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McKesson v. Doe, The Professional Rescuer's Doctrine: Could It Be Louisiana's Saving Grace?

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MCKESSON V. DOE, THE PROFESSIONAL RESCUER’S DOCTRINE: COULD IT BE LOUISIANA’S SAVING GRACE?

ANDREA CARRO*

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I. INTRODUCTION

Considering the plethora of news stories, civil and criminal cases, and even more discourse regarding protests sparked by police violence over the last decade, let me bring you back to a scorching summer day in Baton Rouge, Louisiana. The day was July 5, 2016, and Alton Sterling decided to sell CDs outside of the Triple S Food Mart, a local corner store in Baton Rouge.¹ Unfortunately, Mr. Sterling did not realize the chaos that would ensue, nor did he know

* J.D., UIC School of Law 2023. During the course of editing this note, I studied for the Illinois Bar Exam and took care of my newborn daughter. I'd like to express a sincere thank you to the members of the UIC Law Review Executive Board for being patient and understanding during my editing process. I'd also like to express my gratitude for my family, friends, and colleagues for their support during this time. Lastly, I'd like to dedicate my note to my daughter, Aubree, to show her that anything is possible if you put forth the effort.

1. Department of Justice, Federal Officials Close Investigation into Death of Alton Sterling, Office of Public Affairs (May 3, 2017), www.justice.gov/opa/pr/federal-officials-close-investigation-death-alton-sterling [perma.cc/QEZ8-2B4R].

that an individual's 911 call, framing his conduct outside of the store as threatening, would cost him his life.²

After responding officers, Howie Lake and Blane Salamoni arrived on scene, Alton Sterling was dead within 90 seconds.³ The officers directed Sterling to place his hands on the hood of a car.⁴ When Sterling did not comply, a physical altercation ensued.⁵ Instructing Sterling to stay still, Officer Salamoni drew his weapon.⁶ Less than one second later, he fired three shots into Sterling's chest.⁷ As Sterling fought for his life, Salamoni fired three more rounds into his back.⁸

Sterling's death sparked a protest—just one in a string of many across the country.⁹ This protest was led by DeRay McKesson, a civil rights activist and a leading voice in the Black Lives Matter Movement.¹⁰ This protest illegally blocked a public highway in front of the Baton Rouge Police Department Headquarters.¹¹ But the department was prepared.¹² Front line officers dressed in riot gear were ordered to stand in front of other officers who were prepared to make arrests.¹³

Among them was Officer Doe.¹⁴ In the presence of McKesson, some protestors began throwing objects at the police officers including full water bottles, which had been stolen from a nearby convenience store.¹⁵ At some point, an unidentified individual picked up a piece of concrete or a similar rock-like object and threw it at the officers making arrests.¹⁶ The object struck Officer Doe's face and he was knocked to the ground and incapacitated.¹⁷ Officer Doe's injuries included loss of teeth, a jaw injury, a brain injury, a

2. *Id.* The caller alleged that Sterling pulled a gun out. *Id.*

3. *Id.*

4. *Id.*

5. Department of Justice, *supra* note 1.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Doe v. McKesson*, 945 F.3d 818, 822-23 (5th Cir. 2019).

10. *About DeRay*, DERAY MCKESSON, www.deray.com/about/ [perma.cc/9CVP-J63H] (last visited Oct. 9, 2021). DeRay came to prominence when he started documenting the Ferguson protests and has continued to publicly advocate for justice and accountability for the victims of police violence as well as ending mass incarceration. *Id.*

11. *Doe*, 945 F.3d at 823.

12. *Id.*

13. *Id.*

14. *Id.* Officer Doe is not his actual name. Associated Press, *Louisiana Officer Wounded in Deadly Ambush Sues Black Lives Matter*, L.A. TIMES (last visited Dec. 30, 2021), www.latimes.com/nation/nationnow/la-na-black-lives-matter-20170708-story.html [perma.cc/6XD7-28SA]. The suit does not name the officer, but according to the LA Times, its description of the officer matches East Baton Rouge Parish Sheriff's Deputy Nicholas Tullier.

15. *Doe*, 945 F.3d at 823.

16. *Id.*

17. *Id.*

head injury, lost wages, and “other compensable losses.”¹⁸ After, Officer Doe filed a lawsuit against DeRay McKesson to recover for his injuries.¹⁹

Part II of this Case Note will provide background on the applicable law that the Fifth Circuit used to dismiss Officer Doe's claims.²⁰ Further in Part II, this Note will address the Professional Rescuer's Doctrine referenced by the Supreme Court in its review of the Fifth Circuit Decision.²¹ The final sections of Part II will address relevant Louisiana Law and how other jurisdictions have applied the Professional Rescuer's Doctrine.²² Part III of this Note goes into an in-depth analysis of the Fifth Circuit's Decision, the Supreme Court's review of that decision, and the Fifth Circuit's remanded decision.²³ Part IV argues that the Fifth Circuit erred by failing to address the Professional Rescuer's Doctrine. It also discusses other jurisdictions' application of the doctrine, arguing that the Fifth Circuit and Louisiana should adopt the *Johnson* approach precluding Officer Doe from recovering.²⁴

Thus, the Fifth Circuit and Louisiana should adopt and apply the Professional Rescuer's Doctrine, a legal framework rarely employed by Louisiana state courts. Examining other courts' application of the doctrine provides insight into whether Officer Doe is precluded from recovering for his injuries. Based on other jurisdictions' applications, reasonings, and public policy considerations, the Fifth Circuit and Louisiana should adopt the *Johnson* approach because allowing an officer to recover under similar facts would open the floodgates to litigation. Further, to allow Officer Doe to recover for damages, would have a chilling effect on demonstrator's First Amendment right to assembly and speech.

II. BACKGROUND

This section will begin by providing an overview of the duty-risk analysis. Next, it addresses how the Fifth Circuit applied the duty-risk analysis to Officer Doe's Claim. It further explains the

18. *Id.*

19. *Id.* at 822.

20. *Id.* at 823.

21. *McKesson v. Doe*, 141 S. Ct. 48, 50 (2020).

22. *Murray v. Ramada Inns, Inc.*, 521 So. 2d 1123 (La. 1988); *Briley v. Mitchell*, 115 So. 2d 851 (La. 1959); *Johnson v. Teal*, 769 F. Supp 947 (E.D. Va. 1991); *Vasquez v. N. Cnty Transit Dist.*, 292 F.3d 1049 (9th Cir. 2002); *Risenhoover v. England*, 936 F. Supp 393 (W.D. Tex. 1996); *Carson v. Headrick*, 900 S.W.2d 685 (Tenn. 1995); *Lenthall v. Maxwell*, 138 Cal. App. 3d 716 (1982).

23. *Doe*, 945 F.3d at 826; *McKesson*, 141 S. Ct. at 51; *Doe v. McKesson*, 2 F.4th 502, 502 (5th Cir. 2021).

24. *Doe*, 945 F.3d at 826; *Johnson*, 769 F. Supp at 947; *Vasquez*, 292 F.3d at 1049; *Risenhoover*, 936 F. Supp at 393; *Carson*, 900 S.W.2d at 685; *Lenthall*, 138 Cal. App. 3d at 716.

Supreme Court's decision regarding the Fifth Circuit's holding which lead to the Fifth Circuit's certification of two questions to the Louisiana supreme court. Lastly, it provides an overview of the Professional Rescuer's Doctrine.

Prior to the Fifth Circuit's decision, the United States District Court for the Middle District of Louisiana dismissed Officer Doe's case for failing to state a plausible claim for relief against McKesson, and it held that the First Amendment barred his claim.²⁵ Officer Doe appealed to the Fifth Circuit asserting that he had stated a plausible claim for relief under a theory of negligence. Officer Doe argued McKesson was negligent for organizing and leading the protest because he "knew or should have known" that the demonstration would turn violent.²⁶ The Fifth Circuit agreed with Officer Doe's negligence argument and evaluated his claim under the duty-risk analysis.²⁷

A. *The Duty-Risk Analysis*

Louisiana Civil Code Article 2315 prescribes personal liability to a person who causes damage to another by requiring the person to repair what has been damaged.²⁸ The Louisiana supreme court has adopted a "duty-risk" analysis for assigning tort liability under a negligence theory.²⁹ There are five elements that a plaintiff must establish in order to prove negligence under the duty-risk theory: "(1) the plaintiff suffered an injury; (2) the defendant owed a duty of care to the plaintiff; (3) the duty was breached by the defendant; (4) the conduct in question was the cause-in-fact of the resulting harm; and (5) the risk of harm was within the scope of protection afforded by the duty breached."³⁰

First, the plaintiff must establish that they suffered an injury.³¹ Then, the plaintiff must prove that the defendant owed a duty of care to the plaintiff.³² Under Louisiana law, whether a defendant owes a plaintiff a duty is a question of law.³³ The

25. *Id.*

26. *Doe*, 945 F.3d at 826.

27. *Id.*

28. *Understanding Baton Rouge Personal Injury Law*, SMITH SHANKLIN SOSA (last visited Dec. 30, 2021), www.smithshanklin.com/how-it-works [perma.cc/GNJ9-LUKT]; Liability for Acts Causing Damages, LA. CIV. CODE ANN. art. 2315 (providing for liability for acts causing damages. Subsection A provides that every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it. LA. CIV. CODE ANN. art. 2315(A). Subsection B provides the type of damages that an injured party may be entitled to). LA. CIV. CODE ANN. art. 2315(B).

