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

ANSWER.BRIEF AND APPENDIX OF RESPONDENT, JOHN KILPATRICK, TO THE BRIEF OF ALFRED SKLAR AND UNITED FIDELITY AND GUARANTY COMPANY

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TABLE OF CONTENTS

TABLE OF AUTBORITIES ii

PRELIMINARY STATEMENT 1

RESPONSE TO STATEMENT OF THE FACTS AND THE CASE 4

RESPONSE TO SPECIFIC FACTS 7

ISSUES ON APPEAL 10

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

SUMMARY OF ARGUMENT 10

RESPONSE TO SUMMARY OF ARUGMENT 11

ARGUMENT 14

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 TEE NON-BITE STRICT LIABILITY IMPOSED BY FLORIDA STATUTE 767.01.

CONCLUSION 30

CERTIFICATE OF SERVICE 31

APPENDIX 32

TABLE OF AUTHORITIES

CITATIONS:

Belcher Yacht, Inc., v. Stickney, 450 So.2d 1111 (Fla. 1984)	24,28
Berglin v. Adams Chevrolet, 458 So.2d 866 (Fla. 4th DCA 1984)	19,20
Donner v. Arkwright-Boston Manufacturer's Insurance Co.. 358 So.2d 28 (Fla. 19/61	27
Hall v. Holton, 330 So.2d 81 (Fla. 2d DCA 1986)	18,19
Jones v. Utica Mutual Insurance Company, 463 So.2d 1133 (Fla. 1983)	26,27,28
Kaiser v. Bailey, 474 So.2d 906 (Fla. 5th DCA 1985)	25
Noble v. Yorke, 490 So.2d 29 (Fla. 1986)	27
Rattet v. Dual Security Systems, Inc., 373 So.2d *948* (Fla. 3d DCA 1979)	25,27,28
Rishel v. Eastern Airlines, Inc., 466 So.2d 1136 (Fla. 3d DCA 1985)	20,21,23
Smith v. Markowitz, 486 So.2d 11 (Fla. 3d DCA 1986)	**21**
Stickney v.Belcher Yacht, Inc., 424 So.2d 962 (Fla. 3d DCA 1983)	24,26,28
Sweet v. Josephson, 173 So.2d 444 (Fla. 1965)	**26**
Whitlock v. Ehlich, 409 So.2d 110 (Fla. 5th DCA 1982)	18
Whitten v. Miami-Dade and Sewer Authority, 357 So.2d 430 (Fla. 3d DCA 1978)	17,21
Wilson v. Florida Processing Company, 368 So.2d (F'la. 3d DCA 1979)	17

STATUTES:

Florida Statute *767.01*	2,10,14,16,26,27,28,29,30
Florida Statute *767.04*	10,14,16,25,26,27,28,29,30
Florida Statute *767.05*	28

OTHER:

W. Prosser & W. Keeton, The Law of Torts, *429*, Sec. 61, (5th ed. 1984)	11,12

PRELIMINARY STATEMENT

This Brief, filed by Respondent, Officer John Kilpatrick, is specifically intended to be the response to the Brief on the merits filed on behalf of Petitioners, Alfred Sklar and United States Fidelity and Guaranty Company. This statement is made to again clarify the point that both parties are Petitioners and Respondents in this consolidated appeal.

This appeal, in the form of two consolidated cases, deals with the liability of land owners and dog owners for severe injuries sustained by a police officer called to the property by an audible burglar alarm and injured while fleeing from four *(4)* large Great Danes. The dogs never came in contact with the police officer and liability was alleged against the husband.and wife, joint property owners, on a theory of statutory liability based on the ownership of their dogs, in a non-bite situation, and also on the common law theory of negligence in failing to control dogs and in calling a police officer to their premises while not providing any warning of dogs.

The Trial Court entered a Summary Final Judgment against the Plaintiff, Officer John Kilpatrick, in favor of the Defendants, Mr. and Mrs. Alfred Sklar. Mrs. Sklar, also known as Dr. Olga Ferrer, operated her medical practice from a separate building on the premises.

