

No. 35829-8-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

JILL DOTY-FIELDING,
Plaintiff/Appellant,

v.

TOWN OF SOUTH PRAIRIE,
Defendant/Respondent.

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
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TOWN OF SOUTH PRAIRIE'S RESPONSIVE BRIEF

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I. INTRODUCTION

The legal relationship between a volunteer and the organization served is distinct, regardless of whether the relationship is defined by statute or by common law. Because a volunteer has no legal duty to perform services for the organization, the organization's legal duty to the volunteer is reduced accordingly. The Town owed Doty-Fielding a duty not to cause her injury by willful and wanton conduct. It did not breach that duty as a matter of law and the trial court's summary judgment should be upheld accordingly.

Regardless of the level of the Town's duty toward Doty-Fielding, her cause of action for negligence is barred because of the doctrine of assumption of risk and/or the fellow servant rule. Doty-Fielding voluntarily and knowingly undertook to engage in an act that not only contradicted her training, but was undertaken in response to a fellow servant's operation of a pump that created excessive water pressure in the fire hose.

II. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred when it granted the Town's motion for summary judgment on the basis that the duty owed a volunteer firefighter is to avoid willful and wanton misconduct.
2. Whether the trial court erred when it granted the Town's motion

for summary judgment based on the doctrine of assumption of risk where plaintiff, voluntarily and knowingly, removed her hand from an activated fire hose and, in violation of her training, slammed her open hand on the metal bale in order to stop the flow of water.

3. Whether the trial court erred when it granted the Town's motion for summary judgment on the basis of the fellow servant doctrine where plaintiff's hand injury was proximately caused by the act or failure to act of another volunteer firefighter.

III. STATEMENT OF THE CASE

On December 25, 1999, Plaintiff Jill Doty-Fielding was operating a fire hose in the course of responding to a call in her capacity as a volunteer firefighter. CP 19, 22, 28-29. Doty-Fielding was injured when, in response to an over pressurized hose, she chose a hazardous means of closing the bale, or handle, on the fire hose nozzle, which she was operating together with other firefighters, Jason Fielding (now Doty-Fielding's husband) and Daryl Flood. CP 27-29, 33, 35, 74-76. Doty-Fielding chose to close the bale by removing her right hand from the bale and slapping the brass bale with her open hand, resulting in injury.

I opened up the hose, and it was too much, and I just slammed my hand back down to - - to slam it, because I could not just forcefully just shut it. I had to slam it to get the - - the full force of like - - kind of like a backhand or a front - - like if you were going to spike a volleyball is basically what I did to the nozzle.

...

When I felt the force was too much, and I - - and I tried to manually shut it for - - with a fist, with a closed fist on there, it wasn't happening, and so then that's when I let go of the bale and then shut it down . . . with an open hand.

CP 33-35.

At the time she was handling the hose, Doty-Fielding's current husband, Jason Fielding, was also on the hose, standing directly behind her, bracing her body with his. CP 29-31. Doug Hinkle was safety officer in charge of Doty-Fielding and Jason Fielding. CP 29. Doty-Fielding had never experienced an inability to close the bale properly before. CP 73-74. Daryl Flood, who was operating the pump, turned the pressure down after Doty-Fielding closed the bale and switched positions with Jason Fielding. CP 66, 76.

Doty-Fielding began as a volunteer firefighter in July 1995. CP 19. She received fire service training from both the department, of which her father was the chief, and from Bates Technical College in Tacoma. CP 19-20. She knew both how to properly open and close the bale on a hose. CP 68, 70-71, 74. Doty-Fielding responded to approximately twenty fire calls in

the period of time between July 1995 and December 1999. CP 23.

As part of her department training, Doty-Fielding and the other firefighters were instructed on numerous occasions not to slap a bale shut. CP 38-40. Flood, the firefighter who was operating the pump that provided water to the hose manned by Doty-Fielding and Jason Fielding, told firefighters in the department on numerous occasions that the nozzles on fire hoses should be shut off gradually and that suddenly slamming the nozzle shut could damage the nozzle, the hose, the pump, and the domestic water system. CP 38-39.

IV. SUMMARY OF ARGUMENTS

A. Duty of Care

The Supreme Court of Washington unequivocally determined that Doty-Fielding was not an employee of the Town, but rather a volunteer, and as such, could sue the Town in tort. Having been granted the volunteer status she sought, Doty-Fielding now attempts to opt out of that status by making the argument that even though she is not an employee, and does not owe the Town any duty of performance, she is entitled to all of the benefits of being an employee, particularly the enhanced duties Washington employers owe their employees.

