A' 14

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.

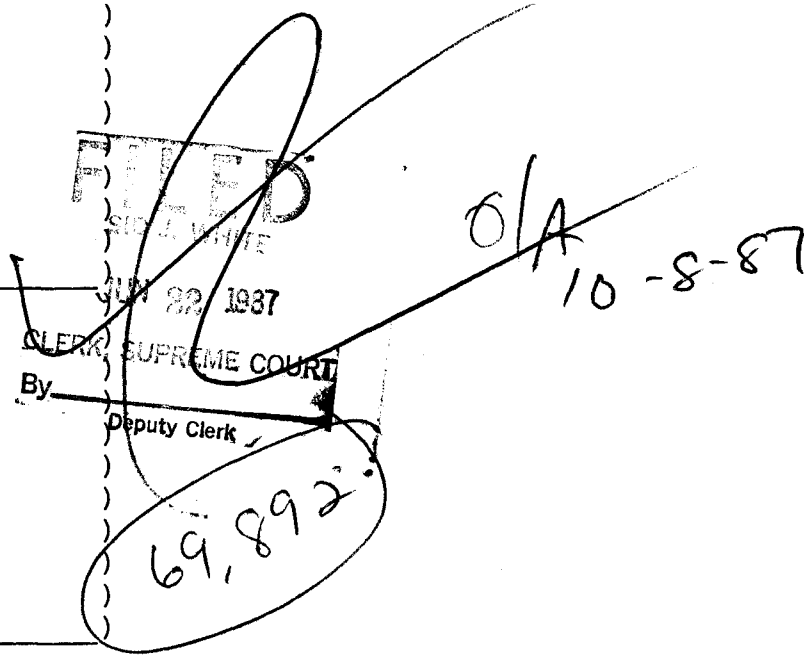
ALFRED SKLAR, et al.,

Petitioners,

vs.

OFFICER JOHN KILPATRICK,

Respondent.



O/A 10-8-87

BRIEF OF RESPONDENTS ON THE MERITS

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

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TABLE OF CONTENTS

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TABLE OF CITATIONS

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REFERENCES

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POINTS ON APPEAL

I. FIREMAN'S RULE IS FAVORED IN FLORIDA AND IS A COMPLETE DEFENSE TO ACTIONS AGAINST LANDOWNERS.

11. F.S.A. SECTION 767.04 EXPRESSLY CITES THAT POSTING OF A BAD DOG SIGN IS A COMPLETE DEFENSE TO "ANY DAMAGES" CAUSED BY A DOG.

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INTRODUCTION

The Respondents/Appellees, Alfred Sklar and United States Fidelity and Guaranty Company will be referred to in the singular as Mr. Sklar or Respondent.

The Respondent/Appellee, Dr. Olga Ferrer (Mrs. Alfred Sklar) will be referred to as Dr. Ferrer or Defendant.

The Petitioner/Appellant, John Kilpatrick, will be referred to as Kilpatrick or Plaintiff.

The Record will be designated by the letter "R". The Transcript of the proceeding before the Court on October 17, 1985 appears in the Record at 734-755.

All emphasis in the Brief is that of the writer.

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STATEMENT OF FACTS

This is the classic case that is barred by the "Fireman's Rule" both as to Alfred Sklar as the landowner/dog owner and as to Mrs. Sklar, landowner.

The Plaintiff, Officer Kilpatrick, was injured while investigating a possible burglary on the Defendants' premises. He climbed over a wrought iron fence in the backyard in the dark, and while being chased by Defendants' dogs, he attempted to leap back over the wrought iron fence and suffered injuries to his leg. The Defendants were not at home at the time, and were not aware of the Plaintiff's presence on their property. There was at least one if not four signs on the premises warning of **dogs.** It was undisputed that there was a sign on the gate through which a regular invitee would enter the backyard, and probably two more were posted. The Petitioner simply restates numerous times that no police officer saw a bad dog sign on the back fence of the Defendants' house that night or on the fence that Kilpatrick jumped over.

On October 10, 1981, Officer Kilpatrick and his partner were patrolling in the Coconut Grove area (R 430,441). At about 9:10 p.m. they heard a burglar alarm coming from a house at 1889 South Bayshore Drive (R 442). The officer jumped over a three foot concrete fence and investigated the front yard and the front of the house (R 443). They noticed a six to seven foot chain-link fence which separated the front and backyards (R 444). They then drove around to the back of the house, where they found a large wrought iron fence with spikes sticking out of the top.

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The gate was closed and locked (R 447). Officer Kilpatrick noticed that one of the back windows was open (R 448).

The Plaintiff testified that he was aware that there were dogs in the neighborhood. He had previously investigated cases in the vicinity where people had dogs (R 446-447). In fact, he heard dogs barking just before he entered the premises on this particular night (R 446). Therefore Officer Kilpatrick testified that he beat on the gate with his flashlight for several minutes in order to arouse any dogs that might be in the yard (R 448). He thought there might be dogs in the yard (R 559).

