047

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,

v.

FREEDOM SAVINGS & LOAN ASSOCIATION, CLIFF JACKSON, CLARENCE HILL, ALEX SPARR and THE MOSLER SAFE COMPANY,

Respondents.

RESPONDENTS BRIEF ON THE MERITS

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PREFACE

This answer brief on the merits is submitted on behalf of Respondents, Freedom Savings & Loan Association and Alex Sparr.

For clarity, the parties will be referred to as follows:

Petitioner for Petitioner/Respondent, Suzanne Taylor Sanderson individually and as Personal Representative of the Estate of Stephen A. Taylor;

Taylor for Petitioner's decedent, Police Officer Stephen A. Taylor;

Respondent or The Bank for Respondent/Defendant, Freedom Savings & Loan Association;

Respondent or Sparr for Respondent/Defendant, Alex Sparr.

The following abbreviations will be used:

(R-____) for the record on appeal as paginated by the Clerk of the Circuit Court in its initial index.

All emphasis and the text and quoted material is by counsel unless otherwise indicated.

ISSUE ON APPEAL

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

STATEMENT OF THE CASE AND FACTS

Respondents accept Petitioner's statement of the case and facts except for Petitioner's statement the complaint alleges an act of negligence by a bank official resulting in the death of a police officer and not a dangerous condition on the premises themselves. Petitioner's second amended complaint sets forth two applicable counts as to these Respondents, alleging an inadequate warning and a failure to warn of a dangerous condition of the premises.

Count II alleges Respondents' "negligent warning" while attempting "to assist Officer Taylor and the other police officers" responding to the risk posed by the bank robbers. (R-15). The complaint alleges bank employee Sparr "knew or should have known of the likelihood of an **emergency condition on the premises** [i.e., the robbery] which would pose a threat of injury to Officer Taylor and others." (R-16). [Emphasis added.] Count II goes on to allege 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 and, as a result, negligently warned the robbers of the eminent approach of policemen, including Officer Taylor, to the front door by

announcing the officers' presence in such a way that it was understood by the robbers." (R-16). [Emphasis added.]

Count III attempts to set forth an action against Respondents for failing to give any warning to Officer Taylor and the other police officers of the "extremely dangerous situation on the premises" due to the bank robbers. (R-15-16).

Contrary to Petitioner's statement of the case and facts, the complaint alleged a dangerous condition of the premises regardless of whether there was an alleged inadequate warning or failure to warn of such condition.

SUMMARY OF ARGUMENT

The Fireman's Rule precludes Petitioner's action because Respondents do not owe a legal duty to protect Officer Taylor from the harm that occurred, absent allegations of willful misconduct and wanton negligence on the part of Respondents. The Fireman's Rule prohibits a policeman from recovering for injuries caused by the very situation that initially required his presence in an official capacity and subjected him to harm. The applicability of the Fireman's Rule is not dependent on traditional premise liability concepts but upon whether the policeman is acting in discharge of his professional duty and whether the risk which necessitated his presence caused the injury. The rule applies whether injuries occur on or off defendant's premises and, contrary to Petitioner's argument, is not limited to cases involving a negligent condition on the premises.

Because Petitioner's complaint fails to allege ultimate facts showing any willful misconduct and wanton negligence on the part of Respondents sufficient to fall outside the scope of the Fireman's Rule, the district court correctly affirmed the circuit court's dismissal of the complaint for failure to state a cause of action.

ARGUMENT

THE DISTRICT COURT CORRECTLY APPLIED THE FIREMAN'S RULE AND AFFIRMED THE TRIAL COURT'S DISMISSAL OF PETITIONER'S COMPLAINT AGAINST THE BANK AND SPARR.

