IN THE SUPREME COURT OF FLORIDA

CASE NO. **69,687**

SUZANNE TAYLOR SANDERSON, Individually, and as Personal Representative of the Estate of STEPHEN A. TAYLOR,

Petitioner,

**vs.**

FREEDOM SAVINGS & LOAN ASSOCIATION, ALEX SPARR, et al.,

Respondents.

_____/



**PETITIONER'S BRIEF ON THE MERITS**

KERRIGAN, ESTESS & RANKIN
400 East Government Street
Pensacola, Florida **32589**
-and-
PODHURST, ORSECK, PARKS, JOSEFSBERG, EATON, MEADOW & OLIN, P.A.
Suite 800, City National Bank Building
**25** West Flagler Street
Miami, Florida 33130
**(305) 358-2800**

BY: JOEL S. PERWIN

## TABLE OF CONTENTS





LAW OFFICES. PODHURST, ORSECK, PARKS. JOSEFSBERG. EATON, MEADOW s OLIN. P.A.- OF COUNSEL. WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780

TABLE OF CASES

**PAGE**

## TABLE OF CASES

**PAGE**





LAW OFFICES. PODHURST. ORSECK. PARKS, JOSEFSBERG, EATON, MEADOW & OLIN. P.A.- OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780

TABLE OF CASES

PAGE





LAW OFFICES. PODHURST, ORSECK. PARKS, JOSEFSBERG. EATON, MEADOW & OLIN, P.A.- OF COUNSEL, WALTER H. EECKHAM, JR.
25 WEST FLAGLER STREET- SUITE 800, MIAMI, FLORIDA 33130-1780

## TABLE OF CASES

**PAGE**





LAW OFFICES. PODHURST. ORSECK. PARKS, JOSEFSBERG. EATON, MEADOW a OLIN, P.A.- OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET. SUITE 800, MIAMI, FLORIDA 33130-1780

## TABLE OF CASES

PAGE



## AUTHORITIES

## I
## STATEMENT OF THE CASE AND FACTS

This case presents a single question: whether the district court erred in affirming the trial court's dismissal, on the basis of the fireman's rule, of a wrongful-death complaint brought by the personal representative of a police officer against a savings and loan association for the active negligence of one of its employees, which allegedly resulted in the death of the police officer during an attempted robbery of the savings and loan.

The plaintiff/petitioner's complaint, as amended, alleged that in October of 1982, her late husband, police-officer Stephen A. Taylor (hereinafter "Taylor") responded to the report of a robbery at defendant/respondent Freedom Savings & Loan Association in Escambia County (hereinafter "the bank") (R. 14-15). In the past, the complaint alleged, the security system at the bank had generated a number of false alarms (R. 17). This occasion, however, was not a false alarm; to the contrary, two men had entered the bank and were in the process of robbing the employees at gunpoint (R. 15).

Nevertheless, according to the complaint, one of the bank's officers, defendant Alex Sparr, acting within the scope of his employment (R. 14), after observing Officer Taylor and another police officer approach the entrance to the bank from the outside, directed another bank employee to meet the police officers at the door, in a manner which "warned the robbers of the imminent approach of policemen, including Officer Taylor, to the front door by announcing the officer's presence in such a way that it was understood by the robbers" (R. 16). As a result, the complaint alleged, "one of the robbers went out the back way, circled around to the front and assaulted and fatally shot Officer Taylor" (*id.*).

In short, the complaint alleged an act of negligence (or worse) by a bank official resulting in the death of a police officer--and not a dangerous condition of the premises themselves. Even assuming ***arguendo*** that the robbery was a "condition" of the premises,

the complaint alleged that Sparr's active negligence had made that "condition" *more* dangerous. Nevertheless, both Sparr and the bank filed a motion to dismiss all of the counts of the complaint relative to them, on the ground that they failed to state a cause of action by the police officer under the fireman's rule, in the absence of any allegation of an "ultimate fact to show willful or wanton negligence or misconduct" (R. 23).[1/]

In a letter dated July 11, 1985, the trial court accepted this defense (R. 26):

> It is my opinion that the "Fireman's Rule" would prevent recovery by the plaintiff under any of those counts of the complaint. The second amended complaint alleges facts which could make the decedent a licensee only and which would impose on the defendant, Freedom Savings & Loan Association, and its agent, Alex Sparr, only the duty to refrain from wanton negligence or willful misconduct which would injur the licensee, or to warn the licensee if such opportunity for warning was present, of any latent hazard known to the defendants and not known to the licensee. The second amended complaint does not allege facts which show violation of such a duty.

Therefore, the trial court entered an order dismissing those counts of the complaint relating to Sparr's alleged misconduct, allowing the plaintiff to amend if possible (R. 28). The plaintiff subsequently voluntarily dismissed with prejudice all of the other counts of the complaint (R. 32), and advised the court that it could not "in good faith allege significant additional facts" regarding the bank and Sparr (see R. 33). Thus, the trial court entered a Final Judgment of Dismissal of all counts against both the bank and Sparr (R. 33).

The district court affirmed that judgment, explicitly acknowledging that its holding represented an expansion of the traditional parameters of the fireman's rule, and further acknowledging that such an expansion conflicts with the decision in *Whitlock v. Elich*, 409 So.2d 110 (Fla. 5th DCA 1982). The district court reasoned that the policies

---

1/ The motion did not argue that the complaint was fatally defective for failing specifically to use the words "wanton," "willful," or "reckless." It argued that the complaint was fatally defective for failing to allege an "ultimate fact" constituting willful conduct or gross negligence.

underlying the fireman's rule are best served by extending that rule beyond mere pre-existing conditions of the premises which the owner or occupant may negligently have created or tolerated, to the protection even of the owner or occupant's active negligence in causing injury to the policeman or fireman after the owner knows or should know of the plaintiff's presence on his property: "[W]e approve this evolutionary extension and application of the firernan's rule to situations in which policemen or firemen are injured in the performance of their duties as long as willful misconduct and wanton negligence on the part of the defendant are not shown" (opinion at 5). In addition, the district court rejected without explanation Mrs. Taylor's alternative contention that her complaint did satisfy the fireman's rule, by alleging facts showing willful and wanton conduct by the bank's employee: "We disagree and find that, at most, her complaint alleges only simple negligence" ***(id.)***. This Court subsequently accepted review of the district court's opinion.

## II
## ISSUE ON APPEAL

WHETHER THE DISTRICT COURT ERRED IN AFFIRMING THE TRIAL COURT'S DISMISSAL OF THE PLAINTIFF'S COMPLAINT AGAINST THE BANK AND SPARR UNDER THE FIREMAN'S RULE.

## III
## SUMMARY OF THE ARGUMENT

As originally formulated, the fireman's rule assigned to policemen and firemen the status of licensees on the property of someone else, and thus invoked the protection of that status only in the particular context in which the concept of "licensee" applied. Florida law does recognize a distinction between the duties of a landowner to invitees, uninvited licensees, and trespassers, but only with respect to a condition of the premises. Such distinctions have no import when the plaintiff's claim is not that he was injured by a condition of the premises, but rather by the active negligence of a landowner who knew or should have known of the plaintiff's presence on the property. In his own affirmative conduct contemporaneous with the plaintiff's presence on his property, a landowner owes

a duty of reasonable care to anyone on his property of whom he has actual or constructive knowledge.

