

3-2

IN THE SUPREME COURT OF FLORIDA  
CASE NOS. 69,890 & 69,892  
Florida Bar No: 184170

OFFICER JOHN KILPATRICK )  
 )  
Petitioner, )  
 )  
vs . )  
 )  
ALFRED SKLAR, et al., )  
 )  
Respondents. )  
\_\_\_\_\_)  
ALFRED SKLAR, et al., )  
 )  
Petitioners, )  
 )  
vs . )  
 )  
OFFICER JOHN KILPATRICK, )  
 )  
Respondent. )  
\_\_\_\_\_)

**FILED**  
SID J. WHITE  
FEB 9 1987  
CLERK, SUPREME COURT  
By Deputy Clerk

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

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

(With Appendix)

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

TABLE OF CONTENTS

	<u>Page</u>
Table of Citations.....	ii, iii
Statement of the Facts and the Case.....	1-5
Summary of Argument.....	5-6
Points on Appeal:	
I.    THE DECISION IN THIS CASE IS IN EXPRESS AND DIRECT CONFLICT WITH <u>SANDERSON V. FREEDOM SAVINGS &amp; LOAN</u> <u>ASSOC.</u> , 11 F.L.W. 2298 (Fla. 1st DCA, Oct. 30, 1986) (WHICH IS PENDING ON CERTIFICATION IN THE FLORIDA SUPREME COURT); WHICH HOLDS THAT WHEN A FIREMAN OR POLICEMAN IS INJURED ON THE DEFENDANT'S PREMISES IN THE PUR- SUIT OF HIS OFFICIAL DUTIES, A SUIT AGAINST THE LANDOWNER OR BUSINESS OWNER IS BARRED BY THE "FIREMAN'S RULE." .....	6-9
II.   THE DECISION IN THE PRESENT CASE IS BASED ON A MISAPPLICATION OF <u>BELCHER YACHT, INC. V. STICKNEY,</u> 450 So.2d 1111 (Fla. 1984); AND NOBLE V. YORKE, 490 So.2d 29 (Fla. 1986).....	9-10
Conclusion.....	10
Certificate of Service.....	11
Appendix.....	A1-4

TABLE OF CITATIONS

	<u>Page</u>
<u>Adair v. The Island Club</u> , 225 So.2d 541 (Fla. 3d DCA 1969) .....	7
<u>Belcher Yacht, Inc. v. Stickney</u> . 450 So.2d 1111 (Fla. 1984) .....	4, 5, 9, 10
<u>Carroll v. Moxley</u> , 241 So.2d 681 (Fla. 1979) .....	4
<u>Christie v. Anchorage Yacht Haven, Inc.</u> , 287 So.2d 359 (Fla. 4th DCA 1973) .....	5
<u>Donner v. Arkwright-Boston Manufacturers Mutual Insurance Co.</u> , 358 So.2d 21 (Fla. 1978) .....	4
<u>Flick v. Malino</u> , 356 So.2d 904 (Fla. 1st DCA 1978)	
<u>Hall v. Holton</u> , 330 So.2d 81 (Fla. 2d DCA 1976) ...	5
<u>Kaiser v. Baley</u> , 474 So.2d 906 (Fla. 5th DCA 1985)	7, 8
<u>Noble v. Yorke</u> , 490 So.2d 29 (Fla. 1986) .....	4, 9, 10
<u>Price v. Morgan</u> , 436 So.2d 1116 (Fla. 5th DCA 1983), <u>reviewed denied</u> , 447 So.2d 887 (Fla. 1984).	5, 7
<u>Rattet v. Dual Security Systems, Inc.</u> , 373 So.2d 948 (Fla. 3d DCA 1979), <u>cause dismissed</u> , 447 So.2d 887 (Fla. 1984) .....	4
<u>Rishel v. Eastern Airlines, Inc.</u> , 466 So.2d 1136 (Fla. 3d DCA 1985) .....	5, 7
<u>Romey v. Johnston</u> , 193 So.2d 487 (Fla. 1st DCA 1967) .....	8
<u>Sanderson v. Freedom Savings &amp; Loan Assoc.</u> , 11 F.L.W. 2298 (Fla. 1st DCA, Oct. 30, 1986) .....	2, 6, 7, 10
<u>Smith v. Allison</u> , 332 So.2d 631 (Fla. 3d DCA 1976)	5
<u>Smith v. Markowitz</u> , 486 So.2d 11 (Fla. 3d DCA 1986)	5, 8

TABLE OF CITATIONS (Continued)

	<u>Page</u>
<u>Whitten v. Miami-Dade Water and Sewer Authority,</u> 357 So.2d 430 (Fla. 3d DCA 1978) .....	5,7
<u>Wilson v. Florida Processing Company,</u> 368 So.2d 609 (Fla. 3d DCA 1979) .....	7

REFERENCES:

W. Prosser & W. Keeton, Torts Section 61 (5th Ed. 1984) .....	5,8
Section 767.01, Florida Statutes (1981) .....	3,4
Section 767.04, Florida Statutes (1981) .....	3,4

per the dog bite statute, even when a policeman is involved who has gone on private property in the performance of his duties.