The Fireman's Rule bars Petitioner's complaint because her cause of action is based upon an injury sustained by a police officer while acting in the line of duty, and there are no allegations of willful misconduct and wanton negligence on the part of Respondents toward the officer which was the cause of his death. Price v. Morgan, **436** So.2d **1116** (Fla. 5th **DCA 1983),** rev.denied **447** So.2d **887** (Fla. **1984).** Under Petitioner's allegations, a bank robber shot and killed Officer Taylor who was responding to The Bank's alarm and discharging his duty to thwart and apprehend the armed robbers. However, the complaint only alleges Respondents negligently warned or failed to warn Officer Taylor of the armed robbers. There are no allegations of ultimate fact showing wanton negligence or willful misconduct by Respondents which caused the injury so as to remove the action from the scope of the Fireman's Rule. Therefore, the district and circuit courts properly concluded Respondents owed no duty to Officer Taylor and Petitioner has no cause of action.

Under Florida law, the sole duty owed by the occupant of property to a police officer injured while discharging his official duty is to refrain from wanton negligence or willful misconduct and to warn the officer of any defect or condition known to the owner or occupant to be dangerous, if such danger is not open to ordinary observation by the police officer. Price v. Morgan, supra; Whitten v. Miami Dade Water and Sewer Authority, 357 So.2d 430 (Fla. 3rd DCA 1978). This rule of law is commonly known as the "Fireman's Rule" or the "discharge of duty" concept. The rule precludes imposing liability on citizens who fail to warn police of the potential dangers inherent in the tasks police are called upon to perform. Rishel v. Eastern Airlines, Inc., 466 So.2d 1136,1138 (Fla. 3rd DCA 1985).

Despite Petitioner's arguments, the Fireman's Rule is not limited to cases involving only a negligent condition on the premises. Absent willful and wanton misconduct, a police officer may not recover from a property owner for injuries arising out the discharge of professional duties, even if the injuries occur off the premises. Whitten, supra; Rishel, supra; Wilson v. Florida Processing Company, 368 So.2d 609 (Fla. 3rd DCA 1979). Instead, the rule precludes a fire fighter or policeman from recovering for injuries caused by the very situation that

initially required their presence in an official capacity and subjected them to harm. Price, supra; Whitten, supra.

The district court correctly rejected Petitioner's contention the Fireman's Rule only applies where the police officer is injured due to a defective condition on the premises, and when a plaintiff alleges any act of negligence, even simple negligence, on the part of the owner of the premises, the applicability of the Fireman's Rule dissipates. (Opinion at 3.) Instead, the district court, following decisions of the Second, Third and Fifth District Courts, held the Fireman's Rule applied because the cause of action was based on an injury sustained by a policeman while acting in the line of duty and there was no alleged willful misconduct or wanton negligence on the part of the Respondents which would injure the licensee.

In practice, Florida courts have treated policemen and firemen as a class unto themselves when injured in the discharge of duties by risks requiring their presence. Price, supra; Whitten, supra: Rishel, supra. Before liability may properly attach against the owner or occupant of property where the officer's injury was caused by the very risk which required his presence at the scene, it must be alleged and shown Defendant

acted with willful misconduct or wanton negligence toward the officer.

The rule, while originating from traditional tort concepts, is principally based upon judicially recognized public policy considerations. The strong public policy considerations behind the Fireman's Rule are set forth in Rishel v. Eastern Airlines, supra. The court in Rishel held the Fireman's Rule is not limited to the cases involving a negligent condition on the premises. A police officer filed an action against Eastern Airlines alleging a gate agent negligently failed to warn her of the violent propensities of an intoxicated passenger. The agent asked police for assistance in removing the drunk passenger from an airplane. While removing the passenger, the police officer was injured.

Officer Rishel alleged Eastern knew or should have known of the intoxicated passenger's propensity to be violent and that Eastern's failure to warn her of this danger constituted gross negligence. The trial court dismissed the plaintiff's complaint and the district court affirmed, holding the Fireman's Rule barred the officer's action.

In reaching its decision, the court discussed the policy considerations behind the Fireman's Rule.

