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TORTS—NEGLIGENCE—THE FIREMAN'S RULE—PUBLIC POLICY OR PREMISES LIABILITY? THE PROPER BASIS FOR THE FIRE FIGHTER'S RULE IN MARYLAND. *Southland Corp. v. Griffith*, 332 Md. 704, 633 A.2d 84 (1993).

I. INTRODUCTION

By the nature of their occupation, fire fighters and police officers face serious hazards resulting from other persons' negligent acts. The fireman's rule, however, generally precludes a police officer or fire fighter from recovering damages from tortfeasors for negligence encountered as a result of such occupational duties.¹ The Court of Appeals of Maryland most recently addressed Maryland's application of this rule in *Southland Corp. v. Griffith*.²

David Griffith, an off-duty police officer, his son, and several friends purchased food at a 7-11 convenience store owned by the Southland Corporation.³ In the parking lot outside the store, Griffith confronted and then attempted to arrest several teenagers who were throwing beer bottles and harassing a female passenger waiting in Griffith's car.⁴ As a result of his unsuccessful attempt to arrest them, Griffith was severely beaten by the teenagers.⁵ Griffith claimed that his son had asked the store clerk to call the police for backup on three occasions during the confrontation, but the clerk failed to make the call promptly.⁶

The trial court found that Griffith ceased to be off-duty once he attempted to make the arrest.⁷ The trial court therefore concluded that the fireman's rule was effective from the time Griffith announced he was a police officer, and that Southland was not liable for Griffith's injuries.⁸ The court granted summary judgment in Southland's favor.⁹

1. *See* *Flowers v. Rock Creek Terrace Ltd. Ptnshp.*, 308 Md. 432, 520 A.2d 361 (1987).

2. 332 Md. 704, 633 A.2d 84 (1993).

3. *Id.* at 707, 633 A.2d at 85.

4. *Id.*

5. *Id.* at 708, 633 A.2d at 85-86.

6. *Id.* at 708, 633 A.2d at 86.

7. *Id.* at 710, 633 A.2d at 87.

8. *Id.*

9. *Id.*

In reversing the lower court and allowing Griffith to recover damages from the convenience store, the Court of Special Appeals of Maryland held that the fireman's rule was inapplicable to this situation.¹⁰ The court found that the clerk's failure to call 911 was analogous to a "hidden danger," thus bringing the case into an exception to the rule.¹¹ The fireman's rule generally precludes an officer from recovering for negligence encountered as a result of occupational duties, however the "hidden danger" exception permits recovery of damages for unanticipated occupational risks.¹²

Although the Court of Appeals of Maryland agreed with the intermediate appellate court that the fireman's rule did not preclude Griffith from recovery,¹³ Maryland's highest court based its conclusion on different grounds. The court of appeals looked to the reason for the officer's presence at the 7-11; the officer entered the premises to purchase food, not to fight crime.¹⁴ The court never reached the issue of whether the fireman's rule applied, as the officer was held to be a "business invitee" to whom the shopkeeper owed a duty of reasonable care.¹⁵ Although there is generally no duty to aid another person in peril,¹⁶ the court held for the first time that there is a special relationship between shopkeepers and business invitees that gives rise to an affirmative duty to aid.¹⁷

The court of appeals' decision in *Griffith* is troublesome because its rationale suggests a reversion to the premises liability basis for the fireman's rule, which was explicitly abandoned, prior to *Griffith*, by the Maryland court in *Flowers v. Rock Creek Terrace Ltd. Partnership*,¹⁸ in favor of a public policy rationale. As the rule now exists under *Griffith*, the confusion that *Flowers* attempted to eradicate as to the proper basis and application of the fireman's rule will inevitably resurface in lower court decisions. By failing to follow and

10. *Griffith v. Southland Corp.*, 94 Md. App. 242, 253, 617 A.2d 598, 604 (1992), *aff'd*, 332 Md. 704, 633 A.2d 84 (1993).

11. *Id.* at 253, 617 A.2d at 603-04.

12. *Id.*

13. *Southland Corp. v. Griffith*, 332 Md. 704, 633 A.2d 84 (1993).

14. *Id.* at 715, 633 A.2d at 89. Griffith was off-duty at the time he arrived at the 7-11. *Id.* at 707, 633 A.2d at 85. In opposition to Southland's motion for summary judgment, Griffith argued that the fireman's rule was inapplicable because the rule does not apply to an off-duty police officer "whose status was that of a volunteer." *Id.* at 709, 633 A.2d at 86. The trial court found that Griffith was no longer "'off-duty' when he undertook to make the arrest." *Id.* at 710, 633 A.2d at 87.

15. *Id.* at 715, 633 A.2d at 89. According to the court of appeals, this duty of reasonable care was not met when the clerk failed to call 911 as requested. *Id.* at 720, 633 A.2d at 91-92.

16. *Id.* at 716, 633 A.2d at 90.

17. *Id.* at 719, 633 A.2d at 91.

18. 308 Md. 432, 520 A.2d 361 (1987).

clarify the application of the *Flowers* rule, the court missed an opportunity to develop a limited and consistent approach to the fireman's rule. Further, the court of appeals did not fully address the holding by the court of special appeals that gave employees an affirmative duty to call 911 at the request of an officer in peril.¹⁹

II. BACKGROUND

A. *The Fireman's Rule*

To establish a cause of action for negligence, a plaintiff must demonstrate that the defendant owed the plaintiff a duty of care,²⁰ that the defendant breached that duty, that injury was suffered by the plaintiff, and that the injury proximately resulted from the breach of that duty.²¹ There are, however, exceptions to the general rule of recovery for negligence, even when all four elements are met. Maryland, like most jurisdictions, adopted the fireman's rule,²² which generally precludes fire fighters and police officers²³ from recovering damages for negligence when the injury occurred while protecting the public.²⁴

The fireman's rule traces its origins back more than a century under the common law to the case of *Gibson v. Leonard*.²⁵ In *Gibson*, the appellant was an on-duty fire fighter who fell and injured himself when the elevator he was riding broke and crashed to the ground.²⁶ The court refused to allow the fireman to recover from

19. See *Griffith v. Southland Corp.*, 94 Md. App. 242, 258-59, 617 A.2d 598, 606 (1992), *aff'd*, 332 Md. 704, 633 A.2d 84 (1993).

20. See *Village of Cross Keys, Inc. v. United States Gypsum Co.*, 315 Md. 741, 751, 556 A.2d 1126, 1131 (1989); *Jacques v. First Nat'l Bank of Md.*, 307 Md. 527, 531, 515 A.2d 756, 758 (1986); see also *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 340 (Cal. 1976).

21. *Lamb v. Hopkins*, 303 Md. 236, 241, 492 A.2d 1297, 1300 (1985); *Scott v. Watson*, 278 Md. 160, 165, 359 A.2d 548, 552 (1976).

