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 PETITIONER

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## AUTHORITIES

## I
## STATEMENT OF THE CASE

In June of 1977, the Petitioner, DONALD ROY JONES (hereinafter "plaintiff"), by and through his parents, Donald and Karen Jones, and his parents individually, brought a civil action against ROY G. DAVIS (hereinafter "defendant"), seeking damages for injuries sustained by the plaintiff in 1974, when he was struck by a wagon being pulled by a dog named Shane owned by the defendant while a guest on the defendant's premises (R. 1-2).[1/] The accident occurred after the plaintiff and two other youngsters--one of them the defendant's son--had been playing with Shane while Shane was tied to the small wagon, which clipped the plaintiff's Archilles tendon when Shane began to chase the plaintiff's dog.

The plaintiff's amended complaint joined as a defendant Respondent UTICA MUTUAL INSURANCE COMPANY (hereinafter "Utica"), which had issued a liability insurance policy covering, inter alia, the defendant Roy G. Davis, doing business on the property in question as Tampa Wholesale Nursery (hereinafter "Nursery") (R. 3-5). In its answer, Utica interposed a general denial and the affirmative defense of contributory negligence (R. 6-7). The defendant interposed the same denial and affirmative defense, and in addition filed a crossclaim against Utica alleging derivative liability under the insurance policy (R. 8-10). Thereafter, the plaintiff filed a second amended complaint naming not only the defendant, but in addition, inter alia, the defendant doing business as Tampa Wholesale Nursery (R. 42-44), and both the defendant and Utica filed answers effectively identical to those filed earlier (R. 46-47, 48-49).

Trial commenced on September 15, 1980, and on that date the trial court directed a verdict in favor of the plaintiff on the question of liability under

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1/ "R." refers to the record on appeal. "Tr." refers to the separately-paginated transcript of the trial at R. 189-530. The Respondent's briefs in the Court of Appeal will be designated "Utica's brief" or "Utica's reply brief."

§767.01, Fla. Stat. (1979) (Tr. 246, 332).[2] In addition, the trial court denied Utica's motion for a directed verdict, which asserted that Utica's liability policy did not cover the injury in question (Tr. 281-282). Instead, the court instructed the jury to determine whether the plaintiff's injuries "arose with respect to the conduct of the business of Roy G. Davis, doing business as Tampa Wholesale Nursery" (Tr. 334). The jury answered that question "Yes" (Tr. 339), awarding the plaintiff $7600.00 and his parents $2250.00 (Tr. 339).

Utica appealed to the Court of Appeal, Second District, on two grounds--that the trial court had erred in failing to direct a verdict in favor of the defendant on the issue of liability under Section 767.01, Fla. Stat. (1979), and that the trial court had erred in failing to direct a verdict in favor of Utica on the issue of insurance coverage (Utica's brief at 8).[3] Thus, Utica "assigned" as error only the trial court's refusal to direct a verdict for the defendant on the issue of liability, thereby challenging the direction of a verdict for the plaintiff on that issue only in this particular context. In short, Utica raised no contention that the question of liability should have been submitted to the jury, but only that it should have been resolved in the defendant's favor as a matter of law. Utica also argued that the trial court erred in submitting the question of coverage to the jury, rather than directing a verdict on that issue in its favor.

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2/ Section 767.01 provides:

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

3/ The defendant did not appeal the judgment entered against him, nor did he cross-appeal the judgment after Utica initiated its appeal from the judgment. He was therefore unable to challenge the plaintiff's judgment against him, which became final, though he was of course entitled as an appellee to urge affirmance of the trial court's judgment against Utica. See HALL v. FLORIDA BOARD OF PHARMACY, 177 So.2d 833 (Fla. 1965); CERNIGLIA v. C & D FARMS, INC., 203 So.2d 1 (Fla. 1967); MacNEILL v. O'NEAL, 238 So.2d 614 (Fla. 1970). The Court of Appeal appeared to acknowledge as much in noting in its opinion that "Utica Mutual Insurance Company, one of the defendants in the trial court, appeals a final judgment awarding damages against it and appellee/defendant Roy G. Davis in favor of plaintiffs . . . ." UTICA MUTUAL INSURANCE CO. v. JONES, 408 So.2d 769, 770 (Fla. 2nd DCA 1982).

The Court of Appeal agreed with both contentions, in UTICA MUTUAL INSURANCE CO. v. JONES, 408 So.2d 769 (Fla. 2nd DCA 1982). As a framework for its consideration of the issue of liability under §767.01, the Court of Appeal began by citing with approval the decision in WENDLAND v. AKERS, 356 So.2d 368, 369-70 n. 5 (Fla. 4th DCA 1978), cert. denied, 378 So.2d 342 (Fla. 1979), which concluded that because the phrase "or to persons" had been added to the statute only by its compilers, that particular phrase "should be given a restrictive scope . . . ." With that observation, the Court of Appeal concluded that the statute should apply "only where the damage done by the dog is the direct cause of the injury," a condition which requires determination of "whether the injury was caused by some canine characteristic within the contemplation of the statute." Id. at 771. In this case, the Court of Appeal concluded, the conduct of Shane in chasing another dog, while obviously a canine characteristic, "was not that conduct which directly caused Donnie's injury. But for the wagon, no injury would have occurred when Shane ran past Donnie, inasmuch as the dog never came in contact with the boy." Id. Thus, the Court of Appeal concluded, "this injury was not caused as a result of the risk created by dog ownership . . . ." Id. at 771-72.

In addition, the Court of Appeal appeared to endorse an alternative holding on this issue of liability--that "Donnie's injuries here were in no way attributable to an affirmative or aggressive toward him by the dog." Id. at 772 (emphasis in original). The Court of Appeal continued: "Although Shane clearly was engaged in an aggressive act toward Donnie's dog, Donnie would not personally have been affected by Shane's act of chasing his dog had the wagon, which was what came in contact with Donnie, not been left tied to Shane." Id. This passage appears to suggest an alternative holding that the statute was inapplicable because Shane had taken no affirmative or aggressive action toward the plaintiff. But on the other hand, this passage also appears to suggest that Shane's aggressive conduct

toward the plaintiff's dog would have satisfied the "aggressive act" requirement if Shane himself had come into contact with the plaintiff, thus rendering this "alternative" holding dependent upon the first.

On the question of insurance coverage, the Court of Appeal observed that the policy in question covered only accidents arising out of the conduct of the defendant's nursing business, and "[n]either the three boys nor the dog were involved in an activity related to the business at the time the injury occurred." Id. at 772. The Court of Appeal continued:

> Although, at the time of the accident, the boys were proceeding toward the back of the nursery where the irrigation system control was located, there was no evidence that they were doing so for the purpose of adjusting those controls. Moreover, while Shane was used after business hours as a watchdog, she was most certainly outside the scope of her employment at the time of the accident. The test to be employed in determining whether the dog was conducting some business of her employer at the time of this accident is whether the dog was doing what her employment contemplated. . . . The business of the employer is the type the employee was employed to perform, occurs within the time and space limits of the employment, and is motivated by a purpose to serve the employer. . . . Although Shane was within the time and space limits of her employment, she had been prevented from properly performing her duties as a watchdog by being tied to the wagon.

Id. at 772. Thus, the Court of Appeal reversed the judgment, and this Court accepted jurisdiction on June 9, 1982.

## II
## STATEMENT OF THE FACTS

In January of 1974, when the plaintiff was 12 years old (Tr. 120), he went to visit his friend Michael Davis, and a third friend, Kenny King, on the Davis' six-to-seven acre property on McIntosh Road in Hillsborough County, Florida (Tr. 26, 77-78, 124). Michael's father, Roy Davis, owned the property--utilizing approximately one and one-half acres as a residential area, and the rest for two businesses--Davis Landscaping Co., Inc., and Roy G. Davis, doing business as

Tampa Wholesale Nursery (Tr. 33-36). In practice, there was "no differentiation" between the residential and business areas of the property (Tr. 33, 254).

On the day in question, the plaintiff and his two friends were playing "in the nursery area" (Tr. 38; see Tr. 78-79) with a 50-60 pound German Shepherd named Shane, which the defendant had received as a gift from a business acquaintance 3-5 years earlier (Tr. 41, 69-70, 176-177). Shane was not a family pet (Tr. 71, 73), but rather was used as a "watch dog" (Tr. 40) on the property: "I've had a dog as a watch dog ever since we moved in there but that particular dog, it was the best one I ever had" (Tr. 40-41). The defendant had experienced problems on the property with "people stealing plants" (Tr. 83), and thus had allowed Shane and his other dogs to run free in the nursery as watch dogs (Tr. 63-64, 73, 83). For this reason, the defendant's "businesses paid for the expenses of the dog" (Tr. 42), including food and veterinarian bills (Tr. 42, 180). In addition, and with the concurrence of his accountant, the defendant deducted all expenses for his dogs as business expenses on both his personal income tax return and the return which he filed for Davis Landscaping Company, Inc. (Tr. 42-43, 179). The defendant had been audited by IRS in 1976, and these deductions had not been questioned (Tr. 178-179).

At the time of the plaintiff's injury, the nursery was closed to the public (Tr. 87); however, there remained a variety of business activities to be performed:

> After all business ceased, then [the gate] was locked always but there are other things that go on after 4 o'clock. There are nursery operations that go on, landscaping trucks coming in and so on and so on (Tr. 44-45).

Among these business activities were certain functions performed by Michael Davis and the defendant's other children. Michael's duties were "important" (Tr. 38), and included potting plants for his father and "turning on the water at night

when the nursery closed" (Tr. 38; see Tr. 38-39, 84). The defendant paid Michael for his services out of "company money" (Tr. 52; see Tr. 38-39, 51-52).

Michael Davis recalled that on the date of the plaintiff's injury, the nursery was closed, and the dog Shane "had the run of the nursery" pursuant to his watch dog functions (Tr. 88; see Tr. 87). As Michael remembered the incident, all three of the young boys had tied Shane to a small red wagon (Tr. 78; see Tr. 149), which was used to haul plants in the business (Tr. 42, 58, 83), and which was ordinarily stored in a shed in which both business and personal items were kept (Tr. 59). Michael remembered that the three boys and the dog, tied to the wagon, had been running up and down the aisles of the nursery (Tr. 77-78). At the time of the accident, however, to the best of Michael's recollection, the three were finished playing and had started toward the back of the property so that Michael could perform his assigned chore of turning on the sprinkler system:

> Q. Mike, just so that I understand it: It is your recollection at this time that the nursery was closed?
>
> A. Yes, sir.
>
> Q. And as I understand, part of your chores then was, when the nursery closed, you had to --
>
> A. -- turn on the water.
>
> Q. -- turn on the water.
>
> A. Yes, sir.
>
> Q. You don't recall whether you had turned it on or you were going to turn it on.
>
> A. I think we was just heading back to turn it on. I can't remember if it was a weekend or not, because if it was a weekend, we didn't turn it on until midafternoon, midafternoon to late afternoon.
>
> Q. About the time of day that this took place?
>
> A. Yes.
>
> Q. It's your recollection that you were going back to turn it on or had gone back and turned it on already?

