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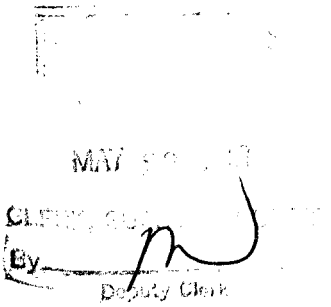
IN THE SUPREME COURT OF FLORIDA

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 REPLY BRIEF ON THE MERITS

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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.

Petitioners would submit that the most significant feature of Respondents' Brief on the Merits ("Answer Brief") is the complete absence of any argument or even mention of two of the more important arguments addressed below. The first argument avoided by Respondents pertains to Respondents' analogy and position below that the careless or mischievous provocation or aggravation defense to a dog bite case should be interpreted and construed in the same light as the other two defenses available to the owner of an attacking dog. Thus, the same principles, law and interpretation should be consistently applied to the child of tender years attacked by a dog which has allegedly been provoked or aggravated as is applied to the blind and illiterate victim of an attack in the presence of a sign warning of a "bad dog" .

As argued below and in Petitioners' Brief on the Merits ("Initial Brief"), such an analogy is extremely accurate and should be determinative as to the basic legal question on appeal and to virtually all of Respondents' points made in their Answer Brief. As such, the following arguments asserted by Respondents in an attempt to support the findings and holding of both the Trial Court and Second District Court of Appeal clearly should be reviewed and, it is believed, found wanting in light of the case law concerning the "bad dog" sign defense ("sign defense") as

applied to blind or illiterate victims as well as the case law upholding an equitable estoppel argument directed against the raising of the sign defense:

> 1) that the wording of §767.04, Florida Statutes (1982) is clear and unambiguous and therefore not subject to interpretation (Answer Brief, Page 1);
>
> 2) that §767.04, Florida Statutes (1982) provides a strict statutory framework for a "dog bite case" and that fundamental common law principles cannot apply or aid in the interpretation of the legislative intent. (Page 2, Answer Brief;
>
> 3) that this Court, in Donner v. Arkwrite, 358 So.2d 21 (Fla. 1978) and Belcher Yacht, Inc. v. Stickney, 450 So.2d 111 (Fla. 1984), removed any and all common law defenses and, apparently, any application of fundamental and consistent common law principles from consideration. (Answer Brief, Page 3);
>
> 4) that the defenses set forth in §767.04, Florida Statutes (1982) are to be strictly and literally construed in the same manner that the liability of the dog owner is strictly construed (Answer Brief, Page 4);
>
> 5) that the statutory language does not expressly exempt young children from the careless or mischievous provocation or aggravation defense and that such an exemption or interpretation of the statute is improper. (Answer Brief, Page 5); and
>
> 6) that the limited statutory defenses in §767.04, Florida Statutes (1982) "should be applicable to all dog bite incidents regardless of age or other disability (insanity, blindness, etc.) of the victim." (Answer Brief, Page 6).

While Respondents obviously have avoided a direct argument as to the necessity of consistent interpretations of the sign defense with the careless or mischievous provocation or

aggravation defense, the above points set forth in the Answer Brief are consistent with Respondents' previous position set forth at Page 4 of their Answer Brief below:

> For the Appellant to contend that the statutory defense of provoking or aggravating the dog inflicting the damage is 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 submitted in the Initial Brief and as argued below, this Court as well as the Fifth District Court of Appeal have specifically addressed Respondents' contention and found it without merit. As held in Flick v. Malino, 374 So.2d 89 (Fla. 5th 1979) and Carroll v. Moxley, 241 So.2d 683 (Fla. 1970), in order for the sign defense to available, it must be shown that the plaintiff had the ability and opportunity to read the warning sign. Thus, this and other courts have specifically construed the purported unambiguous and literal language of the statute, in light of justice and fundamental common law principles, and held that the sign defense is not a "strict" or literal defense to be applied without regard to fundamental common law principles, fairness or justice. It is imperative that the defenses and statute be consistently interpreted.

