IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,454

Florida Bar No: 184170

DANIEL H. BRANTLEY )
)
Petitioner, )
)
vs. )
)
GIRL SCOUT COUNCIL OF TROPICAL )
FLORIDA, INC., a Florida )
corporation, )
)
Respondent. )



ON PETITION FOR DISCRETIONARY REVIEW TO
THE THIRD DISTRICT COURT OF APPEAL

# BRIEF OF PETITIONER ON THE MERITS
# DANIEL H. BRANTLEY

(With Appendix)

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## POINTS ON APPEAL

I. THIS SUMMARY JUDGMENT WAS IMPROPER BECAUSE (A) THE EVIDENCE INDICATED A JURY QUESTION AS TO A DANGEROUS CONDITION NOT OPEN AND OBVIOUS, AND (B) IT WAS PREMATURE AS DISCOVERY WAS NOT COMPLETED.

11. THE SUMMARY JUDGMENT MUST ADDITIONALLY BE REVERSED SINCE THE FIREMAN WAS INJURED BY A CONDITION OTHER THAN THE CONDITION HE CAME ON THE PREMISES FOR (THE FIRE). THIS QUESTION IS PENDING IN THE SUPREME COURT ON THE MERITS IN KILPATRICK V. SKLAR, (Sup. Ct. No. 86-556) and SANDERSON V. FREEDOM SAVINGS AND LOAN ASSOC., ET AL., (Sup. Ct. Case No. 69,687).



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## INTRODUCTION

The Petitioner, Daniel Brantley, will be referred to as Plaintiff or Brantley.

The Respondent, Girl Scout Council of Tropical Florida, Inc. a Florida corporation, will be referred to as Defendant or Council.

The Record on Appeal will be designated by the letter "R". All emphasis in the Brief is that of the writer unless otherwise indicated.



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## STATEMENT OF THE FACTS AND THE CASE

This case falls into an established exception to the Fireman's Rule. Threfore, even if the Fireman's Rule is retained in Florida, this cause of action should be reinstated since the Defendant was on the premises and could have warned the firemen of a condition not open and obvious, and therefore this is an exception to the Fireman's Rule and presents a jury question.

In this case the firemen were on the premises for four or five hours fighting the fire, and officers of the Defendant and the maintenance people were also on the premises talking with the firemen and assisting them. Therefore the question of whether they should have advised the firemen was a question to be submitted to the jury.

One clear exception to the Fireman's Rule is that there will be liability if the Defendant was on the premises and did not warn the fireman of a dangerous condition which is not open and obvious, and this situation creates a jury question. In the present case the firemen were on the premises fighting the fire from 4:00 P.M. to 8:00 or 9:00 P.M. and officers, as well as maintenance people, employed by the Defendant were all on the premises. They did not warn Fireman Brantley of the dangerous condition which was not open and obvious to him; namely post holes for a fence which had been taken out, leaving the large holes still in the ground, with brush grown over them, such that Fireman Brantley stepped in one, was severely injured and has not worked since then.

Additionally, there was additional discovery still to do,



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namely deposing the additional maintenance people as to the covered holes, so additionally the Summary Judgment was premature. Therefore this is simply another situation of an improper Summary Judgment.

This is an appeal from a Summary Final Judgment which was premature since the lower court entered it before the Plaintiff had an opportunity to complete discovery. The Summary Judgment must therefore be reversed so that the Plaintiff can complete discovery and a jury can decide the factual issues. The Plaintiff is entitled to an opportunity to depose the Defendant's agents concerning which of the Defendant's staff had knowledge of the holes on their property and which of the Defendant's staff could have warned the Plaintiff about the holes. Additionally, the facts already in the Record demonstrate issues of fact as to this known dangerous condition precluding Summary Judgment.

