IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,454

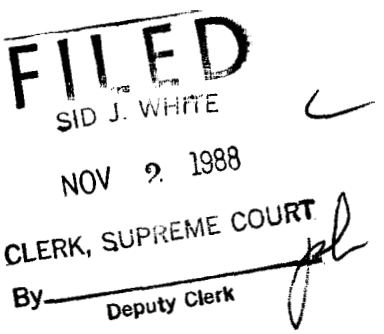
DANIEL H. BRANTLEY,

Petitioner,

vs.

GIRL SCOUT COUNCIL OF TROPICAL FLORIDA, INC., a Florida corporation,

Respondent.
_____/



On Appeal From
The Third District Court of Appeal of Florida

BRIEF ON THE MERITS OF RESPONDENT, GIRL SCOUT COUNCIL OF TROPICAL FLORIDA, INC.

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STATEMENT OF THE CASE AND OF THE FACTS

The Statement of the Case and of the Facts of Petitioner, Daniel H. Brantley ("Brantley"), fails to address material portions of the record and, therefore, Girl Scout Council of Tropical Florida, Inc. ("Girl Scout Council") must present its own statement.

CASE

Brantley's complaint alleged that Brantley was a business invitee while fighting a fire at Camp Choee, which was operated by Girl Scout Council and that he was injured when he stepped into a hole covered by grass, due to Girl Scout Council's alleged breach of a duty to maintain its premises in reasonably safe condition for him. [R. 1-3] Girl Scout Council denied these allegations in its answer. [R. **8-91** The complaint does not allege that Brantley was a licensee or that Girl Scout Council had a duty to warn Brantley of any dangerous condition on the premises known to Girl Scout Council.

After answering the complaint and after having conducted extensive discovery, Girl Scout Council filed a motion for summary judgment. [R. 71-79] At the time of hearing on this motion, Brantley's counsel argued once again that Brantley was an invitee on Girl Scout Council's property while fighting the Camp Choee fire. [R. 2551 In response, counsel for Girl Scout Council pointed out to the lower court that Brantley had

incorrectly alleged that he was an invitee and had incorrectly alleged that Girl Scout Council owed Brantley a duty of reasonable care, since Brantley was a licensee as to whom Girl Scout Council owed only a duty to refrain from willful and wanton harm and to warn of latent dangers of which it had knowledge. Counsel then argued that Girl Scout Council was entitled to summary judgment based solely on the issues raised by the pleadings. [R. 247-248] Then, counsel for Girl Scout Council advised the lower court that Brantley might wish to amend his pleadings, but that based on the posture of the evidence, Girl Scout Council would still be entitled to summary judgment. [R. 248-250] Counsel for Brantley then told the lower court that he would like to amend the complaint by pleading willful and wanton negligence on the part of Girl Scout Council based on Girl Scout Council's alleged "failure to maintain the premises." [R. 258] The lower court then opined that counsel for Brantley was proffering an amendment which suggested nothing more than simple negligence, rather than willful and wanton negligence. [R. 259] In any event, counsel for Brantley never requested leave to amend the complaint to plead that Brantley was a licensee and that Girl Scout Council owed him a duty to warn of latent perils known to Girl Scout Council, not open to ordinary observation and of which Girl Scout Council had a reasonable opportunity to warn. [R. 243-263]

With regard to Brantley's argument that summary judgment was premature because discovery was not complete and that he needed to depose all of the staff of Girl Scout Council present on the date of his alleged injury, it is necessary to point out that Brantley never moved the lower court, pursuant to Rule 1.510(f) Fla.R.Civ.P., to continue the hearing on the Motion for Summary Judgment on this ground. Rather, Brantley's counsel merely "advised" the court at the hearing on the Motion for Summary Judgment that his discovery was not complete and that he "would like to complete discovery." [R. 255, 2581 Further, although prior to the summary judgment hearing, Girl Scout Council offered to obtain all of the addresses of the persons on the Girl Scout Council staff present at Camp Choee on the date of Brantley's alleged injury, Brantley's counsel did not accept the offer. [R. 165-1661

The trial court entered summary final judgment for Girl Scout Council [R. 413-4151, which was affirmed per curiam by the Third District. [R. 4161 The Third District's opinion cites Sanderson v. Freedom Savings & Loan Association, 496 So.2d 956 (Fla. 1986), presently pending review in this Court. This Court then accepted jurisdiction to review the Third District's per curiam affirmance.

