

IN THE SUPREME COURT OF OHIO

RICKY M. TORCHIK, :  
Appellant, : Case No. 08-0534  
vs. : DISCRETIONARY APPEAL from a  
JEFFREY M. J. BOYCE, et al., : Judgment of the Fourth District Court  
Appellee.. : of Appeals of Ohio (Ross County)  
Court of Appeals Case No. 06 CA 002921

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MERIT BRIEF OF *AMICUS CURIAE*, OHIO ASSOCIATION FOR JUSTICE,  
URGING REVERSAL  
IN SUPPORT OF APPELLANT'S POSITION

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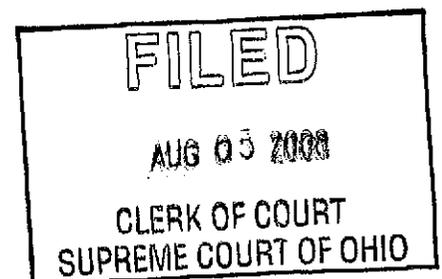
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**STATEMENT OF FACTS**

*Amicus Curiae*, Ohio Association for Justice, accepts and incorporates Appellant's Statement of Facts, as if fully rewritten herein.

**ARGUMENT**  
**IN SUPPORT OF APPELLANT'S PROPOSITION OF LAW NO. I**  
**OF AMICUS CURIA, OHIO ASSOCIATION FOR JUSTICE**

**PROPOSITION OF LAW NO. I: 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.**

**I. INTRODUCTION**

The instant appeal presents the legal issue of whether Ohio's Fireman's Rule (hereinafter referred to as the "Firefighter's Rule") protects a negligent construction contractor from liability to a police officer injured during the course of his official duties. Contrary to the judgment of the Court of Appeals, the Firefighter's Rule protects only the premises owner, not a negligent third party whose conduct did not cause the firefighter or police officer to respond to an emergency scene. For the reasons that follow, this Court should reverse the judgment of the Court of Appeals, finding that the Firefighter's Rule does not apply to the circumstances of this case. In the alternative, this Court should abrogate the Firefighter's Rule in Ohio.

**II. HISTORY OF THE FIREFIGHTER'S RULE IN OHIO**

The Firefighter's Rule protects a property owner from liability to a firefighter or police officer injured on the premises in the performance of their official duties. The Firefighter's Rule was first adopted in Ohio in *Scheurer v. Trustees of Open Bible Church* (1963), 175 Ohio St. 163, 192 N.E.2d 38. In *Scheurer*, a police officer suffered injuries when he fell into an open excavation pit while investigating a reported break-in. In finding no liability for the negligence of the property owner, this court held at paragraphs one and two of the syllabus as follows:

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.

More recently, this Court revisited the Firefighter's Rule in *Hack v. Gillespie* (1996), 74 Ohio St.3d 362, 658 N.E.2d 1046. 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 narrow issue considered in *Hack* was the potential liability of an owner of private property to a firefighter who was injured on the premises while performing his official duties. In adhering to its earlier holding in *Scheurer*, the *Hack* Court held as follows:

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 or police officer's presence on the premises, but failed to warn them of any known, hidden danger thereon.

*Hack*, at syllabus.

*Amicus Curiae*, Ohio Association for Justice, respectfully submits that the Court of Appeals in the present case wrongly extended the holding *Hack* to find erroneously that in addition to protecting property owners, the Firefighter's Rule protects third parties whose negligence proximately causes injury to police and firefighters on the premises. Simply stated, the Court of Appeals' erroneous extension of the Firefighter's Rule to encountered risks not

directly associated with a firefighter's or police officer's response to the emergency on the premises is contrary to most modern case law considering the Firefighter's Rule. Indeed, the public policy of the Firefighter's Rule and common sense tells us that it is only the person whose conduct triggers the response who should be immune from liability under the Firefighter's Rule.

