513 (Ga. App. 2005); *Thomas v. Pang*, 811 P.2d 821 (Haw. 1991); *Winn v. Frasher*, 777 P.2d 722 (Idaho 1989); *McShane v. Chicago Inv. Corp.*, 601 N.E.2d 1238 (Ill. App. Ct. 1992); *Babes Showclub, Jaba, Inc. v. Lair*, 918 N.E.2d 308 (Ind. 2009); *Pottebaum v. Hinds*, 347 N.W.2d 642 (Iowa 1984); *Apodaca v. Willmore*, 349 P.3d 481 (Kan. App. 2015), *aff'd*, 392 P.3d 529 (Kan. 2017); *Hawkins v. Sunmark Indus., Inc.*, 727 S.W.2d 397 (Ky. 1986); *Mullins v. State Farm Fire & Cas. Co.*, 697 So. 2d 750 (La. Ct. App. 1997); *White v. State*, 19 A.3d 369 (Md. 2011); *Farmer v. B & G Food Enterprises, Inc.*, 818 So. 2d 1154, 1157 (Miss. 2002); *Krause v. U.S. Truck Co., Inc.*, 787 S.W.2d 708 (Mo. 1990); *Buchanan v. Prickett & Son, Inc.*, 279 N.W.2d 855 (Neb. 1979); *Wiley v. Redd*, 885 P.2d 592 (Nev. 1994); *Migdal v. Stamp*, 564 A.2d 826 (N.H. 1989); *Baldonado v. El Paso Nat. Gas Co.*, 176 P.3d 277 (N.M. 2007); *Hack v. Gillespie*, 658 N.E.2d 1046 (Ohio 1996); *Mignone v. Fieldcrest Mills*, 556 A.2d 35 (R.I. 1989); *Carson v. Headrick*, 900 S.W.2d 685 (Tenn. 1995); *Juhl v. Airington*, 936 S.W.2d 640 (Tex. 1996); *Fordham v. Oldroyd*, 171 P.3d 411 (Utah 2007); *Benefiel v. Walker*, 422 S.E.2d 773 (Va. 1992); *Mullen v. Cedar River Lumber Co.*, 630 N.W.2d 574 (Wis. Ct. App. 2001).

gone so far as to codify the professional rescuer doctrine: (1) California, Cal. Civil Code Sec. 1714.9; (2) New Hampshire, N.H. Rev. Stat. § 507:8-h; and, (3) Nevada, N.R.S. § 41.139(1). All courts that recognize the professional rescuer doctrine emphasize the narrowness of the doctrine, which does not prevent professional rescuers from bringing a claim for injuries sustained for reasons other than the hazard that occasioned the professional rescuer's presence.

*ii. Theories of assumption of risk and public policy continue to support application of the professional rescuer doctrine.*

Lyon argues that the professional rescuer doctrine should be abandoned because the bases for the doctrine have eroded or been found wanting by courts of other states. App. Br. at 8-22. But Lyon fails to acknowledge that a plaintiff's implied primary assumption of risk completely bars recovery in Washington, a concept which is consistent with Washington's professional rescuer doctrine. Moreover, legitimate public policy concerns continue to support the professional rescuer doctrine, and any change in policy is best left to the legislature.

A. Theories of express and implied primary assumption of risk operate as a complete bar to recovery in Washington.

From the inception of the doctrine to the present, Washington courts recognize that the professional rescuer doctrine is based on the concept of assumption of risk. *See Maltman*, 84 Wn.2d at 978; *Markoff*, 2019 WL 3887407 at \*3 (“The professional rescuer doctrine is based on a broad policy of assumption of risk.”). That is, “[p]rofessional rescuers assume certain risks inherent in their jobs and may not collect damages from those whose negligence brings about such risks.” *Markoff*, 2019 WL 3887407 at \*3. “The firefighter’s rule . . . [is] an example of the proper application of the doctrine of assumption of risk.” *Neighbarger v. Irwin Indus., Inc.*, 882 P.2d 347, 354 (1994).

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). “Express assumption of risk arises when a plaintiff explicitly consents to relieve the defendant of a duty owed by the defendant to the plaintiff regarding specific known risks.” *Id.* at 410. “[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) (internal quotation marks and subsequent citations omitted). “The plaintiff’s consent to relieve the defendant of any duty is implied based on the plaintiff’s decision to engage in an activity that involves those known risks.” *Id.*<sup>3</sup>

“[T]he professional rescue doctrine is essentially a type of implied primary assumption of risk.” *Beaupre v. Pierce County*, 161 Wn.2d 568, 576, 166 P.3d 712 (2007). In seeking and obtaining employment as a professional rescuer, such as a fire fighter, the fire fighter has decided to engage in an activity that involves known risks, including the risk of being injured by flames, smoke, and falling debris. Fire fighters know of these dangers before they respond to their first fire, i.e., “in advance” of any negligently created hazard. *Gleason*, 192 Wn. App. at 795-96. In maintaining their employment, they regularly (and heroically) confront these dangers. In such circumstances, the fire fighter has impliedly assumed the risk of injury from dangers inherent in the hazard he or she is responding to.<sup>4</sup>

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<sup>3</sup> See also *Pellham*, 199 Wn. App. at 410-11 (suggesting that the Supreme Court recognize a theory of “inherent peril assumption of risk,” which would similarly “bar[] a claim resulting from specific known and appreciated risks impliedly assumed often in advance of any negligence of the defendant.”).

