

IN THE SUPREME COURT OF OHIO

08-0534

RICKY M. TORCHIK,

Appellant,

vs.

JEFFREY M. J. BOYCE, et al.,

Appellee.

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On Appeal from the Ross County
Court of Appeals, Fourth Appellate
District Court of Appeals

Court of Appeals
Case No. 06 CA 002921

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT RICKY M. TORCHIK

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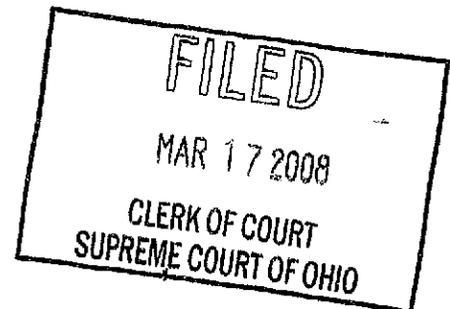


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**EXPLANATION OF WHY A SUBSTANTIAL CONSTITUTIONAL QUESTION
IS INVOLVED AND WHY THIS CASE IS A CASE OF PUBLIC OR GREAT
GENERAL INTEREST**

There is no more fundamental constitutional right for the injured than a right to a remedy. Appellant Ricky M. Torchik (“Appellant”) sustained damages which are uncompensated by the Workers’ Compensation system and are a substantial fundamental right. Appellant sustained physical pain, anxiety, mental distress, loss of enjoyment of life, inability to perform everyday activities and physical impairment. Those damages are left uncompensated by the current Workers’ Compensation system and Appellant has been denied a fundamental right seeking redress for those damages.

This case presents an issue of great public and/or general interest because any time immunity is granted to a wrongdoer who subsequently is not responsible for the damages they create that cost, as in this case, is shifted to all Ohioans in the form of higher costs and taxes. As a society, we value our first responders who already shoulder significant risk for the benefit of the common good. Anytime a court expands that risk, at the expense of the public, it is of public interest.

STATEMENT OF THE CASE

Appellant was injured on February 4, 2003. Appellant timely filed a Complaint against Jeffrey M. J. Boyce (hereinafter “Boyce”) and Appellee Daniel Heskett (hereinafter Appellee), asserting personal injury. Both Boyce and Appellee filed Motions for Summary Judgment asserting they were entitled to judgment as a matter of law. The trial court granted Boyce’s and Appellee’s Motions for Summary Judgment on August 11, 2006.

Appellant timely filed his Notice of Appeal with the Fourth Appellate District Court on September 7, 2006. Appellant originally appealed both the trial court’s decision as to Boyce and Appellee. Appellant withdrew his Appeal regarding Boyce and appealed the decision as to Appellee only.

On February 1, 2008, the Fourth Appellate District issued its Decision and Judgment Entry overruling Appellant’s appeal and affirming the trial court’s decision of granting Appellee’s Motion for Summary Judgment.

STATEMENT OF FACTS

On February 4, 2003, Appellant was acting in the course and scope of his employment as a Deputy Sheriff with the Ross County Sheriff's Department when he was injured. Appellant was dispatched to the property owned by Boyce, located at 213 Sulfer Spring Road, Chillicothe, Ohio. Appellant went to the property to investigate a burglar alarm.

Appellant had been to this property on previous occasions due to the unexplained tripping of the burglar alarm. While on the premises, Appellant checked the doors and windows in front of the home and then went to the rear of the premises to check the back door. In order to gain access to the back door, Appellant had to go up a set of stairs to a deck which led to the rear entrance of the premises.

After concluding his checks on the property, Appellant was exiting toward the way he came, when he attempted to descend down a set of stairs which collapsed underneath him.

As a result of the collapse, Appellant sustained serious permanent injuries to his knees and other parts of his body, incurring medical expenses, wage loss, impaired earning capacity, and other general damages recognized under Ohio law. Specifically, Appellant suffered physical pain, anxiety, mental distress, loss of enjoyment of life, inability to perform everyday activities, and physical impairment. These are items of general damages recognized under Ohio law, that are not compensated under Ohio's Workers' Compensation system.

Boyce purchased the land and built the house on it to completion in October 2000. Boyce had contracted with Appellee to build the home, construct the deck, and to construct the steps to the

deck. The deck steps were built without handrails and the baseboard of the deck was not attached to the ground, so it raised and lowered when the ground would freeze and thaw.

It was alleged before the trial court that the steps were negligently designed and constructed.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law: The public policy considerations which justify immunity to private property owners or occupants for their negligence when firefighters and police officers enter the property, under authority of law(The Fireman's Rule), does not extend to unrelated negligence of independent contractors who create hazards on private property.

The trial court granted Appellees' Motion for Summary Judgment applying the benefit of immunities obtained within the Fireman's Rule to third party independent contractors. The trial court stated that if Appellee's negligence was the sole issue in the case, there was a genuine issue of material fact concerning the negligence of Appellee and would overrule the Appellee's Motion. However, Appellee asserted that the Fireman's Rule should govern liability to the third party independent contractor.