29. *Doe*, 945 F.3d at 826.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*; *Posecai v. Wal-Mart Stores, Inc.*, 752 So. 2d 762, 766 (La. 1999).

determination of duty varies depending on the facts, circumstances, and context of each case and is limited by the particular risk, harm, and plaintiff involved.³⁴ Louisiana recognizes a universal duty on the part of the defendant in negligence cases to use reasonable care to avoid injuring another.³⁵ Particularly, Louisiana state courts elucidate specific duties based on consideration of various moral, social, and economic factors.³⁶ Louisiana does not recognize a duty to protect others from the criminal activities of third persons.³⁷ However, Louisiana does recognize a duty to refrain from negligently causing a third party to commit a crime that is a foreseeable consequence of negligence.³⁸

Next, the plaintiff must prove that the defendant breached their duty.³⁹ To meet the cause-in-fact element of a negligence claim under Louisiana state law, a plaintiff must prove only that the conduct was a necessary antecedent of the accident.⁴⁰ This means that but for the defendant's conduct, the incident probably would not have occurred.⁴¹ In regards to the last element, it is an uncontroversial proposition of tort law that intentionally breaking the law or encouraging others to break the law is relevant to the reasonableness of one's actions when assessing a breach of a duty of care.⁴²

B. Fifth Circuit Application of Duty-Risk

Applying the duty-risk factors to Officer Doe's case, the Fifth Circuit determined that Officer Doe's claim for relief was sufficiently plausible.⁴³ The Fifth Circuit looked further; it questioned whether the complaint should be dismissed based on

34. Dupre v. Chevron U.S.A., 20 F.3d 154, 157 (5th Cir. 1994) (holding that the owner or operator of a facility has a duty to exercise reasonable care for the safety of persons on his or her premises and a duty to not expose such persons to unreasonable risks of injury or harm). *Id.* at 154.

35. *Doe*, 945 F.3d at 826 (quoting Boykin v. La. Transit Co., 707 So. 2d 1225, 1231 (La. 1998)).

36. *Id.* at 827.

37. *Id.*; see *Posecai*, 752 So. 2d at 766 (holding that a business owner has no duty to provide security guards in its parking lot if there is a very low risk of crime).

38. *Doe*, 945 F.3d at 827; see *Brown v. Tesack*, 566 So. 2d 955, 955 (La. 1990) (holding that a school board was liable because the misuse of flammable fluid and the injuries caused by it were foreseeable because children having access to a flammable substance will most likely light it).

39. *Doe*, 945 F.3d at 827.

40. *Id.* at 828.

41. *Doe*, 945 F.3d at 828; see also *Roberts v. Benoit*, 605 So. 2d 1032, 1052 (La. 1992) (holding that the Sheriff was not liable on the basis of negligently hiring Cook who had injured plaintiff while off-duty).

42. *Id.*

43. *Id.*

First Amendment grounds.⁴⁴ The Fifth Circuit referenced the Supreme Court's decision in *NAACP v. Claiborne Hardware Co.*, and found that the First Amendment does not protect violence.⁴⁵ In *Claiborne*, the petitioners appealed a finding that they were liable for damages cause by a boycott under a common law tort theory because certain participants in the boycott had engaged in physical force, violence, and intimidation to achieve the desired results.⁴⁶ The Supreme Court reversed the lower court's decision and found that only those who took part in the unlawful activity could be held liable.⁴⁷ Absent a specific intent to further such unlawful conduct, mere association by petitioners with the boycotting was insufficient to predicate liability.⁴⁸ Therefore, in order for a plaintiff to defeat a First Amendment defense, a finding that the defendant authorized, directed, or ratified specific tortious activity would justify holding him responsible for the consequences of that activity.⁴⁹

The Fifth Circuit also noted *Clark v. Community for Creative Non-Violence* which stands for the proposition that reasonable time, place, and manner restrictions do not violate the First Amendment.⁵⁰ In *Clark*, the petitioners had violated a statute restricting camping when they slept in tents that were erected to demonstrate the plight of the homeless.⁵¹ The Supreme Court found that the demonstrators' proposed activities fell within the definition of camping in the statute and that the ban was content-neutral and did not interfere with the demonstrators' message regarding the homeless.⁵² Applying these principles, the Fifth Circuit found that McKesson did direct the specific tortious activity and ordered demonstrators to violate a reasonable time, place, and manner restriction insofar that the First Amendment did not protect him from liability.⁵³

C. Supreme Court Review

After the Fifth Circuit's decision, the United States Supreme Court granted certiorari.⁵⁴ The Court addressed whether the Fifth

44. *Id.*

45. *Id.*; *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) (holding that an individual cannot be held liable for the violent acts of a third party just by association alone. It is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those aims).

46. *Claiborne Hardware*, 458 U.S. at 888.

47. *Id.*

48. *Id.*

49. *Doe*, 945 F.3d at 829.

50. *Id.* at 832.

51. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 289 (1984).

52. *Id.*

53. *Doe*, 945 F.3d at 832.

54. *Mckesson*, 141 S. Ct. at 49.

Circuit's use of the duty-risk analysis violated the First Amendment.⁵⁵ When violence occurs during activity protected by the First Amendment, the Court must evaluate the situation with precision to determine if the violence gives rise to liability for damages.⁵⁶ The Court noted that a First Amendment issue is implicated only if Louisiana law permits recovery under circumstances relating to the violation.⁵⁷ To arrive at the correct decision, the dispute could be greatly simplified by guidance from the Louisiana Supreme Court on the meaning of Louisiana law.⁵⁸ In exceptional cases, certification to a state court is advisable before addressing a constitutional issue.⁵⁹

The Fifth Circuit subsequently certified the two questions of law to the Louisiana Supreme Court.⁶⁰ The first question is: whether Louisiana law recognizes a duty, under the facts alleged in the complaint, or otherwise, not to negligently precipitate the crime of a third party.⁶¹ The second question is: assuming McKesson could otherwise be held liable for a breach of duty owed to Officer Doe, does Louisiana's Professional Rescuer's Doctrine bar recovery under the facts alleged in the complaint?⁶² This note focuses on answering the second question.

D. The Professional Rescuer's Doctrine

The Professional Rescuer's Doctrine is a judge made rule that provides that a professional rescuer, such as a fireman or a policeman, who is injured in the performance of his duties, assumes the risk of such an injury.⁶³ As a result, that officer will not be

55. *Id.* at 50.

56. *Id.* (quoting *Claiborne*, 458 U.S. at 916).

57. *McKesson*, 141 S. Ct. at 49.

58. *Id.*; see *Bellotti v. Baird*, 428 U.S. 132, 151 (1976) (vacating the judgment that enjoined enforcement of the state statute by the district court and remanding the cases for certification of relevant issues of state law to the state supreme court and for abstention pending the decision of that tribunal).

59. *McKesson*, 141 S. Ct. at 51; see *Bellotti*, 428 U.S. at 151; *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 207 (1960) (holding that the court of appeals should not have reached a constitutional issue without first deciding two non-constitutional questions of state law that might have disposed of the case).

60. *Doe*, 2 F.4th at 502.

61. *Id.* This Note will not address this question. The Fifth Circuit found that Officer Doe had plausibly alleged that McKesson knew or should have known that the protest he led onto a public highway would turn confrontational and violent and that in the course of organizing and leading the protest, he breached a duty of reasonable care owed to Officer Doe and persons similarly situated. *Doe*, 2 F.4th at 502.

62. *Doe*, 2 F.4th at 502.

63. *Id.* at 504; *Gann v. Matthews*, 873 So. 2d 701, 705 (La. Ct. App. 2004) (determining that a police officer who was attempting to handcuff a drunk defendant was barred from recovery by the Professional Rescuer's Doctrine when the defendant moved, and the police officer struck her knee on a vehicle suffering injuries).

entitled to recover damages.⁶⁴ In *Doe v. McKesson*, the parties disagree as to whether this doctrine bars Officer Doe from recovering.⁶⁵ It is important to evaluate this doctrine through the lens of other jurisdictions to determine how it would apply to this case.⁶⁶

The Professional Rescuer's Doctrine is also known as the firefighter's rule.⁶⁷ Historically, firemen who were injured while on duty have not been able to recover for their injuries against the at-fault party.⁶⁸ Courts around the United States have generally held that the doctrine extends to police officers as well.⁶⁹ Distinct from the rescue doctrine,⁷⁰ the Professional Rescuer's Doctrine applies only to an individual whose employment requires that person to engage in the rescue of others.⁷¹ A professional rescuer who is injured while engaged in a rescue within the scope of their employment may not bring an action against the victim being rescued if the victim's own negligence causes the rescuer's injury.⁷²

The rationale for this doctrine is that professional rescuers, such as police or firefighters, assume the risks associated with their profession.⁷³ But, if the risk is hidden, unknown, extra hazardous, or otherwise not reasonably anticipated or foreseen, the

64. *Doe*, 2 F.4th at 502.

65. *Id.*; see McKesson Supplemental Brief, *Doe*, 2 F.4th 502 (No. 17-30864) [hereinafter McKesson Supplemental Brief]; Doe Supplemental Brief, *Doe*, 2 F.4th 502 (No. 17-30864) [hereinafter Doe Supplemental Brief].

66. *Doe*, 2 F.4th at 504.

67. *Firefighter's Rule Law and Legal Definition*, US LEGAL (last visited Oct. 9, 2021), definitions.uslegal.com/f/firemans-rule/ [perma.cc/HD48-MMKP].

68. *Note: Assumption of the Risk and the Fireman's Rule*, 7 WM. MITCHELL L. REV. 749, 749-50 (1981), open.mitchellhamline.edu/cgi/viewcontent.cgi?article=2710&context=wmlr [perma.cc/2KN2-PUHG].

69. See *Berko v. Freda*, 459 A.2d 663, 663 (N.J. 1983) (holding that the Professional Rescuer's Doctrine applies to police officers as well as firefighters.); *Steelman v. Lind*, 634 P.2d 666, 666 (Nev. 1981); *Hannah v. Jensen*, 298 N.W.2d 52, 52 (Minn. 1980); *Walters v. Sloan*, 571 P.2d 609, 609 (Cal. 1977); *Garcia v. City of S. Tucson*, 640 P.2d 1117, 1117 (Ariz. Ct. App. 1982); *Whitten v. Miami-Dade Water & Sewer Auth.*, 357 So. 2d 43, 4300 (Fla. Dist. Ct. App 1978).

