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.

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

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

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

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LAW OFFICES RICHARD A. SHERMAN, P.A.
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SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

TABLE OF CITATIONS

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INTRODUCTION

The Appellees/Petitioners, Alfred Sklar and United States Fidelity and Guaranty Company will be referred to in the singular as Sklar, Defendant or Petitioner.

The Respondent/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.

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

STATEMENT OF THE FACTS AND THE CASE

This is a classic case of the "Fireman's Rule". In fact Prosser uses an example almost identical to the present situation in explaining the rule. (See the quote from Prosser later in this Brief.)

What transpired was that the Plaintiff police officer 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 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 gate so he went to the back and climbed over the top of the wrought iron fence.

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SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
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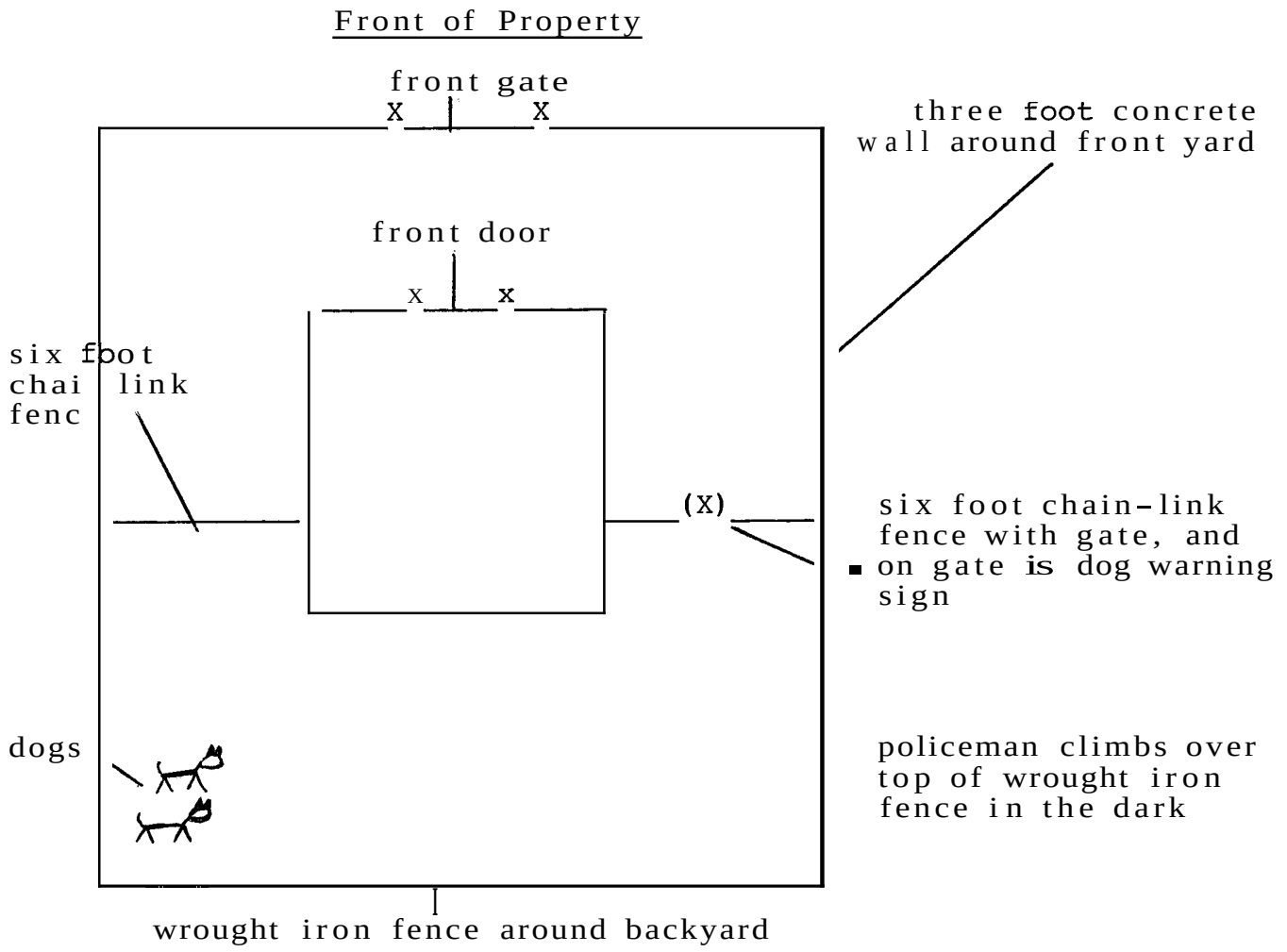
A diagram of the yard is as follows:



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 the wrought iron fence in the dark.

