DONALD ROY JONES, etc., et al.,

Petitioner,

vs.

UTICA MUTUAL INSURANCE CO.,

Respondent.

_____/

IN THE SUPREME COURT OF FLORIDA

CASE NO. 61,681

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

BRIEF OF RESPONDENT ON JURISDICTION

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I
STATEMENT OF THE CASE AND FACTS

For the purpose of this brief on jurisdiction, Respondent adopts the facts set forth in the decision of the Second District Court of Appeal of which Petitioner seeks review. UTICA MUTUAL INSURANCE COMPANY v. DONALD ROY JONES, et al., _____ So.2d _____ (Fla. 2nd DCA 1982) (1982 FLW DCA 230). A copy of the Second District Court of Appeal Opinion has been attached as an appendix to this brief.

II
ARGUMENT

At the outset, it should be noted that the factual similarities Petitioner alleges exist between the decision of district court and the decision in Mapoles vs. Mapoles, 350 So.2d 1137 (Fla. 1st DCA 1977), do not exist. Petitioner has alleged that "the dogs in this case and in Mapoles were placed in contact with the injuring instrumentality by their owner". Petitioner's Brief at 4. (See also Petitioner's Brief at 2). This is incorrect. The only testimony at trial regarding ownership of the dog was that it was owned by defendant Roy G. Davis. Counsel for Petitioner acknowledged as much at trial. (R 217). Mr. Davis further testified that he had no idea that the boys or anyone else for that matter were using the wagon and the dog, Shane, as a single entity. Counsel for Petitioner also admitted this at trial. (R 232). It was on this basis that the court directed a verdict for all defendants on the Petitioner's premises liability theory. (R 233-234). The three boys tied the dog to the wagon. (A1). Therefore, Petitioner's statements that the dogs "owner" placed the dog in proximity to the instrumentality that injured

Petitioner are inaccurate and arguments based upon that premise should be disregarded.

A. THE DISTRICT COURT'S DECISION IS IN ACCORD WITH THE EXISTING FLORIDA LAW IN THAT THE DECISION HOLDS §767.01 FLA. STAT. (1979) REQUIRES A SHOWING THAT THE DAMAGE WAS "DONE BY" A DOG.

Petitioner attempts to suggest that the first basis of the district court's holding in this case distinguishes between injuries directly caused by and those indirectly caused by the dog. This is inaccurate. The first alternative holding of the district court in this case was that strict liability should only be imposed upon the dog owner where the injury is caused as a result of the extraordinary risk created by dog ownership which justifies the imposition of such liability. (A2). Not withstanding Petitioner's allegations, the holding of the district court is not that contact between the animal and the injured party is essential to liability under §767.01. The district court recognized that the damage in this case had not been done by a dog, but rather, had been done by a dog/wagon entity created by the boys. The dog's owner, Roy G. Davis, had no idea of the existence of this dog/wagon entity. Thus, the risk was neither one he created voluntarily, nor simply by virtue of his ownership of the dog. The district court simply applied the statute and found that " 'damage done by their dogs...' does not include cases where the dog does not itself inflict any damage." Smith v. Allison, 332 So.2d 631 (Fla. 3rd DCA 1976). Accordingly, the court as the first alternative ground for its ruling held that but for the creation of this dog/wagon entity, no injury would have occurred and therefore no liability attaches pursuant to the strict liability statute.

In this sense, there is no conflict between the district court's opinion and the opinion in Mapoles vs. Mapoles, supra. There, the owner or agent of the owner voluntarily placed the dog on the rear seat of a Volkswagon where the owner of the vehicle had previously placed a loaded 12-gauge shotgun. While Respondent would suggest that the fact situation was more properly one dealt with under a negligence theory, it is a factually distinct situation from the one presently before this court, and is one which permits, we suppose, the conclusion that the owner there created the risk. As has already been pointed out, that is not the case in the decision before this Court. Additionally, the Mapoles vs. Mapoles decision does not indicate that counsel for the defendant raised the issue regarding whether or not the injury had actually been "done by" a dog. The only issue evidently raised there was whether or not the statute applied absent an aggressive or affirmative act.

The three additional cases which Petitioner represents conflict with the decision of the district court do not in fact conflict. Each case involves a dog acting like a dog and directing those actions toward the party injured. One of the cases, Allstate Insurance Co. vs. Greenstein, 308 So.2d 561 (Fla. 3rd DCA 1975), involves contact and thus does not support the "no contact" theory created by Petitioner and incorrectly attributed to the district court in this case.

