IN THE SUPREME COURT OF FLORIDA

SHAUN LEO REED, et al., Petitioners,

vs.

FELIX BOWEN and MARTHA BOWEN, Respondents.

CASE NO. 69,689

ON PETITION FOR DISCRETIONARY REVIEW
OF THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON JURISDICTION

Submitted By:

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TABLE OF CONTENTS

CITATION OF AUTHORITIES

CITATION OF AUTHORITIES (continued)

STATEMENT OF THE CASE AND FACTS

This cause is before this Court seeking discretionary review of a decision of the District Court of Appeal, Second District. In that October 24, 1986 decision, the Second District affirmed by way of an eleven page per curiam Opinion the Trial Court's denial of Petitioners' Motion to Strike Affirmative Defense which pertained to the only issue submitted for the jury's determination at trial - the application of the mischievous or careless provocation or aggravation of a dog defense to a four year old victim of a dog attack. A.1.[1] In so holding, the Second District expressly and directly disagreed with the only other decision in the State of Florida as to the application of said defense to a child of tender years - Harris v. Moriconi, 331 So.2d 353 (Fla. 1st DCA 1970), cert. dismissed, 341 So.2d 1084 (Fla. 1976). A.2. On November 24, 1986, Petitioners timely filed their Notice to Invoke Discretionary Jurisdiction of Supreme Court pursuant to Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure, and Article V, III(b)(3), Florida Constitution. A.3.

At the time of the attack, the Petitioner/minor child was four years old.[2] As a result of the attack, Shaun suffered multiple, complex dog bite lacerations in and around the eyes which required emergency surgery under a general anesthesia, a two day hospitalization and resulted in Shaun's temporary loss of sight, permanent scarring and permanent emotional trauma. Prior to the trial below, it was uncontested that Florida Statutes §767.04

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[1] All references to the Appendix will be indicated by the symbol "A." followed by the appropriate number from the Appendix.

[2] For purposes of this brief, the minor child/Petitioner, Shaun Leo Reed, will be referred to as Shaun or Petitioner/minor child.

(1982) casts the owner of a dog in the role of a virtual insurer, holding the owner strictly liable for injuries and damages resulting from their dog biting another unless one of the limited statutory defenses applies. It was also uncontested that the Respondents were both the owners of the dog in question and that the dog attacked and bit Shaun, inflicting the severe injuries and damages. Thus, the only contested issues at the start of the trial was whether Shaun was lawfully on the property of the Appellees and whether he somehow carelessly or mischievously provoked or aggravated the dog.

Subsequent to the defense resting below, the Trial Court properly directed a verdict in favor of Petitioners, holding that they had met their burden as a matter of law under Florida Statutes §767.04 (1982) and that Shaun was lawfully on the premises at the time of the attack. Respondents did not appeal the directed verdict entered in favor of Petitioners. Hence, the only remaining issue submitted to the jury was the asserted affirmative defense that Shaun somehow carelessly or mischievously provoked or aggravated the dog.

Both prior to and at trial, Petitioners moved to strike the affirmative defense as inapplicable as a matter of law with regard to an attack of a dog upon a child of tender years - to wit, four years of age. Additionally, Petitioners moved for Summary Judgment prior to trial and for a directed verdict at the close of the Respondents' case on the ground that the affirmative defense was inapplicable as a matter of law to a child of tender years and that the Respondents had failed to offer sufficient proof or evidence beyond mere speculation or conjecture to permit the jury to lawfully find that the dog was mischievously or carelessly provoked or aggravated.

Despite the Trial Court's misgivings with regard thereto and despite the case law directly on point, the Trial Court erroneously ruled that the statutory defense of mischievous or careless provocation or aggravation should

apply to a child of four years. Further, the Trial Court denied Petitioners' Motion for Summary Judgment and Motion for Directed Verdict despite the failure of Respondents to offer sufficient proof or evidence, other than speculation or conjecture, to permit the jury to consider the exculpatory provision of the statute and the asserted provocation or aggravation of the dog.

On December 3, 1985, the jury returned a verdict in favor of the Respondents based solely on the remaining defense. On December 20, 1985, the Trial Court denied Petitioners' timely filed post-trial motions and entered its Final Judgment consistent with the jury verdict. Thereafter, Petitioners timely filed their Notice of Appeal to the Second District on January 15, 1986.

