IN THE SUPREME COURT OF FLORIDA

CASE NO. 61,681

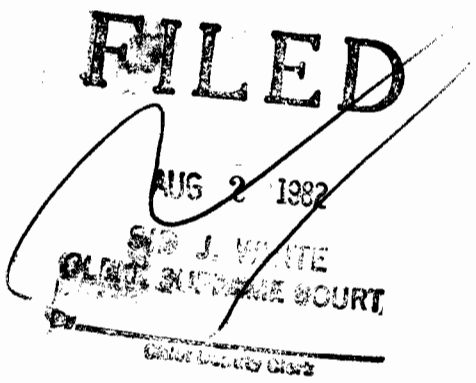
DONALD ROY JONES, etc., et al.,

Petitioner,

vs.

UTICA MUTUAL INSURANCE CO.,

Respondent.



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

REPLY BRIEF OF PETITIONER

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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.

II
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.[2/]

We began with the assertion (brief at 10-13), that the Court of Appeal erred in adverting to the legislative history of this statute as a basis for ignoring its plain meaning. Utica answers (brief at 6) that the "recognition that the statute as originally enacted applied solely to damages to 'sheep or other stock killed or maimed by' dogs is a relevant portion of that history and therefore a proper consideration in determining the applicability of the statute." That is wrong, and the cases cited in our initial brief make that abundantly clear.

Next (brief at 13), we observed that the courts have recognized only three exceptions to this strict liability statute.[3/] Since neither the warning-sign or provocation defenses are at issue here, we concluded that the most charitable reading of

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1/ Utica objects only to three assertions in our initial statement of the facts, which we will identify and defend in the argument portion of this brief.

2/ Utica appears to acknowledge that its sole assertion of error on this point is the refusal of the trial court to direct a verdict on liability in its favor--and thus that the direction of a verdict for the plaintiff on this point is not directly at issue here. We contend that the trial court did not err in denying the defendant's motion for a directed verdict because, at the least, the issue was appropriate for the jury.

3/ The three exceptions are cases in which the owner posts a warning sign; cases in which the plaintiff's conduct constitutes provocation or aggravation of the animal; and 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 injury.

the District Court's opinion is that it found that the animal's conduct in this case was not the proximate cause of injury (brief at 14). Utica declines this offering, however (brief at 8), and insists that it is "incorrect" to invoke the theory of proximate causation as the basis for the District Court's holding. Instead, Utica insists that the District Court's holding is based solely upon the conclusion that the injury here was not a result of the "risk created by dog ownership" (brief at 8).

That insistence, of course, concedes the necessity of reversal. There is no statutory defense based upon the risk created by dog ownership; no court of this State has ever recognized such a defense, and neither Utica nor the District Court has suggested any articulable standard for administering such a defense. That observation is evident in any consideration of the cases interpreting the statute. Utica discusses these cases--and various theories of liability--in a shotgun fashion. We will answer these various and disparate points in the order in which they are raised.

First (brief at 10), Utica submits that the District Court was right to note that "but for the wagon, no injury would have occurred since the dog never came in contact with Petitioner" (brief at 10). As we observe in our initial brief (p. 15), the obvious answer is that the injury would not have occurred "but for" the dog either. That observation would be sufficient to satisfy the requirements of causation in an ordinary negligence case; a fortiori, it should be sufficient to meet those requirements under a strict liability statute.[4/] Utica fails to acknowledge or answer the point.

Second (brief at 10), Utica asserts that the owner of the animal had no knowledge that the dog had been tied to the wagon, and thus should not be held liable for a "risk he had not created or contributed to in any way simply by the mere act

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4/ And as we note in our initial brief (pp. 18-19), it has been sufficient in a number of cases decided under this statute. Even though injury would not have occurred "but for" an automobile in three cases--and "but for" a shotgun in a fourth--the statute was found to apply.

of ownership . . . ."[5/] Yet that is precisely the purpose of this strict liability statute, under which liability is derivative of "the act of ownership." MAPOLES v. MAPOLES, 350 So.2d 1137, 1138 n. 2 (Fla. 1st DCA 1977), cert. denied, 354 So.2d 888 (Fla. 1978). See our initial brief at p. 17 n.10. In reviewing the cases in this area--cases in which animals are running loose, barking or growling at people--one finds no discussion of whether or not the owner had actual knowledge of what his animal was doing, because that factor is simply irrelevant. This is a strict liability statute, and the owner's lack of knowledge or culpability is no defense. Utica ignores the point.

