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[Wash. Ct. App. No. 36528-0-III]

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

CERTIFICATION FROM
THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION III

DANIEL LYON,

Appellant,

v.

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

Respondents.

**RESPONSE TO BRIEF OF AMICUS CURIAE
WASHINGTON DEFENSE TRIAL LAWYERS**

MASTERS LAW GROUP, P.L.L.C.
Kenneth W. Masters, WSBA 22278
Shelby R. Frost Lemmel, WSBA 33099
241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033
ken@appeal-law.com
shelby@appeal-law.com
Attorneys for Appellant

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INTRODUCTION

The “true doctrine of *stare decisis* is compatible with this [Court’s] function” to “change a rule of law when reason so requires.” ***Rights to Waters of Stranger Creek***, 77 Wn.2d 649, 653, 466 P.2d 508 (1977). While court-made law needs stability, this Court wisely recognized that it “should not be confused with perpetuity.” ***Stranger Creek***, 77 Wn. 2d at 653. For the law to stay relevant, this Court must change it when reason requires it. 77 Wn. 2d at 653.

The PRD’s legal underpinnings have eroded. The cases this Court relied on when adopting the PRD have been reversed, the policy considerations undermining the PRD have been refuted, and this state’s law on assumption of risk has changed. The PRD is incorrect, where it singles out professional rescuers, denying them the right to recover for personal injuries caused by negligent third parties – a right workers in far more dangerous professions enjoy. It is harmful, where it leaves injured professional rescuers left to bear the significant cost of injuries sustained protecting the public.

No legal fiction, or amount of cynicism, can prop up this incorrect and harmful rule. Firefighters like Daniel Lyon do not choose their profession, or those they rescue, hoping for an injury with financial award. This Court should abandon the PRD.

ARGUMENT

A. Stare decisis does not require adherence to the PRD, an incorrect and harmful doctrine whose legal underpinnings have eroded.

WDTL principally argues that this Court should not consider the “legal underpinnings” test this Court articulated in *Pendergrast v. Matichuk* for overruling precedent “because the [PRD] is not dependent on any separate ‘legal underpinning’ in the sense required by that test.” WDTL 3 (186 Wn.2d 556, 565, 379 P.3d 96 (2016) (citing *W.G. Clark Constr. Co. v. Pac. Nw. Reg’l Council of Carpenters*, 180 Wn.2d 54, 66, 322 P.3d 1207 (2014) (citing *United States v. Gaudin*, 515 U.S. 506, 521, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995))). WDTL does not address Lyon’s contention that the PRD is incorrect and harmful. BA 6-7, 10-22, 25-28; Reply 2-19, 24-26. These tests are independent, and this Court may strike down the PRD on the grounds that it is incorrect and harmful, regardless of the legal underpinnings test. *W.G. Clark Constr. Co.*, 180 Wn.2d at 66; Reply 2-3.

WDTL argues that the PRD does not have “legal underpinnings” like those in *W.G. Clark Constr. Co.*, in which the “legal underpinning” was “an interpretation of federal law [related to ERISA preemption] that had fallen out of favor among federal courts.”

WDTL 3-4. It argues that the PRD, “by contrast ... is not similarly dependent on outside ‘legal underpinnings’ because it is a common law tort doctrine created by this Court.” WDTL 4. That is, WDTL essentially suggests that the legal underpinnings test is limited to situations in which this Court’s decision at issue depends on federal interpretation of federal law. WDTL 3-4. WDTL offers no support for the assertion that the legal underpinnings test is so narrow. *Id.*

This Court did not create the PRD out of whole cloth, but relied on decisions from New Jersey and Oregon. ***Maltman v. Sauer***, 84 Wn.2d 975, 978-79, 530 P.2d 254 (1975).¹ Both have since abandoned their versions of the PRD (as have many other states), rejecting the policy rationales upon which the PRD is based, and abandoning the doctrine as unnecessary and unjust. BA 10-22; Reply 3-7. New Jersey’s highest court noted that courts around the country have criticized the firefighters’ rule for failing to “comport with notions of redress and equal treatment underlying modern tort law.”

