

IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,890 and 69-892
(Consolidated)

OFFICER JOHN KILPATRICK,
Petitioner,

vs.

ALFRED SKLAR, MRS. ALFRED SKLAR
a/k/a DR. OLGA FERRER, and
UNITED STATES FIDELITY AND
GUARANTY COMPANY,
Respondents

ALFRED SKLAR, MRS. ALFRED SKLAR
a/k/a DR. OLGA FERRER, and
UNITED STATES FIDELITY AND
GUARANTY COMPANY,
Petitioner,

vs.

OFFICER JOHN KILPATRICK
Respondent.

PETITIONER, OFFICER JOHN KILPATRICK'S,
BRIEF ON JURISDICTION
AND
APPENDIX

DISCRETIONARY PROCEEDING TO REVIEW
A DECISION OF THE DISTRICT COURT OF APPEAL
THIRD DISTRICT

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STATEMENT OF THE CASE AND FACTS

This is a case where a police officer was injured attempting to escape vicious dogs while investigating a residential burglary. The trial court entered a Summary Judgment against the Plaintiff.

The Third District Court of Appeal, in an opinion appended hereto reported at 11 FLW **2352**, 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 The Third District Court of Appeal correctly ruled that the common-law Fireman's Rule was superseded by the dog-bite statute.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, Petitioner 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.

As to the liability of the property owner, Petitioner contends that the Third District Court of Appeal incorrectly ruled that under the Fireman's Rule a policeman is barred as a matter of law from recovery where he was injured by attempting to escape vicious dogs while investigating a burglary.

The owner of the dogs has petitioned this Court to invoke discretionary jurisdiction, and the Plaintiff-Appellant in the Third District Court of Appeal, Officer John Kilpatrick, petitions to invoke this Court's discretionary jurisdiction and resolve the conflicts cited, as to the liabilities of the dog owner and the property owner.

SUMMARY OF ARGUMENT

I. THE THIRD DISTRICT COURT OF APPEAL'S HOLDING THAT 767.04 PROVIDES A SIGN DEFENSE IN A NON-BITE 767.01 CAUSE OF ACTION CONFLICTS WITH SWEET v. JOSEPHSON, 173 So.2d 444 (Fla. 1965); BELCHER YACHT INC. v. STICKNEY, 450 So.2d 1111 (Fla. 1984); AND JONES v. UTICA MUT. INS. CO., 463 So.2d 1153 (Fla. 1985).

II. THE THIRD DISTRICT COURT OF APPEAL'S HOLDING THAT A POLICEMAN'S CLAIM FOR INJURY SUSTAINED IN ESCAPING FROM DOGS ON THE OWNERS' PREMISES WHILE RESPONDING TO THE OWNERS' BURGLAR ALARM IS BARRED AS A MATTER OF LAW CONFLICTS WITH HIX v. BILLEN, 284 So.2d 209 (Fla. 1973); MALDONADO v. JACK M. BERRY GROVE CORP., 351 So.2d 967 (Fla. 1977); FLICK v. MALINO, 356 So.2d 904 (Fla. 1st DCA 1978); BERGLIN v. ADAMS CHEVROLET, 458 So.2d 866 (Fla. 4th DCA 1984); ADAIR v. THE ISLAND CLUB, 225 So.2d 541 (Fla. 2d DCA 1969); WHITLOCK v. ELICH, 409 So.2d 110 (Fla. 5th DCA 1982); AND CHRISTIE v. ANCHORAGE YACHT HAVEN INC., 287 So.2d 359 (Fla. 4th DCA 973).

III. THIS CASE PRESENTS THE SAME ISSUE CERTIFIED TO THIS COURT BY THE FIRST DISTRICT COURT OF APPEAL IN SANDERSON v. FREEDOM SAVINGS & LOAN ASSN., ET AL, Case No. BK- , FLW 2298.

ARGUMENT

I. THE OWNER OF A DOG IS NOT ENTITLED TO INVOKE THE STATUTORY DEFENSES OF FLORIDA STATUTE 767.04 AS A DEFENSE TO THE NON-BITE STRICT LIABILITY IMPOSED BY FSA 767.01.

In making this argument, Petitioner 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 Petitioner in making this argument in no way concedes that a sign was posted which complied with 767.04 and that Petitioner 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 responsibility 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.

Footnote 3 of the Third District's Opinion in Stickney v. Belcher Yacht, Inc., 424 So.2d 962 (Fla. 3d DCA 1983) stated as to 767.04:

"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)."
424 So.2d at 964

This Court in ruling on Stickney held that the statute should be strictly and explicitly construed. In Belcher Yacht Inc. v. Stickney, 450 So.2d 1111 (Fla. 1984), this Court exonerated the owner but held the agent of the owner liable and stated that:

"We agree with the District Court's holding on this issue insofar as it applies to the dog owner, Belcher, 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."
²Compare with Section 767.05 Florida Statutes (1979), which specifically refers to 'an owner or keeper of any dog'.
450 So.2d 1111 (1984)
at 1112

Similarly the statutes explicitly provide the enumerated defenses in 767.04 only as to dog bites. Florida Statute 767.01 does not provide any of the enumerated defenses and imposes strict liability on the dog owner for damage other than by bite.

