

IN THE SUPREME COURT OF OHIO

RICKY M. TORCHIK,

Appellant,

vs.

JEFFREY M. J. BOYCE, et al.,

Appellee.

:  
:  
:  
:  
:  
:  
:  
:  
:  
:

Case No. 08-0534

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

Court of Appeals

Case No. 06 CA 002921

---

MERIT BRIEF OF APPELLANT RICKY M. TORCHIK

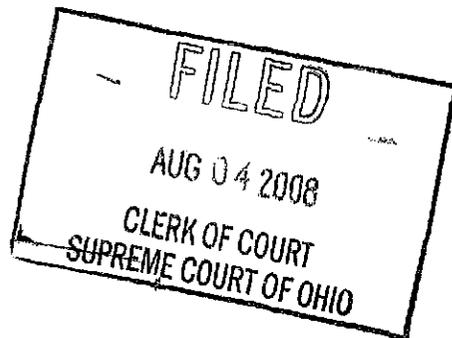
---

Frank E. Todaro (0038500)  
Robert J. Wagoner (0068991)  
Todaro & Wagoner Co., L.P.A.  
471 East Broad Street, Suite 1303  
Columbus, Ohio 43215  
Tel: 614-242-4333  
Fax: 614-242-3948  
E-mail: [frank@todarolaw.com](mailto:frank@todarolaw.com)  
E-mail: [bob@todarolaw.com](mailto:bob@todarolaw.com)

COUNSEL FOR APPELLANT,  
RICKY M. TORCHIK

John C. Nemeth (0005670)  
John C. Nemeth & Associates  
21 East Frankfort Street  
Columbus, Ohio 43206  
Tel: 614-443-4866  
Fax: 614-443-4860  
Email: [nemeth@nemethlaw.com](mailto:nemeth@nemethlaw.com)

ATTORNEY FOR APPELLEE,  
DANIEL HESKETT



**TABLE OF CONTENTS**

	<b>Page</b>
<b>TABLE OF AUTHORITIES</b> .....	iv
<b>STATEMENT OF THE CASE</b> .....	1
<b>STATEMENT OF FACTS</b> .....	2
<b>ARGUMENT</b> .....	4

Proposition of Law: The public policy considerations which justify immunity to private property owners or occupiers 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.

**Authorities Relied Upon to Support Proposition of Law:**

R.C. § 4121 .....	15
R.C. § 4123 .....	15
R.C. § 4123.931 (H) .....	15
R.C. § 4127 .....	15
R.C. § 4131 .....	15
<u>Scheurer v. Trustees of the Open Bible Church</u> (1963), 175 Ohio St. 163.....	5,6,12
<u>Brady v. Consolidated Rail Corp.</u> (1988), 35 Ohio St.3d 161 .....	5,6,13,14
<u>Hack v. Gillespie</u> (1995), 74 Ohio St.3d 362 .....	6,7,8,12,13,14,16
<u>Wever v. Hicks</u> (1967), 11 Ohio St.2d 230 .....	17
<u>Benjamin v. Deffet Rentals</u> (1981), 66 Ohio St.2d 86 .....	17
<u>Rennenger v. Pacesetter Co.</u> (1997), 558 N.W.2d 419 .....	17
<u>Gray v. Russell</u> (1993), 853 S.W.2d 928 .....	19

<u>Donohue v. San Francisco Housing Authority</u> (1993),16 Cal. App. 4 <sup>th</sup> 658 .....	19
<b>CONCLUSION</b> .....	20
<b>CERTIFICATE OF SERVICE</b> .....	21
<b>APPENDIX</b>	<b><u>Appx. Page</u></b>
Notice of Appeal to the Supreme Court of Ohio (March 17, 2008) .....	1
Decision and Judgment Entry of the Ross County Court of Appeals (February 1, 2008)...	4
Decision and Entry of the Ross County Court of Common Pleas (August 11, 2006) .....	17
<u>Rennenger v. Pacesetter Co.</u> (1997), 558 N.W.2d 419 .....	24
<u>Gray v. Russell</u> (1993), 853 S.W.2d 928 .....	29
<u>Donohue v. San Francisco Housing Authority</u> (1993),16 Cal. App. 4 <sup>th</sup> 658 .....	35

## TABLE OF AUTHORITIES

	<b>Page</b>
<u>Benjamin v. Deffet Rentals</u> (1981), 66 Ohio St.2d 86 .....	17
<u>Brady v. Consolidated Rail Corp.</u> (1988), 35 Ohio St.3d 161 .....	5,6,13,14
<u>Donohue v. San Francisco Housing Authority</u> (1993),16 Cal. App. 4 <sup>th</sup> 658 .....	19
<u>Gray v. Russell</u> (1993), 853 S.W.2d 928 .....	19
<u>Hack v. Gillespie</u> (1995), 74 Ohio St.3d 362 .....	6,7,8,12,13,14,16
<u>Rennenger v. Pacesetter Co.</u> (1997), 558 N.W.2d 419 .....	17
<u>Scheurer v. Trustees of the Open Bible Church</u> (1963), 175 Ohio St. 163.....	5,6,12
<u>Wever v. Hicks</u> (1967), 11 Ohio St.2d 230 .....	17

## STATEMENT OF THE CASE

On February 4, 2003, Appellant Ricky M Torchik (hereinafter "Torchik") was injured. Torchik timely filed a Complaint in the Ross County Court of Common Pleas against Jeffrey M. Boyce (hereinafter "Boyce") and Appellee Daniel Heskett (hereinafter "Heskett"), asserting negligence and personal injuries. Both Boyce and Heskett filed Motions for Summary Judgment asserting they owed no duty to Torchik and therefore were entitled to judgment as a matter of law.

On August 11, 2006, the trial court granted both Boyce's and Heskett's Motions for Summary Judgment. On September 7, 2006, Torchik timely filed his Notice of Appeal with the Fourth Appellate District Court. Torchik originally appealed both the trial court's decisions as to Boyce and Heskett. However, Torchik withdrew his appeal regarding Boyce and focused his appeal on the decision relating to Heskett only.

On February 1, 2008, the Fourth District Court of Appeals issued its Decision and Judgment Entry overruling Torchik's appeal, affirming the decision of the trial court granting Heskett's Motion for Summary Judgment.

On March 17, 2008, Torchik timely filed his Memorandum in Support of Jurisdiction in the Supreme Court of Ohio. On June 18, 2008, this Court issued an Entry accepting Torchik's appeal and issued an Order for the transmittal of the record from the Court of Appeals of Ross County.

Torchik submits his Merit Brief in accordance with the Rules of Practice of the Supreme Court of Ohio.

## STATEMENT OF FACTS

In March 2000, Boyce contracted with Heskett to build a home on his property located at 213 Sulpher Springs Road, Chillicothe, Ohio. In the fall of 2000, as a part of that contract, Heskett agreed to construct a deck with stairs to provide access to the deck. The deck was constructed with treated wood, screws and nails. They were attached to the side of the deck by screws at the top step. There were no anchors for the steps at the base of the stairs. There was no hand railing.

On February 4, 2003, Torchik, while acting in the course and scope of his employment as a Deputy Sheriff for the Ross County Sheriff's Department, was dispatched to Boyce's property to investigate a burglar alarm. Torchik had been to this property on previous occasions due to the unexplained tripping of the burglar alarm. While at the premises, Torchik went to the rear of the house to check the doors.

Torchik walked up the stairs on one end of the deck, checked the back door and windows. As he went to leave, he stepped on the stairway located at the other end of the deck. The entire stairway broke loose from the deck and collapsed under him. Since there was no handrail, Torchik was unable to break his fall and was severely injured.

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

The trial court determined that there was a genuine issue of material fact as to whether or not the steps were negligently designed and constructed. However, the trial court determined that the contractor, Heskett, did not owe a duty of care to Torchik and Heskett's Motion for Summary Judgment was granted.

## ARGUMENT

**Proposition of Law: The public policy considerations which justify immunity to private property owners or occupiers 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 contractor's who create hazards on private property.**

### A. Introduction

The issue before this Court is whether or not there is sufficient public policy justification to extend the Fireman's Rule beyond its traditional application to property owners and occupiers, to extend immunity to third party independent contractors who negligently perform work on the premises and create a hazardous condition on the premises.

The Fireman's Rule has been described as a special limited duty rule that insulates property owners or occupiers from negligence claims of firefighters or police officers that enter the property in the performance of their official duty. The rule generally prevents firefighters and police officers from recovering tort damages from a property owner or occupant for injuries attributable to the negligence that requires their presence on the scene.

This Court has shifted its analysis in justifying the rule from common law entrant classifications in defining "duty" to public policy considerations.

Torchik asserts that neither the entrant classifications nor the policy considerations justify the extension of the Fireman's Rule to negligent third party independent contractors. No Ohio case has extended the rule to negligent independent third parties or non-property owners or occupiers until the instant case.

Torchik is not asking this Court to expand or contract the Fireman's rule. Torchik is merely asking this Court not expand the Rule and apply it to its current criteria.

**B. The Fireman's Rule has been traditionally applied to owners or occupiers of property.**

Traditionally, the Fireman's Rule applied exclusively to owners and occupiers of property. The Fireman's Rule is a special, limited duty rule that a landowner or occupier owes a firefighter or police officer that suffers injury while on a property owner's premises in a professional capacity. This Court first adopted the Fireman's Rule in Scheurer v. Trustees of the Open Bible Church (1963), 175 Ohio St. 163. In Scheurer, a police officer suffered injuries when he fell into an open excavation pit while investigating a reported break-in at the premises. This Court in Scheurer held that the police officer could not recover against the property owner for negligence, stating as follows:

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 paragraph 2 of the syllabus. (Emphasis added.)

This Court re-visited the Fireman's Rule in Brady v. Consolidated Rail Corp. (1988), 35 Ohio St.3d 161. In Brady, a police officer suffered injuries while pursuing a suspect onto the railroad's right-of-way.

Interestingly, in Brady, this Court focused on the fact that the police officer's injury occurred in an area that was generally open to the public. This Court held "the following:

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.

Id. at 163.

