THE SUPREME COURT OF FLORIDA

JOHN KILPATRICK,

Petitioner,

vs.

ALFRED SKLAR, ET AL.,

Respondents.

CASE NO. *69,890*

DISTRICT COURT OF APPEAL,
THIRD DISTRICT - *86-556*

ALFRED SKLAR, ET AL.,

Petitioners,

vs.

JOHN KILPATRICK

Respondent.

CASE NO. *69,892*

DISTRICT COURT OF APPEAL,
THIRD DISTRICT - *86-556*

PETITIONER, JOHN KILPATRICK'S,

INITIAL BRIEF ON THE XERITS

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PRELIMINARY STATEMENT

This appeal, in the form of two consolidated cases, deals with the liability of land owners and dog owners for severe injuries sustained by a police officer called to the property by an audible burglar alarm and injured while fleeing from four *(4)* large Great Danes. The dogs never came in contact with the police officer and liability was alleged against the 'husband and wife, joint property owners, on a theory of statutory liability based on the ownership of their dogs, in a non-bite situation, and also on the common law theory of negligence in failing to control dogs and in calling a police officer to their premises while not providing any warning of dogs.

The Trial Court entered a Summary Final Judgment against the Plaintiff, Officer John Kilpatrick, in favor of the Defendants, Mr. and Mrs. Alfred Sklar. Mrs. Sklar, also known as Dr. Olga Ferrer, operated her medical practice from a separate building on the premises.

The Third District Court of Appeal found issues of material fact and reversed the Summary Judgment as to the issue of liability on behalf of the dog owner, Mr. Sklar, but affirmed the Summary Final Judgment in favor of his wife based on the theory that there was no evidence to show that she technically owned the dogs and that the police officer's action against her was barred by the common law theory of the Fireman's Rule.

Mr. Sklar seeks review by this Court based on the

reversal of the summary final judgment in his favor. The Plaintiff, Officer John Kilpatrick, seeks review of the affirmance of the Summary Final Judgment on behalf of Dr. Olga Ferrer, and on the finding of the District Court of Appeal that a sign, allegedly on the premises, is a defense under Florida Statute 767.01 to the dog owner. Since both sides in this matter are Petitioners and Respondents, the Plaintiff below, Officer John Kilpatrick, will be referred to in this Brief as the Plaintiff. Mr. and Mrs. Sklar will be referred to as Defendant Sklar or Defendant Ferrer. When referring to both, they will be the Defendants. References to the record will be "R. ".

For further clarification, there was an agreement among counsel that, when discussing the direction which Bayshore Drive runs in the Coconut Grove area of Miami, references would be made to Bayshore Drive as if it ran North and South.

STATEMENT OF THE CASE AND FACTS

Plaintiff/Petitioner/Respondent, Officer John Kilpatrick (Plaintiff), a 1979 graduate of the Police Academy, was a City of Miami uniformed police officer on patrol duty on the date of the incident, October 10, 1981. R. 422. The Plaintiff was working with, and responsible for, a trainee in sector 70, commonly known as Coconut Grove, an area with which he was familiar from his duty riding a marked vehicle on patrol. Though more experienced in the area commonly known as Liberty City, the Plaintiff had been in sector 70 for approximately six months prior to the date of the incident and was familiar with Rayshore Drive, but had no specific recollection of driving on a side street known as "Ah-We-Wa" and had never had any dealings with the occupants of the residence at 1889 Bayshore Drive. R. 429-432.

On the evening in question, the Plaintiff and Trainee Moore, who was in a recruit's uniform, armed with only a night stick, were in a marked police vehicle heading north on Bayshore Drive a little after 9:00 p.m., six hours after going on duty when, at about the same time, they both heard an audible burglar alarm. The Plaintiff made a U-turn and headed south on Bayshore Drive at: a slow speed in order to pinpoint the source of the audible alarm, which appeared to be coming from Ah-We-Wa. He pulled into Ah-We-Wa, which is not much more than an alleyway, and once he had ascertained the right house, 1889 Rayshore Drive, he called

the dispatcher with the address advising the dispatcher that he was going to check out the alarm and was assigned the call by the dispatcher at approximately 9:10 or 9:15 p.m. R. *437-441.*

Since the house in question sits quite a distance from Bayshore Drive, he pulled the police vehicle back onto Ah-We-Wa to get closer to the house and, accompanied by Trainee Moore, he jumped a three-foot high, concrete fence and entered the area of the front yard to check out the front of the house. He observed a six to seven foot high, chain-link fence on either side of the house dividing the front and back yards, and after thoroughly checking the front of the house, he climbed back over the concrete fence with Trainee Moore to keep the house under observation from Ah-We-Wa as he walked to the rear. R. *442-445.*

Off in the distance he heard dogs barking, but they seemed to be at a great distance, approximately a block or more. The barking did not seem to come from the vicinity or any where close to the vicinity. The next time that the Plaintiff heard any barking was while he was actually fleeing from the dogs after having entered the back yard of the property, which is a separate enclosure. R. *446, 565.*

Approaching the northwest corner of the property on Ah-We-Wa, the Plaintiff saw a wrought-iron entrance driveway gate that was U-shaped with large spikes sticking up as part of the gate. He believes the gate was locked, and he observed an old, ill-cared for and beaten up station wagon

in the driveway which he thought was out of context with the surroundings. He also observed a barred but open window near the station wagon and some things on the pound that appeared to be roof tiles lying under the window. Noticing both the open window and the old station wagon, he thought that this might have been a point of entry, and even though the window had wrought iron bars, there was enough room for someone to slip into the house if someone were the size of the Plaintiff or smaller. Though he had never encountered dogs in the Coconut Grove area, he had some experience with dogs in Liberty City, and because of that experience, he had a habit of shaking or rattling a gate to attract dogs in case they might be on the premises, something that worked *99* out of *100* times. The Plaintiff beat on the gate with his flashlight for what seemed like five to ten minutes, but was probably only a few seconds. R. *447-449, 554, 560, 562, 565.*

The Plaintiff saw no "Beware of Dog" signs on the concrete fence or at the point of entry; and after having beaten on the gate and shining the flashlight into the yard for a sufficient amount of time to attract dogs that may have been on the premises, he felt duty-bound to check out the possible point of entry. So, accompanied by Trainee Moore, he jumped the fence and proceeded toward the open window. Only a portion of the back yard was illuminated by floodlights. R. *450, 462,* 558-560. He proceeded toward the open window while shining the flashlight on both the car and

the house. Though his revolver was holstered, he had his hand on his weapon. After a few seconds and before ever reaching the house, he heard a rustling noise off to his right, which would have been in the area of the far back portion of the preinises and immediately turned to see what appeared to be a pack of dogs coming at him out of the darkness and into the lighted portion of the yard. Immediately he turned and ran as fast as possible realizing that it was useless to attempt to confront what appeared to be a pack of dogs. Only after he turned to run, did the dogs begin to bark. R. *451-454, 455-458, 565.* He was approximately 20 feet from the point of entry when the dogs appeared *25* to 30 feet away. R. *563.*

