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No. 111987

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
Defendants/Appellees/Cross-Appellants

DEFENDANTS WILLMORE BRIEF OF APPELLEE AND CROSS 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. STATEMENT OF ISSUES ON APPEAL

Defendant states that the issue on appeal is as follows:

A. Whether the district court appropriately ruled that Firefighter's Rule bars plaintiff's claims as a matter of law.

Plaintiff asserts that there is an additional 'sub-issue' of whether an exception applies to the Firefighter's Rule. Defendant asserts that this issue was not raised in the pleadings addressing summary judgment, and was first raised in plaintiff's Motion for Reconsideration, and is not properly before this court.

It appears that plaintiff does not raise the issue of whether the district appropriately granted summary judgment against plaintiff on the negligent entrustment claim against Defendant Mark Willmore, and that issue is not before this court, and no claims remain as against Defendant Mark Willmore.

Defendant states that the issue on the cross-appeal is as follows:

B. Whether the district court erred in ruling that proximate cause was a fact question rather than a legal issue in this case.

II. STATEMENT OF FACTS

Defendant states that Plaintiff's statement of facts is correct in many particulars, but requires some correction and supplementation for all the issues on appeal to be considered. The facts of the case are as follows:

1. The motor vehicle accident (MVA) at issue occurred on 10/18/2009 at K177 at or near milepost 97.4, approximately .8 miles north of K177's junction with I70. (ROA, III, 181-198.)

2. The first accident occurred shortly before 03:36 a.m., wherein defendant Matthew Willmore reported that he fell asleep at the wheel, and rolled his 1998 Ford F150 pickup truck in the median that ended up blocking both lanes of southbound K177 at the location at issue. (ROA, III, 181-192.)

3. Plaintiff was a Riley County Police Department (RCPD) officer responding, in the course and scope of his employment, to the first accident. (ROA, III, 193-198.)

4. At the time of the dispatch regarding defendant's one vehicle, rollover accident, RCPD dispatch advised plaintiff that the accident was north of I70, and the vehicle was blocking the southbound lanes. (ROA, III, 199-202.)

5. The dispatch recordings evidence that RCPD dispatch advised plaintiff of the location of the accident, being north of I70 on K177, and that defendant's vehicle was in the southbound lanes of K177 just north of I70. The dispatch recordings evidence that plaintiff acknowledged that the accident was north of I70. (ROA, III, 199-202.)

6. The RCPD cruiser operated by plaintiff, traveled to the accident scene "1039", meaning "with lights and sirens", at a high rate of speed. (ROA, III, 199-

202.)

7. At the time that the RCPD cruiser driven by plaintiff struck defendant's disabled vehicle, it was traveling 104 mph. (ROA, III, 193-202.)

8. A vehicle belonging to a witness to both accidents, David McGillis (hereinafter "McGillis), was stopped on the left hand shoulder near the median of northbound K177 at or near the location of defendant's vehicle. (ROA, III, 181-202.)

9. The MVARs indicate that RCPD dispatch advised plaintiff of the first accident, at approximately 3:36 a.m., and that there were no injuries, just southbound lane blockage of K177, north of I70. (ROA, III, 181-202, 199.)

10. According to the dashboard camera of the RCPD cruiser at issue, the MVA involving plaintiff did not occur until almost 6 minutes later at 03:42:33 a.m. Therefore, the first MVA happened at least 6 minutes prior to the second MVA. (ROA, III, 181-202, s*ee also*, the video of the dashboard camera showing the operation of the plaintiffs' vehicle as it approached the accident scene, which will be presented to the court upon request, and was played to district court at the hearing on the motion, and is referenced in the ROA at III, 203.)

11. McGillis's vehicle can be seen stopped at or near the median at the location of the first accident for over a mile from the vantage point of the RCPD cruiser as it traveled southbound on K177 to the accident scene. (ROA, III, 199-203.)

12. Plaintiff Apodaca testified, and reported to RCPD Internal Affairs (IA)

that, as he approached the accident scene, he recognized that McGillis's vehicle was the location of the accident, and that Plaintiff even began putting on his search spotlight to light up the accident scene. (ROA, III, 199-203, 205-206.)

13. Plaintiff testified, and reported to RCPD IA, that he never slowed down as he approached what he determined to be the scene of the accident, and agrees that he struck the disabled vehicle at 104 mph. (ROA, III, 199-203, 206.)

14. Plaintiff was disciplined by his employer, RCPD, with suspension without pay for violating police department policies and procedures governing officer conduct in driving emergency vehicles. (ROA, VII, 481-495.)

III. ARGUMENT AND AUTHORITIES

A. Whether the district court appropriately ruled that Firefighter's Rule bars plaintiff's claims as a matter of law.

1. Standard of Review for Summary Judgment

Defendant concurs with plaintiff's standard of review on this matter, whether the district court appropriately ruled that the Firefighter's Rule bars plaintiff's claims as a matter of law is a legal issue over which this court has *de novo* review.

> """The [district] court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the

> conclusive issues in the case. On appeal, we apply the same rules and where we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied.' [Citations omitted.]''" *Korytkowski v. City of Ottawa*, 283 Kan. 122, 128, 152 P.3d 53 (2007).