It is submitted that this is a classic case of the Fireman's Rule - the policeman has come on the property to investigate a burglary (over a fence into a backyard at night) and is injured in the course of that pursuit, and is prevented from suing the landowner by the "Fireman's Rule". Therefore this case is in express and direct conflict with the cases which have held that lawsuits by police officers against landowners, arising from activities on the premises in pursuit of the duties, are precluded by the "Fireman's Rule." See, Sanderson v. Freedom Savings, infra, which is pending on certification to the Florida Supreme court.

Additionally, the Third District's decision is based on a misapplication of certain Supreme Court cases which hold there are no common law defenses to a dog bite. In the present case, first of all, there was no dog bite, but the Plaintiff injured himself climbing back over the fence. Secondly, the decision is based on a misapplication, as the Supreme Court cases should not be construed to bar as a defense the "Fireman's Rule", as in the present case where the policeman climbs over a fence at night into a backyard, is scared by dogs in that yard, and is now suing the homeowner for over one million dollars. This is a classic case of the reason for the "Fireman's Rule"; without it a homeowner or businessman could not risk having a policeman or fireman

come into his property because the liability to the policeman or fireman would be far more than what a burglar could steal, or what the house would be worth.

The decision of the Third District is as follows:

After entering appellees' yard to determine why a burglar alarm was sounding, police officer John Kilpatrick was chased by four Great Danes. Fleeing from the dogs, Kilpatrick tried to vault over a wrought-iron fence, became impaled on a spike, and sustained injuries to his calf. He sued appellees for damages, predicating their liability on section 767.01, Florida Statutes (1981),<sup>1/</sup> and common law. Appellee Alfred Sklar moved for summary judgment on the ground that the fireman's rule, which absolves a property owner of liability for injuries incurred by a police officer or firefighter during the discharge of duties for which he was called to the property, barred Kilpatrick's recovery. Sklar also contended that his posting of a warning sign, one of the statutory defenses provided<sup>2/</sup> by section 767.04, Florida Statutes (1981)- barred Kilpatrick from recovering damages. Mrs. Alfred Sklar [Dr. Olga Ferrer] asserted, in a separate motion, that she was exonerated from statutory liability because she did not own the dogs. The trial court granted the motions, and Kilpatrick appealed.

In his appeal, Kilpatrick asserts that the trial court erred as a matter of law in entering an adverse summary judgment because section 767.01 abrogates the fireman's rule as a defense. He also cites the presence of material issues of fact regarding whether the sign allegedly posted on appellees' property fulfilled the requirements of section 767.04, Florida Statutes (1981). Alternatively, Kilpatrick contends that the fireman's rule does not apply to his case because he sustained his injuries as a result of circumstances unrelated to his reason for being on the property.

---

1/ Footnote omitted - contained in appendix.

2/ Footnote omitted - contained in appendix.

We agree that genuine issues of fact exist and reverse the summary judgment in favor of Sklar; we affirm, however, as to Dr. Ferrer.

Chapter 767 renders dog owners strictly liable for damages or injuries to persons caused by their dogs. Sections 767.01, 767.04. The Florida supreme court has consistently ruled that section 767.04 supersedes the common law and, therefore, abrogates common-law defenses in situations covered by the statute. Noble v. Yorke, 490 So.2d 29 (Fla. 1986); Belcher Yacht, Inc. v. Stickney, 450 So.2d 1111 (Fla. 1984); Donner v. Arkwright-Boston Manufacturers Mutual Insurance Co., 358 So.2d 21 (Fla. 1978); Carroll v. Moxley, 241 So.2d 681 (Fla. 1979). Thus a dog owner may no longer assert the fireman's rule as a defense against recovery by a police officer who enters on private property "in the performance of any duty imposed upon him by the laws of this state...." Section 767.04. In Rattet v. Dual Security Systems, Inc., 373 So.2d 948 (Fla. 3d DCA 1979), cause dismissed, 447 So.2d 887 (Fla. 1984), this court held that the defenses available in section 767.04 are also applicable to causes of action accruing under section 767.01. Accordingly, in light of the interrelationship of the two statutes, and the case law interpreting section 767.04, we hold that the fireman's rule does not protect a dog owner in a lawsuit for damages under section 767.01.

