IN THE SUPREME COURT OF FLORIDA

CASE NO. 61,681

DONALD ROY JONES, etc., et al.,

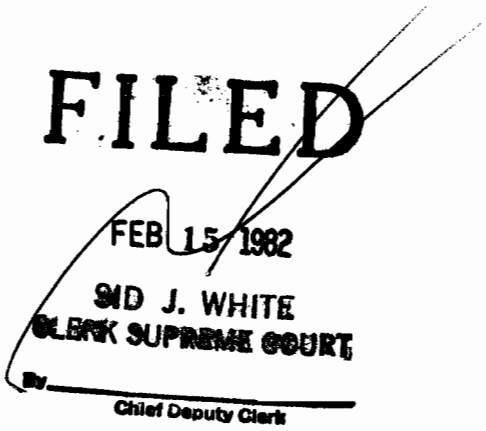
Petitioner,

vs.

UTICA MUTUAL INSURANCE CO.,

Respondent.

_____/



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

PETITIONER'S BRIEF ON JURISDICTION

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I
STATEMENT OF THE CASE AND FACTS

The procedural history and the facts of this case are adequately set forth in the decision and opinion sought to be reviewed--UTICA MUTUAL INSURANCE CO. v. DONALD ROY JONES, et al., ____ So.2d ____ (Fla. 2nd DCA 1982) (1982 FLW DCA 230)--a copy of which is appended to this brief at A. 1. We adopt that recitation for the purposes of this brief, which argues that the decision sought to be reviewed expressly and directly conflicts with decisions of this Court and various other district courts of appeal, in three independent ways. Thus, this Court has jurisdiction to review the cause under Article V, Section 3(b)(3) of the Florida Constitution.[1/]

II
ARGUMENT

A. THE DISTRICT COURT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS IN OTHER DISTRICTS ON THE REQUISITE PROOF OF CAUSATION UNDER §767.01, FLA. STAT. (1979).

For over 75 years, the courts of this state have held that §767.01 means exactly what it says, and that a dog-owner is strictly liable--as a virtual insurer --for any injury caused by his dog. See DONNER v. ARKWRIGHT-BOSTON MANUFACTURERS MUTUAL INS. CO., 358 So.2d 21, 23 (Fla. 1978) ("virtual insurer"); RATTET v. DUAL SECURITY SYSTEMS, INC., 373 So.2d 948, 950 (Fla. 3rd DCA 1979) ("insurer"); MAPOLES v. MAPOLES, 350 So.2d 1137, 1138 & n. 2 (statutory liability derives from "the act of ownership," and "virtually makes an owner the insurer of the dog's conduct . . . ."); SMITH v. ALLISON, 332

1/ The central fact giving rise to this litigation is that the petitioner (hereinafter "plaintiff") was injured after he and two other youngsters had been playing with a dog named Shane while Shane was tied to a small wagon, which clipped the plaintiff's Achilles tendon when Shane began to chase another dog. On appeal, the defendant charged error only in the refusal of the trial court to direct a verdict in its favor on the question of liability under §767.01, Fla. Stat. (1979), which provides that "Owners of dogs shall be liable for any damage done by their dogs to sheep or other domestic livestock, or to persons." The trial court directed a verdict for the plaintiff, and the district court held that the trial court should have directed a verdict for the defendant.

So.2d 631, 633 (Fla. 3rd DCA 1976) ("absolute liability"); ALLSTATE INSURANCE CO. v. GREENSTEIN, 308 So.2d 561, 563 (Fla. 3rd DCA 1975) ("insurer"); ENGLISH v. SEACHORD, 243 So.2d 143, 195 (Fla. 4th DCA 1971), cert. dismissed, 259 So.2d 136 (Fla. 1972) (per curiam) ("virtually an insurer"); JOSEPHSON v. SWEET, 173 So.2d 463, 464 (Fla. 3rd DCA 1964) ("insurer"). In this case, however, the district court departed from this clear line of decisions by holding that liability attaches under the statute only when the dog directly causes an injury and not when it indirectly causes an injury:

> 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 injury.
>
> * * * * *
>
> 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 [the plaintiff's] injury. But for the wagon, no injury would have occurred when Shane ran past [the plaintiff], 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 (A. 2).

