

SUPREME COURT OF FLORIDA

CASE NO. 75,579

4th District No. 88-1204

T.C. Case No. 87-5236AA

JAMES LANZA, et ux.

Petitioners,

vs.

GARY PAUL POLANIN,

Respondent.

FILED

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APPEAL FROM THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA IN AND FOR THE
FOURTH DISTRICT

PETITIONERS' INITIAL BRIEF

Donald S. Hershman, P.A.
Florida Bar No. 269042

Attorney for Petitioners
Arbern Financial Centre
301 Yamato Road, Suite 1299
Boca Raton, FL 33431
(407) 241-6650

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PREFACE

The Petitioners, Police Officer James Lanza (hereinafter referred to as "Petitioner" or the "Petitioner-Police Officer" or the "Officer") and Barbara Lanza, his wife (hereinafter referred to as "Petitioner") were the Plaintiffs in the action before the trial Court and Appellants before the Court of Appeal. The Respondent, Gary Paul Polanin (hereinafter referred to as "Respondent") was the Defendant below.

Citations to the record are designated herein as (R.____.) Reference herein (App. "____".) is to the attached Appendix.

TABLE OF CITATIONS

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STATEMENT OF THE CASE AND FACTS

This is an appeal from an Order of the Fourth District Court of Appeal on rehearing which affirmed the trial Court's Final Summary Judgment in favor of Respondent and which certified the following question of great public importance to this Court.

IF A VEHICLE IS INVOLVED IN A TRAFFIC ACCIDENT, IS A PASSENGER IN THAT VEHICLE ENTITLED TO THE PROTECTION OF THE "FIREMAN'S RULE" IF HE NEGLIGENTLY INJURES THE POLICEMAN WHILE RESISTING ARREST.

Petitioners, a police officer and his wife, commenced this action to recover damages from Respondent whose conduct in resisting lawful arrest, which followed and was independent of an automobile accident the Officer was summoned to investigate, resulted in serious and permanent injury to the Officer. (R. 1-2.)

On December 13, 1986, Officer Lanza, then a nine-year veteran of the Boca Raton Police Department, was on duty in uniform, and patrolling in a marked police vehicle. At or about 10:15 P.M., Officer Lanza was dispatched to the scene of a two-car accident on a public street in Boca Raton. (R. 136.) Shortly after he arrived on the scene, Officer Lanza attempted to question Monica Harmon, the driver of one of the vehicles involved. However, Respondent, a passenger in Ms. Harmon's car, disrupted the accident investigation by repeatedly shouting, and screaming profanities, at Officer Lanza. (R. 150, 152, 154-155, 172, 175-176, 178.) Respondent had consumed alcoholic beverages prior to the incident and was apparently under the influence of

the same at the scene. (App. "C".) (R. 176-177.) Officer Lanza attempted, in vain, to explain the investigation to Respondent in an effort to halt the interference. (R. 154.) The Officer then requested that Respondent sit on the sidewalk at a distance from the accident scene and warned Respondent that if he continued to interfere with the investigation, Respondent would be arrested for obstructing justice. (R. 156.) Despite the warning, Respondent resumed his disruptive behavior when Officer Lanza began questioning Ms. Harmon. Officer Lanza then placed Respondent under arrest. (R. 156.)

Officer Lanza helped Respondent to his feet from his place on the sidewalk and began escorting Respondent to the squad car. Respondent went reluctantly. (R. 160.) As they approached the squad car, Officer Lanza attempted to handcuff Respondent. However, Respondent resisted and pulled away from the Officer, who then positioned himself to maintain control of Respondent. (R. 157-160, 204.) During the struggle that ensued, Officer Lanza suffered serious injury, including a tear of the rotator cuff in his right shoulder. (R. 168-171, 204-205.) Officer Lanza's injuries were treated and subsequently operated upon, and he continues to undergo prescribed therapy.

Officer Lanza is right-handed and, as a result of the injuries suffered, he cannot draw his firearm from its holster in the proper manner. (R. 93-94.) Officer Lanza was unable to resume his position as an active duty police officer and was forced to retire from the Boca Raton Police Force.

On or about March 1, 1988, Respondent moved the Court for a summary judgment, alleging that Petitioners' personal injury suit against Respondent for job-related injuries suffered by Officer Lanza is barred under the so-called Fireman's Rule. (R. 55-58.) However, as applied in Florida, the Fireman's Rule only precludes liability for conduct or conditions which cause the presence of the officer and cause him or her injury. Notwithstanding the controlling substantive law and the fact that Petitioners state a cause of action founded upon Respondent's independent negligent conduct, which proximately caused injury to Officer Lanza but did not cause the Officer's presence at the scene of the injury, the Court granted Respondent's Motion for Summary Judgment on April 8, 1988. (R. 72.) On April 11, 1988, Final Summary Judgment was granted in favor of Respondent. (R. 73.) Appellant subsequently moved for a Rehearing on Respondent's Motion for Summary Judgment, based on the Court's erroneous application of the Fireman's Rule. (R. 209-211.) Petitioners' Motion was denied summarily. (R. 215.) Respondents appealed the Court's Final Summary Judgment to the Fourth District Court of Appeal.

