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No. 97826-3

(Washington Court of Appeals No. 36528-0-III)

SUPREME COURT
OF 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.

**RESPONDENT OKANOGAN COUNTY ELECTRIC
COOPERATIVE'S ANSWER TO AMICI CURIAE BRIEFS**

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I. SUMMARY OF ANSWER

45 years ago, in *Maltman v. Sauer*, 84 Wn.2d 975, 530 P.2d 254 (1975), this Court unanimously made the Professional Rescuer Doctrine part of Washington common law. Now this Court is being asked to overrule *Maltman* and strike the Professional Rescuer Doctrine from Washington common law.

That makes this a case about the rule of stare decisis. Moreover, this case concerns the rule of stare decisis to be applied when this Court is being asked to overrule one of its common law decisions. In such a situation, this Court should decline to overrule its decision unless the advocates for change have shown that the existing common law rule is clearly harmful and incorrect. Because the advocates for abrogation of the Professional Rescuer Doctrine have failed to show that the rule is clearly harmful and incorrect, this Court should decline to overrule *Maltman* and should affirm the trial court's dismissal of the Plaintiff's claims on the ground that the Professional Rescuer Doctrine bars his claim.

II. ANSWER TO AMICI

A. This Court should require the Plaintiff to show that the Professional Rescuer Doctrine, adopted unanimously by this Court 40 years ago in *Maltman*, is clearly harmful and incorrect before this Court will abrogate the doctrine. In requiring the Plaintiff to make that showing, this Court should clarify that the correct test for whether to overrule a common law decision of this Court is the “clearly harmful and incorrect” test of *Stranger Creek* and not the “undermining” test of *W.G. Clark*.

Amicus curiae Washington Association for Justice Foundation does not offer *any* express stare decisis analysis, as such. WAFJ's argument for

overruling *Maltman* simply assumes the correctness of the stare decisis analysis set forth in the Plaintiff's reply brief.¹

The Plaintiff asserts that, under this Court's stare decisis jurisprudence, a decision of this Court may be overruled in either of two circumstances: (1) the decision has been shown to be clearly harmful and incorrect; or (2) the legal underpinnings of the decision have been eroded. *See* Reply Brief at 2. The Plaintiff is correct that, since this Court's decision in *W.G. Clark Construction Co. v. Pacific Northwest Regional Council of Carpenters*, 180 Wn.2d 54, 322 P.3d 1207 (2014), this Court has stated that a decision of this Court may be overruled if either circumstance is satisfied. This Court should now clarify that the two circumstances are in fact distinct tests, and that a common law decision of this Court will only be overruled if that decision has been shown to be clearly harmful and incorrect.²

The legal-underpinnings test was first announced in *W.G. Clark*. The case involved whether ERISA's general "relates to..." preemption clause barred claims made under two Washington statutes designed to

¹ The issue of whether this Court should overrule *Maltman*, and abrogate the Professional Rescuer Doctrine as a rule of Washington common law, has come to this Court in a procedural posture truncating the briefing on the controlling issue of stare decisis. Instead of seeking direct review, the Plaintiff appealed to Division Three. The Plaintiff in his opening brief to Division Three urged that court to reject the Professional Rescuer Doctrine, but did not address either this Court's rule of stare decisis or explain why Division Three was entitled to disregard this Court's decision in *Maltman*. After the Respondents had filed their answering briefs, but before the Plaintiff had filed his reply brief, Division Three certified the case to this Court, and this Court accepted certification. The Plaintiff then submitted his reply brief, ***and for the first time addressed stare decisis***. Accordingly, the briefs now being submitted to answer the briefs of the amicus curiae will be the only chance the Respondents will have to answer the Plaintiff's stare decisis argument.

² The Cooperative adopts the argument on this point of amicus curiae Washington Defense Trial Lawyers. *See* WDTL Brief at 2-5. What follows supplements that analysis.

ensure workers on public projects are paid for their work. *See W.G. Clark*, 180 Wn.2d at 57. This Court had held, in *Puget Sound Electrical Workers Health & Welfare Trust Fund v. Merit Co.*, 123 Wn.2d 565, 8070 P.2d 960 (1994), and *International Brotherhood of Electric Workers Local No. 46 v. Trig Electrical Construction Co.*, 142 Wn.2d 431, 13 P.3d 622 (2000), that the clause did preempt such claims. But as Justice Owens explained in her opinion for a unanimous court:

