IN THE SUPREME COURT OF OHIO

RICKY M. TORCHIK,	:	
	:	**Case No. 08-0534**
Appellant,	:	
	:	**On Appeal from the Ross County**
vs.	:	**Court of Appeals, Fourth Appellate**
	:	**District**
JEFFREY M. J. BOYCE, et al.,	:	
	:	**Court of Appeals**
Appellee.	:	**Case No. 06 CA 002921**

REPLY BRIEF OF APPELLANT RICKY M. TORCHIK

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I. INTRODUCTION

Appellee Daniel Heskett (hereinafter "Heskett") has failed to advance one public policy justification to extend the Fireman's Rule to non-owners or occupiers of property. The best that Heskett can do mirrors the sentiment of the lower court, only that they could find nothing in the law that previously excluded application of the Fireman's Rule beyond owners and occupiers of property. However, Heskett provides no insight or justification as to why an independent contractor, who typically under the law is liable for failing to meet the standard of care, should be immune from liability.

Torchik asserts that before this Court grant anyone immunity for negligent conduct, at the peril of others, there should be strong justification for giving one a free pass. Otherwise, the purpose of this rule of law would not promote safety of others, but would foster recklessness by contractors because of their freedom from liability.

Heskett also leaps to a conclusion, without basis in fact, that he was an "agent" of Boyce, the owner of the premises. There is absolutely no evidence in the record, implied or otherwise, that Heskett was anything other than an independent contractor hired to construct the premises. Heskett's attempt to categorize himself as an "agent" is without merit.

Heskett criticizes Torchik for asserting that the steps in the rear of the premises were open to the public. Maybe a better way to categorize the relevance of the location of the steps would be a location that was foreseeable to pedestrian traffic. Torchik asserts that the duty of care imposed upon Heskett was to construct steps that were sufficient for foreseeable pedestrian traffic. It was this duty imposed upon Heskett by way of the foreseeable use of the steps that establishes his duty and breach of duty. Foreseeability is a very relevant point in this case because one of the underpinnings of the Fireman's Rule is the fact that the fireman or police

officer comes onto the property unannounced and puts the occupier in a position of not being necessarily prepare for his arrival. This pivotal justification for the Fireman's Rule does not apply to Heskett. Heskett's duty is based upon foreseeable pedestrian use which was determined at the time of the construction. Therefore, whether the pedestrian is a neighbor, mailman, or firefighter does not change the duty owed to the users of the steps. That is why the Fireman's Rule cannot apply to Heskett and should not be expanded to Heskett without justification.

Lastly, Heskett criticizes Torchik because of the discussion regarding general damages. General damages were pled in the Complaint. General damages are relevant because both Heskett and the trial court state that Torchik's damages are adequately compensated by way of the Workers' Compensation administrative remedy. Torchik points out to the Court that the Workers' Compensation remedy is not a complete remedy, as there is no compensation for general damages. Compensation for general damages is an entitlement under the common law and is a vested right. Denying Torchik of his right to a remedy has constitutional implications. The Court should not tread lightly on evaluating whether or not balancing the interests of Torchik and being entitled to his vested right of general damages against the public policy considerations of granting Heskett immunity. In that balance, Torchik should clearly prevail.

Torchik's Reply Brief will focus on these narrow issues raised in Heskett's brief.

II. LAW AND ARGUMENT

A. Public policy considerations do not support applying the Fireman's Rule to independent contractors.

Heskett offered this Court no basis to extend the Fireman's Rule beyond the traditional application to owners and occupiers of property. Heskett's brief is totally void of any discussion of why this Court should extend the rule to independent contractors doing the work of the property owner who are under their own standard of care to perform the work in a workmanlike

manner, consistent with their condition of employment. Heskett's justifications are no more convincing then what was advanced by the trial court. That is, that there is no case law prohibiting the extension of the law to independent contractors. If that rationale is used, then the Court could equally hold that there is no case law requiring that it be extended to independent contractors. It is just an illogical analysis. The logical analysis would be to look at why the courts over the years have imposed the rule and determine if those factors or circumstances apply to independent contractors. They clearly do not. That has been the thrust of Torchik's Merit Brief. None of those public policy arguments raised in Torchik's Brief has been rebutted or contrasted by Heskett. It is clear that Heskett's Brief falls far short of justifying why this Court should grant a class of defendants immunity for their negligence in injuring, maiming or killing firefighters and police officers. Heskett could not answer the question of why he should be immune from liability when the steps collapse under a police officer but liable for his negligence when a postman, neighbor or meter reader finds himself in the same situation. There is no logical or constitutional justification for granting immunity when Heskett's duty of care is fixed at the time of construction by foreseeability of the use of the steps.

Heskett has been unable to respond to the argument that the Fireman's Rule was granted to premises owners and occupiers because of their lack of foreseeability as to when and where and how a fireman or police officer may enter the property and become injured. That does not apply to Heskett because although he does not know when it may happen, he certainly knows how the steps will be used in a foreseeable way.

B. Heskett is not an agent of Boyce, the owner of the premises.

Heskett contends in his brief that he was an agent of Jeffrey Boyce and thus he should be given the same immunities as the premises owner. Torchik asserts that there is absolutely no

evidence in the record to support the contention that Heskett was an "agent". The record does affirmatively support the contention that Heskett was an independent contractor who was hired to construct a home and deck.