FACTS

Camp Choee is a twenty acre girl scout camp operated by Girl Scout Council. [R. 172-1821 On January 21, 1985, Dade County

firefighters, including Brantley, were summoned to the camp to extinguish a brush fire. [R. **118-120, 191, 308, 318, 328-329, 3421** As stated by the firefighters, the terrain in the area of the fire was weedy, woodsy, rocky and rough [R. **120, 274, 360, 3891** and it was hard for the firefighters to see either the ground or their feet while fighting the fire, since it was dark and smokey and the terrain was bushy. [R. **131, 3671**

The area of Camp Choee where Brantley claims he fell into a hole is off limits to the girl scouts and there are no scheduled activities for them there because it is too woodsy. [R. **190-1911** This section of the property is inhabited by foxes, rats and snakes which make excavations into the ground and there are also holes in the ground created by nature. CR. **206, 212-2131**

In **1981**, fences were installed at Camp Choee to enclose the property [R. **1851** and while fighting the Camp Choee fire, Brantley was positioned near one of the fences. [R. **1251** Brantley now claims in his brief that he subsequently "found out" that the holes into which he allegedly fell were located along this fence and were apparently "old post holes left unfilled after the Defendant had the chain link fence installed." [See Brantley's brief at pp. **4-51** In making this latter statement, Brantley has taken liberties with the record because he himself testified in his deposition that he was not sure if the holes he allegedly stepped into were post holes, although they looked like post holes to him. [R. **132-1341** Further, although fellow

firefighter, Lieutenant Dewey Henry, testified that the holes he saw by the fence looked like holes "for a fence post," [R. 3781, neither Brantley nor Henry nor anyone else ever testified that these were post holes left unfilled by Girl Scout Council after it installed the fence on the property. Then at page 5 of his brief, Brantley invites the court to fish through his blanket record references [R. 80-141, 354-3801 for testimony in support of the statement, but to no avail because the statement in Brantley's brief is the product of his imagination.

The staff of Girl Scout Council called the firefighters immediately upon seeing smoke on the grounds of the Girl Scout Camp [R. 216-2171 and the firefighters arrived at Camp Choee within a few minutes after they were summoned. [R. 358, 3841 After their arrival, the firefighters ordered everyone except the property manager, Charles Pifer, off the property because of the danger posed by the fire, contrary to Brantley's suggestion at pages 5 and 8 of his brief that members of Girl Scout Council's staff paraded around the camp and chatted with the firefighters as they fought the fire. Pifer was allowed to stay in the site manager's house, out of the way of the firefighters, since there was no fire in that area. However, the firefighters did not speak with the Girl Scout Council's staff while they were busy fighting the fire. [R. 219-2221

I.

SUMMARY OF ARGUMENT

Brantley argues that summary judgment for Girl Scout Council was improper because factual issues remained to be adjudicated regarding Girl Scout Council's duty to warn him as a licensee about some grass covered holes on its girl scout camp. However, in the trial court, the only claim made by Brantley was the legally incorrect claim that Brantley was an invitee as to whom Girl Scout Council owed a duty to maintain its premises in reasonably safe condition and Brantley never alleged any duty to warn on the part of Girl Scout Council in his complaint. Moreover, he never moved the lower court to amend his complaint to plead that he was a licensee and that Girl Scout Council owed him a duty to warn, even after his counsel was made aware at the summary judgment hearing that there was no allegation of duty to warn in the complaint and that Brantley could not be an invitee under the firemen's rule. Therefore, Brantley's argument about Girl Scout Council's duty to warn comes too late as it has been waived and, since Brantley never alleged *any* viable cause of action in his complaint, summary judgment was mandated.

Further, the summary judgment was correct purely from a common sense vantage point because no citations of law are even required to conclude that during an emergency, the girl scouts, who summoned the firefighters to their camp immediately upon smelling and seeing smoke on the grounds, had no reasonable

opportunity to warn the firefighters about grass covered holes on twenty acres of rocky and rough terrain obscured by the dusk and by smoke, especially considering the fact that the firefighters wanted everyone from Girl Scout Council off the property and away from danger.

II.

Brantley's claim that the lower court's summary judgment improperly cut off his opportunity to depose everyone present at the time of the fire is not a bona fide argument because when counsel for Girl Scout Council offered to obtain the addresses of all of those persons for Brantley's counsel, Brantley's counsel did not accept the offer. Obviously, Brantley cannot now seriously attempt to convince this court that he wanted or needed to depose individuals whose addresses he did not even request. In any event, Brantley did not follow 1.510(f), Fla.R.Civ.P. in that he did not file any affidavit in the trial court explaining why he needed more time to complete discovery and that it was necessary to continue the summary judgment hearing, thereby waiving any right to complain that discovery was not complete prior to the entry of summary judgment.

III.

The Third District's per curiam affirmance of the trial court was warranted on grounds unrelated to the holding in Sanderson v. Freedom Savings & Loan Association, 496 So.2d 956 (Fla. 1986) and, therefore, regardless of this court's disposition of Sanderson, the Third District's opinion should be approved.

ARGUMENT I

THE SUMMARY JUDGMENT WAS UNQUESTIONABLY CORRECT BASED ON THE ISSUES RAISED BY THE PLEADINGS.

A. The Only Issue Raised By Brantley's Complaint And Girl Scout Council's Answer Thereto Was Whether Brantley Was An Invitee As To Whom Girl Scout Council Breached A Duty To Maintain Its Premises In Reasonably Safe Condition.