<sup>4</sup> The limited scope of the professional rescuer doctrine, i.e., that it permits claims based on injuries occurring for reasons other than the hazard to which the

The fact that Washington courts continue to recognize express and implied primary assumption of risk as complete bars to recovery distinguishes Washington law from Oregon law. *Compare Pellham, supra,* with O.R.S. § 31.620. In *Christensen v. Murphy*, 678 P.2d 1210 (Or. 1984), relied upon by Lyon, the Oregon Supreme Court abandoned Oregon’s professional rescuer doctrine in significant part because, subsequent to the Oregon Supreme Court adopting the professional rescuer doctrine, the Oregon legislature abolished assumption of risk as a complete defense to a plaintiff’s claim. *See id.* at 1216-17 (noting that since the enactment of O.R.S. § 18.475(2)<sup>5</sup> (which eliminated implied assumption of risk doctrine), the “major theoretical underpinning [of the professional rescuer doctrine] is gone”). In Washington, the assumption of risk—the “major theoretical underpinning” of the professional rescuer doctrine—remains a viable and complete defense.

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professional rescuer responded to, is comparable to other “taxonomies” of assumption of risk, i.e., implied unreasonable and implied reasonable assumption of risk, which likewise do not bar a claim. *See Pellham*, 199 Wn. App. at 409-10.

<sup>5</sup> Precursor to O.R.S. § 31.620.

B. *Legitimate public policy concerns support the professional rescuer doctrine.*

Public policy concerns are “intertwined” with the assumption of risk analysis. *Krause v. U.S. Truck Co., Inc.*, 787 S.W.2d 708 (Mo. 1990). Lyon criticizes the public policy concerns that are often cited in support of the professional rescuer doctrine. App. Br. at 17-22. While Lyon may disagree with these policies, he fails to show that they are baseless, incorrect, or unreasonable. Contrary to Lyon’s position, public policy continues to support the professional rescuer doctrine.

1. *The professional rescuer doctrine encourages citizens to summon professional assistance to hazardous situations.*

In maintaining a civilized and ordered society, citizens must not hesitate to summon aid to situations that endanger people and property. *See Kapherr v. MFG Chemical, Inc.*, 625 S.E.2d 513, 515 (Ga. App. 2005) (“Citizens should be encouraged and not in any way discouraged from relying on those public employees who have been specially trained and paid to deal with these hazards.”). Where a community has pooled its resources to train and employ professional rescuers, it falls on such professionals to respond to hazardous situations. If a person creating a hazard were to consider, even for a brief moment, that he or she could be liable for injury

or death of a fire fighter, that brief hesitation could mean otherwise avoidable loss of life and property. For instance, perhaps a person thinks he or she can control the situation and spends precious seconds trying to remedy the situation before it gets out of control. *See, e.g., Meunier v. Pizzo*, 696 So.2d 610, 615 (La. App. 1997) (noting “[i]f police officers were allowed to recover in such situations, proprietors might choose to resort to self-help measures instead, creating additional risks to public safety.”). Liability concerns might also disproportionately affect the poor and uninsured. *See Fox*, 594 N.E.2d at 496 (“[T]he 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.”). If even one disaster could be avoided because of a prompt, unhesitating call for help, the professional rescuer doctrine serves its purpose.

Lyon cites to Dean Prosser’s cursory statement that this rationale is “preposterous rubbish.” App. Br. at 14, 27 (citing PROSSER, WILLIAM L., LAW OF TORTS § 68 (4th ed. 1971)). But Prosser does not expound on this statement and fails to support it with any authority or data (other than a tongue-in-check footnote reference to “rubbish collectors”). As evidenced by the number of jurisdictions that continue to find the professional rescuer doctrine supported by public policy, *see supra*, Note 2, many jurists have

expressly disagreed with Prosser's conclusion. *See, e.g., Fordham v. Oldroyd*, 171 P.3d 411, 413 (Utah 2007).<sup>6</sup> Simply labeling this notion “preposterous rubbish” does not make it so.

2. **Professional rescuers are trained and employed, at public expense, for the very purpose of confronting hazardous situations and are compensated for this risk.**

The fact that professional rescuers receive training and compensation for exposing themselves to dangerous situations for the benefit of the greater good further supports the professional rescuer doctrine. Professional rescuers are “trained to expect the unexpected . . . . [s]uch is the nature of their business.” *Hack v. Gillespie*, 658 N.E.2d 1056 (Ohio 1996). They heroically confront risks on a daily basis. No one is better situated to engage in rescue situations, and no one has more experience in accomplishing the rescue. This training and experience separates

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<sup>6</sup> Dean Prosser's derisiveness does not deter us from believing that it is not too farfetched to expect that prudent motorists might, perhaps on the advice of their insurance carriers, confront their rescuers with waiver of liability documents or, if able to do so, engage in a dialogue with rescuers to gain assurance that they are competent to undertake the rescue. Like many, we would prefer to inhabit a society in which the consequences of one's inattention do not include the compensation of those on whom all of us collectively confer the duty to extricate us from our distress.

