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Supreme Court No. 97826-3

COA III No. 36528-0

SUPREME COURT OF THE STATE OF WASHINGTON

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.

**RESPONDENT PUD NO. 1 OF DOUGLAS COUNTY'S ANSWER
TO AMICUS BRIEF FILED BY WASHINGTON STATE
ASSOCIATION FOR JUSTICE FOUNDATION**

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TABLE OF CONTENTS

I.	SUMMARY OF ANSWER.....	1
II.	STATEMENT OF FACTS	1
III.	COUNTERSTATEMENT OF ISSUE.....	2
IV.	ARGUMENT	3
	A. Washington’s assumption of risk jurisprudence supports the professional rescuer doctrine.	3
	B. Sound public policy supports treating professional rescuers differently than other types of workers who are allowed to sue third parties for on-the-job injuries.	12
V.	CONCLUSION.....	14

TABLE OF AUTHORITIES

Cases

<i>Beaupre v. Pierce Cty.</i> , 161 Wn.2d 568, 166 P.3d 712 (2007).....	5
<i>Christensen v. Murphy</i> , 678 P.2d 1210 (Or. 1984).....	4
<i>Gregoire v. City of Oak Harbor</i> , 170 Wn.2d 628, 244 P.3d 924 (2010).....	4, 5, 8
<i>Gleason v. Cohen</i> , 192 Wn. App. 788, 368 P.3d 531 (2016).....	passim
<i>Jessee v. City Council of Dayton</i> , 173 Wn. App. 410, 293 P.3d 1290 (2013).....	4, 6, 10
<i>Kirk v. Washington State Univ.</i> , 109 Wn.2d 448, 746 P.2d 285 (1987).....	4, 5
<i>Loiland v. State</i> , 1 Wn. App.2d 861, 407 P.3d 377 (2017).....	7, 8
<i>Maltman v. Sauer</i> , 84 Wn.2d 975, 530 P.2d 254 (1975)	4, 8
<i>Pellham v. Let's Go Tubing, Inc.</i> , 199 Wn. App. 399, 398 P.3d 1205 (2017).....	4
<i>Riehl v. Foodmaker, Inc.</i> , 152 Wn.2d 138, 94 P.3d 930 (2004)	3
<i>Scott v. Pac. W. Mountain Resort</i> , 119 Wn.2d 484, 834 P.2d 6 (1992).....	6, 7
<i>Shorter v. Drury</i> , 103 Wn.2d 645, 695 P.2d 116 (1985)	4, 5
<i>State ex rel. State Fin. Comm. v. Martin</i> , 62 Wn.2d 645, 384 P.2d 833 (1963).....	3

Other Authorities

O.R.S. § 31.620.....	4
WPI 13.03	8

I. SUMMARY OF ANSWER

Respondent PUD No. 1 of Douglas County (“the PUD”) submits this Answer to the Amicus Brief of Washington State Access for Justice Foundation (“WSAJ”).

The Court should decline WSAJ’s invitation to abandon the professional rescuer doctrine based on WSAJ’s argument that the evolution of the Court’s assumption of risk jurisprudence or the fact that other types of workers injured on-the-job are allowed to bring claims against third parties. Washington’s assumption of risk jurisprudence has not changed so much since *Maltman* that assumption of risk no longer provides a theoretical foundation for the professional rescuer doctrine. To the contrary, the professional rescuer doctrine readily satisfies all the elements of the implied primary assumption of risk defense, which—like the professional rescuer doctrine—appropriately operates as a complete bar to making a claim against entities allegedly responsible for a hazardous situation. Further, there are sound public policy reasons to treat professional rescuers different from other types of workers, and this Court should defer significant policy decisions to the legislature.

II. STATEMENT OF FACTS

Appellant Lyon was a fire fighter who responded to the Twisp River Fire, and suffered serious burns. The PUD owned the property where the

Fire allegedly started (but not the site where Lyon was burned). The PUD did not own or maintain the overhead power lines (or utility right-of-way) that allegedly caused the Fire and which crossed over the PUD's property.

III. COUNTERSTATEMENT OF ISSUE

Whether the Court should accept WSAJ's invitation to abandon the professional rescuer doctrine when WSAJ fails to show that the doctrine is incorrect and harmful, and when (A) the professional rescuer doctrine is consistent with the implied primary assumption of risk defense, and (B) there are sound public policy reasons to treat professional rescuers differently from other types of workers concerning their ability to pursue third party claims?

