

**CLAIM BY LAW ENFORCEMENT
OFFICER FOR DOG BITE AGAINST
OFFICER WHO HANDLED DOG AND
EMPLOYER BARRED BY
FIREFIGHTERS' RULE**



JAMES GRAFTON RANDALL, ESQ.



CASENOTE

JAMES GRAFTON RANDALL, ESQ.

**A CLAIM BY A LAW ENFORCEMENT OFFICER WHO WAS BITTEN BY
A POLICE DOG HANDLED BY ANOTHER LAW ENFORCEMENT
OFFICER IS BARRED BY THE “FIREFIGHTERS’ RULE”.**

Filed 3/28/12 Sullivan v. City of Huron CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

DOUGLAS P. SULLIVAN et al.,

Plaintiffs and Appellants,

v.

CITY OF HURON et al.,

Defendants and Respondents.

F061294

(Super. Ct. No. 10CECG00324)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Donald R. Franson, Jr., Judge.

Law Office of Mark E. Merin, Mark E. Merin and Cathleen A. Williams, for Plaintiffs and Appellants. Emerson, Corey, Sorensen, Church & Libke and Ryan D. Libke for Defendants and Respondents.

Appellant Douglas P. Sullivan, a Fresno County deputy sheriff, and Michael Lyons, a police officer with the City of Huron (City), both responded to an office burglar alarm. Lyons released City's K-9 police dog to search for the burglar, but the dog attacked and injured Sullivan. The trial court concluded Sullivan's personal injury claims for strict liability for dog bite and negligence were barred by the firefighter's rule and sustained Lyons and City's (collectively, respondents) demurrer without leave to amend.

Sullivan contends the firefighter's rule does not bar his claims because (1) there must be an "emergency" for the firefighter's rule to apply and the complaint can be read to allege no emergency when Lyons released the dog, and (2) he has alleged facts that constitute the independent cause exception to the firefighter's rule. He also claims the trial court abused its discretion by denying leave to amend the complaint. We affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

The complaint alleges that Fresno County Deputy Sheriff Manuel Flores and Sullivan responded to an audible burglary alarm at an office building near the City of Huron in Fresno County. They parked their patrol cars near the northwest corner of the building. Lyons arrived on the scene with his K-9 dog at the southeast corner of the building. Sullivan positioned himself about 50 feet from the northwest corner of the building to observe and assist in apprehending anyone who might exit and head in his direction. Flores and Lyons entered the building through a shattered sliding glass door to look for an intruder. Inside the building, Lyons negligently released his dog without maintaining control of the dog by sight or voice commands. The dog left the building through the shattered glass door on the south wall and viciously attacked Sullivan, inflicting permanent injuries.

Sullivan and his wife sued respondents for personal injury and loss of consortium on theories of strict liability for dog bite (Civ. Code, § 3342) and negligence in releasing the dangerous animal. Respondents demurred to the complaint on the ground that the claims were barred by the firefighter's rule. The trial court sustained the demurrer without leave to amend, finding that the firefighter's rule and case law barred a law enforcement officer from suing another officer to recover for injuries caused by the negligence of the other officer while the officers jointly carried out their law enforcement duties.

DISCUSSION

Standard of Review

A ruling on a general demurrer decides the case on the merits on the alleged facts without a trial. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 437, fn. 4.) In reviewing an order sustaining a demurrer, we examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory. (*Village Northridge Homeowners Assn. v. State Farm Fire & Casualty Co.* (2010) 50 Cal.4th 913, 921.) We assume the truth of all material facts properly pled (*ibid.*), as well as facts that may be inferred from those alleged. (*Westamerica Bank v. City of Berkeley* (2011) 201 Cal.App.4th 598, 607 (*Westamerica Bank*)). If a complaint shows on its face that its claims are barred, it is subject to demurrer. (See, e.g., *Walters v. Sloan* (1977) 20 Cal.3d 199, 201-202 [demurrer properly sustained where police officer's complaint for personal injuries disclosed that the claim was barred by the fireman's

rule].) If we agree that no liability exists as a matter of law on the facts alleged, we affirm the judgment. (*Westamerica Bank*, at p. 607.)

We review the order denying leave to amend for abuse of discretion. The trial court abuses its discretion when it sustains a demurrer without leave to amend if there is a reasonable possibility the plaintiff can amend the complaint to allege any cause of action. (*Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 711.)

