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The Missouri Firefighter's Rule

*Gray v. Russell*¹

I. INTRODUCTION

The firefighter's rule bars injured firefighters and police officers from recovering against individuals whose ordinary negligence created the situation that required the presence of the officer or firefighter.² In Missouri, the firefighter's rule originated as a landowner liability rule and as an exception to the rescue doctrine.³ More recently, however, the rule has been influenced by the doctrine of assumption of risk and by public policy concerns. The result has been a hodgepodge of old and new rationales that form the basis for an inconsistent rule that relies on superfluous analysis.⁴ In *Gray v. Russell*,⁵ the Missouri Supreme Court reasserted the firefighter's rule's basis in the rescue doctrine, and thereby prevented a beneficial change in analysis.⁶

II. FACTS AND HOLDING

Roy and Martha Gray filed a personal injury suit against the Russells, doing business as Russell's Variety Store.⁷ On September 30, 1988, Gray, while performing his duties as a police officer, conducted a routine inspection of the building owned by the Russells.⁸ As part of this inspection, Gray checked the loading dock behind the building and then descended the wooden steps from the dock.⁹ The steps collapsed, and Gray injured his neck and back.¹⁰

* For a good discussion of this area prior to *Gray v. Russell* see Louie A. Wright, Note, *The Missouri "Fireman's Rule": An Unprincipled Rule in Search of a Theory*, 58 U.M.K.C. L. REV. 329 (1990).

1. 853 S.W.2d 928 (Mo. 1993).

2. *Berko v. Freda*, 459 A.2d 663, 663-64 (N.J. 1983).

3. See *Nastasio v. Cinnamon*, 295 S.W.2d 117, 120-21 (Mo. 1956); *Anderson v. Cinnamon*, 282 S.W.2d 445, 448 (Mo. 1955).

4. *Gray*, 853 S.W.2d at 930.

5. 853 S.W.2d 928 (Mo. 1993).

6. *Id.* at 930.

7. *Id.* at 929.

8. *Id.*

9. *Id.*

10. *Gray v. Russell*, No. WD 45607, 1992 WL 237617, at *1 (Mo. Ct. App. Sept. 29, 1992), *rev'd*, 853 S.W.2d 928 (Mo. 1993).

The Grays alleged that the Russells negligently failed to maintain the steps in a reasonably safe condition and that they knew or should have known of such condition.¹¹ The Russells filed a motion for summary judgment, arguing that the firefighter's rule barred the Grays' action. Adopting the Russells' argument, the trial court granted summary judgment in their favor.¹² The Grays appealed to the Western District of the Missouri Court of Appeals. Finding that the Grays' action fell within an exception to the firefighter's rule, the court of appeals reversed.¹³ The Missouri Supreme Court subsequently granted transfer.

The Missouri Supreme Court reversed the summary judgment and remanded the case to the trial court, holding that the firefighter's rule applies only in emergency situations.¹⁴

III. LEGAL BACKGROUND

A. *Early Development of the Firefighter's Rule*

Since its birth over a century ago in the seminal case of *Gibson v. Leonard*,¹⁵ the firefighter's rule has gained almost universal acceptance.¹⁶ In *Gibson*, the Illinois Supreme Court held that firefighters were licensees and thus were owed no duty of care by a landowner, except to refrain from willful

11. *Id.*

12. *Id.*

13. *Id.* at *2-3.

14. *Gray*, 853 S.W.2d at 931-32.

15. 32 N.E. 182 (Ill. 1892), *overruled by* *Dini v. Naiditch*, 170 N.E.2d 881 (Ill. 1960). For other early firefighter's rule cases finding that firefighters are licensees, see *Lunt v. Post Printing & Publishing Co.*, 110 P. 203, 207 (Colo. 1910), *overruled by* *Mile High Fence Co. v. Radovich*, 489 P.2d 308, 314 (Colo. 1971); *Pincock v. McCoy*, 281 P. 371, 372 (Idaho 1929); *Woodruff v. Bowen*, 34 N.E. 1113, 1116 (Ind. 1893); *Aldworth v. F. W. Woolworth Co.*, 3 N.E.2d 1008, 1009 (Mass. 1936); *Hamilton v. Minneapolis Desk Mfg. Co.*, 80 N.W. 693, 694 (Minn. 1899); *New Omaha Thomson-Houston Elec. Light Co. v. Anderson*, 102 N.W. 89, 92-93 (Neb. 1905); *Drake v. Fenton*, 85 A. 14, 14 (Pa. 1912); *Beehler v. Daniels*, 29 A. 6, 6 (R.I. 1894); *Burroughs Adding Mach. Co. v. Fryar*, 179 S.W. 127, 128 (Tenn. 1915), *overruled by* *Hudson v. Gaitan*, 675 S.W.2d 699, 703 (Tenn. 1984), *overruled on other grounds by* *McIntyre v. Balentine*, 833 S.W.2d 52, 56 (Tenn. 1992). See also Annotation, *Duty and Liability of Owner or Occupant of Premises to Fireman or Policeman Coming Thereon in Discharge of His Duty*, 13 A.L.R. 637 (1921). But see *Meiers v. Fred Koch Brewery*, 127 N.E. 491, 493 (N.Y. 1920) (holding that firefighter was not a licensee or a trespasser, but was rightfully on premises and was owed a duty of reasonable care under all the circumstances).

16. *Walters v. Sloan*, 571 P.2d 609, 611 (Cal. 1977).

or affirmative acts.¹⁷ Because of this minimal duty of care, the firefighters were effectively barred from suing the negligent landowner for the injuries they had sustained.¹⁸ Thus, the firefighter's rule first emerged as a per se landowner liability rule.¹⁹

Landowner liability rules hinge upon classification of the entrant as a trespasser, licensee, or invitee, and application of the corresponding duty of care. The *Gibson* court could not find a firefighter to be an invitee because there existed no "enticement, allurements, or inducement being held out to him by the owner."²⁰ Furthermore, the court referred to "the ancient rule of the common law" that one who enters upon the land of another to save life or property is not a trespasser.²¹ Finally, having only one classification remaining, the court cited to *Cooley on Torts* for the rule²² that firefighters

17. *Gibson*, 32 N.E. at 190-91. Note that the rules of landowner liability have changed dramatically over the years. Some states have altered the concomitant duties associated with status as trespasser, licensee, and invitee. Also, some states have adopted a standard duty of reasonable care for all three classifications or have adopted a common duty for just licensees and invitees. See Vitauts M. Gulbis, Annotation, *Modern Status of Rules Conditioning Landowner's Liability Upon Status of Injured Party as Invitee, Licensee, or Trespasser*, 22 A.L.R. 4TH 294, 301-10 (1983).

