IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JUL 8 1985
CLERK, SUPREME COURT
By ________
Chief Deputy Clerk

JERRY NOBLE, et ux, et al., :

Petitioners, :

vs. : CASE NO. 67,021

SUE A YORKE, et al., :

Respondents. :

ON APPEAL FROM A DECISION OF THE
FOURTH DISTRICT COURT OF APPEAL
DISTRICT COURT NO. 84-1424

RESPONDENTS' ANSWER BRIEF

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POINTS ON APPEAL

POINT I

WHETHER THE DOCTRINE OF EQUITABLE ESTOPPEL IS AVAILABLE TO AVOID THE EXEMPTION FROM LIABILITY CREATED BY F.S. 767.04.

POINT II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE PLAINTIFFS' REQUEST FOR LEAVE TO AMEND.

INTRODUCTION

The Petitioners were the defendants/appellees in the trial court and in the district court of appeal, respectively, and will hereafter be referred to as the "Petitioners". The Respondents were the plaintiffs/appellants in the trial court and in the district court of appeal, respectively, and will be referred to hereafter as the "Respondents".

All emphasis is supplied.

The record on appeal shall be designated by the letter "(R)".

The appendix attached hereto shall be designated by the letter "(A)".

RESPONDENTS' ANSWER TO PETITIONERS' STATEMENT OF THE CASE AND THE FACTS

(A) STATEMENT OF THE CASE

The Respondents essentially adopt the Petitioners' Statement of the Case. However, the Respondents disagree with Petitioners' suggestion or implication that the Fourth District Court of Appeal reversed the trial court's final summary judgment solely upon its finding that the trial court erred procedurely in denying the Respondents' request for leave to amend presented at the summary judgment level. The Fourth District Court of Appeal additionally reversed the trial court's final summary judgment upon its finding that an equitable estoppel would be warranted by the facts of the case at bar and that in this regard a factual question was presented to be decided by a jury and not as a matter of law. Indeed, the jurisdictional basis for the instant case before this Court is predicated upon the question certified by the Fourth District Court of Appeal with regard to the applicability of the doctrine of equitable estoppel to § 767.04 F.S.

(B) STATEMENT OF FACTS

The Respondents essentially adopt Petitioners' Statement of Facts. However, the Respondents believe that the following additional statements are relevant and appropriate.

The route or path taken by the Respondents in their attempt to locate Mrs. Noble once they arrived at the Petitioners' house was in accordance with the express directions given to the Respondents by Mrs. Noble (R-134A) (The transcribed

deposition of Stanley Yorke contains a typographical error which numbered two pages as page 5. The incorrectly numbered page 5 is referred to herein with the suffix "A"). The Petitioner, Mrs. Noble, testified at her deposition that it was understandable that the subject dog would bark and jump at the Respondents inasmuch as the dog was protecting her back yard which was her home for seven years (R-53, 54). Furthermore, Mrs. Yorke also testified that the dog sign on the front door was prompted by the dog's habit of jumping at the front dog and frightening visitors who approach it (R-56).

In addition to the American Kennel Club registration certificate indicating the dog's owner as Betsy Noble (R-21, 22), Mrs. Noble during her deposition testified about the subject dog with such remarks as: "Well, the lady _I_ bought her from ...". "When she was young and _I_ was interested in showing her ... "; " ... _I_ wanted to breed her ... "; "_I_ just had her spade." (R-60)

Finally, Mrs. Yorke testified that some time after the dog bite incident took place, Mrs. Noble explained to her that the Nobles had had a party at their house the Sunday preceding the dog bite and had forgotten to lock or latch the gate (R-103).

SUMMARY OF ARGUMENT

The Respondents contend that the doctrine of equitable estoppel is a viable defense to a dog owner's exemption from liability as provided for under § 767.04 F.S. and that the Fourth District Court of Appeal in the appellate proceedings below was correct in so holding.

The foregoing conclusion is predicated upon the following points which are supported by the authorities appropriately indicated in the body of Respondents' argument;

First. Section 767.04 is in derogation of common law and must be strictly construed. In that regard, absent specific statutory provision, no statutory modification or change in common law will be inferred beyond that necessary to carry out the intent of the legislature in enacting legislation.

