OA 10-8-87

IN THE SUPREME COURT OF FLORIDA,

CASE NOS. 69,890 & 69,892

Florida Bar No.: 352470

OFFICER JOHN KILPATRICK,

Petitioner,

vs.

ALFRED SKLAR, et al.,

Respondents.

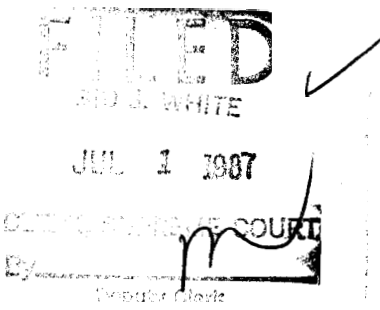
ALFRED SKLAR, et al.,

Petitioners,

vs.

OFFICER JOHN KILPATRICK,

Respondent.



BRIEF OF RESPONDENT,

MRS. ALFRED SKLAR a/k/a DR. OLGA FERRER

PONZOLI & WASSENBERG, P.A.
Attorneys for Respondent,
Mrs. Alfred Sklar a/k/a
Dr. Olga Ferrer
302 Roland/Continental Plaza
3250 Mary Street
Miami, Florida 33133
Telephone: (305) 442-1654

TABLE OF CONTENTS

	Page
TABLE OF CITATIONS	i
INTRODUCTION	1
STATEMENT OF FACTS	2
SUMMARY OF ARGUMENT	3
ARGUMENT	
I. RESPONDENT MRS. SKLAR ADOPTS THE ARGUMENT OF CO-RESPONDENTS THAT WHETHER AS A MATTER OF LAW THE TRIAL COURT CORRECTLY RULED THAT THE "FIREMAN'S RULE" BARS THE PETITIONER POLICE OFFICER FROM RECOVERING INJURIES SUSTAINED DURING A BURGLARY INVESTIGATION.	5
II. WHETHER WHERE THE UNCONTRADICTED EVIDENCE BEFORE THE TRIAL COURT WAS THAT MRS. SKLAR HAD NO OWNERSHIP INTEREST IN THE DOGS, THE PETITIONER KILPATRICK IS BARRED FROM RECOVERING UNDER THE "DOG BITE" STATUTES.	6
CONCLUSION	14
CERTIFICATE OF SERVICE	15

TABLE OF CITATIONS

CASES: Page

Belcher Yacht, Inc. v. Stickney, 450 So. 2d 1111 (Fla. 1984) 6, 7

Berko v. Freda, 459 A2d 663 (N.J. 1983) 11

Calvert v. Garvey Elevators, Inc., 694 P2d 433 (Kan. 1985) 11

Christie v. Anchorage Yacht Haven, Inc., 287 So. 2d 359 (Fla. 4th DCA 1973). 6

Davy v. Greenlaw, 135 A2d 900 (N.H. 1957) 10

Flick v. Malino, 356 So. 2d 904 (Fla. 1st DCA 1978). 6

Malo v. Willis, 126 Cal. App. 3d 545, 178 Cal. Rptr. 744 (Ct. App. 1982) 12

Noble v. York, 490 So. 2d 29 (Fla. 1986). 7

Pottenbaum v. Hinds, 347 N.W. 2d 642 (Iowa 1984) 9, 10, 11

Preferred Risk Mutual Insurance Co. v. Saboda, 489 So. 2d 768 (Fla. 5th DCA 1986) 12

Steelman v. Lind, 634 P2d 666 (Nev. 1981) 8, 9, 11

Walters v. Sloan, 571 P2d 609 (Cal. 1977) 11

OTHER AUTHORITY:

Fla. Statutes §§767.04 6

2 Harper and James, The Law of Torts (1956). 9

Prosser, Business visitors and invitees; 26 Minn. L. Rev. 573, 608-612 . . . . . 8, 9

INTR DUCTION

This is the Brief of Respondent, MRS. ALFRED SKLAR a/k/a DR. OLGA FERRER. The parties will be referred to respectively as "Petitioner, Kilpatrick" and "Mr. Sklar," "Respondent, Mrs. Sklar and USF&G."

The record will be designated by the letter "R." The transcript of the deposition of Mr. Sklar will be designated by the letters "Mr.-D" and the transcript of Mrs. Sklar's deposition will be designated by the letters "Mrs.-D."