Third (brief at 11-13), Utica attempts to distinguish three cases discussed in our initial brief (pp. 18-19),[6/] on the ground that the dogs which were growling and barking in ENGLISH and BRANDEIS, and the dog which ran into the car in ALLSTATE, were all acting within the scope of the risk created by dog ownership--presumably for no other reason than because Utica says so. But somehow--and also because Utica says so--the animal in this case was precluded from acting like a dog because the young boys had tied her to a wagon. We simply do not understand why the conduct of three young boys in tying a dog to a wagon is not part of the risk created by dog ownership under this strict liability statute; and we cannot stress too strongly that, despite our express challenge to do so (brief at 24), Utica has failed to suggest any analytical framework through which to arrive at that conclusion.[7/] Thus far, it seems to be strictly a matter of Utica's intuition.

5/ Of course, the owner's son directly participated in creating the "dog-wagon entity."

6/ 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); BRANDEIS v. FELCHER, 211 So.2d 606 (Fla. 3rd DCA), cert. denied, 219 So.2d 706 (Fla. 1968); ALLSTATE INSURANCE CO. v. GREENSTEIN, 308 So.2d 561 (Fla. 3rd DCA 1975).

7/ That framework must accomodate a number of hypotheticals advanced in our initial brief (pp. 23-24), which Utica has declined to discuss. For example, what if a leashed dog darts in front of someone, who trips over the leash? Only the leash--not the dog--touches the plaintiff. Is that within the risk created by dog

In our initial brief (pp. 22-24), we talk about the difficulty (indeed, impossibility) of articulating and enforcing a standard of liability based upon some notion of the risk created by dog ownership. That discussion derives from the observation (see our brief at pp. 15-18) that the traditional standard of proximate causation is amply satisfied in this case. Utica fails even to acknowledge, no less rebut, that vital point. Thus, we argued, if Utica seeks to advance some other standard of causation or liability, Utica bears the burden to tell us what that standard is, and to tell us how it might be enforced. We can simply think of no way to determine when a given injury is within the risk created by dog ownership other than to apply the typical standard of proximate causation, under which liability may be excused only if the participation of the animal is overwhelmed or superseded by some other cause. We are left by Utica's brief with nothing to hold onto--with no theory of liability to address or rebut. We think that constitutes a concession that no such theory may be devised, and we think that omission is fatal to Utica's position.

Fourth (brief at 13-14), Utica discusses the decision in MAPOLES v. MAPOLES, supra, 357 So.2d 1137.[8/] Through two hypotheticals (brief at 14), Utica argues that MAPOLES was wrong. According to Utica, MAPOLES stands for the proposition that the statute applies "upon a showing of involvement of any type by the dog in the occurrence of an injury." Thus, according to Utica, MAPOLES would find liabil-

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ownership? And if attaching a dog to a leash is within that risk, then why not attaching a dog to a wagon? This notion of "dogness" is simply impossible to define. At one point, for example (brief at 15), Utica throws out the phrase "unique characteristics of dogs . . . ." What in the world does that mean?

8/ We stand corrected by Utica (brief at 13) on the facts of MAPOLES. The owner did not place the dog in the back of the car; the owner was present and "permitted the dog to be placed in the car . . . ." 350 So.2d at 1138.