Both officers then jumped over the wrought iron fence and proceeded toward the open window at the back of the house (R 450). There were flood lights in the backyard which extended about 25 feet from the house (R 459). About five feet from the window, Officer Kilpatrick saw some dogs running towards him (R 452). He immediately turned and ran back towards the gate (R 453). The dogs were not barking when he first noticed them, but they started barking when he started running (R 566). As he was jumping over the fence, one of the spikes got caught between his boot and his leg. The spike went into his leg and caused a six inch wound in his calf (R 457-458) The dogs that chased Officer Kilpatrick were Great Danes (R 453). Officer Kilpatrick testified that he was familiar with Great Danes, because his brother-in-law owned one (R 453). The officer said that he himself had owned dogs most of his life, and that he had a Labrador Retriever (R 454). He testified that he did a lot of hunting and fishing since the accident (R 534-553).

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Photographs taken by a police investigator on the night of the incident indicate that there was at least one sign on the premises warning of dogs. The trial court determined that there was no fact questions since it was undisputed that at least one warning sign was present the night Kilpatrick was injured.

> THE COURT: Isn't the testimony clear that at least one sign was up, perhaps not two but at least one was up?
>
> MR. SHIELDS: Your Honor, I would respectfully show the court the pictures. Every police officer has testified and the pictures show---they are right here, Your Honor. These were identified as part of the record.
>
> THE COURT: The police testified to one thing but I seem to recall that in reading through the transcripts that have been made part of the record that the parties living in the house said that at least one sign was up, that the other one they had seen the day before but that two days later it wasn't there. So I still haven't any question of fact on the signs.
>
> MR. SHIELDS: Your Honor, the sign in question is seen in this picture if you go onto the premises. And once you are on the premises and in the jurisdiction of the dogs, if you look down towards Bayshore Drive and you look down that way, that is the sign.
>
> (R 746)

The sign Mr. Shields was referring to was the second dog sign. It was never disputed the fact that at least one other warning sign was posted on the perimeter of the property, and the second appeared in the police photo taken the night of the incident.

> THE COURT: I have understood the testimony from at least the deposition of the owners of the property that at least one of the signs

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> on the perimeter was up and the other one was probably up.
>
> (R 748)
>
> THE COURT: And there was one sign up, everybody agrees.
>
> MR. SHIELDS: Your Honor, respectfully there is a question as to where.....
>
> (R 850-851)

The Plaintiff did not refute the landowners' testimony that the dog warning signs were posted prior to this incident (Brief of Appellant Kilpatrick at 8; R 774).

The trial court entered a Summary Judgment in favor of the Defendants, holding the suit barred by the Fireman's Rule (R 862). The Plaintiff's Motion for Rehearing was denied and the Plaintiff appealed (R 414, 415).

On appeal the Third District reversed the Summary Judgment in favor of Alfred Sklar. Kilpatrick v. Sklar, 497 So.2d 1289, 1291 (Fla. 3d DCA 1986). It affirmed the Judgment for Mrs. Sklar stating:

> As to Dr. Ferrer (Mrs. Sklar) 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 fireman'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), review denied, 337 So.2d 887 (Fla. 1984); Whitten v. Miami-Dade Water & Sewer

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Authority, 357 So.2d 430 (Fla. 3d DCA), cert. denied, 364 So.2d 894 (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.

Kilpatrick, 1291.

This is a classic case showing the reason for the "Fireman's Rule"; without it homeowners or businessmen could not risk having a policeman or fireman come onto the property because the liability to the policeman or fireman would be far more that what a burglar could steal, or what the house would be worth; as evidenced by the present million dollar lawsuit against the homeowners.

The opinion below created confusion, as evidenced by the fact that both sides sought review in this Court.* The Respondents respectfully assert that the Fireman's Rule is a valid defense to a dog injury, as is the posting of warning sign and that these defenses apply to both Mr. and Mrs. Sklar. There is no legal precedent to reverse the Summary Judgment entered in favor of Dr. Ferrer (Mrs. Sklar) and Kilpatrick presents no authority or rationale whatsoever for abolishing the Fireman's Rule or the statutory bad dog sign defense.

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* This Brief will address the issues raised by the Plaintiff/Petitioner, Kilpatrick. Additional matters were addressed in the Brief of Petitioner, Sklar previously file in this case.

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SUMMARY OF ARGUMENT

The Petitioner presents no legal authority whatsoever to support his position that this Court should abolish the Fireman's Rule. The facts of this case present the classic example of the circumstances under which the Fireman's Rule is needed and must be applied.

What transpired was that the Plaintiff police officer was investigating a possible burglary at the Defendants' 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 the wrought iron fence in the dark. While creeping through the backyard in the dark, the Defendant's dogs came running toward the Plaintiff barking. The Plaintiff ran back to the fence, and when climbing over the top cut his leg.

It is important to remember that there was no dog bite. The policeman was scared by the dogs and injured himself by climbing over the fence to get out of the backyard.