This well-established principle was not altered or expanded by the fireman's rule. That rule does characterize a policeman or fireman as a licensee, but only to the extent that the concept of licensee has meaning under Florida law. Thus, the fireman's rule necessarily prescribes only a landowner's duty to a policeman or fireman relative to some pre-existing condition of his property. It has no effect upon the landowner's duty to exercise reasonable care in his own affirmative conduct on the property, once he knows or should know of the officer's presence. This conclusion is bolstered by the criteria for application of the fireman's rule, and by the policies which underlie that rule. Those policies are not served by immunizing landowners from liability for affirmative contemporaneous acts of negligence toward a policemen or firemen whom they know or should know is on their property.

Finally, even if the fireman's rule did apply in this case, Mrs. Sanderson's complaint does allege facts which satisfy its requirements. It alleges that the bank, through its officer, alerted the robbers to the officer's presence without bothering to ascertain whether the bank alarm was false or not. Surely a reasonable jury could find such conduct to be wanton and willful, and thus to satisfy the fireman's rule. For this alternative reason as well, therefore, the district court erred in approving the trial court's dismissal of the complaint.

## IV
## ARGUMENT

THE DISTRICT COURT ERRED IN AFFIRMING THE TRIAL COURT'S DISMISSAL OF THE PLAINTIFF'S COMPLAINT AGAINST THE BANK AND SPARR UNDER THE FIREMAN'S RULE.

***A. The Distinction Between Invitees, Uninvited Licensees and Trespassers is Relevant Only to a Condition of the Premises: a Landowner Owes All Persons of Whom***

***He Has Actual or Constructive Knowledge a Duty of Reasonable Care in* His *Own Affirmative Conduct*.**

It is well settled that Florida law recognizes a distinction between the duties owed by a landowner to various categories of persons injured on his property--various classes of invitees, uninvited licensees or trespassers--only with respect to conditions of the property itself, but not with respect to acts or omissions of the landowner unrelated to a pre-existing condition of his property. Thus in ***Wood v. Camp*, 284** So.2d **691, 695, 696** (Fla. **1973)** (our emphasis), this Court acknowledged "inherent distinctions in relationships involved between persons who come upon an owner's property"--"distinctions as between persons for liability connected with the condition of [the] premises . . . ."[2/] The ***Wood*** opinion, however, did not leave this conclusion to mere inference: "The case of active negligence not related to the premises is of course a valid exception. Hix v. Billen, **284** So.2d **209.**" ***Wood v. Camp*, 284** So.2d at **695.**

In ***Hix v. Billen*, 284** So.2d **209, 210** (Fla. **1973),** the plaintiff charged her neighbor with negligence in pouring gasoline directly into the carburetor of the defendant's car, resulting in an explosion. Pointing out that "this action really has no relationship to defendant's *premises*," this Court held that the plaintiff's status as licensee was irrelevant, and that the case was governed by the standard of ordinary care:

> There is a distinction to be noted between active, personal negligence on the part of a landowner and that negligence which is based upon a negligent condition of the premises. The real reason which gave rise to the limited liability to a trespasser or uninvited guest licensee, is not because his injury upon defendant's premises is of any less concern as an injury, but because his presence is not likely to be anticipated, so that the owner or occupier owes him no duty to take precautions toward his safety beyond that of avoiding willful injury and if his presence be

---

[2/] ***Accord, Goldberg v. Strauss*, 45** So.2d **883, 885** (Fla. **1950)** ("a natural or artificial condition on the premises"); ***Lowery v. Rosenberg*, 147** So.2d **321, 322** (Fla. 1st **DCA 1962), *cert. denied*, 153 So.2d 306** (Fla. **1963)** ("a dangerous condition upon the defendants' premises").

> discovered, to give warning of any known dangerous condition not open to ordinary observation by the uninvited licensee or trespasser. This rule relating to the limited duty to uninvited licensees (and trespassers) continues as our basic law with respect to an alleged negligent condition of the premises.[3/]

The Court in ***Hix*** expressly adopted the district court's opinion as its own, 284 So.2d at 210. In that opinion, the Fourth District Court of Appeal noted (emphasis in original):

> Thus, Florida courts have long denied recovery to a licensee injured ***as a result of the condition*** *or* ***use*** *of* ***the*** *land-* ***owner's premises,*** in the absence of a specific showing of a breach of the landowner's duty of care ....
>
> On the other hand, where the presence of the injured person is known to the landowner, and ***the injury*** is ***caused by the active conduct or affirmative negligence of the landowner, as distinguished from the condition of the premises,*** the great weight of authority and better reasoning is that the landowner may be liable for ordinary negligence to the injured person.

*Billen* ***v. Hix,*** 260 So.2d 284, 286 (Fla. 4th DCA 1972), ***aff'd,*** 284 So.2d 209 (Fla. 1973) (adopting district-court opinion).

Thus, *Hix* adopted an explicit distinction between a dangerous condition of the premises on the one hand, which imposes different duties upon the defendant depending upon the plaintiff's status, and on the other hand a claim of negligence by the landowner unrelated to a pre-existing condition of his property, which imposes a standard of ordinary care. As the Court said later in *Maldonado* ***v. Jack M. Berry Grove Corp.,*** 351 So.2d 967, 968 (Fla. 1977):

> Only when liability is predicated upon an alleged defective or dangerous condition of the premises is the injured person's

---

[3/] The *Hix* decision thus overruled ***Cochran v.*** *Abercrombie,* 118 So.2d 636 (Fla. 2nd DCA 1960), in which the district court had imposed upon the landowner only those duties owed to a licensee, even though the landowner's asserted negligence was unrelated to any condition of his premises, apparently because the landowner had no actual knowledge of the specific location of the plaintiff--and thus of the danger--at the time of injury. ***See Hix,*** 284 So.2d at 210, overruling ***Cochran.*** Since ***Hix*** adopted the standard of reasonable care--imposing a duty when the landowner knows or ***should know*** of the plaintiff's presence on his property--the lack of actual knowledge in ***Cochran*** should not have been dispositive, and thus ***Cochran*** was properly overruled by *His*.

> status relevant. ***Wood*** controls the liability of a landowner for injuries arising out of a defect in the premises, whereas the standard of ordinary negligence set forth in ***Hix*** governs the liability of a landowner to a person injured on his property unrelated to any defective condition of the premises.

***Accord, Bernard v. Florida East Coast R.*** Co., 624 F.2d 552 (5th Cir. 1980) (Florida law) ("In 1973, the Florida Supreme Court declared that, in determining a landowner's duty of care, the plaintiff's status is crucial only where the injury was caused by a condition of the land itself"); *Gerlach v. Trepanier,* 440 So.2d 73, 74 (Fla. 5th DCA 1983) ("While such an inquiry [into the plaintiff's status] is relevant in a premises liability case, it has no application to the instant case, where the injury was not caused by a defect in the land"); *Mustipher* ***v. Palmetto Gas*** Co., 285 So.2d 426, 427 (Fla. 3rd DCA 1973) (per curiam) ("Upon remand, the question of liability vel non of Bonded should be tested in light of the duty owed by one in occupancy or control of premises to a licensee who is in the status of a social guest thereon as pronounced recently in Hix v. Billen, 1973, 284 So.2d 209, as to whether the alleged negligence involved was personal negligence of the defendant or that negligence which is based upon a negligent condition of the premises").