18. *Gibson*, 32 N.E. at 196.

19. See *Anderson v. Cinnamon*, 282 S.W.2d 445, 446-47 (Mo. 1955).

20. *Gibson*, 32 N.E. at 183 (quoting *Sweeney v. Old Colony & Newport R.R.*, 92 Mass. (10 Allen) 368, 372 (Mass. 1865)). But see *Meiers*, 127 N.E. at 492 (stating in dicta that it could be fairly said that there existed an implied invitation for a firefighter to come onto the premises).

21. *Gibson*, 32 N.E. at 184 (quoting *Proctor v. Adams*, 113 Mass. 376 (1873)).

22. *Id.* at 183-84 (citing THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 313 (1st ed. 1880)). The court referred to the following passage from *Cooley on Torts*:

The third class of licensees comprehends those cases in which the law gives permission to enter a man's premises. This permission has no necessary connection with the owner's interest, and is always given on public grounds. An instance is where a fire breaks out in a city. Here the public authorities, and even private individuals, may enter upon adjacent premises as they may find it necessary or convenient in their efforts to extinguish or to arrest the spread of the flames. The law of overruling necessity licenses this, and will not suffer the owner of a lot to stand at its borders and exclude those who would use his premises as vantage ground in staying the conflagration.

COOLEY, *supra* at 313.

were "mere naked licensee[s]."²³ Thus, the court arrived at the licensee status for firefighters primarily by default.

This *Gibson* formulation received some criticism because of its narrow view of the various classifications of entrants and because it had no authority for its propositions.²⁴ Nonetheless, almost every state adopted some form of the firefighter's rule premised upon the firefighter's status as a licensee.²⁵ Some states, however, chose to classify firefighters as *sui generis*, recognizing that such entrants did not fit well into the traditional classifications.²⁶

Although the genesis of the firefighter's rule was initially based on notions of landowner liability, the courts also fashioned this rule as an

23. *Gibson*, 32 N.E. at 190. See Annotation, *supra* note 15, at 638 (stating the majority rule to be that "a member of the public fire department who, in an emergency, enters on premises in the discharge of his duty, is a mere licensee, under a commission to enter given by law, to whom the owner or occupant owes no greater duty than to refrain from the infliction of wilful or intentional injury").

24. See Louie A. Wright, Note, *The Missouri "Fireman's Rule": An Unprincipled Rule in Search of a Theory*, 58 U.M.K.C. L. REV. 329, 332-33 n.30 (1990). For a general criticism of the rule that firefighters are licensees, see Comment, *Torts—Are Firemen and Policemen Licensees or Invitees?*, 35 MICH. L. REV. 1157 (1937).

25. In a state with a uniform standard of care towards invitees and licensees, the firefighter's status as a licensee would not be a bar to recovery, since the firefighter would be owed the same duty of care as other plaintiffs. The following cases have adopted uniform standards of care for licensees, invitees, and trespassers: *Webb v. Sitka*, 561 P.2d 731, 733 (Alaska 1977); *Rowland v. Christian*, 443 P.2d 561, 568 (Cal. 1968), *superseded by statute as stated in Perez v. Southern Pac. Transp. Co.*, 267 Cal. Rptr. 100, 103 (Cal. Ct. App. 1990); *Mile High Fence Co. v. Radovich*, 489 P.2d at 314 (Colo. 1971); *Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97, 105 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973); *Pickard v. City & County of Honolulu*, 452 P.2d 445, 446 (Haw. 1969); *Cates v. Beauregard Elec. Coop., Inc.*, 328 So. 2d 367, 371 (La. 1976), *cert. denied*, 429 U.S. 833 (1976); *Limberhand v. Big Ditch Co.*, 706 P.2d 491 (Mont. 1985); *Ouellette v. Blanchard*, 364 A.2d 631, 634 (N.H. 1976); *Basso v. Miller*, 352 N.E.2d 868, 872 (N.Y. 1976); *Mariorenzi v. Joseph Di Ponte, Inc.*, 333 A.2d 127, 133 (R.I. 1975).

The following cases have adopted a uniform standard of care for licensees and invitees: *Wood v. Camp*, 284 So. 2d 691, 695 (Fla. 1973); *Poulin v. Colby College*, 402 A.2d 846, 851 & n.5 (Me. 1979); *Mounsey v. Ellard*, 297 N.E.2d 43, 51 & n.7 (Mass. 1973); *Peterson v. Balach*, 199 N.W.2d 639, 647 (Minn. 1972); *O'Leary v. Coenen*, 251 N.W.2d 746, 751 (N.D. 1977); *Hudson v. Gaitan*, 675 S.W.2d 699, 703-04 (Tenn. 1984); *Anotoniewicz v. Reszcynski*, 236 N.W.2d 1, 11-12 (Wis. 1975).

Cf. *Young v. Ferguson*, 724 P.2d 991, 995 (Wash. 1986) (refusing to adopt uniform standard of care); *Lohrenz v. Lane*, 787 P.2d 1274, 1277 (Okla. 1990) (same).

26. See *Buren v. Midwest Indus., Inc.*, 380 S.W.2d 96, 97 (Ky. 1964); *Krauth v. Geller*, 157 A.2d 129, 130 (N.J. 1960).

exception to the rescue doctrine.²⁷ Developed in order to ensure that proximate cause analysis would not prevent a rescuer from recovering in tort,²⁸ the rescue doctrine provides that one who negligently imperils another may also be liable to a third party who sustains injuries while attempting to rescue the imperiled individual.²⁹ So long as the rescue is not "wanton,"³⁰ the rescuer is deemed a foreseeable plaintiff for proximate cause purposes.³¹

Despite this imputed foreseeability for rescuers, Missouri and other states have withheld the application of the rescue doctrine to firefighters and police officers for public policy reasons.³² Specifically, the Missouri Supreme Court has announced that these "professional rescuers" must face these dangers as part of their public duty and, therefore, should be barred from recovery in tort.³³

Whether examining the firefighter's rule in terms of landowner liability or in terms of the rescue doctrine, the result is identical: firefighters are owed no duty of care while acting within their firefighting or rescue capacities.³⁴

27. See *infra* notes 46-49 and accompanying text.

28. *Gray*, 853 S.W.2d at 931. "Essentially, the rescue doctrine embodies a policy choice by courts to deem rescue attempts to be foreseeable for purposes of tort recovery . . ." *Id.*

29. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 44, at 307-08 (5th ed. 1984).