Therefore this is the classic example of the reason for the Fireman's Rule - the policeman has come on the property to investigate a burglary and is injured in the course of that pursuit, and is prevented from suing the landowner by the "Fireman's Rule".

Additional facts are that there was at least one warning sign on the gate through which a regular person would walk into the backyard where the dogs were. However the policeman did not want to alert a possible burglar by walking through the front

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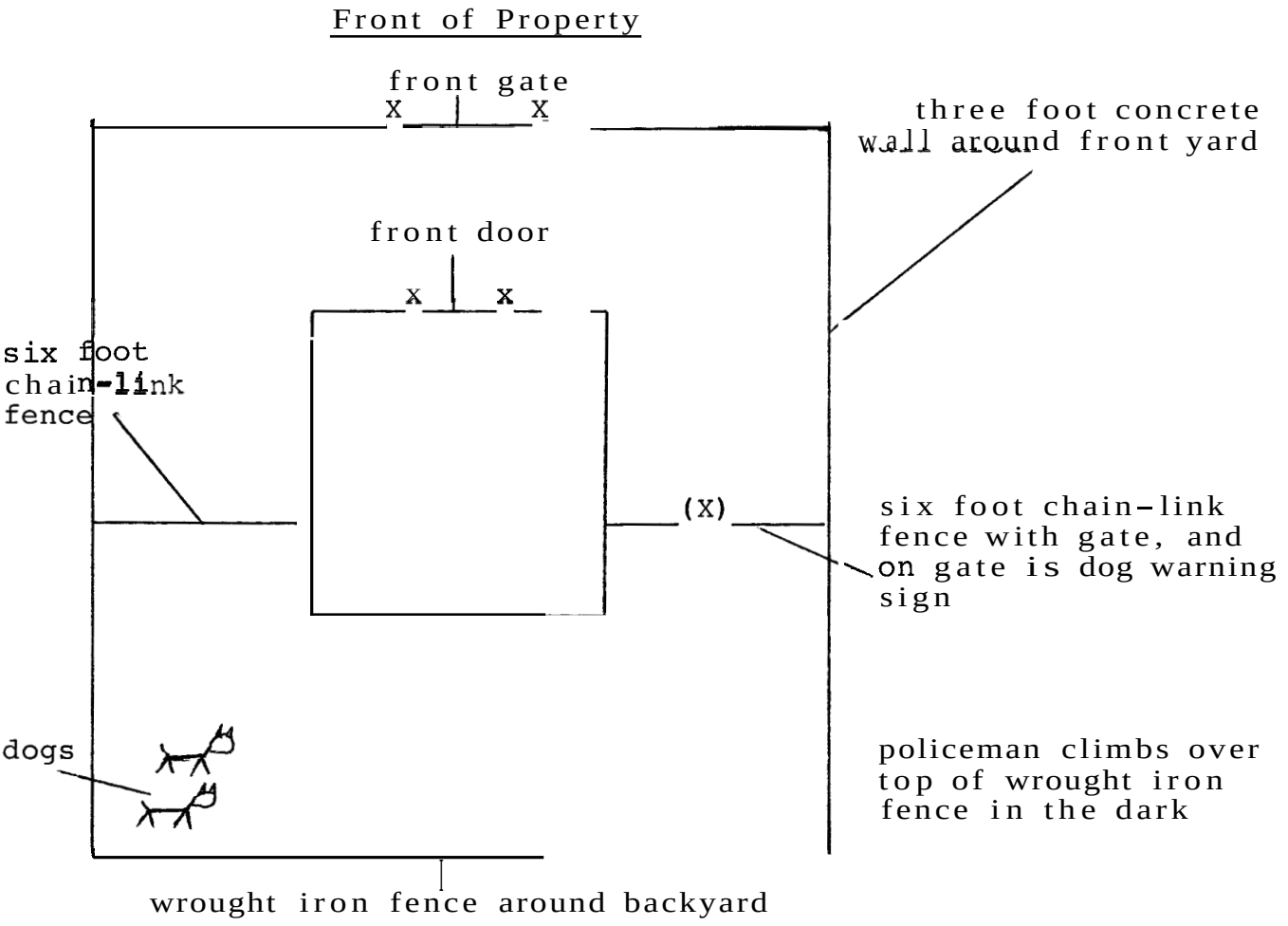
gate so he went to the back and climbed over the top of the wrought iron fence.

A diagram of the yard is as follows:



Therefore there was a dog warning sign to warn a regular invitee who would come in through the front gate, and walk to the gate that went to the backyard. There was a sign on that gate to the backyard. However the policeman did not go through that gate because he did not want to alert a burglar, but instead went around in the dark to the backyard and climbed over the top of

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the wrought iron fence in the dark.

