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 THE MERITS

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STATEMENT OF THE CASE AND FACTS

This is an appeal by Plaintiffs/Appellants/Petitioners, Shaun Leo Reed, a minor, by and through his parent and next friend, May Elretta Lawrence, and May Elretta Lawrence, individually, of a Final Judgment entered by Judge John H. Dewell. R. 100.[1] This Court accepted jurisdiction of this cause on March 20, 1987 to review the decision of the District Court of Appeal, Second District, entered on October 24, 1986. Therein, the Second District affirmed by way of an eleven page per curiam opinion the Trial Court's denial of Petitioner's Motion to Strike Affirmative Defense which pertained to the only issue submitted for the jury's determination - the application of the mischievous or careless provocation or aggravation defense to a four year old victim of a dog attack. Petitioners timely filed their Notice to Invoke Discretionary Jurisdiction as to the Second District's decision pursuant to Rule 9.030(a)(2)(a)(IV), Florida Rules of Appellate Procedure, and Article V, III(b)(3), Florida Constitution.

The Polk County Circuit Court action was tried before a jury and arose as a result of an attack by the Defendants/Appellees/Respondents, Felix and Martha Bowen's, dog against Shaun on September 2, 1983. At the time of the attack, Shaun was four years old and was lawfully on the property of Respondents. The minor child 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. T. 75-76, 84-87, 111-115.

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[1] For purposes of this brief, the Petitioner/minor child will be referred to as the minor child or Shaun. Additionally, T. will denote the trial transcript portion of the Record on Appeal and R. will denote the balance of the Record on Appeal.

Prior to the trial below, it was uncontested that Florida Statutes §767.04 (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 severe injury and damage. T. 162-163. Thus, the only contested issue with regard to the Petitioners' case in chief as to liability was whether Shaun was lawfully on the property of the Respondents.

Subsequent to the defense resting below, the Trial Court properly directed a verdict in favor of Appellant, holding that Petitioners had met their burden under Florida Statutes §767.04 (1982) and that Shaun was lawfully on the premises at the time of the attack. T. 159. Respondents have not appealed the directed verdict entered in favor of Petitioners. Hence, the only remaining issue with regard to the liability of Respondents was the asserted affirmative defense of Respondents that Shaun somehow mischievously or carelessly provoked or aggravated their 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. T. 5. 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 and that the Respondents' failed and were unable to offer sufficient proof or evidence beyond mere speculation or conjecture to permit the jury to lawfully find that Shaun had mischievously or carelessly provoked or aggravated the dog. R. 11-12, T. 159-160.

As acknowledged by Respondents' counsel in his closing argument, the sole proof or evidence offered by the Respondents with regard to their asserted defense that Shaun mischievously or carelessly provoked or aggravated the dog was the testimony of a neighbor, Mrs. Jean Jones:

> So it narrowed it down to one issue, one defense: Did Shaun provoke or aggravate the dog into inflicting the damage? And, luckily, and we can bless God for this, that there was a witness to that incident, the next door neighbor, because I can honestly tell you that had there not been a witness, we wouldn't be here today. But - so the whole thing, the whole issue here today is going to be determined by you as to whether or not you believe Jean Jones. That's really all you have to determine here today, whether or not you believe Jean Jones.

T. 199 (emphasis added).

Mrs. Jean Jones' testimony with regard to the alleged mischievousness or carelessness was insufficient to give rise to a jury question, given the fact that she testified that she could not actually see what Shaun was doing or whether he in fact touched the dog or anything else - she just assumed he was. T. 154-156. Said testimony was consistent with her deposition testimony filed in support of the Motion for Summary Judgment denied by the Trial Court, wherein she stated:

> A. Well, I was in my living room. I could look out my window right into Mr. Felix' porch and I saw this little boy. And he come around to the van. And he kneeled down and looked under the van and, I don't know whether he pulled the chain to the dog or what he did, but the dog apparently bit him or snapped at him or something. He screamed, and Felix ran out. . .
>
> Q. OK. Could you see the bite itself or the snap itself?
>
> A. No.

Q. OK. You just saw the little boy kneel under there? And did you see him pulling or something?

A. It's apparently as if he was pulling something. So I guess it was the chains. I said it was the chains, I don't know. . .