¹ ***Maltman*** relied on the New Jersey case ***Krauth v. Geller***, 31 N.J. 270, 157 A.2d 129 (1960), and on the Oregon case ***Spencer v. B.P. John Furniture Corp.***, 255 Or. 359, 467 P.2d 429 (1970), adopting their “fire fighter’s” rules. ***Maltman***, 84 Wn.2d at 978-79. In 1993, New Jersey abrogated its firefighters’ rule by statute. ***Ruiz v. Mero***, 189 N.J. 525, 537-38, 917 A.2d 239 (2007) (quoting N.J. STAT. ANN. § 2A:62A-21). Oregon abolished its firefighters’ rule in 1984, after abolishing the assumption-of-risk doctrine it was based on. ***Christensen v. Murphy***, 296 Or. 610, 620-21, 678 P.2d 1210 (1984).

Ruiz, 189 N.J. at 533. Oregon’s highest court carefully analyzed and rejected each of four policy considerations often cited to support the firefighters’ rule. **Christensen**, 296 Or. at 619-20. In short, the “outside ‘legal underpinning’” of Washington’s PRD – the cases upon which **Maltman** is based – has been eroded. *Compare id. with* WDTL 4.

WDTL counters that the PRD is not “underpinned” by Oregon and New Jersey law, where “this Court’s common law is independent of the common law and statutory law of other states.” WDTL 4. That statement is belied by **Maltman**’s reliance on Oregon and New Jersey for guidance. 84 Wn.2d at 978-79. This Court plainly was not bound by those state’s laws in **Maltman**, but found their reasoning persuasive nonetheless. 84 Wn.2d at 978-79. That being the case, it is certainly proper for this Court to consider that those states have since reversed course, as have many others. BA 10-22; Reply 3-7.

WDTL’s reliance on **Deggs v. Asbestos Corp. Ltd.** is similarly misplaced. WDTL 4 (citing 186 Wn.2d 716, 381 P.3d 32 (2016)). There, Deggs asked this Court to overrule three cases. **Deggs**, 186 Wn.2d at 727. Persuaded that the cases were likely incorrect when decided, but not harmful, this Court considered whether their legal underpinnings had “changed or disappeared

altogether.” 186 Wn.2d at 728-30. This Court held that only one of the “underpinnings” of one of the three cases had been “undermined.” *Id.* at 731-32. This does not help WDTL.

Deggs and **Maltman** are simply incomparable. Whereas **Deggs** is based on three cases, one of which was undermined in part, **Maltman** is based on two lines of cases from two different states, both adopting a doctrine later struck down by those states. 84 Wn.2d at 978-79. This is not a matter of New Jersey or Oregon “undermining” their PRDs in part: both abandoned the PRD entirely, also rejecting the policy considerations underpinning the PRD. BA 10-14; Reply 3-5. They are not alone. BA 14-17; Reply 5-7. And further undermining **Maltman**, Washington law on assumption of risk has since evolved, and under this recently emerged law, the PRD is a type of implied reasonable assumption of risk, which does not bar recovery, but operates like contributory negligence. WSAJ 5-14; Lyon’s Response to WSAJ 2-6; BA 8-10; Reply 2-6.

Finally on this point, WDTL suggests that this Court should read into legislative inaction with respect to the PRD. WDTL 5. But as WSAJ correctly points out, it is this Court’s function to revisit its own court-created common law. WSAJ 5 (citing **Freehe v. Freehe**, 81 Wn.2d 183, 189, 500 P.2d 771 (1972) (*overruled on other grounds*)).

by **Brown v. Brown**, 100 Wn.2d 729, 675 P.2d 1207 (1984)). As this Court put it, “we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule.” **Freehe**, 81 Wn.2d at 189 (quoting **Borst v. Borst**, 41 Wn.2d 642, 657, 251 P.2d 149 (1952)).

In short, this Court plainly has the authority to reconsider the PRD. It should do so, and abandon this incorrect and harmful doctrine whose legal underpinnings have eroded.

B. Public policy weighs in favor of abrogating the PRD.

WDTL next argues that professional rescuers are distinct from other professionals who routinely face danger, where “[a]most the entire workload of fire responses consists of emergencies brought about by negligence.” WDTL 6-8. The statistics WDTL employs do not support its assertion. *Id.* WDTL argues that 1.6% of structure fires are caused by “natural” events and that 4.2% are caused by intentional conduct. WDTL 6 (citing U.S. Fire Administration, Residential building fire causes in 2017, <https://www.usfa.fema.gov/data/statistics/#causesR>). From that, WDTL concludes that the “remainder ... will either always (52% caused by cooking) or usually be the result of negligence.” *Id.*

The fire that seriously injured Lyon was not a structure fire, so these statistics are irrelevant here. And fires that are not caused by nature or by intent are not *ipso facto* caused by negligence. Indeed, it is quite odd for the WDTL – a group of defense lawyers – to assert that 94.2% of fires are caused by negligence, a claim that defendants PUD and OCEC would almost certainly contest.

