Back to the Basics: Restoring Fundamental Tort Principles by Abolishing the Professional-Rescuer's Doctrine*

I. INTRODUCTION

He died as he lived, helping someone in need.[1]

Thus began Robert Nowicki's obituary. Nowicki was only forty-nine when he was killed helping Kenny Pigue, the driver of a stalled tractor-trailer, on Interstate 55 in eastern Arkansas.[2] A roadside-assistance worker for the Tennessee Department of Transportation, Nowicki was on the way to assist a different driver when he saw Pigue's vehicle stalled on the side of the road.[3] A lawsuit later filed by Nowicki's estate alleged that the truck driver had been driving negligently and with too much cargo for his empty fuel tank.[4] As Nowicki assisted Pigue, a second tractor-trailer hit Pigue's truck from behind, which in turn struck Nowicki.[5] Arkansas State Police pronounced Nowicki dead at the scene.[6]

Had Nowicki helped Pigue as a random act of kindness, his widow's negligence suit against the truck driver could have

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1. Robert H. Nowicki, LEGACY.COM (July 17, 2011), http://www.legacy.com/obituaries/newsday/obituary.aspx?n=robert-h-nowicki&pid=152619672.

2. Kevin McKenzie, *Arkansas State Police Continue to Investigate Fatal Crash on I-55 Bridge*, COM. APPEAL, http://www.commercialappeal.com/news/arkansas-state-police-continue-investigate-fatal-c (last updated June 21, 2011, 11:09 PM).

3. Nowicki v. Pigue, 2013 Ark. 499, at 4, 430 S.W.3d 765, 768.

4. *See id.* at 3, 430 S.W.3d at 768.

5. *See Preliminary Fatal Crash Summary*, ARK. ST. POLICE (June 20, 2011), http://www.asp.state.ar.us/fatal/index.php?do=view_reports&accident_number=230&year_rec=2011.

6. *Id.* The driver of the second truck also died in the accident. *See id.*

prevailed.[7] This is because Arkansas, like most jurisdictions, allows an injured rescuer to recover against the party whose negligence created the need for rescue.[8] Under Arkansas's "Good Samaritan" law, these rescuers also are not liable for any negligence committed during the rescue.[9] By providing both a civil remedy and immunity for rescue-related injuries, Arkansas law encourages selfless and uninhibited behavior when one finds another in need.[10]

Despite its laudable purpose, Arkansas's rescue doctrine does not apply to "professional rescuers," a term liberally construed by the Arkansas Supreme Court. For example, the court has prevented volunteer firefighters from recovering under the rescue doctrine.[11] In the 2013 case involving Nowicki, the state's high court expanded the definition of "professional rescuer" to include roadside-assistance workers.[12] As a result, Nowicki's widow recovered nothing from the man her husband died to protect.[13]

Nowicki demonstrates the fundamental injustice of the professional-rescuer's doctrine. If a Good Samaritan had died

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7. *See, e.g.*, Woodruff Elec. Coop. v. Weis Butane Gas Co., 225 Ark. 114, 279 S.W.2d 564 (1955) (upholding a jury verdict in favor of a Good Samaritan injured while helping individuals involved in a highway accident).

8. *See, e.g.*, Price v. Watkins, 283 Ark. 502, 678 S.W.2d 762 (1984) (allowing a plaintiff to recover against both a neighbor who needed the plaintiff's help after negligently stopping his vehicle on a highway and the owner-operator of a tractor-trailer that subsequently crashed into the plaintiff); Mo. Pac. R.R. v. Cunningham, 214 Ark. 468, 217 S.W.2d 240 (1949) (upholding jury verdict in favor of a plaintiff injured saving children from a fire negligently started by the defendant).

9. ARK. CODE ANN. § 17-95-101(a) (Repl. 2010); *see also* ARKANSAS MODEL JURY INSTRUCTIONS—CIVIL 612 (2014) ("A person acting under stress in response to humanitarian impulses, in attempting to rescue another who reasonably appears to be in danger of substantial injury or loss of life, is not chargeable with negligence because [his][her] conduct may now appear to have been unwise . . . . [He][She] is required to use only that degree of care a reasonably careful person would use under the same or similar circumstances.").

10. *See Woodruff Elec. Coop.*, 225 Ark. at 119, 279 S.W.2d at 567 ("In stopping to render aid, the [rescuers] did only what good people have been urged to do ever since the parable of the Good Samaritan as contained in Holy Writ.").

11. *See* Waggoner v. Troutman Oil Co., 320 Ark. 56, 61-62, 894 S.W.2d 913, 916 (1995).

12. *See* Nowicki v. Pigue, 2013 Ark. 499, at 8-9, 430 S.W.3d 765, 770-71. The formal title of what this comment calls the "professional-rescuer's doctrine" varies across jurisdictions. Because *Nowicki*—the most recent Arkansas Supreme Court majority opinion on the subject—used "the professional-rescuer's doctrine" to refer to the concept, this comment does so as well. *See id.* at 2, 430 S.W.3d at 767.

13. *See id.* at 8-9, 430 S.W.3d at 770-71.

helping Pigue, the rescue doctrine would have allowed her estate to recover. Moreover, the low standard of care under the Good Samaritan statute virtually guarantees that a plaintiff will survive summary judgment.[14] This best serves the goals of our civil justice system—to deter negligence and provide redress.[15] In reality, however, the Arkansas Supreme Court undermines these policies by broadly construing "professional rescuer" to include professions such as the roadside-assistance worker.

Arkansas's professional-rescuer jurisprudence allows for future expansion of the doctrine, both in this state and beyond. This comment urges the Arkansas General Assembly to avoid such an injustice by abolishing the doctrine altogether.[16] Part II describes the gradual erosion of the doctrine's theoretical underpinnings as the concept evolved in Arkansas. Part III analyzes the professional-rescuer's doctrine in the context of other tort concepts, such as duty, assumption of risk, and comparative fault. Part IV discusses the doctrine's role as an exception to the broader rescue doctrine and the right of employees to recover against negligent third parties for on-the-job injuries. Finally, Part V concludes by calling on the Arkansas General Assembly to statutorily abolish the professional-rescuer's doctrine.

II. THE PROFESSIONAL-RESCUER'S DOCTRINE

The professional-rescuer's doctrine debuted in American common law in 1892.[17] While courts traditionally limited the doctrine's application to firefighters and police officers,[18] some

14. *See* ARK. CODE ANN. § 17-95-101(b) (Repl. 2010). In a case that applied the professional-rescuer's doctrine to a police officer, New Jersey Supreme Court Judge Alan Handler raised this issue in a dissenting opinion. *See* Berko v. Freda, 459 A.2d 663, 668 (N.J. 1983) (Handler, J., dissenting). A decade later, the New Jersey Legislature abolished the doctrine. *See* N.J. STAT. ANN. § 2A:62A-21 (West 2015).