22. *Steinwedel v. Hilbert*, 149 Md. 121, 131 A. 44 (1925).

23. Although the name suggests otherwise, the fireman's rule applies equally to police officers. See *Flowers v. Rock Creek Terrace Ltd. Ptnshp.*, 308 Md. 432, 442 n.4, 520 A.2d 361, 366 n.4 (1987). There are, however, significant problems with applying the rule to both fire fighters and police officers. Although it is generally clear that when applying the rule to fire fighters, the act of negligence is one that requires the officer's presence, it is less clear with police officers. Police officers, by the nature of their job, are required to confront numerous types of difficult and disorderly persons. It is thus difficult to determine when a police officer goes beyond the scope of his or her "anticipated occupational risk." See *infra* note 58 and accompanying discussion of exceptions to the rule.

24. *Flowers*, 308 Md. at 446-47, 520 A.2d at 368.

25. 32 N.E. 182 (Ill. 1892).

26. *Id.* at 183.

the landowner for his injuries, even though the landowner may have been negligent.²⁷ The court analyzed the duty of the landowner to keep the premises safe for the fire fighter in terms of premises liability,²⁸ stating that at the time the fire fighters entered the premises, they were licensees on the property.²⁹ The license to be on the property, the court stated, arose not from permission by the landowner, but rather from the public at large, as the fire fighter was on the land by public right, for the protection of the public.³⁰ Finding that the landowner owed the fire fighter no greater duty than to any other licensee, the court stated that

[i]t is the well-settled doctrine that a mere naked license or permission to enter premises does not impose an obligation on the owner or person in possession to provide against the dangers of accident; and it surely cannot detract from the applicability of the rule that the license or permission has its origin in a source other than such owner or person in possession.³¹

Thus, the court in *Gibson* resolved the issue of the landowner's liability to a fire fighter in favor of the landowner, based strictly on the fire fighter's status on the land.³² This holding became popularly known as the fireman's rule.³³

Since *Gibson*, nearly every state has adopted the fireman's rule.³⁴ Three different rationales are used to explain the fireman's rule: (1) common law premises liability, (2) assumption of risk, and (3) public policy.³⁵ The rule as originally adopted by most states was based upon premises liability. This common-law rationale has been attacked by many courts, however, for being outdated and formalistic.³⁶

27. *Id.*

28. *Id.*

29. *Id.* at 184.

30. *Id.*

31. *Id.*

32. *Id.*

33. See David L. Strauss, Comment, "Where There's Smoke, There's the Fire-fighter's Rule: Containing the Conflagration After One Hundred Years," 1992 Wis. L. REV. 2031 (1992).

34. *Id.* at 2032. States that have not adopted the fireman's rule include Arkansas, Massachusetts, Washington, Pennsylvania, and Texas. *Id.* at 2032 n.6.

35. See *Carpenter v. O'Day*, 562 A.2d 595, 596, *aff'd*, 553 A.2d 638 (Del. 1988).

36. *Flowers v. Rock Creek Terrace Ltd. Ptnshp.*, 308 Md. 432, 444, 520 A.2d 361, 367 (1987). According to the court, the use of the premises liability theory as the basis for the rule ostensibly limits its application to the landowner context. *Id.* As tort law developed, other tort theories seemed more appropriate to serve the purpose of the rule, such as public policy and assumption of risk. *Id.* at 445, 520 A.2d at 367.

Under the premises liability theory, fire fighters and police officers were held to be licensees, not invitees.³⁷ An invitee is defined as

a person invited or permitted to enter or remain on another's property for purposes connected with or related to the owner's business; the owner must use *reasonable and ordinary care* to keep his premises safe for the invitee and *to protect him from injury* caused by an unreasonable risk which the invitee, by exercising ordinary care for his own safety, will not discover.³⁸

A licensee is "one who enters the property with the knowledge and consent of the owner but for his own purposes or interest; *the owner owes no duty to a licensee* under the traditional common law view except to abstain from wilful or wanton misconduct or entrapment."³⁹ As long as police officers and fire fighters were deemed by the courts to be licensees, a property owner owed them no duty of care except to avoid wanton and wilful injuries and entrapment.⁴⁰

Recognizing the difficulty in classifying fire fighters as licensees, the Supreme Court of Illinois in *Dini v. Naiditch*⁴¹ stated that

[i]t is highly illogical to say that a fireman who enters the premises quite independently of either invitation or consent *cannot be an invitee* because there has been no invitation, but can be a licensee even though there has been no permission. The lack of logic is even more patent when we realize that the courts have not applied the term "licensee" to other types of public employees required to come on another's premises in the performance of their duties, and to whom the duty of reasonable care is owed. If benefit to the landowner is the decisive factor, it is difficult to perceive why a fireman is not entitled to that duty of care, or how the landowner derives a greater benefit from the visit of other public officials, such as postmen, water meter readers and revenue inspectors, than from the fireman who comes to prevent the destruction of his property.

37. *Sherman v. Suburban Trust Co.*, 282 Md. 238, 242, 384 A.2d 76, 79 (1978).

38. *Id.* (emphasis added).

39. *Id.* (emphasis added).

40. *Id.* One explanation for classifying fire fighters and police officers as licensees rather than invitees is that they are likely to enter the premises at unforeseeable times, upon unusual parts of the premises, and under emergency circumstances, such that it would be a heavy burden on landowners to require them to make the premises reasonably safe. *Id.* at 243, 384 A.2d at 79.

41. 170 N.E.2d 881 (Ill. 1960).

Consequently, it is our opinion that since the common-law rule labelling firemen as licensees is but an illogical anachronism, originating in a vastly different social order, and pock-marked by judicial refinements, it should not be perpetuated in the name of "stare decisis."⁴²

Due to these difficulties of classifying fire fighters and police officers as licensees, most states have abandoned the use of the premises liability theory as the basis for the rule.⁴³ Instead, these jurisdictions now base the rule on the assumption of risk doctrine, and more often, on the theory of public policy.⁴⁴ Some states abandoned the common-law classifications with respect to the fireman's rule only when they abandoned premises liability principles in their entire tort jurisprudence.⁴⁵ Other states have held that fire fighters and police officers are in a class *sui generis* for the purposes of applying the rule.⁴⁶

The second basis for the fireman's rule, the assumption of risk doctrine,⁴⁷ is premised on the logic that fire fighters and police officers, as persons trained to deal with dangerous situations, assume all of the known risks inherent in the hazards they are trained to confront.⁴⁸ By assuming these risks, firemen and police officers cannot thereafter recover because they are injured in the process. In *Krauth v. Geller*,⁴⁹ the New Jersey Supreme Court clearly explained the policy reasons behind the modern trend away from premises liability and toward assumption of risk. In a frequently quoted opinion, the Chief Justice of the New Jersey Supreme Court wrote in *Krauth*:

[I]t is the fireman's business to deal with that very hazard and hence, perhaps by analogy to the contractor engaged as an expert to remedy dangerous situations, he cannot complain of negligence in the creation of the very occasion for his engagement Probably most fires are attributable to negligence, and in the final analysis the policy

42. *Id.* at 885 (citations omitted).