Q. OK. Was it a bad dog bite, as far as you know?

A. I don't know, I didn't see it.

Q. You didn't see it?

A. No. . .

Q. What actually did you see? Let me get specific. You say you think you saw him pulling on the chain? You're not sure what he was doing under there?

A. I presumed he was after the dog.

Q. OK. What did you actually see that made you presume that?

A. The way he got down. The dog sleeps under the van, and the way he got down there to look under to see if the dog--I say, to see if the dog was under there. And then, as if he reached under to do something. So I just say he was pulling the dog out.

Q. But all you saw was him reached under there?

A. That's right.

Q. You didn't see him pull on the dog's ears?

A. No.

Q. You didn't see him pull the chain, you just thought he was going to pull the chain?

A. As if he was pulling something, so I just said it was the chain.

Q. But you don't know actually what he was pulling?

A. No.

R. 16-20.

Despite the Trial Court's misgivings with regard thereto, T. 93-96, 167, and despite the case law directly on point and contrary to Respondents' position, the Trial Court ruled that the statutory defense of mischievous or careless provocation or aggravation should apply to a child of four years. Further, the Court denied Petitioners' Motion for Summary Judgment and Motion for Directed Verdict despite the failure of the Defendants to offer sufficient proof or evidence, other than speculation or conjecture, to permit the jury to consider the exculpatory provision and asserted provocation or aggravation of the dog. T. 160.

The Court therefore submitted the case to the jury with the only issue pertaining to liability being whether Shaun mischievously or carelessly provoked or aggravated the Respondents' dog such as to bar his recovery from Respondents. The Court instructed the jury:

> The Court now instructs you, as a matter of law, that the Defendants, Felix and Martha Bowen, owned the dog which bit the Plaintiff, Shaun Reed. The Court further instructs you, as a matter of law, that the Plaintiff, Shaun Reed, was lawfully in or on the property of the Defendants, Felix and Martha Bowen, at the time of the aforesaid dog bite. So the issue for your determination on the defenses of the Defendants, Felix and Martha Bowen, is whether the Plaintiff, Shaun Reed, mischievously or carelessly provoked or aggravated the dog that attacked the Plaintiff, Shaun Reed...
>
> If the greater weight of the evidence does not support the defense of the Defendants, Felix and Martha Bowen, then your verdict should be for the Plaintiffs, Shaun Reed and Mae Lawrence, in the total amount of their damages. However, if the greater weight of the evidence supports the defense of the Defendants, then your verdict should be for the Defendants, Felix and Martha Bowen...

T. 206-207.

Thereafter, on December 3, 1985, the jury returned a verdict in favor of the Respondents. On December 10, 1985, Petitioners timely filed their Motion for Judgment in Accordance with Motion for Directed Verdict and Motion for New Trial pursuant to Rule 1.480(b)(c) and Rule 1.530, Florida Rules of Civil Procedure. R. 94-96. The grounds for said Motions were the erroneous rulings by the Court that the affirmative defense of mischievous or careless provocation was applicable despite the age of Shaun as well as the fact that the evidence submitted with regard to the defense could not support or justify the verdict returned by the jury.

On December 20, 1985, the Trial Court denied Petitioners' Motion for Judgment in Accordance with Motion for Directed Verdict and Motion for New Trial and entered its Final Judgment consistent with the jury verdict. R. 97,98. Petitioners timely filed their Notice of Appeal to the Second District Court of Appeal on January 15, 1986, R. 102, which subsequent thereto affirmed the lower court decision. As previously noted, this Court accepted jurisdiction pursuant to Article V, III(b)(3), Florida Constitution and Rule 9.030(a)(2)(IV), Florida Rules of Appellate Procedure on March 20, 1987.

SUMMARY OF ARGUMENT

The Trial and District Courts respectively erred in denying and affirming the denial of Petitioners' Motion for New Trial based on the erroneous application of the defense of mischievous or careless provocation or aggravation to a child of tender years. As held by this Court in Swindell v. Hellcamp, 242 So.2d 708 (Fla. 1970) and either ignored or rejected by the courts below, 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.

