Firehouse Lawyer

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Firefighter's Rule: Time For Re-Examination?

Since a similar legal publication aimed at the fire service included an article and recent cases from California and Arizona in their June issue, I thought perhaps another in-depth look at this rule might be of interest to readers. We wrote an article in the Firehouse Lawyer in March 1998 about this same subject, but with an emphasis on Washington cases.

For readers unfamiliar with the long-established Fireman's Rule, it is a general rule of non-liability to firefighters, applicable to property owners whose negligence caused the emergency that led to the firefighter's presence on the property where the fire (or other emergency) occurred. One of the early, leading cases on the Rule was a New Jersey court decision, *Krauth v. Geller,* 31 N.J. 270, 273-74, 157 A. 2d 129, 131 (1960). The New Jersey court said the rule is based on public policy. The court reasoned that it is the fireman's business to deal with those types of hazards and therefore the fireman cannot complain of negligence in the creation of the very occasion for his engagement. Most fires are attributable to negligence, the court said, and in the final analysis the policy decision is that it would be too burdensome to charge all such careless persons for injuries suffered by "the expert" retained with public funds to deal with such emergencies.

Actually, the Firefighter's Rule is a particular application of the broader "professional rescuer doctrine" which generally bars recovery for injuries suffered by the professional rescuer. The State of Washington adopted that doctrine in *Maltman v. Sauer,* 84 Wn. 2d 975, 530 P.2d 254 (1975). The court said it is the business of such professional rescuers to deal with such hazards and so they cannot complain of the negligence which created the exposure to those hazards. But the *Maltman* court implied that only those risks within the scope of anticipated dangers identified with that particular rescue operation would be non-actionable. This suggests that unanticipated dangers or unforeseeable negligence, which was not the reason causing the response might be actionable.

Washington State has not been aligned with the majority of states adopting the Firefighter's Rule. By way of background, readers should know that there are three classes of persons who come upon the private property of another and get injured, for purposes of premises liability

cases. First, invitees get the most protection, as owners owe them a duty of ordinary care, which means they can be liable for negligence. Second, licensees (such as social guests) get an intermediate level of protection, as owners owe them a duty of care to avoid gross negligence and willful or wanton misconduct. Third, and last, trespassers are seldom owed any duty of care, and can recover for injuries only under a few very narrow exceptions. Most states consider firefighters to be like licensees, but Washington considers them to be invitees.

That sounds promising, but in Washington the court decided, in 1975, the case of *Strong v. Seattle Stevedore Co.,* 1 Wn. App. 898, 466 P. 2d 545 (1970). In that decision, while the Court of Appeals said firemen are invitees, they did not hold the property owner liable, because they said the deceased battalion chief, who died in a pier fire involving creosoted pilings, would have had superior knowledge than the property owner regarding the special dangers in such fires.

Subsequent cases that have discussed *Strong* seem to imply that it is an example of an application of the professional rescuer doctrine, which of course is analytically about the same as the Fireman's Rule. However, in 1982, another case shed some light on the situation. In *Sutton v. Shufelberger,* 31 Wn. App. 579, 643 P.2d 920 (1982) the case involved a police officer injured by a second vehicle while getting off his motorcycle during a traffic stop involving a first vehicle. The court said Washington had never applied the Fireman's Rule to policemen, but seemed to acknowledge that the rule could be a bar to recovery when the emergency responder tries to make a claim against the person causing the original emergency. However, the *Sutton* court said that other negligent conduct (other than the original negligence that caused the fire or other emergency, which led to the response) or willful misconduct *may* create liability to injured firefighters or police.

Finally, in *Ballou v. Nelson,* 67 Wn. App. 67, 834 P. 2d 97 (1992), police officers were physically assaulted while responding to a public disturbance complaint. The Court of Appeals said that Washington had never really adopted the Fireman's Rule, citing *Strong, supra,* and said the rule does not provide immunity to one who commits "independent acts of misconduct" after responders have arrived on the premises.

I would say that, in Washington at least, the synthesis of these cases means that (1) firefighters are invitees under the *Strong* ruling but are still subject to the professional rescuer doctrine in the sense that they assume the risk of injury caused by the very negligence that brought them to the scene, but (2) numerous exceptions can apply such as the

one arising from independent acts of negligence *either caused* (in my opinion) by the same property owner or someone else. The best counsel is to analyze the particular facts of your situation to ascertain if the injury or death was a result of the original negligence or of some other independent conduct, condition, or defect in the premises.

