IN THE SUPREME COURT OF FLORIDA
CASE NO. 61,681

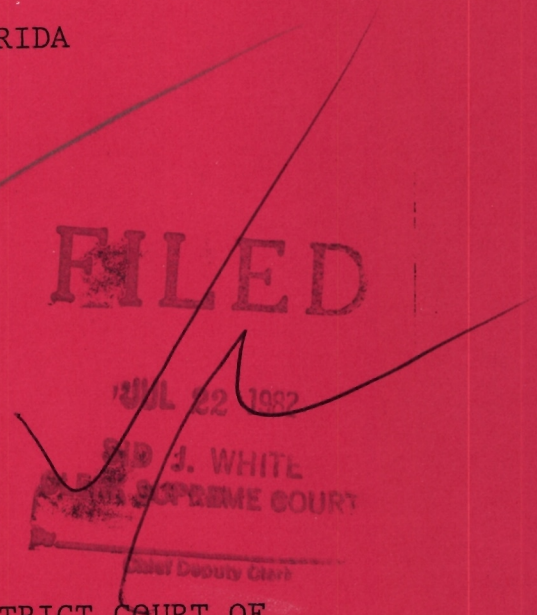
DONALD ROY JONES, etc., et al.,

Petitioner,

vs.

UTICA MUTUAL INSURANCE CO.,

Respondent.



ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

BRIEF OF RESPONDENT

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STATEMENT OF CASE

Respondent agrees with the statement of case set forth by Petitioners with respect to the material statements set forth therein with the exception of the points noted below. For consistency, Respondent will utilize the same method of reference to the record and transcript as was used by Petitioners. "R." refers to the record on appeal. "Tr." refers to the transcript of the trial.

Respondent appealed to the Second District Court of Appeal and presented two separate issues. Petitioners correctly noted that Respondent alleged that the trial court had erred in failing to direct a verdict in its favor on the issue of liability under §767.01, but failed to note that Respondent challenged both the applicability of that statute to the facts, and the finding of liability since the evidence at trial showed conclusively that the injury to Petitioner was not "done by" a dog owned by Roy G. Davis. On both issues, liability and insurance coverage, the relief sought was a reversal of the trial court's ruling and a determination that directed verdicts should have been entered on both issues in favor of UTICA MUTUAL.

Petitioners have incorrectly designated the Second District Court of Appeal's discussion of Wendland vs. Akers, 356 So.2d 368 (Fla. 4th DCA 1978) as a "frame work for its

consideration of the issue of liability". (Brief of Petitioners at 3). As will be pointed out in the argument portion of Respondent's brief, that historical analysis of the statute was one of several matters considered by the court in construing the statute. That method of construction was consistent with this Court's pronouncements. Rather than repeat the discussion at this point, Respondent would refer the court to the initial portion of its argument regarding liability.

Finally, Petitioners attempt to characterize the district court's alternative holding on the issue of liability as "dependent upon the first". This is an improper characterization of that holding and should more properly have been included in the argument section of their brief. Respondent will consider and discuss the soundness of both alternative holdings in the argument section of the brief.

STATEMENT OF FACTS

Petitioners' statement of the facts is essentially correct in its material statements with the exception of the following specific points.

The Petitioners claim that "Shane was not a family pet" is completely inaccurate. Petitioners have apparently inadvertently failed to review the testimony of Roy G. Davis at pages 71 through 73 of the trial transcript where it is noted finally that Shane was a family pet and that he was

also a dog used to protect the property. Additionally, Michael Davis testified that Shane was a family pet and only used from time to time as a "kind of watchdog". (Pr. 89, 83).

Petitioners are also completely incorrect in asserting that Michael Davis testified that at the time of the injury he and the other boys were headed toward the back of the property for the purpose of turning on the sprinkler system. (Brief of Petitioners at 6). This point is also thoroughly discussed in the argument portion of this brief. For purposes of brevity, we will at this point simply point out that Michael Davis, at least based upon a fair reading of his testimony, did not know why the boys were walking toward the back of the nursery at the time of the injury. He in fact testified that the three boys were on the premises that day solely for the purposes of playing, (TR.86), and that just prior to the accident, that Donald Roy Jones was running along slightly ahead of the wagon being pulled by Shane. (TR.77-79). This testimony also contradicts Petitioners' assertion that Michael Davis recalled that the three boys had stopped playing at the time of the accident. (Brief of Petitioners at 7).

ISSUES ON APPEAL

I. THE TRIAL COURT ERRED IN FAILING TO DIRECT A VERDICT IN FAVOR OF THE RESPONDENT AS TO THE APPLICABILITY OF 767.01, FLORIDA STATUTES, AND FURTHER ERRED IN FAILING TO DIRECT A VERDICT IN FAVOR OF RESPONDENT AS TO LIABILITY UNDER THAT SECTION BECAUSE THE EVIDENCE PRESENTED AT TRIAL SHOWED CONCLUSIVELY THAT THE INJURY TO PETITIONER WAS NOT "DONE BY" A DOG OWNED BY ROY G. DAVIS.

II. THE TRIAL COURT ERRED IN FAILING TO DIRECT A VERDICT IN FAVOR OF RESPONDENT UTICA MUTUAL INSURANCE COMPANY IN THE ISSUE OF INSURANCE COVERAGE WHEN NO EVIDENCE WAS PRODUCED AT TRIAL TO PROVE THE PETITIONER'S INJURIES WERE CAUSED BY AN OCCURRENCE WITH RESPECT TO THE CONDUCT OF THE BUSINESS OF ROY G. DAVIS d/b/a TAMPA WHOLESALE NURSERY.

ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO DIRECT A VERDICT IN FAVOR OF THE RESPONDENT AS TO THE APPLICABILITY OF §767.01, FLORIDA STATUTES, AND FURTHER ERRED IN FAILING TO DIRECT A VERDICT IN FAVOR OF RESPONDENT AS TO LIABILITY UNDER THAT SECTION BECAUSE THE EVIDENCE PRESENTED AT TRIAL SHOWED CONCLUSIVELY THAT THE INJURY TO PETITIONER WAS NOT "DONE BY" A DOG OWNED BY ROY G. DAVIS.

In addressing the first issue raised before it on appeal in this case, the Second District Court of Appeal recognized that Respondent had directly challenged the applicability of §767.01, Florida Statutes, to the facts adduced at trial. Presented with this question the district court quite correctly began analysis of the applicability of the statute by recognizing that "in construing a statute, the court should where possible consider its history, the evil to be corrected, the intent of a legislature, the subject regulated, and the object to be obtained." Utica Mutual Insurance Company vs. Jones, 408 So.2d 769, 771 (Fla. 2d DCA 1982), citing Englewood Water District vs. Tate, 334 So.2d 626 (Fla. 2d DCA 1976).

Utilizing this framework, the district court analyzed the history of the statute as set forth in Wendland vs. Akers, 356 So.2d 368 (Fla. 4th DCA 1978), cert. denied, 378 So.2d 342 (Fla. 1979), the rationale underlying strict liability statutes, and two excerpts from Florida appellate decisions which set forth in the court's opinion how the

rationale of strict liability applies to this statute regarding strict liability for dog ownership. Following this analysis, the district court concluded that §767.01 did not apply because the injury had not been caused by conduct on the part of the dog which was considered to be within the risk created by dog ownership.

Petitioners would have this court believe that the framework for the district court's analytical perspective was the history of the statute regarding the presence or absence of the phrase "to persons". Brief reference to the opinion below show this is entirely incorrect. The district court quite simply followed in this case, as it had in Englewood Water District vs. Tate, the procedure set forth by this court in Smith vs. Ryan, 39 So.2d 281 (Fla. 1949). While Petitioners would prefer a blind application of the statute based solely upon the face value of the words contained therein, the district court correctly considered this history along with the object to be obtained by the application of strict liability in construing the statute. The recognition that the statute as originally enacted applied solely to damages to "sheep or other stock killed or maimed by" dogs is a relevant portion of that history and therefore a proper consideration in determining the applicability of the statute.

At common law, the dog owner who was without knowledge of the animal's vicious propensities could not be

held liable for injuries done by that dog. Ferguson vs. Gangwer, 192 So. 196 (Fla. 1939). The predecessors of the current §767.01, Florida Statutes, removed this scienter requirement, thereby obviating the necessity of alleging and proving the owner's knowledge of the dog's vicious nature. Id. at 197. Section 767.01, Florida Statutes (1973), which governs this action, provides:

> "Owners of dogs shall be liable for any damage done by their dogs to sheep or other domestic animals or livestock, or to persons."

While it is true, as Petitioners allege, that numerous Florida cases have held that §767.01 renders the dog owner a virtual insurer, it has also been held that this statute should not be construed so as to produce unreasonable or ridiculous consequences. Rattet vs. Dual Security Systems, Inc., 373 So.2d 948 (Fla. 3d DCA 1979). That ruling is in accord with the general principle that statutes in derrogation of the common law should be strictly construed, In Re Levy's Estate, 141 So.2d 803 (Fla. 2d DCA 1962), and that construction of a statute which would lead to an absurd result should be avoided. McKibben vs. Mallory, 293 So.2d 48 (Fla. 1974).

In construing §767.01 the district court recognized that the statute embodies a concept of strict liability, however, the district court further recognized that "strict liability has been confined to consequences which lie within the extraordinary risk whose existence calls for such special

responsibility". Utica Mutual Insurance Company vs. Jones, supra at 771 (citing Prosser, Law of Torts, 581 (4th ed. 1971)). In determining the consequences for which the legislature intended to impose strict liability upon the dog owner, the court below recognized that the liability established by §767.01 attached solely on the basis of the dog ownership, and agreed that strict liability should only exist for those risks created by the mere act of ownership. Thus the initial portion of the court's opinion was directed towards analyzing whether the injury in this case resulted from some risk inherent in the owning of a dog.

Petitioners would have this court believe that the basis of the district court's ruling was that the dog, Shane, was not the proximate cause of the injury. (Brief of Petitioners at 14). This is incorrect. As the district court clearly stated, "because this injury was not caused as a result of the risk created by dog ownership, we hold that §767.01 does not apply here". Utica Mutual Insurance vs. Jones, supra at 772.

This ruling by the district court implicitly recognizes that:

> The intentional wrongdoer is commonly held liable for consequences extending beyond the scope of the foreseeable risk he creates, and many courts have carried negligence liability beyond the risk to some extent. But where there is neither intentional harm nor negligence, the line is generally drawn at the limits of the risk, or even with it. This

> limitation has been expressed by saying that the Defendant's duty to insure safety extends only to certain consequences. More commonly, it is said that the Defendant's conduct is not the 'proximate cause' of the damage. But ordinarily in such cases no question of causation is involved, the limitation is one of the policy underlying liability. Prosser, Law of Torts, 517 (4th ed. 1971) (footnotes omitted).

The ruling below is a finding of no proximate cause only in the sense that the district court determined that the injury was not proximately caused by a risk created by the mere act of dog ownership. Respondent respectfully suggests that the district court ruled correctly inasmuch as extension of strict liability to the facts in this case would produce an unreasonable and unintended result well beyond the limitation of the policy underlying strict liability.

> A. "[D]one by their dogs" means an injury caused by the dog as a result of conduct within the risk created by the mere act of dog ownership.