43. See generally *Flowers v. Rock Creek Terrace Ltd. Ptnshp.*, 308 Md. 432, 444-45, 520 A.2d 361, 367 (1987).

44. *Id.*

45. See *Ouellette v. Blanchard*, 364 A.2d 631, 634 (N.H. 1976).

46. See *Carpenter v. O'Day*, 562 A.2d 595, 598 (Del. Super. Ct. 1988); *Buren v. Midwest Indus.*, 380 S.W.2d 96, 98 (Ky. Ct. App. 1964); *Shypulski v. Waldorf Paper Prods. Co.*, 45 N.W.2d 549, 550 (Minn. 1951); *Krauth v. Geller*, 157 A.2d 129, 130 (N.J. 1960); *Pearson v. Canada Contracting Co.*, 349 S.E.2d 106, 110 (Va. 1986).

47. See Note, *Assumption of Risk and the Fireman's Rule*, 7 WM. MITCHELL L. REV. 749 (1981).

48. See *Carpenter v. O'Day*, 562 A.2d 595, 598-99 (Del. Super. Ct. 1988).

49. 157 A.2d 129 (N.J. 1960).

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.⁵⁰

Jurisdictions have abandoned the assumption of risk doctrine in favor of a comparative negligence analysis in general tort law. Likewise, many also have abandoned this theory as a basis for the fireman's rule.⁵¹

The latest trend in most jurisdictions that have retained the fireman's rule⁵² is to base the rule on grounds of public policy. Although the specific policy reasons articulated vary from state to state,⁵³ most courts have focused on the nature of the relationship between fire fighters and police officers and the public they serve.⁵⁴ Fire fighters and police officers are employed and trained at the taxpayers' expense for the express purpose of dealing with the inevitable negligence of the public.⁵⁵ In addition to it being unfair to require the public to pay for the hazard that the police and fire fighters knowingly confront as part of their job, it would also subject the taxpayer to paying once for the officer to confront the hazard, and then again for injuries sustained as a result.⁵⁶ Instead, police officers and fire fighters often receive special compensation and benefits as recognition for the hazardous nature of their occupations.⁵⁷

50. *Id.* at 131.

51. *Id.*

52. Several states have recently abrogated the rule. See FLA. STAT. ch. 112.182 (1990); MINN. STAT. § 604.06 (1983 & Supp. 1987); *Wills v. Bath Excavating*, 829 P.2d 405, 409 (Colo. Ct. App. 1991), *aff'd and remanded*, 847 P.2d 1141 (Colo. 1993); *Banyai v. Arruda*, 799 P.2d 441, 442-43 (Colo. Ct. App. 1990); *Christenson v. Murphy*, 678 P.2d 1210, 1218 (Or. 1984). Some jurisdictions have also refused to expand the rule beyond premises liability law to public policy. See, e.g., *Court v. Grelinski*, 379 N.E.2d 281 (Ill. 1978).

53. The most common policy considerations were summarized in *Christenson v. Murphy* as follows:

- 1) To avoid placing too heavy a burden on premises owners, to keep their premises safe from the unpredictable entrance of fire fighters;
- 2) To spread the risk of fire fighters' injuries to the public through workers' compensation, salary and fringe benefits;
- 3) To encourage the public to call for professional help and not rely on self-help in emergency situations;
- 4) To avoid increased litigation.

678 P.2d 1210, 1217 (Or. 1984). This court proceeded to abolish the fireman's rule. *Id.* at 1217-18.

54. See generally *Flowers v. Rock Creek Terrace Ltd. Ptnshp.*, 308 Md. 432, 447-48, 520 A.2d 361, 368 (1987).

55. *Krauth v. Geller*, 157 A.2d 129, 131 (N.J. 1960).

56. *Id.*

57. *Id.*

The fireman's rule is not, however, without its limits. Case law from every state that addresses the rule demonstrates that the rule is pock-marked with exceptions. One limitation bars recovery from the negligence that required the officer's presence at the scene.⁵⁸ "Thus a police officer who while placing a ticket on an illegally parked car is struck by a speeding vehicle may maintain action against the speeder but the rule bars recovery against the owner of the parked car for negligently parking."⁵⁹

Another exception allows recovery in situations where the officer must confront an ultra-hazardous situation or a "hidden danger."⁶⁰ For example, in *Lipson v. Superior Court of Orange County*,⁶¹ fire fighters arrived at a boilover at a chemical plant.⁶² The owner told the fire fighters that there were no toxic chemicals in the building.⁶³ When fumes from toxic chemicals in the building injured the fire fighters, the court held that the owner's misrepresentation as to the presence of toxic chemicals in the building was a subsequent act of

58. See, e.g., *Walters v. Sloan*, 571 P.2d 609, 610 (Cal. 1977). The principles of the fireman's rule are the same as in all of tort law—that one who knowingly confronts a hazard cannot recover for injuries caused by that hazard. This is sometimes called the "original negligence" test, distinguishing between the original negligence the officer is called to confront, and subsequent or independent acts of negligence. See generally *Berko v. Freda*, 459 A.2d 663 (N.J. 1983) (discussing the different kinds of negligence that may be covered by the fireman's rule).

59. *Walters*, 571 P.2d at 611 n.2.

60. See, e.g., *Aravanis v. Eisenberg*, 237 Md. 242, 206 A.2d 148 (1965) (incorrect storage of acetone caused an unexpected "flash" that caused firefighter's injuries). This exception is sometimes explained in terms of "ultra-hazardous activity," such as incorrect storage of acetone or a known fire hazard, and other times in terms of a "hidden danger," where, for example, an owner misrepresents the presence of toxic chemicals in a burning building. See *infra* note 61 and accompanying text. Although they are often interchangeable, there may be times when one formulation of the exception is more accurate than the other. See, e.g., *Southland Corp. v. Griffith*, 332 Md. 704, 633 A.2d 84 (1993) (although it was alleged that the failure to call 911 was a "hidden danger," it would be illogical to call it an "ultra-hazardous activity"). This exception is also explained in terms of an act of negligence subsequent to the original act of negligence (e.g., fire) that required the officer's presence. See *infra* note 80. It is difficult to break the exceptions down because they do not fit into neat categories, and the rationale given may not always be the only possible way of avoiding the fireman's rule. For example, in *Lipson v. Superior Court of Orange County*, John Berger, real party in interest, argued that the presence of chemicals made the act of fire fighting an ultra-hazardous activity. *Lipson v. Superior Court of Orange County*, 644 P.2d 822, 830 (Cal. 1982). The court held, however, that the act of misrepresenting the presence of toxic chemicals was an act of negligence after the original act of negligence. *Id.* at 827.