A. Yes.

Q. And the other boys accompanied you when you went back to do this on this day?

A. Yes, sir.

Q. And if the nursery had closed, as you recall it, would Shane then have had the run of the nursery to do what she was supposed to do out there?

A. (Indicating affirmatively.)

Q. Your answer is yes?

A. Yes, yes.

(Tr. 87-88).[4/] At that point, Michael recalled, another dog--a small yellow dog owned by the plaintiff--ran out from one of the rows of plants, and Shane took off after it, at which point the wagon he was pulling hit the plaintiff's leg (Tr. 77-80).

The plaintiff's recollection of the incident was identical, with one exception: the plaintiff recalled that Mike Davis and Kenny King were already in the nursery when he arrived there (Tr. 124), and had already tied Shane to the red wagon (Tr. 125, 146, 147). The plaintiff remembered that the two other boys were "jumping in the wagon but the dog was too weak to pull them so they decided to quit doing that and then they headed back toward the back of the nursery then" (Tr. 125). Thus the plaintiff supported Michael Davis' recollection that the three had stopped playing at the time of the accident, and were heading toward the back of the property (see also Tr. 152). There was no evidence that the boys were still playing with Shane at the time of the accident. However, the plaintiff did not specifically recall whether the boys on that particular occasion were heading toward the back in order to turn on the sprinklers (Tr. 154-155). He

4/ In light of Michael's testimony that "I think we was just heading back to turn it on", the Court of Appeal was incorrect in concluding that "there was no evidence that ["the boys were proceeding toward the back"] for the purpose of adjusting those controls." 408 So.2d at 772.

did note that the pathway on which the three were walking "leads back toward where the sprinkler systems are" (Tr. 154). The plaintiff had accompanied Michael Davis in turning on the sprinklers on numerous occasions (Tr. 128-129), and had on occasion assisted him (Tr. 143). On this occasion, however, he could only recall that the three were walking back toward the sprinklers after having played with the dog (Tr. 125, 152). At this point, his recollection was identical to that of Michael Davis--that the plaintiff's small yellow dog appeared in the pathway ahead of them, that Shane started to run after him, and that the wagon which Shane was pulling hit the plaintiff's leg (Tr. 153-159).

The plaintiff suffered a severance of his Achilles tendon (Tr. 93-94). He required an operation to suture the two ends of the tendon together with a piece of wire, spent two weeks in a leg-long cast, three weeks in a short-leg cast, and three months in an orthopedic brace (Tr. 95-96). His injured leg was permanently weaker than the other leg (Tr. 103), and he had a permanent scar approximately four and a half inches long (Tr. 96, 138). He missed a month of school (Tr. 133), and he suffered intense pain when the wires were removed from his leg after the short-leg cast was taken off (Tr. 134). He was forced to stop playing football because he was no longer as fast a runner (Tr. 137-138), and he suffered various problems in his job as an electrician, including severe cramps in his calf and an inability to wear the shoes required at work (Tr. 137-139).

## III
## ISSUES ON APPEAL

A. WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR A DIRECTED VERDICT ON THE ASSERTED GROUND THAT §767.01, FLA. STAT., DID NOT APPLY TO THE FACTS OF THE INSTANT CASE.

B. WHETHER THE TRIAL COURT ERRED IN DENYING UTICA'S MOTION FOR A DIRECTED VERDICT ON THE ASSERTED GROUND THAT THE INSURANCE POLICY AT ISSUE PROVIDED NO COVERAGE FOR THE DEFENDANT ON THE FACTS OF THE INSTANT CASE.

## IV
## ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION FOR A DIRECTED VERDICT ON THE ASSERTED GROUND THAT §767.01, FLA. STAT., DID NOT APPLY TO THE FACTS OF THE INSTANT CASE.

It is important to note at the outset that the sole error alleged on this issue (Utica's brief at 9), and the sole basis for the Court of Appeal's ruling, 408 So.2d 769, was the failure of the trial court to direct a verdict for the defendant on the question of liability under §767.01, Fla. Stat. Thus Utica challenged the order of the trial court directing a verdict for the plaintiff on liability only insofar as Utica claimed error in the failure of the trial court to direct a verdict in its favor instead. There is no argument here, and no decision by the appellate court, that the question of liability should have been submitted to the jury--only Utica's contention and the appellate court's conclusion that the trial court should have ruled in Utica's favor as a matter of law.

Since Utica chose to frame the issue in that way, it is axiomatic that no other issue is appropriate for appellate consideration. See, e. g., GIFFORD v. GALAXIE HOMES OF TAMPA, INC., 204 So.2d 1 (Fla. 1967); CITY OF MIAMI v. STECKLOFF, 111 So.2d 446 (Fla. 1959); TRUXELL v. TRUXELL, 259 So.2d 766 (Fla. 1st DCA 1972); LESPERANCE v. LESPERANCE, 257 So.2d 66 (Fla. 3rd DCA 1971). Thus the judgment at trial on this issue should be reinstated if the trial court did not err in declining to direct a verdict for Utica, even if the trial court should have submitted the issue to the jury rather than directing a verdict for the plaintiff. The independent propriety of the directed verdict for the plaintiff is simply not before this Court.

It cannot be stressed too strongly that having thus framed the issue on appeal, Utica's burden was to demonstrate "that no evidence has been submitted on which the jury could lawfully find a verdict for the plaintiff, and [that this

conclusion results] from the presence of a state of facts that permits no other legal result." HERNANDEZ v. MOTRICO, INC., 370 So.2d 836, 838 (Fla. 3rd DCA 1979). Because "the direction of a verdict can constitute an encroachment on the right of a litigant to a jury trial and an invasion by the Court of the province of a jury which is contrary to constitutional guarantees, where there is any evidence to justify a possible verdict for the non-moving party--even if a preponderance of the evidence appears to favor the movant," a verdict should not be directed. Id. at 838. Accord, WELFARE v. SEABOARD COAST LINE RAILROAD, 373 So. 2d 886, 888-89 (Fla. 1979); HELMAN v. SEABOARD COAST LINE RAILROAD CO., 349 So.2d 1187, 1190 (Fla. 1977) ("For a directed verdict to be sustained, there needed to be a complete absence of competent evidence to support the verdict . . . "); TESHER & TESHER, P. A. v. ROTHFIELD, 392 So.2d 100 (Fla. 4th DCA 1981) ("A directed verdict should not be entered unless no proper view of the evidence could sustain a verdict for the party moved against"); TESHER & TESHER, P. A. v. ROTHFIELD, 387 So.2d 499 (Fla. 4th DCA 1980) (error to direct a verdict where there is "some, slight or minimal evidence" tending to prove the plaintiff's case); DANIELS v. WEISS, 385 So.2d 661 (Fla. 3rd DCA 1980); BILAMS v. METROPOLITAN TRANSIT AUTHORITY, 371 So.2d 693 (Fla. 3rd DCA 1979); LAIRD v. POTTER, 367 So.2d 642 (Fla. 3rd DCA), cert. denied, 378 So.2d 347 (Fla. 1979); O'CONOR v. DEPARTMENT OF TRANSPORTATION, 364 So.2d 84 (Fla. 3rd DCA 1978); SUN LIFE INSURANCE CO. OF AMERICA v. EVANS, 340 So.2d 957 (Fla. 3rd DCA 1976). Thus, if there was "some, slight or any minimal evidence" in support of the plaintiff's position in this case, the trial court did not err in denying Utica's motion for a directed verdict. And that is the only question before this Court.

The Court of Appeal concluded that the trial court should have ruled as a matter of law that §767.01, Fla. Stat., is inapplicable to the facts of the instant case, and thus should have directed a verdict on liability as a result. As a pre-

face, citing WENDLAND v. AKERS, 356 So.2d 368, 369 n. 5 (Fla. 4th DCA 1978) cert. denied, 378 So.2d 342 (Fla. 1979), the Court of Appeal adopted Utica's argument (brief at 9-10) that because the statute, as originally enacted in 1881 and re-enacted in 1901, covered only damage to other animals, and not to persons, and because only in the Compilation of Florida Statutes was the phrase "to persons" included, that phrase should be strictly construed. And the Court of Appeal expressly proceeded to construe the statute mindful of this "history, the evil to be corrected, the intent of the legislature, the subject regulated, and the object to be obtained." 408 So.2d at 771.

We think that threshold analytic framework was inappropriate, and casts serious doubt upon all of the legal conclusions which the Court of Appeal derived from it. Section 11.2421, Fla. Stat., specifically provides that the "revision, consolidation, and compilation of the public statutes . . . is adopted and enacted as the official statute law of the state under the title of 'Florida Statutes . . .' and shall take effect immediately upon publication." Moreover, the Preface accompanying the Compilation of Florida Statutes indicates that "portions [of Florida Statutes] carried forward from the preceding regular edition are the official law of the state and therefore constitute the best evidence of what the law is" (p. vi). While substantive departure by the compilers from the language of enacted legislation may be ineffective before official publication in the Florida Statutes, such publication constitutes official adoption by the legislature of the language published, and "[t]he statute in such case should be effectuated as the language actually contained in the latest enactment warrants . . . and appropriate effect should be given to the connected and complete terms and provisions as they appear in the re-enacted statute . . . ." DAVIS v. FLORIDA POWER CO., 64 Fla. 246, 60 So. 759, 765 (1912).[5/] Thus, no word or phrase in the statute is

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5/ Accord, HILLSBOROUGH COUNTY COMMISSIONER v. JACKSON, 58 Fla. 210, 50 So. 423, 424 (1909); COULTER ELECTRONICS, INC. v. DEPARTMENT OF REVENUE, 365 So.2d 806, 810 (Fla. 1st DCA 1978).

entitled to any greater or lesser deference than any other. All constitute its present composition, and all should be read in accordance with their plain meaning and with the extant judicial interpretations.

This conclusion derives from two longstanding principles of statutory construction. First is the "cardinal rule of statutory construction that the entire statute under consideration must be considered in determining legislative intent, and effect must be given to every part of [a] section and every part of the statute as a whole. From a view of the whole law in pari materia, the court will determine legislative intent." STATE v. GAL DISTRIBUTORS, INC., 349 So.2d 150, 153 (Fla. 1977). As this Court noted in ATLANTIC C.L.R. CO. v. BOYD, 102 So.2d 709, 712 (Fla. 1958): "We are obligated to give meaning to all words chosen by the legislature." Such cases leave no room for any court to apply a more restrictive interpretation, or a stricter standard of proof, to some part of the statute than to any other. The district court in this case expressly did so.

