No. 14-111987-A

IN THE COURT OF APPEALS OF THE
STATE OF KANSAS

JUAN A APODACA,
Plaintiff/Appellant,

v.

MARK WILLMORE,
MATTHEW WILLMORE, and
OAK RIVER INSURANCE COMPANY
Defendant/Appellee

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF SHAWNEE COUNTY,
HONORABLE LARRY D HENDRICKS, JUDGE,
DISTRICT COURT CASE NO. 11 C 1195

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I. NATURE OF THE CASE

This is a personal injury action stemming from an October 18, 2009 accident wherein Plaintiff/Appellant, Juan Apodaca, suffered injury after his vehicle collided with Defendant/Appellee Mark Willmore's truck, which was sideways blocking both lanes of southbound traffic on K-177. Prior to trial, Defendant moved the District Court to enter summary judgment on its behalf. Plaintiff opposed this request, arguing that as a matter of law, Apodaca was not precluded from recovery. Shawnee County District Court Judge, Larry D Hendricks, granted Defendant's motion on March 13, 2014 (R.V. 7, p. 692). The instant appeal followed.

II. STATEMENT OF THE ISSUE TO BE DECIDED ON APPEAL

A. Should public policy lead to the extension of the "Fireman's Rule" to cover police officers despite their expanded duties?

B. If extended to police officers, did the Defendant's actions give rise to an exception under the Fireman's Rule?

III. FACTUAL STATEMENT OF THE CASE

At approximately 3:36 am, on October 18, 2009, Defendant/appellee, Matthew Willmore, drove north on K-177 and rolled his father's pickup truck across the median after falling asleep at the wheel, and came to a rest blocking the southbound lanes. (R.V. 7, p. 683). Defendant had 10-12 beers to drink prior to the rollover accident. (R.V. 7, p. 686). The district court found the Defendant was under the influence of

alcohol at the time of the accident. (R.V. 7, p. 684). Defendant exited the truck, spoke with a witness, and contacted his parents by cellphone. (R.V. 7, p. 684). Subsequent to the accident, Defendant turned off the trucks headlights and taillights, leaving the truck unlit in the dark and blocking both lanes of southbound traffic. (R.V. 7, p. 684). Plaintiff/appellant, Juan Apodaca, a Riley County police officer, was called to respond to the scene of the accident, and travelled at a high rate of speed southbound on K-177. (R.V. 7, p. 684-85). The headlights of a witness's vehicle, which had stopped on the side of the road in the north bound lanes, could be seen from over a mile away by Plaintiff as he approached the scene. (R.V. 7, p. 685). Believing this was the scene of the accident in the northbound lanes, Plaintiff intended to drive past the accident in the southbound lanes, cross the median, and then come up behind the accident in the northbound lanes. (R.V. 7, p. 686). Plaintiff was unaware that Defendant's truck had the headlights and taillights turned off. (R.V. 7, p. 686). At approximately 3:42 am, Plaintiff's vehicle struck Defendant's unlit truck, which was blocking the southbound lanes, at 104 mph. (R.V. 7, p. 683). At 6:02 am, Defendant was given an evidentiary breath test, which determined his blood alcohol level was .103 at the time of the test. (R.V. 7, p. 686).

IV. ARGUMENT AND AUTHORITIES

Standard of Review

The district court granted the Defendant/ Appellee's motion for summary judgment, finding the Plaintiff/Appellant was barred from recovery in this case under the "Fireman's Rule." (R.V. 7, p. 692). The district court erred in first extending the Fireman's Rule to cover Plaintiff, a police officer, and second, by finding no exception to the Fireman's Rule was present in this case. *Id.* Summary judgment is appropriate only where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Waste Connections of Kansas, Inc. v. Ritchie Corp.*, 296 Kan. 943, 962, 298 P.3d 250 (2013). Because there is no factual dispute, this Court may review the district court's order de novo. *See David v. Hett*, 293 Kan. 679, 682, 270 P.3d 1102 (2011).

A. The Fireman's Rule should not be extended to include Police Officers because the public policy that supports the rule's application to fire fighters is insufficient to cover other types of public safety officers.

Whether or not the "Fireman's Rule" bars recovery from a new class of plaintiff's is a question of law. *See Calvert v. Garvey Elevators, Inc.*, 236 Kan. 570, 572, 694 P.2d 433 (1985). The Court reviews questions of law de novo. While some jurisdictions have extended the

Fireman's Rule to cover police officers, no Kansas Appellate Court has ever considered extending the rule beyond fire fighters.