70. *Rescue Doctrine*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (Desk ed. 2021) An injured rescuer may sue the person who imperiled the victim rescued. *Id.* The rescue doctrine is a doctrine of standing that allows a party who rescues a person placed in peril by the negligence or intentional tort of a third party to bring an action against the third party to recover injuries or costs that the rescuer sustained during the rescue. *Id.*

71. *Professional Rescuer Doctrine (Firefighter's Rule)*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (Desk. ed. 2021).

72. *Id.*

73. *Id.*; *Lee v. Luigi, Inc.*, 696 A.2d 1371, 1374 (D.C. 1997) (holding that a police officer who was injured when he slipped and fell on a slippery substance while descending a cluttered stairway in a restaurant while on duty investigating a suspected burglary in response to an activated burglar alarm was barred from compensation for his injuries by the Professional Rescuer's Doctrine).

professional rescuer may seek recovery.⁷⁴ The rule bars firefighters, police officers, ambulance drivers, emergency medical technicians, and other professional rescuers from maintaining a tort suits against a private party.⁷⁵

E. Relevant Louisiana Law

Louisiana law provides little to no guidance on how the doctrine may apply to the specific facts here.⁷⁶ In fact, in *Murray v. Ramada Inns, Inc.*, the supreme court of Louisiana found that the common law doctrine of assumption of risk no longer had a place in state tort law.⁷⁷ Further, in *Briley v. Mitchell*, the supreme court of Louisiana found that a police officer acting in his official duties can recover for damages.⁷⁸ However, neither of these cases mentioned the Professional Rescuer's Doctrine.⁷⁹

F. Other Jurisdiction's Application of the Professional Rescuer's Doctrine

Recently, states have applied exceptions to the Professional Rescuer's Doctrine,⁸⁰ making it difficult to assess how jurisdictions should apply the doctrine.⁸¹ Many jurisdictions disagree about the exceptions and the scope of the rule.⁸² The cases addressed below highlight the differing applications of the doctrine throughout jurisdictions. Examination of the distinguishing reasonings, approaches, and application by jurisdiction is necessary in

74. *Professional Rescuer Doctrine (Firefighter's Rule)*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (Desk. ed. 2021); *Beaupre v. Pierce Cnty.*, 166 P.3d 712, 715 (Wash. 2007) (holding that the Professional Rescuer Doctrine did not bar a suit brought by a sheriff's deputy for injuries sustained when a fellow sheriff's deputy struck him with a police car during a hot pursuit). The doctrine did not apply to negligent or intentional acts of intervening parties not responsible for bringing the rescuer to the scene. *Id.*

75. Robert H. Heidt, When Plaintiffs Are Premium Planners for Their Injuries: A Fresh Look at the Fireman's Rule, 82 IND. L.J. 745, 745 (2007).

76. *Doe*, 2 F.4th at 504.

77. *Murray*, 521 So. 2d at 1124 (finding that the answer to the certified question of whether assumption of the risk serves as a total bar to recovery by a plaintiff in a negligence case is that it does not serve as a total bar to a plaintiff's recovery in a negligence case).

78. *Briley*, 115 So. 2d at 855.

79. *Murray*, 521 So. 2d at 1123; *Briley*, 115 So. 2d at 851.

80. *Tort Law - Professional Rescue Doctrine - Washington Supreme Court Declines to Apply Professional Rescue Doctrine in Suit by Policeman Against Fellow Officer.* - *Beaupre v. Pierce County*, 166 P.3d 712 (Wash. 2007), 121 HARV. L. REV. 1644, 1644 (2008) [hereinafter *Tort Law - Professional Rescue Doctrine*] (citing *State Farm Mut. Auto. Ins. Co. v. Hill*, 775 A.2d 476, 484-85 (Md. Ct. Spec. App. 2001)).

81. *Tort Law - Professional Rescue Doctrine*, *supra* note 80, at 1644.

82. Heidt, *supra* note 75, at 753.

determining whether Officer Doe's negligence claim is barred.⁸³

In 1991, the United States District Court for the Eastern District of Virginia decided *Johnson v. Teal*.⁸⁴ There, the plaintiff, William Johnson, worked as a police officer for the Metropolitan Washington Airport Authority at Washington National Airport in Arlington, Virginia.⁸⁵ On February 15, 1989, he had received notice of an emergency holdup alarm.⁸⁶ In responding to that alarm, he was involved in an accident and suffered extensive injuries.⁸⁷ The court concluded that the Professional Rescuer's Doctrine shields only negligent acts that create the need for a firefighter or police officer.⁸⁸ It did not shield the acts of third parties unrelated to the risk that required the officer's presence.⁸⁹ The court concluded that the defendant, Teal, could be held liable for the injuries to the plaintiff because his injuries arose out of an incident that did not require the officer's presence.⁹⁰

In 2002, the United States Court of Appeals for the Ninth Circuit decided *Vasquez v. N. County Transit Dist.*⁹¹ The plaintiff, Kenneth Vasquez, was a police officer in San Diego.⁹² Vasquez was dispatched to a railroad crossing because the crossing gate arms were stuck down, and traffic was backing up.⁹³ Vasquez suffered injuries when one of the railroad crossing's gate arms struck him in the head.⁹⁴ The Ninth Circuit court of appeals was tasked with

83. *Johnson*, 769 F. Supp at 947; *Vasquez*, 292 F.3d at 1049; *Risenhoover*, 936 F. Supp at 393; *Carson*, 900 S.W.2d at 685; *Lenthall*, 138 Cal. App. 3d 716 at 716.

84. *Johnson*, 769 F. Supp at 947.

85. *Id.* at 948.

86. *Id.* An emergency hold-up alarm is a silent alarm which sends a signal to a central station monitored by a third party. *Hunter v. BPS Guard Servs., Inc.*, 654 N.E.2d 405, 547 (Ohio Ct. App. 1995). When that third party receives the signal from the hold-up alarm, it notifies law enforcement authorities. *Id.*

87. *Johnson*, 769 F. Supp. at 947. The facts of the accident are as follows: the plaintiff drove his motorcycle north on Thomas Avenue in Arlington, Virginia at approximately fifteen miles per hour with his sirens on. *Id.* The plaintiff claims that the defendant, Chavis Teal, was driving south on Thomas Avenue. *Id.* The defendant approached an intersection where southbound vehicles are required to yield the right of way to northbound vehicles. *Id.* However, the defendant failed to yield the right of way or heed plaintiff's emergency lights. *Id.* As a result, defendant's failure to yield forced plaintiff to take evasive action. *Id.* The plaintiff ended up losing control of his motorcycle. *Id.* Consequently, he was pinned underneath his motorcycle and suffered extensive and serious injuries. *Id.*

88. *Id.*

89. *Id.* at 950; *Berko*, 459 A.2d at 666 (holding that negligently created risks that did not create the occasion for the firefighter's presence will give rise to a cause of action against the homeowner).

90. *Johnson*, 769 F. Supp. at 953.

91. *Vasquez*, 292 F.3d at 1052.

92. *Id.*

93. *Id.*

94. *Id.* In this case, Vasquez was tasked with directing traffic. *Id.* at 1052. Another officer manually lifted the arm across the street from where Vasquez

determining whether the Professional Rescuer's Doctrine barred Vasquez's claim for injuries.⁹⁵ The court noted that the rule does not prevent recovery in all situations.⁹⁶ As such, California crafted several exceptions to the rule.⁹⁷ One exception, the independent cause exception, was at issue in this case.⁹⁸ Under that exception, the Professional Rescuer's Doctrine does not shield a defendant from being held liable for the injuries of an officer if the acts of misconduct are independent from those which called for the officer's presence.⁹⁹ The court found its holding in *Donohue v. San Francisco Housing Authority* to be controlling.¹⁰⁰ The court reasoned that the independent cause exception applies if the plaintiff can show that the injuries did not result from the same negligent act for which the plaintiff was called to the scene.¹⁰¹ Thus, the Ninth Circuit held that the district court erred when it held that the independent cause exception cannot apply because genuine issues of material fact remain to be resolved.¹⁰²

On April 2, 1996, the United States district court for the western district of Texas, Waco Division decided *Risenhoover v. England*.¹⁰³ The plaintiffs were injured agents of the Bureau of

was standing. *Id.* As a result, the arm on Vasquez's side also responded to the manual movement. *Id.* Vasquez observed that traffic could flow normally again and turned his back to the crossing and began returning to his car. *Id.* The crossing gate arm closest to Vasquez broke and fell striking him in the head. *Id.*

95. *Vasquez*, 292 F.3d at 1052. Prior to the action being heard by the 9th Circuit, Vasquez filed an action in state court against North County Transit District and Amtrak. *Id.* The case was removed to federal court. *Id.* The defendants filed a motion for summary judgment that was granted on the ground that the firefighter's rule barred Vasquez from bringing his claim. *Id.* Vasquez later appealed. *Id.*

96. *Id.* at 1055.

97. *Id.*; CAL. CIV. CODE § 1714.9 (West 2002) (providing four exceptions where a person is responsible not only for the results of that person's willful acts causing injury to a peace officer, firefighter, or any emergency medical personnel employed by a public entity, but also for any injury occasioned to that person by want of ordinary care of skill in the management of the person's property or person).

98. *Vasquez*, 292 F.3d at 1055; CAL. CIV. CODE § 1714.9(e) (West 2002) is not intended to change or modify the common law independent cause exception to the firefighter's rule as set forth in *Donohue v. San Francisco Housing Authority*, 16 Cal. App. 4th 658 (1993).

99. *Vasquez*, 292 F.3d at 1055; *Lipson v. Superior Ct.*, 31 Cal. 3d 362, 368 (1982) (holding that the fireman's rule does not prohibit a firefighter from recovering damages where the act which results in his injury is independent from the act which created the emergency to which the fireman responded).