The Fireman's Rule is highly favored in Florida and throughout the nation and this is the classic case where it must be applied. Rishel v. Eastern; Sanderson v. Freedom Savings, infra. Kilpatrick has cited only a single jurisdiction which has abrogated this rule and has presented no rationale for this Court to act in contravention of Florida's strong public policy and the vast majority of jurisdictions throughout the nation. Kilpatrick's assertion that he was an invitee is clearly contrary to established law in Florida and is but another attempt to circumvent the Fireman's Rule. Smith v. Markowitz, infra. Equally untenable is his argument that the landowners created a hidden dangerous condition by turning on the burglar alarm and leaving their home, while their dogs were present in the fenced-in yard.

Kilpatrick has presented no persuasive argument or authority for abolishing the Fireman's Rule. There are no facts in this case that fall into an exception to the rule, such that the Sklars could be liable for willful and wanton negligence. This Court should uphold the Fireman's Rule for strong public policy reasons to prevent the very type of lawsuit as the present situation, where the policeman is investigating a burglary, climbs over a fence at night into a backyard, is scared by dogs and is now suing the landowners for over a million dollars in damages.

Based on the Third District's denial of the use of the "Fireman's Rule" defense in this case, the Petitioner now claims

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that even the statutory defense of putting up a "Bad Dog" sign does not apply because the policeman was not bitten by the dogs. This argument is a misapplication of the statutory scheme, legislative intent and Florida case law.

Under the statutes, the posting of a "Bad Dog" sign is an absolute defense to "any damages" or injury caused by a dog. The statute expressly states that the owner shall not be liable for "any damages" if he posts a sign that says "Bad Dog". F.S.A. Section 767.04. This is consistent with Florida case law which has found that defenses available under Section 767.04, also apply to injury cases. Stickney v. Belcher Yacht; Vandercar v. David; Xnapp v. Ball;, infra. Therefore even if the Fireman's Rule defense were not involved, the posting of a bad dog sign is an absolute defense to the policeman's claim based on the injury caused by a dog.

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I. FIREMAN'S RULE IS FAVORED IN FLORIDA AND IS A COMPLETE DEFENSE TO ACTIONS AGAINST LANDOWNERS.

It is important to remember that the Plaintiff police officer was invest gating a possible burglary at the Defendants' 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 the wrought iron fence in the dark. While climbing over the top of the fence in the dark he cut his leg on a spike on the top of the fence. He is now seeking over a million dollars in damages from the landowners.

Therefore this is the classic example of the reason for the Fireman's Rule - the policeman has come on the property to investigate a burglary and is injured in the course of that pursuit, and is prevented from suing the landowners by the "Fireman's Rule".

The facts are that there was a warning sign on the gate through which a regular person would walk into the backyard where the dogs were. However the policeman did not want to alert a possible burglar by walking through the front gate so he went to the back and climbed over the top of the wrought iron fence.

The Petitioner/police officer is asking this Court to abrogate the Fireman's Rule in Florida, but presents no authority or rationale to do away a defense that is strongly favored in Florida and throughout the United States. Sanderson v. Freedom Savings & Loan Ass'n, 496 So.2d 954 (Fla. 1st DCA 1986). In 26 pages of argument Kilpatrick cited a single jurisdiction that has

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abolished the rule. All the remaining cases relied upon by the Petitioner allow for recovery by a police officer under the exact same circumstances as Florida law. Romedy v. Johnston, 193 So.2d 487 (Fla. 1st DCA 1967) (landowner owes duty to licensee to refrain from wanton negligence or willful misconduct); Lipson v. Superior Court of Orange County, 182 Cal.Rptr. 629, 644 P.2d 822 (1982) (in California Fireman's Rule never construed to shield defendant from liability for acts of misconduct, independent from these which necessitated the calling of the fireman; therefore he can recover for negligent or intentional misconduct).*

The Petitioner fails to cite *any* authority for his assertion that a police officer is an invitee, because "for all intents and purposes" he was directly invited to the premises by the ringing of the Defendants' burglar alarm. Once again Florida law is clearly contrary to Kilpatrick's position, as it has been repeatedly established that a policeman or fireman is a licensee and not an invitee. Smith v. Markowitz, 486 So.2d 11, 12 (Fla. 3d DCA 1986) rev. denied, 494 So.2d 1153 (Fla. 1986):

> First, under Florida law, the plaintiff officer herein [Robert E. Smith] was a licensee on the property owned by the defendant Markowitz and managed by the defendant Bonded Rental Agency, Inc. when the plaintiff entered the said property chasing a criminal suspect who had allegedly been involved in an illegal drug transaction in the area. We decline to recede from or

* The Petitioner also misconstrues the law on assumption of the risk when he erroneously claims that Florida has done away with this defense. In Blackburn v. Dorta, 348 So.2d 287 (Fla. 1977) the Supreme Court held that implied assumption of the risk was not a complete bar to recovery, but it merged with the newly adopted doctrine of comparative negligence. Hall v. Holton, 330 So.2d 81 (Fla. 2d DCA 1976) (assumption of the risk merges with and becomes a phase of comparative negligence).

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> distinguish as urged the cases in this area of law so as to make he said plaintiff an invitee on the subject property. (Citations omitted)

Florida courts have consistently rejected the argument that a landowner can be liable for a negligent condition on or off the premises. Rishel v. Eastern Airlines, Inc., 466 So.2d 1136, 1138 (Fla. 3d DCA 1985).