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IV. ARGUMENT

WSAJ argues that the Court should abandon the professional rescuer doctrine because (1) Washington’s current assumption of risk framework does not support the doctrine, and (2) others types of workers can pursue claims against third parties for on-the-job injuries. Neither of these arguments justify the reversal of well-established common law and the significant change in public policy advocated by WSAJ.¹

A. Washington’s assumption of risk jurisprudence supports the professional rescuer doctrine.

WSAJ argues that Washington’s assumption of risk jurisprudence, on which the professional rescuer doctrine is based, has changed so much

¹WSAJ argues that the Court has power to abolish common law rules without the need to “await legislative action.” WSAJ Br. at 5. This may be true in certain circumstances, but should not be done lightly and is not appropriate here. Indeed, principles of stare decisis dictate that, before a common law rule is abandoned or modified, the appellant must establish that the doctrine is both incorrect and harmful. *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004). The standard is not, as seemingly advocated by WSAJ, that the court will reverse precedent simply upon finding a rule “old and unsatisfactory.” WSAJ Br. at 5 (citation omitted). If this were the standard, and judges were free to abandon old rules and make new rules at their whim, the common law would cease to be a predictable system but rather a “formless mass of unrelated rules, policies, declarations and assertions—a kind of amorphous creed yielding to and wielded by them who administer it.” *State ex rel. State Fin. Comm. v. Martin*, 62 Wn.2d 645, 665–66, 384 P.2d 833 (1963).

since *Maltman v. Sauer*, 84 Wn.2d 975, 530 P.2d 254 (1975) that it no longer provides an adequate legal basis for the doctrine. This argument fails.

Washington's assumption of risk jurisprudence continues to support the professional rescuer doctrine. This Court first recognized the four-category² assumption of risk classification scheme in *Shorter v. Drury*, 103 Wn.2d 645, 655, 695 P.2d 116 (1985). Since then, this Court and the Court of Appeals have consistently applied the four-category framework. *E.g.*, *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 636, 244 P.3d 924 (2010); *Kirk v. Washington State Univ.*, 109 Wn.2d 448, 453, 746 P.2d 285 (1987); *Pellham v. Let's Go Tubing, Inc.*, 199 Wn. App. 399, 408, 398 P.3d 1205 (2017); *Gleason v. Cohen*, 192 Wn. App. 788, 797–98, 368 P.3d 531 (2016); *Jessee v. City Council of Dayton*, 173 Wn. App. 410, 415, 293 P.3d 1290 (2013).

The assumption of risk doctrine remains a viable defense in Washington. Unlike the Oregon legislature³, the Washington legislature has not abolished assumption of risk by statute. Moreover, this Court has found that express and implied primary assumption of risk defenses (both of which

²The four categories of assumption of risk are: (1) express, (2) implied primary, (3) implied unreasonable, and (4) implied reasonable.

³See O.R.S. § 31.620; *Christensen v. Murphy*, 678 P.2d 1210 (Or. 1984).

operate as a complete bar to recovery) are consistent with Washington’s contributory fault scheme. *Shorter*, 103 Wn.2d at 656; *Kirk*, 109 Wn.2d at 453.

At issue in this case is the “implied primary” taxonomy of the assumption of risk defense. The professional rescuer doctrine is a textbook example of the proper application of the implied primary assumption of risk defense. This Court has recognized as much. *See Beaupre v. Pierce Cty.*, 161 Wn.2d 568, 576, 166 P.3d 712 (2007) (“[T]he professional rescue doctrine is essentially a type of implied primary assumption of the risk.”). The implied primary assumption of risk defense continues to provide the critical theoretical underpinning of the professional rescuer doctrine.

For implied primary assumption of risk to apply, “[t]he evidence must show the plaintiff (1) had full subjective understanding (2) of the presence and nature of the specific risk, and (3) voluntarily chose to encounter the risk.” *Gregoire*, 170 Wn.2d at 636. Regarding the second element, the specific risk encountered by the plaintiff must be something “inherent” in the activity in which the plaintiff was engaged. *Gleason*, 192 Wn. App. at 793–94.⁴ Regarding the third element, plaintiffs’ actions are

⁴In *Gleason*, the plaintiff, an experienced, but not professional, logger, was injured while cutting defendant’s tree on defendant’s property. The Court of Appeals found there were at least genuine issues of material fact concerning

voluntary even when they “feel[] compelled by outside considerations to take the risk.” *Jessee*, 173 Wn. App. at 415 (citing RESTATEMENT (SECOND) OF TORTS § 496E cmts. a & b (1965)). “[I]mplied primary assumption of risk is the exception rather than the rule in assumption of risk situations.” *Gleason*, 192 Wn. App. at 796 (citation omitted). “Implied primary assumption of risk occupies a very narrow niche.” *Id.* (quotation marks and citation omitted).