The Fourth District Court of Appeal in its opinion filed August 23, 1989, reversed and remanded the matter to the trial court for further proceedings. (App. D.) The Respondents then filed a Motion For Rehearing which resulted in the opinion of the Fourth District Court of Appeal, dated February 7, 1990, which granted the Motion For Rehearing, withdrew and cancelled the

original opinion, and substituted its new opinion which affirmed the Summary Final Judgment of the court below. (App. E.)

The Fourth District Court of Appeal, which was clearly uncomfortable with its ruling, then certified the above-referenced question to this Court. As a result of that certification, the instant discretionary appeal was filed.

SUMMARY OF ARGUMENT

As a matter of law, the circumstances under which the Petitioner/Police Officer was injured permit Petitioners' personal injury claims against Respondent. The Florida Fireman's Rule does not bar a tort action, where as here, a police officer is injured in the line of duty by an independent act of negligence that is not the cause of the officer's presence at the scene of the injury, and which occurred subsequent to the officer's arrival at the scene.

ARGUMENT

The Fireman's Rule Does Not Bar Tort Claims By An Officer Who Is Injured In The Line Of Duty By Misconduct That Is Not The Cause Of The Officer's Presence At The Scene Of The Injury And Which Is An Independent Act of Misconduct.

The Fireman's Rule does not uniformly bar recovery for injuries sustained by a Police Officer in the discharge of duty. Bovino vs. McDonald's Corporation, 509 So.2d 991 (Fla. 4th DCA 1987). Rather, Florida courts have stated that the Rule was not intended to bar recovery for acts of misconduct which were not the cause of the officer's presence at the scene of the injury. See, Preferred Risk Mutual Insurance Company vs. Saboda, 489 So.2d 768, 770 n.2 (Fla. 5th DCA 1986) (citing Price vs. Morgan, 436 So.2d 1116 (Fla. 5th DCA 1983), rev. den., 447 So.2d 887 (Fla. 1984), and Whitlock vs. Elich, 409 So.2d 110 (Fla. 5th DCA 1982)). The Fireman's Rule only shields the Defendant from liability for acts that furnish the occasion for the officer's presence. See, e.g., Rishel vs. Eastern Air Lines, Inc., 466 So.2d 1136, 1138 (Fla. 3rd DCA 1985); Whitten vs. Miami-Dade Water and Sewer Authority, 357 So.2d 430, 431-432 (Fla. 3rd DCA 1978), cert. den., 364 So.2d 894 (Fla. 1979). Misconduct in addition to and subsequent to that which necessitated the officer's presence is redressable in tort. Preferred Risk, 489 So.2d at 770, n.2. Moreover, police officers do not consent voluntarily to being injured, nor does the doctrine of implied assumption of the risk apply, merely by virtue of the officers' choice of profession. See, Peltz, "The Transformation Of The

Fireman's Rule From A Limited Premise Liability Doctrine Into An Illogical Broad Barrier To Fair Compensation", 17 Stet. L. Rev. 137, 146-148 (1987) (citing Blackburn vs. Dorta, 348 So.2d 287 (Fla. 1977), and Black vs. District Board of Trustees of Broward Community College, 491 So.2d 303, 306 (Fla. 4th DCA 1986)).

The circumstances under which the Petitioner/Police Officer was injured clearly preclude application of the Fireman's Rule. The Officer was summoned to the scene of an automobile accident on a public street. After the Officer arrived at the scene, Respondent, a passenger in one of the cars, committed additional and subsequent acts of misconduct which caused injury to the Officer. Respondent's misconduct was clearly separate and distinct from that to which the Officer responded and anticipated responding to. The Fireman's Rule does not apply, and Respondent should be held liable in tort.

CONCLUSION

The public policy behind the Fireman's Rule does not apply to this Defendant/Respondent. Curiously, both the majority and dissenting opinions contained in the Fourth District Court of Appeal's opinion on rehearing verbalize the public policy behind the Fireman's Rule, i.e. to encourage persons who require police or fire department assistance to call for help instead of failing to do so because of possible civil liability.

Clearly this Respondent does not belong to the class of persons sought to be protected by the Rule. Arguably, the driver is protected by the Rule, but the Defendant/Respondent, who happened to be a passenger and who improperly involved himself in the situation, should not be protected. He is no different from a bystander to a fire or to an automobile collision who negligently injures a police officer or a fireman in the performance of their duties.

For all of the foregoing, the opinion of the Fourth District Court of Appeal on rehearing should be reversed.

Respectfully submitted,

HERSHMAN & ROTH

By: Donald S. Hershman
DONALD S. HERSHMAN, ESQ.
Florida Bar No. 269042

Attorneys for Petitioners
Arbern Financial Centre
301 Yamato Road, Suite 1299
Boca Raton, FL 33431
(407) 241-6650

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail this 15th day of March, 1990, to: Nancy P. Maxwell, Esq., METZGER, SONNEBORN & RUTTER, P.A., P. O. Box 024486, West Palm Beach, Florida 33402.



DONALD S. HERSHMAN