Doty-Fielding cannot have it both ways. She has been identified as not having employee status under a statute that broadly interprets the meaning of the word so as to include and protect as many workers as possible. The determination of her status is the law of the case and requires, as a matter of law, that she be entitled to a lesser duty of care, that of willful and wanton misconduct.

B. Assumption of Risk

Doty-Fielding was an experienced firefighter, trained and certified by a local technical college and additionally trained by her father, the Fire Chief, as well as by other, more experienced firefighters. She was aware that her choice to participate in such a hazardous undertaking was a risky one. Her assumption of the risk involved is a complete bar to recovery.

C. Fellow Servant Rule

Unable to close the bale as she was trained to do, Doty-Fielding blames that inability on the over pressurized pump or hose. She also blames her choice to "spike" the bale with her open hand on a lack of training, without having offered any evidence of what training would have prevented her injury. To the extent that her injury was caused by fellow firefighters, her action is barred under the fellow servant rule.

V. ARGUMENT

- A. The duty owed by an organization to a volunteer worker is the duty to avoid willful and wanton misconduct.

In Doty v. Town of South Prairie, 155 Wn.2d 527, 120 P.3d 941 (2005), the Washington Supreme Court identified the relationship Jill Doty-Fielding had with the Town of South Prairie as that of a volunteer.

Doty exercised her "free choice" when she voluntarily made the effort to join the Town's volunteer fire fighter department, and then, at her own discretion, elected when to respond to calls and whether to attend drills. Doty volunteered her services, without expectation of remuneration, of her own free choice and absent any compulsion on the part of the Town.

Id. at 547.

The Supreme Court examined the relationship in Doty under the auspices of the Industrial Insurance Act (IIA). However, that in no way limits the application of the Court's characterization of the relationship. A number of courts, including Washington state courts, have addressed the issue of whether a volunteer is an employee under a variety of state and federal labor and employment laws, such as Title VII and the Fair Labor Standards Act. These courts have made their analyses based on the common premise that absent remuneration or compensation, or the expectation of remuneration or compensation, a volunteer is not entitled to the benefits afforded employees.

For instance, the Second Circuit has squarely held that Title VII does not cover volunteers. In O'Connor v. Davis, 126 F.3d 112 (2nd Cir. 1997), the court dismissed a hospital intern's sexual harassment claims because she was not an employee within the meaning of Title VII. The intern received no salary or benefits and thus she could not establish the "'essential condition' or remuneration." Similarly, in Tadros v. Coleman, 898 F.2d 10 (2nd Cir. 1990), cert. denied, 498 U.S. 869 (1990), the court upheld the dismissal of a visiting lecturer's Title VII claims where the defendant, a medical college, did not pay the plaintiff or control the plaintiff's work.

In Graves v. Women's Professional Rodeo Ass'n, Inc., 907 F.2d 71 (8th Cir. 1990), the Eighth Circuit held that the defendant was not an employer under Title VII because it did not compensate the putative employees and there was no duty of service owed by them. Several district courts have issued similar rulings. See Neff v. Civil Air Patrol, 916 F. Supp. 710 (S.D. Ohio 1996); Smith v. Berks Community Television, 657 F.Supp. 794 (E.D. Pa. 1987).

In Tony & Susan Alamo Foundation v. Sec'y of Labor, 471 U.S. 290, 105 S.Ct. 1953, 85 L.Ed.2d 278 (1985), the Supreme Court applied an economic reality test to determine whether individuals were employees under

the Fair Labor Standards Act. The individuals in this case were held to be employees because they expected to and did receive in-kind benefits for their services, but the Court explained that the FLSA excludes individuals who work "without promise or expectation of compensation." Id. at 295.

Compensation, and lack thereof, also drove the decision of the National Labor Relations Board in WBAI Pacifica Foundation, 328 NLRB No. 179, 1999 WL 676522 (1999). There, in holding that unpaid staff members of a radio station were not employees because they do not work for another for hire, the Board concluded that the fundamental relationship between employers and employees is the economic relationship.

Doty-Fielding argues that the common law duty the Town owed Doty-Fielding as a volunteer is defined by WISHA, a statutory scheme addressing the relationship between an employer and an employee. Her argument fails, because the Supreme Court has already characterized Doty-Fielding as a volunteer pursuant to the statutory scheme of the IIA, and also because the sole Washington Court of Appeals that has considered the language defining "employee" as presented in RCW 49.17.020(5), rejected the notion that the definition included volunteers. WISHA standards simply do not apply to non-employees, or volunteers.

