THE AFTERMATH OF RUIZ V. MERO: WHY THE NEW JERSEY LEGISLATURE MUST REKINDLE THE FIREFIGHTERS’ RULE

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ABSTRACT

This Note explores the history, common law expansion, and statutory abrogation of the firefighters’ rule in New Jersey tort law. For decades, the rule protected Garden State homeowners from civil liability for injuries to first responders. In its original form, the rule barred tort claims based only on the very negligence that necessitated the first responders’ presence on scene. However, the courts slowly expanded the reach of the rule until it eventually was used to bar recovery for injuries caused by acts of negligence completely separate from that which prompted the emergency response. In response, the state legislature sweepingly abrogated all forms of the rule. This Note urges the legislature to restore the firefighters’ rule to its original form and provides both traditional and nontraditional justification for such action. Having been a New Jersey firefighter for over ten years, the author offers a unique and insightful point of view on this timely issue.

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INTRODUCTION

Put yourself in the shoes of an average homeowner, who, like most, fails to religiously clean his oven as the owner’s manual recommends. Now imagine the homeowner’s thought process in the minutes after discovering that the accumulated material has caught fire: What do I do? Where is the extinguisher? Should I call 911? It’s spreading to the rest of the kitchen! Can I get my family out in time? Fast forward to the fire department’s arrival. The homeowner, still overcome by the enormity of the situation, barely notices as a fireman trips and falls to the ground while hurrying up the driveway. The homeowner watches helplessly as the fire is extinguished and the fallen fireman’s arm is placed in a sling. Now picture the shock on the face of the homeowner when, months later, he is served with a lawsuit seeking money damages and alleging that the negligent maintenance of his oven caused the firefighter’s injury.

The common law firefighters’ rule protected New Jersey land occupiers from civil liability for decades by barring first responders from bringing lawsuits based on the negligent acts that necessitated their presence. Unfortunately, the state has followed a recent national trend and abolished the rule, leaving open the door to first responders to sue for injuries caused by acts of ordinary negligence. In a society that appropriately respects, yet financially under-compensates, those who regularly risk their lives for strangers, it seems politically incorrect to argue for a rule that prevents them from recovering for injuries. However, this Note points out that the firefighters’ rule is not a complete bar to lawsuits—it merely prevents recovery for injuries resulting from the ordinary negligence that caused the emergency response. Firefighters may still seek damages for injuries caused by intentional acts, risks not inherent to firefighting, violations of statutes and ordinances, or a tortfeasor’s failure to warn of hidden dangers. Furthermore, the author submits that the majority of firefighters do not expect to be able to sue
homeowners for the ordinary negligence that causes an emergency. The New Jersey Legislature has provided an unnecessary avenue for tort recovery that can be abused by a litigious-minded minority of the Garden State’s bravest.

Part I of this Note discusses the background of and justifications for the firefighters’ rule in New Jersey. This section provides a detailed description of the rule, its expansion, and its exceptions. Part II examines the conflicting interpretation of N.J.S.A. 2A:62A-21, which abrogated the firefighters’ rule. Part III compares New Jersey to the national trend regarding the firefighters’ rule. Part IV explores the possible consequences New Jersey faces as a result of its decision to abrogate the firefighters’ rule. Part V recommends several steps New Jersey can take to restore the firefighters’ rule to its original narrow form and better compensate first responders. In this way, the Garden State will protect homeowners from unreasonable litigation while ensuring that these heroic men and women receive the support they deserve.

I. BACKGROUND OF THE FIREFIGHTERS’ RULE IN NEW JERSEY

New Jersey first adopted the firefighters’ rule in 1960 in Krauth v. Geller, a case involving a fireman who was injured when he fell down a flight of stairs while investigating a smoke condition in a home.1 The Supreme Court of New Jersey held that the firefighters’ rule barred lawsuits against a homeowner “for negligence with respect to the creation of the fire.” 2 The Court explained the three primary justifications for the rule included: lack of duty owed to the fireman based on his sui generis status3, assumption of risk, and a public policy of spreading

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2 Id. at 130.
3 See id. (explaining that a sui generis status exists when a party has the authority to enter another’s property pursuant to his public employment even absent permission or invitation from the owner, who may not deny entry); BLACK’S LAW DICTIONARY 1434 (6th ed. 1990) (defining sui generis as “[o]f its own kind or class”).
the cost of injuries to those retained with public funds to deal with inevitable, yet negligently created, dangers.\footnote{Krauth, 157 A.2d at 130–31; see generally Joseph Scholz, Rosa v. Dunkin’ Donuts: The Fireman’s Rule Revisited, 44 Rutgers L. Rev. 405, 408–10 (1992) (providing an in-depth explanation of these justifications).}

The Court then outlined several important exceptions to the rule that allow a firefighter to seek damages for injuries caused by a homeowner’s negligence. These exceptions consist of injuries resulting from risks beyond those inevitably involved in firefighting, hazards created in violation of statute or ordinance, failure to utilize an available opportunity to warn of hidden dangers, and wanton conduct coupled with a high degree of probability that harm would ensue.\footnote{Krauth, 157 A.2d at 131–33.} The rule is therefore not a complete bar to recovery for injured firefighters. In fact, the rule prohibits a very limited number of lawsuits—only those based on the negligence that created the “very occasion for [the firefighter’s] engagement.”\footnote{Id. at 131.}