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING. 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

Specific Facts

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 house (R 443). They noticed a six to seven foot chain-link fence which separated the front and back yards (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. 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 a few seconds 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 back yard 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

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING. 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
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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).

Officer Kilpatrick sued the home owners under Fla. Stat. Section 767.01(1981) and common law (R 1-4). Alfred Sklar moved for Summary Judgment based on the Fireman's Rule and because he had posted at least one warning sign (R 144-148). Mrs. Sklar (Dr. Olga Ferrer) also sought Summary Judgment asserting that she did not own the dogs and therefore was free from any liability (R 64-74).

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 were no fact questions since it was undisputed that at least one warning sign was present the night Kilpatrick was injured. After considering the motions and Memorandum of Law it entered a Summary Judgment in favor of the Defendants holding that this suit was barred by the Fireman's Rule (R 802), and Kilpatrick appealed (R 415).

On appeal the Third District reversed. Kilpatrick v. Sklar, 497 So.2d 1289 (Fla. 3d DCA 1986). The Third District held that the Fireman's Rule is not a defense to injury from being scared by a dog. The Third District stated that the only defense to a "dog injury" is the presence of a "bad dog" sign, as per the dog bite statute, even when a policeman is involved who has gone on private property in the performance of his duties.

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

This is a classic case showing the reason for "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 that what a burglar could steal, or what the house would be worth; as evidenced by the present million dollar lawsuit against the homeowner.

The Third District's decision is based on a misapplication of certain Supreme Court cases, which limit common law defenses to a dog bite. It is also contrary to Florida law which favors the Fireman's Rule as a protection for property owners against liability. Sanderson, infra.

The opinion below created confusion, as evidenced by the fact that both sides sought review in this Court.* The Petitioners respectfully asserts that the Fireman's Rule is a valid defense to a dog injury, as is the posting of warning sign.

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* This Brief will address the issues raised by the Defendants/ Petitioners Sklars and U.S.F.& G. Additional matters raised by the Plaintiff/Petitioner Kilpatrick will be addressed in response to his Brief of Petitioner.

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

SUMMARY OF ARGUMENT

This is a classic case of the "Fireman's Rule", as substantiated by the fact that Prosser uses an example almost identical to the present situation to explain the need for such a rule. The Decision of the Third District misinterpreted and misapplied the Noble and Belcher Yacht; infra cases.

What transpired was that the Plaintiff police officer 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 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 landowner.

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".

Kilpatrick and the Third District relied solely on the dog bite statute, in an attempt to circumvent the application of the "Fireman's Rule". In the present case, first of all, there was no dog bite, but the Plaintiff injured himself climbing over the fence. Second, the District Court's decision is based on a misapplication of Florida Law; as the Supreme Court cases should not be construed to bar the use of the "Fireman's Rule", as a

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE. FLA. 33301 • TEL (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA 33130 • TEL. (305) 940-7557

defense; 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.

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, Section 61 (5th Ed.)

Kilpatrick's suit is clearly barred by the "Fireman's Rule". The Third District's abrogation of the "Fireman's Rule" defense is contrary to the law and strong public policy in Florida, which favors the "Fireman's Rule". Sanderson, infra.

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

It is respectfully submitted that Florida case law and the legislative intent of F.S.A. 763.01 (1981) do not eliminate the use of the "Fireman's Rule" defense, simply because a policeman was scared by dogs and injured himself. The dog bite statute does not effect the protection afforded by the "Fireman's Rule" and the Third District's opinion must be reversed and the Summary Judgment reinstated for the Petitioner.

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

ARGUMENT

THE "FIREMAN'S RULE" BARS THE PLAINTIFF POLICE OFFICER FROM RECOVERING FOR INJURIES SUSTAINED DURING BURGLARY INVESTIGATION AND THE OPINION OF THE THIRD DISTRICT MISINTERPRETED THE LAW AND MUST BE REVERSED; THE THIRD DISTRICT MISINTERPRETED AND MISAPPLIED THE NOBLE AND BELCHER YACHT, INFRA, CASES, AND THIS DECISION IS IN CONFLICT WITH NUMEROUS CASES INCLUDING SANDERSON, INFRA.

As indicated in the "Summary of Argument'' section, this is the classic case that is barred by the "Fireman's Rule".