The Fireman's Rule is a common-law doctrine adopted by Kansas in 1985 in *Calvert v. Garvey Elevators*. 236 Kan. 570. The Fireman's Rule limits, but does not eliminate, the liability of individuals whose negligent actions cause a firefighter's injuries when those same acts required the fire fighter to respond in their official capacity. *Id.* at 572. While some jurisdictions have adopted this rule under assumption of risk or premises liability principles, Kansas chose to adopt the rule based on public policy. *See McKernan ex rel. McKernan v. General Motors Corp.*, 269 Kan. 131, 3 P.3d 1261 (2000); *See also Calvert*, 236 Kan. 570. These public policy concerns are not equally applicable to police officers.

In arriving at its holding, the *Calvert* court considered the Fireman's Relief Fund as provided for in K.S.A. 40-1701 *et seq.*, which provides compensation to fire fighters who are injured or killed while discharging their duties, and also provides funds to purchase life insurance for fire fighters. *Calvert*, 236 Kan. at 575. There is no similar relief fund provided for police officers in the Kansas Statutes.

Next, the *Calvert* Court discussed that firefighters are generally called to premises to fight fires:

> Fire Fighters are present upon the premises, not because of any private duty owed the occupant, but because of the duty owed to the public as a whole. In populous areas fire fighters are first concerned with keeping a fire confined and preventing it from

> spreading to other structures, and then with the preservation of the burning property.

Id. at 576.

In a subsequent case, the Kansas Supreme Court further explained:

> The rationale behind limiting landowner or occupier liability is that since a large proportion of fires are started by the negligence of the landowner or occupier, it would be unreasonable to make that person respond in damages to the firefighter who is employed and trained for the purpose of fighting such fires.

McKernan ex rel. McKernan, 269 Kan. at 140.

The Fireman's Rule as described in *Calvert,* was applied to emergencies whose creation was complete, such as fires or specifically in *Calvert*, a gas leak. In these situations, the negligent act is completed and the fire fighter is now cleaning up and/or putting under control the result of such negligence. The fire fighter is generally not facing a conscious adversary who is actively thwarting the fire fighter's efforts. Policeman find themselves in many situations where they are not just trying to contain the effects of a completed act of negligence, but are actively trying to thwart someone who is committing an intentional act.

The types of emergencies police officers respond to, put them in a different category than fire fighters and give rise to different policy concerns. Police officers respond to domestic violence situations, engage in high speed vehicle pursuits, respond to calls for vicious dogs running at large, and various other matters. If the Court extended the Fireman's Rule

to police officers, such officers would be precluded from bringing a cause of action against the domestic violence participant who batters the police officer, a fleeing suspect who causes an accident during a high speed vehicle pursuit, or the owner of a vicious dog that negligently allowed the dog to run at large and bite the officer. These officer's situations would fall under the Fireman's Rule because they would have been injured by the very reason that caused the officer to respond to the scene. It is very unlikely that the Kansas Supreme Court would extend the Fireman's Rule to these situations.

The Court should find the Fireman's Rule does not apply to police officers in the state of Kansas. The Court should find the district Court erred in granting Defendant summary judgment based off an extension of the Fireman's Rule, reverse the district Court's decision and remand the case for further proceedings.

B. If the Fireman's Rule is extended, the Defendant's negligent actions in this case fall into recognized exceptions to the rule.

The Fireman's Rule does not apply in every case where a fire fighter is injured. Most jurisdictions which have a Fireman's Rule have a litany of exceptions. Many states have enacted statutes that limit or abolish the Fireman's Rule. Kansas has no such statute, so this Court should look to case law for the rule's exceptions.

The district court erred in determining this case did not fall into one of the exceptions to the Fireman's Rule. (R.V. 7, p. 692). Whether an

exception to the Fireman's Rule is met, is a mixed question of facts and law. *See generally Calvert*, 236 Kan. 570. Given there is no genuine dispute in facts, this Court should review only the questions of law. *See Id.* Even if the rule is extended to police officers, the Court should find Defendant's actions fall into exceptions articulated in *Calvert*. The *Calvert* Court held:

> It is not the public policy to bar a fire fighter from recovery for negligence or intentional acts of misconduct by a third party, nor is the fire fighter barred from recovery if the individual responsible for the fire fighter's presence engages in **subsequent acts of negligence** or misconduct upon the arrival of the fire fighter at the scene. Public policy would not bar a fire fighter from recovery if an **individual fails to warn of known, hidden dangers** on his premises or for misrepresenting the nature of the hazard where such misconduct cause the injury to the fire fighter.