As the district court recognized, statutory liability pursuant to §767.01 should be imposed upon the dog owner only where the damage done by the dog is the direct cause of the injury. Utica Mutual Insurance Company vs. Jones, supra, at 771. To determine whether or not the dog itself directly caused the injury, the appropriate consideration for this court, as for the district court, is whether the injury resulted from some conduct by the dog which is contemplated as a risk created by the mere act of dog ownership.

Testimony at trial indicated that the injury to Petitioner was caused when the wagon being pulled by the dog, Shane, struck the Petitioner as the dog sprinted past Petitioner in pursuit of a second dog. (TR.77, 157). While Shane's reacting to and chasing another dog present in the area (TR.77, 80) admittedly falls within the risk created by dog ownership, that conduct did not directly cause the injury to the Plaintiff. The district court accurately pointed out that but for the wagon, no injury would have occurred since the dog never came in contact with Petitioner. That observation merely emphasizes that it was not a risk created by Roy G. Davis which directly caused the injury. Mr. Davis testified at trial that he had no knowledge that Shane and the wagon were being used as a single entity for any purpose. (TR.60, 66). The damage was done by the dog-wagon entity created by the boys. To construe the statute to impose liability upon Mr. Davis for a risk he had not created or contributed to in any way simply by the mere act of ownership would be to impose liability upon him beyond that contemplated by the statute. The fact that injury would not have occurred absent the presence of the wagon, emphasizes the fact that it was not a risk created by the dog owner which directly caused this injury.

Petitioners would characterize this argument as one suggesting an absence of proximate cause because of the

absence of "contact" between the dog and the Petitioner. Neither the district court nor the Respondent has taken the position that contact is necessary for liability under the statute. Petitioners ignore, and attempt to lead this Court to ignore, the fact that the district court initially ruled as a matter of law that §767.01 does not apply because the injury was not caused as a result of a risk created by dog ownership. Petitioners point to the "but see" citation of English vs. Seachord, 243 So.2d 193 (Fla. 4th DCA 1971) cert. dismissed, 259 So.2d 136 (Fla. 1972) and Brandeis vs. Felcher, 211 So.2d 606 (Fla. 3d DCA), cert. denied, 219 So.2d 706 (Fla. 1968) in the section of the opinion below discussing the alternative holding in a futile attempt to represent that the district court acknowledged some conflict with those decisions. Neither the district court nor Respondent would have any difficulty illustrating that each of these opinions is consistent with the Second District Court of Appeal's first holding in this case regarding the risk created by dog ownership.

The English vs. Seachord, supra, decision involved a Plaintiff who exited his house one morning to pick up the morning newspaper. While he was in the process of doing so the Defendant's dog began growling at him from Defendant's yard. The Plaintiff became frightened, jumped onto the top of his car for safety and the dog then came to the edge of

the car and put his paws on it but did not attack the Plaintiff. As a result of the incident, the Plaintiff reinjured his back. Growling, aggressive and curious dogs are obviously within the risk associated with dog ownership. Therefore as a threshold matter the statute should have been and was deemed to apply to that fact situation.

Quite similarly, the Brandeis vs. Felcher, supra, case involved a youngster who was frightened when "two dogs suddenly started barking, and charged the fence" as the young Plaintiff passed by. Id. at 606. In his fright, the Plaintiff darted away from the fence into the street where a motor vehicle fatally injured him. Again as a threshold matter the conduct of these dogs is certainly within the risk contemplated by dog ownership and therefore would appear to be a situation in which the statute should apply regardless of contact.

The final case noted by Petitioners in their attempt to reconstruct the opinion of the Second District Court of Appeal, Allstate vs. Greenstein, 308 So.2d 561 (Fla. 3d DCA 1975), involved an injury which occurred when a dog "ran into a car, thereby causing the accident". Smith vs. Allison, 332 So.2d 631 (Fla. 3d DCA 1976). According to the allegations of the complaint, the dog ran into the street and struck Plaintiff's car causing him to lose control and collide with a power pole. Plaintiff testified at trial that that accident

resulted when the dog ran into the street and he attempted to swerve to avoid hitting the animal. Again, upon initial examination it would appear that the case involved the dog dashing out into the street after a car which is conduct that as a matter of common knowledge is within the risk created by dog ownership.

Thus, each of these three cases cited by Plaintiff as alleged conflicts with the Second District opinion in this case are in fact consistent with the Second District's opinion insofar as that opinion requires the injury be caused as a result of conduct by the dog which is within the risk created by dog ownership. Nowhere in its opinion does the district court utilize the absence of contact between the dog and the Petitioners for any purpose other than to illustrate that the cause of the injury in this case was other than a risk contemplated by the mere act of dog ownership.

Petitioners are understandably confused as to whether or not to disavow allegiance to the decision of the First District Court of Appeal in Mapoles vs. Mapoles, 357 So.2d 1137 (Fla. 1st DCA 1977), cert. denied, 354 So.2d 888 (Fla. 1978). Contrary to Petitioners' representation, the dog in the Mapoles case was placed in the back seat of an automobile by the dog owner's boyfriend. Id. at 1137. The boyfriend was also the owner of the motor vehicle and had earlier placed a shotgun in the back seat of the vehicle.

The dog somehow caused the shotgun to discharge and as a result a third person standing outside of the vehicle was injured. The First District Court of Appeal indulged in a mechnical and, as set out in the opinion, syllogistic approach to application of §767.01. As the court stated:

> If the statute means what it says, the syllogism is clear: Cam was the owner of the dog; damage was caused to a person by the dog; and thus the owner of the dog is liable for the damage done.

Id. at 1138. Under this approach, the owner of the dog could presumably have been found liable if the boyfriend had dropped the dog into the back seat and the shotgun had discharged immediately. Additionally, under this theory suggested by the Mapoles vs. Mapoles court, and the rationale supported by Petitioners, the owner of that dog would also have been liable had the boyfriend picked up the dog and swung it by the tail striking the third party.

