

IN THE SUPREME COURT OF
THE STATE OF FLORIDA

CASE NOS. 69,890 and 69-892
(Consolidated)

OFFICER JOHN KILPATRICK,
Petitioner,

vs .

ALFRED SKLAR, MRS. ALFRED
SKLAR a/k/a DR. OLGA FERRER,
and UNITED STATES FIDELITY
AND GUARANTY COMPANY,
Respondents.

ALFRED SKLAR and UNITED STATES
FIDELITY AND GUARANTY COMPANY,
Petitioners,

vs .

OFFICER JOHN KILPATRICK
Respondent .

PETITIONER, OFFICER JOHN KILPATRICK'S,
REPLY TO BRIEF OF ALFRED SKLAR
and UNITED STATES FIDELITY AND GUARANTY COMPANY

DISCRETIONARY PROCEEDINGS TO REVIEW
A DECISION OF THE DISTRICT COURT OF APPEAL
THIRD DISTRICT

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STATEMENT OF THE CASE AND FACTS

Officer Kilpatrick, Plaintiff in the trial court, appealed to the Third District Court of Appeal from an adverse summary judgment.

The Third District Court of Appeal ruled that, as to the owner of the dogs, the Summary Judgment would be reversed for a factual determination of inter alia whether there was effective compliance with the "sign" defense of Florida Statute 767.04. Officer Kilpatrick in his petition to this Court contends that the "sign" defense does not apply to a non-bite case brought under Florida Statute 767.01.

The Third District Court of Appeal affirmed the trial court's summary judgment for the property owner. Officer Kilpatrick in his petition to this Court contends that the "fireman's rule" does not bar his claim as a matter of law in as much as he was on the property at the invitation of the owner to apprehend burglars - not to deal with vicious dogs.

The dog owner, Mr. Sklar, has petitioned this Court for review of the decision in favor of the police officer contending that the common law defense of the "fireman's rule" to statutory liability under the dog statute is abolished only as to dog bite cases that the rule abolishing common law defenses does not apply to non-bite cases. This Brief is in opposition to the dog owner's petition.

SUMMARY OF ARGUMENT

I. THE THIRD DISTRICT COURT OF APPEAL'S HOLDING THAT 767.04 PROVIDES A SIGN DEFENSE IN A NON-BITE 767.01 CAUSE OF ACTION CONFLICTS WITH SWEET v. JOSEPHSON, 173 So.2d 444 (Fla. 1965); BELCHER YACHT INC. v. STICKNEY, 450 So.2d 1111 (Fla. 1984); AND JONES v. UTICA MUT. INS. CO., 463 So.2d 1153 (Fla. 1985).

II. THE THIRD DISTRICT COURT OF APPEAL'S HOLDING THAT A POLICEMAN'S CLAIM FOR INJURY SUSTAINED IN ESCAPING FROM DOGS ON THE OWNERS' PREMISES WHILE RESPONDING TO THE OWNERS' BURGLAR ALARM IS BARRED AS A MATTER OF LAW CONFLICTS WITH HIX v. BILLEN, 284 So.2d 209 (Fla. 1973); MALDONADO v. JACK M BERRY GROVE CORP., 351 So.2d 967 (Fla. 1977); FLICK v. MALINO, 356 So.2d 904 (Fla. 1st DCA 1978); BERGLIN v. ADAMS CHEVROLET, 458 So.2d 866 (Fla. 4th DCA 1984); ADAIR THE ISLAND CLUB, 225 So.2d 541 (Fla. 2d DCA 1969); CHRISTIE v. ELICH, 409 So.2d 110 (Fla. 5th DCA 1982); AND CHRISTIE v. ANCHORAGE YACHT HAVEN INC., 287 So.2d 359 (Fla. 4th DCA 973).