Pollock v. Crestview Country Club Ass'n,41 Kan.App.2d 904, 908 (2009).

2. The district court properly determined that the Firefighter's Rule barred plaintiff's claims as a matter of law.

The Firefighter's Rule bars plaintiff's recovery. The Kansas Supreme Court has stated that public policy prohibits public safety officers from suing those that have called upon their assistance. Kansas refers to this defense based on public policy as the, "firefighter's rule." The "firefighter's rule" has been explained as follows:

> The firefighter's rule, as adopted in Kansas, provides that a firefighter who enters upon the premises of another in the discharge of his duty may not maintain a cause of action against the individual whose negligence created the risk which necessitated the firefighter's presence and resulted in injury to the firefighter. *Calvert*, 236 Kan. at 572.

McKernan v. GMC, 269 Kan. 131, 134 (2000).

In *McKernan*, it was specifically noted that the "firefighter's rule" was not a subset of "assumption of risk", e.g., that firefighters assume the risk of injuries when encountering known dangers in a fire. 269 Kan. at 135. It was noted that this defense was purely a matter of "public policy":

> "'It is a **public policy of the State of Kansas that 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.' *Calvert*, 236 Kan. at 576.

McKernan, 269 Kan. at 135, bold emphasis added.

While Kansas has never addressed this defense in the context of law enforcement officers, this same public policy reasoning supporting this defense stands. The district court properly stated, "the plaintiff's argument that the appellate courts in Kansas have not seen fit to include police officers in the rule is unpersuasive. No party has quoted a case to this court and the court can find no case where the issue has been raised. It took over one hundred years for the fire fighter's rule to be raised in Calvert as an issue of first impression." (Memorandum Opinion, ROA, VII, 690-691.)

There is no valid reason that this defense should not apply in this case. In using the Supreme Court's holding above, and just substituting "law enforcement officer" for "firefighter", then Kansas law provides that a law enforcement officer "cannot recover for injuries caused by the very wrong that initially required his presence in an official capacity and subjected the [law enforcement officer] to harm; that public policy precludes recovery against an individual whose negligence created the need for the presence of the [law enforcement officer] at the scene in his professional capacity." See, *Calvert*, 236 Kan. at 576; *McKernan*, 269 Kan. at 135.

As referenced above, it appears that this rule has never been addressed in the context of law enforcement officers in the State of Kansas. It has, however, been addressed numerous times in many other states. In addressing the fact that this defense is available throughout the country and is applicable to law enforcement officers, in a Utah case involving injury to a state trooper investigating a MVA, it was held that:

> For over a century, **this rule has been adopted by the vast majority of jurisdictions that have considered it**. The Alaska Supreme Court recently noted: "Nearly all of the courts that have considered whether or not to adopt the firefighter's rule have in fact adopted it." *Moody v. Delta W., Inc.*, 38 P.3d 1139, 1140-41 (Alaska 2002) (stating that at the time the decision was issued, only one state had rejected the rule, while the overwhelming majority of states that had considered the rule had adopted it, but also noting that the rule had been abolished or limited by statute in several states). "The broad, albeit not unanimous, endorsement by the courts of the fireman's [rule] suggests that the rule is sound." Johnson, supra, § 1.07[2] (footnote omitted); see also 8 Am. Jur. 2d Automobiles & Highway Traffic § 691 (1997) (noting that the fireman's rule is "widely recognized"). Although it "has been criticized by some authors and judges, it is undeniably true . . . that almost all jurisdictions confronting this issue have adopted some form of the fireman's rule." *Pottebaum v. Hinds*, 347 N.W.2d 642, 643-44 (Iowa 1984) (citations omitted).

Fordham v. Oldroyd, 131 P.3d 280, 282 (Utah Ct. App. 2006); affirmed, 171 P.3d 411 (Ut. 2007). In fact, the *Fordham* court wanted to call the rule, not the "fireman's rule", but the **"professional rescuer's doctrine."** *Id.*

As the district court herein noted, there is no reason that law enforcement officers should not subject to this rule under the limited circumstances where the rule

applies. The Kansas public policy reasons for the "firefighter's rule" are reiterated in other states where the rule is applied to law enforcement:

> The dominant public policy rationale common to all these cases is that firefighters and **police officers have a relationship with the public that calls on them to confront certain hazards as part of their professional responsibilities**. See, e.g., *Thomas*, 811 P.2d at 825 ("The very purpose of the fire fighting profession is to confront danger. Fire fighters are hired, trained, and compensated to deal with dangerous situations that are often caused by negligent conduct or acts. '[I]t offends public policy to say that a citizen invites private liability merely because he happens to create a need for those public services.'" (brackets in original) (quoting *Pottebaum v. Hinds*, 347 N.W.2d 642, 645 (Iowa 1984))). **It would be naive to believe that fire and police professionals will be called on to draw on their training in meeting only those hazards brought on by prudent acts gone awry. Members of the public, who owing to their negligence find themselves in need of aid, should summon assistance without fear of exposing their assets to compensate their rescuer in the event of injury**.

