

ESPINOZA V. SCHULENBURG: ARIZONA ADOPTS THE RESCUE DOCTRINE AND FIREFIGHTER’S RULE

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INTRODUCTION

The rescue doctrine permits an injured rescuer to recover damages from the individual whose tortious conduct necessitated the rescue. The firefighter’s rule limits the rescue doctrine by preventing a public safety officer who could otherwise bring suit under the rescue doctrine from recovering if the officer sustained her injuries while acting in the capacity of a professional. In *Espinoza v. Schulenburg*,¹ the Arizona Supreme Court addressed for the first time these two doctrines, and whether they apply to a situation in which an off-duty firefighter receives injuries while providing emergency aid. In a unanimous decision, the court adopted both the rescue doctrine and a narrow construction of the firefighter’s rule, which only applies to firefighters at a rescue scene as a result of their on-duty obligations as firefighters.

I. FACTUAL AND PROCEDURAL BACKGROUND

While driving home from work on the evening of February 10, 2002, Phoenix firefighter Elizabeth Espinoza encountered an accident scene on State Route 101.² Espinoza stopped to help and identified herself as an emergency medical technician to those already at the scene.³ The Schulenburg family had been involved in the accident, and their vehicle was partially blocking one lane of traffic.⁴ Espinoza approached the Schulenburgs’ car, and as she reached inside to switch on the emergency flashers, another car rear-ended the vehicle.⁵ As a result of that accident, Espinoza broke her hip, wrist, and a finger, tore knee ligaments,

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1. 129 P.3d 937 (Ariz. 2006).
 2. *Id.* at 938.
 3. *Id.*
 4. *Id.*
 5. *Id.*

and suffered other harm.⁶ She received workers' compensation as a result of her injuries.⁷

Espinoza sued the Schulenburgs for compensation for her injuries.⁸ The trial court granted summary judgment to the Schulenburgs, ruling that the firefighter's rule barred Espinoza's claim against them.⁹ Upon review, Division One of the Court of Appeals reversed the case and remanded it for trial.¹⁰ It held that the firefighter's rule does not bar a public safety professional from bringing a claim against the individual whose actions made the response necessary, so long as no employment mandate required the response.¹¹ The Court of Appeals remanded the case for a determination of whether Espinoza's employment obligated her to stop and render aid in the event of an emergency.¹² Such an obligation, the court reasoned, could place her in a de facto on-duty status, thus triggering the application of the firefighter's rule.¹³ The Arizona Supreme Court granted review to determine the correct function of the firefighter's rule as applied to off-duty firefighters.¹⁴

II. EXPANSION AND CONTRACTION OF THE RIGHT TO RECOVER

A. *The Rescue Doctrine*

The rescue doctrine permits an injured rescuer to receive compensation from the individual whose tortious acts gave rise to the need for rescue.¹⁵ The rescue doctrine removes the normal scope-of-liability barriers inherent in some actions for recovery for personal injury.¹⁶ Thus, notwithstanding arguments that harm to a rescuer is unforeseeable, or that the rescuer's decision to help is a superseding cause, the scope of liability extends to include the rescuer's injuries stemming from the rescue.¹⁷ This policy of expanded liability finds an explanation in Justice Cardozo's proclamation that "[d]anger invites rescue."¹⁸ While Arizona

6. *Id.*

7. *Id.*

8. *Id.* Espinoza also sued Casey Barnett, the driver of the car that rear-ended the disabled car, as well as the Department of Public Safety, which had an officer at the scene at the time of the accident. *Id.*

9. *Id.*

10. *Espinoza v. Schulenburg*, 108 P.3d 936, 941 (Ariz. Ct. App. 2005).

11. *Id.* at 939.

12. *Id.* at 941.

13. *Id.* at 939–41.

14. *Espinoza*, 129 P.3d at 938.

15. *See id.* at 939; *see also* DAN B. DOBBS, *THE LAW OF TORTS* 456 (2000). Although the court in *Espinoza* addressed the rescue doctrine in terms of liability for negligence, the Restatement applies it to cases of strict liability as well. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 32 cmt. c, illus. 4 (Proposed Final Draft No. 1, 2005). Arizona's willingness to follow the Restatement indicates that the rescue doctrine would allow recovery in cases of strict liability. *See infra* note 19 and accompanying text.

16. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 32 cmt. b.

17. *Id.*; *see also* *Wagner v. Int'l Ry. Co.*, 133 N.E. 437, 438 (N.Y. 1921) ("The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had.").