Firefighter's Rule

The firefighter's rule, which applies equally to police officers injured in the line of duty, is an application of the doctrine of primary assumption of risk. (*Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532, 538 (*Neighbarger*)). Under the firefighter's rule, a member of the public whose conduct causes the intervention of the firefighter owes no duty of care with respect to the original negligence that caused the firefighter's intervention. The injured firefighter cannot seek damages from the negligent party. (*Ibid.*)

The firefighter's rule has four justifications: (1) firefighters should not be permitted to sue based on the very negligence they are employed to confront; (2) firefighters already are adequately compensated with special salary, retirement and disability benefits for undertaking their hazardous work; (3) the public pays taxes to secure the services of firefighters and should not have to pay twice through taxation and individual liability for that service; and (4) abrogation of the rule would embroil the courts in relatively pointless litigation over rights of indemnification among the employer, the retirement system and the defendant's insurer. (*Neighbarger, supra*, 8 Cal.4th at pp. 539-540.)

Exception for No "Emergency"

The firefighter's rule is subject to both judicial and statutory exceptions. (See 6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, §§ 853-859, pp. 75-85.) Sullivan contends the firefighter's rule applies only to emergency situations and it is reasonable to infer from the allegations of the complaint that the emergency no longer existed when Lyons released the dog. Specifically, the complaint does not state the time interval between when the burglar alarm was triggered and when the officers arrived. Sullivan asserts that the longer the interval of time involved, the less likely it is that the burglar or vandal who triggered the alarm would still be present, thereby justifying Lyons's release of the police dog. In addition, because the complaint alleges that Lyons "released his canine ... without controlling the canine's exit from the building and when ... LYONS was unable to control the canine by sight or voice commands," it implies there was adequate time and opportunity for Lyons to inspect and shut off exits from the building so his police dog would not run freely from his command and control and attack other officers responding to the alarm.

Respondents counter that the firefighter's rule does not require an emergency. Rather, as pertinent to this case, the injury must occur during law enforcement operations.

Many cases applying the firefighter's rule involve situations commonly recognized as emergencies, but not all. For example, in *Hamilton v. Martinelli & Associates* (2003) 110 Cal.App.4th 1012 (*Hamilton*), the plaintiff, a corrections officer, suffered injuries to her neck and back while performing a maneuver during a required training course. She sued her instructor for negligence and intentional tort. (*Id.* at p. 1016.) The court concluded the doctrine of primary assumption of risk and the firefighter's rule barred her claims. (*Id.* at p. 1017.) The plaintiff's employment duties included restraining violent juvenile offenders. By participating in employer-

required training, she assumed the risk she would be injured while training to restrain a violent juvenile offender. (*Id.* at p. 1023.)

The court concluded that the firefighter's rule "extends not only to risk of injury while responding to emergency situations, but also to the risks of injury while training to respond to those emergencies." (*Id.* at p. 1026.)

Also, at least twice the Supreme Court has stated directly or by inference that the firefighter's rule applies when officers are injured during the course of their employment, regardless of whether the situation would meet Sullivan's definition of "emergency."

In an example Sullivan cites for another proposition, the Supreme Court stated, "a police officer who while placing a ticket on an illegally parked car is struck by a speeding vehicle may maintain [an] action against the speeder but the [fireman's] rule bars recovery against the owner of the parked car for negligent parking." [Citation.]" (*Lipson v. Superior Court* (1982) 31 Cal.3d 362, 368.) Ticketing an illegally parked vehicle does not meet Sullivan's definition of "emergency," but the Supreme Court recognized that the situation fell within the firefighter's rule.

Likewise, in *Hubbard v. Boelt* (1980) 28 Cal.3d 480, 483, the court stated: "We conclude that such recovery is precluded by reason of the so-called 'fireman's rule,' which bars certain tort causes of action by firemen and policemen injured during the course of their hazardous occupations. [Citation.]"

Sullivan cites a number of cases that describe the situation that precipitated the firefighter's or law enforcement officer's presence at the scene as an emergency. A commonsense reading of those cases discloses that the rule applies when an officer is injured during the course of his or her occupation, which is commonly recognized as involving emergencies. Sullivan has cited no case, other than *Hamilton, supra*, 110 Cal.App.4th 1012, where the court considered whether the law enforcement situation during which the injury occurred involved sufficient immediate peril to meet the dictionary definition of "emergency."

