OA 10-8-87

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.

FILED
SID J. WHITE
JUL 22 1987
CLERK, SUPREME COURT
By
Deputy Clerk

REPLY BRIEF OF PETITIONERS ON THE MERITS

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

(With Appendix)

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TABLE OF CITATIONS

REFERENCES

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INTRODUCTION

The Petitioners will briefly address the Respondent's erroneous allegations that the facts as stated are not supported in the Record, so that this Court can move on to the legal issues involved.* Kilpatrick filed a Memorandum of Law in opposition to the Defendant's Motion for Summary Judgement and attached the Deposition testimony of Mr. and Mrs. Sklar, which undisputedly stated that at least one, if not three dog warning signs were posted on their property the night of the incident (A 1-8; R 235-314). Kilpatrick's own Memorandum admits that one sign was present on the interior fence of the Sklar's property (R 236).

Relying on this undisputed evidence the trial court asked the following question to establish whether a fact question existed on the presence of a dog warning sign:

> THE COURT: Isn't the testimony clear that at least one sign was up, perhaps not two but at least one was up?
>
> MR. SHIELDS (Plaintiff's counsel): Your Honor, I would respectfully show the court the pictures. Every police officer has testified and the pictures show--they are right here, Your Honor. These were identified as part of the record.
>
> THE COURT: The police testified to one thing but I seem to recall that in reading through the transcripts that have been made part of the record that the parties living in the house said that at least one sign was up, that the other one they had seen the day before but that two days later it wasn't there. So I still haven't any question of fact on the signs.

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* Portions of the Record are attached in the Appendix to this Brief for ease of reference. The underlining is that of the Respondent, Kilpatrick.

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MR. SHIELDS: Your Honor, the sign in question is seen in this picture if you go onto the premises. And once you are on the premises and in the jurisdiction of the dogs, if you look down towards Bayshore Drive and you look down that way, that is the sign.

Now, I would respectfully point out to the court--

THE COURT: Hold on. That sign is on the outside of the gate.

MR. SHIELDS: No, your Honor. You are inside the premises. You are inside. That picture is taken from inside the premises.

The point is the court has hit on the fact that there are factual discrepancies in the record. The most recent case, the Adam Chevrolet/Bergman case, soon to be, Justice Barkett participated, cited--

THE COURT: Where is that?

MR. GALLAGHER (Defendant's counsel): Taking all the facts to be true, there would be four signs on the property, two on the dog pen, warning of dogs...

. . . .

(R 745-747)

THE COURT: I have understood the testimony from at least the deposition of the owners of the property that at least one of the signs on the perimeter was up and the other one was probably up.

MR. GALLLAGHER: There is also usually sign right up here. It is in the left-hand corner of this picture. Obviously, it is not here. These pictures were taken by the police officer. We have to assume that the police officer did not take the signs down.

THE COURT: That is the second sign that is questionable.

MR. GALLAGHER: The sign that is questionable, clearly, this is the sign.

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> That warning is up on the property the night of the incident. Whether he saw it, I cannot say one way or the other. He denies that.
>
> (R 748)
>
> . . . .
>
> THE COURT: And there was one sign up, everybody agrees.
>
> MR. SHIELDS: Your Honor, respectfully, there is a question as to where... There is a factual question of whether that was warning to him under the circumstances...
>
> (R 750-751)

The facts are just as the Petitioner stated, and are substantiated in the Record by the Respondent's own pleadings and testimony. The trial court determined that there was no fact question since it was undisputed that at least one warning sign was present (if not three signs) on the night Kilpatrick was injured (R 235-314; 745-751).

The amount of damages sought by the Respondent are important as they substantiate the public policy reasons for adhering to the Fireman's Rule in Florida. The Chief Judge of the Third District inquired as to the relevancy of the amount of the damages to the application of the Fireman's Rule. In response we noted that without the Rule homeowners or businessmen could not risk having a policeman or fireman come onto the property because the liability to the policeman or fireman would be far more than what a burglar could steal, or what the house would be worth. Additionally the Respondent does not deny that he is seeking a million dollar recovery for his injury, rather he simply says that he is not trying to recover more than a million dollars for

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a mere cut on his leg.