18. *Espinoza*, 129 P.3d at 939 (quoting *Wagner*, 133 N.E. at 437).

courts have never espoused the doctrine expressly, they do generally follow the Restatement,¹⁹ which does.²⁰

On the other hand, the rescue doctrine does not provide an unlimited right to recover against parties whose wrongful acts create the need for rescue.²¹ Liability only arises from harm that resulted from a risk naturally flowing from the rescue.²² Further, if the rescuer's actions are abnormal, or if she has no hope of aiding the endangered person or property, she may not rely on the rescue doctrine to justify compensation for her injuries.²³

B. The Firefighter's Rule

Where the rescue doctrine expands an individual's tort liability to those injured in a rescue attempt, the firefighter's rule limits that liability.²⁴ An individual who might otherwise recover under the rescue doctrine cannot if her injuries occurred while executing her duties as a professional firefighter.²⁵ Put in terms of duty, an individual owes no duty to firefighters to avoid creating the circumstances which require the firefighter's services.²⁶

The policy behind the rule is that tort is not the proper forum in which to compensate injured firefighters for harm resulting from the conduct that created the need for their employment.²⁷ Since it is probable that negligence is the cause of most fires, it would be too burdensome to make all those responsible liable to firefighters who are compensated out of public funds to deal with those very occurrences.²⁸

The Arizona Court of Appeals first applied the firefighter's rule in *Grable v. Varela*,²⁹ in which it agreed with the New Jersey Supreme Court that, since the firefighter's business is to deal with such dangers, the firefighter "cannot complain of negligence in the creation of the very occasion for his engagement."³⁰ Since

19. *Cunningham v. Goettl Air Conditioning, Inc.*, 980 P.2d 489, 492 (Ariz. 1999) ("In the absence of statutory and case authority that directly speaks to an issue, Arizona courts look to the Restatement for guidance."); *MacNeil v. Perkins*, 324 P.2d 211, 215 (Ariz. 1958) ("In the absence of prior decisions to the contrary this court has consistently followed the application of the Restatement of the Law of Torts in cases where the Restatement is applicable[.]").

20. *Espinoza*, 129 P.3d at 939 (referring to RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 32).

21. *See* DOBBS, *supra* note 15, at 456.

22. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 32.

23. *See* DOBBS, *supra* note 15, at 456.

24. *Espinoza*, 129 P.3d at 939–40.

25. *See id.* at 939.

26. DOBBS, *supra* note 15, at 769.

27. *Espinoza*, 129 P.3d at 939.

28. *Id.* (quoting *Grable v. Varela*, 564 P.2d 911, 912 (Ariz. Ct. App. 1977)).

29. 564 P.2d 911.

30. *Id.* at 912 (quoting *Krauth v. Geller*, 157 A.2d 129, 131 (N.J. 1960)); *see also Espinoza*, 129 P.3d at 939.

firefighters receive pay to confront risks, their compensation should reflect the possibility of injury, thus making further recovery for injuries inappropriate.³¹

III. DECISION OF THE ARIZONA SUPREME COURT

Faced with two rules never expressly accepted by the state's highest tribunal, the Arizona Supreme Court adopted both the rescue doctrine and the firefighter's rule.³² In so doing, however, the court narrowly construed the firefighter's rule by allowing its application only when a firefighter's on-duty responsibilities cause her presence at the scene.³³ Because her presence at the accident scene did not result from her on-duty obligations as a firefighter, the rule did not bar Elizabeth Espinoza's claim against the Schulenburgs.³⁴

Writing for a unanimous court, Vice Chief Justice Berch first concluded that the rescue doctrine permitted Espinoza's suit against the Schulenburgs.³⁵ Although Arizona courts had yet to expressly adopt the rescue doctrine, the court noted that it generally follows the Restatement, and would continue to do so in this case.³⁶ The court agreed with Justice Cardozo that rescue is a normal human response to danger,³⁷ and noted further that "[t]he law should encourage people to respond to those in distress."³⁸ In adopting the rescue doctrine, however, the court rejected the notion that reasonable rescuers could not be contributorily negligent or assume the risk of injury.³⁹ Instead, those defenses apply only to reduce recovery.⁴⁰

Having found Espinoza's claim valid under the rescue doctrine, the court turned to the Schulenburgs' contention that the firefighter's rule barred her suit.⁴¹ While it did adopt that rule,⁴² the Arizona Supreme Court's narrow construction

31. See *DOBBS*, *supra* note 15, at 772; see also *Espinoza*, 129 P.3d at 939 (justifying the firefighter's rule on grounds that the public compensates, trains, and equips firefighters to handle emergencies, regardless of their cause).