The trial court found:

> The evidence indicates that Jeffrey Boyce purchased the land and built a house on it with the construction beginning in March 2000 and completed in October 2000. Heskett built the house, the deck and the steps...
>
> Ohio law provides that contractor may be liable to those who may foreseeability be injured by a structure when the work is negligently done. See Jackson v. City of Franklin, 51 Ohio App.3d 51, 53; Fink v. J-WII Homes, Inc., 2006-Ohio-3083, unreported Case No. CA2205-01-21 (Court of Appeals for Butler County 2006)*{sic}*. 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.

It is clear from the evidence in the record that Heskett was an independent contractor who was hired to build the house. There is no evidence that Boyce controlled how Heskett did the work, provided specific direction or control over Heskett's work, but merely hired him as a builder to build the home. The trial court appeared to determine that, but for the Fireman's Rule, Heskett would be individually liable for his negligent conduct.

Ohio has long held that an employer or principle is vicariously liable for the torts of employees or agents under the doctrine of *respondeat superior* but not for the negligence of an independent contractor over whom it retained no right of control or the mode or manner of doing the work contracted for. Councellor v. Douglas, (1955), 63 Ohio St. 292.

The distinction between an agent and independent contractor provides that an agency relationship is the fiduciary relationship which results from the manifestation of consent by one

person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act. See the Restatement of Law 2d. Agency (1958), 7, Section 1.

The only evidence before the Court is the evidence of an independent contractor relationship of a landowner contracting with a builder to build a house. Therefore, as the trial court stated, but for the application of the Fireman's Rule, Heskett would be negligent for his conduct and the court was satisfied that there was a sufficient issue of fact to present to the jury. The question remaining unanswered by Heskett is why should this Court extend immunity to Heskett. Torchik and the Amicus Curie have suggested that none of the public policy considerations adopted by this Court in support of the Fireman's Rule apply to an independent contractor. Without more, this Court should follow its precedent and limit the rule to premises owners and occupiers.

Heskett argues that it is up to the legislature to limit the Rule, not the Court. Heskett has it wrong, there is no legislative enactment of the Fireman's Rule. This is solely a matter of common law. Heskett's argument that this Court must yield to the Ohio legislature rather than interpret its prior decisions is also wrong. What Torchik asks is for the Court to apply the Fireman's Rule consistently with its past decisions and public policy analysis, as well as consistently with other jurisdictions around the country who have analyzed the rule. Torchik asks Ohio to follow other jurisdictions in taking a restrictive and cautious view when doling out immunity. Clearly, other jurisdictions have backed away from a broad blanket of immunity and have imposed liability where the wrongful conduct justified it.

Ohio has followed this precedent by providing exceptions to the Rule to hold premises owners and occupiers to liability when fairness and conduct dictate they are liable for injury. This Court has examined the balance of when a property owner or occupier has prior superior

knowledge of a hazard or hidden trap they should take steps to protect others. In this case, Heskett had prior superior knowledge that the steps were not adequately secured to the deck.

Heskett has no real excuse or justification for why he did not construct steps in a manner consistent with their foreseeable use. Heskett has not given this Court any reason to give him immunity. Heskett's only argument is that he could not have anticipated when a firefighter may use the steps, but common sense tells us that is not a justification.

C. Torchik's general damages are relevant to the Court's analysis of limiting the application of the Fireman's Rule to independent contractors.

Heskett criticizes Torchik for discussing the fact that he pled and sustained general damages which have been uncompensated through the Workers' Compensation system and who seeks compensation here. Both Heskett and the trial court have justified their position by indicating that Torchik can rely upon the benefits of the Workers' Compensation system to compensate for his loss. Torchik's point is two-fold. First, the Bureau of Workers' Compensation system has a statutory right of subrogation and they seek to be reimbursed for the third party conduct. Second, Torchik's compensation through the Workers' Compensation system, in and of itself, is incomplete, since he is not compensated for general damages and physical pain, anxiety, distress, loss of enjoyment of life, inability to perform everyday activities and physical impairment. Torchik asserts that that is a significant uncompensated loss.

Therefore, the justification for subjecting firefighters and police officers to risk, only to be partially compensated for their loss, is really not a strong justification at all. Rather, Torchik asserts it should suggest to this Court that the Rule should be used sparingly. Particularly when the Rule is being applied beyond its traditional application to property owners.

III. CONCLUSION

After consideration of the foregoing briefs, Torchik asks this Court to consistently apply the Fireman's Rule to only immunize premises owners and occupiers of property. The Court has established exceptions to the Fireman's Rule, which will expose premise owners to liability. But neither this Court nor any other court has purposefully extended the Rule to non-premises owners and occupiers. While this Court has been asked to do so, Heskett has failed to provide the Court with any justification for doing so. In the end analysis, Heskett's liability should be established by duty, breach of duty and proximate cause. Heskett's duty is established by the standard of care necessary to meet the foreseeable risks of harm to the people who use the steps in a foreseeable manner. Heskett should not be granted immunity for his negligent conduct because the person who was injured was a police officer. Based on this, Torchik respectfully requests this Court to overrule the decision of the appellate court and remand this matter back to the trial court for trial on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was served upon John C. Nemeth, Attorney for Appellee Daniel Heskett, at John C. Nemeth & Associates, 21 E. Frankfort Street, Columbus, Ohio 43206, by ordinary U.S. mail, postage prepaid this 15th day of September, 2008.

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