Second, the district court's decision transgresses the cardinal rule of statutory construction that plain and unambiguous language in a statute needs no "construction," and creates the "obvious [judicial] duty to enforce the law according to its terms." VAN PELT v. HILLIARD, 75 Fla. 792, 78 So. 693, 694-95 (1918).[6/] This duty to enforce the law according to its terms, of course, is inconsistent with any judicial license to depart from the plain meaning of statutory language in the recognition that some of that language was added by the compilers of that statute.

From this perspective, we observe at the outset that §767.01 is a strict liability statute, which has consistently been construed to "virtually [make] an owner the insurer of the dog's conduct." MAPOLES v. MAPOLES, 350 So.2d 1137,

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6/ Accord, HEREDIA v. ALLSTATE INSURANCE CO., 358 So.2d 1353 (Fla. 1978); REINO v. STATE, 352 So.2d 853 (Fla. 1977); THAYER v. STATE, 335 So.2d 815 (Fla. 1976); FLORIDA REAL ESTATE COMMISSION v. McGREGOR, 268 So.2d 529 (Fla. 1972); BLOUNT v. STATE, 102 Fla. 1100, 138 So. 2 (1931).

1138 (Fla. 1st DCA 1977), cert. denied, 354 So.2d 888 (Fla. 1978). Accord, DONNER v. ARKWRIGHT-BOSTON MANUFACTURERS MUTUAL INS. CO., 358 So.2d 21, 23 (Fla. 1978) ("virtual insurer"); RATTAT v. DUAL SECURITY SYSTEMS, INC., 373 So.2d 948, 950 (Fla. 3rd DCA 1979) ("insurer"); SMITH v. ALLISON, 332 So.2d 631, 633 (Fla. 3d DCA 1976) ("absolute liability"); ALL-STATE INSURANCE CO. v. GREENSTEIN, 308 So.2d 561, 563 (Fla. 3rd DCA 1975) ("insurer"); ENGLISH v. SEACHORD, 243 So.2d 193, 195 (Fla. 4th DCA 1971) (per curiam) ("virtually an insurer"), cert. denied, 259 So.2d 136 (Fla. 1972); JOSEPHSON v. SWEET, 173 So.2d 463, 464 (Fla. 3rd DCA 1964) ("insurer"). Liability under the statute is said to derive solely from "the act of ownership", MAPOLES v. MAPOLES, supra, 350 So.2d at 1138 n. 2,[7/] and the only recognized exceptions are (1) cases in which the owner posts a warning sign; (2) cases in which the plaintiff's conduct constitutes provocation or aggravation of the animal, see RATTAT v. DUAL SECURITY SYSTEMS, INC., 373 So.2d 948, 951 (Fla. 3rd DCA 1979); or (3) cases in which the plaintiff's "behavior was so blatant as to supersede the dog's behavior as the legal or proximate cause of the plaintiff's injuries." ENGLISH v. SEACHORD, supra, 243 So.2d at 195.[8/]

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7/ One court has even ventured the opinion that:

> It can reasonably be argued, as plaintiff-appellee does argue here, that reasoning by analogy the courts have interpreted Fla. Stat. §767.01 to impose absolute liability in every case where the actions of the dog are a factor in plaintiff's ultimate injury.

SMITH v. ALLISON, 332 So.2d 631, 633 (Fla. 3rd DCA 1976).

8/ Neither in the trial court nor in the Court of Appeal did Utica argue either that warning signs were posted or that the plaintiff's conduct constituted provocation or aggravation of the animal. The "provocation" defense has been variously and inaccurately characterized as a defense of "assumption of risk," as this Court noted in DONNER v. ARKWRIGHT-BOSTON MANUFACTURERS MUTUAL INS. CO., 358 So.2d 21, 24-25 (Fla. 1978). This is not merely a distinction without a difference, since "[o]ne can knowingly and voluntarily expose himself to the danger of a vicious dog without necessarily provoking or aggravating him maliciously or carelessly." Id. at 24 n. 5. In making this distinction, this Court in DONNER "overruled" a number of cases "[t]o the extent that [they] express or imply the existence of a separate defense predicated upon assumption of risk". Id. at 26. These cases include ALLSTATE INSURANCE CO. v. GREENSTEIN,

In its most favorable light, the Court of Appeal's decision may fairly be attributed to its conclusion that for two reasons, Shane's conduct was not the proximate cause of the plaintiff's injury. See generally WENDLAND v. AKERS, supra, 308 So.2d 561; HALL v. RICARDO, 297 So.2d 849 (Fla. 3rd DCA 1974); ISAACS v. POWELL, 267 So.2d 864 (Fla. 2nd DCA 1972); ENGLISH v. SEACHORD, supra, 243 So.2d 193; and VANDERCAR v. DAVID, 96 So.2d 227 (Fla. 3rd DCA 1957). See also RUTLAND v. BEIL, 277 So.2d 807 (Fla. 2nd DCA 1973); KNAPP v. BALL, 175 So.2d 808 (Fla. 3rd DCA 1965) (both cases using the loose "assumption of risk" language). However, because these cases were overruled by DONNER only to this limited extent, both Utica and the plaintiffs properly cited them in their briefs for other purposes.

In this case, Utica expressly conceded that "I couldn't represent to the Court that you should instruct [the jury] on the assumption of risk" (Tr. 222), and in response to the plaintiff's argument that the assumption-of-risk defense was inapplicable in this case, noted "I don't have any dispute as to that, I think that's just what I said" (Tr. 223). Clearly, then, Utica is precluded here from asserting that a directed verdict in its favor was appropriate on the "provocation" theory.

We note in passing that sustaining the "provocation" defense--which has been read into §767.01 by analogy to the specific statutory defenses prescribed in the dog-bite statute, §767.04, see RATTAT v. DUAL SECURITY SYSTEMS, INC., supra, 373 So.2d at 951--requires far more than is shown by the facts of this case. Section 767.04 reads as follows:

> The owners of any dog which shall bite any person, while such person is on or in a public place, or lawfully on or in a private place, including the property of the owner of such dogs, shall be liable for such damages as may be suffered by persons bitten, regardless of the former viciousness of such dog or the owners' knowledge of such viciousness. A person is lawfully upon private property of such owner within the meaning of this act when he is on such property in the performance of any duty imposed upon him by the laws of this state or by the laws or postal regulations of the United States, or when he is on such property upon invitation, expressed or implied, of the owner thereof; provided, however, no owner of any dog shall be liable for any damages to any person or his property when such person shall mischievously or carelessly provoke or aggravate the dog inflicting such damage; nor shall any such owner be so liable if at the time of any such injury he had displayed in a prominent place on his premises a sign easily readable including the words "Bad Dog."

Satisfaction of the "provocation" defense requires a showing that the plaintiff has acted so as "to incite or encourage the dog's actions which resulted in [the] injury." KNAPP v. BALL, 175 So.2d 808, 809 (Fla. 3rd DCA 1965). In this case the undisputed fact is that Shane was provoked not by the plaintiff's conduct, but by another dog. Thus, there was no basis for directing a verdict on the "provocation" defense, and of course Utica has also waived any such argument.

356 So.2d 368, 371 (Fla. 4th DCA 1978), cert. denied, 378 So.2d 342 (Fla. 1979); ENGLISH v. SEACHORD, supra, 243 So.2d at 195. First, the Court of Appeal concluded that Shane was not the proximate cause of the injury because it was the wagon, and not Shane, which touched the plaintiff:

> Statutory liability pursuant to section 767.01 should be imposed upon the dog owner only where the damage done by the dog is the direct cause of the injury. . . . In determining whether the dog itself directly caused the injury, we must examine whether the injury was caused by some canine characteristic within the contemplation of the statute.
>
> While Shane's chasing another dog present in the area obviously constitutes the type of canine characteristic within the contemplation of the statute, it was not that conduct which directly caused Donnie's injury. But for the wagon, no injury would have occurred when Shane ran past Donnie, inasmuch as the dog never came in contact with the boy. Because this injury was not caused as a result of the risk created by dog ownership, we hold that section 767.01 does not apply here.

408 So.2d 769.

Reduced to its essentials, the Court of Appeal's holding is that Shane was not the proximate cause of the injury because the injury would not have occurred "but for" the wagon. The obvious answer is that the injury would not have occurred "but for" the dog either. We speak here about a strict liability statute. Yet even in the ordinary negligence case, the standard of requisite causation is satisfied--as Florida Standard Jury Instruction 5.1(a) provides--upon proof that the negligence "directly and in natural and continuous sequence produces or contributes substantially to producing such [injury], so that it can reasonably be said that, but for the negligence, the [injury] would not have occurred." See SARDELL v. MALANIO, 202 So.2d 746, 747 (Fla. 1967); POPE v. PINKERTON-HAYS LUMBER CO., 120 So.2d 227 (Fla. 1st DCA 1960), cert. denied, 127 So.2d 441 (Fla. 1961).

Of course, this standard applies to a defendant's conduct even when the asserted act of negligence combines with some other concurring or intervening

cause--such as an act of God or the negligence of some other person--which is also an efficient intervening cause, in the sense that "but for" the other cause as well, the injury would not have occurred. See BESSETT v. HACHETT, 66 So.2d 694, 701 (Fla. 1953); TAMPA ELECTRIC CO. v. JONES, 138 Fla. 746, 190 So. 26, 27 (1939); ATLANTIC COAST LINE R. CO. v. HENDRY, 150 So. 598 (Fla. 1933) (per curiam); SEABOARD AIR LINE RY CO. v. WATSON, 94 Fla. 571, 113 So. 716, 720 (Fla. 1927); STARLING v. CITY OF GAINESVILLE, 90 Fla. 613, 106 So. 425, 426 (1925); FLORIDA EAST COAST RAILWAY CO. v. McKINNEY, 227 So.2d 99, 103 (Fla. 1st DCA 1969), cert. denied, 237 So.2d 176 (Fla. 1970). Accord, FLORIDA EAST COAST R. CO. v. UNITED STATES, 519 F.2d 1184, 1199 (5th Cir. 1975) (Florida law); HEYMAN v. UNITED STATES, 506 F. Supp. 1145, 1150 (S.D. Fla. 1981) (Florida law).[9/] Thus, even in the ordinary negligence context, a defendant is liable for injury produced or substantially produced in a natural and continuous sequence by his conduct, such that "but for" such conduct, the injury would not have occurred; and such liability is not escaped in the recogni-

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9/ This principle is reflected in Florida Standard Jury Instructions 5.1(b) and 5.1(c). Of course, the question of whether a defendant's negligence constitutes a substantial contributing cause of any damage is almost always a question for the jury. HELMAN v. SEABOARD COAST LINE R. CO., 349 So.2d 1187, 1189 (Fla. 1977); WALE v. BARNES, 278 So.2d 601, 605 (Fla. 1973); VISINGARDI v. TIRONE, 193 So.2d 601, 604-05 (Fla. 1966); MONTGOMERY v. STARY, 84 So.2d 34, 38 (Fla. 1955). Accord, MALTEMPO v. CUTHBERT, 504 F.2d 325, 327 (5th Cir. 1974) (Florida law). See generally, GIBSON v. AVIS RENT-A-CAR SYSTEMS, INC., 386 So.2d 520, 522 (Fla. 1980); HENDELES v. SANFORD AUTO AUCTION, INC., 364 So.2d 467 (Fla. 1978); VINING v. AVIS RENT-A-CAR SYSTEMS, INC., 354 So.2d 54, 56 (Fla. 1977). This observation informs the trial court's unwillingness to direct a verdict for Utica in this case, which is the sole error asserted on this point. Moreover, we should note that as a general proposition, unless the defendant is able to isolate that aspect of the damage caused by his own conduct, the recognition that other efficient causes contributed to the injury does not relieve the defendant of his responsibility for the entire amount of the plaintiff's damage. DE LA CONCHA v. PINERO, 104 So.2d 25 (Fla. 1958); CITY OF WEST PALM BEACH v. PITTMAN, 62 So.2d 25 (Fla. 1952); DAVIDOW v. SEYWORTH, 58 So.2d 865, 867-68 (Fla. 1952); C. F. HAMBLIN, INC. v. OWENS, 127 Fla. 91, 172 So. 694, 696 (1937); FLORIDA EAST COAST R. CO. v. PETERS, 77 Fla. 411, 83 So. 559, 564 (1919); SCHWAB v. TOLLEY, 345 So.2d 747, 751 (Fla. 4th DCA 1977).

tion that the injury would not have occurred "but for" the concurrence or intervention of some other cause as well.