We are not, however, as Utica asserts (brief at 13), "confused" about our position on MAPOLES. Our position (brief at 20) is that "the MAPOLES decision was right," since the facts of that case do satisfy the traditional requirements of proximate causation; but we acknowledge (brief at 21 n.13) that MAPOLES is a tougher case than this one, because the shotgun in MAPOLES was more of a contributing cause of the injury than was the wagon in this case. Thus, we think there is room for this Court to affirm the trial court in this case even if this Court concludes that MAPOLES goes too far. We do not think that position is confusing, and we do think that MAPOLES was right.

ity "if the boyfriend had dropped the dog into the back seat and the shotgun had discharged immediately," or even "had the boyfriend picked up the dog and swung it by the tail striking the third party" (brief at 14). We think these examples perfectly illustrate our point. We think in neither example would the statute apply, because in both hypotheticals the animal is taking no affirmative conduct at all, and is solely the instrumentality of someone else.[9/] In both hypotheticals, any involvement of the animal is overwhelmed by the conduct of someone else; in neither example could it possibly be said that the animal itself was a proximate cause of injury.

But under the actual facts of MAPOLES, the dog was much more than the mere instrumentality of someone else. The dog was engaged in active, affirmative conduct--conduct not superseded by the actions of someone or something else. Thus, MAPOLES does not stand for the proposition which Utica attributes to it--that liability is appropriate upon a showing of "involvement of any type by the dog." To the contrary, MAPOLES is consistent with traditional notions of proximate causation, counseling liability only when the animal plays some kind of an active role. It thus supports liability in this case, because in this case Shane was not a mere instrumentality of someone else, but was engaged in affirmative, aggressive conduct of her own--the inherently canine activity of chasing another dog.[10/]

These are the only four points which Utica makes about the first basis for the District Court's ruling on the issue of liability under the statute. These points skirt around the central issue, but they do not address it. This is a strict liability statute. The activity of the animal in this case amply satisfied the traditional definition of proximate causation--the traditional standard for determining when the

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9/ These hypotheticals aptly illustrate the MAPOLES dissent's concern that liability should not attach if the animal's involvement is no different than would have been "a falling sack of groceries." 350 So.2d at 1139. But the actual facts of MAPOLES do not, because a sack of groceries cannot pace the back seat of a car.

10/ Indeed, as we observe in our initial brief (p. 21 n.13), MAPOLES is a tougher case than this one, because the animal in MAPOLES appears to have been engaged in random and undirected activity, while the animal in this case played even more of an active role in the chain of events leading to injury.

animal's conduct (the canine characteristic) is sufficiently involved in the sequence of events leading to injury so as to render its owner culpable. If there is some other way to measure causation, Utica has yet to suggest it. If there is some other way to measure the scope of liability under the statute--to define "canine characteristic," and to define the extent to which such a canine characteristic must have contributed to an injury in order for the statute to apply--Utica has yet to suggest one. This dog was acting like a dog. She was chasing another dog. Admittedly, that conduct was not the sole cause of the injury; but Utica has yet to invoke any legal context in which the requisites of causation are so severe. By any traditional measure of causation--and certainly by the measure applicable to cases of ordinary negligence--the animal's involvement in this case was clearly sufficient to sustain a jury's verdict. Clearly no greater showing is required under this strict liability statute.

Fifth, Utica addresses what may have been an alternative holding on liability by the District Court, to the effect that the plaintiff's injury in this case was not the result of an affirmative act by the dog. For the first time, Utica has made clear its position that the statute does not apply unless it might be shown that the animal actually intended contact with or injury to the plaintiff:

> The affirmative testimony from the injured Petitioner was that the dog was neither acting aggressively toward nor chasing him. (TR. 157). Rather, the undisputed testimony was that the sole object of the dog's action was another dog which suddenly appeared on the premises. (TR. 77-80, 155, 157) (our emphasis).11/

Thus, according to Utica, it is not enough that the animal is moving in the direction of the plaintiff (as Shane was), and thus is "directing" its activity toward the plaintiff; instead, it must be shown that the animal actually intended contact with the plaintiff. To state that proposition is to rebut it; clearly there is room in this statute for liability even when it cannot be shown that the animal did not subjectively