Fordham v. Oldroyd, 174 P.3d 411, 413 (Ut. 2007).

Since there is no reason for Kansas not to extend the "firefighter's rule" to law enforcement officers for the same reasons that it extended the rule to firefighters, this rule provides a legal defense to plaintiffs' claims. In clarifying the public policy basis for the rule that is accepted in Kansas, in the context of law enforcement officers, it was held:

> Modern courts stress interrelated reasons, based on public policy, for the rule. The **negligent party is said to**

> **have no duty to the public safety officer to act without negligence in creating the condition that necessitates the officer's intervention because the officer is employed by the public to respond to such conditions and receives compensation and benefits for the risks inherent in such responses.** Requiring members of the public to pay for injuries resulting from such responses effectively imposes a double payment obligation on them. Further, because negligence is at the root of many calls for public safety officers, allowing recovery would compound the growth of litigation.

Moody v. Delta Western, 38 P.3d 1139, 1141-1142 (Alaska 2002).

The *Moody* court, from Alaska, further explained:

> The public pays for emergency responses of public safety officials in the form of salaries and enhanced benefits. Requiring members of the public to pay for injuries incurred by officers in such responses asks an individual to pay again for services the community has collectively purchased. Further, negligence is a common factor in emergencies that require the intervention of public safety officers. Allowing recovery would cause a proliferation of litigation aimed at shifting to individuals or their insurers costs that have already been widely shared. To borrow the language of the seminal *Krauth* case, "in the final analysis the policy decision is that it would be too burdensome to charge all who carelessly cause conditions requiring a response by a public safety official with the injuries suffered by the expert retained with public funds to deal with those inevitable, although negligently created," conditions.

Moody, 38 P.3d at 1142-1143.

The scope of "firefighter's rule" is not unlimited. In the Kansas cases adopting the rule, the extent of the defense and exceptions to it were examined. As explained

in *McKernan*, the Kansas courts have recognized the following limits:

> In *Calvert*, this court stated:
>
> > "It is not the public policy to bar a firefighter from recovery for negligence or intentional acts of **misconduct by a third party**, nor is the firefighter barred from recovery if the individual responsible for the firefighter's presence engages in **subsequent acts of negligence or misconduct upon the arrival** of the firefighter at the scene. Public policy would not bar a firefighter 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 causes the injury to the firefighter. 236 Kan. at 576.

McKernan, 269 Kan. at 141. These are the limits or exceptions to the rule. Therefore, plaintiff's concern about the breadth of the police officer's duties are already considered by the scope of the rule as it already exists in Kansas. The scope of the rule is that a public safety officer, "**only assumes hazards which are known and can be reasonably anticipated** at the site of the fire and are a part of [the job.]" (Emphasis added.) 236 Kan. at 576. *McKernan*, 269 Kan. at 141.

In the case at bar, plaintiff was told, explicitly, of the hazards coming upon him, to wit: (1) a rollover accident, (2) on K177, (3) north of I-70, (4) lane blockage in the southbound lanes; and (5) plaintiff even seeing the upcoming accident scene as marked by the McGillis vehicle, and the other vehicles they passed as they sped to the scene. There is no question that the hazard posed by defendant's vehicle was a known

hazard, putting the facts of this case squarely within the ambit of the rule. There are not any exceptions to the rule that apply to this case as announced in *Calvert* and *McKernan*. As a result, plaintiffs' claims fail, as a matter of law, under the Kansas "firefighter's rule", as logically extended to law enforcement officers.

Plaintiff claims that when defendant turned off the lights to his truck, that was a "subsequent act of negligence" and would bar the application of the firefighter's rule. Plaintiff misreads the exception to the rule. The exception provides for the possibility of liability for "subsequent acts" **after the arrival** of the public safety officer. The typical event is that after arrival of the officer on the scene, he or she is struck by a third party while at the scene. If defendant turned off the lights, this was an act of alleged negligence that occurred prior to the arrival of plaintiff. Further, there is a factual issue about whether defendant turned off the lights, or they were damaged as a result of the accident. Regardless, the firefighter's rule still applies.

3. No additional exceptions exist to the Firefighter's Rule other than previously discussed, and no issue exists with respect to the type of defendant's conduct in this case.

   a. This was an argument not raised during summary judgment, but on the motion for reconsideration.

Plaintiff claims that an exception exists to the firefighter's rule in that it should not apply to gross negligence or wanton conduct of a defendant. Plaintiff did not assert this exception to the rule in the arguments on summary judgment below, and the court should not consider it now. This issue was not asserted until plaintiff filed

a motion for the district court to reconsider its prior summary judgment ruling.

Reconsideration of a previously entered judgment is proper only when the court has made a manifest error of fact or law, when new evidence has been discovered, or when there has been a change in the relevant law. A party cannot and should not raise new arguments or present new evidence that should have been raised in the first instance or rehash arguments previously considered and rejected by the court. See *West Pet Supply Company vs. Hill's Pet Products*, 847 F.Supp. 858, 860 (D.Kan. 1994).