Therefore, this Court has made a distinction as to that limitation of duty where the land is held open to the public. The Court in Brady discussed and distinguished Scheurer when discussing that its holding in Scheurer there was guided by the fact that police officer's are likely to enter premises at unforeseen times and venture into unlikely places typically in emergency situations. This Court addressed the fact that a 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 can come onto the premises at any hour of the day or night and go to parts of the premises where people normally would not go. This Court focused on the fact that the presence of firemen and police officers cannot be reasonably anticipated by the owner since there is no regularity to their appearance.

However, in Brady, this Court did recognize that a premises owner's duty should extend to those areas that are held open to the public where the premises owner can anticipate the presence of the public and prepare for it. The Court stated:

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.

This Court's most recent discussion of the Fireman's Rule is expressed in Hack v. Gillespie (1995), 74 Ohio St.3d 362. The syllabus in the Hack decision sets out the following rule:

An owner or occupier of private property can be liable to a firefighter or police officer who enters the 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 or police officer's presence on the premises, but failed to warn them of any known, hidden danger thereon.

Id. at syllabus. (citation omitted.)

In Hack, this Court discussed its divergence from trying to analyze the Fireman's Rule solely in the context of duty owed by property owners or occupiers as it relates to the common law entrant classifications, i.e. licensees or invitees, to a rule that is more properly grounded on public policy considerations not artificially imputed common law entrant classifications (see Hack at 365).

In abandoning the premises liability rationale to justify the Fireman's Rule, this Court discussed the following several factors that justify the Fireman's Rule application to property or occupiers:

1. Firefighters and police officers can enter the premises of private property or occupant under authority of law;
2. Landowners or occupiers can rarely anticipate the presence of safety officers on the premises, the burden is placed on possessors of property would be too great if firefighters and police officers were classified, in all instances, as invitees to whom a duty of reasonable care was owed;
3. The rule has been deemed to be justified based on a cost spreading rationale through the Ohio Workers' Compensation system;
4. Fireman's Rule is based upon firefighters and police officers assumption of certain risks that may exist by way of the nature of their chosen profession;
5. It would be unfair to impose the ordinary care standard upon a landowner because firefighters can enter the premises at any time and cannot be anticipated.

Therefore, this Court has moved away from the traditional premises owner/entrant

classification analysis in drawing the lines. However, the public policy considerations are still focused on the fairness or unfairness to the **premises owner or occupier of property**. Said another way, even though this Court in Hack acknowledged that they wanted to move away from entrant classification in determining liability, all of the public policy considerations focus on the fairness or unfairness to the premises owner or occupier. Nothing in the discussion of public policy considerations would even logically extend to a negligent third party independent contractor who created a hazardous condition on the property, as in this case.

For example, when trying to apply the public policy considerations to this case, it is clear that they do not support extending the Fireman's Rule to non-property owners or occupiers. In the instant case, looking at the development of the Fireman's Rule in Ohio, Heskett was hired by Boyce to construct a deck at the rear of the premises. That deck included two sets of steps which allegedly were only attached to the deck by the very top set of stairs and were not adequately grounded, nor did the steps have a railing. The independent contractor's duty of care relates to the foreseeable use of the steps that he is building. The contractor's duty is to construct a set of steps fit for that purpose. It is reasonably foreseeable that Torchik or anyone else would be using the steps to gain access to the deck. That duty was fixed at the time that the steps were constructed. Torchik's purpose for using the steps has nothing to do with the fact that he is a police officer or a fireman. The contractor, Heskett, would owe the same duty to a neighbor, the milk man, postman, firefighter or police officer that used the steps to gain access to the deck in a reasonably foreseeable way. There is no public policy justification for insulating the independent contractor from foreseeable risks of harm due to his negligence simply because Torchik was using the steps in his capacity as a police officer to check the door as compared to a neighbor who would use the same steps to enter the premises.

If we now go back through each of the public policy considerations this Court discussed in Hack to justify the Rule, none of them logically apply to the negligent third party contractor in

a way that was intended by the Court.

For example, the fact that Torchik entered the property and used the steps for authority of law really does not change the duty of care in constructing sturdy steps, as it is foreseeable that a police officer or any other pedestrian would use the steps in the same way that Torchik did.

Under the second consideration, Heskett does not have to anticipate the presence of Torchik using the steps, as he would have to anticipate not when Torchik would use the steps, but the fact that Torchik or anyone would use the steps for purposes of gaining access to the deck. Therefore, the timing does not affect the duty that Heskett would owe to a user of the property.

The third justification is a little bit more complex and will be discussed separately, in an argument below, but the cost spreading rationale through Ohio's Workers' Compensation laws also does not readily apply. Suffice it to say here, that since 1995, when this Court last discussed the concept of cost sharing benefits of Ohio's Workers' Compensation system, the Ohio legislature has granted the Bureau the entitlement to pursue its right of subrogation against negligent third parties for money that it has paid. If anything, the public policy considerations regarding subrogation have reversed this public policy consideration.

The next rationale regarding assumption of the risk also does not fit the context of the negligent third party contractor because the same concepts of assumption of the risk, specifically foreseeability of injury, also applied to Heskett's foreseeability as it relates to his duty of care in constructing steps adequate for their foreseeable use.

Said more plainly, to the extent that the law should impose upon Torchik the obligation to foresee risk of harm, it must also impose the same rule of foreseeability upon Heskett to foresee risk of harm. Actually, Torchik was confronted with looking at a set of steps that would appear to be relatively new. He would have had no reason to believe that these steps were

not sturdy. Rather, the fact the steps were recently constructed would have given him a feeling of confidence that they were new and in good condition. Torchik will address more thoroughly below the assumption of the risk argument.

Lastly, relating to the fact that Torchik may enter the property any time, day or night, and that it is difficult to anticipate his arrival, this point would have no rational application to a negligent third party contractor who created a hazardous condition on the property years earlier due to his negligently designed and constructed steps. No public policy considerations support the lower court's extension of the Fireman's Rule to a negligent third party contractor.

All of the justifications discussed by this Court and other courts for the Rule focused on the fact that property owners could be put at an unfair disadvantage by policemen and firemen responding to emergencies that the property owner could neither anticipate nor prepare for. The premises owner did not have a choice in whether or not they would allow police and fireman to enter the property. Those first responders were going to come onto the property under an operation of their official duties and the courts have established the Fireman's Rule to not punish a property owner who could not protect himself from liability. That is the essence of the Rule, which does not fit with the negligent third party contractor who, under the standard of care, must construct his steps in such a way that they meet the demands of their foreseeable use. Those duties are fixed at the time of completion of the steps.

Unless a policeman or fireman would use those steps in a fashion that was not foreseeable, meaning that they were doing something that would not ordinarily be expected of the set of steps, then there should be no excuse or intervening act to insulate the negligent third party contractor from liability.

While it is true that this Court can try to justify the extension of the Fireman's Rule, say by concepts of cost sharing administrative remedies or assumption of the risk, there is no justification for extending the rule based upon fairness or unfairness to the negligent third party

contractor. If this Court chooses to focus its attention on the equities relating to the negligent third party independent contractor, there is no justification for insulating someone on their own negligence, particularly if the involved conduct is foreseeable.

This Court concluded at the end of its public policy analysis a four part test to be applied to owners and occupiers to determine whether the Fireman's Rule would apply. Applying the test to a negligent third party independent contractor clearly does not make sense with the court's test.

- (1) The injury was caused by the owner's or occupier's willful or wanton misconduct or affirmative act of negligence.

In this case we are not dealing with an owner or occupier. However, Torchik would argue that in this context a third party contractor could never be in a position to act affirmatively, willfully, or wantonly towards a firefighter, so it is a test without a meaning.

- (2) Injury resulting from a hidden trap.

The nature of the stairs looked secure and relatively new. It did not appear to be dangerous. It was a trap to the extent it gave a false sense of security of being sturdy.

- (3) Injury caused by the property owner's or occupier's violation of a duty imposed by statute enacted for the benefit of firefighters or police.

Torchik could find no such duty or ordinance that would apply to a third part contractor, such that it would make the Rule meaningful. Building codes and construction standards are for the protection of the public in general.

- (4) The owner or occupier was aware of the firefighter's or police officer's presence on the premises but failed to warn them of any known dangers.

The test could never apply to a third party contractor and is nonsensical in its application. Torchik opposed the rationale of the courts below for attempting to apply this test. It clearly proves that this part of the test has no application to third party contractors.

contractor. If this Court chooses to focus its attention on the equities relating to the negligent third party independent contractor, there is no justification for insulating someone on their own negligence, particularly if the involved conduct is foreseeable.

This Court concluded at the end of its public policy analysis a four part test to be applied to owners and occupiers to determine whether the Fireman's Rule would apply. Applying the test to a negligent third party independent contractor clearly does not make sense with the court's test.

- (1) The injury was caused by the owner's or occupier's willful or wanton misconduct or affirmative act of negligence.

In this case we are not dealing with an owner or occupier. However, Torchik would argue that in this context a third party contractor could never be in a position to act affirmatively, willfully, or wantonly towards a firefighter, so it is a test without a meaning.

- (2) Injury resulting from a hidden trap.

The nature of the stairs looked secure and relatively new. It did not appear to be dangerous. It was a trap to the extent it gave a false sense of security of being sturdy.

- (3) Injury caused by the property owner's or occupier's violation of a duty imposed by statute enacted for the benefit of firefighters or police.

Torchik could find no such duty or ordinance that would apply to a third part contractor, such that it would make the Rule meaningful. Building codes and construction standards are for the protection of the public in general.

- (4) The owner or occupier was aware of the firefighter's or police officer's presence on the premises but failed to warn them of any known dangers.

The test could never apply to a third party contractor and is nonsensical in its application. Torchik opposed the rationale of the courts below for attempting to apply this test. It clearly proves that this part of the test has no application to third party contractors.

**C. There is no public policy justification for extending the Fireman's Rule to negligent third party contractors.**

As stated above, when this Court tries to implement public policy considerations for justification of the Rule to negligent third party independent contractors, those public policy justifications do not fit circumstances that apply to third party contractors.