In 1979, the rule’s application was expanded to volunteer firefighters in \textit{Ferraro v. Demetrakis}.\footnote{Ferraro v. Demetrakis, 400 A.2d 1227, 1229 (N.J. Super. Ct. App. Div. 1979).} This case involved firemen who sued a property owner for injuries sustained in an apartment fire caused by negligent maintenance of an oil burner—a situation that does not fit any of the aforementioned exceptions to the rule.\footnote{Id. at 1228.} The court, adhering to the assumption of risk and cost spreading policies, noted that the firemen were covered by workers’ compensation and were aware of the inherent dangers of the job.\footnote{Id. at 1229.} These factors led the court to conclude that there was “no reason to make liability turn upon whether the fireman is full-time or only a volunteer.”\footnote{Id.}

The Supreme Court of New Jersey again expanded the rule in 1983, this time making it applicable to police officers.\footnote{Berko v. Freda, 459 A.2d 663, 666 (N.J. 1983).} In \textit{Berko v. Freda}, a police officer sued a car owner for injuries he
sustained while pursuing the owner’s stolen vehicle. The officer claimed that the owner was negligent in parking the car with the keys in the ignition. Because both police officers and firefighters are paid to confront dangers created by citizens, a fact that distinguishes these professions from most other public employees, the Court was compelled to extend the firefighters’ rule to law enforcement. This decision again implicated the assumption of risk and cost spreading justifications, and did not fit any of the rule’s exceptions.

The rule underwent its most far-reaching expansion in 1991 when the Supreme Court of New Jersey decided *Rosa v. Dunkin’ Donuts*. This case concerned a police officer who was injured when he slipped on powdered sugar while responding to an emergency medical assistance call. The Court, expanding the assumption of risk rationale, held that the suit was barred by the firefighters’ rule because the conditions that caused the fall were the type “inherent in the performance of the officer’s duties.” As Justice Handler noted in his vigorous dissent, this controversial ruling prevented the police officer from seeking compensation for injuries caused by ordinary negligence that “had nothing whatsoever to do with the emergency that brought the officer to the premises.” Justice Handler called for the firefighters’ rule to be replaced with accepted tort principles or, in the alternative, limited to its original form established by *Krauth*. The *Rosa* majority’s broad expansion of the firefighters’ rule unfortunately evoked a drastic response from the New Jersey Legislature.

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12 *Id.* at 664.
13 *Id.*
14 *Id.* at 666.
16 *Id.* at 1130.
17 *Id.* at 1134.
18 *Id.* at 1135 (Handler, J., dissenting).
19 *Id.* at 1139.
II. STATUTORY ABROGATION OF THE FIREFIGHTERS’ RULE

In 1994, the New Jersey Legislature enacted N.J.S.A. 2A:62A-21, permitting a firefighter, police officer, or first aid squad member to seek damages for line-of-duty injuries that are “directly or indirectly the result of the neglect, willful omission, or willful or culpable conduct of any person or entity.”20 The only limit imposed by the statute was a prohibition of lawsuits against an injured first responder’s employer or co-employee.21 The plain language of this statute, therefore, appeared to do away with the firefighters’ rule. In considering a case filed just prior to the statute’s enactment, the Supreme Court foreshadowed its future holding in Ruiz v. Mero22 by claiming “[b]ecause the Legislature has, in effect, abolished the firefighters’ rule in New Jersey, this case is probably the last in which this Court will consider an application of the rule.”23 Despite the seemingly clear statutory language, however, courts continued to struggle with its interpretation.

In 2001, the Superior Court of New Jersey, Appellate Division, was faced with a claim involving a firefighter who was injured when he tripped over a curb while responding to an outdoor grill fire caused by negligent maintenance of the gas line.24 In that case, Kelly v. Ely, the court expressed its “grave doubts . . . that the Legislature did, indeed, intend that a fireman injured while responding to a fire could seek damages for injuries received while in the course of responding to a fire simply because the fire itself was the product of negligence.”25 The court pointed out that if such an interpretation was adopted, “the scope of potential liability would be

21 Id.
23 Boyer v. Anchor Disposal, 638 A.2d 135, 136 (N.J. 1994) This case involved a claim brought by a fire inspector injured while conducting an inspection at a shopping mall. The Court ultimately determined that the firefighters’ rule did not apply because the inspector’s injuries were not the result of risks “inevitably involved in firefighting.” Id. at 139.
25 Id. at 1034.
virtually unlimited.” The court claimed that the Legislature instead “intended to restore the law to its pre-Rosa state and afford protection to a firefighter injured as a result of negligence unrelated to and independent of, the onset of the fire.”

Two years later, in Roma v. United States, the Third Circuit Court of Appeals interpreted N.J.S.A. 2A:62A-21 very differently. Roma, a firefighter injured while fighting a fire in a Navy yard hangar, argued that he was entitled to damages as the fire was the result of negligence. The court claimed that the Kelly holding was “inconsistent with the plain language” of the statute and held that the firefighters’ rule was no longer applicable in New Jersey. The court then predicted that the New Jersey Supreme Court would interpret the statute as having completely abolished the firefighters’ rule.

In 2007, the New Jersey Supreme Court put the issue to rest with its unanimous holding in Ruiz v. Mero. This case involved a police officer who sustained injuries while breaking up a drunken bar fight. The officer sued the bar owner, alleging that he failed to provide adequate security during a promotional event at the establishment. The Court looked to the plain language of N.J.S.A. 2A:62A-21 and agreed with the Roma court that the firefighters’ rule had been completely abolished in New Jersey. In reaching this conclusion, the Court acknowledged that the statute “was a response to Rosa[,]” but claimed “it seems much more likely that the Legislature intended to adopt Justice Handler’s view [rather] than to re-establish pre-Rosa

26 Id.
27 Id.
29 Id. at 359.
30 Id.
31 Id. at 362.
33 Id. at 241.
34 Id.
35 Id. at 247.
What the Court failed to point out was that Justice Handler’s dissent in 
*Rosa* did not solely call for the abolition of the firefighters’ rule. Justice Handler also asserted that, “[m]inimally, we should confine the doctrine to its original channel: barring suit for an act of ordinary negligence that occasions the presence of the firefighter at the place where he or she is injured.”