Thus, as properly and specifically held by the First District in Harris, supra, the conclusive presumption mandated by this Court in Swindell, supra, that a child under six years of age is incapable of committing negligence (or a crime) is directly applicable to the affirmative statutory defense of mischievous or careless provocation or aggravation as set forth in §767.04, Florida Statutes (1982). Given the fact that the case at bar, as tried and appealed, has no other legal or factual questions to preclude a clear and determinative decision as to the sole issue presented - whether the careless or mischievous provocation or aggravation defense is applicable to a child of tender years - the instant petition presents a perfect vehicle for this Court's resolution of the acknowledged decisional conflict between the First, Second and now Fifth Districts.

As opposed to adopting the First District's well reasoned interpretation as to the application of the statutory defense to a child of tender years (or the similarly persuasive decision of the Ohio Court of

Appeal), the Second District opted for the rationale of the Arizona and Illinois courts despite the primary basis for the decisions in said states - the fact that the statutory defense in said states provides no mitigating or limiting language or circumstances to the defense other than the "provoking" of the animal. In Florida, the Legislature has clearly failed to provide such a broad brush defense to a dog bite attack, limiting the provocation or aggravation to one effected through "careless(ness)" or mischievous(ness)." As such, the question, as properly determined by the First District, becomes not whether a provocation or aggravation occurred, but rather whether it occurred as a result of the careless or mischievous act of the victim given the well-established law in Florida as to the inability of a child of tender years to commit either contributory negligence or a crime. It is patently clear that such a limitation must have been intended by the Legislature as to the statutory defense.

ARGUMENT

I. THE TRIAL AND DISTRICT COURTS ERRED IN RESPECTIVELY DENYING AND AFFIRMING THE DENIAL OF PETITIONERS' MOTION FOR NEW TRIAL BASED ON THE ERRONEOUS APPLICATION OF THE MISCHIEVOUS OR CARELESS STATUTORY DEFENSE TO A CHILD OF TENDER YEARS.

The cause of action below was tried before a jury and arose out of an attack by the Respondents' dog on Petitioner, Shaun Leo Reed. The cause of action, both below and on appeal, is governed by Florida Statutes §767.04 (1982)[2], 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).

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[2] §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."

In the case at bar, the Trial and District Courts failed and refused 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 presumed to be incapable of committing contributory negligence or, for that matter, a crime. See generally Swindell v. Hellkamp, 242 So.2d 708 (Fla. 1970). Additionally, the courts below 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.

Finally, the Second District improperly opted in its opinion below for the Kansas rule of law as to the capability of a child of tender years of committing contributory negligence as opposed to this Court's holding in Swindell, supra. As stated in the opinion below:

> 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 of 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 avoid a particular danger is one of fact falling within the providence of a jury.

Opinion page 8 (emphasis added).

The emphasized position of the Second District above is directly and expressly contrary to this and the majority of courts in the United States' position that a child under the age of six is incapable of committing contributory negligence or a crime. The Trial and District Courts therefore committed reversible error in denying Petitioners' 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 mischievous or carelessness of the minor Petitioner, 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 held by this Court in Swindell, supra, a child under six years of age is conclusively presumed to be incapable of committing contributory negligence or a crime.

> 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). The general principle has likewise given rise under the common law to the Attractive Nuisance Doctrine and the increased duty that a land owner owes to protect child invitees from danger as compared to the duty owed by the same landholder to adult invitees. Green Springs, Inc. v. Calvera, 239 So.2d 264 (Fla. 1970); McCain v. Bankers Life and Casualty Co., 110 So.2d 718 (Fla 3d DCA 1959).

The preference of the Second District Court of Appeal of submitting to a jury the question of whether a child has a particular capacity at a certain age for committing willful and malicious acts or avoiding particular

dangers flies in the face of the majority of Courts in the United States, including this Court, and further ignores the extremely important policy consideration given to the fact that a child of tender years is incapable of discerning the consequences of its actions and, therefore, cannot be held legally liable for acts under any objective standard designed for normal reasoning persons.

> There is an age at which no care can be required of a child, in other words, an age at which the doctrine of contributory negligence has no application. Even there is wide disagreement regarding the criteria to be used for determining whether a child is utterly incapable of negligence, the courts universally recognize that some children may be of such tender years as to be without the mental or physical capacity to understand and appreciate the perils that may threaten them and to avoid such dangers, and therefore are not charged with personal contributory negligence for having failed to avoid injury from such perils, but are conclusively presumed to be incapable of such negligence.