The dogs in question were four large Great Danes weighing approximately 190 pounds each and standing three and one-half feet tall at the shoulder or nearly six feet standing on both legs. R. 38, *664-665, 463, 781.*

The Plaintiff was seriously injured when the cuff of his uniform trousers got caught on one of the spikes as he was attempting to jump the fence, and the spike went through his right calf leaving him hanging on the fence with his feet in the air, though fortunately on the side of the fence away from the dogs. After being removed from this precarious position by Trainee Moore, the Plaintiff called the dispatcher to request assistance knowing that a back-up was already on the way. Officer Fuentes, also accompanied by a trainee, now Officer Wilkins, arrived within two to

three minutes after the injury occurred. R. 465-466.

Officer Fuentes was concerned that the dogs would come over the fence while he was giving first aid and got on the radio to advise the dispatcher that he thought it might be necessary to use his weapon if they came over the fence. Both Fire Rescue and Sergeant Longueria arrived shortly. R. 468-469, *688.*

While the Plaintiff was still being treated on the scene by the paramedics, the owners, Defendants, Sklar and Ferrer, arrived at about the same tine as Lieutenant Cabrera, Commander of the shift. The alarm continued to ring until after the Plaintiff was transported to Mercy Hospital. R. *472-474.*

Lieutenant Cabrera testified to the procedures that would normally have been followed if there had been a warning sign on the premises or if the dogs had responded to the Plaintiff's rattling of the fence. The same procedures were detailed by the Plaintiff. R. *559-560, 644-645.* The testimony is uncontradicted that the Plaintiff violated no police procedures or practices.

The testimony also is uncontroverted that there was no warning sign of any sort on the perimeter or exterior of the premises. Lieutenant Cabrera stated in identifying pictures taken at the scene that they depicted no sign and that he had no independent recollection of a sign on the perimeter of the premises. R. 646-647. Officer Fuentes testified that he walked the entire perimeter *of* the

premises and saw no sign at all. R. 695, 697. Officer Wilkins, then a trainee, testified that he saw no sign and that there were no signs on the gate or the fence. R. 668, 670.

ID Technician Mejia was called to the scene in order to take pictures of the general area. It was her pictures that were identified at several of the depositions. She stated that she saw no signs on the fence or on the ground. She used a flash to take the pictures due to the darkness at night. She was asked at her deposition about a "white rectangle" that is barely visible on a fence that is on the interior of the premises. She could not identify it. R. 600-603, 610-613, *624,* 630-635. When asked about the same "little white rectangle" at his deposition, Lieutenant Cabrera stated that he did not know what it was. R. 653. A similar response was given by Officer Fuentes. R. 697.

No witness has ever identified and described what appears to be a sign of some sort, hanging on a fence inside the premises. In fact, at the hearing on the Motion for Summary Final Judgment, Attorney J. David Gallagher, Counsel for the Appellees, stated that the photo depicting the white rectangle was taken from a position that the Plaintiff would have been in once he was already on the premises and at about the same spot when he first noticed the dogs coming out of the darkness. R. *748.*

Defendant Sklar testified that there were several alarm systems to protect the premises at the time and that

the reason for having the dogs was to protect against burglaries since two break-ins had occurred prior to getting the dogs. R. 19, 25-26. He testified that he noticed that the sign that normally would have been affixed to the gate where the Plaintiff entered was not there a few days after the incident, and he had to replace it. R. 28, 29, 41, 53-54. He testified that when he and his wife were not at home, the dogs were allowed to wander from a pen in the far-back portion of the yard into the area where they confronted the Plaintiff, and this was part of their function which was to protect the house. R. 45, 53. Defendant Ferrer did not recall looking for a sign on the night in question but remembers, specifically, looking for it the day before and noticing that it was there. R. 774. She also stated that the dogs were kept in the back of the property but allowed to roam in the main yard for security purposes when they were out, and that the alarm system was there for security reasons and had a three-fold purpose. It was to chase away burglars, call the police to the premises, and alert the neighbors. R. 790-792.

It should be noted that both Defendants did identify one picture with a sign prominently displayed at the portion of the gate where the Plaintiff entered the premises but this picture was taken at some time after the accident, and its only purpose was to indicate where the sign normally would have been. R. 62, 735-786.

At the hearing on the Summary Final Judgment,

Attorney Gallagher agreed with the uncontroverted testimony and the pictures taken on the scene that night that the sign that was normally in place on the gate was not there that evening. R. 748.

In making its ruling, the Trial Court indicated its sympathy for the hazards that police officers face but stated that the Court found no willful or wanton conduct and, while not believing that the case fell under the Fireman's Rule, stated that, "I believe it is clear that at least one sign was up."; and went on to say that the owners, not being present at the time, had no knowledge of the problem, and therefore, could not warn the 'Plaintiff about the situation in addition to stating that, "I hope the Third District reverses me." R. *753-754.*

In its opinion at *497* So. 2d 1289, the Third District Court of Appeal affirmed in part, reversed in part and remanded with directions. On the one hand, the Court noted that the Plaintiff contended that the Fireman's Rule did not apply because the injuries were sustained as a result of circumstances unrelated to his reason for being on the property but, then stated that the Fireman's Rule does apply and precludes the Plaintiff's action against Defendant Ferrer as a inatter of law without discussing the merits of the Plaintiff's contentions. The Appellate Court also found that a sign acted as a defense to a situation arising under liability in a non-bite situation under Florida Statute 767.01.

ISSUES ON APPEAL

WHETHER THE DISTRICT COURT ERRED IN AFFIRMING THE TRIAL COURT'S SUMMARY FINAL JUDGMENT IN FAVOR OF OLGA FERRER RASED ON TEE FIREMAN'S RULE

WHETHER TEE DEFENSE OF A SIGN ALLEGEDLY ON THE PREMISES IS EVEN AVAILARLE TO A DOG OWNER FOR INJURIES CAUSED **BY** DOGS OTHER THAN BY A COG SITE UNDER FLORIDA STATUTE *767.01*

SUMMARY OF ARGUMENT

The Fireman's Rule should be abolished in the state of Florida, as it has in other jurisdictions, since it is an outmoded and no longer practical doctrine in this day and age.

Even if this anachronistic rule were to remain the law of this state, Plaintiff's injuries occurred because of separate and independent acts of negligence **on** the part of the Defendants/Landowners clearly taking the situation out of the Fireman's Rule.