The trial court acknowledged it could find no Ohio case that applied the Fireman's Rule beyond the traditional application of property owners or occupiers, but nonetheless applied the immunity doctrine to the benefit of Appellee, a non-property owner/third party contractor. Furthermore, neither the trial court nor the affirming Appellate Court gave any justification for expanding this immunity doctrine except to say that no case law appears to prohibit it. Therefore, this is a case of first impression in Ohio.

The Fireman's Rule is a special limited duty rule that insulates a property owner or occupier from negligence claims of firefighters or police officers unless the homeowner's or occupier's conduct fits certain exceptions to immunity. The policy justification for the rule generally addresses the unfairness of imposing liability upon a property owner or occupier for injury when the firefighter or police officer entered upon the property, without invitation, or notice to conduct official business. Further, the property owner or occupier is not in a position to anticipate an emergency they could not protect themselves or insure the safety of the premises.

Neither the trial court nor the Appellate Court could find any support in the case law to expand this immunity doctrine beyond its traditional application and they did not provide any rational basis or explanation as to why an independent contractor ought to be immune for their negligent acts based upon any public policy consideration.

The Appellate Court, echoing the rationale of the trial court, stated as follows:

In the case at bar, we agree with the trial court's conclusion that an independent contractor who performed work upon private property may invoke the fireman's rule to bar an injured public safety officer's negligence claim. Although Ohio courts traditionally have applied the rule in the landowner context, nothing in the cases suggests that the rule is limited to the land owner context.

(Appellate Court's Decision and Judgment Entry, p. 11.)

While the trial court discussed rationale that police officers and firefighters assume the risk of encountering unexpected hazards and that this type of loss is better compensated through the Workers' Compensation system rather than through a civil action, neither the Appellate Courts or the trial court gave any policy discussion as to why the negligence of the independent contractor should be forgiven when their negligence happens to injure a first responder to an emergency.

This Court last addressed the Fireman's Rule and the public policy behind the rule in Hack v. Gillespie (1995), 74 Ohio St.3d 362. In Hack, this Court was being asked to abolish the rule. In the instant case, Appellant is simply seeking a ruling that the doctrine not be expanded without justification.

This Court in Hack laid out the public policy considerations supporting the Fireman's Rule. Addressing those justifications, this Court discussed three identifiable policies supporting the rule, as follows:

As can be gleaned, this court's holding in *Scheurer* is based on certain legal theories and various public policy concerns. First, fire fighters and police officers can enter the premises of a private property owner or occupant under authority of law. Hence, fire fighters and police officers can be distinguished from ordinary invitees. *Id.*, 175 Ohio St. at 168-169, 23 O.O.2d at 456, 192 N.E. 2d at 41-42. Second, because a landowner or occupier can rarely anticipate the presence of safety officers on the premises, the burdens placed on possessors of property would be too great if fire fighters and police officers were classified, in all instances, as invitees to whom a duty of reasonable care is owed. *Id.*, 175 Ohio St. at 170, 23 O.O.2d at 457-458, 192 N.E. 2d at 43. Third, the rule has been deemed to be justified based on a cost-spreading rationale through Ohio's workers' compensation laws. In this regard, this court has recognized that all citizens share the benefits provided by fire fighters and police officers and, therefore, citizens should also share the burden if a fire fighter or police officer is injured on the job. *Id.*, 175 Ohio St. at 170-71, 23 O.O. 2d at 457, 192 N.E.2d at 43.

Id. at 367.

In *Hack*, this Court re-examined the public policy issues surrounding its continued support of the Fireman's Rule. In examining this Court's prior policy justification for the rule, the focus is clearly on the unfairness to a premises owner or occupier who may incur liability because of a policeman or fireman entering the premises for purposes of doing public business.

The early justifications for the rule stem from immunizing the premises owner or property owner from liability, specifically, if they started or caused a fire which brought the firefighter to the premises. Over time various jurisdictions have expanded the scope to defects and hidden hazards on the property.

There is no public policy consideration served by granting immunity to a non property owner. The lack of justification for expanding the rule serve as a warning. Those justifications for the Fireman's Rule do not apply to a third party contractor. The contractor's duty, "standard of care", is set at the time the work is being performed. Specifically, in this case, a contractor would be

expected to construct steps suitable for their foreseeable and intended purpose.

As long as the use of the steps is foreseeable, then the contractor's duty, constructing the steps sufficient to hold the weight of a person and provide a handrail, is set at the time the work is being performed. The duty should be the same at the time whether the person is a next door neighbor or a police officer using the steps.

Unlike the property owner who cannot anticipate an emergency, or the condition of the premises during the emergency, the contractor does not face this uncertainty, and so the justification for immunity does not exist.

In fact, when the trial court attempted to apply the criteria for the Fireman's Rule to the third party contractor, it became nonsensical. For example, in trying to apply the Fireman's Rule to the Appellee in his independent contractor status, the trial court stated the following:

In the case at bar, there is no evidence that Heskett was on the premises when officer Torchik was injured. Further, no evidence shows Heskett was aware of Torchik's presence on the premises. Therefore, the Court finds that as a matter of law, no affirmative act of negligence on Heskett's part of any willful or wanton misconduct.

(trial court Decision and Entry, pp. 6-7.)