In Lafley v. Seadrunar Recycling, 2007 WL 1464433, Division One examined Washington's Minimum Wage Act language, which, like WISHA, defines employee as "any individual employed by an employer." RCW 49.46.010(5).¹ In determining that this language did not confer employee status on persons working 40 hours a week in work therapy at a recycling center, it stated, "Because the record establishes no promise or expectation of compensation for the time she spent at the Recycling Center and because Lafley volunteered for her own purposes, we conclude the trial court did not err in concluding Lafley was not an 'employee' and dismissing her claim under the MWA." The court also dismissed Lafley's claim under Washington's Law Against Discrimination, a statute that does not define employee, because she could not show she was an employee.

Even if WISHA's safe workplace rules applied, they clearly cannot apply to these facts. A safe workplace simply does not exist for firefighters. Harry Doty, Doty-Fielding's father, testified in deposition that there is no way to make the scene of a fire completely safe. CP 44-45. Because of the inherently dangerous nature of fighting a fire on someone else's property, it is absurd to argue that the Town was under a duty to provide a safe workplace.

¹ WISHA defines employee as a person "who is engaged in the employment of ... an employer." RCW 49.17.020(5).

Just as importantly, Doty-Fielding's argument that she was not properly trained, and thus did not have a safe workplace, must fail. It is undisputed that she received training on how to open and close the bale. CP 38, 68. It is also undisputed that the injury occurred when Doty-Fielding deviated from her training, removed her hand from the bale, and hit it with her open hand – a move she was specifically trained not to do. CP 38-39. The mechanism of the injury had nothing to do with WISHA standards, even if they did apply.

Because the 1911 enactment of the IIA gave rise to an administrative alternative to the common law system of compensation that provided relief for accidents in the workplace, there is a dearth of Washington cases that have examined the duty of an organization to a volunteer who is injured while in the course of volunteering. Particularly when the injury occurred away from the employer's premises.

Despite the lack of Washington case law specifically on point to these facts, premises liability cases can be instructive, regardless of whether they have precedential value, simply because they identify the duty owed upon the relationship between the parties. Washington case law equates the status of a licensee with being a volunteer. Both are entitled to be protected against

willful or wanton negligence. Shafer v. Tacoma Eastern R. Co., 91 Wash. 164, 166, 157 P. 485 (1916) ("That duty in the case of licensees and volunteers is not to willfully or wantonly injure."); Smith v. Seattle School Dist., 112 Wash. 64, 69, 191 P. 858 (1920) (citing Shafer with approval). That logical analysis whereby the duty owed is determined by the relationship of the parties is evidenced in Geer v. Sound Transfer Co., 88 Wash. 1, 152 P. 691 (1915) ("It is doubtless a general rule, sustained by preponderating authority, that one ... who voluntarily assists ... is a mere volunteer ... to whom the master owes no duty, save to protect him from wanton or willful injury.").

Doty-Fielding, who fought to be identified as a volunteer under the IAA, would now like to have her relationship with the Town re-characterized to avoid the fact that the common law equates the duty owed a volunteer with the duty owed a licensee. However, the Washington Supreme Court's identification of the relationship, decided on the facts under the auspices of a statute that defines "employee" very broadly, must control. Doty-Fielding was a volunteer and the Town owed her a duty not to injure her through its willful and wanton conduct. Since nothing remotely resembling willful and wanton conduct occurred here, the summary judgment should be upheld accordingly.

B. Doty-Fielding assumed the risk of her injury.

Regardless of the Town's legal duty to Doty-Fielding, her cause of action for negligence is barred because she assumed the risk of her injury.

Prior to the enactment of workmen's compensation laws, the liability of an employer for injuries sustained by an employee in the course of her employment was limited. Limitations on the employer's liability arose from what Dean Prosser called the “unholy trinity” of common law defenses: contributory negligence, assumption of risk, and the fellow servant rule. See W. Prosser, Law of Torts § 80, at 526-27 (4th ed. 1971). See also Athas v. Hill, 300 Md. 133, 138, 476 A.2d 710, 712 (1984). When worker’s compensation laws were passed, they abolished the common law defenses and substituted strict liability for workplace injuries, with compensation provided by the Industrial Insurance System. Worker’s Compensation benefits became the exclusive remedy for workers who were injured in the workplace, and the “unholy trinity” defenses became unavailable to employers where the exclusive remedy applied. However, the present case, as ruled by the Supreme Court, falls outside of the exclusive remedy provisions of worker’s compensation laws, making the common law defenses available to a party defending against tort claims. Consequently, assumption of the risk

applies, and the Town cannot be held liable for Doty-Fielding's mishap.