Several district-court decisions have applied the rule in such a context. In ***Florida East Coast*** *R.* ***Co. v. Gonsiorowski,*** 418 So.2d 382, 384 (Fla. 4th DCA 1982), ***review denied,*** 427 So.2d 736 (Fla. 1983), the landowner's agent was operating a train--an activity obviously unrelated to a pre-existing condition of the property--and the plaintiff's complaint charged that the operator should have known that the object on the track in front of him was a human being. Although the plaintiff was a trespassor relative to conditions of the property, the court enforced a duty of ordinary care:

> As to the second injury, which occurred when plaintiff was struck by the train, the trial court quite properly denied a directed verdict. Plaintiff's status on the property was irrelevant with respect to this injury as it was not caused by the condition of the premises but rather by the operation of the train. . . . Where the liability of a landowner to a person injured on his property is unrelated to any defective condition of the premises, the standard of reasonable care under the circum-

stances as set forth in *Hix* governs.

Likewise in **Walt Disney World v. *Beattie*, 428** So.2d 693, 694-95 (Fla. 5th DCA), (emphasis in original), **review denied,** 440 So.2d 354 (Fla. 1983), in which the plaintiff may have been a trespassor in Disney World's lake, the defendant's agent, driving a boat, should have known of the plaintiff's presence in the water, and thus was liable for ordinary negligence:

> The parties devote much of their argument to questions relating to the status of plaintiff upon the Disney property, i.e., whether invitee, uninvited licensee or trespasser, because in a premises liability case, the status of the injured person is important in defining the landowner's duty towards that person. Appellant contends that appellee was a trespasser in the lake, or at best an uninvited licensee. Appellee contends that he was an invitee. . . . However, this is not a premises liability case because there is no evidence whatever to indicate that plaintiff was injured because of a **defective condition in the Disney premises.**
>
> Under these circumstances, the plaintiff's status on the property is not relevant. Only when liability is predicated on an alleged defect or dangerous condition of the premises is the injured person's status relevant.. . . The standard of ordinary negligence governs the liability of a landowner to persons injured upon the property by the active negligence of the landowner.

Similarly in *Bolton v. Smythe,* 432 So.2d **129, 130** (Fla. 5th DCA), **review denied,** 440 So.2d 353 (Fla. 1983), the defendant was potentially liable for ordinary negligence in turning on his sprinkler system and causing an accident, because he was alleged to have committed a contemporaneous, affirmative act (emphasis in original):

> It does not appear necessary to **us** for [the plaintiff] to plead any additional facts or elements. His complaint sets out knowledge or imputed knowledge on the part of [the defendant] that his sprinkler was creating a hazardous condition to passing motorists. From such knowledge arose a duty to the motorists to stop the hazardous sprinkler. He breached this duty by failing to do so, and [the plaintiff] was injured as a consequence.
>
> We do not think that [the defendant's] liability turns on his status as a landowner, because what is alleged in this case **is** active negligence on his part, not a defective condition of his land. . . . Here, [the defendant's] liability for simple negligence

> should be the same whether his sprinkler caused the hazardous condition or whether he was just a pedestrian squirting traffic with a hose to annoy the passing drivers, so ***long as [the defendant] allegedly knew or had reason to know the sprinkler was creating the hazardous condition.*** This allegation was sufficiently set out in [the plaintiff's complaint].

In all of these cases, the duty of ordinary care arose upon proof that the landowner knew or should have known of the plaintiff's presence on or near his property, and thus of any potential harm which the landowner's negligent conduct might cause to the plaintiff. Putting aside for the moment Officer Taylor's status as a policeman, it is clear that this description easily fits the instant case. Sparr and thus the bank had actual knowledge of Officer Taylor's presence on the property; the bank had actual knowledge through other employees that a robbery was taking place; and a reasonable jury could find that because of the alarm, Sparr should have known of the robbery--of the possibility that his conduct would cause harm to the police officers. Under this formulation, both Sparr and the bank owed Officer Taylor a duty of reasonable care.

Of course, Sparr's conduct was not totally ***unrelated*** to a condition of the bank's property, assuming ***arguendo*** that the robbery was a "condition" of the premises. But Sparr was liable for ordinary negligence because his affirmative, contemporaneous conduct made that condition ***more*** dangerous. In the same way, in *Bolton* ***v. Smythe, supra,*** the landowner's personal negligence was certainly ***related*** to a condition of his property. Indeed, the act of negligence attributed to the defendant was the ***creation,*** or at least the ***activation,*** of a dangerous condition on the property, by turning on the sprinkler system. Nevertheless, because the plaintiff charged not that the defendant had failed to correct or warn about a pre-existing condition of the property, but had committed a personal act of negligence contemporaneous with the injury, the relationship between the asserted conduct and the condition of the property was secondary, and the duty of ordinary care applied.

There can be no question, therefore, that if the fireman's rule does nothing more

than to employ the traditional concept of a "licensee," then the rule obviously has no application in this case. Even the district court in this case admitted that much, by acknowledging that its holding constitutes an "evolutionary extension and application of the fireman's rule . . ." (opinion at 5). The question, therefore, is whether the fireman's rule has evolved, or should evolve, beyond the parameters of the traditional concept of a licensee.

***B. The Fireman's Rule is a Legal Construct Defining Certain People as Licensees: It Does Not and Should Not Expand the Legal Context to which the Duties Owed to Licensees are Confined.***

Since the various categories applicable to those who are injured on land (invitee, uninvited licensee, and trespasser) were created to define a landowner's duties only relative to conditions of the land, it necessarily follows that any legal construct (like the fireman's rule) which would assign a given plaintiff (like a policeman) the status of one of those categories (like a licensee) can have legal significance only within the parameters in which those categories were created to operate--that is, only regarding conditions of the land. And that is precisely how the fireman's rule has been defined: "The appellant occupied the status of a licensee on the premises of the appellee."[4/]

***1. The Fireman's Rule in Florida.*** For this reason, it is not surprising that the fireman's rule traditionally operates only to prescribe a landowner's duty to a policeman or fireman who "may become exposed to a **dangerous condition** created by the negligent manner in which the owner has **maintained *his* premises.**" *Romedy* ***v. Johnston,*** 193 So.2d 487, 491 (Fla. 1st DCA 1967) (our emphasis). Thus, "if the owner has knowledge of

---

[4/] ***Berglin*** *v. Adams* ***Chevrolet,*** 458 So.2d 866, 867 (Fla. 4th DCA 1984). ***Accord, Smith v. Markowitz,*** 486 So.2d 11 (Fla. 3rd DCA), ***review denied,*** 494 So.2d 1153 (Fla. 1986); ***Whitten v.*** *Miami-Dade* ***Water and Sewer Authority,*** 357 So.2d 430, 432-33 (Fla. 3rd DCA), ***cert. denied,*** 364 So.2d 894 (Fla. 1978); ***Hall v. Holton,*** 330 So.2d 81, 82 (Fla. 2nd DCA 1976), ***cert. denied,*** 348 So.2d 948 (Fla. 1977). ***See also Restatement (Second) of the Law of*** *Torts* §345(1), at 226-27 (1965).

pitfalls, booby traps, latent hazards or other similar dangers, then a failure to warn such licensee could under proper circumstances amount to wanton negligence ...." **Id.** at 490. Because the very characterization of a plaintiff as licensee can relate only to "pitfalls, booby traps, latent hazards, or other similar dangers," it necessarily follows that the fireman's rule can relate only to "pitfalls, booby traps, latent hazards, or other similar dangers." Like the generic category which it adopts, the rule necessarily is limited to the condition of property.

