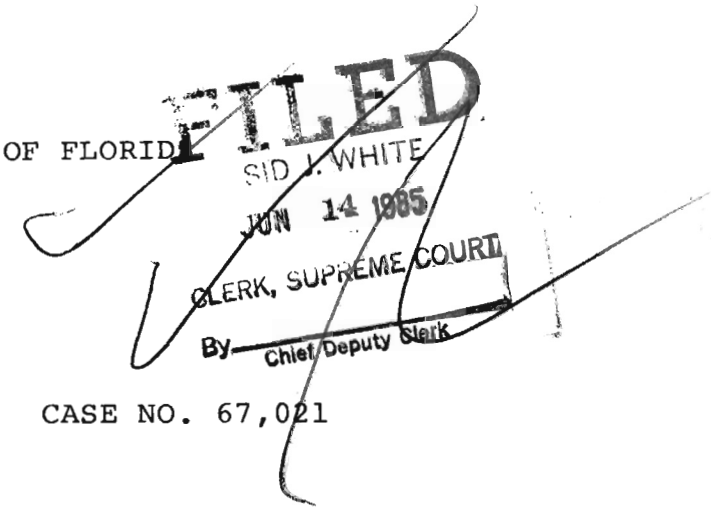
IN THE SUPREME COURT OF FLORIDA



JERRY NOBLE, et ux., et al., :

Petitioners, :

v. : 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

PETITIONERS' BRIEF

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QUESTIONS PRESENTED

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

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

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INTRODUCTION

COMES NOW the Petitioners, and file herewith their Brief of Petitioner in accordance with the applicable rules of this Court.

The Petitioners are the Defendants below, and hereinafter will be referred to as the Petitioners.

The Respondents are the Plaintiffs below, and hereinafter will be referred to as the Respondents.

(R) Shall designate the Record of Appeal.

(A) Shall designate references to the attached Appendix.

Emphasis has been added.

STATEMENT OF THE CASE AND THE FACTS

(A) STATEMENT OF THE CASE

Respondents, SUE A. YORKE and STANLEY YORKE, commenced this action in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, seeking to recover damages as a result of a dog bite sustained by Respondent, SUE A. YORKE, when she was bitten by Petitioner, Nobles' dog.

Subsequent to this, the Respondents filed a three count Amended Complaint against the Petitioners. Count I stated a statutory cause of action against the Petitioners, pursuant to Florida Statute 767.04. Count II stated a common law cause of action predicated upon the Petitioners' negligent maintenance of their property. Count III stated a derivative cause of action for Respondent, Stanley Yorke, based upon his wife's injuries.

Petitioners thereafter filed a Motion to Dismiss Count II of the Respondents' Amended Complaint. The trial court granted Petitioners' Motion and dismissed Count II of the Amended Complaint.

Subsequently, the Petitioners filed a Motion for Final Summary Judgment, which was granted by the trial court, based upon this Court's recent decision of Belcher Yacht, Inc. v. Stickney, 450 So2d 1111 (Fla. 1984).

An appeal was taken from the Final Summary Judgment entered in favor of the Petitioners.

The Fourth District Court of Appeals reversed the trial court's Final Summary Judgment upon its finding that the trial court erred procedurally, in denying the Respondents' request for leave to amend, presented at the summary judgment level.

(B) STATEMENT OF FACTS:

Petitioner, ELIZABETH NOBLE, was involved in the making of "jockey silks". The Respondents, being interested in having a set of jockey silks made for them, contacted the Petitioner, Elizabeth Noble, by telephone. (R-134) Subsequent to this telephone conversation, at approximately 10:00 a.m. on April 12, 1982, the Respondents, SUE A. YORKE and STANLEY YORKE, traveled to the Petitioners' home.

The Petitioners' property is approximately one and one-half acres in over all size. The main house is located in the front of the property and the whole front yard is enclosed by a five foot chain link fence. The back yard behind the main house is similarly enclosed, with a separate, six foot high chain link fence. Approximately 120 feet behind this is a second, smaller building, where the Respondent, Elizabeth Noble, conducts her seamstress work. There is a dirt driveway which runs the whole south perimeter of the Petitioners' property, from the street, all the way to the back of the Petitioners' property. (R-42-44) The Petitioners' dog, is normally kept either in the house or in the back yard, inside the six foot high chain link enclosure. (R-45)

On the date in question, the Respondents arrived at the Noble home, and proceeded to the front door of the main house. (R-97,98) A "Bad Dog" sign was posted on the front door of the Petitioner's home. (R-97,134A) After receiving no answer, the Respondents then proceeded to the right side, or southern most portion of the property, and then began to proceed in an easterly direction down the dirt driveway toward the rear of the Petitioner's property. (R-100, 101, 134-36) As the Respondents passed the back yard of the Petitioners' home, they heard a dog barking and growling. At approximately the same time the Respondents were passing one of the gates, which was part of the rear chain link fence, the Petitioners' dog hit the gate, causing it to open. (R-101-102,135) The Respondent, SUE A. YORKE, reached up to close the gate, and as her fingers protruded through the fence, the dog bit her right index finger.