In citing this federal case, it is noted that the Kansas Supreme Court has specifically recognized that federal court decisions interpreting Federal Code of Civil Procedure are highly persuasive in applying the Kansas Code of Civil Procedure which is based upon the Federal Code. *Rebarchek vs. Farmers Coop*, 272 Kan. 546 (2001); *Stock vs. Nordhus*, 216 Kan. 779 (1975). Federal authorities interpreting Federal Rule 59 governing motions to alter or amend judgment have been adopted by the Kansas Court of Appeals. *Wenrich vs. EMC*, 35 Kan.P2d. 582, 585-86 (2006).

In this case, plaintiff raised this new argument in his motion to reconsider. The district court denied this motion and noted that, "the post judgment motion is simply an attempt to revisit issues already addressed or advance arguments that could have been raised in prior briefing." (ROA, VII, 722). This court should similarly decline to consider plaintiff's new argument.

In this regard, it should be noted that plaintiff's attempt to advance this new argument is properly considered in the context of the district court's denial of plaintiff's motion for reconsideration. As such, this issue needs to be considered under an "abuse of discretion" standard. See, *Beal v. Rent-A-Center*, 13 Kan.App.2d 375 (1989); *Exploration Place, Inc. v. Midwest Drywall Co.*, 277 Kan. 898, 900, 89 P.3d 536 (2004).

b. Notwithstanding, an exception to the application of the Firefighter's Rule regarding defendant's alleged reckless conduct does not exist under these circumstances

As plaintiff concedes, only two published cases in Kansas have actually applied the Firefighter's Rule. See, *Calvert vs. Garvey Elevators*, 236 Kan. 570 (1985), and *McKernan vs. GM Corp.*, 269 Kan. 131 (2000). As the district court properly noted, the defense of the Firefighter's Rule is purely one of public policy. The policy was clearly delineated as follows: "It is **public policy of the state of Kansas that 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.**" *McKernan* 269 Kan. at 135 citing *Calvert*, 236 Kan. at 576.

The Kansas courts in those cases not only announced the public policy that provides the defense, but the courts also listed the exceptions to this clearly stated rule. The exception sought by plaintiff at this time (e.g., reckless, wilful, wanton conduct) is not in the listed exceptions. In fact, the only exceptions noted in the

Kansas cases relate to: (a) negligence or intentional acts or misconduct of a third party, (b) subsequent acts of negligence or misconduct upon the arrival of the firefighter at the scene, or (c) failure to warn of hidden dangers. See, *Calvert*, 236 Kan. at 576. These are the only exceptions to the rule as adopted in Kansas. Kansas did not adopt any willful or wanton act exception to the rule.

The Kansas courts specifically stated that the scope of the rule is that a public safety officer assumes all hazards which are known and can be reasonably anticipated at the site of the accident and are part of [the job]. *Calvert*, 236 Kan. at 576. *McKernan*, 269 Kan. at 141. In the present case, plaintiff assumed the risk of which he had been advised, to wit: that there was a disabled vehicle at the location where plaintiff ran into it at over 100 mph.

In this case, defendant drank alcohol long before driving, and defendant thought that he had the requisite capacity to operate his vehicle safely. (ROA, V, 438-441, 451, 454.) Defendant fell asleep on the roadway in the early morning hours and accidentally overturned his vehicle. Defendant created exactly the sort of hazard that should be known and reasonably anticipated by plaintiff in this case as would be covered by the Firefighter's Rule. This case involves defendant allegedly negligently creating a public safety hazard by leaving the remains of an accidental wreck on the roadway. Plaintiff was told exactly when, where, how, and why he should be coming to the scene of the incident at issue. As such, this was a hazard that he not only

reasonably should have anticipated, but arguably actually knew about. He cannot get around the strong public policy contained in the Firefighter's Rule as adopted in Kansas by trying to create an exception to the rule that is not specifically recognized in the Kansas cases adopting the rule.

Also, the exception sought by plaintiff is not accepted in many jurisdictions. The primary case cited by plaintiff in his brief is *Randich vs. Pirtano Construction*, 804 N.E.2d 581 (Ill App. 2003). In that case, the court allowed a claim by a firefighter to go forward against a contractor that had arguably willfully and wantonly failed to locate and expose live gas mains that it knew were in the same utility easement before it began boring, which resulted in a fire causing injury to the firefighter. As such, plaintiff's claim for willful and wanton misconduct was not barred by the Firefighter's Rule.

It is noted that this *Randich* case is not a case from the Illinois Supreme Court, but comes from the Appellate Court of Illinois in the 2nd District. The rule announced in *Randich* has not been adopted by the Illinois Supreme Court, and has been specifically disavowed in other appellate districts in Illinois. See, *Sears vs. Atkin,* 2011 Ill.App. Unpub. Lexis 2444, (Ill. App. 1st District, 2011), previously provided to adverse counsel.