It is clear that the trial court's effort to apply the exceptions of the Fireman's Rule to the independent contractor makes no logical connection to the analysis of past cases. When trying to justify the rule relating to property owners or occupiers, it was relevant as to whether or not the premises owner was on the property at the time of the fireman's or officer's visit. That notice to the premises owner of the presence of the police officer was relevant in terms of giving the property owner an opportunity to warn of hazards. These discussions make no sense when discussing why a third party contractor, who would not be expected to be on the premises once his work was completed, would somehow be immune from liability simply because the contractor was not at the

property at the time that the police officer was injured.

Appellant asserts that when analyzing this Court's and other courts' discussion of public policy concerns supporting the adoption of the Fireman's Rule, some of those discussions are policy justifications versus policy rationalizations. For example, when we look at the need for an immunity rule, the policy justifications stem from the unfairness to the premises or property owner for incurring liability if their negligence caused a fire or other hazard to fire and police. It was out of the concern that people would not call in fire and police alarms for the fear of being sued that the rule was born.

Many courts have come up with other rationalizations for the fireman's rule which really do not focus on the unfairness to the premises or property owner, but justify the rule because of other avenues of recovery for the police officer and fireman. Specifically, as discussed in Hack, courts have also taken into consideration that firefighters may assume certain risks in their profession or that there is another available source of compensation, through the Workers' Compensation system.

Appellants assert that rationalizations should be distinguished from justifications in that the focus of expanding this rule should look to the benefit or detriment of the person who is gaining the immunity versus the fireman or policeman who are giving up the immunity. Said another way, the question before this Court is whether or not we should expand these immunities to a non-property owner, non-occupier, independent contractor. In analyzing this narrow question of expanding the immunity doctrine, we should only look to the policy justifications and whether or not they fit the independent contractor.

The concerns that the independent contractor who may have caused a hazard on the premises might not call fire or police because of their conduct does not fit. All of the public policy concerns

about failing to report fires or crimes because of risk of being sued do not fit. The consideration that property owners do not invite firemen and policemen upon the property or have notice of when an emergency may arise and cannot be insurers of the premises 24/7 does not fit. The independent contractor's duties are fixed at the time the work is being performed. In effect, the independent contractor is providing a product which must be fit for its intended purpose. There is no justification for the Fireman's Rule to be applied to the independent contractor who creates a hazard on private property. It is important to note that many states have adopted the Fireman's Rule. The remainder have either abolished the common law rule by case law or statute.¹ Many jurisdictions have moved toward a trend of restricting or eliminating the Fireman's Rule.

In a case very similar to the instant case, the Supreme Court of Iowa refused to expand the rule to contractors in Rennenger v. Pace Setter Co. aka Pace Setter Company, Inc., 558 N. W. 2d 419 (1997). In Rennenger, a firefighter sued a contractor involved in a renovation of an apartment building for injuries sustained when he fell from an unguarded and un-railed deck area of a building while fighting a fire. The District Court of Poke County granted Summary Judgment for the contractor on the basis of the firefighter's rule. The Court of Appeals reversed and the contractor and appealed. In reversing the trial court and affirming the appellate court, the Supreme Court of Iowa held that a contractor was not protected by the firefighter's rule since the alleged negligent acts

¹ States that have abolished or declined to adopt the rule by court decision include the following:

1. Colorado, Wills v. Bath Excavating & Constr. Co., 829 P.2d 405 (Colo. Ct. App. 1991)
2. South Carolina, Trousdell v. Cannon, 572 S.E. 2d 264 (2002)
3. Oregon, Christensen v. Murphy, 678 P. 2d 1210 (1984)
4. Pennsylvania, Mull v. Kerstetter, 540 A.2d 951 (Pa. Super. Ct. 1998)
5. Texas, Juhl v. Airington, 936 S.E. 2d 640 (1996)

Abolished by statute

6. Florida, Fla. Stat. §112.182
7. Michigan, Minn. Com. Laws § 600.2965
8. Minnesota, Minn. Stat. § 604.06
9. New Jersey, N.J. Stat. Ann §2A:62A-21
10. New York, N.Y. Gen. Oblig. Law §11-106

of the contractor that resulted in the firefighter's injuries were independent from the act which created emergency to which the firefighter had responded. Iowa's approach, like other jurisdictions, demonstrates that courts are not rushing to provide immunity unless there is a reasonable justification to do so.

Lastly, one of the policy rationalizations for implementing the Fireman's Rule is that firefighters have other methods and means of compensation, specifically, the Ohio Workers' Compensation Fund.

This Court last addressed this issue in 1995 when subrogation was not as important and as profound as it is today. Under the current law, the Bureau of Workers' Compensation is very active and aggressive in asserting its subrogation rights when third parties are responsible. Another public policy is served where we allow the responsibility for wrongful conduct to be born by the wrongdoer. It does serve the public policy of requiring wrongdoers to shoulder the burden of the costs associated with their negligent conduct rather than requiring the Bureau of Workers' Compensation to shoulder the cost.

Public policy will be well served by requiring independent contractors to stand behind their work and to do their due diligence in meeting the standard of care permitting immunity will only foster substandard work. First, it will prevent unnecessary injuries to not only firefighters but neighbors and invitees to the premises. It will prevent unnecessary injury, unnecessary wage loss, and unnecessary medical expenses. Further, in those instances when there is a loss, that loss should be borne by the wrongdoer. In the present day, where the Bureau is very aggressive in asserting subrogation, it does not serve the best interest of Ohioans to permit the Bureau to absorb losses where subrogation exists.