This conclusion is bolstered by reference to one of the criteria for application of the fireman's rule--that the condition of the premises in question "is not open to ordinary observation by the licensee ...." **Price v. Morgan,** 436 So.2d 1116, 1121 (Fla. 5th **DCA** 1983), **review denied,** 447 So.2d 887 (Fla. 1984). **Accord, *Whitten v.* Miami-Dade Water and Sewer Authority,** 357 So.2d 430, 432 (Fla. 3rd **DCA), cert. denied,** 364 So.2d 894 (Fla. 1978). That criterion has absolutely no meaning with respect to the operational negligence of a landowner once he knows or should know that the policeman or fireman is on the premises. Such a criterion could ***only*** relate to a pre-existing condition of the premises, and thus the fireman's rule could only relate to a pre-existing condition of the premises.

**2. The Policies Behind the Rule.** In addition, this conclusion is bolstered by reference to the policies which underlie the fireman's rule. The district court opined that the rule would best be served by its expansion to cover contemporaneous acts of negligence, but it did not explain what policy could possibly be served by such an expansion. **As** Professor Prosser has put it, the most defensible rationale for the fireman's rule is that because policemen and firemen come onto one's premises at unanticipated times, and because they are trained to anticipate any dangerous conditions which might be encountered, it would be unreasonable to impose upon the landowner the duty to ***prepare*** the premises for such unanticipated events:

> Perhaps the most legitimate basis for the distinction lies in the fact that firemen and policemen are likely to enter at unforeseeable times, upon unusual parts of the premises, and under circumstances of emergency, where care in ***looking after the premises,*** and in ***preparation*** for the visit, cannot reasonably be looked for. A person who climbs into a basement window in search of a fire or a thief does not expect any assurance that he will not find a bulldog in the cellar, and he is trained to be on guard for any such general dangers inherent in the profession.

W. Keeton, *Prosser and Keeton on the Law of Torts,* §61 at 431-32 (5th ed. 1984) (our emphasis).

This rationale was accepted by the court in *Romedy v. Johnston,* 193 So.2d 487, 491 (Fla. 1st DCA 1967):

> Since the occurrence of fires is unpredictable, it would be wholly impractical and unreasonable to require the owner or occupant of premises to exercise at all times the high degree of care owed to an invitee in order to guard against the remote possibility that a fire may occur and a fireman, while fighting the fire, may become exposed to a dangerous condition created by the negligent manner in which the owner has maintained his premises. The emergency situation most generally created by the outbreak of a fire does not make time for conferences between the owner and members of the fire department in order that defective conditions of the building might be pointed out and dangers thereby avoided by those having the responsibility for containing and extinguishing the blaze. For these reasons, and many others, the policy of the law refuses to impose upon owners and occupants of premises the obligation to firemen which is owed to invitees.
>
> It is a matter of common knowledge that in the performance of their duties firemen are constantly exposed to dangerous and hazardous conditions. They face the risk of injury from exposure to fire, smoke, and collapsing structures. These are risks assumed by those voluntarily seeking and accepting this type of employment. The injurious effect of coming in contact with fire and smoke is exactly the same, whether the fire originates as a result of an accident or the negligent acts of the owner of the premises.

These policies are simply not implicated when the policeman or fireman is injured not by a condition of the premises, but by an act of operational negligence by the owner after he knew or should have known of the policeman's or fireman's presence on the property. That is not a risk which the officer assumes when he comes upon the property--

that the owner's contemporaneous act of negligence may injur him in a manner unrelated to the condition of the property. Such an operational act is not one of the "dangerous and hazardous conditions" to which such officers "are constantly exposed." It is not one of the "risks assumed by those voluntarily seeking and accepting this type of employment." And on the other side of the scale, there is nothing "impractical and unreasonable" in requiring the owner ***not*** to ***prepare*** his property for a visit which the owner should not reasonably anticipate, but rather to act in a non-negligent way after he knows or should know of the officer's presence on his property. There is a big difference between requiring reasonable care in preparation for events which cannot be predicted, and requiring reasonable care in the course of events of which the owner **is** or should be aware. And while it **is** conceivable (though unlikely) that a landowner might hesitate before calling the police or fire department if he might be liable for some pre-existing condition of his property, it **is** inconceivable that he would similarly hesitate because of the risk of liability for some affirmative act of negligence after the officers arrive. The policies which underlie the fireman's rule are simply not implicated in that context.

Thus in ***Whitlock v. Elich*, 409** So.2d **110, 111** (Fla. 5th DCA **1982),** the plaintiff/ policeman was helping the defendant get into her condominium through a window, when the defendant negligently removed a flashlight which the officer had used to keep the window partially open, resulting in injury to the officer's hand. The trial court granted summary judgment for the defendant on the ground that the officer's complaint had failed to allege facts showing wanton or willful conduct under the fireman's rule, but the district court reversed:

> In this case, the facts were not in dispute on this issue and the trial judge made the determination that [the officer] was a licensee as a matter of law. We would agree with that determination. But such a determination, as in ***[Wood v.*** *Camp,* **284** So.2d **691** (Fla. **1973)** and ***Hall v.*** *Holton,* **330** So.2d **81** (Fla. 2nd DCA **1976), *cert. denied,* 348** So.2d **948** (Fla. **1977)],** is relevant only where an injury is caused by a defective condition of the premises. ***Maldonado v. Jack M. Berry Grove Corp.*, 351**

> So.2d 957 (Fla. 1977). In this case, there was evidence that the injury was ***not*** caused solely by any defect in the premises but, at least in part, by the negligent act of [the defendant] in removing a flashlight prop from the window frame and actively "scissoring" [the officer's] hand while she was moving the glass pane in an attempt to assist him. The Florida Supreme Court has recognized a distinction between an injury caused by the active conduct of the putative tortfeasor and an injury caused by a defective condition of the landowner's premises. *Maldonado; Hix v. Billen*, 284 So.2d 209 (Fla. 1973). In the former situation, the applicable standard is ordinary negligence. The summary judgment below is reversed for this reason.[5/]

The instant case is directly analogous. In both cases, the injury allegedly was caused not simply by a condition of the premises, but also, "at least in part," by an act of operational negligence on the part of the owner which was unrelated to the owner's maintenance of the premises. As in ***Whitlock,*** the standard here is one of ordinary negligence. That is the only formulation consistent with the concept of a licensee, and with the purposes and policies underlying the fireman's rule.

3. ***Other Jurisdictions.*** For this reason, it is not surprising that the ***Whitlock*** decision is consistent with the overwhelming majority of cases in other jurisdictions.[6/]

---

?/ We must respectfully disagree with the district court (opinion at 5) that the "Whitlock case, relied upon so heavily by appellant, failed even to discuss the fireman's rule." To the contrary, the ***Whitlock*** opinion expressly acknowledges that the defendant had secured a summary judgment from the trial court by invoking ***Hall v. Holton***, 330 So.2d 81 (Fla. 2nd DCA 1976), ***cert. denied,*** 348 So.2d 948 (Fla. 1977)--which explicitly concerned the firernan's rule--for the proposition that "the plaintiff was barred from recovering for an injury incurred while discharging his professional duties in the absence of wanton negligence or willful conduct on her part." ***Whitlock v. Elich***, 409 So.2d at 111. In that context, the district court in ***Whitlock*** characterized the issue on appeal as follows: "[I]f this be considered strictly a 'premises liability' case--*i.e.*, an injury resulting from a condition of the premises (a defective window)--then the issue would be the status of the policeman at the time of injury in order to determine the applicable standard of duty to be imposed upon [the defendant] as an owner or occupant of the premises." 409 So.2d at 111. In this light, it is difficult to understand the district court's conclusion that ***Whitlock*** does not address the fireman's rule.