As to this incident, which is the subject matter of this lawsuit, the Respondents testified at deposition that on the evening prior to April 12, Respondent, STANLEY YORKE, spoke with Petitioner, ELIZABETH NOBLE, over the telephone and was informed by Mrs. Noble that there were "Beware of Dog" signs about her property but not to worry because the dog was secured and quartered. (R-134) The Respondent, STANLEY YORKE, further testified that immediately following the dog bite, he noticed that the latch was in an up-right or unlocked position, thereby permitting the gate to open. (R-137)

The Petitioners' dog, which inflicted the bite, is listed on the American Kennel Club Registration Certificate as an American

Staffordshire Terrier, and the Certificate further lists the dog's owner as one, BETSY NOBLE. (R-21,22) In addition to the American Kennel Club Certificate, the Petitioners, in response to the Respondents' Request for Admissions, filed July 15, 1983, unequivocally admitted that both Petitioners, JERRY and ELIZABETH NOBLE, owned the dog. (R-14)

The Respondents have further testified that, on the day of the incident, after having arrived at the Petitioners' residence, and noticing the "Beware of Dog" sign on the front door, they proceeded cautiously, notwithstanding the telephone conversation the evening before. (R-134A, 135)

STATEMENT OF JURISDICTION

This Court has jurisdiction under the Florida Constitution Article Five, Section 3(b)(3) (1980) and the Florida Rules of Appellate Procedure Rule 9.030(a)(2)(A)(v).

Rule 9.030(a)(2)(A)(v) provides for discretionary jurisdiction of this Court of a decision of the District Court of Appeal that passes upon a question certified to be of great public importance.

The District Court of Appeal for the Fourth District certified the following question to this Court as one of great public importance:

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

This Court, therefore, has discretionary jurisdiction over this cause of action.

SUMMARY OF ARGUMENT

The doctrine of equitable estoppel should not be rendered applicable to bar the statutory defenses available to a dog owner under F.S. 767.04.

It is apparent from the cases which have construed F.S. 767.04 and from the decisions of this Court, that the legislature, in enacting this section, intended the statute to provide the exclusive remedies and defenses in situations which fall under the statute.

Additionally, although the issue regarding an express invitation by a dog owner has not been considered, this Court has held that F.S. 767.04 governs dog bite injuries and that the owner of a business establishment is exonerated from liability in a suit brought by an economic invitee, as long as the statutorily provided defense of posting a "Bad Dog" sign is complied with.

By allowing the doctrine of equitable estoppel to come into play, if this court would in effect be acting in a legislative capacity, by rewriting the statute and providing an exception to the exceptions provided in F.S. 767.04.

Further, this statute was enacted in 1949, and yet with all its reoccurring problems, the legislature has chosen to remain silent. We can only infer from their silence that the legislature has chosen to adopt the interpretations rendered by this court, in support of the statutes' strict interpretation.

Petitioners also contend that the trial court did not err in denying Respondents' request for leave to amend.

It has been noted that we must look to whether or not the facts of the case would justify an amendment of the pleadings.

Respondents have sought to amend, to include a common law count against Mr. Noble, who they contend to be the non-owner of the dog, yet they failed to inform the judge or to present any facts at the summary judgment level from which the trial judge could discern that an amendment to the pleadings may have been justified.

Petitioners assert that in light of their response to a Request for Admissions whereby ownership was admitted by both Jerry and Elizabeth Noble, along with the fact that the Respondents themselves alleged joint ownership in their Complaint, it is clear that the trial court exercised sound discretion in denying respondents request.

ARGUMENT I

THE DOCTRINE OF EQUITABLE ESTOPPEL DOES NOT ACT AS A BAR THEREBY PREVENTING A DOG OWNER FROM CLAIMING THE STATUTORY DEFENSE AS PROVIDED IN F.S. §767.04

Both the Respondents, as argued at the District Court level and the Court of the Fourth District Court of Appeals, as enunciated in their opinion, note that an equitable estoppel would be warranted by the facts of this case.