And yet the District Court in this case applied an even tougher standard in the application of a strict liability statute. There is no question that the injury in this case would not have occurred "but for" the animal, and that the animal's behavior substantially contributed to that injury in a natural and continuous sequence of events. There is simply no room for any contention that the contribution of the wagon so overwhelmed the conduct of the animal as to break the chain of causation and render factually insignificant the contribution of the dog. There can be no denial that the standards of causation applicable in the case of ordinary negligence were amply satisfied in this case. At the very least, such a standard should be dispositive of the application of a strict liability statute, like the one in this case.[10/] Yet the District Court was not content with that stan-

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10/ As we have noted, note 7, supra, there is ample room for a stricter standard of causation appropriate to the application of this strict liability statute, and consistent with the longstanding construction that the statute "virtually makes an owner the insurer of the dog's conduct." MAPOLES v. MAPOLES, supra, 350 So.2d at 1138. Indeed, the district court in SMITH v. ALLISON, 332 So.2d 631, 633 (Fla. 3rd DCA 1976), acknowledged a construction of the statute which would "impose absolute liability in every case where the actions of the dog are a factor in plaintiff's ultimate injury" (our emphasis).

Likewise, in ALLSTATE INSURANCE CO. v. GREENSTEIN, 308 So.2d 561 (Fla. 3rd DCA 1975), the reviewing court found that the trial court "was correct in concluding that the evidence introduced at trial could not support a finding by the jury that the plaintiff . . . was the sole proximate cause of the accident," 308 So.2d at 563 (our emphasis). In upholding a summary judgment for the plaintiff with such language, the appellate court appeared to be interpreting §767.01 to permit a finding that the dog in question was the proximate cause of injury unless it might be concluded that the animal played no role whatsoever in the causative chain of events leading to the injury--that is, unless the plaintiff himself was "the sole proximate cause of the accident." We cannot in good faith contend that this is a typical common-law definition of proximate cause relative to the animal--insofar as any involvement, however slight, would satisfy the standard articulated. However, as we have noted, we construe here not a common-law action for negligence, but rather a statute prescribing strict liability--which virtually makes the owner an insurer of the dog's conduct. Under these circumstances, the appellate court in ALLSTATE may well have properly inferred a legislative intent to impose liability whenever the animal plays a role, however slight, in the causative chain of events.

dard, finding no causation because "[b]ut for the wagon, no injury would have occurred when Shane ran past Donnie, inasmuch as the dog never came in contact with the boy." 408 So.2d at 771.

It is not surprising that the District Court was unable to find any authority supporting so onerous a requirement of proof of causation under this strict liability statute.[11/] Indeed, almost every citation of authority in the District Court's opinion constitutes acknowledgement of contrary authority. With the introduction "But see," the District Court cites the opinions in ENGLISH v. SEACHORD, 243 So.2d 193 (Fla. 4th DCA 1971), cert. dismissed with approval of district court opinion, 259 So.2d 136 (Fla. 1972) (per curiam), and BRANDEIS v. FELCHER, 211 So.2d 606 (Fla. 3rd DCA), cert. denied, 219 So.2d 706 (Fla. 1968). The District Court was correct that both cases point to a conclusion opposite to the one reached in this case. In ENGLISH v. SEACHORD, a verdict for the plaintiff under the statute was permissible where the plaintiff, frightened by a growling dog, jumped on top of a car and injured his back. Clearly the injury would not have occurred "but for" the car, and of course, as in this case, there was no contact whatever between the animal and the plaintiff. In dismissing certiorari, this Court expressly approved of that holding.

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11/ The District Court did cite two cases in introducing its analysis of causation. One of them is the dissenting opinion in MAPOLES v. MAPOLES, supra, 350 So.2d 1138. We discuss that, infra. The other is dictum in SMITH v. ALLISON, 332 So.2d 631, 634 (Fla. 3rd DCA 1976)--to the effect that liability should not be imposed under the statute when the damage results only from "some physical agency set into motion by a chain of events which may have been triggered by the presence of the dog . . . ." We think that dictum merely reflects the sentiment that the contribution of the animal may be overwhelmed by some intervening factor, so as to break the chain of causation. That was not the case here. Moreover, it should be noted that SMITH was decided not on the basis of any failure in the plaintiff's proof of causation, but rather on the ground that the animal in question had not committed an affirmative act--which is the District Court's alternative holding, discussed infra. In short, the District Court was unable to cite any case in which this strict liability statute was held to be inapplicable even though the animal's conduct substantially contributed to injury in an uninterrupted chain of causation, such that "but for" the animal's involvement, the injury would not have occurred.

Likewise, in BRANDEIS v. FELCHER, a verdict for the plaintiff was permissible where the plaintiff, frightened by two dogs barking at him from behind a fence, ran into the street and was run over by an automobile. Again, the injury would not have occurred "but for" the car, and again there was no contact whatever between the animal and the plaintiff. Thus, the District Court was right to acknowledge the disparity between its holding and these two cases.

Finally, we would add the case of ALLSTATE INSURANCE CO. v. GREENSTEIN, 308 So.2d 561 (Fla. 3rd DCA 1975), in which a summary judgment for the plaintiff on the question of liability was upheld where the plaintiff had swerved his car to avoid a dog which had run into the street, and was injured in a subsequent crash after avoiding any contact with the animal. Again, the injury would not have occurred "but for" the automobile, and there was no contact between the animal and the plaintiff. Nevertheless, because the injury also would not have occurred "but for" the animal, summary judgment for the plaintiff was upheld.

Thus, even before addressing the decision in MAPOLES v. MAPOLES, 350 So.2d 1137 (Fla. 1st DCA 1977), cert. denied, 354 So.2d 888 (Fla. 1978), it is apparent that the decision in this case departs from the great--indeed unanimous --weight of authority on this issue of causation. Admittedly, the dogs in ENGLISH, BRANDEIS and ALLSTATE in all likelihood had not been placed in the proximity of these instrumentalities by their owners--and certainly had not been placed there by the plaintiffs--as was the case here. Instead, on their own initiative, they were running, barking or growling in the direction of the plaintiff (acting like dogs) so as to cause the plaintiff, in reaction, to encounter an instrumentality which injured him. However, as we have noted at length, note 8, supra, assumption of risk and contributory negligence are not a defense under this statute, and Utica expressly disavowed any such defense. And it is certainly no defense that the dog's owner contributed to the injury; that would make no

sense at all. Thus, unless the plaintiff has actually provoked the dog, or unless some other factor so overwhelms the sequence of events as to constitute a superceding cause, it simply does not matter how active the plaintiff (or the owner) has been in contributing to the injury. Since neither exception applies here, the ENGLISH, BRANDEIS and ALLSTATE decisions are directly on point. Thus, the propriety of the District Court's holding in this case should not stand or fall with the validity of its criticism of the MAPOLES decision.

Nevertheless, we think the MAPOLES decision was right. In that case, a dog placed in the back seat of an automobile by its owner was found to have somehow triggered a shotgun placed in the back seat by a third person (of which the owner was unaware), and thereby to have injured an individual outside of the car. There seems to us to be little question, in the classic sense, that the conduct of the dog in MAPOLES was the proximate cause of the plaintiff's injury--in the sense that "but for" the dog's conduct, no injury would have occurred, and that the injury resulted from an uninterrupted chain of events flowing from that conduct. Thus the court in MAPOLES concluded:

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

350 So.2d at 1138. The same can be said of this case. In neither case did the animal actually touch the plaintiff; in both cases the dog activated or propelled some instrumentality which did touch the plaintiff; and in both cases the dog was placed in proximity to that instrumentality by its owner, in conjunction with third persons.[12/]

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12/ Thus, there is no basis for distinguishing MAPOLES from the instant case on the ground that the boys in this case contributed to the injury by tying Shane to the wagon, even assuming that these twelve-year olds were capable of "contributory negligence". Certainly the owner's contribution is no defense. And no less in MAPOLES than in this case did the owner contribute to the injury by placing the dog in the back seat of a car with a loaded shotgun. Certainly the contribution of a third party--the owner of the car in MAPOLES, the third

As we have noted, the District Court acknowledged that its decision conflicts with MAPOLES, and without any additional reasoning or analysis, adopted Judge Smith's dissent in MAPOLES for the proposition that the majority's decision in that case extends liability under §767.01 "beyond that contemplated by the legislature . . . ." 408 So.2d at 772. In dissent in MAPOLES, Judge Smith argued that it was only the animal's "passive movement" which discharged the shotgun--not any characteristic which might be considered actively canine. As Judge Smith observed, "[b]y this draconian reading of the statute, the owner is absolutely liable although dogness played no more a part than if the trigger had been jolted by a cat or a falling sack of groceries." 350 So.2d at 1139.

In our view, the dissent in MAPOLES counsels a departure from the traditional standard of proximate causation outlined above. Clearly the injury in MAPOLES would not have occurred "but for" the animal's conduct, which substantially contributed to the injury in an unbroken chain of events. It simply cannot be said that the explosion of the shotgun was such an overwhelming cause of the injury as to break the chain of causation and relieve the animal's owner of responsibility. If this animal had not been present, the shotgun in all probability would have remained dormant in the back seat of the automobile, a danger to no one. Thus, without suggesting a new standard of causation, or any guidance for its application, the dissent in MAPOLES clearly counsels departure from the traditional criteria for judging the requisites of proximate causation.[13/]

boy in this case--is no defense, if the dog's contribution is also substantial. And certainly the plaintiff's contribution is no defense to strict liability under a statute which recognizes no such defense, so long as the plaintiff's conduct is not a superceding or overwhelming cause. See note 8, supra. Moreover, Utica disavowed any such defense in this case. Thus, any distinction between MAPOLES and this case must focus on the extent of the animal's contribution--a subject of the following discussion.