6/ Because the amicus brief to be filed by the Police Benevolent Association will devote itself primarily to the policies underlying the fireman's rule--and in particular to the corresponding limits upon the rule in jurisdictions other than Florida--the following discussion, in order to avoid a duplication of effort, will be cursory rather than comprehensive. We respectfully urge the Court to consider the survey of other jurisdictions in

For example, in ***Lipson v. Superior Court,*** 644 P.2d 822 (Cal. 1982), in which the plaintiff firefighters were injured while fighting a fire caused by the boilover of toxic chemicals, the California Supreme Court held that the defendant was liable for ordinary negligence because he had carelessly misrepresented to the firemen that the fire was nontoxic--an independent act of negligence which increased the risk to the firemen, wholly apart from any negligence which may have caused the fire and occasioned the summoning of the firefighters.

In ***Kaiser v. Northern States Power Co.,*** 353 N.W.2d 899 (Minn. 1984), the Minnesota Supreme Court explicitly held that where a landowner is negligent after the firefighter arrives at the scene, and where such negligence materially increases the risk or creates new risks, the negligent party is not shielded from liability by the fireman's rule: "We believe that the common law 'fireman's rule' should not be extended beyond its landowner/occupier foundation and should not be applied to prevent recovery by a fireman or policeman against someone who intentionally injures the officer or causes injury by his active negligence after the officer arrives on the scene."

In ***Christensen v. Murphy,*** 296 Or. 610, 678 P.2d 1210 (1984), the Oregon Supreme Court held that the fireman's rule did not bar a policeman's widow's recovery for wrongful death caused by the defendant prison matron's negligence in permitting the escape of a young inmate whose male accomplice killed the pursuing policeman. At least in that context, the fireman's rule could not survive Oregon's statutory abrogation of the doctrine of assumption of risk. The incompatibility of the district court's reasoning in the instant case with the abolition in Florida of the doctrine of assumption-of-risk, ***see Blackburn v. Dorta,*** 348 So.2d 287 (Fla. 1977), is discussed in greater detail in the amicus brief of the Police Benevolent Association. ***See*** **Black** ***v. District Board of Trustees of Broward Community College,*** 11 FLW 1526, 1527 (Fla. 4th DCA July 18, 1986). To avoid

---

that amicus brief.

a duplication of effort, we respectfully refer the Court to that brief.

In *Buren v. Midwest Industries, Inc.*, 380 S.W.2d 96, 97-98 (Ky. 1964), the Kentucky Supreme Court held that notwithstanding the fireman's rule, a landowner or occupant "may be liable ...for actively negligent conduct (new negligence that is subsequent conduct after the fireman arrives on the premises), and, in some jurisdictions, for statutory violations 'creating undue risks of injury beyond those inevitably involved in firefighting.'" Thus in *Hawkins v. Sunmark Industries, Inc.*, ___ S.W.2d ___ (Ky. August 7, 1986) (29 *Atla L.* Rep. 445 (December 1986)), the same court refused to extend the doctrine to a products-liability action against the manufacturer of a faulty gasoline pump whose defective release valve permitted a low-grade fire in the pump assembly to escalate into a holocaust, engulfing the firefighters. The defendant oil company, which had designed, built, and operated the gas station, may have been protected by the fireman's rule in its capacity as owner and operator of the service station, but it was not protected in its capacity as designer and builder of the pump, because its negligence in that capacity was outside the ambit of the fireman's rule.[7/] In one way or another, all of these cases limit the rule to the particular context in which it first arose--the context of a landowner's responsibility for a condition of the premises which pre-dates the officer's presence there.

*4.* **The *Florida Cases Cited* by *the District Court.*** The district court in the instant case concluded, however, that in Florida the fireman's rule has already been expanded beyond those parameters. It cited three cases for this proposition (opinion at

---

[7/] *See Price v. Tempo, Inc.*, 603 F. Supp. 1359 (E.D. Pa. 1985) (Pennsylvania law) (permitting fireman's action for negligence in manufacture of defective firefighting equipment); *Herman v. Welland Chemical, Ltd.*, 580 F. Supp. 823, 830-32 (M.D. Pa. 1984) (Pennsylvania law) (permitting fireman's action for negligence against manufacturer of chemicals which exploded upon collision of transporting truck, which in turn caused a secondary collision injuring plaintiff); *Court v. Grzelinski*, 72 Ill.2d 141, 147-48, 379 N.E.2d 281, 284 (1978) (permitting fireman's action for negligence against manufacturer of vehicle which exploded, causing the fire).

4)--*Romedy v. Johnston,* 193 So.2d 487 (Fla. 1st **DCA** 1967); *Whitten v. Miami-Dade Water and Sewer Authority,* 357 So.2d 430 (Fla. 3rd **DCA**), *cert. denied,* 364 So.2d 894 (Fla. 1978); and *Rishel v. Eastern Airlines, Inc.,* 466 So.2d 1136 (Fla. 3rd **DCA** 1985). We must respectfully disagree that any of these cases represents an expansion of the traditional fireman's rule; and certainly none of them represents the kind of expansion which the district court adopted here.

***Rornedy v. Johnson*** is a classic application of the traditional fireman's rule, and does not remotely expand it. It was an action by the wife of a fireman who died as a result of smoke inhalation while fighting a fire at the defendant's hotel, who argued that the hotel was "constructed, remodeled, and maintained in such manner as to permit combustible materials to remain in the concealed space between the ceiling of the ballroom and lobby and the roof." 193 So.2d at 488. The court noted that the "entire burden" of the plaintiff's position "is that a fireman who suffers injuries resulting in his death under the circumstances alleged in the complaint filed herein occupies the legal status of an invitee . . . ." *Id.* at 489. In adopting the classic fireman's rule, the court held that "it would be wholly impractical and unreasonable to require the owner or occupant of premises to exercise at all times the high degree of care owed to an invitee in order to guard against the remote possibility that a fire may occur and a fireman, while fighting the fire, may become exposed to a dangerous condition created by the negligent manner in which the owner has maintained his premises." *Id.* at 491. In contrast, the court noted, the "risk[s] of injury from exposure to fire, smoke, and collapsing structures" are "risks assumed by those voluntarily seeking and accepting this type of employment." *Id.* These kinds of risks are "exactly the same, whether the fire originates as the result of an accident or the negligent acts of the owner of the premises." *Id.* These considerations supported the court's application of the fireman's rule, and the entry of judgment for the defendant in the absence of any allegation of

wanton or willful conduct. The case does not remotely support an expansion of that rule.

In ***Whitten v. Miami-Dade Water and Sewer Authority, supra,*** the court did purport to expand the fireman's rule (in a manner wholly unrelated to the present issue), but upon closer scrutiny, it is clear that the ***holding*** of ***Whitten*** does not represent an expansion of the traditional rule, and that the ***Whitten*** court might have justified its decision without any ***dictum*** counseling such an expansion. Indeed, as we will note, a subsequent case has done precisely that.

