

RE-EXAMINING THE FIREFIGHTER’S RULE IN ARIZONA

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In Arizona, the “firefighter’s rule” bars firefighters and police officers from bringing lawsuits against people who negligently create situations that require their assistance. Scholars nationwide have heavily criticized the firefighter’s rule, and five states have already abolished it. In June 2016, the Arizona Court of Appeals decided Sanders v. Alger, in which it overturned a superior court decision that would have expanded the firefighter’s rule to apply to caregivers. The fact that the rationales supporting the firefighter’s rule could be used to justify this expansion illustrates the unclear, malleable nature of those rationales. The Arizona Supreme Court, which granted review of Sanders v. Alger in January 2017, should take advantage of this second chance to reconsider the firefighter’s rule. This Note examines the rationales behind the firefighter’s rule and explains why each is insufficient to support the injustice that the rule produces. By focusing on the inappropriateness of the firefighter’s rule in Arizona, this Note contributes a new voice to the existing body of tort literature.

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INTRODUCTION

Arizona has a well-established policy of allowing its citizens to pursue tort claims.¹ The Arizona Constitution states that 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.”² Additionally, the Arizona Supreme Court has stated that “[t]here is perhaps no doctrine more firmly established than the principle that liability follows tortious wrongdoing; that where negligence is the proximate cause of injury, the rule is liability and immunity is the exception.”³

In keeping with this policy, the Court adopted the rescue doctrine, which generally allows an individual who is injured while rescuing another to sue the person “whose negligence created the need for rescue.”⁴ The reasoning behind the rescue doctrine is that “injury to a rescuer is a foreseeable result of the original negligence.”⁵ However, the Court simultaneously adopted an exception to the doctrine for the most foreseeable type of rescuers: firefighters.⁶ The “firefighter’s rule” holds that “[a] rescuer who could otherwise recover cannot do so if she is

1. See, e.g., ARIZ. CONST. art. XVIII, § 6; *id.* art. II, § 31.

2. *Id.* art. XVIII, § 6.

3. *Stone v. Ariz. Highway Comm’n*, 381 P.2d 107, 112 (Ariz. 1963). While a constitutional analysis of the rule is beyond the scope of this Note, it should be noted that parties to lawsuits involving the Arizona firefighter’s rule have argued that the rule is inconsistent with the Arizona Constitution. See, e.g., Appellants’ Consolidated Reply Brief at 8, *White v. State*, 202 P.3d 507 (Ariz. Ct. App. 2008) (No. 07–0496) (arguing that a particular interpretation of the rule—which the court ultimately adopted—“undermine[d] Arizona’s strong Constitutional prohibition against limiting its citizens’ right to redress in the Courts”); Opening Brief of Plaintiff-Appellant at 19, *Read v. Keyfauber*, 308 P.3d 1183 (Ariz. Ct. App. 2013) (No. 12–0007) (arguing that because the rule “operates as an assumption of risk,” only a jury may decide whether the rule applies, pursuant to Article 18, section 5 of the Arizona Constitution).

4. See *Espinoza v. Schulenburg*, 129 P.3d 937, 939 (Ariz. 2006); see also *id.* (quoting RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 32 (AM. LAW INST., Proposed Official Draft, 2005)) (“[I]f 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.”). The *Espinoza* Court explained that the rescue doctrine “declares as a matter of policy that injury to a rescuer is a foreseeable result of the original negligence[,] . . . [bridging] what otherwise might be a fatal hole in an injured volunteer’s suit for damages.” *Id.* (footnote omitted).

5. *Id.*

6. *Id.* at 939–40.

performing her duties as a professional firefighter.”⁷ The general premise of the rule is that a firefighter should not be able to sue a person whose actions create the very risk that the firefighter is employed and trained to confront.⁸

Thus, if Ari, an Arizona resident, lights her house on fire while negligently igniting fireworks in her backyard, and her neighbor is killed while rescuing Ari from the fire, then the rescue doctrine allows the neighbor’s family to sue to recover damages for their tragic loss. But if instead a firefighter is killed while trying to rescue Ari, then the firefighter’s family will be barred from suing pursuant to the firefighter’s rule. Likewise, if a Good Samaritan stops to render aid at the scene of a car accident and is killed in the process by a negligent driver who was texting while driving, the Good Samaritan’s family may sue the negligent driver. But if instead the person who stops to help is an on-duty firefighter or police officer, the firefighter’s or police officer’s family will be barred from suing.

The firefighter’s rule originated in an 1892 Illinois Supreme Court case⁹ and has evolved significantly since then, with many states adopting and developing their own versions.¹⁰ For example, many jurisdictions have expanded the rule to cover additional categories of so-called “professional rescuers,” such as EMTs, veterinarians, tow truck drivers, and emergency surgeons.¹¹ In Arizona, although still referred to as the “firefighter’s” rule, the rule has been expanded to cover

7. *Id.* at 939 (citing *Orth v. Cole*, 955 P.2d 47, 49 (Ariz. Ct. App. 1998)). When the Court decided *Espinoza*, the Arizona Court of Appeals had already been applying the firefighter’s rule for 29 years. *See Grable v. Varela*, 564 P.2d 911 (Ariz. Ct. App. 1977). A tort case involving the rule generally progresses as follows: first the firefighter brings a claim; next the court determines *as a matter of law* whether the defendant owed the firefighter a duty; if so, the case proceeds to a jury for a determination on the specific facts of the case, including a determination of breach, causation, assumption of risk, and comparative fault. But a finding that the firefighter’s rule applies is equivalent to a determination that the defendant owed no duty. This prevents the case from reaching a jury and terminates it before the issues of breach, causation, damages, assumption of risk, or comparative fault are considered. *See Gipson v. Kasey*, 150 P.3d 228, 230 (Ariz. 2007) (describing the four elements of a negligence claim and whether the judge or jury decides each element).

8. DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 363 (2d ed. 2011) (“When firefighters, police officers, and perhaps other public safety officers are injured by perils that they have been employed to confront, many courts hold that they ordinarily have no claim against the person who created those perils.”).

9. *See Gibson v. Leonard*, 32 N.E. 182, 185–86 (Ill. 1892) (holding that because the fire patrol member was “a mere licensee,” the owner of the burning building owed no duty to the patrol member to maintain the premises in safe repair); David L. Strauss, *Where There’s Smoke, There’s the Firefighter’s Rule: Containing the Conflagration After One Hundred Years*, 1992 WIS. L. REV. 2031, 2031 (1992).

10. Strauss, *supra* note 9, at 2031–32.

11. *Pinter v. Am. Family Mut. Ins. Co.*, 613 N.W.2d 110 (Wis. 2000) (EMTs); *Farnam v. State*, 101 Cal. Rptr. 2d 642, 645 (Ct. App. 2000) (veterinarians); *Griner v. Ga. Farm Bureau Mut. Ins. Co.*, 596 S.E.2d 758 (Ga. Ct. App. 2004) (tow truck drivers); *Carter v. Taylor Diving & Salvage Co.*, 341 F.Supp. 628 (E.D. La. 1972), *aff’d*, 470 F.2d 995 (5th Cir. 1973) (surgeons providing emergency care).

police officers.¹² But in *Sanders v. Alger*, the Arizona Court of Appeals's most recent published case addressing the firefighter's rule, the court had the opportunity to expand the rule to a new category of professional rescuers; namely, caregivers.¹³ In declining to do so, the court's *Sanders v. Alger* opinion brings to light some of the fundamental flaws in the reasoning behind the rule. On January 10, 2017, the Arizona Supreme Court granted review,¹⁴ creating an opportunity to re-examine the rule, as this Note proposes.

Part I of this Note synthesizes the development of the firefighter's rule in Arizona. The development begins with the Arizona Court of Appeals's first application of the rule in *Grable v. Varela*, includes the Arizona Supreme Court's only case considering the rule, *Espinoza v. Schulenburg*, and ends with the most recent published Arizona Court of Appeals case regarding the rule, *Sanders v. Alger*. Part II discusses each of the commonly cited rationales for the firefighter's rule, and explains why none of these rationales provides sufficient support for the rule in Arizona. Part III argues that the Arizona Supreme Court, in *Sanders v. Alger*, should refuse to expand the rule beyond its current scope and should clarify the rationales behind the rule. Additionally, Part III argues that the Court or the Arizona Legislature should take affirmative steps to limit or even abolish the rule because it is based on flawed reasoning and it discriminates against some of the state's most important public safety professionals.