15. *See* Stephen D. Sugarman, *Why No Duty?*, 61 DEPAUL L. REV. 669, 669 (2012).

16. Many states have legislatively or judicially abolished the doctrine, while others have significantly limited its scope. *See, e.g.*, MICH. COMP. LAWS ANN. § 600.2965 (West 2015) ("The common law doctrine that precludes a firefighter or police officer from recovering damages for injuries arising from the normal, inherent, and foreseeable risks of his or her profession is abolished.").

17. *See* Gibson v. Leonard, 32 N.E. 182, 184 (Ill. 1892) (characterizing a firefighter as "a mere naked licensee" to which a landowner owed no duty to keep her premises safe).

18. *See* Flowers v. Sting Sec., Inc., 488 A.2d 523, 527 (Md. Ct. Spec. App. 1985) (describing the "Fireman's Rule" in its traditional form).

jurisdictions expanded it to include additional occupations.[19] The theoretical underpinnings of the doctrine evolved in a similar fashion. Courts once used premises liability to justify the doctrine's existence before shifting toward assumption of risk.[20] Ultimately, courts in many jurisdictions, including Arkansas, settled on "public policy" as the appropriate justification for the professional-rescuer's doctrine.[21]

A. Rationales Underlying the Professional-Rescuer's Doctrine

1. Premises Liability

Courts traditionally analyzed the professional-rescuer's doctrine within the framework of premises liability.[22] Under this approach, courts categorized professional rescuers as licensees to whom landowners owed only a duty not to injure "intentionally or by willful and wanton misconduct."[23] A landowner's affirmative duties toward a professional rescuer were limited to warning the rescuer of hidden dangers known by the landlord and to carrying out her own activities with reasonable care.[24] Absent any duty to make the premises safe for professional rescuers,[25] the premises liability theory provided a basis to dismiss, for example, a firefighter's suit against a landowner who negligently caused the firefighter's injury.[26]

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19. *See* Christensen v. Murphy, 678 P.2d 1210, 1215-16 n.7 (Or. 1984) (discussing cases that applied the professional-rescuer's doctrine to bar recovery from a harbor patrol police officer and an owner of a helicopter that crashed while dumping water on a forest fire); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 430 nn.39-42 (5th ed. 1984) (citing cases that applied the doctrine to bar recovery from doctors and Army helicopter crews); Robert H. Heidt, *When Plaintiffs Are Premium Planners for Their Injuries: A Fresh Look at the Fireman's Rule*, 82 IND. L.J. 745, 745 n.2 (2007) (citing cases that applied the doctrine to bar recovery from customs inspectors and EMTs).

20. *See* Recent Case, Beaupre v. Pierce County, *166 P.3d 712 (Wash. 2007)*, 121 HARV. L. REV. 1644, 1647 (2008).

21. *Id.*; *see also* Waggoner v. Troutman Oil Co., 320 Ark. 56, 59, 894 S.W.2d 913, 915 (1995) ("[T]he most persuasive decisions, we think, are those that justify the Fireman's Rule on public policy considerations.").

22. *See, e.g.*, Thomas v. Pang, 811 P.2d 821, 823 (Haw. 1991) ("Historically, the Fireman's Rule was explained in the context of the landowner's liability.").

23. KEETON ET AL., *supra* note 19, at 430 (footnote omitted).

24. *Id.*

25. *See id.* at 429-30.

26. *See* Gibson v. Leonard, 32 N.E. 182, 184 (Ill. 1892).

Because of its shortcomings, premises liability no longer underlies the professional-rescuer's doctrine in most of the jurisdictions that retain the rule.[27] Courts usually find it difficult to place firefighters and police officers in any of the common law categories of entrants.[28] No court seriously considers them trespassers, as both enter private property to perform a public duty.[29] Moreover, in the event of a fire, a firefighter does not need permission to enter private property; he does so "as a matter of right pursuant to his public employment."[30] It is therefore improper to categorize firefighters as invitees—which requires the landowner's invitation—or licensees—which requires the landowner's permission.[31]

Characterizing professional rescuers as licensees is also inconsistent with how courts treat other public employees. These individuals also enter private property as a matter of right, and courts classify them as invitees to whom landowners owe a duty of reasonable care.[32] Courts impose this duty of reasonable care toward garbage collectors, tax collectors, water-meter

27. *See* Dini v. Naiditch, 170 N.E.2d 881, 885 (Ill. 1960) ("[T]his legal fiction that firemen are licensees to whom no duty of reasonable care is owed is without any logical foundation."); *see also* DAN B. DOBBS, THE LAW OF TORTS 770 (2000) ("The courts eventually began to divorce the rule from its connection to landowner cases.").

28. *See, e.g.*, Thomas v. Pang, 811 P.2d 821, 823 (Haw. 1991) ("Difficulty arose when fire fighters were classified as invitees or licensees as they did not fit neatly in either category."); *see also* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 395-96 (4th ed. 1971) ("Such individuals do not fit very well into any of the arbitrary categories which the law has established for the classification of visitors.").

29. *See* Krauth v. Geller, 157 A.2d 129, 130 (N.J. 1960), *superseded by statute*, N.J. STAT. ANN. § 2A:62A-21 (West 2015); *see also* PROSSER, *supra* note 28, at 396 ("They are not trespassers, since they are privileged to come."). A trespasser is one who enters land "without a privilege to do so." RESTATEMENT (SECOND) OF TORTS § 329 (1965).

30. Christensen v. Murphy, 678 P.2d 1210, 1214 (Or. 1984); *see also* PROSSER, *supra* note 28, at 396 ("The privilege is independent of any permission, consent or license of the occupier, and they would be privileged to enter, and would insist upon doing so, even if he made active objection.").

31. A licensee is a "person who is privileged to enter or remain on land only by virtue of the possessor's consent." RESTATEMENT (SECOND) OF TORTS § 330 (1965). An invitee is a "person who is invited to enter or remain on land," either as a member of the public or for purposes related to the landowner's business dealings. *Id.* § 332.

32. *See* Mounsey v. Ellard, 297 N.E.2d 43, 47 (Mass. 1973) ("It seems logical to contend that if the trashman and mailman can rely on the appearance of safety . . . the police officer should be afforded the same right."); *see also* PROSSER, *supra* note 28, at 396 ("Where it can be found that the public employee comes for a purpose which has some connection with business transacted on the premises by the occupier, he is almost invariably treated as an invitee.").

readers, postal workers, and building inspectors.[33] On one hand, it seems rational to impose a higher duty toward a mailman than a firefighter, since the former does not regularly encounter and is not trained to confront the risks that the latter expects on a daily basis. However, entrants are not placed into the common law categories based on the risks they assume; the concepts account solely for the purpose of an entrant's presence and her relationship to the landowner.[34] Therefore, if a firefighter belongs in any category, she should be an invitee because her presence is usually summoned for a purpose that unequivocally benefits the landowner.[35]

Premises liability is too narrow a theory to support the broad scope of the professional-rescuer's doctrine.[36] By definition, the entrants categories developed under common law do not apply outside of the landowner-entrant relationship.[37] Therefore, when a professional rescuer is injured on public property, or is injured by someone other than the landowner, a court's characterization of the rescuer as a licensee does not rationalize barring her recovery.

