IN THE SUPREME COURT OF FLORIDA

KURT WIPPERFURTH,

Petitioner,

v.

PATRICIA A. HUIE,

Respondent.

SUPREME COURT CASE NO. 83,476
5DCA CASE NO. 93-01665
CIRCUIT COURT CASE NO. 93-30012-CI-CI

ANSWER BRIEF OF RESPONDENT, PATRICIA A. HUIE

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PRELIMINARY STATEMENT

References to the Record on Appeal from the Trial Court will be designated by the letter "R" followed by the appropriate page number. References to the Deposition Transcript of Patricia A. Huie, contained within the Record on Appeal, will be designated by the letter "D" followed by the appropriate page number. Reference to the Record on Appeal from the Fifth District Court of Appeal will be designated by the letters "AR" followed by the appropriate page number.

The Plaintiff, PATRICIA A. HUIE, will be referred to as "HUIE". The Defendant, KURT WIPPERFURTH, will be referred to as "WIPPERFURTH".

STATEMENT OF THE CASE

The Plaintiff, PATRICIA A. HUIE, brought a personal injury action against KURT WIPPERFURTH and ORMOND KENNEL AND PET CENTER, INC., for injuries sustained as a result of being attacked and bitten by a Doberman Pinscher named "Duke" which was owned by the Defendant, KURT WIPPERFURTH. (R-7, 21 and 47) The attack took place at a kennell operated by ORMOND KENNEL AND PET CENTER, INC. where HUIE was employed. Both HUIE and WIPPERFURTH filed Motions for Summary Judgment on the liability issue based on the facts established by the record which were without dispute. The Trial Court granted the Motion for Summary Judgment filed by WIPPERFURTH and denied the Motion for Summary Judgment filed by HUIE, at which time the Trial Court entered a Final Summary Judgment in favor of WIPPERFURTH and against HUIE. HUIE appealed the entry of that Judgment, as well as the Trial Court's failure to enter Summary Judgment in favor of HUIE and against WIPPERFURTH on the liability issue, to the Fifth District Court of Appeal. The Fifth District reversed the Trial Court in its opinion filed March 4, 1994. (AR-3-10) The Supreme Court issued its Order regarding a briefing schedule for the questions certified to it in the Fifth District Opinion. (AR-12,13)

STATEMENT OF THE FACTS

On June 30, 1990, the Plaintiff, PATRICIA HUIE, was an employee of ORMOND KENNEL AND PET CENTER, INC., in a capacity where she was responsible for caring for and exercising dogs that were boarded with the kennel. (R-33, D-11) Shortly before that date WIPPERFURTH had boarded his dog, a 60 to 75 pound Doberman Pinscher named "Duke" at the kennel. (R-21, D-18-25) Prior to that time, there was no reported indication of the dog's prior inclination for vicious conduct, despite the fact that the dog had been left at the kennel for obedience training. (R-22, D-19)

As part of her duties at the kennel, HUIE walked the animals. At the time of the attack which is the subject of this dispute, she was walking WIPPERFURTH's Doberman Pinscher, Duke, in the kennel's backyard on a 16 foot flex lead leash with a choker collar which was standard procedure. (R-33-35 and D-19-23) At a time when the walk was several minutes old, the dog jumped up on the front of HUIE. At that time she took a step back and said, "No, off", at which time the dog dropped down. She then turned to leave the dog so he could defecate, at which time the dog jumped on her back and bit her shoulder. As HUIE turned to get the dog off, he clamped onto her right arm. HUIE then pulled him to the side gate where he released her. (R-33-34 and D-24-27)

At the time of the attack, Duke was owned by WIPPERFURTH and had been boarded at the ORMOND KENNEL AND PET CENTER, INC. WIPPERFURTH was not present at the time of the attack. There was no veterinarian present and no medical treatment or veterinarian procedures were underway at the time. (D-21,23, 30 and 73)

The Plaintiff, HUIE, worked at the ORMOND KENNEL AND PET CENTER, INC. and lived on premises. Her duties were to manage and care for the animals that resided at the kennel. That set of responsibilities included cleaning, feeding, medicating and walking the animals. (D-13) The dogs were walked 2 to 3 times per day, on each occasion, one at a time. (D-17, 18)

At the time of the attack the dog did not exhibit any growling and made no sounds. (D-31) Shortly after the incident, the dog acted affectionately and wagged his tail in the presence of the Plaintiff. (D-33) There were no other witnesses to the incident and there was no provocation. (D-30,73)

ISSUE ON APPEAL

IS THE OWNER OF A DOG WHO ATTACKS AND BITES A KENNEL WORKER WITHOUT PROVOCATION DURING AN EXERCISE WALK WHILE BOARDED AT THE KENNEL LIABLE FOR DAMAGES UNDER FLORIDA STATUTES, SECTION 767.04?