This Court has ruled concurrently with Stickney, (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 Mut. Ins. Co., 463 So.2d 1153 (Fla. 1985).

The Third District's ruling in this case thus conflicts with the foregoing cases.

11. THE THIRD DISTRICT COURT OF APPEAL'S RULING THAT A POLICEMAN IS BARRED AS A MATTER OF LAW BY THE FIREMAN'S RULE IN AN ACTION AGAINST THE OWNER OF THE PREMISES FOR DAMAGE CAUSED BY PURSUING DOGS CONFLICTS WITH CASES OF THIS COURT AND OTHER COURTS OF APPEAL HOLDING THAT THE FIREMAN'S RULE IS RESTRICTED TO INSTANCES OF DEFECTS IN THE PREMISES AND THAT THE FIREMAN'S RULE DOES NOT APPLY TO INSTANCES OF NEGLIGENCE WHICH ARE EITHER SEPARATE FROM THE PURPOSE FOR WHICH THE FIREMAN OR POLICEMAN WAS CALLED TO THE PREMISES OR INDEPENDENT THEREOF.

The First District Court of Appeal in Sanderson v. Freedom Savings & Loan Assn., et al, Case No. BK-69, 11 FLW 2298 has certified to this Court the issue of whether the Fireman's Rule applies to other than a defect in the condition of the premises. That court points out that the Fireman's Rule has its origins in the standard of care applicable to owners of property as to licensees and invitees on the property and notes that the decisions in Whitlock v. Elich, 409 So.2d 110 (Fla. 5th DCA 1982) and Hix v. Billen, 284 So.2d 209 (Fla. 1973) can be interpreted to so restrict the Fireman's Rule.

This Court 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 uninvited licensee or trespasser."

284 So.2d at 210

This Court has 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."

351 So.2d at 968

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

In Flick v. Malino, 356 So,2d 904 (Fla. 1st DCA 1978), the court ruled that although the liability of the defendant's husband who owned the dog would be governed by the dog-bite statute, the liability of the defendant's/wife who owned the property as does Respondent/Olga Ferrer by the entirety, would be governed by common law, and that under the common law an issue of fact raising the 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.

In Berglin v. Adams Chevrolet, 458 So,2d 866 (Fla. 4th DCA 1984), a police investigator was injured by a falling garage door, a condition of the premises known to the property owner, and the court reversed a summary judgment for the Defendant.

It is submitted that the landowner's failure to control vicious dogs is an independent act not inherent in the nature of the premises and not connected with the purpose for which the policeman was called to 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 Whitlock court did consider the Fireman's Rule in arriving at its decision as evidenced by its citation to Hall v. Holton, 330 So,2d 81 (Fla. 2d DCA 1976). 409 So,2d at 111.

Courts which have invoked the Fireman's Rule have applied it to bar injury arising from the incident which caused the officer to come to the scene in the line of duty Adair v. The Island Club, 225 So.2d 541 (Fla. 2d DCA 1969) (escaping chlorine gas). Petitioner came on the property to investigate a burglary--not to apprehend vicious dogs.

The Third District in the instant case inexplicably ruled that vicious dogs, as a matter of law, do not constitute an actionable case because of the Fireman's Rule. As stated, the effect of the Fireman's Rule was to relegate the policeman to the status of a licensee. Even assuming the applicability of the Fireman's Rule in relegating the policeman, Kilpatrick, to the status of a licensee, the instant case is in direct conflict with Christie v. Anchorage Yacht Haven Inc., 287 So.2d 359 (Fla. 4th DCA 1973).

The court in Christie directly held that, as a matter of law, the Plaintiff stated a cause of action against the property owner as a licensee sufficient to take the case to the jury. There was evidence that the defendant was the owner of the property, that it was charged with the knowledge that a vicious dog was kept on the premises unrestrained thus presenting a dangerous condition and risk to those persons coming upon the property, that persons regularly or with implied permission of the owner came on the property, (such as by inviting a policeman to come on by

virtue of a burglar alarm), and that such persons would not be aware of the danger or risk involved.

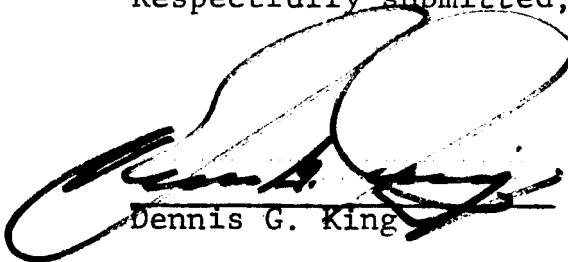
The Court's ruling in the instant case creates direct conflict with the foregoing cases.

CONCLUSION

For the foregoing reasons and authorities this Court should take jurisdiction and resolve the conflicts cited and rule that:

1. The statutory defenses of FSA 767.04 do not apply to a non-bite case under 767.01; and
2. That the Fireman's Rule does not preclude a cause of action against an owner of premises by a policeman who was injured escaping vicious dogs during the investigation of a burglary instigated by the owner's burglar alarm.

Respectfully submitted,


Dennis G. King

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this _____ day of February, 1987, to: J. David Gallagher, Esquire, 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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