Brantley argues at pages 13-21 of his brief that the trial court's summary judgment improperly deprived him of his opportunity to prove to a jury that Girl Scout Council breached a duty to warn him of the alleged latent danger posed by post holes covered with grass on its property and in so arguing, he makes reference to the "firemen's rule" which treats firemen as licensees. However, Brantley fails to advise this court that his complaint does not allege that Girl Scout Council had a duty to warn of latent dangers on Girl Scout Council's property and does not allege that Brantley was a licensee at the time of injury. Rather, the complaint alleges only that Brantley was a business invitee and that Girl Scout Council owed and breached a duty to keep its premises in reasonably safe condition for him. Therefore, Girl Scout Council's denial of this allegation, created the only liability issue.

B. Brantley Was Not *An* Invitee On Girl Scout Council's Premises; He Was A Licensee **And,** As A Matter Of Law, Girl Scout Council Did Not Owe Brantley A Duty To Maintain Its Premises In Reasonably Safe Condition For Him.

The First District Court of Appeal of Florida has rejected outright Brantley's argument that as a firefighter, he was an

invitee on Girl Scout Council's premises as to whom Girl Scout Council owed a duty of reasonable care. See, Romedy v. Johnston, 193 So.2d 487, 489 (Fla. 1st DCA 1967) where the First District said:

> "The entire burden of appellant's argument on this appeal is that a fireman who suffers injuries resulting in his death under the circumstances alleged in the complaint filed herein occupies the legal status of an invitee to whom the owner owes the duty of keeping the premises in a reasonably safe condition, and to guard against subjecting the invitee to dangers of which the owner is cognizant or might reasonably have foreseen. Although appellant recognizes that the weight of authority in the United States on the question presented is contrary to her position, she charges that such is an anachronism which should now be rejected. She points to the minority view expressed in decisions rendered by courts of last resort in the states of Illinois, New York, and Minnesota, as representing the sounder rule of law which should be adopted and followed by the courts of Florida.
>
> As indicated above, the majority of courts in this country adhere to the view that in the absence of statute or express invitation, a fireman who enters upon the premises of another in the discharge of his duty occupies the status of a licensee. This is the view apparently favored in Florida as gleaned from the decision rendered by the Supreme Court in the case of Fred Howland, Inc. v. Morris.". . .
>
> * * * * *
>
> "It well may be that because of the important and essential public service rendered by members of organized fire departments they should be considered sui generis and entitled to all the protection accorded invitees under the law. We believe, however, that if such change is to be made in the law, orderly processes of government dictate that it should be accomplished by the adoption of an appropriate statute by our legislature, and not by judicial legislation enacted by the courts."
>
> Romedy v. Johnston, supra at 489, 491, emphasis supplied.

The Third District Court of Appeal has also held that a fireman is a licensee and has succinctly set forth the sole duty of care owed to the fireman.

> ". . .Once upon the premises, the fireman or policeman has a legal status of a licensee and the sole duty owed him by the owner of 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 licensee. Adair v. Island Club, 225 So.2d 541 (Fla. 2d DCA 1969)."
>
> Whitten v. Miami-Dade Water & Sewer Authority, 357 So.2d 430, 432 (Fla. 3d DCA 1978), emphasis supplied.

Thus, Girl Scout Council's only legal duty to Brantley fell within the purview of the "fireman's rule," as clearly explained by the Third District in Rishel v. Eastern Airlines, Inc., 446 So.2d 1136, 1138 (Fla. 3d DCA 1985).

> "The fireman's rule, as generally framed, provides that an owner or occupant of property is not liable to a police officer or a firefighter for injuries sustained during the discharge of the duties for which the policeman or fireman was called to the property. See, Price v. Morgan, 436 So.2d 1116 (Fla. 5th DCA 1983), review denied, 447 So.2d 887 (Fla. 1984); Whitten v. Miami-Dade Water & Sewer Authority, 357 So.2d 430 (Fla. 3d DCA 1978). Contrary to the appellants' assertion, the fireman's rule, as applied in Florida, is not limited to cases involving a negligent condition on the premises. This court has held that absent a showing of willful and wanton misconduct, neither a fireman nor a policeman may recover from a property owner for injuries arising out of the discharge of professional duties, even though the injuries have not occurred on the premises. Wilson v. Florida Processing Co., 368 So.2d 609 (Fla. 3d DCA 1979); Whitten."
>
> Rishel v. Eastern Airlines, Inc., 466 So.2d 1136, 1138 (Fla. 3d DCA 1985).

Elaborating on the above statement of the firemen's rule, the Fifth District Court of Appeal, in Price v. Morgan, 436 So.2d 1116, 1119 (Fla. 5th DCA 1983), stated that a landowner's duty to warn a fireman of dangerous conditions on the premises does not even arise unless there are facts demonstrating that the landowner had a reasonable opportunity to warn under the circumstances.