STATEMENT OF FACTS

The Statement of Facts of Co-Respondents, Mr. Sklar and U.S.F.&G. are adopted by Mrs. Sklar, with the following addition:

The uncontradicted evidence before the trial court was that the dogs on the premises were owned solely by Mr. Sklar, and that Mrs. Sklar had absolutely no ownership interest whatsoever in them. (Mr.-D 13, 14; Mrs.-D 6, 7)

SUMMARY OF ARGUMENT

With regard to the "Fireman's Rule" Respondent, Mrs. Sklar adopts the argument of Co-Respondents, Mr. Sklar and USF&G, that under the undisputed facts of this case, the trial court was correct in granting Summary Final Judgment.

In addition, the Petitioner, Kilpatrick, has no cause of action against Mrs. Sklar under the dog bite Statutes, as the uncontradicted evidence shows that she did not have any ownership interest in the dogs.

Assuming arguendo that the "dog bite" Statute abrogates the "Fireman's Rule" as to dog owners (which Respondent, Mrs. Sklar disagree), Mrs. Sklar as a non-dog owner, is entitled to raise the "Fireman's Rule" as a bar to the Petitioner, Kilpatrick's recovery in this case. He was injured by a risk associated with his very reason for being on the premises.

Public policy supports the continued adherence to the common law "Fireman's Rule." The modern trend is towards adoption of the rule. It would be inconsistent, unfair, and against public policy and modern tort liability principles to submit a citizen to tort liability for an injury incurred to a police officer, caused by a hazard that may be expected in the discharge of his professional responsibilities.

In the instant case, a police officer on the premises of an estate, who heard dogs barking on his arrival to investigate an alleged burglary could reasonably expect dogs to be on the premises. There is no evidence of willful or wanton behavior necessary to avoid the effect of the Fireman's Rule.

Trial court order granting Summary Judgment to Mrs. Sklar should be affirmed by this Court as it was by the District Court of Appeal.

ARGUMENT

I.

RESPONDENT ADOPTS THE ARGUMENT OF CO-RESPONDENTS THAT AS A MATTER OF LAW THE TRIAL COURT CORRECTLY RULED THAT THE "FIREMAN'S RULE" BARS THE PETITIONER POLICE OFFICER FROM RECOVERING INJURIES SUSTAINED DURING A BURGLARY INVESTIGATION.

II.

WHERE THE UNCONTRADICTED EVIDENCE BEFORE THE TRIAL COURT WAS THAT MRS. SKLAR HAD NO OWNERSHIP INTEREST IN THE DOGS, THE PETITIONER IS BARRED FROM RECOVERING UNDER THE "DOG BITE" STATUTES.

The uncontradicted evidence before the trial court was that the dogs in question were owned solely by Mr. Sklar and that Mrs. Sklar had absolutely no ownership interest in them.

Where there is no evidence that a person owns a dog, or dogs, there can be liability imposed under Sections *767.01* et. seq. for any injuries which occur as a result of any activities by the dogs. See Flick v. Malino, *356 So.* 2d *904* (Fla. 1st DCA *1978);* Christie v. Anchorage Yacht Haven, Inc., 287 *So.* 2d *359* (Fla. 4th DCA 1973).

Under Belcher Yacht v. Stickney, *450* So. 2d 1111 (Fla. *1984)* only a dog owner may be subject to the strict liability or immunity contained in §§ *767.04* Florida Statutes. As a matter of law, the Petitioner is barred from recovering under the "dog bite" statutes against Mrs. Sklar.

Even assuming arguendo that the Petitioner, Kilpatrick, is correct in asserting that the statutes abrogate the fireman's rule as to dog owners (which Respondent Mrs. Sklar disagrees), Mrs. Sklar may still assert the Fireman's

Rule as a bar to the Respondent's recovery against her.

In Noble v. Yorke, 490 So. 2d 29 (Fla. 1986) the Florida Supreme Court re-affirmed its prior holding in Belcher Yacht, Inc. v. Stickney, *450* So. 2d 1111 (Fla. 1984), that "the strict liaiblity of Section 764.04 is limited to dog owners and a dog bite victim may sue the non-owner of the dog upon a theory of common law liability.'' Noble, 11 F.L.W. 1987.

Obviously, if the common law cause of action against Mrs. Sklar remains viable, then, the common law defense of the Fireman's Rule is equally viable.

Applying the Fireman's Rule to the instant case, there is a complete absence of any evidence of the wanton negligence necessary to overcome the "Fireman's Rule."

