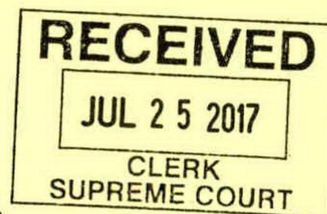
No. 2016-SC-000248

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. 12-CI-00262

REPLY BRIEF FOR APPELLANT NORFOLK SOUTHERN RAILWAY COMPANY

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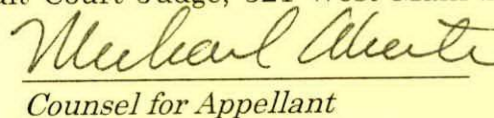
CERTIFICATE OF SERVICE

In accordance with CR 76.12(5), on July 24, 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) Lyman Darby, 535 Wellington Way, Suite 330, Lexington, KY 40503; (2) Kelly P. Spencer, Spencer Law Group, 2224 Regency Road, Lexington, KY 40503; (3) Samuel P. Givens, Jr., Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; and (4) Hon. Darren Peckler, Boyle Circuit Court Judge, 321 West Main Street, Danville, Kentucky 40422.



Counsel for Appellant

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INTRODUCTION

Plaintiff-Appellee Sharon Johnson's brief provides no meaningful response to the arguments made by Defendant-Appellant Norfolk Southern. Appellee's short argument section does nothing more than parrot the flawed reasoning of the Court of Appeals' opinion, without addressing any of the contrary arguments outlined in Appellant's opening brief. Notably, the brief does not address any of the cases cited by Norfolk Southern that applied the Firefighter's Rule on materially indistinguishable facts. Nor does it mention the open and obvious danger doctrine, despite the extensive discussion of that case law in the opening brief. In short, Appellee's brief provides no basis to affirm the decision below. Reversal is required.

ARGUMENT

I. The Firefighter's Rule Applies to This Case.

Plaintiff cites only two cases in her brief: *Sallee v. GTE*, 839 S.W.2d 277 (Ky. 1992), and *Buren v. Midwest Industries*, 380 S.W.2d 96 (Ky. Ct. App. 1964). Both are cited almost exclusively for a point that is not in dispute: identifying the elements of the three-part test for the Firefighter's Rule. Plaintiff does not engage with any of the cases cited by Norfolk Southern to explain why the Court of Appeals misapplied those elements to the facts of this case.

A. A Landowner Need Not Call for Emergency Assistance Himself to be Protected by the Rule.

Without any analysis, Plaintiff asserts that the Firefighter's Rule does not apply because "Appellant did not contact law enforcement regarding the suspect and were [sic] likely not aware of the incident in question." Appellee Br., p. 7. As explained in Norfolk Southern's opening brief, however, that argument makes little sense considering the history and purpose of the Firefighter's Rule.

The Rule serves multiple purposes, but none more important than what courts have termed a "public policy" rationale: "'it is the fireman's business to deal with that very hazard and hence . . . he cannot complain of negligence in the creation of the very occasion for his engagement,' the precise risk which the public pays him to undertake." *Buren*, 380 S.W.2d at 98; *see also Sallee*, 839 S.W.2d at 278 (same); *Moody v. Delta W., Inc.*, 38 P.3d 1139, 1142 (Alaska 2002); *Day v. Caslowitz*, 713 A.2d 758, 760 (R.I. 1998); *Pottebaum v. Hinds*, 347 N.W.2d 645 (Iowa 1984). Similarly, many courts have articulated a version of an "assumption of risk" theory when applying the Firefighter's Rule. *See, e.g., Rice v. Vanderespt*, 389 S.W.3d 645, 647 (Ky. Ct. App. 2012); *Fletcher v. Illinois Central Gulf Railroad Company*, 679 S.W.2d 240, 243 (Ky. Ct. App. 1984). Still more have noted that the Rule is justified by the compensation rules that often allow first responders to recover quickly without initiating litigation—as Officer Johnson did here. *See, e.g., Krauth v. Geller*, 31 N.J. 270 (N.J. 1960); *Furstein v. Hill*, 590 A.2d 939 (Conn. 1991).

None of these policy rationales has anything to do with the person needing assistance. Nor should they. An officer's duty is not to individual citizens but to the public at large. And that duty does not stop at the property line. *See Wallace v. Thoroughbred Hosp., LLC*, No. 2010-CA-001289-MR, 2011 WL 5119131, at *4 (Ky. Ct. App. Oct. 28, 2011) ("[P]olice officers are still mandated to respond to the disorder ... at the various spots it is occurring.").