In Allstate Insurance Co. vs. Greenstein, 308 So.2d 561 (Fla. 3rd DCA 1975), Petitioner suggests the plaintiff was injured after swerving his car and avoiding contact with a dog which had run into the street. The opinion in Greenstein indicates the Complaint alleged the dog ran

into the street and struck Greenstein's car. Id. at 562. Greenstein testified at trial that he swerved to avoid hitting the animal, but it is not clear that he did so. This was resolved in the later decision of the same district court, Smith vs. Allison, 332 So.2d 631 (Fla. 3rd DCA 1976), where the panel, which included one of the judges from the Greenstein panel, described Allstate vs. Greenstein as a case where the "dog ran into a car". Thus, this case cited for Petitioner's "no contact" theory does not support that theory.

Both of the other two cases cited on this point by Petitioner involve simply a dog, not some other entity. Petitioner suggests English vs. Seachord, 243 So.2d 193 (Fla. 4th DCA 1971), cert. dismissed, 259 So.2d 136 (Fla. 1972), stands for the proposition that a verdict for the plaintiff was permissible under the statute where the plaintiff, frightened by a growling dog, jumped on top of a car and injured his back. In reality the court in English vs. Seachord reversed a directed verdict in favor of the defendant because the jury had been incorrectly instructed in such a manner that they may have considered contributory negligence in their decision. This Court then affirmed the lower court's decision in that regard. Further, the district court in that case specifically remanded for trial inasmuch as the court felt there existed a jury question on this issue of causation. Similarly, the opinion in Brandeis vs. Fletcher, 211 So.2d 606 (Fla. 3rd DCA), cert. denied, 219 So.2d 706 (Fla. 1968), is represented by Petitioners as one in which it was ruled a verdict for Plaintiff was permissible. There plaintiff was frigtened by two dogs barking at him from behind a fence, ran into the

street and was run over by an automobile. In reality this decision was a reversal of a summary judgment for the defendants and a remand for jury trial on this issue of whether the damage to the plaintiff was done by the dogs. While Petitioner cites each of these cases for his "no contact" theory, they in fact are consistent with the district court's ruling in the case before this court because in each case we have a dog, not an entity of which the dog is simply a part.

No conflict exists between the decision of the district court in this case and the decisions in English, Brandeis, and Greenstein. Dogs growling, barking and charging fences, and chasing and running into cars are all risks created by dog ownership. In neither English nor Brandeis did the court rule that the damage was done by a dog. Therefore, there is no basis for asserting conflict with the decision of the distrct court in this case, where the district court ruled the damage was not done by the dog. In Greenstein the owners negligently allowed the dog to be loose on the streets, and it subsequently ran into a car causing an accident. Clearly there, it was the dog, not some other entity, which caused the injury. If the statute means what it says, the damage must be done by a dog for strict liability to attach. The district court pointed out that no damage would have been done but for the presence of the wagon for the purpose of clarifying that if in our situation we had simply a dog, rather than the dog/wagon entity, his chasing of a second dog would have caused no injury. The simple act of dog ownership, for which strict liability is imposed, does not create the risk that some third person will attach some injuring instrumentality to

that dog. Thus, no conflict exists between this decision and the cases cited by Petitioner, and thus no basis for review.

B. THE DISTRICT COURT'S DECISION IS CONSISTENT WITH THE CURRENT FLORIDA LAW AND CORRECTLY INTERPRETS §767.01 TO REQUIRE AFFIRMATIVE OR AGGRESSIVE ACTION BY THE DOG TOWARD THE INJURED PARTY.

The district court's alternative ruling with regard to the applicability of §767.01 was that the statute did not apply because the evidence in the record was clear that the injuries were in no way attributable to an affirmative or aggressive act toward the Petitioner by the dog. (A2). The Petitioner's own testimony at trial was that the dog was neither chasing nor acting aggressively towards him in any fashion. (R155-157). The dog merely ran past the Petitioner as it chased Petitioner's dog which had suddenly appeared up ahead.

The district court's decision is consistent with and closely analogous to the decision of the Third District Court of Appeal in Smith vs. Allison, supra. There, the plaintiff observed the dog in the middle of the road as he approached in his vehicle. The dog suddenly turned and ran across in front of his vehicle. The plaintiff swerved to miss the dog and in doing so crashed. The Smith vs. Allison, supra, court relied upon Rutland vs. Biel, 277 So.2d 807 (Fla. 2nd DCA 1973), in ruling that application of the statute would be improper in that situation. Both in Smith vs. Allison, and in the case here for review, although the dog was acting in an affirmative manner in neither case was the dog directing his conduct toward the injured party.