> The Fireman's Rule, as generally framed, provides that an owner or occupant of property is not liable to a police officer or firefighter for injuries sustained during the discharge of the duties for which the policeman or fireman was called to the property. See Price v. Morgan, 436 So.2d 1116 (Fla. 5th DCA 1983); review denied, 447 So.2d 887 (Fla. 1984); Whitten v. Miami-Dade Water & Sewer Authority, 357 So.2d 430 (Fla. 3d DCA 1978). Contrary to appellants' assertion, the fireman's rule, as applied in Florida, is not limited to cases involving a negligent condition on the premises. This court has held that absent a showing of willful and wanton misconduct, neither a fireman nor a policeman may recover from a property owner for injuries arising out of the discharge of professional duties, even though the injuries have not occurred on the premises. Wilson v. Florida Processing Co., 368 So.2d 609 (Fla. 3d DCA 1979); Whitten.

Kilpatrick argues that it is something more than negligence to have fenced-in dogs on the property and to fail to warn of their presence, or in the alternative, that is a separate act of negligence for homeowners to turn on their burglary alarm and leave their home, while their dogs were on the grounds. This feeble attempt to avoid the Fireman's Rule, overlooks the basic law involved.

A landowner only owes one duty to a policeman and that is to refrain from willful misconduct, wanton negligence and warn of a

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dangerous condition which is not open to ordinary observation by the officer. Whitten v. Miami-Dade Water & Sewer Authority, 359 So.2d 430 (Fla. 3d DCA 1978). The Sklars turned on their burglar alarm and went out for the evening. The dogs were on the fenced-in property, containing at least one dog warning sign. These acts cannot be viewed as wanton negligence, willful misconduct or a "hidden dangerous condition" rendering the landowners liable. No case in Florida has held this.

Under Florida law Kilpatrick has no cause of action against the landowners for negligence because they breached no duty of care owed to him. The Summary Judgment in favor of Dr. Ferrer must be affirmed as it reflects correct Florida law.

Strong Public Policy Favor Landowner's Immunity Under Fireman's Rule

Under the Firemen'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 Firemen's Rule applies to police officers as well as to firemen. Whitten, supra.

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. 2d DCA 1969); Hall v.

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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. Romedy v. Johnston, supra. Under the licensee theory, the landowner has absolute immunity from suit absent some grossly negligent conduct. The Third District has recently reaffirmed the police officer's status as a licensee in Smith v. Markowitz, supra. The Plaintiff's assertion that he was "invited" on the premised by the ringing burglar alarm and thus was an invitee, is contrary to the wealth of case law that holds that a policeman is a licensee when he is discharging his public duties. Smith, supra; Adair, supra; Romedy, supra 491:

> The position taken by appellant has been considered and passed upon by other courts in cases similar to the one now before us for review. This contention has been rejected for the reason that firemen, in the performance of their duties in attempting to extinguish fires and preserve property, enter upon the premises of others by permission of law and not at the invitation of the owner.

The Plaintiff alleges negligent conduct on the part of the Defendants in setting the alarm and leaving home; allegedly this created a dangerous condition when combined with having dogs in the yard. However Kilpatrick cites no legal authority that holds that these routine acts are negligent conduct, let alone willful negligence. Kilpatrick responded to the ringing burglar alarm, and was investigating the possible burglary when he was injured. The act of setting the alarm and leaving the house cannot be viewed as a separate act of negligence on the part of the

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landowners, for it was the alarm that summoned the police in the first place.

Furthermore the Plaintiff did not cite any case law that holds that the presence of dogs in a fenced-in yard is a hidden dangerous condition. The Plaintiff's own testimony refutes any possibility of a hidden danger, when he admitted hearing dogs bark and admitted that he suspected that dogs were present in the Defendants' yard (R 446,559).

Rather he now argues on appeal that the presence of dogs, without a warning, combined to create a totally unexpected situation. This assertion flies in the fact of the Record below where he admitted that he thought dogs were present on the property and banged on the gate with a flashlight to arouse them. It was undisputed that at least one dog warning sign was present. Under no view of the facts, nor under any legal authority could it be found that a hidden dangerous condition existed on the Sklars' property.

In Rishel v. Eastern Airlines, supra, the Third District once again noted that there are strong public policy reasons to support the application of the Firemen's Rule. In that case an agent of Eastern called the police to remove a drunken passenger from the airplane. The passenger later attacked the police officer. The police officer's complaint against Eastern alleged that the agent failed to warn the officer of the violent propensities of the passenger. The court affirmed a dismissal of the policeman's complaint, holding that the Firemen's Rule barred the policeman's cause of action.