100. *Vasquez*, 292 F.3d at 1055; *Donohue*, 16 Cal. App. 4th at 663 (reasoning that the injuries at issue "were not caused by an act of negligence which prompted the plaintiff's presence in the building" and that the firefighter's rule does not bar recovery). The plaintiff commenced a personal injury action after he slipped on wet stairs during a non-emergency fire safety inspection of a building owned by defendant city housing authority. *Id.*

101. *Vasquez*, 292 F.3d at 1056.

102. *Id.* at 1060.

103. *Risenhoover*, 936 F. Supp at 395.

Alcohol, Tobacco, Firearms and Explosives (“ATF”) and surviving family members of deceased ATF agents.¹⁰⁴ They brought a negligence claim after an attempted execution of a search and arrest warrant resulted in severe injuries and death to the responding agents because present media organizations alerted the inhabitants of the impending raid.¹⁰⁵ The court addressed the plaintiffs’ negligence theory through the lens of the Professional Rescuer’s Doctrine.¹⁰⁶ At the time, Texas courts had neither adopted nor rejected the rule.¹⁰⁷ The court found that the rule cannot be applied in cases where a police officer is injured by an independent actor that is not connected with the reason for why the officer was called to the place of injury.¹⁰⁸ It also does not apply to conduct that the officer could not reasonably anticipate would occur by reason of his presence at the place of injury.¹⁰⁹ Because the defendants were not the owners of the premises where the plaintiffs were injured nor were they connected with the event that brought the officers to the place of injury, the court determined that the rule was inapplicable to the case.¹¹⁰

On June 5, 1995, the supreme court of Tennessee decided *Carson v. Headrick*.¹¹¹ On October 16, 1991, the defendant, Judith Headrick, called 911 to report a potential domestic disturbance at her home.¹¹² Upon arrival, the responding officers, Carson and Baird, were shot and wounded by Headrick’s husband.¹¹³ The officers filed suit against Headrick alleging that she negligently failed to communicate the actual threats made by her husband.¹¹⁴ Headrick moved for summary judgment relying on the Professional Rescuer’s Doctrine.¹¹⁵ The Professional Rescuer’s Doctrine was first adopted in Tennessee by *Burroughs Adding Machine Co. v. Fryar*, but has since evolved.¹¹⁶ In *Burroughs*, the Tennessee court found

104. *Id.* at 396. On February 28, 1993, the ATF attempted execution of search and arrest warrants of Mount Carmel religious center. *Id.* The defendants, media organizations and an ambulance service, caused their injuries by alerting the inhabitants of the impending raid. *Id.* As a result, when the ATF agents went to execute the search, individuals from inside the compound began firing. *Id.* After the shooting stopped, four ATF agents were dead while numerous others sustained gunshot and shrapnel-related injuries. *Id.*

105. *Id.* at 405.

106. *Id.*

107. *Id.* at 406.

108. *Risenhoover*, 936 F. Supp at 406.

109. *Id.*; *Lenthall*, 138 Cal. App. 3d at 719.

110. *Risenhoover*, 936 F. Supp at 406.

111. *Carson*, 900 S.W.3d at 685.

112. *Id.* at 686. Headrick reported that her husband was violent at times and that he had been drinking and had guns in the home. *Id.* As the officers responded, Headrick’s husband began firing a rifle. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*; *Hudson v. Gaitan*, 675 S.W.2d 699, 703-04 (Tenn. 1984) (“The

that a policeman could not recover for his injuries since he was a licensee.¹¹⁷ Subsequently, in *Buckeye Cotton Oil Co. v. Campagna*, the Tennessee court found that a fireman could recover for injuries since he was considered an invitee and the landowner owed a duty of reasonable care to him.¹¹⁸ Subsequently, in *Hudson v. Gaitan*, the Tennessee supreme court abolished the distinction between invitee and licensee.¹¹⁹ Since *Hudson*, the rationale changed once more, and the Tennessee courts held that a citizen owes no duty of reasonable care to police officers responding to their call for assistance.¹²⁰ As always, there is an exception.¹²¹ When a police officer is injured by the intentional, malicious, or reckless acts of a citizen, the action is not barred by the Professional Rescuer's Doctrine.¹²² Here, in *Headrick*, the court found that the rule barred recovery because the defendant informed the dispatcher about her husband's violent past.¹²³

On December 28, 1982, the court of appeals of California

common law classifications of one injured on land of another as an 'invitee' or 'licensee' are no longer determinative in this jurisdiction in assessing the duty of care owed by the landowner to the person injured; the duty owed is one of reasonable care under all of the attendant circumstances, foreseeability of the presence of the visitor and the likelihood of harm to him being one of the principal factors in assessing liability. Care that is reasonable in one context may be wholly unreasonable or more than reasonable in a different context. *Eddy v. Syracuse University*, 78 A.D.2d 989, (1980); *Poulin v. Colby College*, 402 A.2d 846 (1979); *O'Leary v. Coenen*, 251 N.W.2d 746 (1977). This duty of reasonable care shall extend to all persons who come upon the defendant's property with his consent, express or implied. *Antoniewicz v. Reszcynski*, 236 N.W.2d 1 (1975); *Peterson v. Balach*, 199 N.W.2d 639 (1972); *Ouellette v. Blanchard*, 364 A.2d 631 (1976); *Paquette v. Joyce*, 379 A.2d 207 (1977). The defense of contributory negligence shall continue to be available to the defendant in such cases.”)

117. *Burroughs Adding Mach. Co. v. Fryar*, 179 S.W. 127, 128 (Tenn. 1915) (“[T]he authorities are uniform to the effect that the owner of property is under no obligation to a policeman or fireman who goes thereupon in the discharge of his duty, except to refrain from inflicting upon such an officer a willful or wanton injury.”).

118. *Buckeye Cotton Oil Co. v. Campagna*, 242 S.W. 646, 647 (Tenn. 1922) (finding that a Memphis fireman who was killed fighting a fire was classified as an invitee to whom the landowner owed a duty of reasonable care because he was fighting a fire outside the city limits of Memphis, and therefore, outside the scope of his public duty).

119. *Hudson*, 675 S.W.2d at 703 (holding that the duty owed to fireman and policeman is one of reasonable care under all the attendant circumstances).

120. *Carson*, 900 S.W.2d at 690 (noting that the state supreme court joins the majority of other jurisdictions who have reaffirmed the policeman and fireman's rule on public policy grounds).

121. *Id.*

122. *Id.*; see *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 898 (Tenn. 1992) (holding that when a police officer is injured by the intentional, malicious, or reckless acts of a citizen, the action is not barred by the policemen and firemen's rule).

123. *Carson*, 900 S.W.2d at 690.

decided *Lenthall v. Maxwell*.¹²⁴ The plaintiff, Lenthall, was a police officer for the City of San Luis Obispo.¹²⁵ Lenthall was responding to a call when he was shot and injured.¹²⁶ In analyzing the trial court's grant of summary judgment, the court of appeals noted that the Professional Rescuer's Doctrine holds that a fireman has no cause of action against a person who negligently started a fire, where the fireman was injured.¹²⁷ The rule has since been extended to police officers.¹²⁸ The rule has also been applied where the defendant's action was wanton and reckless.¹²⁹ The court of appeals concluded that the rule does not apply to injuries inflicted by an independent actor not connected with the event bringing the officer to the place of injury.¹³⁰ In addition, it does not apply to injuries caused by conduct that the officer could not reasonably anticipate would occur.¹³¹ However, the Professional Rescuer's Doctrine applies when an officer is injured by a party in the event that brought the officer to the place of his injury and the officer could reasonably expect an act by the liable party while he is on duty.¹³² A police officer called to subdue a violent offense involving firearms, should reasonably expect that one of the persons that called on him might resist him by use of the firearms involved.¹³³

Therefore, to best answer the question posed by the Fifth Circuit to the Louisiana supreme court, the facts of Officer Doe's case must be analyzed under other jurisdictions' renditions of the Professional Rescuer's Doctrine.¹³⁴

III. COURT'S ANALYSIS

This section will apply an in-depth analysis as to how the Fifth Circuit used the duty-risk analysis to come to the conclusion that Officer Doe could recover on his negligence claim against

124. *Lenthall*, 138 Cal. App. 3d at 716.

125. *Id.* at 717.

126. *Id.* The plaintiff and other officers responded to an order to proceed to the defendant's home. *Id.* The order stated that "a 415 Family with weapons, possibly shots fired", was in progress. *Id.* When the plaintiff arrived at the residence, he was shot and injured by the defendant. *Id.* The plaintiff claimed that the shot was intentional. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*; *Spargur v. Park*, 128 Cal. App. 3d 469 (1982) (holding that summary judgment was improper when an officer was hit and injured by a car he parked in front). The court found that it could not be determined from the record whether the defendant's car proceeded accidentally because of poor brakes or because of an intentional failure to stop. *Id.*

130. *Lenthall*, 138 Cal. App. 3d at 719.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Doe*, 2 F.4th 502 (5th Cir. 2021).

McKesson.¹³⁵ Subsequently, it analyzes the United States Supreme Court's decision to vacate the Fifth Circuit's decision and remand it back to the Fifth Circuit.¹³⁶ Finally, it examines the Fifth Circuit's decision on remand that certified two questions to the Louisiana supreme court.¹³⁷

A. *Facts & Procedural History*

Officer Doe sued DeRay McKesson in Louisiana state court alleging claims of negligence and *respondeat superior*.¹³⁸ This Note only addresses the Fifth Circuit's evaluation of Officer Doe's negligence claim.¹³⁹ Officer Doe alleged that McKesson was in Baton Rouge for the purpose of demonstrating, protesting and rioting to incite others to violence against police and other law enforcement officers.¹⁴⁰ In response to Officer Doe's Complaint, McKesson filed a Rule 12 Motion asserting that Officer Doe had failed to state a plausible claim for relief against him.¹⁴¹ The Louisiana middle district court ultimately agreed, finding that Officer Doe had failed to state a plausible claim for relief against McKesson because his allegations were mere conclusory statements.¹⁴² Thus, McKesson's

135. *Doe*, 945 F.3d at 826.