*Fordham*, 171 P.3d at 413.

professional rescuers from other public workers and lay rescuers. Further, professional rescuers are paid in accordance with the risks they encounter, and are compensated for on-the-job injuries. *See infra*, Section (A)(3). The fact that the public employs professional rescuers for the very purpose of responding to the hazardous situations that the public creates, creates a unique relationship between professional rescuers and the public. It would be “unfair to permit a firefighter to sue for injuries caused by the negligence that made his or her employment necessary.” *Neighbarger*, 882 P.2d at 352; *see also Thomas v. Pang*, 811 P.2d 821, 825 (Haw. 1991) (“[It] offends public policy to say that a citizen invites private liability merely because he happens to create a need for [emergency] services.”).

Lyon complains that training is not an adequate reason to apply different rules to “ordinary” rescuers and professional rescuers. App. Br. at 19. But beyond training and skills, professional rescuers such as fire fighters and police officers have a unique role in our society. The essence of the profession is for the rescuer to put him or herself in harm’s way in order to help other people. The intention and purpose of their profession is to rescue people. “Ordinary” rescuers do not sign up to rescue someone with this degree of intentionality and do not engage in rescues on a daily basis.

People working in dangerous professions likewise do not sign up with the intention of putting themselves in harm’s way in order to protect

others. Oil rig workers (an example used by Lyon) certainly might work in a hazardous environment, but they engage in that work for the purpose of extracting oil for profit. The fact that the work is dangerous is tangential to the primary purpose of the job. Oil rig workers do not sign up for that work with the intent (or the societal expectation) that they will intentionally put themselves in danger for the good of others. *Cf. Moody v. Delta Western, Inc.*, 38 P.3d 1139, 1141 (Alaska 2002) (“Government entities maintain police and fire departments in anticipation of those inevitable physical perils that burden the human condition, whereas most public employment posts are created not to confront dangers that will arise by to perform some other public function that may incidentally involve risk.”) (citation omitted); *Hack*, 658 N.E.2d 1046<sup>7</sup>.

Lyon also claims that fire fighters are not paid enough for the dangers they encounter. App. Br. at 20. No admissible evidence supports such argument. Instead, Lyon cites to a “ZipRecruiter” website page for the

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<sup>7</sup> [U]nlike water, electric and gas meter readers, postal workers and others, fire fighters can enter a homeowner’s or occupier’s premises at any time, day or night. They respond to emergencies, and emergencies are virtually impossible to predict. They enter locations where entry could not be reasonably anticipated, and fire fighters often enter premises when the owner or occupier is not present.

*Hack*, 658 N.E.2d at 1050–51.

proposition that Washington fire fighters are paid an average yearly salary of \$54,000. *Id.* at 20, n.3. The record before the trial court, however, did not contain evidence of Lyon's compensation, and the average salary of fire fighters in Washington is not subject to judicial notice. This information should be stricken and disregarded on appeal.

3. **The professional rescuer doctrine is supported by cost spreading rationale.**

The professional rescuer doctrine is supported on public policy grounds based on cost spreading rationale. The public and professional rescuers have a unique relationship. In maintaining a professional rescue service with public funds, the public has an expectation, based on a social contract, that professional rescuers will not seek to hold negligent citizens responsible for their injuries sustained in combating a negligently created hazard. *E.g., Fox*, 594 N.E.2d at 496<sup>8</sup>; *accord Scheurer v. Trustees of Open*

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<sup>8</sup> 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 publicly 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

*Bible Church*, 192 N.E.2d 38, 43 (Ohio 1963). The public pays to train and maintain professional rescuer organizations and has set up statutory compensation schemes to ensure that an injured professional rescuer is adequately compensated. It would be unfair to tax the citizenry a second time for a professional rescuer's injury. *See, e.g., Moody*, 38 P.3d at 1142 (“Requiring members of the public to pay for injuries resulting from [responding to negligently created hazards] effectively imposes a double payment obligation on them.”); *Neighbarger*, 882 P.2d at 355 (“In effect, the public has purchased exoneration from the duty of care and should not have to pay twice, through taxation and through individual liability, for that service.”).

In sum, Washington is among the majority of states that continue to apply the professional rescuer doctrine, which it does for sound and principled reasons. The professional rescuer doctrine is consistent with how Washington courts apply assumption of risk and is supported by public policy that is widely accepted by courts across the nation. Lyon has failed

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contract for all of us to say to any one of us “fire and police protection are available only at your peril.”

*Fox*, 594 N.E.2d at 496.

to meet his burden to show that the professional rescuer doctrine is clearly “incorrect” so as to justify its abandonment.

3. Lyon fails to meet his burden to show that the professional rescuer doctrine is clearly harmful.

Lyon cannot show that the professional rescuer doctrine is so harmful that the Court should depart from its precedent and abandon the doctrine. Lyon does not expressly argue that the professional rescuer doctrine is harmful as a rule of law. He does argue that the rule’s application to his case denies him the ability to seek certain remedies, which he argues is unjust. App. Br. at 22, 27-18.