The Third District Court of Appeal found issues of

material fact and reversed the Summary Judgment as to the issue of liability on behalf of the dog owner, Mr. Sklar, but affirmed the Summary Final Judgment in favor of his wife based on the theory that there was no evidence to show that she technically owned the dogs and that the police officer's action against her was barred by the common law theory of the Fireman's Rule.

Mr. Sklar seeks review by this Court based on the reversal of the summary final judgment in his favor. The Plaintiff, Officer John Kilpatrick, seeks review of the affirmance of the Summary Final Judgment on behalf of Dr. Olga Ferrer, and on the finding of the District Court of Appeal that a sign, allegedly on the premises, is a defense under Florida Statute 767.01 to the dog owner. Since both sides in this matter are Petitioners and Respondents, the Plaintiff below, Officer John Kilpatrick, will be referred to in this Brief as the Plaintiff. Mr. and Mrs. Sklar will be referred to as Defendant Sklar or Defendant Ferrer. When referring to both, they will be the Defendants. References to the record will be "R. ".

Petitioner's Brief is divided into sections called, "Statement of the Case and Facts," "Specific Facts," and "Summary of Argument." Therefore, the response of Officer John Kilpatrick (the Defendant) will be to those specific sections.

For further clarification, there was an agreement

among counsel that, when discussing the direction which Bayshore Drive runs in the Coconut Grove area of Miami, references would be made to Bayshore Drive as if it ran North and South.

RESPONSE TO STATEMENT OF THE FACTS AHD THE CASE

Since this matter is in the form of two consolidated appeals, Plaintiff does not wish to unnecessarily duplicate large portions of matters previously presented to this Court in other briefs.

Therefore, this Court is respectfully referred to the Statement of the Case and Facts contained on pages 3 through 10 of the Initial Brief on the Merits filed by this Plaintiff, but as the Petitioner. The aforementioned Statement of the Case and Facts is incorporated as if fully set forth herein.

Responding specifically to the portion entitled Statement of the Facts and Case filed by the Defendants in their Petitioners' Brief, Defendant respectfully points out that this broad-brush summary in no way reflects the true facts of the case.

It is stated that the Plaintiff did not want to alert the possible burglar by walking in through the front gate. There is no evidence that the "front gate" was one in which the Plaintiff could have walked through that night. By reading this version, one would think that there was actually an accessible front gate. Plaintiff has attached to this brief, as Appendix Number 2, a photocopy of the picture taken by I.D. Technician Mejia on the night in question depicting an interior gate. This same picture is the only one that depicts a "white rectangle" hanging

somewhat askew, presumably on its side, and facing the interior of the premises, Again, as will be shown in great detail, no witness has ever identified this "white rectangle" as a sign warning of dogs, or as a sign containing anything in particular.

The picture, taken from inside the premises, further depicts that the alleged front gate leads into the main portion of the enclosed premises in an area that was presumably used for storage. To the right of the picture can be seen objects that look like stored roof tiles. There is also some type of wooden equipment, presumably a wooden carpentry horse, in the picture in addition to other items stored to the left of the picture leaning against the fence. The ground does not appear to be finished off in any way and this confirms the lack of testimony as to whether or not this was actually a "front gate." There is no question that this gate, even if it could have been opened, is approximately six (6) to seven (7) feet in height.

The use of the diagram by the Defendants is totally misleading as was pointed out in arguments at the Third District Court of Appeal. In his Reply Brief at the District Court, Plaintiff attached a far more detailed diagram which was totally supported by the record. That diagram "Appendix One at the District Court" is attached as Appendix One to this Brief. It is amazing that Defendants' diagram, shown to be totally inaccurate, would again be

submitted to this Court.

In looking at the Defendant's diagram, one is totally perplexed as to where the police officer actually did enter the .premises. The diagram appears to indicate that the alleged "dog warning sign" is on the outside of the enclosure containing the dogs which is incorrect.