Because the fireman's rule is not a defense under sections 767.01 or 767.04, appellees may avoid liability in this case only if they prove one of the statutory defenses in section 767.04 or if they do not own the dogs. The record reveals genuine factual issues as to whether Alfred Sklar established the statutory defense by posting an easily readable "bad dog" sign in a prominent place. See, Carroll; Kaiser v. Baley, 474 So.2d 906 (Fla. 5th DCA 1985); cf. Noble (statutory defense does not apply where dog owner affirmatively directs invitee to ignore warning sign); Belcher Yacht (business invitee could not recover from dog owner where invitee saw and understood sign); Rattet (evidence showed sign had been posted for substantial period of time even though witnesses testified they did not notice sign on date of incident). We therefore reverse the summary judgment as to Alfred Sklar and remand the cause for further proceedings.

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. See, Belcher Yacht; Flick v. Malino, 356 So.2d 904 (Fla. 1st DCA 1978); Smith v. Allison, 332 So.2d 631 (Fla. 3d DCA 1976); Christie v. Anchorage Yacht Haven, Inc., 287 So.2d 359 (Fla. 4th DCA 1973). Furthermore, because Dr. Ferrer is not within the purview of Chapter 767, the firman's rule applies and precludes Kilpatrick's action against her. See, Smith v. Markowitz, 486 So.2d 11 (Fla. 3d DCA 1986); Rishel v. Eastern Airlines, Inc., 466 So.2d 1136 (Fla. 3d DCA 1985); Price v. Morgan, 436 So.2d 1116 (Fla. 5th DCA 1983), reviewed denied, 447 So.2d 887 (Fla. 1984); Whitten v. Miami-Dade Water & Sewer Authority, 357 So.2d 430 (Fla. 3d DCA), cert. denied, (Fla. 1978); see generally, W. Prosser & W. Keeton, Torts Section 61 (5th ed. 1984). We therefore affirm that portion of the summary judgment exonerating Dr. Ferrer. We find no merit in the other points. Affirmed in part; reversed in part; remanded with directions.

#### SUMMARY OF ARGUMENT

It is submitted that this case is a misapplication of two Supreme Court cases concerning dog bites, as well as being in express and direct conflict with cases concerning the "Fireman's Rule", one of which cases is pending on certification to the Florida Supreme Court.

In the present case a policeman was investigating a possible burglary at the Defendant's residence one night after dark. The policeman did not want to alert the possible burglar by walking in through the front gate, so he went to the back of the house and climbed over the top of a wrought-iron fence in the dark. While creeping through the backyard he became alerted by the Defendant's barking dogs in the backyard, ran back to jump over



the fence and while going over the top cut his leg and became allegedly permanently disabled. He is now suing the landowner for over \$1 million dollars.

It is submitted that this is the classic case which is barred by the Fireman's Rule. Therefore, it is in express and direct conflict with the cases precluding liability of the homeowner or business owner to the fireman or policeman by the "Fireman's Rule".

Additionally, this decision is based on a misapplication of two cases of the Supreme Court which concern dog bites. Those cases do not state that the Fireman's Rule would not be a defense in a situation such as the present one, involving an injury to a policeman who went on the homeowner's property in the pursuit of his duties.

#### ARGUMENT

- I. THE DECISION IN THIS CASE IS IN EXPRESS AND DIRECT CONFLICT WITH SANDERSON V. FREEDOM SAVINGS & LOAN ASSOC., 11 F.L.W. 2298 (Fla. 1st DCA, Oct. 30, 1986) (WHICH IS PENDING ON CERTIFICATION IN THE FLORIDA SUPREME COURT); WHICH HOLDS THAT WHEN A FIREMAN OR POLICEMAN IS INJURED ON THE DEFENDANT'S PREMISES IN THE PURSUIT OF HIS OFFICIAL DUTIES, A SUIT AGAINST THE LANDOWNER OR BUSINESS OWNER IS BARRED BY THE "FIREMAN'S RULE."

It is submitted that the decision of the Third District Court of Appeal is in express and direct conflict with the Sanderson case cited above.

It should be noted that the Sanderson case is pending in the Florida Supreme Court on certification.

The Sanderson case is the most recent manifestation of the long line of cases in Florida which hold that when a fireman or a policeman is injured on the defendant's premises in the pursuit of his duties as a fireman or policeman, that a lawsuit against the landowner is barred.

Under the Fireman's Rule, the owner of premises is not liable to a policeman or a fireman for injuries sustained on the premises while the policeman or fireman is discharging his public duties. In Florida, there is no doubt that the Fireman's Rule applies to police officers as well as to firemen. Whitten v. Miami-Dade Water and Sewer Authority, 357 So.2d 430 (Fla. 3d DCA 1978); Wilson v. Florida Processing Company, 368 So.2d 609 (Fla. 3d DCA 1979); Rishel v. Eastern Airlines, 466 So.2d 1136 (Fla. 3d DCA 1985); See also, Price v. Morgan, 436 So.2d 1116 (Fla. 5th DCA 1983).