We conclude Sullivan's complaint alleged a situation that fell squarely within the firefighter's rule. Responding to a burglar alarm and searching the building for a suspect is classic hazardous law enforcement activity, regardless of the amount of time since the alarm was triggered or the officers were at the scene. The search of a burglarized building brings with it risks of harm, such as the presence of burglars, who may be armed and hiding. Officers use police dogs, with their superior sense of smell, speed and agility, to detect and flush out hiding suspects, thereby reducing the risk of harm to the officers. That the dog may attack a fellow officer at the scene is a risk inherent in the activity of searching the building. As a matter of law, the alleged situation demanded law enforcement intervention, thereby bringing it within the firefighter's rule.

Exception for Independent Cause

Courts have recognized an exception to the firefighter's rule for independent cause. Under this exception, the firefighter's rule negating liability does not apply to independent acts of misconduct that are committed after the firefighter or police officer has arrived on the scene. (*Neighbarger, supra*, 8 Cal.4th at p. 538.) This exception has been applied mainly in police officer cases. (6 Witkin, Summary of Cal. Law, *supra*, § 856, pp. 78-79.)

The trial court, in sustaining the demurrer to Sullivan's complaint, concluded the complaint did not allege any acts of independent misconduct. Sullivan contends this was error because he alleged that Lyons was negligent in unleashing the police dog that attacked him, which is independent of the triggered burglar alarm that precipitated his presence at the building. Respondents counter that the independent cause exception does not apply because Sullivan's injuries arose out of a joint law enforcement operation. And, under Supreme Court case law, a negligent officer and his employer are not liable when the negligence results in injury to another officer engaged in a joint law enforcement operation.

A number of cases apply the independent cause exception when the police officer or firefighter is injured by a separate independent act that occurred after he or she arrived on the scene.

For example, in *Donohue v. San Francisco Housing Authority* (1993) 16 Cal.App.4th 658, 663-664, a firefighter was injured when he fell on slippery steps while conducting a routine building inspection. The firefighter's rule did not bar the plaintiff's claims for premises liability and negligence. The negligent conduct that caused the injury was the housing authority's failure to install nonslip adhesive treads on the stairs, coupled with the improper practice of hosing down the stairs. Neither of these acts was the reason for the plaintiff's presence. Since the injuries were not caused by an act of negligence that prompted the plaintiff's presence in the building, the firefighter's rule did not bar his claim.

In *Stapper v. GMI Holdings, Inc.* (1999) 73 Cal.App.4th 787, 792-793, an injured firefighter sued the maker of a garage door that allegedly malfunctioned, trapping the firefighter in a burning garage. Although the plaintiff's injuries were the result of the fire, the firefighter's rule did not bar her product liability claims.

In *Vasquez v. N. County Transit Dist.* (9th Cir. 2002) 292 F.3d 1049, the plaintiff officer responded to a report of a railroad crossing gate arm that was stuck in the "down" position and blocking traffic. While the plaintiff directed traffic, another officer lifted the other crossing gate arm, which caused the gate arm near the plaintiff also to lift. Loose bolts securing that gate arm failed and the arm fell on the plaintiff's head, injuring him. The plaintiff sued for premises liability, product liability and general negligence. (*Id.* at pp. 1052-1053.) The court concluded that triable issues of fact existed as to whether the plaintiff's claims were barred by the independent cause exception: whether the collapse of the crossing gate arm was independent of the faulty lifting mechanism that brought the plaintiff to the scene. (*Id.* at p. 1060; see also *Malo v. Willis* (1981) 126 Cal.App.3d 543, 548, 549 [officer pulled a motorist over for speeding. The motorist negligently stepped on the clutch instead of the brake, hitting the officer. The fireman's rule did not apply because the negligent act that caused the injury was not the act that precipitated the officer's presence]; *Terhell v. American Commonwealth Associates* (1985) 172 Cal.App.3d 434, 441 [firefighter fell through an unguarded opening in the roof while in the course of his employment. Plaintiff's action for premises liability damages was not barred by the firefighter's rule].)