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11/ Later (brief at 18), Utica says: "There was affirmative evidence that Shane was not acting aggressively toward nor chasing the Petitioner" (our emphasis).

intend to contact or injure the plaintiff--even if there were some way to determine the subjective intentions of animals. In our initial brief (p. 30), we offered the obvious example of a plaintiff who is injured while standing between one dog which attacks another. There can be no question that the statute would be satisfied in such a case, despite the recognition that the animal "intended" no contact with the plaintiff. And if the animal has "directed" activity toward the plaintiff in such a case, then Shane "directed" her activity toward the plaintiff here. Utica offers no response. It would define this strict liability statute out of existence to import a requirement that the animal actually intend contact with or injury to the plaintiff.

In all four cases in this area discussed in our initial brief (pp. 26-28) in which a verdict for the plaintiff was permissible, Utica's interpretation of the "affirmative act" requirement would have necessitated a judgment for the defendant.[12/] In none of these cases could it possibly be said that the animal intended contact with the plaintiff--or even that the animal "directed" its conduct toward the plaintiff, any more than Shane directed her conduct toward the plaintiff in this case. Yet in all of these cases, a verdict for the plaintiff was permissible. Utica discusses these cases, but fails to provide any basis for distinguishing them. It is easy enough to say that such cases support enforcement of a requirement that the animal intend contact with the plaintiff, but every one of them would have come out differently had that

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12/ In RUTLAND v. BIEL, 277 So.2d 807 (Fla. 2nd DCA 1973), there was no possible interpretation of the facts supporting an inference that the animal either intended or directed any contact with or injury to the plaintiff; and yet the court remanded the case for trial. In SMITH v. ALLISON, 332 So.2d 631 (Fla. 3rd DCA 1976), the animal was not engaged in any aggressive or affirmative conduct, but was in retreat, and thus the statute did not apply. But the court in SMITH approved the decision in ALLSTATE INSURANCE CO. v. GREENSTEIN, 308 So.2d 561 (Fla. 3rd DCA 1975), in which "the dog ran into a car, thereby causing an accident," 332 So.2d at 633. Thus in ALLSTATE there was affirmative action, though there could be no possible inference that the animal "intended" or "directed" any contact with the car. In SCOTT v. GORDON, 321 So.2d 619 (Fla. 3rd DCA 1975), the plaintiff jumped over a fence and landed on the defendant's dog. Although no possible view of the evidence would support any conclusion that the animal intended contact with the plaintiff, the court nonetheless reversed for trial. Finally, in MAPOLES, there could be no possible inference that the animal had any intention of setting off the shotgun or injuring the plaintiff.

interpretation been embraced by the reviewing court. There is no authority supporting so restrictive a construction of the "affirmative act" requirement.

Instead, as we argued (brief at 28-30), the "affirmative act" requirement merely compels a showing that 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--rather than remaining idle or attempting to escape. Utica has a problem with that construction, however, expressed in two curious sentences (brief at 19). First, Utica is "hard pressed to understand, and would invite the Petitioner to explain, how the animal in the Mapoles vs. Mapoles decision was 'nothing more than a victim of the Plaintiff's conduct'." That challenge makes no sense at all. The animal in MAPOLES was not "nothing more than a victim of the Plaintiff's conduct." That is why the statute did apply, and that is why we agree with MAPOLES.

Second, if our construction of the "affirmative act" requirement is correct, Utica asks, "why is the dog's affirmative action in the form of exiting the roadway and heading toward the sidewalk [presumably, in SMITH v. ALLISON, supra] insufficient to serve as a basis for liability?" The answer is that the animal in SMITH v. ALLISON was running away from the plaintiff, not acting affirmatively or aggressively. The SMITH case reflects an obvious conclusion that retreat is inherently inconsistent with affirmative or aggressive conduct.[13/]

Finally (brief at 20), Utica cites two recent cases on the statute--BOZARTH v. BARETTO, 399 So.2d 370 (Fla. 3rd DCA 1981), and SUTTON v. SWEET, 376 So.2d 443 (Fla. 4th DCA 1979). As we observe in our initial brief (p. 30), the court in BOZARTH, without disclosing the facts of the case, affirmed a jury verdict for the