> The Fireman's Rule permits individuals who require police or fire department assistance to summon aid without pausing to consider whether they will be held liable for consequences which, in most cases, are beyond their control. There is no question that police and fire fighters work in hazardous occupations at great personal risk. See Hannah v. Jensen, 298 N.W.2d 52 (Minn. 1980). It is because these dedicated public officials are willing to assume the risks attendant to their routine duties that citizens are able to rely on their protection. We are reluctant to undermine the security offered by these public servants through the imposition of liability on citizens who fail to warn police or fire fighters of the potential dangers inherent in a task they are called upon to perform.

Rishel, supra, at 1138.

The policy considerations behind the Fireman's Rule were first discussed in Romedy v. Johnston, 193 So.2d 47 (Fla. 1st DCA 1967). In Romedy, the court affirmed the dismissal of a complaint by a fireman, injured while fighting a fire at the defendant's hotel, because there was no allegation the hotel acted with willful and wanton misconduct. The complaint alleged the defendant constructed, remodeled, and maintained the hotel in such a manner as to constitute a fire hazard which was known or should have been known by the hotel. After determining the fireman to be a licensee, the trial court dismissed the action

because the allegations were insufficient to charge the hotel with the breach of any legal duty owed to a licensee.

In affirming the trial court in Romedy, the court stated the only duty of an owner to a fireman upon the premises for the purpose of extinguishing a fire is to refrain from willfully and wantonly injuring the licensee. Since the owner's liability does not arise due to his negligent acts in creating or maintaining a condition on his premises which contributes to the cause of the fire and which necessitates the presence of the fireman on the premises, the duty to avoid willfully and wantonly injuring the fireman arises when the fireman comes on the premises in response to a fire call.

Romedy was partially based on dictum found in Fred Howland, Inc. v. Morris, **196** So. **472 (1940)** in which this court said firemen and policemen while on premises in the fulfillment of their duties as such are licensees to whom the property owner has only the duty to refrain from willful and wanton injury. In what appears to have been the initial recognition of the policy considerations behind the Fireman's Rule in Florida, this court said:

> Defendant cites may cases dealing with firemen and policemen, where the courts have almost uniformly held that such officers are

> licensees. The theory - and it is a correct one - upon which such holdings are based is that of **overwhelming necessity,** and no duty rests upon the property owner to protect such licensee from injury.

Fred Howland, Inc. v. Morris, supra, at **476.** [Emphasis added.]

The Romedy court expounded on the policy considerations behind what has now become the Fireman's Rule, explaining why the hotel owner did not owe the duty of reasonable care to the firemen:

> This contention has been rejected for the reason that firemen, in the performance of their duties in attempting to extinguish fires and preserve property, enter upon the premises of others by permission of law and not at the invitation of the owner . . . . 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 time the high degree of care owed to an invitee in order to guard against the remote possibility that 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 permit time for conferences between the owner and members of the fire department in order that the defective conditions of the building might be pointed out and dangers thereby avoided by those having the responsibility for containing and extinguish the blaze.
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> * * *

> 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 . . . .

Romedy v. Johnston, supra, at 491.

The Fireman's Rule in its current state evolved in Whitten v. Miami Dade Water and Sewer Authority, supra, when the court defined the duty owed to police or firemen injured off defendant's premises but while discharging their professional duty. In that case, two police officers and four firemen were injured evacuating and attempting to control the area of a chlorine gas leak at a water plant. One plaintiff was injured in the plant while the other five were injured performing their duty outside the plant. The trial court granted summary judgment for the plant owner. Affirming the summary judgment, the court set forth Florida's view on the legal status and the duty owed police and firemen injured while encountering a risk inherent in their profession.