Finally, the abolition of the common law categories undermines premises liability as a legal framework for the professional-rescuer's doctrine.[38] In recent years, a number of state courts and the Restatement (Third) of Torts have replaced the distinction between invitees and licensees with a general standard of reasonable care.[39] Despite this movement, Arkansas

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33. PROSSER, *supra* note 28, at 396.

34. *See* RESTATEMENT (SECOND) OF TORTS §§ 329, 330, 332 (1965) (defining "trespasser," "licensee," and "invitee" based on the entrant-landowner relationship and not assumed risks).

35. *See* Dini v. Naiditch, 170 N.E.2d 881, 886 (Ill. 1960). A number of courts have categorized professional rescuers as invitees, which avoids the struggle of logically placing them in another category and reduces the likelihood of any undue favoritism toward the landowner. *See Mounsey*, 297 N.E.2d at 47-48. However, this still fails to satisfy the consent requirement for classification as an invitee.

36. *See* Flowers v. Sting Sec., Inc., 488 A.2d 523, 528 (Md. Ct. Spec. App. 1985) ("[I]t is too limited an explanation of a potentially broader legal phenomenon.").

37. *See* DOBBS, *supra* note 27, at 772 ("Even where the landowners' rules are retained, they offer no support for the firefighter's rule as applied to injuries outside the land.").

38. *See* Thomas v. Pang, 811 P.2d 821, 824 (Haw. 1991) ("[A]s distinctions among invitees, licensees and trespassers were abolished, this rationale could no longer serve as the basis for the Rule.").

39. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7(a) (2010); DOBBS, *supra* note 27, at 615-16. Even the English Parliament, the progenitor of the categories, has abandoned the distinction. *Id.* at 615.

courts still recognize the common law categories.[40] However, the Arkansas Supreme Court has never used premises liability as a basis for the professional-rescuer's doctrine, relying instead on "public policy."[41]

2. Assumption of Risk

As the premises liability rationale fell out of favor, some courts began using implied assumption of risk to justify the professional-rescuer's doctrine. Under this theory, a plaintiff who voluntarily encounters a known risk created by the defendant has implicitly consented to the risk and therefore cannot recover for any resulting injuries.[42] Applied to professional rescuers, courts use "primary assumption of risk" to say that a defendant owes no duty to a rescuer who assumes the inherent risks of her profession.[43] Primary assumption of risk applies when a plaintiff willfully participates in an activity that has certain inherent risks. By her participation, the plaintiff consents to those risks, and therefore the defendant has no duty to protect her from any injuries that might result.[44] This is not an affirmative defense; it defeats the plaintiff's prima facie case of negligence by eliminating any duty owed by the defendant.[45]

Though it may be reasonable to assume certain risks, primary assumption of risk nonetheless bars the plaintiff's recovery entirely. For example, a spectator at a baseball game primarily assumes the inherent risks associated with the sport, such as being hit by a foul ball.[46] Though it is not unreasonable to join the crowd in spite of these risks, a fan smacked by a ball will nonetheless fail to recover against the player who hit it. The player has no duty to protect the fan from the risks she primarily assumes. Similarly, this theory posits that a firefighter primarily assumes the inherent risks of fighting fires and therefore cannot recover for injuries resulting from those risks.

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40. *See* Roeder v. United States, 2014 Ark. 156, at 11 n.6, 432 S.W.3d 627, 634 n.6.

41. *See* Waggoner v. Troutman Oil Co., 320 Ark. 56, 59, 894 S.W.2d 913, 915 (1995). For a discussion on the "public policy" set forth in *Waggoner*, see Part III, *infra*.

42. *See* Rini v. Oaklawn Jockey Club, 861 F.2d 502, 504 (8th Cir. 1988); *see also* RESTATEMENT (SECOND) OF TORTS § 496A (1965) (describing assumption of risk).

43. *See* Walters v. Sloan, 571 P.2d 609, 612 (Cal. 1977) (en banc), *superseded by statute*, CAL. CIV. CODE § 1714.9 (West 2014).

44. *See Rini*, 861 F.2d at 506.

45. *See id.*

46. *See* RESTATEMENT (SECOND) OF TORTS § 496A cmt. c (1965).

While primary assumption of risk establishes that the defendant did not act negligently, secondary assumption of risk functions as an affirmative defense to a successful prima facie case of negligence.[47] Here, a plaintiff "is aware of a risk created by the negligence of the defendant and proceeds or continues voluntarily to encounter it."[48] The Eighth Circuit Court of Appeals has characterized secondary assumption of risk as either "reasonable" or "unreasonable."[49] For example, "secondary reasonable assumption of risk" encompasses such situations as the one in which a plaintiff injures himself rushing into a negligently started fire to save his infant child.[50] In this situation, the Eighth Circuit held that Arkansas law would not reduce the plaintiff's tort recovery against the person who negligently started the fire.[51] However, had the same plaintiff rushed into the fire to save his favorite hat, then the jury would assess his "secondary unreasonable assumption of risk" to determine whether comparative fault principles should reduce, but not bar, his recovery.[52]

Courts seem to have reached a consensus—if the professional-rescuer's doctrine is based on assumption of risk, then it is based on primary assumption of risk.[53] Therefore, although a firefighter is similar to the plaintiff who reasonably assumes risks in order to save life or limb, the Eighth Circuit's interpretation of Arkansas law does not apply to professional rescuers. If it did, professional rescuers would likely receive a windfall in court because their on-the-job encounters with risks are rarely unreasonable. However, the Eighth Circuit approach is unlikely to affect Arkansas's use of the professional-rescuer's doctrine, as Arkansas courts have yet to cite this decision in any meaningful way.[54]

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47. *See* 65A C.J.S. *Negligence* § 397 (West 2015).

48. *Rini*, 861 F.2d at 506.

49. *Id.*

50. *Id.*; *see also* RESTATEMENT (SECOND) OF TORTS § 496A cmt. c (1965) (providing a similar example in which an independent contractor continues to use a machine despite knowing of its dangerous condition).

51. *See Rini*, 861 F.2d at 508-09.

52. *See id.* at 506-08.

53. *See, e.g.*, Thomas v. Pang, 811 P.2d 821, 824 (Haw. 1991) ("When assumption of risk was used as the rationale for the application of the Rule, the term was used in its primary sense, meaning that the defendant owed no duty of care to the fire fighter.").