The question of appropriate remedies to provide emergency personnel injured in the line of duty, however, is a political question that is best left to the arena of public debate and the political/legislative process. To that end, both state and federal legislation provide remedies to professional rescuers injured on-the-job. *See* Title 51 RCW (Industrial Insurance Act); Chapter 41.26 RCW (Law Enforcement Officers’ and Fire Fighters’ Retirement System Act (LEOFF))<sup>9</sup>; 5 U.S.C. § 8101 et seq. (Federal

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<sup>9</sup> LEOFF creates an “actuarial reserve system” for injured police officers and firefighters to provide them “sure and certain recovery.” *Hansen v. City of Everett*, 93 Wn. App. 921, 926, 971 P.2d 111 (1999). Compared to Washington’s Industrial Insurance Act, LEOFF provides extra protections to police officers and fire fighters by allowing them to collect workers’ compensation and also allowing them to bring job related negligence suits against their employers. *Hauber v. Yakima Cty.*, 147 Wn.2d 655, 660, 56 P.3d

Employees' Compensation Act ("FECA"))<sup>10</sup>. These statutes represent society's solution to the complex problem of compensating workplace injuries, including injuries suffered by professional rescuers.

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559, 561 (2002) (citing RCW 51.04.010, RCW 41.26.281). This extra protection is warranted because of the "vital and dangerous nature of their work." *Id.* Further, "[b]y exposing an employer to liability for negligent acts toward its employees, [LEOFF] creates a strong incentive for improved safety." *Hansen*, 93 Wn. App. at 926.

The fact that LEOFF does not apply to Lyon's case does not justify abandonment of the professional rescuer doctrine as argued by Lyon. Response at 15-16. LEOFF can be applied in harmony with the professional rescuer doctrine. LEOFF allows a fire fighter to sue his or her **employer**, RCW 41.26.281, but does not allow the fire fighter to sue the person allegedly at fault for creating a hazard that injured the fire fighter. Further, the policy underlying the action against the employer pursuant to LEOFF (improved safety) does not apply to a suit brought against a third party. Employers, especially public employers, are uniquely situated to establish policies, train, and furnish equipment to improve workers' safety. A suit brought by a fire fighter against his or her employer may well motivate adoption of additional safeguards. This is not so when the fire fighter sues a third party, such as the PUD. Suing the PUD does not incentivize the fire fighter's employer to improve safety. Arguably, it creates a reverse incentive: If an injured fire fighter can recover from a third party, i.e., a landowner, it is less likely that the fire fighter will sue his or her employer, and, unconcerned about liability, the employer will not adopt safeguards.

<sup>10</sup> FECA provides workers' compensation benefits to federal employees. 5 U.S.C. § 8102. FECA defines "employees" broadly to include "a civil officer or employee in any branch of the government of the United States, including an officer or employee of an instrumentality wholly owned by the United States." 5 U.S.C. § 8101. Firefighters employed by United States Forest Service are considered employees covered by FECA. *Thol v. United States*, 218 F.2d 12 (9th Cir. 1954). Part time and seasonal employees are also covered by FECA. 20 C.F.R. § 10.216. FECA benefits are comprehensive, and include payment

In conclusion, Lyon fails to meet his burden to clearly show that the professional rescuer doctrine is clearly incorrect and harmful so as to justify this Court departing from established precedent. It is not enough for Lyon to disagree with the policy bases of the professional rescuer doctrine and that argue its application to him in this particular case is unfair. As recognized by Lyon, the doctrine represents a “societal value judgment” and a balancing of competing policy concerns. It is not the role of the Court to try to gauge the pulse of society every few decades and modify its doctrines (based on undeveloped facts in a single case) to reach a result that seems fair in one particular case or a result it deems consistent with current public opinion. The legislature is the proper forum for enacting wide-ranging issues of social policy. This Court need not, and should not, abandon the professional rescuer doctrine, but should defer any change in the law to the legislature.

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for total and partial disability and the procurement of necessary medical services and devices. 5 U.S.C. §§ 8103 – 8106. If an employee’s injuries are covered under FECA, then FECA is the sole remedy against the United States or its instrumentality. 5 U.S.C. § 8116(c); *Thol*, 218 F.2d at 13.

**B. The professional rescuer doctrine does not violate Article 1, section 12 of the Washington State Constitution.**

Lyon argues that the professional rescuer doctrine violates Article 1, section 12 of the Washington State Constitution's guarantee of equal protection.<sup>11</sup> App. Br. at 23-28. Lyon's equal protection argument fails because the professional rescuer doctrine neither burdens a suspect or semi-suspect class nor does it affect a fundamental right. Thus, the professional rescuer doctrine should be examined, and upheld, under rational basis review, which requires only that a law has a rational relation to a legitimate government interest.