57 Am.Jur.2d Negligence §362 (1972).

Consistent therewith, the Ohio Appellate Court in Ramsey v. King, 470 N.E.2nd 241 (Oh. App. 1984), held, in strikingly similar 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.

> We cannot say where the line of demarcation occurs, with respect to the ability of a child to tease, torment, or abuse, within the meaning of R.C. 955.28, but we hold as a matter of law, that a 3-year-old child is incapable of such conduct. While a child may be capable of such conduct at the age of 5, 6, or 7, it would seem axiomatic that there is some age, in infancy, where we cannot attribute the ability to tease, torment, or abuse to a child. For example, an infant only two weeks old surely cannot be considered capable of teasing, tormenting, or abusing a dog. We hold that such is also true for a child the age of three...

Id. at 244. Thus, this cause should be reversed and remanded for a new trial.

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).

The first Florida appellate court to consider the propriety or lack thereof of submitting to a jury the question of mischievous or careless provocation or aggravation in a dog bite case involving a child of tender years was the First District in Harris, supra. Therein, the First District found and held:

> Petitioner urges that since a child under six years of age is legally incapable of negligence[6] 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.[7]
>
> 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.

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[6] Swindell v. Hellkamp, Sup.Ct.Fla. 1970, 242 So.2d 708.

[7] Webster's Seventh New Collegiate Dictionary defines careless to mean "free from care: . . . UNCONCERNED, INDIFFERENT. . .: not taking care. . .: NEGLIGENT. . ." The same authority defines negligent to mean "marked by a carelessly easy manner".
Ballentine's Law Dictionary, Third Edition, defines careless to mean "A word of broad significance, including negligence, wantonness, recklessness. The word is synonymous with the word 'negligent,' but 'negligent' is probably the preferable word when used in legal pleadings and

> proceedings." (Citation omitted) The lack of due diligence or care. guilty of negligence" and negligence as "A word of broad significance which may not be readily defined with accuracy. (Citation omitted) The lack of due diligence or care. . . . In the legal sense, a violation of the duty to use care. . . ."
> Please see also numerous case cites in Words and Phrases, Volume 6, West Publishing Co., carelessness.

Id. at 355. As to the definitions of careless, Blacks Law Dictionary 193 (5th ed. 1979) simply defines careless to mean "absence of care; negligent; reckless."

In Harris, the First District apparently did not consider and therefore did not hold whether or not a child under six years of age is capable of "mischievous" provocation or aggravation, as the Court held that there was absolutely question that such a defense was refuted by the agreed upon facts of that case. However, given the fact that the underlying basis for the Harris decision is the fundamental principle that a child under six years of age is conclusively presumed incapable of committing either negligence or a crime, it necessarily follows that a child under six is likewise incapable of being held to have mischievously provoked or aggravated a dog that subsequently attacks the child.

The decision by the Trial Court not to strike the affirmative defense and the erroneous instruction to the jury consistent therewith was apparently based on Respondents' argument that this Court had implicitly overruled Harris, supra, in Donner v. Arkwrite, 358 So.2d 21 (Fla. 1978) and Belcher, supra. T.93-94. However, contrary to Respondents' assertion, neither Donner nor Belcher considered or ruled upon the question of whether the defense of mischievous or careless provocation or aggravation could be applied to a minor under six years of age. To the contrary, both Supreme

Court cases merely held that §767.04, Florida Statutes (1979) superseded the common law as to the application of comparative negligence in general and that a jury should not be instructed on both the common law defense of assumption of the risk "as well as" the defenses expressed in §767.04, Florida Statutes (1979).

As noted by this Court in Donner and as apparently conceded by the parties to that appeal, the common law defense of assumption of the risk was 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).

This Court in Donner in fact 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 assumed risk. The Donner court simply held that they incorrectly "classified" the provocation defense as assumption of the risk, and said classification was later improperly argued as authority for the instruction of a jury in a dog bite case on both the statutory defenses as well as the 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 confirmed the conceptual accuracy of the comparison of the provocation defense with the defense of assumption of the risk but stated that the classification with or instruction on both theories was potentially confusing.