136. *McKesson*, 141 S. Ct. at 51.

137. *Doe*, 2 F.4th 502 (5th Cir. 2021).

138. Complaint at 5-6, *Doe v. McKesson*, 272 F. Supp. 3d 841 (M.D. La. 2017) (No. 16-00742-BAJ-RLB) [hereinafter Complaint]. Officer Doe's claim under the theory of *respondeat superior* means that he alleged liability to McKesson under a theory of agency.

139. *Doe*, 945 F.3d at 818. Officer Doe alleged that under the doctrine of *respondeat superior*, the defendant was liable for the actions of Black Lives Matter membership, which caused his injuries. *Id.* McKesson responded that Black Lives Matter is not an entity with the capacity to be sued. *Id.* Officer Doe responded by amending his complaint. *Id.* *Respondeat superior* is defined as the liability of a principal for the wrongdoing of an agent. *Respondeat Superior*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (Desk. ed. 2021).

140. *Doe v. McKesson*, 272 F. Supp. 3d 841, 845 (M.D. La. 2017). Officer Doe conceded that the demonstration was peaceful when it commenced, but that the protest turned into a riot when McKesson pumped up the crowd. *Id.* Specifically, Doe alleged that McKesson did nothing to calm the crowd when demonstrators began throwing water bottles and other objects at police officers. *Id.*

141. *Id.* McKesson asserted a Rule 12 Defense. *Id.* According to Rule 12(b), every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. FED. R. CIV. P. 12(b). A party may assert one of the following defenses by motion: lack of subject matter jurisdiction, lack of personal jurisdiction, improper venue, insufficient process, insufficient service of process, failure to state a claim upon which relief can be granted; and failure to join a party under Rule 19. *Id.*

142. *Doe*, 272 F. Supp. 3d at 852. The court found that McKesson's alleged statement that "people take to the streets as a last resort" cannot give rise to a cause of action: it is not plausible that this statement could be "likely to invite lawless action" or be of such a character that could serve as "evidence that he gave other specific instructions" to the unidentified demonstrator to throw a rock at the plaintiff. *Id.* The court also reasoned that to premise McKesson's

motion to dismiss was granted with prejudice.¹⁴³ Officer Doe appealed the Louisiana middle district court's decision to the Fifth Circuit.¹⁴⁴

B. The Fifth Circuit's Initial Decision

On appeal, the Fifth Circuit evaluated Officer Doe's negligence claim under Louisiana's duty-risk analysis.¹⁴⁵ The court did not address the first element of the duty-risk analysis which requires a plaintiff to suffer an injury as it was not a disputed issue.¹⁴⁶

The court assessed whether McKesson owed a duty of care to Officer Doe by evaluating the facts and circumstances of the case.¹⁴⁷ On the day of the protest, McKesson planned to block a public highway.¹⁴⁸ McKesson was seen and heard giving orders throughout the day and night of the protests.¹⁴⁹ The court held that under Louisiana law, blocking a public highway is a criminal act.¹⁵⁰ Because of these facts, the Fifth Circuit determined that it was "patently foreseeable" that the Baton Rouge police would be required to respond to the demonstration by clearing the highway and making arrests.¹⁵¹ If patently foreseeable, an individual incurs

liability on the sole basis of his public statements in which he had identified himself as a leader of the Black Lives Matter movement or a participant in various demonstrations would impermissibly impose liability on McKesson for merely exercising his right of association. *Id.*

143. *Id.* at 854. The court dismissed the claim with prejudice because the plaintiff had ample opportunity to demonstrate to the court that he could state plausible claim for relief against an individual or entity. *Id.* Officer Doe produced a proposed amended complaint that failed to state a plausible claim for relief against any of the named defendants and also attempts to hold a hashtag liable for damages in tort. *Id.*

144. *Doe*, 945 F.3d at 826.

145. *Id.*

146. *Id.* at 826; Complaint, *supra* note 138, at 5-6 (alleging the plaintiff suffered acute injury and multiple serious and prolonged injuries which included but are not limited to his neck and face, discomfort, humiliation, pain and suffering, mental and emotional injury, medical and pharmaceutical expenses, and future lost wages); Appellee's Supplemental Letter Brief at 1, *Doe v. McKesson*, 945 F.3d 818 (5th Cir. 2019) (No. 17-30864) (noting the plaintiff's injury).

147. *Doe*, 945 F.3d at 826.

148. *Id.*

149. *Id.*

150. *Id.*; Section § 14:97(A) of the Louisiana Statutes Annotated provides: "Simple obstruction of a highway of commerce is the intentional or criminally negligent placing of anything or performance of any act on any railway, railroad, navigable waterway, road, highway, thoroughfare, or runway of an airport, which will render movement thereon more difficult." LA. STAT. ANN. § 14:97(A) (2014). Section § 14:97(B) provides: "Whoever commits the crime of simple obstruction of a highway of commerce shall be fined not more than two hundred dollars, or imprisoned for not more than six months, or both." LA. STAT. ANN. § 14:97(B) (2014).

151. *Doe*, 945 F.3d at 826.

liability for injuries caused by his own negligent conduct and the violent actions of another that were a foreseeable result of his conduct.¹⁵² The court held McKesson should have known that leading the demonstrators onto a busy highway was likely to provoke a confrontation between the police and demonstrators.¹⁵³

Next, the Fifth Circuit turned to whether McKesson breached a duty owed to Officer Doe.¹⁵⁴ The court held that McKesson ignored the foreseeable danger to officers, bystanders, and demonstrators when he brought a group of demonstrators onto a public highway.¹⁵⁵ By ignoring the foreseeable risk of violence, McKesson failed to exercise reasonable care in conducting his demonstration.¹⁵⁶ The Fifth Circuit reasoned that McKesson owed Officer Doe a duty not to negligently precipitate the crime of a third party and that a jury could plausibly find that a violent confrontation with a police officer was a foreseeable effect of negligently directing a protest.¹⁵⁷

Thereafter, the Fifth Circuit evaluated whether McKesson's breach of duty was the cause-in-fact of Officer Doe's injury.¹⁵⁸ To meet the cause-in-fact element, a plaintiff must prove only that the conduct was a necessary antecedent of the accident.¹⁵⁹ In layman's terms, but for the defendant's conduct, the incident probably would not have occurred.¹⁶⁰ Under the cause-in-fact test, the court determined that by leading the demonstrators onto the public highway and provoking a violent confrontation with the police, McKesson's negligent actions were the "but for" causes of Officer's Doe's injuries.¹⁶¹

The Fifth Circuit supported this conclusion by referencing claims within Officer Doe's amended complaint.¹⁶² The amended complaint alleges that McKesson led hundreds of protestors down a public highway in an attempt to block the interstate.¹⁶³ It further alleges that at the same time, McKesson knew he was in violation

152. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM §19 (2010) (The conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of the plaintiff or a third party).

153. *Doe*, 945 F.3d at 827.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 828.

159. *Doe*, 945 F.3d at 828.

160. *Id.* at 826.

161. *Id.* at 828.

162. Amended Complaint at 3, *Doe v. McKesson*, 272 F. Supp. 3d 841 (M. D. La. 2017) (No. 19-1108) [hereinafter Amended Complaint].

163. *Id.*; Michelle Garcia, *Hundreds, Including DeRay Mckesson, Arrested at Protests over Police Brutality*, VOX (Jul 10, 2016, 1:05 PM), www.vox.com/2016/7/10/12139490/deray-mckesson-arrested [perma.cc/L272-QXLX].

of the law and livestreamed his arrest.¹⁶⁴ During this time, Officer Doe was struck by a piece of concrete or a rock-like object.¹⁶⁵ Although it may have been an unknown demonstrator that threw the hard object at Officer Doe, without McKesson's planning and leading of the protest, Officer Doe alleges that his injuries would not have occurred.¹⁶⁶ As a general rule, the Fifth Circuit noted that intentionally breaking, and encouraging others to breach the law is relevant to the reasonableness of one's actions.¹⁶⁷ As such, the court was able to conclude that under the duty-risk analysis, Officer Doe had pleaded a sufficient claim to proceed to discovery.¹⁶⁸

The Fifth Circuit ultimately concluded that under the duty-risk analysis, McKesson could be held liable for the injuries Officer Doe suffered.¹⁶⁹ However, the video showed a protestor telling McKesson to film the white lines on the road to prove that the protestors were complying with the police's demands to not stray from the road.¹⁷⁰ Nevertheless, the Fifth Circuit dismissed this evidence and continued its analysis to determine whether Officer Doe's complaint fails on First Amendment grounds since McKesson illegally led a demonstration on a highway.¹⁷¹

To counter McKesson's First Amendment defense at the pleading stage, Officer Doe needed to plausibly allege that his injuries were the consequence of tortious activity, that was authorized, directed, or ratified by McKesson in violation of his duty of care.¹⁷² Using these allegations as support, the Fifth Circuit concluded McKesson directed the demonstrators to engage in the criminal act of occupying the highway,¹⁷³ causing a confrontation

164. *McKesson*, 141 S. Ct. 48 at 48; Amended Complaint, *supra* note 162; Natasha Bertrand, *A prominent Black Lives Matter activist live-streamed his chilling arrest in Baton Rouge*, BUSINESS INSIDER (Jul 10, 2016, 8:01 AM), www.businessinsider.com/deray-mckesson-live-streams-arrest-in-baton-rouge-2016-7 [perma.cc/2DJT-JLTY]. "One protester can be heard telling McKesson to 'film the white line' on the road to prove that the protestors were complying with the police's demands to not stray into the road. McKesson says more than once that there is no sidewalk that protestors could have been marching on instead. Still, he is arrested: 'City police. You're under arrest. Don't fight me. Don't fight me,' a cop yells as he approaches McKesson from behind." *Id.*

165. Amended Complaint, *supra* note 162.

166. *Doe*, 945 F.3d at 828.

