A Survey of the Continuing Validity of the Fireman's Rule in Light of Peak v. Central Tank Coatings

by John Hicks and Samuel P. Bennett

Since its inception, the Fireman's Rule (also referred to as the Firefighter's Rule, the Firemen's Rule, or the public rescuer doctrine) has operated to immunize property owners who negligently caused a fire from liability to responding firefighters for any injuries sustained. In a recent case, *Peak v. Central Tank Coatings, Inc.*, the United States District Court of Kansas dismissed a claim brought by a group of volunteer firefighters who were injured when a contractor's container box exploded. Although the Defendant was neither an owner nor an occupier of the land, the *Peak* court held that the public's general interests require protection for individuals who report emergencies caused by their own negligence. The ruling in *Peak* reaffirms the continuing applicability of the Fireman's Rule even as a growing number of jurisdictions reject it.

Notably, a sizable minority of states (18) do not currently apply the Fireman's Rule[i] and have either explicitly declined to adopt, rejected, limited, or failed to address it.[ii] The remaining jurisdictions still invoke the Fireman's Rule as a bar to recovery for negligence in association with the cause of a fire. The reasoning behind this bar, however, varies from jurisdiction to jurisdiction.

Historically, courts advanced three separate doctrines to warrant application of the Fireman's Rule: 1) traditional premises liability; 2) assumption of the risk; and 3) public policy. Under the traditional application of premises liability, firefighters are classified as licensees, and thus the property owner is liable only for willful, wanton, or intentional injury.[iii] Support for the traditional licensee theory has largely given way as the invitee/licensee/trespasser classification has declined in its importance for determining the appropriate standard of care. As a result, only three states[iv] continue to place heavy emphasis on the treatment of firefighters as licensees.[v]

Today, the majority of jurisdictions that invoke the Fireman's Rule turn to either the doctrine of assumption of the risk or public policy as the underlying reason for its application. Under an assumption of the risk analysis, courts[vi] regard fighting fires as inherently dangerous and, as such, by performing the required duties of the job, firefighters assume the risk of being injured in the course of the dangerous activity.[vii] Although the public policy theory varies by jurisdiction[viii], the recent *Peak* decision provides a modern reiteration of the traditional rule and its underlying public policy rationale.

In *Peak*, members of the Kirwin Volunteer Fire Department sued a company hired to repair and repaint the City of Kirwin's water tower which was observed to be emitting smoke.[ix] When firefighters arrived, the defendant's trailer was also on fire, with charred pieces of the water tower appearing to have fallen onto the ground around it.[x] A container box at the scene, owned by Defendant, exploded and injured the Plaintiff firefighters.[xi] Plaintiffs argued that because Defendant was a hired contractor, neither an owner nor occupier of the land, Defendant was a third-party and not entitled to protection under the Fireman's Rule.

Applying Kansas state law, the District Court recited the rule as follows:

> A firefighter cannot recover for injuries caused by the very wrong that initially required his presence in an official capacity and subjected the firefighter to harm; that public policy precludes recovery against an individual whose negligence created a need for the presence of the firefighter at the scene in his professional capacity.[xii]

Despite the general rule, however, a firefighter only assumes hazards which are known and can be reasonably anticipated at the site of the fire and are part of firefighting.[xiii] Under Kansas law, three exceptions to this general rule have been articulated: 1) negligence or intentional acts by a third party; 2) individuals who fail to warn of known, hidden dangers or misrepresent the extent of the hazard on the premises; and 3) subsequent misconduct or negligence by the individual responsible for the fire.[xiv]

The *Peak* court reiterated that the risks and costs of injury to firemen should be spread among the public as a whole rather than placed solely on private individuals.[xv] At the heart of the Fireman's Rule is the protection of the individuals who played the initial role in causing the fire.[xvi] For the benefit of the community, such individuals should be encouraged to report fires.[xvii] The public's general interest in reporting emergencies extends beyond the owner-occupier classification.[xviii] Therefore, the *Peak* court expanded the protections of the Fireman's rule beyond those

who are owners or occupiers of the land to individuals who have some interest, property or otherwise, and who contact emergency services to extinguish a fire caused by their misconduct or negligence.[xix] For purposes of the "third-party" exception to the general rule, "third parties" are only those parties whose conduct is not alleged to have negligently caused the fire.[xx] It is clear then that, although a minority of states have chosen to reject it, the Fireman's Rule is not only still applicable in a majority of jurisdictions, but that in the wake of *Peak*, may be expanded to protect non-owners and non-occupiers from liability.

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[i] These states are Alabama, Colorado, Florida, Maine, Massachusetts, Michigan, Minnesota, Montana, New Jersey, New York, North Carolina, North Dakota, Oregon, Pennsylvania, South Carolina, Vermont, West Virginia, and Wyoming.

