

IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,890 and 69,892

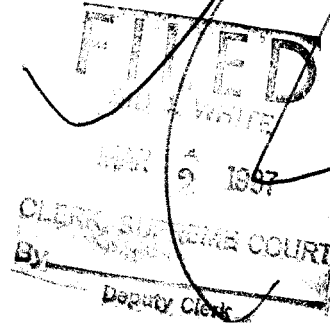
Florida Bar No. 352470

OFFICER JOHN KILPATRICK,  
Petitioner,

vs .

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

Respondents.



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

Petitioners,

vs .

OFFICER JOHN KILPATRICK,  
Respondent.

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

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BRIEF OF RESPONDENT, MRS.  
ALFRED SKLAR a/k/a DR. OLGA FERRER

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STATEMENT OF THE CASE AND FACTS

The Petitioner, OFFICER JOHN KILPATRICK, is attempting to invoke this Court's discretionary jurisdiction to review the portion of the Third District Court of Appeal Opinion, which affirmed the portion of the summary judgment entered by the trial court against Respondent, MRS. ALFRED SKLAR a/k/a DR. OLGA FERRER. The court held:

As to Dr. Ferrer, however, the record demonstrates that she did not own the Great Danes and thus is not subject to liability pursuant to Section 767.01. . . . Furthermore, because Dr. Ferrer is not within the purview of Chapter 767, the fireman's rule applies and precludes Kilpatrick's action against her . . . . We therefore affirm that portion of the summary judgment exonerating Dr. Ferrer. (citations omitted)

Because Respondent, DR. FERRER, was not an owner of the dogs involved in the subject incident, the court held that she could not be found liable under the "dog bite" statutes, and could avail herself of the common law "fireman's rule" defense against the Petitioner, police officer.

By implication the Third District Court of Appeal held that, as a matter of law, the police officer/petitioner's injuries occurred as a result of circumstances related to his being on the Respondent's property. Thus, the Petitioner's cause of action was barred against the Respondent/non-dog owner/landowner by the fireman's rule.

## SUMMARY OF ARGUMENT

This Court is without jurisdiction as to Petitioner, KILPATRICK's, claim against Respondent, DR. FERRER. There is no jurisdictional conflict revealed by the District Court of Appeal decisions cited by the Petitioner.

Regardless of this Court's view of the correctness of the opinion of the Third District Court of Appeal sub judice, the proper test of the Supreme Court's discretionary conflict jurisdiction is whether the alleged conflicts (1) announce a rule of law which conflicts with a rule previously announced by the Supreme Court or another district, or (2) apply a rule of law to produce a different result in a case which involves substantially the same facts as a prior case. The cases cited by Petitioner, KILPATRICK, do not meet this test. The Third District opinion under review in the instant case is in harmony with the allegedly conflicting opinions cited by Petitioner, KILPATRICK, against Respondent, DR. FERRER, or are distinguishable on their facts.

The holding of the Third District Court of Appeal in the instant case, as to Respondent, DR. FERRER, was that, as a matter of law, the "fireman's rule" bars the Petitioner/police officer's cause of action for common law negligence against the Respondent/landowner for injuries, caused by a condition on the landowner's premises, occurring as a result of circumstances related to the police officer's presence

during the discharge of duties for which he **was** called to the premises. There is no conflict jurisdiction as there are no cases which expressly and directly conflict with that holding.

ARGUMENT

I. THE PORTION OF THE THIRD DISCRICT COURT OF APPEAL OPINION IN THIS CASE AFFIRMING THE SUMMARY FINAL JUDGMENT AS TO RESPONDENT, MRS. ALFRED SKLAR A/K/A DR. OLGA FERRER IS NOT IN EXPRESS OR DIRECT CONFLICT WITH ANY OTHER DISTRICT COURT OF APPEAL OPINION OR PRIOR SUPREME COURT OPINION.

The cases cited by Petitioner, KILPATRICK, as being in alleged conflict with the opinion rendered in the instant case by the Third District Court of Appeal are not in express and direct conflict with it or are distinguishable in their facts. The proper standard of conflict jurisdiction is not whether this Court might disagree with the opinion appealed from. The proper test is whether the decision under review (1) announces a rule of law which conflicts with a rule previously announced by the Florida Supreme Court or another district, or (2) applies a rule of law to produce a different result if the decision involves substantially the same facts as a prior case. See Mancini v. State, 312 So. 2d 732 (Fla. 1975); Kincaid v. World Insurance Company, 157 So. 2d 517 (Fla. 1963); Kyle v. Kyle, 139 So. 2d 885 (Fla. 1962).

The facts of the allegedly conflicting cases must be analytically the same as the case under review for there to be conflict jurisdiction in the Florida Supreme Court. Department of Revenue v. Johnston, 442 So. 2d 950 (Fla. 1983); Kyle. Because the cases cited by Petitioner, KILPATRICK, fail to meet the above tests, this Court is without jurisdiction to

to review the portion of the Third District Court of Appeal opinion affirming the Summary Final Judgment entered in favor of Respondent, DR. FERRER.

The District Court held that the Petitioner/police officer's common law negligence cause of action against the Respondent/landowner/non-dog owner was barred by the "fireman's rule." Inherent in the court's holding is a finding that as a matter of law the police officer's injury was caused by a condition on the landowner's property, which occurred during the police officer's discharge of his duties, and as a result of circumstances related to his presence on the property.