The Plaintiff, Officer Kilpatrick, was injured while investigating a possible burglary on Defendant's premises. While being chased by the Defendant's dogs, he attempted to leap over a wrought iron gate and suffered injuries to his leg. The Defendant was not at home at the time, and was not aware of the Plaintiff's presence on his property. It was undisputed that there was at least one sign on the premises warning of dogs.

The trial court correctly held that the Fireman's Rule barred the Plaintiff's action in this case, and that the Defendant was entitled to Summary Judgment as a matter of law. Recent cases state that Florida favors the Fireman's Rule and there is no doubt that the Firemen's Rule applies to policemen as well as to firemen. Sanderson v. Freedom Savings and Loan Association, 496 So.2d 954 (Fla. 1st DCA 1986) (currently pending review in this Court); Whitten v. Miami Dade Water and Sewer Authority, 357 So.2d 430 (Fla. 3d DCA 1978).

When a policeman is injured on the premises in the discharge of his duties, the landowner is immune from suit, absent willful or wanton negligence on the landowner's part. Sanderson, supra. As a matter of law, the Plaintiff has failed to show any willful

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

or wanton conduct sufficient to imposed liability on the Defendant. Sanderson, supra. Moreover, the landowner in the present case has an absolute defense where he posted signs warning of the presence of dogs. F.S.A. Section 767.04 (1981). The Third District's opinion abrogating the Fireman's Rule defense is contrary to Florida case law, strong public policy and must be reversed as to the Appellant.

The District Court embraced the Plaintiff's gratuitous suggestion that the dog-bite statute supersedes or abrogates the Fireman's Rule. The fact that F.S.A. Section 767.01 abrogates and supersedes common law is not a unique situation, as many statutory schemes in Florida have done this. For example the common law rights to Dower and Curtsey have been abrogated by the Florida descent and distribution laws. This does not mean that the Florida Statute does away with any rights or defenses that exist in other areas of estate law. In other words there is nothing in the statute or in Belcher Yacht Inc. v. Stickney, 450 So.2d 1111 (Fla. 1984) relied upon by the Third District, that states that a police officer who is normally barred from recovery for injuries sustained while discharging his duties, has a cause of action simply because a dog is present.

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

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING. 524 SOUTH ANDREWS AVE.. FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

and clearly not a business invitee as a matter of law. Whitten, supra. In an attempt to recover in this case the Plaintiff would have this Court overlook 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.

A. Fireman's Rule Requires Summary Judgment For The Defendant

Under the Firemen's Rule, the owner of premises in 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 v. Miami Dade, supra; 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. 2d 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. Romedy v. Johnston, 193 So.2d

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
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487 (Fla. 1st DCA 1967). Under the licensee theory, the landowner has absolute immunity from suit absent some grossly negligent conduct. This was recently reaffirmed in Smith v. Markowitz, 486 So.2d 11 (Fla. 3d DCA 1986) rev. denied, 494 So.2d 1153 (Fla. 1986).

The Plaintiff did not alleged any wanton or negligent conduct on the part of the Defendant. 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 Defendant's yard (R 446, 559). Applying present Florida law it is clear that the Firemen's Rule mandated the entry of the Summary Judgment for the Defendant, which Judgment, should be reinstated.

In Whitten v. Miami Dade and Sewer Authority, supra, the Third District for the first time discussed the "Firemen's Rule" and extended the landowner's immunity to include premises injuries suffered by policeman or fireman. In that case, two policemen and four firemen responded to a chlorine gas leak at the defendant water plant. All of them suffered chlorine gas poisoning, however only one of them actually went onto the premises to stop the leak. The court said that it made no sense to permit a cause of action for the five men that did not enter the premises, and at the same time to bar a cause of action for the man who went into the building on the theory that he was a licensee. The court therefore applied the Firemen's Rule to bar

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

recovery for all Plaintiff's. See also, Price v. Morgan, supra. As with the licensee theory, only willful or wanton conduct on the part of the landowner will negate the Firemen's Rule.

Similarly in Wilson v. Florida Processing Company, supra, the court applied the Firemen's Rule to bar recovery for a policemen who inhaled chlorine gas while evacuating residents of the area. The court affirmed a directed verdict for the defendant/landowner on the authority of the Whitten case.

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.

> 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

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

> 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.