CERTIFIED QUESTIONS BY FIFTH DISTRICT COURT OF APPEAL:

1. IS THE INDEPENDENT CONTRACTOR EXCEPTION TO THE DANGEROUS INSTRUMENTALITY DOCTRINE AVAILABLE TO A DOG OWNER AS A DEFENSE TO AN ACTION UNDER SECTION 767.04, FLORIDA STATUTES?

2. UNDER SECTION 767.04, DOES THE TERM "OWNER" INCLUDE A KENNEL OWNER OR VETERINARIAN WHO UNDERTAKES THE CARE, CUSTODY, AND CONTROL OF A DOG PURSUANT TO AN AGREEMENT WITH THE DOG'S ACTUAL OWNER?

SUMMARY OF ARGUMENT

HUIE was the victim of a dog attack which took place while HUIE was a kennel worker at the ORMOND KENNEL AND PET CENTER, INC. The Fifth District Court of Appeals reversed a Partial Summary Judgment on liability against HUIE under Florida Statutes, §767.04. That statute provides two defenses which involve either provocation, or exoneration based on the placement of a "bad dog" sign. Neither of those defenses have any application in this case.

The sole issue is whether or not there is an exception to the statutory remedy based on the case of Wendland v. Akers, 356 So.2d 368 (Fla. 4th DCA 1978), cert. denied, 378 So.2d 342 (Fla. 1979). The language in that case dealt with facts that clearly indicate provocation, but the case itself went on to suggest that there existed an "independent contractor" defense when custody or possession of the animal was transferred to a veterinarian who was performing medical services.

From a factual standpoint HUIE distinguishes that case on the basis of its facts since she was neither a veterinarian nor was she performing any medical or other extraordinary services at the time of the attack. In the case before the Trial Court, HUIE was merely walking the dog on a leash as part of her responsibilities as a kennel worker.

From a legal standpoint, the HUIE points out that the courts have refused, on a number of occasions, to engraft any other defenses other than those the legislature clearly intended. In Belcher Yacht, Inc. v. Stickney, 457 So.2d 1111 (Fla. 1984), the

court recognized that Florida Statutes, §767.04, was an exclusive statutory civil remedy for persons bitten by dogs and, thereby, supersedes or eclipses any common law liability that may have previously existed. The courts have indicated that the statute makes the dog owner an insurer of his dog with certain exceptions. Carroll v. Moxley, 241 So.2d 681 (Fla. 1970).

The tort defense of comparative negligence or assumption of the risk are not available in regard to this statute, Donner v. Arkwright-Boston Manufacturers Mutual Insurance Co., 358 So.2d 21 (Fla. 1978) and English v. Seachord, 243 So.2d 194 (Fla. 4th DCA 1971). The Supreme Court has also refused to apply the common law standard of no negligence below the age of six because the statute itself applied to "any person" without restriction, Reed v. Bowen, 512 So.2d 198 (Fla. 1981). In a decision dealing with the Fireman's Rule, the court recognized that that rule was a common-law defense and had no application to a statutory remedy dealing with Florida Statutes, §767.04, Kilpatrick v. Skal, 548 So.2d 215 (Fla. 1989). The Plaintiff's position is quite simple. A remedy has been created by statute for people bitten by dogs against the people or persons who own them. HUIE was bitten by a dog owned by WIPPERFURTH and since none of the recognized statutory defenses are available, HUIE is entitled to a Partial Summary Judgment on liability. The decisions since the enactment of the statute have clearly indicated that there are no other recognized defenses and HUIE is entitled to judgment as a matter of law. As a result, the quesitons certified should be answered in the negative and the decision of the District Court should be affirmed.

ARGUMENT

ISSUE ON APPEAL

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1. Historical Background and Analysis. This case was presented to the Trial and Appellate Courts involving a dog bite in which HUIE, a kennel worker at ORMOND KENNEL AND PET CENTER, INC., was bitten by a dog owned by WIPPERFURTH that was being boarded at the kennel. The facts and circumstances of the case are such that there is no question that none of the statutory defenses of provocation or "bad dog" sign are available and the only question presented is whether or not there is an exception to the strict liability created by Florida Statute, Section 767.04, based on the transfer of the dog from its owner to a temporary custodian.