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13/ Of course, to become truly metaphysical, we can think of a sense in which the animal in SMITH might be said to have taken the "affirmative action" of running away. There is a sense in which the act of retreating in SMITH "caused" the plaintiff in reaction to crash his motorcycle. In this particular sense, the SMITH decision may be wrong. However, that conclusion is unnecessary to resolve this case, since in this case there can be no question that Shane was not retreating, but was moving forcefully in the plaintiff's direction.

defendant and the trial court's refusal to direct a verdict for the plaintiff because there were sufficient facts upon which the jury might conclude that the injury was not proximately caused by any aggressive or affirmative act "directed against said plaintiff by defendant's dog . . . ." And in SUTTON v. SWEET, 376 So.2d 443 (Fla. 4th DCA 1979) (per curiam), the court, again without disclosing the facts, found there to be "genuine issues of fact remaining which require resolution by a jury" concerning "[w]hether the door to the utility room was indeed ajar so that the dog could get out, and whether the dog's 'growling and lunging' was directed at appellant . . . ." Both cases seem to us fatal to Utica's position, in that both find the "affirmative act" requirement appropriate for consideration by the jury. That observation, of course, requires reversal in this case. Of course, to the extent that either case should be read to impose a requirement that the animal actually intend contact with or injury to the plaintiff, we respectfully disagree.

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.

Utica insists (brief at 25) that "three young boys playing with a dog and a little red wagon in no way constitutes the conduct of the nursery business." We insist that coverage is appropriate when the invitee of an employee of a business is injured by a wagon used in the business and in the possession of the night watchman of the business, who is on duty at the time, while the invitee is accompanying the employee in the performance of one of his duties. It is our contention that the testimony in this case permitted the jury to characterize the accident in precisely those terms, and thus that the trial court did not err in declining to direct a verdict in favor of Utica on the issue of coverage.

We raised two general arguments about coverage. First (brief at 33-40), we argued that the plaintiff was entitled to a directed verdict on the issue of coverage, and therefore that the trial court committed no error in declining to direct a verdict

for Utica. Utica does not deny the well-settled principles that the construction of an insurance policy is question of law for the court, that ambiguities in such a policy must be construed against the insurer, and that where a policy is susceptible of two interpretations, the trial court must adopt that interpretation which provides coverage. Instead, Utica raises three points.

First (brief at 25), citing no authority, Utica contends that this argument was not raised by the plaintiff either before the trial court or before the District Court, and thus is inappropriate for this Court's consideration. That assertion is wrong, and the conclusion is wrong. Utica was the moving party in assigning as error the trial court's refusal to direct a verdict in its favor on the issue of coverage. As the party defending that decision by the trial court, the petitioner is entitled to raise any argument which will sustain it. See IN RE ESTATE OF YOHN, 238 So.2d 290 (Fla. 1970); COHEN v. MOHAWK, INC., 137 So.2d 222 (Fla. 1962); ESCARRA v. WINN-DIXIE STORES, INC., 131 So.2d 483 (Fla. 1961).

Second (brief at 26), Utica asserts that the entire premise of our contention--that the language of this policy is sufficiently broad to cover an accident occurring on the business premises during business hours, even if neither the boys nor the dog were engaged in a business-related function at the instant of injury--is that this injury occurred during business hours, when in fact the nursery was closed at the time. That the nursery was closed to the public, of course, does not mean that the injury did not occur during business hours--in light of the undisputed evidence that both the boys and the dog had business-related functions to perform after the nursery was closed to the public (Tr. 38-39, 44-45, 63-64, 73, 83-84). This dog was a night watchman, and for a night watchman "business hours" begin precisely when the business is closed to the public.