There is equally a complete lack of evidence that the dogs kept in the yard constitute a defective or dangerous condition. Should they even be considered as such, the uncontradicted evidence before the Court is that the Petitioner, Kilpatrick, was aware that there may have been dogs present on the premises while he was there to investigate the burglary. The tetimony of the Petitioner, Kilpatrick, that he heard dogs barking, that he "rattled" the fence with his flashlight, and that he, in fact, thought that there may be dogs in the fenced-in yard, all show that the investigating police

officer/Petitioner was cognizant of the presence of the dogs on the premises.

The "Fireman's Rule" has been applied in many courts throughout the country, when a police officer, in the performance of his duty, is injured by a negligently created risk or hazard, of which the police officer is aware.

In Steelman v. Lind, 634 P2d 666 (Nev. 1981) the Supreme Court of Nevada applied the "Fireman's Rule" in affirming a summary judgment against the plaintiff/police officer. In Steelman, a highway patrol trooper sued a motorist who had negligently stopped on a highway to retrieve beehives which had fallen from a trailer. His tractor trailer crashed into Steelman's police car while he was seated in it on the side of the road behind the motorist retrieving the beehives.

The court in Steelman held that a police officer cannot base a tort claim upon damage caused by the very risk that he is payed to encounter and with which he is trained to cope. The beehives in Steelman "created the occasion'' for the police officer's presence at the scene of the accident.

The actions taken by the police officer in Steelman, helping a motorist in distress, "forms a part of what troopers are hired to do and falls directly under the ordinary course of the duties of the occupation." Id at 668.

The court in Steelman cited Prosser, Business

visitors and invitees; *26* Minn. L. Rev. *573, 608-612* and *2* Harper and James, The Law of Torts *(1956) $27.14* pp. *1503-1504* in reaching its conclusion that the fireman's rule is based, in part, on the notion that taxpayers employ policemen to deal with future damages that may result from the taxpayers' own negligence. The Fireman's rule protects taxpayers from being subjected to multiple penalties for the police protection.

> If this were not the rule citizens would be reluctant to seek aid sought in their behalf upon the fear that a subsequent claim for injury by the officer might be far more damaging than the initial fire or assault. To hold otherwise would create far too severe a burden to homeowners in keeping their premises reasonably safe for the unexpected arrivals of police and firemen.

Id at *667* (citiations omitted.)

In Steelman as in the instant case, the police officers were injured by events one would expect could occur while the police officers were discharging their duty.

The Supreme Court of Iowa adopted the fireman's rule in Pottenbaum v. Hinds, *347* N.W. 2nd *642* (Iowa *1984).* The court in Pottenbaum recognized that a majority of jurisdictions limit the extent of a negligent actor's liability to policemen who are injured while performing their official duties. The court in Pottenbaum pointed out that

> the modern trend is not away from the rule but toward it as evidenced by the recent adoption of the fireman's rule in several jurisdictions.

Id at *644* (citations omitted; emphasis added.)

The court in Pottenbaum concluded that the fireman's rule is compelled by modern tort principles. A citizen does not have a right to exclude a policeman from his premises during emergency situations. A citizen does not have a right to control a police officer's actions once on the citizen's premises.

A policeman is privileged to enter a citizen's land pursuant to his public duties at any time. Because of this courts, such as the Iowa Supreme Court and Florida District Courts of Appeal, "classify policemen as bare licensees and hold this the only duty owed to these public servants is to not wantonly or willfully injure them." Id at *647.*

There is absolutely no evidence contained in the record before the court that Mrs. Sklar's actions were wanton or willful, or that the dogs constituted a "hidden danger." See Co-Respondent, Mr. Sklar's brief. ~~See also~~ Davy v. Greenlaw, *135* A2d *900* (N.H. *1957)* (fireman's rule precludes action by policeman against owner of a building, whose building contained an unsafe fire escape - owner's duty is to warn of dangers not open to ordinary observation.)

Kansas adopted the Fireman's Rule in Calvert v. Garvey Elevators, Inc., *694* P2d *433* (Kan. *1985)* and held that a firefighter may not base a cause of action upon a hazard that can be reasonably anticipated at the site of a fire and are part of fire fighting.

The analogy between the holding in Calvert and the instant case is obvious. Officer Kilpatrick was injured by a hazard that could be reasonably anticipated by a police officer investigating a burglary. Officer Kilpatrick testified that he thought that dogs were present at the Sklar's property.

Petitioner Kilpatrick correctly points out an exception to application of the Fireman's Rule where the injury is caused by actions of third parties. See Steelman; Pottenbaum; Walters v. Sloan, *571* P2d *609* (Cal. *1977).* This exception has no application to the instant case as there is no allegation that third parties unconnected with Officer Kilpatrick's investigation at the Sklar home, are in any way responsible for the Petitioner, Sklar's damages.