167. *Id.*

168. *Id.*

169. *Id.*

170. Bertrand, *supra* note 164.

171. *Doe*, 945 F.3d at 834.

172. *Id.* at 829; see *Claiborne Hardware Co.*, 458 U.S. at 927 (citing to the test that the Court used to defeat a First Amendment defense).

173. *Doe*, 945 F.3d at 828; Amended Complaint, *supra* note 162. Defendant McKesson was present during the protest and did nothing to calm the crowd and instead incited the violence. *Id.* When the defendants ran out of water bottles they were throwing at the Baton Rouge City Police, a member of Black Lives Matter, under the control and custody of the defendants, then picked up and hurled pieces of concrete or similar rock like substance at the police making

between Baton Rouge police and protesters. And, as a result, it was foreseeable that Officer Doe could sustain injuries.¹⁷⁴ Accordingly, there was no constitutional issue present because Officer Doe plausibly alleged that his injuries were the result of the tortious activity that McKesson authorized.¹⁷⁵

McKesson argued in his petition for rehearing that the Fifth Circuit permits Officer Doe to hold him liable for the tortious conduct of others even though Doe, in his complaint, only alleged that McKesson was negligent, not that he intended Doe's injuries.¹⁷⁶ The Fifth Circuit rejected McKesson's argument and held that under the Restatement (Third) of Torts, this type of third-party liability is a standard aspect of state law.¹⁷⁷

The Fifth Circuit acknowledged that McKesson's negligent conduct took place in the context of a political protest.¹⁷⁸ The court referenced *NAACP v. Claiborne Hardware* and noted that the presence of activity protected by the First Amendment imposes limitations on the kind of conduct that may give rise to damages liability on parties that may be held accountable for those damages.¹⁷⁹ The criminal conduct allegedly ordered by McKesson was not protected by the First Amendment because McKesson ordered the demonstrators to violate a reasonable time, place, and manner restriction by blocking the public highway.¹⁸⁰ The Fifth Circuit attempted to bolster its position using *Clark v. Community for Creative Non-Violence*. In *Clark*, which held that reasonable time, place, and manner restrictions do not violate the First Amendment, the Supreme Court found that a ban on camping was a content-neutral regulation even though the plaintiff's argued that it infringed on their First Amendment rights when they wanted to sleep in a park to demonstrate the plight of homelessness.¹⁸¹ After this analysis, the court concluded that addressing Officer Doe's claim against McKesson with state tort law was not a violation of McKesson's First Amendment right.¹⁸²

arrests. *Id.*

174. *Doe*, 945 F.3d at 828.

175. *Id.*

176. *Id.*

177. *Doe*, 945 F.3d at 828; RESTATEMENT (THIRD) OF TORTS § 19 (AM. L. INST. 2012). The conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of the plaintiff or a third party. *Id.*

178. *Doe*, 945 F.3d at 832.

179. *Id.*; *Claiborne Hardware Co.*, 458 U.S. at 916-17.

180. *Doe*, 945 F.3d at 832.

181. *Id.*; *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 289 (1984) (holding that a ban on camping was a reasonable time, place, and manner limitation to protect a park). The Court also found that the ban was content-neutral and did not interfere with the demonstrators' message regarding the homeless. *Id.*

182. *Doe*, 945 F.3d at 832.

C. *The United States Supreme Court's Reversal of the Fifth Circuit's Decision*

After McKesson petitioned the Supreme Court for certiorari, the Court granted review to determine whether the Fifth Circuit's theory of liability violates the First Amendment.¹⁸³ In his petition for certiorari, McKesson asserted two reasons warranting the Supreme Court's intervention.¹⁸⁴ First, he asserted that the Fifth Circuit's decision conflicts with the directly controlling precedent of the Supreme Court's decision in *Claiborne Hardware*.¹⁸⁵ Specifically, McKesson alleged that the Fifth Circuit erred when it held that mere negligence suffices to hold a protest leader responsible for the unlawful acts of others.¹⁸⁶ Second, McKesson argued that the speech and associational rights at issue are the essence of self-government since he and others assembled to speak out on matters of public concern.¹⁸⁷

In his petition, McKesson pointed out that the theory of personal liability adopted by the Fifth Circuit infringes on speech and associational rights and poses an existential threat to the exercise of the First Amendment rights the *Claiborne* rule is meant to safeguard.¹⁸⁸ He further stated that affirming the Fifth Circuit's decision would create a rule imposing unfettered personal liability to protestors for wrongs committed by unknown individuals that the protestor neither encouraged nor approved. The effect of such a holding would chill speech and act as compelled silence.¹⁸⁹

In his response in support of denying McKesson's petition, Officer Doe made two assertions contrary to McKesson's claims.¹⁹⁰ First, Officer Doe argued that the First Amendment does not protect against tort liability for the reasonably foreseeable consequences of one's own negligent, illegal, and dangerous activity that poses a risk of serious harm to others.¹⁹¹ Officer Doe refuted McKesson's argument by claiming that *Claiborne* recognized protection for peaceful, lawful activity, not for unpeaceful, unlawful activity at

183. *McKesson*, 141 St. Ct. at 50.

184. Petition for Writ of Certiorari at 14, *McKesson*, 141 S. Ct. 48 (No. 19-1108) [hereinafter Petition for Writ of Certiorari].

185. *Id.* McKesson remarked that *Claiborne* reasoned that the First Amendment forbids holding a protest leader personally liable for the unlawful acts of other persons that he did not incite, authorize, direct, ratify, or otherwise specifically intend. *Id.*

186. *Id.*

187. *Id.* at 15.

188. *Id.*

189. *Id.* Specifically, in a historical context, the non-violent protests led by Doctor Martin Luther King would have been among the first casualties of the court's rule. *Id.*

190. Brief for the Respondent at i, *McKesson*, 141 S. Ct. 48 (No. 19-1108).

191. *Id.*

issue in this case.¹⁹² Secondly, Doe argued that, as a matter of public policy, a rule to the contrary would encourage negligent, unpeaceful, and illegal behavior at the expense of others, exposing law enforcement officers to serious harm that tort liability is intended to discourage.¹⁹³

The Supreme Court began its analysis of the Fifth Circuit's decision by determining that the interpretation of state law is too uncertain and that the constitutional issue is only implicated if Louisiana law permits recovery under these circumstances.¹⁹⁴ In exceptional instances, certification is advisable before addressing a constitutional issue.¹⁹⁵ The Supreme Court decided that the Fifth Circuit should have certified questions before the Louisiana supreme court because of two aspects of the case.¹⁹⁶ First, the dispute presents novel issues of state law calling for the exercise of judgment of state courts.¹⁹⁷ Speculation by a federal court about how a state court would weigh the moral value of protest against economic consequences of withholding liability is particularly gratuitous when the state courts are willing and able to address questions of state law on certification.¹⁹⁸

Second, certification in this case ensures that any conflict between state law and the First Amendment is not purely hypothetical.¹⁹⁹ Essentially, the novelty of the claim only emphasizes that it is important to avoid premature adjudication of constitutional questions when a federal court is asked to invalidate a state's law.²⁰⁰ The Louisiana supreme court could announce the same duty as the Fifth Circuit, but the Fifth Circuit should not have ventured into an uncertain area of tort law that could impact First Amendment rights without first seeking guidance from the Louisiana supreme court.²⁰¹

The Supreme Court stated that the Fifth Circuit should have certified the following questions: whether McKesson could have

192. *Id.* at 1.

193. *Id.*

194. *McKesson*, 141 S. Ct. at 50.

195. *Id.* at 51.

196. *Id.*

197. *Id.*; *Lehman Bros. v. Schein*, 416 U.S. 386, 386 (1974) (finding that the proper procedure for the New York court of appeals was to certify the state law question to the Florida supreme court because of the novelty of the legal questions). "When federal judges in New York attempt to predict uncertain Florida law, they act . . . as 'outsiders' lacking the common exposure to local law which came from sitting in the jurisdiction." *Id.*

198. *McKesson*, 141 S. Ct. at 51; *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 97 (1997) (holding that the case or controversy present was moot when an employee resigned from her position during the pendency of her appeal and no longer had standing). Additionally, the lower courts should have certified the question regarding Article XXVII of the Arizona state law. *Id.*

199. *McKesson*, 141 S. Ct. at 51.

200. *Id.*

201. *Id.*

breached a duty of care in organizing and leading the protest and whether Officer Doe alleged a particular risk within the scope of the protection afforded by the duty, provided one exists.²⁰² The Supreme Court vacated the decision of the Fifth Circuit and remanded the case with instructions for the Fifth Circuit to certify questions to the Louisiana Supreme Court.²⁰³

D. The Fifth Circuit's Decision on Remand from the Supreme Court

On remand, the Fifth Circuit requested that the parties file supplemental letter briefs to address three questions: (1) whether the Professional Rescuer's Doctrine applies to the specific facts of the case; (2) whether the court should certify the question to the Louisiana supreme court; and (3) whether the court should apply the Professional Rescuer's Doctrine to dismiss this case at this juncture of the proceedings.²⁰⁴

In McKesson's supplemental letter brief, he provided three different arguments.²⁰⁵ First, he alleged that the Professional Rescuer Rule supports dismissal in the case at bar.²⁰⁶ He claimed that the risk that caused Officer Doe's injury arose from the very emergency that Officer Doe was hired to remedy.²⁰⁷ Second, McKesson alleged that nothing about the course of the case proceedings hinders the court's dismissing on Professional Rescuer Doctrine grounds.²⁰⁸ Third, if the Fifth Circuit is not prepared to dismiss on those grounds, certifying the question—along with the

202. *Id.*; *Doe*, 945 F.3d at 839 (Willett, J., concurring in part and dissenting in part) (“Indeed, as the Supreme Court has itself stressed, our carefully wrought system of federalism is best served by avoiding ‘the friction of a premature constitutional adjudication.’ And certification of state-law questions may be particularly important in First Amendment cases.”) (quoting *R. R. Comm’n. of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941)).