Finally, in a case analogous to Sullivan's, *Rose v. City of Los Angeles* (1984) 159 Cal.App.3d 883, 889 (*Rose*), one police officer negligently shot another officer during a joint operation by two police departments to serve search warrants on a suspected narcotics dealer. The injured officer brought a personal injury action against the other officer and the city. The court held, as a matter of law, the fireman's rule did not apply because the plaintiff's injury was caused by the defendant officer's separate and independent act, which was not the original circumstance to which the plaintiff was called.

If this were the extent of the law, Sullivan's arguments might be more convincing. *Rose*, however, is of questionable precedential value after our Supreme Court's ruling in *Calatayud v. State of California* (1998) 18 Cal.4th 1057 (*Calatayud*). We think the holding and rationale of *Calatayud* dispositive of Sullivan's action.

Calatayud

By way of background, in 1982 the Legislature enacted a statute that exempted willful misconduct from the immunity conferred by the firefighter's rule. In pertinent part, Civil Code section 1714.9 subdivision (a)(1) (section 1714.9(a)(1)) provides that "any person" is responsible for the results of his or her willful or negligent conduct causing injury to a peace officer where the conduct occurs after the person knew or should have known of the presence of the peace officer.

In *Calatayud, supra*, 18 Cal.4th 1057, the court considered whether the Legislature intended "any person," as used in section 1714.9(a)(1), to apply to fellow public safety members who are jointly engaged in the discharge of their responsibilities. There, CHP officers were attempting to detain a highly agitated man near a parking structure where shots had been fired. The CHP officers carried shotguns. The plaintiff, a city police officer, arrived in response to an "officer needs assistance" call. As the plaintiff approached to assist, one officer fell and his shotgun discharged and struck the plaintiff. (*Calatayud*, at p. 1060.) The court defined the issue as whether the firefighter's rule or the statutory exception should govern the negligent officer's, and his employer's, liability. (*Ibid.*) It concluded the Legislature did not intend section 1714.9(a)(1) to include fellow public safety members who are jointly engaged in the discharge of their responsibilities. (*Calatayud*, at p. 1072.) Four reasons supported this conclusion.

First, the effect of section 1714.9 is to reimpose a duty of ordinary care that would otherwise be abrogated by the firefighter's rule. It is logical to reimpose this duty on landowners, product manufacturers and members of the public. A peace officer's primary duty, however, is to protect the public. Imposing a duty of care to avoid injury to fellow officers creates the potential for conflicting duties, particularly when responding to a rapidly developing emergency or crisis. (*Calatayud, supra*, 18 Cal.4th at pp. 1068-1069.) Joint operations by peace officers are to be encouraged. Public safety would be compromised if the threat of a lawsuit accompanied every failure to exercise due care in making an arrest, quelling a disturbance, extinguishing a fire, or handling any of the other functions public safety members routinely discharge. (*Id.* at p. 1069.)

Second, the cost-spreading rationale is one of the critical public policy reasons underlying the firefighter's rule. (*Calatayud, supra*, 18 Cal.4th at p. 1070.) The public pays the bill, whether the firefighter is compensated by public benefits derived from taxation or from purchased insurance proceeds. Applying the firefighter's rule relieves public agencies of the burden of lawsuits over rights of subrogation that are pointless because the public fisc pays, regardless of the outcome.

The court found it highly unlikely the Legislature intended to encourage costly litigation, including derivative actions, when the public has already financed statutory compensation of injured public safety members. (*Ibid.*)

Third, extending section 1714.9(a)(1) to fellow officers jointly discharging their duties would impair efficient judicial administration, another policy underlying the firefighter's rule. The difficult problems of determining causation are multiplied in cases turning on the propriety of chosen police tactics that frequently involve a judgment call on the part of the officer who inadvertently inflicts injury. (*Calatayud, supra*, 18 Cal.4th at p. 1071.) In enacting the statute, the Legislature intended to make third party tortfeasors bear the consequences of their misconduct, not burden the public with greater costs for police, fire, and medical emergency protection. (*Id.* at pp. 1071-1072.)