13/ We will allow, however, that MAPOLES is a tougher case than this one; it is closer to the edge of the sphere of responsibility defined by the proximate cause requirement. To put the same point otherwise, we acknowledge that the contribution of the shotgun in MAPOLES was a greater contribution--was closer to constituting a supervening or overwhelming cause--than was the wagon in the

It is that difficulty--the difficulty of fashioning a workable and administrable alternative to the traditional notion of proximate causation--which almost compels approval of the holding in MAPOLES, and which certainly compels disapproval of the conclusions of the District Court in this case. Apart from the traditional concept of proximate causation, how is one to determine whether or not an animal's behavior is sufficiently active, or canine, or dispositive of the outcome, so as to render the owner liable for its conduct? Certainly it is not enough to say, as the District Court said here, that "[b]ut for the wagon, no injury would have occurred . . . ." "But for" the automobiles in ENGLISH, BRANDEIS and ALL-STATE--"but for" the shotgun in MAPOLES--no injury would have occurred either.

Certainly it is not enough to dismiss a case--as the District Court did here, and as did the dissent in MAPOLES--with the meaningless observation that the injury was not caused "but some canine characteristic within the contemplation of the statute." 408 So.2d at 771; see 350 So.2d at 1138. There is simply no way to define or administer such a standard, and we are frankly at a loss to imagine when a dog can be found not to have acted like a dog. Certainly the animal in this case was exhibiting canine characteristics when she chased another dog, and

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instant case. We say this in appreciation of Judge Smith's observation that the animal's conduct in MAPOLES was merely "passive movement," by which we think Judge Smith meant to suggest that it was entirely random and undirected activity of the animal which by sheer coincidence--like a monkey at a typewriter--produced the result. In this sense, the shotgun may have been more of a "cause" than the animal.

In this case, in contrast, Shane was hardly engaged in "passive movement," but was actively and purposefully engaged in an act of "dogness." As Judge Smith observed: "Strict liability for dog biting, barking, chasing, jumping, vicious or rambunctious conduct, yes. For passive movement which discharges a shotgun, no." 350 So.2d 1139. This case did involve "chasing," and thus the contribution of the animal in this case was a far more active and substantial contribution than that of the animal in MAPOLES. We think that both cases were sufficient to impose strict liability upon the animal's owner, but we merely point out here that departure from the reasoning in MAPOLES does not necessarily counsel affirmance of the District Court's conclusion in this case. This is an easier case than MAPOLES.

in this context it seems to us meaningless to suggest that Shane was acting less like a dog because she was tied to a wagon at the time. She was acting like a dog tied to a wagon. Even the animal in MAPOLES was acting like a dog when he restlessly paced around the back seat of the automobile. He was certainly not acting like a "sack of groceries," as the dissent suggested. And while it was certainly not a canine characteristic which attached ~~Shane~~ Davis's dog to the wagon, it was a canine characteristic—the act of chasing after another dog—which was a substantial contributing cause of this injury.

Certainly it cannot be said that liability is only appropriate when the animal actually touches the plaintiff; animals and people can cause injury in a variety of ways without actually touching the injured party. And certainly, as we have noted repeatedly, there is no room in this strict liability statute for the avoidance of liability on the ground that the plaintiff or the owner or some third party also contributed to the injury.

Thus, we ask this Court to consider by what articulable and administrable standard the District Court's conclusion in this case could possibly be upheld. And we ask this Court to consider the implications of attempting to administer any of the three alternatives to the "but for" standard obliquely suggested by the District Court's decision--the alternative of defining "canine characteristic"; the alternative of requiring that the animal touch the plaintiff; the alternative of focusing on the involvement of the owner, the plaintiff, or some third person. It seems to us that any attempt to distinguish this case on any of these bases would quickly become mired in metaphysics. What happens when an owner is walking his dog on a leash, and the dog suddenly darts in front of a pedestrian, who trips over the leash? Is the dog acting less "canine" because it is attached to the leash, or because only the leash touches the plaintiff? Is the owner only responsible when he himself is walking the dog, but not when some third person is doing so? What happens when a dog is chasing someone or something, and

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knocks over a lamp which causes the plaintiff injury? Is the statute inapplicable because the owner or the plaintiff or someone else has placed the lamp where it was, or because only the lamp touched the plaintiff? What happens when a dog takes the affirmative action of digging a hole or dropping its bone on the floor, and someone falls? Is the statute inapplicable because the bone or hole, and not the dog, has touched the plaintiff? Is the statute applicable only where the dog has found the bone itself, but not where the plaintiff or the owner or someone else has given the bone to the dog? Every one of these questions--and dozens of others--are raised by any departure from traditional standards of proximate causation, and all of them illustrate that any such departure would be simply impossible to administer. Especially since the traditional standards of proximate causation are amply satisfied in this case, it seems to us that approval of the District Court's conclusion requires the articulation and defense of some administrable standard of causation under this statute. We simply are unable to think of one, and we challenge the Respondent to offer one. If it cannot, the District Court's decision on liability must be reversed.

As a final point on this first basis for the District Court's ruling on the issue of liability, we should note that even if a reasonable standard of causation might be developed, the District Court's decision can be affirmed only if the application of such a standard to the facts of this case requires the entry of judgment for Utica as a matter of law. As we have noted, the sole assignment of error is the refusal of the District Court to direct a verdict for Utica. And as we also have noted, note 9, supra, the question of proximate causation is almost always one for the jury. Indeed, this Court recently reiterated its "directions to the appellate courts" that the issue of proximate causation of injury "is generally one for the jury unless reasonable men could not differ in their determination of that question." WELFARE v. SEABOARD COAST LINE R. CO., 373 So.2d 886, 888-89 (Fla. 1979). Accord, HELMAN v. SEABOARD COAST LINE R. CO., 349

So.2d 1187 (Fla. 1977). And of course, circumstantial evidence is fully competent evidence from which to draw a conclusion of legal causation. TUCKER BROTHERS, INC. v. MENARD, 90 So.2d 908 (Fla. 1956); MAJESKE v. PALM BEACH KENNEL CLUB, 117 So.2d 531 (Fla. 2nd DCA 1959), cert. denied, 122 So.2d 408 (Fla. 1960). No matter what the standard of causation, we think the facts of this case at the least created a jury question on the issue of causation, and that the Respondent is at a loss to demonstrate that the trial court should have directed a verdict on that issue. There is simply no room for any conclusion that the trial court in this case should have directed a verdict on the issue of liability.

As we have noted, the District Court appeared to endorse an alternative basis for its decision on the issue of liability under the statute, citing RUTLAND v. BIEL, 277 So.2d 807, 809 (Fla. 2nd DCA 1973), for the proposition that the statute is inapplicable "where the dog takes no affirmative or aggressive action toward the injured party." The District Court continued:

> Donnie's injuries here were in no way attributable to an affirmative or aggressive act toward him by the dog. Although Shane clearly was engaged in an aggressive act toward Donnie's dog, Donnie would not personally have been affected by Shane's act of chasing his dog had the wagon, which was what came in contact with Donnie, not be left tied to Shane (408 So.2d at 772).

The first sentence of this passage clearly suggests an alternative holding--that liability under the statute is inappropriate unless it can be shown that the animal somehow directed its conduct toward the plaintiff. The second sentence, however, appears to soften this holding, by acknowledging that the animal's conduct in this case would have been considered sufficiently directed toward the plaintiff were it not for the fact that the wagon, and not the dog, came into contact with the plaintiff. On this reading of the District Court's language, there is no alternative holding on liability, but merely a repetition of the argument that the injury was not caused by a "canine" characteristic because the animal was tied to a wagon.

In an abundance of caution, we consider the implications of the District Court's suggestion, in reliance upon the RUTLAND decision, that the animal must be shown to have directed its conduct toward the plaintiff. In RUTLAND the court reversed an order of summary judgment for the plaintiff on liability where the facts of the case showed no more than the following:

> While viewing an aquarium in the living room [of her Minister] with other guests, [the plaintiff] heard a dog yell. She looked down, just a little to her side and back of her and saw the dog. She took a step backward, tripped over the dog, and fell flat on her back.

277 So.2d at 808. In light of the evidence that the plaintiff had seen the dog, and then stepped backward toward it, and only then tripped over it, the court in RUTLAND rightly found "a genuine issue as to a material fact" not concerning the affirmative or aggressive conduct of the animal, but rather on the question whether the plaintiff may have provoked the animal. Id. at 808-09. On the basis of this well-settled defense to the statute, see n. 8, supra, the court found error in the order of summary judgment for the plaintiff, and reversed and remanded for further proceedings consistent with its ruling.

As an alternative holding, however, the court also noted, as the District Court observed in this case, that the statute also requires a showing of affirmative or aggressive action by the animal. But if the District Court's interpretation of the "affirmative action" requirement in this case were correct, such a remand in RUTLAND would not have been necessary, since under no interpretation of the facts in RUTLAND could it reasonably be inferred that the animal "intended" or "directed" any contact with or injury to the plaintiff. A far more reasonable interpretation of the "affirmative act" requirement is that it necessitates a showing that the dog is somehow in motion in the general direction of the plaintiff at the time of the accident in question, rather than merely sitting or lying passively, or even moving away from the plaintiff. That interpretation would be consistent with the general notion of proximate causation, since other factors would constitute

superceding or overwhelming causes when the dog is merely passive or retreating. A review of the other cases in this area makes that conclusion inescapable.

For example, in SMITH v. ALLISON, 332 So.2d 631 (Fla. 3rd DCA 1976), the court reversed a jury verdict for the plaintiff because the facts showed only that, as he drove down the road on his motorcycle, the plaintiff "observed the dog in the middle of the road," and the dog began to run across the road for no other reason than to avoid being hit by the plaintiff. 332 So.2d at 633. On these facts, the court in SMITH may have been correct in applying RUTLAND v. BIEL for the proposition that the statute is inapplicable "where the dog does not itself inflict any damage," id. at 634. However, the court in SMITH was quick to distinguish the case of ALLSTATE INSURANCE CO. v. GREENSTEIN, 308 So.2d 561 (Fla. 3rd DCA 1975), in which the statute was properly applied upon a showing that "the dog ran into a car, thereby causing an accident," 332 So.2d at 633. There was no possible suggestion in ALLSTATE that the animal "intended" or "directed" contact with the car or with its driver--only that the driver was injured when "he swerved to avoid hitting the animal." 308 So.2d at 562. Nevertheless, the reviewing court found the "affirmative act" requirement to be satisfied:

> In [RUTLAND v. BIEL], the Second District Court of Appeal held that 767.01 is inapplicable where the dog takes no affirmative or aggressive action toward the injured person. While we might agree with the court on the facts involved in the Rutland case, we think it is apparent here that [the dog] did take some affirmative action resulting in [the plaintiff's] injuries (id. at 563).