Second. The force and effect of the language of a statute is to be determined by legislative intent and no literal interpretation of a statute will be given when to do so leads to an unreasonable result of purpose not designated by the legislature.

Third. One may be estopped to assert a statutory claim or defense absent a specific statutory provision to the contrary.

Section 767.04 F.S. exempts dog owners from liability for bites inflicted by their animals if they display a bad dog sign on their property which is both prominently located and easily readable.

The Respondents submit that it is eminently clear from the foregoing emphasized language of the statute that the

legislature intended to grant dog owners immunity under the statute if and only if they provide actual and effective notice to the public of the risk of being bitten. It is therefore logical and reasonable to conclude that the legislature did not intend to furnish tort exemption to a dog owner who by virtue of intentional and/or negligent misrepresentations undermines and vitiates the effectiveness of the warning for which the "bad dog" sign was designed. Any other conclusion would lead to the absurd result in giving a dog owner license to trap a dog bit victim in circumstances created by that owner and then reward him with the tort immunity provided under the statute. It was precisely for the purpose of avoiding such types of inequities that the doctrine of equitable estoppel developed in the common law.

Application of equitable estoppel in conjunction with § 767.04 F.S. is wholly consistent with the intent of the legislature in enacting the statute and promotes rather than diminishes that intent. It may well be that the legislature could have permissibly expressly provided that equitable estoppel not be available as a defense to the liability exemption of the statute or that such language could have been employed by the legislature from which such intent could be reasonable inferred. Clearly, however, the statute neither expressly disallows application of the doctrine nor does it contain language suggesting such a result. To the contrary, the statute expressly requires an effective and genuine warning and therefore implicitly provides that a dog owner who misrepresents and

vitiates that warning should not be entitled to the statutory tort exemption.

As to the Petitioners' argument that the trial court was correct in refusing to allow Respondents the opportunity to amend their complaint, the Respondents respectfully submit that the law in Florida is clear that such an opportunity should be afforded even at summary judgment proceedings if a claimant can state a cause of action. The record on appeal clearly demonstrates the existence of an issue of fact as to Mr. Noble's ownership of the offending dog. Since § 767.04 F.S. applies only to dog owners, the Respondents should have been entitled to include a common law negligent count against the Petitioner, Mr. Noble. The trial court not only erred in refusing the Respondents' request for amendment at the summary judgment proceedings, but also erred when at an earlier stage of the lower court proceedings, it dismissed the common law count of negligence contained in Respondents' amended complaint.

strictly construed. In that regard, this Court in Carlile v. Game and Fresh Water Commission, 354 So.2d 362 (Fla. 1977), quoted with approval the following language found in 30 Fla. Jur., Statute, § 130:

> "Statutes in derogation of the common law are to be construed strictly, however. They will not be interpreted to displace the common law further than is clearly necessary. Rather, the courts will infer that such a statute was not intended to make any alteration other than was specified and plainly pronounced. A statute, therefore, designed to change the common law must speak in clear, unequivocal terms, for the presumption is that no change in the common law is intended unless the statute is explicit in this regard."

Id. at 364.

In Carlile, supra, the plaintiff brought a personal injury action against a Florida state agency in the county where his accident took place. The state agency moved to transfer the action arguing that under common law when a tort action is brought against the state or one of his agencies, venue lies where the agency maintains its principal headquarters. The plaintiff contended that by virtue of § 762.28 F.S. whereby the state and its agencies waived sovereign immunity and subjected itself to tort claims " ... in the same manner and to the same extent as a private individual ... ", the state waived its common law venue privilege. This Court found that absent a reference to venue in the statute " ... we must conclude that venue was not intended to be covered ... ." Id. at 365.

In City of Pensacola v. Capital Realty Holding, 417 So.2d 687 (Fla. 1st DCA 1982), the district court held that although Florida's Marketable Record Title Act codified as §

712.01, et. seq. F.S., deviated from common law with regard to ancient defects against the title of real property, it was not the intent of the statute to deviate from all common law doctrines regarding real property such as "accretion" absent clear and unequivocal language to the effect. Id. at 689.