Because of these competing public policies, Appellant asserts that this Court should only expand the Fireman's Rule when the original justifications demand it. However, in looking at the rationalizations for the Fireman's Rule, public policy actually leans in favor of limiting the scope of the rule to its original intention and not expanding the rule to incorporate the negligent conduct of independent third parties.

CONCLUSION

For the above stated reasons, Appellant Ricky M. Torchik contends that a matter of first impression has been presented to this Court along with a substantial constitutional question and case of public or great general interest for the Court's consideration. Justice requires this Court reverse the Court of Appeals and not unnecessarily and without sound basis expand the application and scope of the Fireman's Rule as it presently exists in Ohio.

Respectfully submitted,

TODARO & WAGONER CO., L.P.A.

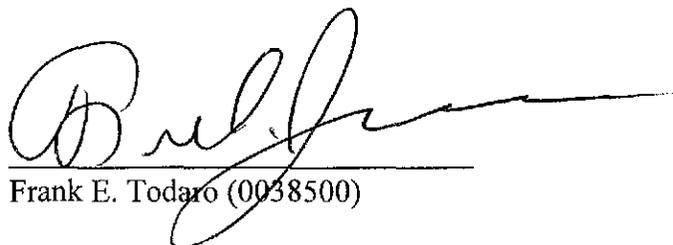


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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was served upon John C. Nemeth, Attorney for Appellee Daniel Heskett, at John C. Nemeth & Associates, 21 E. Frankfort Street, Columbus, Ohio 43206, by ordinary U.S. mail, postage prepaid this 14th day of March, 2008.



Frank E. Todaro (0038500)

ATTORNEY FOR APPELLANT,
RICKY M. TORCHIK

cc: Ricky M. Torchik
Joseph Pursglove, Esquire

EXHIBIT 1

COURT OF APPEALS

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

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ROSS COUNTY COMMON PLEAS
CLERK OF COURTS
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| RICKY M. TORCHIK, | : | |
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| Plaintiff-Appellant, | : | Case No. 06CA2929 |
| | : | |
| v. | : | |
| | : | DECISION AND JUDGMENT ENTRY |
| JEFFREY M.J. BOYCE, et al., | : | |
| | : | |
| Defendants-Appellees. | : | |

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CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:

ABELE, P.J.

This is an appeal from a Ross County Common Pleas Court
summary judgment in favor of Daniel Heskett, defendant below and
appellee herein, and Jeffrey M.J. Boyce.¹

Ricky M. Torchik, plaintiff below and appellant herein,
assigns the following error for review:

¹ Appellant initially appealed the trial court's decision as
it relates to Boyce, the landowner, but subsequently withdrew the
assignment of error. Boyce then filed a motion requesting that
we dismiss him from the appeal. We grant Boyce's motion to
dismiss and consider this appeal only as it relates to Heskett.

"THE TRIAL COURT ERRED TO THE PREJUDICE OF THE PLAINTIFF-APPELLANT WHEN IT GRANTED DEFENDANT-APPELLEE DANIEL HESKETT'S MOTION FOR SUMMARY JUDGMENT BY APPLYING THE 'FIREMAN'S RULE' BEYOND THE SCOPE OF THE PROPERTY OWNERS AND APPLYING THE RULE TO INDEPENDENT CONTRACTORS."

In February 2003, appellant, a Ross County Sheriff's Deputy, visited Boyce's property to investigate a burglar alarm. While on the property, he suffered injuries when the steps of a wooden deck collapsed. Appellee, a building contractor, constructed the house, the deck, and the steps. Appellant subsequently filed a complaint against Boyce and appellee and alleged that they were negligent.

Both Boyce and appellee requested summary judgment and asserted that the "fireman's rule" barred appellant's claims. The trial court agreed and granted both Boyce and appellee summary judgment. The court recognized that no Ohio court had expanded the rule to apply to non-property owners, such as an independent contractor who performed work upon the premises, but reasoned that "it would seem anomalous to apply the fireman's rule only to the owner or occupier of property and thus restrict the owner or occupier's liability while the contractor's liability would be governed by traditional concepts of negligence, thus requiring a determination as to whether the officer is a licensee or invitee." This appeal followed.

In his sole assignment of error, appellant asserts that the trial court erred by granting summary judgment in appellee's favor. Specifically, he asserts that the trial court improperly

concluded that the fireman's rule applies to negligence claims against independent contractors. Appellant argues that the rule applies only in the context of a premises liability claim against the owner or occupier of the property, not against an independent contractor who performed work upon the property.

A

SUMMARY JUDGMENT STANDARD

Appellate courts conduct a de novo review of a trial court summary judgment decisions. See, e.g., Grafton v. Ohio Edison Co. (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Accordingly, appellate courts must independently review the record to determine whether summary judgment is appropriate and need not defer to the trial court's decision. Brown v. Scioto Cty. Bd. of Commrs. (1993), 87 Ohio App.3d 704, 711, 622 N.E.2d 1153; Morehead v. Conley (1991), 75 Ohio App.3d 409, 411-412, 599 N.E.2d 786. Thus, to determine whether a trial court properly granted summary judgment, an appellate court must review the Civ.R. 56 standard as well as the applicable law. Civ.R. 56(C) provides:

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party

against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

Thus, a trial court may not grant summary judgment unless the evidentiary materials demonstrate that: (1) no genuine issue as to any material fact remains to be litigated; (2) after the evidence is construed most strongly in the nonmoving party's favor, reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party; and (3) the moving party is entitled to judgment as a matter of law. Vahila v. Hall (1997), 77 Ohio St.3d 421, 429-30, 674 N.E.2d 1164.