Finally, Civil Code section 1714.9, subdivision (d) preserves the exclusivity of the Workers' Compensation Act: "The liability imposed by this section shall not apply to an employer of a peace officer" Thus, if the statutory exception applied to officers, an injured officer could sue when the negligent officer was employed by another agency but not when the officer was employed by his own employer. *Calatayud* concluded there was "no rational reason" for "liability to depend solely on whether the plaintiff and defendant wore different badges and uniforms when the risk of injury is the same." (*Calatayud, supra*, 18 Cal.4th at p. 1072.)

Sullivan argues that *Calatayud* "does not undermine [his] right to recovery, it underscores it." He claims *Calatayud* did not change the basic parameters of the firefighter's rule so the independent cause exception remains viable and applies to his allegation that Lyons negligently released his dog after they had arrived at the scene.

In addition, because *Calatayud* involved an emergency, it does not control this case where the emergency had dissipated when the dog was released. We consider each contention.

First, *Calatayud* did change the basic parameters of the firefighter's rule and the independent cause exception. *Calatayud* made the firefighter's rule applicable and the independent cause exception inapplicable to law enforcement officers who injure another officer while they are jointly engaged in the discharge of their job responsibilities. Further, we disagree that *Calatayud* did not involve an independent act. The *Calatayud* court considered whether the officer should be liable for conduct causing injury that occurred after the "person knew or should have known of the presence of" the officer." (*Calatayud, supra*, 18 Cal.4th at pp. 1059-1061.) The only reasonable inference is that the tortious conduct at issue occurred independent of the conduct that caused the officers to arrive at the scene. (See also *McElroy v. State of California* (2002) 100 Cal.App.4th 546, 548-549 [firefighter's rule barred liability where CHP officers informally assisted with police activity that injured police officers]; *Farnam v. State of California* (2000) 84 Cal.App.4th 1448, 1455 (*Farnam*) [firefighter's rule barred claim where CHP officer's police dog bit police officer at the scene of an arrest]; *City of Oceanside v. Superior Court* (2000) 81 Cal.App.4th 269, 285 [firefighter's rule barred claim by government-employed lifeguard who was injured during joint rescue operation due to the negligence of another government-employed lifeguard].)

Second, we addressed Sullivan's "no emergency" arguments earlier in the opinion. We concluded that regardless of whether the precipitating situation is described as an "emergency," the firefighter's rule applies when the officer is injured while carrying out his law enforcement responsibilities. And, the situation alleged in this case—responding to a burglar alarm and searching for the suspect—falls squarely within the firefighter's rule.

Strict Liability for Dog Bites

Sullivan also contends that respondents are strictly liable under Civil Code section 3342, which provides that dog owners are strictly liable to any person who is bitten by their dog while in a public place or lawfully in a private place. Sullivan concedes that the firefighter’s rule may constitute a defense to a strict liability claim, but submits under *Calatayud*—the rule applies only in an emergency—and he has or can allege there was no emergency when the dog was released.

This argument fails for the same reasons stated earlier. We have concluded the complaint alleges a joint law enforcement operation, regardless of the imminent peril --analogous to that at issue in *Calatayud*. Further, the allegations that Lyons negligently unleashed his dog are similar to the allegations in *Calatayud* that the officer negligently handled his shotgun. Both involve officer negligence in the handling of a “tool” officers regularly use in their line of work. (See also *Farnam, supra*, 84 Cal.App.4th at pp. 1450, 1455 [firefighter’s rule barred claim for CHP officer’s negligent handling of police dog that bit plaintiff police officer at the scene of an arrest. The hazard posed by the police dog was inherent in the activity the public hired the police officer to perform].) Sullivan’s attempt to distinguish *Farnam* on its facts fails. In both cases, the injured officer alleged the canine officer handled the dog negligently.

Leave to Amend

Sullivan also argues that the trial court abused its discretion when it refused to allow him to amend his complaint. Amending the complaint to allege “‘no emergency’ existed when defendant Lyons released his dog,” a factual conclusion, would not cure the defect. In reviewing the sufficiency of a complaint, we ignore conclusions of fact or law. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.)

Sullivan has not shown how he otherwise can amend the complaint regarding the circumstances of the officers’ presence at the building to render the firefighter’s rule inapplicable. Thus, the trial court’s refusal to allow an amendment is correct.

DISPOSITION

The judgment is affirmed. Costs are awarded to respondents.

CORNELL, J.

WE CONCUR:

WISEMAN, Acting P.J.

LEVY, J.