> It is well settled that Florida is among the majority of states that holds that an owner or occupant of premises is not liable to a policeman or fireman for injuries sustained on the premises by virtue of a negligently created condition which necessitated the

> policeman or fireman's presence on the premises in discharge of his duty . . . . Once upon the premises, the fireman or policeman has a legal status of a licensee and the **sole** duty owed him by the owner or occupant of the premises is to refrain from wanton negligence or willful misconduct and to warn him of any defect or condition known to the owner or occupant to be dangerous if such danger is not open to ordinary observation by the licensee. Adair v. Island Club, 225 So.2d 541 (Fla. 2nd DCA 1969).

Whitten, supra, at 431-432.

Since five of the six plaintiffs in Whitten were injured off the premises, they argued the plant owner owed those who were off the premises a different duty of care because they cannot be classified as licensees. The court rejected this argument, stating that its holding was not based upon an invitee - licensee distinction, but rather upon an affirmative response to the query of whether the firemen and police officers were acting in discharge of the professional duties when they were injured. Whitten, supra, at 432. In other words, the applicability of the Fireman's Rule is determined by whether the risk which resulted in the fireman's or policeman's injury was the reason for their being at the scene in their professional capacity.

The court in Whitten was careful to note that it was not abandoning the "licensee" concept set forth in Romedy in ascertaining the applicable standard of care owed by a landowner or occupant to a police officer or fireman who comes on the property in the discharge of his duty and is injured. Comparing the "licensee" concept with the "discharge of duty" concept, the court stated:

> Of course, for all practical purposes, the 'licensee' concept is not different from the 'discharge of duty' concept, with the one exception being that the latter has a more wide spread application . . . . Additionally, we pointed out that under either theory, willful misconduct or wanton negligence on the part of the owner or occupant of the premises will be held actionable.

Whitten, supra, at 433.

The "discharge of duty" concept of the Fireman's Rule was approved by the Fifth District Court of Appeal in Price v. Morgan, supra. Responding to a fire as an off duty fireman, the plaintiff's decedent was killed while fighting the fire from outside the premises, unaware combustible materials were inside the store. The complaint alleged, among other things, the store failed to adequately warn the deceased fireman of the danger presented by the flammable substances kept in the store; failed to secure the premises to prevent intruders from entering and

starting the fire; and, with wanton negligence, the store owner or his agents started the fire.

Agreeing with the store owner and affirming the dismissal of the complaint in Price, the court held the action was barred by the Fireman's Rule. The court noted the rule has only been applied to prohibit police or fire fighters from recovering for injuries caused by the very misconduct which created the risk which necessitated their presence. Regardless of whether the "licensee" concept or the Fireman's Rule is applied, recovery is not precluded if the occupant acted with willful an wanton misconduct.

Under either theory, the initial inquiry is to determine whether or not the policeman's injury is proximately caused by the emergency condition requiring his presence at the time of injury. If *so,* then the inquiry shifts to whether or not there is wanton negligence or willful misconduct on the part of the owner which caused the injury. If these two questions are answered affirmatively, then the "licensee" concept and the Fireman's Rule are inapplicable and the policeman may recover from the owner. However, if there is no alleged wanton negligence or willful misconduct on the part of the owner which causes the injury, as seen in the present appeal, either the

"licensee" concept or the Fireman's Rule precludes an action on behalf of the policeman, depending upon whether the injury occurs on or off the premises.

The Fifth District Court of Appeal reaffirmed the viability of the Fireman's Rule in Preferred Risk Mutual Insurance Company v. Saboda, **489** So.2d **768** (Fla. 5th DCA **1986).** In Saboda, the court reversed a judgment for the estate of a police officer who was shot and killed by a deranged homeowner during a siege of the homeowner's home because the police officer's estate failed to establish wanton negligence or willful misconduct on the part of the homeowner sufficient to support a verdict against the homeowner's estate. The court based its decision on Price, noting the Fireman's Rule prohibits firemen or policemen from recovering for injury caused by the very misconduct which created the risk which necessitated their presence. Since the deranged homeowner was found to have been incapable of willful and wanton misconduct, the police officer was not entitled to recover from the homeowner despite the fact it was the homeowner who shot and killed the officer.