61. 644 P.2d 822 (Cal. 1982).

62. *Id.* at 824.

63. *Id.*

negligence, and affirmed the lower court's dismissal of a motion for summary judgment by the owner.⁶⁴ Because the injuries incurred were caused by an act of negligence other than what the fire fighters were called upon to confront,⁶⁵ the court did not apply the fireman's rule.⁶⁶

A third exception to the fireman's rule is the "intentional tort" test, followed by New York.⁶⁷ This test makes a distinction between acts of negligence and intentional torts committed against a fire fighter or police officer. The test bars recovery for negligent acts, but permits recovery for intentional torts.⁶⁸ In *Christiano v. Marinaccio*,⁶⁹ the Supreme Court of Westchester County, New York permitted a police officer to recover after being intentionally shot in the face and arm while attempting to calm a couple involved in a domestic argument.⁷⁰ The court stated that basic tort principles require that one who intentionally harms another should be subject to liability for that action, notwithstanding the fireman's rule.⁷¹

The existence of so many exceptions to the fireman's rule created by courts around the country demonstrates that courts recognize that no single, bright-line articulation of the rule can possibly encompass every scenario. The rule, under any rationale, is harsh, as it precludes police officers and fire fighters from recovering for injuries caused by another's negligence. This is true even though other public servants have the full range of tort remedies available to them.⁷² As an attempt to mitigate the harshness of the rule, courts have carved out exceptions to permit injured officers to recover under certain circumstances. The exceptions arise most frequently where the landowner is guilty of some kind of gross negligence, and the injuries, but for that gross negligence, are avoidable. As in other states across the country, Maryland courts have had great difficulty in finding an

64. *Id.* at 832-33.

65. Here, the injuries were "caused" by the misrepresentation of the owner as to the presence of toxic chemicals, not the actual "boilover," which originally caused the fire. *Id.* at 827.

66. *Lipson*, 644 P.2d at 826, 832-33.

67. See *Cristiano v. Marinaccio*, 548 N.Y.S.2d 378, 380 (N.Y. Sup. Ct. 1989); see also *Lang v. Glusica*, 393 N.W.2d 181, 183 (Minn. 1986); *Mahoney v. Carus Chemical Co.*, 510 A.2d 4, 9-12 (N.J. 1986).

68. See *Cristiano*, 548 N.Y.S.2d at 380.

69. 548 N.Y.S.2d 378 (N.Y. Sup. Ct. 1989).

70. *Id.* at 379.

71. *Id.* at 380. Like other cases limiting the application of the fireman's rule, the New York court seems to be mitigating the harshness of the rule by allowing police officers and fire fighters to recover in certain instances. Similarly, however, the court failed to justify why police officers and fire fighters should be held to a different tort standard than other public servants.

72. See *infra* note 86.

adequate and rational basis for actual application of the fireman's rule.

B. *The Rule in Maryland*

The fireman's rule in Maryland, like in other jurisdictions, was initially based upon a premises liability theory, whereby a fire fighter or police officer was classified as a licensee instead of an invitee, and could therefore not recover from the landowner.⁷³ As early as 1965, however, the Court of Appeals of Maryland acknowledged that there are difficulties inherent in utilizing the premises liability theory as the basis for the fireman's rule.⁷⁴

In *Aravanis v. Eisenberg*,⁷⁵ a fire started when Eisenberg knocked a tool off his work bench which hit a jug of acetone.⁷⁶ The acetone came in contact with the pilot light of a hot water heater nearby and caught on fire.⁷⁷ While fighting the fire, Aravanis, a fire fighter called to the scene, was severely burned by a sudden flash.⁷⁸ Aravanis alleged that his injuries were a result, not of the fire itself, but of the defendant's negligent storage of the acetone.⁷⁹ Additionally, the fire fighter argued that the anticipated occupational risk of fire fighting was over before the flash that burned him occurred.⁸⁰

While maintaining premises liability as the basis for the fireman's rule in Maryland, the *Aravanis* court struggled with the injustice of precluding the fire fighter from recovery.⁸¹ The court suggested that the status of a fire fighter could change from licensee to invitee, thus imposing a greater duty on the landowner, which would in turn result in compensation by the landowner for the fire fighter's injuries.⁸² The court stated that it is "after the initial period of his

73. *Steinwedel v. Hilbert*, 149 Md. 121, 131 A. 44 (1925).

74. *Aravanis v. Eisenberg*, 237 Md. 242, 248, 206 A.2d 148, 151 (1965) ("The criticism of what was formerly the almost universal rule is based essentially upon making the determination of what is justice between the parties depend upon cramming firemen into the inflexible legal category of licensee.").

75. 237 Md. 242, 206 A.2d 148 (1965).

76. *Id.* at 247, 206 A.2d at 151.

77. *Id.*

78. *Id.* Although it was not explained in the case, the "flash" apparently resulted from the burning acetone.

79. *Id.* at 253-54, 206 A.2d at 154; *see also supra* note 58 and accompanying text. This is a formulation of the "original negligence" theory, whereby the negligent storage of the acetone was an independent act of negligence, apart from the negligent starting of the fire.

80. *Aravanis*, 237 Md. at 253-54, 206 A.2d at 154-55.

81. *Id.* at 250-52, 206 A.2d at 153-54.

82. *Id.* at 254, 206 A.2d at 155. The court stated that "[t]he balancing of the scales of justice as between fireman and property owner, it is suggested, may shift with the place in which the fireman is injured and also, perhaps, with

anticipated occupational risk, or from perils not reasonably foreseeable as part of that risk, that the justice of continuing to regard him as a licensee only is questioned.”⁸³

The decision in *Aravanis* was the first in Maryland to suggest that the fireman’s rule was based on something other than strict status classification. In its holding, the court asserted what appears to be a public policy rationale for the rule, rather than a premises liability rationale. The court stated that “[f]ighting the fire, however caused, is his occupation. Compensation for injuries sustained in the fulfillment of his duties, absent other circumstances, is the obligation of society.”⁸⁴ The court never reached the issue of whether the fire fighter’s status should, in fact, change from licensee to invitee, thus allowing recovery, because it found that the jury instructions given were no less favorable than they would have been if the court had found the change in status the fire fighter requested, and the jury had found for the defendants.⁸⁵

It took the Court of Appeals of Maryland thirteen years to reexamine the proper application of the fireman’s rule.⁸⁶ In *Sherman v. Suburban Trust Co.*,⁸⁷ Sherman, a police officer, responded to a call from a bank where someone had attempted to pass a forged check.⁸⁸ While watching the apprehended suspect from a small teller’s cage, Sherman bent over to pick up the check that the clerk had accidentally dropped, and in the process injured his back on the coin changing machine.⁸⁹ The court accepted the possibility that the officer’s status could change from licensee to invitee as suggested in *Aravanis*,⁹⁰ but held that Sherman’s injury took place during the period of his anticipated occupational risk, and thus precluded the officer from recovery.⁹¹ Although it appeared after *Aravanis* that the court would begin to develop a basis other than premises liability for the fireman’s rule, the court in *Sherman* failed to provide any further guidance on this matter.

the stage in the execution of the fireman’s duties when the injury occurs.” *Id.* at 250, 206 A.2d at 153. Further, the court stated that “[w]e have recognized that there may be a change of status, ‘geographical or chronological,’ of one who starts as an invitee [T]here is no reason in logic or justice, when circumstances warrant, why the transmutation cannot be from licensee to invitee.” *Id.* at 253, 206 A.2d at 154 (citations omitted).