Now let us take a look at the Arizona and California cases, to see how those decisions fit into the analysis set forth above for Washington. Importantly, the Arizona case involved an *off-duty* paramedic or EMT who stopped at a traffic accident and then was injured. In our view, given the court's analysis, the particular negligence of various parties does not enter into the equation much in this case. The salient feature was that the responder was not on duty, but was essentially a volunteer or Good Samaritan. The court noted that if she had been on duty, she would have had various protections such as other fire department vehicles, flashing lights and other officers to fend off oncoming traffic. Also, here she had a choice to become involved, so the professional rescuer doctrine and the Fireman's Rule had no application whatsoever, so the Court of Appeals of Arizona reversed the trial court which had ruled the Fireman's Rule barred recovery and dismissed all claims against the negligent causer of the accident. See *Espinoza v. Schulenberg, et al.,* 1 CA-CV-04-0438, Court of Appeals of Arizona, Div. One Department A (2005).

In the California case, the firefighter was participating in a joint drill (while on duty) taking place in a neighboring city to his city fire department, when he was struck by a car and injured. He claimed the other city (not his employer), which was in charge of the drill did not operate in accord with NFPA regulations applicable to such drills. There was no question that the Fireman's Rule applied, even though the situation was a drill and not an actual emergency, as that had already been decided in California. Also, a prior case had held that the Rule applied to joint activities of multiple departments. In this case, the court held the Fireman's Rule was a bar to recovery, discussing the usual "assumption of risk" rationale and noting that firefighting is inherently dangerous work. Based on the facts, the firefighter was barred from recovery here. See *Bench v. City of Monrovia,* B173530, Court of Appeal of California, Second Appellate District, Div. Five (2005).

In discussing the Rule, the California court did note that in that state, as in Washington, there can be liability for independent acts of negligence, when the misconduct is not the reason the firefighter was called to the scene in the first instance. In *Donohue v. San Francisco Housing Authority,* 16 Cal. App. 4th 658, a firefighter on scene to investigate one fire code violation was hurt when he slipped on the stairs. The court allowed such a claim, holding that the Rule was not a bar to recovery. We would say that this may be the minority rule, but it applies in Washington as well as California. Therefore, again, we advise close inspection of the cause of the injuries to see if it is the reason the firefighter was dispatched. But only if you know whether your state is with the majority or the minority can you decide if you may have a case.

JOB INTERVIEWS – QUESTIONS NOT TO ASK:

My HR service—Hrhero.com from M. Lee Smith Publishers had a couple of good articles this week. The first one listed numerous "off limits" interview questions, i.e. questions NOT to ask, unless you want to be sued for some sort of job discrimination. Here is a sampling of some of the questions on the "off limits" list:

- What is your age?
- What is your date of birth?
- When did you graduate from high school?
- Were you born in the U.S.?
- Do you have any disabilities?
- Does anyone in your family have a disability for which you have to provide care?
- Have you ever been treated by a psychologist or a psychiatrist?
- Have you ever been treated for a drug addiction or alcoholism?
- Are you married, single, or divorced?
- How many children do you have?
- Who is going to care for them while you're at work?
- Are you pregnant?

As you can see, some of these "no-no's" are more obvious than others. When in doubt call your attorney, and also be advised that in Washington, there is a "pre-employment inquiry guide" in the WAC provisions promulgated to implement the Washington Law Against Discrimination, chapter 49.60 of the RCW.

The second article in this week's service discussed the details of conducting internal investigations. I will not go into the excellent tips in the article in this issue. However, the article reminded me that one of the best classes I have ever conducted was a training in which I taught various personnel of a large nonprofit corporation in this area how to perform as internal investigators, when asked to do so by their employer. Sometimes it is most cost effective, and entirely possible to do without conflicts of interest, to have one of your own personnel do the investigation of alleged misconduct, instead of hiring an outside investigator or attorney. Sometimes it is not. Feel free to contact the Firehouse Lawyer to schedule such a training session.

OPEN PUBLIC MEETINGS ACT:

It is funny how the same questions keep coming up, notwithstanding the endless training and conferences attended by fire district commissioners and staff. For example, the question was again presented this month to me: "If our Board just holds a study session or retreat, is that considered a meeting subject to the Act?" The simple answer is yes. Any time a quorum of the Board meets and discusses *any* district business, it is a meeting, and it does not matter if no decisions are made. Discussion is "action" within the meaning of the Act.

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