Clearly, based upon these decisions just discussed, the applicability of the Fireman's Rule is not dependent on traditional premise liability concepts but upon whether the

police or firemen are acting in discharge of their professional duties when they are injured. The district court below was correct in focusing its inquiry on whether Officer Taylor was injured discharging his duty, and whether the risk which necessitated his presence caused the injury.

The allegations of Petitioner's complaint fall squarely within the parameters of the Fireman's Rule. While on duty and responding to The Bank's robbery alarm, Officer Taylor was shot and killed by one of the bank robbers. Without question, Officer Taylor was injured by the very risk which necessitated his presence on the scene. The risk of being shot while discharging the duty to thwart a robbery is an inherent part of his job. As discussed in Romedy and its progeny, the risk Officer Taylor encountered was a risk he voluntarily assumed in seeking and accepting a job as a Pensacola police officer.

Petitioner's complaint contains no allegation of ultimate fact showing willful and wanton misconduct by these Respondents. At most, the complaint sets forth simple negligence by alleging Respondents negligently warned the robbers of the arrival of the police or negligently failed to warn the police of the robbers presence.

The application of the Fireman's Rule to Petitioner's claim is further supported by the public policy considerations behind the rule as set forth in Rishel. If liability is imposed upon persons who fail to warn police of potential dangers inherent in tasks the police are called upon to perform, then the security provided by police will be undermined. Clearly, that would be a harsh, unconscionable rule, contrary to the public interest. The rule is designed to encourage the public to seek assistance from the police who are better equipped and trained to handle the risk posed by a robbery and who have voluntarily accepted such risks as part of their profession.

Petitioner attempts to avoid the Fireman's Rule by contending the complaint alleges affirmative negligence on the part of Respondents unrelated to any condition of the property. As previously pointed out, it is not the condition of the property that is material but whether it is the condition requiring the police presence that causes the injury. Nonetheless, the complaint alleges Respondents negligently warned or negligently failed to warn Officer Taylor of the bank robbers presence. It is difficult to see how an inadequate or nonexistent warning of a bank robbery is "unrelated" to any condition of the property. Apparently, Petitioner now recognizes

the fallacy in her argument since she admits on page 23 of her brief that Officer Taylor knew bank robbers are dangerous and also knew a robbery was taking place.

Florida cases cited by Petitioner to support her argument are inapplicable because none involved an officer injured by a risk encountered while discharging his duty relative to the risk. In each case, the defendants were charged with creating a hazard which would have occurred regardless of any condition existing on the premises where the accident occurred, such as operating a train in Florida East Coast Railway v. Gonsiorowski, 418 So.2d 383 (Fla. 4th DCA 1982); operating a water sprinkler, Bolton v. Smythe, 432 So.2d 129 (Fla. 5th DCA 1983); operating a motorboat Walt Disney Company v. Beattie, 428 So.2d 693 (Fla. 5th DCA 1983); or attempting to start a neighbor's car, Hicks v. Billen, 284 So.2d 209 (Fla. 1973).

The threshold inquiry for applying the Fireman's Rule is not whether the case involved a negligent condition on the premises, but whether it is alleged the police officer was acting in the discharge of his professional duty when injured. Whitten, supra, at 430. This significant distinction is evident when comparing Whitlock v. Elich, 409 So.2d 110 (Fla. 5th DCA 1982) and those cases applying the Fireman's Rule. The Fireman's Rule

did not apply to bar the action in Whitlock because the injury was caused by the defendant's negligent act of removing a prop from a window which then struck the officer. Unlike the present case, the officer in Whitlock did not encounter a risk of the type usually dealt with by police and which was the cause of his presence and the source of injury. The Fifth District Court of Appeal, sitting en banc, expressly approved this critical distinction, explaining why the Fireman's Rule applied in Price but not in Whitlock.