Although the Petitioners take no issue with the fact that the doctrine of equitable estoppel is deeply ingrained in our system of jurisprudence, Petitioners respectfully maintain that this well established doctrine has no application in cases brought pursuant to F.S. §767.04.

In order to render a determination of this issue, it is necessary to first examine the cases which have construed F.S. 767.04 and to interpret the legislative intent behind the adoption of this Statute.

It has been noted by this Court as far back as 1970, in Carroll v. Moxley, 241 So2d 681 (Fla. 1970) that F.S. 767.04 superseded the common law in that a person who suffers an injury in the nature of a dog bite, may only bring a cause of action under the Statute. This Rule was again enunciated by this Court in 1978, in Donner v. Arkwright-Boston Manufacturers Mutual Insurance Company, 358 So2d 21 (Fla. 1978) This Court, once again revisited this issue in its recent decision of Belcher

Yacht v. Stickney, 450 So2d 1111 (Fla. 1984). In Belcher, this Court held:

> The Dog Bite Statute superseded common law and provides exclusive remedy in dog bite actions ...

Belcher at page 1111.

It is clear from this Court's interpretation of F.S. 767.04 that the legislature in enacting this Statute intended that the Statute provide the exclusive remedy in situations governed by it.

The equitable estoppel argument raised by the Respondents, if adopted, would in essence fly directly in the face of the legislative intent, by providing exceptions, to that which the legislature has deemed to be exclusive.

Respondent and the Fourth District Court of Appeals expressed concern as to the harsh inequities which may result in not allowing the use of the doctrine of equitable estoppel in circumstances such as those in the case at bar. A similar concern was expressed by the Court of the Third District Court of Appeals in Stickney v. Belcher Yacht, Inc., 424 So2d 962 (Fla. 3d DIST 1983) where it noted:

> Florida's Dog Bite Statute, if considered an exclusive remedy, would vitiate, needlessly, the distinction between the degree of care owed by a land owner to a visitor on the land who is an invitee and one who is a trespasser... . The conclusion we would be forced to reach in this case is that the owner may post signs inviting the public unto his lands to do business, and where an accepting member of the public comes unto the land and is mauled by a large attack dog, the owner will not be liable because he has posted another smaller but conspicuous sign which reads "Beware of Dog".

Stickney at page 966.

Both, Respondent and the Fourth District Court of Appeals would contend that the refusal to allow the doctrine of equitable estoppel to act as a bar to the Statutory defenses would result in this gross inequity, as espoused by the Court in Stickney, supra. However, this is not necessarily true. As noted by this Court in Belcher, supra, the Statute cuts two ways. First, it imposes absolute liability upon the owner of a dog for any injuries caused by the dog, regardless of scienter. Secondly, it provides the only defenses by which the dog owner may escape liability from a bite injury inflicted by his dog. Should this Court allow the doctrine of equitable estoppel to come into play and act as a barrier to the Statutory defenses, it would in effect be rewriting F.S. 767.04 by creating an exception to the exceptions provided in the Statute. Therefore, this Court would in essence be acting as a legislative body.

It is a well known general principle that the Courts are law interpreting and not law making bodies, and that the concerns of changing the laws is a legislative as opposed to a judicial function. Further, legislative action is reviewable by the Courts only when the supreme law of the land is violated, and the Courts should not annul the intent the law making powers express in a duly enacted Statute. In the instant case, the intent of the legislature is clear: The owner of a dog will be liable for any damages caused by the animal, however, if the owner takes the necessary precautions, liability will be avoided.

Again, as noted earlier, this Court addressed a situation similar to the case at bar. Belcher Yacht, supra, involved a question of whether an economic invitee could recover against the owner of the dog for dog bite injuries sustained on the business premises. Although Belcher, supra, did not involve an express invitation by the owner to the economic invitee, it can be closely analogized to the situation at bar. In answering this question, this Court adopted the District Court's holding that a directed verdict for Belcher was appropriate in light of Stickney's admission that he had seen and understood the "Beware of Dog" sign.

Again, as noted in Carroll, supra, the only concern is whether or not the "Bad Dog" sign is sufficient to put a potential victim on notice of the risk involved. If so, the owner's liability will be avoided.

