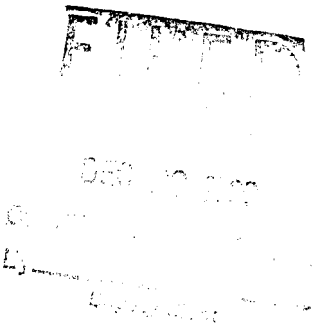

IN THE SUPREME COURT OF FLORIDA

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

RESPONDENT'S BRIEF ON JURISDICTION

Submitted By:

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CITATION OF AUTHORITIES

SUMMARY OF ARGUMENT

Petitioner asks the Supreme Court to invoke its Discretionary Jurisdiction to review this case on the basis that the Second District Court of Appeals decision in this case is in direct conflict or disagreement with the decision of the First District Court of Appeal's decision in Harris v. Moriconi, 331 So.2d 353 (Fla. 1st DCA 1970) cert. dismissed, 341 So.2d 1084 (Fla. 1976).

In actuality, the two decisions present little or no decisional conflict.

Although the Court in the Harris case held that, as a matter of law, a child under the age of six could not be held liable for carelessly provoking the dog and thus he was not subject to this defense under §767.04 Florida Statutes (1982), the Court did not preclude the statutory defense of mischievous aggravation of the dog, because of the child's tender years. In fact, the opinion reflects that the Court considered this defense and determined that under the particular factual circumstances of this case, in that the child unquestionably ran over the dog's tail accidentally, she had not mischievously aggravated or teased the dog into biting her.

However, after considering the same statutory defense of mischievous aggravation and/or teasing the dog, the jury in the present case found that Shaun did mischievously or carelessly provoke or aggravate the dog into biting him and thus found for the defendant dog owners.

Therefore, viewing the decisions as a whole, there is no decisional conflict between them. Both cases considered the defense of mischievous aggravation under the statute. Harris merely held that the minor child had

not mischievously aggravated the dog into biting her, while the present case held that the minor child had mischievously aggravated the dog into biting him.

Respondents therefore respectfully request and urge the Court to decline jurisdiction to review this decision on its merits.

ARGUMENT

I. THE DECISION BELOW IS NOT IN SUBSTANTIAL CONFLICT WITH THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN HARRIS v. MORICONI.

Petitioner asks the Supreme Court to invoke its Discretionary Jurisdiction to review this case on the basis that the Second District Court of Appeals decision in this case is in direct conflict or disagreement with the decision of the First District Court of Appeal's decision in Harris v. Moriconi, 331 So.2d 353 (Fla. 1st DCA 1970) cert. dismissed, 341 So.2d 1084 (Fla. 1976).

Respondent would show that in actuality the decision in these two cases are not in conflict.

In the Harris case, the Court held that as a matter of law (based on the Swindell case), a child under the age of six could not be held liable for carelessly provoking the dog since, in the Court's opinion, the term negligence and careless were synonomous. However, the Court in this case did not hold that a child under the age of six is not subject to the statutory defense of mischievous aggravation of the dog as a matter of law. On the contrary, the Court considered this defense and determined that under the factual circumstances of this case, the child had not mischievously aggravated or teased the dog into biting her, since she had unquestionably run over the dog's tail accidentally.

In addition, Judge Rawl's dissenting opinion in the Harris case points out the Court's majority opinion relative to negligence and careless being synonomous, in respect to a child under the age of 6, applies in common law, but in this case the legislative declaration removes the disability of age. Judge Rawl's decision appears to be the more reasoned one, and the one apparently adopted by subsequent cases.

In Minisall v. Krysiak, 242 So.2d 756, (4th DCA 1970), where a three year old was bitten by a dog and sued under the statute, the Court considered the defendant's affirmative defense that the three year old had mischievously or carelessly provoked the dog into biting her, but the Court in holding for the child, found that the defendants had provided no proof on this defense and thus it failed.

In Donner v. Arkwrite, 358 So.2d 21, (Fl Sup Ct 1978), the Florida Supreme Court held that when considering cases involving FS §767.04, it was removing the common law defenses, including assumption of the risk, once and for all and that the only defenses available to the dog owner were those set out in the statute itself.

In reaching this decision, the Court stated that:

> "With regard to those statutory defenses, the legislature apparently felt that good morals dictated that if a person kicks, teases, or in some other way provokes the dog into injuring him, he should not be compensated."

This decision was reinforced and reaffirmed by the Florida Supreme Court in Belcher Yacht, Inc. v. Strickney, 450 So.2d 1111, (Fl Sup Ct 1984), where it reaffirmed its previous decision in the Donner case, requiring that the statutory defenses superseded the common law defenses in dog bite cases. The Court goes on to say that the decision:

> "overrules all earlier decisions of district courts of appeal to the contrary and that it (the Florida Supreme Court) recedes from any of its previous decisions which appear to conflict with this opinion."

This, of course, included the decisions in the Swindell case and the Harris case, which are the cases Petitioner relies upon to support their right to this Court invoking its Discretionary Jurisdiction to consider the present case.

As stated before, the Harris case considered the defense of mischievously aggravating the dog into inflicting the damage. After such consideration they specifically determined that, under the factual circumstances of that case, the child had not mischievously aggravated or teased the dog into biting her, since she had unquestionably run over the dog's tail accidentally.

However, the present case contained quite a different set of factual circumstances. In the present case, the jury considered this defense also and held that under the factual circumstances of the present case, Shawn did mischievously or carelessly provoke or aggravate the dog into biting him. The jury went on to find for the Defendant and the Second District Court of Appeal affirmed this decision.

To argue further appears to be unnecessary since the Second District Appellate Court's Opinion is so well reasoned and presented, that Respondent merely requests this Court to consider said decision in reaching its present jurisdictional question.

CONCLUSION

The decision of the Second District Court below presents little or no decisional conflict with the First District Court's decision in the Harris case. They both considered the defense of mischievous aggravation under the applicable statute. Harris merely held that the minor had not mischievously aggravated the dog into biting her, while the present case (Reed v. Bowen) held that the minor had mischievously aggravated the dog into biting him. Respondents therefore respectfully request and urge the Court to decline jurisdiction to review this decision on its merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to HANK B. CAMPBELL, ESQUIRE, FROST & PURCELL, P.A., 395 South Central Avenue, P.O. Box 2188, Bartow, Florida 33830, Attorney for Petitioners, SHAUN LEO REED, et al, this 23rd day of December, 1986.

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