Nonetheless, the *Ruiz* Court officially stripped New Jersey property owners of the protection that the firefighters’ rule provided for over forty-five years.

This Note does not assert that the *Ruiz* Court misinterpreted the statute, but rather argues that the Legislature must amend the statute to reinstate the narrow firefighters’ rule. Indeed, the broad language of the legislation is unambiguous and the only specific exception to the right of recovery involves suing an employer or co-employee. Additionally, there is little evidence of a contrary legislative intent. The United States Court of Appeals for the Third Circuit pointed out that relevant legislative history for N.J.S.A. 2A:62A-21 “does not exist.”

Similarly, the Superior Court of New Jersey claimed that an “[e]xamination of the legislative history sheds no particular light on the statute’s intended scope.” Thus, we are left with the plain language of the statute that leaves little doubt the firefighters’ rule has been completely abolished.

Unfortunately, New Jersey is not the only state that has taken such a dangerous step. By examining how a lack of the firefighters’ rule has impacted two nearby states, it becomes clear that New Jersey must act quickly to restore the protections of the rule before its courts are flooded with cases that test the bounds of common sense.

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36 Id. at 246.
III. EXPLORING THE NATIONAL TREND OF ABROGATION

Since the mid-1980s, many states across the country have acted to abolish their respective firefighters’ rules both statutorily and judicially.\(^{41}\) This represents a marked shift in policy from the period spanning back to the 1960s, when the rule was “being generally followed throughout the United States.”\(^{42}\) Although legislative history and the associated literature are silent as to an explanation for this dramatic and abrupt shift, one can speculate that more recent movements to expand access to the courts were caused by post-September 11\(^{th}\) awareness and a newfound respect for first responders.\(^{43}\) Under these contemporary conditions, limiting an injured firefighter’s ability to litigate may be unpopular and politically dangerous.

A. New York

In 1996, New York enacted General Obligations Law 11-106, which made a person liable for “any injury . . . proximately caused by the neglect, willful omission, or intentional, willful or culpable conduct” of that person.\(^{44}\) Less than a year after the statute took effect, a New York Appellate Division court quickly put to rest any question of its intent, holding that “the affirmative defense founded upon the ‘firefighters rule’ was rendered meritless by the enactment

\(^{41}\) E.g. MINN. STAT. ANN. § 604.06 (1984); FLA. STAT. § 112.182 (1990); Christensen v. Murphy, 678 P.2d 1210, 1218 (Or. 1984) (holding that “the ‘fireman’s rule’ is abolished in Oregon as a rule of law”); Willis v. Bath Excavating, 829 P.2d 405, 409 (Co. App. Div. 1991) (noting that “the [state] supreme court has in effect rejected the fireman’s rule”). But see White v. State, 2008 WL 3915357, at ¶ 20 (Ariz. Ct. App. 2008) (noting that at least 25 states have adopted the firefighters’ rule and concluding that “we do not detect an existing trend to relax or abolish the firefighter’s rule”).


\(^{43}\) See generally Paul Bergman, Emergency!: Send a TV Show to Rescue Paramedic Services!, 36 U. BALTIMORE L. REV. 347, 366 n.105 (2007) (citing a Gallup Poll conducted at the end of 2001 indicating that Americans ranked firefighters first among all professionals with regard to “honesty and ethics”); Deborah J. Cantrell, Sensational Reports: The Ethical Duty of Cause Lawyers To Be Competent in Public Advocacy, 30 HAMLINE L. REV. 567, 581 (2007) (noting that a sex discrimination suit against the New York City Fire Department had to be abandoned because “it was clear after September 11 that New York’s firefighters had suffered tragic losses and that suing FDNY would not be strategically positive”); Wills For Heroes Foundation – Protecting Those Who Protect Us, at http://www.willsforheroes.org/history.htm (last visited Feb. 7, 2009) (explaining that the organization was started shortly after the September 11, 2001 terrorist attacks to provide free legal estate planning services to first responders).

\(^{44}\) N.Y. GEN. OBLIG. § 11-106 (1996).
of General Obligations Law § 11-106. This interpretation permitted first responders in New York to seek damages for injuries resulting from the very act of negligence that brought them to the scene of an emergency.

In 1997, firefighter Samuel Castro suffered physical harm while responding to a vehicle accident. Castro, injured when he was struck by another car while working at the scene, sued the drivers whose negligent operation caused the initial accident. The trial court dismissed the case after the defendants raised the firefighters’ rule. However, the appellate court, noting that “[section] 11-106 . . . significantly restricts the scope of the ‘firefighter’s rule[,]” reversed, rejecting the affirmative defense and reinstating the claim. Thus, the lawsuit proceeded based solely on the act of negligence that prompted Castro’s response to the accident but did not directly cause his injuries. As the court merely reinstated the claim and did not perform a proximate cause analysis to determine if the defendants’ negligence was sufficiently tied to his injuries, it was admittedly unclear whether Castro would ultimately be permitted to recover. However, allowing this claim to be heard on the merits ran counter to the fundamental policy considerations of the firmly-rooted firefighters’ rule.