54. The same year the Eighth Circuit Court of Appeals decided the case in question, the Arkansas Supreme Court held that Arkansas courts "no longer apply the assumption of

States began abolishing assumption of risk as an independent doctrine during the 1950s.[55] This led courts that had once justified the professional-rescuer's doctrine on assumption of risk to abolish the outright bar to recovery for professional rescuers.[56] When considering primary and secondary assumption of risk separately, critics condemn the former as unnecessary and the latter as producing the wrong result.[57]

Primary assumption of risk is unnecessary because it merely encompasses principles already addressed by existing negligence concepts—that the defendant either had no duty toward the plaintiff or did not breach any duty owed.[58] Because the elements of a negligence claim are themselves adequate to bar an undeserving plaintiff from recovery, there is no need for a complicated assumption of risk analysis. Eliminating unneeded duplication better avoids confusion in an area of the law that already bewilders courts and commentators alike.[59]

Secondary assumption of risk produces poor results by allowing a negligent defendant to evade liability based on any amount of the plaintiff's fault, however small.[60] This is but a variant of the "contributory negligence" doctrine[61] abolished in most jurisdictions due to the injustice of barring recovery even when a defendant's negligence substantially outweighs that of the plaintiff.[62] In 1955, Arkansas led the nation toward resolution of this injustice by replacing its contributory

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risk doctrine, but permit the jury to compare negligence." Dawson v. Fulton, 294 Ark. 624, 627, 745 S.W.2d 617, 619 (1988).

55. *See* DOBBS, *supra* note 27, at 538.

56. *See, e.g.*, Christensen v. Murphy, 678 P.2d 1210, 1218 (Or. 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 . . . .").

57. *See generally* Fleming James, Jr., *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185 (1968) (criticizing the doctrine).

58. Blackburn v. Dorta, 348 So. 2d 287, 291 (Fla. 1977); *see also* Stephen D. Sugarman, *Assumption of Risk*, 31 VAL. U. L. REV. 833, 835 (1997) ("[W]hen we are tempted to say 'assumption of risk' we should instead say something else.").

59. *See* Rini v. Oaklawn Jockey Club, 861 F.2d 502, 504 (8th Cir. 1988) (considering assumption of risk "a frequent cause of confusion").

60. *See* Sugarman, *supra* note 58, at 835.

61. *See* White v. Ellison Realty Corp., 74 A.2d 401, 404 (N.J. 1950) ("We reach a like conclusion on the question of the plaintiff's contributory negligence or assumption of risk. These legal concepts are virtually identical . . . .").

62. *See* AARON D. TWERSKI ET AL., TORTS: CASES AND MATERIALS 482-84 (3d ed. 2012).

negligence regime with the more reasonable comparative fault doctrine.[63] Under comparative fault, a plaintiff's negligence proportionally reduces—but does not completely bar—her recovery.[64] To date, almost every jurisdiction has followed Arkansas's lead and abandoned contributory negligence in favor of comparative fault.[65]

The striking resemblance between assumption of risk and the old contributory negligence doctrine creates tension in the jurisdictions that no longer recognize contributory negligence.[66] Some states resolve this problem by abandoning assumption of risk altogether.[67] Others merge the concept with comparative fault.[68] The Arkansas General Assembly opted for the latter by including "risk assumed" in the comparative fault statute's definition of "fault."[69] Accordingly, jurors in Arkansas may consider assumption of risk to reduce recovery, but they cannot use the concept to completely bar a damage award.

3. "Public Policy"

In jurisdictions that reject both premises liability and assumption of risk, vague notions of "public policy" serve as the last line of defense for the professional-rescuer's doctrine. Policy considerations used to support the doctrine in the past have varied widely. One court sought to prevent a double burden on a defendant as both a tortfeasor and taxpayer.[70] Another wanted to avoid any possibility that fear of liability would deter the public from summoning professional rescuers in

63. 1955 Ark. Acts 191 (current version at ARK. CODE ANN. § 16-64-122 (Repl. 2005)); *see also* Robert B Leflar, *The Civil Justice Reform Act and the Empty Chair*, 2003 ARK. L. NOTES 67, 69 (2003) (noting Arkansas's progressive position on the issue).

64. *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 7 cmt. h (2010).

65. TWERSKI ET AL., *supra* note 62, at 484.

66. *See* DOBBS, *supra* note 27, at 539 ("After the advent of comparative negligence, courts found it logically or morally difficult to maintain a dual system in which the plaintiff's fault only reduced damages if it was called contributory negligence, while it barred the plaintiff entirely if it was called assumed risk.").

67. *See, e.g.*, OR. REV. STAT. ANN. § 31.620 (West 2014) (abolishing implied assumption of risk).

68. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2506(F)(2) (2015) (defining "fault" to include "assumption of risk").

69. ARK. CODE ANN. § 16-64-122(c) (Repl. 2005) ("The word 'fault' as used in this section includes any . . . risk assumed . . . which is a proximate cause of any damages sustained by any party.").

70. DOBBS, *supra* note 27, at 771.

times of need.[71] Finally, the Oregon Supreme Court has reasoned that the use of workers' compensation, salary, and fringe benefits to redress professional rescuers' injuries better spreads the risk of injury to the general public.[72]

B. The Professional-Rescuer's Doctrine in Arkansas

Though the professional-rescuer's doctrine has existed in the United States for over 100 years, no Arkansas court recognized the doctrine until 1995.[73] The Arkansas Supreme Court thus had little precedent when it expanded the doctrine to include roadside-assistance workers in *Nowicki*.

Four years before adopting the professional-rescuer's doctrine, the Arkansas Supreme Court held that a motel had a duty of reasonable care toward an off-duty constable.[74] In *Catlett v. Stewart*, Fred Stewart was having coffee at a motel restaurant when a dispute arose between an armed, drunken man and his wife.[75] Stewart intervened and was shot.[76] He later sued the motel, alleging that an employee failed to call the police after realizing the man was armed.[77] The motel argued that it owed no duty toward Stewart under the fireman's rule because Stewart had acted voluntarily in his official capacity as a law enforcement officer.[78]

Without adopting the fireman's rule, the court nonetheless engaged in a telling application of the doctrine. The court distinguished between a public safety officer's private actions and those taken "in the execution of [his] official duties."[79] An officer injured while performing official duties cannot recover because he is considered a licensee; however, he may recover for injuries resulting from other private acts.[80]

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71. Cornwell v. State Farm Mut. Auto. Ins. Co., 396 F. Supp. 2d 1020, 1028 (S.D. Iowa 2005). Dean Prosser denounced the idea that liability discourages individuals from summoning help as "preposterous rubbish." *See* KEETON ET AL., *supra* note 19, at 431.