This case arises from a grass fire which occurred in the afternoon of January 21, 1985, on the Defendant's property at Camp Choee, owned and operated by the Defendant Girl Scout Council of Tropical Florida, Inc. (R 1-3; 151-239). The Plaintiff a Dade County fire fighter was dispatched to the Defendant's property along with several other units to fight a fire which posed a threat to the campgrounds and buildings (R 1-3; 80-141); 151-239); 243-335). The Plaintiff, Dan Brantley, is a 41 year old fire fighter, who had worked as a fireman for over seven years (R 80-141) prior to this incident. Mr. Brantley was injured when he stepped in one hole of a row of unfilled post holes 6"-8" in diameter, which were concealed by low lying brush,



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on the Defendant's property (R 80-141; 354-380). Mr. Brantley responded with his unit, to the Defendant's fire at approximately 4:30 P.M. and assisted until the fire was put out, about 8 or 9 o'clock that evening (R 80-141). The fire was moving in a north to south path and, in an effort to contain it, Mr. Brantley was assigned to start a back fire on the south line of the fire, to burn out the area that would otherwise feed the main fire as it moved south (R 80-141). Brantley built the backfire by walking backwards in a straight line east to west on the south side of the Defendant's property which was fenced by an eight foot chain link fence. Brantley set the backfire just inside, or to the north of the fence, on the Defendant's property. The area was covered by low bushes, Palmetto and coral rock and was typical Florida terrain in its natural state (R 80-141; 336-353; 354-380). It was dusk and difficult for Brantley to see because of the underbrush, and the smoke from the fire (Depo. 50; R 80-141). However he made his way along the fence line through the low lying brush and, he stumbled and fell, and as a result injured his back (R 80-141, 243-412). As he was in an area between the oncoming main fire and the eight foot fence, Mr. Brantley was forced to get up and keep moving after he fell in order to escape from the burning area. When he got to the west end of the property he had to climb a four foot fence to get away from the fire (R 80-141; 354-380). After the fire was under control, he went back to the area where he fell and discovered a row of unfilled holes 6" to 8" in diameter. Although Mr. Brantley did not know at the time he fell that he was walking



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along a row of holes, he went back to the area where he fell, after the fire was under control, and found out that he had stepped into holes which were apparently old post holes, left unfilled after the Defendant had the chain link fence installed (R 80-141; 354-380). He was severely injured and has not worked since then.

At the time of the fire the executive director of the Camp was present and remained there throughout the fire. Similarly, the site manager, property manager and the executive director were all on the premises during the time the fire was being fought. While these people and other members of the Defendant's staff communicated with the firemen, no one warned of the brush covered row of unfilled post holes located along the inside of the chain link fence (R 151-239; 80-141; 264-335). Ms. Tejera stated that she was not aware of the existence of any holes in that area, that she did not know when they might have been made or whether any other member of the Defendant's staff knew anything about the post holes. She stated in her Deposition that several other people had been on the staff who might have information regarding the property and when the post holes were made, and about the grounds and overall upkeep (R 151-239).

Although the Subpoena for Deposition and the Plaintiff's Interrogatories requested the Defendant to produce the person with the most information regarding the post holes and maintenance of the property, the one person produced by the Defendant, Ms. Tejera, admitted that she did not know about the post holes and she did not maintain the property, although she



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named several persons on the staff who did have that information (R 6; 8-9; 151-239).

Specifically, Ms. Tejera named the executive director and the 28 people on the board of directors, and gave a list of names of thirteen people present on the grounds on the day of the fire. However she did not provide addresses or phone numbers for them, at the time of her Deposition, which was 3 days before the hearing on the Defendant's Motion for Summary Judgment. Ms. Tejera identified both the site manager and the property manager as the people who took care of the grounds and although she claimed to be the person most knowledgeable about the premises she repeatedly answered "I don't know" to questions about the premises, maintenance and upkeep of the grounds during her Deposition (R 151-239; Depo. 21; 30,34,37,38,39,40,41,43,44,46, 47,48,52,53,54,55,56,59,64).

In summary, the facts set out in the lower court's Judgment were undisputed with regard to the concealed post holes presenting a trap to the Plaintiff; that the Defendant had a duty to warn about this concealed danger and that there were a number of people who had an opportunity to warn the Plaintiff. However, as the Plaintiff was not allowed to complete discovery, he was unable to determine which of the Defendant's staff knew about the unfilled holes.