Plaintiff's injuries were the direct result of the actions of the dogs owned by at least one of the two Defendants and the liability is predicated on Florida Statute *767.01,* which does not provide the defense of a sign as does the companion statute of *767.04,* which covers the more conventional dog-bite situations. This cause should be remanded to the trial court for further proceedings without the Defendants having the benefit of attempting to use the alleged placement of a sign on the property as a defense in an action under Florida Statute *767.01.*

ARGUMENT

THE DISTRICT COURT ERRED IN AFFIRMING THE TRIAL COURT'S SUMMARY FINAL JUDGMENT IN FAVOR OF A CO-OWNER OF THE PREMISES, OLGA FERRER, EA ED ON THE FIREMAN'S RULE

THE FIREMAN'S RULE IS AN ANACHRONISM THAT IS BECOMING INCREASINGLY DISFAVORED BY THE COURTS OF THIS NATION AND SHOULD BE ABOLISHED IN THE STATE OF FLORIDA

The instant case gives this Court the opportunity of, for the first time, reviewing what applicability, if any, the old and outdated common law principle, commonly known as the Fireman's Rule, has in today's modern society and in this growing state. It is submitted that although this Court has the opportunity to review this theory of denying recovery to police officers and firefighters for the first time, there is at the time that this brief is being prepared a similar case pending in this Court styled Suzanne Taylor Sanderson v. Freedom Savings & Loan Association, et al, *496* So.2d *954* (Fla. 1st DCA 1986), under present case number *69,687.* This Court has been informed of this pending similar case and it is also understood that the Petitioner's counsel in Sanderson has planned to inform the Court of the instant case. At the time this brief is being filed, it is the understanding of Plaintiff's counsel that The Acadeny of Florida Trial Lawyers is seeking the Court's permission to file an amicus curiae brief. The Acadeny filed one in Sanderson, as did The Police Benevolent Pssociation. This Court is strongly but respectfully urged to consider The Police Benevolent Association's brief also in that it

provides a wealth of background, historical perspective and several fine arguments. Plaintiff respectfully adopts the arguments contained in those briefs.

In order for Plaintiff to prevail and have the affirmance of the trial court's summary judgment by the Third District reversed, it is not necessary that the Fireman's Rule be abolished in this state. However, Plaintiff is respectfully taking this opportunity of making this Court aware of a growing trend throughout the country which is gradually eroding the antiquated excuse for depriving police officers and firefighters of their just compensation.

In the well respected and often cited hornbook, W. Prosser & W. Keeton, The Law of Torts, 429, Sec. 61, (5th ed. 1986), it is stated as follows:

> "Firemen and policemen, on the other hand, traditionally have been held to be merely licensees, entering under a privilege conferred by legal authority, toward whom there is no such duty. The occupier is still required to refrain from injuring such persons intentionally or by willful and wanton misconduct, and he must esercise reasonable care for their protection in carrying on his activities, and give warning of hidden dangers of which he knows, as in the case of other licensees; but there is in general no obligation to inspect and prepare the premises for them. And the fact that the occupier himself has been negligent in starting the fire for which the fireman is called may make no difference."

Even this broad brush approach indicates a clear distinction in situations involving willful and wanton

misconduct and other situations where there are hidden dangers not obvious to the police officer or firefighter entering the premises. While these distinctions are applicable to the instant case and will be dealt with in more detail in a later section of the brief. They show that even this outdated common law rule was never intended to act as a complete bar to recovery, and has been further eroded in modern times. Further on in that section, at *431*, it goes on to state as follows:

> "Yet the fireman's rule has been held only to apply when the firefighter or police officer is injured from the very danger, created by the defendant's act of negligence, that required his professional assistance and presence at the scene in the first place, and the rule will not shield a defendant from liability for independent acts of misconduct which otherwise cause the injury." *431*.

In seeking this Court's abolition of the rule in the state of Florida, Plaintiff is not asking this Court to embark upon a road totally unheard of in American jurisprudence.

The basis for the Fireman's Rule, if taken in the abstract, is not totally ludicrous. Otherwise it would not have continued to retain some support in this state and others. It is based upon two related theories dealing with the alleged licensee status of police officers and firefighters entering premises in the course of their duty and a related "assumption of risk" theory which would make land owners immune for the negligent condition of their

premises when police officers or firefighters are summoned in the course of their duties, either for the purpose of extinguishing fires or in some peace keeping, public safety respect.

Recently, these theories have come under strict scrutiny since police officers and firefighters are clearly being set aside from others public servants like building inspectors, meter readers, mail carriers and so on.

There are strong public policy considerations, enunciated in other writings and by other courts that deal with the unfair burden placed upon taxpayers in general, who are not guilty of negligence, in bearing the complete burden of compensating police officers and firefighters injured (or worse) through no fault of their own other than the fact that they have accepted employment which is for the benefit of society as a whole.

It goes without saying that even the modern Worker's Compensation system found, in various forms, throughout the United States does not always fully compensate an injured person or his family for the loss. It is also a general rule that those systems, eventually supported by the taxpayers in general, can be reimbursed by a recovery on the part of the injured person when that injured person has the right to go against the actual wrongdoer. Firefighters and police officers, barred by this outdated rule, not only do **not** have this opportunity, but all taxpayers must share in the burden of compensating them

while actual wrongdoers/tortfeasors can hide behind this veil of immunity.

It is conceded that the Fireman's Rule does not act as a complete bar but the more situations in which it is allowed to so act, the greater the disservice to the injured firefighters and police officers and the greater disservice to society in general.

One of the complexities in making these arguments is the interrelationship of the premises liability theory with the "assumption of risk" theory. It is submitted that the almost automatic classification of police officers and firefighters as licensees is, at least, partly the basis for these problems. In many instances, like the instant case, the police officer is, for **all** intents and purposes, directly invited to the premises. Clearly, the across-the-board classification as a licensee can be unjust in that it does not recognize the individual cases in which the police officer (or firefighter) can be summoned to the premises. It must be pointed out that the classic common law doctrine of assumption of risk was abolished a decade ago in Florida. Elackburn **v.** Dorta, *348* So.2d 287 (Fla. 1977). This point is dealt with in greater depth in the brief of The Police Benevolent Association, in pages **9-11,** and should not be unnecessarily duplicated here.

As an example, in the instant case, Defendant Ferrer specifically testified that the purpose of the burglar alarm was to deter burglaries and to call the police

to the premises.

It should be noted that it would be the complete extreme situation for Plaintiff to advocate an abolition of any type of limited liability concept every time a firefighter or police officer is injured in the course of his or her duties. As an example, numerous cases and treatises have given examples of smoke inhalation suffered by firefighters or other similar injuries so inherent and so much a part of their duties, that it would be impractical to attribute negligence to the person whose property is on fire, thus causing the smoke, which in turn caused the smoke inhalation. However, it is more than reasonable to state that police officers or firefighters should be accorded at least the same protection from negligence and acts of misconduct as the public in general or public servants/ public employees.