1. Lyon is not a member of a suspect or semi-suspect class.

“To qualify as a suspect class for purposes of an equal protection analysis, the class must have suffered a history of discrimination, have as the characteristic defining the class an obvious, immutable trait that frequently bears no relation to ability to perform or contribute to society, and show that it is a minority or politically powerless class.” *Andersen v. King Cty.*, 158 Wn.2d 1, 19, 138 P.3d 963 (2006) (citations omitted), *abrogated by Obergefell v. Hodges*, 135 S. Ct. 2584, 192 L. Ed.

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<sup>11</sup> Article 1, section 12 provides: “No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.”

2d 609 (2015). Lyon does not argue that he is a member of a “suspect class.” This is because, no matter how Lyon might define his class—narrowly as a class of federal seasonal firefighters, or, broadly as a law enforcement officer/emergency responder—he cannot establish his class is “suspect” in the sense that the class has suffered a history of discrimination, has “immutable” traits, and is politically powerless. *See Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 313–14, 96 S. Ct. 2562, 2567, 49 L. Ed. 2d 520 (1976) (concluding that a “class of uniformed state police officers over [age] 50 [does not] constitute a suspect class for purposes of equal protection analysis”).

Lyon suggests that, by virtue of the professional rescuer doctrine, professional rescuers are unfairly singled out from a larger population of ordinary rescuers, other public employees, and people who work in dangerous professions. App. Br. at 25. But there are legitimate reasons for treating professional rescuers, as a group, differently from others. In *Thomas v. Pang*, the Supreme Court of Hawaii rejected an equal protection challenge that firefighter fighters, as a class, were treated differently than other public employees in a way that was unconstitutional. 811 P.2d at 825. The *Thomas* Court stated:

We recognize that other public employees to whom workers’ compensation benefits are available are not precluded from recovering from private parties for injuries sustained on

private property. But this does not relegate fire fighters to second-class citizens, nor does it create an equal protection problem. It is the nature of the firefighting profession and its relationship to the public which distinguishes fire fighters from most other public employees. Danger is inherent in a fire fighter's work and the fire fighter is trained and paid to encounter hazardous situations unlike the majority of public employees. The public policy considerations which persuaded us to adopt the Rule amply support a classification of fire fighters separate and apart from most public employees.

*Id.* The Louisiana Court of Appeals rejected a similar constitutional challenge. *See Meunier v. Pizzo*, 696 So. 2d 610, 615 (La. Ct. App. 1997) (“We find that 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.”). Treating professional rescuers differently from other people does not make professional rescuers a suspect class.

2. Lyon does not have a fundamental right to sue an entity allegedly responsible for creating a hazard, which caused his presence at the scene of emergency and his injury.

Lyon argues that the professional rescuer doctrine violates Washington's equal protection clause because “redress for personal injury is a fundamental right.” App. Br. at 24. Lyon overreaches in making this argument, and this Court should reject Lyon's broad characterization of what he considers his “fundamental” right impacted by the professional rescuer doctrine.

Lyon’s right affected by the professional rescuer doctrine should be described “carefully” and narrowly. *Anderson*, 158 Wn.2d at 24. A fundamental right is one that is “objectively, deeply rooted in this Nation’s history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.” *Id.* Under an equal protection analysis, a “careful description of the asserted fundamental liberty interest is required . . . [and] [the Court] must . . . exercise the utmost care whenever [it is] asked to break new ground in this field.” *Id.* at 25 (internal quotation marks and subsequent citation omitted). The Court is “careful” in defining what rights are “fundamental” because “[b]y extending constitutional protection to an asserted right or liberty interest, [the Court], to a great extent, place[s] the matter outside the arena of public debate and legislative action.” *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21, 117 S. Ct. 2258, 138 L.Ed.2d 772 (1997)).

Generally, courts examining a litigant’s right to petition a civil court for redress define the right to access the court narrowly, focusing on the nature of relief sought by the litigant. *See, e.g., United States v. Kras*, 409 U.S. 434, 442, 93 S. Ct. 631, 636, 34 L. Ed. 2d 626 (1973) (“We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment . . .”). For example, in *Kras*, the United States Supreme Court

held that neither due process nor equal protection is violated by requiring a person to pay an administrative fee prior to filing a bankruptcy petition. *Kras*, 409 U.S. at 445 (“Kras’ alleged interest in the elimination of his debt burden, and in obtaining his desired new start in life, although important and so recognized by the enactment of the Bankruptcy Act, does not rise to the same constitutional level.”). Similarly, the United States Supreme Court has held that requiring a litigant to pay a filing fee to seek judicial administrative decisions reducing welfare benefits does not violate equal protection or due process. *Ortwein v. Schwab*, 410 U.S. 656, 93 S. Ct. 1172, 35 L. Ed.2d 572 (1973). In *Miranda v. Sims*, 98 Wn. App. 898, 991 P.2d 681 (2000), the Washington Court of Appeals concluded that a litigant’s right to access the courts did not require the appointment of counsel (at public expense) to indigent litigants involved in a coroner’s inquest into the death of the litigants’ family member. *See id.* at 907 (“[T]he right of access to the courts has not, by itself, been recognized as a fundamental right.”).