The Defendant moved for Summary Judgment solely on the basis of Ms. Tejera's Deposition in which she admitted not having any knowledge of the holes. Ms. Tejera's Deposition, however, does not answer for the numerous other people who, she admitted, did



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have that information and would know when the holes were made, etc. It is undisputed that the Plaintiff was denied the opportunity to depose these other individuals including the site manager, the property manager, the executive director and the thirteen staff members who were on the grounds at the time the fire was being fought.

The judge was informed that the Plaintiff had not completed discovery on the central issue of the case (R 243-263). However the court disregarded this and summarily disposed of the case applying the Fireman's Rule. It is submitted that the application of the Fireman's Rule was premature here because the condition, i.e., the unfilled post holes, were undisputedly a latent trap on the property, totally unrelated to the fire. Further because the Defendant's staff had summoned the firemen to their property, therefore knew of their presence, they undisputedly had a duty to warn of the holes and, lastly, there was ample opportunity for any one of the several staff members to advise the firemen about the holes. Ms. Tejera stated that she was at the service center at the front of the property when the firemen arrived and remained on the property and that Charlie Pifer, the property manager, remained on the property with the firemen during the time the fire was being fought. Mr. Pifer was at the front gate (R 151-239). The Record shows at least one fireman stayed at the front gate on the fire truck throughout the fire. Lt. Dewey F. Henry stated that he was on Engine 34 with Dan Brantley the day of the fire on the Defendant's property. He stated the Engine 34 pulled up to the front entrance of the property where the main



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building was and that the engine remained parked there for a long time (R 354-380). In any event Mr. Pifer, the property manager, was on the grounds walking around during the entire time (R 151-239). Additionally, Mr. Danford, who was working with Unit 36 on this fire, stated in his Deposition that he remained at the fire engine the entire time, a 3-4 hour period that the fire was being fought. Similarly Lee Warrick, the driver on Engine 34, stated that Engine 34, which the Plaintiff arrived on, remained at the entrance near one of the main buildings for about 20 minutes (R 381-412) and then to the south field where Mr. Brantley was assigned to back fire. He stated that the ground was not visible because it was covered with grass and weeds.

While there was apparently ample opportunity for any one of several of the Defendant's staff to warn the firemen of the existence of the post holes, no one did.

Mr. Brantley suffered a painful back injury after he stumbled over the unfilled holes on the Defendant's property. As a result of this injury he was unable to continue on active duty as a fire fighter and was assigned to light duty, doing administrative work for the fire department (R 80-141; 354-380; 326-335; 336-353). Mr. Brantley attempted to discover which of the Defendant's staff knew about the holes and which of the 13 people present during the fire failed to warn the firemen about the holes but the Defendant resisted producing any information until just three days before the hearing on Summary Judgment. This did not leave the Plaintiff enough time to take Depositions of these 13 people, or anyone else, and as a result, there had



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been, in effect, no discovery accomplished as to the Defendant's knowledge of the hidden post holes, and therefore the Summary Judgment was premature. The lower court was advised of this, but would not allow the Plaintiff an opportunity to complete discovery prior to granting Summary Judgment (R 243-263).

In disregard of the disputed fact that there was a concealed trap on the Defendant's property, i.e., the hidden post holes, which undisputedly gave rise to a legal duty to warn the Plaintiff and the undisputed evidence that several people had an opportunity to warn about this hidden trap, and with absolutely no evidence to show which of the Defendant's staff knew of this hazard, because the Plaintiff had not been given an opportunity to depose them, the court granted the Defendant's Motion for Summary Judgment. The Appellant timely entered an appeal seeking a reversal of the Judgment (R 413-415; 240).