The facts in Hack are similar to the instant case but demonstrate why the Fireman's Rule should not apply to independent contractors. 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." Hack at 365. The fire fighter in Hack 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 firefighter responded." Hack at 365. Ultimately, the Court in Hack applied the Fireman's Rule and insulated the owner of the property and the occupiers of the property for the defective nature of the railing. However, the factual foundation of Hack is different from the instant case. First, in Hack the claims were brought against the premises owner's or occupiers. The negligent third party contractor who constructed the railing was not a party to the case and the issue was not extending the Rule to that contractor.

Additionally, in Hack the property owner testified that he had not been aware of the condition of the railing and that he had not installed it. That is significant because if the property owner had not installed the railing then he would not have owed a duty of care to those using the railing, if it was anchored incorrectly and he if did not discover it was anchored incorrectly, the owner/occupier could not have warned others of its defective

condition.

In the instant case, Heskett did construct the steps, he was aware of how it was installed and whether or not it would have been adequate for its foreseeable use. Further, in Hack the occupiers of the premises also claimed that they did not install the railing and they were unaware of the defective condition of the railing. Therefore, clearly the facts of Hack are distinguished from the instant case because of Heskett's knowledge here of the construction of the steps at the time they were constructed.

There is no public policy consideration that would support extending the Fireman's Rule to the negligent third party contractor.

**D. The "open to the public" exception in Brady is applicable.**

In Brady, this Court discussed the "open to the public" exception to the Fireman's Rule, where the court would impose the same duty of care to property owners and occupiers if the injury occurred on that portion of the property that was typically open to the public. In fact, policy considerations suggest that since Torchik's injury in the instant case occurred on private property that would normally be held open to the public, liability should attach.

Even though this is private property steps and stairways leading from the street to the front door of a home or back door in this instance, it is part of the property that is open to the public. It can be argued that people put doors and steps leading to the doors such that they would invite the public to enter the premises in that particular location. As referenced above, in Brady, *supra*, this Court found that when a police officer enters upon privately owned land in the performance of his official duties and suffers harm due to a condition on part of the land held open to the public, he is an invitee in the same manner as other private citizens lawfully using such land.

Torchik asserts that the analysis in this case is similar to the analysis in Brady. Since steps leading up to the deck and doorway would be held open to the public, even though it is on

private property, it is reasonably foreseeable and anticipated that people would use the steps to come onto the property. Just like Heskett should foresee that people would come onto the premises by way of using the steps, Heskett should be held to that degree of care relating to the foreseeability of people using the steps.

In Brady, this Court stated:

We find no persuasive reason to hold defendant railroad company to a lesser standard of care with respect to police officers than that which they owe to the general public. Therefore, we must remand this cause for further proceedings consistent with our determination that since Officer Brady was injured within the railroad right-of-way, he was an implied invitee.

Id. at 164.

Torchik acknowledges that we are not analyzing this case as an invitee or a licensee, the concept that the duty of care is the same whether or not the person entering the property is the public in general or police officer as relevant. The steps and deck area are held open to the public. This is the foreseeable way to gain access to the property. There is no public policy justification for insulating a negligent third party contractor to a lesser standard of care with respect to the police officer than that which they would owe to the general public. That aspect of Brady is on all fours with the instant case.

**E. Ohio's statutory compensation schemes no longer justify the application of the Fireman's Rule.**

This Court in Hack discussed one of the justifications for the Rule was that Ohio has statutory compensation schemes which hamper the admittedly harsh reality of public servants being injured in the line of duty. Hack at 367. The Appellate Court in this case addressed that aspect of this Court's decision without any discussion. The Appellate Court stated as follows:

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 (Appellate Decision at p. 12).

Unfortunately, there is no discussion from the Appellate Court as to why it would be better to compensate Torchik through the Workers' Compensation system rather than the civil action system. Certainly, Torchik has not been fully compensated through the Workers' Compensation system because he is not entitled to collect all of his damages. He is unable to recover for his physical pain, anxiety, mental distress, loss of enjoyment of life, inability to perform ordinary activities and physical impairment. Therefore, Torchik has not made a full recovery and he is without a remedy.

It is also important to note that the Hack decision was determined in 1995. Since then, public policy considerations relating to the use of Workers' Compensation benefits have greatly changed. Ohio's Workers' Compensation system has gone through a series of stresses and strains in which it has struggled to remain viable. The Workers' Compensation system has made a dramatic shift in attempting to punish wrongdoers for their negligent conduct by the Ohio Legislature enacting Senate Bill 227. The 124<sup>th</sup> General Assembly enacted S.B. 227, which modified Revised Code Sections 4121, 4123, 4127, and 4131, by enacting a statutory right of subrogation against third parties. This law came into effect in April 2003. The bill gave the Bureau of Workers' Compensation an entitlement to recover benefits paid that are recoverable from negligent third parties. Specifically, Section 4123.931(H), provides that the statutory subrogee may institute and pursue legal proceedings against third parties either by itself or in conjunction with the claimant.

Therefore, when taking into account the public policy consideration surrounding

subrogation, those considerations favor imposing liability upon the negligent third party contractor making the wrongdoer responsible for his negligent conduct.

This Court should not extend the immunity provided by the Fireman's Rule to Heskett because this is inconsistent with the Bureau's subrogation provisions which permit them to pursue negligent third parties for injury.

In the instant case, Torchik asserts that it is the better public policy to reserve the application of Workers' Compensation benefits for those instances where injuries are either caused by the employer or are caused due to true Fireman's Rule to insulate negligent third party contractors without just cause and burden the Workers' Compensation system unnecessarily.

In Hack, the Court discussed the concept of spreading that risk among all Ohioans who benefit from the emergency services. Torchik asserts that it is unfair that diligent and upstanding businesses should have to indemnify negligent independent contractors. Torchik asserts that this should be a fault-based system and costs be allocated to the negligent wrongdoers rather than the public at large. That is the only system which will foster safety for all Ohioans.

**F. Torchik did not assume risk of injury and assumption of the risk does not justify extending the Fireman's Rule to negligent third party independent contractors.**

The last concept discussed in Hack relates to a rationalization of the rule that firefighters and police officers assume risks by the very nature of their chosen profession. The Court has recognized that risks encountered are not always directly connected with arresting criminals or fighting fires. Such responders are trained to expect the unexpected, as is the nature of their business. While assumption of the risk is a fair question, it does not justify or excuse the negligence of Heskett. Nothing about assumption of the risk justifies the negligence of a

negligent party who could foreseeably anticipate those risks and avoid them in the first place. When putting the analysis of the foreseeability of risk at the forefront, imposing a duty upon Heskett and balancing it against the assumption of risk of a firefighter who must anticipate and expect the unexpected, the scales of justice tip heavily in favor of imposing that responsibility upon the independent contractor who is profiting from his work being performed and has a duty to perform that duty consistent with foreseeable risks to others. While at the same time, the firefighter is not *per se* profiting from his work activities, but is “doing the work” for the benefit of the public. It would seem that this would justify balancing the issue of foreseeability by imposing the duty upon Heskett, the independent contractor, in preventing the harm in the first place rather than on the fireman in trying to discover it and avoid it.

As to the assumption of the risk, secondary or implied assumption of the risk is when the Plaintiff consents to or acquiesces an appreciated, known, or obvious risk to the Plaintiff's safety. See Wever v. Hicks (1967), 11 Ohio St.2d 230, paragraph one of the syllabus. Secondary or implied assumption of the risk exists when a Plaintiff, who fully understands the risk of harm to himself, nevertheless voluntarily chooses to subject himself to the harm under circumstances that manifest his willingness to accept the risk. See Benjamin v. Deffet Rentals (1981), 66 Ohio St.2d 86, 89. In implied assumption of the risk cases, the Defendant owes the Plaintiff a duty, but because the Plaintiff knew of the danger involved and acquiesced to it, the Plaintiff's claim may be barred under comparative negligence principles.

In the instant case, Torchik, Appellant did not knowingly assume the risk of injury of ascending a negligently constructed stairway. There is no evidence in the record that Torchik was aware of any danger of ascending or descending the steps and in light of it acquiesced to it. In fact, the opposite occurred. Torchik observed a set of steps and a deck that were relatively

new in construction and did not give any warning or indication that they were about to give way. There is no evidence that Torchik voluntarily assumed any risk. Torchik only voluntarily assumed the task of using the steps. Therefore, at least as to the facts of the instant case, assumption of the risk is a public policy consideration does not apply to extend the Fireman's Rule to a negligent third party independent contractor for defectively designing steps.

**G. There is no public policy justification for expanding the Fireman's Rule.**

The lower courts acknowledged that no Ohio case has extended the Fireman's Rule beyond the application of a premises owner or occupier. In essence, the lower courts determined that since there was no case law prohibiting it, they would apply it. As Torchik has asserted above, there is no public policy justification for extending the Rule to non-premises owners/third party contractors. It is also clear that many other states who have adopted the Fireman's Rule had done so in a very limited fashion. The remainder has abolished the common law rule either by law or statute.

Most jurisdictions have moved toward a trend of restricting or eliminating the Fireman's Rule. The Supreme Court of Iowa refused to expand the rule to contractors. Rennenger v. Pacesetter Co., (1997), 558 N.W.2d 419. In Rennenger, a firefighter sued a contractor involved in the 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 Fireman's Rule. The Court of Appeals reversed and the contractor 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

Fireman's Rule since the alleged negligent acts of the contractor that resulted in the firefighter's injuries were independent from the act which created the 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 reasonable justification to do so.

In Gray v. Russell (1993), 853 S.W.2d 928, the Supreme Court of Missouri found that a police officer who was injured when he fell down stairs of a loading dock while checking locks of a business premises was not barred from bringing a personal injury suit against the owners. The Court held that the officer's claim against the owners for alleged negligence in failing to adequately maintain the steps at the loading dock fell outside the scope of the Fireman's Rule because the officer was injured during routine building check and not while responding to an emergency.

In Donohue v. San Francisco Housing Authority (1993), 16 Cal. App. 4<sup>th</sup> 658, the Court of Appeals of the First District, Division 2, California Court of Appeals, found that a firefighter's personal injury action against a building owner was not barred by the Fireman's Rule when he alleged that he slipped and fell on wet slick stairs during an unannounced fire safety inspection of the building, because the firefighter's injuries were not caused by an act of negligence which prompted his presence in the building.