The Donner Court in fact went on to specifically state in footnote 5 that:

> While Petitioner concedes that the statutory defenses of "mischievously or carelessly provoking or aggravating the dog" would have to be applied in much the same fashion as the common law doctrine of assumed risk, we note that the statutory and common law defenses are not synonymous. One can knowingly and voluntarily expose himself to the danger of a vicious dog (assumption of the risk) without necessarily provoking or aggravating him maliciously or carelessly.

Id. at 24. This Court thereby implicitly recognized the fact that the assumption of the risk defense was in fact a much broader defense than the provocation defense set forth in §767.04, Florida Statutes (1982). The Court further recognized that the application with regard to the two defenses would necessarily be similar as to both mischievous or careless provocation or aggravation. As held by the First District in Harris, supra, that consistent application would include the fundamental common law principle that a child is conclusively presumed incapable of committing negligence or assuming the risk. Logically, if the common law exception to the doctrine of assumption of the risk applies to that broader defense, it must likewise apply to the more narrow but consistent statutory defense.

The Trial Court was therefore in error in its denial of Petitioners' Motion to Strike, Motion for Summary Judgment and Motion for New Trial as well

as in its instruction to the jury to determine whether Shaun mischievously or carelessly provoked or aggravated the dog that attacked him.

C. THE SECOND DISTRICT'S RELIANCE ON THE CITED ARIZONA AND ILLINOIS DECISIONS IS MISPLACED GIVEN THE DISTINGUISHABLE NATURE OF THE STATUTES IN SAID STATES AND IS INDICATIVE OF THE ERRONEOUS NATURE OF THE HOLDING BELOW.

In the Second District's decision below, the Court relies and prefers the easily distinguishable decisions in Illinois, Arizona and Kansas to support the rationale of its opinion as opposed to those cases, including the First District's opinion in Harris and this Court's decision in Swindell, supra, which are more closely akin to the facts and circumstances of the case at bar and, in the case of Harris, interpret Section 767.04, Florida Statutes (1982) as opposed to the easily distinguishable statutes in Illinois and Arizona. Thus, the Second District appears to prefer the Kansas approach to the question of the capacity of a child at any age to be capable of committing contributory negligence to this Court's well-reasoned decision in Swindell, supra.

Similarly, the Court below cites as authority for its decision the Arizona decision of Tony v. Bouthillier, 631 P.2d 557 (Ariz. Ct. App. 1981) and the Illinois decision of Nelson v. Lewis, 344 N.E.2d 268 (Ill. App. 1976) in preference to the First District's decision in Harris, supra, the Ohio Court of Appeals' decision in Ramsey, supra, and the Louisiana Court of Appeal's decision in Betbeze v. Cherokee National Insurance Company, 345 So.2d 577 (La. Ct. App. 1977), despite the fact that the Arizona and Illinois statutes are clearly distinguishable from the Florida and Ohio statutes with regard to dog bite liability.

In Tony, supra, the Arizona Court of Appeal centered its decision as to the application of the statutory defense of provocation to a child of

tender years on the fact that the statute did not distinguish between intentional and unintentional, or, as in the State of Florida, careless or mischievous, acts of provocation. To the contrary, the statute in Arizona (as well as in Illinois) merely states that a person who provokes a dog, without reference to intent or carelessness, is barred from recovering under the Statute. In Florida, it is clear that the Legislature intended the provocation or aggravation defense to be limited or qualified by the nature and intent of the provocation given its inclusion in the Statute of the requirement that the aggravation or provocation be carelessly or maliciously effected.

D. THE SECOND DISTRICT'S STRICT CONSTRUCTION AND FINDING THAT THE SUBJECT STATUTE IS REPLETE WITH ALL INCLUSIVE TERMS IS CONTRARY TO THE INTERPRETATIONS OF THIS COURT AS TO THE "BAD DOG" SIGN DEFENSE AND THE ACTUAL LANGUAGE AND INTENT OF THE SUBJECT DEFENSE.

Nor is the Second District's finding in its decision below that §767.04, Florida Statutes (1982) should be strictly construed and that the statute is replete with all inclusive terms correct or persuasive. In fact, this and other courts in the State of Florida have explicitly dealt with the construction of the statute and refused to strictly construe same as to the defenses enunciated therein. Significantly, Respondents below argued in their Reply Brief that the treatment of the "bad dog" sign defense in the case law is analogous to the manner in which the other defenses should be treated. Such is an extremely accurate analogy and comparison.