The approach utilized in Mapoles vs. Mapoles, and suggested by Petitioners in this case, would hold the dog owner liable solely based upon a showing of involvement of any type by the dog in the occurrence of an injury. As Petitioner's backpedaling analysis of the Mapoles vs. Mapoles decision clearly indicates, even he is uncomfortable with the unwarranted extension of strict liability proposed in that opinion. The Second District Court of Appeal opinion in this case should be affirmed as correctly recognizing that

only that conduct by a dog which is of the type which merits the application of strict liability to dog owners should result in application of §767.01. Only when that conduct directly causes an injury should liability be imposed. As the testimony at trial clearly showed, the injury in this case was caused as a result of the creation of a dog-wagon entity which the dog's owner neither knew of nor foresaw. Certainly the existence of such a dog-wagon entity was not one of the unique characteristics of dogs which compelled the legislature to establish strict liability for dog ownership.

> B. "[D]one by their dogs" means as a result of the dog's affirmative or aggressive act toward the injured party.

The uncontradicted evidence at trial was that the injuries sustained by Petitioner were in no way attributable to an "aggressive act" by the dog. (TR.155 - 157). The affirmative testimony from the injured Petitioner was that the dog was neither acting aggressively toward nor chasing him. (TR.157). Rather, the undisputed testimony was that the sole object of the dog's action was another dog which suddenly appeared on the premises. (TR.77-80, 155, 157). The Second District Court of Appeal recognized this testimony and as an alternative basis for reversing the judgment of the trial court recognized that "where the dog takes no affirmative or aggressive action toward the injured party" §767.01 is

inapplicable. Utica Mutual Insurance Company vs. Jones, supra at 772 (citing Rutland vs. Biel, 277 So.2d 807 (Fla. 2d DCA 1973) and Smith vs. Allison, supra.)

The Rutland vs. Biel decision involved an injury to the Plaintiff which was sustained while she was attending a church function in the home of the Defendant, Rutland. The Plaintiff apparently heard a dog "yelp", looked a little to her side and in back of her and saw the dog for the first time. She admitted at trial that she must have been stepping on the dog or his hair and thereby causing him to yelp. Seeing the dog, Plaintiff took a step backward, tripped over the dog and fell flat on her back. Reversing a partial summary judgment in favor of the Plaintiff as to liability, the Second District Court of Appeal in that opinion held that §767.01 is not applicable to a situation where the dog takes no affirmative or aggressive action toward the injured party.

Subsequent to Rutland vs. Biel there has been no recorded decision disputing the Second District's interpretation that the statute requires the showing of an affirmative or aggressive act toward the injured party. The Third District Court of Appeal subscribed to this interpretation of the statute in Smith vs. Allison, supra. There, a dog owned by the Defendant escaped from a fenced-in yard and, according to the testimony of the Plaintiff, positioned himself in the

middle of the road. Plaintiff further testified that he was some distance away when he first observed the dog in the middle of the road. As the Plaintiff approached the dog:

> [a]ll of a sudden, the dog turned in front of me to run over to the other side. * * * I moved to the right. * * It was a sharp swing to the right. I guess I turned a little bit too far in avoiding him and I crashed.

Id. at 633. The Smith vs. Allison court noted that §767.01 was inapplicable in "cases where the dog does not itself inflict any damage". Id. at 634. Noting the Plaintiff's testimony that the dog's actions were quite clearly not directed toward the Plaintiff, the court held that the absolute liability imposed by §767.01 did not apply. In so holding the court reversed a jury verdict in favor of the Plaintiffs.

Consistent with Smith vs. Allison and Rutland vs. Biel is the Third District Court of Appeal opinion in Scott vs. Gordon, 321 So.2d 619 (Fla. 3d DCA 1975). The Plaintiff in that case had jumped from a fence and landed upon a dog owned by the Defendant. The Plaintiff's testimony on deposition was that the dog suddenly appeared beneath his feet as he was nearing the ground. The trial judge entered partial summary judgment as a matter of law inasmuch as it "did not appear as a matter of law that the dog did the damage". Id. at 620. The basis for the court's ruling, contrary to

Petitioners' contention, was that the facts presented did not show where the dog was immediately prior to the Plaintiff's jump, nor whether the Plaintiff could have seen the dog prior to the jump. Id. at 620. Absent such evidence it would be impossible to determine whether any aggressive or affirmative act toward the Plaintiff on the part of the dog caused the injury.

The Second District Court of Appeal in this case recognized that the facts before the trial court failed to meet the standard set forth in Rutland, Smith, and Scott. Construing the evidence adduced at trial in the light most favorable to the Petitioners, the injury occurred when Shane, reacting to the presence of another dog, accelerated and ran in the direction of that dog. Petitioner was ahead of Shane when the dog began to sprint toward the other dog and as Shane ran past the Petitioner some part of the wagon struck his leg causing his injury. (TR.77-80, 155, 156). There was no evidence of record indicating that any part of the dog came in contact with the Petitioner. There was affirmative evidence that Shane was not acting aggressively toward nor chasing the Petitioner. (TR.157). The affirmative testimony was that the sole object of Shane's actions was the other dog. (TR.77-80, 155, 157). Recognizing the absence of such testimony the Second District Court correctly ruled, as an alternative basis for its reversal, that §767.01 was inappli-

cable in this case.

Petitioners suggest that the more reasonable interpretation of the "affirmative or aggressive act" requirement would be to construe it to require only that the dog "is somehow in motion in the general direction of the Plaintiff at the time of the accident in question". (Brief of Petitioners at 26). Petitioners further suggest that the Rutland vs. Biel case holds that:

> "[T]he statute will not support liability when the animal is purely passive, and is nothing more than a victim of the Plaintiff's conduct. Rather, the question is whether the animal is an active participant in a chain of events leading to injury, in a sense of taking affirmative or aggressive action toward someone or something - not necessarily the Plaintiff.
> ...
> The 'affirmative act' requirement is a reasonable safeguard insofar as it forbids the imposition of liability in cases in which the animal is purely a passive instrumentality in a chain of events leading to injury."