The simple holding of ***Whitten*** is that the fireman's rule may apply even when the plaintiff police officer or fireman was not actually on the defendant's premises at the time of his injury, but was performing his job outside the premises.[8/] The plaintiffs in ***Whitten*** were policemen and firemen who responded to an emergency call at a water plant, at which a heavy chlorine gas fog was enveloping the area. Several of the plaintiffs suffered chlorine-gas poisoning while performing various functions (evacuating occupants, directing traffic) outside the premises. Nevertheless, their claim--that the defendant had negligently maintained the premises, thus allowing the leak--was properly barred by the trial court under the fireman's rule.

In affirming, however, the district court noted that its holding was "not based upon an invitee-licensee distinction, but rather upon an affirmative response to the query of whether appellants were acting in discharge of their professional duties when they were allegedly injured." Adopting part of the reasoning of the ***Romedy*** decision--to the effect that firemen assume the risk of injury caused by the very condition which warranted their presence on or at the property--the ***Whitten*** court held that such reasoning warranted its "expansion" of the fireman's rule, 357 So.2d at 433:

---

[8/] ***Accord, Price v. Morgan,*** 436 So.2d 1116 (Fla. 5th DCA 1983), ***review denied,*** 447 So.2d 887 (Fla. 1984); ***Wilson v. Florida Processing Co.,*** 368 So.2d 609 (Fla. 3rd DCA 1979).

> Of course, for all practical purposes, the **"licensee"** concept is no different from the "discharge of duty" concept, with the one exception being that the latter has a more widespread application, as the facts **sub *judice*** disclose. We therefore find no reason to abandon the cases cited herein which utilizes [sic] the "invitee-licensee" distinction in ascertaining the applicable standard of care owed by a landowner or occupant to a police officer or fireman who **enters** upon premises in the discharge of his duty and is injured thereon. Additionally, we point out that upon either theory, willful conduct or wanton negligence on the part of the owner or occupant of the premises will be actionable.

Thus, the ***Whitten*** court found it necessary to "expand" the traditional fireman's rule in order to accommodate the case in which an officer is injured off the premises by a pre-existing condition of the premises.

Even apart from the obvious fact that this purported "expansion" of the fireman's rule has absolutely nothing to do with the district court's expansion of the rule in this case (to cover contemporaneous acts of negligence), we respectfully submit that the **Whitten** decision is entirely defensible within the parameters of the traditional **"invitee/licensee"** distinction, and thus did not have to expand the fireman's rule at all. To the contrary, it is well-recognized that in proper cases, whether a police officer or a fireman is involved or not, the duties of a landowner may extend beyond the boundaries of his property. For example, in proper cases a hotel operator may have a duty to warn his patrons of the risk of a criminal assault outside of the hotel, since "the duty of a business to protect invitees can extend to adjacent property, particularly entrances to the business premises, if the business is aware of a dangerous condition on the adjacent property and fails to warn its invitees or to take some other reasonable preventive action." *Banks* ***v.*** *Hyatt Corp.,* 722 F.2d 214, 215 (5th Cir. 1984). Similarly, a landowner in proper cases will have a duty to correct or warn about dangerous conditions on a public sidewalk constituting an entranceway to the premises.[9/] All of these cases apply status-

---

9/ **See *Burmeister v.* American Motorists Ins.** Co., **403** So.2d 541, 542 (Fla. 4th DCA

based distinctions--distinctions between invitees, licensees and trespassers-in defining a landowner's obligations regarding dangers which exist outside of the strict boundaries of the landowner's property.

Thus, the fireman's rule does not expand upon the traditional definition of a landowner's duty, in characterizing a policeman or fireman as a licensee even when the policeman or fireman was not on the defendant's property at the time of his injury. That was the explicit conclusion of the Fifth District Court of Appeal in ***Price v. Morgan, supra*** note **8, 436** So.2d at **1120,** which reached precisely the same conclusion as the ***Whitten*** case, **without** expanding upon the traditional fireman's rule: "In applying the 'fireman's rule' to fact situations, such as the one before us here, where the fireman is outside the premises when he is injured in the discharge of his duties, there is no need to depart from those cases which hold police and fire personnel to be licensees when they enter upon premises in the discharge of their duty." Thus, it was entirely unnecessary for the Third District in ***Whitten*** to depart from the "licensee" concept in order to ensure that the fireman's rule governs injuries to policemen or firemen who are not on the premises, in favor of a broader "discharge of duty" concept. Indeed, as we note in the following footnote, that entire "discharge of duty" concept has its own problems--problems which the ***Whitten*** court could easily have avoided by applying the traditional fireman's rule.10/

---

**1981); *Shields v. Food Fair Stores of Florida, Inc.*, 106 So.2d 90, 92** (Fla. 3rd DCA **1958), *cert. denied,* 109** So.2d **168** (Fla. **1959). *See also Viands v. Safeway Stores, Inc.*, 107** A.2d **118, 119-20** (D.C. Ct. App. **1954); *Cooley v. Makse,* 46** Ill. App.2d **25, 196** N.E.2d **396, 398 (1964); *Stewart v. 104 Wallace Street, Inc.*, 87 N.J. 146, 432** A.2d **881, 883 (1981); *Love v. Clam Box, Inc.*, *35* Misc.2d **36, 232** N.Y.S.2d **924, 925-26** (N.Y. **Sup.** Ct. **1962)** (per curiam). ***See generally*** Annotation, ***Liability of Operator of Business Premises to Patron Injured by Condition of Adjacent Property,* 39** A.L.R.3d **579, 580-81 (1971).**

10/ The "discharge of duty" concept is technically erroneous, to the extent that it applies the fireman's rule only to a "negligently created condition which necessitated the policeman's or fireman's presence on the premises in discharge of his duty." ***Whitten v. Miami-Dade Water & Sewer Authority,* 357** So.2d at **431.** It is well-recognized that the fireman's rule will govern liability to a policeman or fireman even if his injury, by a

The fireman's rule applies whenever the officer is injured by a pre-existing condition of the property, so long as the officer is discharging his duties at the time of the injury, whether that condition is related or unrelated to the officer's reason for being at the property, and whether the officer is actually on the property or not at the time of his injury. That **is** the correct statement of the fireman's rule, and it is entirely consistent with the traditional concept of the duty owed to a licensee. Thus, it is respectfully submitted that the district court was incorrect in asserting that ***Whitten*** necessarily expanded the traditional parameters of the fireman's rule. And in any event, as we have noted, such a purported "expansion" has nothing whatsoever to do with the particular expansion of the rule endorsed by the district court in this case.