Although admittedly the foregoing cases are factually dissimilar to the case at bar, they clearly demonstrate that simply because a statute changes or modifies common law with regard to a specific area of the law, it does not necessarily follow that every other common law principal that may be related to that specific area has also been modified or eliminated. Thus as observed by this Court in Carlile, supra, the mere fact that by statute, the state in derogation of common law consented to be subjected to tort liability in the same manner as a private individual did not also compel the conclusion that the common law principal of venue was modified. A reading of § 767.04 F.S. clearly demonstrates that there is no clear and unequivocal language to the effect that the doctrine of equitable estoppel is unavailable as a defense to the tort exemption created thereunder. Nor does the statute make any reference whatsoever to the doctrine.

Furthermore, there is no inherent prohibition in the law to invoke the doctrine of equitable estoppel with regard to rights or defenses created by statute. As observed in 28 Am. Jur.2d, Estoppel and Waiver, § 34, p. 639:

> "It [estoppel] may, in proper cases, operate to cut off a right or privilege confered by statute or even by the constitution."

See also 31 C.J.S., Estoppel, § 61, p. 389 fn. 54.

Application of the foregoing principal may be found in Moss Theaters, Inc. v. Turner, 616 P.2d 1127 (App. N.M. 1980), involving an action by a theater owner against a contractor for the alleged negligent construction and design of a fence. Examining the evidence introduced at trial, the appellate court found that a jury could have concluded that the plaintiff, by virtue of his conduct, " ... waived any right given it by the Uniform Building Code of the State of New Mexico or that he was estopped to assert such right." Id. at 1131. In so holding, the appellate court referred to numerous case authorities supporting the proposition that a statutory right may be waived or that one may be estopped from asserting such a right. Of particular interest in those cases referred to by the appellate court is Outboard Marine Corp. v. Superior Court, City of Sacramento, 52 Cal. App.3d 30, 124 Cal. Rptr. 852 (1975), which stated:

> "The doctrine of waiver is generally applicable to all rights and privileges to which a person is legally entitled including those confered by statute unless otherwise prohibited by specific statutory provision."

Id. at 1129. The emphasized language, "unless otherwise prohibited by specific statutory provision", underscores this Court's approval and recognition of the statement in Florida Jurisprudence alluded to earlier that statutes in derogation of common law will not be infered to intend to make any alterations

" ... other than specifically and plainly pronounced ... ." Carlile, supra, quoting Florida Jurisprudence.

In addition to the preceding legal principals, other rules of statutory construction relevant to the issue before this Court have been adopted and followed by the courts of this state. For example:

> "It is well settled that in construing a statute the court should consider its history, evil to be corrected, the intention of the law making body, subject regulated and object to be obtained."

Englewood Water District v. Tate, 334 So.2d 626, 628 (Fla. 2d DCA 1976). And as observed by this Court in State v. Sullivan, 116 So. 255, 261 (Fla. 1928):

> "In statutory construction the legislative intent is the pole star by which we must be guided, and this intent must be given effect even though it may appear to contradict the strict letter of the statute ... . The primary purpose designated should determine the force and effect of the words used in the act and no literal interpretation should be given that lends to an unreasonable or ridiculous conclusion or a purpose not designated by the lawmakers."

See also Garner v. Ward, 251 So.2d 252, 255, 256 (Fla. 1971).

With the foregoing principals of law in mind, it is now appropriate to examine the issue certified to this Court by the Fourth District, to wit:

> Is the doctrine of equitable estoppel available to avoid the exemption from liability created by F.S. 767.04.

As demonstrated above, absent specific statutory provision, there is no rule of law which in general exempts statutory rights and defenses from operation of the doctrine of

equitable estoppel. The language of § 767.04 F.S. obviously contains no language specifically precluding application of the doctrine. Nevertheless, the Petitioner contends that if equitable estoppel is available to avoid the liability exemption created under the statute, the intent of the legislature in enacting the statute would be defeated by judicial legislation. If indeed such a result would occur, then admittedly that would be violative of the principals set forth in State v. Sullivan, supra, to the effect that "[i]n statutory construction legislative intent is the pole star ... " by which the courts should be guided. It is thus crucial to determine what in fact was the intent of the Florida legislature in enacting § 767.04 F.S. and in providing the tort exemption thereunder.