On the other hand, due process (not equal protection) is violated when a court requires an indigent person seeking a marriage dissolution to pay a filing fee. *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L.Ed.2d 113 (1971). This is because the right to marry, and the right to end a marriage, “involves interests of basic importance in our society,” *id.* at 377,

91 S. Ct. at 785, i.e., familial rights that are deeply rooted in this Nation's traditions and values.

In this case, Lyon cannot establish that the professional rescuer doctrine denies him a fundamental right to access the courts. *See Miranda*, 98 Wn. App. at 907. Preliminarily, he characterizes his alleged right affected by the professional rescuer doctrine far too broadly in arguing that it affects his ability to seek "redress for personal injury." App. Br. at 24; *cf. Anderson*, 158 Wn.2d at 24 (instructing courts to use "utmost care" in describing asserted fundamental liberty interests). The professional rescuer doctrine does not deny Lyon redress in the courts of this state; it limits his ability to hold certain people liable for his injuries.

The actual right Lyon seeks to advance in this lawsuit is an economic right, i.e., the right to recover damages from an alleged tortfeasor. Such a "right" is similar to the non-fundamental (economic) right to file a bankruptcy petition or the right to challenge an administrative decision regarding welfare. *Kras, Ortwein, supra*. Lyon's right to hold certain people responsible for his injuries is not a traditional and sacred right, such as the right to marry and divorce. *Boddie, supra*. In fact, the professional rescuer doctrine is 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 doctrine proscribes a claim brought by a professional rescuer against the alleged tortfeasor that caused the need for the rescuer to present at a hazardous situation.

Lyon relies on two cases for the proposition that his right to seek redress for personal injuries against any and all wrongdoers is a fundamental right. App. Br. at 24 (citing *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 782, 819 P.2d 370 (1991); *Hunter v. N. Mason High Sch.*, 85 Wn.2d 810, 814, 539 P.2d 845 (1975)). Neither case supports Lyon's broad characterization of the right to access the courts.

*Doe* is not an equal protection case. It involved an appeal of a discovery order requiring the defendant-appellant to disclose sensitive information. *Doe*, 117 Wn.2d at 775-76. In discussing whether the trial court abused its discretion, the Court weighed the plaintiff's interest in disclosure and the defendant's privacy interest. *Id.* at 780-89. The Court considered the contours of CR 26 through a constitutional lens of a litigant's right to access the courts. *Id.* The Court reviewed its jurisprudence arising under the due process clause, privileges and immunities clause, and equal

protection clause. *Id.* Based on the Court’s constitutional case law, the Court concluded that CR 26 (and its companion rules CR 27-37) “grant a broad right of discovery which is subject to the relatively narrow restrictions of CR 26(c).” *Id.* at 782. The court found that the plaintiff’s constitutional right to access the court and “concomitant right to discovery” “must be accorded a high priority.” *Id.* at 783. Ultimately, the Court affirmed the trial court’s discovery order requiring defendant to produce the requested discovery because the plaintiff’s interests outweighed the defendant’s. *Id.* at 789. *Doe* does not hold that there is a broad right to seek redress for personal injuries that applies to every person who might file suit in Washington.

In *Hunter*, the Court considered a “nonclaim” statute<sup>12</sup>, which required plaintiffs suing a government entity to give the entity pre-suit notice within 120 days of the plaintiff’s alleged injury, and concluded that the statute violated equal protection. 85 Wn.2d 810. The Court noted that the statute “arbitrarily” created two classes of defendants: government and non-government, and, further created two classes of “tort victims,” victims injured by the government and victims injured by non-government actors. *Id.* at 813. The Court further observed:

Nonclaim statutes constitute a barrier to suit for a significant number of victims of governmental misfeasance. It is a rare

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<sup>12</sup> Former RCW 4.96.020.

plaintiff who happens to know of the short notice period he must comply with, or to consult a lawyer before his time to file has expired. Only where the injured person is educated or well advised enough to know in advance of his or her legal rights is compliance with the notice requirements realistically possible. By increasing the demands on the potential plaintiff, these statutes grossly magnify the unfair impact of the unequal distribution of legal counsel and knowledge between rich and poor.

*Id.* at 813–14 (footnote omitted). At bottom, “[t]he effect of the notice requirement on tort victims not fortunate enough to be aware of it is to deny them their cause of action.” *Id.* at 814.

In its equal protection analysis, the *Hunter* Court applied the following standard:

Statutory classifications which substantially burden such rights as to some individuals but not others are permissible under the equal protection clause of the Fourteenth Amendment only if they are reasonable, not arbitrary, and . . . rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

*Id.* (citations and quotation marks omitted). The Court observed that the traditional justification for the nonclaim statute was to protect government entities because of their “size” and the “number of activities they are involved in.” *Id.* at 815. The Court found this rationale unsupported, and, due to the legislative waiver of sovereign immunity, the sole interest of protecting the public treasury was not a reasonable ground for

distinguishing between classes of litigants based on governmental status. *Id.* at 817-19.

*Hunter* does not stand for the proposition that a person has a fundamental right to seek redress for personal injuries from any and all alleged tortfeasors.