B

NEGLIGENCE ACTION

A negligence action requires a plaintiff to establish that: (1) the defendant owed the plaintiff a duty of care; (2) the defendant breached the duty of care; and (3) as a direct and proximate result of the defendant's breach, the plaintiff suffered injury. See, e.g., Texler v. D.O. Summers Cleaners (1998), 81 Ohio St.3d 677, 680, 693 N.E.2d 217; Jeffers v. Olexo (1989), 43 Ohio St.3d 140, 142, 539 N.E.2d 614; Meniffee v. Ohio Welding Products, Inc. (1984), 15 Ohio St.3d 75, 472 N.E.2d 707. If a defendant points to evidence to illustrate that the plaintiff will be unable to prove any one of the foregoing elements and if the plaintiff fails to respond as Civ.R. 56 provides, the defendant is entitled to judgment as a matter of law. See Feichtner v. Cleveland (1994), 95 Ohio App.3d 388,

394, 642 N.E.2d 657; Keister v. Park Centre Lanes (1981), 3 Ohio App.3d 19, 443 N.E.2d 532.

In this case, the central dispute is the duty, if any, that appellee, an independent contractor, owed to appellant, a police officer. Appellee claims that the fireman's rule sets forth the applicable duty. Appellant counters that the rule does not apply to his claim against appellee, a non-landowner or non-occupier, and because the rule does not apply, ordinary negligence principles define appellee's duty.

C

THE FIREMAN'S RULE

The fireman's rule is a special, limited duty rule that a landowner or occupier owes a firefighter or police officer who suffers injury while on a property owner's premises in a professional capacity. The rule provides: "An owner or occupier of private property can be liable to a fire fighter or police officer who enters premises and is injured in the performance of his or her official job duties if (1) the injury was caused by the owner's or occupier's willful or wanton misconduct or affirmative act of negligence; (2) the injury was a result of a hidden trap on the premises; (3) the injury was caused by the owner's or occupier's violation of a duty imposed by statute or ordinance enacted for the benefit of fire fighters or police officers; or (4) the owner or occupier was aware of the fire fighter's presence on the premises, but failed to warn [him] of any known, hidden danger thereon. (Scheurer v. Trustees of Open

Bible Church [1963], 175 Ohio St. 163, 23 Ohio Op.2d 453, 192 N.E.2d 38, paragraph two of the syllabus, followed.)" Hack v. Gillespie (1996), 74 Ohio St.3d 362, 658 N.E.2d 1046, syllabus.

The Ohio Supreme Court first adopted the fireman's rule in Scheurer v. Trustees of Open Bible Church (1963), 175 Ohio St. 163, 23 O.O.2d 453, 192 N.E.2d 38. In that case, a police officer suffered injuries when he fell into an open excavation pit while investigating a reported break-in at the premises. The court held that the police officer could not recover against the property owner for negligence and stated: "A policeman entering upon privately owned premises in the performance of his official duty without an express or implied invitation enters under authority of law and is a licensee. Where a policeman enters upon private premises in the performance of his official duties under authority of law and is injured, there is no liability, where the owner of the premises was not guilty of any willful or wanton misconduct or affirmative act of negligence; there was no hidden trap or violation of a duty prescribed by statute or ordinance (for the benefit of the policeman) concerning the condition of the premises; and the owner did not know of the policeman's presence on the premises and had no opportunity to warn him of the danger." *Id.* at paragraphs one and two of the syllabus.

In Brady v. Consolidated Rail Corp. (1988), 35 Ohio St.3d 161, 519 N.E.2d 387, the court re-visited the fireman's rule. In Brady, a police officer suffered injuries while pursuing a

suspect. The officer fell and hit his knee on a piece of loose rail laying on railroad tracks as he exited the police cruiser to chase the suspect. He subsequently filed a complaint against the railroad company.

On appeal, the Ohio Supreme Court considered "whether a police officer injured in the performance of his duties on a railroad right-of-way is a licensee or invitee with respect to the railroad." *Id.* at 162. The court held "that the liability of a landowner to a police officer who enters the land in the performance of his official duty, and suffers harm due to a condition of a part of the land held open to the public, is the same as the liability of the owner to an invitee." *Id.* at 163. Thus, unlike Scheurer, Brady involved a part of land held open to the public. The Brady court explained the rationale for its holding in Scheurer: "In holding the policeman to be a mere licensee, this court was guided by the fact that police officers * * * are likely to enter premises at unforeseeable times and venture into unlikely places, typically in emergency situations. Thus, the landowner cannot reasonably anticipate their presence nor prepare the premises for them, and the police officer must take the premises as the owner himself uses them. 'Policemen and firemen come on the premises at any hour of the day or night and usually because of an emergency, and they go to parts of the premises where people ordinarily would not go. Their presence cannot reasonably be anticipated by the owner, since there is no regularity as to their appearance and in most instances their