72. *See* Christensen v. Murphy, 678 P.2d 1210, 1217 (Or. 1984).

73. *See* Waggoner v. Troutman Oil Co., 320 Ark. 56, 60, 894 S.W.2d 913, 915 (1995).

74. Catlett v. Stewart, 304 Ark. 637, 642-43, 804 S.W.2d 699, 702-03 (1991).

75. *See id.* at 641, 804 S.W.2d at 702.

76. *Id.*

77. *See id.* at 640-41, 804 S.W.2d at 701-02.

78. *Id.* at 643, 804 S.W.2d at 703.

79. *Catlett*, 304 Ark. at 643, 804 S.W.2d at 703.

80. *Id.*

The *Catlett* majority characterized Stewart's actions as private because the purpose of his visit was limited to "drinking coffee, reading a magazine, and meeting friends."[81] The court also noted that the restaurant was located outside Stewart's law enforcement jurisdiction.[82] Because the court found that Stewart intervened "entirely by humanitarian concerns," the fireman's rule, if adopted, would not have barred his recovery.[83]

Although the Arkansas Supreme Court did not adopt the professional-rescuer's doctrine in *Catlett*, the case provides a useful illustration of the distinction between official duties and private acts. Four years later, the Arkansas Supreme Court applied this distinction in *Waggoner v. Troutman Oil Co.*[84] The case arose after the driver of a pickup truck collided with an above-ground kerosene storage tank, which caused the truck to ignite.[85] Ben Waggoner, who was working at his nearby business, saw the smoke and ran to the truck to evacuate children from the area.[86] In addition to owning a small business, Waggoner also worked as a volunteer firefighter.[87] As he subdued the flames with a hose from a fire truck, the tank exploded, leaving Waggoner with third-degree burns over much of his body.[88]

Waggoner then sued the pickup truck driver, the storage tank owner, and the kerosene supplier.[89] A trial court dismissed his complaint, and the Arkansas Supreme Court affirmed, thus formally adopting the professional-rescuer's doctrine.[90] The court stated that Waggoner could not recover "for the very valid public policy reason that the party or parties who negligently started the fire had no legal duty to protect the firefighter from the very danger that the firefighter was employed to confront."[91]

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81. *Id.* The majority omitted some unfavorable facts from its opinion. At trial, Stewart testified that "he felt a duty to act as a police officer to prevent violence" and that he yelled "[p]olice officer, drop your gun" before the armed man shot him. *Id.* at 646, 804 S.W.2d at 704 (Brown, J., dissenting) (internal quotation marks omitted).

82. *Id.* at 643, 804 S.W.2d at 703 (majority opinion).

83. *Id.*

84. 320 Ark. 56, 894 S.W.2d 913 (1995).

85. *Id.* at 57-58, 894 S.W.2d at 914.

86. *Id.*

87. *Id.* at 57, 894 S.W.2d at 914.

88. *Id.* at 58, 894 S.W.2d at 914.

89. *Waggoner*, 320 Ark. at 58, 894 S.W.2d at 914.

90. *See id.* at 58-60, 894 S.W.2d at 914-15.

91. *Id.* at 60, 894 S.W.2d at 915.

As in *Catlett*, the *Waggoner* court also distinguished between a professional rescuer's official duties and his private acts.[92] Though Waggoner had volunteer firefighting experience, he was working at his privately owned business on the day of the accident.[93] Thus, pure happenstance accounted for Waggoner's involvement. Like Fred Stewart, Waggoner acted solely out of humanitarian concern. Nevertheless, the court found that Waggoner acted officially as a volunteer firefighter, and the professional-rescuer's doctrine barred his recovery.[94]

Just two years after deciding *Waggoner*, the Arkansas Supreme Court was asked to broaden the doctrine's scope. In *Ouachita Wilderness Institute v. Mergen*,[95] an outdoor instructor at a juvenile rehabilitation camp sued the camp after two juvenile offenders stole his truck and crashed it during a high-speed police chase.[96] A jury returned a verdict in favor of the instructor.[97] On appeal, the camp argued that the professional-rescuer's doctrine barred the instructor's recovery because the risk of property damage was one that the instructor had a duty to accept by virtue of his occupation.[98] The Arkansas Supreme Court rejected this argument because the camp had not raised it at trial.[99] Nonetheless, the court acknowledged that the camp's argument "may have merit,"[100] which signals that the court may have applied the professional-rescuer's doctrine to the camp instructor had the defense not been waived.

The Arkansas Supreme Court did not revisit the professional-rescuer's doctrine until 2013, when it dramatically expanded the doctrine to include roadside-assistance workers in *Nowicki*. Through two cases decided eighteen years apart, the Arkansas Supreme Court created a doctrine that categorically bars recovery for volunteers and a loosely defined class of "professionals."

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92. *Id.* at 59, 894 S.W.2d at 915.
93. *Id.* at 57, 894 S.W.2d at 914.
94. *See Waggoner*, 320 Ark. at 61-62, 894 S.W.2d at 916.
95. 329 Ark. 405, 947 S.W.2d 780 (1997).
96. *Id.* at 411, 947 S.W.2d at 783.
97. *See id.*
98. *Id.* at 413, 947 S.W.2d at 784.
99. *Id.*
100. *Ouachita Wilderness Inst.*, 329 Ark. at 413, 947 S.W.2d at 784.

III. DUTY PRINCIPLES AND THE PROFESSIONAL-RESCUER'S DOCTRINE

To win a negligence case, a plaintiff must first establish that the defendant owed her a duty of care.[101] The judge, never a jury, decides this question as a matter of law.[102] Under any of the traditional approaches, a negligent actor has a duty toward a professional rescuer whose injuries are foreseeable.[103] To avoid this result, the Arkansas Supreme Court has relied on a countervailing "public policy" that there should be no duty "to protect the [professional rescuer] from the very danger that [she] was employed to confront."[104] Therefore, "public policy" bars a plaintiff's recovery based on her voluntary participation in an inherently risky activity. This mirrors primary assumption of risk, a doctrine unequivocally abolished by the Arkansas General Assembly in the state's comparative fault statute.[105]

A. Approaches to Duty

Foreseeability divides the world of duty in two. This is apparent in the majority and dissenting opinions in *Palsgraf v. Long Island Railway Co.*,[106] as well as in the Restatements of Torts. In *Palsgraf*, Justice Cardozo, then sitting on the New York Court of Appeals, wrote for a majority that limited a negligent actor's duty to only those individuals whose injuries were foreseeable.[107] The Restatement (Second) adopted this approach—it states that an actor is not liable to an injured person if "the actor could not reasonably have anticipated injury."[108] Thus, both the *Palsgraf* majority and the Restatement (Second) defined duty based on the foreseeability of injury to a particular person.

