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, REPLY BRIEF AND APPENDIX TO THE ANSWER BRIEF OF ALFRED SKLAR AND UNITED STATES FIDELITY AND GUARANTY COMPANY

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PRELIMINARY **STATEMENT**

Due to the fact that this is a Reply Brief, Plaintiff will do his very best to not repeat the statements and arguments already made in great detail in previous briefs to this Court. It therefore adopts its previous preliminary statements as to the manner in which the parties will be referred to in this brief. Also, where applicable, references will be made to particular portions of previous briefs where totally repeating those arguments would serve no useful purpose at this point.

Plaintiff respectfully and adopts and incorporates as if fully set forth herein its Statement of Facts as contained in its Initial Brief on the Merits contained on Page 3 through 10 of said Brief.

ISSUES ON APPEAL

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

WHETHER THE DEFENSE OF A SIGN ALLEGEDLY ON THE PREMISES IS EVEN AVAILABLE TO A DOG OWNER FOR INJURIES CAUSED BY DOGS OTHER THAN BY A DOG BITE UNDER FLORIDA STATUTE 767.01

REPLY TO STATEMENT OF FACTS.

It should be pointed out that in the second paragraph of the Statement of Facts, the Defendants erroneously state that "the Petitioner simply restates numerous times that no police officer saw a bad dog sign on the back fence of Defendants' house that night or on the fence that Kilpatrick jumped over." As this Court has surely become aware of by this point, the Plaintiff has consistently made numerous citations to the Record that substantiate the uncontroverted facts that only one "white rectangle," presumably a sign of some sort hanging on its side, can be seen when someone is already on the premises. Even that statement may *go* too far, in favor of the Defendants, in that the picture, which no one can read in any event, was taken with the benefit of a photographer's flash.

Just prior to that erroneous statement. the totally unsupported statement is made that "there was at least one if not four *(4)* signs on the premises warning of dogs." At best, Defendants can argue that once on the

premises, someone might be able to see the purported sign, turned on its side, down what almost appears to be an alleyway on the side of the Defendants' home. The fact that this statement concerning the "sign," and other statements concerning the "sign" that have been made by Defendants throughout these briefs, is totally unsupported should become obvious.

Plaintiff respectfully refers to his previous Statement of Facts as being far more detailed in giving this Court the correct picture of what happened that unfortunate night.

Defendants refer to a portion of the argument at the hearing on the Summary Judgment, which was later reversed by the Third District Court of Appeal. In it, the undersigned counsel did state that, "Your Honor, the sign in question is seen in this picture if you *go* on to the premises. And once you are one the premises and in the jurisdiction of the dogs, if you look down Bayshore Drive, and you look down that way, that is the sign."

First of all, it should be clearly stated that the "white rectangle" does appear to be a sign of some sort. What it says, if anything, has never been established. Defendants *go* on, on Page *4* of their Respondents' Brief, to state that the undersigned counsel was referring to the "second dog sign." This is totally inexplicable. In fact, the only picture depicting anything remotely resembling a

sign was the one referred to by undersigned counsel dealing with the picture that showed the inside of the premises. Again it is clear that it is impossible for the Defendants to state that there was actually a sign or signs dealing with a "dog warning" anywhere else on the premises. If so, the references to the Record would have been apparent.

ARGUMENT

I. THE DISTRICT COURT ERRED IN AFFIRMING THE TRIAL COURT'S SUMMARY FINAL JUDGMENT IN FAVOR OF A CO-OWNER OF THE PREMISES, OLGA FERRER, BASED 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

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

II. 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 FLORIDA STATUTE *767.01.*

REPLY TO SUMMARY OF ARGUMENT AND ARGUMENT

It is strongly suggested to this Court that, contrary to the statement made by Defendants, the Plaintiff has presented a wealth of legal authority from other jurisdictions and support from this jurisdiction, that the Fireman's Rule "has seen its day." The vague allusions to of "at least one warning sign" will not be belabored any further since this Court has the opportunity of actually reading the testimony cited at great length by the Plaintiff. The obvious discrepancies and inaccuracies in the diagram again presented by the Defendants in the Summary of Argument have also been dealt with and will not be

repeated. However, Plaintiff again respectfully attaches a correct diagram to this Brief as Appendix One.

Plaintiff takes strong exception to the statement made that the Fireman's Rule "is favored in Florida and is a complete defense to actions against landowners." It is inconceivable how this statement could be made based on the fact that numerous cases have allowed a police officer or firefighter to recover when the injuries are not related to the reason why he or she were on the premises. If one were to take this implausible position, a police officer or firefighter would never be allowed to recover against a landowner under any circumstances.