In the unpublished *Sears* case, the court went through the history of the Firefighter's Rule in Illinois and cited numerous cases that take the opposite view of

the 2nd District Appellate Court in *Randich*. It was noted that other Illinois appellate courts have held that a defendant cannot be liable for a firefighter's injuries even though his willful and wanton misconduct may have been the cause of the fire. The *Sears* court cited, *Luetje vs. Corsini,* 126 Ill.App.3d 74, 466 N.E.2nd 1304 (1984), wherein the Firefighter's Rule barred plaintiff's claim arising from *any* conduct of defendant that caused the fire. The defendant's conduct is not determinate of the issue of the landowner's liability to the injured firefighter under the rule. *Id.*

The court in *Sears* did not find the *Randich* court's opinion persuasive and noted that it ignored the major themes from the Illinois Supreme Court cases that adopted the Firefighter's Rule. The *Randich* court is a singular case that has not been adopted in the balance of Illinois nor has it been adopted by the Supreme Court in the state of Illinois. See *Dini vs. Naiditch*, 170 N.E.2d 881 (Ill. 1960), *Washington vs. Atlantic Richfield*, 361 N.E.2d 282 (Ill. 1976). As a result, it appears that most of Illinois courts hold that the Firefighter's Rule applies even in the face of willful and wanton conduct.

Another case cited by plaintiff is the case from New Jersey, *Mahoney vs. Carus Chemical Company*, 510 A.2d 4 (NJ 1986). In that case there were numerous dissents showing the limits of the breadth of the exception sought by plaintiff in this case. The dissent pointed out that trying to distinguish what conduct would amount to an exception was fraught with ambiguity, and that the underlying reason for the rule

would still seem to apply despite claims of reckless or wanton conduct. The dissent cited the New Jersey Supreme Court case that originally adopted the rule and noted that its reasoning should still apply, and noted:

> As Chief Justice Weintraub took pains to point out in *Krauth*,
>
> > [w]antonness is not too precise a concept. It is something less than intentional hurt, and so viewed is an advanced degree of negligent misconduct. **In the context of the policy considerations which underlie the rule of non-liability for negligence with respect to the origination of a fire, it is debatable whether degrees of culpability are at all pertinent.** [31 N.J. at 277.]
>
> Notice first that the *Krauth* Court by no means sought to obliterate the distinction between willful, wanton conduct on the one hand and ordinary negligence on the other. As the majority points out, ante at 574, "[t]his Court has consistently recognized the importance of [that] distinction * * *." In no case in which the distinction has been recognized and applied, however, have we even hinted that the difference between ordinary negligence and willful-wanton misconduct should afford a basis for favoring a victim whose job it is to confront the very risks that give rise to his employment in the first place, irrespective of their cause. **Those different degrees of negligence are irrelevant [585] to the "fireman's rule." "It is not important in the application of the 'fireman's rule' to determine what caused the particular danger which brought about the injury. Of critical importance is whether the particular danger is one that the fireman would anticipate in the performance of his duties."** *Court v. Grzelinski*, 72 Ill.2d 141, 154, 19 Ill.Dec. 617, 623, 379 N.E.2d 281, 287 (1978) (Ryan, J., dissenting).

See, *Mahoney*, 510 A.2d 4, 15 (N.J. 1986). This is the same reasoning that the Kansas courts used in adopting the rule.

The only other case cited by plaintiff was the Michigan case of *Miller v. Inglis*,

567 N.W.2d 253 (Mich.App. 1997). That case involved a situation where a police officer was stopped at a pre-existing car accident and then her vehicle was hit by a pair of drunk drivers. The trial court granted summary judgment to the drunk drivers under the 'fireman's rule'. The appellate court reversed and stated that it would be a fact question whether the drunk drivers were guilty of wilful and wanton conduct that would bar plaintiff's claims under the rule. Obviously, the Michigan courts do not follow Kansas law. The conduct described in *Miller* would not allow defendants to invoke the rule in Kansas as they were not the parties whose conduct brought the police to the scene. Also, that was a situation of subsequent negligent conduct or subsequent misconduct by a third party. This case does not fit Kansas law, and is not on point nor persuasive in any way.

In the Kansas case of *Calvert*, 236 Kan. 570, the Court specifically cited the Arizona case of *Grable vs. Barela*, 564 P.2d 911 (Ariz. 1977) as support for adopting the Firefighter's Rule. In *Grable*, the court specifically addressed the issue of what sort of tortious conduct could create an exception to the Firefighter's Rule. The *Grable* court specifically considered plaintiff's argument that the conduct of a minor in playing with matches and then causing the fire to an abandoned building was "reckless" thus bringing plaintiff's claim within the arsonist exception to the Firefighter's Rule. The conduct at issue was determined to be reckless, such as is claimed by plaintiff in the present case. The court held, however, that in order to get

out from under the Firefighter's Rule, the conduct at issue must not just be reckless or gross negligence, but willful and malicious. The court held that reckless conduct in the civil tort sense was not enough to create an exception to the rule.

In addition, it has been noted that other jurisdictions have specifically declined to create an exception to the Firefighter's Rule when a defendant's conduct could arguably classified as reckless or wanton. In California, it was held that the rule would apply to both negligent and reckless conduct on the part of a defendant. See, *Hubbard vs. Boelt*, 620 P.2d 156 (1980). This California case was modified by subsequent statute wherein the Firefighter's Rule was adopted and legislative exceptions created.