Consistent therewith, both this Court and the Second and Fourth District Courts of Appeal have likewise held that the

common law Doctrine of Equitable Estoppel was consistent with the statutory defenses set forth in §767.04, Florida Statutes (1982) and was therefore available to the victim of a dog bite to avoid an owner's attempted defense of liability based on sign defense. Thus, contrary to Respondents' position in the Answer Brief and the Second District's decision below, it is clear that §767.04, Florida Statutes (1982) has neither completely abrogated the common law nor done away with the necessity that the statutory provisions and defenses be interpreted in light of and in harmony with existing law, both common and statutory, unless clear and explicit language to the contrary is set forth in the statute.

The second omitted or avoided argument raised below and relied upon to a large extent by the Second District below are the decisions in other jurisdictions with regard to statutory defenses in dog bite cases and their application to children of tender years. Respondents have completely avoided any discussion of the national case law and for good reason. As set forth in the Initial Brief, the Second District relied and preferred the easily distinguishable decisions in Illinois, Arizona and Kansas to support the rationale of its opinion as opposed to relying on those cases, including the First District's opinion in Harris v. Moriconi, 331 So.2d 353 (Fla. 1st DCA 1976) and this Court's decision in Swindell v. Hellkamp, 242 So.2d 708 (Fla. 1970) which are more closely akin to the facts and circumstances of the case at bar.

As noted in the Initial Brief, the Arizona and Illinois decisions with regard to the application of a provocation defense

to a child of tender years specifically relied on and emphasized the fact that the legislatures in Arizona and Illinois failed to distinguish between intentional and unintentional, or, as in the State of Florida, careless or mischievous acts of provocation. To the contrary, those legislatures merely provided that a person who provokes a dog is barred from recovering under the statute. In Florida, it is patently clear that the legislature intended that the provocation or aggravation defense be limited or qualified by the nature and intent of the provocation given its inclusion of the requirement that the aggravation or provocation be carelessly or mischievously effected. Not only is it well established that proper statutory construction mandates that statutes be interpreted and construed, when possible, consistent with appropriate principles of the common law, but the Florida Legislature, as did the Ohio Legislature, specifically limited the statutory defense of provocation or aggravation, contrary to the Illinois and Arizona statutes, to require a specific intent or carelessness prior to the invoking or consideration of the defense.

Respondents argue that to construe the dog bite statute in light of fundamental common law principles, including the conclusive presumption that a child under six years of age is incapable of committing contributory negligence or a crime, would be tantamount to this Court engaging in judicial legislation. However, the failure of the Second District below to look to the fundamental principles of the common law existing at the time of legislation and presumably, as a matter of law, known by the

Legislature, if not corrected, would in fact result in "judicial legislation" as the Legislature's decision not to specifically and definitively abrogate the common law as to the application and extent of the enumerated defenses would not have been given effect. As noted in the Initial Brief,

> (s)tatutes 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).

Additionally, while Respondents are correct in their statement that the statute does not specifically or expressly exempt children of tender years from the careless or mischievous provocation or aggravation defense, Respondents and the Second District have failed to take the next logical step and note that the statute does not exempt blind or illiterate victims from the sign defense or provide for the equitable estoppel of a defendant in its assertion of the sign defense. However, this Court has properly held that, despite the absence of any express exemption, those fundamental principles of justice do in fact temper the sign defense.

Had the Florida Legislature intended "to radically depart from those principles" of the common law as suggested by Respondents, the Florida Legislature could and should have used

clear and explicit language or could have, as did the Arizona and Illinois Legislatures, drafted and adopted a statute which set forth that any provocation was a defense to an action based on the dog bite statute. However, the Florida Legislature clearly and explicitly limited the provocation and aggravation defense to a provocation or aggravation that is carelessly or mischievously effected. Thus, the Legislature specifically declined to include all inclusive terms as to the defenses enumerated in §767.04, Florida Statutes (1982) and such an all inclusive interpretation should not be adopted by this Court absent such a legislative declaration. Therefore, 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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail Postage Prepaid to LOUIS L. SUPRINA, ESQUIRE, Post Office Box 1505, Winter Haven, FL 33882-1505, this 26th day of May, 1987.

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