“The classic example of implied primary assumption of risk involves participation in sports, where a person knows that the risk of injury is a natural part of such participation.” *Gleason*, 192 Wn. App. at 798. “To the extent a plaintiff is injured as a result of a risk inherent in the sport, the defendant has no duty and there is no negligence.” *Id.* (citing *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 498, 834 P.2d 6 (1992)). “A defendant simply does not have a duty to protect a sports participant from dangers which are an inherent and normal part of a sport.” *Id.*

The professional rescuer doctrine comports with the implied primary assumption of risk defense as it has been applied by Washington courts for several decades.

whether the activity causing the injury was something “inherent” in cutting down trees or was “additional negligence” of people working with the plaintiff.

Just like implied primary assumption of risk occupies a “narrow niche” in the assumption of risk framework, *Gleason*, 192 Wn. App. at 796, the professional rescuer doctrine is a narrow limitation of the doctrine, *see* PUD Resp. Br. at 11-12. Further, both implied primary assumption of risk and the professional rescue doctrine apply only to risks “inherent” in a particular activity. *Gleason*, 192 Wn. App. at 796; *Maltman*, 84 Wn.2d at 978-79. Implied primary assumption of risk does not apply to acts of “additional” negligence (i.e., risks not inherent in the activity). *Gleason*, 192 Wn. App. at 797-98, 800. Similarly, the professional rescuer doctrine does not apply when the firefighter is injured by an extra-hazardous or hidden danger, an intervening cause, or an intentional act. *Loiland v. State*, 1 Wn. App.2d 861, 866, 407 P.3d 377 (2017).

As noted above, the professional rescuer doctrine is analogous to the “classic” example of implied primary assumption of risk: participating in sports. A ski racer knows that ski racing involves a risk of injury. Therefore, under the implied assumption of risk doctrine, an organizer of a ski race will not be liable to the skier if the skier slips on an ice patch and wipes out. On the other hand, if the race organizer places the race course too close to structures, and the skier strikes the structure, this “additional” negligence is something not inherent in the sport. *Scott, supra*.

Similarly, professional rescuers, such as firefighters, understand that their profession involves the risk of coming into contact with fire and being burned. If a firefighter responds to a fire, and is burned by the fire he is responding to, this is a risk inherent in the profession and one that the firefighter assumes. *Maltman, supra*. On the other hand, if the firefighter responds to a fire and is struck by another responding vehicle, this is additional negligence that is not inherent in the profession and which the firefighter did not assume. *Loiland, supra*.

In sum, the professional rescuer doctrine is a pure and appropriate application of the implied primary assumption of risk defense.

WSAJ's arguments to the contrary are unconvincing. WSAJ argues that firefighters do not "impliedly consent to relieve the defendant of a duty of care owed to [the fire fighter] in relation to the specific risk." WSAJ Br. at 10 (citing WPI 13.03). First of all, "consent to relieve the defendant of a duty of care" is not an element of implied primary assumption of risk. *See Gregoire*, 170 Wn.2d at 636.⁵ This consent is presumed, as a matter of law,

⁵"The evidence must show the plaintiff (1) had full subjective understanding (2) of the presence and nature of the specific risk, and (3) voluntarily chose to encounter the risk." *Gregoire*, 170 Wn.2d at 636. WPI 13.03's inclusion of a fourth element (i.e., requiring defendants to establish that a plaintiff "impliedly consents to relieve the defendant of a duty of care owed to the person in relation to the specific risk") is inconsistent with the elements laid out by the *Gregoire* court.

when the three elements of the defense are met. Moreover, firefighters responding to fires meet these three elements. Firefighters have a “full subjective understanding” of the presence of a specific risk inherent in the profession, i.e., injury by fire. In seeking and obtaining employment as a firefighter, firefighters choose to encounter this risk. There is no draft or conscription obligating people to serve as professional rescuers (indeed, there may be stiff competition for certain positions). It cannot be seriously argued that firefighters enter the profession not knowing that they are expected to place their lives on-the-line for the sake of others.⁶ The fact that firefighters seek and obtain employment as firefighters is tantamount to impliedly consenting to relieve third parties of a duty of care.

WSAJ next argues that firefighters are “left with no reasonable alternative course of conduct to avoid harm or to exercise or protect a right or privilege because of the defendant’s negligence.” WSAJ Br. at 10-11.

⁶It is not necessary or appropriate for the Court to reach the question of what firefighters know regarding how they might be compensated for on-the-job injuries and their potential causes of action against third parties. The professional rescuer doctrine has been the law in this state for over 40 years, and ignorance of the law is no excuse for its application to a particular case. If the professional rescuer doctrine rises or falls depending on what individuals know about the state of the law at the time they become firefighters, this is further proof that this matter needs to be studied by the legislature. The court is not equipped to research and gather data on this subject.