Assumption of risk doctrine may take the form of express assumption of risk or implied assumption of risk. Karch v. King County 127 Wn.App. 1015 (2005). This case concerns implied primary assumption of risk. A successful assumption of risk defense operates as a complete bar to recovery. Karch, 127 Wn.App. at 1015 (citing Scott v. Pacific W. Mountain Resort, 119 Wn.2d 484, 496, 834 P.2d 6 (1992)). A defendant can prevail on an implied assumption of risk defense when it can show that a plaintiff had full subjective understanding of the specific risk, both its nature and presence, and voluntarily chose to encounter the risk. Taylor v. Baseball Club of Seattle, L.P., 132 Wn.App. 32, 38, 130 P.3d 835, 838 (2006). "Implied 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." Taylor, 132 Wn.App. at 37 (quoting Scott, 119 Wn.2d at 497). Implied primary assumption of risk applies a subjective standard, one specific to the plaintiff and her situation.

The reasoning adopted by Washington courts in interpreting the 'rescue doctrine' is instructive and should be applied in this case. The rescue

doctrine “is intended to provide a source of recovery to one who is injured while reasonably undertaking the rescue of a person who has negligently placed himself in a position of imminent peril.” Maltman v. Sauer, 84 Wn.2d 975, 976-977, 530 P.2d 254, 256 (1975). However, in barring the claim by a professional rescue crew, the Supreme Court in Maltman adopted the reasoning that:

It is contemplated that a firemen in the performance of his duty shall endeavor to extinguish fires however caused and encounter those risks and hazards which are ordinarily incidental to such an undertaking and which may be reasonably expected to exist in the situation in which he places himself...those dangers which are inherent in professional rescue activity, and therefore foreseeable, are willingly submitted to by the professional rescuer when he accepts the position...

Id. at 978. The Maltman court concluded that:

It is the business of professional rescuers to deal with certain hazards, and such an individual cannot complain of the negligence, which created the actual necessity for exposure to those hazards.

Id. at 979.

The law of the case doctrine stands for the proposition that once an appellate holding enunciates a principle of law, that holding will be followed in subsequent stages of the same litigation. Roberson v. Perez, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). The law of the case in this matter, as decided by the Supreme Court, is that Doty-Fielding’s service was unquestionably

voluntary, as she “volunteered her services, without expectation of remuneration, of her own free choice and absent any compulsion on the part of the Town. In sum, Doty meets the definition of volunteer.” Doty, 155 Wn.2d at 547.

There is no dispute that Doty-Fielding voluntarily chose to become a volunteer firefighter for the Town. There is also no dispute that she chose to attend this particular fire call. CP 24. She volunteered with the fire department beginning in July 1995. CP 19. She knew of the existence and nature of the risk of handling a fire hose and fighting fires. She thus impliedly consented to relieve the Town of its duty regarding the specific known and appreciated risks of fighting fires when she chose a well-known hazardous means of closing the bale on the fire hose. The volunteer firefighters had been instructed on numerous occasions not to slam a hand against the bale to shut off the hose, but to gradually close the bale until it was shut off. CP 38, 39. Daryl Flood testified that prior to Christmas of 1999 he told many people that the nozzles should be shut down gradually. He reasserted that many times he relayed to other firefighters to shut the nozzle gradually or it would cause trouble with the equipment. CP 38, 39. Even apart from the specific instruction received, any jury would conclude that a

reasonable person of “ordinary prudence” knows that metal is stronger than flesh and bone and that striking a piece of brass with an open hand can cause injury to the hand.

In addition to the risks of the specific shut-off technique Doty-Fielding used, it is undisputed that she was aware of the overall dangers of firefighting. Flood's testimony establishes that not only is a fire itself inherently dangerous, but so too are the equipment, traffic, people, and other miscellaneous hazards involved in fighting a fire. CP 41. There is no such thing as a safe fire. Harry Doty, Doty-Fielding's father, testified in deposition that there is no way to make the scene of a fire completely safe. CP 44-45. Because of the inherently dangerous nature of firefighting, it is absurd to argue that the Town was under a duty to provide a safe “workplace.”

Doty-Fielding had substantial previous experience fighting live fires. She testified in her deposition that she had “probably been on maybe twenty calls.” CP 23. She began as a volunteer firefighter with Fire District 20 in July 1995, giving her approximately 4-1/2 years of experience prior to her injury. Doty-Fielding also was trained by the department and at Bates Technical College in firefighting, and attended weekly meetings and alternate weekend sessions for training and drills with the department. CP

19-21.