Third and finally, the district court asserted that the fireman's rule was expanded in ***Rishel v. Eastern Airlines, Inc.*****, 466** So.2d **1136** (Fla. 3rd DCA **1985).** Again, although there is ***dictum*** in ***Rishel*** which suggests such an expansion, the holding of that case is perfectly consistent with the traditional parameters of the fireman's rule. The police officers in ***Rishel*** were called to remove an intoxicated passenger from an airplane, and the court held that the defendant carrier did not have an affirmative duty to warn the officers that the intoxicated passenger might be dangerous or violent. That was simply part of the risk inherent in their jobs. The central question in ***Rishel*** was whether the intoxicated passenger was a "condition" of the premises, and the district court avoided

---

condition of the premises, is unrelated to the circumstances which necessitated the officer's presence on or at the property. ***See, e.g., Smith v. Markowitz*****, 486** So.2d **11** (Fla. **3rd** DCA), ***review denied,*** **494** So.2d **1153** (Fla. **1986)** (fireman's rule applied where officer tripped over a water pipe while chasing a criminal suspect across the defendant's property); ***Berglin v. Adams Chevrolet,*** **458** So.2d **866** (Fla. 4th DCA **1984)** (fireman's rule applied where officer was injured by overhanging garage door while investigating burglary); ***Hall v. Holton,*** **330** So.2d **81, 82** (Fla. 2nd DCA **1976), *cert. denied,*** **348** So.2d **948** (Fla. **1977)** (fireman's rule applied where the officer fell through the floor of an abandoned building which he was checking for vagrants). As the court noted in ***Rornedy v. Johnston,*** **193** So.2d **487, 489** (Fla. 1st DCA **1967),** the fireman's rule properly applies to all "pitfalls, booby traps, latent hazards, or other similar dangers" which an officer may encounter on the property in question. Thus, the entire "discharge of duty" concept advanced by the district court in ***Whitten*** was not only unnecessary, but was erroneous.

that question by holding that the fireman's rule is not limited to conditions of the premises, but instead applies whenever the injury arises out of the plaintiff's discharge of his professional duties. But that formulation reaches well beyond the facts at issue in ***Rishel,*** and was totally unnecessary to the district court's resolution of that particular case. In *Rishel,* the intoxicated passenger ***was*** the "condition" of the premises which induced the officer's presence there. The airline could hardly be faulted for failing to warn the officers of any known dangerous propensities of that intoxicated passenger, because he was the very dangerous condition which the officers were called to apprehend. There was no allegation in ***Rishel*** that the airline or its employees had done anything to **increase** the danger which the officers should have known they were facing when called to apprehend the passenger. Thus, the outcome in ***Rishel*** is perfectly consistent with the traditional licensee concept; in the absence of any contemporaneous affirmative act of negligence, the airline would be liable only under the traditional rule governing its obligation to a licensee--to refrain from wanton or willful misconduct.~~11~~/

**5.** ***Conclusion.*** In the instant case, if Mrs. Sanderson's complaint were based solely upon the bank's failure to warn her husband that bank robbers are dangerous--just like the ***Rishel*** complaint was based on the failure to warn that the intoxicated passenger was dangerous--that complaint would properly have been dismissed under the fireman's

---

11/ ***See*** **also** ***Preferred Risk Mutual*** *Ins.* ***Co. v. Saboda,*** 489 So.2d 768 (Fla. 5th **DCA** 1986) (fireman's rule applied to police officer's survivors' action against homeowner who became deranged as a result of a drug overdose, and killed the officer who responded to the call). ***Preferred*** **Risk** is arguably defensible on the theory that the homeowner did not occupy the status of a landowner at the time of the incident, but rather, in his deranged mentality, was the "condition" of the premises--like the intoxicated passenger in ***Rishel***--to which the officers were responding. Of course, this is a fiction at best, and ***Preferred Risk*** is subject to criticism on two grounds: **1)** the homeowner committed a contemporaneous affirmative act resulting in injury, and thus the fireman's rule should not have applied; and 2) even under that rule, the homeowner clearly acted in a wanton and willful manner. The viability of ***Preferred*** **Risk** need not be resolved in the instant case, however, because the instant case involves an affirmative act of negligence in ***addition*** to the condition to which the officer was responding.

rule. But Mrs. Sanderson is not alleging that the bank had a duty to warn Officer Taylor that bank robbers are dangerous people. Officer Taylor knew that already--and he knew that a robbery was taking place. Mrs. Sanderson's claim is that the bank committed an ***affirmative act of negligence,*** not that it ***failed*** to warn Officer Taylor of the robbers. Sanderson's claim is that the bank acted affirmatively to **enhance** the danger--to make it worse--by recklessly alerting the robbers to the officers' presence at the bank.

That is not a risk which is inherent in a police officer's job. The officer certainly takes the risk that a bank robber may be dangerous. But the officer does not take the risk that once his presence on the property is known to the landowner, the landowner will do something careless to ***increase*** the risk and cause the officer harm. The policies which underlie the fireman's rule have nothing to do with such events--any more than the traditional rules governing the duties owed to licensees have anything to do with an affirmative act of negligence by the landowner.

Thus, we respectfully disagree with the district court that any other Florida case has ever expanded the traditional parameters of the fireman's rule in any respect; and we certainly disagree that there has ever been an expansion which would govern a case of active affirmative negligence like this one. As we have demonstrated, such an expansion would not serve the purposes of the fireman's rule, and the district court should not have endorsed the trial court's dismissal of Mrs. Sanderson's complaint on that basis. To the contrary, as in *Bolton v. Smythe*, 432 So.2d 129, 130 (Fla. 5th DCA), *review denied*, 440 So.2d 353 (Fla. 1983), "the complaint adequately states a cause of action in terms of simple negligence," and the trial court erred in dismissing it. And of course, the question of whether Sparr was in fact negligent is a classic question for the jury.~~12~~1

---

12/ *See English v. Florida State Board of Regents*, 403 So.2d 439, **440** (Fla. 1981); *Marks v. Del Castillo*, 386 So.2d 1259 (Fla. 3rd DCA 1980), *review denied*, 397 So.2d 778 (Fla. 1981); *Holley v. Mt. Zion Terrace Apartments, Inc.*, 382 So.2d 98 (Fla. 3rd DCA 1980); *Acme Electric, Inc. v. Travis, 218* So.2d 788 (Fla. 1st DCA), *cert. denied*, 225 So.2d 917

***C. Even if the Fireman's Rule Did Apply in this Case, the Trial Court Erred in Dismissing the Complaint, Which Does State a Cause of Action Under the Fireman's Rule.***

Before closing, in an abundance of caution, we should also point out that even if this Court finds that the fireman's rule does apply in this case, the trial court still erred in dismissing the plaintiff's complaint against Sparr and the bank. Admittedly, the fireman's rule requires proof of wanton negligence. In this case, we respectfully submit that the plaintiff's complaint alleges facts which, if accepted by a jury, would permit a reasonable factfinder to conclude that Sparr was reckless, and that Sparr and the bank may therefore be liable.

If the fireman's rule was applicable, it required Sparr and the bank to refrain from wanton or willful conduct once officer Taylor's presence on the property was either known or should reasonably have been anticipated.@/ In this case, whether the bank's alarm system had failed repeatedly in the past or not, we think a reasonable jury could conclude that Sparr was reckless or wanton in announcing the police officers' presence to the two bank robbers, thus placing their lives in jeopardy, without bothering to determine whether the alarm was false or not.