SUMMARY OF ARGUMENT

The Second District Court of Appeal's Opinion below holding that the careless or mischievous provocation or aggravation defense is applicable to a child of tender years in a dog bit case is an acknowledged contradiction of and in direct and express conflict with the decision of the First District Court of Appeal in Harris v. Moriconi, 331 So.2d 353 (Fla. 1st DCA 1970), cert. dismissed, 341 So.2d 1084 (Fla. 1976). Thus, this Court has and should accept jurisdiction of this cause pursuant to Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure, and Article V Section III(b)(3), Florida Constitution.

The Trial and District Courts erred in respectively denying and affirming Petitioners' Motion for New Trial based on the erroneous application of the defense of mischievous or careless provocation or aggravation. As held

ARGUMENT

I. THE OPINION BELOW FINDING THAT THE CARELESS OR MISCHIEVOUS PROVOCATION OR AGGRAVATION DEFENSE TO A DOG ATTACK IS APPLICABLE TO A CHILD OF TENDER YEARS IS IN DIRECT AND EXPRESS CONFLICT WITH THE DECISIONS OF THIS COURT AS WELL AS THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN HARRIS v. MORICONI.

The Second District's decision below has created express and direct decisional conflict within the meaning of Article V, Section III(b)(3), Florida Constitution and Rule 9.030(a)(2)(A)(IV), Florida Rules of Appellate Procedure. The express conflict in the case at bar is not merely "express" as an announcement or application of a rule of law which conflicts or produces a different result from another decision involving substantially the same controlling fact, but is, in fact, an acknowledged contradiction of the rule of law announced in the identical factual setting of Harris v. Moriconi, supra. As the Second District conceded in its opinion:

> In so holding, we disagree with the first district in Harris v. Moriconi, 331 So.2d 353 (Fla. 1st DCA), cert. dismissed, 341 So.2d 1084 (Fla. 1976), that because the term "negligence" as customarily used in tort actions and the term "careless" as used in the statute are synonymous, a child under the age of six is, as a matter of law, incapable of being careless within the meaning of the statute.[2] In arriving at its decision, the first district applied the presumption, enunciated in Swindell v. Hellkamp, 242 So.2d 708 (Fla. 1970), that in the absence of a legislative declaration, any child under the age of six is conclusively presumed incapable of committing contributory negligence.

A.1, p.5 (emphasis added). In order to fulfill the spirit and purpose of Article V(3)(b)(3), Florida Constitution and Rule 9.030(a)(2)(A)(IV), of providing for uniform operation of the laws of the State of Florida as announced by the District Courts, certiorari must be granted in order to reconcile the two contradictory District Court opinions. Furthermore, the

Second District's Opinion is in direct and express conflict with this Court's decision in Swindell v. Hellcamp, 242 So.2d 708 (Fla. 1970), (A.4), wherein this Court, applying a well-established and fundamental principle of common law, held that a child under six years of age is conclusively presumed to be incapable of committing contributory negligence. Swindell is consistent with the vast majority of case law in America that have likewise set minimum ages at which a child is conclusively presumed incapable of negligence. 57 Am.Jur.2d Negligence §361 et.seq. Consistent therewith, this Court has held that children under the age of seven are also conclusively presumed incapable of committing a crime. Clay v. State, 196 So. 462 (1940); see also, 14 Fla.Jur.2d Criminal Law §25 (1979).

Contrary to the First District's holding in Harris, supra and this Court's holding in Swindell, supra and Clay, supra, the Second District improperly opted in its opinion for the Kansas rule of law as announced in Hank's v. Booth, 716 P.2d 596 (Kan. App. 1986), despite its acknowledgement of the Swindell and Clay precedent.

> Although Florida's statute does impose a requirement that the provocation be committed "mischievously" or "carelessly," we agree that there is no precise age at which a child may be said, as a matter of law, to have acquired such knowledge and discretion as to be held accountable for all his actions and that the question of the capacity of a child at a particular age to be capable of committing a willful or malicious act or to avoid a particular danger is one of fact falling withing the province of a jury.

A.1, page 8 (emphasis added).

Such a holding is not only an unsound position as far as policy is concerned, but ignores or rejects this Court's well-settled opinion that a child under the age of seven is conclusively presumed incapable of committing either negligence or a crime.

II. THE TRIAL AND DISTRICT COURTS ERRED IN RESPECTIVELY DENYING AND AFFIRMING PETITIONERS' MOTION FOR NEW TRIAL BASED ON THE ERRONEOUS APPLICATION OF THE DEFENSE OF MISCHIEVOUS OR CARELESS PROVOCATION OR AGGRAVATION.

