

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

Court of Appeals
Case No. 06 CA 002921

MERIT BRIEF OF APPELLEE DANIEL HESKETT

Frank E. Todaro (0038500)
Todaro & Wagoner Co., L.P.A.
471 East Broad Street, Suite 1303
Columbus, Ohio 43215
(614) 242-4333
(614) 242-3948
frank@todarolaw.com

David A. Herd (0059448)
John C. Nemeth (0005670)
John C. Nemeth & Associates
21 East Frankfort Street
Columbus, Ohio 43206
(614) 443-4866
(614) 443-4860
herd@nemethlaw.com

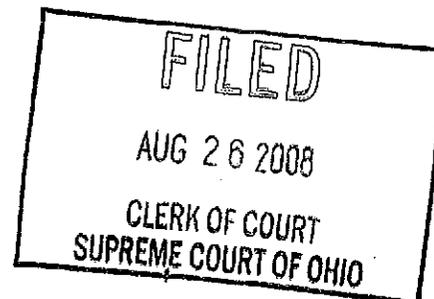


TABLE OF CONTENTS

	Page
<u>TABLE OF AUTHORITIES</u>	ii
<u>STATEMENT OF THE CASE</u>	2
<u>STATEMENT OF THE FACTS</u>	2
<u>ARGUMENT</u>	3
<u>Response to Proposition of Law: The public policy considerations behind the Fireman’s Rule apply equally during the dependent contractors on private property as to the owner of the private property itself.</u>	
<u>CONCLUSION</u>	6
<u>CERTIFICATE OF SERVICE</u>	6

TABLE OF AUTHORITIES

Page

Brady v. The Consolidated Rail Corp., 35 Ohio St. 3d 161 (1988).....3

Hack v. Gillespie, 74 Ohio St. 3d 362 (1995).....3, 5, 6

Scheurer v. Trustees of the Open Bible Church, 75 Ohio St. 3d 163 (1963).....3

STATEMENT OF THE CASE

Appellee, Daniel Heskett (hereinafter Heskett) agrees that Appellant, Ricky M. Torchik (hereinafter Torchik) provided an appropriate statement of the case.

STATEMENT OF THE FACTS

Heskett generally agrees with Torchik's statement of the facts, except for the editorializing concerning the extended nature of damages. Facts concerning damages were generally not part of the record below and no determinations on damages were made by either inferior court.

Further, Heskett notes the stairs in question were built "to the state code" (Trial Court's August 11, 2006 Decision and Entry, page 3). And at no time has Torchik disputed this evidence. In addition, Heskett was not aware of Torchik's presence at Mr. Boyce's home on February 4, 2003. (Trial Court's August 11, 2006 Decision and Entry, page 4).

Moreover, the trial court applied the Fireman's Rule because "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." (Trial Court's August 11, 2004 Decision and Entry, page 4-5). The trial court determined that Heskett did not owe a duty of care to Torchik and Heskett's motion for summary judgment was granted. The Court of Appeals affirmed and this Court accepted jurisdiction.

ARGUMENT

Response to Proposition of Law: The public policy considerations behind the Fireman's Rule apply equally to agents or independent contractors on private property as they do to the owner of the private property itself.

Appellant Torchik is correct in noting that this court first adopted the Fireman's Rule in Scheurer v. Trustees of the Open Bible Church, 75 Ohio St. 3d 163 (1963). In Scheurer, this court stated the rule that an officer cannot recover against a property owner for negligence on private premises where there is no willful or wanton misconduct, hidden trap or violation of a statute or ordinance for the benefit of the officer. At no time when the Fireman's Rule has been revisited has it been limited to exclude application to agents, employees or contractors of the property owner. Nevertheless, Torchik argues for such exclusion.

Torchik attempts to argue for exclusion and interpretation through Brady v. The Consolidated Rail Corp., 35 Ohio St. 3d 161 (1988). However, the language of Brady does not support Torchik's contentions. The only distinction made in Brady was that a landowner need exercise ordinary care towards an officer when it is reasonable for the landowner to expect the officer's presence on an area of landowner's property that is held open for the use of the general public. Brady at 163. Such is not the situation here. There is no evidence in the record that the part of the premises involved here was held open for use of the general public so that the distinguishing exception in Brady might apply.

Torchik then cites to Hack v. Gillespie, 74 Ohio St. 3d 362 (1995), as this Court's most recent discussion of the Fireman's Rule. Again, Heskett agrees. Heskett further agrees with the five delineated factors and rationales stated at page 7 of Torchik's merit brief as having been discussed by this Court in Hack. However, none of the five delineated reasons have anything to

do with the contention that an agent or contractor for a land owner should be liable to an officer as an exception to the Fireman's Rule. That is, the mere fact that it is an agent or contractor of the landowner involved does not change (1) That the officer can enter the premises under authority of law; (2) The time of entering on premises cannot be anticipated; (3) The costs incurred by the officers are spread through the Workers' Compensation system; (4) Officers assume risks as part of the nature of their chosen profession or; (5) That it is inherently unfair to change the rule because officer's can enter the premises under the law at any time and cannot be anticipated. Again, none of these items of discussion have a specific bearing on the identity of the tortfeasor as the owner or the agent of the owner.