(Brief of Petitioner at 28-29). We are hard pressed to understand, and would invite the Petitioner to explain, how the animal in the Mapoles vs. Mapoles decision was "nothing more than a victim of the Plaintiff's conduct". Additionally, if Petitioners' "in motion" theory is correct, then why is the dog's affirmative action in the form of exiting the roadway and heading toward the sidewalk insufficient to serve as a basis for liability?

Utilizing Petitioners' analysis, Shane was in this case nothing more than a victim of the conduct of the three

boys who tied him to the wagon, and was purely passive insofar as his relationship to the Petitioners was concerned in that according to the testimony, Shane directed no actions toward the Petitioners whatsoever. Thus, even under Petitioners' analysis no liability should be imposed upon the dog owner in the fact situation before this court.

Two recent opinions emphasize the adherence to this requirement of an affirmative or aggressive act directed toward the injured party and further emphasize the abuse of that requirement by the Mapoles vs. Mapoles decision. In Bozarth vs. Baretto, 399 So.2d 370 (Fla. 3d DCA 1981), the Third District Court of Appeal affirmed a jury verdict for the Defendant indicating that there was sufficient evidence of record for the jury to find that the injuries to Plaintiff were not caused by an aggressive or affirmative act directed against the Plaintiff by the dog. In Sutton vs. Sweet, 376 So.2d 443 (Fla. 4th DCA 1979), where the Plaintiff had alleged the threatening actions of the dog caused him injury, the Fourth District Court reversed a summary judgment for the Defendants. The district court suggested there were issues of fact regarding "whether the dog's growling and lunging was directed at" the Plaintiff.

As has been discussed, there was no issue of fact at trial in this case regarding whether Shane directed his acts toward the Petitioners. The Petitioners' own testimony

confirmed Shane was not doing so. (TR.157). Thus, the district court was correct in ruling that the trial court erred in failing to direct a verdict in favor of Respondent and the dog owner based upon the affirmative testimony that there was no affirmative or aggressive act by the dog toward the injured party.

As a final note on this issue Respondent would point out that affirming the district court's ruling does not insulate dog owners from liability. Rather, such a ruling still leaves Plaintiffs with negligence theories available, and preserves strict liability for those special situations which arise out of the type conduct which warrants its application.

II. THE TRIAL COURT ERRED IN FAILING TO DIRECT A VERDICT IN FAVOR OF RESPONDENT UTICA MUTUAL INSURANCE COMPANY ON THE ISSUE OF INSURANCE COVERAGE WHEN NO EVIDENCE WAS PRODUCED AT TRIAL TO PROVE THE PETITIONER'S INJURIES WERE CAUSED BY AN OCCURRENCE WITH RESPECT TO THE CONDUCT OF THE BUSINESS OF ROY G. DAVIS D/B/A TAMPA WHOLESALE NURSERY.

Initially we note, as did Petitioners and as has this court on many occasions recently, this second issue should not be addressed because Petitioners have not alleged, and this court has not found, that any conflict exists between the decision of the district court and that of any other district court or the Supreme Court. Petitioners have failed to suggest any reason they should be allowed a second appeal on this issue, and consistent with this court's recognition that district courts of appeal are courts of final appellate jurisdiction rather than intermediate courts of appeal, this court in its discretion should now decline to provide a second review for the issue raised here by Petitioners. Sanchez vs. Wimpey, 409 So.2d 20 (Fla. 1982); Jenkins vs. State, 385 So.2d 1356 (Fla. 1980); Ansin vs. Thurston, 101 So.2d 808 (Fla. 1958).

In an apparent effort to evoke sympathy on the part of this court, Petitioners have alleged that they "will have won a hollow victory in establishing liability under the statute with very little hope of recompense for injuries" if this court does not address the issue of insurance coverage.

(Petitioners' Brief at 31). Respondent would point out, as did Petitioners in their Statement of Facts, that the dog's owner Roy G. Davis, owned 20 acres of property in Hillsborough County. (TR.33). Of the six to seven acres he used, 1½ acres was utilized for his resident and the remainder was utilized for his two businesses, DAVIS LANDSCAPING COMPANY, INC. and ROY G. DAVIS d/b/a TAMPA WHOLESALE NURSERY. (Brief of Petitioner at 4-5) (TR.33-36). Unless Petitioners have chosen not to seek recovery against Mr. Davis, their neighbor (TR.141-143), for some reason, there is no explanation for their having "very little hope of recompense".

The policy of insurance at issue before the trial court contained an endorsement captioned "Comprehensive General Liability Insurance" which provided that ROY G. DAVIS d/b/a TAMPA WHOLESALE NURSERY was insured at the time of this accident for liability from occurrences "with respect to the conduct of a business of which he is the sole proprietor." Occurrences are defined in the policy as accidents. The policy further specifies in defining "Hazards" that the business of ROY G. DAVIS d/b/a TAMPA WHOLESALE NURSERY is that of "nurserymen". Mr. Davis clarified the nature of this business when he testified at trial that TAMPA WHOLESALE NURSERY was involved in propagating and growing ornamental plants for sale on a wholesale basis. (TR.34-37). Respondent

contends, and the District Court of Appeal ruled, that the injuries sustained by Petitioner did not result from an accident with respect to the conduct of the business of TAMPA WHOLESALE NURSERY. Consequently, the policy of insurance issued by Respondent did not provide coverage for any liability Roy G. Davis may have incurred as a result of Petitioner's injuries.