The prospect of liability for homeowners of hundreds of thousands of dollars will require a decision to be made in each emergency. The landowner would have to chose whether to allow a fire to burn or a thief to steal whatever he can. The owner's property loss could be a lot less than the liability to the attending fireman or policeman. To require such decision making is clearly contrary to the public policy reasons for having police and fire protection.

Along the same lines, if this Court finds that the Fireman's Rule defense is abrogated by the dog bite statute, then all dog owners will essentially be excluded from police and fire protection. This clearly inequitable result can be avoided, if the statute is applied, by adhering to the law that a bad dog sign is a complete defense in a dog injury case. The Respondent has presented no valid reason to abrogate either the Fireman's Rule or the bad dog sign defense. The Third District's Opinion must be reversed as it is contrary to the law and strong public policy in Florida favoring the retention of the Fireman's Rule.

I. FIREMAN'S RULE IS FAVORED IN FLORIDA AND IS A ETE DEF I, ACTIONS AGAINST LANDOWNERS

Kilpatrick's argument that he was not injured while discharging his professional duties is completely contrary to the facts and Florida law and is just another attempt to circumvent the Fireman's Rule. Kilpatrick testified that he first jumped over the concrete fence in the front yard of the Sklar's property and investigated the whole front of the house, looked into the

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windows, etc. to see if the house had been burglarized (R 443). He saw an open window (R 30). He then jumped back over the front yard fence and walked around to the rear of the house (R 445). He said he heard dogs barking about a block away (R 446). Thinking that there might be dogs in the backyard he beat on the gate with his flashlight to arouse the dogs (R 141; 448-449; 559). He then hopped over the fenced and proceeded directly to the open window (R 450; 451; 453). Five feet from the window he heard a noise and turned and saw the dogs (R 452). He then ran back to the fence and in jumping back over it he was injured (R 455-456).

Kilpatrick claims that he is somehow removed from the Fireman's Rule if his injury was not caused by a burglar or by climbing in or out of the open window. However the facts clearly fall within the scope of the Fireman's Rule, as demonstrated by Florida case law.

Fireman's Rule Applies to Facts of This Case and Reflects Florida's Public Policy.

In Wilson v. Florida Processing Co., 368 So.2d 609 (Fla. 3d DCA 1979) the police officer was called to evacuate residents of a town due to escaping chlorine gas. He was not called to stop the leak. He inhaled some gas and sued for his injuries. His claim was barred by the Fireman's Rule. The police officers in Whitten v. Miami-Dade Water & Sewer Authority, 350 So.2d 430 (Fla. 3d DCA 1978) were also barred from recovery when they inhaled chlorine gas, when called to evacuate citizens and divert traffic from the area. The court restated the rule that once

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upon the premises the policeman has the status of a licensee and the landowner has only the duty to refrain from wanton negligence or willful conduct. Whitten, 432.

The same type of argument that Kilpatrick makes was rejected in Wilson, supra and in Adair v. The Island Club, 225 So.2d 541 (Fla. 2d DCA 1969). The officer in Wilson claimed the he was beyond the scope of his normal duties as a policeman when he inhaled chlorine gas while evacuating local residents. The court refused to allow the policeman to sue the landowner stating:

> It is perfectly obvious that the evacuation of endangered citizens such as that undertaken by Wilson forms a part of precisely what policeman are hired to do and falls directly under the ordinary course of the duties of that occupation.

Wilson, at 611.

Similarly in Adair the policeman was called to render aid to distressed individuals and make the area safe after a gas leak. The club manager asked the officer to help him move a tank which was hitting against a seawall. In relocating the tank the officer inhaled some of the gas. He sued, claiming that his police duties were completed and at the time of injury his status changed from licensee to business invitee. The appellate court rejected this argument and upheld the dismissal of his complaint. Adair, 543, 547.

Kilpatrick asserts that he was not called to the premises to investigate dogs and therefore the injury from being chased by dogs is not related to his police duties of investigating a burglary. This type of argument has been repeatedly rejected by Florida courts as well as other jurisdictions. Sherman v.

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Suburban Trust Co., 282 Md. 238, 384 A.2d 76 (1978)(officer called to investigate forgery could not recover for injury from coin changing machine); Fletcher v. Illinois Central Gulf Railroad Co., 679 S.W.2d 240 (Ky.App. 1984).