The analysis of this claim begins with the statutory language which is set forth below:

> **767.04 Dog owner's liability for damages to persons bitten.** 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 person 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 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." (emphasis added)

The evaluation and interpretation of Florida Statutes, Section 767.04, and its companion statute, Section 767.01, have resulted in an interpretation where the statute has been construed as an exclusive statutory civil remedy for persons bitten by dogs which thereby supersedes or eclipses any common law liability that may have existed, Belcher Yacht, Inc. v. Stickney, 450 So.2d 1111 (Fla. 1984); Noble v. Yorke, 490 So.2d 29 (Fla. 1986)

The legislative replacement of any common law remedy has, by its language, clearly and unequivocally made a dog owner liable for damages caused by his dog without regard to the dog's known vicious propensities. The cases indicate that the statute makes the dog owner an insurer of his dog with certain enumerated exceptions, Carroll v. Moxley, 241 So.2d 681 (Fla. 1970)

The Legislature created in the statute two enumerated defenses, those being provocation and the posting of a "Bad Dog" sign. There is no enumerated exception for temporary transfer of the dog's custody or handling by a kennel worker during a walk or any other activity.

The Trial Court, in making its decision, relied upon Wendland v. Akers, 356 So.2d 368 (Fla. 4th DCA, 1978) cert. denied, 378 So.2d 342 (Fla. 1979). The facts established without dispute that Dr. Petschulat was an experienced veterinarian. Mrs. Wendland brought her large German Shepard dog to Dr. Petschulat for treatment and was with him at the time of the injury. At that time, the German Shepard was in strange surroundings, with strong odors, held by two people he had never seen (Dr. Petschulat and his assistant, who was the Plaintiff below). One was standing by him with her arms around his neck to immobilized the front leg for insertion of a needle, and the other pressing his head down. Under these circumstances the dog bit the veterinarian's assistant. The court, on those facts, found the conduct "nothing less than 'carelessly aggravating and provoking' the animal as this statute says". Had the Wendland court gone no further, the same result would have been reached, but HUIE would have prevailed at the Trial Court level since there was no provocation or other recognized defense. However, the Wendland court created or recognized as a defense an exception to the strict liability imposed by statute by a so called "independent contractor" defense and compared the transfer of the dog to the veterinarian with a car to a repair shop in regard to the imposition of liability.

In Wendland, supra., the court at various times agreed that the offending conduct was provocation, that the assumption of risk defense applied, and that there was a question of causation. The announced holding recognizes an exception to the statutory

liability for a veterinarian doing his job as an independent contractor without comparative negligence on the part of the owner which seems to take the case outside the statute's framework.

The question in this case is very different. In Wendland, supra., there were facts strongly suggesting that the veterinarian's assistant was bitten as a result of a diagnostic procedure where the dog had to undergo aggravation or provocation to be treated. In HUIE, the services provided were similar to those provided by an owner, that is walking the dog. There was no claim or facts to support provocation or aggravation. There was no veterinarian providing treatment and the dog was merely a boarder and not there for treatment or medicial care.

While the dog was boarded, the facts indicate that the dog attacked the Plaintiff without provocation, an act the owner would be responsible for, but for the temporary stay at the kennel. The statute itself contemplates liability "on or in a public place, or lawfully on or in a private place, including the property of the owner of such dog". The language clearly intended liability to extend beyond the owner's property and to properties of others. There obviously is no requirement that the dog owner be present.

It should be noted that despite the determination that the Supreme Court clearly held that Section 767.04 superseded common law in those situations covered by the statute, Belcher Yacht, Inc. v. Stickney, 457 So.2d 1111 (Fla. 1984) and Carroll v. Moxley, 241 So.2d 681 (Fla. 1970), the Legislature has not amended or revised Section 767.04 since Carroll, supra. and Donner v. Arkwright-Boston Manufacturers Mutual Insurance Company, 358 So.2d 21 (Fla. 1978).

