

IN THE SUPREME COURT OF FLORIDA

CASE NOS, 69,890 & 69,892

Florida Bar No: 184170

OFFICER JOHN KILPATRICK )

Petitioner, )

vs. )

ALFRED SKLAR, et al., )

Respondents. )

ALFRED SKLAR, et al., )

Petitioners, )

vs. )

OFFICER JOHN KILPATRICK, )

Respondent, )

*[Handwritten signature]*  
By \_\_\_\_\_  
Deputy Clerk

ON PETITION FOR DISCRETIONARY JURISDICTION  
FROM THE THIRD DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENTS  
ALFRED SKLAR, and  
UNITED STATES FIDELITY & GUARANTY COMPANY

Law Offices of  
RICHARD A. SHERMAN, P.A.  
Richard A. Sherman, Esquire  
Rosemary B. Wilder, Esquire  
Suite 102 N Justice Building  
524 South Andrews Avenue  
Fort Lauderdale, Florida 33301  
(305) 525-5885 - Broward  
(305) 904-7557 - Dade

TABLE OF CONTENTS

	<u>Page</u>
Table of Citations.....	ii
Statement of Facts and Case.....	1-2
Summary of Argument.....	3-4
Argument :	
I. F.S.A. SECTION 767.04 EXPRESSLY STATES THAT POSTING OF A BAD DOG SIGN IS A COMPLETE DEFENSE TO "ANY DAMAGES" CAUSED BY A DOG .....	5-6
11. FIREMAN'S RULE IS A COMPLETE DEFENSE TO ACTION AGAINST LANDOWNER.....	7-8
Conclusion.....	9
Certificate of Service.....	10

TABLE OF CITATIONS

	<u>Page</u>
<u>Belcher Yacht Inc. v. Stickney</u> , 450 So.2d 1111 (Fla. 1984) .....	5
<u>Christie v. Anchorage Yacht Haven Inc.</u> , 287 So.2d 359 (Fla. 4th DCA 1973). ....	4,7
<u>Knapp v. Ball</u> , 175 So.2d 808 (Fla. 3d DCA 1965) .....	3,6
<u>Sanderson v. Freedom Savings &amp; Loan Association</u> , 11 FL.W. 2298 (Fla. 1st DCA Oct. 30, 1986) .....	1,3,9
<u>Stickney v. Belcher Yacht Inc.</u> , 424 So.2d 962 (Fla. 3d DCA 1983) .....	3,5
<u>Sweet v. Josephson</u> , 173 So.2d 444 (Fla. 1965) .....	5
<u>Vandercar v. David</u> , 96 So.2d 227 (Fla. 3d DCA 1957). ....	3,6

REFERENCES

F.S.A. Section 767.01 .....	5
F.S.A. Section 767.04. ....	3,5

STATEMENT OF FACTS AND CASE

It is submitted that this is a case where this Honorable Court should exercise its discretion to clear up the law regarding the application of the Fireman's Rule and the dog bite statutes. The confusion caused by the Third District's opinion below is substantiated by the fact that both the Plaintiff and the Defendants have sought review in this Court for clarification of the lower court's decision. Moreover, another Fireman's Rule case is already pending in this Court and its holding is in direct conflict with the decision in this case. Sanderson v. Freedom Savings & Loan Association, 11 F.L.W. 2298 (Fla. 1st DCA Oct. 30, 1986). Therefore the Respondents agree completely that there is conflict with other appellate decisions, which conflict only this Court can resolve; jurisdiction exists and should be accepted.

What transpired was that the Plaintiff police officer was investigating a possible burglary at the Defendant's residence one night after dark. The policeman did not want to alert the possible burglar by walking in through the front gate, so he went to the back of the house and climbed over the top of the wrought iron fence in the dark. While creeping through the backyard in the dark, the Defendant's dogs came running toward the Plaintiff barking. The Plaintiff ran back to the fence, and when climbing over the top cut his leg.

As the Petitioner has pointed out there was no dog bite in this case, but the policeman was scared by the dogs and injured himself by climbing over the fence to get out of the backyard.

The trial court granted a Summary Judgment for the

Defendants homeowner and dogowner, holding that this suit was barred by the "Fireman's Rule".

On appeal the Third District reversed. The Third District held that the Fireman's Rule is not a defense to injury from being scared by a dog. The Third District stated that the only defense to a "dog injury" is the presence of a "bad dog" sign, as per the dog bite statute, even when a policeman is involved who has gone on private property in the performance of his duties.