32. *Espinoza*, 129 P.3d at 939–40.

33. *Id.* at 940.

34. See *id.* at 942.

35. *Id.* at 939.

36. *Id.* at 939. The Restatement provides that "if an actor's tortious conduct imperils another or the property of another, the scope of the actor's liability includes any physical harm to a person resulting from that person's efforts to aid or protect the imperiled person or property, so long as the harm arises from a risk that inheres in the effort to provide aid." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 32 (Proposed Final Draft No. 1, 2005).

37. *Espinoza*, 129 P.3d at 939 (citing *Wagner v. Int'l Ry. Co.*, 133 N.E. 437, 437 (N.Y. 1921)).

38. *Id.*

39. *Id.* at 939 n.1.

40. *Id.* (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 32 cmt. d). Numerous cases hold that comparative negligence rules apply to appropriately reduce the plaintiff's recovery. See Jeffery F. Ghent, Annotation, *Rescue Doctrine: Applicability and Application of Comparative Negligence Principles*, 75 A.L.R.4TH 875, 876–80 (1990).

41. *Espinoza*, 129 P.3d at 939.

42. *Id.* at 940–41.

made it inapplicable to Espinoza's suit, and thus also allowed her claim to go forward.⁴³

While adopting the firefighter's rule, the court elected to construe and apply it narrowly. Arizona's policy is that when negligence causes an injury, "the rule is liability and immunity is the exception."⁴⁴ Thus, a narrow construction for a rule limiting liability appropriately follows.⁴⁵ The firefighter's rule applies when the firefighter's presence at the rescue scene is a result of his or her on-duty obligations as a firefighter.⁴⁶ Therefore, the rule does not apply to off-duty volunteers, even if they use their professional training in rendering aid.⁴⁷

The court made clear that the notion that a firefighter assumes the risk of the dangers of rescue does not form the basis for the firefighter's rule in Arizona.⁴⁸ First, the assumption of the risk defense no longer serves to completely bar a plaintiff's claim in this state.⁴⁹ Further, no reason exists to differentiate between firefighters and lay volunteers who also assume the risk when helping another in danger, yet have the rescue doctrine available to them.⁵⁰ While professionals may often have more knowledge of the danger involved in rescue, some lay rescuers may have training that provides them with that same awareness.⁵¹ Thus, assumption of the risk cannot provide a useful explanation for the firefighter's rule.⁵²

Because no obligation imposes a duty upon off-duty firefighters to act, they are in the same position as lay volunteers.⁵³ They act beyond the scope of their employment, do not receive compensation, and lack the benefits of safety equipment, identification, and trained support.⁵⁴ These facts illustrate the flaw in the test put forth by the Court of Appeals that the firefighter's rule may apply to an off-duty firefighter if her employer mandates that she respond to emergency situations.⁵⁵ The Arizona Supreme Court noted that such a test would make the right to recovery turn on the arbitrary policies of each government unit, and, in fact, a duty to stop or provide assistance might not actually put the firefighter back

43. *Id.* at 942.

44. *Id.* at 940 (quoting *Stone v. Ariz. Highway Comm'n*, 381 P.2d 107, 112 (Ariz. 1963), *overruled in part* by *Grimm v. Ariz. Bd. of Pardons & Paroles*, 564 P.2d 1227 (Ariz. 1977)); *see also* ARIZ. CONST. art. 18, § 6 ("The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation."); *Orth v. Cole*, 955 P.2d 47, 49 (Ariz. Ct. App. 1998) (finding that firefighter's rule does not apply to non-emergency, non-rescue situations); *Garcia v. City of S. Tucson*, 640 P.2d 1117, 1121 (Ariz. Ct. App. 1982) (declining to apply firefighter's rule to claim for injuries resulting from independent negligence of third party).

45. *See Espinoza*, 129 P.3d at 940.

46. *Id.*

47. *Id.* at 940–41.

48. *Id.* at 940.

49. *Id.* (citing ARIZ. REV. STAT. ANN. § 12-2505(A) (2006)).

50. *See id.*

51. *Id.*

52. *See id.*

53. *See id.* at 941.