83. *Id.* at 252, 206 A.2d at 153-54.

84. *Id.* at 251, 206 A.2d at 153.

85. *Id.* at 254, 206 A.2d at 155.

86. *Sherman v. Suburban Trust Co.*, 282 Md. 238, 384 A.2d 76 (1978).

87. 282 Md. 238, 384 A.2d 76 (1978).

88. *Id.* at 239, 384 A.2d at 78.

89. *Id.* at 240, 384 A.2d at 78.

90. *Id.* at 244, 384 A.2d at 80.

91. *Id.* at 246, 384 A.2d at 81.

Flowers v. Rock Creek Terrace Ltd. Partnership,⁹² however, represented a significant evolution of the fireman's rule in Maryland by establishing that the proper basis for the rule is public policy.⁹³ In *Flowers*, a fire fighter responding to an alarm fell through an open elevator shaft while attempting to evacuate the building.⁹⁴ The court prohibited recovery for the fire fighter under the rule, but refused to base its rationale on premises liability.⁹⁵ The *Flowers* court specified several problems underlying the premises liability rationale for the fireman's rule.⁹⁶ Notably, the court was concerned that the rule, as explained under the premises liability theory, did not encompass the negligence of someone other than the landowner. Although the defendants, an elevator and a security guard company, were not landowners, the court invoked the rule anyway.⁹⁷ Moreover, the court pointed out that other public officers, such as postmen and building inspectors, are owed a duty of due care against other persons' negligence, while their counterparts, police officers and fire fighters, are not, because the court has deemed them to be licensees.⁹⁸ As a result of these inconsistencies, the *Flowers* court concluded that the fireman's rule is best explained by a public policy rationale.⁹⁹

Instead of continuing to use a rationale based on the law of premises liability, we hold that, as a matter of public policy, firemen and police officers generally cannot recover for injuries attributable to the negligence that requires their assistance. This public policy is based on a relationship between firemen and policemen and the public that calls on these safety officers specifically to confront certain hazards on behalf of the public. A fireman or police officer may not recover if injured by the negligently created risk that was the very reason for his presence on the scene in his occupational capacity.¹⁰⁰

The court cautioned that not all actions for negligence would be precluded by the fireman's rule.¹⁰¹ For example, the rule does not cover "pre-existing hidden dangers where there was knowledge of the danger [by the tortfeasor] and an opportunity to warn [Other examples] include acts which occur subsequent to the safety

92. 308 Md. 432, 520 A.2d 361 (1987).

93. *Id.* at 447, 520 A.2d at 368.

94. *Id.* at 436-37, 520 A.2d at 363.

95. *Id.* at 443, 520 A.2d at 366.

96. *Id.* at 443-44, 520 A.2d at 366.

97. *Id.*

98. *Id.* at 444, 520 A.2d at 366-67.

99. *Id.* at 447, 520 A.2d at 368.

100. *Id.* at 447-48, 520 A.2d at 368.

101. *Id.* at 448, 520 A.2d at 368-69.

officer's arrival on the scene and which are outside of his anticipated occupational hazards."¹⁰²

The *Flowers* rule was subsequently applied by the Court of Special Appeals of Maryland in *Flood v. Atsgood Realty*.¹⁰³ In *Flood*, a police officer, responding to a call regarding possible narcotic activity in a vacant house, was injured when he fell through a hole in the second floor.¹⁰⁴ In a brief opinion, citing *Flowers* for the proposition that Maryland follows the modern trend of rejecting premises liability in favor of a public policy rationale, the intermediate appellate court stated that

[i]n the case *sub judice*, the appellant was clearly within the performance of his duties when he was injured. The only reason the appellant was on the premises was to investigate possible drug activity there and to search for a suspect. Under [the *Flowers* rule], . . . being in an admittedly unsafe and generally uninhabitable building looking for a drug suspect was a risk that the appellant assumed, on behalf of the public, when he accepted employment as a police officer, and therefore the appellee owed him no duty to make the premises safe.¹⁰⁵

Thus, public policy clearly remained the proper rationale underlying the fireman's rule in Maryland until *Griffith*.

C. Duty to Aid

After addressing the issue of whether or not the fireman's rule applied, the *Griffith* court addressed a second issue, whether the clerk at the 7-11 had a duty to aid the police officer.¹⁰⁶ Under the common law, a private person is generally under no duty to assist another person in distress.¹⁰⁷ The Second Restatement of the Law of Torts states the general rule that "[t]he fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."¹⁰⁸

Section 314A of the Second Restatement, however, carves out specific exceptions to this rule by establishing special relationships that give rise to an affirmative duty to aid or protect others in distress.¹⁰⁹ Examples of such special relationships include common

102. *Id.* at 448, 520 A.2d at 369.

103. 92 Md. App. 520, 608 A.2d 1297 (1992).

104. *Id.* at 523, 608 A.2d at 1299.

105. *Id.* at 527, 608 A.2d at 1301.

106. *Southland Corp. v. Griffith*, 332 Md. 704, 715-16, 633 A.2d 84, 85 (1993).

107. *Scott v. Watson*, 278 Md. 160, 166, 359 A.2d 548, 552 (1976); see *infra* notes 108-10.

108. RESTATEMENT (SECOND) OF TORTS § 314 (1965).

109. *Id.* § 314A (1965); see *infra* note 110 for the text of § 314A.

carrier to passenger, innkeeper to guest, and a possessor of land who holds it open to the public to those who enter the land in response to that invitation.¹¹⁰

Various jurisdictions have further held that a special relationship giving rise to an affirmative duty to aid exists between a shopkeeper and business invitee.¹¹¹ Recognizing this special relationship would give rise to an affirmative duty on the part of the shopkeeper to aid a business invitee in distress. For example, in *Jones v. Kwik Karol and Ginalco, Inc.*,¹¹² an attendant at a convenience store was informed that one of the customers was being harassed.¹¹³ The attendant refused to notify the police, and shortly thereafter the customer was severely beaten.¹¹⁴ The Louisiana high court ruled that the store owner had a duty to take reasonable precautions for the safety of his patrons and that this duty was breached by the attendant's failure to act when asked to call the police.¹¹⁵

The Supreme Court of Wyoming reached a similar result in *Drew v. LeJay's Sportsmen's Cafe, Inc.*¹¹⁶ In that case, employees of a restaurant failed to promptly obtain medical assistance for a choking patron.¹¹⁷ The court in *Drew* held that the restaurant owed its customer a duty to summon medical assistance within a reasonable time.¹¹⁸ The court declined, however, to adopt section 314A of the Second Restatement of Torts because it felt the duty to aid did not

110. RESTATEMENT (SECOND) OF TORTS § 314A (1965). This section provides in full:

(1) A common carrier is under a duty to its passengers to take reasonable action

(a) to protect them against unreasonable risk of physical harm, and

(b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.