In answer to the foregoing question, it must be preliminarily observed that any doubt which may have existed prior to Belcher Yacht, Inc. v. Stickney, 450 So.2d 1111 (Fla. 1984), was resolved by this Court's decision therein, holding that § 767.04 F.S. abrogates the common law with regard to dog bites in situations covered by the statute. Therefore, under the statute it is no longer necessary for a dog bite victim to prove the common law requirement of scienter and absolute liability is imposed upon a dog owner for his animal's bites. However, at the same time the statute grants a dog owner tort immunity for a dog bite if he has on his premises a sign including the words "bad dog" which is both predominantly displayed and easily readable.

The emphasized language immediately above obviously conditions and qualifies a dog owner's tort immunity notwithstand-

ing that he displays a "bad dog" sign on his property -- the sign must be also be prominent and easily readable. Thus the intent of the legislature as observed by this Court in Carrol v. Moxley, 241 So.2d 681 (Fla. 1970) is:

> " ... to make certain that before a dog owner will be relieved of liability, the attempt to give notice that a bad dog is on the premises must be genuine, effective and bona fied."

Id. at 683. Continuing, this Court explained that the purpose of the foregoing notice requirement is to insure that a potential dog bite victim is given " ... actual notice of the risk of bite ... " for " ... it would be unreasonable to conclude that a dog owner should be shielded from liability where a victim was trapped ... ." Id. at 683.

Thus, the question first posed above regarding the intent of the legislature in enacting § 767.04 F.S. with respect to the tort immunity granted a dog owner had already been clearly and succinctly answered by this Court in Carroll, supra. That being to afford exemption from liability if and only if a dog owner genuinely, effectively and bona fidedly, gives actual notice to a potential dog bite victim that he risks being bitten should he choose to enter the dog owner's premises. It was precisely for this reason that this Court in Belcher, supra, affirmed the district court's approval of the trial court's directed verdict in favor of the dog owner, Belcher, with regard to the plaintiff, Stickney's, statutory claim. In other words, the dog owner, by complying with the provisions of the statue in

displaying a prominent, easily readable "bad dog" sign had given Stickney actual notice of the risk of a dog bite.

The fact that Stickney in the Belcher case, supra, may have been a business invitee did not persuade this Court that a different result should be reached. Thus, the Court had little trouble in dismissing the scenario furnished by the Third District Court in Stickney v. Belcher Yacht, Inc., 424 So.2d 926, 966 (Fla. 3d DCA 1984) of a dog owner posting a sign on his premises inviting in the public and at the same time posting a smaller but conspicuous sign warning of a "bad dog". Belcher, supra, tells us that in such cases, so long as the sign complies with the statute, a member of the public enters the dog owner's premises at his risk. But such a conclusion is premised upon the assumption that in fact the dog bite victim was given actual and effective notice of the risk. Carroll, supra. Even the Petitioners concede at page 12 of their brief citing Carroll, supra, that actual notice of the risk is the determinative factor in extending the tort immunity of § 767.04 to a dog owner.

What then should result if a dog owner dilutes and vitiates the warning attendant to a "bad dog" sign displayed on his premises? Should the tort immunity of 767.04 F.S. be extended to a dog owner who affirmatively represents that a "bad dog" sign displayed on his premises can and should be ignored either because the dog is not on the premises or because the animal is safely and securely quartered and represents no risk? Such are the facts in the case at bar.

The record indicates that on the day prior to Mrs. Yorke's dog bite her husband, Stanley, in a conversation with Mrs. Noble was advised by her not to worry about the "Beware of Bad Dog" sign on her premises because the dog was secured and quartered (R-174). As a matter of fact, in that conversation Mrs. Noble told the Yorkes the precise path to take in order to find her once the Yorkes arrived at her property and on the day Mrs. Yorke was bitten, she and her husband followed Mrs. Noble's directions to the letter (R-134a).

After knocking on the front door and receiving no response (R-97, 98), the Yorkes walked around to the right side of the house and began walking down a dirt roadway in the direction of a smaller house or building where Mrs. Noble conducted her seamstress work and where she told the Yorkes she could be found if no one answered the front door of the main house (R-100-101, 135-136). It was along this roadway that Mrs. Yorke was bitten.