Since then ... courts across the country (including federal courts here in the Ninth Circuit) have analyzed the United States Supreme Court's developing ERISA preemption jurisprudence and come to a consensus that these types of state law claims are not preempted by ERISA because they have only a tenuous connection to ERISA plans. [citation omitted] As a result of this conflict between our rule and the rule followed by federal courts, the outcome of this type of case in Washington is entirely dependent on whether the lawsuit is filed in federal or state court. This has led to blatant forum shopping and created inconsistent and unjust results for parties in Washington, as lamented by both the superior court judge in this case and the federal district court judge in the parallel federal case. In light of the national shift in ERISA preemption jurisprudence and the persuasive reasoning underlying that shift, we now join courts across the country and hold that this type of state law is not preempted by ERISA.

180 Wn.2d at 57-58.

At the conclusion of its opinion, this Court “[ook] th[e] opportunity to clarify how we apply the doctrine of stare decisis *when the United States Supreme Court provides additional guidance or clarifies the proper analytical approach for a federal issue*”:

Generally, under stare decisis, we will not overturn prior precedent unless there has been “a clear showing that an established rule is incorrect and harmful.” *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). However, this court must

have the flexibility to consider emerging United States Supreme Court case law when considering earlier decisions on federal issues.

Id. at 65-66. This Court then clarified that “we can reconsider our precedent not only when it has been shown to be incorrect and harmful but also when the legal underpinnings of our precedent have changed or disappeared altogether.” *Id.* at 66.

In short, the legal-underpinnings stare decisis test announced by this Court in *W.G. Clark* is an outgrowth of this Court’s responsibilities ***when applying federal law***. In matters of federal law, the ultimate arbiter, the highest authority, is the Supreme Court of the United States. When a precedent of this Court involves federal law, this Court has a duty to reconsider that precedent under the *federal* rule of stare decisis, and that rule expressly includes the duty to reconsider a precedent whose “underpinnings [have been] eroded ...by subsequent decisions of [the Supreme] Court [of the United States].” *United States v. Gaudin*, 515 U.S. 506, 521, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), *followed and applied in W.G. Clark*, 180 Wn.2d at 66. That is precisely what this Court did in *W.G. Clark*—reconsider its ERISA precedents because the underpinnings of those precedents had been eroded by subsequent decisions of the Supreme Court of the United States.³

³ Although the focus of this Court’s discussion was the shift of the federal Circuit Courts of Appeals away from the broad view of preemption applied by this Court in *Merit* and *Trig*, a review of those decisions confirms that the Circuit Courts had shifted in response to a change in the U.S. Supreme Court’s approach to the issue.

This Court has no such duty when it comes to Washington State common law. In matters of Washington common law, it is this Court that is the ultimate arbiter and the highest authority.⁴ If the United States Supreme Court were by one of its decisions to come out in favor of a rule that conflicted with Washington common law, and no principle of federal preemption was implicated, this Court would “not be bound to follow it, for we determine the common law within our jurisdiction for ourselves[.]” *McGinn v. North Coast Stevedoring Co.*, 149 Wash. 1, 12, 270 P. 113 (1928). The common law of Washington is “judge-made law,” *Senear v. Daily Journal-American*, 97 Wn.2d 148, 152, 641 P.2d 1180 (1982), and the members of this Court are the judges with the final authority to say what that law is. In short, there can be no “erosion” of the “legal underpinnings” of a common-law decision of this Court, comparable to the erosion of the legal underpinnings of a decision of this Court on an issue of federal law, because this Court answers to no other court when this Court decides an issue of Washington common law.

⁴ Washington State’s adoption of the common law predates statehood, deriving from an act of the Territorial Legislature which made the common law of England the law of the territory. *See Wyman v. Wyman*, 91 Wn.2d 317, 318, 588 P.2d 1133 (1979), *vacated not in rel. part on reconsideration*, 94 Wn.2d 99, 615 P.2d 452 (1980) (noting “the adoption of the English common law in 1863”); West’s RCWA 4.04.010 (“The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state.”) (listing under “credits” the various statutory iterations of the adoption of the common law preceding the present version codified at RCW 4.04.010). The fact that the common law was adopted in Washington by a legislative enactment, however, has never been thought to render this Court’s decisions any less authoritative for determining the content of that law.

