IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

BRENT LOCKHART,	)	
Plaintiff	)	Civil Action No.: 2:02CV00095
	)	
v.	)	**REPORT AND**
	)	**RECOMMENDATION**
	)	
COASTAL COAL COMPANY, LLC,	)	By: PAMELA MEADE SARGENT
Defendant	)	United States Magistrate Judge
	)	

This case involves the claim of a federal mine inspector, Brent Lockhart, against a mine operator, Coastal Coal Company, LLC, for injuries sustained in a rockfall while the plaintiff was conducting an inspection of one of the defendant's mines. This matter is before the court on the defendant's motion for summary judgment, ("the Motion"), (Docket Item No. 8). Jurisdiction over this matter is based upon diversity of citizenship. *See* 28 U.S.C. § 1332. The Motion is before the undersigned magistrate judge by referral pursuant to 28 U.S.C. § 636(b)(1)(B). As directed by the order of referral, the undersigned now submits the following report and recommended disposition.

I. Facts

The relevant facts are not disputed. Lockhart, a Tennessee resident, was working as a federal mine inspector for the Mine Safety and Health Administration,

("MSHA"), on April 7, 1999, when he was injured while conducting an inspection of Coastal's Sargent Hollow Mine in Wise County, Virginia. Lockhart has stated that, at the time of his injury, he was conducting a "spot inspection" focused upon health requirements such as the reduction of dust, gas and noise levels. Lockhart has conceded, however, that regardless of the specified purpose of the inspection, he was responsible for noting any violation of federal mining laws, including any roof control violations. Coastal concedes that the mine's operators knew that Lockhart was present in the mine when a large slab of rock fell from the roof of the mine and struck him. Lockhart has sued Coastal, alleging that Coastal was negligent in that it failed to properly maintain its mine roof and that Coastal's negligence caused his injuries. Subsequent to this incident, MSHA issued a citation against Coastal for its failure to correct the adverse roof conditions or to take proper steps under its roof control plan.

II. Analysis

The standard of review for a motion for summary judgment is well-settled. The court should grant summary judgment only when the pleadings, the responses to discovery and the record reveal that "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *see, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Miller v. Leathers*, 913 F.2d 1085, 1087 (4th Cir. 1990) (en banc), *cert. denied*, 498 U.S. 1109 (1991); *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985). A genuine issue of fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving

party." *Anderson*, 477 U.S. at 248.

In considering a motion for summary judgment, the court must view the facts and the reasonable inferences to be drawn from the facts in the light most favorable to the party opposing the motion. *See Anderson*, 477 U.S. at 255; *Matsushita*, 475 U.S. at 587; *Nguyen v. CNA Corp.*, 44 F.3d 234, 237 (4th Cir. 1995); *Miltier v. Beorn*, 896 F.2d 848, 850 (4th Cir. 1990); *Ross*, 759 F.2d at 364; *Cole v. Cole*, 633 F.2d 1083, 1092 (4th Cir. 1980). In other words, the nonmoving party is entitled to have "'the credibility of his evidence as forecast assumed.'" *Miller*, 913 F.2d at 1087 (quoting *Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979)). Therefore, in reviewing the Motion in this case, the court must view the facts and inferences in the light most favorable to the plaintiff.

Coastal asserts that the court should enter summary judgment in its favor because the so-called "fireman's rule" bars the plaintiff's claim. "The fireman's rule is a common-law doctrine that limits a defendant's liability for otherwise culpable conduct resulting in injuries and property damage to fire fighters, law enforcement officials, and their employers." *Goodwin v. Hare*, 246 Va. 402, 403, 436 S.E.2d 605 (1993) (citing *Benefiel v. Walker,* 244 Va. 488, 490, 422 S.E.2d 773, 774 (1992)). The rule is based on an assumption of the usual risks of injury in such employment. *Goodwin*, 246 Va. at 403, 436 S.E.2d at 605; *Commonwealth v. Millsaps*, 232 Va. 502, 510, 352 S.E.2d 311, 315 (1987); *Chesapeake & Ohio Ry. v. Crouch*, 208 Va. 602, 607, 159 S.E.2d 650, 654 (1968). Under the "fireman's rule" firefighters and police officers are held, as a matter of law, "to assume the risks of injury occasioned by ordinary negligence inherently involved in the normal pursuit of their duties."