Doty-Fielding's assumption of the risk arguments presented at the time of summary judgment all failed because she testified that she injured her hand because she attempted to close the bale on the nozzle by slapping it with her open hand "like if you were going to spike a volleyball." Thus, in order to avoid application of the assumption of the risk doctrine, Doty-Fielding would have had to have presented evidence that she did not have knowledge or appreciation of the risk that she might hurt her hand by slapping a piece of metal with an open hand. Such evidence, even if offered, would be entirely contrary to common sense. More importantly, however, Doty-Fielding did not even attempt to offer such evidence. Instead, Doty-Fielding simply presented allegations by her attorney that she wasn't aware of the risk or didn't have other courses of action open to her. However, these points are simply argument, and not evidence. For instance, Doty-Fielding did not submit a declaration stating that the only way to close the bale was by slapping it with her open hand.

Doty presented no evidence regarding the mechanism of her injury – her decision to close the bale on the nozzle by slapping it with her open hand. Ordinary common sense tells us that slapping a piece of metal with an open

hand presents a risk of injury to the hand, including the injury that Doty-Fielding suffered. Since Doty-Fielding has presented no evidence that she did not assume this specific risk, summary judgment was proper in favor of the Town on the issue of assumption of the risk.

No genuine issue of material fact remains as to Doty-Fielding's assumption of the risk. She knew she was engaging in hazardous activity where both the fire and the equipment involved can present foreseeable hazards. Therefore, the Town cannot be held liable for her injuries.

C. The Town is not liable for injuries caused by another firefighter.

Even if Doty-Fielding's claim that, despite her volunteer status, she was still an employee or servant of the Town were true, her claim would still be barred because of the fellow servant rule. Since the Supreme Court found that the IIA does not apply to Doty-Fielding, the common law defense of the “fellow servant rule” applies. Under the fellow servant rule, the Town is not liable for injuries caused by the actions of other firefighters. The fellow servant rule generally provides nonliability for an employer whose employee, while acting within the scope of his employment, is injured by the actions of a fellow servant. Garcia v. Brulotte, 25 Wn.App. 818, 820, 609 P.2d 976, 978 (1980).

Doty-Fielding testified in her deposition that Daryl Flood was the driver and also the pump operator in attendance at the fire, and that Jason Fielding (now her husband) was backing her up on the same hose. CP 26-32. Plaintiff also testified that Jake Doty, Layne Ross, and Doug Hinkle all were present as part of the response team for the fire that evening. CP 25-26.

Furthermore, the only liability theory that Doty presents on appeal, the allegation of failure to train, clearly creates a factual scenario to which the fellow servant rule applies. Doty claims that her injuries resulted because someone in the volunteer fire department failed to properly train her in techniques for handling the hose. She then seeks to impute the liability of the trainer to the fire department as a whole and then to the Town of South Prairie. However, under the fellow servant rule, neither the fire department nor the Town is liable for Doty's injury, allegedly caused by the negligent action or inaction of another firefighter.

VI. CONCLUSION

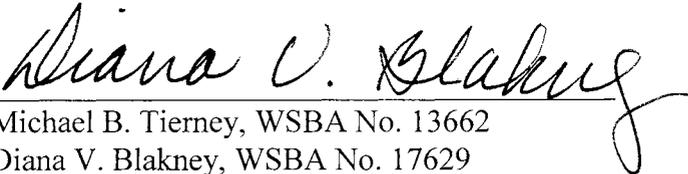
Doty-Fielding's theory of the case cannot overcome the multiple hurdles it faces. First, it is undisputed that the law of the case establishes that Doty-Fielding is a volunteer. It is likewise undisputed that the duty owed to volunteers is simply the duty to avoid willful and wanton misconduct.

Second, Doty-Fielding offers no evidence to show that she did not assume the risk of injury to her hand when she chose to slap a large piece of metal with her open hand. Third, Doty-Fielding can present no theory of liability that avoids the application of the fellow servant rule. For all these reasons, the Town was entitled to summary judgment and the trial court's ruling on the matter should be upheld.

Dated this 11th day of June, 2007.

Respectfully submitted,

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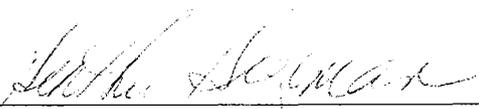
I, Heather Hegeman, hereby certify under penalty of perjury that on June 11, 2007, I caused to be filed with the Washington State Court of Appeals, Division II, via ABC Legal Messengers, the original of the following documents:

1. Town of South Prairie's Responsive Brief; and
2. Proof of Service.

I also caused to be served via ABC Legal Messengers, copies of said documents upon:

John W. Schedler
Lee Smart Cook Martin & Patterson, P.S., Inc.
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701 Pike Street
Seattle, WA 98101-3929

Dated this 11th day of June, 2007.



Heather Hegeman