The test for whether this Court should overrule one of its common-law decisions should take into account the nature of the judicial process, and in particular the nature of the process by which this Court makes the common law. This Court does not have the power to commission the filing of cases in order to bring an issue this Court wishes to grapple with before it, the way the Legislature can reach out and seize hold of an issue through the process of crafting bills and holding hearings and conducting investigations. The common law is made case-by-case, and within each of those cases this Court is further confined by the rules of evidence and the record created by an adversarial process limited by those rules. The result is a law-making process that is highly accretive, in which one case builds upon the next.⁵ And as that process unfolds, often over time periods spanning decades, the expectations of those affected by these decisions take hold as the contour of the law is clarified.

The test articulated 50 years ago in *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970), under which this Court will not overrule one of its decisions unless the proponents of overruling show that the rule of that decision is clearly harmful and incorrect, fits the realities and imperatives of the common-law making process. This Court therefore should clarify that, in matters involving whether to overrule a common-law decision, the *Stranger Creek*

⁵ As Justice Felix Frankfurter once summarized the difference between legislative and judicial law making, in a letter to his colleague Hugo Black, “legislatures make law wholesale, judges retail.” See D. O’Brien, “Justice Robert H. Jackson’s Unpublished Opinion in *Brown v. Board*: Conflict, Compromise, and Constitutional Interpretation” at 18 (Univ. Of Kansas Press 2017) (quoting the letter) (internal quotation marks omitted).

requirement of showing that an existing rule is clearly harmful and incorrect is the controlling test. *Maltman* should not be overruled, and the Professional Rescuer Doctrine should not be abrogated, unless the Plaintiff in this case satisfies the requirements of that test.

B. The Plaintiff has failed to show that the Professional Rescuer Doctrine rule adopted in *Maltman* is clearly harmful and incorrect. In fact, the Professional Rescuer Doctrine is grounded in sound notions of public policy, and is neither harmful nor incorrect.

The history of the Professional Rescuer Doctrine is a classic illustration of how the common law evolves as it addresses a specific social and economic circumstance.⁶ The Michigan Supreme Court comprehensively reviewed this history in *Kreski v. Modern Wholesale Electric Supply Co.*, 429 Mich. 347, 415 N.W.2d 178 (1987). The court began its analysis by remarking upon the “overwhelming” court support for the rule:

The precedential authority supporting the fireman's rule is impressive, and deeply rooted in common law. When faced with the question whether to adopt the rule, courts have overwhelmingly been in favor of doing so. The fireman's rule is based on practicability and common sense.

Kreski, 415 N.W.2d at 183 (footnotes omitted). The court then laid out the history of the early decisions, their reliance on the owner/occupier classification scheme, and the ultimately unsatisfactory nature of this approach. *See id.* at 183-84. The court then analyzed the shift away from

⁶ As on the issue of stare decisis, the Cooperative adopts the arguments of amicus curiae WDTL. *See* WDTL Brief at 6-8. What follows supplements that analysis.

owner/occupier liability concepts to what it described “a focus on assumption of risk and public policy.” *See id.* at 185-186.

Finally, the court set forth its public policy rationale for adoption of the rule:

The public policy rationales advanced in favor of the rule are more than sufficient to support it. The policy arguments for adopting a fireman's rule stem from the nature of the service provided by fire fighters and police officers, as well as the relationship between these safety officers and the public they are employed to protect. It is beyond peradventure that the maintenance of organized society requires the presence and protection of fire fighters and police officers. The fact is that situations requiring their presence are as inevitable as anything in life can be. It is apparent that these officers are employed for the benefit of society in general, and for people involved in circumstances requiring their presence in particular. The public hires, trains, and compensates fire fighters and police officers to deal with dangerous, but inevitable situations. Usually, especially with fires, negligence causes the occasion for the safety officer's presence. The very nature of police work and fire fighting is to confront danger. The purpose of these professions is to protect the public. [W]orkers' compensation benefits are available to police officers and fire fighters injured in the course of their employment. This fairly spreads the cost of these injuries to the public as a whole. As a result of examining the policy rationales supporting the fireman's rule, we are persuaded that considerations of fairness and public policy compel us to adopt the rule for Michigan.