At page four of their Reply Brief below, Respondents stated:

> For the Appellant to contend that the statutory defense of provoking or aggravating the dog inflicting the damages not available to the defendant because of the plaintiff's age, disability would be comparable to contending that the statutory defense of the prominently displayed "bad dog" sign was not available to a defendant

> because a plaintiff was suffering the disability of being unable to see the sign, or unable to read because of lack of education, or being too young to read. Both such contentions are clearly erroneous.

Id.

As specifically held by the Fifth District Court of Appeal in Flick v. Malino, 374 So.2d 89 (Fla. 5th DCA 1979) consistent with this Court's decision in Carroll v. Moxley, 241 So.2d 683 (Fla. 1970):

> She (dog owner) argued successfully before the lower tribunal that Section 767.04, which imposes a strict liability upon dog owners, also protects from liability a dog owner who displays "in a prominent place on his premises a sign easily readable including the words, 'BAD DOG'." The trial judge erred in granting summary judgment for Mrs. Malino (dog owner) because it cannot be said as a matter of law that a sign, even though posted in a prominent place, is "easily readable" as to a three-year-old child.
>
> The Florida Supreme Court has suggested that a "BAD DOG" sign must give actual notice to the plaintiff before the defendant may avoid liability:
>
> > ...[B]efore a dog owner will be relieved of a liability the attempt to give notice that a bad dog is on the premises must be genuine, effective and bona fide. In every case, the factual determination must be made whether the 'Bad Dog' sign as posted is in a prominent place and easily readable, so as to give actual notice of the risk of bite to the victim. Carroll v. Moxley, 241 So.2d 683 (Fla. 1970) (emphasis added)
>
> The Court also noted in Carroll, at 683, that "[n]ot every sign, even if seen, is sufficient to put a potential victim on notice of the risk he assumes by being on the premises." And in Romfh v. Berman, 56 So.2d 127, 129 (Fla. 1951), the Court reversed a jury verdict for the plaintiff because there was no question as to the plaintiff's ability to read a warning sign placed by defendant. We hold that "easily readable" means the plaintiff must have had ability and opportunity to read the warning sign, and in this

> case there was no dispute as to the fact that Jennifer Flick was incapable of reading the warning sign.

Id. at page 90.

As noted in Flick, this Court has at least twice held that in order for a dog owner to be relieved of liability based on the prominent display of a "bad dog" sign, the victim must be such as to be able to obtain actual notice of the risk of an attack by the dog. Respondents' analogy and comparison below is extremely probative and determinative with regard to the issue in the instant appeal of whether the defense of careless or mischievous provocation or aggravation can be applied to a child of tender years. The Trial Court's erroneous holding and the Second District's erroneous affirmance that the defense should be applied to a child of tender years must be reversed.

Similarly and significantly, both this Court, the Second District and the Fourth District Court of Appeal have recently held that the common law doctrine of equitable estoppel consistent with the statutory defenses in §767.04, Florida Statutes (1982) and was therefore available to the victim of a dog bite to avoid the owners' exemption from liability based on the "bad dog" sign defense. Noble v. Yorke, 490 So.2d 29 (Fla. 1986); Godbey v. Dresner, 492 So.2d 800 (Fla. 2d DCA 1986). Thus, contrary to the Second District's decision in the case at bar, it is clear that §767.04, Florida Statutes (1982) has not completely abrogated the common law nor done away with the necessity that statutory provisions be interpreted, when possible, in harmony with existing law, both common and statutory, unless clear and explicit language to the contrary is set forth in the statute.

Additionally, the Second District's finding that §767.04, Florida Statutes (1982) is replete with all inclusive terms such as "any dog," "any

damages," and "any person" is immaterial to the question of whether or not the defense of careless or mischievous aggravation or provocation is applicable to children of tender years. Had the Florida legislature, as did the Arizona and Illinois legislatures, drafted and adopted a statute which states that any provocation was a defense to an action pursuant to the dog bite statute, the statement would be persuasive. However, the Florida legislature clearly and explicitly limited the provocation and aggravation defense to provocation or aggravation that is carelessly or mischievously effected. Thus, the legislature specifically declined to include all inclusive terms as to that defense and a child of tender years, incapable as a matter of law in Florida of carelessness or the intent necessary to commit a crime, cannot be barred from recovery based on said defense.