The call of the Plaintiffs below in both Sanderson and the instant case have been heard before in an appellate decision rendered in this State. In Rishel v. Eastern Airlines, Inc., 466 So.2d 1136 (Fla. 3d DCA 1985), the court upheld the dismissal of the complaint of a police officer who alleged negligence against Eastern Airlines for not advising her of the violent propensity of an intoxicated airplane passenger whom she had been called to the airplane to remove. She was injured in so doing and the court upheld the decision of the trial court based on what might be termed an "assumption of risk" theory in that Eastern had no

responsibility to warn the Plaintiff of the clearly obvious condition for which she was called to remove the passenger. This met with a strong and eloquent dissent from Judge Ferguson who clearly pointed out that, even under the Fireman's Rule, an owner who summons an officer has a duty to warn of any dangerous condition known to the owner if such danger is not open to ordinary observation by the officer. He went on to state as follows:

> "The procedural point aside, I have reservations as to whether the fireman's rule, as generally applied, does justice in all cases. I see no reason why, in this age of crowded living, an owner or occupier of premises should not be liable for the creation of unusual hazards which reasonable persons know, or should know, pose a danger to lives and property, foreseeably requiring the presence of firemen or policemen rushing in to give aid. The fireman's rule works to relieve negligent land owners or occupiers of any duty except to disclose to the officer or fireman the existence of a hazard on the premises after the crisis has arisen and the rescuer-to-be has arrived. See Hall v. Holton, 330 So.2d 81, 83 (Fla. 2d DCA 1976), cert. denied, *348* So.2d 948 (Fla. 1977). As a practical matter, in emergency situations there is seldom time for a useful relay of such information. If precedence were no bar, I would follow the Oregon Supreme Court which, in Christensen v. Murphy, 296 Or. 610, 678 P.2d 1210 (1984), discarded the fireman's rule on a finding that the public policy considerations upon which it is based have not proved sound or equitable." *466* So.2d at 1139-40.

The Oregon case referred to by Judge Ferguson in his dissent was the subject of a case note entitled Oregon Abolishes the Fireman's Rule - Christensen v. Murphy,

(complete cite: H. Brown, Oregon Abolishes the Fireman's Rule - Christensen v. Murphy) 19 Suffolk U. L. Rev. (1985). In the author's Analysis he states that "having considered the factors that led Oregon to become the first jurisdiction to abolish the Fireman's Rule, it is appropriate to inquire into the continuing validity of the rule in other jurisdictions." 19 Suffolk U.L. Rev. at 972.

In concluding the article, the author stated as follows:

> "Because of the fireman's rule, public safety officers are the only employees who are barred from suing third parties who injure them while they are acting within the scope of their employment. As a result, their sole recourse is to obtain compensation from various statutory benefits, primarily workers' compensation. This limitation on third party actions undercuts both of the rationales advanced in support of the fireman's rule, namely public policy and assumption of risk. In the area of public policy, the ban on third party actions adversely affects the public interest in several ways. First, the injured officer, or the estate of a deceased officer, may be inadequately compensated because statutory compensation is generally inferior to recovery in tort. In addition, forcing the injured officer to rely solely on publicly financed benefits has negative consequences for the public as well. By immunizing tortfeasors from liability, the fireman's rule does nothing to discourage, and may even be said to encourage, misconduct. Moreover, because the taxpayer must provide the funds for the workers' compensation benefits paid to public employees, the fireman's rule requires citizens who act reasonably to pay for the misconduct of those who act unreasonably. If the fireman's rule were abolished, public

> safety officers could pursue third party actions, thus allowing the workers' compensation insurer to obtain reimbursement. This result would reduce the taxpayers' costs and place the burden of bearing the costs of liability where it belongs - on the wrongdoer.
>
> The impact of the fireman's rule on third party actions illustrates the fallacy of premising the rule on the assumption of risk rationale. If the rationale were applied to all employees who are injured by risks that are inherent in their occupations, none of them could maintain a third party action. Yet courts that employ such reasoning to bar public safety officers from recovering freely allow employees who are injured by risks that are arguably inherent in their occupations to bring such actions. There is no logical reason to treat firefighters and police officers any differently in this regard than employees in other hazardous occupations." 19 Suffolk U. L. Rev. at 973-75.

One state whose earlier decisions were somewhat harsh on police officers and firefighters is California, which has since taken a more practical approach to the real life situations that occur in this day and age. In noting that the Fireman's Rule also applies to police officers, the Court emphasized that negligent or wanton and willful misconduct, in matters other than which caused the police officer to be called to the premises, could still create liability. In Walters v. Sloan, 20 Cal. 3d 199, 142 Cal. Rptr. 152, 571 P.2d 609 (1977), the court stated as follows:

> "Thus a police officer who while placing a ticket on an illegally parked car is struck. by a speeding vehicle may maintain an action against the speeder but the rule bars recovery against the

owner of the parked car for negligently parking."

In California's more recent 1982 case, a fireman suffered injuries in battling a boilover at a chemical manufacturing facility. The allegations were that the owners had incorrectly informed the firefighters that the accident did not involve toxic and dangerous substances. Finding the distinction between any possible negligence in causing the boilover itself and the misrepresentation as to the nature of the materials involved, the court stated that the injured firefighter could collect damages for the injuries sustained based on the independent conduct of the misrepresentation. Lipson v. Superior Court of Orange County, 31 Cal. 3d 362, 182 Cal. Rptr. 629, *644* P.2d 822 (1982).

That court, still espousing the view that the Fireman's Rule is interrelated with the theory of assumption of risk, stated:

> "As many other jurisdictions and legal commentators have recognized, a fireman does not assume every possible risk he nay encounter while engaged in his occupation. A fireman assumes only those hazards which are known or can reasonably be anticipated at the site of the fire.
>
> Smoke, flames, and the collapse of a burning wall, ceiling, or floor are typical risks normally associated with a fireman's occupation. However, the risk that the owner or occupier of a burning building will deceive a firefighter as to the nature or existence of a hazard on the premises is not an inherent part of a firefighter's job. A fireman

> cannot reasonably be expected to anticipate such misconduct on the part of an owner or occupier of a building.
>
> Thus, the principle of assumption of risk, which forms the theoretical basis for the fireman's rule, is not applicable where a fireman's injuries are proximately caused by his being misled as to the nature of the danger to be confronted." *644* P.2d at *827-28* (citations ommitted).