Cases decided after *Hunter* limit *Hunter* to cases involving “legislation that essentially shortens the statute of limitations for suits against state defendants.” *McDevitt v. Harbor View Med. Ctr.*, 179 Wn.2d 59, 68, 316 P.3d 469, 475 (2013) (citations omitted). Obviously, this is not the issue presented in Lyon’s case.

Moreover, in *Hunter*, there was no legitimate reason for treating government entities differently from other entities given the legislature’s waiver of sovereign immunity. *See* 85 Wn.2d at 817-19. In Lyon’s case, however, there are several legitimate reasons to treat professional rescuers differently from other types of employees and rescuers. *See supra*, Section (A)(2)(b)(ii). And unlike the legislature’s act of waiving sovereign immunity that predicated the *Hunter* court’s decision, the state legislature has taken no action to curb the professional rescuer doctrine, or the assumption of risk defense that underlies it.

Finally, *Hunter* involved a rule that often operated to completely bar a plaintiff’s claim. In the case of the professional rescuer doctrine, however,

the rule is narrow and applies only to claims for injuries that are “inherently within the ambit of those dangers which are unique to and generally associated with the particular rescue activity.” *Markoff*, 2019 WL 3887407 at \*3. The professional rescuer doctrine is much more limited than the nonclaim statute struck down in *Hunter*.

In sum, Lyon fails to establish that the professional rescuer doctrine affects a fundamental right so as to violate equal protection.

3. The professional rescuer doctrine passes constitutional muster under a rational basis review.

“The level of scrutiny to be applied under an equal protection analysis depends on whether a suspect or semi-suspect classification has been drawn or a fundamental right is implicated; if neither is involved, rational basis review is appropriate.” *Andersen*, 158 Wn.2d at 18. Because Lyon fails to show that he is a member of a suspect or semi-suspect class, or that the professional rescuer doctrines affects a fundamental right, the Court reviews Lyon’s constitutional challenge under the rational basis standard. *Am. Legion Post #149 v. Washington State Dep’t of Health*, 164 Wn.2d 570, 604, 192 P.3d 306 (2008). “Rational basis review requires a law to be rationally related to a legitimate government interest.” *Id.*; *see also Yurtis v. Phipps*, 143 Wn. App. 680, 694, 181 P.3d 849 (2008) (“[W]hen

access to the courts is not essential to advance a fundamental right, access may be regulated if the regulation rationally serves a legitimate end.”).

The “end” of the professional rescuer doctrine is to encourage the reporting of dangerous conditions, and to spread the foreseeable risk of injury to the public through salary and workers’ compensation. *See* Title 51 RCW; Chapter 41.26 RCW; 5 U.S.C. § 8101 et seq.; *Maltman*, 84 Wn.2d at 978; *Ballou*, 67 Wn. App. at 73. The doctrine, in place for several decades and affirmed despite repeated challenges, is rationally related to this end: the doctrine is limited to professional rescuers, and is narrowly tailored to avoid injustice. Moreover, the government has a legitimate public interest in preventing public employees from recovering from multiple sources for the same injury, a recovery that may ultimately be borne by taxpayers, insureds, or, in this case, utility rate payers. *See Nebbia v. People of New York*, 291 U.S. 502, 537, 54 S. Ct. 505, 78 L. Ed. 940 (1934) (“[A] state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose.”).

In sum, the professional rescuer doctrine is an economic policy that is rationally related to promoting the public welfare. The professional rescuer doctrine passes constitutional muster under rational basis review.

**C. The Court should not create an exception to the professional rescuer doctrine based on the alleged gross negligence of the person who created the emergency to which professional rescuers respond.**

As a final plea, Lyon urges the Court to create a new exception to the professional rescuer doctrine that applies in cases where a tortfeasor was grossly negligent<sup>13</sup> in creating the danger to which the rescuer responded. App. Br. at 28-35. This Court recently declined an invitation to adopt an exception to the professional rescuer doctrine based on the willful, wanton, or reckless conduct of the person creating the emergency to which professional rescuers respond. *Markoff, supra*. This Court should similarly reject Lyon’s invitation to adopt an exception based on an even lower degree of intentionality.

Creating a gross negligence exception to the professional rescuer doctrine would be problematic. Such an exception would focus on the blameworthiness of a person’s conduct, which is conceptually different from other “exceptions” to the doctrine. Moreover, the exception advocated by Lyon is unprecedented and would create an exception that would

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<sup>13</sup> Gross negligence is negligence that falls “greatly below the standard of care established by law,” and requires the plaintiff to put forth “substantial evidence of serious negligence.” *Boyce v. West*, 71 Wn. App. 657, 665, 862 P.2d 592 (1993).

swallow the rule. Finally, this case does not present facts, at least as alleged against the PUD, that justify a new gross negligence exception.

1. There is no compelling reason to create a gross negligence exception to the professional rescuer doctrine.

Lyon fails to demonstrate a need, or persuasive reasoning, for a new exception to the professional rescuer doctrine that is only slightly higher than ordinary negligence.