California Civil Code Section 1714.9 carved out legislative exceptions to the Firefighter's Rule providing that "willful acts causing injury" to a public safety officer will result in liability. The statute also allows liability where the conduct occurs after the arrival of the public safety officer, or when the conduct violates a statute or ordinance and was not the event that precipitated the response, or there was intent to injure, or the conduct was arson as defined in the penal code. See, *California Civil Procedures Section 1714.9(a)(1)-(4).*

In short, it appears that the many jurisdictions that have considered the issue would find that the conduct alleged by plaintiff in this case fits squarely within the Firefighter's Rule, and the exception sought by the plaintiff herein regarding wanton

and willful conduct would not apply to these facts. The form of conduct alleged by plaintiff in this case against defendant, especially the conduct giving rise to the necessity to call police officers, should not be subject to exception to the Firefighter's Rule as applied in Kansas.

It must be remembered that the public policy supporting the application of the Professional Rescuer Firefighter Doctrine is that, "professional rescuers do assume the risk of injury resulting from a hazard inherent within the particular rescue activity." 89 ALR 4th 1079, 1084 (1991), citing *Maltman vs. Sauer*, 530 P.2d 254 (Wash. 1975).

The general rule provides that:

> To be shielded from liability under the Firefighter's Rule, an alleged tortfeasor must establish: (1) that the tortfeasor injured the police officer or firefighter in the course of his employment, (2) that the risk the tortfeasor created was the type of risk that one could reasonably anticipate would arise in the dangerous situation which their employment requires them to encounter, and (3) that the tortfeasor is the individual who created the dangerous situation which brought the police officer or firefighter to the crime scene, accident scene, or fire.

Higgins vs. Rhode Island Hospital, 35 A.3d 919, 923 (2012). No mention is made of the type of tort or malfeasance that is alleged against a defendant.

One court clarified this issue by stating that as long as the conduct of the defendant is one considered in the scope of risk that the officer should expect, the rule bars recovery. In considering the type of defendant's conduct in whether to apply the rule, the New Mexico Supreme Court held:

> We choose to adopt a two-prong test based on culpability that holds the public liable for intentional acts and some reckless acts. Under our test, the person creating a peril owes a professional rescuer no duty if the rescuer's injury (1) was derived from the negligence that occasioned the rescuer's response; or (2) was derived from the reckless conduct that occasioned the rescuer's response and was within the scope of risks inherent in the rescuer's professional duties. This test ignores different "degrees" of negligence, a distinction we rejected in *Govich*, 112 N.M. at 233, 814 P.2d at 101.

Baldonado v. El Paso Natural Gas Co.,143 N.M. 288, 292 (N.M.2007). Under this well-reasoned analysis that seems to follow the public policy rationale adopted in Kansas, defendant would still be entitled to the benefit of the rule.

Also, it should be noted that it has been specifically held that actions of a drunk driver do not fall outside the scope of ordinary negligence so far as to justify an exception to Firefighter's Rule. A mere allegation of driving drunk is not sufficient to create an exception. See, *Hallquist vs. Midden*, 196 S.W.3rd 601 (Mo.App. Ed. 2006).

It is also noted that any reckless or wanton conduct with respect to defendant's behavior in this case had ceased at the time that plaintiff's accident occurred. At the time of plaintiff's accident, defendant was no longer operating his vehicle either under or not under the influence of alcohol. Plaintiff was advised of a one car motor vehicle accident that was blocking a public roadway at the point where plaintiff ran into defendant's disabled vehicle at a high speed. "The risk the tortfeasor created was the type of risk that one could reasonably anticipate would arise in the dangerous situation

which [plaintiff's] employment requires [him] to encounter." *Higgins*, 35 A.3d at 923 (2012). In the present case, there was no subsequent act or conduct independent of the act that gave rise to necessity of plaintiff's presence on the accident scene. Given that plaintiff was aware of the accident, was aware of the risks that were presented to him, was trained to meet those risks, and was compensated for same, there is no reason not to apply the Firefighter Rule under these specific circumstances.

In addition, as referenced above, Kansas enumerated specific exceptions to the application of the Firefighter's Rule. The exception asserted by plaintiff herein is not enumerated in the Kansas cases adopting Firefighter's Rule.

Based upon the foregoing, the district court's decision to grant summary judgment to defendant based upon the Firefighter's Rule was the correct decision. Plaintiff was called to the scene of an MVA where he knew that someone, defendant herein, had been involved in a rollover accident and was blocking the highway. Plaintiff chose to disregard his training, and all the information provided to him that he was driving into a known accident scene.

IV.CROSS-APPEAL

A. Whether the district court erred in ruling that proximate cause was a fact question rather than a legal issue in this case.

1. Standard of Review - Summary Judgment

As referenced above, this court shall apply the same standards as the district court in determining whether defendant was entitled to summary judgment. In addressing the particular issue of whether this court can decide the issue of proximate cause, as a matter of law, it is important to keep the following standards in mind.