> ". . .Before the duty to warn of a hidden danger arises, however, the presence of the licensee on the premises must be known or reasonably expected by the owner.". . .
>
> * * * * *
>
> "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 dangerous when such danger is not open to ordinary observation by the licensee and when there is reasonable opportunity to give such warning. Hall v. Holton, supra at 119-1121, emphasis supplied.

The Fifth District further declared, citing Professor Prosser, that a landowner has no duty to inspect and prepare his premises for a fireman. Id., at 1121. See also, Hall v. Holton, 337 So.2d 81 (Fla. 2nd DCA 1976).

Most recently, the First District Court of Appeal has held that a plaintiff-fireman must allege and prove willful and wanton negligence on the part of a landowner in order to have *any* recovery in a case governed by the fireman's rule.

". . .we hold that the fireman's rule bars recovery in personal injury sustained by the fireman or policeman while acting in the line of duty, unless the complaint sufficiently alleges willful misconduct or wanton negligence on the part of the defendant which would injure the licensee. The decisions in Whitten, Romedy, and Rishel v. Eastern Airlines, Inc., 466 So.2d 1136 (Fla. 3d DCA 1985), support our holding and expound upon the policy reasons for it.

* * * * *

". . .Gleaning direction from the above authorities, we approve this evolutionary extension and application of the fireman's rule to situations in which policemen or firemen are injured in the performance of their duties as long as willful misconduct and wanton negligence on the part of the defendant are not shown."

Sanderson v. Freedom Savings & Loan Association, 496 So.2d 954, 956-957, emphasis supplied.

The First District then proceeded to affirm the lower court's dismissal of the plaintiff's complaint which alleged only simple negligence.

"Appellant argues, in the alternative, that she has adequately alleged willful and wanton negligence on the part of the appellee. We disagree and find that, at most, her complaint alleges only simple negligence."

Sanderson, supra at 957.

Similarly, the Fifth District, in Price v. Morgan, supra, affirmed the trial court's dismissal of a complaint with prejudice where the complaint did not allege any willful or wanton conduct on the part of the defendant and more importantly did not allege any opportunity to warn on the part of the defendant.

". . .Appellant failed to allege any ultimate facts demonstrating any wanton negligence or willful conduct of appellee subsequent to the arrival of the firemen on

the scene, nor did she allege any opportunity to warn upon arrival of the firemen or any facts, such as those found in Hall v. Holton, whereby the presence of the fireman upon the premises could have been anticipated prior to the fire."

Price v. Morgan, supra, at **1121-1122**, emphasis supplied.

C. Brantley Never Moved The Trial Court To Amend His Complaint To Allege That Girl Scout Council Owed **A** Duty To Warn Him, **As A** Licensee, Of Any Dangers Known To Girl Scout Council And Not Open To Ordinary Observation And He Has Therefore Waived His Right To Argue On Appeal That Factual Issues Remain To Be Adjudicated As To Whether Girl Scout Council Owed And Breached A Duty To Warn Him Of Holes Covered By Grass On The Premises Of Camp Choee.

It is well settled that summary judgment is proper if the record shows that there are no triable questions of material fact regarding the issues raised by the pleadings and that only the issues raised by the pleadings can be considered by the trial judge in ruling on a motion for summary judgment. See, Hart Properties, Inc. v. Slack, 159 So.2d 239 (Fla. 1964) where this court said:

"We hold again that issues in a case are made solely by the pleadings and that the function of a motion for summary judgment is merely to determine if the respective parties can produce sufficient evidence in support of the operative issues made in the pleadings to require a trial to determine who shall prevail.

"Pleadings are the allegations made by the parties to a suit for the purpose of presenting the issue to be tried and determined. They are the formal statements by the parties of the operative, as distinguished from the evidential, facts on which their claim or defense is based." 25 Fla.Jr., Pleadings, Sec. 2.

The science of pleading is considerably less exacting and much simpler than in the days when

> Professor Crandall taught the intricacies of Stephen's Rules of Pleading. Nevertheless, pleadings under present rules are intended to serve the same purpose. This purpose is to "* * * present, define and narrow the issues, and to form the foundation of, and to limit, the proof to be submitted on the trial." 71 C.J.S. Pleading Sec. 1. The objective sought in the present rules is to reach issues of law and fact in one affirmative and one defensive pleading. F.R.C.P. 1.7 an 1.8, 30 F.S.A.
>
> This purpose will not be served nor this objective achieved if operative issues, as distinguished from evidential issues, are allowed to be created outside the pleadings in depositions, admissions, affidavits, and the like, which may be filed in a cause. If this were allowed neither the parties nor the court would be able to say with certainty what the triable issues in a cause are.
>
> In White v. Fletcher, Fla. 1956, 90 So.2d 129, we rejected the contention that a motion for summary judgment was a pleading directed to the issues in a cause, and in doing so we expressed the view that the triable issues in a cause are made by the pleadings, saying:
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> > "A motion for summary judgment necessarily proceeds upon the theory that the legal issues are fully settled by the pleadings, and there exists no genuine dispute as to a material fact."
>
> Hart Properties, supra, at 239, emphasis supplied.