appearance is highly improbable.'" Id. at 163, quoting Scheurer, 175 Ohio St. at 171. "However, where a policeman enters into an area of the landowner's property which is held open for the use of the general public, where it is reasonable for the landowner to expect police presence and prepare for it, the police officer stands in the same position as others being an invitee, albeit implied, toward whom the landowner must exercise ordinary care." Id. at 163. The court noted that Colorado, Illinois, Nebraska, New Jersey, and New York adopted a similar exception to the fireman's rule, and that the Restatement adopts this view: "The liability of a possessor of land to a public officer or employee who enters the land in the performance of his public duty, and suffers harm because of a condition of a part of the land held open to the public, is the same as the liability to an invitee.'" Id., quoting Section 345(2).

The court gave its most recent pronouncement of the fireman's rule in Hack. In Hack, a firefighter suffered injuries when he responded to a fire and leaned over an improperly-secured railing on the porch that collapsed and caused him to fall to the ground. The firefighter asked the supreme court to "overrule Scheurer and hold that a landowner owes a duty of reasonable care, in all instances, to fire fighters who enter upon the private premises in the exercise of their official duties." Id. at 365. The firefighter alternatively requested the court to limit Scheurer "so that a fire fighter can recover against a negligent landowner where, as here, the dangerous condition that

caused the injury was in no way associated with the emergency to which the fire fighter responded." Id. at 365. The court stated that these arguments "miss the fundamental purpose upon which the holding in Scheurer is based." Id. The court conceded that it had previously "determined that the duty of care owed by a landowner to a fire fighter (or police officer) stems from common-law entrant classifications, i.e., licensees or invitees. However, Ohio's Fireman's Rule is more properly grounded on policy considerations, not artificially imputed common-law entrant classifications. Indeed, persons such as fire fighters or police officers who enter land pursuant to a legal privilege or in the performance of their public duty do not fit neatly, if ever, into common-law entrant classifications." Id. at 365-366 (footnotes omitted).

The Ohio Supreme Court thus abandoned a premises liability rationale to justify the fireman's rule and instead used various policy rationales to explain the rule:

"First, fire fighters and police officers can enter the premises of a private property owner or occupant under authority of law. Hence, fire fighters and police officers can be distinguished from ordinary invitees. Second, because a landowner or occupier can rarely anticipate the presence of safety officers on the premises, the burdens placed on possessors of property would be too great if fire fighters and police officers were classified, in all instances, as invitees to whom a duty of reasonable care was owed. Third, the rule has been deemed to be justified based on a cost-spreading rationale through Ohio's workers' compensation laws. In this regard, this court has recognized that all citizens share the benefits provided by fire fighters and police officers and, therefore, citizens should also share the burden if a fire fighter or police officer is injured on the job."

Hack, 74 Ohio St.3d at 367 (citations omitted).

Hack further stated that the rationale behind the fireman's rule is based upon firefighters' and police officers' assumption of certain risks that exist "by the very nature of their chosen profession." Id. The court also recognized that "[t]he risks encountered are not always directly connected with arresting criminals or fighting fires," explaining: "Members of our safety forces are trained to expect the unexpected. Such is the nature of their business. The risks they encounter are of various types. A fire fighter, fighting a fire, might be attacked by the family dog. He or she might slip on an object in the middle of a yard or on a living room floor. An unguarded excavation may lie on the other side of a closed doorway, or the fire fighter might be required to climb upon a roof not realizing that it has been weakened by a fire in the attic. Fortunately, Ohio has statutory compensation schemes which can temper the admittedly harsh reality if one of our public servants is injured in the line of duty." Id. at 367. Thus, under Hack the risk encountered need not be one directly associated with the firefighter's or police officer's response to the situation.

The court also noted that it would be unfair to impose the ordinary standard of care applicable to a landowner-invitee situation because "fire fighters can enter a homeowner's or occupier's premises at any time, day or night." Id. Unlike an invitee whom the landowner expects and for whom the landowner can

prepare the premises, the landowner cannot anticipate an emergency responder's presence on the property and thus has no time to ensure the premises are safe for a firefighter or police officer responding to an emergency. As the court explained, firefighters and police officers "respond to emergencies, and emergencies are virtually impossible to predict. They enter locations where entry could not be reasonably anticipated, and fire fighters often enter premises when the owner or occupier is not present." *Id.* at 368. The court found that abrogating the fireman's rule would impose "too great a burden" on landowners and occupiers. *Id.* at 368.

In the case at bar, we agree with the trial court's conclusion that an independent contractor who performed work upon private property may invoke the fireman's rule to bar an injured public safety officer's negligence claim. Although Ohio courts traditionally have applied the rule in the landowner context, nothing in the cases suggests that the rule is limited to the landowner context. Here, the homeowner had complete control of the premises and the appellee was not actively involved in any construction projects. Furthermore, as the Hack court observed, police officers and firefighters are trained to expect the unexpected and to encounter potentially perilous situations, irrespective of whether a landowner or a third party created the situation that ultimately caused the police officer's or

firefighter's injury.¹ We believe that in the case sub judice, appellant's injuries are better compensated through the workers' compensation system, rather than through a civil action against an independent contractor. We, however, welcome further review and scrutiny of this rule and its application as we believe, in light of Hack, that any modification should originate with the Ohio Supreme Court.