In rejecting a proposed exception to the professional rescuer doctrine for willful, wanton, or reckless conduct, the Court of Appeals in *Markoff* stated:

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. Washington courts have not looked to the conduct of a person in creating a hazard to establish whether the professional rescuer doctrine applies. Rather, our courts have always analyzed whether the professional rescuer assumed a risk inherent in the nature of the rescue at issue.

2019 WL 3887407, at \*6.

Lyon's proposed exception to the professional rescuer doctrine for gross negligence goes beyond the assumption of risk underpinnings of the doctrine to the blameworthiness of the person who allegedly caused the emergency. Lyon's proposed exception is conceptually different from the

current recognized exceptions to the professional rescuer doctrine.<sup>14</sup> The basis of the professional rescuer doctrine is that, regardless of how the dangerous situation occurred, professional rescuers need to, and are going to, respond. For instance, fire fighters are expected to respond to a fire, regardless if it started naturally, negligently, or by arson. The fire must be extinguished in order to save lives and property. To include a new exception for gross negligence, an inquiry that focuses on the tortfeasor's actions leading up to the emergency situation, is antithetical to the professional rescuer doctrine in a way that the other recognized exceptions are not.

Moreover, an exception based on a tortfeasor's gross negligence would swallow the rule. Emergencies can occur naturally or artificially by the acts/omissions of people. Artificial emergencies generally do not occur when things go according to plan. For artificial emergencies, in most cases, it could be argued that the emergency was proximately caused by someone's breach of the standard of care. And it is not a stretch that the artificial

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<sup>14</sup> These exceptions include when the professional rescuer is injured by (1) hidden or extra-hazardous dangers, (2) an intervening act of a third party, or (3) intentional acts of a third party. *Loiland*, 1 Wn. App.2d at 866. These exceptions recognize that there are certain things that might occur at the scene of the emergency that the professional rescuer did not expect, did not account for, and did not contract for when accepting employment as a professional rescuer. These exceptions are well founded in the assumption of risk basis for the professional rescuer doctrine.

emergency was the result of someone acting “greatly below” the standard of care, which is all that is required to establish gross negligence.

Finally, Lyon’s argument for adoption of a gross negligence exception is also not supported by the cases he cites from jurisdictions other than Washington. App. Br. at 32-35. As recognized in Lyon’s briefing, not one of the jurisdictions Lyon cites to have adopted an exception for gross negligence. Rather, other states have adopted an exception based on a person’s reckless or willful and wanton conduct. Lyon does not advocate on appeal for the creation of a professional rescuer doctrine exception for recklessness or willful/wanton conduct. And, in *Markoff*, this Court recently rejected an argument asking the Court to create such an exception.

In sum, adopting an exception to the professional rescuer doctrine based on gross negligence would be unprecedented, and again, would create an exception that could be used to assert a claim in nearly all cases where a professional rescuer is injured in responding to a hazardous situation created by someone’s alleged negligence.

2. The Court need not reach the issue of creating a new exception to the professional rescuer doctrine because Lyon does not allege facts establishing that the PUD was grossly negligent.

Finally, it is not even necessary for the Court to reach the issue of whether a new exception to the professional rescuer doctrine for gross

negligence because this case does not present facts, at least as alleged against the PUD, justifying the creation of new law as advocated by Lyon.

Lyon's Complaint does not allege facts to support the allegation that the PUD was negligent, much less that it acted with gross negligence. In Lyon's FAC, the only facts he alleges relating to the PUD's role in the Twisp River Fire are: "[The fire] apparently started near an unoccupied house located at 591 Twisp River Road," and "[t]he fire emanated on property owned by [the PUD], where the unoccupied house was located." CP at 25 (FAC at ¶¶ 4.2-4.3).<sup>15</sup> The remainder of Lyon's factual allegations are addressed to Defendant-Respondent OCEC, which owned, operated, and maintained power lines over the property, and was responsible for maintaining the right-of-way. CP at 25-28 (FAC at ¶¶ 4.5 – 4.22). Significantly, the location of Lyon's actual injury was not on the PUD's property. *See* CP at 21 (FAC at pg. 4, ln. 3-10 (stating that injury occurred in the vicinity of Woods Canyon Road, when Lyon's crew was "signaled to head down Woods Canyon Road, directly into the path of the fire"))).

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<sup>15</sup> Lyon's FAC also alleges "Defendants' conduct constituted gross negligence in that Defendants failed to exercise even slight care to maintain the [overhead] power lines in a safe condition." CP at 29 (FAC at ¶ 5.4.2). This is a legal conclusion that the Court need not accept as true for purposes of a CR 12(c) motion. *Haberman*, 109 Wn.2d at 120.

Because Lyon fails to allege any facts suggesting that the PUD acted grossly negligent, this is not an appropriate case for the Court to decide whether a tortfeasor's gross negligence constitutes an exception to the professional rescuer doctrine. *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"). The Court's opinion on this question would thus be an improper and unnecessary advisory opinion.

## **VI. CONCLUSION**

For the foregoing reasons, this court should affirm the trial court's dismissal of Lyon's claims against the PUD.

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of September, 2019.

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## DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that a true and accurate copy of the document to which this declaration is affixed was filed and served, on this day, electronically through the Court of Appeals' online Portal.

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