In the Third District the Plaintiff advised the Court that the Fireman's Rule was currently being reevaluated in the cases of Sanderson v. Freedom Savings and Loan Association, 496 So.2d 954 (Fla. 1st DCA 1986) and Kilpatrick v. Sklar, 497 So.2d 969 (Fla. 3d DCA 1987). Plaintiff asserted that his Complaint was similar to the one filed by the police office in Kilpatrick wherein the police officer asserted that even if the Fireman's Rule was to remain part of the law in Florida, it was inapplicable where the police officer is on the premises for reasons unrelated to the manner in which he was injured and injury resulted from the independent act of negligence on the part of the landowner. In addition the Plaintiff in Kilpatrick



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specifically requested that the Florida Supreme Court abrogate the Fireman's Rule, which of course would entitle him to go forward with his lawsuit. The Third District per curiam affirmed the Summary Judgment entered against the Plaintiff, citing Sanderson along with several other cases addressing the Fireman's Rule (A 1). This Court accepted jurisdiction to review the Third District Court of Appeal's decision in this case involving the Fireman's Rule.



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## SUMMARY OF ARGUMENT

This case falls into an established exception to the Fireman's Rule. Therefore even if the Fireman's Rule is retained in Florida, this cause of action should be reinstated since the Defendant was on the premises and could have warned the firemen of a condition not open and obvious, and therefore this is an exception to the Fireman's Rule and presents a jury question.

In this case the firemen were on the premises for four or five hours fighting the fire, and the officers of the Defendant and the maintenance people were also on the premises talking with the firemen and assisting them. Therefore the question of whether they should have advised the firemen was a question to be submitted to the jury.

The Summary Judgment was granted based on the Fireman's Rule, as the Plaintiff is a fireman. However one clear exception to the Fireman's Rule is that there is liability of the Defendant if the Defendant is on the premises and does not warn the fireman of a dangerous condition not open and obvious. In the present case the firemen were on the premises fighting the fire from 4:00 P.M. to 8 or 9 P.M., and officers, as well as maintenance people, of the Defendant were on the premises, and did not warn the fireman of the dangerous condition not open and obvious, namely post holes for a fence which had been taken out, leaving the large holes still in the ground, with brush grown over them, such that the fireman stepped in one and was severely injured and can no longer work as a fireman. Therefore the facts already in the Record clearly preclude Summary Judgment.



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Additionally, there was additional discovery still to do, namely deposing the additional maintenance people as to the covered holes, so additionally the Summary Judgment was premature.

Therefore this is simply another situation of an improper Summary Judgment; as it was entered before the Plaintiff had an opportunity to complete discovery on the most significant issue in this case, and additionally because Summary Judgment was entered even though there were genuine factual issues to be decided.

Florida law mandates reversal where summary judgment deprives a party of a full and fair opportunity to conduct discovery and also requires reversal where there are genuine issues of fact left to be determined. Both rules require reversal in this case as the Record reveals that four days before the Hearing on Summary Judgment, the Plaintiff learned for the first time that there were numerous people who were knowledgeable about the grounds and when the post holes were dug, but the Defendant produced only one person for deposition who admittedly did not have any information about it. The Plaintiff must necessarily depose those people to determine which of the Defendant's staff had knowledge of the existence of the holes. Similarly as the Defendant's knowledge about the holes remains an issue of fact, Summary Judgment must be reversed to resolve this question as it will establish the Defendant's liability for the Plaintiff's injury.



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I. THIS SUMMARY JUDGMENT WAS IMPROPER BECAUSE (A) THE EVIDENCE INDICATED A JURY QUESTION AS TO A DANGEROUS CONDITION NOT OPEN AND OBVIOUS, AND (B) IT WAS PREMATURE AS DISCOVERY WAS NOT COMPLETED

It is undisputed in this case that the row of unfilled post holes located on the Defendant's property were concealed by brush and posed a latent dangerous condition of which the Defendant was required to warn the Plaintiff, as a matter of law. Whitten v. Miami-Dade Water & Sewer Authority et al., 357 So.2d 430 (Fla. 3d DCA 1978).

> [Tlhe sole duty owed [a policeman or firernan] 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].

Id. at 432.