This is a stretch. If a professional rescuer wants to avoid risks inherent in the profession, the most obvious “reasonable alternative” would be to choose a different profession. WSAJ appears to argue that, in the situation where a firefighter receives a call and is dispatched to the fire, the firefighter has no alternative but to continue into the inferno. This is also a highly suspect argument. Firefighters, through their training and experience, surely are allowed to exercise some independent judgment in responding to particular threats. And even if a fire fighter present on-scene is given an order to enter into a dangerous situation, there is always an alternative—the firefighter could disobey the order or seek to fulfill the order in a different way. The fact that firefighters might feel “compelled by outside considerations to take the risk,” *Jessee*, 173 Wn. App. at 415, does not make their decisions involuntary, *id.*⁷

Finally, firefighters encountering fires do not fall into the “unreasonable” or “implied reasonable” taxonomies of assumption of risk. *Cf.* WSAJ Br. at 11. Unreasonable and implied reasonable assumption of risk apply “in most situations,” i.e., situations where “a plaintiff who has

⁷WSAJ’s example of persons “dash[ing]” into burning structures “to save their own property, or the lives or property of others,” WSAJ Br. at 9, 12, is an apt description of the rationale underlying the rescue doctrine. But it does not take into account the unique nature of professional rescuers.

voluntarily encountered a known specific risk has, at worst, merely failed to use ordinary care for his or her own safety, and an instruction on contributory negligence is all that is necessary and appropriate.” *Gleason*, 192 Wn. App. at 796-97. The circumstance of a professional rescuer responding to a fire is not like “most situations.” A firefighter entering a fire is not “merely fail[ing] to use ordinary care for his or her own safety.” *Id.* Firefighters enter fires because it is their job, because they have special training and equipment, and because they are expected to place the lives of others over their own. Firefighters cannot generally be said to be negligent or contributorily negligent when carrying out their professional duties. Thus, the professional rescuer doctrine does not conform to unreasonable and implied reasonable assumption of risk taxonomies.

In conclusion, Washington’s assumption of risk jurisprudence supports the professional rescuer doctrine. In particular, the professional rescuer doctrine meets all the criteria of the implied primary assumption of risk defense. Consistent with implied primary assumption of risk, the professional rescuer doctrine appropriately bars professional rescuers from pursuing claims against allegedly negligent third parties for injuries caused by a hazard inherent in the rescue activity.

B. Sound public policy supports treating professional rescuers differently than other types of workers who are allowed to sue third parties for on-the-job injuries.

WSAJ argues that injured firefighters should be allowed to pursue claims against third parties responsible for causing the danger to which firefighters respond just like Washington workers are allowed to sue third parties for workplace injuries. WSAJ Br. at 14-15. Professional rescuers, however, are not in the same position as other types of workers. This Court, and the majority of courts across the nation, have found that public policy supports treating professional rescuers differently.

As explained in the PUD's Response Brief, pgs. 18 – 23, professional rescuers are bound by a “social contract” that is created when citizens pool their resources to employ, train, and equip professional rescuers. With these professional rescuers in place, citizens are then instructed to summon professional assistance in dangerous situations, regardless of how caused, so that the danger may be mitigated and further harm avoided. In consideration for their employment (and training and equipment) at the public expense, professional rescuers, give up certain rights, including the right to pursue a claim against the people who caused them to respond. Although professional rescuers give up certain rights, they are not without remedy when they are injured in the line of duty. In furtherance of this social contract, the public has established statutory

means of sure and certain compensation when professional rescuers are injured. Allowing professional rescuers to sue the people responsible for their employment breaches the social contract. The policy supporting the professional rescuer doctrine is distinct from the policy to allow third party claims in the employment context and does not compel abandonment of the professional rescuer doctrine.

WSAJ further argues that “[i]t seems anomalous to allow a firefighter to bring third-party claims against intervening tortfeasors and intentional tortfeasors, yet bar a claim against the tortfeasor whose conduct started the fire that injured the firefighter.” WSAJ Br. at 15. There is no anomaly. The professional rescuer doctrine bars professional rescuers from bringing a claim against the person negligently responsible for the fire because of the social contract described *supra*. The professional rescuer doctrine does not bar claims against intervening or intentional tortfeasors because the harm caused by such persons is not expected or inherent in the firefighter’s employment. This comports with the implied primary assumption of risk defense underlying the professional rescuer doctrine.

In sum, as a matter of public policy, there are sound reasons for treating professional rescuers differently from other employees who can generally bring claims for on-the-job injuries caused by third parties. To the extent the Court finds this public policy unconvincing or outdated, it should

still abstain from abandoning the professional rescuer doctrine. Instead, the Court should defer modification of the doctrine to the legislature, the policy-making branch of government, which is best situated to address the significant public policy issues implicated by this appeal.

V. CONCLUSION

For the foregoing reasons, this Court should not abandon the professional rescuer doctrine.

RESPECTFULLY SUBMITTED this 7th day of January, 2020.

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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, via Appellate Portal, to the following:

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