Other California cases, since Lipson, .further support the view that negligent or intentional independent acts by tortfeasors cannot be considered automatically immunized by the Fireman's Rule. Rose v. City of Los Angeles, 159 Cal. App. 3d 883, 206 Cal. Rptr. *49 (1984);* Shaw v. Plunkett, *135* Cal. App. 3d *756, 185* Cal. Rptr. *571* (1982); Krueger v. City of Anaheim, 130 Cal. App. 3d 166, 181 Cal. Rptr. 631 (1982); Spargur v. Park, *128* Cal. App. 3d *469,* 180 Cal. Rptr. *257 (1982).*

The California court's rationale in cases like Lipson, specifically dealing with misrepresentations made by the land owner/tortfeasor, demonstrate the injustices that can result in a fact pattern similar to the instant case. This Plaintiff was called to the scene of a possible burglary and given absolutely no warning that there were four *(4)* very large and dangerous dogs on the premises secluded in a portion of the yard that was completely unlit. Since the testimony was that the Plaintiff was, at the very least, inferentially invited, based on the purpose of the burglar alarm, it was clearly a misrepresentation to him to,

after taking all practical, reasonable and logical precautions, find himself confronted by these dogs with no warning.

This is not to confuse the statutory obligations dealing with a sign that will be discussed in other portions of this brief. From purely a common law point of view, it was clearly a misrepresentation, though not spoken, to lure a police officer to the premises, already asking him to put his life in danger by possibly confronting a burglar, and then not provide even the simplest warning, in the form of a sign, which would have advised him of the danger in entering the premises. The justification for obliterating these vague distinctions in the Fireman's Rule can be seen by the injustices done if one were to say that misrepresentations, if made orally, can obviate the rule while done equally negligent but in a more passive manner, do not negate the rule.

In Illinois the Fireman's Rule has seen a logical evolution from its earliest days of, for the most part, preventing recoveries to actually considering firefighters and police officers to be invitees to whom land owners owe the duty of care *to* keep their premises safe. This was finally cleared up by the Supreme Court of that state in 1960 when it rejected the applicability of the common law classifications and simply held that land owners owed a duty of reasonable care to police officers and firefighters so that when they were rightfully on the premises, where they

might be reasonably expected to be, they would not be injured. Dini v. Naditch, 20 Ill.2d 406, 117 NE 2d. 881 (1960).

This Court is respectfully referred to an article that appeared in the California Law Review entitled "Negligent Actions by Police Officers and Firefighters: A Need for Professional Rescuers Rule." The author stated as follows:

> "Several courts, adopting the assumption rationale, have attempted to distinguish the assumed-no-duty-risks from the remaining risks by using the term "inherent" to describe risks for which recovery is barred. This term fails to distinguish properly between those risks that are dependent on and those risks that are independent of the emergency or specific situation. It has been used to bar recovery for injuries arising from risks that are merely associated with the general task of the professional rescuer in such a way that one might expect the risk ordinarily to exist in the task. For example, it has been said that dealing with 'poor housekeeping is a hazard inherent . . . in fire fighting," and that the 'risk of being struck by a negligent motorist is "inherent" in working by the highway. On the other hand, the use of the terms dependent and independent more properly focuses attention on the emergency of specific problem that the professional rescuer is attempting to remedy, and requires that the origin of the risk be considered in relation to the task that the rescuer agrees to undertake. In contrast, the courts' use of the term "inherent" to describe risks that are commonly associated with the task results in classification of some independent risk as inherent, and therefore assumed, simply because of that association. The use of inherent in this manner leads courts to confuse

knowing encounters with assumptions. 66 Cal. L. Rev. 585 (1978).

It went on to state that once a risk is properly classified as independent, the assumption rationale is inapplicable. The professional rescuer could therefore recover for negligently caused injuries attributable to that risk.

In his conclusion, the author stated, in summary, that a person would not be liable to professional rescuers for injuries caused by risks dependent on the specific emergency or problem encountered unless the dependent risk is extraordinary or blameworthy, but that a person would owe a duty of reasonable care to professional rescuers For independent risks that the person causes unless, of course, the jurisdiction generally imposes no duty on any person for this type of risk or injury.

This article is cited as another example of the concern and confusion regarding the various types of classifications and risks associated with the long standing Fireman's Rule. It points out the further public policy considerations that are associated with protecting those who protect the public in general.

The state of Florida, through its highest court, now has the opportunity of seeing its jurisprudence evolve in a more logical and contemporary manner related to injuries sustained by police officers and firefighters.

EVEN IF THE FIREMAN'S RULE IS TO REMAIN A PART OF THE LAW OF THIS STATE, IT IS

INAPPLICABLE IN THE INSTANT CASE WHERE THE POLICE OFFICER WAS ON THE PREMISES FOR REASONS UNRELATED TO THE MANNER IN WHICH HE WAS INJURED, RESULTING FROM THE INDEPENDENT ACT OF NEGLIGENCE ON THE PART OF THE PROPERTY OWNERS WHICH IS NOT REASONABLY DENOMINATED A "CONDITION OF THE PREMISES," i.e. VICIOUS DOGS.

It is again respectfully but strongly pointed out that, in order for Plaintiff to prevail in this matter on the issue of the Fireman's Rule, it is not necessary for this Court to abrogate it or severely limit it in any way. Obviously, if the Court did, it would inure to the benefit of this Plaintiff. Plaintiff's position is that he felt duty bound, through his counsel, to take this opportunity to advance arguments that have been adopted by the highest courts of other states in this land so that Florida would have the opportunity of also taking this major step in its jurisprudence. In order for Plaintiff to prevail on the issue of the Fireman's Rule, this Court must only adopt the decisions of the district courts of the state that have clearly delineated situations where the police officer or firefighter was injured in the line of duty through reasons and for causes totally independent of his actually being on the premises.

The Plaintiff, an experienced police officer in charge of a trainee at the time of the incident, responded to a burglar alarm, a fairly normal procedure in his profession. The testimony is uncontroverted that he took every reasoneble precaution to ascertain whether or not

there were dogs on the premises. No one has ever identified a warning sign anywhere on the premises at the time of the incident, and there are only vague allusions to a white rectangle, somewhat askew, in the corner of the yard that can only be seen, as stated by defense counsel, once Plaintiff was actually in the yard and, it might be said, "within the jurisdiction of the dogs." The testimony is further uncontroverted that the injuries were sustained in fleeing the four *(4)* large Great Danes of which the Plaintiff had no knowledge. He had not violated any police procedure or practice and had done everything possible, in an affirmative way, to ascertain the existence of any dogs.

The facts clearly place this case among the vast number of cases that allow a police officer or firefighter to recover for injuries when it is the independent act of negligence that causes the injuries.