The Respondent cites to no authority that the presence of dogs in a fenced-in yard of a house is a dangerous condition on the land. The trial court noted that there was no evidence whatsoever that the dogs were attack dogs, or had any dangerous propensities (R 742-744; 750). Kilpatrick's Complaint simply alleged that dogs were allowed to roam in the fenced-in area (R 750). There is no case that states that encountering dogs during a burglary investigation is a "totally unrelated life-threatening situation". That is because the presence of dogs is a common occurrence. It is so common that the police have specific procedures to be used if dogs are on the premises. More importantly Kilpatrick had his own technique for dealing with dogs when he thought they were present (R 448-449; 452; 558-559).

To offset the fact that the policeman cannot recover against taxpayers for injuries sustained from dangers inherent in their jobs, funds are set up to compensate them, such as Workers' Compensation benefits.

> It is in recognition of the public nature of the duties performed by firemen, and the dangers inherent therein, that both state and municipal pension funds are established to compensate them in the event they suffer injury or death while acting in the course of their employment.
>
> Romedy v. Johnston, 193 So.2d 487, 491 (Fla. 1st DCA 1967)

Kilpatrick has not presented any support for his

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allegation that having dogs is wanton or willful negligence such that he is entitled to sue the homeowners. Being chased by dogs is a normal risk. Assuming arguendo that it was negligent to own dogs, Kilpatrick still can not recover. This is the law of Florida and the public policy behind it has been succinctly reviewed recently by the Nevada Supreme Court:

> The origins of the rule lie in the area of tort law relating to the duty owed by an owner or occupier of land toward one who comes upon the land. See Prosser, Business Visitors and Invitees; 26 Minn.L.Rev. 573, 608-612. The rule developed from the notion that taxpayers employ firemen and policemen, at least in part, to deal with future damages that may result from the taxpayers' own negligence. To allow actions by policemen and firemen against negligent taxpayers would subject them to multiple penalties for the protection. 2 Harper & James, The Law of Torts (1956) Section 27.14 pp. 1503-1504.
>
> A public safety officer in Steelman's position cannot base a tort claim upon damage caused by the very risk that he is paid to encounter and with which he is trained to cope. Giorgi v. Pacific Gas & Elec. Co., 266 Cal.App.2d 35, 72 Cal.Rptr. 119 (1968); Walters v. Sloan, 571 P.2d 609 (Cal. 1977).
>
> Such officers, in accepting the salary and fringe benefits offered for the job, assume all normal risks inherent in the employment as a matter of law and they may not recover from one who negligently creates such a risk. See e.g., Maltman v. Sauer, 84 Wash.2d 975, 530 P.2d 254 (1975); Buren v. Midwest Industries, Inc., 380 S.W.2d 96, 98-99 (Ky. 1964). If this were not the rule, citizens would be reluctant to seek the aid of a public safety officer or to have such aid sought in their behalf upon the fear that a subsequent claim for injury by the officer might be far more damaging than the initial fire or assault. To hold otherwise would create far too severe a

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> burden upon homeowners in keeping their premises reasonably safe for the unexpected arrivals of police or firemen. See Aravanis v. Eisenberg, 237 Md. 242, 206 A.2d 148 (1965).
>
> Steelman v. Lind, 634 P.2d 666, 667 (Nev. 1981)

As we have previously stated the million dollar damage claim of Officer Kilpatrick clearly substantiates the very reason for retaining the Firemen's Rule. His subsequent claim is certainly far more damaging to homeowners than what the burglar could steal. This Court should adhere to the rule. It was properly used as to Dr. Ferrer (Mrs. Sklar) and it should have been used to prevent a claim against the dog owner Mr. Sklar.

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

Incredibly Kilpatrick ignores his own pleadings where he put before the court the testimony of both Mr. and Mrs. Sklar that their signs said "beware of dogs" (R 235-314; A 2;5).

Kilpatrick erroneously claims that the defenses listed in Section 767.04 are not available if the dog causes personal injury, but does not bite the Plaintiff. He totally ignores the express language of the statute which says:

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

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on his premises a sign easily readable including the words "Bad Dog".

F.S.A. Section 767.04.