> In Whitlock the policeman was not injured as a result of the risk which necessitated his presence on the premises - i.e., the risk of an intruder - but by an independent act of negligence of an owner of the premises in closing a window frame on the policeman's hand.

Preferred Risk v. Saboda, footnote number 2, at 770.

Petitioner attempts to distinguish the present appeal from the Fireman's Rule cases by contending the rule is inapplicable because Respondents' "negligent warning" of Officer Taylor increased or enhanced the risk he encountered. The enhanced risk argument has been rejected in Rishel, Price, Romedy, and Preferred Risk.

In Rishel, the officer alleged Eastern increased the passenger's intoxicated condition by serving him more drinks

during the flight. The fire fighter in Price alleged the store owner negligently stored combustible materials in his building prior to the fire, failed to secure the store from intruders, and in fact started the fire by such conduct. In Romedy, it was alleged the defendant enhanced the risk faced by the fire fighter by building the hotel with hidden spaces so that the fire could spread more rapidly. Finally, in Preferred Risk, the homeowner not only increased the risk but was the risk which necessitated the officer's presence and caused his death. In each case the Fireman's Rule was applied despite allegations of enhanced risk.

Clearly, Officer Taylor's unfortunate death at the hands of a bank robber is inherently within the ambit of those dangers which are unique and generally associated with police activity. Any negligence on the part of Respondents in no way constitutes independent misconduct unrelated to the risk requiring Officer Taylor's presence. The risk causing his presence and causing his death was a bank robbery in progress. Since Respondents' conduct which purportedly enhanced the risk encountered by Officer Taylor does not rise to the level of willful and wanton misconduct, the district court properly affirmed the trial court order dismissing the Plaintiff's complaint.

Finally, Petitioner contends the complaint states a cause of action even if the Fireman's Rule applies. The complaint does not state a cause of action because it fails to allege ultimate facts of willful and wanton negligence which is necessary to fall within the exception of the Fireman's Rule. The term "wanton negligence" is willful and wanton misconduct sufficient to support a judgment for punitive damages or a conviction for manslaughter. White Construction Company, Inc. v. DuPont, 455 So.2d **1026** (Fla. 1984). At most, the complaint alleges simple negligence, i.e., "negligently warned" and "failed to give any warning." **(R-16).** In fact, Petitioner expressly pled that Respondents were attempting "to assist Officer Taylor."

Comparing the allegations of the complaint in Price, which the court held failed to allege ultimate acts of willful and wanton misconduct, with the allegations of Petitioner's second amended complaint, demonstrates the inadequacy of Petitioner's argument. In Price, the defective complaint alleged defendant was wantonly negligent by, among other things, starting the fire which caused the plaintiff's injury. The court said such allegations were insufficient to plead willful misconduct and wanton negligence. The allegations of ultimate fact in the

present case fall even shorter in alleging the necessary egregious conduct on the part of The Bank and Sparr as did the complaint in Price.

CONCLUSION

The decision of the district court should be affirmed because the theory of liability alleged in Petitioner's complaint is precluded by the Fireman's Rule.

J. Craig Knox

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to Robert G. Kerrigan, Esq., 400 East Government Street, Pensacola, Florida 32589; Joel S. Perwin, Esq., Suite 800, City National Bank Building, 25 West Flagler Street, Miami, Florida 33130, Sally R. Doerner, Esq., The Academy of Florida Trial Lawyers, Floyd, Pearson, Richman, Greer, Weil, Zack & Brumbaugh, P.A., One Biscayne Tower, 25th Floor, Miami, Florida 33131, and Robert D. Peltz, Esq., Police Benevolent Association, Rossman, Baumberger & Peltz, P.A., 1207 Biscayne Building, 19 West Flagler Street, Miami, Florida 33130, this 6th day of March, 1987.

J. Craig Knox