The plaintiff's complaint alleged that Sparr had actual knowledge that the alarm had been tripped, observed the two officers approaching, and "was aware that the approach of these policemen was in response to an alarm" (R. **16).** The cornplaint also

---

(Fla. **1969).**

13/ ***See Price v. Morgan,*** **436** So.2d **1116, 1121** (Fla. 5th **DCA 1983),** ***cert. denied,*** **447** So.2d **887** (Fla. **1984)** ("If considered a licensee, once his presence on the premises is known or should reasonably be anticipated by the owner, the owner has the obligation to refrain from wanton negligence or willful conduct . . ."); ***Hall v. Holton,*** **330** So.2d **81, 83** (Fla. 2nd **DCA 1976),** ***cert. denied,*** **348** So.2d **948** (Fla. **1977)** ("reason to believe he is coming"). ***See also Boyce v. Pi Kappa Alpha Holding Corp.,*** **476** F.2d **447, 452** (5th Cir. **1973)** (Florida law) (actual or constructive knowledge), ***quoted in Bernard v. Florida East Coast R. Co.,*** **624** F.2d 552, **554** (5th Cir. **1980)** (Florida law).

alleged that Sparr "knew or should have known of a condition on the premises such that the officers outside could not see in but persons inside could see out" ***(id.).*** Even if the complaint implies that Sparr attempted to head off the officers in the mistaken belief that as in the past, the alarm system had been falsely activated, a reasonable jury could conclude that Sparr acted in a wanton and reckless manner when he announced the officers' presence before ascertaining whether the alarm had been false or not. That was not simple carelessness; it was recklessness, which cost a human life.[14]/

It is that cost--the cost of a human life--which in part defines the quality or degree of the defendants' negligence in this case. If Sparr's negligence had not threatened such dire consequences--if it had merely threatened to cause confusion or panic, or perhaps some lesser injury--then it might properly be characterized as merely negligent. But it is "well-established that the amount of care required increases with the dangerousness of the agency involved and thus with the likelihood of injury ...." ***Marks v. Delcastillo,*** 386 So.2d 1259, 1263-64 & n.8 (Fla. 3rd DCA 1980), ***review denied,*** 397 So.2d 778 (Fla. 1981), ***citing Carter v. J. Ray Arnold Lumber*** Co., 83 Fla. 470, 91 So. 893 (1922). In the instant case, Sparr knew, or should have known, that if he was wrong about the false alarm, that meant that the bank was being robbed, and of course such a robbery poses an imminent deadly threat to anyone who may be involved with it, and especially to police officers. Thus, the known risk of Sparr's carelessness was death or serious bodily injury. In that context, a reasonable jury might certainly find that he was reckless in his conduct.

Admittedly, the plaintiff's complaint alleged only negligence--not willfulness (R. 15-16). What matters, however, is not the legal rubric under which the complaint was

---

14/ ***See generally Bernard v. Florida*** *East Coast* ***R.*** Co., 624 F.2d 552, 554-55 (5th Cir. 1980) (Florida law); ***Boyce v. Pi Kappa Alpha Holding Corp.,*** 476 F.2d 447, 452 (5th Cir. 1973) (Florida law); ***Berglin v. Adams Chevrolet,*** 458 So.2d 866 (Fla. 4th DCA 1984); ***Rornedy v. Johnston,*** 193 So.2d 486, 490 (Fla. 1st DCA 1967).

brought, but the operative ***facts*** which it alleged. Under Rule 1.110(b)(2), Fla. R. Civ. P., the sufficiency of a complaint is not judged by its statement of legal conclusions, but by the extent to which it contains "allegations of ultimate fact" sufficient to advise the opposing party of the basis for the relief requested.[15/] Thus, "[i]f a complaint states a cause of action on any ground, a motion to dismiss should be denied." ***Bolton v. Smythe,*** 432 So.2d 129, 130 (Fla. 5th DCA), ***review denied,*** 440 So.2d 353 (Fla. 1983), ***citing Carson v. City of Ft. Lauderdale,*** 155 So.2d 620 (Fla. 3rd DCA 1963). Indeed, even if a complaint affirmatively states the wrong legal theory, it is nonetheless facially sufficient so long as it states the ultimate facts necessary to support relief under any legal theory.[16/]

In this case, if we are correct that the facts alleged in the plaintiff's complaint are sufficient to support a jury's finding of wanton or willful conduct, then the trial court erred in dismissing the complaint for failure to state a cause of action under the fireman's rule. ***Compare Price v. Morgan,*** 436 So.2d 1116, 1121 (Fla. 5th DCA 1983), ***review denied,*** 447 So.2d 887 (Fla. 1984) (insufficient facts alleged). Our primary contention, however, is that no such allegation is necessary, because the fireman's rule is not implicated in this case. Instead, the complaint alleges acts of operational negligence by the bank and Sparr apart from their maintenance of the premises, and thus states a

---

15/ ***See Fountainbleau Hotel Corp. v. Walters,*** 246 So.2d 563 (Fla. 1971); ***Chasin v. Richey,*** 91 So.2d 811 (Fla. 1957); ***Stanton v. Harris,*** 13 So.2d 17 (Fla. 1943); ***Davis v. Wilson,*** 139 Fla. 698, 190 ***So.*** 716 (1939); ***Stephl v. Moore,*** 94 Fla. 313, 114 ***So.*** 455 (1927); ***Couture v. Dade County,*** 93 Fla. 342, 112 ***So.*** 75 (1927); ***Drew Library Co. v. Union Investment Co.,*** 66 Fla. 382, 63 ***So.*** 836 (1914); ***H.W. Metcalf*** Co. ***v. Martin,*** 54 Fla. 531, 45 ***So.*** 463 (1908); ***Baker v. McKinney,*** 54 Fla. 495, 44 ***So.*** 944 (1907); ***Town of Orange City v. Thayer,*** 45 Fla. 502, 34 ***So.*** 573 (1903); ***Rishel v. Eastern Airlines, Inc.,*** 466 So.2d 1136 (Fla. 3rd DCA 1985); ***Clark v. Boeing Co.,*** 395 So.2d 1226, 1229 (Fla. 3rd DCA 1981); ***Dawson v. Blue*** *Cross* ***Association,*** 293 So.2d 90 (Fla. 1st DCA 1974); ***Byrum v. Williams,*** 276 So.2d 836 (Fla. 4th DCA 1973).

16/ ***See Roger Rankin Enterprises, Inc. v. Green,*** 433 So.2d 1248 (Fla. 3rd DCA 1983). ***See also Thompson v. Allstate*** *Ins.* ***Co.,*** 476 F.2d 746 (5th Cir. 1973) (federal rules).

cause of action in negligence.

## V
## CONCLUSION

It is respectfully submitted that the opinion of the district court should be reversed, and the cause remanded with instructions to remand the case to the trial court for further proceedings upon the plaintiff's amended complaint.

## VI
## CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 12th day of February, 1987, to: J. CRAIG KNOX, ESQ., P.O. Box 1739, Tallahassee, Florida (Counsel for Respondents); ROBERT D. PELTZ, ESQ., Rossman, Baumberger & Peltz, P.A., 1207 Biscayne Building, 19 West Flagler Street, Miami, Florida 33130 (Counsel for Police Benevolent Association); and SALLY R. DOERNER, ESQ., Floyd, Pearson, Richman, etc., One Biscayne Tower, 25th Floor, Miami, Florida 33131 (Counsel for Academy of Florida Trial Lawyers).

Respectfully submitted,

KERRIGAN, ESTESS & RANKIN
400 East Government Street
Pensacola, Florida 32589
-and-
PODHURST, ORSECK, PARKS, JOSEFSBERG,
EATON, MEADOW & OLIN, P.A.
Suite 800, City National Bank Building
25 West Flagler Street
Miami, Florida 33130
(305) 358-2800

BY: _____
JOEL S. PERWIN

SANDE-PBRM/amg