30. *Id.* "The rule is not limited to spontaneous or instinctive action, but applies even when there is time for thought. And whether the person injured in the attempt at rescue is the rescuer, or the person rescued, or a stranger, the original wrongdoer is still liable." *Id.* at 308.

31. *Id.* at 307. As Judge (later Justice) Cardozo declared: "Danger invites rescue The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had." *Wagner v. International Ry.*, 133 N.E. 437, 437-38 (N.Y. 1921).

32. *Gray*, 853 S.W.2d at 931.

33. *Id.*; *Nastasio v. Cinnamon*, 295 S.W.2d 117, 121 (Mo. 1956). See *Berko v. Freda*, 459 A.2d 663, 667 n.2 (N.J. 1983) (stating that the firefighter's rule does not make a firefighter's rescue unforeseeable, but, because of public policy, the rescue doctrine simply does not apply).

34. Whereas the rescue doctrine deals with proximate cause analysis, landowner liability rules examine the duty aspect of the negligence cause of action. Duty and proximate cause are closely related. KEETON ET AL., *supra* note 29, § 44, at 274 (the questions of duty and proximate cause are "one and the same").

Note that in *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928), the proximate cause analysis was couched in terms of "duty": "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation." *Id.* at 100 (Cardozo, C.J.). "Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others." *Id.* at 103 (Andrews,

The reason for this identical result was alluded to by the California Supreme Court in *Walters v. Sloan*:³⁵

[T]he fireman's rule is based on a principle as fundamental to our law today as it was centuries ago. The principle is not unique to landowner cases but is applicable to our entire system of justice—one who has knowingly and voluntarily confronted a hazard cannot recover for injuries sustained thereby.³⁶

The California Supreme Court added that "in the final analysis the policy decision is that it would be too burdensome to charge all who carelessly cause or fail to prevent fires with the injuries suffered by the expert retained with public funds"³⁷ Courts have used justifications such as landowner classifications and the exception to the rescue doctrine to hide their common goal of fairness and public policy that have truly supported the rule.

B. The Missouri Firefighter's Rule

Missouri first adopted the firefighter's rule in the companion cases of *Anderson v. Cinnamon*³⁸ and *Nastasio v. Cinnamon*.³⁹ In these cases, several firefighters were injured while fighting a fire at the defendant's apartment building when the porch on which they were standing collapsed.⁴⁰ Both plaintiffs brought personal injury actions against the landowner, and both suits were barred by the firefighter's rule.⁴¹

The *Anderson* court, despite discussing cases that regarded firefighters as *sui generis*, declared that firefighters were licensees.⁴² Furthermore, the

J., dissenting).

35. 571 P.2d 609 (Cal. 1977). The court in *Walters* did not have the landowner liability doctrine with which to support the firefighter's rule. In *Rowland v. Christiah*, 443 P.2d 561 (Cal. 1968), the California Supreme Court abolished entrant classifications in favor of a uniform standard of care. *Id.* at 568. The *Walters* court found that the changes brought about by *Rowland* did not relate to the firefighter's rule. *Walters*, 571 P.2d at 612. Furthermore, the court found several public policy reasons that independently supported the rule, and thus the court upheld the rule. *Id.* at 612-14.

36. *Walters*, 571 P.2d at 611.

37. *Id.* at 612 (quoting *Krauth v. Geller*, 157 A.2d 129, 130 (N.J. 1960)).

38. 282 S.W.2d 445 (Mo. 1955).

39. 295 S.W.2d 117 (Mo. 1956).

40. *Anderson*, 282 S.W.2d at 446.

41. "Although the words 'fireman's rule' do not appear in the opinion, the [*Anderson*] case does apply the fireman's rule in Missouri." *Phillips v. Hallmark Cards, Inc.*, 722 S.W.2d 86, 89 (Mo. 1986).

42. *Anderson*, 282 S.W.2d at 447.

court held that the landowner owes no duty to licensees as to maintenance of the premises, "except for wantonness or some form of intentional wrong or active negligence of the possessor"⁴³ or for "'knowingly let[ting] him go into a hidden peril."⁴⁴ Finally, the Court held that

where it is not alleged that the possessor of land was informed that firemen intended to enter and use the porch of his building with their fire-fighting equipment before they went on it, he cannot be held liable for failure to warn them to leave it after he knew of their presence there.⁴⁵

Unlike his predecessor in *Anderson*, the plaintiff in *Nastasio* framed his argument in terms of the rescue doctrine.⁴⁶ The court opined that the plaintiff performed the duties that he was compensated to perform; hence, the act of

43. *Id.* Missouri has since changed the duty owed to licensees. In *Wells v. Goforth*, 443 S.W.2d 155, 158 (Mo. 1969), the court expressly adopted the RESTATEMENT OF TORTS § 342 (1934). Section 342 holds a possessor liable to a licensee for harm caused by a nonobvious natural or artificial condition if (1) the possessor knows of the condition; (2) realizes that the condition poses an unreasonable risk of harm; and (3) fails to remedy the condition or warn the licensee of the risk. *Id.*

44. *Anderson*, 282 S.W.2d at 448 (quoting *Gilliand v. Bondurant*, 59 S.W.2d 679, 687 (Mo. 1933)). Wanton conduct, intentional wrongs, active negligence, and hidden dangers became exceptions to the firefighter's rule. See *Lambert v. Schaefer*, 839 S.W.2d 27, 29 (Mo. Ct. App. 1992).

45. *Anderson*, 282 S.W.2d at 450-51. Because the plaintiff in *Anderson* alleged that the defendant knew of the unsafe and unstable condition of the porch and that the defendant was present at the scene of the fire and could have warned the plaintiff of the condition, the court had to resolve the question of whether there existed a duty to warn of a hidden danger. *Id.* at 447-50.

The court justified its conclusion that firefighters are licensees and not owed a duty to be warned of all dangerous conditions on the premises by arguing in dicta that such a duty would impose too great a burden on landowners, since one would not know when firefighters might come, or where they might go. Also, the court stated that such warnings would interfere with the firefighters' operations. *Id.* at 448.