The Respondent still misapplies the dicta in Sweet v. Josephson, 173 So.2d 444 (Fla. 1965) (which expressly found that Section 767.04 did not repeal the Strict Liability Statute, Section 767.01, and that Section 767.04 allowed a suit to be brought by a plaintiff against a dog owner, where the Plaintiff was injured but not bitten); and Stickney v. Belcher Yacht Inc., 424 So.2d 962 (Fla. 3d DCA 1983) (which unquestionably held that the posting of a "Bad Dog" sign shielded the owner from statutory liability for damages caused by a dog bite). Neither case even suggests that the "Bad Dog" sign defense is bottomed on whether the dog injured or bit the Plaintiff. Rather in Belcher Yacht Inc. v. Stickney, 450 So.2d 1111 (Fla. 1984) this Court held that the statute abrogated common law liability and that strict liability for dog bites is imposed only on dog owners, who are exonerated by the posting of a "Bad Dog" sign. See also, Vandercar v. David, 96 So.2d 227 (Fla. 3d DCA 1957) (defenses of contributory negligence and assumption of the risk available in an action where a dog caused injury other than a bite); Knapp v. Ball, 175 So.2d 808 (Fla. 3d DCA 1965) (no rejection of defenses required due to statutorily imposed liability for dog injury).

Kilpatrick had no cause of action because the Sklars breached no duty to him under the Firemen's Rule. There is no basis for his allegation of the existence of a "totally unrelated life-threatening situation" (dogs in the yard). Therefore he

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attempted to impose absolute liability upon Mr. Sklar under the dog-bite statute. This strategy however ignores the fact that the Firemen's Rule prevents any action against Mr. Sklar.

Even if Kilpatrick could rely upon the dog-bite statute, he is still barred from recovery, since it was undisputed that at least one, if not more signs, warned of the presence of dogs on the premises. The fact that he did not see the sign does not change the evidence that they were there, nor does it prevent the application of the statute. Rattet v. Dual Security Systems, 373 So.2d 948 (Fla. 3d DCA 1979).

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, supra. Therefore this defense was available in the present case, where the dog did not bite Kilpatrick, but merely chased him and the defense barred the Plaintiff's action.

Kilpatrick misrepresents this Court's decision in Jones v. Utica Mutual Ins. Co., 463 So.2d 1153 (Fla. 1985). Jones never addressed the application of statutory defenses at all. Rather the issue in Jones was whether the strict liability statute should impose absolute liability, with no consideration of causation. In rejecting this premise, this Court states that the legislature did not intend strict liability for dog owners in every instance where the actions of a dog are a factor in an

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injury. The opinion finds that the rules of ordinary causation should apply. Nowhere in that decision is there any reference to what defenses are available to the dog owner.

Along the same lines in Donner v. Arkwright-Boston Manufactures Mutual Ins. Co., 358 So.2d 21 (Fla. 1978) this Court notes that a statutory defense would be that the Plaintiff voluntarily exposed himself to the danger of a vicious dog without necessarily provoking or aggravating him maliciously or carelessly. The citing of Donner in Jones was in reference to the statute being construed to virtually make the owner an insurer of the dog's conduct. Jones, 1156. Donner was not cited as authority regarding defenses to dog injuries, since Jones does not address this issue at all.

The cardinal rule of statutory construction is that plain and unambiguous language in a statute needs no construction and creates the obvious duty to enforce the law according to its terms. Jones, supra, 1156. Van Pelt v. Hilliard, 75 Fla. 792, 78 So. 693 (1918). The statute clearly states that "no owner of any dog shall be liable for any damage ... if at the time of any such injury he had displayed in a prominent place on his premises a sign easily readable including the words "Bad Dog". F.S.A. 767.04. Kilpatrick has presented no authority that supports his position that the statutory dog sign defense does not apply to injuries caused by dogs. His action is barred by the Fireman's Rule. The dog sign defense must be permitted, if the Fireman's Rule is not applied to Mr. Sklar.

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CONCLUSION

The Respondent has presented no persuasive legal basis for abolishing the Fireman's Rule or the statutory dog sign defense. The Judgment for Petitioner, Sklar, the landowner/dog owner, must be reinstated under the Firemen's Rule and under the statutes relating to dogs.

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