Accordingly, based upon the foregoing reasons, we overrule appellant's assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

¹ We note that the fireman's rule exists in the majority of other jurisdictions, but it has many variations. See, e.g., Levandoski v. Cone (Conn.2004), 267 Conn. 651, 841 A.2d 208; Flowers v. Rock Creek Terrace Ltd. Partnership (Md.1987), 308 Md. 432, 520 A.2d 361; Pottebaum v. Hinds (Iowa 1984), 347 N.W.2d 643; Kreski v. Modern Wholesale Elec. Supply Co. (Mich.1987), 429 Mich. 347, 415 N.W.2d 178.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

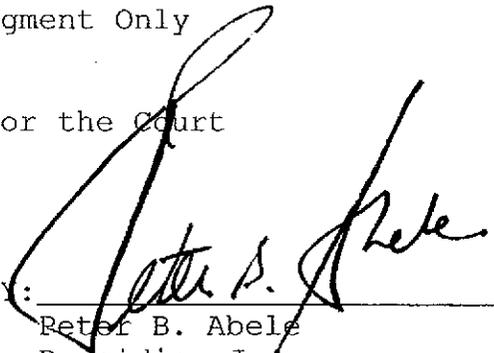
The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J.: Concurs in Judgment Only
Kline, J.: Dissents

For the Court

BY: 

Peter B. Abele
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

EXHIBIT 2

12

11a

IN THE COMMON PLEAS COURT
ROSS COUNTY, OHIO

RICKY TORCHIK, ET AL,
PLAINTIFFS,
VS
JEFFREY BOYCE, ET AL,
DEFENDANTS.

FILED

AUG 11 2008

WITH THE JUDGE OF
THE ROSS COUNTY
COMMON PLEAS COURT
CASE NO.

DECISION AND ENTRY

* * * * *

This cause came on for consideration of the motion of defendant, Daniel Heskett (hereinafter Heskett) for summary judgment. The court has considered the motion of Heskett, plaintiff Ricky Torchik's (hereinafter Torchik) response, the reply of Heskett, and the materials attached to the various motions and responses as well as the depositions of Daniel Heskett and Jeffrey Boyce.

In order to succeed on a motion for summary judgment, movant must show:

- (1) There is no genuine issue as to any material fact;
- (2) The moving party is entitled to judgment as a matter of law;

(3) Reasonable minds can come to but one conclusion, and that conclusion is adverse to the non-moving party, in whose favor the evidence is to be most strongly construed. Harless v. Willis Day Warehousing Co., 54 Ohio St. 2d 64, 66; Temple v. Wean United, Inc., 50 Ohio St. 2d 317, 327.

The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove his case. The moving party must specifically point to some evidence which demonstrates that the non-moving party cannot support its claims. If the moving party satisfies its requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating that there is a genuine issue of material fact for trial. Vahila vs. Hall, 77 Ohio St. 3d 421, 429; Dresher vs. Burt, 75 Ohio St. 3d 280; Merritt vs. Kenlon Township Board of Trustees, 125 Ohio App. 3d 533, 536.

Additionally, Ohio Civil Rule 56(C) provides in part as follows:

... (S)ummary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and written stipulations of fact, if any, timely filed in the action show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule.

In the case at bar, many of the facts are not contested. Torchik was a deputy with the Ross County Sheriff's Department and had served with the Sheriff's Department for over ten years when the incident occurred. On February 4, 2003, Torchik was on duty when he was dispatched to property owned by one Jeffrey M.J. Boyce at 213 Sulphur Spring Road, Chillicothe, Ohio. Torchik went to the

property for the purpose of checking a home burglar alarm that had sounded. Torchik had been to the property five or six times previously. Torchik checked doors and windows and then when he took his first step off the wood deck of the house on the property, the steps collapsed under him. Torchik asserts that as a result, his left knee was injured. There is no evidence that the property owner or Heskett were aware of Torchik's presence.

The evidence indicates that Jeffrey Boyce purchased the land and built a house on it with construction beginning in March of 2000 and completed in October of 2000. Heskett built the house, the deck, and the steps. Mr. Boyce's deposition testimony indicates that he was not aware of any problems with the steps and had no knowledge of any problems with the steps prior to February 4, 2003. (Boyce deposition, pages 9-10). Boyce does recall steps were missing at one time. Mr. Boyce put them back in place and fastened them to the deck with screws (Boyce deposition, page 13). The steps in question were built without handrails. The baseboard of the deck was not attached to the ground so that it raised and lowered with the ground as it froze and thawed (Heskett deposition, page 10). Heskett further testified that the steps were built "to the state code" (Heskett deposition, page 10). The stairs were connected to the deck by screws at the top step (Heskett deposition, pages 8-9).