203. *McKesson*, 141 S. Ct. at 51.

204. Letter from Lyle Cayce, Clerk of the Fifth Circuit, to Ian Lewis Atkinson, Christine Marie Calogero, William Gibbens, David Thomas Goldberg, Donna Unkel Grodner, attorneys, (Dec. 8, 2020) (on file with the Fifth Circuit court of appeals).

205. Defendant-Appellee's Supplemental Letter Brief at 1, *Doe*, 2 F.4th 502 (No. 17-30864) [hereinafter Defendant-Appellee's Supplemental Letter Brief].

206. *Id.*

207. *Id.*; *Holloway v. Midland Ins.*, 759 So. 2d 309, 313 (La. Ct. App. 2000) (holding that a firefighter who was injured while trying to remove a driver from a vehicle that struck a tree did not state a cause of action against the insured and the driver under the Professional Rescuer Doctrine).

208. Defendant-Appellee's Supplemental Letter Brief, *supra* note 205, at 2. McKesson argues that a forfeiture does not result from the fact that McKesson's brief in the Fifth Circuit did not raise the Professional Rescuer Doctrine issue as an alternative ground for affirming the judgment of dismissal. *Id.* Also, the fact that judgment was granted on First Amendment grounds before McKesson could file an answer or a Rule 12(c) motion does not preclude dismissal on Professional Rescuer grounds. *Id.*

duty questions identified by the Supreme Court—would be proper.²⁰⁹ But neither certifying the issue alone nor remanding it to the district court would be appropriate.²¹⁰

In Officer Doe's supplemental letter brief, he claimed that the Professional Rescuer's Doctrine did not apply to this case.²¹¹ He argued that under *Murray v. Ramada Inns, Inc.*, the Louisiana supreme court abolished the assumption of risk doctrine.²¹² He further argued that under *Briley v. Mitchell*, firemen, police officers, and others who in their professions of protecting life and property necessarily endanger their safety do not assume the risk of all injury without recourse against others.²¹³ In addition, he alleged that if the Professional Rescuer's Doctrine does apply to the case at bar, the questions of fact regarding whether the risk of harm to Officer Doe were dependent or independent is a jury question, which would preclude dismissal of the case.²¹⁴

After reviewing the supplemental letter briefs, it was clear that the parties disagreed as to whether the Professional Rescuer's Doctrine bars Officer Doe from pursuing his negligence claim.²¹⁵ Additionally, there was limited guidance from the opinions of the supreme court of Louisiana as to how the Professional Rescuer's Doctrine might apply to the particular facts of the case.²¹⁶ Therefore, the Fifth Circuit determined that it would take this opportunity to elicit guidance on the issue from the supreme court of Louisiana.²¹⁷ The Fifth Circuit certified two questions: (1) whether Louisiana law recognizes a duty under the facts of this case not to negligently precipitate the crime of a third party and (2) whether Louisiana's Professional Rescuer's Doctrine bars recovery under the facts alleged in the complaint.²¹⁸ This note will address

209. *Id.* at 4.

210. *Id.* McKesson argues that without addressing both the duty question and the Professional Rescuer question, protestors would continue to be deterred by the threat of liability under the state tort rule the Fifth Circuit's vacated decision established—because leaders have no way of controlling who will be injured when a third party hurls an object. *Id.*

211. Defendant-Appellee's Supplemental Letter Brief, *supra* note 205.

212. *Id.*; *Murray* 521 So. 2d at 1124 (holding that assumption of the risk does not serve as a total bar to a plaintiff's recovery in a negligence case).

213. Defendant-Appellee's Supplemental Letter Brief, *supra* note 205; *Briley*, 115 So. 2d at 851 (holding that a police officer who sought to recover damages for his personal injuries when he attempted to recapture a wild deer that had escaped from the defendant's property was not barred by the doctrine of assumption of the risk).

214. Defendant-Appellee's Supplemental Letter Brief, *supra* note 205.

215. *Doe*, 2 F.4th at 504; McKesson Supplemental Brief, *supra* note 65 (arguing that Professional Rescuer's Doctrine does bar Officer Doe from recovery under a negligence claim); Doe Supplemental Brief, *supra* note 65 (arguing that Professional Rescuer's Doctrine does not prevent Officer Doe from pursuing a negligence cause of action).

216. *Doe*, 2 F.4th at 507.

217. *Id.*

218. *Id.*

whether Officer Doe's negligence claim will be barred based on other jurisdictions' application of the Professional Rescuer's Doctrine.²¹⁹

IV. PERSONAL ANALYSIS

This section analyzes and applies the differing jurisdictions' approaches pertaining to the Professional Rescuer's Doctrine to the facts of *McKesson*.²²⁰ Next, it assesses which state law interpretation of the Professional Rescuer's Doctrine the Fifth Circuit and Louisiana should adopt and apply to this case.²²¹ This section proposes that the Fifth Circuit and Louisiana should adopt an approach similar to that used in *Johnson v. Teal* decided by the Eastern District of Virginia in 1991. Lastly, it addresses whether Officer Doe's claim should be dismissed.²²²

A. *Various Jurisdiction's Applications of the Professional Rescuer's Doctrine*

In *Johnson v. Teal*, the United States District Court for the Eastern District of Virginia found that the Professional Rescuer's Doctrine shields only negligent acts that create the need for a firefighter or police officer from liability.²²³ The rule does not shield the acts of third parties unrelated to the risk that required the officer's presence.²²⁴ Applying this rule in *McKesson* would bar Officer Doe from recovering. In his complaint, Officer Doe stated that on Saturday, July 9, 2016, he was a duly commissioned police officer and was ordered to respond to a protest, march, and blocking of a public street organized by *McKesson*.²²⁵ The mere fact that Officer Doe was directed to be present at the protest precludes him from recovering. In addition, he alleges that the defendants were in Baton Rouge for the purpose of demonstrating, protesting, and rioting to incite others to violence against police and other law enforcement officers.²²⁶ His own reasoning for being there shows that he knew that the protest could get violent. Accordingly, his injuries were a direct result of the risk that required his presence at the scene.

The factual differences between Officer Johnson's claim and Officer Doe's claim provide support for why Officer Doe would be

219. *Id.*

220. *Johnson*, 769 F. Supp. at 947; *Vasquez*, 292 F.3d at 1049; *Risenhoover*, 936 F. Supp. at 393; *Carson*, 900 S.W.2d at 685; *Lenthall*, 138 Cal. App. 3d at 716.

221. *Id.*

222. *Doe*, 2 F.4th at 502.

223. *Johnson*, 769 F. Supp at 947.

224. *Id.*

225. Complaint, *supra* note 138, at 3.

226. *Id.*

barred from recovery.²²⁷ Officer Johnson was on his way to a call when he was injured, whereas Officer Doe was already on the scene when he was injured.²²⁸ Thus, Officer Johnson was injured as a result of a third party unrelated to the risk that required his presence, whereas, Officer Doe was injured because of the risk that required his presence. Under *Johnson's* application of the Professional Rescuer's Doctrine, Officer Doe would be barred from recovery.

In *Vasquez v. N. County Transit Dist.*, the Ninth Circuit noted that California had created exceptions to the Professional Rescuer's Doctrine, most notably the independent cause exception.²²⁹ Under that exception, the doctrine does not shield a defendant from liability for acts of misconduct that are independent from those that necessitated the summoning officer.²³⁰ The exception applies if the plaintiff shows that the injuries resulted from the same negligent act for which the plaintiff was called to the scene.²³¹ For Officer Doe's claim to apply under the independent cause exception, he would have to prove that his injuries were a result of the same negligent act which he was called to the scene for. Officer Doe alleged that the Defendants had planned a protest to block a known highway.²³² He was called to the scene and ordered to effectuate arrests and remove the Defendants from the public highway.²³³ Under this exception, Officer Doe could allege that he was called to arrest individuals for blocking a highway and that his injuries resulted from an independent negligent action that resulted when individuals at the protest began throwing rocks and other objects at himself and other officers.

The factual similarities between the claims warrant discussion as well. In *Vasquez*, Officer Vasquez had been called to the scene because the crossing gate arm at the railroad crossing was broken.²³⁴ As he was walking away from the arm, it fell and struck him in the head.²³⁵ He was not barred from recovery because the independent cause exception did apply.²³⁶ Here, Officer Doe was called to the scene to remove individuals from a public highway during a protest.²³⁷ He could argue that the independent cause

227. *Johnson*, 769 F. Supp. at 947.

228. *Id.* at 948; Complaint, *supra* note 138, at 3; *Johnson*, 769 F. Supp at 948. In *Johnson*, the driver was not related to or in any way the cause of the robbery to which the officer was responding and did not heed the sirens or emergency lights.

229. *Vasquez*, 292 F.3d at 1055.

230. *Id.*

231. *Id.*

232. Complaint, *supra* note 138, at 3.

233. Complaint, *supra* note 138, at 4.

234. *Vasquez*, 292 F.3d at 1052.

235. *Id.* at 1053.

236. *Id.* at 1060.

237. Complaint, *supra* note 138, at 3.

exception applies because he was called to the scene for a protest and it turned into a riot after he was already there.²³⁸ Under the independent cause exception, Officer Doe would be able to recover against McKesson for his injuries.

In *Risenhoover v. England*, the United States District Court for the Western District of Texas found the Professional Rescuer's Doctrine inapplicable in cases where a police officer is injured by an independent actor not connected with the event bringing the officer to the place of injury.²³⁹ In addition, the Professional Rescuer's Doctrine does not apply to conduct that an officer could not reasonably anticipate would occur by reason of his presence at the place of injury.²⁴⁰ Officer Doe arrived at the scene because a crowd of people were blocking a highway.²⁴¹ A protestor injured him.²⁴² As such, he was not injured by an independent actor because the individual was already there for the protest. In addition, Officer Doe alleged that the Baton Rouge Police Department anticipated violence, so it arranged for a front line of officers in riot gear.²⁴³ The Professional Rescuer's Doctrine would bar recovery here because Officer Doe could reasonably anticipate that the violence would occur by reason of his presence at the protest.