(2) An innkeeper is under a similar duty to his guests.

(3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.

(4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

Id.

111. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 376 (5th ed. 1984).

112. 490 So. 2d 664 (La. Ct. App. 1986).

113. *Id.* at 665.

114. *Id.*

115. *Id.* at 666.

116. 806 P.2d 301 (Wyo. 1991).

117. *Id.* at 302-03.

118. *Id.* at 305.

extend to a duty to actually *provide* medical assistance, only to call for it.¹¹⁹

Although Maryland courts have held that there is a special relationship between a common carrier and its passengers,¹²⁰ the shopkeeper/business invitee exception was not adopted until 1993.¹²¹ *Southland Corp. v. Griffith*¹²² was the first Maryland case to address this special relationship.

III. THE INSTANT CASE

David Griffith, an off-duty police officer, his son, and several friends purchased food at a 7-11 convenience store.¹²³ After returning to his car in the parking lot of the store, Griffith saw several teenagers throwing beer bottles and harassing a female passenger waiting in Griffith's car.¹²⁴ Griffith attempted to arrest the teenagers and was severely beaten in the process.¹²⁵ Griffith filed suit in the Circuit Court for Anne Arundel County against the Southland Corporation, which owned the convenience store, and the three men who assaulted him in the parking lot of the store.¹²⁶ Griffith claimed that his son had asked the store clerk to call the police for backup on three occasions during the confrontation, but the clerk failed to make the call promptly.¹²⁷ The defendant Southland Corporation moved for summary judgment "because the so-called 'fireman's rule' . . . precluded recovery in a negligence action against it by a police officer injured by a negligently created risk that was the very reason for the officer's presence on the scene."¹²⁸ The trial judge agreed and granted summary judgment in favor of Southland.¹²⁹

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119. *Id.* at 306. The Wyoming court cited other jurisdictions that also acknowledged a special relationship between a shopkeeper and a business invitee, but did not find them instructive to the case at hand. See *Personal Representative Estate of Starling v. Fisherman's Pier, Inc.*, 401 So. 2d 1136 (Fla. 1981) (holding that a business owner has a duty to render aid to a person exposed to a known danger); *Hovermale v. Berkeley Springs Moose Lodge No. 1483*, 271 S.E.2d 335 (W. Va. 1980) (holding that a shopkeeper owes a duty to render aid to an invitee after he knows or had reason to know the invitee is ill or injured).
120. *Scott v. Watson*, 278 Md. 160, 166-67, 358 A.2d 548, 552 (1976) (holding that a landlord has no special duty to protect tenants from crimes perpetrated on the landlord's premises by third parties).
121. *Southland Corp. v. Griffith*, 332 Md. 704, 719, 633 A.2d 84, 91 (1993).
122. 332 Md. 704, 633 A.2d 84 (1993).
123. *Id.* at 707, 633 A.2d at 85.
124. *Id.* at 707-08, 633 A.2d at 85.
125. *Id.* at 708, 633 A.2d at 85-86.
126. 94 Md. App. 242, 248, 617 A.2d 598, 601 (1992), *aff'd*, 332 Md. 707, 633 A.2d 84 (1993).
127. *Id.* at 247, 617 A.2d at 601.
128. *Griffith*, 332 Md. at 708-09, 633 A.2d at 86.
129. *Id.* at 710, 633 A.2d at 87.

The Court of Special Appeals of Maryland reversed the summary judgment, holding that Southland could be liable to the police officer, notwithstanding the fireman's rule, for its employee's failure to call 911 when requested.¹³⁰ The court had two bases for this conclusion. First, the court of special appeals held that the fireman's rule does not preclude recovery in instances where the officer is injured by events which are outside his anticipated occupational hazard.¹³¹ The court recognized *Flowers'* holding that certain acts of negligence are not protected by the fireman's rule.¹³² The intermediate court then stated, "[w]hen we apply [the *Flowers*] principles to the case *sub judice*, it is crystal clear . . . [that the clerk's] refusal to act was an event in the nature of a 'hidden danger' that no police officer in this day and age could possibly anticipate."¹³³

Second, the court of special appeals ruled that Maryland public policy demands that the public not ignore "the legitimate plea of an officer in trouble."¹³⁴ The court argued that ignoring the officer's plea for assistance would be contrary to the State's interest in providing its citizens with rapid and effective police and fire protection.¹³⁵ The court made it clear that it would not impose a general duty to come to the aid of a stranger, but announced the very narrow rule that

when a police officer is in danger during the performance of his or her duties protecting patrons on the premises of a business, and requests, directly or indirectly, that an

130. *Griffith v. Southland Corp.*, 94 Md. App. 242, 617 A.2d 598 (1992), *aff'd*, 332 Md. 704, 633 A.2d 84 (1993).

131. *Id.* at 252-53, 617 A.2d at 603-04.

132. *Id.* at 253, 617 A.2d at 603.

133. *Id.* at 253, 617 A.2d at 603-04.

134. *Id.* at 256, 617 A.2d at 605.

135. *Id.* The *Griffith* court referred to § 18-101 of Article 41 of the Maryland Code to illustrate Maryland's demonstrated interest in providing its citizens with rapid and effective fire and police protection. MD. ANN. CODE art. 41, § 18-101 (1990). Section 18-101 provides in pertinent part:

(a) The General Assembly recognizes the paramount importance of the safety and well-being of the citizens of Maryland and further recognizes that when the lives or property of its citizens are in imminent danger, timely and appropriate assistance must be rendered.

(c) The General Assembly is concerned that avoidable delays in reaching appropriate emergency aid are occurring to the jeopardy of life and property.