### **III. APPLICATION OF THE FIREFIGHTER'S RULE IN OTHER STATES**

When applying the Firefighter's Rule, appellate courts throughout the country consistently draw a distinction between injuries stemming from the negligence that brought the firefighters or police to the scene in the first place and injuries suffered from independent causes that may follow. In *Krueger v. City of Anaheim*, 130 Cal.App.3d 166, 170, 181 Cal.Rptr. 631, 633 (1982), the court noted that the doctrine speaks only to the negligence that started the fire to which firefighters are responding. "[T]hus, a police officer who while placing a ticket on an illegally parked car is struck by a speeding vehicle may maintain action against the speeder but the rule bars recovery against the owner of the parked car for negligently parking." *Walters v. Sloan* (1977), 20 Cal.3d 199, 202 n.2, 571 P.2d 609, 611 n.2. Accord: *Berko v. Freda* (1983), 93 N.J. 81, 85, 459 A.2d 663, 665. Similar views were expressed in *Pottebaum v. Hinds* (Iowa 1984), 347 N.W.2d 642, 646:

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. . . . [A]lthough 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.

Similarly, in *Hauboldt v. Union Carbide Corp.* (1991), 160 Wis.2d 662, 467 N.W.2d 508, 512, the court refused to expand the Firefighter's Rule to cover manufacturers whose defective product starts or contributes to a fire. See, also, *Hawkins v. Sunmark Indus., Inc.* (Ky. 1986), 727 S.W.2d 397. Likewise, in *Wilbanks v. Echols* (1993), 209 Ga. App. 210, 433 S.E.2d 134, 135, the 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.

Michigan Fireman's Rule is very similar to the Ohio rule. The Michigan 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. *Woods v. City of Warren* (1992), 439 Mich. 186, 482 N.W.2d 696, 700. Indeed, the Firefighter's Rule adopted in *Woods* is very similar to the rule advocated by the Court of Appeals majority in the present case.

In *Gibbons v. Caraway and Mound Steel & Supplies* (1997), 455 Mich. 314, 565 N.W.2d 663, the Michigan Supreme Court considered the identical issue presented in the instant action: Whether the "normal" risks inherent in the fulfillment of a police officer's or firefighter's duties include *all* possible risks that could arise in that situation. In *Gibbons*, a police officer was struck by a negligent motorist while directing traffic at an accident scene to which he had been dispatched. The negligent motorist argued that she was protected by the Firefighter's Rule; however, the *Gibbons* Court found that "the fireman's rule is not a license to act with impunity, without regard for the safety officer's well-being." Citing *Kreski v. Modern Wholesale Elec. Supply Co.* (1987), 429 Mich. 347, 372, 415 N.W.2d 178. The *Gibbons* Court proceeded, therefore, to reverse the Court of Appeals' upholding of the trial court's granting of summary judgment on the issue of liability in favor of the negligent motorist.

The Supreme Court of Kentucky also revisited the application of its Firefighter's Rule in *Sallee v. GTE South, Inc.* (Ky. 1992), 839 S.W.2d 277. In *Sallee*, a paramedic was injured while attending to an assault victim at a construction site. The Kentucky Supreme Court noted that there are three prongs to its Firefighter's Rule: 1) The purpose of the policy is to encourage owners and occupiers, and others similarly situated, in a situation where it is important to themselves and to the general public to call a public protection agency, and to do so free from any concern that by so doing they may encounter legal liability based on their negligence in creating the risk; 2) The policy bars public employees (firefighters, police officers, and the like) who, as an incident of their occupation, come to a given location to engage a specific risk; and 3) The policy extends only to that risk. Citing *Buren v. Midwest Indus., Inc.*, (Ky. 1964), 380 S.W.2d 96, and *Hawkins v. Sunmark Indus., Inc.*, *supra*. In reversing the Court of Appeals' upholding of summary judgment in favor of the construction company, the *Sallee* Court noted that the construction company does not fit the first prong of the rule because they are neither owners, occupiers, nor persons otherwise fitting the description of those who need to be protected by the Firefighter's Rule. The *Sallee* Court further noted that the paramedic plaintiff did not fit the third prong of the Firefighter's Rule because he was not injured by the risk he was called upon to engage, but by a risk different in both kind and character.