54. *Id.*

55. *See id.* at 941–42.

on duty.⁵⁶ The firefighter might still lack equipment and trained personnel normally available when she is on duty.⁵⁷ Further, in such a situation, the firefighter would likely not receive pay or compensation for any injuries sustained.⁵⁸ Thus, the firefighter would lose her right to sue without receiving the benefits that support the firefighter's rule: special training and public compensation.⁵⁹

The court found it desirable to encourage those individuals most qualified to assist in a time of need to voluntarily provide that assistance.⁶⁰ Furtherance of this policy required rejection of the analysis used in several jurisdictions that apply the firefighter's rule to those officers who act in a professional manner.⁶¹ A focus on how the professional acts produces illogical results by making those who act most professionally the least likely to receive compensation for their injuries.⁶² The rule should not discourage individuals from using their professional skills when rendering aid, and thus the court held that the determinative factor lies in *why* the firefighter comes to the scene.⁶³

In addition to construing the rule narrowly, under the facts of the case the court elected to apply the rule only to firefighters.⁶⁴ The court did note, however, that "the rule would seem to apply equally well to police officers,"⁶⁵ and used the terms "professionals,"⁶⁶ "police officer,"⁶⁷ and "officer"⁶⁸ while discussing the rule. This could be construed as an invitation to lower courts to apply the

56. *Id.* at 942.

57. *Id.*

58. *Id.*

59. *Id.* The court does note, however, that a mandate that volunteer firefighters help in any firefighting effort they come across may effectively put those officers on duty. *Id.* Such a policy that "returns that officer to the system of public compensation" may justify application of the rule. *Id.* Even though employment policy can assist in the determination of the officer's work status, the essential inquiry turns on whether the firefighter gives assistance because of her on-duty responsibilities as a firefighter. *Id.* The court also leaves the door open to applying the rule to off-duty police officers, noting that the presence of a badge, gun, and authority to make an arrest distinguish the situation from the case at bar. *Id.* at 942 n.5.

60. *Id.* at 942.

61. *Id.* (citing numerous cases).

62. *Id.*

63. *Id.*

64. *Id.* at 941 n.3 ("The rule's application to professions other than firefighters is not before us, and the court of appeals has applied the rule only to firefighters. We note, however, that the rationale for the rule would seem to apply equally well to police officers, and other states have consistently applied the rule to them. We recognize that the rule has been extended both explicitly and implicitly to other professions. Absent facts before us, however, we decline to decide the reach of the rule.") (internal citations omitted).

65. *Id.* While one Arizona Court of Appeals case stated that the rule applied to police officers, that court found the rule inapplicable to the case because it was the independent negligence of a third party that caused the plaintiff's injuries. *Garcia v. City of S. Tucson*, 640 P.2d 1117, 1120-21 (Ariz. Ct. App. 1982).

66. *Espinoza*, 129 P.3d at 940, 941.

67. *Id.* at 942.

68. *Id.*

firefighter's rule to other professionals. Even so, the court concluded that the facts of the case did not make it necessary to expand the rule's scope any further.⁶⁹

Finally, the court agreed with the Court of Appeals that the availability of workers' compensation did not make the firefighter's rule automatically applicable.⁷⁰ The law includes travel to and from work within the scope of a firefighter's employment solely for the purposes of workers' compensation eligibility.⁷¹ Thus, most off-duty firefighters who stop to provide aid in an emergency will not be eligible for such benefits.⁷² The court also noted that even in cases in which the off-duty rescuing firefighter is eligible for workers' compensation (as in this case), the workers' compensation fund has a right of subrogation against third-party awards to prevent double-recovery.⁷³

CONCLUSION

In *Espinoza v. Schulenburg*, the Arizona Supreme Court addressed for the first time the rescue doctrine and firefighter's rule, and adopted them both. Following the Restatement, it held that those who are injured while engaged in the rescue of persons or property in danger will have a claim in Arizona courts against those whose tortious actions gave rise to the need for rescue. The court also espoused a limitation on the rescue doctrine, the firefighter's rule, which prevents firefighters who could otherwise recover under the rescue doctrine from receiving compensation for injuries sustained while performing professional firefighting duties. This exception is a narrow one, however, and on its face applies only to firefighters and only if the firefighter comes upon the scene as a result of his or her on-duty obligations as a firefighter. Despite the apparent narrow construction and application of the rule, the court left open the possibility that the rule might apply to other types of professionals, even those who are off-duty at the time they render aid. How far the rule will stretch, however, will be left to another day.

69. See *id.* at 941 n.3, 942 n.5.

70. *Id.* at 941.

71. ARIZ. REV. STAT. ANN. § 23-1021.01(A) (2006).

72. *Espinoza*, 129 P.3d at 941.

73. *Id.* at 941 (citing ARIZ. REV. STAT. ANN. § 23-1023(C) (2006)). In addition, workers' compensation does not include recovery for pain and suffering. *Id.*