Torchik recognizes that there are legitimate underpinnings to the Fireman's Rule. The Court should analyze closely those policy considerations that justify the necessity of immunity for negligence. Many other jurisdictions refuse to grant immunity but those jurisdictions that do are rather narrow in their application.

This is a case of first impression for Ohio, the crossroad of determining whether or not

we are going to further expose our first responders to unknown and unanticipated risks. Being a police officer or firefighter is risky business. We expect a lot out of our first responders to do things that the general public is glad that they do not have to. It would seem logical that we would try to do our best to limit that unknown risk to those circumstances where they must be exposed to that risk rather than in the instant case where there is no policy justification for exposing them to that risk.

This Court should adopt the position that they will hold the line on expansion of the Fireman's Rule. Torchik urges this Court to follow other jurisdictions that either hold the line or retract the scope of the Fireman's Rule, acknowledging that we ask enough of the first responders and do not need to pile on.

### CONCLUSION

The lower court's decision to extend the Fireman's Rule to negligent independent contractors, without precedent, is unfounded. Appellant Ricky M. Torchik asserts there is no justification through public policy considerations to expand immunity to Appellee Daniel Heskett when Heskett had all the tools of foreseeability available to him at the time that he completed his work. Torchik, on the other hand, could not anticipate the negligence of Heskett or the negligent condition of the stairway. Heskett certainly could foresee that Torchik and others like him would be using the steps and should have constructed them accordingly.

Public policy considerations have changed with regard to imposing those costs of injury to the Workers' Compensation system. With the introduction of subrogation provisions in the Workers' Compensation statute, as well as statutory provisions allowing direct suits against third parties, this Court should reject efforts to impose additional burdens upon the Worker's

Compensation system that cut off their rights of subrogation. For the foregoing reasons, Torchik respectfully requests this Court reverse the appellate court and remand this matter back to the trial court for trial on the merits.

Respectfully submitted,

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



Frank E. Todaro (0038500)  
471 E. Broad St., Ste. 1303  
Columbus, Ohio 43215  
Tel: 614-242-4333  
Fax: 614-242-3948  
Email: [frank@todarolaw.com](mailto:frank@todarolaw.com)

ATTORNEY FOR APPELLANT,  
RICKY M. TORCHIK

**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 4<sup>th</sup> day of August, 2008.



Frank E. Todaro (0038500)

ATTORNEY FOR APPELLANT,  
RICKY M. TORCHIK

cc: Ricky M. Torchik  
Joseph Pursglove, Esquire



**NOTICE OF APPEAL OF APPELLANT RICKY M. TORCHIK**

Appellant Ricky M. Torchik hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Ross County Court of Appeals, Fourth Appellate District, entered in Court of Appeals case No. 06CA 002921 on February 1, 2008.

This case raises a substantial constitutional question and a question of public or great general interest.

Respectfully submitted,

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



Frank E. Todaro (0038500)  
471 E. Broad St., Ste. 1303  
Columbus, Ohio 43215  
Tel: 614-242-4333  
Fax: 614-242-3948  
Email: [frank@todarolaw.com](mailto:frank@todarolaw.com)

ATTORNEY FOR APPELLANT,  
RICKY M. TORCHIK

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 14<sup>th</sup> day of March, 2008.



Frank E. Todaro (0038500)

ATTORNEY FOR APPELLANT,  
RICKY M. TORCHIK

cc: Ricky M. Torchik  
Joseph Pursglove, Esquire

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

08 FEB -1 PM 2:16

FILED  
ROSS COUNTY COMMON PLEAS  
CLERK OF COURTS  
TY D. HINTON

RICKY M. TORCHIK,	:	
	:	
Plaintiff-Appellant,	:	Case No. 06CA2921
	:	
v.	:	
	:	DECISION AND JUDGMENT ENTRY
JEFFREY M.J. BOYCE, et al.,	:	
	:	
Defendants-Appellees.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: Frank E. Todaro, 471 East Broad Street, Suite 1303, Columbus, Ohio 43215

COUNSEL FOR APPELLEE  
JEFFREY M.J. BOYCE: John L. Fosson, 325 Shannon Drive, Chillicothe, Ohio 45601

COUNSEL FOR APPELLEE  
DANIEL HESKETT: John C. Nemeth and Michael J. Collins, 21 East Frankfort Street, Columbus, Ohio, 43206

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.<sup>1</sup>

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

<sup>1</sup> 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.<sup>1</sup> 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.

---

<sup>1</sup> 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.

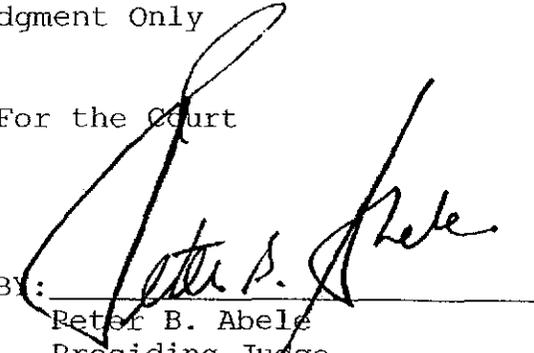
The Court finds there were reasonable grounds for this appeal.

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.



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 Kenton 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 11). 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. Y-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.

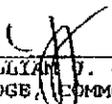
For these reasons and considering the standards of Dresher vs Burton supra, plaintiff's claims against Heskett must be dismissed. It is therefore the order of the court the motion for summary judgment of Heskett is granted and the claims of plaintiffs against him are dismissed. *Costs to plaintiff*

ENTER: 9-7-06

The Clerk of this Court is hereby directed to serve a copy of the foregoing Order, and the date of this Order, to all counsel or interested parties not represented by appearance, personal service or by U.S. Mail, and to file a return on the Decket.

Judge

7

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

▷

Rennenger v. Pacesetter Co.  
Iowa, 1997.

Supreme Court of Iowa.

John J. RENNENGER, Individually and as Next  
Friend of Rhonda C. Rennenger, Heather M.  
Rennenger, and Renada N. Rennenger, and Sandra  
K. Rennenger, His Wife, Appellants,

v.

PACESETTER COMPANY a/k/a Pacesetter Com-  
pany, Inc., Appellee.  
No. 95-1162.

Jan. 22, 1997.

Firefighter sued contractor involved in renovation of apartment building for injuries sustained when he fell from unguarded and unrailed deck area of building while fighting fire. The District Court, Polk County, Michael J. Streit, J., granted summary judgment for contractor on basis of firefighter's rule. The Court of Appeals reversed, and contractor appealed. The Supreme Court, *Wright*, J., held that contractor was not protected by firefighter's rule since alleged negligent acts of contractor that resulted in firefighter's injuries were independent from act which created emergency to which firefighter had responded.

Decision of Court of Appeals affirmed, and district court judgment reversed and remanded.

West Headnotes

II. Negligence 272 ⇌ 570

272 Negligence

272XVI Defenses and Mitigating Circumstances

272k550 Assumption of Risk

272k570 k. Professional Rescuers;

"Firefighter's Rule". Most Cited Cases

(Formerly 272k32(2.18))

Firefighter's rule prohibits firefighters and police officers from recovering damages when their claim

is based on same conduct or act that initially created need for person's presence in his or her official capacity.

III. Negligence 272 ⇌ 1205(7)

272 Negligence

272XVI Premises Liability

272k1205(7) Liabilities Relating to Construction, Demolition and Repair

272k1205 Liabilities of Particular Persons Other Than Owners

272k1205(6) Contractors

272k1205(7) k. In General. Most

(Formerly 272k32(2.18))

Contractor involved in renovation of apartment building was not protected by firefighter's rule in negligence suit brought by firefighter who was injured when he fell from unguarded and unrailed deck area that was under construction while fighting fire in apartment building; contractor's alleged negligence in failing to make construction site reasonably safe, and failing to install temporary railings or barriers, and in failing to provide adequate warning were independent from act which created emergency to which firefighter had responded.

\*420 *Wright*, J., *Ordway and the Members of Patterson, Lorentzen, Duffield, Timmons, Irish, Becker & Ordway, L.L.P.*, Des Moines, for appellants.

*William K. Carter and Elizabeth A. Nigm* of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, for appellee.

Considered by *McIntosh*, C.J., and *Larsen*, *Callaway*, *Neuman*, and *Andreassen*, JJ.

*Andreassen*, Justice.

In 1984 we adopted the fireman's rule [hereinafter referred to as the firefighter's rule] and held that a dram shop operator was protected by the rule in a suit brought by two police officers seeking damages for injuries they sustained when an intox-

icated patron assaulted them while they were attempting to quell a disturbance at a tavern. *Id.* 387 N.W.2d 419, 423 (Iowa 1986). We recognized that courts have generally extended the firefighter's rule to police officers and have held the rule is applicable to all causes of action.

Since our adoption of the rule in 1984, we considered the application of the rule in two appeals. Both appeals involved police officer dram shop actions.

Here, we must decide if a contractor involved in the renovation of a four-story apartment building is protected by the firefighter's rule in a negligence suit brought by a firefighter who was injured while fighting a fire in the apartment building. Under the circumstances of this case, we conclude the firefighter's rule does not apply. The decision of the court of appeals is affirmed; the district court judgment is reversed and the suit is remanded for trial.

### I. Background Facts and Proceedings.

John J. Rennenger was a firefighter for the City of Des Moines who was seriously injured in the course of his employment when he fell from a deck area on the fourth floor level to the deck area on the third floor of an apartment building owned by Sherman Hill Association, Inc. The apartment building was under repair and construction by Pacesetter Company (Pacesetter) at the time.

John Rennenger, individually and as next friend for his three children, and Sandra K. Rennenger, his spouse (collectively referred to as Rennenger), brought a negligence suit against Pacesetter for personal injuries and loss of consortium. The petition alleged John was injured at the apartment building when he fell from an unguarded and unrailed fourth floor landing that was under construction by Pacesetter.