In construing the provisions of the policy it should be emphasized that coverage provisions must be construed as written when they are unambiguous. McCormick & Sons, Inc. vs. Auto Owners Insurance Company, 382 So.2d 807 (Fla. 2d DCA 1980). Such provisions are not rendered ambiguous simply because analysis is necessary to interpret their meaning, scope or coverage. Travelers Insurance Company vs. C. J. Gayfers & Company, Inc., 366 So.2d 1199, 1201 (Fla. 1st DCA 1979). Unambiguous provisions must be given their plain, normally accepted meaning. Brown vs. Lee County Mosquito Control District, 352 So.2d 1116 (Fla. 2d DCA 1977). Such provisions should be read in the light of the skill and experience of ordinary people, without resort to uncommon meanings. Stewart vs. State Farm Mutual Insurance Company, 316 So.2d 598, 599 (Fla. 1st DCA 1975). Policy interpretations should be reasonable, practical and sensible, consistent with the interests of the parties. U. S. Fidelity and Guaranty vs. Hazen, 346 So.2d 632, 633 (Fla. 2d DCA 1977).

The plain language of this insurance policy purports to provide coverage for Mr. Davis only with respect to the conduct of his nursery business. Interpreting the pertinent clauses of the insurance contract in light of the above mentioned rules of construction, it is clear that three young boys playing with a dog and a little red wagon in no way constitutes the conduct of the nursery business. The coverage provisions of the policy must be interpreted with "a view to the character of the risks assumed by the insurers." O'Conner vs. Safeco Insurance Company, 352 So.2d 1244 (Fla. 1st DCA 1977). Reasonable interpretation of the coverage provisions of the policy issued by Respondent can only lead to the conclusion that the risk of injury incurred in the manner the Petitioner was injured was not assumed by Respondent UTICA MUTUAL in providing coverage for the conduct of the nursery business.

Petitioners attempt to raise before this court the contention that the policy of insurance is ambiguous insofar as it might be interpreted to provide coverage for "accidents occurring on the business premises during business hours". (Brief of Petitioners at 36). This was not an argument raised before the Second District Court of Appeal, nor a contention upon which Petitioners proceeded at trial. Thus, Petitioners not only seek a second appeal on an issue where no basis for a conflict jurisdiction exists, but would

also have this court consider arguments not presented to the district court below.

This new issue raised for the first time is of no merit. Initially we should note that the interpretation Petitioners urge is that the accident occurred on the business premises during business hours. (Brief of Petitioner at 36). The evidence at trial was undisputed that the injury to Petitioner occurred after the nursery business was closed for the day. (TR.87). Petitioner's own Statement of Facts recognizes that this was indeed the case. (Brief of Petitioner at 5). In fact, Petitioner's argument that the dog, Shane, was at the time of the injury a watchdog depends upon the conclusion that the business was closed for the day. Thus, this court need go no further than to recognize that this second purported construction of the policy language is merely a smoke screen created by the Petitioners.

Additionally, the cases cited by Petitioners in support of this argument that accidents occurring on the business premises are covered relies upon a series of cases which primarily arise out of "premises liability policies". That is not the type of policy that is involved in this case. For example, the decision of the Second District Court of Appeal in Linderman vs. American Homes Assurance Company, ____So.2d____ (Fla. 2d DCA 1982) (1982 FLW DCA 1200), involved coverage provisions provided for "the ownership, maintenance

or use of the premises for the purpose of a gasoline service station, and all operations necessary and incidental thereto, herein called service station operations". Id. at 1201. The court there determined that the employee whose negligence resulted in the injury was "doing an activity regularly associated with the service station business". Id. It would be misleading to suggest that this opinion is at all persuasive in a situation such as that presently before this court.

Similarly, the decision in Knowles vs. Lumbermans Mutual Casualty Company, 69 R.I. 309, 33 A.2d 185 (1943) involved a policy covering:

> [t]he ownership, maintenance, occupation or use of the premises...including the public ways immediately adjoining for the purpose of an automobile dealer or repair shop, and all operations either on the premises or elsewhere which are incidental thereto,....

Id. at 186. That language is much more comprehensive than that present in the policy now before this Court. Even so, the court in Knowles did not rule, as Petitioners suggest, that the injury was "incidental to the performance of the dog's watchdog function". Rather, the court ruled that on new trial this language should be construed only to require a showing that the keeping of a watchdog on the premises was a customery incident to the ownership, maintenance, occupation or use of the premises as a garage, salesroom

or service station. Consequently, this is also a decision involving a theory of liability which is not present in this case. Even had the ruling been as Petitioners claim, the evidence in the present case is conclusive that Shane was not involved in activity incidental to the watchdog function.

The arguments which Petitioners make in the section of their brief captioned "The Legal Construction of the Policy" beg the question as to whether the boys or the dog were involved at the time of the injury in the conduct of Roy G. Davis' nursery business. Consequently, the issue to be determined if this court feels it is appropriate that a second appeal on this issue be allowed, is whether or not the accident arose with respect to the conduct of the nursery business.

Petitioners at trial contended that the accident arose with respect to the conduct of the nursery business under any three theories. First of all, Petitioners maintained that at the time of the accident the three boys were proceeding towards the back of the nursery where the irrigation system control was located. (TR.125-28). There was no evidence that the boys were proceeding in that direction at the time of the accident for the purpose of adjusting those controls or otherwise involving themselves with the irrigation system. The district court so observed in ruling that the boys were

not involved in activity related to the business. It is important to examine all of the testimony with regard to the reason the boys were proceeding towards the rear of the nursery. The injured Petitioner, DONALD ROY JONES, testified that he did not know why he and the other boys were proceeding toward the rear of the nursery. (TR.125, 154). Michael Davis, son of the owner of the premises, Roy G. Davis, testified that at the time of the accident the boys were still playing with Shane and the wagon, that is, running along next to Shane and the wagon. (TR.77-78). It is the remainder of Michael Davis' testimony upon which Petitioners allege they established that the boys were in fact engaged in some type of nursery business at the time of the injury. That testimony was as follows: (TR.83-88).

