O.A 6.29.87

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 THE MERITS

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STATEMENT OF THE CASE AND FACTS

Petitioners, SHAUN REED, a minor, by and through his parent and next friend, MAY LAWRENCE, and MAY LAWRENCE, individually were Plaintiffs/Appellants below and will be referred to as "Shaun", or "Appellant" in this Brief. Respondents, FELIX and MARTHA BOWEN were Defendants/Appellees below and will be referred to as "the Bowens" or "Appellee" in this Brief.

In the early afternoon of September 2, 1983, Mr. & Mrs. Felix Bowen (Defendants) were sitting under their carporch in front of their home. Their dog was chained to the carporch post and was lying, as he usually does, close to them under their van. After a while, four year old Shaun (Plaintiff) came over to their place and started playing with their dog. At the time Shaun was being baby-sat by his grandfather who, it was ascertained later, was apparently sleeping in his home while Shaun was roaming through the neighborhood.

When the Bowens saw Shaun going toward their dog under their van, Mrs. Bowen told him not to play with the dog, because the dog's ears were sore and that if he played with the dog he might get bitten. When the child persisted in trying to play with the dog, Mrs. Bowen asked him to go home and leave the dog alone. The Bowens watched as Shaun left them and disappeared from their sight at his grandmother's home. They then went inside their own home.

After a few minutes they heard a scream under their carporch and rushed out to find that Shaun had returned to their home and had been bitten by their dog. Mr. Bowen picked Shaun up and immediately brought him to the hospital for treatment.

The Bowens found out later that their next door neighbor, Jean

Jones, had heard and witnessed the whole sequence of events leading up to the biting, including: the Bowens telling Shaun to go home the first time; Shaun leaving; the Bowens going back into their home; Shaun returning to the carporch about ten minutes later with his shoes in his hands; Shaun putting his shoes down and kneeling beside the van; Shaun bending down further to see under the van where the dog was; Shaun pulling on the dog's chain or the dog's ears, at which time the dog snapped at Shaun and bit his face. T.149-157.

Shaun, through his mother, sued the Bowens under Florida Statute §767.04 (1982). The Bowens defended on the basis of the statutory defense that Shaun carelessly or mischievously provoked or aggravated the dog into biting him.

The jury found for the Bowens and the Court issued the final judgment in favor of the Bowens. Shaun appealed this Final Judgment and the Second District Court of Appeal affirmed the Trial Court's decision, by way of an eleven page very well written opinion entered on October 24, 1986.

Petitioner then filed his Petition with this Court, for review of the decision of the Second District Court of Appeal. This Petition was granted.

SUMMARY OF ARGUMENT

The sole issue in the case at bar is whether the defense of "mischievously or carelessly provoking or aggravating the dog", under FS §767.04 (1982), was properly applicable to this particular child. Shaun was four years old at the time of the incident and, according to the jury verdict, had the capacity to understand the consequences of his actions. The particular facts of this case are quite significant since, luckily there was an impartial witness to the whole sequence of events leading up to and including the biting.

Petitioner/Appellant contends that this case should have been decided on the basis of the line of Florida cases which hold that a child of tender years is presumed to be incapable of committing negligence or contributory negligence, and therefore, by Petitioner's reasoning, incapable of malicious or careless action, rather than being decided on the basis of the clear and unambiguous language of the statute, as the lower courts did.

The applicable cases no longer support Petitioner's contention, if in fact they ever have. This court in Belcher Yacht, Inc. v. Stickney, 450 So.2d 1111 (Fla 1984), reaffirmed its previous decisions requiring that the statutory defenses superseded the common law defenses in dog bite cases and further stated that this decision overrules all earlier decisions of the 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.

Florida Statute §767.04 is very explicit about the limited defenses available to a dog bite victim. It places strict liability on the

dog owner, except for those very limited statutory exceptions. Had the legislature intended to limit the exceptions even more, by exempting young children from the statutory defenses provided by §767.04, it would have been a simple matter for it to say so. To add such an exemption by court action would be engaging in judicial legislation of a statute which is already in derogation of the common law. If such an exemption is advisable, it should be done only by the legislature.

In the case at bar, both the lower court and the district court agreed with this line of reasoning and held that it was strictly controlled by the statute and that, because of the plain and unambiguous language of the statute, they could not automatically exempt children below a certain age from the statutes' operation. Having made this determination and the jury having found that Shaun had mischievously or carelessly provoked the dog into biting him, they ruled in favor of the Bowens (dog owners).

Therefore, the lower court's decision should be affirmed on all issues.