III. THIS CASE PRESENTS THE SAME ISSUE CERTIFIED TO THIS COURT BY THE FIRST DISTRICT COURT OF APPEAL IN SANDERSON v. FREEDOM SAVINGS & LOAN ASSOCIATION, 496 So.2d 954 (Fla. 1st DCA 1986), ONLY AS TO THE PROPERTY OWNER, DR. FERRER.

ARGUMENT

I. SANDERSON V. FREEDOM SAVINGS AND LOAN ASSOCIATION, 496 So.2d 954 (Fla. 1st DCA 1986) POINTS OUT THE CONFLICT OF THE INSTANT DECISION AS TO THE LIABILITY OF THE PROPERTY OWNER, RESPONDENT, MRS. ALFRED SKLAR, d/b/a DR. OLGA FERRER, AND DOES NOT DEAL WITH THE LIABILITY OF THE DOG OWNER, PETITIONER, ALFRED SKLAR.

II. THE STRICT LIABILITY OF THE DOG OWNER FOR INJURY CAUSED OTHER THAN BY BITE UNDER 767.01 SUPERSEDES THE COMMON LAW "FIREMAN'S RULE" WHICH, IF EXTANT IN FLORIDA, IS A LIMITED DEFENSE AVAILABLE ONLY TO PROPERTY OWNERS FOR INJURIES SUFFERED IN THE LINE OF THE DUTY WHICH THE POLICEMAN WAS PERFORMING.

The dog owner, Alfred Sklar, relies on the case of Sanderson v. Freedom Savings and Loan Association, 496 So.2d 954 (Fla. 1st DCA 1986) for conflict jurisdiction.

The first point to be made is that Sanderson does not deal in any way with liability for damage caused by dogs, by biting or otherwise.

Sanderson raises the question whether the "fireman's rule", which this Court has never directly considered, applies to non-premises related acts of property owners. Petitioner Kilpatrick argues in his jurisdictional brief that Sanderson and the cases cited therein support conflict jurisdiction and the viability of Officer Kilpatrick's claim against the property owner.

The property owner's repeated reference to a "million dollar claim" (Brief, pages 2, 6, and 10) is either an attempt to evoke sympathy for an indigent estate owner vis-a-vis a wealthy police patrolman, or a counter-weight to the presence of United States Fidelity and Guaranty Company

as an adequate insurer-defendant. Said references have no logical bearing on the issues of law presented to this Honorable Court.

The "fireman's rule" is an anachronism and should be abolished. See dissent of Judge Ferguson in Rishel v. Eastern Airlines, Inc., 466 So.2d 1136 (Fla 3rd DCA 1985).

The main rationale for the rule, i.e. that property owners will be deterred from calling for assistance, has been described by Professor Prosser as "preposterous rubbish". Prosser, Sec. 61 at 397 (4th ed 1971). The "fireman's rule" is not a favorite principle of the law and, even when invoked, should be, and has been, strictly limited.

The judicial trend is to abolish the rule or limit it severely. As pointed out by Judge Ferguson, the Oregon Supreme Court has abolished the rule. Christensen v. Murphy, 678 P.2d 1210 (Or. 1984)

An aberrant interpretation of the rule led one court to hold that it barred an action by the policeman against the perpetrator of an assault on the policeman. Lang v. Glusica, 387 N.W.2d 895 (Minn. App. 1986). This preposterous result was fortunately corrected by the Supreme Court of Minnesota which pointed out that the rule was severely restricted to protect only land owners, and does not shield even land owners from liability for hidden or unanticipated risks, or from negligence which materially

enhances the risk or creates new risk. Lang v. Glusica, 393 N.W.2d 181 (Minn. 1986).

The rule has been soundly criticized in the literature J. Flynn, Fireman's Rule Applicable to Police Officers, 14 Seton Hall L. Rev. 759 (1984); H. Brown, Oregon Abolishes the Fireman's Rule. 19 Suffolk U.L. Rev. 957 (Winter 1985); Negligence Actions by Police Officers and Firefighters, A Need for a Professional Rescuer's Rule, 66 Cal. L. Rev. 585 (1978).