In any event, Lyon agrees that many fires, including the one that seriously injured him, are caused by negligence. But it does not logically follow that professional rescuers cannot recover against those who negligently cause fires merely because their profession involves encountering danger created, at times, by negligence. This choice, does not, as WDTL suggests, contrast professional rescuers to “amateurs,” who also choose to encounter risk to aid the person whose negligence caused it, or an innocent third party. WDTL 7. Professional rescuers do the same.

WDTL ignores the more apt comparison to other professionals who face even more occupational risk than professional rescuers. Reply 9-12. Take for example loggers, who face more occupational risk than any other United States worker, or first-line supervisors of construction trades and extraction workers, and grounds maintenance workers, who round out the top ten. *Id.*

(citing <https://time.com/5074471/most-dangerous-jobs/>). Both work in dangerous environments, and the risks they face will often result from third-party negligence on the job cite. The difference is they have a claim.

WDTL next argues that allowing professional rescuers to sue those whose negligence caused their injuries would “incentivize [them] to hope” that their injuries are “caused by a wealthy, or well-insured person.” WDTL 7. This proves too much. Firefighters do not “hope” to be injured, and there is no indication that they weigh potential injury, negligence, and tort recovery when setting out to fight a fire. If they did, the PRD would plainly disincentivize all rescue. This legal fiction that professional rescuers assess potential tort recovery is just as “preposterous,” if not more so, than the legal fiction that those in need of rescue pause during an emergency to asses their potential liability. BA 14, 27-28 (quoting **Christensen**, 296 Or. at 620) (quoting Prosser, William L., *Law of Torts* § 68, 397 (4th ed. 1971)).

In arguing that the cost of caring for injured firefighters should be “socialized” through benefits packages rather than “the tort system,” WDTL ignores that the PRD does not spread the cost of a firefighter’s injuries to others, but forces them to bear many of those

costs alone. *Compare id. with* BA 26-28; Reply 17; **Walters v. Sloan**, 20 Cal.3d 199, 216, 571 P.2d 609 (Acting C.J. Tobriner, dissenting) (1977). In striking down its firefighters' rule, Oregon expressly rejected this policy rationale, stating that it treats firefighters differently than other public employees injured on the job, who may recover workers' compensation and salary benefits from the public, but who may also sue third-party tortfeasors. **Christensen**, 296 Or. at 619-20. The same is true in Washington – as WSAJ points out, allowing injured professionals to sue negligent third parties for occupational injuries is consistent with the IIA, under which injured workers may sue third-party tortfeasors. WSAJ 14-15; Response to WSAJ 7.

WDTL concludes by cautioning that abolishing the PRD would negatively affect “the perceived incentives of professional rescuers,” claiming that while wealthy people and people “of limited means” might need rescue if they negligently start a kitchen fire, “the wealthy person implicitly offers more favorable terms of employment to the firefighter in the form of potential additional compensation in the event of injury or death.” WDTL 8. Such cynicism cannot prop up this incorrect and harmful doctrine.

With an average income of only \$55,000 a year, one can safely assume that courageous firefighters do not chose their occupation for the money. One can equally safely assume that they do not choose whom to rescue based on income. Again, nothing suggests that professional rescuers consider potential recovery before rescuing. If they did, the PRD would strongly disincentivize many rescues.

In sum, there is no public policy that justifies an incorrect and harmful doctrine that singles out one class of workers and denies them the right to recover in tort that other workers enjoy.

CONCLUSION

This Court should reconsider *Maltman* and its progeny and abandon the PRD, where it is incorrect and harmful, and unsupported by the current law. This Court should reverse and remand for trial, allowing Lyon to pursue negligence claims against PUD and OCEC.

RESPECTFULLY SUBMITTED this 7th day of January 2020.

MASTERS LAW GROUP, P.L.L.C.