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101. 1 HOWARD W. BRILL & CHRISTIAN H. BRILL, ARKANSAS PRACTICE SERIES: LAW OF DAMAGES 735 (6th ed. 2014).

102. *Id.*

103. These approaches are discussed in Part III.A., *infra*.

104. *See* Waggoner v. Troutman Oil Co., 320 Ark. 56, 60, 894 S.W.2d 913, 915 (1995).

105. *See* ARK. CODE ANN. § 16-64-122 (Repl. 2005).

106. 162 N.E. 99 (N.Y. 1928).

107. *Id.* at 100 ("The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension.").

108. RESTATEMENT (SECOND) OF TORTS § 281 cmt. c (1965).

In his dissenting opinion in *Palsgraf*, however, Judge Andrews favored a duty of reasonable care to every member of society, regardless of whether the injury is foreseeable.[109] The drafters of the Restatement (Third) endorsed the Andrews approach.[110] Under this rule, the trier of fact should consider foreseeability only to determine whether a defendant's acts proximately caused the plaintiff's injury.[111] Specifically, proximate cause may be established by tracing the injury to the defendant's conduct in "a natural and continuous sequence."[112] Arkansas courts follow this approach, as judges are to instruct jurors that "proximate cause" means "a cause which, in a natural and continuous sequence, produces damage and without which the damage would not have occurred."[113]

Justice Cardozo also once famously proclaimed that "[d]anger invites rescue" in a case that held a railroad liable not only to the direct victims of its negligence, but also to their rescuers.[114] Although the case involved a Good Samaritan and not a professional rescuer,[115] the foreseeability analysis does not change. In fact, a professional rescuer is more foreseeable than a Good Samaritan because her presence is not only anticipated, but mandated in the event of an emergency.[116] Thus, under the

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109. *See Palsgraf*, 162 N.E. at 103 (Andrews, J., dissenting) ("Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others.").

110. RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 7(a) (2010) ("An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.").

111. *See Palsgraf*, 162 N.E. at 104. The Restatement (Third) eschews the term "proximate cause," and instead states that "[a]n actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious." RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 29 (2010).

112. *See Palsgraf*, 162 N.E. at 104.

113. ARKANSAS MODEL JURY INSTRUCTIONS—CIVIL 501 (2014); *see also* Regions Bank & Trust v. Stone Cnty. Skilled Nursing Facility, Inc., 345 Ark. 555, 568, 49 S.W.3d 107, 116 (2001) ("In Arkansas, negligence is a proximate cause of an injury only if the injury is the natural and probable consequence of the negligent act . . . ."). The Arkansas Supreme Court has also applied the Cardozo approach, although the court has never explicitly stated that foreseeability is required for duty to exist. *See, e.g.*, Dunn v. Brimer, 259 Ark. 855, 856, 537 S.W.2d 164, 166 (1976) (holding the defendant owed a duty to the plaintiff because the plaintiff's injury "was to be expected").

114. Wagner v. Int'l Ry., 133 N.E. 437, 438 (N.Y. 1921).

115. *See id.* at 437.

116. *See* TWERSKI ET AL., *supra* note 62, at 135-37. Justice Cardozo did not consider a rescuer's conscious decision to help others—as opposed to an instinctive reaction to the emergency—to be of any significance in determining liability. *See Wagner*, 133 N.E. at

Cardozo approach, negligent actors have a duty toward professional rescuers because their injuries are foreseeable. Under the Andrews approach, wrongdoers have a duty toward "the world at large," with no exception for professional rescuers.

B. Countervailing Considerations Leading to No-Duty Determinations

1. The "Inherent Risk Policy"

While *Palsgraf* provided a useful framework for judges to determine duty, neither the majority nor the dissent created a bright-line rule. Under either approach, meaningful policy considerations may compel a lack of duty. The Restatement (Third), for example, allows the general duty of reasonable care to be displaced or modified if "an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases."[117] Courts have used these "principles or policies" to insulate social hosts who serve alcohol to their guests from liability[118] and to limit the duty of certain medical professionals to customary practice rather than reasonable care.[119]

In *Waggoner*, the Arkansas Supreme Court displaced the duty owed to professional rescuers with the policy that an individual who negligently creates danger should not be required "to protect the [professional rescuer] from the very danger that [she] was employed to confront."[120] This "policy" uses the risks inherent to an occupation to determine that, by joining that occupation, the employee "engage[s] to encounter" risks and therefore cannot complain of negligence in the creation of those risks.[121]

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438 ("[C]ontinuity between the commission of the wrong and the effort to avert its consequences . . . . is not broken by the exercise of volition.").

117. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 7(b) (2010).

118. *See* Ferreira v. Strack, 652 A.2d 965, 968 (R.I. 1995) (refusing to impose a duty on social hosts who serve alcohol to guests based in part on "issues of social policy").

119. United Blood Servs. v. Quintana, 827 P.2d 509, 519 (Colo. 1992) (en banc) (limiting the duty of "those practicing a profession involving specialized knowledge or skill" to the exercise of "care in a manner consistent with the knowledge and ability possessed by members of the profession in good standing").

120. Waggoner v. Troutman Oil Co., 320 Ark. 56, 60, 894 S.W.2d 913, 915 (1995).

121. *Id.* at 59, 894 S.W.2d at 915.

Not coincidentally, *Waggoner*'s "public policy" essentially replicated the language used by other courts to find no duty based on primary assumption of risk. The New Jersey Supreme Court, for example, once held that assumption of risk barred a firefighter's claim because there was no duty to protect a firefighter from "negligence in the creation of the very occasion for his engagement."[122] The Oregon Supreme Court relied on this New Jersey decision when it used assumption of risk to adopt the professional-rescuer's doctrine.[123] There is no meaningful difference between this language and *Waggoner*'s "inherent risk policy"—both used the inherent dangers of a rescuer's profession to displace the defendant's duty.

The inherent risk policy implicitly contradicts Arkansas's comparative fault statute because it categorically bars a plaintiff from tort recovery based on risks she assumes by joining a dangerous profession. To avoid this problem, a proper rule of law would allow a jury to determine which risks were assumed and whether recovery should be reduced on a case-by-case basis.[124] However, Arkansas's comparative fault statute already adequately imposes this rule.[125] Therefore, the professional-rescuer's doctrine in its current form contradicts Arkansas law and, if modified, would unnecessarily duplicate the state's existing comparative fault statute.

When faced with this problem, the Oregon Supreme Court abandoned the professional-rescuer's doctrine.[126] After the Oregon State Legislature statutorily abolished implied assumption of risk in 1975, a plaintiff's voluntary encounter with risks became a factor that could reduce, but not automatically bar, her recovery.[127] In 1984, the Oregon Supreme Court was asked to expand the professional-rescuer's doctrine—which at that time only applied to firefighters—to

122. Krauth v. Geller, 157 A.2d 129, 131 (N.J. 1960), *superseded by statute*, N.J. STAT. ANN. § 2A:62A-21 (West 2015).

123. *See* Spencer v. B.P. John Furniture Corp., 467 P.2d 429, 430 (Or. 1970) (en banc), *overruled by* Christensen v. Murphy, 678 P.2d 1210 (Or. 1984).