Millsaps, 232 Va. at 509-10, 353 S.E.2d at 315. The Virginia Supreme Court has said that "the application of the assumption of risk doctrine to these public officials is not based upon a spirit of venturesomeness in the face of a known danger; rather, it is based upon the relationship between the public officials and the public from which arises an obligation to accept the usual risks of danger involved in performing their fire fighting and law enforcement duties." *Goodwin*, 246 Va. at 404, 436 S.E.2d at 606.

In offering this argument, Coastal concedes that Virginia courts have never applied the "fireman's rule" to bar suit by anyone other than a firefighter or a police officer. *See Washington v. Minter*, 1994 WL 1031221 (Va. Cir. Ct. June 14, 1994) (refusing to apply rule to bar school crossing guard's suit since Virginia courts have applied fireman's rule to only firefighters and police officers). Therefore, the issue of whether the rule should be extended to bar suit by a federal mine inspector against a mine operator for injuries suffered in the course of his employment is one of first impression in Virginia. Thus, the court must "divine what the Supreme Court of Virginia would decide if faced with this question." *Johnson v. Teal*, 769 F. Supp. 947, 949 (E.D. Va. 1991).

After an exhaustive search, I can find few jurisdictions which have applied the fireman's rule to bar claims brought by anyone other than firefighters or police officers. *See Hamilton v. Martinelli & Assocs. Justice Consultants, Inc.*, 2 Cal. Rptr. 3d 168, 177 (Cal. Ct. App. 2003) (fireman's rule barred suit by probation corrections officer against training course business); *City of Oceanside v. Superior Court*, 96 Cal. Rptr. 2d 621, 631 (Cal. Ct. App. 2000) (fireman's rule extends to publicly employed lifeguards); *but see Heck v. Robey*, 659 N.E.2d 489, 505 (Ind. 1995) (refusing to

extend fireman's rule to cover paramedics), *abrogated on other grounds*, *Control Techniques, Inc. v. Johnson,* 762 N.E.2d 104 (Ind. 2002); *Kiernan v. Miller,* 612 A.2d 1344, 1348 (N.J. Super. Ct. Law Div. 1992) (fireman's rule did not apply to volunteer first aid worker who was injured while rendering medical assistance to injured person); *Krause v. U. S. Trucking Co.,* 787 S.W.2d 708, 713 (Mo. 1990) (fireman's rule does not apply to ambulance attendant who responded to emergency scene). In fact, I have found only one case in which this rule has been applied to bar suit by an inspector who sought to recover damages for injuries incurred in the scope of his employment.

In *Whiting v. Central Trux & Parts, Inc.*, 984 F. Supp. 1096 (E.D. Mich. 1997), the United States District Court for the Eastern District of Michigan held that the fireman's rule barred recovery by a customs inspector who was injured by a falling truck hood while inspecting a truck entering the country. In *Whiting* the court found that a customs inspector should be considered a "public safety officer" covered by the rule. *Whiting*, 984 F.Supp. at 1106. In reaching this finding, the court stated,

> As a policy matter, Mr. Whiting's job is not distinguishable enough from that of a police officer to warrant the non-application of the rule. There is, to be sure, a certain amount of risk in becoming a Customs Inspector – but that risk is inextricably bound to the Inspector's everyday job. Indeed, one of the aspects for which the public pays Customs Inspectors is putting themselves at risk, if necessary, to enforce federal law.

Whiting, 984 F.Supp. at 1106.

On the other hand, I have found several cases in which the courts have refused

to apply the fireman's rule to bar suit by inspectors injured in the performance of their duties. In *Sam v. Wesley*, 647 N.E.2d 382 (Ind. Ct. App. 1995), the Court of Appeals of Indiana refused to extend the rule to bar suit by a building inspector who was injured while performing an inspection. The court reasoned,

> We do not believe that a building inspector is a professional public safety officer in the nature of a fire fighter, police officer or paramedic. Building inspectors do not receive special training from the State to confront emergency situations, as do the other safety professionals included in the fireman's rule. Further, a building inspector's job does not expose one to particular, specific, emergency risks as do the jobs listed above. A building inspector is not called upon to rescue an individual caught in a building which is not up to code. Instead, an inspector is employed to confirm that constructors are complying with the building code. There is some risk inherent in performing these duties; however, "many kinds of public employees confront danger inherent in their jobs... If we did not distinguish fire fighters and police officers from other public employees, then no public employees would be able to recover for injuries sustained as a result of those dangers." *Lees v. Lobosco*, [625 A.2d 573, 576 (N.J. Super. Ct. App. Div. 1993)]....
>
> Fire fighters, police officers and paramedics all face very particular types of risk, directly related to the task of confronting emergencies and rescuing individuals, which are not present in the job of a building inspector.