Plaintiff concedes that the status of a police officer or firefighter, under most circumstances, is that of a licensee. However, the circumstances of this case, and, specifically, the testimony of Defendant Ferrer, show that the Plaintiff was invited to the premises by the burglar alarm whose avowed purpose was to call the police. In citing Smith v. Markowitz, 486 So.2d 11, (Fla. 3d DCA 1986), the Defendants obviously do not point out the fact that the manner in which the police officer was injured was a totally different situation from the instant case and was one which fits in the traditional scope of the Fireman's Rule.

It is also interesting to note that Defendants rely on Rishel vs. Eastern Airlines, Inc., 466 So.2d 1136 (Fla. 3d DCA 1985), when that case clearly supports the

traditional Fireman's Rule concept of a police officer injured for the exact reason she was called to the airplane, i.e. an intoxicated passenger. Plaintiff again respectfully calls this Court's attention to Judge Ferguson's dissent in that case. Plaintiff regrets that he must constantly refer to the fact that numerous statenents are made without any support in the record. On Page 17 of the Defendants/Respondents Brief, the totally unsubstantiated statement that there was a warning sign on the gate is again repeated.

Again, it is pointed out that this one "warning sign" is in fact the "white rectangle" never identified as anything other than that, and an object which one can only presume is actually a sign of some sort. The further statement is made, once again, that the Plaintiff did not want to alert a possible burglar by walking through the front gate, so he instead went to the back yard. There is absolutely no testimony to indicate that the gate attached to the six (6) foot high chain linked fence was a "front gate." Plaintiff does not ask this state's highest court to make that factual determination, nor should the Defendants. Perhaps, that gate was open. Taking the facts in a light most favorable to the Defendants, the Plaintiff then would have opened the gate and upon closing the gate would then have had to turn around, putting his back to the house, the yard and a possible burglar, in order to inspect the inside

of the gate facing the interior of the premises. Then, it would have been his duty, presumably according to the Defendants, to insure that there were no warning signs on the inside of the gate and, if a sign were upside-down, turned askew, or unreadable, he would then have had to spend the time to find out what, if any, warning was intended for him. That is a totally preposterous situation.

Or perhaps the Plaintiff should have attempted to climb the six (6) foot fence and put himself in the precarious situation of being an easy target for a possible burglar. Should he then have been charged with the duty to., while straddling the top of the six (6) foot high fence, lean over into the yard and see if there were any signs on the interior of the fence? Again,.this would be a totally absurd burden to place upon the Plaintiff.

The further statement made by the Defendants that the Fireman'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" is also a vague generalization and without support. A series of non-Florida cases are then cited, none of which are factually similar to the instant case. It is respectfully suggested that, in the true spirit of appellate advocacy, almost any rule of law can find alleged support if one combs the forty-nine (49) other jurisdictions to come up with a handful of selected cases, including a 1915 Tennessee case,

as cited by Defendants, none of which truly represent the law of this state or the modem trends in the law today.

Plaintiff will not belabor the points already made concerning the applicable Florida Statute *767.01,* and the "dog-bite statute'' *767.04.* This state's legislature had every opportunity to provide certain defenses to *767.01* liability and has seen fit not to. Defendants clearly point out that, "the cardinal rule to statutory construction is a plain and unambiguous language when the statute needs no construction and creates the obvious duty to enforce the law according to its terms." Defendants'/Respondents' Brief at *27* (citations omitted). It is respectfully submitted that this Court cannot simply presume that the legislature intended to provide defenses to one statute as it had to another.

It is respectfully submitted that this Court's decision in Belcher Yacht, Inc., v. Stickney, *450* So.2d 1111 (Fla. *1984)*, was somewhat harsh. But, in all fairness to this Court, the leglislature had provided certain defenses clearly applicable to *767.04.* One might take the liberty of rationalizing at great length that the circumstances causing that plaintiff's injuries were not those that the legislature intended to be immune from liability based on the totality of the circumstances. However, *as* this Court

concluded, at 1113, it felt bound to enforce the law of this state as written by the legislature.

In the instant case, this Court's enforcement of *767.01* as the clearly enunciated law of the state would not even produce such a harsh result.

The instant case gives this Court, for the first time, the opportunity of clearing up the misconception in Rattet v. Dual Security Systems, *373 So.2d 948* (Fla. 3d DCA 1979), that would seemingly "jump" or "transpose" defenses from one statute to another. Defendants seemingly confuse the fact that Stickney dealt with the business invitee and therefore the whole issue of statutory liability is inapplicable due to the fact that they allege the Plaintiff in the instant case was nothing more than a licensee. Nothing in this Court's decision in Stickney, or in the statute, differentiates between a business invitee and a licensee. In fact, even the "dog-bite statute'' deals with a person "lawfully on or in a private place." There is no question that the Plaintiff was lawfully on the premises of the Defendants, and the statute that controls, *767.01,* does not even have that language in it.

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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 29 day of June, 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.

BY: John E. Shields, Esquire