

RENDERED: APRIL 15, 2016; 10:00 A.M.  
TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2014-CA-001298-MR

SHARON W. JOHNSON

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT  
HONORABLE DARREN W. PECKLER, JUDGE  
ACTION NO. 12-CI-00262

NORFOLK SOUTHERN RAILWAY  
COMPANY

APPELLEE

OPINION  
REVERSING AND REMANDING

\*\* \*\* \* \* \* \* \*

BEFORE: COMBS, DIXON AND D. LAMBERT, JUDGES.

DIXON, JUDGE: Appellant, Sharon Johnson, appeals from a judgment of the Boyle Circuit Court granting a directed verdict in favor of Appellee, Norfolk Southern Railway Company, on the grounds that the Fireman's Rule barred Appellant's recovery as a matter of law in her premises liability case. For the reasons set forth herein, we reverse and remand for further proceedings.

On June 16, 2011, Appellant, a police officer employed by the City of Danville, and another officer, Sergeant Matano, responded to a call about an individual acting in a disorderly manner at the end of Dillehay Street adjacent to Centre College. Upon arriving at the scene, Sergeant Matano first approached the individual who stated that he was the devil before he turned and fled across a field owned by Centre College toward property owned by Appellee. Sergeant Matano chased the suspect and Appellant thereafter joined in the foot pursuit. The record is undisputed that the suspect fled across the field and through a tree line located on Appellee's property. As the suspect approached a steep embankment located on the other side of the tree line, Sergeant Matano deployed his taser, hitting the suspect in the back and causing him to roll down the embankment. Officer Matano was then able to stop and sidestep down the embankment. Unfortunately, Appellant thereafter came running through the tree line and fell to the bottom of the embankment, suffering injuries to her wrist and eye.

In June 2012, Appellant filed an action in the Boyle Circuit Court against Appellee<sup>1</sup> claiming that the embankment was a dangerous condition and that Appellee breached its duty to warn her of the danger. Following discovery, Appellee filed a motion for summary judgment on the issue of liability, which was denied. The case thereafter proceeded to trial in June 2014. Prior to Appellant presenting her case, Appellee moved for a directed verdict based upon the

---

<sup>1</sup> Appellant initially sued both Appellee and Centre College alleging that each owned the property where she fell. Centre College was subsequently dismissed by summary judgment in September 2013, as it had no ownership or control over the property at issue.

Fireman's Rule. The trial court reserved judgment until the close of Appellant's proof, at which time it ruled that any recovery was barred as a matter of law by the Fireman's Rule. Appellant's case was thereafter dismissed and she appeals to this Court as a matter of right.

Appellant argues in this Court that the trial court erred in granting a directed verdict because the three-prong test set forth in *Sallee v. GTE South, Inc.*, 839 S.W.2d 277 (Ky. 1992) was not met, thus precluding the application of the Fireman's Rule. We must agree.

In *Buren v. Midwest Industries, Inc.*, 380 S.W.2d 96, 98 (Ky. 1964), Kentucky's then-highest Court enunciated the Fireman's Rule (also known as the "Firefighter's Rule"). Therein, a building resident was grilling steaks when they caught fire and the flames ignited grease that had accumulated and adhered to the inside of a vent over the grill. In the course of battling the building fire, three firefighters were killed. The decedents' estates filed an action against the building owners alleging that their failure to comply with applicable fire safety ordinances "caused . . . the deceptive speed with which the fire suddenly enveloped the premises . . . ." 380 S.W.2d at 97. In holding that the Fireman's Rule barred the estates' claims, the Court noted,

[A]s a general rule the owner or occupant is not liable for having negligently created the condition necessitating the fireman's presence (that is, the fire itself), but may be liable for failure to warn of unusual or hidden hazards, for actively negligent conduct and, in some jurisdictions, for statutory violations 'creating undue risks of injury beyond those inevitably involved in fire fighting.'

(Quotation taken from *Krauth v. Geller*, 31 N.J. 270, 157 A.2d 129, 131).

. . . ‘[I]t is the fireman's business to deal with that very hazard and hence, perhaps by analogy to the contractor engaged as an expert to remedy dangerous situations, he cannot complain of negligence in the creation of the very occasion for his engagement,’ the precise risk which the public pays him to undertake. *Id.*

*Id.* at 97-98.