Sam, 647 N.E.2d at 385; *see also, Gray v. Russell*, 853 S.W.2d 928, 930-31 (Mo. 1993) (fireman's rule did not bar suit by police officer injured while conducting a routine building inspection); *Orth v. Cole*, 955 P.2d 47, 49 (Ariz. Ct. App. 1998) (fireman's rule did not bar suit by fireman injured during routine inspection of apartment complex).

Based on my review of these cases, I am persuaded that the fireman's rule in Virginia should not be expanded to bar claims brought by any public employees other than police officers or firefighters. I agree with the reasoning of the Superior Court of New Jersey as set forth in *Lees v. Lobosco,* 625 A.2d at 576, that "[a]ny extension of the fireman's rule beyond fire and police officers would thus contradict the rule's rationale." I also agree with the concern that "any such extension would invite the wholesale abolition of traditional tort actions by public employees who suffer injuries as a result of hazards inherent in their employment." *Lees*, 625 A.2d at 576.

Furthermore, based on recent Virginia precedent limiting the application of this rule, I am persuaded that Virginia courts would not expand this rule to bar this plaintiff's claim. In particular, it has been held that the fireman's rule in Virginia does not extend to shield negligent acts from suit that are separate and independent from the act that occasioned an officer's presence. *Johnson,* 769 F. Supp. 947. Nor does the rule bar suits for injuries inflicted by third parties due to risks not inherent in the plaintiffs' employment. *Benefiel,* 244 Va. at 495-96, 422 S.E.2d at 777. Virginia courts also have held that the fireman's rule applies only when the officer is in the "zone of danger" that pertains to the emergency on which the officer had been called. *See Stafford v. Hodges,* 25 Va. Cir. 234, 238 (1991). Furthermore, the Virginia Supreme Court has held that the fireman's rule is inapplicable with respect to a rescue squad's response to accidental release of ultrahazardous chemical. *Philip Morris, Inc., v. Emerson*, 235 Va. 380, 405, 368 S.E.2d 268, 282 (1988). The Virginia Supreme Court also has held that the fireman's rule is inapplicable to bar suit where the defendant commits an intentional tort injuring a firefighter or police officer. *Goodwin,* 246 Va. at 404-05, 436 S.E.2d at 606.

Finally, I also am persuaded that the fireman's rule "violates 'a fundamental tenent of our jurisprudence...: the right of redress for those injured as a result of the wrongdoing of others,'" *Boyer v. Anchor Disposal*, 638 A.2d 135, 140 (N.J. 1994) (Handler, J., concurring) (quoting *Mahoney v. Carus Chem. Co.*, 510 A.2d 4 (N.J. 1986)). Thus, I believe it should be narrowly construed. This view of narrow construction has been applied by many, if not most, of the courts which have adopted the rule. *See Moody v. Delta Western, Inc.*, 38 P.3d 1139, 1141 (Alaska 2002) ("Jurisdictions adopting the Firefighter's Rule emphasize its narrowness").

Based on my review of the relevant authority, from both Virginia and other jurisdictions, and the stated policies underlying the rule, I am persuaded that the Supreme Court of Virginia would not apply the fireman's rule to bar the plaintiff's claim. Therefore, I recommend that the court deny the defendant's motion for summary judgment.

PROPOSED FINDINGS

As supplemented by the above summary and analysis, the undersigned now submits the following formal findings, conclusions and recommendations:

1. There are no genuine issues of material fact in dispute in this case;
2. Under Virginia law, the "fireman's rule" does not bar the plaintiff's claim; and
3. The defendant's motion for summary judgment should be denied.

RECOMMENDED DISPOSITION

Based on the above-stated reasons, I recommend that the court deny the Motion, (Docket Item No. 8).

Notice to Parties

Notice is hereby given to the parties of the provisions of 28 U.S.C. §636(b)(1)(C):

> Within ten days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendation to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge]. The judge may also receive further evidence to recommit the matter to the magistrate [judge] with instructions.

Failure to file written objection to these proposed findings and recommendations within 10 days could waive appellate review. At the conclusion of the 10-day period the Clerk is directed to transmit the record in this matter to the Honorable Glen M. Williams, Senior United States District Judge.

The Clerk is directed to send copies of this Report and Recommendation to all counsel of record.

DATED: August _____, 2003.

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UNITED STATES MAGISTRATE JUDGE