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> We adhere to the view that strong public policy considerations support application of the Firemen's Rule to cases such as the present one. The Firemen's Rule permits individuals who require police or fire department assistance to summon aid without pausing to consider whether they will be held liable for consequences which, in most cases, are beyond their control. There is no question that police and fire fighters work in hazardous occupations at great personal risk. See Hannah v. Jensen, 298 N.W.2d 52 (Minn. 1980). It is because these dedicated public officials are willing to assume the risks attendant to their routine duties that citizens are able to rely on their protection. We are reluctant to undermine the security offered by these public servants through the imposition of liability on citizens who fail to warn police or fire fighters of the potential dangers inherent in the tasks they are called upon to perform.
>
> Rishel at 1138.

Nothing is more common place or expected that the presence of dogs in a fenced-in yard. This is why the Fireman's Rule defense is viable especially in the present case where the policeman climbs over a fence at night into a backyard, is scared by dogs in the yard, and is now suing the homeowner for over one million dollars.

The facts are that there was a warning sign on the gate through which a regular person would walk into the backyard where the dogs were. However the policeman did not want to alert a possible burglar by walking through the front gate so he went to the back and climbed over the top of the wrought iron fence.

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

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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.
>
> W. PROSSER, THE LAW OF TORTS, 429, Section 61 (5th Ed. 1986)

Closely on point is Smith v. Markowitz, supra, where the police office was chasing a criminal across the defendant's yard and tripped over a pipe and was injured. The court in affirming the summary judgment for the defendant reaffirms the status of the policeman as a licensee and not a business invitee. Smith, 12. Next the Court states that the duty owned to the officer is that of refraining from wanton negligence, unfair conduct and to warn of hidden dangers. Smith, 12. Finally the court finds that the pipe was open to ordinary observation and not a latent or hidden danger.

> Third, it appears without genuine material dispute that the above-ground water pipe, over which the plaintiff stumbled and fell while on the subject property, was open to ordinary observation and represented, in no sense, a latent or hidden danger. It is also plain, as a matter of law, that the maintenance of this water pipe did not amount to wanton negligence or willful conduct by the defendant. This being *so,* there can be no negligence liability attached to the

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> defendants for the plaintiff's injuries in this case.
>
> Smith at 12.

Similarly the presence of dogs on the Sklar premises was not a latent or hidden danger and did not form a trap for the officer. This is true especially in light of Kilpatrick's undisputed testimony that he was aware of dogs in the vicinity, heard dogs barking, thought dogs might be present in the yard, and banged on the gate to arouse the dogs before climbing over the fence.

The most recent case reaffirming the Fireman's Rule is Sanderson v. Freedom Savings, supra, which is currently pending before this Court. Two men robbed a bank and the police officer went to the scene. A bank employee warned the robbers about the presence of police. One robber went out the back door, circled around to the front of the bank and fatally shot the officer. The trial court dismissed the plaintiff's complaint because of the Fireman's Rule, noting that the rule is highly favored in Florida.

> As shown by this Court's opinion in Romedy v. Johnston, 193 So.2d 487 (Fla. 1st DCA 1967), the fireman's rule is favored in Florida. According to that rule, a fireman who enters upon the premises of another in the discharge of his duty occupies the status of a licensee so that the owner of the premises only owes him the duty to refrain from wanton negligence or willful-misconduct which would injure him. As explained in Romedy, the fireman's rule is a policy decision designed to protect owners of property since to require an owner of premises to exercise, in regard to firemen acting in an emergency situation, the high degree of care owed to an invitee would be impractical and unreasonable. The licensee concept set forth in Romedy has been applied to policemen so that they are

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> also included within the strictures of the fireman's rule. Whitten v. Miami-Dade Water & Sewer Authority, 357 So.2d 430 (Fla. 3d DCA 1978).

Sanderson, 955.

The plaintiff argued on appeal that even simple negligence on the part of the landowner abrogates the applicability of the Fireman's Rule. The First District disagreed holding:

> ... [T]he fireman's rule bars recovery in personal injury and wrongful death actions when the cause of action is based upon an injury sustained by the 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.

Sanderson, 956.

The term wanton negligence is not synonymous with gross negligence, but with willful and wanton misconduct sufficient to support a judgment for exemplary or punitive damages or a conviction for manslaughter. White Construction Co. Inc. v. Dupont, 455 So.2d 1026 (Fla. 1984); Preferred Risk Mut. Ins. Co. v. Saboda, 489 So.2d 768 (Fla. 5th DCA 1986). Kilpatrick has alleged no facts that rise to the level of wanton negligence on the part of the Sklars, sufficient to circumvent the application of he Fireman's Rule defense and therefore the landowners are immune from liability.