The Rule's supporting rationales also have nothing to do with the officer's relationship to the property in question. "[T]the present-day basis for continuing the Fireman's Rule does not relate to his now rejected status as a mere licensee." *Hawkins v. Sunmark Industries, Inc.*, 727 S.W.2d 397, 400 (Ky. 1986). Rather, "[i]ts present viability relates to the peculiar status of the fireman as a part of fire prevention whose existence and presence at the fire is needed in the public interest, limited to those who can reasonably expect to benefit from his presence." *Id.*

Thus, the Rule applies regardless of how the officer came to be on the property in question or whose property it is. Otherwise, homeowners would have no protection against liability claims even in the event that an officer himself encountered and pursued a suspect across their property. That is the very kind of injury the Rule was meant to address.

B. **Plaintiff Was Indeed Injured by the Kind of Hazard She Was Called to Address.**

Plaintiff also argues that the Rule should not apply because her injury was not caused by the precise hazard she was called to address: an unruly suspect. This argument lacks merit. As Norfolk Southern's opening brief explained at length, pursuit of a fleeing suspect *is* precisely the sort of hazard one might expect to encounter when called to the scene to deal with a disorderly person. *See, e.g.*, VR 1: 6/16/14; 13:08: 37 (trial court holding "it was in the line of duty that that action took place."); VR 1: 6/16/14; 11:14:22 (Officer Johnson admitted she was trained on how to conduct a foot chase as part of her job); Johnson Depo. at 18:12-25 (same).

Moreover, case law from Kentucky and other jurisdictions makes clear that the rule applies to a broad range of hazards reasonably encountered by the officer, even if not the precise reason they were called in the first instance. The rule has been applied, for example:

- where an officer called to the scene of a train derailment inhaled toxic fumes, *Fletcher*, 679 S.W.2d at 243;
- where an officer was shot while responding to a domestic violence call, *see Rice*, 389 S.W.3d at 647;
- where an officer was injured in a parking lot after being called to respond to disorderly conduct at a completely different location at a hotel, *see Wallace*, 2011 WL 5119131, at *3;
- where a paramedic injured his back carrying someone down the stairs because another person negligently dropped one end of the stretcher, *see Maggard v. Conagra Foods, Inc.*, 168 S.W.3d 425, 428 (Ky. Ct. App. 2005);

- where an officer slipped and fell on an icy sidewalk while responding to a home security alarm, *see Day v. Caslowitz*, 713 A.2d 758 (R.I. 1998);

- where an officer fell down a stairway when investigating a suspected burglary, *see Lee v. Luigi, Inc.*, 696 A.2d 1371 (D.C. 1997);

- where an officer fell on an allegedly unsafe deck when responding to a home alarm, *see Furstein*, 590 A.2d at 944;

- where an officer slipped down a staircase while escorting two suspected shoplifters he came to the store to arrest, see *Hill v. Adler's Food Town, Inc.*, 180 Mich. App. 495 (Mich. Ct. App. 1989); and

- where an officer slipped officer slipped and fell on powder spilled on a donut shop floor while responding to call for medical assistance, *see Rosa v. Dunkin' Donuts of Passaic*, 583 A.2d 1129 (N.J. 1991), *abrogated by* N.J. STAT., § 2A:62A-21 (1994).

Each of these cases shows that the third prong of the *Sallee* test is nowhere near as restrictive as the Court of Appeals believed. On the contrary, the Rule encompasses any hazard that an officer might reasonably be expected to encounter when responding to a call for assistance. That plainly involves natural terrain that must be crossed while pursuing a fleeing suspect. To hold otherwise would eviscerate the Rule in all but the narrowest circumstances. *See, e.g., Rosa*, 583 A.2d at 1133 ("To hold otherwise creates artificial distinctions between the negligence that occasioned one's presence and the negligence defining the scene at which one arrives (and with which one has been commissioned and empowered to deal).").

II. Plaintiff Fails to Address Defendant's Open and Obvious Danger Argument.

Finally, Plaintiff simply ignores Norfolk Southern's argument about the application of the open and obvious danger doctrine. By so doing, she has

waived any right to contest that argument. Because the Firefighter's Rule plainly bars her claim, this Court need not address the argument either. However, if the Court should conclude that the Firefighter's Rule does not apply, it should nevertheless reverse the decision below on the ground that plaintiff's claim fails as a matter of law because the embankment down which she fell was an open and obvious danger and no prudent landowner would have posted a sign to warn about the potential hazard. *See Carter v. Bullitt Host, LLC*, 471S.W.3d 288, 298 (Ky. 2015) ("Applying comparative fault to open-and-obvious cases does not restrict the ability of the court to exercise sound judgment in these cases any more than in any other kind of tort case."); *see also Shelton v. Ky. Easter Seals Soc'y, Inc.*, 413 S.W.3d 901, 912, 916 (Ky. 2013) (same).

CONCLUSION

For the foregoing reasons, this Court should reverse the ruling of the Kentucky Court of Appeals, and reinstate the Boyle Circuit Court's judgment in favor of Norfolk Southern.

Respectfully Submitted,

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