Pacesetter filed an answer and alleged, as an

affirmative defense, reliance upon the firefighter's rule. After conducting discovery, Pacesetter filed a motion for summary judgment urging that the firefighter's rule barred plaintiff's recovery and entitled Pacesetter to summary judgment as a matter of law. Rennenger filed a resistance to the motion urging the rule did not apply.

The district court granted the motion for summary judgment and dismissed Rennenger's action. The court concluded Rennenger received his injuries while performing official duties relating to the hazardous situation. The court found "firefighters and police officers may not recover for injuries suffered as a direct result of the duties they were called upon to perform."

Rennenger timely appealed the court's judgment. We transferred the appeal to the Iowa Court of Appeals. Iowa B.App. 30, 401. It held Rennenger's claims were an exception \*421 to the firefighter's rule because the claims were based on a third-party's negligent conduct. The appellate court cited *Pottebaum* in stating the scope of the rule. In *Pottebaum*, we relied upon the language of the California Supreme Court, which stated "the [firefighter's rule] does not prohibit a firefighter from recovering damages when the act which results in his injury is independent from the act which created the emergency to which the [firefighter] responded." *Pottebaum*, 367 P.2d 100, 104 (quoting *California Firefighters Ass'n v. City of Los Angeles*, 43 Cal. 2d 373, 382 (1955), 367 P.2d 100, 104 (1962)). The appellate court reversed the district court's judgment and remanded for trial. We granted Pacesetter's application for further review. Iowa B.App. 307.

Summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 237(c). The scope of the firefighter's rule is a legal question subject to summary determination.

### II. Firefighter's Rule.

In *Pottebaum*, we adopted a limited firefighter's rule. *Pottebaum*, 477 N.W.2d at 645. In Iowa, the firefighter's rule prohibits firefighters and police officers from recovering damages when their claim is based on the same conduct or act that initially created the need for the person's presence in his or her official capacity. *Id.* See generally Richard C. Tinney, Annotation, *Firefighter's Rule: A Comparative Analysis*, 1998 *Supp. 1B* 1; Larry D. Scheafer, Annotation,

Although other jurisdictions adopted the rule in the context of the duties owed by a landlord or occupier to individuals entering on the premises, or upon reliance of the assumption of risk doctrine to bar recovery, we adopted the rule for policy reasons. We concluded

it offends public policy to say that a citizen invites private liability merely because he happens to create a need for those public services. Citizens should be encouraged and not in any way discouraged from relying on those public employees who have been specially trained and paid to deal with these hazards. Additionally, a citizen does not have the right to exclude public safety officers from emergency situations or to control their actions once they have been alerted to an emergency and arrive on the scene. Indeed, a citizen may have a legal duty to summon a public safety officer in some instances and to say he may, in the course of discharging that duty, risk tort liability to officers who are specially trained and hired to cope with these hazards, strikes us as inconsistent and unfair. Finally, although we are aware of the widespread existence of liability insurance, we believe these risks are more effectively and fairly spread by passing them onto the public through the government entities that employ firefighters and police officers.

*Id.* at 645-46 (citation omitted). In *Chapman*, we found no new policy reasons to abandon our position supporting the firefighter's rule. *Chapman*,

In defining the scope of the firefighter's rule in Iowa, we stated:

This is not to say that firemen or police officers are barred from recovery in all instances in which they are injured by negligent acts. *The relevant inquiry is whether the negligently created risk which resulted in the fireman's or policeman's injury was the very reason for his presence on the scene in his professional capacity.* If the answer is yes, then recovery is barred; if no, recovery may be had.

As these cases point out, although policemen are barred from recovery against the person whose negligence created the need for their presence, they are not barred from recovery for negligent or intentional acts of misconduct by a third party. Nor would they be barred from recovery if the individual responsible for their presence engaged in subsequent acts of negligence or misconduct once the officer was on the scene.

We held the firefighter's rule applies to a dram shop action where the dram shop violation is the act which created the need for the officer's presence.

In recognition of the limited scope of the Iowa rule, we refused to apply the rule when an intoxicated driver's car collided with a squad car that was responding to a request for assistance in a high speed chase. *Gail*, 410 N.W.2d at 667. Although the police officer was performing law enforcement activities, we observed "the main act that created the need for Gail's presence was the highspeed chase and not the indirect dram shop violation." *Id.* Clearly, the scope of the Iowa rule is narrow.

Although the Michigan court also adopted the firefighter's rule on public policy grounds, the scope of its rule is broader. See *Kreski v. Modern*

In adoption of the firefighter's rule, the Michigan court stated:

Thus, as a matter of public policy, we hold that firefighters or police officers may not recover for injuries occasioned by the negligence which caused their presence on the premises in their professional capacities. *This includes injuries arising from the normal, inherent, and foreseeable risks of the chosen profession.*

(emphasis added). The court summarized: [t]he scope of the rule adopted today includes negligence in causing the incident requiring a safety officer's presence and those risks inherent in fulfilling the police or fire fighting duties.... The firefighter's rule only insulates a defendant from liability for injuries arising out of the inherent dangers of the profession.

*Id.* (emphasis added). Consequently, in Michigan the firefighter's rule prevents recovery for two types of injury, (1) those derived from the negligence causing the safety officer's presence, and (2) those stemming from the normal risks of the safety officer's profession.

In contrast, the Wisconsin court adopted a very limited firefighter's rule. In Wisconsin, a firefighter may not recover from the landowner or occupier who negligently starts a fire or negligently fails to curtail its spread. (application of public policy consideration prevents a firefighter from recovery against property or occupier whose only negligence is in starting a fire or failing to curtail its spread); *see also In re ...* (court refused to expand the firefighter's rule to cover manufacturers whose defective product starts or contributes to a fire).

Likewise, in *Hollands v. Lemons*, 209 Ill. App. 3d 433 S.W.2d 134-135 (1993), the court applied the same "relevant inquiry" we expressed in *Potte-*

*baum* when determining if the rule should apply. The Georgia court refused to apply the rule where the firefighter was injured not by reason of the fire but when he fell into an open excavation while trying to get to the fire. *Id.* We believe the limited firefighter's rule as applied to firefighters in Wisconsin and Georgia expresses the limited scope of the firefighter's rule adopted in Iowa.

### III. Application of Firefighter's Rule.

Rennenger alleged he was injured when he fell from the unrailed and unguarded landing on the fourth level of the apartment building while he was searching for occupants and ventilating the apartment building. The building was being remodeled and repaired by Pacesetter. Rennenger claims that Pacesetter was negligent in failing to make the construction site reasonably safe, in failing to comply with state and federal safety standards, in failing to install temporary railings or barriers, and in failing to provide adequate warning. Rennenger makes no claim that Pacesetter negligently caused the fire or contributed to its spread. Apparently the fire was a result of arson. Although Rennenger's injuries may have arisen from the normal, inherent, and foreseeable risks of a firefighter, our firefighter's\*423 rule is limited to those injuries arising from the acts that created the need for the firefighter's presence. Clearly, the alleged negligent acts that resulted in Rennenger's injuries are independent from the act which created the emergency to which he and the fire department had responded.

We affirm the court of appeals decision; we reverse the district court judgment and remand for trial.

### DECISION OF COURT OF APPEALS AFFIRMED; DISTRICT COURT JUDGMENT REVERSED AND REMANDED.

Iowa, 1997.  
*Rennenger v. Pacesetter Co.*  
558 N.W.2d 419

END OF DOCUMENT

▷  
Gray v. Russell  
Mo., 1993.

Supreme Court of Missouri, En Banc.  
Roy G. GRAY and Martha Gray, Appellants,  
v.  
Kenneth RUSSELL and Helen Russell, d/b/a Rus-  
sell's Variety Store, Respondents.  
No. 75449.

May 25, 1993.

Police officer, who was injured in fall down stairs of loading dock while checking locks at business premises, brought personal injury suit against owners. Owners were granted summary judgment by the Circuit Court, Henry County, Missouri, J., and officer appealed. Appeal was transferred from the Court of Appeals. The Supreme Court, J., held that officer's claim against owners for alleged negligence in failing to adequately maintain steps from loading dock fell outside scope of "fireman's rule."

Reversed and remanded.

West Headnotes

272 Negligence 272 ⚡ 1040(3)

Negligence

272.1040 Premises Liability  
272.1040 Standard of Care  
272.1040 Status of Entrant  
272.1040 Licensees  
272.1040 k. Care Required in  
General. Most Other Cases  
(Formerly 272k32(2.2))

272 Negligence 272 ⚡ 1085

272 Negligence

272.1085 Premises Liability  
272.1085 Breach of Duty

272.1085 k. In General. Most Other Cases  
(Formerly 272k52)

Possessor of land is liable for bodily harm caused to licensees by nonobvious danger or artificial condition on land if possessor knows of condition, realizes it poses unreasonable risk of harm, and fails to either remedy condition or warn licensees of risk; law no longer holds safety of gratuitous licensees in disregard.

Negligence 272 ⚡ 1060

Negligence

272.1060 Premises Liability  
272.1060 Standard of Care  
272.1060 k. Police, Firefighters and Other Public Servants.  
(Formerly 272k32(2.18))

Duty owed to public safety officers is not automatically defined in terms of duty to licensees; status of person entering land of another is fact dependent determination, and, once person's presence becomes known, his or her status as invitee, licensee, or trespasser largely disappears, and uniform duty of reasonable care is owed in each instance.

Negligence 272 ⚡ 570

Negligence

272.570 Defenses and Mitigating Circumstances  
272.570 Assumption of Risk  
272.570 k. Professional Rescuers;  
"Firefighter's Rule". Most Other Cases  
(Formerly 272k32(2.18))  
"Firefighter's rule" (also known as "fireman's rule") applies only in emergencies.

Negligence 272 ⚡ 1315

272 Negligence

272.1315 Premises Liability  
272.1315(L) Defenses and Mitigating Circumstances  
272.1315 Assumption of Risk  
272.1315 k. Professional Rescuers;

"Firefighter's Rule". Most Circuits

(Formerly 272k32(2.18))

Police officer's claim against owners for alleged negligence in failing to adequately maintain steps from loading dock, which collapsed, causing multiple injury to officer while he was checking door locks on closed business in scope of his employment, fell outside scope of "fireman's rule," because officer was injured during routine building check and not while responding to emergency.