Third and finally, Utica chooses to discuss two of the twenty-three cases which we cite on the point (brief at 36-40). 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 nonetheless was held to cover an injury which occurred while an employee was working on his own truck. Because nothing in the policy excluded activities for the personal benefit of an employee, it was held to cover the accident. Likewise, the policy in this case--covering activities "with respect to the conduct of the business"--does not confine itself to profit-making activities. Utica answers (brief at 26-27), that the policy in LINDERMAN was a "premises liability" policy, which is somehow different from the policy in this case. The policy in this case was also a "premises liability" policy covering the nursery, and, as in LINDERMAN, was limited to injuries bearing some relationship to the conduct of the business. The policy in LINDERMAN covered only "operations necessary and incidental" to the service station covered, and yet the work of an employee on his own car was held to be covered. We think the case is directly on point.

Second, in KNOLLS v. LUMBERMENS MUTUAL CASUALTY CO., 69 R.I. 309, 33 A.2d 183 (1943) (cited in our brief at p. 38), a watchdog kept at a garage escaped and injured a passing pedestrian, and the injury was covered under a policy covering "all operations either on the premises or elsewhere which are necessary and incidental" (our emphasis) to the maintenance, occupation, or use of the garage.[14/] And yet in KNOLLS, the animal was not performing its watchdog function after it had escaped from the garage and was running free. Nevertheless, the policy was sufficiently broad to cover the injury. Thus, even if Utica is correct that no view of the evidence suggests that Shane was performing her watchdog function at the time of the injury, she is no different from the animal in KNOLLS. The injury still occurred with respect to the conduct of the business, because it occurred on the business property during the hours in which Shane's business function was to be performed. We think the KNOLLS case is right on point.

14/ Utica finds this language "more comprehensive" than the language under our policy. We think precisely the opposite argument can be made; the policy in KNOLLS was limited either to operations on the premises or to operations "incidental" to the use of the premises; our policy is broader, since it covers all operations "with respect to the conduct of" the business (our emphasis).

We also invite this Court's attention to the other two-dozen cases which we cite on this issue of coverage (brief at 36-40). They conjoin to establish that the policy at issue in this case is susceptible of a construction by which coverage is allowed for an injury occurring on the premises of a business, during the "business hours" of the watchdog, even if the injury did not occur at a precise moment in which the watchdog was performing her assigned function. That is a reasonable interpretation of this policy covering injuries occurring "with respect" to the business, and the trial court was required to adopt that construction as a matter of law. A fortiori, the trial court did not err in declining to direct a verdict for Utica on the issue of coverage.

Second (brief at 40-44), we argued that even if this policy should be construed to cover only injuries occurring at the precise moment that some business-related activity is taking place, the evidence in this case permitted the jury to conclude that Shane was performing as a watchdog at the time of the injury.[15/] Utica insists (brief at 28) that "the evidence in the present case is conclusive that Shane was not involved in activity incidental to the watchdog function." First, Utica maintains (brief at 2, 28), there was "no evidence" that the three boys were proceeding to turn on the irrigation system--a business-related function--before the injury occurred. We can only repeat Michael Davis' testimony (Tr. 87) that "I think we was just heading back to turn it on." Nor was this, as Utica asserts (brief at 31) a "single statement . . . ." Asked later if he recalled that the boys "were going back to turn it on or had gone back and turned it on already," Michael answered "Yes" (Tr. 88). We think the jury was entitled to believe that testimony.

15/ As we observed in our initial brief (p. 43 n.15), that observation serves readily to distinguish the only two cases cited by Utica (brief at 36-37)--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), and EMPLOYERS MUTUAL CASUALTY CO. v. KANGUS, 245 N.W.2d 873 (Minn. 1976). In both cases there was no evidence that the defendant was performing a job-related function at the time of the injury. One was taking target practice with a pistol, and one was settling off fireworks in the middle of a speedway.