The cases cited by the Petitioner, KILPATRICK, either do not conflict with the Third District Court's holding as to Respondent, DR. FERRER, or are factually distinguishable. Sanderson v. Freedom Savings & Loan Association, Case No. BK-69, 11 F.L.W. 2298, 2299, cited by Petitioner held

that the fireman's rule bars recovery in personal injury and wrongful death actions when the cause of action is based upon an injury sustained by a fireman or policeman while acting in the line of duty, unless the complaint sufficiently alleges willful misconduct or wanton negligence on the part of the defendant which would injure the licensee.

There is no allegation of willful or wanton behavior before the court. Sanderson does not conflict with the decision under review. Rather it supports it and is in complete harmony with the Third District's holding as to Respondent, DR. FERRER.



Both, Christie v. Anchorage Yacht Haven, Inc., 287 So. 2d 359 (Fla. 4th DCA 1973) and Flick v. Malino, 356 So. 2d 904 (Fla. 1st DCA 1978) are cited by Petitioner, KILPATRICK, as express and direct conflict with the decision under review. Both cases held that a non-dog owner cannot be liable under the "dog bite" statutes for injuries occurring on a landowner/non-dog owner's property, but that the landowner/non-dog owner could be liable in common law for the same injuries. Both courts held that it was a jury question as to whether the landowner/non-dog owner was liable for the activities of the dogs, a condition on the landowner's property.

Neither case involved a police officer or fireman discharging his duties or the "fireman's rule." Both, Christie and Flick, are in harmony with the Third District Court of Appeal decision under review.

As the non-dog owner/landowners, in Flick and Christie, were not subject to liability under the "dog bite" statutes neither is DR. FERRER. All are, however, subject to common law liability for a condition on their land, i.e. dogs. The instant case is factually distinguishable from Christie and Flick in that those cases did not involve police officers discharging their duty. The common law defense of the "fireman's rule" was not available to the landowners in Christie and Flick but is available to DR. FERRER against Petitioner, KILPATRICK.

There is no Florida District Court decision or Supreme

Court decision which conflicts with Chirstie, Flick, or the instant decision holding that dogs kept on property are conditions on premises. The law cited by Petitioner, KILPATRICK, in Hix v. Billen, 284 So. 2d 209 (Fla. 1973) and Maldonado v. Jack M. Berry Grove Corporation, 351 So. 2d 967 (Fla. 1977) in no way expressly and directly conflict with the decision under review.

Berglin v. Adams Chevrolet, 458 So. 2d 866 (Fla. 4th DCA 1984) obviously does not conflict with the decision under review as it did not involve a condition on the premises and did involve allegations of wanton negligence and willful misconduct. In the Third District Court's decision under review, there is no allegation of willful or wanton behavior, and in accord with Christie and Flick the decision does involve a condition on the land.

Whitlock v. Elich, 409 So. 2d 110 (Fla. 5th DCA 1982) is also easily distinguishable on its facts. Whitlock involved the active negligence of the defendant, in removing a flashlight which supported an open window, causing the window to close and injure the plaintiff, police officer. The decision under review concerns a condition on the land.

Under Adair v. The Island Club, 225 So. 2d 541 (Fla. 2d DCA 1969) so long as a police officer is on a landowner's premises performing his duties as a police officer, he is protected by the "fireman's rule." Adair in no way conflicts

with the decision under review.

CONCLUSION

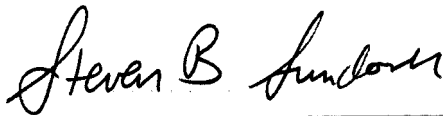
The holding of the Third District Court in the decision under review does not expressly or directly conflict with the decisions of other district courts or prior decisions of the Supreme Court.

There is no conflict with the District Court of Appeal's holding that the "fireman's rule" bars the police officer's common law cause of action against the landowner/non-dog owner, where the police officer's injury was caused by a condition on the landowner's property occurring during the police officer's discharge of his duties on the property.

This Court does not have jurisdiction as to the portion of the decision under review affirming Summary Final Judgment in favor of Respondent, MRS. ALFRED SKLAR a/k/a DR. OLGA FERRER.

Respectfully submitted,

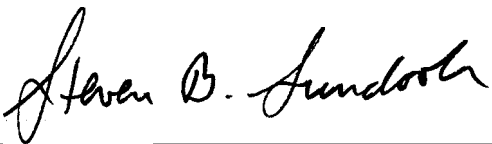
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By   
STEVEN B. SUNDOOK

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 25th day of February, 1987, to: DENNIS G. KING, P.A. and JOHN E. SHIELDS, ESQ., 2050 S.W. 22nd Street (Coral Way) Suite 402, Miami, Florida 33145; J. David Gallagher, Esq., WICKER, SMITH, BLOMQUIST, TUTAN, O'HARA, McCOY, GRAHAM & LANE, Grove Plaza, 5th Floor, 2900 S.W. 28th Terrace, Miami, Florida 33133; Lawrence B. Craig, Esq., MERRITT, SIKES *ii* CRAIG, P.A., Third Floor, McCormick Building, 111 S.W. Third Street, Miami, Florida 33130; and Richard A. Sherman, Esq., RICHARD A. SHERMAN, P.A., Suite 102 N Justice Building, 524 South Andrews Avenue, Fort Lauderdale, Florida 33301.

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