The diagram attached to this Brief is supported by the Record and indicates the fact' that the front yard, on Bayshore Drive, was a large, open area sloping toward the hone which is on a slight hill above Bayshore Drive. The "white rectangle" (nowhere identifed as a dog-warning sign) is indicated 'by an "x" and hung on the inside of a gate facing the interior portion of the premises, within the enclosure containing the dogs. The gate in question is the one where the Plaintiff climbed, and the "*" indicates the point where he was at the time the dogs came out of the darkness from the area of their Pen.

It is also the same point that was acknowledged at the trial court hearing where the picture was taken depicting the "white rectangle." Defendants' counsel's own admission, as detailed further in Plaintiff's Statement of Facts, demonstrates the fact that Plaintiff was already at the point where the dogs came at him before the "white rectangle" could have been seen.

The specific portions of the Record that support the diagram of the Plaintiff are R. *439-448*, R. *597*.

RESPONSE TO SPECIFIC FACTS

In the section of their Brief entitled Specific Facts, Defendants flesh out, only slightly more than in their previous section, the circumstances giving rise to this suit. It is respectfully submitted that the true facts of this case and the proper picture cannot be condensed to only two and one-half (2½) pages. Again, this Court is respectfully referred to the Statement of the Case and Facts contained on Pages 3 through 10 of the Plaintiff's Initial Brief as Petitioner, which contains more than twice as many specific references to the Record.

As one example, the Specific Facts do not in any way indicate the fact that every police officer and the I.D. Technician testified to the fact that no sign was seen on the premises that night. In fact, there is no direct testimony that there was a sign warning of the dogs anywhere on the premises that night. Again, we have only reference to a barely visible object, the "white rectangle" hanging askew on the gate inside the premises. Plaintiff takes a very strong issue with the sentence contained in the middle paragraph on Page 5 that "the trial court determined that there was no fact question since it was undisputed that at least one warning sign was present on the night Kilpatrick was injured." Not only was that fact disputed on the trial court level and on the District Court of Appeal level, but the facts of the case are undisputed that no one has ever

identified a warning sign on the premises that night. While numerous specific references are contained in Plaintiff's Statement of the Case and Facts in its Petitioner's Brief, it is obvious why the statement made on Page 5 of Defendants' Brief is not supported by the Record. There can be no cite to the Record when no testimony supports the position.

Plaintiff is shocked that, on Page 6 of the Brief, Defendants again referred to the "present million dollar lawsuit." It should be noted that on the following two (2) pages (7 and 8 of the Brief), Defendants again, without support of the Record, refer to the figure of one million dollars. The reason that it is not supported by the Record is simple. No place in the Record is there any indication that the Plaintiff sought damages in excess of one million dollars, nor are damages even related to this Brief.

This same tactic was used in the Respondents' Brief at the Third District Court of Appeal, and, when mentioned in Oral Argument, received a rather pointed response from the Chief Judge of the Third District Court of Appeal. Plaintiff is totally amazed that Defendants' counsel would seemingly attempt to influence this Court on the issue of damages when it is not a part of the Record and is not even at issue.

It is unfortunate that Plaintiff's counsel must bring this matter to the attention of this State's highest

court. Quoting from his own Reply Brief in the Third District Court of Appeal, at Pages 5 and 6, the Defendant (referred to therein as Appellant) stated in response to this "million dollar argument" that:

> "Appellant's undersigned counsel, as an officer of the Court, feels compelled to bring this to this Honorable Court's attention, and respectfully represents to the Court that the issue of Appellant's damages are not on appeal, but that there is no question as to the severe extent of Appellant's injuries and that he will never be able to return to active police work due to the nature and extent of these injuries.
>
> These statements are only made and brought to this Honorable Court's attention since the assertions made by Appellees might be construed to indicate that a sum in excess of one million dollars is being sought for a mere cut.

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*

SUMMARY OF ARGUMENT

The Fireman's Rule should be abolished in the state of Florida, as it has in other jurisdictions, since it is an outmoded and no longer practical doctrine in this day and age.

Even if this anachronistic rule were to remain the law of this state, Plaintiff's injuries occurred because of separate and independent acts of negligence on the part of the Defendants/Landowners clearly taking the situation out of the Fireman's Rule.