ALLSTATE thus reaffirms the general rule, as does SMITH's endorsement of its holding, that the statute in no sense requires a showing that the dog "intended" or "directed" contact with or injury to the plaintiff--only that the dog was in motion, acting in an affirmative way, rather than merely sitting passively, or even (as in SMITH) attempting to escape.

Moreover, the district court's conclusion conflicts with SCOTT v. GORDON, 321 So.2d 619 (Fla. 3rd DCA 1975), in which the undisputed facts were that the

plaintiff climbed over a fence, jumped from it, and landed on the defendant's dog. In dispute, however, was the plaintiff's contention that after he had jumped from the fence, the animal took the affirmative and aggressive action of running underneath him. Because that fact was in dispute, the court reversed an order of partial summary judgment for the plaintiff on liability under the statute, and remanded the case so that the question of liability might be "submitted to the jury under proper instructions." Id. at 620. If the District Court's theory of liability in this case were correct, the court in SCOTT certainly would not have remanded for submission of the issue to the jury, since under no reasonable construction of the facts could it be said that the animal intended or directed contact with or injury to the plaintiff. The sole question was whether the dog was active or passive, and the order of remand leaves no question that a showing of some affirmative activity is sufficient to support a judgment under the statute.

To this litany should be added the case of MAPOLES v. MAPOLES, supra, 350 So.2d 1137--the case in which the animal somehow set off a shotgun which injured the plaintiff. Clearly there were no facts suggesting that the animal intended injury to or contact with the plaintiff--or even directed its activity toward the plaintiff--and in this light the reviewing court addressed the very theory which the District Court advanced here:

> What appellants fail to recognize is that the facts of this case are such that the injury resulted from the affirmative act of the dog. Thus, the subject statute that virtually makes an owner the insurer of the dog's conduct is applicable (id. at 1138).

We think that all of these cases are consistent with a reasonable interpretation of the holding in RUTLAND, and thus that the District Court in this case simply took RUTLAND too far. What RUTLAND holds is that the 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 the sense of taking

affirmative or aggressive action toward someone or something--not necessarily the plaintiff. That interpretation is supported by the facts of SMITH v. ALLISON, ALLSTATE INSURANCE CO. v. GREENSTEIN, SCOTT v. GORDON, and MAPOLES; in each of these cases, the animal was in motion, but in none of them can it be said that such motion was directed toward the plaintiff--either in effect or by intention.

This case is no different. In this case Shane was not passive or docile. She was behaving exactly as dogs behave; she was chasing another dog. By all accounts, Shane was acting in an affirmative and aggressive manner, and that affirmative behavior brought her into direct contact with the plaintiff in a manner which severed the plaintiff's Achilles tendon. That is all the showing that the statute requires, and thus it is not surprising that the District Court was unable to cite a single case which counsels a stricter construction of the "affirmative act" requirement.

Nor is it reasonable to assume that a strict liability statute would embrace a requirement of proof that the instrument of injury be shown to have "directed" or "intended" contact with the plaintiff, rather than merely to have acted in such a way as to bring it about. The "affirmative act" requirement is a reasonable safeguard insofar as it forbids the imposition of liability in cases in which the animal is merely a passive instrumentality in a chain of events leading to injury. Even a strict liability statute should not reach that far. In cases in which the animal is at all active, however, whether or not in a manner from which an "intention" to make contact with the plaintiff is observable--the statute reasonably imposes liability upon the owner for any injury caused thereby.

We also think that this conclusion stems from the hopelessness of attempting to fashion and administer a judicial standard for determining when an animal "intends" or "directs" its conduct toward the plaintiff. It is difficult enough to determine the intentions of human beings, even by objective standards, and it

seems to us that any judicial attempt to reach beyond the minimum requirement that the dog be in motion will reduce the action to a mere guessing game. What happens, for example, when the plaintiff is standing between one dog and another, and is injured when one attacks the other? Clearly, the attacking dog "intended" no contact with the plaintiff, but clearly the statute is satisfied. And if the statute is satisfied because the attacking animal "directed" his conduct toward the plaintiff--if only by the effect of that conduct--then just as clearly Shane "directed" her conduct toward the plaintiff in this case. The only difference is the wagon, which subsumes this entire discussion under the previous discussion. In short, because Shane did direct her conduct toward the plaintiff in this case, the District Court's conclusion that the "affirmative act" requirement was unsatisfied must have reflected the District Court's belief that the statute remains inapplicable unless the plaintiff can demonstrate--by one means or another--that the animal actually intended contact with the plaintiff. With all respect, any such requirement is ridiculous, and would be impossible to enforce.

Finally on this point, we should note again that the only assertion of error is the trial court's unwillingness to direct a verdict for Utica on the issue of liability. Thus, the point must fail if the question was appropriate for consideration by the jury, even though the trial court eventually directed a verdict for the plaintiff. We note again that issues of proximate causation are almost always for the jury. And in this connection, we should call this Court's attention to the latest case interpreting §767.01--BOZARTH v. BARRETO, 399 So.2d 370 (Fla. 3rd DCA 1981) (per curiam)--in which the appellate court, without disclosing the facts of the case, affirmed a jury verdict for the defendant and the trial court's refusal to direct a verdict for the plaintiff on the issue of aggressive or affirmative conduct under the statute:

> The cause was properly one for jury determination on liability as there was, in our view, sufficient evidence in

> the record for the jury to conclude, as it did, that the plaintiff['s] injuries were not proximately caused by any aggressive or affirmative act directed against said plaintiff by defendant's dog, which of necessity, would also defeat the plaintiff['s] derivative claim.14/

In short, BOZARTH holds explicitly that administration of the "affirmative act" requirement is appropriate for consideration by the jury. We agree that at the least in this case, that issue was appropriate for the jury, and thus that the trial court did not commit any error in declining to direct a verdict for Utica on the issue of liability. That is the only point at issue here, and Utica has offered no basis upon which to conclude that the trial court should have directed a verdict in its favor on the "affirmative act" requirement.

### B. THE TRIAL COURT DID NOT ERR IN DENYING UTICA'S MOTION FOR A DIRECTED VERDICT ON THE ASSERTED GROUND THAT THE INSURANCE POLICY AT ISSUE PROVIDED NO COVERAGE TO THE DEFENDANT ON THE FACTS OF THE INSTANT CASE.

We recognize that this Court accepted conflict jurisdiction on the issue of liability only, and need not address the question of insurance coverage. However, we brief this issue below in the hope that this Court will consider it, in the recognition that the plaintiff will have won a hollow victory in establishing liability under the statute with very little hope of recompense for his injuries. Moreover, we think the issue of coverage is appropriate for this Court's consideration, because the District Court very narrowly construed the policy at issue in a manner wholly inconsistent with the longstanding judicial policy of broadly construing insuring provisions or exclusions so as to favor coverage.

The parties and the District Court all agreed that the relevant portions of the liability policy covering the nursery are those prescribing coverage for bodily injury or property damage caused by an "occurrence"--defined as "an accident

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14/ It should not escape notice that BOZARTH uses the word "directed"--not "intended". At the least, there was evidence in this case that Shane "directed" her activity toward the plaintiff.

. . . which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured"--"but only with respect to the conduct of a business of which [the named insured] is the sole proprietor" (R. 35). We also all agree that insurance coverage provisions should be construed as written when they are unambiguous; that analysis may be necessary to interpret the meaning, scope or coverage of unambiguous provisions; that such provisions should be given their plain, ordinarily accepted meaning, and be read in the light of ordinary and common experience; and that policy interpretation should be reasonable, practical and sensible, consistent with the intent of the parties. Such generalzations, however, tell us very little about whether the business policy in question covered the injury in this case.

We have reviewed the relevant testimony in our statement of the facts. The District Court concluded that the "policy covers only accidents arising out of the conduct of Davis' nursery business. Neither the boys nor the dog were involved in an activity related to the business at the time the injury occurred." 408 So.2d at 772. The District Court continued:

> Although, at the time of the accident, the boys were proceeding toward the back of the nursery where the irrigation system control was located, there was no evidence they were doing so for the purpose of adjusting those controls. Moreover, while Shane was used after business hours as a watchdog, she was most certainly outside the scope of her employment at the time of the accident. The test to be employed in determining whether the dog was conducting some business of her employer at the time of this accident is whether the dog was doing what her employment contemplated. Morrison Motor Co. v. Manheim Services Corp., 346 So.2d 102 (Fla. 2nd DCA 1977), cert. denied, 345 So.2d 983 (Fla. 1978). The business of the employer is the type the employee was employed to perform, occurs within the time and space limits of the employment, and is motivated by a purpose to serve the employer. Id. Although Shane was within the time and space limits of her employment, she had been prevented from properly performing her duties as a watchdog by being tied to the wagon.

At the outset, it should be noted that the District Court's interpretation of the evidence--to the effect that the boys were not on their way to adjust the irrigation system, and that the dog was prevented from properly performing her duties because tied to the wagon--were advanced in support of the sole contention raised by Utica on this issue--that the trial court erred in declining to direct a verdict for Utica on the issue of coverage instead of submitting the case to the jury, as it did. Thus, as we have noted, Utica undertook the burden of demonstrating "that no evidence has been submitted on which the jury could lawfully find a verdict for the plaintiff," HERNANDEZ v. MOTORICO., INC., supra, 370 So.2d at 838, and that there was "a complete absence of competent evidence to support the verdict," HELMAN v. SEABOARD COAST LINE RAILROAD CO., supra, 349 So.2d at 1190. Of course, the decision of the District Court must stand or fall with the propriety of its conclusion that Utica satisfied that strict standard.

1. The Legal Construction of the Policy.

As a generality, and assuming no relevant factual dispute, we acknowledge that the construction of an insurance policy is a question of law for the court. See ZAUTNER v. LIBERTY MUTUAL INSURANCE CO., 382 So.2d 106, 107 (Fla. 3rd DCA 1980); ELLENWOOD v. SOUTHERN UNITED LIFE INSURANCE CO., 373 So.2d 392 (Fla. 1st DCA 1979); DRISDOM v. GUARANTEE TRUST LIFE INSURANCE CO., 371 So.2d 690, 693 (Fla. 3rd DCA 1979); GAULDEN v. ARKWRIGHT-BOSTON MANUFACTURERS MUTUAL INSURANCE CO., 358 So.2d 267, 268 (Fla. 3rd DCA 1978); STATE FARM FIRE & CASUALTY CO. v. LICHTMAN, 227 So.2d 309, 311 (Fla. 3rd DCA 1969) ("A trial court has a duty, as a matter of law, to determine the extent of coverage under an insurance policy"); TRAVELERS INDEMNITY CO. v. SYMON, TULLY & ASSOCIATES, INC., 222 So.2d 767 (Fla. 1st DCA 1969); UNITED SERVICES AUTOMOBILE ASSOCIATION v. PORRAS, 214 So.2d 749, 750 (Fla. 3rd DCA 1968) ("the policy being ambiguous and the facts

not in dispute, it was within the province of the trial judge to resolve the ambiguity as a matter of law . . . .").