More recently the Fifth District declined a plaintiff/police officer's invitation to abolish the Firemen's Rule in Preferred Risk Mutual Ins. Co. v. Saboda, 489 So.2d 768 (Fla. 5th DCA 1986). Noting that the rule is well established in Florida and is adhered to by the overwhelming weight of authority in the country, the court entered a summary judgment for the defendants. Kilpatrick relied upon Preferred Risk below to argue that the landowner created a trap for him and that misconduct abrogated the Firemen's Rule. However, there was no hidden danger or trap involving dogs present in a fenced-in yard, where there was at least one warning sign and where the officer testified he heard barking, suspected that dogs were present and knew that other property owner's had dogs on the premises. The Third District opinion reversing the Petitioner's Summary Judgment was based solely on the abrogation of the Fireman's Rule defense and not on any alleged dangerous condition on the property. Kilpatrick, 1291.

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. This 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

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING. 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

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.

Similarly the existence 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, and thought dogs might be present in the yard.

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.

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.

It is clear from the cases that the Plaintiff in the present case has no cause of action under Florida law. Florida courts

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

have uniformly applied the licensee theory in situations where a policemen or a fireman is injured on the landowner's premises, and have resisted all attempts to raise the plaintiff's legal status to that of an invitee. See, Romedy v. Johnston, supra; Smith v. Markowitz, supra. The plaintiff has not shown any willful or wanton conduct on the part of the Defendant or any failure to warn of a hidden danger.

In order to impose liability on the landowner, the landowner must actually be on the premises and have an opportunity to warn the policeman of any hidden dangers. In the present case, it is undisputed that the Defendant was not home at the time of the accident, had no knowledge of the policeman's presence, and therefore had no opportunity to warn him of any potential danger. Moreover, the landowner's duty to the licensee is to warn of any hidden dangers known to the landowner and not apparent to the licensee. In the present case, the officer's own testimony indicates he suspected that dogs might be present on Defendant's premises. The possibility that dogs were on the premises was therefore apparent to the Plaintiff. As a matter of law then, the presence of dogs was not a hidden danger which would give rise to the Defendant's obligation to warn. This case therefore is squarely within the rule which provides immunity for the landowner absent some willful or wanton negligence.

In W. PROSSER, THE LAW ON TORTS, Section 61 (5th Ed.), 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

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING. 524 SOUTH ANDREWS AVE., FORT LAUDERDALE. FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

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.

> 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 in 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.

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 trial court correctly entered Summary Judgment for the Defendant and it must be reinstated.

B. The Dog-Bite Statute Does Not Preclude Summary Judgment For The Defendant

Because the Plaintiff had no cause of action due to the Firemen's Rule and there was no basis for his allegations of willful or wanton negligence for failure to warn of a hidden condition, the Plaintiff attempted to impose strict liability upon the Defendant under the dog-bite statute. This approach ignored the fact that the Firemen's Rule prevents any action against the Defendant.

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

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE. FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING. 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305)940-7557

the premises. The Record is quite clear, as 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 (1981). This complete defense is available in actions brought under Section 767.01, which deals with injuries other than dog bites. Rattet v. Dual Security Systems, 373 S0.2d 948 (Fla. 3d DCA 1979), cause dismissed, 447 So.2d 887 (Fla. 1984). 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, this 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

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING. 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

undisputed that warning signs were present on the premises, and that the officer claimed he did not see them (T 748). Summary Judgment for 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 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 mere licensee, and a lesser standard of care applied in the present case.

Therefore, even if the Firemen's Rule was not an absolute bar to the Plaintiff's action against the Defendant, the dog-bite statute does not impose any liability upon the Defendant. The undisputed existence of warning signs on the premises, as recognize by the trial court, was a complete defense to the strict liability statue and the judgment for the Petitioner must be reinstated.

C. Third District's Opinion is Based on a Misapplication of Belcher v. Stickney and Noble v. Yorke and the District Court's Abrogation of the Fireman's Rule Defense Must be Reversed.

The District Court held that this Court's decisions in Belcher v. Stickney, supra, and Noble v. Yorke, 490 So.2d 29

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

(Fla. 1986) no longer permit a dog owner to assert the Fireman's Rule as a defense against recovery by a police officer injured in the performance of his duty. Kilpatrick, 1290. In other words it held that the Fireman's Rule does not protect a dog owner in any suit for damages under Section 767.01, regardless of the status of the Plaintiff. Kilpatrick, 1291. The Third District Court has misapplied the holdings in Noble and Belcher Yacht because neither case holds that the dog bite statute abrogates all legal defenses to an action under Section 767.04.

In the first place, both of those cases involve a dog bite, and business invitees, not licensees.