A more judicially perplexing decision was reached in Green v. Peterson. Steven Peterson, a farmer desiring to raze a silo on his farm, hired an independent contractor to perform the demolition. The contractor consulted the fire department and commenced the destruction

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45 Dubois v. Vanderwalker, 245 A.D.2d 758, 761 (N.Y. App. Div. 1997) (involving an action by a police officer whose patrol car was struck by a car that skidded off the highway in severe snow storm).
47 Id.
48 Id.
49 Id. at 984.
50 Id.
52 Id. at 1158.
with the aid of a firefighting team.\textsuperscript{53} Ernest Green, a volunteer firefighter, was injured when the burning silo collapsed.\textsuperscript{54} He subsequently sued Peterson, claiming the hazard posed by the silo was a product of negligence.\textsuperscript{55} Although the court determined that the defendant did not violate any ordinances by keeping the silo in substandard condition, it nonetheless found that Peterson could be held liable under section 11-106.\textsuperscript{56} Such a holding arguably discourages owners from ridding their property of dangerous hazards and punishes those who take the proper steps of consulting professionals.

\textit{B. Massachusetts}

The Supreme Court of Massachusetts first analyzed the duty of care owed to first responders in \textit{Mounsey v. Ellard}, a 1973 lawsuit filed by a police officer who was injured when he slipped on ice while serving a summons.\textsuperscript{57} Although the Court did not specifically discuss the firefighters’ rule, it concluded that all lawful visitors are owed a “common duty of reasonable care.”\textsuperscript{58} Massachusetts did not revisit this issue until 2000, when the Appeals Court decided \textit{Hopkins v. Medeiros}.\textsuperscript{59} In \textit{Hopkins}, the court permitted an officer, injured while attempting to subdue a melee, to sue the instigator of the fight even though he was not the one who struck the plaintiff.\textsuperscript{60} The court, citing \textit{Mounsey} and two subsequent statutes providing police officers the right to file suits against alleged tortfeasors, concluded “that the firefighter’s rule has no continuing vitality in Massachusetts.”\textsuperscript{61} This definitively opened the door for litigation by injured first responders.

\textsuperscript{53} \textit{Id.}
\textsuperscript{54} \textit{Id.}
\textsuperscript{55} \textit{Id.}
\textsuperscript{56} \textit{Id.} at 1159.
\textsuperscript{58} \textit{Id.} at 51.
\textsuperscript{60} \textit{Id.} at 338.
\textsuperscript{61} \textit{Id.} at 343.
In 2005, the Superior Court of Massachusetts was presented with a case involving a police officer injured as a result of a store employee’s alleged negligence. The employee witnessed a customer shoplifting and dutifully notified his manager. The manager, in turn, requested assistance from Officer Flaherty, who was on-duty at the time but happened to be taking a break in the store. The shoplifter, realizing she had been discovered, ran out of the store with the employee, store manager, and Officer Flaherty in pursuit. The shoplifter attempted to drive away from the store, but the employee placed himself directly behind her car to prevent her escape. The undeterred shoplifter struck the employee with her vehicle. Seeing this, Officer Flaherty ran towards the vehicle, identified himself, and ordered the suspect to stop. The shoplifter continued to drive away and struck Officer Flaherty, throwing him over the hood and onto the pavement.

Officer Flaherty brought suit against the store, arguing that the employee negligently ignored a store policy prohibiting employees from chasing shoplifters. The court pointed to Hopkins and declared that the firefighters’ rule did not bar Officer Flaherty’s recovery. The court denied Walgreen’s motion for summary judgment, noting that the employee “knew or should have known that [the shoplifter] was a desperate and panicked woman . . . had arrived in an automobile, and . . . would be desperate enough to get in her car and barrel out of the parking lot.” Although it is unclear whether a jury would follow such a tenuous proximate cause

63 Id. at *1.
64 Id.
65 Id.
66 Id.
67 Id.
68 Id.
69 Id.
70 Id.
71 Id. at *2 n.3.
72 Id. at *3.
analysis to permit recovery for Officer Flaherty’s injuries, simply allowing the question to go to a jury props open the door for future similar litigation. This decision sets a clear path for officers, injured while carrying out their lawfully charged duties, to sue diligent employees whose conduct neither violates an ordinance nor is intended to harm an officer.

IV. POSSIBLE RAMIFICATIONS FOR NEW JERSEY

If the Garden State wishes to avoid cases such as those described above, the Legislature must amend N.J.S.A. 2A:62A-21 to reinstate the very limited version of the firefighters’ rule that was in place before the Rosa decision expanded it beyond reason. It is important to underscore that the common law rule is not a complete bar to litigation for first responders injured while serving our community. Such brave personnel would still enjoy a legal right to recover for injuries caused by hazards created in violation of statute or ordinance, wanton conduct with a high probability that harm could result, failure to warn of hidden dangers, and risks beyond those inevitably involved in emergency response. The only litigation that would be prohibited is that involving the negligence of property owners that caused the emergency response in the first place.

We can apply the rule to the two seminal cases already decided in New Jersey to illustrate the narrowness of the proposed version. In Ruiz v. Mero, Officer Ruiz claimed that the bar owner was negligent because he did not provide sufficient security for the event, ultimately leading to a fight among the patrons.73 Specifically, Ruiz asserted that such a failure was in “contravention of a municipal ordinance.”74 If a court agrees that an ordinance was violated, Ruiz’s claim would fall outside the purview of the limited firefighters’ rule, allowing for suit.

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74 Id.
Recall the controversial *Rosa* decision (the police officer who slipped on sugar in a donut shop) that arguably led to the statutory abrogation of the firefighters’ rule. Because Officer Rosa was not suing the store owner for an act of negligence that prompted his response to the scene, the limited version of the firefighters’ rule would not bar his claim. Additionally, the limited rule comports with Justice Handler’s reasoned dissent in *Rosa*. Citing prior case law, Justice Handler noted, “[w]e could not have been more emphatic previously in holding that such negligence [that which did not cause the emergency] is not immune from recovery.”75

Justice Handler provided examples of actions that would, in his opinion, be improperly barred by the *Rosa* holding: a firefighter injured after falling on icy steps while responding to an emergency medical call; a police officer who fell into a hole in the owner’s yard while investigating a burglar alarm; and an officer who, while checking the rear doors of a building, fell down a flight of stairs because the handrail was too wide.76 The injured first responders in all of these scenarios would be permitted to seek damages without interference from this Note’s proposed firefighters’ rule because they involve negligence separate from that which necessitated their presence. Adopting this narrow version of the rule would therefore be a sufficient legislative response to the *Rosa* decision. The sweeping abrogation, codified in N.J.S.A. 2A:62A-21, simply goes too far and allows for irrational lawsuits.