[1] Negligence 272 ⚡403

[1] Negligence

[1] Proximate Cause

[1] k. Vulnerable and Endangered Persons; Rescues and Emergencies.

(Formerly 272k56(1.17))

"Rescue doctrine" embodies policy choice by courts to deem rescue attempts to be foreseeable for purpose of tort recovery because "danger invites rescue"; doctrine ensures that issue of proximate cause will not hinder injured rescuer's attempt to recover from original tortfeasor, and thus, same negligence which imperils victim is also proximate negligence as to nonwanton rescuer.

[1] Negligence 272 ⚡570

[1] Negligence

[1] Defenses and Mitigating Circumstances

[1] Assumption of Risk

[1] k. Professional Rescuers;

"Firefighter's Rule". Most Circuits

(Formerly 272k74)

Benefits of "rescue doctrine" are withheld from public safety officers who are injured in line of duty while performing rescue, on grounds of public policy; such "professional rescuers" cannot recover for injuries attributable to negligence that required their assistance, because their position specifically requires them to confront these hazards on behalf of public; because of their exceptional responsibilities, when firefighters and police officers are injured in performance of their duties, cost of their injury should be borne by public as a whole, through

workers' compensation laws and provision of insurance benefits and special disability pensions.

Negligence 272 ⚡570

Negligence

[1] Defenses and Mitigating Circumstances

[1] Assumption of Risk

[1] k. Professional Rescuers;

"Firefighter's Rule". Most Circuits

(Formerly 272k32(2.18))

"Firefighter's rule," which prohibits firefighter from recovering against person whose ordinary negligence created emergency, extends to police officers.

Negligence 272 ⚡570

Negligence

[1] Defenses and Mitigating Circumstances

[1] Assumption of Risk

[1] k. Professional Rescuers;

"Firefighter's Rule". Most Circuits

(Formerly 272k32(2.18))

Negligence 272 ⚡1315

Negligence

[1] Premises Liability

[1] Defenses and Mitigating Circumstances

[1] Assumption of Risk

[1] k. Professional Rescuers;

"Firefighter's Rule". Most Circuits

(Formerly 272k32(2.18))

Where routine inspection is being carried out, firefighter or police officer can choose not to proceed if apparent risks present unreasonable danger, and in such circumstances, public policy does not require exceptional rules of law such as rescue doctrine in firefighter's rule, and relative duties and liabilities of parties can then be addressed by whatever traditional rules are applicable, including premises liability.

[1] Negligence 272 ⚡570

Negligence  
Defenses and Mitigating Circumstances  
Assumption of Risk  
k. Professional Rescuers;  
"Firefighter's Rule".

(Formerly 272k32(2.18))

"Firefighter's rule" is narrow exception to rescue doctrine, justified by public's need for immediate and courageous action by public safety officers in emergency situations.

\*929, Sedalia, for appellants.  
Kansas  
City, for respondents.  
Jeffrey P. Ray, Kansas City, for amicus curiae MODL.  
P. Kevin Blackwell, Independence, for amicus curiae MATA.  
Judge.

In this case we revisit the "firefighter's rule," which, under certain circumstances, precludes tort recovery by public safety officers who are injured in the line of duty. Because the firefighter's rule is an exception to the rescue doctrine, it does not bar an action for injuries suffered by a police officer while performing routine duties in a nonemergency situation when those injuries are caused by a landowner's ordinary negligence. We reverse the judgment in favor of respondents and remand.

## I.

On review of a defendant's motion for summary judgment, this Court views the record in the light most favorable to the plaintiff, according to plaintiff all reasonable inferences that may be drawn from the evidence. Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed in connection with the motion, demonstrate that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Rule 74.04(c)*.

The facts are not in dispute. Appellant Roy

Gray was a police officer employed by the City of Windsor, Missouri. His duties included checking the buildings in the city's business district pursuant to department procedures. On the evening of September 30, 1988, Gray performed a routine inspection of the building owned by respondents. After checking the loading dock behind the building, he started to descend the wooden steps at the dock's west end. The stairs collapsed and he was badly hurt. At no time pertinent to the suit are facts alleged that would constitute an emergency or rescue situation.

Appellants Roy Gray and his wife sued respondents for negligence and loss of consortium, alleging that the stairs were not reasonably safe, that respondents knew or should have known of this condition, and that their failure to properly maintain the stairs led to Roy Gray's injuries. Respondents' motion for summary judgment was granted on the grounds that the firefighter's rule bars this suit.

## II.

The firefighter's rule has been discussed in a number of decisions by this Court. Its initial appearance was in the companion cases of *City of Windsor v. Gray*, 282 S.W.2d 144 (Mo. 1955), and *City of Windsor v. Gray*, 282 S.W.2d 147 (Mo. 1955). These decisions involved an incident in which a firefighter and a volunteer firefighter, respectively, fell through a third-floor porch while battling a blaze. The owner of the building did not warn the firefighters that the porch was unsafe although\*930 he had knowledge of the danger and an opportunity to warn them.

The court analyzed the owner's duty to the firefighters in the context of the traditional rules of premises liability. The Court decided that firefighters have the same status as licensees, even though they do not need the possessor's permission in order to enter the property. 282 S.W.2d at 146-7. This classification was fatal to the suit, as the Court noted that "a possessor owes no duty to licensees as

to maintenance". Consequently, the owner was absolved of liability for his failure to warn the firefighters to leave the porch after he knew of their presence there. The court extended the rule to the volunteer firefighter.

On their face, and appear dispositive of appellants' cause of action. But the definition of a possessor's duty to licensees was discarded in

There, the Court "concluded that the existing law is outmoded and should be changed."

In its place, the Court adopted the rule set forth in *Restatement, Law of Torts, First* § 342 (1934). That section holds a possessor of land liable for bodily harm caused to licensees by a nonobvious natural or artificial condition on the land, if the possessor knows of the condition, realizes it poses an unreasonable risk of harm, and fails to either remedy the condition or warn licensees of the risk. Accordingly, the law no longer holds the safety of gratuitous licensees in disregard.

The Court rejected the more expansive form of the rule set out in the 1965 Restatement, which only requires the possessor of land to have "reason to know of the condition". This version was advocated in Judge Storckman's concurring opinion.

It should be noted that, under present law, the duty owed to public safety officers is not automatically defined in terms of the duty to licensees. The status of a person entering the land of another is a fact-dependent determination. See *Restatement (Second) of Torts* § 342. In addition, once a person's presence becomes known, his or her status as an invitee, licensee, or trespasser largely disappears, and a uniform duty of reasonable care is owed in each instance.

at 51.

Subsequent opinions of this Court have dealt with the firefighter's rule from a more general perspective. In *Phillips v. Williams*, 122 S.W.2d 461, 466 (Mo., 1938), the Court discussed the rule's development and noted arguments advanced by other courts as support for its continued viability, such as assumption of the risk and public policy considerations. The Court declined the plaintiffs' invitation to abandon the rule, but no statement of the rule itself appears in the opinion. The rule was restated, however, in *Restatement (Second) of Torts* § 342 (1990), as follows:

Not being a traditional premises liability case, *Phillips* correctly cites *Anderson* and *Wentworth* as authority with regard only to the recognition of the firefighter's rule in Missouri law.

The rule provides that a fireman brought in contact with an emergency situation solely by reason of his status as a fireman who is injured while performing fireman's duties may not recover against the person whose ordinary negligence created the emergency.

A careful reading of this statement shows why the conclusion that appellants' petition is barred by the rule is erroneous. Quite simply, the firefighter's rule applies only in emergencies.

Thus, appellants' claims fall outside the scope of the rule because Roy Gray was injured during a routine building check and not while responding to any emergency. The reason for this particular limitation is that the firefighter's rule originated as an exception to the "rescue doctrine," as noted in *Anderson*, 282 S.W.2d at 420.

The wording of the rule suggests other situations that fall outside its scope, such as injuries caused by wanton or reckless acts, and intentional torts. See *Ander-son*, 282 S.W.2d at 447.

*Cardozo* discusses the policy considerations behind the development of the rescue doctrine as a "legal shorthand" for \*931 proximate cause, and of the firefighter's rule as an exception thereto, most of which need not be repeated here. Essentially, the rescue doctrine embodies a policy choice by courts to deem rescue attempts to be foreseeable for purposes of tort recovery because, in Cardozo's memorable phrase, "Danger invites rescue."

*citing*

The doctrine ensures that the issue of proximate cause will not hinder an injured rescuer's attempt to recover from the original tortfeasor. Thus, "the same negligence which imperils a victim is also proximate negligence as to the nonwanton rescuer."

The benefits of the rescue doctrine, however, are withheld from public safety officers who are injured in the line of duty while performing a rescue, again on grounds of public policy. Such "professional rescuers" cannot recover for injuries attributable to the negligence that required their assistance, because their position specifically requires them to confront these hazards on behalf of the public. As stated in

Although the rule developed in connection with firefighters, hence its name, it has been extended to police officers.

exempted ambulance attendants from the firefighter's rule precisely because their responsibilities do not encompass a duty to rescue.

Policemen and firemen have exceptional responsibilities. At the scene of an emergency they are covered by a panoply of legal powers and duties necessary to control the people and place where rescue is required. They are expected to act with daring and dispatch to protect life and property.

Firefighters and police of-

ficers are hired, trained, and compensated to deal with dangerous situations affecting the public as a whole. Because of their exceptional responsibilities, when firefighters and police officers are injured in the performance of their duties the cost of their injuries should also be borne by the public as a whole, through the workers' compensation laws and the provision of insurance benefits and special disability pensions. We have identified this reasoning as "the most persuasive and most nearly universal rationale for the fireman's rule".

Some courts also cite the assumption of risk rationale, noting that police officers and firefighters voluntarily assume the hazards inherent in their respective professions.