The Mapoles vs. Mapoles, supra, decision which has been repeatedly

cited by plaintiff in fact does not address the question ruled upon in this portion of the district court's opinion. As a review of the Mapoles decision reveals, the only question raised was whether the injury there was caused by an affirmative act. 350 So.2d at 1138. While Respondent concurs with the district court that the Mapoles decision extends liability under §767.01 far beyond that contemplated by the legislature, strictly read the Mapoles decision does not address the issue now before this court and therefore presents no conflict.

Petitioner additionally cites Scott vs. Gordon, 321 So.2d 619 (Fla. 3rd DCA 1975), in support of its claimed conflict on this issue. Petitioner suggests this case was one in which the reviewing court remanded for submission to the jury the question of whether or not the animal had taken affirmative or aggressive action of running underneath the plaintiff. Petitioner's Brief at 7. In fact in that case the reviewing court, speaking through Judge Pearson who was the author of the Smith vs. Allison, supra, decision, reversed the partial summary judgment for plaintiff and remanded for trial because the facts presented did not show as a matter of law that the dog did the damage. This ruling is in reality consistent with the district court's ruling in this case because absent evidence of where the dog was prior to the plaintiff's leap it would be impossible to determine whether any aggressive or affirmative act on the part of the dog was directed toward plaintiff and caused the plaintiff's injury.

The final case cited by Petitioner as creating conflict with the district court opinion in this case was Allstate vs. Greenstein, supra.

As has been pointed out earlier in this brief, the plaintiff alleged, and the Smith vs. Allison court later confirmed, that that was a case in which the dog ran into the car. Petitioner's representation as to the "undisputed facts" in that case are thus inaccurate. The Greenstein case does not support Petitioner's argument that conflict exists because this was no dispute as to whether an affirmative act was present.

Although Petitioner claims that "every extant decision interpreting the requirement of an aggressive or affirmative act" conflicts with the district court opinion in this case, it is clear that the cases he cites do not in fact conflict. Additionally, Petitioner has failed to bring to the Court's attention that in addition to the Rutland vs. Biel, supra, decision, two additional recent decisions confirm and are consistent with the district court opinion in this case. In Bozarth vs. Barreto, 399 So.2d 370 (Fla. 3d DCA 1981), the court held that inasmuch as the plaintiff's injuries were not proximately caused by "any aggressive or affirmative act directed against said plaintiff by the defendant's dog" the jury decision was a proper one. Id. Additionally, the Fourth District Court of Appeal in Sutton vs. Sweet, 376 So.2d 443 (Fla. 4th DCA 1979), reversed a summary judgment for the defendants on the grounds that there were genuine issues of fact remaining as to whether the "dog's 'growling and lunging' was directed at" the plaintiff. Quite clearly then, in addition to Rutland vs. Biel and Scott vs. Gordon, at least two other district court opinions are consistent with that of the district court in this case.

III
CONCLUSION

Inasmuch as Petitioner has been unable to direct the Court's attention to any failure on the part of the district court to adhere to precedent in reaching its decision that Florida Statutes §767.01 does not apply in the case before this Court, Petitioner's arguments regarding the district court's efforts to avoid an absurd application of the statute are moot and require no response. Further, Petitioners do not assert that a conflict exists with regard to the second portion of the opinion, that is, coverage under the policy of insurance issued by Utica Mutual Insurance Company. In the event this Court in its discretion accepts jurisdiction as requested by Petitioner, this Court should decline to consider the merits of that issue. Sanchez vs. Wimpey, _____ So.2d _____ (Fla. 1982) (1982 FLW 21).

Respondent requests the Court decline to accept jurisdiction of this matter, or alternatively, accept jurisdiction only on the issue upon which Petitioner has alleged conflict.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 7th day of March, 1982, to: HOWARD GARRETT, ESQ., 518 Tampa Street, Tampa, Florida 33602, Attorney for Appellee; and to JOEL D. EATON, ESQ. and JOEL S. PERWIN, ESQ., Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadow & Olin, P.A., 1201 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130-1780 and WAGNER, CUNNINGHAM, VAUGHAN & McLAUGHLIN, P.A., 708 Jackson Street, Tampa, Florida 33602, Attorneys for Petitioner.

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