Plaintiff's injuries were the direct result of the actions of the dogs owned by at least one of the two Defendants and the liability is predicated on Florida Statute 767.01, which does not provide the defense of a sign as does the companion statute of *767.04,* which covers the more conventional dog-bite situations. This cause should be remanded to the trial court for further proceedings without the Defendants having the benefit of attempting to use the alleged placement of a sign on the property as a defense in an action under Florida Statutue *767.01.*

RESPONSE TO SUMMARY OF ARGUMENT

Defendants' Summary of Argument, though admittedly a summary, attempts to state some facts that are not only not contained in the Record but are totally incorrect. First of all, as will be discussed later in great detail and which can be seen by the picture contained in the attached Appendix, there is not even a logical inference that the gate to the six (6) or seven (7) foot-high chain link fence was, in fact, a front entrance. While Plaintiff does not ask this Court to make factual determinations as to that or other issues, it is equally inappropriate for Defendants to make such factual determinations on their own. It must also be remembered that the injuries sustained by the Plaintiff were the direct result of his fleeing from four *(4)* large Great Danes and the attempt to jump the fence over which he had previously climbed. The Summary of Argument seems to indicate that the injuries were sustained in climbing over the fence to initially enter the premises.

The two further references to "one million dollars" need not be addressed again.

Once again, Defendants rely on the learned treatise, The Law of Torts by Prosser. By the use of one small quote from a fairly large section, Defendants have found one sentence that might seemingly, at first blush, support their position only since it refers to a bulldog.

This Court is respectfully referred to the entire

section of W. Prosser and W. Keeton, The Law of Torts, Section 61 (5th Ed., *1984).* In reviewing pages *429* through *432,* dealing with the law concerning both firemen and policemen and the Fireman's Rule, one can find the bulldog quote and notices that footnote 51 cites one **(1)** Nevada and two (2) California cases. As previously pointed out to the Third District Court of Appeal, none of these three (3) cases refer in any way to a bulldog, and all three (3), if read in their entirety, actually support the position of the Plaintiff. Obviously not cited by Defendants was the portion contained on Page 431 of the Prosser text which stated:

> "Yet the Fireman's Rule has been held only to apply when the firefighter or police officer is injured from the very danger, created by the defendant's act of negligence, that required his professional assistance and presence at the scene in the first place, and the Rule will not shield a defendant from liability from independent acts of misconduct which otherwise cause the injury."

That quote, and the numerous cases cited in support of same, are far more on point to the instant case.

Plaintiff was not injured by the spike on the fence while climbing over the fence to approach the open window in the home. Nor was Plaintiff injured as he attempted to approach the home and found himself actually confronted by a burglar, incidents directly related to his being called to the premises by the burglar alarm. Plaintiff was, in fact, injured as a direct result of being

surprised by four *(4)* large Great Danes coming out of the darkness causing him to flee from this life-threatening situation.

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 OW 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.

At the onset, it is respectfully pointed out that, since both parties are Petitioners and Respondents, many of the points made in a brief while "wearing one hat" apply once that party "changes hats." In his brief as Petitioner, Plaintiff argued for the abolition of the Fireman's Rule as an anachronysm, and, while not repeating those arguments in this Respondent's Brief, still takes the strong position that Florida now has the opportunity of following other progressive jurisdictions in that regard. The other two arguments contained in his brief as a Petitioner are clearly applicable as a response to the argument presented in the brief filed by Defendants in their role as Petitioners.

Plaintiff clearly contends that this is the classic case of a situation where the Fireman's Rule is inapplicable. Even in those jurisdictions that clearly follow the Fireman's Rule, it has not been utilized to prevent a police officer or firefighter from recovering for injuries that were unrelated to his or her being on the premises and which resulted from a separate act of misconduct or negligence on the part of the property owner.