Obviously, these considerations do not apply in nonemergency or nonrescue situations. When, as here, a routine inspection is being carried out, the firefighter or police officer can choose not to proceed if the apparent risks present unreasonable danger. In such circumstances, public policy does not require exceptional rules of law such as the rescue doctrine and the firefighter's rule. The relative duties and liabilities of the parties can then be addressed by whatever traditional rules are applicable; here, those concerning premises liability. The firefighter's rule does not exist to discriminate against public safety officers or to make them second class citizens. Nor does it exist to insulate individuals from liability for ordinary negligence in ordinary situations. The firefighter's rule is a narrow exception to the rescue doctrine, justified by the public's need for immediate and courageous action by public safety officers in emergency situations.

In sum, appellants' claims are not barred by the firefighter's rule because the injuries complained of were not sustained under circumstances that would engage Roy Gray's professional duty to rescue or to respond to an emergency. The summary judgment in favor of respondents is reversed,\*932 and the cause is remanded to the trial court.

This is not to imply that a "separate and independent acts" exception, as argued by appellants, could not be recognized in an appropriate case. We reserve for another day the question of whether a public safety officer who is injured during a rescue attempt because of an act of negligence unrelated to the emergency at hand may maintain a cause of action, notwithstanding the applicability of the firefighter's rule.

All concur.  
Mo., 1993.  
Gray v. Russell  
853 S.W.2d 928

END OF DOCUMENT

▶  
 Donohue v. San Francisco Housing Authority  
 Cal.App. 1 Dist., 1993.

Court of Appeal, First District, Division 2, California.

Robert DONOHUE, Plaintiff and Appellant,  
 v.

SAN FRANCISCO HOUSING AUTHORITY et  
 al., Defendants and Respondents.

No. A049317.

June 15, 1993.

Review Denied Sept. 16, 1993.

Fire fighter brought personal injury action against building owner, alleging that he slipped and fell on wet, slick stairs during unannounced fire safety inspection of building. The Superior Court, San Francisco County, No. 866133, Ira A. Brown, J., entered summary judgment for owner, and appeal was taken. The Court of Appeal, 7 Cal.App.4th 1620, 281 Cal.Rptr. 446, affirmed. Fire fighter's petition for review was granted, 284 Cal.Rptr. 510, 814 P.2d 289. The Supreme Court, 13 Cal.Rptr.2d 849, 840 P.2d 954, remanded case for reconsideration. On remand, the Court of Appeal, Smith, J., held that: (1) fire fighter's rule did not bar claim, and (2) fire fighter's conduct in proceeding to traverse stairs was no more than species of contributory negligence to be considered by jury in apportioning comparative fault.

Reversed.

#### West Headnotes

#### [1] Negligence 272 ↪570

##### 272 Negligence

272XVI Defenses and Mitigating Circumstances

272k550 Assumption of Risk

272k570 k. Professional Rescuers;

"Firefighter's Rule". Most Cited Cases

(Formerly 272k32(2.18))

Under "fire fighter's rule," person who started fire is not liable for injury sustained by fire fighter who is summoned to fight fire since party who negligently started fire has no legal duty to protect fire fighter from very danger that fire fighter is employed to confront.

#### [2] Negligence 272 ↪570

##### 272 Negligence

272XVI Defenses and Mitigating Circumstances

272k550 Assumption of Risk

272k570 k. Professional Rescuers;

"Firefighter's Rule". Most Cited Cases

(Formerly 272k105)

For defendant to invoke defense of fire fighter's rule, negligence must create obvious risk and be cause of fireman's presence.

#### [3] Negligence 272 ↪1315

##### 272 Negligence

272XVII Premises Liability

272XVII(L) Defenses and Mitigating Circumstances

272k1310 Assumption of Risk

272k1315 k. Professional Rescuers;

"Firefighter's Rule". Most Cited Cases

(Formerly 272k32(2.18))

Fire fighter's rule did not bar personal injury claim brought by fire fighter who slipped and fell on wet, slick stairs during unannounced fire safety inspection of building since fire fighter's injuries were not caused by act of negligence which prompted his presence in building; facts that fire fighter was injured while in regular course of his duties and that hazard was one normally encountered as part of his job were not dispositive, negligent conduct at issue was building owner's failure to install nonslip adhesive treads on stairs coupled with improper maintenance practice of hosing down stairs and neither of these acts was reason for fire fighter's presence since fire fighter was not summoned to scene to inspect slipperiness of stairs, but rather to inspect for

fire code violations.

[4] Negligence 272 ⇨ 1304

272 Negligence

272XVII Premises Liability

272XVII(L) Defenses and Mitigating Circumstances

272k1301 Effect of Others' Fault

272k1304 k. As Grounds for Apportionment; Comparative Negligence. Most Cited Cases

(Formerly 272k97)

Negligence 272 ⇨ 1315

272 Negligence

272XVII Premises Liability

272XVII(L) Defenses and Mitigating Circumstances

272k1310 Assumption of Risk

272k1315 k. Professional Rescuers; "Firefighter's Rule". Most Cited Cases

(Formerly 272k32(2.18))

Building owner owed general duty to tenants and visitors to maintain its premises in reasonably safe condition and owner breached its duty of care by hosing down stairs prior to fire fighter's unannounced fire safety inspection and by failing to install skid resistant treading on stairs and therefore, fire fighter's conduct in proceeding to traverse stairs, despite full appreciation of risk created by such negligence, was no more than species of contributory negligence to be considered by jury in apportioning comparative fault in fire fighter's personal injury action.

[5] Judgment 228 ⇨ 181(33)

228 Judgment

228V On Motion or Summary Proceeding

228k181 Grounds for Summary Judgment

228k181(15) Particular Cases

228k181(33) k. Tort Cases in General.

Most Cited Cases

Material issue of fact as to whether building owner

breached duty of care toward fire fighter in maintaining property precluded summary judgment for owner in fire fighter's personal injury action, alleging that he slipped and fell on wet, slick stairs during unannounced fire safety inspection of building.

**\*\*149 \*660** Thomas J. Brandi, Mylene L. Reuvekamp, Bianco, Brandi & Jones, San Francisco, for plaintiff and appellant.

McGee, Lafayette, Willis & Greene, Gary T. Lafayette, Kevin M. Clarke, San Francisco, for defendants and respondents.

SMITH, Associate Justice.

Robert Donohue, a San Francisco firefighter, brought this action for personal injuries after he slipped and fell on wet, slick stairs during an unannounced fire safety inspection of a building owned by the San Francisco Housing Authority (SFHA). The California Supreme Court remanded this case for reconsideration in light of *Knight v. Jewett* (1992) 3 Cal.4th 296, 11 Cal.Rptr.2d 2, 834 P.2d 696 (*Knight*), after we had affirmed summary judgment in favor of SFHA by applying traditional common law principles regarding assumption of the risk. Upon reconsideration in light of *Knight*, we conclude that assumption of the risk no longer presents an absolute bar to plaintiff's recovery, but in this factual setting constitutes a mere variant of the doctrine of contributory negligence. We will therefore reverse the judgment of the lower court.

**\*661 BACKGROUND**

The facts are basically undisputed. Plaintiff Robert Donohue was employed as a firefighter with the San Francisco fire department from 1955 until his retirement in March of 1987. On March 26, 1986, in his capacity as battalion chief, plaintiff conducted a fire safety inspection of a low rise apartment building owned by SFHA. The building consists of three floors with a flight of concrete stairs leading from the third floor to a penthouse door, which opens out onto the roof.

Plaintiff noticed that the stairs were wet and, since he observed two or three men with a hose leaving the scene, concluded that they had just finished washing down the stairs. As part of his inspection, plaintiff climbed the stairway to see if the penthouse door was locked, a condition not permitted by the fire code. Having inspected the building a number of times before, he knew the door had sometimes been left locked.

Plaintiff was wearing crepe-soled shoes issued by the fire department and was particularly cautious in traversing the stairway, knowing that the steps were wet and having observed puddles and mud. As he descended the stairs from the penthouse door, plaintiff slipped and fell on the landing above the third floor, breaking his arm. After the injury, plaintiff did not return to work and went on disability retirement.

The concrete steps did not have skid-resistant treads on them, despite the fact that several years earlier the SFHA safety committee had recommended that they be installed. In accordance with routine practice, the fire department did not give SFHA any advance notice of the inspection, although SFHA had general knowledge that its buildings were being inspected on a quarterly basis.

According to injury reports kept by the fire department, plaintiff had multiple slip-and-fall accidents prior to the incident in question, although all of the accidents occurred under firefighting conditions.

Defendant moved for summary judgment based on the theory that plaintiff's recovery was barred by either the firefighter's rule or traditional common law assumption of the risk. The court granted summary judgment without specifying which ground formed the basis of its ruling.

\*662 APPEAL

I

*The Knight Opinion*

In *Knight*, a three-judge plurality of the state Supreme Court (with a fourth, Justice Mosk, concurring in the result) effectively abolished the previous judicial categorization\*\*150 of assumption of the risk into "reasonable" and "unreasonable" forms for purposes of determining whether the defense is subsumed by comparative negligence as set forth in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 119 Cal.Rptr. 858, 532 P.2d 1226(*Li*). After analyzing *Li* and the authorities it cites, *Knight* declared that survival of the doctrine, in any given fact situation, should instead turn on the distinction between "primary" and "secondary" assumption of the risk. Primary assumption of the risk according to *Knight* refers to "those instances in which the assumption of the risk doctrine embodies a legal conclusion that there is 'no duty' on the part of the defendant to protect the plaintiff from a particular risk...." Secondary assumption involves "those instances in which the defendant does owe a duty of care to the plaintiff but the plaintiff knowingly encounters a risk of injury caused by the defendant's breach of that duty ... ." (*Knight, supra*, 3 Cal.4th 296, 308, 11 Cal.Rptr.2d 2, 834 P.2d 696.) In the second instance, the plaintiff's conduct is simply equivalent to contributory negligence and not deemed an absolute bar to recovery.

*Knight* held that "the question whether the defendant owed a legal duty to protect the plaintiff from a particular risk of harm does not turn on the reasonableness or unreasonableness of the plaintiff's conduct, but rather on the nature of the activity or sport in which the defendant is engaged and the relationship of the defendant and the plaintiff to that activity or sport." (*Knight, supra*, 3 Cal.4th 296, 309, 11 Cal.Rptr.2d 2, 834 P.2d 696.)