Subsequently, in *Fletcher v. Illinois Central Gulf Railroad Company*, 679 S.W.2d 240 (Ky. App. 1984), this Court expanded the Rule to apply to police officers, holding that “[a]s we view the matter, the law in this jurisdiction, as enunciated in *Buren*, is that policemen, as well as firemen, must be deemed to assume all normal risks inherent in their employment. Thus, they cannot recover damages for injuries sustained when they are exposed to an unreasonable risk of harm negligently created by a party if the unreasonable risk itself is the reason they are present.” *Id.* at 243. The Court further observed,

We note, however, that our decision should not be construed to mean that policemen and firemen are precluded from recovering for any injury incurred in the performance of their duties. On the contrary, our decision is limited in scope. It applies only to those situations where officers in the performance of their duties are required to subject themselves to an unreasonable risk of harm negligently created by a party and are injured. In such instances, they may not maintain a negligence action against the party who created the risk to recover damages for any injuries they may have sustained as a result of their exposure to that particular risk.

*Id.*

As Appellant points out, *Sallee v. GTE South, Inc.*, 839 S.W.2d 277 (Ky. 1992), sets forth three prongs necessary to the application of the Firefighter's Rule as adopted in Kentucky:

- 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.

*Id.* at 279 (footnote omitted). In *Sallee*, a paramedic, who responded to a call to treat and transport an assault victim, injured his ankle when he stepped into a shallow trench as he was departing the ambulance. He thereafter brought a personal injury action against the utility company that had created the trench in the process of installing an underground cable line. The trial court ruled that Sallee's claim was barred by the Firefighter's Rule and granted summary judgment in favor of the utility company. This Court affirmed on appeal. However, on discretionary review, our Supreme Court reversed the lower courts, finding that Sallee was not injured by a risk inherent in his occupation and, therefore, the Firefighter's Rule did not bar his claim. The Court concluded,

Sallee, fits the second prong of the Firefighter's Rule, because he was indeed a firefighter called to the location

where he was hurt to engage a specific risk. However, he does not fit the third prong because he was not injured by the risk he was called upon to engage, but by a risk different in both kind and character.

Moreover the respondents, who seek to shield themselves from liability even should they be proved at fault for this injury, do not fit the first prong of the rule because they are neither owners, occupiers, nor persons otherwise fitting the description of those who, in the situation presented, need to be protected.

. . . .

The present case presents neither a risk which was part of the emergency being attended, nor persons in the class the rule intends to protect. We recognize that the Firefighter's Rule is not restricted to "owners or occupiers," but covers as well others who need to be protected so they will call upon the appropriate public protection agency. But the respondents do not fit this description.

*Id.* at 279-80.

We are persuaded that a like result is required herein. As in *Sallee*, Appellee does not fit within the first prong of the rule because it is neither an owner, occupier, nor person otherwise falling within the description of those who, in the specific situation presented herein, need to be protected so they will call upon the appropriate public protection agency. There is no evidence that Appellee placed the call regarding the suspect, or was even aware of the incident in question. More importantly, Appellee in no manner negligently created a risk that necessitated or was the cause of Appellant's presence on the property. Instead, Appellant's entering onto the property and subsequently falling down the embankment was the

result of wholly independent factors not involving Appellee. Furthermore, while Appellant certainly assumes all of the risks inherent with being a police officer, she “was not injured by the risk [s]he was called upon to engage, but by a risk different in both kind and character.” *Sallee*, 839 S.W.2d at 279.

While it certainly may still be the case that Appellee’s liability for Appellant’s injuries cannot be established, its absence will depend not upon the Fireman's Rule, but rather upon those considerations which generally govern the relationship between possessors of real property and those who are injured on it. Accordingly, we conclude that the trial court erred in granting a directed verdict in favor of Appellee and ruling that Appellant’s claims are barred by the Fireman’s Rule.

For the foregoing reasons, the judgment of the Boyle Circuit Court is reversed and this matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lyman S. Darby  
Lexington, Kentucky

BRIEF FOR APPELLEE:

Robert B. Cetrulo  
Edgewood, Kentucky