Contrary to what the Petitioner asserts, the Firemen's Rule is uniformly applied in other jurisdictions to bar a policeman's cause of action for injuries occurring in the discharge of his duties. The rule is even applied in the situation where the office goes onto the premises to investigate a crime and then is

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injured by some event unrelated to the performance of his duties. In Sherman v. Suburban Trust Company, 282 Md. 238, 384 A.2d 76 (1978), the plaintiff police officer went onto bank premises to investigate an attempt to negotiate a forged check. While he was interviewing a teller, he bent over to pick up a check and struck his back on a coin changing machine. The court affirmed a summary judgment for the bank, holding that the police officer was a licensee and the landowner's only duty was to refrain from willful or wanton misconduct or entrapment. In Scheurer v. Trustees of the Open Bible Church, 175 Ohio St. 163, 192 N.E.2d 38 (1963), the policeman went on to church premises to investigate a possible burglary and he fell into an unguarded excavation on the church property. The court again held that the policeman was a mere licensee, and that there could be no liability where the landowner did not know of the policeman's presence on the premises and therefore had no opportunity to warn him of the danger. Similarly in Nared v. School District of Omaha, 191 Neb. 376, 215 N.W.2d 115 (1974), the policeman responded to a school burglar alarm and was injured when he fell through a false ceiling in the school attic. The court held as a matter of law that the defendant did not breach any duty to the police officer, since the defendant was not present on the premises when the accident occurred and had no reason to anticipate the presence of the officer on the premises. See also, Cook v. Demetrakas, 275 A.2d 919 (R.I. 1971); Burroughs Adding Machine Co, v. Fryar, 132 Tenn. 612, 179 S.W. 127 (1915).

In W. PROSSER, THE LAW OF TORTS, 429 Section 61 (5th Ed.

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1986), the author states that recent court decisions have expanded the foundation and application of the Firemen's Rule, reasoning that firemen and policemen are professionally trained to deal with dangerous situations on a regular basis and must be held to assume the normal apparent risks that are to be expected in encountering such hazards.

In summary, the Firemen's Rule has been uniformly applied throughout the country to bar a policeman's cause of action against the landowner for injuries received in the course of his duties. The Third District correctly affirmed the Summary Judgment for the landowner. The Petitioner has presented virtually no case law which abrogates the Fireman's Rule or modifies it to allow for recovery for simple negligence. This Court should uphold the Fireman's Rule for strong public policy reasons, to prevent the very type of lawsuit as the present case, where the policeman is investigating a burglary, climbs over a fence at night into a backyard, is scared by dogs in the yard, and is now suing the landowners for over a million dollars in damages.

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11. F.S.A. SECTION 767.04 EXPRESSLY STATES THAT POSTING OF A BAD DOG SIGN IS A COMPLETE DEFENSE TO "ANY DAMAGES" CAUSED BY A DOG.

The Petitioner erroneously claims that the defenses listed in Section 767.04 are not available if the dog causes personal injury, but does not bite the plaintiff. This position ignore the express language of the statute which says:

> .... no owner of any dog shall be liable for any damages to any person or his property when such person shall mischievously or carelessly provoke or aggravate the dog inflicting such damage; nor shall any such owner be so liable if at the time of any such injury he had displayed in a prominent place on his premises a sign easily readable including the words "Bad Dog".

F.S.A. Section 767.04.

The Petitioner misapplies the dicta in Sweet v. Josephson, 173 So.2d 444 (Fla. 1965) (which expressly found that Section 767.04 did not repeal the strict liability statute, Section 767.01, and that Section 767.04 allowed a suit to be brought by a plaintiff against a dog owner, where the Plaintiff was injured but not bitten); and Stickney v. Belcher Yacht Inc., 424 So.2d 962 (Fla. 3d DCA 1983) (which unquestionably held that the posting of a "Bad Dog" sign shielded the owner from statutory liability for damages caused by a dog bite). Neither case even suggests that the "Bad Dog" sign defense is bottomed on whether the dog injured or bit the Plaintiff, Rather in Belcher Yacht Inc. v. Stickney, 450 So.2d 1111 (Fla. 1984) this Court held that the statute abrogated common law liability and that strict liability for dog bites is imposed only upon dog owners, but they are completely exonerated by the posting of a "Bad Dog" sign. See

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also, Vanderc r v. David, 96 So.2d 227 (Fla. 3d DCA 1957) (defenses of contributory negligence and inciting and provoking dog's conduct available in an action where a dog causes injury other than a bite); Knapp v. Ball, 175 So.2d 808 (Fla. 3d DCA 1965) (no rejection of defenses required due to statutorily imposed liability for dog injury).

The Plaintiff had no cause of action because the Sklars breached no duty to him under the Firemen's Rule. There is no basis for his allegations of willful or wanton negligence for failure to warn of a hidden dangerous condition (dogs in the yard). Therefore the Plaintiff attempted to impose absolute liability upon Mr. Sklar under the dog-bite statute. This strategy however ignores the fact that the Firemen's Rule prevents any action against Mr. Sklar.

Even if the Plaintiff could rely upon the dog-bite statute, he is still barred from recovery, since it was undisputed that at least one, if not two signs, warned of the presence of dogs on the premises. The Plaintiff fails to show Record support for his allegation that the trial court erroneously recognized that a warning sign was present and was a completely defense to any statutory liability. In fact the Record is quite clear, as quoted in the Statement of Facts, that it was undisputed that at least one warning sign was posted on the night of the incident.