One such suit was reluctantly allowed to proceed in 2006.77 In *Smith v. Bradley*, an injured police officer sued a driver whose negligent operation of his car resulted in a single-vehicle crash in which the driver was the only victim.78 Upon his arrival on scene, Officer Smith

75 Id. at 1136 (Handler, J., dissenting) (citing Wietecha v. Peoronard, 510 A.2d 19 (N.J. 1986) in which the Court allowed an injured police officer to recover from a party whose ordinary negligence did not cause the initial emergency, a motor vehicle accident).
76 Id. at 1135.
78 Id. at *3.
smelled gasoline and, fearing an explosion, attempted to pull Mr. Bradley from the wreckage. As Smith tried to remove Bradley’s seatbelt, Bradley began flailing his arms as a result of the shock and pain from his injuries. Officer Smith sustained an injury to his back while trying to control Bradley. Smith then filed suit against Bradley, claiming that the defendant’s negligent operation of his car led to the officer’s response and subsequent injuries.

Officer Smith conceded that Bradley was in a state of shock and did not “purposefully” cause injury by flailing his arms. At trial, Officer Smith claimed that such behavior is common among accident victims and estimated that he had seen similar conduct “probably over 100 times.” The only alleged negligence on the part of Mr. Bradley, therefore, was that which caused the accident in the first place. The Superior Court discussed the Kelly interpretation of N.J.S.A. 2A:62A-21, but concluded that the statute instead completely abrogated the firefighters’ rule. In allowing Officer Smith’s suit to proceed, the court stated that “[i]rrespective of our own views of what would constitute a wise policy in this area, unless the Legislature acts further . . . we are bound by the plain language of the statute.” It is time for the Legislature to respond to this plea for a more reasonable policy.

Recall Kelly v. Ely, another irrational lawsuit that may survive a motion to dismiss because of N.J.S.A. 2A:62A-21. In that case, a firefighter attempted to sue a homeowner because he was allegedly negligent in failing to inspect the hose connecting the propane tank to the grill, as recommended in the owner’s manual. Such a claim tests the bounds of logic. However,
under the current statute, Kelly’s action would be permitted to proceed to the jury. Although it is unknown whether a jury would be convinced that failing to inspect a gas line could foreseeably lead to a firefighter being injured by tripping over a curb, allowing such a suit to go forth violates the principle of judicial economy. The New Jersey Legislature must act swiftly to protect homeowners and avoid such ramifications.

V. PROPOSED ACTION AND JUSTIFICATIONS

For an example of a limited firefighters’ rule codified in statute, New Jersey can look to a notoriously liberal state that has nonetheless restricted access to its courts: California. Civil Code section 1714.9 provides for recovery by an injured first responder “[w]here the conduct causing injury violates a statute, ordinance, or regulation, and the conduct causing injury was itself not the event that precipitated either the response or presence of the peace officer, firefighter, or emergency medical personnel.”88 The statute further allows for tort claims if a person’s conduct was “intended to injure” a first responder.89 The California Legislature made clear its intent by specifically noting that “[t]his section is not intended to change or modify the common law independent cause exception to the firefighter’s rule as set forth in Donohue v. San Francisco Housing Authority.”90

In Donohue, a firefighter was injured when he fell on wet stairs while conducting an unannounced safety inspection.91 The firefighter sued the property owners, alleging they were negligent in hosing down the stairway and failing to install nonslip adhesive treads.92 The court concluded that “[s]ince the injuries were not caused by an act of negligence which prompted

89 Id. § 1714.9(a)(3).
90 Id. § 1714.9(e).
92 Id. at 663.
plaintiff’s presence in the building, the firefighter’s rule [did] not bar the . . . claim.”93 California has clearly codified the narrow version of the firefighters’ rule that existed in New Jersey before the Rosa decision expanded it beyond acceptable limits. New Jersey should amend N.J.S.A. 2A:62A-21 to mirror California’s statute for various traditional and nontraditional reasons.

A. Traditional Justifications

As noted above, the New Jersey Supreme Court adopted the firefighters’ rule for three main policy reasons: lack of duty owed to firefighters, assumption of risk, and a public policy of spreading the cost throughout the community.94 These rationales will be explained in turn.

Courts and scholars alike have reached different conclusions as to the duty owed firefighters when they enter private property in the course of their employment.95 Under the common law principles of premises liability, “the duty owed to a firefighter depended on his legal status as an entrant onto the occupier’s land.”96 As the Court clearly stated in Krauth, however, firefighters do not fit within any established category of entrant requiring a duty of care on the part of the property owner:

[The firefighter] is not a trespasser, for he enters pursuant to public right. Although it is frequently said he is a licensee rather than an invitee, it has been correctly observed that he falls within neither category, for his entry does not depend upon permission or invitation of the owner or occupier, nor may they deny him admittance. Hence his situation does not fit comfortably within the traditional concepts.97

93 Id.
96 Scholz, supra note 4, at 407.
97 Id. at 130 (citing William L. Prosser, Handbook of the Law of Torts § 78 (2d ed. 1955)).
A critical distinction between first responders and other entrants must be emphasized: although a property owner can order an invitee or licensee to leave his property, he cannot force firefighters to leave.98 Consider the following example put forth by one legal scholar:

[A]ssume A invites B to A’s home for a social gathering. During the course of the gathering, a window is shattered, thereby exposing B to the risk of injury. A can tell B to leave until the situation is made safe. By law, B has to comply with A’s command, and A is allowed to relieve himself of all potential liability. The landowner loses this right with regard to firefighters. For example, if a fire were to break out in a landowner’s garage, the landowner could attempt to prevent injury to any firefighters arriving on the scene by requesting that they simply allow the property to burn. Such a request, however, would likely be ignored. Without the Fireman’s Rule, the landowner would then be subject to liability even though he had taken maximum steps to remedy the firefighters’ exposure to danger.99

This Note urges a common sense approach and cautions against assigning an artificial status to first responders. Instead, we must acknowledge that first responders occupy a *sui generis* status—a class of their own based on their ability to enter private property during the course of their employment absent permission from the landowner. Dreiman agrees with this logical approach and realistically acknowledges that “[u]nder the circumstances of a typical fire, ‘it is not reasonable to require the level of care that is owed to invitees or, without some modification, the level of care owed to licensees.’”100 Thus, property owners simply do not owe first responders a traditional duty of care.

The firefighters’ rule is most often based on the theory of assumption of risk. The *Krauth* Court adopted this self-explanatory theory by holding that “it is the fireman’s business to deal with [the] very hazard” that brings him to the scene.101 By abrogating the firefighters’ rule, the

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98 See William L. Prosser, *Handbook of the Law of Torts* § 61 (4th ed. 1971) (noting that a property owner has “power of control or expulsion which his occupation of the premises gives him over the conduct of a third person who may be present, to prevent injury to the visitor”).


100 *Id.* at 397 (quoting Pearson v. Canada Contracting Co., 349 S.E.2d 106, 111 (Va. 1986)).

New Jersey Legislature has effectively claimed that first responders do not assume the risk of being injured by others’ negligence. This Note agrees with such a claim—to an extent. By accepting employment as emergency responders, such personnel have not automatically assumed the risk of being injured by all acts of negligence. However, it is reasonable to declare that first responders are well aware of the risks posed by the emergency situations they have elected to confront. For example, a trained firefighter understands that by running into a burning building, he has placed himself at risk of being injured by the smoke and flames. It is equally reasonable to assert that the same firefighter entering the same building has not contemplated the possibility of being injured by falling down a flight of stairs assembled in violation of a building code. The narrow firefighters’ rule prohibits recovery for the former situation, while permitting a cause of action for the latter.

The Krauth Court also embraced the cost spreading policy by noting:

[I]t 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 to deal with those inevitable, although negligently created, occurrences. Hence, for that risk, the fireman should receive appropriate compensation from the public he serves, both in pay which reflects the hazard and in workmen’s compensation benefits for the consequences of the inherent risks of the calling.\(^{102}\)

Unfortunately, the enactment of N.J.S.A. 2A:62A-21 has undermined this policy and caused courts to “question the continued vitality” of the cost spreading rationale.\(^{103}\) Although firefighters and police officers admittedly receive low salaries that do not appropriately reflect the danger they willingly confront, providing a separate cause of action is not acceptable when adequate alternatives are readily available.

In essence, the Legislature has claimed that it cannot provide sufficient compensation for injured emergency responders. If it could, there would be no need for a separate lawsuit against

\(^{102}\) Id.

the property owner. While reality may demand an acknowledgement of such a situation, especially given the current national economic crisis, we owe firefighters and police officers more. We must ask ourselves, why was the starting salary for New York City police officers only recently raised from $25,100 while the same city’s firefighters start at a meager $36,400? In contrast, this Note argues that the public as a whole bears the responsibility of increasing the financial compensation for firefighters, not the individual tortfeasor whose negligence created the need for the firefighter to execute his normal duties. The primary avenue should instead be worker’s compensation.

In New Jersey, worker’s compensation does not bar an action against the third party responsible for the injury. If such an action yields monetary damages greater than or equal to that available under worker’s compensation, the plaintiff would not receive any payment through worker’s compensation. If, however, the damages awarded are less than that available under worker’s compensation, worker’s compensation will pay the difference. This structure vitiates the cost spreading theory by literally replacing public compensation with a private recovery.

The New Jersey Legislature’s abandonment of the cost spreading rationale is especially perplexing given the state statutorily created a firefighters’ relief fund. The purpose of this fund is to support “any persons and the families of any persons who are injured or die in the course of doing public fire duty, or who may become needy or disabled or die as the result of

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104 See Steven Greenhouse & Michael Barbaro, Deal Raises Officers’ Pay 4% a Year, N.Y. TIMES, Aug. 22, 2008, at B1 (reporting that officers’ starting salaries were raised to $42,000 and noting that the previous $25,100 base “created huge difficulties for efforts to recruit . . . police officers”).
107 Id. § 34:15-40(b). If worker’s compensation payments have already been made, the employer or insurance company will be reimbursed by the third party. Id.
108 Id. § 34:15-40(c).
doing such duty.”\textsuperscript{110} New Jersey is the only state in the nation with such a fund.\textsuperscript{111} Unfortunately, an analysis of the fund’s 2006 and 2007 financial statement shows that these resources are being underused. At the end of 2007, the fund had a total of $127,553,572\textsuperscript{112}—up from $119,079,321 in 2006.\textsuperscript{113} However, only $4,323,857 was paid out to support firefighters in 2007,\textsuperscript{114} compared to $3,827,900 in 2006.\textsuperscript{115} Although these may seem like large sums, consider that interest on the fund accounted for $3,771,366 alone in 2006.\textsuperscript{116} The intent of this fund is not being served when the total relief paid is barely more than the annual interest.