Kenneth W. Masters, WSBA 22278
Shelby R. Frost Lemmel, WSBA 33099
241 Madison Avenue North
Bainbridge Island, WA 98110
(206) 780-5033
ken@appeal-law.com
shelby@appeal-law.com
Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that I caused to be filed and served a copy of the foregoing **RESPONSE TO BRIEF OF AMICUS CURIAE WASHINGTON DEFENSE TRIAL LAWYERS** on the 7th day of January 2020 as follows:

Co-counsel for Appellant

Evergreen Personal Injury Counsel	<input type="checkbox"/>	U.S. Mail
Stephen L. Bulzomi	<input checked="" type="checkbox"/>	E-Service
James W. McCormick	<input type="checkbox"/>	Facsimile
100 South Ninth Street		
Tacoma, WA 98402		
sbulzomi@epic-law.com		
jmccormick@epic-law.com		

Counsel for Respondent OCEC

Forsberg & Umlaugh, PS	<input type="checkbox"/>	U.S. Mail
Aloysius G. Lingg	<input checked="" type="checkbox"/>	E-Service
Scott A. Samuelson	<input type="checkbox"/>	Facsimile
901 – 5 th Avenue, Suite 1400		
Seattle, WA 98164		
glingg@foum.law		
ssamuelson@foum.law		
jbranaman@foum.law		

Carney Badley Spellman, P.S.	<input type="checkbox"/>	U.S. Mail
Mike B. King	<input checked="" type="checkbox"/>	E-Service
701 Fifth Avenue, Suite 3600	<input type="checkbox"/>	Facsimile
Seattle, WA 98104		
king@carneylaw.com		

Counsel for Respondent PUD

Paine Hamblen, LLP	<input type="checkbox"/>	U.S. Mail
Daniel W. Short	<input checked="" type="checkbox"/>	E-Service
717 West Sprague Avenue, Suite 1200	<input type="checkbox"/>	Facsimile
Spokane, WA 99201		
dan.short@painehamblen.com		
scott.cifrese@painehamblen.com		
julie.heath@painehamblen.com		
amy.oien@painehamblen.com		

Counsel for Washington Department of Natural Resources

Washington State Attorney General	<input type="checkbox"/>	U.S. Mail
Paul F. James	<input checked="" type="checkbox"/>	E-Service
1125 Washington Street SE	<input type="checkbox"/>	Facsimile
Olympia, WA 98504		
paulj@atg.wa.gov		
resolyef@atg.wa.gov		

Counsel for Washington Department of Fish & Wildlife

Washington State Attorney General	<input type="checkbox"/>	U.S. Mail
Michael J. Throgmorton	<input checked="" type="checkbox"/>	E-Service
Jennifer D. Loynd	<input type="checkbox"/>	Facsimile
7141 Clearwater Drive SWA		
Olympia, WA 98504		
michaelt3@atg.wa.gov		
jennifer.loynd@atg.wa.gov		

Counsel for Washington State Association for Justice

Richter-Wimberley, PS	<input type="checkbox"/>	U.S. Mail
Daniel E. Huntington	<input checked="" type="checkbox"/>	E-Service
422 West Riverside, Suite 1300	<input type="checkbox"/>	Facsimile
Spokane, WA 99201		
danhuntington@richter-wimberley.com		

Valerie D. McOmie
4549 NW Aspen Street
Camas, WA 98607
valeriemcomie@gmail.com

U.S. Mail
 E-Service
 Facsimile

Counsel for Washington Defense Trial Lawyers

Nicoll Black & Feig, PLLC
Noah S. Jaffe
1325 Fourth Avenue, Suite 1650
Seattle, WA 98101
njaffe@nicollblack.com

U.S. Mail
 E-Service
 Facsimile



Shelby R. Frost Lemmel, WSBA 33099
Attorney for Appellant

MASTERS LAW GROUP

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- danhuntington@richter-wimberley.com
- glingg@foum.law
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- sbulzomi@epic-law.com
- scott.cifrese@paineambly.com
- sheila.espinoza@paineambly.com
- ssamuels@foum.law
- valeriemcomie@gmail.com

Comments:

Sender Name: Tami Cole - Email: paralegal@appeal-law.com

Filing on Behalf of: Shelby R Frost Lemmel - Email: shelly@appeal-law.com (Alternate Email: paralegal@appeal-law.com)

Address:

241 Madison Ave. North
Bainbridge Island, WA, 98110
Phone: (206) 780-5033

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