The Third District's decision is based on a misapplication of certain Supreme Court cases which hold there are no common law defenses to a dog bite. In the present case, first of all, there was no dog bite, but the Plaintiff injured himself climbing back over the fence. Second, the decision is based on misapplication, as the Supreme Court cases should not be construed to bar as a defense the "Fireman's Rule", as in the present case where the policeman climbs over a fence at night into a backyard, is scared by dogs in that yard, and is now suing the homeowner for over one million dollars. This is a classic case showing the reason for the "Fireman's Rule"; without it a homeowner or businessman could not risk having a policeman or fireman come into his property because the liability to the policeman or fireman would be far more than what a burglar could steal, or what the house would be worth. Third, regardless of the existence of the valid defense of Fireman's Rule in this case, there is no conflict in the Third District's finding that the statutory "Bad Dog" sign applies to a statutory cause of action for dog injury.

### SUMMARY OF ARGUMENT

The Respondents agree completely that conflict exists in this case and that the lower court's decision creates confusion and uncertainty as to the law regarding the proper application of the defense of the "Fireman's Rule" and the statutory defense of a "Bad Dog" sign. The confusion caused by the appellate decision below is substantiated by the fact that both sides have sought review of the opinion.

Based on the Third District's denial of the use of the "Fireman's Rule" defense in this case, the Petitioner now claims that even the statutory defense of putting up a "Bad Dog" sign does not apply because the policeman was not bitten by the dogs. This argument is a misapplication of the statutory scheme and legislative intent and is a prime example of the confusion caused below.

Under the statutes, the posting of a "Bad Dog" sign is an absolute defense to "any damages" or injury caused by a dog. The statute expressly states that the owner shall not be liable for "any damages" if he posts a sign that says "Bad Dog". F.S.A. Section 767.04. This is consistent with Florida case law which has found that defenses available under Section 767.04, also apply to injury cases. Stickney v. Belcher Yacht, Inc.; Vandercar v. David; Knapp v. Ball; infra.

The Respondents agree that express and direct conflict exists with Sanderson v. Freedom Savings, infra, on review before this Court; but Sanderson is a correct statement of the law that the Fireman's Rule applies and it requires reversal of the

decision below. There is nothing in Christie v. Anchorage Yacht, infra, that abrogates the application of the "Fireman's Rule" defense where a strict liability statute is not involved. There is no conflict with that case or any other cited by Petitioner for reversal of the Judgment in favor of Dr. Ferrer, who did not own the dogs. The Briefs in this case show the confusion and uncertainty regarding the use of the Fireman's Rule and "Bad Dog" sign defenses and this Court should accept jurisdiction to resolve these confusing legal issues.

I. F.S.A. SECTION 767.04 EXPRESSLY STATES THAT  
POSTING OF A BAD DOG SIGN IS A COMPLETE  
DEFENSE TO "ANY DAMAGES" CAUSED BY A DOG.

The Petitioner erroneously claims that that the defenses listed in Section 767.04 are not available if the dog causes personal injury, but does not bite the plaintiff. This position ignore the express language of the statute which says:

.... no owner of any dog shall be liable for any damages to any person or his property when such person shall mischievously or carelessly provoke or aggravate the dog inflicting such damage; nor shall any such owner be so liable if at the time of any such injury he had displayed in a prominent place on his premises a sign easily readable including the words "Bad Dog".

F.S.A. Section 767.04.

The Petitioner misapplies the dicta in Sweet v. Josephson, 173 So.2d 444 (Fla. 1965) (which expressly found that Section 767.04 did not repeal the Strict Liability Statute, Section 767.01, and that Section 767.04 allowed a suit to be brought by a plaintiff against a dogowner, where the Plaintiff was injured but not bitten); and Stickney v. Belcher Yacht Inc., 424 So.2d 962 (Fla. 3d DCA 1983) (which unquestionably held that the posting of a "Bad Dog" sign shielded the owner from statutory liability for damages caused by a dog bite). Neither case even suggests that the "Bad Dog" sign defense is bottomed on whether the dog injured or bit the Plaintiff. Rather in Belcher Yacht Inc. v. Stickney, 450 So.2d 1111 (Fla. 1984) this Court held that the statute abrogated common law liability and that strict liability for dog bites is imposed only on dog owners, who are exonerated by the



posting of a "Bad Dog" sign. See also Vandercar v. David, 96 So,2d 227 (Fla. 3d DCA 1957) (defenses of contributory negligence and assumption of the risk available in an action where a dog causes injury other than a bite); Knapp v. Ball; 175 So,2d 808 (Fla. 3d DCA 1965) (no rejection of defenses required due to statutorily imposed liability for dog injury).

The mixing and matching of the defenses by the Third District has created the confusion evidenced by the Petitioner's arguments. The appellate court correctly allowed the Fireman's Rule defense as to the landowner but erroneously barred its application to the dog owner; then the court correctly allowed the "Bad Dog" sign defense to the dog owner, which the Plaintiff now disputes. This is unquestionably a case for review by this Court as there is uncertainty as to the application of the defenses to the various parties and confusion about whether the fact that no dog bite was involved changes the law; and jurisdiction should be accepted by this Court to clear up these issues which will affect future litigation.