[ii] For cases rejecting or declining to adopt the Fireman's Rule, see: *Thompson v. FMC Corp.*, 710 So. 2d 1270 (Ala. Civ. App. 1997); *Wills v. Bath Excavating & Constr. Co.*, 829 P.2d 405 (Colo. Ct. App. 1991); *Foster v. Atwood*, 1995 Me. Super. LEXIS 192; *Hopkins v. Medeiros*, 724 N.E.2d 336, 48 Mass App 600 (2000) ("the firefighter's rule has no continuing vitality in Massachusetts"); *Fisher v. Swift Transp.*, 2006 Mont. Dist. LEXIS 390; *Christensen v. Murphy*, 296 Ore. 610, 678 P.2d 1210 (1982); *Bole v. Erie Ins. Exch.*, 2009 PA Super 38, 967 A.2d 1017 (Pa. Super. Ct. 2009); *Trousdell v. Cannon*, 251 S.C. 636, 572 S.E.2d 264 (2002); see, also Fla. Stat. § 112.182; Mich. Comp. Laws § 600.2965; Minn. Stat. § 604.06; N.J. Stat. Ann. § 2A:62A-21; N.Y. Gen. Oblig. Law § 11-106.

[iii] *Farmer v. B & G Food Enters*., 818 So. 2d 1154, 1156 (Miss. 2002).

[iv] Oklahoma, Texas, and Washington.

[v] *Hays v. Reeves & Son*, 1976 Okla. Civ. App. LEXIS 152; *Campus Mgmt., Inc. v. Kimball*, 991 S.W.2d 948, Tex. App. – Fort Worth 1999, pet. denied; *McDonald v. Highline Sch. Dist. No. 401*, 2010 Wash. App. LEXIS 1334.

[vi] California, Connecticut, Illinois, Louisiana, Nebraska, Nevada, Ohio, Rhode Island, Virginia, and District of Columbia.

[vii] See *Walters v. Sloan*, 20 Cal. 3d 199, 142 Cal Rptr 152, 571 P 2d 609 (1977); *Fournier v. Battista*, 1996 Conn. Super. LEXIS 1860; *McShane v. Chi. Inv. Corp.*, 235 Ill. App. 3d 860, 601 N.E.2d 1238 (1992); *Mullins v. State Farm Fire & Cas. Co.*, 697 So. 2d 750 (La. Ct. App. 1997); *Buchanan v. Prickett & Son, Inc.*, 203 Neb. 684, 279 N.W.2d 855 (1979); *Steelman v. Lind*, 97 Nev. 425, 634 P.2d 666 (1981); *Hack v. Gillespie*, 74 Ohio St. 3d 362, 658 N.E.2d 1046 (Ohio 1996); *Mignone v. Fieldcrest Mills*, 556 A.2d 35 (R.I. 1989); *Benefiel v. Walker*, 244 Va. 488, 422 S.E.2d 773 (1992); *Young v. Sherwin-Williams*, 569 A.2d 1173 (D.C. App. 1990).

[viii] Jurisdictions relying on public policy are Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maryland, Mississippi, Missouri, New Mexico, Ohio, South Dakota, Tennessee, Utah, and Wisconsin. See *Moody v. Delta Western*, 38 P.3d 1139 (Alaska 2002); *Espinoza v. Schulenburg*, 212 Ariz. 215, 129 P.3d 937 (2006); *Waggoner v. Troutman Oil Co.*, 320 Ark. 56, 894 S.W.2d 913 (1995); *Fournier v. Battista*, 1996 Conn. Super. LEXIS 1860; *Carpenter v. O'Day*, 562 A.2d 595 (Del. Super. 1988); *Kapherr v. MFG Chem., Inc.*, 277 Ga. App. 112, 625 S.E.2d 513 (2005); *Thomas v. Pang*, 72 Haw. 191, 811 P.2d 821 (1991); *Winn v. Frasher*, 116 Idaho 500, 777 P.2d 722 (1989); *Babes Showclub v. Lair*, 918 N.E.2d 308 (Ind. 2009); *Pottebaum v. Hinds*, 347 N.W.2d 642 (Iowa 1984); *Hawkins v. Sunmark*, 727 S.W.2d 397 (Ky. 1986); *White v. State*, 419 Md. 265, 19 A.3d 369 (Ct. App. 2009); *Farmer v. B & G Food Enters.*, 818 So. 2d 1154 (Miss. 2002);*Krause v. U.S. Truck Co., Inc.*, 787 S.W.2d 708 (Mo. 1990); *Baldonado v. El Paso Natural Gas Co*., 143 N.M. 288, 2008-NMSC-005, 176 P.3d 277; *Thompson v. Summers*, 1997 SD 103, 567 N.W.2d 387;*Carson v. Headrick*, 900 S.W.2d 685 (Tenn. 1995); *Fordham v. Oldroyd*, 2007 UT 74, 171 P.3d 411;*Pinter v. American Family Mut. Ins. Co.*, 236 Wis.2d 137, 613 N.W.2d 110 (2000).

[ix] 2014 U.S. Dist. LEXIS 93044, at *2 (D. Kan. July 9, 2014), aff'd, Peak v. Central Tank Coatings, Inc., No. 14-3157 (10th Cir. March 12, 2015).

[x] *Id*. at *3.

[xi] *Id*. at *4.

[xii] *Id*. at *10 (citing *Calvert v. Garvey Elevators*, 236 Kan. 570, 694 P.2d 433, 438 (Kan. 1985)).

[xiii] *Calvert*, 694 P.2d at 439.

[xiv] *Id.* at 438-439.

[xv] 2014 U.S. Dist. LEXIS 93044, *11.

[xvi] *Id.*

[xvii] *Id.* at *12-13.

[xviii] *Id.*

[xix] *Id.*

[xx] *Id.* at *12.