Arguendo, if the Plaintiff had entered the premises for the express purpose of quieting the dogs, following a complaint by neighbors, it could be stated that his action would be barred by the Fireman's Rule as it is currently stated. Again, arguendo, if the Plaintiff responded to a call from a neighbor that a child was on the premises and was being attacked by the four *(4)* large Great Danes, resulting in Plaintiff's jumping the fence and attempting to extracate the child from the situation, it could again be stated that the Fireman's Rule might bar Plaintiff's action.

The facts of this case are completely different.

It should be pointed out that the danger from dogs is, admittedly, a danger that a police officer might confront. It could further be stated that a police officer might expect to be confronted by almost any and all dangers known to man in the course of carrying out his duties in protecting the public. Plaintiff's position is clearly that certain dangers are not expected, nor should they be expected under certain circumstances, and, as the courts of this state and other states have consistently held, it is not the danger itself but the context in which that danger creates the injuries.

A police officer may expect to be injured by dogs if he voluntarily places himself in a position where such an injury could logically occur. The facts of the instant case are that the Plaintiff suspected the possibility of dogs and thought he heard dogs far off in the distance, but did not associate them with the property. Based on his experience in another part of the City of Miami, he took every precaution to arouse the dogs, said precaution being the rattling of the fence which had worked for him in the past. His affirmative actions and the negligence of the Defendants in not having any warning signs on the premises combine to create a totally independent and life-threatening situation for the Plaintiff who was responding to a burglar alarm, which, as Defendant Ferrer testified, was specifically for the purpose of calling the police.

Plaintiff's position is not purely that the dogs were dangerous (obviously four (4) large Great Danes maintained for security reasons could not be considered harmless), nor that the mere failure to post a sign was negligent (presumably one or two small dogs could have been penned somewhere on the property), but the combination of the dogs without any warning created a totally unexpected situation that unfortunate evening in October of 1981.

Even the cases that deal with the separate, independent and contemporaneous act of negligence do not prevent Plaintiff's action from going forward. In the classic case of Whitlock v. Ehlich, 409 So.2d 110 (Fla. 5th DCA 1982), a police officer was allowed to recover for a totally separate act of negligence on the part of the homeowner, who, by removing a flashlight propping up a window, allowed that window to fall on the officer's hand doing him serious injury.

Obviously, in the instant case, the Defendants were not at home and arrived while the Plaintiff was still being treated for his injuries on the scene. Nevertheless, the Defendants' negligent act of leaving the premises, knowing that a burglar alarm could go off, either falsely or because of an actual burglary, coupled with the presence of four (4) large Great Danes and no warning signs, set into motion a situation which carried on throughout the evening and became a separate contemporaneous act of negligence.

In Hall v. Holton, 330 So.2d 81 (Fla. 2d DCA

1986), a case cited in The Law of Torts, the police officer's action was not barred even though the Defendant property owner was not around. There the court clearly stated that, where the circumstances are such that one might reasonably expect the presence of a licensee at the site of a hidden but dangerous condition on his premises, that it is not too much to ask the land owner to erect signs or take other suitable precautions to warn a licensee when he comes. In Hall, which involved an abandoned building, where, obviously the land owners were not present, the court went on to state that it construes the requirement of knowledge of the licensee's presence to include those circumstances where the owner could reasonably anticipate that the licensee would be on his premises. In the instant case, it is not only reasonable to expect the land owner to anticipate the presence of the licensee, but to actually expect it knowing the presence of the burlgar alarms on the property and the fact that one of the burglar alarm systems, as it did, could go off either as a false alarm or in response to an actual break-in.

While the Hall court found it reasonable for a police officer to be expected in an abandoned building, it is even more reasonable to expect a police officer to respond to a burglar alarm installed for the express purpose of having him prevent burglaries.

Hall v. Holton, supra was cited as one of the cases in The Law of Torts standing for the proposition that

the land owner must give warning of hidden dangers of which he knows as in the case of other licensees. The Law of Torts, supra at *430*. The Court in Hall, clearly found, given the facts of that case and the Fireman's Rule as it has been construed for the most part, that the Plaintiff/police officer was a licensee. Citing Post v. Lunney, 261 So.2d 146 (Fla. 1972), it stated the clear-cut law on the subject that, "the duty owed to a licensee is to refrain from wanton negligence or willful misconduct which would injure him, to refrain from intentionally exposing him to danger, and to warn him of the defect or condition known to the land owner to be dangerous when such danger is not open to ordinary observation by the licensee." The instant case clearly sets forth facts which show that the combination of four *(4)* large Great Danes with no warning created a dangerous condition, not open to ordinary observation by the licensee. In the instant case, Plaintiff went beyond simply observing and took affirmative conduct to find out if that particular danger was present.

The Hall court went on to say that the defendant had not satisfied the summary judgment burden of demonstrating that he had no reason to anticipate the presence of police officers in his building. In the instant case, the Defendants should have actually expected a police officer responding to the burglar alarm, their avowed reason for having it.

Also cited in the same footnote in The Law of

Torts is the California case of Lipson v. Superior Court of Orange County, supra, in which it was clearly stated that, "The fireman's rule governs in California. Its parameters are narrow. The rule does not prohibit a firefighter from recovering damages where the act which results in his injury is independent from the act which created the emergency to which the fireman responded. A defendant is liable for failing to warn of the known, hidden danger on his premises, or from misrepresenting the nature of a hazard, if such misconduct caused the fireman's injuries." 644 P.2d at 832-33.

It may be argued that the dogs were an obvious danger. True, but only once they had been observed. It is plain that a danger cannot be obvious within the meaning of the licensee rule if it becomes obvious only when it is too late for that danger to be obviated by those who are confronted by it. The fact that one map see the bottom of an otherwise concealed hole as he is falling through it does not make the danger it presents an obvious one. Marks v. Delcastillo, 386 So.2d 1259 (Fla. 3rd DCA 1980).

Another recent Florida case that is clearly analagous to the instant case is Berglin v. Adams Chevrolet, 458 So.2d 866 (Fla. 4th DCA 1984). In that case an investigator for the Delray Eeach Police Department was injured when a garage door at the Chevrolet dealership fell on him while investigating a burglary. Apparently the door had been damaged in the burglary, and the court found that

the summary judgment in favor of the dealership should be reversed based on the clear issues of material fact that had to be resolved as to whether or not the Plaintiff in that case had been warned. One of the cases it cited, Hall v. Holton, supra, was somewhat different in that clearly the land owner, as in the instant case, was not on the premises literally at the time the incident occurred. However, the Berglin court found no distinction with whether the land owner is on the premises or not because it cites the law of this state that there is a two-part duty on the part of the land owner, the second of which is to warn of the danger not open to ordinary observation of which the land owner is aware.

The issues of material fact that caused both Hall and Berglin to be reversed are even more pronounced in the instant case.