It is further undisputed that the Defendant knew that the firemen were on the premises and therefore the duty to warn of the hidden holes arose. Hall v. Holton, 330 So.2d 81 (Fla. 2d DCA 1976); Berglin v. Adams Chevrolet, 458 So.2d 866 (Fla. 4th DCA 1984) see also, Price v. Morgan, 436 So.2d 1116 (Fla. 5th DCA 1983):

> The application of either the "licensee rule" or the "fireman's rule" does not, however, preclude recovery for injuries by a fireman under any and all circumstances, just because he is on the premises in the discharge of his duties. If considered a licensee, once his presence on the premises is known or should reasonably be anticipated by the owner, the owner has the obligation to refrain from wanton negligence or willful conduct and to warn the licensee of defects or conditions known to the owner to be



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> dangerous when such danger is not open to ordinary observation by the licensee and when there is reasonable opportunity to give such warning.

Id. at 1121.

In Hall v. Holton, 330 So.2d 81 (Fla. 2d DCA 1976) the District Court reversed the entry of Summary Judgment in favor of a defendant building owner, finding that where a dangerous condition existed on the owner's premises which was not open to ordinary observation, the owner had a duty to the policeman, who could reasonably be expected to be on the owner's premises, to warn about the condition. In Hall the owner had been advised that the floors in his building were rotten, even though no holes were apparent; and the court found that factual questions were created by the owner's apparent knowledge that the floors in the building posed a danger. This is significant to the present case as the evidence shows that the Defendant was fully aware that the firemen would be on the premises and there is a strong inference that they knew a dangerous condition existed which posed a hazard to the firemen. The combination of the existing concealed dangerous condition, the owner's implied knowledge of the condition, and the reasonable expectation that a policeman would be on the premises, gave rise to factual questions regarding the owner's knowledge of the condition which placed a duty on him and whether the owner fulfilled his duty, and these factual questions warranted a reversal of Summary Judgment. With the same reasoning, Summary Judgment must be reversed below for a resolution of the owner's knowledge of the land's condition, which placed a duty on the Defendant to warn, as a matter of law,



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and whether it fulfilled the duty to the firemen in this case.

Similarly in Berglin v. Adams Chevrolet, 458 So.2d 866 (Fla. 4th DCA 1984) there was a significant fact question regarding the duty to warn, where the evidence established the defendant owner had knowledge of the danger and that the injured polceman was on the premises with agents of the owner, who failed to warn of an unobvious danger. There a crime scene investigator went to the defendant's premises to investigate a burglary, and was not advised by the defendant's agent that a garage door was precariously positioned and could unexpectedly close. The investigator was hit by the door and injured. Immediately thereafter the owner's agent spoke to the investigator telling him he was afraid the door had hurt him. The investigator sued the premise's owner for willful negligence and then appealed summary judgment entered against him. The District Court reversed summary judgment finding that the defendant was "... obligated to refrain from wanton negligence or willful conduct which would injure the appellant and to warn him of any defect or condition known to the defendant to be dangerous if such danger was not open to ordinary observation by the plaintiff". Berglin, 867. The appellate court found disputed issues regarding the defendant's breach of duty and reversed summary judgment under the facts and on the authority of Whitten, supra, and Hall v. Holton, supra.

Like Berglin, in the present case there is a strong inference from the evidence that the Defendant knew that there was a concealed dangerous condition on its property since it was undisputed that it had fencing erected during the time it owned



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the property, and that it regularly maintained the grounds where the Plaintiff fell and that it knew the firemen were on their property, and specifically in that area. There are significant factual questions in this case which necessitate a reversal. It is further undisputed that a number of the Defendant's agents were present at the time of the fire, and remained on the property throughout the fire and had an opportunity over a three to four hour period of time to warn Mr. Brantley about the concealed row of post holes. The only fact question left to be determined is how many of the Defendant's agents knew about the existence of the row of post holes along the south fence and the court prevented the Plaintiff from finding out this information by prematurely entering Summary Judgment and thereby cutting off the Plaintiff's opportunity to complete discovery. Under these circumstances the entry of Summary Judgment was an abuse of discretion and must be reversed.