The existence of the legal duty is a question of law to be determined by the court. *McGee v. Chalfant*, 248 Kan. 434, 437 (1991). On the other hand, the question of negligence is very fact sensitive. Each case's facts must be determined in context to determine if they are sufficient to prove negligence. The ultimate determination of the presence or absence of negligence is usually left to the trier of fact. *Sterba v. Jay*, 249 Kan. 270, 278 (1991). However, where there is no evidence presented on a particular issue or the evidence presented is undisputed and it is such that minds of reasonable persons could not draw differing inferences and arrive at opposing conclusions within the concept of reason and justice, the matter becomes a question of law for the court's determination. *Sampson v. Hunt*, 233 Kan. 572 (1983).

2. Defendant's conduct is not the legal proximate cause of plaintiff's accident

At approximately 3:35 a.m., defendant was traveling northbound on K177 after exiting from I70 to travel to Manhattan, Kansas. Defendant reported that he fell asleep, and when he woke, he found himself in the median. When he attempted to get his vehicle back on the roadway, he overcorrected causing it to roll in the median.

Defendant's vehicle came to rest blocking both southbound lanes of K177 just short of a mile north of its intersection with the interstate. His vehicle came to rest, on its wheels, facing toward the east. He wanted to move his vehicle, but could not. It would not start. Further, he reported that he could not push it out of the way because a tire was missing, and another tire was flat. (ROA, III, 163-164.)

A passerby, David McGillis, stopped when he saw defendant's vehicle leave the roadway. After McGillis confirmed that defendant was uninjured, McGillis contacted law enforcement to advise of the accident. (ROA, III, 164.) Records from the RCPD confirmed that RCPD dispatch advised plaintiff of the accident at issue. (ROA, III, 181-203.) RCPD dispatch advised plaintiff of the first accident at around 3:36 a.m. Shortly thereafter, RCPD dispatch advised plaintiff that there were no injuries, but there was lane blockage of both southbound lanes at the accident scene. RCPD dispatch also advised plaintiff that both southbound lanes of K177 were blocked north of I70.

After receiving all this information about the first accident on K177, north of I70, and blockage of the southbound lanes, plaintiff reported he was in route, "1039" meaning "lights and sirens" traveling southbound on K177 towards the accident. About 6 minutes later, plaintiff's RCPD cruiser drove at 104 mph into the accident scene, and collided with defendant's disabled vehicle. The dashboard camera of the plaintiffs' vehicle confirms that the accident happened at 3:42:33 a.m. (ROA, III, 203

- video will be made available.)

The uncontroverted facts confirm that RCPD dispatch advised plaintiff of the location of the accident, the blocking of the southbound lanes, and that plaintiff was or should have been aware of this information 6 minutes before he drove into the accident scene. Plaintiff drove into the accident scene at 104 mph. There was no evidence of braking or slowing prior to impact, and plaintiff confirmed he did not brake or slow down.

Plaintiff admitted that he was aware that they were approaching the accident scene when they saw McGillis' vehicle parked off the roadway. Plaintiff knew, as he approached the scene, that this was "his accident." The dashboard camera confirms that plaintiff could see McGillis's vehicle for well over a mile from the scene.

While plaintiff contends that defendant turned off the lights making his disabled vehicle difficult to see. It is noted, however, that it is uncontroverted that plaintiff was advised that there was lane blockage in the southbound lanes in K177, north of I-70. Further, plaintiff recognized they were approaching the accident due to the presence of witness McGillis's vehicle parked in the median well over a mile before they reached the accident scene. As such, lighting or lack thereof on defendant's disabled vehicle is a condition that arguably should be expected given the training that the officers received regarding responding to accident scenes. Do they not anticipate that there could be vehicles, people, or other detritus of an accident in

the roadway at or near the site of accident that are not illuminated?

Further, there was a significant time delay between the first accident and the second, at least 6 minutes, likely more, given the delay in getting the information from the scene to dispatch, and from dispatch to plaintiff's cruiser. Plaintiff had at least 6 minutes to think about the fact that he was driving to an accident scene at a known location before he got there.

More importantly, plaintiff was on his way to the scene of the first accident for the purpose of securing and investigating the accident scene. Plaintiff was not some random vehicle coming to the accident. Plaintiff was the investigating law enforcement officer coming to a known accident site.

Even without advance knowledge of the accident, other drivers had been able to avoid defendant's disabled vehicle. Two 'civilian' vehicles had already passed, southbound, through the accident scene without crashing into defendant's disabled vehicle. The occupant of plaintiff's vehicle, former party Dulaney, even testified that other southbound vehicles had stopped prior to entering the accident scene and were "waving" as plaintiff went by. (ROA, III, 167.)

The uncontroverted evidence is that plaintiff was aware or should have been aware of the following facts as they drove into the accident scene at 104 mph without slowing down at all: 1) that there was a prior accident, 2) the nature of the accident, i.e., rollover, 3) the location of the accident on K177 just north of I70, 4) the

southbound lanes of K177 were blocked due to the accident, 5) they could see the site of the accident from over a mile away, and 6) they were at the location for the specific purpose of responding to the first accident. Given these uncontroverted facts, the negligence, if any, of defendant that resulted in the disabled vehicle being in the roadway is not the legal and/or proximate cause of the second accident.