The district court itself recognized that this "decision conflicts with Mapoles v. Mapoles," 350 So.2d 1137 (Fla. 1st DCA 1977). There a dog somehow triggered a loaded shotgun in the back of an automobile and shot a pedestrian standing outside the vehicle. The reviewing court held that the requirements for application of §767.01 were satisfied. As the district court acknowledged, there is no basis for distinguishing MAPOLES from the instant case. In neither case did the animal actually touch the plaintiff; in both cases the dog activated some instrumentality which caused the injury; in both cases the dog was placed in proximity to that instrumentality by its owner.[2/]

2/ 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" in this context. No less in MAPOLES did the owner of the

In addition, the district court's holding in this case conflicts with a number of others which are consistent with MAPOLES. Thus in ENGLISH v. SEACHORD, 243 So.2d 193 (Fla. 4th DCA 1971), cert. dismissed, 259 So.2d 136 (Fla. 1972) (per curiam), a verdict for the plaintiff was permissible under the statute where the plaintiff, frightened by a growling dog, jumped on top of a car and injured his back. There was no contact whatever between the animal and the plaintiff, and the injury was inflicted by the car, not the dog. This Court expressly approved that holding in dismissing certiorari. In BRANDEIS v. FLETCHER, 211 So.2d 606 (Fla. 3rd DCA), cert. denied, 219 So.2d 706 (Fla. 1968), 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, there was no contact between the animals and the plaintiff, only between the plaintiff and the car. And in ALLSTATE INSURANCE CO. v. GREENSTEIN, 308 So.2d 561 (Fla. 3rd DCA 1975), the reviewing court upheld summary judgment for the plaintiff under the statute where he 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.

We fail to perceive any basis for distinguishing these cases from the instant case.[3/] In each of them, the animal's behavior precipitated an injury actually

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dog "contribute" to the injury by placing it in the back seat with a loaded shotgun. Moreover, there is no defense of contributory negligence or assumption of risk under this strict liability statute. See DONNER v. ARKWRIGHT-BOSTON MANUFACTURERS MUTUAL, 358 So.2d 21, 24-35 (Fla. 1978); RATTAT v. DUAL SECURITY SYSTEMS, INC., 373 So.2d 948, 951 (Fla. 3rd DCA 1979); ENGLISH v. SEACHORD, 243 So.2d 193, 195 (Fla. 4th DCA 1971), cert. dismissed, 259 So.2d 136 (Fla. 1972) (per curiam) (expressly approving district court's opinion). The only analogous defense is the "provocation" defense, which is different from contributory negligence or assumption of risk, 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." DONNER v. ARKWRIGHT-BOSTON MANUFACTURERS MUTUAL, supra, 358 So.2d at 24 n.5. See KNAPP v. BALL, 175 So.2d 808, 809 (Fla. 3rd DCA 1965). Should this Court accept review of this case, we are prepared to demonstrate that the defendant expressly disavowed any defense of provocation, assumption of risk, or contributory negligence.

3/ Indeed, the district court in this case cited ENGLISH and BRANDEIS with the introductory signal "But see . . . ." (A. 2).

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caused by some other instrumentality. Admittedly, the dogs in ENGLISH, BRANDEIS and ALLSTATE had not been placed in the proximity of these instrumentalities by their owners, but rather on their own initiative were running, barking, or growling in the direction of the plaintiff (in short, acting like dogs) so as to cause the plaintiff, in reaction, to encounter an instrumentality which injured him. In contrast, the dogs in this case and in MAPOLES were placed in contact with the injuring instrumentality by their owner, and the combination of the two caused the injury. It may have been this difference which prompted the district court in this case to conclude that "[i]n 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" (A. 2).

However, this distinction is of no significance, in light of the recognition (see note 2, supra) that this strict liability statute does not embrace a defense of contributory negligence or assumption of risk, and it certainly does not render the owner any less liable when the owner himself has contributed in some way to the injury. A dog no less exhibits canine characteristics when he chases a person or another dog while attached to a wagon, than he does when not attached to a wagon. Since any contribution to the injury by the plaintiff or the owner does not constitute a defense unless there is provocation--and since the statute clearly applies whether or not the dog itself actually touches the plaintiff--it seems to us irrelevant in this context that the dog in this case was tied to a wagon.[4/] The inevitable conclusion is that children tying dogs to wagons is

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4/ Moreover, it seems to us that any attempt to distinguish this case on that basis would quickly become mired in metaphysics. Certainly it is not enough to say, as the district court said here, that "[b]ut for the wagon, no injury would have occurred . . . ." (A. 2). But for the automobiles in ENGLISH, BRANDEIS, and ALLSTATE, no injury would have occurred either. Moreover, to attempt a distinction on the ground that someone placed Shane in proximity to the injuring instrumentality is not very helpful either. What happens when the 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 like a dog because it is attached to the leash, or because only the leash touches the plaintiff? What happens when a dog is chasing something or someone, and knocks over a lamp which causes the

simply one of the risks of dog ownership defined by §767.01. Thus, this case is not distinguishable from ENGLISH, BRANDEIS, or ALLSTATE; it expressly and directly conflicts with the holdings of these cases--and of course, the ENGLISH decision was expressly approved by this Court, 259 So.2d 136. And it indisputably conflicts with MAPOLES v. MAPOLES.5/

B. THE DISTRICT COURT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH A NUMBER OF DECISIONS CONDITIONING LIABILITY UNDER §767.01 UPON SOME AFFIRMATIVE OR AGGRESSIVE ACTION BY THE DOG.