Regarding the application of the Firefighter's Rule in Ohio, *Amicus Curiae*, Ohio Association for Justice, respectfully submits that this Court should draw a distinction between injuries stemming from the negligence that brought the firefighters or police officers to the scene and injuries suffered from independent causes. Indeed, if the judgment of the Court of Appeals in the present case is upheld, then the Firefighter's Rule in Ohio will become an unjust "license to act with impunity, without regard for the safety officer's well-being." See *Kreski, supra*.

#### IV. FAIRNESS OF THE FIREFIGHTER'S RULE

The historical public policy basis for the Firefighter's Rule is fairness. On this issue, the California Supreme Court has explained that it is "unfair to permit a firefighter to sue for injuries caused by the negligence that made his or her employment necessary." *Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532, 541-542, 882 P.2d 347. ". . . [I]t is the fireman's business to deal with that very hazard [the fire] and hence, . . . he cannot complain of negligence in the creation of the very occasion for his engagement." *Calatayud v. State of California* (1998) 18 Cal.4th 1057, 1062, 959 P.2d 360.

*Amicus Curiae*, Ohio Association for Justice, respectfully submits that finding that the Ohio Firefighter's Rule exonerates negligent third parties from any duty of care does not further the public policy of fairness for two reasons. First, it cannot be said that injuries caused at least in part by independent acts of negligence are inevitable in the performance of a firefighter's or police officer's duties. Second, while it may be reasonable for the public to insure itself from tort suits alleging negligence by its members in the creation of an emergency situation, it is not reasonable for the public to insure a negligent third party from a damage suit when the third party's negligence injures during, but not because of an emergency. The mere chance that the negligence reveals itself during an emergency should not shift the costs of damages, which the negligent third party would have otherwise borne, from the tortfeasor to the public.

In the present case, there is nothing fair about extending the Firefighter's Rule to protect Appellee, Daniel Heskett, from liability arising from his negligence. Contrary to the analysis of the Court of Appeals, the liability issues relating to Heskett do not focus on the cause of the burglar alarm sounding at the Boyce residence, but rather on the resulting effect of the alarm. In

this regard, the deck stairs at the Boyce residence did not collapse as the result of the sounding alarm, but rather as the result of Heskett's independent acts of negligence. Said another way, Heskett's negligence did not make Appellant's employment necessary nor was it the occasion for Appellant's official presence at the residence in question. Simply stated, there is nothing fair about requiring the public to become the insurer of Heskett under the circumstances of the present case. There is also nothing fair about precluding the Ohio Bureau of Workers' Compensation from enforcing its statutory subrogation rights against Heskett. Accordingly, this Court should reverse the judgment of the Court of Appeals in the present case.

#### **V. FORESEEABILITY OF UNEXPECTED HAZARDS IS IRRELEVANT**

In extending the Firefighter's Rule to Appellee, Daniel Heskett, in the present case, the Court of Appeals erroneously found that the risk of unexpected hazards is known or should be reasonably anticipated by firefighters and police officers. Indeed, the Court of Appeals found erroneously in the present case that Appellant assumed the risk of injury because police work, by its very nature, is hazardous. While foreseeability may have been a relevant consideration in the application of the Firefighter's Rule at one time, it no longer factors into an assumption-of-the-risk analysis. In this regard, courts no longer focus on the foreseeability of the hazard or the firefighter's or police officer's subjective awareness of risk, but on the defendant's duty of care and the relationship of the parties. *Neighbarger*, supra, 8 Cal.4<sup>th</sup> at p. 545. Foreseeability is a proper consideration in the analysis of comparative fault, but not primary assumption of the risk. *Id.*, at p. 539.