In Florida a dog owner will not be held liable for injuries caused by his dog where the displays a sign on the premises warning of the dog's presence. F.S.A. Section 767.04. This complete defense is available in actions brought under Section

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767.01, which deals with injuries other than dog bites. Rattet v. Dual Security Systems, 373 So.2d 948 (Fla. 3d DCA 1979). Therefore this defense was available in the present case, where the dog did not bite the Plaintiff, but merely chased him and the defense barred the Plaintiff's action.

In Belcher Yacht v. Stickney, supra, the Supreme Court said that a business invitee could not recover for dog-bite injuries where the owner had posted a "Beware of Dog" sign on the fence at the entrance to the property. In this case, the plaintiff admitted that he had seen and understood the sign before entering the business premises. The court affirmed a directed verdict for the owner. In Rattet v. Dual Security Systems, supra, the facts are similar to those of the present case. Two guard dogs were chasing the plaintiff and he jumped over a fence and injured himself. There were "Warning Bad Dog" signs at 25 yard intervals along the fence, but the plaintiff testified that he did not see them. However, the evidence was convincing that the signs were there, and the court affirmed a summary judgment for the defendant dog owner. Similarly in the present case it is undisputed that warning signs were present on the premises, and that the officer claimed he did not see them (R 748). The trial court's Summary Judgment for Mr. Sklar was properly granted and must be reinstated.

In Fusinski v. Robertson, 391 So.2d 771 (Fla. 3d DCA 1980), the Third District again held that the dog owner could not be held liable for a dog bite where the owner "had posted signs in accordance with Florida Statutes". The court reversed a judgment

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for the plaintiff, who was a business invitee.

The above cases indicate that the posting of a warning sign is an absolute defense for the dog owner, even in a situation where the plaintiff says he did not see the sign. Moreover, it should be noted that in the above cases the plaintiffs were business invitees, and as such the defendant dog owners owned them a higher degree of care. The Plaintiff police officer in the present case was a licensee, and a lesser standard of care applied.

Kilpatrick misrepresents this Court's decision in Jones v. Utica Mutual Ins. Co., 463 So.2d 1153 (Fla. 1985) Jones never addressed the application of statutory defenses at all. Rather the issue in Jones was whether the strict liability statue should impose absolute liability, with no consideration of causation. In rejecting this premise, this Court states that the legislature did not intend strict liability for dog owners in every instance where the actions of a dog are a factor in an injury. The opinion finds that the rules of ordinary causation should apply. Nowhere in that decision is there any reference to what defenses are available to the dog-owner.

Along the same lines in Donner v. Arkwright-Boston Manufactures Mutual Ins. Co., 358 So.2d 21 (Fla. 1978) this Court notes that a statutory defense would be that the Plaintiff voluntarily exposed himself to the danger of a vicious dog without necessarily provoking or aggravating him maliciously or carelessly. The citing of Donner in Jones was in reference to the statute be construed to virtually make the owner an insurer of

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the dog's conduct. Jones, 1156. Donner was not cited as authority regarding defenses to dog injuries, since Jones does not address this issue at all.

This Court in Belcher Yacht held that the dog-bite statute is the exclusive remedy in a dog-bite action brought by an economic invitee against a business establishment, which owns a dog and the court affirmed the directed verdict for the defendants. The facts in the present case are quite different where the injured party was a policeman investigating a burglary and clearly not a business invitee and was injured when he jumped over the fence after being scarred by dogs. In an attempt to recover in this case the Plaintiff would have this Court completely disregard Kilpatrick's status as a working police officer, because it is clear that the Firemen's Rule does apply and bars the Plaintiff from recovery.

Even if the Fireman's Rule was not an absolute bar to the Plaintiff's action against Mr. Sklar, the dog owner, the dog statues provide that the posting of warning sign absolves the owner of liability for any damage caused by a dog, F.S.A. Section 767.04. The cardinal rule of statutory construction is that plain and unambiguous language in a statue needs no construction and creates the obvious duty to enforce the law according to its terms. Jones, supra, 1156. Van Pelt v. Hilliard, 75 Fla. 792, 78 So. 693 (1918). The statue clearly states that "no owner of any dog shall be liable for any damage ... if at the time of any such injury he had displayed in a prominent place on his premises a sign easily readable including the words "Bad Dog". F.S.A.

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767.04.

The Petitioner has no legal basis for his request that this Court abolish the Fireman's Rule and the statutory dog sign defense. The Judgment for the landowner must be affirmed and the Judgment for Mr. Sklar, landowner/dog-owner must be reinstated under the Fireman's Rule and under the statutes relating to dogs.

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CONCLUSION

The Firemen's Rule bars the Plaintiff's cause of action against the Defendants and the Summary Judgment must be affirmed for Dr. Ferrer (Mrs. Sklar) and reinstated for Mr. Sklar. There was no reversible error in the trial court's determination that the Defendants' warning signs were a complete defense to any possible liability under the dog-bite statute and the Third District's Opinion must be reversed and the Judgment reinstated for Mr. Sklar.

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