I. THE FIREFIGHTER'S RULE IN ARIZONA

Arizona courts have been applying the firefighter's rule since 1977.¹⁵ But Arizona cases, like in many states, lack a clear and consistent unifying justification for the rule.¹⁶ This perhaps partially explains why the doctrine is highly fact-dependent and subject to numerous exceptions.¹⁷

A. Early Application of the Rule

The Arizona Court of Appeals first applied the firefighter's rule in *Grable v. Varela*.¹⁸ In *Grable*, a firefighter brought suit after he was injured while fighting

12. See *White v. State*, 202 P.3d 507, 514 (Ariz. Ct. App. 2008) (applying the firefighter's rule to bar suits brought by two deceased police officers' families).

13. See 375 P.3d 1199 (Ariz. Ct. App. 2016).

14. *Sanders v. Alger*, No. CV-16-0181-PR (Ariz. Jan. 10, 2017).

15. *Grable v. Varela*, 564 P.2d 911 (Ariz. Ct. App. 1977).

16. See, e.g., *Thomas v. Pang*, 811 P.2d 821, 826 (Haw. 1991) (Padgett, J., dissenting) (“[T]he courts which have adopted the ‘Fireman’s Rule’ have had great difficulty in explaining the legal rationale upon which it rests, and have adopted various explanations to justify the result reached. Moreover, those courts have also riddled the rule with exceptions.”); Strauss, *supra* note 9, at 2040 (“In analyzing very fact-specific cases, courts find themselves struggling to apply ‘a practical rule in search of an adequate theory.’”).

17. See *Thomas*, 811 P.2d at 826 (Padgett, J., dissenting); Strauss, *supra* note 9, at 2040.

18. 564 P.2d 911, 913 (Ariz. Ct. App. 1977) (“We hold that a fireman has no cause of action against one whose negligence caused the fire in which he was injured.”).

a fire caused by a minor who was playing with matches.¹⁹ The court held that the firefighter's suit was barred, reasoning that "[o]ther jurisdictions are almost unanimous in denying recovery by an injured fireman from one whose sole connection with the injury is that his negligence caused the fire."²⁰

In its second case addressing the rule, *Garcia v. City of South Tucson*, the Arizona Court of Appeals held that the rule also applies to police officers.²¹ However, the court declined to apply the rule under the particular circumstances of *Garcia* based on a new exception for an officer whose injury is caused by "the independent negligence of a third person."²² In this situation, the rule does not apply to bar the officer's suit.²³ In *Garcia*, one police officer shot another police officer in the back during an attempt to draw a gunman from a home.²⁴ The plaintiff officer, who was rendered paraplegic as a result of the incident, was awarded \$3.59 million in his negligence suit against the City.²⁵

On appeal, the City argued, *inter alia*, that the officer's suit should have been barred by the rule.²⁶ The court of appeals affirmed the jury's award, explaining that the rule does not apply where, as here, the officer's injury was caused by a third party's intervening act of negligence.²⁷ In other words, the officer could not have sued the gunman, whose actions created the need for the officer's presence at the scene in the first place, but the officer could sue the City, whose intervening acts ultimately caused the officer's injury.²⁸

Subsequently, in *Orth v. Cole*, the court of appeals established the "non-emergency," "non-rescue" exception to the rule.²⁹ Under that exception, the rule does not bar claims arising out of a firefighter's performance of non-emergency, non-rescue functions.³⁰ In *Orth*, a firefighter was injured while performing a routine inspection of an apartment building.³¹ The court held that the firefighter's negligence suit against the apartment owners was not barred by the rule because "the emergency conditions of a fire or some similar exigency" were absent.³² The court also reasoned that "it would further no public policy . . . to hold, in effect,

19. *Id.* Grable argued that the rule violated section 23-1023 of the Arizona Revised Statutes, a statute that permitted an employee entitled to workmen's compensation to pursue a negligence claim against a third-party tortfeasor. *Id.* at 912. However, the court disagreed and found that the statute did not create a cause of action where none existed. *Id.* at 913.

20. *Id.* at 912.

21. 640 P.2d 1117, 1121 (Ariz. Ct. App. 1981).

22. *Id.*

23. *Id.*

24. *Id.* at 1119.

25. *Id.* In *Garcia*, a South Tucson Police sergeant's negligence—in ordering his officers to shoot before giving a warning—ultimately caused the officer's injury. 640 P.2d at 1121.

26. *Id.* at 1120.

27. *Id.* at 1121.

28. *Id.*

29. 955 P.2d 47, 49 (Ariz. Ct. App. 1998).

30. *Id.*

31. *Id.* at 47.

32. *Id.* at 48.

that a property owner owes a duty of reasonable care to all building inspectors except those who work for the fire department.”³³

B. The Arizona Supreme Court Adopts the Rule

In 2006, after the Arizona Court of Appeals had been applying the firefighter’s rule for more than 29 years, the Arizona Supreme Court in *Espinoza v. Schulenburg* officially adopted the rule and simultaneously established the off-duty exception.³⁴ In *Espinoza*, an off-duty firefighter voluntarily stopped at the scene of a car accident to render aid.³⁵ While the firefighter was turning on the vehicle’s hazard lights, another vehicle rear-ended it.³⁶ The firefighter brought suit against the driver who caused the initial accident, the driver who subsequently rear-ended the vehicle she was in, and the Department of Public Safety officer who was also at the scene.³⁷ The Court held that the suit was not barred because “[o]ff-duty professionals who risk injury to volunteer aid in emergency situations fall outside the policy rationale for the firefighter’s rule because they are under no obligation to act.”³⁸

In explaining the policy rationale behind its holding, the Court quoted the following passage from *Grable*:

Probably most fires are attributable to negligence, and in the final analysis the policy decision is that it would be too burdensome to charge all who carelessly cause or fail to prevent fires with the injuries suffered by the expert retained with public funds to deal with those inevitable, although negligently created, occurrences.³⁹

The Court went on to explain that in some jurisdictions the rule is based on the idea that firefighters assume the risk of injury.⁴⁰ In Arizona, however, the rule could not be based on this theory because assumption of risk is not a complete bar to recovery under Arizona’s comparative fault system.⁴¹ Thus, even if the Court decided that it was appropriate as a matter of law to deem all firefighters to have impliedly assumed certain risks, this would not be enough to justify a categorical bar on firefighter suits, because in Arizona such a finding would simply allow the jury to reduce the damages accordingly.⁴² Additionally, the Court

33. *Id.* at 48. In almost every case discussing the firefighter’s rule in Arizona, courts have stated that the rule is “narrowly applied.” *See id.* (“In our opinion, *Grable* exemplifies when the rule applies and *Garcia* signals that the rule is narrowly applied in Arizona.”); *infra* note 41 and accompanying text.

34. 129 P.3d 937 (Ariz. 2006).

35. *Id.* at 938.

36. *Id.*

37. *Id.*

38. *Id.* at 941.

39. *Id.* at 939 (quoting *Grable v. Varela*, 564 P.2d 911, 912 (Ariz. Ct. App. 1977)).

40. *Espinoza v. Schulenburg*, 129 P.3d 937, 940 (Ariz. 2006).

41. *Id.* (citing ARIZ. REV. STAT. ANN. § 12-2505(A) (2003)) (“The defense of contributory negligence or of assumption of risk is in all cases a question of fact and shall at all times be left to the jury.”); *see also* ARIZ. CONST. art. 18, § 5.

42. *Espinoza*, 129 P.3d at 940.

noted that if the rule were based on assumption of risk, then the rule would logically apply to all rescuers, in direct conflict with the rescue doctrine.⁴³

The Court also addressed workers' compensation, explaining that "[t]he existence of workers' compensation . . . supports the policy rationale for the [rule] by providing some compensation for those injured in the line of duty."⁴⁴ It went on to state, however, that the availability of workers' compensation is not determinative for at least two reasons.⁴⁵ First, allowing firefighters to seek both workers' compensation and tort damages would not, as some argue, entitle them to "double recovery," because the Arizona workers' compensation scheme includes a subrogation right against third-party recoveries.⁴⁶ And second, the two remedies are not one in the same, because workers' compensation is subject to limitations and does not allow recovery for pain and suffering.⁴⁷

The Court acknowledged and approved of the exceptions to the rule established by the court of appeals in *Orth* and *Garcia*, noting that these exceptions comport with "Arizona's policy of protecting its citizens' right to pursue tort claims."⁴⁸ Accordingly, the Court stated: "We adopt the firefighter's rule, but we construe it narrowly."⁴⁹ In a footnote, the Court also recognized that the rule's rationale seemed to apply equally to police officers and that the rule has been extended elsewhere to "other professions"—but it declined to decide this issue because it was not raised by the facts.⁵⁰

As the Court's official adoption of the firefighter's rule, *Espinoza* should have clearly established the rationales for the rule and guided future decisions. However, the case simply offered a few of the common rationales without critically examining them, and did not address the rule's tension with Arizona's policy of preserving tort remedies other than to say that the *exceptions to the rule* comport with the policy and that the rule should be construed narrowly. Post-*Espinoza*, the Arizona Court of Appeals has continued to do the same—restate the unquestioned rationales and then proceed to decide each case on its facts. And, arguably, the court of appeals has not effectuated *Espinoza's* instructions to construe the rule narrowly.