However the present case does not involve a dog bite, but 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, the two cases out of this 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 manner and it is submitted that is is clearly a misapplication of these cases to hold that they would apply to impose liability in the present situation; which would be contrary to the public policy in Florida, which favors the Fireman's Rule defense.

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

Each case restates the principle that the statute provides absolute defenses to the dog bite liability. This is an express recognition that other defenses do in fact exist and are permitted, but that if adequate signs are posted there is total immunity given to the dog owner under the statute. That is not to say that the Fireman's Rule is not a valid defense to a policeman's cause of action for injuries sustained on the job.

In Sanderson, supra, the plaintiff police officer was killed during a bank robbery. The case was dismissed based on the Fireman's Rule. The court noted that the Fireman's Rule is 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 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, 955-956.

These same policy reasons apply in the present case where a police officer, investigating a possible burglary, jumps over a back fence enters the yard and gets injured jumping over the front gate in an attempt to outrun the owner's dogs. There is no

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

basis for the District Court's abrogation of the Fireman's Rule which in effect overrides strong public policy.

The misapplication of Belcher and Noble in the Decision below is clearly pointed out by looking to the language used by this Court in those cases. In Belcher the issue whether the dog bite statute is an alternate to, rather than an abrogation of, common law.

This Court in holding that the statute abrogates the common law, recognized the various jury questions that arise, as a result of affirmative defenses, and in no way does the case hold that only statutory defenses exist:

> To assuage some of the fears raised by such a specter, we can only point out that the statue cuts two ways: it imposes absolute liability upon the dog owner when the dog-bite victim is in a public place or lawfully on or in a private place except when the dog is carelessly or mischievously provoked or when the owner had displayed in a prominent place on the premises a sign easily readable including the words "Bad Dog". We can easily envision situations where a jury might be called upon to decide whether the victim was lawfully on the land, whether he provoked the dog, whether the sign was placed in a prominent place on the premises, whether the sign was easily readable, or whether there was in fact a sign....
>
> As we noted above, section 767.04, Florida Statutes (1979), applies only to the dog owner. It "supersedes the common law, only in those situations covered by the statutes." Carroll, 241 So.2d at 682.

Belcher, 1113.

In Noble this Court allowed the defense of equitable estoppel to be used to avoid immunity under the statute, where the owner had an easily readable "Bad Dog" sign. In other words a defense

LAW OFFICES RICHARD A. SHERMAN, P.A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33301 • TEL. (305) 525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

not mentioned in the statute was permitted to defeat the absolute immunity under Section 767.04. Therefore the case does not stand for the proposition that only statutorily named defenses are permissible.

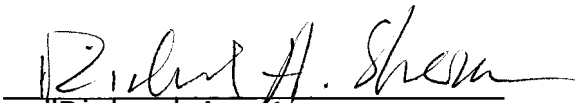
It simply does not follow, from the Belcher Yacht, Inc. v. Stickney and Noble v. Yorke cases, whatsoever that liability would attach to a homeowner when he has dogs in his backyard fenced in, a policeman is investigating a burglary one night and does not want to alert the burglar by walking in the front 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.

LAW OFFICES RICHARD A. SHERMAN, P. A.
SUITE 102N JUSTICE BUILDING, 524 SOUTH ANDREWS AVE.. FORT LAUDERDALE, FLA. 33301 • TEL. (305)525-5885
SUITE 518 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

CONCLUSION

The Firemen's Rule bars the Plaintiff's cause of action against the Defendant and the Summary Judgment must be reinstated. There was no reversible error in the trial court's determination that the Defendant's warning signs were a complete defense to any possible liability under the dog-bite statute. The Opinion of the Third District must be reversed, as it is contrary to the law and strong public policy in Florida, favoring the application of the Fireman's Rule.

Law Offices of
RICHARD A. SHERMAN, P.A.
Richard A. Sherman, Esquire
Rosemary Wilder, Esquire
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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 8th day of June, 1987 to:

J. David Gallagher, Esquire
Wicker, Smith, et al.
Grove Plaza - 5th Floor
2900 S.W. 28th Terrace
Miami, FL 33133

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

Lawrence B. Craig, Esquire
Merritt, Sikes & Craig, P.A.
3rd Floor - McCormick Building
111 S.W. 3rd Street
Miami, FL 33130

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

Law Offices of
RICHARD A. SHERMAN, P.A.
Richard A. Sherman, Esquire
Rosemary B. Wilder, Esquire
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
Richard A. Sherman