In the instant case, it is clear that the Plaintiff was not summoned to the premises in order to calm dogs that had been the cause of a complaint registered by neighbors. He was summoned by a burglar alarm that, as was testified to by Defendant Ferrer, was there to specifically call a police officer to the premises while discouraging burglars. Had the Plaintiff seen a sign on the premises warning of dogs, or had he aroused the dogs by rattling his flashlight against the fence, this situation might be considerably different. In response to the possible burglarly, Plaintiff exercised all due caution and relied on his experience to attenpt to arouse dogs that might have been on the premises. He was not injured as a direct result of the burglary, and, as it turned out, it was never actually established that there had been an attempted break-in. Plaintiff was not injured climbing over the fence, nor was he injured in attempting to enter the premises and consequently hurt by some object, instrument or

condition related or attached to the house.

It has never been the law of this state that a police officer or firefighter is automatically barred from recovery because the injuries occur in the discharge of his duty.

Defendants contend that the landowner in the present case gas an absolute defense because of the alleged posting of signs warning of the presence of dogs. As dealt with in great detail in his Petitioner's Brief, it is abundantly clear that the defenses allowed under Florida Statute *767.04* are not applicable to Florida Statute 767.01 which makes the owner of the dog an absolute insurer of his animal's conduct.

The issue of the alleged sign or signs is crucial to all aspects of this case since the posting of a sign that is sufficient to give warning can act as a complete defense under Florida Statute *767.04* (the actual dog-bite statute). However, as will be discussed further, the mere mechanical posting of a sign somewhere on the premises does not automatically confer immunity on the landowner for dog bites. The case law of this state has clearly pointed out that the sign must provide sufficient notice to someone entering the premises, clearly a question of fact for a trier of fact to decide. The issue of an alleged sign or signs also is material to the common law arguments dealing with the Fireman's Rule since it is the position of the

Plaintiff that summoning a police officer to the premises through a burglar alarm, providing no warning of four (4) large Great Danes and setting up a series of circumstances that allowed those animals to attempt to attack the invited police officer create such a clear separate, independent act of misconduct that there is no way the Fireman's Rule, even extending its traditional applications, can be used to shield a landowner.

Dealing with Defendants' arguments concerning the Fireman's Rule, one cannot help but notice the broad generalizations concerning the alleged law that police officers and firefighters are denied recovery in all circumstances where they are discharging their duties. Cases cited like Whitten v. Miami-Dade and Sewer Authority, 357 So.2d 430 (Fla. 3d DCA 1978), and Wilson v. Florida Processing Company, 368 So.2d (Fla. 3d DCA 1979), stand for the conventional application of the Fireman's Rule where the plaintiffs were injured by inhaling chlorine gases that were the specific reason they were called to the premises, While not conceding the arguments contained in his other brief seeking the abolition of the Fireman's Rule, Plaintiff has no problem in recognizing the fact that courts have traditionally not allowed recovery to police officers or firefighters when the injuries are the direct result of their being on the premises even if it was an initial act of negligence (starting the fire, etc.) that resulted in their

being there in the first place.

The Court is again referred to one of the cases cited in Plaintiff's other brief, which stated that a police officer is allowed to recover for a totally separate act of negligence on the part of the homeowner, who, by removing a flashlight propping up a window, allowed that window to fall on the officer's hand doing him serious injury. Whitlock v. Ehlich, 409 So.2d 110 (Fla. 5th DCA 1982). It should be remembered that this case is clearly consistent with the position taken by Prosser and already quoted in this brief. The removal of the flashlight was a separate independent act of negligence. Arguendo, if the dogs had not been on the premises and the Plaintiff had approached the window, and attempting to climb in the window to look for a burglar, the window had, for no apparent reason, fallen and injured him, Plaintiff's position would not be nearly as strong. Here, in response to the burglary and while approaching the open window, Plaintiff found himself in a totally unrelated life-threatening situation.