II. THE TRIAL COURT FURTHER ERRED IN FAILING TO DIRECT A VERDICT IN FAVOR OF APPELLANTS WITH REGARD TO THE ONLY REMAINING DEFENSE AND ISSUE PERTAINING TO LIABILITY.

Even assuming, for argument's sake, that the Trial Court did not commit reversible error by its denial of Petitioners' Motion to Strike, Motion for Summary Judgment and Motion for New Trial, it is clear from the record that Respondents failed to meet their burden with regard to the improperly allowed affirmative defense and that the Court should have directed a verdict in favor of Petitioners on said defense.

As noted in the Statement of the Case and Facts, the Court granted Petitioners a directed verdict at the close of the case with regard to their case in chief under Florida Statutes §767.04 (1982). Thus, the Court held as a matter of law that Shaun was lawfully in or on the property of the Respondents and was attacked and injured by the Respondents' dog while lawfully on said property. T. 159. However, the Court declined at that time

and upon Petitioners' post-trial Motion for Judgment in Accordance with Motion for Directed Verdict to grant a directed verdict in Appellant's favor with regard to the one remaining defense and issue in the case - whether the minor child mischievously or carelessly provoked or aggravated the dog.

As acknowledged by counsel for Respondents, the basis for the aforesaid defense was grounded solely and completely on the testimony of a neighbor, Mrs. Jean Jones. However, Mrs. Jones testified both at trial as well as in her deposition that her testimony with regard to any asserted acts of Shaun and the results thereof was pure speculation. T. 154-156, R. 13-21. In fact, Mrs. Jones testified that she assumed and speculated that Shaun was pulling on something under the van, but that she did not know what he was actually doing as she could not see the action nor could she see the attack by the dog.

Thus, the facts and testimony below, even viewed in a light most favorable to and with all proper inferences in favor of Respondents, establish as a matter of law that the relied upon testimony does not support or justify the verdict returned by the jury given the testimony's speculative, contingent and inconclusive nature and remoteness to the attack. As stated by the Third District Court of Appeal in Wilson v. Robinson, 104 So.2d 124 (Fla. 3d DCA 1958),

> when testimony for a defendant was uncertain and not sufficient to sustain a verdict for the defendant, there was no error in directing a verdict for the plaintiff who successfully carried the burden of proof on the issues presented.

Id. Similarly, as stated generally in 55 Fla.Jur.2d Trial §90 (1984):

> It is clear from the general rules discussed above that a verdict for the plaintiff, or other party with the burden or proof, may properly be directed where there is no opposing evidence or no evidence on which a verdict for the defendant or other

> adverse party may lawfully be found, and the movant fully establishes his claim.

Id. As the Court below found as a matter of law, the Plaintiff fully established his claim and, as argued above, the Defendant was unable to present sufficient evidence to sustain its defense.

The verdict rendered was therefore contrary to the manifest weight of the evidence. The Order Denying Motion for Judgment in Accordance with Motion for Directed Verdict and Motion for New Trial must therefore be reversed and the cause remanded for a new trial on damages only.

CONCLUSION

The Trial Court erroneously held that the statutory defense of mischievous or careless provocation or aggravation should be applied to a four year old minor despite the fundamental principle that a child under six years of age is conclusively presumed to be incapable of committing negligence or a crime. Given the fact that the Court correctly directed a verdict as to the remainder of Petitioners' case in chief, the cause should be reversed and remanded for a trial on damages alone. At the very least, the Trial Court's ruling that the asserted careless as opposed to mischievous nature of Shaun's alleged actions should be submitted to the jury was error requiring reversal for a new trial.

Additionally and notwithstanding the impropriety as a matter of law of the application of same to a four year old minor, the Trial Court erred in failing to direct a verdict in favor of Petitioners with regard to the statutory defense of mischievous or careless provocation or aggravation as the facts and testimony below were insufficient as a matter of law to support or justify the verdict returned by the jury. Wherefore, Petitioners respectfully request this Court reverse the decision and judgment below and remand for a trial on the issue of damages alone.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished by U.S. Mail to LOUIS L. SUPRINA, ESQUIRE, Post Office Box 1505 Winter Haven, Florida 33880, this 14th day of April, 1987.

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