It is clear from the facts of this case, that although the telephone conversation did take place the evening before the incident in question, when the Respondents arrived at the Petitioners' home, they both saw the sign and clearly understood its meaning. (R-134A, 135)

F.S. 767.04 was enacted in 1949. Numerous opinions have been rendered, each discussing various difficulties encountered by the application of this Statute. It is clear then that the legislature has been put on notice and yet, has chosen to take no action. One can only infer then, that the intent of the legislature was that this Statute be strictly construed.

As noted by this Court in Belcher Yacht, supra;

> There has been no action by the legislature to amend this law and we are not disposed to revisit the issue.

Id at page 1113

ARGUMENT II

THE TRIAL COURT DID NOT ERR IN DENYING THE RESPONDENTS' REQUEST FOR LEAVE TO AMEND.

Although Petitioners do not dispute the liberal approach given to Rule 1.190 of the Florida Rules of Civil Procedure, they do take issue with the ruling of the Fourth District Court of Appeals that, on the facts of this case, the trial court erred in denying the Respondents' request for leave to amend.

In their opinion the Court noted:

> 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 the 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.

(A-2)

The Petitioners would maintain that the Fourth District Court of Appeals has misapplied this general principle to the facts of the case at bar.

Although the Rule provides that leave to amend shall be freely given when justice so requires, it has been noted:

> Rule 1.190, FRCP, ... is generally interpreted to allow a Plaintiff to at least amend his Complaint one time ... unless ... it is clear that a Plaintiff will not be able to state the cause of action.

Town of Micanopy v.Connell, 304 So2d 478 (Fla 1st District 1974).

Petitioners would contend that in order to discern whether the trial court abused its discretion, we must direct our inquiry to the question of whether the Respondent could clearly state a cause of action, or whether the Respondent may have a cause of action, which would justify an amendment to the pleadings?

Petitioners assert that based on the facts of the instant case, the response to the foregoing must be answered in the negative.

Initially, the Respondents filed their Complaint stating a cause of action pursuant to F.S. §767.04. Subsequently, Respondents filed an Amended Complaint, adding a common law count based on the Petitioners' negligent maintenance of their property. Shortly after the dismissal of this common law count, Petitioners moved for entry of summary judgment. At the summary judgment level, Respondent requested leave to amend which was denied, and the denial of which became grounds for reversal at the district court level. However, a review of the transcripts of the summary judgment hearing reveal that the trial judge was exercising her sound discretion in denying Respondents' request for leave to amend.

Respondent argued at the district court level that a question existed as to the ownership of the offending canine,

which pursuant to Belcher, supra, would justify the amending of their Complaint to include a common law count against the non-owner. Yet, the transcripts reveal that the Respondents never informed the trial court as to a possible dispute involving ownership, thereby raising in the trial court's mind, the possibility of a justification for an amendment of the pleadings. Moreover, the information on which the Respondents claim this dispute, the American Kennel Club Certificate, was made available to the Respondents on October 26, 1983 through a Request to Produce and yet, again, was not presented at the summary judgment level.

Moreover, the record further reveals that the Petitioners, in response to the Respondents' Request for Admissions, filed July 15, 1983, admitted that both Jerry and Elizabeth Noble owned the dog. As to this admission, Rule 1.370(b) of the Florida Rules of Civil Procedure expressly states that matters admitted in a Request for Admission are conclusively established, unless withdrawn or amended.

Furthermore, the Respondents themselves allege the ownership of the dog by both Petitioners in both their original Complaint (R-1-3) and in their Amended Complaint (R-27-31).

In line of the information presented to the trial court at the summary judgment hearing, coupled with the pleadings then before the Court, it is clear that the trial court was exercising sound judicial discretion when it relied on Belcher, supra, as controlling, absent being informed of any grounds which could justify an amendment of the pleadings.

CONCLUSION

The District Court of Appeal of Florida, Fourth District, erred in finding that the application of the doctrine of equitable estoppel would be warranted by the facts of this case and in holding that, the trial court erred procedurally, in denying the Respondents' request for leave to amend.

It is respectfully submitted that for the reasons stated herein, the District Court of Appeal of Florida, Fourth District, decision appealed, must be reversed; that the answer to the certified question presented must be answered in the negative; and that the trial court's decision be reaffirmed.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by United States Mail to MARK L. WEINSTEIN, ESQ., SCHWARTZ, KLEIN, STEINHARDT & WEISS, P.A., Attorneys for Respondents, 2750 N.E. 187 Street, North Miami Beach, FL 33180, on this 13th day of June, 1985.

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