The landowner's immunity is based on two theories of law. The cases uniformly hold that the policeman or fireman has the status of a licensee while on the landowner's premises in the discharge of his duty. The landowner's duty therefore is to refrain from wanton negligence or willful misconduct which might injure the licensee, and to warn of any dangerous conditions known to the landowner and not apparent to the licensee. Adair v. The Island Club, 225 So.2d 541 (Fla. 3d DCA 1969); Hall v.

Holton, 330 So.2d 81 (Fla. 2d DCA 1976). The landowner must not only have knowledge of the dangerous condition, he must also have knowledge that the policeman or fireman is on the premises and is about to be exposed to the danger. Romey v. Johnston, 193 So.2d 487 (Fla. 1st DCA 1967). Under the licensee theory, the landowner has absolute immunity from suit absent some grossly negligent conduct. This Court has recently reaffirmed the police officer's status as a licensee in Smith v. Markowitz, supra.

The facts of this case underscore the reason for the "Fireman's Rule". Fireman and policemen take unique risks in their line of duty, and they are trained as to these.

Prosser gives this exact example as the reason for the "Fireman's Rule":

Perhaps the most legitimate basis for the distinction lies in the fact that firemen and policemen are likely to enter at unforeseeable times, upon unusual parts of the premises, and under circumstances of emergency, where care in looking after the premises and preparation for the visit, can not reasonably be looked for. A person who climbs in through a basement window in search of a fire or a thief does not expect any assurance that he will not find a bull dog in the cellar, and he is trained to be on guard for any such dangers inherent in the profession.

Prosser on Torts, Section 61 (5th Ed.)

The decision in the present case is in express and direct conflict with the long lines of cases, as manifested most recently by Sanderson, which is pending on certification in the

Supreme Court.

11. THE DECISION IN THE PRESENT CASE IS BASED ON A MISAPPLICATION OF BELCHER YACHT, INC. V. STICKNEY, 450 So.2d 1111 (Fla. 1984); AND NOBLE V. YORKE, 490 So.2d 29 (Fla. 1986).

The decision in the present case by the Third District also is based on a misapplication of the Belcher Yacht, Inc. v. Stickney and Noble v. Yorke cases.

In the first place, both of those cases involve a dog bite.

However the present case does not involve a dog bite, but only an injury caused when the policeman climbed over the fence into the backyard at night, was scared by barking dogs and injured himself while climbing back over the fence. Therefore the dog bite statutes would not apply in this situation.

Moreover, these two cases by the Florida Supreme Court should not be read so broadly as to be held to mean that the Fireman's Rule is not a defense to injury to a policeman in this type of situation when he climbs over the top of a fence into someone's backyard at night in pursuit of his duties. These cases have been misapplied as to the present situation.

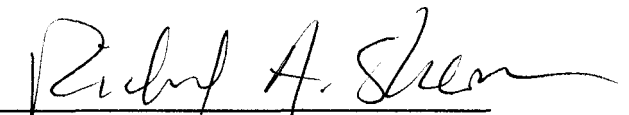
Neither case discusses the Fireman's Rule in any matter and it is submitted that it is clearly a misapplication of these cases to hold that it would apply to alleviate liability in the present situation.

It simply does not follow from the Belcher Yacht, Inc. v. Stickney and Noble v. Yorke cases whatsoever that liability would attach to a homeowner when he has dogs in his backyard fenced in, a policeman is investigating a burglary one night and does not want to alert the burglar by walking in the front door, therefore comes around to the back of the yard and climbs over a fence into the backyard at night, becomes scared by the barking dog and when climbing back over the fence cuts his leg, becomes permanently disabled and is now suing the homeowner for over a million dollars. This is the exact type of situation the Fireman's Rule was designed to prevent.

CONCLUSION

The decision in the present case is in conflict with Sanderson v. Freedom Savings & Loan Assoc., supra; and with Belcher Yacht, Inc. v. Stickney, supra; and Noble v. Yorke, supra.

Law Offices of  
RICHARD A. SHERMAN, P.A.  
Suite 102 N Justice Building  
524 South Andrews Avenue  
Fort Lauderdale, Florida 33301  
(305) 525-5885 - Broward  
(305) 940-7557 - Dade

By:   
Richard A. Sherman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the fore-  
going was mailed this 5th day of February , 1987 to:


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

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

Lawrence B. Craig, Esquire  
Merritt, Sikes & Craig, P.A.  
Third Floor - McCormick Bldg.  
111 S.W. Third Street  
Miami, Florida 33130

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

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

By:   
Richard A. Sherman