The Petitioner argues at page 12 of their brief that the facts of Belcher, supra, are analogous to those of the case at bar because in both instances the dog bite victim saw the statutory posted "bad dog" signs displayed on the respective owner's premises. Ergo, a literal interpretation of § 767.04 F.S. requires that the Yorkes benefit from the tort immunity provided under the statute. However, Belcher, supra, and the instant case are not analogous because although in both instances the dog bite victim saw the warning sign, in the case at bar the victim was told by the dog owner to ignore it and to pretend it

wasn't there. The affirmative conduct and representations of Mrs. Noble was equivalent to removing the sign. Indeed if any analogy does exist between Belcher, supra, and the case at bar, it may be found in this Court's observation that situations may clearly exist under the statute where a jury may have to decide if a bad dog sign was displayed prominently on the premises or easily readable or if in fact the sign existed at all. Belcher, supra at 156. In such cases, the jury would essentially be determining whether the sign provided actual and effective notice. That inquiry is no different in purpose than permitting a jury to decide if a dog owner by virtue of his conduct or representations subsequent to displaying a bad dog sign vitiated or destroyed the effectiveness of the notice intended to be provided by the sign.

It is one thing for a citizen confronted with the two sign example in Stickney, supra, to conciously make the decision to enter the owner's premises, albeit perhaps upon the mistaken assumption that he would not be impliedly invited onto the premises if a bad dog was free to injure him. In such a situation the victim's assumption as to his safety is at best a "guess" and is made directly in the face of a sign warning him that behind the door their lives a dog who can bite him. The dog owner has taken no affirmative action nor made any express representations that would tend to influence the victim's decision, who, but for such representations may very well have decided that discretion in the better part of valour and left. But in a situation such as that in the case at bar, the dog owner has in fact eliminated in the mind of the victim the potential of

a dog bite. By analogy to the Stickney scenario, such conduct on the part of the dog owner would be akin to the owner greeting a visitor at his shop door and reassuring him in no uncertain terms that entry onto the premises is perfectly safe because his "puppy" is well secured and in any event the "bad dog" sign was displayed only for the purpose of scaring away unwanted intruders. Meanwhile, however, the owner's "puppy" who he speaks about so affectionally is a 60-pound pit bull who is not secure by reason of the owner's negligence and who if he so chooses can gain access to the victim.

In this example furnished immediately above, the literal interpretation of § 767.04 F.S. suggested by the Petitiioners would afford the dog owner immunity and in doing so would accomplish precisely what this Court admonished against in State v. Sullivan, supra, where to do so would lead " ... to an unreasonable and ridiculous conclusion or purpose not designed by the lawmaker." Id. at 261. Rather as stated in Sullivan, supra, the primary purpose of a statute should be the measure of the force and effect of the words. In Carroll, supra, this Court held that it would be unreasonable to conclude that the legislature intended to afford a dog owner tort immunity under the statute when a victim was "trapped" because the notice furnished by a posted "bad dog" sign was inadequate. Id. at 683. Is it not also unreasonable to conclude that the legislature intended to relieve a dog owner from tort immunity when, by his conduct, he affirmatively negates the notice displayed on his premises. The literal interpretation of the statute advanced by

the Petitioner necessitates an unreasonable and ridiculous conclusion.

In its opinion below, the Fourth District Court observed that " ... the doctrine of equitable estoppel is deeply engrained in our jurisprudence and should not be abrogated except by specific legislative intent. Yorke v. Noble, 466 So.2d 349, 351 (Fla. 4th DCA 1985) (A-5).

The doctrine of equitable estoppel " ... is based upon the grounds of public policy, fair dealing, good faith and justice (28 Am. Jur., Estoppel and Waiver, § 28) and " ... may constitute a defense of both legal and equitable claims." Commerce National Bank v. Van Denburgh, 252 So.2d 267 (Fla. 4th DCA 1971). As stated in Commerce National Bank v. Van Denburgh, supra:

> "Equitable estoppel may be applied where the representations of one party reasonably leads another to believe in a certain state of affairs and in reliance on such representations the latter changes his position to his detriment. Under those circumstances the person whose representations cause the other to change his position may not later assume a position inconsistent with the state of affairs which has intentionally caused the other to believe."

Id. at 270. See also Boynton Beach State Bank v. Wyth, 126 So.2d 283 (Fla. 2d DCA 1961).