Id. at 186-189.⁷

⁷ The Michigan Supreme Court referred to the Professional Rescuer Doctrine by its familiar shorthand, “the Fireman’s Rule.” The Plaintiff in this case insists that Washington has not adopted the “Fireman’s” (Firefighter’s) Rule, but this claim ignores that courts using that phrase do so as a colloquial shorthand for what this Court referred to in *Maltman* as the Professional Rescuer Doctrine. The Michigan Legislature later modified the substantive scope of Michigan’s “Fireman’s Rule,” but did not follow the example of the New Jersey legislature which abrogated New Jersey’s rule *See Boulton v. Fenton Township*, 272 Mich. App. 456 726 N.W.2d 733 (2006) (discussing statutory changes adopted in 1998). The history of the New Jersey rule and its legislative repeal are addressed on footnote 10, at page 15 of this brief.

WAFJ's brief offers an extended disquisition on the evolution of Washington assumption-of-the-risk law, contending that this evolution shows that Washington assumption-of-the-risk law no longer supports the Professional Rescuer Doctrine. Specifically, WAFJ contends that Washington assumption-of-the-risk law now operates as a complete bar to liability only in situations involving "implied primary" assumption of the risk, and that professional rescuers do not present such a situation. *See* WAFJ Brief at 12-13. As part of this analysis, WAFJ relies on this Court's decision in *Beaupre v. Pierce County*, 161 Wn.2d 568, 166 P.3d 712 (2007), for this Court's statement in that case that it has traditionally analyzed the Professional Rescuer Doctrine as a matter of assumption of the risk. *See* WAFJ brief at 10-11. But WAFJ ignores that in *Beaupre* this Court *also* stated that this Court considers the situation of firefighters and police *as one of "implied primary" assumption of the risk:*

[T]he professional rescue doctrine is essentially a type of implied primary assumption of the risk. *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 496-99, 834 P.2d 6 (1992) (listing the four types of assumption of risk and describing implied primary assumption of the risk as a situation where an individual assumes the risks inherent in an activity); *see Vroegh v. J & M Forklift*, 165 Ill.2d 523, 530, 651 N.E.2d 121, 209 Ill.Dec. 193 (1995) (describing fireman's rule as an implied primary assumption of risk "whether an owner or occupier of land has any duty to fire fighters injured").

Beaupre, 161 Wn.2d at 576.

The unarticulated premise of WAFJ's argument is that the evolution of Washington assumption-of-the-risk law has undermined the legal basis for Washington's Professional Rescuer Doctrine, and therefore as a matter

of stare decisis this Court should overrule *Maltman* and abrogate our state's Professional Rescuer bar against recovery. But as previously demonstrated in Section II.A of this brief, undermining is not the proper test to determine whether this Court should overrule one of its common law decisions. And in any event, *Beaupre* shows there has been no such undermining; this Court's present doctrine of assumption-of-the-risk is consistent with *Maltman* and the Professional Rescuer Doctrine bar against recovery.⁸

WAFJ, like the Plaintiff, also criticizes the Professional Rescuer Doctrine because it prevents someone subject to its limitations from receiving full compensation (WAFJ and the Plaintiff both equate full compensation with what a jury would award if given the chance). But even if one treats this criticism as an attempt to satisfy the "clearly harmful" showing requirement of *Stranger Creek*, the argument proves too much. For the same could be said of every tort rule that in any way prevents a plaintiff from receiving full compensation from a party whose conduct can be shown to have caused the plaintiff's injury. And this Court is not about to abolish our present tort system with one in which all that would be required to recover in tort would be to show that a defendant, as a matter of cause and effect, substantially contributed to a plaintiff's injury.

⁸ The Plaintiff urges that *Maltman* has been undermined because this Court in *Maltman* cited with approval to the Oregon Supreme Court's decision in *Spencer v. B.P. John Furniture Corp.*, which rested Oregon's professional rescuer doctrine on assumption of the risk, and Oregon has subsequently abandoned the professional rescuer doctrine after assumption of the risk was abolished in Oregon. The shortest answer to this undermining claim based on the evolution of assumption-of-the-risk law is that this Court has not abolished assumption of the risk.

Moreover, this argument must be presumed to have considered by this Court when it unanimously adopted the Professional Rescuer Doctrine in the first place. (To assume that the nine members of this Court who signed on to the Court's opinion in *Maltman* did *not* consider it would be to condemn those distinguished jurists with common-law malpractice, and there is plainly no basis for doing so.) And there is nothing about the argument against the Professional Rescuer Doctrine based on insufficient compensation that WAFJ has shown to have changed since *Maltman*.