Another point that is attempted to be made by the Defendants deals with the fact that the Defendants/ landowners were not on the premises at the time. There is no question as to that, but the law of this state does not require that the defendants/landowners actually be present at the time that the injuries occur. In Hall v. Holton, 330 So.2d 81 (Fla. 2d DCA 1976), the police officer was injured

while searching an abandoned building looking for vagrants/ trespassers. The Hall court stated that the defendant in that case had not satisfied the summary judgment burden of demonstrating that he had no reason to anticipate to the presence of police officers in his building. In the instant case, the Defendants should have actually expected a police officer responding to the burglar, their avowed reason for having it. In another recent Florida case, 'similar to Hall v. Holton, a question arose as to whether the plaintiff/ police investigator had been properly warned of a garage door falling on him. Berglin v. Adams Chevrolet, 458 So.2d 866 (Fla. 4th DCA 1984). There a question of fact arose, causing a reversal of the summary judgment, as to whether a separate independent act of negligence occurred when the defendants did not properly warn the investigator of the door presumably damaged in the burglary. That appellate court cited Hall v. Holton, supra, which was somewhat different in that the landowner, as in the instant case, was not on the premises literally at the time the incident occurred. However, the Berglin court found no distinction with whether the landowner is on the premises or not, because it cites the law of this state that there is a two-part duty on the part of the landowner, the second of which is to warn of a danger not open to ordinary observation of which the landowner is aware. Obviously, the facts of the instant case are even stronger than either Hall

or Berglin. Recently, the Third Court of Appeal decided the case of Rishel v. Eastern Airlines, Inc., 466 So.2d 1136 (Fla. 3d DCA 1985), in which the court upheld the dismissal of the complaint of a police officer who alleged negligence against the airline for not advising her of the violent propensity of an intoxicated passenger whom she had been called to the airplane to remove. She was injured in so doing, and the court upheld the decision based on what might be termed an "assumption of risk" theory in that the danger was not only clearly obvious, but was the exact reason for her being called to the airplane.

In that case, Judge Ferguson filed a strong and eloquent dissent seeking the abolition of the Fireman's Rule and citing cases from other jurisdictions. Since his dissent is quoted in the portion of the Plaintiff's Brief, as Petitioner, at Page 18, it will not be repeated here. In his brief, at Pages 12 through 25, Plaintiff argued for the abolition of this anachronistic common law rule and many of those arguments are pertinent here but will not be repeated. More on point are the arguments made by Plaintiff on Pages 25 through 39 of his Petitioner's Brief, which clearly show that in order for the Third District Court of Appeal to be reversed and the summary judgment on behalf of Defendant Ferrar to be reversed, the abolition of the rule is not necessary. Those arguments cite cases from other jurisdictions and, in order to not duplicate any more than

is necessary, will not be repeated.

Though Rishel and Whitten, from which he quotes, resulted in judgments for the defendant, the clear-cut law as to the defendant's/landowner's duties are clearly spelled out.

> "The sole duty owed a policeman or fireman by the owner or occupant of the premises is to refrain from wanton negligence or willful conduct and to warn him of any defect or condition known to the owner or occupant to be dangerous, if such danger is not open to ordinary observation by the policeman or fireman." Rishel, supra, at 1138.

It is clear that Plaintiff did not deliberately wish to endanger either his own life or that of Trainee Moore. He did not deliberately put himself in a position to be attacked by four *(4)* dogs, each of which was bigger than him. Defendants consistently try to point out the fact that Plaintiff heard barking in the distance, but the Record clearly indicates that the barking was not attributed by the Plaintiff to the premises in question, even though he took all obvious precautions to assure himself that dogs were not on the premises.

It would appear that one of the arguments put forward by the Defendants deals with the fact that these dogs were simply an obvious condition of the premises and not a hidden danger. One of the cases cited is Smith v. Markowitz, *486* So.2d 11 (Fla. **3d** DCA *1986).* There the summary judgment was sustained based on the fact that the pipe over which that plaintiff tripped pursuing a suspect

was a clearly open and obvious danger. It should be noted that Plaintiff did not trip over a spike in the ground which had been placed there in order to attach a rope, the other end of which would be attached to a dog or dogs. Nor was the Plaintiff injured when he tripped over some type of tether line on which a dog or dogs had their freedom of the yard. It is also pointed out that he did not injure himself by falling in a hole dug by the dogs, or by slipping on a slippery substance left by the dogs through their normal act of "a call to nature."