*Amicus Curiae*, Ohio Association for Justice, respectfully submits that the risk of encountering negligently constructed stairs at a residence to which a police officer is dispatched is not an "inherent risk" of a police officer's employment. Apparently, the Court of Appeals

misunderstood the use of the phrase "inherent risk" in the context of assumption of the risk. Contrary to the findings of the Court of Appeals, "inherent risk" does not refer to the type of injury the plaintiff sustains or the manner in which the injury occurred, but rather the reason for the injury. This Court should, therefore, reverse the judgment of the Court of Appeals in the present case.

## **VI. OTHER STATES' ABROGATION OF THE FIREFIGHTER'S RULE**

A number of jurisdictions, including Pennsylvania, have abrogated the Firefighter's Rule altogether. See *Mull v. Kerstetter* (1988), 373 Pa. Super. 228, 540 A.2d 951, 954 (rejecting rule's notion that firefighters assume risk of duty as matter of law, and applying normal principles of negligence to firefighter's claims). See, also, *Banyai v. Arruda* (Colo. Ct. App. 1990), 799 P.2d 441, 443 (rule is unwarranted departure from the general duty to exercise due care for the safety of others); *Christensen v. Murphy* (1984), 296 Or. 610, 619-620, 678 P.2d 1210 (public policy does not justify rule). The Oregon court in *Christenson*, at 620 provided the following justification for its rejection of the rule:

By denying a public safety officer recovery from a negligent tortfeasor, the officer is not directed to recover his damages from the general public; rather the officer is totally precluded from recovering these damages from anyone. Contrast this with other public employees who are injured when confronting dangers on their jobs. The latter can recover workers' compensation and salary benefits from the public, but are also allowed additional tort damages from the third-party tortfeasors. Under the 'fireman's rule' the injured public safety officer must bear a loss which other public employees are not required to bear.

Other states have rejected the Firefighter's rule by statute. See Minn. Stat. Ann. § 604.06 (West Supp. 2000) (effective 1991); N.J. Stat. Ann. § 2A-62A-21 (West Supp. 1999) (effective 1994). See, also, Fla. Stat. Ann. § 112.182 (West 1992) (effective 1990, rule changes status of police and firefighters to invitees and only applies to suits against property owners).

*Amicus Curiae*, Ohio Association for Justice, respectfully submits this Court to abrogate the Firefighter's Rule in Ohio. This Court should reject the rule's notion that firefighters and police officers assume the risk of duty as matter of law. The rule is an unwarranted and outdated departure from the general duty to exercise due care for the safety of others. Simply stated, public policy no longer justifies the Firefighter's Rule.

## CONCLUSION

The relevant inquiry in applying Ohio's Firefighter's Rule is whether the negligently created risk which resulted in the firefighter's or police officer's injury was the very reason for his or her presence on the scene in his or her professional capacity. If the answer is yes, then recovery is barred; however, if the answer is no, then recovery may be had. Although police officers 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 should 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. Contrary to the judgment of the Court of Appeals in the instant action, the Firefighter's Rule does not apply to the circumstances of this case. This Court should, therefore, reverse the judgment of the Court of Appeals. In the alternative, this Court should abrogate the Firefighter's Rule in Ohio, finding that the original public policy considerations for adopting the rule are no longer applicable.

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**CERTIFICATE OF SERVICE**

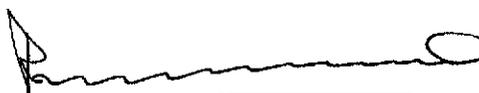
This is to certify that a true and accurate copy of the foregoing Merit Brief of *Amicus Curia*, Ohio Association of Justice, Urging Reversal in Support of Appellant's Position, was served, via ordinary U.S. mail, postage prepaid, upon the following parties, this 5<sup>th</sup> day of August, 2008:

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