The Supreme Court of New Jersey, in Berko v. Freda, *459* A2d *663* (N.J. *1983)* re-affirmed its support for the Fireman's Rule. The court in Berko stated:

> We perceive more than a mere dollars-and-cents consideration underpinning the fundamental justice of the "Fireman's Rule." There is at work here a public policy component that strongly

> opposes the notion that an act of ordinary negligence should expose the actor to liability for injuries sustained in the course of a public servant's performance of necessary, albeit hazardous, public duties.

Id at 667.

The court in Malo v. Willis, 126 Cal. App. 3d 545, 178 Cal. Rptr. 774 (Ct. App.1982) in determining whether the Fireman's Rule applies, focussed on whether the defendant's negligence is a risk typical of the police officer's activity or is the type normally associated with the policeman's presence.

Finally the Fifth District Court of Appeal sitting ~~en banc~~ in Preferred Risk Mutual Insurance Company v. Saboda, 489 So. 2d 768 (Fla. 5th DCA 1986) held that Florida, in accord "with the overwhelming weight of authority in the country" recognizes the common law Fireman's Rule.

The court in Saboda held that in order to defeat the fireman's rule, a plaintiff must establish "wanton negligence" on the part of a defendant. The court defined "wanton negligence" as "willful and wanton misconduct sufficient to support a judgment for exemplary or punitive damages or a conviction for manslaughter." Id at 770, n. 3.

There is a complete lack in the record of the ''wanton negligence" necessary to defeat the "Fireman's Rule"

in the instant case.

Based upon the strong policy considerations, modern tort law principles and the vast weight of authority nationwide, this court should re-affirm Florida's adherence to the common law Fireman's Rule. A police officer may not sue a citizen for common law negligence when the police officer is injured by a risk associated with the discharge of his professional duties and his presence on the citizen's property.

In the instant case, the Petitioner, fully aware of the risks inherent in invertigating a burglary, voluntarily chose to ccnfront those risks for compensation. He testified that he was specifically aware, of the fact that dogs might be on the premises. Under these uncontradicted facts, the trial court was correct in applying the "Fireman's Rule" and in granting the Motion for Summary Final Judgment.

CONCLUSION

Because Mrs. Sklar is not an owner of the dogs, the Petitioner, Kilpatrick is barred from recovering under the "dog bite" Statute. Under the "Fireman's Rule" the Petitioner, Kilpatrick may not recover from Mrs. Sklar as he was injured by a risk associated with the very reason for his being on the premises in his professional capacity.

Therefore, it is, respectfully, requested that this Court affirm the Summary Final Judgment entered by the trial court, and approved by the Third District Court of Appeal.

Respectfully submitted,

PONZOLI & WASSENBERG, P.A.
Attorneys for Respondent,
Mrs. Alfred Sklar a/k/a
Dr. Olga Ferrer
302 Roland/Continental Plaza
3250 Mary Street
Miami, Florida 33133
Telephone: (305) 442-1654

By Steven B Sundook
STEVEN B. SUNDOOK

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of foregoing Brief of Respondent, Mrs. Alfred Sklar a/k/a Dr. Olga Ferrer, was mailed this 30th day of June, 1987, to: John E. Shields, Esq., DENNIS G. KING, P.A., 2050 S.W. 22nd Street (Coral Way), Miami, Florida 33145-2626; J. David Gallagher, WICKER, SMITH, BLOMQVIST, TUTAN, O'HARA, McCOY, GRAHAM & LANE, Grove Plaza, 5th Floor, 2900 S.W. 28th Terrace, Miami, Florida 33133; Richard A. Sherman, Esq., LAW OFFICES OF RICHARD A. SHERMAN, Suite 102 N Justice Building, 524 South Andrews Avenue, Fort Lauderdale, Florida 33301; and to: Lawrence B. Craig, Esq., MERRITT, SIKES & CRAIG, P.A., Third Floor, McCormick Building, 111 S.W. Third Street, Miami, Florida 33130.

PONZOLI & WASSENBERG, P.A.
Attorneys for Respondent,
Mrs. Alfred Sklar a/k/a
Dr. Olga Ferrer
302 Roland/Continental Plaza
3250 Mary Street
Miami, Florida 33133
Telephone: (305) 442-1654

BY Steven B. Sundook
STEVEN B. SUNDOOK