ARGUMENT

I. THE TRIAL AND DISTRICT COURTS WERE CORRECT IN HOLDING THAT A CHILD OF TENDER YEARS, WHO IS SUING UNDER THE DOG BITE STATUTE (FLORIDA STATUTE §767.04) IS SUBJECT TO THE STATUTORY DEFENSE OF MISCHIEVOUSLY OR CARELESSLY PROVOKING OR AGGRAVATING THE DOG INFLICTING THE DAMAGE.

Appellee readily admits that the whole issue before the court is whether or not the statutory defense of "mischieviously or carelessly provoking or aggravating the dog inflicting the damage" is applicable to Shaun, who was four years old at the time of the incident.

Appellant contends that this issue should have been decided, not on the basis of the clear and unambiguous wording of Florida Statute §767.04 but by that line of Florida cases which hold that a child of tender years is presumed to be incapable of committing negligence or contributory negligence.

Appellant argues that the cases reflect that a minor under the age of six is conclusively presumed to be incapable of contributory negligence and thus incapable of mischievously or carelessly provoking a dog into biting them. Plaintiff cites mainly the following cases for support:

Swindell v. Hellkemp, 242 So.2d 708 (Fla 1970)

Harris v. Moriconi, 331 So.2d, (1st DCA 1976)

Both of these cases involved a minor under the age of six, with the Swindell case being a 4 year 7 month old girl involved in an automobile accident and the Harris case being a 5 year old girl involved in a dog bite accident, under Florida Statute §767.04 (1982). The Harris case, which was a 1st DCA case, used the Swindell case as precedent for its decision.

Appellee would show the Court that in actuality, the above cited cases are no longer authority for Appellant's argument on the present issue - if in fact they ever have been .

First, the Swindell case concerned common law tort only (not statutory law) when it held that a minor under the age of six was conclusively presumed to be incapable of contributory negligence. In addition, it still left the minor driver of the vehicle (age 17) with the defense that he was not guilty of any negligence which was the proximate cause of the accident. Therefore, since the jury found that the defendant was not guilty of negligence, the court upheld the verdict for the defendant driver. However, under Florida Statute §767.04 (The Dog Bite Statute), the defense of no negligence on the part of the dog owner is not available to the dog owner since this statute is one of strict liability and the owner's defenses are limited to the statutory defenses.

Second, the Harris case 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.

In addition, Judge Rawls' dissenting opinion in this case, noted that the majority opinion was founded on a common law rule that a child under six is legally incapable of negligence. Since common law rules apply only in the absence of a legislative declaration, and the legislature has declared via section 767.04 that the affirmative defense of careless provocation is available without any reference to the age or other disability of

the person committing the act, Judge Rawls felt the common law had been modified and, thus, a child could fall within the statute's proscription. Judge Rawls' 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:

> "... we can only conclude that in making the dog owner the insurer against damage done by his dog, thereby supplanting the common law negligence-type action, the legislature intended to shoulder him with the burden of his animal's act except in the specific instances articulated in the enactment -- where the dog is provoked or aggravated or the victim is specifically warned by a sign. 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 this Court in Belcher Yacht, Inc. v. Stickney, 450 So.2d 1111 (Fla 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 main cases Appellant relies upon to support their right to a reversal of the lower court's orders.

Having concluded that the issue is controlled by statute rather than common law, we must then look to the statute.

Florida Statute §767.04 places strict liability for damages for dog bites upon dog owners, unless:

1. The owner had prominently displayed a "Bad Dog" sign on his premises, or
2. The injured party was not lawfully on the private premises of the owner, or
3. The injured party mischievously or carelessly provoked or aggravated the dog inflicting the damage.

The statute is very explicit about these limited defenses and places strict liability on the dog owner, except for those specific statutory exceptions. Thus, making the dog owner virtually an insurer against damage caused by his dog with only certain explicit exceptions.

The Court in Wendland v. Akers, 356 So.2d 368 (4th DCA 1978), expresses this concept of the statute well when it states:

> "The defenses in the statute are for the protection of the owner of the dog who is free from fault or negligence which proximates the injury."

In the Present Case (Reed v. Bowen), the jury found that Shaun had mischievously or carelessly provoked or aggravated the dog inflicting the

damage, after the trial court instructed the jury that in deciding whether the child mischievously or carelessly provoked or aggravated the dog as contemplated by section 767.04, they should consider all the circumstances surrounding the incident, including the age and maturity of the child.

In considering the present issue before the court, we see that the statutory language does not expressly exempt from this defense young children who are bitten. To add such an exemption would be engaging in judicial legislation of a statute which is in derogation of common law and thus subject to literal construction.

The two most recent Appellate decisions considering this exact issue are the Present Case (which is the subject of this appeal) Reed v. Bowen, 11 FLW 2254 (Fla.2d DCA Oct. 24, 1986) and the case of Walter Porter and Kay Porter, individually, and Walter Porter as next friend of Michael T. Porter, a minor, v. Allstate Insurance Co., et al, 11 FLW 2366-2368 (Fla. 5th DCA Nov. 13, 1986).