(e) It is the purpose of this subtitle to establish the three digit number, 911, as the primary emergency telephone number for the State of Maryland

Id.

employee of the business who is not in the path of danger summon aid via the 911 system, then that employee has a legal obligation to do so promptly.¹³⁶

The Court of Appeals of Maryland affirmed the holding of the court of special appeals, but on different grounds.¹³⁷ The high court rejected the intermediate court's contention that the failure of the clerk to call 911 when requested was a hidden danger not reasonably anticipated by an officer.¹³⁸ The court held that the danger was not hidden, and therefore did not fall under the hidden danger exception to the fireman's rule, but rather was a reasonably anticipated occupational hazard officers are aware of when arresting disorderly individuals.¹³⁹

Despite this finding, the court dismissed the fireman's rule as inapplicable for other reasons.¹⁴⁰ The court reasoned that the police officer entered the store as a customer for the purpose of purchasing food, and thus, was a "business invitee" to whom the shopkeeper owed a duty of care.¹⁴¹ Based on this fact, the court held that the fireman's rule did not preclude Griffith from recovery.¹⁴²

The Maryland high court concluded that the only issue remaining was whether Southland had a legal duty to come to Griffith's aid by promptly calling the police for assistance.¹⁴³ Although the court recognized that generally there is no common-law duty to aid a person in distress, it also noted that other jurisdictions have adopted exceptions to this rule based on the existence of a "special relationship" between the parties.¹⁴⁴ As a result, the Maryland court adopted section 314A of the Second Restatement of the Law of Torts for the proposition that:

136. *Griffith*, 94 Md. App. at 258-59, 617 A.2d at 606. The court did not find a conflict between this holding and the spirit of the fireman's rule.

Here, we have no prior judicial ruling that conflicts with our holding in this case. Maryland first recognized the "fireman's rule" in a day and a time when there was no need for an emergency telephone system—a day and a time when the societal demands and needs were as different as the biplane of yesteryear is from the spaceship of today.

Id. at 258, 617 A.2d at 606.

137. *Southland Corp. v. Griffith*, 332 Md. 704, 633 A.2d 84 (1993).

138. *Id.* at 715, 633 A.2d at 89.

139. *Id.*

140. *Id.*

141. *Id.* at 719, 633 A.2d at 89. It is interesting to note that the court does not address the issue of whether Griffith was on or off duty. *See supra* note 12.

142. *Griffith*, 332 Md. at 719, 633 A.2d at 89.

143. *Id.* at 716, 633 A.2d at 89.

144. *Id.* at 716-17, 633 A.2d at 90.

[A]n employee of a business has a legal duty to take affirmative action for the aid or protection of a business invitee who is in danger while on the business's premises, provided that the employee has knowledge of the injured invitee and the employee is not in the path of danger.¹⁴⁵

In so doing, the court determined that neither the fact that Griffith was an off-duty police officer,¹⁴⁶ nor his attempt to arrest his assailants¹⁴⁷ impacted upon his status as a business invitee. Concluding that a legal duty was owed to Griffith by the store, the court held that the entry of summary judgment for Southland was incorrect.¹⁴⁸

IV. ALTERNATIVE APPROACHES

The fireman's rule is harsh, and it is often difficult to reconcile a bar to recovery with the important public safety function police officers and fire fighters perform. The rule prevents an injured public servant from recovering damages for his or her injuries caused by an admittedly negligent tortfeasor. Such a drastic divergence from ordinary principles of tort law, which otherwise allow recovery, ought to be limited in scope to those instances where public policy demands such a result.

Maryland courts, like others around the country, have encountered significant difficulties in applying the fireman's rule.¹⁴⁹ The rule's evolution from a premises liability basis to a public policy basis was an attempt by the courts to move away from rigid, arbitrary classifications of liability to a more flexible and just approach.¹⁵⁰ The

145. *Id.* at 719, 633 A.2d at 91. The court found illustration five of the Second Restatement of Torts § 314A instructive:

A, a patron attending a play in B's theater, suffers a heart attack during the performance, and is disabled and unable to move. He asks that a doctor be called. B's employees do nothing to obtain medical assistance, or to remove A to a place where it can be obtained. As a result, A's illness is aggravated in a manner which reasonable prompt medical attention would have avoided. B is subject to liability to A for aggravation of his illness.

Id. at 719 n.8, 633 A.2d at 91 n.8 (quoting RESTATEMENT (SECOND) OF TORTS § 314A (1965)).

146. *Id.* at 715, 633 A.2d at 89.

147. *Id.*

148. *Id.* at 720, 633 A.2d at 92.

149. See generally *Southland Corp. v. Griffith*, 332 Md. 704, 633 A.2d 84 (1993); *Sherman v. Suburban Trust Co.*, 282 Md. 238, 384 A.2d 76 (1978); *Aravanis v. Eisenberg*, 237 Md. 242, 206 A.2d 148 (1965).

150. See generally *Southland Corp. v. Griffith*, 332 Md. 704, 633 A.2d 84 (1993); *Sherman v. Suburban Trust Co.*, 282 Md. 238, 384 A.2d 76 (1978); *Aravanis v. Eisenberg*, 237 Md. 242, 206 A.2d 148 (1965).

Court of Appeals of Maryland, in *Southland Corp. v. Griffith*,¹⁵¹ focused on the purpose for which the officer was on the premises as the rationale for determining whether the fireman's rule applied.¹⁵² This focus, however, presents the same difficulties that the *Flowers* court attempted to eradicate by holding that the proper basis for the rule is public policy. By resurrecting the premises liability theory in *Griffith*, the fireman's rule will once again be subject to an unclear standard for application and produce the unjust results that *Flowers* had once successfully avoided.¹⁵³

Concentrating on the purpose of the officer's presence, as the court of appeals did in *Griffith*,¹⁵⁴ ostensibly reverts back to the premises liability test. Although the court in *Griffith* recognized that *Flowers* rejected the emphasis on the officer's status on the land,¹⁵⁵ the court still relied on premises liability in reaching its conclusion, stating that "[t]he fireman's rule is not applicable [because]. . . [Griffith] entered the store as a customer for the sole purpose of purchasing food. He was at that time, under our cases, a 'business invitee' to whom the store owner owed a duty to use reasonable and ordinary care."¹⁵⁶ With this, the court summarily rejected any analysis of public policy and instead held the fireman's rule inapplicable because of the officer's "status" on the land.¹⁵⁷

Judge Bloom's dissenting opinion of the intermediate appellate court's decision, correctly pointed out why the court of special appeals' focus was incorrect in *Griffith*:

[S]ince the rule is based upon public policy grounds, it is immaterial that appellant was already on the premises, as a patron, when the incident that required him to act in the capacity of a police officer arose. He was injured in the performance of his duty; the hazard he encountered was one his duty required him to confront. There is no suggestion that appellee did anything to injure or entrap him, or

151. 332 Md. 704, 633 A.2d 84 (1993).

152. *Id.* at 715-16, 719-20, 633 A.2d at 89, 91-92.

153. See *Flowers v. Rock Creek Terrace Ltd. Ptnshp.*, 308 Md. 432, 520 A.2d 361 (1987).

154. *Griffith*, 332 Md. at 715-16, 719-20, 633 A.2d at 89, 91-92.

155. *Id.* at 713, 633 A.2d at 88. The *Griffith* court specifically recognized *Flowers*' abandonment of the premises liability theory:

Prior to 1987, the rationale behind the fireman's rule focused on the status of the safety officer on the landowner's premises. . . . [*Flowers*] departed from traditional principles of landowner's or premises liability in cases involving fire fighters or police officers, *i.e.*, whether their status was that of a licensee or invitee.