Calvert, 236 Kan. at 576 (emphasis added).

There are six exceptions that can be derived to the Fireman's Rule in Kansas from this paragraph in *Calvert*;

(1) Negligence of a third party;

(2) Intentional act of misconduct by a third party;

(3) **Subsequent act of negligence by party responsible for fire fighters presence**;

(4) Misconduct after the fire fighter arrives by party responsible for fire fighters presence;

(5) **Failure to warn of known, hidden dangers on the premises**;

(6) Misrepresenting the nature of the hazard.

See Id.

In this case, the Defendant "failed to warn of known hidden dangers," and engaged in a "subsequent act of negligence." Both are exceptions to the Fireman's Rule in Kansas. The district court erred when finding this set of circumstances did not meet either of these exceptions. (R.V. 7, p. 692).

1. Plaintiff's injuries were caused by Defendant failing to warn of known, hidden dangers.

The exceptions expressed in *Calvert* were written with fire fighters specifically in mind, evidenced by the phrase "fire fighters" being mentioned in all six exceptions in the above referenced paragraph. If the Court decides to extend the Fireman's rule to police officers, it should logically extend all of these exceptions to police officers, but do so in a way applicable to the types of emergencies to which police officers respond.

For instance, consider the exception "public policy would not bar a firefighter from recovery if an individual fails to warn of known, hidden dangers *on his premises*." *Id.* (emphasis added). The language "on his premises" is included within the context of fire fighters who generally enter someone's premises when fighting a fire. The fact that fire fighters generally enter onto the premises of another during emergencies is

discussed extensively throughout *Calvert*, and then expressed as part of the exception. Police officers respond to a wider variety of dangers than fire fighters, including many that do not involve entering someone's premises. If the Fireman's Rule is extended to include police officers, the failure to warn of known, hidden dangers exception should be naturally extended to situations beyond one's own premises.

Here, Defendant admits that he turned off the headlights and taillights of his truck which were blocking both lanes of southbound traffic. Defendant did not turn on his emergency flashers. It is uncontroverted that at the time of the accident, just after 3:40 am, Defendant's truck was blocking the road and not visible to Plaintiff. Defendant did not act to warn Plaintiff or other drivers of the hidden danger lurking in the road ahead of them. The Court should find this claim by the Plaintiff meets the exception to the Fireman's Rule; failure to warn of a known, hidden danger. Plaintiff, as a matter of law, should not be barred from recovering under this theory.

2. Plaintiff's injuries were caused by a negligent act untaken by Defendant subsequent to the accident.

Plaintiff's injuries were caused by a subsequent negligent act by the Defendant. The district court erred by finding that to meet the exception, the subsequent act of negligence must occur after the rescuer's arrival at the scene. (R.V. 7, p. 692). The district court erred by reading two exceptions in *Calvert* together as one; "If the defendant turned off his

lights, it was an act that occurred before the plaintiff's arrival. It was not a subsequent act of negligence or misconduct that occurred upon the police officers arrival at the scene." *Id.* This Court should interpret subsequent acts of negligence and misconduct upon arrival at the scene as two distinct exceptions to the rule.

Other jurisdictions also draw a distinction between the act of negligence that caused the rescuer to be called to the scene and additional acts of negligence, allowing rescuers to recover for the latter. *Wietecha v. Peoronard*, 102 N.J. 591, 510 A.2d 19, 20-21 (1986) ("independent and intervening negligent acts that injure the safety officer on duty are not insulated"); *see also Terhell v. American Commonwealth Assoc.*, 172 Cal.App.3d 434, 218 Cal.Rptr. 256, 260 (1985) ("having an unguarded hole in the roof was not the cause of [the firefighters] presence at the scene, and the firefighter's rule has never been applied to negligence which did not cause the fire."). As noted by one commentator, all jurisdictions allow recovery from an act of negligence that was independent of the specific reason the rescuer was summoned. *See* Jack W. Fischer, *The Connecticut Firefighter's Rule: 'House Arrest' for a Police Officer's Tort Rights*, 9 U. Bridgeport L.Rev. 143, 149 (1988).