The Supreme Court of California In Bank has declined to abolish the rule completely, but has restricted and narrowed its applicability to a situation where the land owner's only connection with a fireman's injury is that his negligence or recklessness caused the fire to which the fireman responded. The rule does not prohibit the recovery of damages where the act which results in his injury is independent from the act which created the emergency to which the fireman responded. Lipson v. Superior Court of Orange County, 644 P.2d. 822 (Cal. 1982).

Prosser's "bulldog in the basement" comment is an offhand remark having no basis in legal precedent.

The Third District Court of Appeal in its ruling as to the property owner, in this case, held that as a matter of law Plaintiff was barred by the "fireman's rule" as to injury inflicted by vicious dogs. Since when is injury by dogs an inexorable concomitant of police work?

What about a bite by Sonny Crockett's pet alligator, a tame western cougar, or a vicious goose? Police are not paid or trained enough to avoid every conceivable "unique" risk.

The "fireman's rule" is a common law rule limited to the property owner - not the dog owner, Petitioner Sklar. As to the dog owner, Florida has its own special scheme of strict statutory liability in 767.01 as to injury (other than by bite) and 767.04 as to bite. Only the latter contains the "sign" defense and - as Petitioner Sklar points out - this is a non-bite case.

As to common law defenses, the Third District Court of Appeal ruled completely consistent with this Court that the statutory dog liability statute supersedes the common law and makes the owner the virtual insurer of the dog's conduct. Donner v. Arkwright-Boston Manufacturer's Insurance Co., 358 So.2d 28 (Fla. 1978). In Donner this Court held that assumption of the risk was no longer a defense under the dog bite statute. The "fireman's rule" is based on the doctrine of assumption of the risk. See Christenson, supra, 678 P.2d 1215-1216, Lipson, supra, 644 P.2d 5827.

Petitioner Sklar incomprehensibly argues that the statutory abolition of common law defenses applies only to bite cases under 767.04. However, this Court has directly cited Donner in the non-bite 767.01 case of Jones v. Utica Mut. Ins. Co., 463 So.2d 1153 at 1156 (Fla. 1985) thereby resolving the issue.

CONCLUSION

For the foregoing reasons and authorities this Court should deny the Petition of Alfred Sklar and United States Fidelity and Guaranty Company and grant the Petition and direct briefing on the merits as to the Petition filed by Officer John Kilpatrick.

Respectfully submitted,

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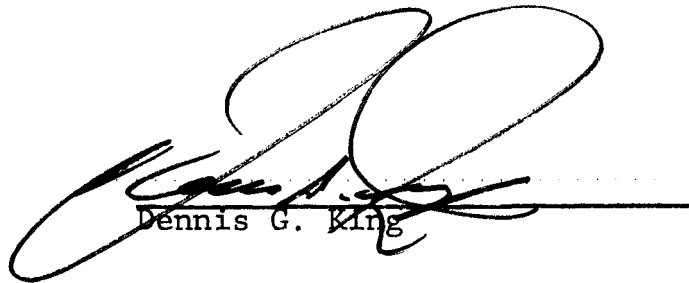
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 26 day of February, 1987, to: J. David Gallagher, Esquire, Wicker, Smith, Blomqvist, Tutan, O'Hara, McCoy, Graham & Lane, Grove Plaza - 5th Floor, 2900 S.W. 28th Terrace, Miami, FL 33133; Lawrence B. Craig, Esquire, Merritt, Sikes & Craig, P.A., 3rd Floor, McCormick Building, 111 S. W. Third Street, Miami, FL 33130; Richard Wassenberg, Ponzoli & Wassenberg, P.A., 302 Roland/Continental Plaza, 3250 Mary Street, Miami, FL 33133; and Richard A. Sherman, P.A., Suite 102N, Justice Building, 524 S. Andrews Avenue, Fort Lauderdale, FL 33301.


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