The Plaintiff clearly advised the court at the hearing on the Defendant's Motion for Summary Judgment, that the facts, underlying whether the Defendant knew about the post holes, were undiscoverable at the time of the hearing, even though the Plaintiff had made a good faith effort to do discovery. The Defendant had resisted producing any information regarding its knowledge that the holes on their property even existed. The Plaintiff requested this information in its Interrogatories to the Defendant and the Defendant refused to even acknowledge the existence of the holes in its Answer (R 11). Then the Plaintiff asked the Defendant to produce those persons who had the most



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knowledge about the grounds, when the holes were dug, etc., and the Defendant produced one person who admittedly did not know anything about the property. Although her Deposition revealed the names of persons who did have information, since it took place just four days before the hearing on Summary Judgment, the Plaintiff did not have an opportunity to depose these individuals.

It was not until the Defendant produced Ms. Tejera, the Defendant's executive vice president, for Deposition four days before the hearing on Summary Judgment, that the Plaintiff learned that both the site manager and the property managers would have information regarding the holes, as well as, the names of numerous other people who had knowledge about the property, when the holes were dug, etc. Moreover, Ms. Tejera admittedly had no knowledge, even though she was produced by the Defendant as the person having the most knowledge about the grounds.

The Plaintiff advised the trial court that he had not been able to complete discovery with regard to those numerous other people in the three days preceding the Summary Judgment Hearing, and also, that Ms. Tejera denied having any knowledge of the holes on the property or even that Mr. Brantley was injured.

In other words, the Defendant organization produced one person as, supposedly the most knowledgeable about the grounds, maintenance, fencing, etc., and she claimed that she did not know anything and although she produced the names of many other people, including the site manager and the property managers, who were well informed about the grounds and the fencing, the Plaintiff never had an opportunity to depose those people before



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the court entered Summary Judgment against him. It is undisputed that discovery was prematurely cut off and the Plaintiff was subjected to an adverse judgment when, the Plaintiff was not allowed an opportunity to depose the people with information regarding the main issue in the case, namely the Defendant's knowledge of the row of unfilled holes.

The law clearly provides that summary judgment cannot operate to deprive a party of the right to do discovery. More particularly it cannot be upheld where the summary judgment ruling has cut off the Plaintiff's opportunity to discover information which could tend to establish the Defendant's liability. Scherr v. Andrews, 497 So.2d 970 (Fla. 3d DCA 1986) (summary judgment for the defendant was reversed where the plaintiff was denied a full and fair opportunity to conduct discovery); Derosa v. Shands Teaching Hospital and Clinic, Inc., 468 So.2d 415 (Fla. 1st DCA 1985) (the appellate court reversed summary judgment entered for defendants finding that it effected a premature termination of discovery where there was a possibility that an additional deposition could reveal a genuine issue of fact); Danna v. Bay Steel Corp., 445 So.2d 704 (Fla. 4th DCA 1984); Sewell v. Flynn, 459 So.2d 372 (Fla. 1st DCA 1984); Moore v. Freeman, 396 So.2d 276 (Fla. 3d DCA 1981) (where the appellate court held summary judgment was prematurely entered where the plaintiff had insufficient time to commence and complete discovery); Cullen v. Big Daddy's Lounge's, Inc., 364 So.2d 839 (Fla. 3d DCA 1978) (summary judgment for the defendant was reversed where the plaintiff had not completed discovery);



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Commercial Bank of Kendall v. Heinman, 322 So.2d 564 (Fla. 3d DCA 1975)(premature entry of summary judgment reversed where the plaintiff had not completed discovery.) ~~See also~~ Lovelace v. Sobrino, 280 So.2d 514 (Fla. 3d DCA 1973); Campbell v. Hartford, 309 So.2d 624 (Fla. 3d DCA 1975).

The Record, and specifically, Ms. Tejera's Deposition, taken together with the Defendant's Answers to the Plaintiff's Interrogatories, reveals that the Plaintiff was denied a full and fair opportunity to conduct discovery by the entry of Summary Judgment. It is apparent that Ms. Tejera did not know anything about the camp grounds, even though the Defendant produced her as the most knowledgeable person. Moreover her Deposition reveals that there were a number of people who did have information which would tend to establish the Defendant's knowledge of the existence of the holes where the Plaintiff fell on the day of the fire and about the Defendant's opportunity to warn the Plaintiff. Moreover, since this Deposition was held just four days before the court heard the Defendant's Motion for Summary Judgment the Plaintiff did not have an opportunity to pursue discovery of the site manager, the property manager or any of the other staff present at the time of the fire. Summary Judgment was incorrectly used to cut off discovery of the facts going to the one undisputed issue in this case, i.e., how many of the Defendant's agents knew about the row of unfilled holes located on the inside of the fence.