One might ask, "what weighs nearly eight hundred (800) pounds, has eight (8) eyes, sixteen (16) feet, and can go in four *(4)* directions at the same time?" It is suggested that it is somewhat stretching a point to say that the answer is nothing more than a condition of the premises. Even if one wished to stretch the point to that extent, the facts of the case, which are uncontroverted, show that the Plaintiff had no warning of four *(4)* Great Danes, and it is difficult to imagine anyone suggesting that they are, in fact, not a danger.

The numerous factual questions, by themselves, would prevent the entry of a summary final judgment. Even before one gets to that stage, it is clear from the Record that the injuries sustained by the Plaintiff had nothing to do with the reason why he was invited to the premises by the Defendants, through their burglar alarm, and thus precluding

the entry of a summary final judgment, even taking that common law rule in its most strict form.

In dealing with the Defendants arguments concerning what is erroneously called the "dog-bite statute" it must first be pointed out that, in their first paragraph, the statement is made that "there was no basis for his allegations of willful or wanton negligence for failure to warn of a hidden condition." In the portions of this Brief dealing with the Fireman's Rule, it has already been demonstrated, by quoting the court in Rishel, that there is a two part test that the defendant/landowners must pass, and that the substitution of the word "for" in place of the word "or" does not make this a singular test. Also, there are no allegations, nor is it contended by either party, that the injuries were sustained as a result of a bite or even contact with the dogs.

Throughout Defendants' briefs in this matter, there are constant references, usually underlined, to the word "undisputed." These vague allegations as to sign or signs, allegedly warning signs, are further pronounced by the fact that there have never been any record citations to the existence of these signs. As noted in great detail, everyone on the premises that night states the fact that they did not see a warning sign. There is no affirmative

testimony of the Defendants/Landowners that a suitable sign was in place nor what that sign allegedly said. It is conceded that people normally do not hang blank signs on their fences. It must also be conceded that people do not normally hang warning signs on the interior of their premises facing only the interior. Though not supported by the record, arguments could be made that the unintelligible writing on the "white rectangle" might very well be a sign warning of danger due to dogs. However, chis is one of the many series of factual disputes that could only be resolved by a jury. This Court in Belcher Yacht, Inc., v. Stickney, *450* So.2d 1111 (Fla. 1984), specifically noted, at 1113, that a sign must include the words, "beware of dog." In the same paragraph, the Court stated the following:

> "In order to illustrate the point more graphically, the Court presents the hair-raising scenario of a dog owner posting signs inviting the public on his land to do business, and when a member of the public accepts the invitation and is mailed by a large attack dog, the owner avoids liability because he has posted another smaller and inconspicuous sign which reads "beware of dog."

The Court further stated:

> "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. *450* So.2d at 1113.

In Stickney there was no question as to the prominence of the sign, the readability of the sign, and the

fact that the plaintiff knew what it meant. In a non-bite case, Rattet v. Dual Security Systems, *373* So.2d *948* (Fla. 3d DCA 1979), there was considerable testimony, unrebutted by the position of the Plaintiff, that prominent signs were displayed every twenty-five (25) yards along the fence. Here the only evidence of one sign is the picture of the "white rectangle" which one can only presume is a sign facing the interior of the premises. A recent case that consistently follows Florida case law and shows the necessity of having a trier of fact decide the sufficiency of the sign is Raiser v. Bailey, *474* So.2d *906* (Fla. 5th DCA *1985).* Here is the postman was the plaintiff when the dog jumped over the fence on which a sign was posted. There was no question as to the sufficiency or prominence of the sign, nor did the postman actually enter the premises about which the sign was to provide a warning.

As many times as Defendants wish to underline the word "undisputed," this does not take the place of citations to the record where witnesses testified as to the absence of signs. In fact, it is undisputed that the only evidence of a sign on the premises is the picture of the "white rectangle" with no further testimony that it actually even warned of dogs to comply with Florida Statute *767.04,* not even at issue in this appeal.

The Third District Court of Appeal correctly ruled that the dog-related statutes supersede the common law,

including the Fireman's Rule. The distinction between the dog-related statutes was dealt with by this Court in Sweet v. Josephson, 173 So.2d 444 (Fla. 1965).