The foregoing statements regarding the fundamental nature and purpose of equitable estoppel are consistent and harmonious with the objective of the legislature in affording a dog owner immunity from tort liability under § 767.04 F.S. Rather than diminishing the intent of the legislature as suggested by the Petitioner, application of the doctrine supports and furthers

that intent. The exemption from tort liability under the statute was obviously conditioned upon actual and effective notice of the risk attendant to entering the premises of a dog owner with a bad dog. Application of equitable estoppel insures that the notice initially displayed by a dog owner remains effective and is not vitiated by the subsequent conduct or misrepresentation.

The Petitioner insists that the language of the statute must be taken literally, i.e., once a dog owner posts a required sign on his premises (assuming it be prominently displayed and easily readable) he is exempted from tort liability simply and finally. Of necessity therefor the Petitioner's position must be predicated upon the conclusion that the intent of the legislature was to afford a dog owner such exemption once a bad dog sign is displayed on his property even if he intentionally or negligently misrepresents the facts and circumstances regarding the safety of entering the owner's property.

The district court held in Yorke, supra:

> "We do not feel the legislature intended to sanction express misrepresentations of fact, nor to immunize those whose misrepresentations caused injury from liability therefrom."

Id. at 351 (A-5). The foregoing holding of the district court is squarely supported by this Court's observation in Carroll, supra, to the effect that it would be unreasonable to conclude that the legislature intended to afford tort immunity to a dog owner where the victim was trapped into coming on to the dog owner's premises. Carroll, supra at 681. The Fourth District Court's holding in Yorke, supra, is further supported by this Court's observation in

Sullivan, supra, that no literal interpretation of a statute should be given which would result in an unreasonable of ridiculous conclusion. Sullivan at 261.

The record on appeal clearly demonstrates that the Yorkes were told to ignore and disregard the "bad dog" sign displayed on the Noble property, that they relied upon that representation and that Mrs. Yorke was injured as a result of that reliance. Clearly the evidence developed in the trial court proceedings were sufficient to create a factual issue to be decided by a jury with regard to estoppel. The Respondent respectfully submits that the district court below was eminently correct in concluding that the doctrine of equitable estoppel is available to avoid the exemption from liability created by § 767.04 F.S. and that this Court's decision in Belcher, supra, in no way precludes application of the doctrine in cases arising under the statute.

In light of all of the foregoing, the Respondent respectfully submits that the Fourth District Court's decision below be affirmed. It is obvious that the argument advanced by the Petitioner would lead to an unreasonable and absurd interpretation of the statute under consideration. The doctrine of equitable estoppel assures that the intent of the legislature in granting tort exemption to a dog owner under § 767.04 F.S. would be furthered rather than diminished. Adherence to the Petitioner's position would defeat rather than promote the obvious intent of the legislature in requiring that before a dog owner be granted the exemption from liability created under the

statute, he must effectively and genuinely give notice of the risk attendant to entering his premises.

RESPONDENT'S ANSWER TO PETITIONERS' ARGUMENT II

THE TRIAL COURT DID NOT ERR IN DENYING THE RESPONDENT'S REQUEST FOR LEAVE TO AMEND

In support of Petitioners' Argument II they state at page 14 of their brief that based upon the facts of the instant case, the Respondents could not have stated a cause of action against either Mr. Noble or Mrs. Noble. Therefore, argued the Petitioners, the trial court was correct in denying the Respondents' request to amend their complaint and the district court was incorrect in holding that the trial court erred in that regard.

The Belcher case, supra, observed that § 767.04 F.S. was applicable only to owners of dogs and did not supersede the common law with regard to non-owners. Belcher, supra at 112, 113. The record on appeal however is replete with evidence from which it could reasonably be inferred that the defendant, Mr. Noble, was not the owner or an owner of the subject dog. For example, a certificate from the American Kennel Club indicates that Mrs. Noble was the sole owner of the dog (R-21, 22). Furthermore, during the course of her deposition, Mrs. Noble spoke about the dog with such remarks as " ... I bought her (referring to the dog) ... " and "When she (the dog) was young and I was interested in showing her, I met some people because I wanted to breed her ... ." (R-60). Furthermore, the Petitioners' admission that they both owned the dog (R-14) could well be taken by a jury to be no more than a self serving statement made in an attempt to afford

the non-dog owner (Mr. Noble) the liability immunity of § 767.04 F.S.