Certainly, it cannot be seriously argued that Girl Scout Council was not entitled to summary judgment based on the issues framed by the pleadings, because whereas Brantley now claims for the first time in this appeal that Girl scout Council had and breached a duty to warn him as a licensee of grass covered holes on Camp Choee, Brantley never alleged this in his complaint and, therefore, Girl Scout Council's alleged duty to warn was never an

issue before the lower court. Rather, the trial court's summary judgment was granted based upon the issue of whether Brantley was an invitee as to whom Girl Scout Council breached a duty to maintain its premises in reasonably safe condition, and as demonstrated by the authorities cited in Section B, supra, the trial court's resolution of this sole issue was indeed correct. Further, although a trial judge who enters summary judgment for the defendant should grant the plaintiff's motion to amend his complaint to plead a viable cause of action which the plaintiff has not yet pled, Plyser v. Hados, **388** So.2d **1284** (Fla. 3d DCA 1980), it is also true that a trial court acts properly by denying an amendment which, as a matter of law, is not sustainable based upon the record. Food Fair Stores of Florida, Inc. v. Sommer, 111 So.2d **743** (Fla. 3d DCA 1959). Indeed, Brantley's counsel did not even request leave to amend his complaint to plead that Girl Scout Council owed a duty to warn Brantley of anything, even after counsel for Girl Scout Council pointed out to the trial court at the hearing on the Motion for Summary Judgment that the complaint did not allege any duty to warn. Rather, counsel for Brantley adhered to the incorrect argument that Brantley was an invitee at the time of his alleged injury and requested leave to amend Brantley's complaint solely for the purpose of pleading willful and wanton negligence on the part of Girl Scout Council. Then, when queried by the trial court as to what facts of record would give rise to an issue of

willful and wanton negligence, counsel made the following proffer regarding the proposed amendment:

> "THE COURT: How are you going to show us willful and wanton under any circumstances?
>
> MR POMEROY: Because the holes had been there for a long time. They had people on the job. They were supposed to maintain the premises and they didn't. . ."

[R. 2581, emphasis supplied.

The trial court then observed that Brantley's counsel was suggesting an amendment which could not be supported by the facts.[1]

> "THE COURT: I don't think that those allegations would substantiate a sufficient basis for permitting a complaint to stand on its face by saying it was willful and wanton because people knew or should have known that there was a hole there. That's not willful and wanton. That's just negligence."

[R. 2591, emphasis supplied.

Accordingly, since Brantley never pled Girl Scout Council's "failure to warn" as a basis for recovery in his complaint and never requested leave to amend his pleadings to allege Girl Scout Council's failure to warn, he has clearly waived his right to complain for the first time on appeal that he should have been

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[1] The lower court was obviously correct in observing that any failure on the part of Girl Scout Council to maintain the terrain of Camp Choee in a "hole-free" condition could not be a basis for willful and wanton negligence, given this court's definition of that term. See, Chrysler Motors, Inc. v. Wolmer, 499 So.2d 823 (Fla. 1986).

allowed to present failure to warn as an issue to the jury, as shown by decisions of District Courts of Appeal which have considered the effect on appeal of a party's failure to raise an issue, by pleading, at the trial court level.

> "In an effort to reverse the final summary judgment appealed herein, the appellant contends the record on appeal reveals that there is a question of fact as to whether or not (1) Robert Demps was within the scope of his employment when he committed the act; (2) the appellee was negligent in hiring Robert Robert Demps when it knew or should have known of his criminal propensities; (3) the appellee ratified the act of Robert Demps if said act was outside the scope of his authority.
>
> The first and third contentions were not raised by the pleadings, pursuant to which the final summary judgment was entered, and we cannot entertain these points for the first time on this appeal.". . .
>
> Davis v. Major Oil Company, 164 So.2d 558, 559 (Fla. 3d DCA 1964), emphasis supplied.
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> * * * * *
>
> "The defendants urge that the trial court erred in failing to permit leave to amend the counter and cross claim. However, we fail to find any application to the trial court in the record to allow such an amendment.
>
> It is elementary that before a trial judge will be held in error, he must be presented with an opportunity to rule on the matter before him.". . .
>
> Margolis v. Klein, 184 So.2d 205, 206 (Fla. 3d DCA 1966).
>
> * * * * *
>
> "Mildred Hunter, as personal representative of the Estate of her deceased husband, appeals an order of final summary judgment in which she raises an issue that she failed to assert below. Unfortunately, a party may not raise an issue for the first time on appeal from a summary judgment. Dober v. Worrell, 401 So.2d 1332 (Fla. 1981)."

Hunter v. Employers Mutual Liability Insurance Company of Wisconsin, 427 So.2d 199 (Fla. 2nd DCA 1982).