43. *Id.*

44. *Id.* at 941.

45. *Id.*

46. *Id.* (citing ARIZ. REV. STAT. ANN. § 23-1023(c) (1995)).

47. *Id.*

48. *Id.* In support of this point, the court cited sections of the Arizona Constitution regarding a person's right to recover in tort. For example, Article II, section 31 of the Arizona Constitution states that "[n]o law shall be enacted in this state limiting the amount of damages to be recovered for causing the death or injury of any person."

49. *Id.*

50. *Id.* at 941 n.3 ("The rule's application to professions other than firefighters is not before us 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." (citations omitted)).

C. *Post-Espinoza Application of the Rule*

In *White v. State*, the Arizona Court of Appeals rejected a reading of the *Garcia* third-party-negligence exception that would have narrowed the scope of the firefighter's rule.⁵¹ The court applied the firefighter's rule to bar suits brought by the families of two police officers who were killed by a gunman while responding to a 911 call regarding that gunman.⁵² The families asserted that the *Garcia* third-party-negligence exception should apply, claiming that the deaths were caused by the independent negligence of the state and various mental health facilities that evaluated but failed to "properly diagnose and treat" the individual who ultimately shot the two officers.⁵³

The families argued that the *Garcia* exception should be interpreted broadly to limit the applicability of the rule solely to the negligence of "the person whose conduct brought an officer to the scene."⁵⁴ In other words, officers should be able to sue any third party.⁵⁵ The court of appeals disagreed, clarifying that the key to the third-party-negligence exception was the *independence* of the third party's conduct.⁵⁶ The exception applies only when the third party's negligence can be proved without reference to the act that brought the officers to the scene.⁵⁷ In this case, the facilities' negligence could not be proved without reference to the gunman's conduct (the reason for the officers' presence at the scene).⁵⁸ Thus, the conduct was not independent, and the rule barred the families' suits.⁵⁹

Five years later in *Read v. Keyfauver*, the court of appeals again clarified one of the established exceptions in favor of a more broadly applicable rule.⁶⁰ In that case, the court clarified the scope of the *Espinoza* off-duty exception.⁶¹ Read, an on-duty police officer, witnessed a rollover accident while issuing a traffic citation to an unrelated vehicle.⁶² Upon witnessing the accident, he ran to the scene to render aid and was injured while extracting the driver, Keyfauver, from the rolled-over vehicle.⁶³ Read argued that the rule should not apply because, like the off-duty firefighter in *Espinoza*, he "voluntarily" extracted Kefauver from the vehicle.⁶⁴ The court rejected his argument, reasoning that Read was on duty, was at the scene as a result of his on-duty obligations, and had an obligation to investigate and secure the scene.⁶⁵

51. *White v. State*, 202 P.3d 507, 512–13 (Ariz. Ct. App. 2008).

52. *Id.*

53. *Id.* at 508–09.

54. *Id.* at 511.

55. *Id.*

56. *Id.* at 512.

57. *Id.*

58. *Id.*

59. *Id.*

60. 308 P.3d 1183 (Ariz. Ct. App. 2013).

61. *Id.*

62. *Id.* at 1185.

63. *Id.*

64. *Id.*

65. *Id.* at 1188. The court also rejected Read's argument that the rule violates the Arizona Constitution. *Id.* Read argued that the rule is "a form of assumption of risk and

Notably, the plaintiffs in both *White* and *Read* asked the court to reconsider the firefighter's rule in light of growing criticism of the rule by courts in other jurisdictions, scholars, and other interest groups. In both cases, the court rejected the plaintiffs' requests because the Arizona Supreme Court had already adopted the rule, leaving the court without the option to overrule it.⁶⁶ The Arizona Court of Appeals' most recent interaction with the proper scope of the rule came in *Sanders v. Alger*.⁶⁷

D. *Sanders v. Alger*

Jeanette Sanders provided in-home care to Francis Alger pursuant to a contract with the Arizona Department of Economic Security ("DES").⁶⁸ Under the Sanders-DES contract, Sanders was obligated to maintain Alger's health and safety, and assist him with transfer to and from his wheelchair.⁶⁹ DES did not employ Sanders, but it provided benefits to her under the Provider Indemnity Program in accordance with section 41-621 of the Arizona Revised Statutes.⁷⁰

Sanders continued to care for Alger for approximately seven years, until an incident occurred on the job in 2011.⁷¹ While Sanders was attempting to transfer Alger from his wheelchair into a vehicle, Alger began to fall.⁷² Sanders attempted to use "cues and prompts" to help Alger regain his balance, but he did not respond.⁷³ Sanders intervened to prevent the fall, and, in the process, she was seriously injured.⁷⁴ She subsequently sued Alger for negligence in Pima County Superior Court.⁷⁵

whether [it] applies is therefore a jury question" pursuant to Article 18, Section 5 of the Arizona Constitution. *Id.* The court refused to consider this argument, noting that the Arizona Supreme Court had already determined in *Espinoza* that assumption of risk is not the basis for the rule. *Id.* The court explained that instead the rule "is based on a principle of exclusion, limiting the scope of the tort system, rather than . . . a derivative of assumption of risk principles." *Id.* at 1189.

66. *See id.* ("[B]riefs filed by amici curiae that represent the interests of public safety professionals assert that the firefighter's rule (1) should be abandoned because it is antiquated and (2) constitutes a form of assumption of risk and is thus a jury question[,] but "we are bound by the rule because the supreme court has adopted it."); *White v. State*, 202 P.3d 507, 513-14 (Ariz. Ct. App. 2008) ("As to . . . whether the rule is unfair, or has reached the end of its applicability in Arizona, the rule has been adopted by our supreme court and thus state.").

67. 375 P.3d 1199 (Ariz. Ct. App. 2016). Although there is a more recent case than *Sanders*, it is unpublished and did not expand the rule's scope. *See Stevenson v. Harmon*, No. 1 CA-CV 15-0329, 2016 WL 3525683 (Ariz. Ct. App. June 23, 2016).

68. *Sanders*, 375 P.3d at 1200.

69. *Id.* at 1202-03.

70. *Id.* at 1201 n.1.

71. *Id.* at 1202-03.

72. *Id.* at 1201.

73. *Id.*

74. *Id.*

75. *Id.*

Relying on *Espinoza*, the Superior Court granted summary judgment in favor of Alger, reasoning that the firefighter's rule barred Sanders's suit.⁷⁶ The court explained that "[b]eing injured by a vulnerable adult while being paid to care for him is comparable to a firefighter being injured while putting out a fire. In both instances, the person is a professional who is paid to work with the hazard that caused the person's injury."⁷⁷

The Arizona Court of Appeals reversed, finding that it was improper to apply the firefighter's rule to caregivers.⁷⁸ The court acknowledged that the following rationale from *Espinoza* applied to both firefighters and caregivers: a "person whose employment depends on [the] existence of [a] particular risk should not be permitted to recover in tort when that risk materializes[.]"⁷⁹ However, the court found that three other key *Espinoza* rationales did not apply.⁸⁰

First, a fire "poses a broader public danger, which may be hazardous not only to the person who started the fire, but also to those persons and structures in proximity, and members of the public should not be dissuaded from calling firefighters by fear of liability."⁸¹ Here, by contrast, a caregiver's negligence poses only a private risk.⁸²

Second, said the court, most fires and accidents are attributable to negligence.⁸³ Therefore, firefighters' and police officers' jobs depend in substantial part on encountering the "negligence that creates the very need for [their] employment."⁸⁴ Moreover, because most fires and accidents are attributable to negligence, it would be a significant burden to "charge all who carelessly cause" them.⁸⁵ Falls, on the other hand, often occur absent any negligence—perhaps simply because of a person's physical limitation or disease.⁸⁶ Thus, Sanders's job as a caregiver did not "depend in any substantial part on encountering 'negligence that creates the very need for [her] employment.'"⁸⁷ And it would not be a "significant burden" to charge all who negligently fall.⁸⁸ Rather, fall cases are

76. *Id.*; see also Under Advisement Ruling re Defendant's Motion for Summary Judgment at 2–5, *Sanders v. Alger*, No. C20131310 (Ariz. Super. Ct. Apr. 20, 2015).