11. FIREMAN'S RULE IS A COMPLETE DEFENSE TO ACTION AGAINST LANDOWNER.

In order to create a jurisdictional conflict the Petitioner ignores the holding below which expressly stated that the Summary Judgment in favor of Dr. Ferrer was based on the fact that as a non-dog owner she was not subject to statutory liability under Chapter 767 and there was no bar to the Defendants' use of the complete defense of the Fireman's Rule:

Furthermore, because Dr. Ferrer is not within the purview of Chapter 767, the Fireman's Rule applies and precludes Kilpatrick's action against her. See Smith v. Markowitz, 486 So.2d 11 (Fla. 3d DCA 1986); Rishel v. Eastern Airlines, Inc., 466 So.2d 1136 (Fla. 3d DCA 1985); Price v. Morgan, 436 So.2d 1116 (Fla. 5th DCA 1983), review denied, 447 So.2d 887 (Fla. 1984); Whitten v. Miami-Dade Water & Sewer Authority, 357 So.2d 430 (Fla. 3d DCA), cert denied, (Fla. 1978); See generally W. Prosser & W. Keeton, Torts Section 61 (5th ed. 1984). We therefore affirm that portion of the summary judgment exonerating Dr. Ferrer.

None of the cases cited by the Petitioner regarding landowner liability involved the application of the Fireman's Rule defense to the Plaintiff's cause of action. Moreover, the Petitioner relies upon Christie v. Anchorage Yacht Haven Inc., 287 So.2d 359 (Fla. 4th DCA 1973) which held that vicious dogs presented a dangerous condition on the property. Kilpatrick then turns around and says that his injury was caused by dogs, which dogs created a dangerous condition on the property. But he goes one step further and claims that his action is not barred by the Fireman's Rule as that rule only applies to dangerous conditions or defects on the property. This circular reasoning is further

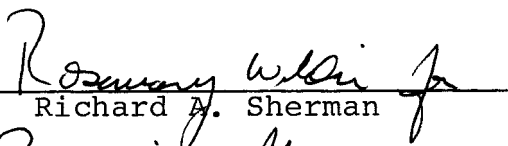

evidence of the confusion existing in this case.

In other words that Plaintiff has used the Third District's disallowance of the Fireman's Rule defense as to the dog owner as a starting off point in his attempt to totally eliminate the complete statutory defense of "Bad Dog" signs as applied to dog owners and the complete Fireman's Rule defense as applied to property owners. The Petitioner's position clearly establishes the extensive confusion about the interaction between the strict liability dog bite statute, the law on dog injury, the available defenses to dog bites or injuries, the application of the Fireman's Rule etc. The Respondents agree that this Court should take jurisdiction in order to clear up the confusion and uncertainty regarding these issues, which confusion will affect future litigation under these statutes.

CONCLUSION

There is express and direct conflict with Sanderson v. Freedom Savings & Loan Assn., supra; and the decision below has created confusion and uncertainty as to the law, which conflict can only be resolved by this Court.

The Law Offices of  
RICHARD A. SHERMAN, P.A.  
Richard A. Sherman, Esquire  
Rosemary B. Wilder, Esquire  
Suite 102 N Justice Building  
524 South Andrews Avenue  
Fort Lauderdale, FL 33301  
(305) 525-5885 - Broward  
(305) 940-7557 - Dade

By:   
Richard A. Sherman  


CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this *2nd* day of March, 1987 to:

J. David Gallagher, Esquire  
Wicker, Smith, et al.  
Grove Plaza - 5th Floor  
2900 S.W. 28th Terrace  
Miami, FL 33133

John E. Shields, Esquire  
Dennis G. King, P.A.  
2050 S.W. 22nd Street  
Suite 402 (Coral Way)  
Miami, FL 33145-2626

Lawrence B. Craig, Esquire  
Merrit, Sikes & Craig, P.A.  
3rd Floor - McCormick Building  
111 S.W. 3rd Street  
Miami, FL 33130

Richard Wassenberg, Esquire  
Ponzoli & Wassenberg, P.A.  
302 Roland/Continental Plaza  
3250 Mary Street  
Miami, FL 33133

The Law Offices of  
RICHARD A. SHERMAN, P.A.  
Richard A. Sherman, Esquire  
Rosemary B. Wilder, Esquire  
Suite 102 N Justice Building  
524 South Andrews Avenue  
Fort Lauderdale, FL 33301  
(305) 525-5885 - Broward  
(305) 940-7557 - Dade

By: *Rosemary Wilder*  
Richard A. Sherman  
*Richard Sherman*