Torchik has made an argument that because steps to a back door were involved, this necessarily is an area that should be considered as having been open to the public. To call this argument a stretch is an understatement. These were stairs to a back door on private property. There is no evidence in the records that they were held open to the general public for any reason, or that either property owner or Torchik would have expected the general public to use the steps. This is exactly the type of area that is quintessentially "private" as opposed to open to the public. The argument presented by Torchik borders on disingenuous. Torchik sites no case law or evidence in the record in support of his proposition that a stairway leading to a back door is to be considered an area kept open to the general public.

Despite the contentions made by Torchik, it still seems quite anomalous to apply the Fireman's Rule only to an owner or occupier of the property but not to an agent of the property owner. Ohio's legislature has not seen fit to an act of legislation eliminating or changing the Fireman's Rule. Given the judicial doctrine of stare decisis, this Court must yield to the Ohio legislature as to any change of the Fireman's Rule instead of reversing previous decisions

establishing the Fireman's Rule. Until such point as the Ohio legislature would act, the Fireman's Rule should remain and apply to owners and occupiers of real property as well as agents and contractors connected to such owners and occupiers, subject of course to the exceptions delineated in Hack, supra. It would be illogical to place additional burdens on agents of a property owner who are not present and are not in a position to warn or upkeep the property. There appears no basis in Ohio law to subject the agent to higher standards than that of the owner or occupier who has control of the property and is indeed actually in a superior position to that of the agent as far as knowledge and ability to warn.

It also merits noting that police officers and firefighters assume the risks inherited with their jobs and that members of the public should not be subject to litigation for calling on them for help. This is essentially the public policy rationale behind the Fireman's Rule in the first place. However, it should be underscored that non-property owners and agents and contractors of property owners make up part of that "public" just as much as do owners and occupiers of property. Police officers and firefighters assume no more risks and no fewer risks when entering on to property to do their job when an agent of a property owner or occupier is involved as compared to simply when owner or occupier himself is involved.

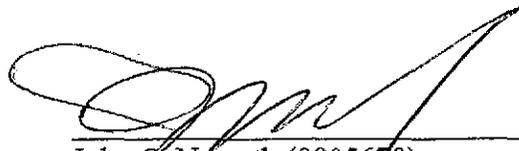
Lastly, it should be noted that Torchik has not shown in the record that any of the Hack exceptions with respect to the property owner or Heskett apply. That is, there is no evidence in the record of willful or wanton misconduct, hidden trap, violation of statutory duties or known dangerous situation without warning. If Torchik had presented evidence of one of the exceptions to Hack then he might have properly proceeded against Heskett regardless of whether Heskett was an agent of a property owner or the property owner himself, as police officers and firefighters can maintain the same legal opportunities under application of the Fireman's Rule

whether the case involved the actual owner or the agent of the owner. However, Torchik has not established any of the Hack exceptions with respect to Heskett. Therefore, Heskett cannot be liable to Torchik when none of the Hack exceptions have been established.

CONCLUSION

Because there is no public policy reason for reversal or alteration of the Fireman's Rule and because inherent fairness dictates that the Fireman's Rule be applied equally to owners, occupiers and their agents, which would include the contractor Heskett here, the opinion of the Fourth Appellate District in this matter should be Affirmed. Affirmance is also required as Torchik has not provide evidence of the record of any of the applicable exceptions to Hack, supra. Accordingly, Torchik has not shown that he has a viable claim against Heskett under Ohio law when application of the Fireman's Rule is given.

Respectfully submitted,



John C. Nemeth (0005670)
David A. Herd (0059448)
John C. Nemeth & Associates
21 East Frankfort Street
Columbus, Ohio 43206
(614) 443-4866
Fax: (614) 443-4860
herd@nemethlaw.com

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing was served by ordinary regular U.S. mail, postage pre-paid on this 26 day of August, 2008 upon:

Frank E. Todaro
Todaro & Wagoner Co., L.P.A.
471 East Broad Street, Ste. 1303

Columbus, OH 43215

Robert W. Kerpsack
ROBERT W. KERPSACK CO., LPA
655 Metro Place South, Suite 255
Columbus, OH 43017

Henry A. Arnett
Livorno and Arnett Co., LPA
1335 Dublin Road, Suite 108-B
Columbus, OH 43215

A handwritten signature in black ink, appearing to read 'D. Herd', written over a horizontal line.

David A. Herd (0059448)
Attorney for Appellee