Finally, since the existence and scope of the defendant's duty in a given situation is a legal question, not a factual one, the applicability of the assumption of the risk doctrine is especially amenable to resolution by summary judgment motion.

*Knight, supra*, 3 Cal.4th 296, 313, 11 Cal.Rptr.2d 2, 834 P.2d 696.) With these principles in mind, we turn to the case at bar.

## II

### *Firefighter's Rule*

SFHA continues to maintain that plaintiff is barred from recovery by application of the firefighter's rule, since his injury was incurred in the \*663 performance of his duties and the hazard of slipping and falling on wet stairs in particular was part and parcel of plaintiff's job as a firefighter.

[1] *Knight, supra*, expressly declares that the firefighter's rule survives as an example of "primary" assumption of the risk. In footnote 5, the court states that in addition to the sports setting, "the primary assumption of risk doctrine also comes into play in the category of cases often described as involving the 'firefighter's rule.' [Citation.] In its most classic form, the firefighter's rule involves the question whether a person who negligently has started a fire is liable for an injury sustained by a firefighter who is summoned to fight the fire; the rule provides that the person who started the fire is not liable under such circumstances. [Citation.] Although a number of theories have been cited to support this conclusion, the most persuasive explanation is that the party who negligently started the fire had *no legal duty to protect the firefighter from the very danger that the firefighter is employed to confront.*" (3 Cal.4th 296, 309-310, 11 Cal.Rptr.2d 2, 834 P.2d 696, emphasis added.) Since *Knight* neither expanded nor restricted the scope of the rule, we must still determine its applicability here.

[2] In our prior opinion in this case, we found that the firefighter's rule did not apply because it does not bar recovery for independent acts of misconduct which were *not the cause of the plaintiff's presence on the scene.* (*Hubbard v. Boelt* (1980) 28

Cal.3d 480, 486, 169 Cal.Rptr. 706, 620 P.2d 156; *Rowland v. Shell Oil Co.* (1986) 179 Cal.App.3d 399, 403, 224 Cal.Rptr. 547.) In order for defendant to invoke the defense, the negligence must create an obvious risk *and* be the cause of the fireman's presence. (*Malo v. Willis* (1981) 126 Cal.App.3d 543, 547, 178 Cal.Rptr. 774.) We adhere to that conclusion.

[3] The fact that plaintiff was injured while in the regular course of his duties as \*\*151 a fireman and that the hazard was one normally encountered as part of his job, are not dispositive. The negligent conduct at issue was SFHA's failure to install non-slip adhesive treads on the stairs coupled with the improper maintenance practice of hosing down the stairs. Neither of these acts was the reason for plaintiff's presence. Plaintiff was not summoned to the scene to inspect the slipperiness of the stairs, he was there to inspect for fire code violations. Since the injuries were not caused by an act of negligence which prompted plaintiff's presence in the building, the firefighter's rule does not bar the present claim. (*Terhell v. American Commonwealth Associates* (1985) 172 Cal.App.3d 434, 440, 218 Cal.Rptr. 256.)

### \*664 III

#### *Primary vs. Secondary Assumption of the Risk*

After *Knight*, whether a plaintiff's cause of action is barred by assumption of the risk or is a mere variant of contributory negligence no longer turns on the reasonableness of the plaintiff's conduct or his subjective awareness of the nature and magnitude of the danger. (*Knight, supra*, 3 Cal.4th 296, 309, 312-313, 316, 11 Cal.Rptr.2d 2, 834 P.2d 696.) Instead, the central question is whether, in light of the nature of the activity and relationship of the parties, the defendant breached a duty of care toward the plaintiff or had no duty to remedy the danger which the plaintiff confronted. If the former, the defense is subsumed by comparative negligence

principles and the claim survives. If the latter, the defense presents an absolute bar to the claim. (*Id.*, at pp. 314-315, 11 Cal.Rptr.2d 2, 834 P.2d 696.)

Again *Knight* provides direct guidance relevant to our situation. After acknowledging that an owner or occupier of land owes a general duty of care to eliminate dangerous conditions on his property (3 Cal.4th at p. 315, 11 Cal.Rptr.2d 2, 834 P.2d 696 citing *Rowland v. Christian* (1968) 69 Cal.2d 108, 70 Cal.Rptr. 97, 443 P.2d 561), *Knight* notes that in the all-or-nothing era prior to *Li*, a defendant who breached this duty by allowing a dangerous condition to exist was nevertheless absolved under common law assumption of the risk if the plaintiff had actual knowledge of the danger and deliberately chose to encounter it. As an example, *Knight* cites *Prescott v. Ralphs Grocery Co.* (1954) 42 Cal.2d 158, 265 P.2d 904 (*Prescott*), a case virtually indistinguishable from the one at bar.

In *Prescott*, a grocery store customer entered the defendant's store to make a purchase. Upon exiting she noticed a lot of dirty water covering the sidewalk and that there was no dry area through which she could walk. After taking three or four steps on the wet sidewalk, she slipped and fell. The evidence showed that the defendant had just washed down the area with two buckets of hot water. (*Prescott, supra*, 42 Cal.2d 158, 160, 265 P.2d 904.)

*Prescott* held that the plaintiff's claim was barred by assumption of the risk if she had actual or constructive knowledge of the danger and voluntarily exposed herself to it. It is clear, however, that the variant of assumption of the risk of which the court speaks *presupposed* a breach of duty by the defendant: "As we have seen, the elements of the defense of assumption of risk are a person's knowledge and appreciation of the danger involved and his voluntary acceptance of the risk. It follows that a person, if he is fully informed, may assume a risk even though the dangerous condition is caused by the negligence of others." (*Prescott, supra*, 42 Cal.2d 158, 162, 265 P.2d 904, emphasis \*665 ad-

ded.) *Prescott* is referred to twice in *Knight* as illustrative of the "secondary" type of assumption of the risk no longer viable after *Li*. (*Knight, supra*, 3 Cal.4th 296, 304, 312, 11 Cal.Rptr.2d 2, 834 P.2d 696.)

[4] Here, as in *Prescott*, defendant SFHA owed a general duty to tenants and visitors to maintain its premises in reasonably safe condition. Evidence was submitted showing that the concrete stairs had been heavily watered down just prior to plaintiff's visit and lacked skid resistant treading, which might have increased traction and prevented the accident. From this evidence a jury could conclude that SFHA \*\*152 breached its duty of care toward plaintiff. Plaintiff's conduct in proceeding to traverse the stairs despite full appreciation of the risk created by such negligence was no more than a species of contributory negligence, to be considered by the jury in apportioning comparative fault.

SFHA cites a series of older cases indicating that a landowner has no duty to warn of a dangerous condition on his property if the condition is so obvious that any reasonable person would have observed it (see 6 Witkin, Summary of Cal. Law (9th ed. 1989) Torts, § 930, pp. 301-302 and cases cited therein) to support its argument that this case falls within the "no-duty" primary assumption of the risk category referred to in *Knight*. These cases are not apposite.

As explained in *Beauchamp v. Los Gatos Golf Course* (1969) 273 Cal.App.2d 20, 77 Cal.Rptr. 914, the "obvious danger" exception to a landowner's ordinary duty of care is in reality a recharacterization of the former *assumption of the risk* doctrine, i.e., where the condition is so apparent that the plaintiff must have realized the danger involved, he assumes the risk of injury even if the defendant was negligent. (*Id.*, at pp. 32-33, 77 Cal.Rptr. 914.) As noted, this type of assumption of the risk has now been merged into comparative negligence. In addition, recent authority makes it clear that while a readily apparent danger may relieve the property owner of a duty to warn, it no

longer necessarily absolves him of a duty to remedy that condition. (*Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104, 119, 273 Cal.Rptr. 457.)

SFHA's reliance on *Danieley v. Goldmine Ski Associates, Inc.* (1990) 218 Cal.App.3d 111, 266 Cal.Rptr. 749 (*Danieley*) for the proposition that plaintiff's action is barred by the "obvious hazard" rule, is unavailing. In *Danieley*, a skier brought a personal injury action against a ski resort for failure to remove or protect skiers from a tree with which she collided. Although the opinion refers to the traditional "obvious hazard" rule when discussing duty to warn, it leaves no doubt that the owner's immunity from \*666 liability was predicated on the sports setting of the case and the fact that collision with an off-course tree is one of the inherent risks which skiers accept when they engage in the sport. (*Id.*, at pp. 122-125, 266 Cal.Rptr. 749; see also *Brown v. San Francisco Baseball Club* (1950) 99 Cal.App.2d 484, 488-492, 222 P.2d 19, & *Neinstein v. Los Angeles Dodgers, Inc.* (1986) 185 Cal.App.3d 176, 184, 229 Cal.Rptr. 612 [spectator at baseball game cannot recover for injuries suffered as a result of flying bat or ball].) Indeed, *Knight* itself cites the ski resort example in distinguishing dangers "inherent in the sport" from dangers caused by the owner's negligence. (*Knight, supra*, 3 Cal.4th 296, 315-316, 11 Cal.Rptr.2d 2, 834 P.2d 696.) Hence, *Danieley* is an instance where the absence of duty is traceable to the nature of the activity or sport involved-primary assumption of the risk.

By contrast, slippery steps was not a danger inherent in the nature of the activity at bar. There was nothing about plaintiff's inspection of the building from which it can be inferred that the property owner's normal duty to keep its public areas in safe condition would be relaxed.

[5] We conclude that this is a "secondary" assumption of the risk case as defined in *Knight*. There was a triable issue of fact concerning whether SFHA breached a duty of care toward plaintiff in

maintaining the property. While a jury would certainly be entitled to consider plaintiff's conduct in deliberately encountering the danger despite his awareness of it for the purpose of determining comparative fault, such behavior does not automatically bar plaintiff's recovery.

#### DISPOSITION

The judgment is reversed.

KLINE, P.J., and BENSON, J., concur.  
Cal.App. 1 Dist., 1993.  
*Donohue v. San Francisco Housing Authority*  
16 Cal.App.4th 658, 20 Cal.Rptr.2d 148

END OF DOCUMENT