Indeed, WAFJ—and for that matter, the Plaintiff—have not even tried to delve into the processes of social evolution since *Maltman* that would be required to show that community values about such matters in 1975 have become outmoded and should be disregarded 45 years later. Of course there are numerous situations that, as an historical matter, one could point to as examples of such changes, and within a comparable period of time. But it should be devastating to the Plaintiff's case that here neither the Plaintiff nor his supporting amicus have so much as attempted to make out such a case.

In the end, WAFJ makes no real effort to come to grips with the public policy basis for the Professional Rescuer Doctrine, exemplified by cases such as the Michigan Supreme Court's decision in *Kreski*. The Michigan Supreme Court in *Kreski* quoted with approval from the public policy rationale for the professional rescuer doctrine of several other state high courts, all of which underscored the fundamental incongruity of allowing firefighters and police to sue the taxpayers who employ them for

protecting those taxpayers against risks, just because the firefighter or police officer was injured by that risk and can show that it was the result of negligence on the taxpayer's part:

- The [fireman's] rule developed from the notion that taxpayers employ firemen and policemen, at least in part, to deal with future damages that may result from the taxpayers' own negligence. To allow actions by policemen and firemen against negligent taxpayers would subject them to multiple penalties for the protection.

Steeleman v. Lind, 97 Nev. 425, 634 P.2d 666, 667 (1981), as quoted in *Kreski*, 415 N.W.2d at 187.

- [S]ince government entities employ and train firefighters and policemen, at least in part, to deal with those hazards that may result from the actions or inaction of an uncircumspect citizenry, it offends public policy to say that a citizen invites private liability merely because he happens to create a need for those public services.

Pottebaum v. Hinds, 347 N.W.2d 642, 645 (Iowa 1984), as quoted in *Kreski*, 415 N.W.2d at 187.

- [W]e hold that, as a matter of public policy, firemen and police officers generally cannot recover for injuries attributable to the negligence that requires their assistance. This public policy is based on a relationship between firemen and policemen and the public that calls on these safety officers specifically to confront certain hazards on behalf of the public.

Flowers v. Rock Creek Terrace, 308 Md. 432, 447, 520 A.2d 361 (1987), quoted in *Kreski*, 415 N.W.2d at 187.

The public policy rationale of these courts amply demonstrates that the Professional Rescuer Doctrine is neither harmful nor incorrect. Although this Court has not expressly grounded our state's Professional Rescuer Doctrine on the public policy rationale of these courts, there

certainly is nothing inconsistent with their rationale and our state's Professional Rescuer Doctrine. The concepts of fairness articulated by these courts is entirely consistent with the concepts of fairness that have animated the development of our state's common law. And the vitality of these concepts confirms that the Professional Rescuer Doctrine is neither harmful nor incorrect.⁹

C. The case for overruling *Maltman* and abrogating Washington's Professional Rescuer Doctrine also fails under *W.G. Clark's* "undermining" test.

Even if this Court decides that "undermining" should be a stare decisis test for deciding whether to overrule a common law decision, this Court should still re-affirm *Maltman* and uphold the Professional Rescuer Doctrine.

First, as shown, the assumption-of-the-risk basis for our state's Professional Rescuer Doctrine has not been undermined. To the contrary, the evolution of our state's assumption-of-the-risk law is *consistent* with Washington's Professional Rescuer Doctrine.

Second, the showing generally required to establish undermining under *W.G. Clark* has not been satisfied. In *Deggs v. Asbestos Corporation, Ltd.*, (*supra*), this Court applied *W.G. Clark's* "undermining" test to determine whether the legal basis for the restrictive gloss on our state's

⁹ WAFJ also fails to address the issue of settled expectations. In *Deggs v. Asbestos Corporation, Ltd.*, 186 Wn.2d 716, 381 P.3d 32 (2016), this Court declined to abrogate a long-standing—and restrictive—gloss on Washington's Wrongful Death cause of action because of the settled expectations that would be adversely affected should this Court abrogate that gloss. *Deggs*, 186 Wn.2d at 729, n.9. The Professional Rescuer's Doctrine has also been longstanding, and abrogating it could impair the allocation of scarce resources to needed prevention activities.

