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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
STATE ASSOCIATION FOR JUSTICE FOUNDATION**

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INTRODUCTION

Since this Court adopted the PRD, the law on assumption of risk underpinning the PRD has evolved. There are now four assumption-of-risk classifications: (1) express; (2) implied primary; (3) implied reasonable; and (4) implied unreasonable. While the first two remain complete bars to recovery, the latter two are only damage-reducing factors.

The PRD is best described as a type of implied reasonable assumption of risk. It is not express where Lyon did not agree in advance to relieve PUD and OCEC of their obligation to use reasonable care. It is not implied primary where Lyon did not voluntarily choose to rush into the raging Twisp River fire, where the only other course was to allow death and destruction. Instead, it is most like implied reasonable assumption of risk, where PUD's and OCEC's negligence that caused the fire forced Lyon into a situation where he had to confront its risks.

This is consistent with the way Washington law treats other injured workers, who, unlike Lyon, may sue negligent third parties who cause workplace injuries. Consistent with the current law on assumption of risk and worker's compensation, this Court should abandon the PRD.

ARGUMENT

A. This Court should abolish the PRD because it is inconsistent with current law on assumption of risk.

WSAJ begins by correctly asserting that it is for this Court to “reconsider an old and unsatisfactory court-made rule.” WSAJ at 5 (quoting *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)). OCEC and PUD both incorrectly argue that it is not for this Court, but for the Legislature, to revisit the PRD. *Compare* Reply 7, 15 *with* OCEC 7, 21; PUD 9, 12-14, 25-26. That is false. It is precisely this Court’s function to reconsider “court-made rule[s].” *Freehe*, 81 Wn.2d at 189. This Court should reconsider and abandon the PRD.

Lyon also agrees with WSAJ that the development of the assumption of risk doctrine in Washington further supports abolishing the PRD. WSAJ 5-14; BA 8-10; Reply 2-6. WSAJ points out, in agreement with Lyon, that both New Jersey and Oregon, upon whose common law *Maltman v. Sauer*, is based, have abandoned their PRDs. WSAJ 6-7; BA 10-14; Reply 2-5 (both addressing 84 Wn.2d 975, 978-79, 530 P.2d 254 (1975)). Oregon abolished its PRD after abolishing the assumption of risk doctrine underpinning its PRD. *Christensen v. Murphy*, 296 Or. 610, 619-21, 678 P.2d 1210

(1984). While this Court has not abolished assumption of risk, it has recognized that two types (including the one the PRD falls under) do not bar recovery, but operate like contributory negligence. **Scott v. Pac. W. Mtn. Resort**, 119 Wn.2d 484, 496-98, 834 P.2d 6 (1992).

As WSAJ explains, after this Court adopted the PRD in **Maltman**, our courts developed assumption of risk law into four categories: express, implied primary, implied reasonable, and implied unreasonable. WSAJ 7 (citing **Shorter v. Drury**, 103 Wn.2d 645, 655-56, 695 P.2d 116, *cert. denied*, 474 U.S. 827 (1985); **Kirk v. WSU**, 109 Wn.2d 448, 452-54, 746 P.2d 285 (1987); **Scott**, 119 Wn.2d at 496-98 nn.20, 23, 24, 26, 28, 31; **Tincani v. Inland Empire Zoological Soc’y**, 124 Wn.2d 121, 143, 875 P.2d 621 (1994)). When assumption of risk is “express,” the parties agree in advance that the one does not owe any duty of care and will not be liable for otherwise negligent conduct. WSAJ 7-8 (citing **Scott**, 119 Wn.2d at 496). When it is “implied primary,” one impliedly consents to relieve the other of any duty regarding specific known and appreciated risks. WSAJ 8 (citing **Scott**, 119 Wn.2d at 497). This implied agreement often occurs before any negligence and is “similar to express assumption [of risk] but without ‘the additional ceremonial and evidentiary weight of an express agreement.’” WSAJ 9 (quoting **Kirk**, 109 Wn.2d at 453

(quoting W. Keeton, D., Dobbs, R. Keeton & D. Owen, *Prosser & Keeton on Torts*, § 68 (5th ed., 1984) (“Prosser & Keeton”))). “Assumption of the risk in this form is really a principle of no duty, or no negligence.” *Tincani*, 124 Wn.2d at 143 (citing Prosser & Keeton at 497). Implied reasonable and implied unreasonable assumption of risk arise when the plaintiff is aware of the risk that the defendant’s negligence creates, but voluntarily chooses to encounter it. WSAJ 8 (citing *Scott*, 119 Wn.2d at 499).