46. *Nastasio*, 295 S.W.2d at 119. "The rescue doctrine is a legal shorthand for a particular factual situation in which courts find the foreseeability requirement satisfied. In those factual circumstances where one is injured while attempting a rescue, the negligence creating the peril requiring rescue is held to be the proximate cause of the rescuer's injury." *Krause v. U.S. Truck Co., Inc.*, 787 S.W.2d 708, 710-11 (Mo. 1990). The Missouri "rescue doctrine" applies to rescues of persons only. *Boyd v. Terminal R.R. Ass'n*, 289 S.W.2d 33, 37 (Mo. 1956). Some jurisdictions have extended the rescue doctrine to include rescues of property as well. See, e.g., *KEETON ET AL.*, *supra* note 29, § 44, at 308.

rescue was not "the child of the occasion."⁴⁷ Thus, foreshadowing future policy arguments justifying the firefighter's rule, the court held that the firefighter's actions did not "bring him within the scope of the 'rescue doctrine'" because it was his duty to the public to take "the risk of rescue."⁴⁸ After concluding that the plaintiff did not come within the scope of the rescue doctrine, the court then relied on the *Anderson* holding to affirm the dismissal of the plaintiff's petition.⁴⁹

Consistent with other jurisdictions, the Missouri Supreme Court outlined various exceptions to the firefighter's rule. In *Bartels v. Continental Oil Company*,⁵⁰ the court flushed out the hidden danger exception.⁵¹ *Bartels* involved a fire at four storage tanks that held kerosene and gasoline.⁵² While firefighters were at the scene, one of the tanks exploded, killing the plaintiff and many others.⁵³ The court cited with approval the rule "that an owner or occupant of premises which firemen enter upon in the discharge of their duty may be held liable to fireman injured by a hidden danger on the premises, where the owner or occupant knew of the danger and had an opportunity to warn the firemen of it."⁵⁴ Furthermore, the court said that "[a]lthough firemen assume the usual risks incident to their entry upon premises . . . they should [not] be required to assume the extraordinary risk of hidden perils of which they might easily be warned."⁵⁵

47. *Nastasio*, 295 S.W.2d at 121 (quoting *Wagner v. International Ry.*, 133 N.E. 437, 438 (N.Y. 1921)).

48. *Id.*

49. *Id.*

50. 384 S.W.2d 667 (Mo. 1964).

51. *Id.* at 670. See also *Wright*, *supra* note 24, at 337-39 (discussing how *Nastasio* and *Anderson* avoided the hidden danger exception through "a marvelous feat of judicial sleight of hand").

52. *Bartels*, 384 S.W.2d at 668.

53. *Id.* at 669.

54. *Id.* at 670 (quoting 86 A.L.R. 2d 1214). This rule strays somewhat from the *Anderson* holding, since the defendant in that case had "the opportunity" to warn, but he was not given notice of the firefighters' intention to go onto the hidden danger (porch) before they did so. The *Anderson* court did not find the structurally defective porch to be a hidden danger for which a warning was required. *Anderson*, 282 S.W.2d at 448.

As one author suggests, the *Bartels* rule emerges looking like what Judge Westhues suggested in his dissents in *Anderson* and *Nastasio*. A landowner will no longer be able to sit idly by and watch as firefighters enter upon a hidden danger simply because he was not notified of their intention beforehand. The defendant in *Anderson* must now make some effort to warn of the unsafe porch. See *Wright*, *supra* note 24, at 339-40.

55. *Bartels*, 384 S.W.2d at 670 (quoting *Shypulski v. Waldorf Paper Prod. Co.*, <https://scholarship.law.missouri.edu/mlr/vol59/iss2/6>

In *Phillips v. Hallmark Cards, Inc.*,⁵⁶ the court recognized the modern underpinnings of the firefighter's rule, breaking the rule free from the strictures of landowner liability and the rescue doctrine.⁵⁷ Referring favorably to a Maryland case,⁵⁸ the court discussed assumption of risk and numerous public policy rationales that independently support the rule.⁵⁹ First, the court said "that because it is the firefighter's duty to cope with the hazards inherent in this dangerous line of work, one should not complain when injured in the line of duty."⁶⁰ Second, the court announced that "especially hazardous governmental functions, such as firefighting and policing, are the collective responsibility of society as a whole and are not functions relegated to dependence upon ordinary tort recovery."⁶¹

Adding its own analysis, the court further argued that the tort process is not compatible with firefighter injuries and that firefighters should be compensated through public funds.⁶² The court found that firefighters do not enter their profession as other employees do, with the expectation that the work premises will be safe.⁶³ Rather, they are expected to encounter dangerous situations, oftentimes created by negligent individuals.⁶⁴ The court concluded that "[p]ermitt[ing] a cause of action for negligence for injuries to firemen in the course of their duties would place unreasonable burdens on every owner or occupier of property."⁶⁵ Not having been "persuaded to abrogate the fireman's rule," the court determined that the plaintiff could not recover.⁶⁶

45 N.W.2d 549, 553 (Minn. 1951)). The court affirmed the trial court's judgment for the plaintiffs, the heirs of the firefighter, finding that the firefighters did not know that the tank would explode as it did. *Id.* at 671-73.

56. 722 S.W.2d 86 (Mo. 1986).

57. *Id.* at 88-89.

58. *Flowers v. Sting Security, Inc.*, 488 A.2d 523 (Md. Ct. Spec. App. 1985), *aff'd sub nom. Flowers v. Rock Creek Terrace Ltd. Partnership*, 520 A.2d 361 (Md. 1987).

59. *Phillips*, 722 S.W.2d at 88 (citing *Flowers*, 488 A.2d. at 527, 532). See *Flowers*, 488 A.2d at 532 ("[A]s more modern tort law makes overwhelmingly clear . . . the Fireman's Rule by no means rests exclusively, or even predominantly, upon that older rationale, [landowner liability]. The major modern justification for the Fireman's Rule is based upon the notion of assumption of risk.").

60. *Phillips*, 722 S.W.2d at 88.