* * * * *

"It is a well established fundamental principle of law that a ground for relief not presented at the trial level will not be considered for the first time on appeal. Sands v. Ivy Liquors, Inc., Fla.App. 1966, 192 So.2d 775, 776; Michael v. Bayshore Marina, Inc., Fla.App. 1966, 183 S.2d 294, 296; Nelson v. Cravero Constructors, Inc., Fla.App. 1960, 117 So.2d 764, 766; Slatcoff v. Dezen, Fla. 1954, 76 So.2d 792, 793; Gautier v. Biscayne Shores Imp. Corp., Fla. 1953, 68 So.2d 386, 389-390. See generally 2 Fla.Jur., Appeals, Secs. 66, 290 (1963, Supp. 1967). Since appellant did not plead or in any other manner raise the issue of trespass at the trial below, he cannot argue that the trial court erroneously refused to submit it to the jury."

Jackson v. Whitmire Construction Company, 202 So.2d 861, 862 (Fla. 2nd DCA 1967), emphasis supplied.

* * * * *

"Issues not presented to the trial court will not be considered for the first time on appeal. Dober v. Worrell, 401 So.2d 1322 (Fla. 1981)."

Atwood v. Hendrix, 439 So.2d 973 (Fla. 1st DCA 1983)

* * * * *

"...A matter raised for the first time on appeal and not originally raised in the trial court is not well taken."..

Jaruagua Enterprises, Inc. v. Dom, Inc., 339 So.2d 702, 703 (Fla. 3d DCA 1976)

* * * * *

"As a general rule, before a trial judge will be held in error, he must be presented with an opportunity to rule on the matter before him. Margolis v. Klein, 184 So.2d 205 (Fla. 3d DCA 1966). An amendment to the pleadings is therefore usually necessary where issues are sought to be litigated which are not raised by the pleadings. See, Fla.R.Civ.P. 1.190."

Amazon v. Davidson, 390 So.2d 383, 386, n.2 (Fla. 5th DCA 1980)

D. Even If Brantley Had Pled A Viable Cause Of Action Under The Firemen's Rule, Girl Scout Council Would Still Have Been Entitled To Summary Judgment Based On The Facts And Common Sense.

Brantley has suggested in his brief that on January 25, 1985, he fell into post holes 6-8 inches in diameter dug in the ground at Camp Choee when the "chain-link fence was installed." Brantley further claims that these post holes were overgrown with and obscured by grass. (See Brantley's brief at pp. 4-5.) The fence was installed in 1981 and the terrain of Camp Choee was replete with holes made by animals and nature. Certainly, Brantley cannot seriously contend that during a fire, Girl Scout Council had a duty to warn him about holes in the ground made by rats, snakes and foxes and covered by grass any more than it had a duty to warn about alleged grass covered holes dug by man four years prior to his alleged fall. Moreover, Brantley has lost sight of the practicalities surrounding the fire at Camp Choee. The fire presented an emergency situation wherein it would have been nothing short of ludicrous for a member of the staff of Girl Scout Council to suggest to the firefi'ghters that they should beware of holes in the ground covered over by grass when the firefighters fighting a fire at dusk could hardly see where they were walking through the bushes because of the smoke generated by the fire on Camp Choee's twenty acre tract of land and the

preposterous thought of imposing such a duty on a landowner is precisely what led the court in Romedy v. Johnston, supra, to state as follows:

> " .Since the occurrence of fires is unpredictable, it would be wholly impractical and unreasonable to require the owner or occupant of premises to exercise at all times the high degree of care owed to an invitee in order to guard against the remote possibility that a fire may occur and a fireman, while fighting the fire, may become exposed to a dangerous condition created by the negligent manner in which the owner has maintained his premises. The emergency situation most generally created by the outbreak of a fire does not permit time for conferences between the owner and members of the fire department in order that defective conditions of the building might be pointed out and dangers thereby avoided by those having the responsibility for containing and extinguishing the blaze. For these reasons, and many others, the policy of the law refuses to impose upon owners and occupants of premises the obligation to firemen which is owed to invitees."
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> Romedy v. Johnston, supra, at 491, emphasis supplied.

Certainly, if, during an emergency situation, the owner of a building has no duty to have a conference with firefighters about defective conditions in a building which might endanger the firefighters in the performance of their duties, Romedy, supra, the staff at Girl Scout Council had no duty, during a brush fire on a twenty acre camp, to tiptoe through the tulips with Brantley and his fellow firefighters and discuss the potential dangers of holes covered over with grass on a rough, weedy and rocky terrain, which could hardly be seen through the smoke in any event.

It is also obvious that both prior to and after the arrival of the firefighters at Camp Choee, no reasonable opportunity existed for Girl Scout Council to warn the firefighters about grass covered holes, even assuming the existence of a duty to do so, since (1): the firefighters were called to the camp on an emergency basis: (2): only a few minutes elapsed between the time the firefighters were summoned and their actual arrival, and (3): upon their arrival, the firefighters wanted all members of Girl Scout Council off the premises and away from the fire.[2]

For all of the above reasons, Girl Scout Council would have still been entitled to summary judgment even if Brantley had made appropriate allegations in his complaint under the firemen's rule.