The cause of action, both below and on appeal, is governed by Florida Statutes §767.04 (1982)[3], which provides both the exclusive remedy and the exclusive defenses in a dog bite action. Belcher Yacht, Inc. v. Stickney, 450 So.2d 1111 (Fla. 1984). However, it is well established that statutory provisions must be interpreted, when possible, in harmony with existing law, both common and statutory.

> Statutes are to be construed with reference to appropriate principles of the common law. And, when possible, they should be so construed as to make them harmonize with existing law, and not conflict with long settled principles. Similarly, the courts will assume that fundamental rules of equity jurisprudence are known to the legislature at the time it inacts a statute, and will not ascribe to the legislature an intent to radically depart from those principles unless clear and explicit language to this purport is used in the statute.

49 Fla.Jur.2d Statutes §172 (1984).

In the case at bar, the Trial Court failed to interpret §767.04, Florida Statutes (1982), in light of the well-established and fundamental principle of common law that a child under six years of age is conclusively

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[3] §767.04 Liability of owners

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

presumed to be incapable of committing contributory negligence or, for that matter, a crime. Swindell supra. Additionally, the Trial Court failed to follow the only decision in the State of Florida directly on point, Harris v. Moriconi, 331 So.2d 353 (Fla. 1st DCA 1976), despite the absence of conflicting authority. As the Second District Court held in Chapman v. Pinellas County, 423 So.2d 578 (Fla.2d DCA 1982) but ignored in the case at bar:

> A trial court is obligated to follow decisions of other district courts of appeal in this state in the absence of conflicting authority and where the appellate court in its own district has not decided the issue.

Id. at 580. The Trial Court therefore committed reversible error in denying Appellants' Motion to Strike the affirmative defense, Motion for Summary Judgment and Motion for New Trial based thereon and in instructing the jury that it should consider the mischievousness or carelessness of the minor Appellant, Shaun Leo Reed.

A. A FOUR YEAR OLD MINOR IS CONCLUSIVELY PRESUMED TO BE INCAPABLE OF COMMITTING NEGLIGENCE OR A CRIME AND THEREFORE IS LIKEWISE INCAPABLE OF MISCHIEVOUS OR CARELESS PROVOCATION OR AGGRAVATION.

As stated by this Court in Swindell, supra:

> In the absence of a legislative declaration, it is our opinion and we so hold, that the child herein involved and any other child under six years of age is conclusively presumed to be incapable of committing contributory negligence. This holding is compatible with the common law rule that a child under seven is conclusively presumed to be incapable of committing a crime in as much as a child must learn individual safety at an early age but social consciousness comes at a somewhat later age.

Id. at 710. See also, Metropolitan Dade County v. Dillon, 305 So.2d 36 (Fla. 3d DCA 1974).

The conclusive presumption necessarily follows from the fact that a person's age, intelligence, experience, knowledge, training, discretion, alertness and physical condition are necessary elements as to whether a person is capable of exercising care in a given situation, detect dangerous conditions or appreciate the degree of hazards involved in conditions actually observed. 38 Fla.Jur.2d Negligence §85 (1982). Likewise, other Courts have held, in like circumstances, that the conclusive presumption against a child of tender years being held accountable for negligence is directly related and applicable to a strict liability dog bite statute with an included provocation defense. See, e.g., Ramsey v. King, 470 N.E.2d 241 (Oh.App. 1984).

B. THE CONCLUSIVELY PRESUMED INCAPABILITY OF A CHILD UNDER SIX YEARS OF AGE COMMITTING NEGLIGENCE OR A CRIME IS DIRECTLY APPLICABLE TO THE AFFIRMATIVE STATUTORY DEFENSE OF MISCHIEVOUS OR CARELESS PROVOCATION OR AGGRAVATION AS SET FORTH IN SECTION 767.04, FLORIDA STATUTES (1982).

As recognized by the Trial Court below, only one appellate court in Florida has considered the question of whether the mischievous or careless provocation or aggravation of a dog under §767.04, Florida Statutes (1982), can be raised with regard to an attack by a dog on a four year old child. Despite the Second District's clear and correct direction in Chapman, supra, and despite the absence of conflicting authority, the Trial Court expressly declined and refused to follow the First District's holding in Harris, supra. Therein, the First District found and held:

> Appellant urges that since a child under six years of age is legally incapable of negligence she is likewise incapable of carelessness and may not therefore be found by a jury to have "carelessly provoke[d]" the dog which bit her. To resolve the issue thus presented, we must determine whether there is a distinction between the term "negligence" as customarily employed in tort actions and "careless" as that term is used in the subject statute. We hold them to be synonymous.