It was undisputed that there were a number of persons available during the entire duration of the fire, which was at



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least three hours, who spoke to the fire fighters but did not warn about the concealed row of unfilled holes. Further discovery as to how many of these people knew about this concealed danger would resolve the issue of which of the Defendant's agents could have warned the Plaintiff.

It is submitted that this case must be reversed under the rules of law, which require that parties be afforded a full and fair opportunity to complete discovery, Scherr; Derosa; Sewell; Moore; Cullen; and that all fact issues be undisputedly resolved before Summary Judgment may be entered.

The strong rule of law in Florida against summary judgment in a negligence case is well known. Holl v. Talcott, 191 So.2d 40 (Fla. 1966).

> If the record reflects the existence of any genuine issue of material fact, or the possibility of any issue, or if the record raises even the slightest doubt that an issue might exist, summary judgment is improper.
>
> Snyder v. Cheezem Developmentt Corp., 373 So.2d 719, 720 (Fla. 2d DCA 1979)

Proceedings for summary judgment may never be used as a substitute for a trial if from the evidence before the court, there appears to be a genuine issue of some material fact which must be established in order for either party to prevail. Herold v. Computer Components International, Inc., 252 So.2d 576 (Fla. 4th DCA 1971).

As the Record clearly shows that the Plaintiff did not have an opportunity to complete discovery; that additional depositions would have tended to establish the Defendant's liability; and



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that there was a question of fact as to how many of the Defendant's agents knew of the concealed danger and which of the Defendant's agents had an opportunity to warn the Plaintiff, Summary Judgment must be reversed.

This Court is addressing the question of whether the Fireman's Rule should apply when the fireman or policeman is injured by a condition other than the condition he came on the premises to correct. If this Court holds that to be an exception to the Fireman's Rule, this case must be reversed, since the fireman did not come on the premises in regard to the post holes.



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11. THE SUMMARY JUDGMENT MUST ADDITIONALLY BE REVERSED SINCE THE FIREMAN WAS INJURED BY A CONDITION OTHER THAN THE CONDITION HE CAME ON THE PREMISES FOR (THE FIRE). THIS QUESTION IS PENDING IN THIS COURT ON THE MERITS IN KILPATRICK V. SKLAR, (Sup. Ct. No. 86-556) and SANDERSON V. FREEDOM SAVINGS AND LOAN ASSOC., ET AL., (Sup. Ct. Case No. 69,687).

In Kilpatrick v. Sklar a policeman was injured during the investigation of a burglary when he was chased by four great danes and in an attempt to escape the dogs, he lacerated his leg on a wrought iron spike. The Plaintiff in Kilpatrick, both in the Third District and in this Court, argued that the Fireman's Rule should be abolished as it was out-moded and no longer a practical doctrine in this day and age. The Plaintiff argued in the alternative that even if this Court were to retain the Fireman's Rule, the Plaintiff's injuries occurred because of separate and independent acts of negligence on the part of the landowners taking the situation out of the Fireman's Rule. The Plaintiff alleged that there was no warning of the presence of the dogs on the property and that he was not injured as he attempted to approach the Defendants' home and found himself confronted by a burglar. Rather he was injured as a direct result of being surprised by the dogs and that this injury was unrelated to his burglary investigation. In other words the Plaintiff asserted that the police officer was on the premises for reasons unrelated to the matter in which he was injured and therefore his action against the landowners was an exception to the Fireman's Rule and the condition causing the injury was something other than the condition for which he came on the



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premises. See generally, Price v. Morgan, 436 So.2d 1116 (Fla. 5th DCA 1983), rev. denied, 447 So.2d 887 (Fla. 1984) (owner of premises is not liable to a policeman or fireman for injuries sustained on the premises by virtue of a negligently created condition which necessitated the policeman or fireman's presence on the premises in the discharge or his or her duties).