61. *Id.* (quoting *Flowers*, 488 A.2d at 534).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 89. Although the court was not "persuaded to abrogate the fireman's rule," it failed to explicate an appropriate standard. The *Phillips* court referred to
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Confronted with the option to expand or limit the scope of this newly justified firefighter's rule, the Missouri Supreme Court chose to do both in *Krause v. U.S. Truck Co., Inc.*⁶⁷ In *Krause*, an ambulance attendant was killed while attempting a rescue at the scene of an automobile accident.⁶⁸ Finding that firefighters and police officers have the "*primary* public duty to confront danger," the court declined to extend the rule to cover ambulance attendants.⁶⁹

However, the court also expanded the rule by declaring a formulation that does not restrict the protection of the firefighter's rule to owners and occupiers of land.⁷⁰ This was a noticeable departure from prior precedent that predicated the firefighter's rule on landowner liability. A firefighter is barred from bringing suit against any negligent person, not just a landowner, whose ordinary negligence created the emergency.⁷¹

Anderson, but failed to recognize the change of the duty owed to licensees since the *Anderson* decision. Wright, *supra* note 24, at 341-43.

Although the court discussed *Anderson* and landowner liability as a rationale for the firefighter's rule, it seemed to do so almost tangentially. The court first analyzed the public policy rationale supporting the firefighters rule, then discussed the *Anderson* decision, and finally concluded by announcing that it was not persuaded. *Phillips*, 722 S.W.2d at 88-89. Considering the court's lengthy exposition of public policy justifications, arguably such justifications played an integral role in convincing the court not to abrogate the firefighter's rule.

67. 787 S.W.2d 708 (Mo. 1990).

68. *Id.* at 710. Note that in *Krause*, the ambulance attendant was not killed on another's premises, but rather on a state highway. *Id.* Premises liability rules would therefore not apply.

69. *Id.* at 713 (emphasis in original). Although no Missouri case had at this time extended the firefighter's rule to cover police officers, the court, in dicta, impliedly supported this extension. The court said that "[t]he fireman's rule is a misnomer. It has been applied to police officers injured while involved in effecting an arrest . . . [and] to police officers injured while engaged in traffic control at the scene of an accident". *Id.* at 711 (citations omitted). The court of appeals recognized police officers' coverage in *Lambert v. Schaefer*, 839 S.W.2d 27 (Mo. Ct. App. 1992).

70. The rule in *Krause* is that "a fireman . . . may not recover against the *person* whose ordinary negligence created the emergency." *Krause*, 787 S.W.2d at 711 (emphasis added).

71. The court announced that:

The rule provides that a fireman brought in contact with an emergency solely by reason of his status as a fireman who is injured while performing fireman's duties may not recover against the person whose ordinary negligence created the emergency. *Phillips v. Hallmark Cards, Inc.*, 722 S.W.2d 86, 87 (Mo. 1986); *Nastasio v. Cinnamon*, 295 S.W.2d 117, 121 (Mo. 1956). The rule excludes firemen from the benefit of the rescue

Although the Court cited *Phillips* and *Nastasio* to support its pronouncement of the rule, neither case worded the rule in quite this manner.⁷² The *Nastasio* court couched the rule in terms of landowner liability,⁷³ and the *Phillips* court failed to make a definitive statement of the rule; it merely referred to cases⁷⁴ that used landowner liability analysis. In *Krause*, there is no mention of entrant classifications.⁷⁵ Furthermore, the *Krause* rule includes the requirement of an "emergency," which was not explicitly stated in the other formulations of the firefighter's rule.⁷⁶

With landowner liability analysis no longer forming the basis for the firefighter's rule, the court "looked elsewhere for a rationale for the fireman's rule."⁷⁷ The court retraced its steps in *Phillips* and examined assumption of risk⁷⁸ and public policy grounds.⁷⁹ First, the court examined assumption of risk and stated the rule that firefighters "assume all risks incident to firefighting" duties, except for hidden dangers known by the landowner.⁸⁰ Subsequently, the court examined the public policy rationales, which they claimed were "[t]he most persuasive and most nearly universal rationale for the fireman's rule."⁸¹ The court gave the following public policy reasons in

doctrine in most cases.

Id.

Some courts have limited the firefighter's rule to protect only owners and occupiers of land. *See* *Court v. Grzelinski*, 379 N.E.2d 281 (Ill. 1978); *Hawkins v. Sunmark Indus.*, 727 S.W.2d 397 (Ky. 1986); *Lave v. Neumann*, 317 N.W.2d 779 (Neb. 1982).

72. In fact, *Phillips* contains no statement of the rule at all. *Gray*, 853 S.W.2d at 930. The *Nastasio* decision adopts the *Anderson* formulation of the rule. *See supra* text accompanying note 49.

73. *Nastasio*, 295 S.W.2d at 121.

74. *Baxley v. Williams Constr. Co.*, 106 S.E.2d 799 (Ga. Ct. App. 1958); *Strong v. Seattle Stevedore Co.*, 466 P.2d 575 (Wash. Ct. App. 1970).

75. *See supra* note 70 and accompanying text.

76. Since the rule was premised upon the rescue doctrine, an emergency would presumably be a requirement; however, none of the previous statements of the rule in Missouri explicitly required an emergency for the firefighter's rule to apply.

77. *Krause*, 787 S.W.2d at 711. The court makes no mention of the rule's relationship to the rescue doctrine.

78. The court noted that primary, not secondary, assumption of the risk is what is involved in firefighter rule analysis. "Primary assumption of the risk is not really an affirmative defense; rather, it indicates that the defendant did not even owe the plaintiff any duty of care." *Id.* at 712 (citing *Armstrong v. Mailand*, 284 N.W.2d 343, 349 (Minn. 1979)).

79. *Id.* at 711 (citing *Phillips*, 722 S.W.2d at 87-88).

80. *Id.* at 712.