The firefighter relief fund is financed by a two percent surtax on fire insurance policies sold in New Jersey by out-of-state insurers.\textsuperscript{117} New Jersey could increase the value of this fund by applying the surtax to in-state insurers or by raising the tax to three percent. Doing so would enable the fund to be used more generously to support injured firefighters. In turn, New Jersey could become a forerunner in providing its brave first responders with the financial support they deserve. Access to the established relief fund should be increased, covering any difference between worker’s compensation payments and actual medical costs incurred by injured firefighters—eliminating the need for lawsuits against homeowners. Such a move would bring New Jersey back in line with the cost spreading policy that rooted the firefighters’ rule for decades.

\textsuperscript{110} Id. § 43:17-3.
\textsuperscript{111} See NJ State Firemen’s Association, News and Information, at http://www.njstatefiremensrelief.com/information.aspx (last visited Mar. 1, 2009) (claiming to be “the only association of its kind in the United States”).
\textsuperscript{112} Kevin B. Finnegan, Morris County Executive Committeeman Report, N.J. State Firemen’s Ass’n 1 (July 31, 2008) (report on file with author).
\textsuperscript{113} Philip C. Horsch, Field Exam’r’s Report to N.J. State Firemen’s Ass’n, 130th Annual Convention 23 (Sept. 14–15, 2007) (report on file with author).
\textsuperscript{114} Finnegan, supra note 109, at 1.
\textsuperscript{115} Horsch, supra note 110, at 23.
\textsuperscript{116} Id.
\textsuperscript{117} N.J. REV. STAT. § 54:18-1 (1997).
This Note also encourages New Jersey to follow the lead of several states by providing its volunteer firefighters with a property tax exemption.\textsuperscript{118} Not only would this attract volunteers in the state with the highest property tax burden in the nation,\textsuperscript{119} it would increase the financial compensation to these dedicated public servants without requiring them to sue homeowners.

\textit{B. Nontraditional Justifications}

There are two additional rationales justifying a restoration of the firefighters’ rule that were not relied upon when the rule was first adopted or expanded. The first implicates basic principles of fairness and equality. By enacting N.J.S.A. 2A:62A-21, the Legislature has permitted first responders to sue property owners for ordinary negligence. However, this is a one-way street. Homeowners do not have the same right to sue first responders for negligence because firefighters have statutory immunity. In 1962, the Legislature passed N.J.S.A. 2A:53A-13, which declared that no volunteer firefighter or rescue worker, “doing public first aid or rescue duty, shall be liable in any civil action to respond in damages as a result of his acts of commission or omission arising out of and in the course of his rendering in good faith any such services”\textsuperscript{120} The only exceptions to this blanket immunity are for “willful or wanton” acts or those involving the “operation of any motor vehicle in connection with the rendering of any such services.”\textsuperscript{121}

Two cases illustrate the implications of this broad immunity. In \textit{Stollenwerk v. Township of Mullica}, a land owner sued firefighters and the township claiming that the fire company

\begin{footnotes}
\item[118] See Edward A. Zelinsky, \textit{Do Tax Expenditures Create Framing Effects? Volunteer Firefighters, Property Tax Exemptions, and the Paradox of Tax Expenditure Analysis}, 24 VA. TAX REV. 797, 813 n.51 (2005) (noting that “it has become an increasingly widespread practice to encourage volunteer firefighting by abating the property taxes of volunteer firefighters” and pointing out three states that have done so).
\item[121] \textit{Id.}
\end{footnotes}
negligently caused fire damage to his property.\textsuperscript{122} Members of a fire company responded to a motor vehicle accident and summoned a medical helicopter to transport victims to the hospital.\textsuperscript{123} As is common practice, the firefighters used flares to mark a landing zone for the helicopter.\textsuperscript{124} The flares unfortunately caused grass in the field to catch fire which, in turn, caused substantial damage to the plaintiff’s tree farm.\textsuperscript{125}

The Superior Court held that N.J.S.A. 2A:53A-13 barred such a suit because the firefighters had immunity from liability and their actions did not qualify as willful or wanton.\textsuperscript{126} This determination also relieved the township from liability because the New Jersey Tort Claims Act\textsuperscript{127} “immunizes the municipality from liability to the same extent as the fire company and its members.”\textsuperscript{128} The result is clearly unfair: a property owner cannot recover for damage to his livelihood caused by firefighter negligence, but if the same fire was caused by the property owner’s negligence, a firefighter injured while battling the brush fire could sue.

For a more tragic example, and one involving personal injury, we turn to \textit{Lauder v. Teaneck Volunteer Ambulance Corps.}\textsuperscript{129} In 1998, eighty-year-old Charles Lauder was transported by ambulance to the hospital because he was having difficulty breathing.\textsuperscript{130} While in transit, the paramedic treating Mr. Lauder removed the chest strap securing the patient to the stretcher in order to place him in a sitting position and assist breathing.\textsuperscript{131} The leg and lap straps remained fastened, but neither the paramedic nor anyone else refastened the chest strap.\textsuperscript{132} As

\begin{flushleft}
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} Id.
\textsuperscript{126} Id. at 424.
\textsuperscript{127} N.J. REV. STAT. § 59:2-2 (1972).
\textsuperscript{128} Id.
\textsuperscript{130} Id. at 1273.
\textsuperscript{131} Id.
\textsuperscript{132} Id.
\end{flushleft}
Mr. Lauder was being removed from the ambulance, the undercarriage of the stretcher collapsed, “causing Lauder to fall and hit his head on the pavement.”133 Mr. Lauder died several days later as a result of the injuries he sustained in the fall.134