The Fifth District in Price noted that the California courts in applying the Fireman's Rule have held that the Rule is not intended to bar recovery for independent acts of misconduct, which were not the cause of the fireman's presence at the scene of the fire. The Rule has only been applied to prohibit a fireman from recovering for injuries caused from the very misconduct which created the risk which necessitated his presence. Price, 1121, citing, Lipson v. Superior Court of Orange County, 31 Cal.3d 362, 81 Cal.Rptr. 629, 644 P.2d 822 Cal. (1982). This same principle was argued by Officer Kilpatrick and Fireman Brantley in asserting that their injuries from escaping from dogs and falling in a hidden hole were conditions which were unrelated to the professional reason why they were on the premises.

In Sanderson the First District Court of Appeal held that the Fireman's Rule bars recovery in personal injury and wrongful death actions, when the cause of action is based upon an injury sustained by a fireman or a policeman when 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 policeman or fireman. Sanderson, 956. The



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Plaintiff in Sanderson argued that the Fireman's Rule only applied in situations where the fireman or policeman was injured due to a defective condition of the premise and that when a plaintiff alleged "any" active negligence, even simple negligence, on the part of the owner of the premises or its agent, the applicability of the Fireman's Rule dissipates. Sanderson, 956. The First District disagreed upholding the Fireman's Rule and it certified the case to this Court as being in conflict with Whitlock v. Elich, 409 So.2d 110 (Fla. 5th DCA 1982). Sanderson, 957.

Petitioner, Fireman Brantley, argued the same position below as that asserted in Sanderson; that his Complaint for negligence on the part of the landowner in failing to warn of a dangerous condition, which was not open and obvious, did not require the application of the Fireman's Rule. As in the Sanderson case, both the trial court and appellate court disagreed finding the cause of action barred by the Fireman's Rule.

Judge Ferguson in his dissenting opinion in Rishel v. Eastern Airlines Inc., 466 So.2d 1136 (Fla. 1985) opined that the Fireman's Rule should be discarded on a finding that the public policy considerations upon which it is based have not proved sound or equitable. Rishel, 1139-1140. Judge Ferguson stated that he saw no reason why in this age of crowded living, a landowner should not be liable for the creation of unusual hazards which reasonable persons know or should know pose a danger to lives and property, foreseeably requiring the presence of firemen or policemen rushing in to give aid. He noted that



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the Fireman's Rule works to relieve negligent landowners of any duty except to disclose to the officer or fireman the existence of a hazard on the premises after the crisis has arisen and the rescuer to be has arrived. Of course Fireman Brantley alleged that the Defendant in this case failed to even meet that recognized duty of disclosing a hidden danger of which he was unaware.

It is respectfully submitted that this Court's decisions in Kilpatrick and Sanderson will not alter the reversal required in the present case. Should this Court retain the Fireman's Rule, this case must be reversed so that the Plaintiff may complete discovery and for a resolution of the factual issues left unresolved by the entry of the Summary Judgment; as the Petitioner's action falls within the exception to the Fireman's Rule. Alternatively, should this Court abrogate the Fireman's Rule, then as a matter of law, Summary Judgment grounded on that Rule must be reversed.



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## CONCLUSION

Regardless of this Court's decision on whether or not to retain the Fireman's Rule, the Plaintiff below is entitled to reversal of the Summary Judgment as his cause of action clearly fell within an exception to the Fireman's Rule; where the evidence showed that the condition was dangerous, not open and obvious, and that the officers and employees of the Defendant were on the premises with the firemen for hours but did not warn them of the post holes. Additionally, Summary Judgment was prematurely entered since it prevented the Plaintiff from completing discovery on the one disputed issue of fact left to be resolved. Finally Summary Judgment must be reversed since Fireman Brantley was not injured by the condition he came on the premises in regard to, so the Fireman's Rule does not apply.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 14th day of October, 1988 to:

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