In this light--and again assuming arguendo no relevant factual dispute--it is essential to understand the appropriate criteria governing the trial court's construction of a policy. We need not remind this Court of the "well-settled axiom that ambiguities in an insurance policy are to be construed against the insurer." OLIVER v. UNITED STATES FIDELITY & GUARANTY CO., 309 So.2d 237, 238 (Fla. 2nd DCA), cert. denied, 322 So.2d 913 (Fla. 1975), citing FEDERAL INSURANCE CO. v. McNICHOLS, 77 So.2d 454 (Fla. 1955). Thus,

> Florida law renders applicable to contracts of insurance the principle that, where a contract of insurance is prepared and phrased by the insurer, it is to be construed liberally in favor of the insured and strictly against the insurer, where the meaning of the language is doubtful, uncertain or ambiguous. Fireman's Fund Insurance Co. of San Francisco, Cal. v. Boyd, Fla. 1950, 45 So.2d 499. The general rule is that, if there are terms in an insurance policy which are ambiguous, equivocal, or uncertain to the extent that the intention of the parties is not clear and cannot be clearly ascertained by the application of ordinary rules of construction, these terms are to be construed strictly and most strongly against the insurer and liberally in favor of the insured so as to effect the dominant purpose of payment to the insured. Beasley v. Wolf, Fla. App. 1963, 151 So.2d 679. The accepted rationale back of this rule is that insurance policies are prepared by experts in this complex area, and the intricate interplay of their various provisions is difficult for a layman to understand. . . . Where there are two interpretations which may fairly be given to language used in a policy the one that allows the greater indemnity will govern. Howard v. American Service Mut. Ins. Co., Fla. App. 1963, 151 So.2d 682.

NEW AMSTERDAM CASUALTY CO. v. ADDISON, 169 So.2d 877, 880-81 (Fla. 2nd DCA 1964) (our emphasis). Accord, MATHEWS v. RANGER INSURANCE CO., 281 So.2d 345, 349 (Fla. 1973); MOORE v. CONNECTICUT GENERAL LIFE INSURANCE CO., 277 So.2d 839, 842 (Fla. 3rd DCA 1973), cert. denied, 291 So.2d 204 (Fla. 1974); MILLER ELECTRIC CO. OF FLORIDA v. EMPLOYERS' LIABILITY ASSURANCE CORP., 171 So.2d 40 (Fla. 1st DCA 1965); BEASLEY v. WOLF, 151 So.2d

679 (Fla. 3rd DCA 1963); FIREMAN'S FUND INSURANCE CO. OF SAN FRANCISCO v. BOYD, 45 So.2d 499 (Fla. 1950).

This presumption of coverage, of course, informs the trial court's construction of a policy, and gives rise to the well-settled corollary that where the policy is susceptible of two interpretations, the trial court must adopt that interpretation which provides coverage: "Where the terms of an insurance policy will bear two interpretations, that one will be adopted which sustains the claim for indemnity." POOLE v. TRAVELERS INSURANCE CO., 130 Fla. 806, 179 So. 138, 141 (1938), cited in ROSEN v. GODSON, 422 F.2d 1082, 1084 (5th Cir. 1970) (Florida law). This language is not permissive; it provides that the construction of a policy favoring coverage will be adopted. Accord, STUYVESANT INSURANCE CO. v. BUTLER, 314 So.2d 567, 570 (Fla. 1975); DaCOSTA v. GENERAL GUARANTY INSURANCE CO. OF FLORIDA, 226 So.2d 104, 105 (Fla. 1969); WILLIAMSON v. NURSES' MUTUAL PROTECTIVE CORP., 142 Fla. 225, 194 So. 643, 644 (1940); ELLIOTT v. BELT AUTO. ASSOCIATION, 87 Fla. 545, 100 So. 797, 798 (1924) ("that which gives the greater indemnity will prevail"); CAVALIER INSURANCE CORP. v. MYLES, 347 So.2d 1060, 1062 (Fla. 1st DCA 1977); DORFMAN v. AETNA LIFE INSURANCE CO., 342 So.2d 91, 93 (Fla. 3rd DCA 1977) (per curiam); CALIO v. EQUITABLE LIFE ASSURANCE SOCIETY, 169 So.2d 502, 504 (Fla. 3rd DCA 1964); HOWARD v. AMERICAN MUTUAL INSURANCE CO., 151 So.2d 682, 686 (Fla. 3rd DCA 1963), cert. discharged, 162 So.2d 666 (Fla. 1964).

At the very least, this insurance policy was susceptible of two interpretations of the clause prescribing coverage "only with respect to the conduct of [the] business . . . ." Even assuming arguendo that the boys and Shane were not engaged in business-related activity at the time of the accident--an assumption we vigorously dispute, infra--this clause of the policy is susceptible of two interpretations. One would strictly limit coverage to accidents occurring while some business function is being performed; the other would more broadly cover

accidents occurring on the business premises during business hours, because such accidents do occur "with respect to the conduct of the business . . . ." Thus in LINDERMAN v. AMERICAN HOME ASSURANCE CO., ____ So.2d ____ (Fla. 2nd DCA 1982) (1982 FLW DCA 1200), the policy in question covered "service station operations," but the injury occurred while an employee was working on his own truck on the premises during working hours, as he and the other employees were permitted by the owner to do. The court of appeal found the policy applicable to an injury caused when the hydraulic lift malfunctioned and the automobile injured a third party:

> [W]e see nothing in the policy language which makes the existence of coverage depend upon whether the activity which causes the injury constitutes profit-making conduct. . . . We do not believe that the fact that the wheel balancing was being done for the personal benefit of [the employee] rather than his employer takes the accident out of the language which provides coverage for occurrences arising out of the ownership, maintenance or use of the premises for the purpose of a gasoline service station.

Accord, LeBLANC v. NEW AMSTERDAM CASUALTY CO., 13 So.2d 245, 202 La. 857 (1943) (business liability policy covered injury caused by employee's own car while in use on employer's business).

Likewise, in DRISDON v. GUARANTEE TRUST LIFE INSURANCE CO., 371 So.2d 690 (Fla. 3rd DCA 1979), a policy covering injury to children while "attending school" was held applicable to an injury sustained on the playground of an elementary school across the street. In DALEO v. BERT & BETTE BAYFRONT 66 MARINE, 273 So.2d 113 (Fla. 3rd DCA 1973) (per curiam), vacated on award of attorney fees only, 282 So.2d 169 (Fla. 1973), an exclusion for injuries arising out of the "operation" of watercraft away from the premises was considered sufficiently ambiguous that the policy was construed to cover injuries caused by a boat explosion away from the marina which occurred while a marina employee was attempting to install an engine on the boat at the owner's direction. In VALDES

v. SMALLEY, 303 So.2d 342 (Fla. 3rd DCA 1974), an automobile liability policy was held to cover the death of a pedestrian struck by a beer mug thrown from the car: "[T]he clause at issue here is not an exclusion, but a clause which reflects as its dominant purpose an intention to extend coverage to the insured or injured party. Therefore, the clause must be liberally construed in favor of the insured." Id. at 344.

In MATHEWS v. RANGER INSURANCE CO., 281 So.2d 345 (Fla. 1973), this Court held that an aircraft policy covering limited commercial uses, including student instruction, but excluding coverage for pilots, crew members, or passengers, must be construed to cover injuries to a student pilot. In ZIMMER v. AETNA INSURANCE CO., 383 So.2d 992 (Fla. 5th DCA 1980), an endorsement covering the "sudden" collapse of a sinkhole was construed to cover the gradual but continual collapse or settlement of the earth as well. In ZAUTNER v. LIBERTY MUTUAL INSURANCE CO., 382 So.2d 106 (Fla. 3rd DCA 1980), coverage of "newly-acquired outboard motor or boats" was held to apply to an inboard boat powered by inboard engines, in light of the ambiguity in the policy as to whether the word "outboard" modified only the word "motor" or also the word "boats": "The trial court was therefore required, as a matter of law, so to interpret the policy." 382 So.2d at 107. In SHELBY MUTUAL INSURANCE CO. v. FERBER SHEET METAL WORKS, INC., 156 So.2d 748 (Fla. 1st DCA 1963), a policy insuring a roofing sub-contractor against accidents was construed to cover deficiencies in his work appearing eight months after its completion. In FINANCIAL FIRE & CASUALTY CO. v. CALLAHAM, 199 So.2d 529 (Fla. 2nd DCA 1967), a liability policy covering camp property and a kindergarten, but excluding day camps during the summer season and saddle animals, was construed to cover an injury caused when two horses escaped from their enclosure on the camp property and were struck on the highway. And in NEW AMSTERDAM CASUALTY CO. v. ADDISON, 169 So.2d 877 (Fla. 2nd DCA 1964), a contractor's liability policy was

held to cover the contractor's negligence in the installation of insulated wire in a swimming pool, notwithstanding a policy exclusion for hazards caused by completed products, where the contractor dispensed services only and did not manufacture products. Accord, AETNA INSURANCE CO. v. STEVENS, 229 So.2d 601 (Fla. 2nd DCA 1970) (per curiam); MILLER ELECTRIC CO. v. EMPLOYERS' LIABILITY ASSURANCE CORP., 171 So.2d 40 (Fla. 1st DCA 1965). Cf. SWIGERT v. AMERICAN BANKERS INSURANCE CO., 247 So.2d 737 (Fla. 3rd DCA), cert. denied, 252 So.2d 797 (Fla. 1971) (policy excluding business chattels off the premises of a residence construed by implication to cover business tools on the premises).

In every one of these cases, assuming no factual conflict, a strict interpretation of the policy would have excluded coverage. And in every one of these cases, the court was required as a matter of law, to adopt the interpretation which favored coverage, even if that interpretation departed from a strict or literal application of the policy language. And this standard of construction is not confined to Florida decisions. In a case very similar to this one--KNOWLES v. LUMBERMENS MUTUAL CASUALTY CO., 69 R.I. 309, 33 A.2d 185 (1943)--in which a watchdog kept at a garage escaped and injured a passing pedestrian--the court found applicable a policy covering "all operations either on the premises or elsewhere which are necessary and incidental" to the maintenance, occupation or use of the garage. Clearly the animal was not performing its watchdog function after escaping from the garage, and at the time it injured the pedestrian. Nevertheless, the injury was "incidental" to the performance of its watchdog function, and the more expansive construction of the policy controlled.