Very recently, the Supreme Court of Minnesota in a short but well reasoned opinion distinguished the previous significant cases in that jurisdiction affecting the Fireman's Rule. Lang v. Glusica, 393 NW 2d 181 (Minn. 1986). While using slightly different language, the court stated that it had previously made it clear that a landowner owed firefighters a duty of reasonable care and that while a firefighter assumed all the risks reasonably apparent to him, he did not assume the risks of hidden or unanticipated risks. The court went on to state that the common law principle should not be extended where someone intentionally

injures the officer or causes injuries by active negligence after the officer arrived at the scene.

Logically, one cannot simply state that the negligence of the Defendants in the instant case was not active nor that it is inapplicable because it did not occur after the Plaintiff arrived at the scene. The negligence that resulted in the serious injuries to the Plaintiff were a constant and ongoing threat to him and to others once the chain of events had been set in motion by the Defendants. The negligence was on-going, but only clearly manifested itself once the unsuspecting police officer, taking every reasonable precaution, found himself in a trap, a trap which culminated from the circumstances set up by the Defendants that evening. The negligence was as active at the time when the Plaintiff found himself in that trap as it would have been if the Defendants had been on the property and observed the entire situation from a window.

In summarizing his second position on the issue of the Fireman's Rule, Plaintiff again respectfully reiterates the fact that these arguments are notwithstanding the strong position taken that this Court can now abolish this anachronistic abomination. Plaintiff, in the instant case, does not need for this Court to go that far since the Summary Final Judgment, affirmed by the Third District, does not withstand the clear issues of material fact that are present in the instant case, clearly taking it out of the Fireman's Rule. In fact, if a balancing test were

applicable, a Summary Final Judgment would have been far more proper in favor of the Plaintiff and against the Defendants due to the overwhelming amount of testimony against the Defendants on all the issues, including against Defendant Ferrer, the non-dog-owner/property owner,

The First District Court of Appeal in Sanderson v. Freedom Savings & Loan Association, et al, supra, recognized the distinction between premises liability cases and cases where the injury was incurred by other means not inherent in the nature of the premises or by separate acts of negligence. The First District Court cited Smith v. Markowitz, 486 So.2d 11 (Fla. 3d DCA 1986), which was a case of a pipe protruding from the ground. On the other hand, it is submitted that the landowners' failure to control vicious dogs is an independent act not inherent in the nature of the premises and more like the case of Whitlock v. Elich, supra, (police officer injured when landowner dropped a window frame on officer's hand--summary ,judgment for landowner reversed).

The Court in Sanderson v. Freedom Savings & Loan Association, et al, supra, points out that the Supreme Court of Florida in Hix v. Billen, **284 So.2d 209** (Fla. **1973)** held:

> "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 discovered, to give warning of any known dangerous condition not open to ordinary observation by the uninvited licensee or trespasser." at 210.

In this Case, the record reflects that the property owners installed the burglar alarm for the purpose inter alia of attracting police to the premises. Thus invited onto the premises to apprehend burglars, the Plaintiff was done in by an unforeseen, unrelated, non-premises condition, i.e. vicious dogs.

Even a premises-related condition can require a warning. Berglin v. Adams Chevrolet, supra. (Police investigator injured by falling garage door, a condition known to property owner--summary judgment for defendant reversed.)

Defendant Ferrer's sign argument indicates that Defendant Ferrer knew of the danger presented by the dogs and that a warning was necessary.

Thus Flick v. Malino, *356* So.2d *904* (Fla. 1st DCA 1978), cited by the Third District Court of Appeal in Stickney v. Felcher Yacht, Inc., supra, supports Plaintiff's position that there are issues of fact precluding summary judgment for the property owner. The Court in Flick indicated that although the liability of Defendant Sklar who

owned the dog would be governed by the Statute, the liability of the Defendant Ferrer who owned the property by the entireties would be governed by common law. Under common law, the issue of fact raising a jury issue was:

> "Whether the posting of 'bad dog' signs was all that was reasonably required. . . ." 356 So.2d at 906.

to protect the Plaintiff.

Here the landowner had reason to anticipate the presence of police attracted by their own burglar alarm. A summary judgment would only be sustained if they had no reason to anticipate the presence of the police. Hall v. Holton, supra; Smith v. Avis Rent-A-Car System, Inc., 297 So.2d 841 (Fla. 2d DCA 1974).

The Fireman's Rule was a variant of the law of premises liability to the effect that a fireman or policman responding to a call is a licensee for purposes of liability of the landowner.

The Supreme Court of Florida held in Maldonado v. Jack M. Berry Grove Corp., 351 So.2d 967 (Fla. 1977):

> "Only where liability is predicated upon an alleged defective or dangerous condition of the premises is the injured person's status relevant. Wood (284 So.2d 691) 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 (284 So.2d 209) governs the liability of a landowner to a person injured on his property unrelated to any defective condition of the premises." at 968.

The Fifth District recently perceived this

distinction in Whitlock v. Elich, supra, wherein the summary judgment was reversed where active negligence of tortfeasor was the cause of injury as contrasted with a defective condition of premises. The Whitlock court does consider the Fireman's Rule in arriving at its decision as evidenced by its citation to Hall v. Holton, supra.

The only authority for the proposition that the dog is an inherent condition of the premises is the off-hand "bull dog in the celler" comment long contained in The Law of Torts, at 431-32. No case law on any jurisdiction researched by counsel supports this extraneous and obviously un-thought-out comment by the author of the treatise.

It seems somewhat discriminatory to single out dogs as an inherent condition of the premises. It is submitted that whether or not there are dogs and the types thereof and the conditions under which they are kept are situations which change with the times and locale, and perhaps even the breed in light of the controversy surrounding "pit bull" ordinances. The situation calls to mind the presence of the alligator on Sonny Crockett's yacht in "Miami Vice." Would injury from the alligator be considered to be a condition of the premises?. How about an injury from a ferocious parrot, or a foul tempered rabbit? It seems inappropriate in this day and age to argue that an injury from any animal is an inherent condition of the premises, or that only dogs have the favored status. At the very least factual issues are presented which should be

decided by a jury, and the District Court's affirmance of the trial court's Summary Judgment should be reversed.

II.

THE OWNER OF A DOG IS NOT ENTITLED TO INVOKE THE STATUTORY DEFENSES OF FLORIDA STATUTE *767.04* AS A DEFENSE TO THE NO??-BITE STRICT LIABILITY IMPOSED BY FLORIDA STATUTE *767.01*

The Third District Court of Appeal reversed the lower court as to the owner of the dog. The Third District Court of Appeal correctly ruled that the common-law Fireman's Rule was superseded by the dog-bite statute. However, Plaintiff contends that it incorrectly ruled that the statutory defenses of Florida Statute *767.04,* in this case the "sign" defense, were applicable to a cause of action under Florida Statutes *767.01* for damages caused by dogs other than by bite.