The administrator of Mr. Lauder’s estate filed a lawsuit against the volunteer ambulance service, hospital, and stretcher manufacturer.135 The Superior Court explained that N.J.S.A. 2A:53A-13 does not permit recovery against a volunteer ambulance service absent a showing of intentional conduct or a lack of good faith.136 The court concluded that “the complaint against the volunteer ambulance squad sounds in negligence and does not allege intentional conduct, nor does plaintiff proffer any evidence of intentional conduct. Accordingly, the volunteer ambulance squad is immune from liability.”137

This Note does not suggest that volunteer fire departments and ambulance services should be stripped of such broad immunity. Surely, subjecting first responders to liability for acts of negligence they commit while executing their duties in good faith would result in a loss of volunteers. First responders, who are not paid in the first place, would find it difficult to continue providing selfless public service with the risk of litigation hanging over their heads on every emergency call. Moreover, without immunity, first responders may take less aggressive measures in fear of being sued for less-than-perfect outcomes. The possible consequences are unacceptable and would leave our communities unprotected.

However, it is important to note the dichotomy presented by N.J.S.A. 2A:62A-21 and N.J.S.A. 2A:53A-13. On one hand, a police officer injured by an accident victim flailing his

133 Id.
134 Id.
135 Id.
136 Id. at 1274.
137 Id.
arms in shock is permitted to sue because the accident was negligently caused.\textsuperscript{138} On the other hand, recovery cannot be sought when an elderly patient dies after the stretcher to which he is strapped is negligently handled, causing him to fall and violently strike his head on the ground.\textsuperscript{139} The New Jersey Legislature must promptly correct this lapse in logic. There are two possible solutions to this conflict. The firefighters’ rule can be reinstated to provide a limited degree of immunity to property owners or first responders can be stripped of immunity. As explained above, adopting the latter proposition would unacceptably leave our communities at risk. Therefore, the only option is to re-establish the firefighters’ rule in a limited, pre-\textit{Rosa} form.

The second nontraditional justification protects first responders from the inevitable delay in summoning help that will follow the rule’s abrogation. If property owners fear being held liable for the very negligence that causes them to dial 911, they will be hesitant to reach for the phone. The hypothetical homeowner who failed to maintain a clean oven may first attempt to extinguish the fire before calling the fire department. Once the homeowner finally realizes the blaze is out of his control and calls for assistance, the fire has spread and become more intense. This delay not only results in greater property damage, it puts the responding firefighters at greater risk of harm because they now must deal with a fully-involved fire.

The New Jersey Superior Court acknowledged the dangerous effects of delay. In \textit{Kelly v. Ely}, the court stated it “cannot ignore the potential consequence of encouraging an owner to delay summoning aid out of fear of incurring liability to a responding firefighter. Such delays can not only increase the risk when the firefighter finally arrives, they can also increase the risk to neighbors who are wholly without fault.”\textsuperscript{140} As the court warns, any delay in calling the fire department not only impacts homeowners and first responders, it also poses a threat to

\textsuperscript{139} Lauder, 845 A.2d at 1271.
neighboring homes and property. If the hypothetical oven fire rages out of control and catches the rest of the house on fire as a result of the untrained homeowner’s attempt to extinguish it before calling 911, the risk to nearby structures and life has substantially increased.

New Jersey must therefore restore a limited version of the firefighters’ rule to serve the well-established justifications of duty owed, assumption of risk, and spreading the cost. Further, the Legislature is encouraged to act promptly in order to level the tort liability playing ground between first responders and private property owners. Doing so will also promote the safety of first responders and homeowners alike.

CONCLUSION

The common law firefighters’ rule protected New Jersey property owners from unreasonable tort liability for almost half a century. The courts naturally expanded it to bar certain claims by volunteer firefighters and police officers. However, it did not completely prevent injured first responders from seeking damages. Such claims were permitted when the injuries resulted from: risks beyond those inevitably involved in firefighting, hazards created in violation of statute or ordinance, failure to utilize an available opportunity to warn of hidden dangers, and wanton conduct coupled with a high degree of probability that harm would ensue. The rule only barred claims involving solely the negligent acts or omissions that created the emergency.

Unfortunately, this narrow and widely accepted version of the rule was expanded beyond logical limits in Rosa v. Dunkin’ Donuts, which prevented first responders from seeking recovery for injuries sustained as a result of any negligent act—even those unrelated to the cause of the emergency response. With the stroke of a pen, the New Jersey Legislature responded
disproportionately by completely abrogating the firefighters’ rule. N.J.S.A. 2A:62A-21 leaves property owners exposed to an unlimited amount of litigation for injuries sustained by the professionals who are retained with public funds to confront the very situations created by the owners’ negligence.

New Jersey courts now face a potential flood of unreasonable litigation. States that have also rejected the firefighters’ rule are already confronting similar litigation. New Jersey must pay attention and learn from these mistakes before judicial economy and integrity are further compromised. The Legislature should follow California’s statutory model, adopt the reasoning of *Kelly v. Ely*, and amend N.J.S.A. 2A:62A-21 to restore the firefighters’ rule to its narrow pre-*Rosa* status. Additionally, the established relief fund should be used to cover outstanding medical bills left after worker’s compensation payments are paid. Taking these steps would serve the justifications that established the common law firefighters’ rule. Furthermore, restoring the limited rule corrects an unfair disparity that allows first responders to sue negligent homeowners but prohibits the same homeowners from seeking damages for a first responder’s negligence.

In a society that values and respects the efforts of first responders, a statutory amendment restoring the firefighters’ rule is logical and will protect these brave professionals from the dangers presented by a homeowner’s delayed call for help. The Legislature must not leave emergency workers on their own to seek adequate compensation for injuries. These courageous people risk their lives to protect our communities—they deserve the peace of mind that our communities will sufficiently and justly compensate them in return. It is time for us to come together and provide for those who respond to our calls for help.