> Having held that as a matter of law the minor plaintiff, being under six years of age, could not have been held liable for carelessly provoking the dog owned by the individual defendant, it necessarily follows that the learned and able trial judge erred in denying appellants' motion for a directed verdict on the issue of liability.

Id. at 355 (footnotes omitted).

As noted by this Court in Donner v. Arkwrite, 358 So.2d 21 (Fla. 1978) and as apparently conceded by the parties to that appeal, the common law defenses of contributory negligence and assumption of the risk were basically subsumed into the mischievous or careless provocation or aggravation defense set forth in §767.04, Florida Statutes (1979). In fact, a long line of cases has consistently conceptualized the provocation or statutory defense as being consistent with the common law defenses of assumption of the risk (now incorporated into the law of comparative negligence - Blackburn v. Dorta, 348 So.2d 287 (Fla. 1977)). Thus, as held by the Third District Court of Appeal in Vandercar v. David, 96 So.2d 227 (Fla. 3d DCA 1957), quoting with approval, Smythe v. Schacht, 93 Cal.App.2d 315, 321, 209 P.2d 114, 118 (1949):

> While the Dog Bite Statute does not found the liability on negligence, good morals and sound reasoning dictate that if a person lawfully upon the portion of another's property where the biting occurred should kick, tease, or otherwise provoke the dog, the law should and would recognize the defense that the injured person by his conduct invited injury and therefore, assumed the risk thereof.

Id. at 25 (emphasis added). Likewise, the Fourth District in English v. Seachord, 243 So.2d 193 (Fla. 4th DCA 1971), held:

> Nor may an owner raise contributory negligence as such as a defense to an action for injuries, although assumption of the risk, usually based on provocation or aggravation of the dog, is permissible as a defense.

Id. at 25. See also Wendland v. Akers, 356 So.2d 368 (Fla. 4th DCA 1978); Allstate Insurance Company v. Greenstein, 308 So.2d 561 (Fla. 3d DCA 1975); Hall v. Ricardo, 297 So.2d 849 (Fla. 3d DCA 1974); Issacs v. Powell, 267 So.2d 864 (Fla. 2d DCA 1972).

In Donner, this Court acknowledged and confirmed the conceptual accuracy of the Vandercar line of cases and their conclusion that the provocation defense could be equated to some degree with the doctrine of contributory negligence or assumed risk. The Donner court merely held that the Vandercar line incorrectly allowed the instruction of a jury in a dog bite case on both the statutory defenses as well as the common law defense of assumption of the risk.

> While Petitioner concedes that the statutory defenses would frequently be applied in much the same fashion as the doctrine of assumed risk, he suggests that to continue permitting trial courts to instruct on the common law doctrine will foster confusion...
>
> We agree with Petitioner that the jury should not have been instructed separately on assumption of risk but should have been charged solely on the defenses expressed in §767.04...
>
> We recognize that our decision today appears to overrule a number of opinions issued by the district courts of appeal of this state stating that the doctrine of assumed risk is a valid defense under the statute. See Allstate... Hall... Issacs... English... Vandercar... However, a careful reading of those cases will show that the defenses asserted, liberally labeled as assumption of risk, were in reality based upon provocation or aggravation of the animal...
>
> Thus, the Vandercar court impliedly concluded that the provocation defense could be equated with the doctrine of assumed risk... Thus, while these cases were conceptually accurate in finding that the defense to the statutory right of action was predicated upon provocation of the dog, as enunciated in the statute, they incorrectly classified this defense as assumption of risk.

Id. at 24-25.

This Court, rather than overruling the Vandercar line of decisions or the Harris, supra, decision, has therefore implicitly affirmed the conceptual accuracy that the provocation defense set forth in Florida Statutes §767.04 (1982) is in fact consistent with the doctrine of assumption of the risk and therefore subject to the conclusive presumption in favor of a child under six years.

CONCLUSION

The decision of the Second District Court below presents decisional conflict which could result in disturbing ramifications at the Trial Court level. A more appropriate petition for certiorari for the resolving of the decisional conflict now existing will not be forthcoming given the fact that the case at bar had but one remaining legal issue. Thus, there are no collateral, factual or legal questions to preclude a clear and determinative decision by this Court as to the appropriate perimeters of the careless or mischievous provocation or aggravation defense. Petitioners therefore respectfully request and urge this Court to accept jurisdiction to review the decision on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to LOUIS L. SUPRINA, ESQUIRE, Post Office Box 1505, Winter Haven, Florida 33883-1505, Attorney for Defendants, FELIX BOWEN and MARTHA BOWEN, this 18th day of December, 1986.

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