77. *Id.* at 3; see also *Sanders*, 375 P.3d at 1201 (quoting the trial court's opinion).

78. *Sanders*, 375 P.3d at 1202. The possible expansion of the rule to other professions is an issue of first impression in Arizona. The Arizona "[S]upreme [C]ourt has not yet expanded the firefighter's rule to professions other than traditional first responders . . ." *Id.* at 1201.

79. *Id.* at 1201–03.

80. *Id.* at 1201–03.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 1201–02.

87. *Id.*

88. *Id.*

perfectly suitable for the tort system, which is “well accustomed to determining whether a particular fall occurred due to negligence.”⁸⁹

Third and finally, the court explained that firefighters and police officers are trained, equipped, compensated, and provided for in the case of injury.⁹⁰ In other words, they surrender their right to sue in exchange for an extensive list of publicly provided benefits. Conversely, in this case, there was no evidence showing that Sanders was similarly trained or compensated, nor was there an indication that caregivers as a group generally receive such training and compensation.⁹¹

The court concluded its discussion of the firefighter’s rule by mentioning the assumption of risk doctrine.⁹² It explained that the determination of whether Sanders was “employed to respond to the very type of event that caused her injury . . . sounds in tort law as assumption of risk.”⁹³ The court then noted that assumption of risk is not and cannot be the basis for the rule, citing the Arizona Supreme Court’s decision in *Espinoza*.⁹⁴ Because the assumption-of-risk rationale was the only rationale that supported applying the rule to caregivers, the court concluded that applying the rule was improper.⁹⁵

Having determined that the firefighter’s rule did not apply, the court held that Alger owed Sanders a duty of reasonable care as a matter of law.⁹⁶ Therefore, the court reversed the grant of summary judgment and remanded the case to the lower court for consideration of Alger’s alternative argument in favor of summary judgment.⁹⁷

Sanders v. Alger is significant because it demonstrates that the firefighter’s rule’s rationales have no clear end. In the case, an Arizona party was able to construct a colorable argument and convince an Arizona court that the rule

89. *Id.*

90. *Id.* at 1202.

91. *Id.* The court noted that Sanders received “some measure of training” and had a contractual right to seek compensation for her injuries from the state under the Provider Indemnity Program, but found these benefits to be insufficient. *Id.*

92. *Id.* Assumption of risk is a defense whereby the defendant claims “that the plaintiff assumed the risk whenever she expressly agreed to by contract or otherwise, and also when she impliedly did so by words or conduct.” See *Phelps v. Firebird Raceway*, 111 P.3d 1003, 1005 (Ariz. 2005) (citing 1 DAN B. DOBBS, *THE LAW OF TORTS* § 211, at 535 (1st ed. 2001)).

93. *Sanders*, 237 P.3d at 1202.

94. *Id.*

95. *Id.*

96. *Id.* at 1203. Alger argued that because Sanders explicitly agreed (by contract) to protect him from falling, it necessarily followed that Alger owed Sanders no duty to prevent himself from falling. *Id.* The court rejected this argument, explaining that contracts that purport to shift risks between parties have no effect on the parties’ respective duties to each other. *Id.* Rather, such risk-shifting provisions are simply relevant to the determination of whether one party assumed the risk—a determination reserved for the jury. *Id.*

97. *Id.* at 1204. Alger’s alternative argument was that no reasonable juror could find that he had breached a duty. *Id.* The lower court did not address this argument because it found the firefighter’s rule conclusive. *Id.*

should be expanded to categorically bar suits by caregivers. *Sanders v. Alger* should serve as a wake-up call to the Arizona legal community that the firefighter's rule and its justifications need to be re-examined. On January 10, 2017, the Arizona Supreme Court gained an opportunity to do just that.⁹⁸ The Court granted review on two issues: "Does the firefighter's rule bar Sanders' negligence claim?"; and "Did the court of appeals err in ruling that Alger owed Sanders a duty of care?"⁹⁹ Answering the first issue will require an in-depth review of the rationales behind the rule.

II. RE-EXAMINING THE COMMON RATIONALES FOR THE FIREFIGHTER'S RULE

In *Sanders v. Alger*, the Arizona Court of Appeals determined that the rationales for the firefighter's rule do not justify extending the rule to caregivers.¹⁰⁰ In fact, close scrutiny of the rationales reveals that they may not justify the rule's application to any profession in Arizona. This Part examines the validity of each of the rationales for the rule that Arizona courts commonly cite or imply. The examination shows that none of the rationales is sufficient as a logical legal justification for the rule.

A. Training and Compensation

One common justification for the firefighter's rule is that firefighters and police officers are provided with the necessary training, equipment, and compensation to handle the risks they face.¹⁰¹ This is certainly true: firefighters and police officers undergo extensive training,¹⁰² are paid for their work, and are entitled to workers' compensation in the event of injury.¹⁰³ The flaw in this as a justification for the rule, however, is that it is overbroad. Many professions other than firefighters and police officers involve significant risk, and the people who

98. *Sanders v. Alger*, No. CV-16-0181-PR (Ariz. Jan. 10, 2017).

99. *Id.*

100. *Sanders*, 375 P.3d at 1202.

101. *See, e.g.*, *Espinoza v. Schulenburg*, 129 P.3d 937, 939 (Ariz. Ct. App. 2006) ("In return for removing the firefighters' right to sue, the public trains, equips, and compensates these public safety officers.").

102. For example, Phoenix firefighter candidates must obtain Emergency Medical Technician training, pass a Candidate Physical Ability Test and a written test, obtain Firefighter I & II Certifications, and complete the Cadet Program. *See* CITY OF PHOENIX, *Firefighter Recruitment*, <https://www.phoenix.gov/fire/employment/firefighters> (last visited Oct. 13, 2016).

103. *See* ARIZ. REV. STAT. ANN. § 23-1021 (2016) ("Every employee coming within the provisions of this chapter who is injured, and the dependents of every such employee who is killed by accident arising out of and in the course of his employment, . . . shall be paid such compensation for loss sustained on account of the injury or death, such medical, nurse and hospital services and medicines, and such amount of funeral expenses in the event of death, as are provided by this chapter."); ARIZ. REV. STAT. ANN. § 23-901 (2012) ("[A public employee is] [e]very person in the service of the state or a county, city, town, municipal corporation or school district, including regular members of lawfully constituted police and fire departments of cities and towns, whether by election, appointment or contract of hire.").

have these similarly risky jobs are also trained, equipped, and compensated by the public to handle the risks inherent in their professions. In other words, if this were the justification for the rule, courts would logically have to apply it to many other professions—but they do not.¹⁰⁴ For example, EMTs, ambulance drivers, highway construction workers, and utility repairmen could all fit this description.¹⁰⁵

However, these other risk-prone professionals are not barred from suing.¹⁰⁶ Of course, when they sue for negligence, their training and understanding of the risks involved are taken into account—in the jury's apportionment of fault.¹⁰⁷ But only in the case of firefighters and police officers is the determination removed from the jury's hands and almost categorically decided 100% in the defendant's favor.

104. See, e.g., *Sanders v. Alger*, 375 P.3d 1199, 1201 (Ariz. Ct. App. 2016) (explaining that other jurisdictions have used this rationale to expand the firefighter's rule to professions other than police officers and firefighters, including one jurisdiction that used the rationale to expand the rule to housekeepers). In Arizona, the rule applies only to firefighters and police officers. See *supra* Sections I.B–C. In other jurisdictions, the irrationality of this justification has not gone unnoticed. For example, Justice Handler of the New Jersey Supreme Court explained:

Many public employees—police officer and sanitation worker alike—confront dangers on the job. Conversely, both classes of employees also confront 'ordinary' risks not involving unusual danger And even if police officers and fire fighters are presumed to be adequately compensated for the risks of their work, the majority does not explain why other governmental employees, who must also be presumed to receive adequate compensation for their work, should not therefore be prohibited . . . from recovering from negligent third parties for injuries attributable to the risks normally inherent in their employment.

Berko v. Freda, 459 A.2d 663, 671 (N.J. 1983) (Handler, J., dissenting). Other justices echo this sentiment:

The fallacy in [the training and compensation justification] is simply that it proves too much. Under this analysis, an employee would routinely be barred from bringing a tort action whenever an injury he suffers at the hands of a negligent tortfeasor could be characterized as a normal inherent risk of his employment.