Express and implied primary assumption of risk continue to operate as complete bars to recovery. 119 Wn.2d at 495-96. But implied reasonable and implied unreasonable assumption of risk reduce damages, but do not bar recovery. *Id.* at 503. Rather, they “retain no independent significance from contributory negligence after the adoption of comparative negligence.” *Id.* at 497.

Lyon’s assumption of risk is implied reasonable assumption of risk, so should not bar his recovery. WSAJ 9-14. His assumption of risk plainly was not express, where he did not agree in advance with PUD and OCEC to absolve them of any duty owed. The same is true, of course, for any professional rescuer.

Lyon’s assumption of risk is not implied primary, where he did not act voluntarily within the meaning of implied primary assumption

of risk.¹ WSAJ 9-11. Implied primary assumption of risk has three elements: the plaintiff knew the risk was present, understood its nature, and voluntarily chose to incur the risk. WSAJ 9 (citing **Kirk**, 109 Wn.2d at 453 (citing Prosser & Keaton at 486-87)). But, when a defendant's conduct places the plaintiff in a dilemma that removes his freedom of choice, the plaintiff does not act voluntarily when he assumes the risk. WSAJ 9-10 (quoting Prosser & Keeton at 491). For example, one who attempts to save "the lives or property of others, from a peril created by the defendant's negligence, do not assume the risk where the alternative is to allow the threatened harm to occur" Prosser & Keeton at 491. An assumption of risk "is not voluntary if that person is left with no reasonable alternative course of conduct to avoid the harm or to exercise or protect a right or privilege because of the defendant's negligence" 6 Wash. Prac., Wash. Pattern Jury Inst. Civ. ("WPI") 13.03.

¹ This Court previously stated in *dicta* that the PRD "is essentially a type of implied primary assumption of the risk." **Beaupre v. Pierce Cnty.**, 161 Wn.2d 568, 576, 166 P.3d 712 (2007). But this Court did not address whether fighting a fire is voluntary within the meaning of implied primary assumption of risk, instead simply relying on prior decisions that implied primary assumption of risk arises "where an individual assumes the risks inherent in an activity." **Beaupre**, 161 Wn.2d at 576 (citing **Scott**, 119 Wn.2d at 496-99). This Court should revisit and clarify this *dicta*.

Professional rescuers do not “voluntarily” assume risk within the meaning of implied primary assumption of risk. WSAJ 10-11. Indeed, the example given by Prosser & Keeton illustrates as much: when firefighters save the lives and property of others from a negligently created fire, they do not act “voluntarily,” where the only alternative is to allow the destruction of property and life. Prosser & Keeton at 491. When the choice is fighting the fire or allowing property to burn and people to die, there is no other reasonable course but to fight the fire. WSAJ 10-11; WPI 13.03.

Thus, the PRD is best described as a form of implied reasonable assumption of risk, where the negligence that caused the fire forces the firefighter “into a situation where he must reasonably choose to undergo the risk.” WSAJ 12-13 (quoting Prosser & Keeton at 497; citing *Tincani*, 124 Wn.2d at 145). Lyon, of course, had no real choice but to rush into the raging Twisp River Fire. It was his job, and property and life were in jeopardy.

B. Abolishing the PRD is also consistent with allowing third-party actions in workers compensation cases.

While recognizing that Lyon was employed by the United States Forest Service, such that his appeal does not directly implicate the Industrial Insurance Act (“IIA”) or the Law Enforcement

Officers' and Fire Fighters' Retirement System Act ("LEOFF"), WSAJ argues that abolishing the PRD is consistent with allowing workers to sue third-party tortfeasors for occupational injuries under the IIA. WSAJ 14-15. Stated another way, disallowing injured firefighters to sue negligent third parties deprives them of a "valuable right" other injured workers enjoy. WSAJ at 15 (quoting *Entila v. Cook*, 187 Wn.2d 480, 488-89, 386 P.3d 1099 (2017) (recognizing that the injured worker's right to sue a negligent third-party as a "valuable right," supported by "strong policy")). This disparate treatment is amongst the reason for striking down the PRD as unconstitutional. BA 25-28; Reply 24-26.

CONCLUSION

This Court should abandon the PRD, where it is incorrect and harmful, and its legal underpinnings have eroded. The current assumption-of-risk law no longer supports a complete bar for professional rescuers. The PRD conflicts with Washington worker's compensation law that permits other injured workers tort recovery professional rescuers are denied. The 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.

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A handwritten signature in black ink, appearing to read "Ken Masters", written over a horizontal line.

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