(Upon questioning by Plaintiff's counsel):

"Q. Okay, I understand from something that Kenneth said that you had some chores that you were required to do around the nursery from time to time like turning on the sprinklers and things of that sort.

A. (Indicating affirmatively).

Q. Okay. When would you normally do that, if you remember back then?

A. I would turn them on after working time and then I would turn them off whenever I was told in an hour or two hours. I don't remember if the water was running then or not. I don't remember if we were running through the water.

Q. You just don't recollect?

A. Right.

. . .

(Upon cross-examination by defense counsel):

Q. I just have a couple of questions, Mike. Were you working at the time this incident occurred?

A. What do you mean by that? Working that day?

Q. Well, yeah, that day.

A. No, sir.

Q. You didn't work at all that day?

A. (Indicating negatively).

Q. I believe it's your testimony --

"MR. FOSTER: I don't think he answered that." What was your answer to that last question? You didn't work at all that day is what he asked.

DEPONENT: Right.

Q. (BY MR. STALLINGS) Did you work at all that day?

A. Other than turning on and off water, no.

Q. You did nothing else by way of work in that nursery?

A. Not that I can remember.

Q. Had you turned on the water at the time this incident occurred? Do you recall?

A. I don't remember if we was going back to turn it on or if it was already on.

. . .

Q. At the time this incident occurred or shortly before, were Kenneth or Donald doing any work at the nursery?

A. No, sir.

Q. Were they buying any plants?

A. No, sir. They just came over to play.

Q. They just came over to play?

A. (Indicating affirmatively).

. . .

(Upon questioning by Plaintiff's counsel):

Q. You don't recall whether you had turned it on or you were going to turn it on?

A. I think we were just heading back to turn it on. I can't remember if it was the weekend or not, 'cause if it was a weekend, we didn't turn it on until mid-afternoon, mid-afternoon to late afternoon.

. . .

Q. It is your recollection that you were going back to turn it on or had gone back to turn it on already?

A. Yes."

Although Petitioners maintain that the single statement by Michael Davis, "I think we was just heading back to turn it on" was uncontradicted by the witnesses and is sufficient to sustain a jury finding that some conduct of the business was ongoing at the time of the incident, it is clear from a review of the testimony set forth above that Michael Davis himself contradicted that statement. It is clear that he

was uncertain as to whether or not the boys were engaged in any conduct of the business at the time of the accident. Because Michael Davis himself was speculating as to whether or not they were involved in the conduct of the business, so too, the jury could only speculate as to this matter. As the District Court of Appeal recognized, a jury's verdict cannot rest on mere probability or guess, arbitrary action, whim or caprice. Lynn v. Pulford, 200 So.2d 201 (Fla. 4th DCA 1967). That decision must have a rational predicate in the evidence, that is, must rest on evidence which can be pointed out in the record as constituting a reasonable foundation. Babcock vs. Flowers, 198 So.2d 326 (Fla. 1940); Corum v. Warren, 200 So.2d 829 (Fla. 1st D.C.A. 1967). It is clear that no rational predicate in the evidence existed for the jury's verdict regarding insurance coverage, and that that verdict was correctly reversed inasmuch as there was no testimony that the boys were involved in any conduct of the business at the time of the injury. The single statement by Michael Davis was no more than speculation, which when read in conjunction with his other comments make it clear that he simply did not know for what reason the boys were on their way to the back of the nursery at the time of the injury. The Second District Court of Appeal's conclusion that there was no evidence the purpose of this trip was in any way related to the conduct of the

business was an accurate conclusion after fairly reading all of the testimony.

The second theory upon which the Petitioners proceeded at trial was that the dog, Shane, in combination with the wagon was used for some purpose in the business. Roy G. Davis eliminated this theory when he testified that the combination of Shane pulling the wagon was not used in the nursery business for any purpose. (TR.60, 66, 67). Specifically Mr. Davis testified:

> "Q. Did you ever use Shane to pull plants around?
>
> A. No.
>
> Q. So the combination of the wagon and Shane pulling the wagon was not used in any way in your business?
>
> A. That's correct."

Thus, the second theory of Petitioners is without merit.

The only remaining basis which Petitioners maintain supports their theory that some conduct of the business was ongoing at the time of the injury would be that the dog was employed as a watchdog after business hours, and because the injury occurred after the nursery had closed for the day a jury could find that the conduct of the nursery business was ongoing at the time of the injury. Petitioners have essentially forsaken all other arguments and suggested that the true question before the Second District Court of Appeal was

"whether the dog was working for the business at the time of the injury". (Brief of Petitioners at 42).

Contrary to Petitioners' claims, the testimony was not unanimous that the boys had stopped playing with Shane at the time the injury occurred. (TR.77-78). Additionally, Petitioners claim that Shane was not a family pet also misrepresents the facts. (Brief of Petitioner at 5). Both Mr. Davis and his son, Michael, testified that Shane was also a family pet. (TR.73, 89). The testimony at trial was that Shane was given to Mr. Davis as a gift, that Shane was a family pet who associated with all members of the family and that Shane was not directly used in the business but was a barking dog allowed to run loose throughout the entire premises, including the business portion, at night. (TR.42, 71-73).