81. *Id.* It seems that the court accepted both assumption of risk and public policy

support of the rule: (1) "[T]he relation between those persons and the public specifically calls them to confront certain hazards on behalf of the public;"⁸² (2) firefighters and police officers are hired, trained and compensated to deal with dangerous situations;⁸³ (3) one who negligently creates the hazard that causes the presence of the police or firefighters has no right to control the firefighter and hence it would be unreasonable to burden landowners and require them to make their premises safe;⁸⁴ and (4) workers' compensation should be utilized to compensate injured firefighters and police officers and thereby spread costs of injuries across the public.⁸⁵

The Western District of the Missouri Court of Appeals explored the various exceptions to the firefighter's rule in *Lambert v. Schaefer*.⁸⁶ Citing *Anderson*, the *Lambert* court found that "[t]he exceptions include: (1) acts involving reckless or wanton negligence or willful conduct; (2) separate and independent acts; and (3) intentional torts."⁸⁷ In this case, two police officers were on a routine patrol and were informed of the suspicious behavior of two youths.⁸⁸ Upon confronting them, the juveniles shot at the officers, and both officers brought civil suits against the minors and their parents.⁸⁹ The court found that all of the exceptions could apply in this case.⁹⁰

In two subsequent cases, the Missouri Court of Appeals strayed from the "emergency" requirement that was announced in *Krause*. In *Gray v. Russell*,⁹¹ the court of appeals flatly rejected the *Krause* formulation.

[A]ppellants argue that the fireman's rule should only be applied . . . [in] an emergency situation. Respondents . . . argue that the fireman's rule should not be limited to emergency situations, but should be applied to all cases where injury is sustained while the

as the underlying rationales for the rule. It found these two rationales "intertwined." *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. 839 S.W.2d 27 (Mo. Ct. App. 1992).

87. *Id.* at 29. Besides the hidden danger exception, which was explored in *Anderson* and *Bartels*, the other exceptions to the firefighter's rule had not been encountered in Missouri case law until *Lambert*.

88. *Id.* at 28.

89. *Id.*

90. *Id.* at 29-30. Although all of the exceptions could have applied, the officers properly alleged only the intentional torts exception. *Id.* Therefore, the court affirmed the dismissal of all but one count of the petition. *Id.* at 30.

91. Case No. WD 45607, 1992 WL 237617 (Mo. Ct. App. Sept. 29 1992), *rev'd*, 853 S.W.2d 928 (Mo. 1993).

fireman or police officer is acting in the scope of his or her employment. We disagree with both positions.⁹²

The court of appeals found that the better test of applicability of the rule would be whether "the risk confronted by the officer is one normally associated with the duty the officer is performing or the reason for that officer's presence at the accident scene."⁹³ If not, then it would qualify under exception two of *Lambert* as a separate and independent act and would fall outside the firefighter's rule.⁹⁴ The court essentially eliminated one layer of analysis by creating this new test. It ignored the emergency element of *Krause* and instead looked to the exceptions to the firefighter's rule. Finally, the court held that the facts of *Gray* fell within this exception, and thus the officer was not barred from bringing suit.⁹⁵

In *Wagener v. Burmeister*,⁹⁶ the Eastern District Court of Appeals followed the Western District's lead in *Gray*. *Wagener* involved a police officer who responded to a malfunctioning burglar alarm and tripped over a raised stair as he departed, severely injuring himself.⁹⁷ The court interpreted *Krause* narrowly and said that it was "tailored to firefighters and seems to base itself upon the firefighter's status as a firefighter and the emergency nature of the situation."⁹⁸

Citing the Western District's decision in *Gray*, the court announced that "[t]he application of the firefighter's rule in cases involving police officers injured in the line of duty has not rested so heavily on the emergency aspect which has been present in cases involving firefighters."⁹⁹ Furthermore, the court said that it was persuaded by the Western District's rule since it was easy to apply and avoided the problems of defining an "emergency situation."¹⁰⁰ Presumably, the Eastern District left the emergency requirement intact for application of the rule to firefighters.

92. *Id.* at *2.

93. *Id.*

94. *Id.* This test announced by *Lambert* is consistent with the approach of other jurisdictions. See *Flowers*, 488 A.2d at 535; *Berko*, 459 A.2d at 665; *Rose v. City of Los Angeles*, 206 Cal. Rptr. 49, 51-52 (Cal. Ct. App. 1984).

95. *Gray*, 1992 WL 237617, at *3.

96. 1993 WL 98195 (Mo. Ct. App. Apr. 6, 1993), *rev'd*, 853 S.W.2d 928 (Mo. 1993).

97. *Id.* at *1.

98. *Id.*

99. *Id.* at *2.

100. *Id.*

Whether intended or not, the *Wagner* court sanctioned the creation of two firefighter rules: one for police officers and one for firefighters.¹⁰¹ Under the firefighter's rule for firefighters, it must first be determined whether there is an "emergency situation." If there is none, the firefighter's rule does not bar the negligence action. If there is an emergency, it is necessary to determine whether one of the exceptions to the firefighter's rule applies, in which case the firefighter can bring the negligence action. Under the firefighter's rule for police officers, there is no need to determine if there is an "emergency situation." If an exception applies, the rule does not bar the negligence action.¹⁰²

Judge Grimm, concurring in the judgment, disagreed with the majority's novel approach and found that the court was bound by the *Krause* formulation, which requires an "emergency situation."¹⁰³

IV. INSTANT DECISION

In *Gray v. Russell*, the Missouri Supreme Court began its analysis by examining Missouri's development of the firefighter's rule, starting with *Anderson*. The court said that although the *Anderson* and *Nastasio* decisions seemed dispositive of this case, the possessor's duty of care owed to licensees as announced in *Anderson* was altered in *Wells v. Goforth*.¹⁰⁴ Therefore, the court said that "the law no longer holds the safety of gratuitous licensees in disregard."¹⁰⁵ The court then looked at the firefighter's rule from a "more general perspective," disregarding any notions of landowner liability.¹⁰⁶

101. *Id.* at *1-2. The court did not specifically enact two rules, but did note that the application of the firefighter's rule involving police officers has not rested so heavily on emergency analysis.

Although it cited the California case in support of its new analysis, the *Wagner* court failed to take advantage of the California rule that applied its test to both firefighters and police officers:

[w]here the defendant's negligence, whether active or passive, creates an apparent risk, which is of the type usually dealt with by firemen [or police officers], and which is the cause of the fireman's [or police officer's] presence, and which is the direct cause of the fireman's [or police officer's] injury, the defendant is not liable

Rose v. City of Los Angeles, 206 Cal. Rptr. 49, 51 (Cal. Ct. App. 1984).

102. Note that the firefighter/officer must have been injured while performing his duties for the rule to apply. *Gray*, 853 S.W.2d at 930.

103. *Wagner*, 1993 WL 98195, at *3.

104. *Gray*, 853 S.W.2d at 930 (citing *Wells v. Goforth*, 443 S.W.2d 155 (Mo. 1969)).

105. *Gray*, 853 S.W.2d at 930.