124. However, if a jury determines that a professional rescuer assumed the majority of the risks that caused her injury, then the rescuer will not recover any damages. *See* ARK. CODE ANN. 16-64-122(b)(2) (Repl. 2005).

125. *See* ARK. CODE ANN. 16-64-122.

126. *See Christensen*, 678 P.2d at 1218.

127. Blair v. Mt. Hood Meadows Dev. Corp., 630 P.2d 827, 832 (Or. 1981) ("The same facts which formerly were analyzed utilizing the doctrine of assumption of risk may nevertheless continue to be relevant in reducing or eliminating recovery for negligence.").

prevent a police officer from recovery.[128] The court refused and instead abolished the doctrine due to its inconsistency with the state's comparative fault system.[129] The court stated that comparative fault "cannot be circumvented by restating as an absence of duty what was previously implied assumption of the risk."[130] However, assumption of risk remains an independent doctrine that bars recovery in the states relied upon by the Arkansas Supreme Court in *Waggoner*.[131]

2. The Inherent Risk Policy Applied to Volunteers

The inherent risk policy is especially perplexing when applied to a volunteer rescuer, such as in *Waggoner*. First, as part of its determination that no duty was owed to a volunteer firefighter, the *Waggoner* court stated that firefighters "are hired, trained, and compensated to deal with dangerous situations."[132] This rationale provides little support for barring a volunteer's recovery because volunteers are unpaid and receive less training than their professional counterparts.

Second, it is inconsistent to immunize a negligent actor from liability to an injured volunteer firefighter while also holding that actor liable for the costs of the volunteer fire department's services. Arkansas law allows a volunteer fire department to recoup the cost of its services from an uninsured property owner who negligently starts a fire.[133] A volunteer fire department may also receive attorney's fees if it sues to enforce its claim.[134] With both life and property at stake, it is unfair to protect a volunteer fire department's monetary expenses while ignoring the volunteer who sacrifices herself to provide the service.

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128. *Christensen*, 678 P.2d at 1213.

129. *See id.* at 1217.

130. *Id.*

131. *See* Yoneda v. Tom, 133 P.3d 796, 808-09 (Haw. 2006); Munson v. Bishop Clarkson Mem'l Hosp., 186 N.W.2d 492, 494 (Neb. 1971). The *Waggoner* court relied heavily on decisions from Nebraska and Hawaii, calling cases from those two states as among "the most persuasive decisions" that recognized the professional-rescuer's doctrine. *See* Waggoner v. Troutman Oil Co., 320 Ark. 56, 59, 894 S.W.2d 913, 915 (1995).

132. *See Waggoner*, 320 Ark. at 59-60, 894 S.W.2d at 915 (quoting Thomas v. Pang, 811 P.2d 821, 825 (Haw. 1991)).

133. *See* ARK. CODE ANN. § 20-22-904 (Repl. 2014).

134. *See* ARK. CODE ANN. § 20-22-906 (Repl. 2014).

IV. OTHER TORT PRINCIPLES AND THE PROFESSIONAL-RESCUER'S DOCTRINE

The expansion of the professional-rescuer's doctrine in *Nowicki* defied the abolition or limitation of the doctrine in many other states.[135] Two decades ago, almost half of the states had adopted the rule, and only three had rejected it.[136] Today, at least ten states have since statutorily abolished the rule or narrowed its scope.[137] Other courts have demonstrated their disapproval of the doctrine.[138] Against this backdrop, the professional-rescuer's doctrine obstructs tort law's goals of redressing injuries and deterring negligence, and the rule undermines adequate tort principles that would otherwise govern rescuers' claims.

A. Tort Recovery for On-the-Job Injuries

Arkansas law explicitly recognizes an employee's right to recover against a negligent third party for an on-the-job injury without distinguishing between occupations.[139] The inherent risk policy that underlies the professional-rescuer's doctrine in

135. *See* Heidt, *supra* note 19, at 745 ("[A]nother common law limit on liability being swept away is the fireman's rule.").

136. *See Waggoner*, 320 Ark. at 58, 894 S.W.2d at 914.

137. Heidt, *supra* note 19, at 746 n.3. For statutes abolishing the doctrine, see FLA. STAT. ANN. § 112.182(1) (West 2014); MASS. GEN. LAWS ANN. ch. 41, § 111F (West 2014); MICH. COMP. LAWS ANN. § 600.2965 (West 2014); MINN. STAT. ANN. § 604.06 (West 2015); N.J. STAT. ANN. § 2A:62A-21 (West 2015); N.Y. GEN. OBLIG. LAW § 11-106 (McKinney 2015). For statutes limiting the application of the doctrine, see CAL. CIV. CODE § 1714.9(a)(2) (West 2014) (allowing police officers and firefighters to recover in certain situations); NEV. REV. STAT. ANN. § 41.139 (West 2014) (allowing action for negligence that occurs after the officer or firefighter has arrived at the scene); N.Y. GEN. MUN. LAW § 205-a(1) (McKinney 2015) (providing additional right of action to firefighters); VA. CODE ANN. § 8.01-226 (West 2014) (imposing a duty of reasonable care toward police officers and firefighters on owners of premises normally open to the public).

138. *See* Orth v. Cole, 955 P.2d 47, 49 (Ariz. Ct. App. 1998) (holding the doctrine only applies where a firefighter is injured during "'the emergency conditions of a fire or some similar exigency'" (quoting Labric v. Pace Membership Warehouse, Inc., 678 A.2d 867, 872 (R.I. 1996))); Banyai v. Arruda, 799 P.2d 441, 443 (Colo. App. 1990) (refusing to adopt the doctrine); Melton v. Crane Rental Co., 742 A.2d 875, 879 (D.C. 1999) (limiting the doctrine); Hopkins v. Medeiros, 724 N.E.2d 336, 343 (Mass. App. Ct. 2000) (stating that the doctrine had "no continuing vitality"); Ruiz v. Mero, 917 A.2d 239, 240 (N.J. 2007) (noting statute abrogated continued application of the doctrine); Christensen v. Murphy, 678 P.2d 1210, 1218 (Or. 1984) (abolishing the doctrine); Mull v. Kerstetter, 540 A.2d 951, 952 (Pa. Super. Ct. 1988) (refusing to adopt the doctrine); Minnich v. Med-Waste, Inc., 564 S.E.2d 98, 103 (S.C. 2002) (refusing to adopt the doctrine).