The decisions in both these cases are well reasoned, well supported and very succinctly worded. Both go into the subject in great detail, so rather than be repetitious with numerous quotes from these decisions and their quoted supporting cases, Appellee requests the court to read and consider these opinions in full (at the end of this brief) in reaching its decision in this case.

Suffice to say that in the Reed case, the court states:

> "We find that, according to the plain and ordinary meaning of those terms (in the statute), we are precluded from automatically exempting children below a certain age from the statute's operation."

It then goes on to affirm the lower court's decision.

In the Porter case, the Court goes even further with its decision:

> "We hold that a child of tender years can mischievously provoke a dog under Section 767.04 and, thus, afford a complete defense to the dog owner. The statute, which imposes strict liability on the owners of dogs, subject only to the two defenses, is not limited in any manner so as to exclude children. See section 1.01, Florida Statutes (1985) ("person" includes children). Accordingly, the judgment entered below is affirmed."

Thus we see that the case law, as well as the Statute itself, supports the Court's finding that Shaun's claim was subject to the statutory defense that Shaun had provoked or aggravated the dog into biting him.

Having come to this conclusion based on the law governing the issue, we might just take a few moments to see if good morals and public policy would disagree with such a finding in the present case.

In this respect Appellee feels that good morals and public policy should require that the limited statutory defenses in §767.04 should be applicable to all dog bite incidents regardless of age or other disability (insanity, blindness, etc.) of the victim. Otherwise there would be no way that a dog owner could protect himself from strict liability in a great number of incidents.

However, this Court does not have to go quite that far in deciding the present case.

The very limited issue of the present case is: whether this particular child should be subject to the defense while he was only four plus years old even though he had the capacity to understand the consequences of his actions (as determined by the jury) or, should the dog owner be barred from using the statutory defense merely because of the child's chronological age?

Under this case's particular factual circumstances, the mere

raising of the question seems to compel the answer. Shaun, age 4, was a bright child and was warned by the Bowens of the dog's condition and told by them to stay away from the dog or the dog might bite him. The grandfather, who was supposed to be minding Shaun, was asleep in the house while he let Shaun wander around the neighborhood. The Bowens (dog owners) did all that is humanly possible to prevent the accident.

Who should prevail? Surely public policy and good morals are on the side of the innocent dog owner as against a parent (grand-parent in this case) who sleeps while his child wanders the streets.

Were it otherwise, there is no way that a dog owner could protect himself against liability for damage done by his dog to young children.

Therefore, Appellee humbly pleads with the Court to affirm the lower Court's decision.

II. THE TRIAL AND THE DISTRICT COURTS WERE CORRECT IN HOLDING THAT THE EVIDENCE SUBMITTED AT THE TRIAL WAS SUFFICIENT TO PERMIT THE JURY TO LAWFULLY FIND THAT SHAUN HAD MISCHIEVOUSLY OR CARELESSLY PROVOKED OR AGGRAVATED THE DOG INTO BITING HIM.

Having failed in their argument to exclude the defense altogether, Plaintiff seeks to overthrow the decision on the basis that the jury verdict was contrary to the manifest weight of the evidence or in the alternative that the evidence was insufficient to proffer the question to the jury.

The Appellate Court opinion, in this case, does such a fine job of refuting this claim, that Appellee merely refers the Supreme Court to review: first, the record itself, and then the Appellate decision relative to this issue. Any added arguments on this issue would be superfluous.

Appellee feels sure that upon such a review this Court will agree with the Trial and District Courts that sufficient evidence was presented for the Court to proffer the question to the jury for their decision and that sufficient real and circumstantial evidence was presented from which the jury could properly conclude that Shaun had provoked or aggravated the dog into biting him.

Therefore, Appellee humbly pleads with the Supreme Court to affirm the Second District Court of Appeal's decision on all the issues presented.

CONCLUSION

The testimony supports, and the jury found, that Shaun did mischievously or carelessly provoke or aggravate or tease the Bowens' dog into biting him. Shaun did this even after being told to go away and not bother the dog anymore.

The statutory defenses are explicit and make no exceptions for disabilities of any kind. The reason for this is evident. The statute itself places strict liability on the dog owner except under specific circumstances. Public policy then demands that the dog owner be allowed to get out of such strict liability under those certain circumstances, one of which is where the dog owner is not guilty of any negligence and the victim himself provoked the dog into biting him. The present case is just such a case.

Therefore, Appellee/Respondent pleads with the Court to affirm the lower court's decision on all the issues.