The district court (A. 2) cited its own earlier opinion in RUTLAND v. BIEL, 277 So.2d 807, 809 (Fla. 2nd DCA 1973), for the proposition that §767.01 is inapplicable "where the dog takes no affirmative or aggressive action toward the injured party"--and found this criterion unsatisfied in the instant case because the plaintiff's "injuries here were in no way attributable to an affirmative or aggressive act toward him by the dog" (emphasis in original) (A. 2). This pro-

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plaintiff injury? Is the statute inapplicable because the owner 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? All of these questions are raised by the distinction drawn by the district court in this case, and all of them illustrate that such a distinction is simply impossible to administer. That is a point which we will develop if given the opportunity to brief this case on the merits.

5/ The district court's decision conflicts not only with the cases discussed above, but also with more general descriptions--found in a number of other cases--of the purposes or administration of §767.01. Thus, the district court's meticulous attempt to limit the statute to some contemplated "canine characteristic" directly and expressly conflicts with all those decisions, supra, declaring that §767.01 makes the owner a "virtual insurer." Moreover, at this level of generality, the district court's decision necessarily conflicts with the conjunction of this Court's decision in DONNER v. ARKWRIGHT-BOSTON MANUFACTURERS MUTUAL INS. CO., 358 So.2d 21 (Fla. 1978) (interpreting the dog-bite statute, §767.04) and RATTET v. DUAL SECURITY SYSTEMS, INC., 373 So.2d 948 (Fla. 3rd DCA 1979) (applying the DONNER decision to §767.01), which combine to hold that "only the defenses" of provocation or warning are available under §767.01. DONNER v. ARKWRIGHT-BOSTON MANUFACTURERS MUTUAL INS. CO., supra, 358 So.2d at 26. There is simply no room in this strict liability statute for any judicial definition of "the risk created by dog ownership" (A. 2)--even if such a distinction could be administered.

nouncement--as applied to the facts of this case--conflicts with every extant decision interpreting the requirement of an aggressive or affirmative act, and with the general thesis that §767.01 is a strict liability statute. None of these cases hold that the plaintiff must demonstrate that the animal by some standard had directed its behavior toward the plaintiff.[6/]

Thus, for example, in ALLSTATE INSURANCE CO. v. GREENSTEIN, supra, the undisputed facts showed nothing more than that a driver was injured when "he swerved to avoid hitting the animal . . . ." 308 So.2d at 562. There was no possible suggestion that the animal "intended" or "directed" contact with the car or with its driver. Nonetheless, the reviewing court concluded that the "affirmative act" requirement had been 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. GREENSTEIN necessarily conflicts with the district court's conclusion in this case.

6/ In RUTLAND itself, the same district court reversed an order of partial summary judgment for the plaintiff where the facts showed no more than that the plaintiff had "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. The district court remanded on two bases--the first that the facts presented a jury question as to whether or not the plaintiff had provoked the animal. Id. at 808-09. As an alternative holding, however, the court also noted that the statute requires a showing of "affirmative or aggressive action toward the injured party," id. at 809--and thus remanded for trial. Yet if the court in RUTLAND had shared the district court's interpretation of the "affirmative act" requirement, it would never have remanded for trial on this question, since by no interpretation of the facts in RUTLAND could it possibly be said that the animal had "intended" or "directed" any action toward the plaintiff. Thus, the "affirmative act" requirement in RUTLAND must have meant something other than that the animal "intend" or "direct" its action toward the plaintiff, or the reviewing court would have found no issue upon which to remand for trial. The district court in this case directed judgment for the defendant. Thus, the decision sought to be reviewed takes RUTLAND too far, and that is why it conflicts with so many other decisions.

This case also conflicts with the decision in 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 was injured when he landed on the defendant's dog. The reviewing court remanded for submission "to the jury under proper instructions" the question of whether or not the animal had taken the affirmative and aggressive action of running underneath the plaintiff. Under the district court's theory in this case, of course, the SCOTT court never would have remanded for trial on this question, since there was no suggestion whatever in SCOTT that the dog had committed an affirmative or aggressive act toward the plaintiff. There was only the question of whether the animal was in motion--that is, whether he acted in an affirmative and aggressive way, the effect of which was to produce contact with the plaintiff. Thus, SCOTT necessarily conflicts--expressly and directly--with the decision on this issue in this case. Finally, the MAPOLES decision conflicts on this point as well, since of course there could be no suggestion whatever that the animal in that case was acting in an affirmative or aggressive manner toward the plaintiff, when that animal somehow set off the shotgun which injured the plaintiff.