Id. at 713-14, 633 A.2d at 88.

156. *Id.* at 715, 633 A.2d at 89.

157. *Id.* at 715-16, 633 A.2d at 89.

failed to warn him of any hidden or unexpected peril.¹⁵⁸

Thus, as stated in *Flowers*, the proper approach to analyzing whether or not the fireman's rule applies, therefore barring the fire fighter or police officer from recovery, "is an analysis of the relationship between firemen and the public whom they serve."¹⁵⁹

In *Flowers*, the court of appeals explained that fire fighters and police officers generally cannot recover for the negligence that requires their assistance.¹⁶⁰ "This public policy is based on a relationship between firemen and policemen and the public that calls on these safety officers specifically to confront certain hazards on behalf of the public."¹⁶¹ In *Griffith*, however, the negligence alleged against Southland Corporation was for failure to call 911 when requested.¹⁶² Griffith argued that if 911 had been called when he first requested, his injuries would have been less severe.¹⁶³ There is no public policy that would support shielding Southland from liability under the fireman's rule in this case. The rule deals only with preventing fire fighters and police officers from recovering when the alleged negligence that was the cause of their injuries is the same negligence they were trained and called to confront. In the present case, the alleged negligence, the failure to call 911, was not the "original negligence" Griffith was duty-bound to confront.

The fireman's rule may have been rightfully rejected in *Griffith*, but for the wrong reasons. The flaw in the court's analysis is that it requires a court to first address the purpose for the officer's presence on the premises. Premises liability should not be used to avoid the public policy analysis outlined in *Flowers*. An analysis more consistent with the *Flowers* approach would first determine if the officer is barred from recovery under the fireman's rule. This question must address the relationship between the officer and the public—whether the officer was injured while dealing with a hazard he was duty bound to confront, or whether he was injured from a negligent act collateral to the original negligence. If the fireman's rule does apply, the officer may not recover for public policy reasons—because he cannot recover for negligence inherent in his duties, and the question of liability is resolved. If, however, he is not barred from recovery under the fireman's rule, because the negligence can be distinguished from his occupational duties, the

158. *Griffith v. Southland Corp.*, 94 Md. App. 242, 262, 617 A.2d 598, 608 (1992).

159. *Flowers v. Rock Creek Terrace Ltd. Ptnshp.*, 308 Md. 432, 444, 520 A.2d 361, 367 (1987).

160. *Id.* at 446-48, 520 A.2d at 368.

161. *Id.* at 447, 520 A.2d at 368.

162. *Griffith*, 332 Md. at 713, 633 A.2d at 88.

163. *Id.* at 709, 633 A.2d at 86.

court should then determine whether there is a basis for recovery under any other tort principles.

Focusing merely on the purpose for the officer's presence, as the *Griffith* court did, is likely to lead to inconsistent applications of the rule and unjust results. For example, an on-duty police officer enters a convenience store for a cup of coffee, is confronted by an armed robber, and is injured in the process because the clerk failed to call for assistance promptly. Under the *Flowers* test, the fireman's rule would shield the store from liability if such danger was a reasonably anticipated occupational hazard.¹⁶⁴ According to the court of appeals in *Griffith*, however, the purpose of the officer's visit was to purchase coffee, automatically making him a business invitee to whom the store owes a duty of due care, regardless of his position as a police officer, and regardless of public policy.¹⁶⁵ The two approaches to the same scenario reach contradictory results.

Clearly, approaching this scenario first from the perspective of premises liability, and not from the proper application of the fireman's rule, may lead to unfair and inconsistent results. The rationale of *Griffith* is inconsistent with the rule established in *Flowers* to the extent that it bases its analysis on premises liability, rather than public policy. For this reason, it is likely to be a source of confusion for lower courts attempting to apply the fireman's rule.

In addition, the court of appeals failed to address the court of special appeals' holding that an employee has a duty to call 911 when an officer, in the performance of his duties, requests such help.¹⁶⁶ The court avoided this issue by concluding that the fireman's rule simply did not apply.¹⁶⁷ The holding of the court of appeals creates an affirmative duty for shopkeepers to aid business invitees in trouble. Rarely, however, will a police officer be a business invitee. Thus, it still remains unclear whether a shopkeeper owes any duty to summon aid for a police officer who is not a business invitee.

Finally, the court of appeals' conclusion that a shopkeeper has a duty to aid business invitees under section 314A of the Second Restatement of Torts leaves questions unanswered. There is no indication of how far a shopkeeper must go to aid a business invitee. *Drew v. LeJay's Sportsmen's Cafe, Inc.*,¹⁶⁸ for example, cited by the court of appeals,¹⁶⁹ did not adopt section 314A of the Restatement because it did not want a shopkeeper to be required to do more than

164. *Flowers*, 308 Md. at 443, 520 A.2d at 366.

165. *Griffith*, 332 Md. at 715-16, 633 A.2d at 89.

166. *Griffith v. Southland Corp.*, 94 Md. App. 242, 258-59, 617 A.2d 598, 606 (1992), *aff'd*, 332 Md. 704, 633 A.2d 84 (1993).

167. *Griffith*, 332 Md. at 715, 633 A.2d at 89.

168. 806 P.2d 301 (Wyo. 1991).

169. *Griffith*, 332 Md. at 717-18, 633 A.2d at 90.

summon aid; it did not want a shopkeeper to be required to actually provide aid.¹⁷⁰ Future Maryland decisions will have to determine whether or not the duty is a duty to provide aid, or merely a duty to summon assistance.

V. CONCLUSION

The use of premises liability as the basis for the fireman's rule has resulted in difficulties for courts applying the rule. Although the rule's longevity attests to the value of the principles of the rule, the numerous exceptions to the rule and the difficult application of the rule in a just manner demonstrate that the premises liability basis is an inadequate explanation for the rule's principles. The Court of Appeals of Maryland, in *Flowers*, properly explained the rule in terms of public policy.

When faced with the injured police officer in *Griffith*, however, the Court of Appeals of Maryland muddied the legal waters by permitting recovery based upon the officer's status on the land—a premises liability justification. By undermining the rationale of *Flowers*, the court of appeals has left the standards for applying the fireman's rule unclear. As a result, many of the problems inherent in using premises liability as the rationale for the fireman's rule, recognized in *Flowers* and its preceding cases, will revisit future Maryland decisions. Maryland courts will have to determine whether the *Flowers* holding was an anomaly and then either accept *Griffith* as a return to the premises liability basis, or find some way to reconcile *Griffith* with *Flowers*. In either event, the Maryland courts should strive for a limited, consistent approach to the rule, that balances the demands of public policy with justice for fire fighters and police officers.

Ami C. Dwyer

170. *Drew*, 806 P.2d at 305.