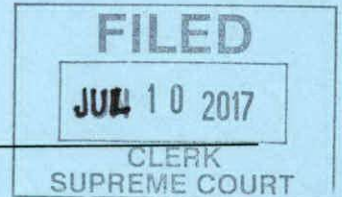


No. 2016-SC-000248



In the
Supreme Court of Kentucky

NORFOLK SOUTHERN RAILWAY COMPANY,

Appellant,

v.

SHARON JOHNSON,

Appellee,

On Appeal From
Court of Appeals No. 2014-CA-001298
Boyle Circuit Court No. 12CI-00262

BRIEF FOR APPELLEE
SHARON JOHNSON

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CERTIFICATE OF SERVICE

In accordance with CR 76.12(5), on July 10, 2017, the undersigned counsel served a true and correct copy of this brief by mailing same, First Class U.S. Mail, postage prepaid, to: (1) Robert Cetrulo, 130 Dudley Road, Suite 200, Edgewood, KY 41017; (2) Michael Abate, 710 W. Main Street, 4th Floor, Louisville, KY 40202; (3) Samuel P. Givens, Jr., Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; and (4) Hon. Darren Peckler, Boyle Circuit Court Judge, 321 West Main Street, Danville, KY 40422.



Counsel for Appellee

I. INTRODUCTION

This is a premises liability case where the trial judge sustained a Motion for a Directed Verdict on behalf of the Appellant. The Judge determined that The Fireman's Rule, as outlined in Buren v. Midwest Industries, Inc., 380S.W.2d 96 (Ky. Ct. App. 1964), bars recovery for the Plaintiff in this case as a matter of law. The Court of Appeals reversed, opining that the Fireman's Rule did not apply to this case. The Court of Appeals remanded the case for another trial.

II. STATEMENT CONCERNING ORAL ARGUMENT

Appellee does not believe oral argument is necessary.

III. COUNTERSTATEMENT OF POINTS AND AUTHORITIES

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IV. COUNTERSTATEMENT OF THE CASE

Appellee Sharon W. Johnson was employed as a police officer by the City of Danville on June 17, 2011. She and Sergeant Matano responded to a call of an individual acting in a disorderly manner on property owned by Norfolk Southern Railway Company at the end of Dillehay Street in the City of Danville. Upon coming into contact with the Appellee and Sergeant Matano, the individual turned and ran across a field located on

Norfolk Southern Railway Company property.

Both the Appellee and Sergeant Matano testified that the suspect fled across the field and into a tree line, before descending an embankment.¹² Sergeant Matano apprehended the suspect with the use of a taser and was able to safely descend the embankment.³ The Appellee, while attempting to assist her Matano, came running through the tree line and fell to the bottom of the embankment.⁴ The Appellee suffered an injury to her wrist and eye. Appellee has acknowledged that the embankment was a natural condition, not caused by the Appellant.⁵ There was no testimony that the Appellant had taken any precautions or actions to warn of or remedy the hazardous embankment.

Suit was filed and after discovery, Appellant moved for summary judgment on the issue of liability.⁶ This Motion was overruled by the Trial Court. Subsequently, a trial date was set and the Appellee presented her case on June 16, 2014.⁷ Prior to the Appellee presenting her case, the Appellant filed a Motion for a Directed Verdict based on the Fireman's Rule.⁸ The Trial Court reserved judgment on Appellant's Motion until the close of Appellee's case. At the close of Appellee's case, a conference was held in the Trial Court chambers with the Judge and both parties' counsel present. Counsel for the Appellee objected to the granting of a Directed Verdict because the three prong test outlined in Sallee v. GTE South, Inc., 839 S.W.2d 277 (Ky. 1992) had not been met.

1 Appellant's deposition pp 39-40.

2 Deposition of Sergeant Matano p 16.

3 Id. p 26.

4 Id. p 31.

5 Appellant's deposition p 58.

6 Circuit Clerk Volume 1 of 2, pp 54-82.

7 Circuit Clerk Volume 2 of 2, p 210.

8 Id. pp 201-209.

The Judge held that the Appellee was barred recovery as a matter of law by the Fireman's Rule.⁹ In its Trial Order and Final Judgment, the Trial Court correctly noted that the Fireman's Rule had been applied to police officers as well as firefighters.¹⁰ The Trial Court also held that the three prong test outlined in Sallee had been met.¹¹ The Court of Appeals reversed and remanded and this Appeal followed on motion of the Appellant.