What the RUTLAND case 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 the 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 GREENSTEIN, SCOTT 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 in intention. The district court's decision in this case directly and expressly conflicts with this line of cases, since the dog in this case clearly was

in motion.[7/] In fact, the animal in this case was in motion toward the plaintiff, though presumably not with any intention of contacting the plaintiff.[8/] The district court's conclusion on this point clearly conflicts --expressly and directly-- with a number of other cases.

C. THE DECISION SOUGHT TO BE REVIEWED IS IN DIRECT AND EXPRESS CONFLICT WITH A NUMBER OF DECISIONS BY THIS AND OTHER COURTS ON THE APPROPRIATE STANDARDS FOR STATUTORY CONSTRUCTION.

The district court in this case cited with approval a pronouncement concerning the legislative history of §767.01 in WENDLAND v. AKERS, 365 So.2d 368 (Fla. 4th DCA 1978), cert. denied, 378 So.2d 342 (Fla. 1979). That recitation is repeated verbatim in the district court's opinion (A. 1). The essential point is that the court in WENDLAND concluded that the legislative draftsmen of the statute never expressly included "persons" among the intended beneficiaries of the statute; instead, the word "persons" was added by those who compiled the statute. In this light, the court concluded in WENDLAND:

> Although the validity of Section 767.01, Florida Statutes (1975), cannot now be questioned because of the rules relating to statutory enactments, Section 767.01 should be given

7/ Moreover, as we shall argue on the merits, the district court's definition of the requisite aggressive conduct makes no sense. What happens 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 it 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" his conduct toward the plaintiff here. The only difference is the wagon, which subsumes this entire discussion under point A, supra. See note 8, infra.

8/ The district court in this case appears to have recognized that much in allowing that "Shane clearly was engaged in an aggressive act toward [the plaintiff's] dog [and, presumably, in the plaintiff's direction, but the plaintiff] would not personally have been affected by Shane's act of chasing his dog had the wagon, which was what came in contact with [the plaintiff], not been left tied to Shane" (A. 2). This curious sentence appears to render the district court's conclusion concerning the "affirmative act" requirement dependent upon its earlier conclusion that the statute is inapplicable because the dog was tied to a wagon. Put otherwise, it appears to suggest that the facts in this case would have satisfied the "affirmative act" requirement were it not for the fact that the dog was tied to a wagon. To the extent that this second point is thus made dependent upon the first, we refer this Court to our discussion of the first, which also conflicts with a number of cases construing the statute.

> a restrictive scope because the legislature never specifically included damage to persons within the purview of the statute at the time of the enactment of these laws.

334 So.2d at 369-70 n. 5. The district court in this case cites this passage with approval, and proceeds to apply 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" (A. 1). In short, the district court in this case isolated the word "persons" from all the other words in the statute, and sought to enforce the statute in a more restrictive manner relative to this single word.

That process conflicts with a number of cases defining the import of §11.2421, Fla. Stat. (1981), which expressly provides that the consolidation entitled "Florida Statutes" "is adopted and enacted as the official statute law of the state . . . ." While substantive departure by the compilers from the language of enacted legislation may be ineffective before official publication in the Florida Statutes, such publication constitues official adoption by the legislature of the language published, and "[t]he statute in such a 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). See HILLSBOROUGH COUNTY COMMISSIONERS 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). In this case, of course, the language of §767.01 has appeared in every compilation since 1906. Thus, in expressly endorsing a "restrictive scope" relative to language officially codified since 1906, the district court in this case transgressed those judicial decisions interpreting the meaning of §11.2421.[9/]

9/ The district court also transgressed a related line of decisions which generally forbid such selectivity in the course of statutory construction. Thus in STATE v. GALE DISTRIBUTORS, INC., 349 So.2d 150, 153 (Fla. 1977), this Court repeated the "cardinal rule of statutory construction that the entire statute under consideration must be considered in determining legislative intent, and

Moreover, 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). See HEREDIA v. ALLSTATE INS. 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) (conflict jurisdiction); BLOUNT v. STATE, 102 Fla. 1100, 138 So. 2 (1931).

III
CONCLUSION

It is respectfully urged that this Court exercise its discretion to resolve the conflicts which appear upon the face of the district court's decision, and accept jurisdiction to review the instant case.

Respectfully submitted,

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effect must be given to every part of this 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." 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." These cases simply 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, and thus its decision directly and expressly conflicts with this more general line of decisions.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this _____ day of February, 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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