Walters v. Sloan, 571 P.2d 609, 617 (Cal. 1977) (Tobriner, J., dissenting).

105. Cf. *id.* (noting that in California highway workers, high-rise construction workers, and utility repairmen are subjected to inherent risk of injury similar to firefighters, but that all three are nonetheless permitted to sue for negligence).

106. See, e.g., *Aitken v. Indus. Comm'n of Ariz.*, 904 P.2d 456, 458–59 (Ariz. 1995) (citing ARIZ. REV. STAT. ANN. § 23–1023(A)) (“In addition to collecting workers’ compensation benefits, an injured employee may sue a third party who caused or contributed to his or her injuries.”).

107. See, e.g., *Briscoe v. United Metro Materials & Concrete Co.*, 536 P.2d 1057 (Ariz. Ct. App. 1975) (affirming the jury's verdict in favor of the defendant—motorist who ran over plaintiff—construction worker's feet while plaintiff was working partially on the road, and holding that the trial court was correct in instructing the jury to consider contributory negligence).

One offered justification for this distinction is that, while many professions involve risk, firefighters and police officers are unique in that their professions depend not just upon the existence of risk, but also upon the existence of *negligence*.¹⁰⁸ However, for both firefighters and police officers, this assertion is overstated. Firefighters are sometimes called upon to confront risks that are not necessarily created by negligence, such as naturally occurring wildfires¹⁰⁹ or non-fire situations such as natural disasters or terrorist attacks.¹¹⁰ And police officers are hired to respond to crime, as well as many other situations and risks that are not necessarily negligently created.¹¹¹

A second conceivable distinction might be that firefighters and police officers face risks that are more numerous, more frequent, or greater than any other profession. This assertion is at least partially negated by U.S. Department of Labor statistics, which listed transportation and material-moving occupations as having the highest total number of fatal occupational injuries in 2014,¹¹² and logging workers as having the highest fatal work injury rate.¹¹³ Moreover, even if this assertion were true, this should arguably entitle them to more, not less, protection.

B. Duplicative Compensation

A second commonly cited rationale for the firefighter's rule is that allowing firefighters to bring negligence suits would lead to duplicative

108. As the Arizona Court of Appeals discussed in *Grable*, the majority of fires arise from an individual's negligence, whereas many other professions involve risks that do not occur primarily as a result of an individual's negligence. *See supra* Section I.A.

109. *See* U.S. FIRE ADMIN. & NAT'L FIRE DATA CENTER, FEMA, U.S. DEP'T OF HOMELAND SEC., FIRE IN THE UNITED STATES 2004–2013, at 55–62 (17th ed. 2016), <https://www.usfa.fema.gov/downloads/pdf/publications/fius17th.pdf>.

110. *See* U.S. FIRE ADMIN., FEMA, U.S. DEP'T OF HOMELAND SEC., OPERATIONAL LESSONS LEARNED IN DISASTER RESPONSE I (2015), https://www.usfa.fema.gov/downloads/pdf/publications/operational_lessons_learned_in_disaster_response.pdf (“Among the incidents in this category are hurricanes, floods, tornadoes, urban-wildland fires, hazardous material releases, communicable disease outbreaks, animal disease outbreaks, terrorist attacks, and search and technical rescue operations.”).

111. *E.g.*, Strauss, *supra* note 9, at 2046 (“Unlike the firefighter who is well-trained to fight mostly predictable fires of negligent origin, very few police functions are analogously predictable.”); CITY OF TUCSON, POLICE OFFICER RECRUIT CAREER WORKSHOP, <https://www.tucsonaz.gov/police/police-officer-recruit-career-workshop> (last visited Nov. 20, 2016) (“[Tucson police officers] will be expected to assist the citizens of our community with a variety of non-law enforcement related issues requiring a depth of knowledge about government and social service issues and the criminal justice system.”).

112. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES IN 2014 (PRELIMINARY RESULTS) 9 (2015), <http://www.bls.gov/news.release/pdf/foi.pdf> (listing “transportation and material moving occupations” at 1,289 fatal injuries and “protective service occupations,” which includes firefighters and law enforcement workers, at 211 fatal injuries). Of the 23 categories of occupations, the “protective service” category had the eighth highest number of fatalities. *Id.* Note that only 86 of the total 4,679 fatal occupational injuries occurred in Arizona. *Id.* at 13.

113. *Id.* at 4.

compensation: workers' compensation payments plus damages from the lawsuit.¹¹⁴ However, this is not an issue in Arizona because the workers' compensation scheme includes an employer's right to recover from the negligent third party.¹¹⁵

Furthermore, the argument that negligence suits are unnecessary because firefighters can instead seek workers' compensation is negated by important distinctions between the two remedies. For example, workers' compensation payments are strictly limited by statute, and an injured employee may seek certain types of damages in a negligence suit that he or she would not be entitled to seek under workers' compensation.¹¹⁶ And finally, this argument does not account for or explain why many other public employees are permitted to seek both workers' compensation and tort damages.¹¹⁷

C. A Flood of Litigation Will Ensure

Another common rationale for the firefighter's rule is that because most fires are caused by negligence, "it would be too burdensome to charge all who carelessly cause or fail to prevent fires"¹¹⁸ This "burdensome" rationale is related to the argument that abolishing the rule would lead to a flood of cases.¹¹⁹ But this seems unlikely. According to the U.S. Fire Administration, from 2012 to 2014, firefighters nationwide suffered approximately 66,200 duty-related injuries annually on a national level.¹²⁰ Of these injuries, more than half resulted in no lost

114. DOBBS ET AL., *supra* note 8, at § 363 ("Some courts suggested that the safety officer would collect workers' compensation or similar benefits from the public employer and that if the negligent defendant were required to pay tort damages, the defendant would pay twice, once indirectly as a taxpayer and again as a tortfeasor.").

115. See ARIZ. REV. STAT. ANN. § 23-1023 (2016).

116. For example, an injured employee or a deceased employee's dependents cannot seek pain and suffering damages from the workers' compensation fund. See *Espinoza v. Schulenburg*, 129 P.3d 937, 941 (Ariz. 2006) ("[W]orkers' compensation payments are limited and do not cover pain and suffering."). And, workers' compensation damages are strictly defined and limited by statute, whereas damages from a civil lawsuit are not subject to such limitations. See ARIZ. REV. STAT. ANN. §§ 23-1041 to 23-1048 (2016). For example, death benefits under the workers' compensation fund are capped at: (1) burial expenses not to exceed \$5,000; (2) a maximum compensation amount equal to two-thirds of the deceased worker's salary, to be divided according to statute among the surviving spouse and dependent children for statutorily specified time periods; and (3) if the deceased has no surviving spouse or children, a dependent sister, brother, or parent may be eligible for up to 40% of the deceased worker's average salary. See ARIZ. REV. STAT. ANN. § 23-1046 (2007).

117. DOBBS ET AL., *supra* note 8, § 363 ("One difficulty with this argument is that it was not applied in other instances of public employee injury.").

118. *Grable v. Varela*, 564 P.2d 911, 912 (Ariz. Ct. App. 1977) (citing *Krauth v. Geller*, 157 A.2d 129, 131 (N.J. 1960)).

119. See Strauss, *supra* note 9, at 2037–38 (listing the common public policy rationales for the rule, including that "[a]n explosion of litigation would occur if firefighters could file suit any time they were injured on the job where property owner/occupier negligence necessitated their presence . . . [and] the courts would be flooded with cases . . .").

120. U.S. FIRE ADMIN. & NAT'L FIRE DATA CENTER, FEMA, U.S. DEP'T OF HOMELAND SEC., FIRE-RELATED FIREFIGHTER INJURIES REPORTED TO THE NATIONAL FIRE

work time and were treated either on the scene with first aid or after the incident at a doctor's office or medical facility.¹²¹ And only 2.8%, or 940 injuries annually, were described as "severe" or "life-threatening."¹²² Thus, if it is assumed that each state had an equal share of injuries, and that all firefighters would sue for even minor injuries, this would lead to an additional 1,324 cases per state each year.