Distinctions also exist between Officer Doe's claim and the claims in *Risenhoover*. In *Risenhoover*, the plaintiffs were injured because the media organizations had alerted the inhabitants of the impending raid.²⁴⁴ The court found the Professional Rescuer's Doctrine, also known as the fireman's rule, inapplicable because the media organizations were not the owners of the land, were not connected with the event bringing the officers to the place of injury, and their conduct was not something the plaintiffs could reasonably anticipate.²⁴⁵ However in *McKesson*, the individual that injured Officer Doe was connected with the event bringing him there and his conduct was something that Officer Doe could anticipate. Therefore, the Professional Rescuer's Doctrine would apply. Under *Risenhoover*, Officer Doe would be unable to recover for his injuries.

In *Carson v. Headrick*, the supreme court of Tennessee found that when a police officer is injured by the intentional, malicious, or reckless acts of a citizen, the action is not barred by the Professional

238. *Id.* The protest turned into a riot. *Id.* Defendants and their membership began to loot a Circle K and some of the items taken were plastic water bottles. The defendants began to hurl them at the police who were in riot gear and hurl over the line of police in riot gear to strike the police who were behind the protective shield formed by the officers in riot gear. *Id.*

239. *Risenhoover*, 936 F. Supp. at 406.

240. *Id.*

241. Complaint, *supra* note 138, at 4.

242. *Id.*

243. *Id.*

244. *Risenhoover*, 936 F. Supp. at 396.

245. *Id.* at 406.

Rescuer's Doctrine.²⁴⁶ Officer Doe alleged that a member of the protest picked up a piece of concrete or similar rock like substance and hurled it into the police that were making arrests.²⁴⁷ As a result, he was struck in the face and immediately knocked down and incapacitated.²⁴⁸ Because the act of throwing the rock could be argued to be intentional or malicious, Officer Doe may be able to recover against McKesson.

The major differences between the cases also work in Officer Doe's favor. In *Carson*, Judith Headrick had called 911 and reported a domestic disturbance.²⁴⁹ She had reported that her husband was violent at times, that he had been drinking and that he had guns in the home.²⁵⁰ When the responding officers arrived on scene, they were shot by her husband.²⁵¹ Their claims were barred against her because Headrick had informed the dispatcher about her husband's past.²⁵² In contrast, Officer Doe was responding to a call about protestors blocking the highway and while he was aware it could get violent, he did not know that protestors would be throwing objects at police.²⁵³ Because McKesson did not provide notice to the police or Officer Doe, his omission shows malicious intent. As such, under *Carson*, Officer Doe could recover for his injuries because the conduct of the protestor was intentional and malicious.

Lastly, in *Lenthall v. Maxwell*, the court of appeals of California found that the Professional Rescuer's Doctrine applies to injuries inflicted by a participant of the event bringing the officer to the place of injury and the officer could reasonably expect that injury while he is on duty.²⁵⁴ Officer Doe alleges that the protestor that threw the rock-like substance at him was under the control and custody of the defendants.²⁵⁵ Thus, the injuries were inflicted by a participant in the protest bringing Officer Doe to the scene. As noted earlier, the Police Department had also anticipated that violence would occur.²⁵⁶ Consequently, the Professional Rescuer's Doctrine would apply to Officer Doe's claim, and he would be unable to recover.

The facts of *Lenthall* are similar to the factual allegations by Officer Doe. In *Lenthall*, officers responded to an order to proceed to the defendant's home and were warned that there were weapons and possibly shots fired.²⁵⁷ When they arrived at the residence, the

246. *Carson*, 900 S.W.2d at 690.

247. Complaint, *supra* note 138, at 5.

248. *Id.*

249. *Carson*, 900 S.W.2d at 686.

250. *Id.*

251. *Id.*

252. *Id.*

253. Complaint, *supra* note 138, at 5.

254. *Lenthall*, 138 Cal. App. 3d at 719.

255. Complaint, *supra* note 138, at 4-5.

256. *Id.* at 4.

257. *Lenthall*, 138 Cal. App. 3d at 716.

officer was shot and injured by the defendant.²⁵⁸ The court of appeals found that a police officer called to subdue a violent offense involving firearms, should reasonably anticipate that firearms could be used when he arrived.²⁵⁹ In Officer Doe's complaint, he references that on July 7, 2016, 12 police officers were shot at a rally while trying to keep the peace.²⁶⁰ In addition, he knew that the protest could turn violent because he notes that the defendants have similarly attacked other persons while protesting.²⁶¹ Because he knew all of this prior to responding to the scene, he could have reasonably anticipated that he could be injured. Accordingly, under *Lenthall*, Officer Doe would be barred from recovery.

B. *The Fifth Circuit and Louisiana Should Adopt the Approach from Johnson*

The Fifth Circuit and Louisiana should adopt the approach from *Johnson*.²⁶² The rule is the most logical. An officer will be unable to recover if the negligence arises out of the event for which he was called to the scene.²⁶³ Allowing an officer to recover under facts similar to Officer Doe's would open the floodgates to litigation because officers could recover for various injuries inflicted at scenes they were ordered to respond. As a result, the adaptation of the Professional Rescuer's Doctrine in *Vasquez* and *Carson* would be too burdensome to adopt. In addition, citizens may be too afraid to call police officers for help if Officer Doe is permitted to recover. For example, if the police officers in *Headrick* were permitted to recover against a distressed homeowner that had called for help, it would deter that individual and others from calling for help in the future.²⁶⁴ As noted in *Johnson*, it would be too burdensome to charge all who cause or fail to prevent fires with the fireman's injuries sustained from inevitable, although negligently created occurrences.²⁶⁵

First Responders are not left without any remedies for injuries incurred during the course of their jobs. Their injuries can be recovered through workers' compensation and other benefits.²⁶⁶

258. *Id.*

259. *Id.*

260. Complaint, *supra* note 138, at 3.

261. *Id.* at 5.

262. *Johnson*, 769 F. Supp. at 947.

263. *Id.*

264. *Carson*, 900 S.W.3d at 685.

265. *Johnson*, 769 F. Supp. at 949; *Krauth v. Geller*, 157 A.2d 129, 131 (N.J. 1960) ("probably most fires are attributable to negligence, and in the final analysis the policy decision is that it would be too burdensome to charge all who 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.")

266. *Johnson*, 769 F. Supp. at 949; *Commonwealth v. Millsaps*, 352 S.E.2d

Workers' compensation is a method by which workers are provided medical care and cash wage benefits for injuries coming within the terms of the applicable worker's compensation act.²⁶⁷ Each state has developed its own workers' compensation act; however, the act is a statutorily created insurance system that allows employees to receive fixed benefits, without regard to fault, for work-related injuries.²⁶⁸ As such, it provides payments to employees in place of tort liability.²⁶⁹

Further, allowing Officer Doe to recover could have a chilling impact on First Amendment rights and depart from Supreme Court precedent. As mentioned earlier, the Supreme Court in *Claiborne* did not permit merchants to recover against a boycott even though some participants engaged in physical force and violence.²⁷⁰ The Court found that mere association by the petitioners with the boycott group was insufficient to predicate liability and it infringed on the petitioners' First Amendment right to assembly.²⁷¹ As such, only the violent protestors could be held liable for the damages to the businesses.²⁷² The same rule should be applied in this case. Officer Doe should only be entitled to recover from the protestor that threw the object at him under an intentional tort theory, not the Professional Rescuer's Doctrine. By allowing Officer Doe to recover against McKesson would infringe on his First Amendment right to assembly.

C. Officer Doe Should be Barred from Recovery

Under the *Johnson* rule, Officer Doe will be barred from recovering on his negligence claim against McKesson. His injuries were the direct result of the reason for his presence at the protest. If Louisiana does adopt a law like *Johnson*, the Fifth Circuit should dismiss Officer Doe's claim against McKesson.

311, 315 (Va. 1987); *see generally*, *State Indus. Comm'n State of New York v. Nordenholt Corp.*, 259 U.S. 263, 271 (1992) ("The contract of employment, by virtue of the statute, contains an implied provision that the employer, if the employee be injured, will pay to him a certain sum to compensate for the injuries sustained, or if death results, a certain sum to dependents. These payments are made irrespective of whether or not the employer was guilty of wrongdoing. It is a part of the compensation agreed to be paid for services rendered in the course of the employment.").

267. 27 Personal Injury--Actions, Defenses, Damages § 147.01 (2023).

268. 21 M.J. WORKERS' COMPENSATION § 2 (2023).

269. 27-169 Appleman on Insurance Law & Practice Archive § 169.3 (2nd 2011).

270. *Claiborne*, 458 U.S. at 888.

271. *Id.*

272. *Id.*

V. CONCLUSION

The Fifth Circuit erred when it did not consider the Professional Rescuer's Doctrine in its initial review of the case. Multiple jurisdictions have applied the Professional Rescuer's Doctrine differently and have developed different exceptions to the rule.²⁷³ After certifying the question regarding the Professional Rescuer's Doctrine, Louisiana and the Fifth Circuit should adopt an interpretation similar to that of *Johnson*. *Johnson* provides that an officer will be unable to recover if the negligence arises out of the event for which he was called to the scene. Applying this rule to the case at bar, Officer Doe's injuries were the direct result of his presence at the protest. He knew that it could get violent as the Police Department prepared its officers with riot gear. Accordingly, Officer Doe and future similarly situated plaintiffs will be precluded from recovery if Louisiana and the Fifth Circuit adopt a version of the Professional Rescuer's Doctrine similar to *Johnson*. Therefore, Officer Doe's complaint against McKesson should be dismissed.

²⁷³ *Johnson*, 769 F. Supp at 947; *Vasquez*, 292 F.3d at 1049; *Risenhoover*, 936 F. Supp at 393; *Carson*, 900 S.W.2d at 685; *Lenthall*, 138 Cal. App. 3d at 716.