Likewise, in JACKSON v. LAJAUNIE, 264 La. 181, 270 So.2d 859 (1973), a gas station liability policy was held applicable when an employee shot a customer with his pistol because he believed the pistol to be loaded with blank ammunition when he fired it at the customer as a prank. The court observed that it was beside the point that shooting a pistol at a customer is not part of the customary

usage of a service station, holding that the accident was covered under the broad language of the policy because it arose out of the use of the premises. Again, there could be no contention that the employee was performing his function at the time he initiated the prank. Likewise, in GRAND UNION CO. v. GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORP., 254 App. Div. 274, 4 N.Y.S.2d 704 (1938), the court found the liability policy of a grocery applicable to injuries caused when an employee or his invitee shot and killed a pedestrian while taking target practice in the grocery basement--which was clearly beyond the scope of any employment responsibilities:

> We hold that the coverage of this policy includes injuries caused by the negligent acts of employees on the premises while the premises are being used by the insured for the declared purposes but where the insured's employees are temporarily acting outside the scope of their employment without notice to or approval by the employer. Any exclusion from coverage of such an ordinary risk of the use of premises for business purposes must be by clear and unequivocal language.

4 N.Y.S.2d at 710. That holding derived from the fact that the employee was on duty, and on the premises, and had only departed momentarily from his employment functions. At best under the evidence in the case, that is precisely what happened.

Likewise, in HOLM v. MUTUAL SERVICE CASUALTY INSURANCE CO., 261 N.W.2d 598 (Minn. 1977), a policy covering a village's vehicle was applied to injuries sustained as a result of a battery committed by a police officer in the course of an arrest, because the arrest and consequent battery were considered a natural and reasonable incident to use of the vehicle. In LEWIS v. FIDELITY & CASUALTY CO., 304 Pa. 503, 156 A. 73 (1931), a liability policy for a carpentry business was construed to cover all "necessary, incidental or implied" functions. In WHETSTONE v. ORION INSURANCE CO., 302 F.2d 15, 16 (10th Cir. 1962), it was held that a policy covering liability "in connection with" the operation of a business "means in any way connected." In AMERICAN MUTUAL LIABILITY

INSURANCE CO. v. BUCKLEY & CO., 117 F.2d 845 (3rd Cir. 1941), injury to a child caused by the explosion of a detonating cap left outside the site of an excavation was held to have occurred "in the performance of the operations carried on." See NASSAU INSURANCE CO. v. MEL JO-JO CAB CORP., 423 N.Y.S.2d 813 (S.Ct. 1980) (assault by cab company employee on passenger held to arise out of the business for purposes of coverage); MILLS v. AGRICHEMICAL AVIATION, INC., 250 N.W.2d 663 (N.D. 1977) (expansive definition of crop spraying business). Cf. CALKINS v. MERCHANTS MUTUAL INSURANCE CO., 399 N.Y.S. 2d 811 (S.Ct. 1977) (at least regarding duty to defend, gift or sale by garage of steel drum to third party was sufficiently incidental to the business that garage liability policy covered injury caused by the drum off the premises).

In sum, and again assuming the correctness of the District Court's factual conclusions, the plaintiff--and not the defendant--was entitled to a directed verdict on the issue of coverage. A fortiori, the trial court did not err in submitting that question to the jury. However, we cannot assume the correctness of the District Court's conclusions of fact, nor in any sense concede that the plaintiff failed to introduce at least "some, slight or minimal evidence" in support of the proposition that the animal was performing a business-related function at the time of the injury. To the contrary, there was sufficient evidence upon which to base such a verdict, and the District Court's conclusion to the contrary is simply wrong.

2. Application of the Facts of this Case.

It is settled beyond dispute that while any interpretation of an insurance contract is a question of law for the court, it is for the jury to determine whether the facts of the case fall within the scope of coverage as defined by the court: "[W]hether a certain set of facts exists to bring a loss to the insured within the terms of a policy is an issue to be determined by the trier of fact." STATE FARM FIRE & CASUALTY CO. v. LICHTMAN, 227 So.2d 309, 311 (Fla.

3rd DCA 1969). Accord, AMERICAN INSURANCE CO. OF NEWARK, N.J. v. BURSON, 213 F.2d 487, 490 (5th Cir. 1954) (Florida law) (on the question of intent); LONDON GUARANTEE & ACCIDENT CO. v. I. C. HELMLY FURNITURE CO., 153 Fla. 453, 14 So.2d 848, 849 (1943); DRISDON v. GUARANTEE TRUST LIFE INSURANCE CO., 371 So.2d 690, 693 (Fla. 3rd DCA 1973) ("The jury must resolve whether the insured's loss falls within the terms of the policy"). In this case, there was ample evidence upon which the jury could have concluded, as it did, that Shane was performing her watchdog function, and thus that the injury fell within the scope of the policy's coverage.

The District Court flatly held that "there was no evidence" that the three boys were heading toward the back of the nursery to turn on the irrigation system at the time they allowed Shane to run free in the nursery. That conclusion is wrong. Michael Davis recalled that the nursery was closed at the time of the incident; that one of his chores at that time was to turn on the sprinkler system; and that just before the accident "I think we was just heading back to turn it on" (Tr. 87-88). While Michael's recollection was not expressed in terms of absolute certainty, he nonetheless made the explicit statement quoted, and the jury was entitled to credit it. No other witness contradicted that statement, and indeed the plaintiff's testimony lent it general support, insofar as the plaintiff specifically recalled that before the accident the three boys were walking along the pathway which "leads back toward where the sprinkler systems are" (Tr. 125, 152, 154).

Moreover, Michael's testimony supported the conclusion that the boys had finished playing with the animal, since they were now heading back to turn on the sprinkler, and the plaintiff explicitly testified that the boys had "decided to quit" playing with the dog and then "headed back toward the back of the nursery" (Tr. 125; see Tr. 152). Michael's testimony then completed the picture, by affirming that "Shane [would] then have had the run of the nursery to do what

she was supposed to do" (Tr. 88). Although Michael at times was unsure of his recollection, neither he nor any other witness ever contradicted any of the testimony quoted above, and the jury was entitled to believe it. Thus, "[f]rom the evidence adduced in the instant case, we think the jury was justified in finding facts clearly within the risk assumed in this particular policy contract," FIREMAN'S FUND INSURANCE CO. OF SAN FRANCISCO v. BOYD, 45 So.2d 499, 501 (Fla. 1950). The District Court was simply wrong to conclude that there was "no evidence" that the boys were performing a business-related function.

Moreover, it seems to us curious that the case should turn on that conclusion. The question is not whether the boys were working for the business at the time of the injury, but whether the dog was working for the business at the time of the injury. So long as the animal was performing her watchdog function, the liability policy applied even if the boys had continued just to play. Thus, the critical question is not whether the boys were on their way to turn on the sprinkler, but whether Shane was acting as a watchdog at the time of the injury. On this question, the District Court concluded that "[a]lthough Shane was within the time and space limits of her employment, she had been prevented from properly performing her duties as a watchdog by being tied to the wagon." 408 So.2d at 772.

We fail to see any basis upon which the District Court could have reached this conclusion as a matter of law, and we fail to understand any reason why Shane was prevented from performing as a watchdog simply because she was tied to a wagon. Whether tied to a wagon or not, Shane "had the run of the nursery to do what she was supposed to do" (Tr. 88). The testimony was unanimous that the boys had stopped playing with Shane, no matter what they decided to do after releasing Shane. Thus the testimony was undisputed that Shane did have the run of the nursery. Whether tied to a wagon or not, Shane was perfectly capable of performing her watchdog functions--perfectly capable of smelling,

seeing, or otherwise sensing the presence of strangers on the premises. Roy Davis testified that Shane was the best watchdog he had ever had (Tr. 40-41), and that Shane's function was to run free in the nursery as a watchdog (Tr. 63-64, 73, 83). There was nothing about this wagon which prevented Shane from performing that function. Indeed Shane would have been able to perform her watchdog function even if she had been sound asleep in the nursery. Arguably, she would have been able to perform that function even if she had been tied to a tree or a table in the nursery. Arguably, she would have been able to perform that function even if she had been blindfolded in the nursery, since she would still be able to smell and hear. These are fanciful examples, but in every one of them, Shane would have been more restricted than she was in this case by being tied to a wagon. The District Court was simply wrong in concluding as a matter of law that Shane "had been prevented from properly performing her duties . . . ."

For this reason, we think the plaintiff was entitled to a directed verdict on the issue of coverage, even adopting the most restrictive interpretation of this insurance policy. But at the least, the question was one for the jury, and the trial court did not err in declining to direct a verdict for Utica on the issue of coverage.[15/] On the facts as construed in the light most favorable to the plain-

15/ That observation serves readily to distinguish the three cases on this issue offered by Utica below. In MORRISON MOTOR CO. v. MANHIEM SERVICES CORP., 346 So.2d 102 (Fla. 2nd DCA 1977), cert. denied, 354 So.2d 982 (Fla. 1978), the employee of an auto auction company was involved in an accident while working on her own time transporting automobiles from other motor companies to the auction--a function for which the other companies were responsible and for which they paid the employee. Under these circumstances, it was clear that the auction company's policy did not provide coverage. In AMERICAN MOTORS INSURANCE CO. v. AMERICAN EMPLOYERS INSURANCE CO., 447 F. Supp. 1314 (W.D. La. 1978), remanded on other grounds, 600 F.2d 15 (5th Cir. 1979), a crew boat company employee, while on duty, departed from his employment responsibilities and injured another while engaging in target practice with a pistol. His conduct was held to be outside the scope of his employment. Finally, in EMPLOYERS MUTUAL CASUALTY CO. v. KANGUS, 245 N.W.2d 873 (Minn. 1976), a "portable welder" at a speedway departed from his employment responsibilities and injured another while igniting fireworks on the infield of the speedway. Again

tiff, the jury clearly could have found, as it did, that the injury took place "with respect to the conduct of business." Interpreting the policy in its broadest light, the trial court should have directed a verdict to that effect, whether or not Shane was performing a watchdog function or the boys were performing some task related to the business. But even if a restrictive broader construction of a statute required such a showing, there was certainly no basis for the trial court to direct a verdict for Utica on coverage, since there was ample evidence upon which the jury could have concluded, as it did, that the boys and the dog were engaged in a business-related function. Indeed, we think that evidence establishes as a matter of law that the policy covered this injury. But at the very least, it created a question for the jury, and the trial court did not err in allowing the jury to decide that question.

## V
## CONCLUSION

The plaintiffs' judgment should be affirmed in all respects.

Respectfully submitted,

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the injury was committed outside the scope of employment, and thus outside the scope of the employer's liability coverage. In all three cases, therefore, there were no facts upon which a jury could conclude that the injury was committed in the course of employment.

## CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 29th day of June, 1982, to: TIMON V. SULLIVAN, ESQ., Shackleford, Farrior, Stallings & Evans, P.A., Post Office Box 3324, Tampa, Fla. 33601, Attorneys for Appellant; and to HOWARD GARRETT, ESQ., 518 Tampa Street, Tampa, Fla. 33602, Attorney for Appellee Davis.

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