THE SUPREME COURT OF FLORIDA

JOHN KILPATRICK,

Petitioner,

vs. CASE NO. 69,890

ALFRED SKLAR, ET AL., DISTRICT COURT OF APPEAL, THIRD DISTRICT - 86-556

Respondents.

ALFRED SKLAR, ET AL.,

Petitioners,

vs. CASE NO. 69,892

JOHN KILPATRICK DISTRICT COURT OF APPEAL, THIRD DISTRICT - 86-556

Respondent.

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PETITIONER, JOHN KILPATRICK'S, REPLY ERIEF TO THE ANSWER BRIEF OF MRS. ALFRED SKLAR, A/K/A DR. OLA FERRER

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PRELIMINARY STATEMENT

It is first respectfully pointed out that this Brief is only meant to serve as a Reply Brief to the Brief filed by the law firm of Ponzoli & Wassenberg, P.A., as the Brief of Respondent, Mrs. Alfred Sklar, a/k/a Dr. Ola Ferrer.

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

ISSUE ON APPEAL,

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

SUMMARY OF ARGUMENT

The issue of whether or not the anachronystic and outmoded Fireman's Rule should be abolished in the state of Florida has been briefed at great length already and Plaintiff respectfully relies on and adopts all of his previous arguments as contained in Plaintiff's Initial Brief. The arguments particularly supporting the modern trend of abolishing the Fireman's Rule are contained in Plaintiff's Brief, as Petitioner, at pages 12 through *24.*

The few self-serving parts of the Record dealing with the ownership of the dogs would seem to point to the fact that, technically at least, only Defendant Sklar owned the dogs. However, it is interesting to note that Defendant Ferrer refers to a lack of any "ownership interest," and it should be pointed out, that in addition to her also owning the house on the premises, she clearly was the sole owner of the office also contained on the premises which benefited equally from the protection afforded by the dogs.

Since this Court has stated that a non-owner may be sued under common law theories, it is clear that there are numerous factual questions that can only be resolved by a trial court concerning the common law liability of Defendant Ferrer. It is also clear that the separate and

independent acts of negligence on the part of both property owners were the direct cause of the injuries to the Plaintiff, and it cannot be decided, as a matter of law, that there can be no liability. The reason for Plaintiff's being on the premises was totally unrelated to the circumstances that brought about his injuries and the overwhelming trend throughout the history of the Fireman's Rule is that this has always been a clear exception.

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

Plaintiff respectully adopts and incorporates, as if fully set forth herein, all of his previous arguments concerning the abolition of the anachronystic and outmoded Fireman's Rule as contained in pages 12 through 25 of his Initial Brief on the Merits.

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

In order to save this Court's time and to not totally reargue matters set forth in great detail previously, Plaintiff respectfully adopts and incorporates, as if fully set forth herein, his arguments contained on pages 26 through 39 of his Initial Brief on the Merits, and will now, only as needed, respond to certain matters addressed in this Brief not already discussed in great detail.

It should be noted immediately that even Defendant Ferrer recognizes the fact that this Court has stated that common law liability as to the non-owner of a dog still remains in spite of the strict liability imposed by Florida statutes. Noble v. York, *490* So.2d *29* (Fla. 1986). While it can be argued at great length that Defendant Ferrer received as much benefit from the protection of the dogs as did her husband, it would appear for the purposes of these arguments, she must be considered a non-owner and only subject to the liability imposed by the common law as opposed to liability created by the Legislature.

Plaintiff does not want to once again repeat argument after argument, but wishes to respectfully point out the key issues in this matter.

First of all, this Court is once again respectfully reminded that none of these issues ever proceeded to a jury trial, but is was a summary judgment, on behalf of the Defendants, that was appealed to the Third District Court of Appeal. Even the trial court noted at the summary judgment hearing the numerous factual questions in dispute. Actually, while it cannot be refuted that there were numerous factual questions, if one were to use a "weighing test," Plaintiff would surely win.

The uncontroverted testimony of every police officer and the I.D. Technician, unrefuted by the Defendants themselves, was that there was no sign placed on the

exterior of the premises to warn the Plaintiff. This is not to confuse the issue of the sign and its importance to the statutory liability, but in terms of acting as warning of the unsuspected danger of four *(4)* large Great Danes.

There can be no question that Plaintiff responded to a burglar alarm, and, based on his experience with dogs in other parts of the City of Miami, attempted to ascertain in every reasonable way if dogs were on the premises before proceeding. The injuries were a direct result of his fleeing from these four *(4)* animals, each larger than himself. As pointed out at great length in the numerous other briefs filed within this cause, this is clearly an independent act of negligence, in fact a trap, and not the standard situation where the police officer or firefighter is injured through circumstances directly related for his or her being on the premises.

The trial court seemingly resolved, as a question of law, these disputed facts, and the Third District Court of Appeal, in mentioning Plaintiff's position on the Fireman's Rule, affirmed without giving any reason to distinguish these facts from the line of cases holding differently.

The Answer Brief of Defendant Ferrer notes some cases not discussed previously at any length. If one looks as these non-Florida cases, it becomes clear that they are selected cases from other jurisdictions and, if read in

their entirety, again point out the fact that separate independent acts of negligence, not being the reason for the police officer or firefighter to be on the premises, are not covered by the Fireman's Rule.

As an example, one Kansas case deals with injuries sustained by a firefighter due to his inhaling anhydrous ammonia, the exact reason for his being on the premises, and is clearly analogous to a series of Florida cases which have denied liability when the injuries, as in this Kansas case, result directly from what occasioned the police officer or firefighter on the premises. Calvert v. Garvey Elevators, Inc., *694* P2d 433 (Kan. *1985).*

In an Iowa case, liability was also denied to a police officer who was assaulted by an intoxicated patron of a bar and this is clearly analogous to a recent Third District Court of Appeal case where a police officer was denied recovery in attempting to remove an intoxicated passenger from an Eastern Airlines airplane. The case relied on by Defendant is Pottenbaum v. Hinds, *347* N.W. 2d *642* (Iowa 1984), and Plaintiff has referred to Rishel v. Eastern Airlines, Inc., *466* So.2d *1136* (Fla. 3d DCA *1985).*

In a New Jersey case liability was also denied when the police officer was injured due to the ordinary act of negligence of leaving keys in the ignition of a car, resulting in its theft and subsequent injury to the officer in retrieving that car. Berko v. Freda, *459* A2d *663* (N.J.

1983). Again, this is the traditional situation where the injury resulted from a normal "police type activity" and also an activity directly related to why the police officer was even involved.

Another case, thirty one *(31)* years old, from New Hampshire, really only discusses the Fireman's Rule in passing and deals with other issues, totally unrelated to this case. Davy v. Greenlaw, *135* A2d 900 (N.H. 1957').

The reliance on Steelman v. Lind, *634* P2d *666* (Nev. 1981), is confusing since the plaintiff police officer, in that case, brought suit against someone whose beehives had fallen off a truck onto the roadway, and the officer placed his car in such a position to prevent another vehicle from striking the truck's owner while retrieving the beehives. The damage was done by the driver of another vehicle that crashed into the officer's car. A footnote in that case indicates a settlement had already been achieved with that second driver.

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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 21 day of [illegible], 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: [signature]
John E. Shields, Esquire