106. *Id.*

The court subsequently framed its analysis in terms of the rescue doctrine, stating that the firefighter's rule originated as a narrow exception to this doctrine.¹⁰⁷ Reiterating *Krause*, the court highlighted the policy considerations behind the rescue doctrine.¹⁰⁸ The court said that the rescue doctrine is "legal shorthand" for proximate cause, and that, as a policy choice, courts find rescue attempts to be foreseeable so that proximate cause will not hinder an injured rescuer's attempt to recover.¹⁰⁹

For policy reasons, however, the court said that the benefits of this rescue doctrine are withheld from public safety officers who are injured while performing a rescue.¹¹⁰ Again looking to *Krause*, the court explained that because their jobs require them to confront dangers on behalf of the public, these officers cannot recover for injuries attributable to the individual whose negligence brought them to the scene of the emergency.¹¹¹ Because firefighters and police officers are hired, trained, and compensated to deal with dangers that affect the public as a whole, the cost of their injuries should be borne by the public as a whole through worker's compensation and insurance.¹¹² Again, the court found that this reasoning was the most persuasive rationale for the firefighter's rule.¹¹³

Finally, the court reasoned that the aforementioned policy considerations do not apply in nonemergency or nonrescue situations.¹¹⁴ In such situations, the court said that a public safety officer can choose not to proceed if the apparent risks present unreasonable danger, and that public policy does not require rules such as the rescue doctrine and the firefighter's rule in these circumstances.¹¹⁵ Furthermore, the *Gray* court did not desire to allow the firefighter's rule to discriminate against public safety officers, or insulate negligent individuals from liability in nonemergency or nonrescue situations.¹¹⁶

The court finished where it began, holding that the firefighter's rule was a narrow exception to the rescue doctrine.¹¹⁷ As a result, the court concluded that the firefighter's rule applied only in emergencies;¹¹⁸ when no

107. *Id.*

108. *Id.* at 930-31.

109. *Id.*

110. *Id.* at 931.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 930.

emergency exists, traditional rules such as premises liability will define the respective duties and liabilities of the parties.¹¹⁹ Thus, Officer Gray's claims were not barred by the firefighter's rule because he was injured during a routine building check, not during an emergency.¹²⁰

V. COMMENT

The court's decision in *Gray v. Russell*, although on the one hand merely a reassertion of prior law, successfully defeated attempts by the courts of appeal to restructure firefighter rule analysis. By maintaining the status quo, the court missed the opportunity to clarify and harmonize the rule and its rationale. Consequently, the Missouri firefighter's rule remains a patchwork of old and new law, containing doctrinal inconsistencies and superfluous analysis.

A. *The Emergency Requirement and Doctrinal Inconsistencies*

Before *Gray*, the Missouri Court of Appeals demonstrated a willingness to disregard the emergency requirement, at least with respect to police officers.¹²¹ In its place, the court looked to whether the risk encountered was "one normally associated with the duty the officer was performing or the reason for that officer's presence at the accident scene."¹²²

By refusing to recognize such analysis, the Missouri Supreme Court accomplished two possible objectives. First, the court maintained uniformity and simplicity by declining to allow the creation of two firefighter's rules, as sanctioned in *Wagener*.¹²³ Second, rather than break new ground, the court took the easy path and upheld the status quo. However, although preventing the creation of two firefighter's rules worked to keep the rule uniform, retaining the emergency requirement breeds confusion and inconsistency.¹²⁴

119. *Id.* at 931.

120. *Id.* at 930.

121. *See supra* notes 99-102 and accompanying text. The *Wagener* court made a half-hearted compromise by eliminating the emergency requirement for police officers and retaining it for firefighters. *Wagener*, 1993 WL 98195, at *1-2.

122. *See supra* note 93 and accompanying text.

123. *See supra* text accompanying notes 99-102. Regardless of the differences between firefighters and police officers, a common firefighter's rule is appropriate considering the similarities of these public safety officers. *See Berko v. Freda*, 459 A.2d 663, 666 (N.J. 1983) ("The similarity between firefighters and police officers compels the extension of the rule to the latter. Both . . . confront crises and ally dangers created by an uncircumspect citizenry . . .")

124. The requirement of an emergency only serves to create needless confusion

In *Gray*, the Missouri Supreme Court reached its holding that the firefighter's rule applies only in emergencies by framing the analysis in terms of the rescue doctrine.¹²⁵ The court said that "[t]he reason for this particular limitation is that the firefighter's rule originated as an exception to the 'rescue doctrine' as noted in *Nastasio*."¹²⁶ With this statement, the court created a catastrophic confusion of the firefighter's rule and its rationales. First, this assertion represents a misunderstanding of the legal history of the rule, both in Missouri and in other jurisdictions. In Missouri, the firefighter's rule originated as a landowner liability rule, not as an exception to the rescue doctrine.¹²⁷ Second, this quote by the court ignores the independence that the firefighter's rule has assumed since its beginning.

Even in one of the first Missouri firefighter's rule cases, the Missouri Supreme Court hinted that independent public policy rationales, not landowner liability or the rescue doctrine, truly formed the basis for the rule. In *Nastasio*, the plaintiff argued that the *Anderson* rule did not control because it did not deal with a rescue doctrine claim; however, the court stated that

[t]he same reasons, hereinafter stated, which cause us to hold that the amended petition fails to state a claim for relief under the "rescue doctrine" cause us also to hold that plaintiff's deceased status under the law of *Anderson v. Cinnamon* was that of licensee and not that of invitee.¹²⁸

In subsequent Missouri cases, the same firefighter's rule's independence can be found in dicta. In *Phillips*, the Missouri Supreme Court first emphasized the assumption of the risk and public policy justifications for the

by diverting our focus from the true issue in a firefighter rule case: whether the risk encountered by the officers or firefighters is one that we should require them, as a matter of law, to assume as incident to their duties as public safety officers. *See Flowers v. Sting Security, Inc.*, 488 A.2d 523, 532-33 (Md. Ct. Spec. App. 1985), *aff'd sub nom. Flowers v. Rock Creek Terrace Ltd. Partnership*, 520 A.2d 361 (Md. 1987).

125. *Gray*, 853 S.W.2d at 930.