Proximate cause is an essential element in a tort claim such as this. It must be determined whether defendant's conduct is the actual, "legal cause" of the injured person's damages. *Deal v. Bowman*, 286 Kan. 853 (2008); *Yount v. Diebert*, 282 Kan. 619 (2006). If it is determined that the damages were caused by an intervening cause, which supersedes the initial cause, then the original cause no longer can be considered the proximate cause of the damages. *Reynolds v. KDOT*, 273 Kan. 261, 268 – 69 (2002); *Barkeley v. Freeman*, 16 Kan. App. 2d 575, 581 (1992).

Plaintiff not only came upon the scene of the first accident many minutes after it occurred, but he was advised that the first accident had taken place and was told where to go to encounter this accident. As a result, plaintiff's pre-existing knowledge of the facts and circumstances of the first accident, the fact that he knew and/or should have known the presence of the first accident in the southbound lanes of K177 demonstrates that the cause of the accident was not the condition of the roadway, but plaintiff's negligence and speeding into a known accident scene. Plaintiff was even suspended from his job due to his conduct in this regard.

In a case dealing with the specific issue of whether a motorist's negligence in arguably causing a prior MVA could possibly be the 'legal' cause of a second accident at the same location, the most recent case on the subject, in Kansas, is *Hale v. Brown*, 287 Kan. 320 (2008). In that case, a driver drove a truck into a tree. The truck was off the roadway not interfering with any lanes of travel. Traffic became congested as a result of this accident. Over half an hour later, the plaintiff driver who was proceeding along the same road noticed the congestion and began slowing down. Another driver failed to react, and collided with the rear of plaintiff's stopped car. The plaintiff filed suit not only against the car that rear-ended her, but also against the driver of the truck that originally drove his vehicle into the tree. The court held that the negligence of the driver of the truck that ran into the tree was not the proximate cause of the second accident. Various factors including length of time between the first and second accidents, the intervening negligent act on the part of the second driver and other issues were factors that the court considered in determining, as a matter of law, that there was no proximate cause. Proximate cause is ordinarily a question of fact. However, when the evidence is undisputed, question of proximate cause becomes one of law.

As recognized in *Hale*, in extraordinary cases, proximate cause can be used to cut off liability for earlier acts of negligence, as a matter of law. 287 Kan. at 323-24. As in *Hale*, in this case there are even more extraordinary facts that show that any

conduct that caused the first accident was not the proximate cause of the second accident. In this case, plaintiff was specifically responding to the negligence of defendant in allegedly causing the first accident. There was a significant delay between the two accidents, but more importantly, plaintiff had advance knowledge of the accident, its location, and circumstances. Add to these facts, that the plaintiff violated his training as a law enforcement officer in how to properly respond with regard to the first accident. With this as a background, under these extraordinary facts, this court can rule as a matter of law that plaintiff's conduct of driving 104 mph into a known accident scene is the superseding and/or intervening cause of the accident involving plaintiffs. Plaintiff was going to the scene because of the first accident, and he was trained to go to the accident. He cannot, now, complain that defendant's conduct in generating the accident scene was the reason he was injured. Under these extraordinary circumstances, this court can determine as a matter of law that defendant's negligence, if any, was not a proximate cause of the second accident and of plaintiffs' claimed injuries.

V.CONCLUSION

Plaintiff's claims against defendant fail, as a matter of law. Plaintiff's conduct in speeding into a known accident scene was the legal and proximate cause of the accident. More importantly, Kansas law and the public policy in support of same do

not allow law enforcement officers to sue those who have called upon those law officers for help. Under the facts found in this case, Kansas public policy as announced under the Firefighter's Rule bars plaintiff's claims against defendant.

Defendant prays that this court affirm the district court's ruling granting summary judgment under the Firefighter's or Public Safety Officer's Rule. Defendant prays that this court reverse the district court's decision on the issue of proximate cause and rule that defendant's conduct was not the proximate cause of plaintiff's injuries, as a matter of law. Defendant prays for his costs and for such other relief as this court deems just and equitable.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that sixteen (16) true and correct copies of the Brief of Appellees/Cross Appellants was hand delivered, on the 10th day of October, 2014, addressed to the following:

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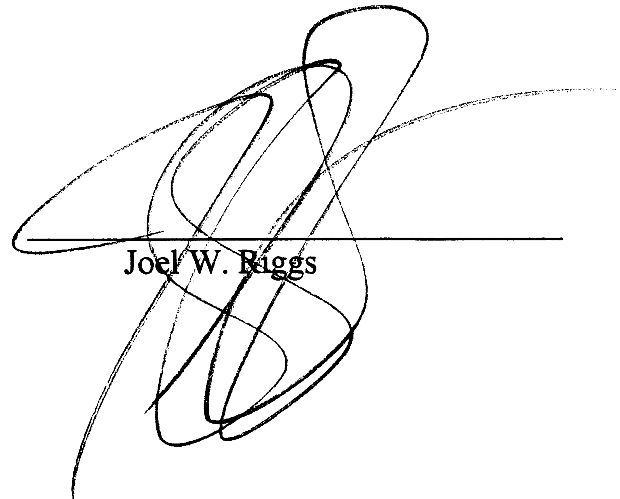

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