In making this argument, Plaintiff expressly reiterates that the Third District Court of Appeal correctly ruled that the dog-bite statutes supersede the common-law Fireman's Rule defense. The Plaintiff in making this argument, in no way concedes that a sign was posted which complied with *767.04* and that Plaintiff read and understood it.

The distinction between the two statutes was explicitly dealt with by this Court in Sweet v. Josephson, *173* So.2d *444* (Fla. *1965).*

This Court held,

> "In sum the first statute *(767.01)* fixes liability on the owner for any damage at all caused by his dog; the second statute *(767.04)* puts upon him responsibile only for injury caused by the bite

> of his dog. That injury could eventuate from the embrace of a Saint Bernard on a stairway or a feist underfoot, though both encounters were friendly, is not difficult to conceive. Yet if the theory of the repeal of the first Statute by the second were adopted, such occurrences would exonerate the owner of the dog and make the doctor's bill the burden of the innocent victim."
>
> 173 So.2d at *446*.

This Court concluded:

> "There is a field of operation for each." Id.

This Court has ruled concurrently with Stickney v. Belcher Yacht, Inc., *424* So.2d 962 (Fla. 3d DCA 1983), a dog-bite case, that in a non-bite case the owner is subject to strict liability without any defenses other than enumerated in the Statute, and has stated again and again that Section 767.01 is a strict liability statute which has consistently been construed to virtually make an owner the insurer of the dog's conduct. Jones v. Utica Mutual Insurance Co., *463* So.2d 1153 (Fla. 1985). (dog towing wagon.)

As to common law defenses, the Third District Court of Appeal ruled completely consistent with this Court that the statutory dog liability statute supersedes the common law and makes the owner the virtual insurer of the dog's conduct. Donner v. Arkwright-Boston Manufacturer's Insurance Co., 358 So.2d 28 (Fla. 1978). In Donner, supra, this Court held that assumption of the risk was no longer a defense under the dog bite statute. The Fireman's Rule is

based on the doctrine of assumption of the risk. See Christenson v. Murphy, 296 Or. 610, 673 P.2d 1215-16 (1984), Lipson v. Superior Court of Orange County, supra.

Defendant Sklar incomprehensibly argues that the statutory abolition of common law defenses applies only to bite cases under 767.04. However, this Court has directly cited Donner, supra, in the non-bite 767.01 case of Jones v. Utica Mutual' Insurance Co., supra, at 1156, thereby resolving the issue.

In another context, the Third District Court has stated:

> "With great force and persuasiveness, the appellant ciaims that the result is unwise and unjust. We do not say because it is does not matter if we agree with those views. Only the legislature has authority in this field. It has made it5 policy decision and that: conclusion must and will be followed."

Lee v. Risk Management Inc.. 409 So.2d 1163 (Fla. 3d DCA 1982).

The normal danger from a dog is a bite, and the bite situation is governed by Section 767.04.

This is not a bite case, and therefore is governed by Section 767.01. It is not unreasonable to deal differently with a situation where a dog causes injury in other than the expected fashion, by biting. Perhaps the legislature could have provided for a sign defense where the sign would warn that a dog is loose or has a propensity to climb upon visitors, tow a wagon erratically, or in some

other way cause injury. However, the legislature has not done so.

Noble v. Yorke, 490 So.2d 29 (Fla. 1986) did not involve a common law defense as to liability, but involved a common law avoidance available to the plaintiff in response to the statutory sign defense.

The Third District Court's opinion relies on its previous opinion in Rattet v. Dual Security Systems, Inc., 373 So.2d 948 (Fla. 3d DCA 1979), for the proposition that the defenses available in Section 767.04 are also applicable to causes of action accruing under 767.01. In the instant case however, the Plaintiff was not injured by a bite, but by damage caused by the dog pursuant to 767.01.

Subsequent to Rattet, the Third District Court ruled in Stickney v. Belcher Yacht, Inc., supra, as follows:

> "What is a situation covered by the Statute is not clear. We do know that situations not covered by Section 767.04 are (1) where the landowner is not the dog owner, e.g., Flick v. Malino, (2) where the dog-caused injury results from other than a bite, e.g., Vandercar v. David, 96 So.2d 227 (Fla. 3d DCA 1957)." n. 3, 424 So.2d at 9 4.

This ruling was affirmed by the Supreme Court of Florida in Belcher Yacht, Inc. v. Stickney, 450 So.2d 1111 (Fla. 1984) wherein the Court held at page 1112 as follows:

> "We agree with the District Court's holding on this issue insofar as it applies to the dog owner, Relcher, but note that Section 767.04 pertains only to the owner. It is silent as to the custodian or keeper of a dog who is not the owner. It neither creates liability

on the part of Herner nor exonerates him because of the posted sign."

The Supreme Court points out in Footnote 2, *450* So.2d 1112 that a comparison of Florida Statute *767.05* notes that the said section specifically refers to "an owner or keeper of any dog".

Under the statutory principle of interpretation expressio unius est exclusio alterius, Section *767.04* contains an express defense of a bad dog sign whereas *767.01* does not.

Section *767.01* is a statute imposing strict liability. Jones v. Utica Mutual Insurance Company, supra.

Therefore, inasmuch as the Statute supersedes the common law and must be interpreted strictly, the dog owner liable under *767.01* is strictly liable without the availability of the statutory defenses listed in *767.04,* in a non-bite case, and therefore, the issue of the sign is immaterial.

CONCLUSION

It is respectfully submitted that this Court take this opportunity to abolish the outdated Fireman's Rule. Even if the Court does not wish to take that step, it is clear that the facts of this case take it out of the Fireman's Rule and the decision of the District Court should be reversed as to Defendant Ferrer.

As to the statutory liability under Florida Statute *767.01,* the defense of a sign is not applicable as

it is under 767.04 situations and that defense should not even be considered when this cause is remanded to the trial court for further proceedings.

Respecfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 30th day of May, 1987, to J. David Gallagher, Esquire, of the firm Wicker, Smith, Blomqvist, Tutan, O'Hara, McCoy, Graham & Lane, Grove Plaza - 5th Floor, 2900 S.W. 28th Terrace, Miami, FL 33133; Lawrence B. Craig, Esquire, Merritt, Sikes & Craig, P.A., 3rd Floor, McCormick Building, 111 S. W. Third Street, Miami, FL 33130; Richard Wassenberg, Ponzoli & Wassenberg, P.A., 302 Roland/Continental Plaza, 3250 Mary Street, Miami, FL 33133; and Richard A. Sherman, P.A., Suite 102N, Justice Building, 524 S. Andrews Avenue, Fort Lauderdale, FL 33301.

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