126. *Id.* Nowhere in *Nastasio* does it note that the firefighter's rule originated as an exception to the rescue doctrine. The rule originated as a landowner liability classification. *See Anderson v. Cinnamon*, 282 S.W.2d 445, 446-47 (Mo. 1955); *Gibson v. Leonard*, 32 N.E. 182, 183-84 (Ill. 1892), *overruled by Dini v. Naidotch*, 170 N.E.2d 881 (Ill. 1960).

127. *See Anderson*, 282 S.W.2d at 446-47.

128. *Nastasio v. Cinnamon*, 295 S.W.2d 117, 119 (Mo. 1956) (emphasis added).

rule,¹²⁹ and in *Krause* the court found that public policy arguments were "the most persuasive rationales" for the firefighter's rule.¹³⁰

Similarly, in other jurisdictions, the firefighter's rule exists independently of landowner liability and the rescue doctrine. For example, in *Berko v. Freda*, the New Jersey Supreme Court found that the rationale for the rescue doctrine has no bearing on the firefighter's rule.¹³¹ Confronting the firefighter's rule as an issue of first impression, the Iowa Supreme Court recently adopted the rule stating that "public policy supports adoption of a narrow rule denying recovery to a firefighter and policeman."¹³² Such jurisdictions no longer formulate their rule upon underpinnings such as landowner liability and the rescue doctrine, and thus do not require an emergency for the firefighter's rule to apply.¹³³

Furthermore, if proximate cause and the rescue doctrine represent policy choices in and of themselves,¹³⁴ then it seems odd that the firefighter's rule could not exist independently of the rescue doctrine and rest upon the more modern and persuasive justifications. Therefore, if the rescue doctrine has lost its importance and the rule is now independently based upon public policy and assumption of risk, the requirement of an "emergency situation" is no longer necessary, and this requirement is inconsistent with the justifications for the rule.

*B. Life Without the Emergency Requirement*¹³⁵

Once the firefighter's rule broke loose from its landowner liability moorings, the Missouri Supreme Court either had to abrogate the rule¹³⁶ or "look[] elsewhere for a rationale" to support it.¹³⁷ The *Phillips* court decided not to abrogate the rule and found public policy and assumption of

129. *Phillips v. Hallmark Cards, Inc.*, 722 S.W.2d 86, 88 (Mo. 1986) (citing *Flowers*, 488 A.2d at 534).

130. *Krause v. U.S. Truck Company*, 787 S.W.2d 708, 712 (Mo. 1990).

131. *Berko v. Freda*, 459 A.2d 663, 667 n.2 (N.J. 1983).

132. *Pottebaum v. Hinds*, 347 N.W.2d 642 (Iowa 1984).

133. *See id.* at 645 ("While we do not ascribe to all of the various policy reasons espoused in support of the fireman's rule [*i.e.* landowner liability and assumption of risk], we do believe adoption of a limited rule is sound. In particular, we agree with the New Jersey Supreme Court [*in Berko*] . . ."). *See also Flowers*, 488 A.2d at 532-37.

134. *See supra* notes 38-31 and accompanying text.

135. To this author's knowledge, Missouri is the only state with an emergency requirement in its firefighter's rule.

136. *See Phillips*, 722 S.W.2d at 89.

137. *Krause*, 787 S.W.2d at 711.

risk to be good supporting rationales.¹³⁸ *Krause* and *Gray* reaffirmed these modern underpinnings; however, reminiscent of the rescue doctrine, the court added an emergency element to the rule, never before seen in its prior decisions.¹³⁹ As demonstrated by other jurisdictions, this emergency requirement is unnecessary.

Emergency analysis attempts to distinguish and sort out those cases in which the firefighter or police officer should recover for acts of negligence from those cases in which the officer should be barred from recovering. However, an identical sorting process would occur, regardless of any inquiry into emergency analysis, by utilizing the already existing exceptions to the firefighter's rule, specifically the independent and separate acts exception.¹⁴⁰

The case of *Rose v. City of Los Angeles* contains an excellent sampling of California cases in which it could be said that no "emergency" existed, but in which courts found the firefighter's rule inapplicable because of the independent and separate acts exception.¹⁴¹ In one example, a police officer was struck by a speeding vehicle while placing a ticket on an illegally parked car. The court said that because of the independent and separate act of negligent speeding, the officer could maintain an action against the speeder, but not against the owner of the illegally parked car.¹⁴² In another case, an officer pulled over two speeding vehicles, and, while sitting in his parked car at the side of the road, one of the drivers stepped on the clutch instead of the brake and hit the officer's car.¹⁴³ Similarly, this court held this to be a separate and independent negligent act, since the driver's inexperience with driving a car with manual transmission was not a risk normally associated with apprehending speeders, nor was it the reason for the officer's presence at the scene.¹⁴⁴ Several other similar cases are cited in *Rose* that reach the same result as these two examples.¹⁴⁵

By focusing on the risks normally associated with firefighting and police activities as well as the officer's purpose for being on the scene, not only will a court remain true to the modern underpinnings of the rule, but it will also achieve the same result as if it had used emergency analysis.

Furthermore, eliminating the emergency requirement eliminates a layer of analysis and simplifies firefighter rule cases. Under *Gray*, there are several threshold issues that have to be examined: First, was the public safety officer

138. *Phillips*, 722 S.W.2d at 88-89.

139. *Gray*, 853 S.W.2d at 930.

140. *See supra* text accompanying notes 93-94.

141. *Rose v. City of Los Angeles*, 206 Cal. Rptr. 49, 51-52 (Cal. Ct. App. 1984).

142. *Id.* at 51 (citing *Hubbard v. Boelt*, 620 P.2d 156 (Cal. 1980)).

143. *Id.* (citing *Malo v. Willis*, 178 Cal. Rptr. 774 (Cal. Ct. App. 1981)).

144. *Id.*

145. *Id.* at 52.

injured while performing firefighter/police officer duties? Second, was there an emergency? Third, did the ordinary negligence of the defendant create the emergency? Without the emergency requirement, only the first question would be necessary. Then, examining the separate and independent acts exception, one can sort out a recoverable firefighter claim from a nonrecoverable one.

VI. CONCLUSION

In *Gray v. Russell* the Missouri Supreme Court had the opportunity to support the firefighter's rule with modern justifications as well as the opportunity to expand the scope of the rule. The court chose to remain consistent with past precedent and retain the firefighter's rule as a very narrow exception to the rescue doctrine. With this choice, the court failed to reap the benefits of doctrinal consistency and increased simplicity.

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