Defendant admits he turned off the headlights and taillights of his truck which was blocking both lanes of southbound traffic. This negligent act by the Defendant was done subsequently to and independently of the accident itself. Plaintiff was responding to the accident, but was injured

because Defendant turned off his truck's headlights and taillights, making the vehicle non-visible on the roadway. Under the Fireman's Rule, even if the Plaintiff is unable to recover for the Defendant's creation of the emergency, Plaintiff *may* recover for Defendant's negligent actions subsequent to and independent of the accident.

The district court erred in finding no exception to the Fireman's Rule existed in this case. The Court should find the Defendant failed to warn of known, hidden dangers and committed a subsequent act of negligence when turning off the headlights and taillights of his truck. Plaintiff, as a matter of law, should not be barred by the Fireman's Rule from recovering under a theory that Defendant negligently turned off his truck's headlights and taillights at night while the vehicle was blocking the road. The Court should reverse the district court's granting of summary judgment and remand for further proceedings.

3. This Court should find the Defendant's wilful, wanton and reckless conduct is an exception to the Fireman's Rule.

Many jurisdictions have recognized wilful and wanton conduct to be an exception under the Fireman's Rule. For example, in *Mahoney v. Carus Chem. Co., Inc.*, a fireman sustained injuries in a fire caused by storage chemicals in fiber-paper drums that the defendant knew created a significant danger of spontaneous ignition. 102 N.J. 564, 567-68, 510 A.2d 4 (N.J. 1986). In finding the fireman was not barred from recovery by the Fireman's Rule, the *Mahoney* Court held

> Thus, to accord immunity to one who deliberately and maliciously creates the hazard that injures the fireman or policeman stretches the policy underlying the fireman's rule beyond the logical and justifiable limits of its principle.
>
> * * * * *
>
> • The immunity of the fireman's rule does not extend to one whose *willful and wanton misconduct* created the hazard that caused injury to the fireman or policeman.

Id. at 574, 579 (emphasis added).

Another example comes from *Randich v. Pirtano Contr. Co., Inc.*, when a defendant-contractor failed to locate a gas main, and then punctured it while installing a television cable. 804 N.E. 2d 581, 584, 346 Ill. App.3d 414 (Ill. App. 2003). While the dismissal of the plaintiff's claims were ultimately affirmed, the *Randich* Court held that

> The Fireman's rule does not protect a defendant whose *willful and wanton misconduct* created the emergency or danger that caused injury to a fireman.

Id. at 589 (emphasis added).

In *Miller v. Inglis*, this exception was applied to a police officer,

> A tortfeasor who acts *wilfully and wantonly* is so culpable that the fireman's rule ought not to preclude the injured officer from suing the egregiously culpable wrongdoer.

223 Mich.App. 159, 567 N.W2d 253, 256 (1997) (emphasis added).

Here, the district court found the Defendant was operating his truck while under the influence of alcohol at the time of his accident. (R.V. 7, p. 684). Under Kansas law, a person driving while under the influence of alcohol is considered to have acted wilfully, wantonly and recklessly. *See Reeves v. Carlson*, 266 Kan. 310, 314-15, 969 P.2d 252

(1998). Wantonness refers to the mental attitude of a wrongdoer rather than a particular act of negligence. *Id.* At 314. Public policy in Kansas should not grant drunk drivers immunity from the consequences of their wanton and reckless conduct. The district court erred when not considering this conduct an exception to the Fireman's Rule. (R.V. 7, p. 692, 722). This Court should follow the lead of other jurisdictions, and find wilful and wanton behavior to be an exception to the Fireman's Rule. This Court should reverse the district court, finding that an exception to the Fireman's Rule was present, and remand for further proceedings.

V. CONCLUSION.

This Court should find the Fireman's Rule does not extend to police officers, and even if it does, that an exception to the rule exists in this case.

WHEREFORE, in keeping with the above and foregoing, Plaintiff/Appellant, Juan A. Apodaca, respectfully requests this Court find that the District Court erred in granting Defendant/Appellee's Motion for Summary Judgment, thus entitling him to remand to the District Court for a trial on the merits.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that sixteen (16) true and correct copies of the Brief of Appellant were hand delivered on this 15th day of September, 2014 to the following:

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And that five (5) true and correct copies were deposited in the U.S. Mail, postage prepaid, on this 15th day of September, 2014 to the following:

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And that a courtesy copy was hand delivered on this 15th day of September, 2014, to the following:

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