139. *See* ARK. CODE ANN. § 11-9-410 (Repl. 2012).

Arkansas therefore proves more than it provides. Under the policy, an employee cannot recover in tort for injuries that result from the normal risks of her job—risks she is paid to encounter. If this were true, then every employee who suffers an injury attributable to a normal part of her job could not sue the tortfeasor who negligently caused her injury. Arkansas courts, however, regularly allow employees whose jobs involve risks to recover for work-related injuries against negligent third parties.[140] By refusing the statutory remedies received by other employees, the doctrine unfairly treats professional rescuers as "second-class" citizens.[141]

In addition to the inherent risk policy, the *Waggoner* court used the volunteer firefighter's receipt of workers' compensation as a basis to bar his tort claim.[142] This was misguided. Under the Arkansas Workers' Compensation Act, receipt of workers' compensation "shall not affect the right of the employee, or his or her dependents, to make a claim or maintain an action in court against any third party for the injury."[143] Moreover, when an employee receives workers' compensation, her employer is entitled to a portion of any civil damages recovered by the employee against the negligent third party.[144] Accordingly, if a professional rescuer can recover against a negligent third party, then the state could regain the money it paid the employee through the workers' compensation fund. By preventing recovery, however, the professional-rescuer's doctrine "eliminate[s] the possibility that the [state] w[ill] recoup any of the monies it has paid in compensation."[145]

140. *See* King v. Cardin, 229 Ark. 929, 934, 319 S.W.2d 214, 218 (1959) (allowing the estate of a highway worker killed by a dump truck to recover against a co-worker who negligently operated the truck); Johnson v. Ark. Steel Erectors, 2009 Ark. App. 755, at 3, 9, 350 S.W.3d 801, 802, 806 (holding construction worker could recover against lessor of a crane that fell on him during work).

141. *See* Walters v. Sloan, 571 P.2d 609, 615 (Cal. 1977) (Tobriner, C.J., dissenting) (internal quotation marks omitted).

142. *See* Waggoner v. Troutman Oil Co., 320 Ark. 56, 61, 894 S.W.2d 913, 916 (1995). A volunteer firefighter in Arkansas is entitled to "minimum compensation" for any on-the-job injuries. ARK. CODE ANN. § 20-22-829(a) (Repl. 2014).

143. ARK. CODE ANN. § 11-9-410(a)(1)(A) (Repl. 2012).

144. *See* ARK. CODE ANN. § 11-9-410(a)(2).

145. DOBBS, *supra* note 27, at 771.

B. Tort Recovery for Rescues

Because "danger invites rescue," Arkansas law permits a citizen injured while rescuing another from negligently created danger to sue for damages.[146] States have allowed recovery under the rescue doctrine in a variety of circumstances, including products liability actions,[147] cases in which the defendant endangered only herself,[148] lawsuits in which the rescue occurred several hours after the negligence,[149] and even where the rescue involved only personal property.[150] Moreover, under Arkansas's Good Samaritan statute, an individual is not liable for her own negligence when attempting a rescue in good faith.[151]

By definition, a professional rescuer is better equipped to confront danger than a Good Samaritan. The law should not exclude a trained and experienced safety officer from protection while encouraging everyone else to spontaneously provide emergency assistance. Rather, the law should protect an individual with high social utility—such as a firefighter or police officer—at the expense of a tortfeasor whose unreasonable conduct put others at risk.

V. CONCLUSION

The abolition or limitation of the professional-rescuer's doctrine in many states weighs heavily against the Arkansas Supreme Court's drastic expansion of the doctrine in *Nowicki*. To be sure, it is not inherently suspect for a state's law to differ from jurisdictional trends. However, states with laws similar to Arkansas have thoroughly analyzed the professional-rescuer's doctrine and called it baseless in both law and policy. It is

146. *See* Price v. Watkins, 283 Ark. 502, 503-04, 678 S.W.2d 762, 763 (1984); Woodruff Elec. Coop. v. Weis Butane Gas Co., 225 Ark. 114, 115-16, 279 S.W.2d 564, 565 (1955); Mo. Pac. R.R. v. Cunningham, 214 Ark. 468, 471-72, 217 S.W.2d 240, 241-42 (1949).

147. *See* Williams v. Foster, 666 N.E.2d 678, 682 (Ill. App. Ct. 1996).

148. *See* Stone's Indep. Oil Distribs. v. Bailey, 176 S.E.2d 613, 619 (Ga. Ct. App. 1970); Brugh v. Bigelow, 16 N.W.2d 668, 671 (Mich. 1944).

149. *See* Parks v. Starks, 70 N.W.2d 805, 806-08 (Mich. 1955).

150. Caldwell v. Ford Motor Co., 619 S.W.2d 534, 536, 544 (Tenn. Ct. App. 1981) (allowing a plaintiff to recover for injuries sustained after jumping into a fire to retrieve his building materials). For other cases allowing recovery under the rescue doctrine, see KEETON ET AL., *supra* note 19, at 308.

151. *See* ARK. CODE ANN. § 17-95-101(b) (Repl. 2010).

therefore questionable for Arkansas to maintain its robust version of the doctrine without further consideration.

Basic tort principles provide a fully adequate framework to resolve a rescuer's claim, which shows that the professional-rescuer's doctrine represents an unwarranted restriction on the goals of tort law. These principles include proximate causation, comparative fault, the right of an employee to recover against third parties for on-the-job injuries, and the rescue doctrine. Moreover, the doctrine undermines Arkansas's comparative fault statute because it bars recovery based on the inherent risks of the plaintiff's activity, instead of reducing recovery as required by statute. To comply with existing law, a court presiding over a negligence suit involving a professional rescuer should instruct the jury to consider the risks that the rescuer assumed during the fault assessment.[152]

In a proper case, the Arkansas Supreme Court should overturn both *Waggoner* and *Nowicki*. However, a more efficient solution exists. With simple legislation, the Arkansas General Assembly could supersede these cases and abolish the doctrine altogether. Because Arkansas does not have a robust body of case law on the professional-rescuer's doctrine, complex statutory language is unnecessary. The Michigan Legislature, for example, abolished the doctrine with a statute that states as follows: "The common law doctrine that precludes a firefighter or police officer from recovering damages for injuries arising from the normal, inherent, and foreseeable risks of his or her profession is abolished."[153] The Arkansas General Assembly should use similar language and also include "all public safety employees," rather than just police officers and firefighters. These modifications will bring Arkansas tort law in line with fundamental principles and restore protection to people like Ben Waggoner, Robert Nowicki, and other public servants who deserve redress in Arkansas courts.

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152. Arkansas's comparative fault statute already mandates this application. *See* ARK. CODE ANN. 16-64-122 (Supp. 2013).

153. MICH. COMP. LAWS ANN. § 600.2965 (West 2015).