This Court held,

> "In sum the first statute (767.01) fixes liability on the owner for any damage at all caused by his dog; the second statute (767.04) puts upon him responsible only for injury caused by the bite of his dog. That injury could eventuate from the embrace of a Saint Bernard on a stairway or a feist underfoot, though both encounters were friendly, is not difficult to conceive. Yet if the theory of the repeal of the first Statute by the second were adopted, such occurrences would exonerate the owner of the dog and make the doctor's bill the burden of the innocent victim. 173 So.2d at 446.

This Court concluded:

"There is a field of operation for each." Id.

This Court has ruled concurrently with Stickney v. Belcher Yacht, Inc., 424 So.2d 962 (Fla. 3d DCA 1983), a dog-bite case, that in a non-bite case the owner is subject to strict liability without any defenses other than enumerated in the Statute, and has stated again and again that Section 767.01 is a strict liability statute which has consistently been construed to virtually make an owner the insurer of the dog's conduct. Jones v. Utica Mutual Insurance Co., 463 So.2d 1153 (Fla. 1985). (dog towing wagon.)

As to common law defenses, the Third District Court of Appeal ruled completely consistent with this Court that the statutory dog liability statute supersedes the

common law and makes the owner the virtual insurer of the dog's conduct. Donner v. Arkwright-Roston Manufacturer's Insurance Co., *358* So.2d *28* (Fla. *1978).* In Donner this Court held that assumption of the risk was no longer a defense under the dog bite statute.

The position that abolition of common law defenses applies only to one of the two dog-related statutes is totally without support and, this Court, took a contrary position when it cited Donner, supra, in resolving Jones v. Utica Mutual Insurance Co., supra, at *1156.*

It is not unreasonable to deal differently with a situation where a dog causes injury in other than the conventional biting situation. Perhaps the legislature could have provided for a sign defense where the sign would warn that a dog is loose or has a propensity to climb upon visitors, tow a wagon erratically, or in some other way cause injury. However, the legislature has not done so.

Noble v. Yorke, *490* So.2d *29* (Fla. *1986)* did not involve a common law defense as to liability, but involved a common law avoidance available to the plaintiff in response to the statutory sign defense.

The Third District Court's opinion relies on its previous opinion in Rattet, supra, for the proposition that the defenses available in Section *767.04* are also applicable to causes of action accruing under *767.01.* In the instant case however, the Plaintiff was not injured by a bite, but

by damage caused by the dog pursuant to 767.01.

Subsequent to Rattet, the Third District Court ruled in Stickney v. Belcher Yacht, Inc., 424 So.2d 962 (Fla. 3d DCA 1983), as follows:

> "What is a situation covered by the Statute is not clear, We do know that situations not covered by Section 767.04 are (1) where the landowner is not the dog owner, e.g., Flick v. Malino, (2) where the dog-caused injury results from other than a bite, e.g., Vandercar v. David, 96 So.2d 227 (Fla. 3d DCA 1957)." n. 3, 424 So.2d at 964.

This ruling was affirmed by this Court in Belcher Yacht, Inc. v. Stickney, supra, wherein this Court held at page 1112 as follows:

> "We agree with the District Court's holding on this issue insofar as it applies to the dog owner, Belcher, but note that Section 767.04 pertains only to the owner. It is silent as to the custodian or keeper of a dog who is not the owner. It neither creates liability on the part of Hemner nor exonerates him because of the posted sign.

This Court points out in Footnote 2, of Belcher at 1112, that a comparison of Florida Statute 767.05 notes that the said section specifically refers to "an owner or keeper of any dog".

Under the statutory principle of interpretation expressio unius est exclusio alterius, Section 767.04 contains an express defense of a bad dog sign whereas 767.01 does not.

Section 767.01 is a statute imposing strict liability. Jones v. Utica Mutual Insurance Company, supra.

Therefore, inasmuch as the Statute supersedes the

common law and must be interpreted strictly, the dog owner liable under 767.01 is strictly liable without the availability of the statutory defenses listed in *767.04*, in a non-bite case, and therefore, the issue of the sign is immaterial.

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.

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