Clearly therefore the Respondents could have stated a common law cause of action against Mr. Noble as a non-owner of the offending dog whose negligence both in quartering the dog as well as in maintaining his property proximately caused Mrs. Yorke's injuries. Such a cause of action was recognized in Flick v. Malino, 356 So.2d 904 (Fla. 1st DCA 1978), involving an action against a non-dog owner spouse who owned property by the entireties where the plaintiff was bitten by a dog owned by the spouse's husband.

In fact in an earlier amended complaint the plaintiff had alleged in count II a cause of action predicated upon the Petitioners' negligent maintenance of the gate confining the subject dog (R-27-31). However, the trial court dismissed that count upon authority of Belcher, supra, (R-36). At the hearing before the trial court at the summary judgment proceedings, the Respondents attempted to amend their complaint to once again state a common law cause of action (R-125, 126). However, the trial judge refused to allow the plaintiffs to amend, again referring to Belcher, supra, to the effect that "I think the Supreme Court has presently said you can't travel under common law." (R-126, 127).

In its opinion in the appellate proceedings below, the Fourth District Court quoted with approval from McClendon v. Key, 209 So.2d 273, 277 (Fla. 4th DCA 1968), to the effect that:

> "Where on a motion for summary judgment matters presented indicate the unsuccessful party may have a cause of action or defense not pleaded, which would justify an amendment of the pleadings, such amendment should not be prevented by the entry of a final judgment. ... Under such circumstances summary judgment should be denied and leave to amend should be granted."

The Respondent respectfully submits that the facts of the instant case falls squarely within the rules stated in McClendon, supra, and that the Fourth District Court was correct in holding that the trial court committed reversible error in not permitting the Respondents to amend their complaint. An examination of the transcript of the summary judgment proceedings in the trial court demonstrate that the trial judge refused Respondents requested amendment upon the mistaken belief that Belcher precluded a common law action for a dog bite under any circumstances and even if not, since the record contained no evidence of scienter, even a common law action would not lie (R-125). However, as pointed out by Respondents at the summary judgment proceedings, evidence of scienter was not developed because that issue was moot once the trial court erroneously dismissed their common law count (R-126).

Parenthetically, the Respondents point out to this Court that the Fourth District Court in its opinion referred to the fact that the trial court had dismissed Respondents common law count of negligence against the Petitioners. However, although the Respondents raised on appeal before the Fourth District Court the trial court's error in dismissing that count (Point III of appellant's brief before the District Court of

Appeal) that issue was not directly reached by the district court in its opinion. Nevertheless it is clear, that the trial court erred in that regard and that such error furnishes an additional basis either independently or in connection with the lower court summary judgment proceedings in holding that the trial court erred in refusing to permit Respondents to amend their complaint.

CONCLUSION

The Respondents respectfully submit that the Fourth District Court of Appeal was correct in holding that the doctrine of equitable estoppel is available as a defense to the exemption from liability created under § 767.04 F.S. in favor of a dog owner; that the district court properly concluded that the facts of the instant case gave rise to a factual issue to be resolved by a jury in determining the existence of an estoppel. Similarly the district court was correct in finding that the trial court erred in not permitting the Respondents to amend their complaint so as to allege a common law negligence count against the Petitioners. Although not expressly reached by the district court, the Respondents submit that the trial court erroneously dismissed the common law count of negligence set forth in their amended complaint.

For all of the reasons presented in Respondents' brief herein, it is respectfully submitted that the decision of the Fourth District Court of Appeal in the appellate proceedings below be affirmed and that the certified question posed to this Court be answered in the affirmative.

Respectfully submitted,

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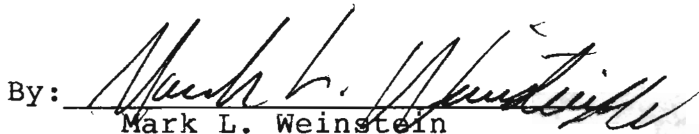
By: 
Mark L. Weinstein

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail, this 3rd day of July, 1985, to: JAMES G. SALERNO, ESQUIRE, Pyszka, Kessler, Massey, Catri, Holton & Doubereley, P.A., Attorneys for Petitioners, 100 Blackstone Building, 707 S.E. 3rd Avenue, Fort Lauderdale, Florida 33316.

By:
Mark L. Weinstein