E. The Cases Cited BY Brantley In Support Of His Duty To Warn Argument Are Not On Point.

Brantley's reliance on Hall v. Holton, 330 So.2d 81 (Fla. 2nd DCA 1976) is misplaced, because in Hall, the Second District clearly held that a duty to warn a licensee such as a fireman or policeman arises only if the owner of the premises can reasonably anticipate that the licensee will be coming onto his property and

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[2] Furthermore, the complaint does not even allege that there was a reasonable opportunity to warn the firemen prior to their arrival on the scene, although Brantley now makes this argument for the first time on appeal. Therefore, summary judgment was proper for this additional reason. See, Price v. Morgan, supra, at 1121-1122.

has sufficient opportunity to warn prior thereto. See, Hall at 83. Indeed, in Hall, the defendant-landowner knew that policemen periodically entered upon his property, whereas here, the fire at Camp Choee was a sudden emergency which the girl scouts could not have anticipated. In fact, the distinction between the situation in Hall and an emergency situation created by a fire was drawn by the Fifth District in Price v. Morgan, supra.

Brantley's reliance on Berglin v. Adams Chevrolet, 458 So.2d 866 (Fla. 4th DCA 1984) is also misplaced, because in Berglin, there was a factual issue raised by the pleadings regarding the defendant's duty to warn the plaintiff-licensee, whereas here, as shown in Section I, A., supra, there never was any issue of Girl Scout Council's duty to warn raised by the pleadings below and, as previously shown, Brantley never moved the trial court for leave to amend his complaint to plead *any* duty and failure on the part of Girl Scout Council to warn Brantley of anything.

ARGUMENT II

BRANTLEY WAIVED HIS RIGHT TO ARGUE ON APPEAL THAT SUMMARY JUDGMENT WAS PREMATURE IN LIGHT OF THE STATUS OF PRE-TRIAL DISCOVERY, SINCE BRANTLEY DID NOT FOLLOW THE DICTATES OF 1.510(F) FLA.R.CIV.P. IN THE LOWER COURT AND SINCE, IN *ANY* EVENT, THE FACTS SHOW THAT BRANTLEY DID NOT INTEND TO CONDUCT FURTHER DISCOVERY.

Rule 1.510(f), Fla.R.Civ.P. provides a remedy for a party opposing a motion for summary judgment who believes that he needs to take additional discovery.

> "(f) When Affidavits Are Unavailable. If it appears from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

Cases decided by the Third District Court of Appeal under this rule have held that a party who has not sought a continuance in the trial court of a hearing on a motion for summary judgment on the ground that discovery was incomplete and also has not filed an affidavit in the trial court explaining why discovery is incomplete and what additional discovery is necessary, may not complain on appeal that summary judgment was prematurely entered by the trial court.

> "Turning to plaintiff's last point on appeal urging that the summary final judgment was premature, we hold that the record does not support this theory. The Florida Rules of Civil Procedure provide a remedy for a party opposing a motion who finds that additional affidavits or depositions are necessary. Plaintiff, having failed to follow the rule even to move for a continuance of the hearing on the motion, may not claim error in the appellate court because the trial judge

proceeded as provided by the rules. Cf. Pase v. Staley, 226 So.2d 129, 131 (Fla. 4th DCA 1969)."

Steiner v. Ciba-Geigy Corporation, 364 So.2d 47 (Fla. 3d DCA 1978).

See also, McNutt v. Sherrill, 141 So.2d 309 (Fla. 3d DCA 1962) and CIA. Ecuatoriana De Aviacion, C.A. v. U.S. and Overseas Corp., 144 So.2d 338 (Fla. 3d DCA 1962).

In the instant case, although Brantley is correct that summary judgment should not be prematurely entered where discovery is not complete, he is not correct in arguing that the trial court's summary judgment was prematurely entered because Brantley needed time to take additional discovery based on Maria Tejera's deposition testimony, since Brantley never preserved this issue for appeal by filing an affidavit or a verified motion pursuant to Rule 1.510(f), Fla.R.Civ.P., seeking a continuance of the hearing on the Motion for Summary Judgment for good cause. Steiner v. Ciba-Geigy Corporation, supra.[3]

It is also necessary to point out that Brantley's present claim that he needed to depose all of the Girl Scout Council's staff present at the time of his alleged accident to prove his case (See Brantley's brief at pp. 8-9, 18-19) is not made in good faith, because when during the deposition of Maria Tejera,

[3]At p. 17 of his brief, Brantley states that he "advised the trial court that he had not been able to complete discovery. . ." This was clearly insufficient to warrant a continuance of the summary judgment hearing under Steiner, supra.

counsel for Girl Scout offered to take a break from the deposition so that Mrs. Tejera could call the Girl Scout Council office and obtain the addresses of those persons present at the camp on the date of fire, counsel for Brantley responded that "perhaps" that could be done "at the end of the deposition," but counsel never requested this information either at the end of the deposition or at any other time prior to the hearing on the Motion for Summary Judgment, notwithstanding his knowledge that the site manager and the property manager, whose testimony he now claims to be crucial, were no longer employed by Girl Scout Council. [R. 162-166, 176-177] Obviously, counsel for Brantley cannot seriously argue that he intended to depose persons whose addresses he did not request after an express offer by Girl Scout Council to provide them and his failure to file an affidavit attesting to his need to take any further depositions bears this out. Indeed, it seems apparent that the very purpose of the affidavit requirement in 1.510(f), Fla.R.Civ.P. is to prevent parties such as Brantley from attempting to prevent the entry of summary judgment on frivolous grounds.