But the actual number would likely be much lower than this, because firefighters have workers' compensation available to them. Firefighters and police officers, whose job it is to face risks, are unlikely as a practical matter to bring a lawsuit each time they suffer a minor treatable injury in the course of their jobs, because workers' compensation will make them whole again for such injuries. Lawsuits, therefore, primarily would be brought in those extreme cases of severe injury or death, where workers' compensation does not cover the entirety of the damage, and where the cost of bringing a lawsuit is outweighed by the potential recovery. Moreover, because of the multiple currently recognized exceptions to the rule, firefighters and police officers already file lawsuits in these extreme-injury and death situations.¹²³ Thus, abolishing the rule likely would not significantly affect the number of lawsuits brought by firefighters and police officers.¹²⁴

In fact, in the states that have abolished the firefighter's rule, it appears that there has not been a significant increase in reported cases of firefighter lawsuits. For example, the Oregon Supreme Court adopted the firefighter's rule in 1970 and then abolished it 14 years later.¹²⁵ A simple Westlaw search using the keywords "firefighter" and "negligence" returns one Oregon negligence case brought by a firefighter between 1970 (when the rule was adopted) and 1984 (when the rule was abolished).¹²⁶ The same search returns zero cases in the 34 years post-abolition. This data, of course, does not paint a complete picture because it includes only appellate decisions. However, one would expect that if there were indeed a flood of new cases, then the number of reported decisions would increase.

And finally, it is important to note that if the firefighter's rule were abolished, this would not impose a "burden" on anyone to "charge" negligent fire-starters. Rather, it would restore an injured firefighter's *option* to seek compensation from the individual who caused his or her injury by bringing a civil

INCIDENT REPORTING SYSTEM (2012-2014), 17 TOPICAL FIRE REPORT SERIES 6, at 1 (Aug. 2016), <https://www.usfa.fema.gov/downloads/pdf/statistics/v17i6.pdf>. This number includes both fire-related and non-fire-related injuries. *Id.* at 11 n.1.

121. *Id.* at 4.

122. *Id.* The percentage of "severe" injuries was 2.3%, and the percentage of "life-threatening" injuries, the highest level of severity, was 0.5%. *Id.*

123. *See supra* Sections I.B–C.

124. *See* Strauss, *supra* note 9, at 2041 ("[I]n reality, abolishing the rule likely would not significantly affect the amount of litigation surrounding it because the numerous exceptions existing today in most states necessarily invite attempts to fall within their reach.").

125. *Spencer v. B.P. John Furniture Corp.*, 467 P.2d 429 (Or. 1970) (adopting the rule); *Christensen v. Murphy*, 678 P.2d 1210 (Or. 1984) (abolishing the rule).

126. *See* Hornbeck v. W. States Fire Apparatus, Inc., 572 P.2d 620 (Or. 1977). The case that first adopted the rule is intentionally excluded from this number.

tort suit instead of, or as a supplement to, seeking workers' compensation—the same option that non-firefighter and non-police-officer employees have when they are injured in the course of their jobs.

D. Assumption of Risk

Ironically, in Arizona, the most logical rationale for the rule—the assumption of risk doctrine—is inapplicable.¹²⁷ The idea behind this rationale is that firefighters and other professional rescuers assume the risk of negligent conduct by third parties, because such risk is inherent in their professions.¹²⁸ This is a persuasive argument—arguably, even if the rule did not exist, most tort cases brought by firefighters against negligent fire-starters would have to address the issue of whether the firefighter assumed the risk under the circumstances. Thus, it might seem logical to bar the entire class of suits rather than waste judicial resources only to determine in each case that the suit should be dismissed because the plaintiff assumed the risk. However, the Arizona Supreme Court has explicitly rejected assumption of risk as a valid rationale for the rule.¹²⁹ Under Arizona's comparative-fault system, assumption of the risk is no longer a complete bar to tort recovery.¹³⁰ Accordingly, a finding that firefighters universally assume certain risks would not justify a complete bar.¹³¹

Other jurisdictions that similarly altered their assumption-of-risk doctrines have acknowledged the effect this has on the firefighter's rule. For example, when the Oregon Supreme Court abolished the rule in 1984, it explained that, because assumption of risk was no longer an available legal foundation for the rule, "its major theoretical underpinning [was] gone."¹³² Furthermore, that court found that most of the other "so-called policy reasons" for the rule were "merely redraped arguments drawn from . . . implied assumption of risk."¹³³ Dobbs, Hayden, and Bublick have similarly observed that "[w]here assumed risk has been abolished as a separate doctrine, and where the special landowners' rules have been abolished as well, the formal supports for the doctrine are shaky."¹³⁴

127. *Espinoza v. Schulenburg*, 129 P.3d 937, 940 (Ariz. 2006) ("That doctrine should not serve as the basis in Arizona, however, because assumption of the risk no longer serves as a complete bar to tort recovery under Arizona's comparative fault system.").

128. *See, e.g., Armstrong v. Mailand*, 284 N.W.2d 343, 345 (Minn. 1979) (holding as a matter of law that "[f]iremen assume, in a primary sense, all risks reasonably apparent to them that are a part of firefighting").

129. *Espinoza*, 129 P.3d at 940 (stating that assumption of risk "should not serve as the basis [for the firefighter's rule] in Arizona").

130. ARIZ. REV. STAT. ANN. § 12-2505 (2016) ("If the jury applies [the defense of assumption of risk], the claimant's action is not barred, but the full damages shall be reduced in proportion to the relative degree of the claimant's fault which is a proximate cause of the injury or death, if any.").

131. *Espinoza*, 129 P.3d at 940.

132. *Christensen v. Murphy*, 678 P.2d 1210, 1217 (Or. 1984).

133. *Id.* Thus far, there appears to be no published research that discusses the effect, if any, that abolishment has had in the states that have taken this step.

134. DOBBS ET AL., *supra* note 8, § 363.

Abolishing the firefighter's rule would not be equivalent to a determination that firefighters and police officers never assume the risk, nor that individuals are always liable to firefighters and police officers.¹³⁵ It would simply restore the authority to make this determination to the proper decision-maker: the jury.¹³⁶

E. People Will No Longer Call for Help

A fifth rationale is that, without the firefighter's rule, members of the public might be dissuaded from calling upon firefighters or police officers because they would fear potential liability.¹³⁷ While this argument is difficult to concretely prove or disprove, in practice it seems unlikely that a person in life-threatening distress would pause to consider potential liability to a rescuer before seeking help.¹³⁸ And even if a person did pause to consider potential liability, it seems unlikely that many members of the public know of the existence of the rescue doctrine or the firefighter's rule—and hence, know that if they call on a regular citizen for help they will be liable, but if they call on a firefighter or police officer they will not be liable. Thus, any aversion to liability may already exist independent of the rule.

Moreover, Arizona's tort system is built on the principle that "liability follows tortious wrongdoing,"¹³⁹ and, therefore, if a person negligently burns his house down, he (or his insurance provider) will be liable to repair the house, to repair any damage done to neighboring houses, and to compensate any civilians injured by the fire.¹⁴⁰ Why would the potential additional imposition of the cost of

135. See *City of Tucson v. Fahringer*, 795 P.2d 819, 823 (Ariz. 1990) ("Of course, this holding does not mean that the City . . . is automatically liable Under our constitution, it is the jury that must decide . . .").

136. *Id.*; see also ARIZ. CONST. art. XVIII, § 5 ("The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury.").

137. *E.g.*, *Sanders v. Alger*, 375 P.3d 1199, 1201 (Ariz. Ct. App. 2016) (citing David L. Strauss, *Where There's Smoke, There's the Firefighter's Rule: Containing the Conflagration After One Hundred Years*, 1992 WIS. L. REV. 2031, 2038 (1992)) ("[M]embers of the public should not be dissuaded from calling firefighters by fear of liability.").

138. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 431 (W. Page Keeton ed., 5th ed. 1984) (referring to the argument that people will be deterred from calling for help in the absence of the firefighter's rule "preposterous rubbish"). For a contrary argument, see Robert H. Heidt, *When Plaintiffs are Premium Planners for Their Injuries: A Fresh Look at the Fireman's Rule*, 82 IND. L.J. 745, 783–85 (2007).

139. *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).

140. Courts upholding the firefighter's rule have not adequately considered the role liability insurance plays in negligence cases:

[A]lthough some courts have been apprehensive that the abolition of the fireman's rule will necessarily place an unreasonable burden on a single negligent tortfeasor . . . these decisions appear to ignore the significant role that insurance presently plays in spreading the risk of loss among

an injured firefighter somehow completely alter his behavior?¹⁴¹ In sum, whether abolishing the rule would actually alter behavior is debatable, but this questionable concern does not justify denying firefighters and police officers an essential right enjoyed by all other persons.