V. ARGUMENT

A) THE COURT OF APPEALS PROPERLY HELD THAT THE FIREMAN'S RULE IS NOT APPLICABLE IN THIS CASE

The Court of Appeals was correct in the reversing the Trial Court's Directed Verdict in this case. The Trial Court granted a Directed Verdict because it felt bound to do so by Buren, *supra*, and that the three prong test from Sallee had been met.¹² In Buren, the Court of Appeals described the Fireman's Rule as follows:

That the fireman is duty bound to assume the risk because he is being paid to do so does not make it any less voluntary. Except for unusual hazards known to the property owner or occupant but unknown to him, the trained fire fighter is equally cognizant of and better able to evaluate the unpredictable dangers involved. When he arrives on the scene, the field is his. The owner has no power to direct or control his actions. He may not order him to stay outside, or stay off the roof, or wear a gas mask, or to limit his actions to shooting water into the building from a safe position outside. To hold the owner responsible while denying him any right or discretion to say what firemen shall or shall not do is not consistent with what this Court believes to be the fundamental law of liability by reason of negligence. Having bound his hands, the law cannot justifiably inflict upon him the consequences of what he might otherwise been able to prevent... nor can a jury be permitted to do so. It is not fairly a question of fact, and this is true whether the claim is based upon common law or statutory negligence.¹³

⁹ Id. p 241.

¹⁰ Id. p 241; citing Fletcher v. Illinois Central Gulf Railroad Company, 679 S.W.2d 240 (Ky. Ct. App. 1984).

¹¹ Circuit Clerk Volume 2 of 2, p 241.

¹² Id.

¹³ Id. quoting Buren v. Midwest Industries, Inc., 380 S.W.2d 96 (Ky.

As previously briefed to the Court of Appeals, the applicability of the Fireman's Rule to a given Plaintiff is determined by the three prong test outlined in Sallee, *supra*.

The Supreme Court in Sallee stated:

There are three prongs necessary to the application of the Firefighter's Rule as adopted in Kentucky:

- 1) The purpose of the policy is to encourage owners and occupiers, and others similarly situated, in a situation where it is important to themselves and to the general public to call a public protection agency, and to do so free from any concern that by so doing they may encounter legal liability based on their negligence in creating the risk.
- 2) The policy bars public employees (firefighters, police officers, and the like) who, as an incident of their occupation, come to a given location to engage a specific risk; and
- 3) The policy extends only to that risk.¹⁴

Appellant Norfolk Southern Railway Company is an owner and occupier of the land located at the end of Dillehay Street in Danville. However, as the Court of Appeals correctly held, Appellant did not contact law enforcement regarding the suspect and were likely not aware of the incident in question.

As with the Plaintiff in Sallee, the Appellant clearly falls within the second prong of the Firefighter's Rule. Appellant Johnson was a police officer employed by the City of Danville at the time of her injury. However, as in Sallee, it is important to identify the specific risk that the Appellant engaged in on June 17, 2011. Appellant and Sergeant Matano responded to a call involving a disorderly person on June 17, 2011. The specific risk that was undertaken by responding to that call was dealing with a non-compliant, and possibly combative, individual. "The hypothetical police officer, and the present movant, assume the risk that occasion their presence, **but not a further risk from a different**

Ct. App. 1964)
¹⁴ Sallee, at 279.

source.”¹⁵

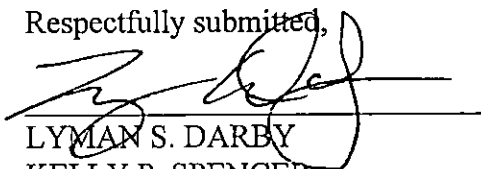
The third prong of the three part test outlined in Sallee is not satisfied in this case. Just as with the Plaintiff in Sallee, Appellant Johnson “was not injured by the risk he was called upon to engage, but by a risk different in both kind and character.”¹⁶ The Appellant was not injured by the disorderly suspect. She was injured when she fell down a hazardous embankment that Appellee had not secured. This risk is different in both kind and character to the risk that caused her to be present on Appellee's land.

All three prongs of the Sallee test must be met in order to bar a Plaintiff recovery under the Fireman's Rule. The facts of this case do not satisfy the first or third prongs, and as a result, the Fireman's Rule is inapplicable.

VI. CONCLUSION

Wherefore, Appellee respectfully prays that this Court affirm the decision of the Court of Appeals.

Respectfully submitted,



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¹⁵ Id. Emphasis added.

¹⁶ Id.