It is obvious that Brantley has waived any right to complain that Judge Hickey's summary judgment was premature.

ARGUMENT III

GIRL SCOUT COUNCIL DID NOT "RESIST" PROVIDING INFORMATION TO BRANTLEY AND BRANTLEY HAS MISREPRESENTED THE CONTENTS OF MARIA TEJERA'S DEPOSITION TESTIMONY.

Brantley claims that Girl Scout Council resisted providing him with information about post holes at Camp Choee but supplies no record evidence of this and Brantley sarcastically complains in his brief that Maria Tejera knew nothing about the property at Camp Choee, but apparently what has upset Brantley is Maria Tejera's testimony that neither she nor anyone else at Girl Scout Council had any knowledge about either Brantley's alleged accident or the holes Brantley allegedly fell into and no knowledge of anyone else ever falling into a hole at the camp. [R. 191, 206-207, 212-213, 233-235]

ARGUMENT IV

THE THIRD DISTRICT'S OPINION DOES NOT CONFLICT WITH SANDERSON AND IN *ANY* EVENT, BRANTLEY WAS INJURED WHILE IN THE DISCHARGE OF HIS DUTIES AS A FIREFIGHTER. THEREFORE, THE FIREMEN'S RULE UNQUESTIONABLY APPLIES TO HIS CLAIM.

In Rishel v. Eastern Airlines, supra, this court made it clear that as long as a plaintiff-fireman is injured during "the discharge of the duties for which (he) was called to the property. . ." the firemen's rule applies to his claim. See, Rishel, supra, at 1138. Here it is uncontroverted that Brantley was injured during the discharge of the duties for which he was called to Camp Choee, i.e., fighting a fire, and surely stumbling and falling while fighting a brush fire on a bushy, weedy, rocky and rough terrain enveloped by dark smoke was a risk associated with Brantley's duty to help extinguish the Camp Choee fire. Therefore, the firemen's rule clearly applies to Brantley. Moreover, Brantley's claim that this court is "re-evaluating the viability of the firemen's rule" by reviewing Kilpatrick v. Sklar, 497 So.2d 969 (Fla. 3d DCA 1987) and Sanderson v. Freedom Savings & Loan Assoc., 496 So.2d 954 (Fla. 1st DCA 1986), is a half-truth. In Kilpatrick v. Sklar, supra, the Third District ruled that the firemen's rule does not apply in situations governed by the Florida dog bite statute and in Sanderson v. Freedom Savings & Loan Assoc., supra, the First District, citing the Third District's opinion in Rishel v. Eastern Airlines, supra, reaffirmed the viability of the firemen's rule by holding

that in a case falling within this rule, the plaintiff must allege willful and wanton negligence in order to state a cause of action. Neither case even hinted that the firemen's rule should be abrogated in toto and there is no reason to assume or suspect that this court will do *so* either.

The Third District's decision to affirm the trial court's summary judgment simply does not conflict in any respect with either Kilpatrick or Sanderson, supra, because this case does not involve either the dog bite statute or willful and wanton negligence and, in any event, as previously shown, Brantley never pled any viable cause of action in his complaint and never moved the trial court for leave to plead a viable cause of action, thereby waiving the arguments he is attempting to make for the first time on appeal. Accordingly, the Third District's per curiam affirmance should be approved, regardless of this court's disposition of Sanderson.

CONCLUSION

For the above-mentioned reasons, the Third District's per curiam affirmance should be approved.

Respectfully submitted,

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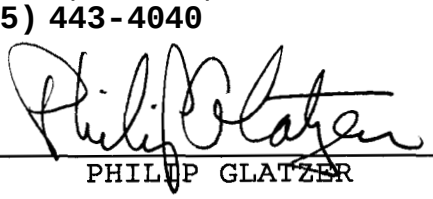
By: 
PHILIP GLATZER

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was this 1st day of November, **1988** delivered by United States mail to: **Richard** A. **Sherman, P.A.,** Suite 102 N. Justice Building, 524 South Andrews Avenue, Fort Lauderdale, Florida 33301 and to **Wayne** W. **Pomeroy, Esquire,** Pomeroy & Pomeroy, **1995** East Oakland Boulevard, Suite 300, Fort Lauderdale, Florida 33306-1186.

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