Ohio law provides that a contractor may be liable to those who may foreseeably be injured by a structure when work is negligently done. See Jackson vs City of Franklin, 51 Ohio App. 3d 51, 53;

Fink vs J-WII Homes, Inc., 2006-Ohio-3083, unreported Case No. CA 2205-01-21 (Court of Appeals for Butler County 2006). Were it the sole issue in this case, the court would determine that there was a genuine issue as to material facts concerning negligence on the part of Heskett and would overrule the motion of Heskett. However, Heskett asserts this case should be governed by the fireman's rule, dealt with most recently by the Ohio Supreme Court in the case of Hack vs Gillespie, 74 Ohio St. 3d 362.

The Hack court specifically stated that in order for a homeowner or occupier of private property to be held liable to a firefighter or police officer who enters the premises and is injured in the performance of official duties, (1) that either the injury was caused by the owner's or occupier's willful or wanton misconduct or affirmative act of negligence; (2) the injury was a result of a hidden trap on the premises; (3) the injury was caused by the owner or occupier's violation of a duty imposed by statute or ordinance enacted for the benefit of firefighters and police officers; or (4) the owner or occupier was aware of the firefighters or police officers presence on the premises but failed to warn them of any known hidden danger thereon. The court believes that these requirements are in the disjunctive so that if any one applies, the homeowner or occupier can be liable to an injured police officer.

While the court has been unable to find any authority extending the fireman's rule to a contractor as opposed to an owner or occupier of property, it would seem anomalous to apply the

fireman's rule only to the owner or occupier of property and thus restrict the owner or occupier's liability while the contractor's liability would be governed by traditional concepts of negligence, thus requiring a determination as to whether the officer is a licensee or invitee.

The Ohio Supreme Court in Hack noted the fact that firefighters and policemen do not readily fall into the classification of licensee or invitee and this provides the rationale for the fireman's rule. Thus, the court believes it appropriate to apply the fireman's rule when a police officer asserts a claim for an injury against a contractor when that policeman or firefighter, while on duty and present on private property, is injured by a structure allegedly negligently built by that contractor on the property.

In applying the Hack test to plaintiff's claim against Heskett, the court must first determine whether Torchik's injury was caused by Heskett's willful or wanton misconduct or affirmative act of negligence. The court can find no authority for the proposition that any of the alleged acts of Heskett constitute willful or wanton misconduct. The next question is what is an affirmative act of negligence. The court has considered the case of Smyczek vs Hovan, 2002-Ohio-2261, unreported Case No. 80180 (Court of Appeals for Cuyahoga County - 2002) cited by Heskett. In Smyczek, the court considered what constituted an affirmative act of negligence. The Smyczek court reviewed two unreported cases, Evans vs Kissack, unreported Case No. 95 CA 102, (Court of Appeals

for Licking County - 1996) and Spitler vs Select Tool and Dye Co., unreported Case No. CA-12791 (Court of Appeals for Montgomery County 1992). Both these cases also involved application of the fireman's rule. In both Evans and Spitler, the Smyczek court noted that the facts expressly reflected defendants knew that the officers were on the premises. The court noted that in those both cases, defendants engaged in some affirmative act which created an issue of fact. In Evans, officers responded to a reported burglary. The defendant in Evans yelled 'run', causing the officers to chase suspects they believed to be escaping out the back door. In Spitler, the court found that a defendant's failure to reasonably answer investigator's direct questions could constitute an affirmative act of negligence. In the Smyczek case, an officer was investigating a reported burglary at premises owned by the defendant. There was approximately 3/4" to 1" of snow on the ground. Smyczek slipped on the premises allegedly due to the uneven nature of the sidewalk. The Smyczek court, based on a lack of any evidence that defendant was aware that the portion of the sidewalk where Smyczek fell was in poor condition and also due to the fact that defendant was not on the premises when Smyczek slipped, held the defendant could not be liable to Smyczek under the first prong of the fireman's rule.

In the case at bar, there is no evidence that Heskett was on the premises when officer Torchik was injured. Further, no evidence shows Heskett was aware of Torchik's presence on the premises. Therefore, the court finds that as a matter of law and

no affirmative act of negligence on Heskett's part nor any willful or wanton misconduct.

With regards to the argument that plaintiff's injury was a result of a hidden trap on the premises, there is no evidence from which the court could conclude that Heskett was aware of a problem. Obviously the lack of handrails was apparent for all to see and could not be hidden. The court further notes that no evidence has been offered by plaintiff that the construction of the steps, other than lack of handrails, was in violation of any code requirements or was negligent in any other way.

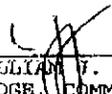
There is no evidence that Torchik's injury was caused by any violation of a duty imposed on Heskett by statute or ordinance for the benefit of firefighters and police officers or that Heskett was aware of the firefighter's or officer's presence on the premises, and failed to warn him of any known or hidden danger.

For these reasons and considering the standards of Dresher vs Burton supra, plaintiff's claims against Heskett must be dismissed. It is therefore the order of the court the motion for summary judgment of Heskett is granted and the claims of plaintiffs against him are dismissed. *Costs to plaintiff*

ENTER: 9.7.03

The Clerk of this Court is hereby directed to serve a copy of the foregoing Order, and its date of filing, on all parties and all counsel or persons having an interest therein, and to file a return thereon by personal service or by U.S. Mail, and to file a return on the Docket.

Judge


WILLIAM W. CORZINE
JUDGE, COMMON PLEAS COURT
ROSS COUNTY, OHIO