With this background, Petitioners first maintain that Shane was "capable of performing as watchdog-type function" at the time the injury occurred and that therefore the injury arose with respect to the conduct of the business. Respondent suggests that the Second District Court's interpretation of the policy was proper, and that the test to be employed is whether the dog was conducting some business of her employer at the time of the accident. The court was further correct that this question can be answered only by determining whether or not the dog was involved in what the

employment contemplated. Although the trial judge suggested during argument on directed verdict motion that Shane was "on duty" at the time of the injury (TR.278), Respondent suggests that even if the dog was considered an employee of the business who was "on duty" at the time of the injury, the Second District Court was correct in determining that the dog was outside of the scope of employment at the time and therefore the accident did not occur with respect to the conduct of the business.

The test to be utilized in determining whether the dog, as with any employee, was conducting some business of its employer at the time of this accident is whether the dog was doing what the employment contemplated. Morrison Motor Company vs. Manhiem Services Corporation, 346 So.2d 102 (Fla. 2d DCA 1977). The business of the employer is being conducted only when the activity of the employee is the type he was employed to perform, that activity occurs within the time and space limits of the employment and the activity is motiviated by the purpose to serve the employer. Id. at 104. Although the dog here was within the time and space limits of his employment in that the business was closed and he was on the nursery property, it is undisputed by the evidence that the dog was not employed by the nursery business to pull the wagon for any purpose. Further, although the dog was serving as a pet for Michael Davis at the time of this

injury, there is no testimony that he was in any way performing the duties of a watchdog and serving thereby Roy G. Davis in the nursery business. The only conclusion which can be reached from a viewing of the evidence in a light most favorable to the Plaintiff is that the dog was not in any way conducting the business of his employer at the time of this accident.

The interesting case of American Motors Insurance Co. vs. American Employers Insurance Co., 447 F.Supp 1314 (WD La. 1978) is instructive in this regard. The insured crewboat company in that case maintained a policy of liability insurance which covered the conduct of its business. While on duty, an employee of the crewboat company shot a third person. Although the employee maintained his motive in shooting was to prepare himself to defend his employer's vessel against sharks, the court found the employee outside the scope of his employment. The court therefore found coverage did not exist under the employer's business liability policy because "circumstances and purposes of the acts did not reasonably foster the employer's business". Id. at 1321. Similarly, the circumstances and purposes of the acts involved in the accident which resulted in Petitioner's injuries in the instant case were not those which reasonably fostered the business of ROY G. DAVIS d/b/a TAMPA WHOLESALE NURSERY. Therefore, no coverage exists under the policy of insurance

issued by UTICA MUTUAL.

Most persuasive is the Minnesota Supreme Court decision in Employers Mutual Casualty Co. vs. Kangas, 245 NW2d 873 (Minn. 1976). There, as in the case now before this court, a sole proprietor had been issued a comprehensive general liability insurance policy. The policy before the Kangas court provided coverage "only with respect to the conduct of a business of which he is the sole proprietor". Id. at 875. This coverage language considered by Kangas court is identical to that construed by the trial court below and now before this court on appeal.

The business of the insured in Kangas was "portable welder". On the date of the accident, July 4, 1973, the insured had performed some services at a speedway during the daytime. That evening, after the races had ended, the insured left his portable welding rig and walked onto the infield of the speedway. He then began igniting fireworks. Shortly thereafter he was informed that a young child had been injured by the fireworks.

In arguing that coverage existed under the comprehensive general liability insurance policy, it was contended that during the time period in which the injury occurred, the alleged insured was available for work and would have worked if requested. Likewise, in the instant lawsuit, it was suggested that the dog was available to act as a watchdog

had any intruders entered the premises. The Kangas court found, however, that the policy provided coverage only when the conduct of the business was ongoing at the time of the accident. Id. at 877. Appellant suggests this logic is compelling and should be applied by this court to the present facts.

The Kangas court further commented that the insurer must have been able to reasonably foresee the liability-producing conduct as emanating from the insured's business. As Defendant Davis' testimony made clear, even he did not foresee that such an injury would arise from the conduct of his business inasmuch as the dog and wagon were not used in any fashion in that business.

Respondent respectfully suggests that because the sole proprietor of the business himself cannot be said to have reasonably foreseen that an injury would occur in the manner Petitioner was injured suggests also that the activity was not reasonably foreseeable to Respondent. Consequently, to determine that coverage exists based upon the mere fact that the dog contributed to the injury constitutes error. There being no evidence that any activity of the business was being conducted at the time of this accident, no coverage exists and the trial court erred in failing to direct a verdict in favor of Respondent UTICA MUTUAL on the issue of insurance coverage.

CONCLUSION

Respondents would respectfully request that this court affirm the holding of the Second District Court of Appeal that Florida Statutes §767.01 (1973) does not apply to the facts in this case because the injury to Donald Roy Jones was not proximately caused as a result of a risk created by the mere act of dog ownership. Further, Respondent would request that this Court affirm the Second District Court of Appeals alternative holding that no liability exists pursuant to that statute in this case because the affirmative testimony at trial was that the dog did not direct any affirmative or aggressive act toward Donald Roy Jones. Additionally, Respondent would ask that this Court decline to consider the issue of insurance coverage because that issue is not properly before this Court there having been no finding or contention of conflict or other basis for a second appeal. In the event that this Court does deem it proper to consider the insurance coverage issue, Respondent would request that the ruling of the Second District Court of Appeal be affirmed in all respects.

Respectfully submitted,

SHACKLEFORD, FARRIOR, STALLINGS
AND EVANS, PROFESSIONAL ASSOCIATION

By: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to JOEL D. EATON, Esquire, 25 W. Flagler Street, Suite 1201, Miami, Florida 33130, Attorney for Petitioner Jones; JOHN McLAUGHLIN, Esquire, 708 East Jackson Street, Tampa, Florida 33602, co-counsel for Petitioner Jones; and HOWARD GARRETT, Esquire, 518 Tampa Street, Tampa, Florida 33602, Attorney for Roy G. Davis this 21st day of July, 1982.

TIMON V. SULLIVAN