F. The Public-Policy Catch-All Rationale

A final justification is the “policy decision that the tort system is not the appropriate vehicle for compensating public safety employees for injuries sustained as a result of negligence that creates the very need for their employment.”¹⁴² Assuming for argument’s sake that this rationale is not merely a disguised version of the assumption-of-risk and training-and-compensation rationales, this rationale is nonetheless flawed because it is not the best public policy. The best public policy would encourage people to take on these key public safety jobs. And it would protect the courageous people who are willing to serve in these roles to the fullest extent possible when they are injured in the course of ensuring society’s safety, rather than placing them “beyond the pale of a judicial philosophy that searches for just and fair results.”¹⁴³

In effect, the rule punishes people who serve as police officers and firefighters by taking away a right to compensation that other citizens enjoy—treating them as “second-class citizens.”¹⁴⁴ Some suggest that the rule does not deny compensation, but rather shifts the cost of the compensation onto the public

policyholders. Many fires arise on business premises or as a result of commercial activities . . . and such commercial ventures will normally carry liability insurance that would cover a fireman’s tort action In addition, comprehensive “homeowners” policies available to the average homeowner or renter commonly contain personal liability coverage that would shield a negligent individual from the full brunt of the fireman’s claim.

Walters v. Sloan, 571 P.2d 609, 619 (Cal. 1977) (Tobriner, J., dissenting)

141. Note that in the absence of the rule, members of the public could still raise the defense of assumption of risk or contributory negligence.

142. Espinoza v. Schulenburg, 129 P.3d 937, 939 (Ariz. 2006).

143. Berko v. Freda, 459 A.2d 663, 673 (N.J. 1983) (Handler, J., dissenting), *superseded by statute*, N.J. STAT. ANN. § 2A:62A-21 (West 1993), *as recognized in* Rowe v. Mazel Thirty, LLC, 34 A.3d 1248 (N.J. 2012). Justice Handler goes on to state:

I am at a loss to understand why this judicial philosophy is repudiated in a case such as this, where the rescuer is not simply a good samaritan but a professional, who is not simply “invited” to rescue but is expected to rescue. In this context, the foreseeability of rescue, which is the predicate for imposing a duty of care, moves from a reasonable anticipation to virtual certainty. If anything, the strength of the duty of care owed to such a rescuer by the negligent party should increase with the certainty of the foreseeability that rescue will be a consequence of the negligence.

Berko, 459 A.2d at 673.

144. Brief of Amicus Curiae Arizona Concerns of Police Survivors, Inc. at 1, *Read v. Keyfauber*, 308 P.3d 1183 (Ariz. Ct. App. 2013) (No. 12–0007).

at-large rather than the individual negligent actor.¹⁴⁵ However, by “denying a fireman any recovery from a negligent tortfeasor, the [firefighter’s] rule does not simply require the fireman to recover his tort damages from the public at large, but instead totally precludes the fireman from recovering these damages at all.”¹⁴⁶ For example, firefighters and police officers cannot recover damages beyond the strict workers’ compensation limits for death and permanent-disability compensation, nor can they recover for pain and suffering.¹⁴⁷

Moreover, spreading the costs of these accidents fails to accomplish the two core goals of tort law: compensation and deterrence.¹⁴⁸ It fails to achieve compensation for the reasons explained in the preceding paragraph. It fails to accomplish deterrence because individual tortfeasors are not forced to internalize the costs of the injuries that they cause, beyond their contribution to the general tax fund. Thus, the firefighter’s rule forces firefighters and police officers to “shoulder a loss which other employees are not required to bear[,]”¹⁴⁹ and it “provides ‘little economic incentive to [landowners] to maintain their premises in a reasonably firesafe condition.’”¹⁵⁰

The facts of *Anderson v. Cinnamon*, a case from the Missouri Supreme Court, are illustrative of the undesirable public policy created by the firefighter’s rule.¹⁵¹ In that case, firefighters were called to put out a fire at a multi-story apartment building.¹⁵² The building had a large porch, which was in a dangerous condition because it was not securely attached to the building or supported.¹⁵³ The owner of the building was aware of the unsafe condition, was present at the scene of the fire, and knew that firefighters were on the porch.¹⁵⁴ Nonetheless, he took no action to warn the firefighters of the “dangerous trap” that they were in.¹⁵⁵ The porch collapsed while multiple firefighters were on and underneath it.¹⁵⁶ An injured firefighter and the widow of a deceased firefighter brought negligence suits against the building owner to recover for their losses; both suits were dismissed as

145. See, e.g., Strauss, *supra* note 9, at 2037.

146. *Walters v. Sloan*, 571 P.2d 609, 619 (Cal. 1977) (Tobriner, J., dissenting); see also Louie A. Wright, *The Missouri “Fireman’s Rule”: An Unprincipled Rule in Search of a Theory*, 58 UMKC L. REV. 329, 351–55 (1990) (criticizing the cost-spreading rationale).

147. ARIZ. REV. STAT. ANN. § 23-1045 (2016) (limiting permanent-disability compensation); *id.* § 23-1046 (limiting death compensation).

148. See DOBBS ET AL., *supra* note 8, at § 10 (“The most commonly mentioned aims of tort law are (1) compensation of injured persons and (2) deterrence of undesirable behavior.”).

149. *Walters*, 571 P.2d at 619 (Tobriner, J., dissenting).

150. Wright, *supra* note 146, at 354 (citing AMERICA BURNING: THE REPORT OF THE NATIONAL COMMISSION ON FIRE PREVENTION AND CONTROL 4–7 (1973)); GUIDO CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 69–138 (1970).

151. 282 S.W.2d 445 (Mo. 1955).

152. *Id.* at 446.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

barred by the firefighter's rule.¹⁵⁷ This outcome fails to (1) compensate the victims of this incident, (2) deter the business owner from causing similar incidents in the future, and (3) allocate liability to the person who was in the best position to prevent the incident.

Similarly, in 1988 in Kansas City, Missouri, firefighters were called regarding a pickup truck on fire at a construction site.¹⁵⁸ Next to the pickup truck were two inadequately marked trailers filled with 50,000 pounds of explosives and fuel oil.¹⁵⁹ Ultimately, six firefighters were killed when the trailers exploded leaving craters 80 to 100 feet in diameter in the ground.¹⁶⁰ The initial pickup-truck fire was set by an arsonist.¹⁶¹ Multiple decedents of the firefighters brought suit against the site owner, the lessor of the site, and various subcontractors to recover for their negligent failure to warn of explosives.¹⁶² The Missouri trial court held that the firefighter's rule barred their suits, but the court of appeals reversed, finding that there was a genuine dispute as to whether the "hidden danger" exception applied.¹⁶³ In cases with facts like these, the inequity of the rule is glaring. Public policy should encourage businesses and individuals to take fire precautions and to warn firefighters of imminent lurking dangers on their property. And public policy should hold businesses and individuals accountable when they cause tragedies like this one.

In sum, the public-policy rationale, like the prior five rationales, is an unsatisfactory justification for the firefighter's rule. Surely the best public policy cannot be a rule that not only gives the public a license to recklessly endanger public-safety officers with no consequences, but also leaves public-safety officers uncompensated when they are injured in the name of the public good.

III. THE TAKEAWAY

In Arizona, if a firefighter, a police officer, and an EMT are injured on duty while responding to a car accident, only the EMT—not the firefighter or the police officer—may seek damages from the negligent driver that caused the accident. This anomalous result, along with the fact that parties in other states have successfully convinced courts to expand the rule to veterinarians and tow truck drivers, and that a party in Arizona was able to convince a court to expand the rule to caregivers, is evidence of a significant flaw in the firefighter's rule.

157. *Id.* at 446–51; *Natasio v. Cinnamon*, 295 S.W.2d 117 (Mo. 1956). Note that these cases do not refer to the "firefighter's rule" by name, but rather discuss the rule in terms of a firefighter's classification as a licensee. *Id.*

158. *Six Kansas City Firefighters Killed in 1988 Explosion*, KANSAS CITY STAR: KC TRUE CRIME, (July 10, 2014, 12:51 PM), <http://www.kansascity.com/news/special-reports/kc-true-crime/article704711.html>; Wright, *supra* note 146, at 329–30.

159. *Id.*

160. *Id.*

161. *Id.*

162. *See Kilventon v. United Mo. Bank*, 865 S.W.2d 741, 743 (Mo. Ct. App. 1993).

163. *Id.* at 743–45.