However, we argued that what the boys were doing at the time of the injury is really tangential; the question is what the animal was doing at the time of the injury, since it is the animal which caused the injury. On that point the District Court concluded: "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." 408 So.2d at 772. With all respect, that conclusion makes no sense. The testimony was undisputed that, at least in part, Shane functioned as a watchdog on the property (Tr. 40-41, 71, 73);[16/] and the performance of that function was nothing more than the act of running free in the nursery after it was closed to the public (Tr. 63-64, 73, 83). In addition, there was ample evidence upon which the jury could conclude that the boys had stopped playing with Shane at the time of this injury, no matter where they were heading after doing so. As the plaintiff testified: "[T]he 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).[17/] Thus, Shane "had the run of the nursery" pursuant to her watchdog func-

16/ Utica finds "completely inaccurate" (respondent's brief at 2) our initial assertion that Shane was not a family pet. We refer this Court to all of the citations in our initial brief at page 5, and especially to Tr. 71:

> Q. And isn't it true, Mr. Davis, that you considered Shane a family pet? Just a family dog at this time and didn't designate it as a watchdog?
>
> A. No, that's not true.

The evidence is undisputed that Shane was used as a watchdog, that her expenses were paid for by the business, and that the defendant deducted all such expenses as business expenses on his tax return: "I've had a dog as a watchdog ever since we moved in there, but that particular dog, it was the best one I ever had" (Tr. 40-41). Utica may be correct (brief at 34) that Shane "was also a family pet," but that is wholly irrelevant. We review here a jury verdict on the question of insurance coverage, and we are entitled to view the evidence in the light most favorable to that verdict.

17/ Utica asserts (brief at 3) that the testimony at pages 77-79 of the transcript contradicts our assertion that Michael Davis also testified that the three boys had stopped playing at the time of the accident. To the contrary, we find nothing at these pages which speaks to the point one way or another. But in the two citations above (Tr. 87, 88), Michael does speak to the point, and he supports the plaintiff's explicit testimony (Tr. 125, 152) that the boys had stopped playing at the time of this accident. And even if Utica were correct (brief at 34) that the testimony on this point "was not unanimous," that observation is irrelevant. The jury was amply entitled to conclude that the boys had stopped playing with the dog.

tions (Tr. 88; see Tr. 87).

We simply do not understand why--as a matter of law--Shane was unable to perform her job because she was tied to a wagon, and thus, as Utica asserts (brief at 35) "was outside the scope of employment . . . ." We might agree with Utica (brief at 35) that "the dog was not employed by the nursery business to pull the wagon for any purpose." But that is not the point; even if Shane's business-related function was not to pull the wagon, the question here is whether as a matter of law she was precluded from performing what was her business-related function because she was tied to a wagon. And as we argue in our brief (p. 43), there was nothing about this wagon which prevented Shane from acting like a watchdog. Shane could hear intruders, see intruders, smell intruders, and bark at intruders. She was perfectly capable of performing her business-related function. And certainly the jury could have reached that conclusion.[18/] Indeed, we think the trial court erred in failing to direct a verdict for the plaintiff on coverage, since this ambiguous policy admits of an interpretation providing coverage even if the boys and the animal were not engaged in a business-related activity at the precise moment of injury. But at the least, the question of whether Shane was functioning as a watchdog at the time of injury was one for the jury.

III
CONCLUSION

The plaintiff's judgment should be affirmed in all respects.

IV
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 30th

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18/ Thus, we find incredible Utica's assertion (brief at 36) that the "only conclusion which can be reached from a viewing of the evidence in the light most favorable to the Plaintiff is that the dog was not in any way conducting the business of his [sic.] employer at the time of this accident." That is easy enough to assert; but Utica has not bothered to explain why Shane was precluded from functioning as a watchdog just because she was tied to a wagon. At the least, the question was one for the jury, and the trial court did not err in declining to direct a verdict on coverage.

day of July, 1982, to: TIMON V. SULLIVAN, ESQ., Shackleford, Farrior, Stallings & Evans, P.A., P.O. Box 3324, Tampa, Florida 33601, Attorneys for Appellant; and to HOWARD GARRETT, ESQ., 518 Tampa Street, Tampa, Florida 33602, Attorney for Appellee Davis.

Respectfully submitted,

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