Wrongful Death cause of action had been undermined. The plaintiff urging this Court to find undermining pointed to a shift in case law around the country, involving several decisions that had rejected restrictions similar to our state's longstanding gloss. *Deggs*, 186 Wn.2d at 732. This Court concluded that the plaintiff's showing did not establish undermining under *W.G. Clark*:

[C]ourts around the country are currently split on when the statute of limitations on a wrongful death action accrues and on whether a judgment in a personal injury case arising out of the same set of facts bars a subsequent wrongful death action. *See* M.C. Dransfield, Time from Which Statute of Limitations Begins to Run Against Cause of Action for Wrongful Death, 97 A.L.R.2d 1151, §§ 2–3 (1964) (collecting accrual cases); Vitauts M. Gulbis, Annotation, Judgment in Favor of, Or Adverse to, Person Injured as Barring Action for His Death, 26 A.L.R.4th 1264 (2015) (collecting prior judgment cases). As courts across the country are split on critical issues before us, this case is unlike *W.G. Clark*, where every court interpreted ERISA preemption differently than we had.

186 Wn.2d at 732.

The principal out-of-state cases relied upon to show a shift away from the doctrine are cases in which the legislature had previously employed its police power to abrogate that state's common law adoption of

the doctrine.¹⁰ As discussed in Section II.A of this brief, legislatures have greater freedom to engage in pro-active policy-making than do courts. The mere fact that a state legislature has chosen to abrogate a common law rule does not show that the common law high court of that state, through the judicial process of case-by-case common-law making, had independently concluded that the rule should be overturned. In fact, a majority of courts continue to adhere to the Professional Rescuer Doctrine. *See* WDTL Brief at 4-5 (referencing cases cited by Respondent Douglas County Public Utility Dist. No. 1); Douglas County PUD Brief at 13, n.2 (citing cases establishing the continuing majority rule status of the Professional Rescuer Doctrine)). In sum, even if this Court applies the undermining test in this

¹⁰ The Plaintiff makes a great deal of the fact that this Court in *Maltman* relied upon the 1960 decision of the New Jersey Supreme Court in *Krauth v. Geller*, 31 N.J. 270, 157 A.2d 129 (1960), and the 1970 decision of the Oregon Supreme Court decision in *Spencer v. B.P. John Furniture Corp.*, 255 Or. 359, 467 P.2d 429 (1970), both of which have subsequently been abrogated. *See* Plaintiff's Reply Brief at 3-4. The Plaintiff acknowledges that the New Jersey common-law rule was abrogated by New Jersey's legislature, but seems to suggest that the New Jersey Supreme Court subsequently concluded that the legislature had acted wisely, citing and quoting from the New Jersey Supreme Court's decision in *Ruiz v. Mero*, 189 N.J. 525, 537-38, 917 A.2d 239 (2007). *See* Plaintiff's Reply Brief at 4. But the language quoted by the Plaintiff, characterizing the Professional Rescuer Doctrine (the "Firefighters' Rule," in New Jersey parlance) as "obtuse and abstruse," is not the opinion of the New Jersey Supreme Court in *Ruiz*. The court in *Ruiz* was quoting from the 1991 *dissent* of Justice Handler in *Rosa v. Dunkin' Donuts*, 122 N.J. 66, 583 A.2d 1129 (1991), objecting to his colleagues' continued adherence to the doctrine, which Justice Handler criticized as "obtuse and abstruse"—the language quoted by the Plaintiff in his Reply Brief. The court in *Ruiz* noted that the New Jersey legislature abrogated the state's Firefighter's Rule by statute the year after Justice Handler had blasted it in his *Rosa* dissent. The court in *Ruiz* did not say whether it approved of that abrogation; the court merely fulfilled its duty to honor that abrogation. As for the Oregon Supreme Court's decision in *Spencer*, it was the Oregon legislature's statutory abrogation of assumption-of-the-risk that moved the Oregon Supreme Court to abrogate that state's Professional Rescuer Doctrine. *See Christensen v. Murphy*, 296 Or. 610, 618-20 678 P.2d 1210 (1984) ("As a result of statutory abolition of implied assumption of risk, we hold that the 'fireman's rule' is abolished in Oregon as a rule of law.").

case, it should conclude that Washington's Professional Rescuer Doctrine has not been undermined.

III. CONCLUSION

This Court should reaffirm the Professor Rescuer Doctrine, and affirm the trial court's dismissal of the Plaintiff's claims against the Defendants based on that doctrine.

Respectfully submitted this 7th day of January, 2020.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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