Recognizing the harshness of the rule in certain cases, Arizona courts have crafted multiple exceptions.¹⁶⁴ The problem with these exceptions is that they are not meaningfully tied to a clear rationale—because the rationales themselves are too vague to give concrete guidance.¹⁶⁵ They also lead to an unpredictable, inconsistent doctrine. And, most importantly, the exceptions require courts to inquire as to whether it is appropriate under the particular circumstances to bar the suit because the firefighter or officer (or caregiver) assumed the particular type of risk involved—a determination reserved for juries in Arizona.¹⁶⁶

Thus, the firefighter's rule might seem to make sense on the surface, but beneath this surface lies flawed reasoning and patent injustice. A Hawaii Supreme Court justice summarized the state of the firefighter's rule as follows: "When a rule of law is so difficult of explanation that courts adopting it have tried to buttress it with varying, shaky, legal explanations, and have shot it full of exceptions, it is usually because the rule is unjust. That is the case here."¹⁶⁷

Arizona should not maintain the status quo simply because the rule is longstanding and other states still follow it. The Arizona Supreme Court should not expand the firefighter's rule any further, and indeed should take affirmative steps to ameliorate the injustice of the rule—following the lead of at least five other states.¹⁶⁸ These ameliorative steps could come in the form of (1) refusing to expand the rule to caregivers in *Sanders v. Alger* and using the case as an opportunity to clarify the rule's rationales; (2) scaling back the scope of the rule; or (3) abolishing the rule altogether.

A. Providing Clear Guidance in Sanders v. Alger

At the very least, in its pending *Sanders v. Alger* opinion, the Court should refuse to expand the rule to caregivers. Applying the rule to caregivers would be an unprecedented expansion of a rule that is already standing on shaky ground. It would mean that the rule's scope is potentially limitless—applying to almost any profession that involves a regularly occurring risk. It could turn the default rule "that liability follows tortious wrongdoing"¹⁶⁹ into the exception for injuries sustained in the course of a person's employment.

164. See *supra* Parts II & III.

165. This is not to say that the courts did not attempt to connect the exceptions to the rationale, but rather that the rationales are so broad that there was no way for the courts to do so.

166. See *Gunnell v. Ariz. Pub. Serv. Co.*, 46 P.3d 399 (Ariz. 2002), for a discussion of the defense of contributory negligence and the requirement that it go to a jury in Arizona.

167. *Thomas v. Pang*, 811 P.2d 821, 826 (Haw. 1991) (Padgett, J., dissenting).

168. *Christensen v. Murphy*, 678 P.2d 1210 (Or. 1984) (abolishing the rule in Oregon); MINN. STAT. ANN. §604.06 (West 1991) (abolishing the rule in Minnesota in 1983); FLA. STAT. ANN. § 112.182 (West 1995) (abolishing the rule in Florida in 1990); N.Y. GEN. OBLIG. LAW § 11-106 (McKinney 1996) (abolishing the rule in New York in 1996); N.J. STAT. ANN. § 2A:62A-21 (West 1993) (abolishing the rule in New Jersey in 1994).

169. *Stone v. Ariz. Highway Comm'n*, 381 P.2d 107, 112 (Ariz. 1963).

Additionally, the Court should view *Sanders* as a wake-up call, signifying that lower Arizona courts may not be applying the rule as “narrowly” as the Court intended. The Court should take advantage of this long-overdue opportunity to re-examine and clarify the rule. The Court should clarify precisely the rationales behind the rule in order to guide lower courts in applying the rule and guide the public in having meaningful discourse about the policy behind the rule. Rather than referring generally to “public policy” and mentioning a variety of rationales briefly, the Court should pinpoint exactly what the rationale(s) are and what policies they are based on. This clarification is essential to guide lower courts in fashioning a consistent doctrine with appropriate exceptions.

By declining to extend the rule to caregivers and clarifying the rationales behind the rule, the Court will send a message to lower courts that the rule truly needs to be applied narrowly. While this would certainly be a step in the right direction, the Court could, and this Author argues, should, go further—by affirmatively limiting the scope of the rule.

B. Scaling Back the Scope of the Rule

In *Sanders v. Alger*, or in another appropriate case, the Court could limit the scope of the rule in one of two meaningful ways. First, the Court could hold that the firefighter’s rule applies only to firefighters. This would allow the Court to scale back the rule while still honoring the precedent established by *Espinoza*. It would simplify the doctrine, and partially strengthen its rationale because firefighters face “mostly predictable” risks that are addressed in their training, whereas police officers generally face more unpredictable and complex risks.¹⁷⁰ It would also provide Arizona the opportunity to observe the practical effects of abolishing the rule for police officers before deciding to abolish the rule entirely.

Second, the Court could hold that the firefighter’s rule does not apply when defendants act with gross negligence, recklessness, or intentionally. In other words, even in cases where none of the current exceptions apply, that is, where firefighters are injured on duty in emergency situations by the conduct that occasioned the need for their services, defendants could nonetheless be held liable if their conduct was grossly negligent, reckless, or intentional. This limit would ensure that ordinary citizens are held liable only when the risks created by their conduct far outweigh the benefits. Moreover, it would ameliorate some of the most egregiously unjust cases of preventable injury or death to firefighters and police officers.

Adopting either or both of these limits would be a logical way to segue into abolishing the rule entirely. It would give the Court and the public an opportunity to observe the effects of significantly retreating from the rule, without fully abolishing it. The Court would have an opportunity to assess whether the concerns about a flood of litigation are legitimate or not. However, these preliminary limits are not mandatory; the Court could overrule *Espinoza* and abolish the rule without taking these preliminary steps.

170. See Strauss, *supra* note 9, at 2045–46.

C. *Abolishing the Rule*

The Court should consider abolishing the rule entirely, in *Sanders* or in another appropriate case, because the rule is (1) unnecessary; (2) in tension with Arizona's strong policy of preserving tort remedies; and (3) unsound as a matter of policy. The rule is unnecessary because juries are fully capable of answering the assumption-of-risk inquiry on a case-by-case basis. The rule conflicts with Arizona's deep-rooted policy of preserving tort remedies because it categorically denies a remedy where one would otherwise be available under the rescue doctrine. And finally, it is unsound as a matter of policy because each of the traditional policy arguments presented to support the rule is flawed. Public policy should incentivize—not punish—people who are willing to take on some of the State's most important jobs. And Arizona's tort system should incentivize the public to prevent fires and deter negligent fire-starters from engaging in similar conduct in the future.

Abolishing the firefighter's rule would mean that all individuals owe an ordinary duty of reasonable care to firefighters and police officers, and it would place all injured rescuers in the same position.¹⁷¹ It would not mean that individuals are always liable to firefighters and police officers. It would simply require a jury to make that determination based on the specific circumstances of the injury.

Some argue that abolishment of the firefighter's rule should come from state legislatures rather than courts.¹⁷² They assert that legislatures are better positioned to balance the various interests at stake and make a policy determination as to whether an entire class of people should (or should not) be denied a duty of care.¹⁷³ However, the judicial branch is equally capable of determining whether a common-law doctrine comports with Arizona's tort liability policies. There is no reason why such a rule—already created by the courts—could not also be abolished by the courts now that the injustice and confusion of the rule have become apparent.

Whether by clarifying, narrowing, or abolishing the firefighter's rule, the Court or the Legislature should act as swiftly as possible to extinguish the injustice that the rule has perpetuated in Arizona for over 39 years. At the very least, in its pending *Sanders v. Alger* opinion, the Court should signal that the rule will not be expanded beyond its current scope, and clarify precisely the rationales behind the rule.

171. In Arizona, the ordinary duty of care is an "obligation, recognized by law, which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm." *Gipson v. Kasey*, 150 P.3d 228, 230 (Ariz. 2007). Because duty is a threshold legal issue decided by the judge before a jury considers the specific facts of the case, Arizona courts do not inquire into foreseeability or other fact-specific issues at the duty stage. *Id.* at 230–34.

172. *E.g.*, Strauss, *supra* note 9, at 2060–61 ("If the firefighter's rule is to be retained, perhaps the respective state legislatures should be the bodies to define the scope of the rule. A legislative body is likely in a much better position than the courts to substantively analyze all of the issues surrounding the rule and to define its proper scope.")

173. *Id.*

CONCLUSION

The firefighter's rule is unjust and, more importantly, unjustifiable. The rule discriminates against firefighters and police officers by denying them a basic right that other citizens enjoy: the right to a tort remedy for work-related injuries. The only satisfactory justification for the rule—assumption of the risk—is inapplicable in Arizona. Thus, Arizona courts have been forced to turn to a number of other unsatisfactory justifications. The result? A fact-dependent doctrine that lacks a unifying rationale. In light of Arizona's comparative fault system and its strong policy of preserving tort remedies, the firefighter's rule is improper in Arizona. In *Sanders v. Alger* or another appropriate case, the Arizona Supreme Court or Legislature should narrow the scope of the rule, or abolish it entirely.