The recognition of Section 767.04 as the exclusive statutory remedy has eliminated the tort defense of comparative negligence and assumption of the risk, Donner v. Arkwright-Boston Manufactuers Mutual Insurance Company, 358 So.2d 21 (Fla. 1978) and English v. Seachord, 243 So.2d 194 (Fla. 4th DCA 1971). In Reed v. Bowen, 512 So.2d 198 (Fla. 1981) the question of the provocator's age was decided under Section 767.04. The court held that the common law definition of no negligence below age six did not apply because the Legislature provided that the provocation defense applied to "any person" without restriction, indicating the legislative intent. In another application, the Florida Supreme Court dealt with the application of the Fireman's Rule in Kilpatrick v. Skal, 548 So.2d 215 (Fla. 1989). The court recognized the Fireman's Rule was a common law defense which had no application to the statutory remedy. The court stated that

> . . .The majority of this Court determined that the statutory claim superseded any common law causes of action. We find the same principle and reasoning applies to common law defenses. We also agree with the Third District that only those defenses provided by statute under section 767.04 apply. We also agree that those defenses apply to a claim under section 767.01. See Rattet v. Dual Security Systems, Inc., 373 So.2d 948 (Fla. 3d DCA 1979), cause dismissed, 447 So.2d 887 (Fla. 1984). . .

By analogy there are only two defenses to strict statutory liability under Section 767.04. Wendland, supra., can be distinguished on its facts as a clear provocation case which is a defense unavailable on the facts of HUIE. The courts have repeatedly refused to recognize or create any other defenses to Florida Statutes, §767.04, and the "independent contractor" defense has no application in this matter.

2. **Disposition of First Certified Question.** The Fifth District Court of Appeal clearly recognized the Florida Supreme Court's precedent prior and subsequent to Wendland:

> "Wendland has made it clear that, until the legislature mandates otherwide, Section 767.04 supersedes the common law and provides both the exclusive remedy and defenses in a dog-bit action. We, therefore, reluctantly conclude that the independent contractor defense recognized in Wendland is no longer viable in an action brought against a dog owner under Section 767.04."

Carroll v. Moxley, 241 So.2d 681 (Fla. 1970), concluded that Section 767.04 superceded the common law in those situations covered by statute. In Donner v. Arkwright Boston Manufacturers Mutual, 358 So.2d 21 (Fla. 1978), the Court made it clear that only statutory and not common law defenses applied based on the statute which made the dog owner an insurer against damage done by his dog.

The Wendland decision is an abberation in the history of the interpretation of the statute and is inconsistent with earlier or later opinions by the Supreme Court. For that reason, the first certified question should be answered in the negative, until such time as the statute is amended by the legislature to allow such defense.

3. **Disposition of the Second Certified Question.** Section 767.04 does not define the term "owner". In Belcher Yacht, Inc. v. Stickney, 450 So.2d 1111 (Fla. 1984), the Supreme Court held that the actual owner of the dog faced liability under Section 767.04 when the owner's guard dog bit a third party on the owner's premises. The security guard who had custody and control of the

guard dog, when it bit the third party, was not liable under the statute, and liability as to custodian could only be had by resort to common law principles. As the Fifth District pointed out, in Huie v. Wipperfurth, 632 So.2d 1109 (Fla. 5th DCA 1994), there have been various treatments of non-owners based on statutory definitions of ownership in other states which are different from Florida Statutes, Section 767.04. HUIE does not question, dispute or oppose an expansion of the definition of ownership to include custodians of the dog, in addition to the actual owner, in regard to liability which would clearly be consistent with the legislative intent which makes the owner the insurer of the damage by his dog. However, Belcher Yacht allows a remedy against the custodian based on common law but, does not impose statutory liability. In Flick v. Malino, 356 So.2d 904 (Fla. 1st DCA 1978), the wife of a deceased dog owner was not an owner even though the dog resided at the residence of the dog owner's wife. In Smith v. Allison, 332 So.2d 631 (Fla. 3rd DCA 1976), the Plaintiff had the clear burden to show defendant's actual ownership of the dog, not mere custody or possession. These decisions seem to suggest that the legislative intent, clear on its face, is that the dog owner and, no one else is subject to statutory liability. While HUIE does not oppose an expansion of that concept, it does not appear to be an appropriate function of this Court to expand the definition which should be a legislative function.

The dog bite statute, Section 767.04, was designed and has been interpreted to shift damages for dog bite victims to the animal's actual owner based on the public policy of holding a dog

owner responsible for the damage done by his dog. The policy can be expanded by answering the second certified question in the positive but, would not be served by attempting to shift ownership to a temporary custodian and relieving the person clearly the focus of the statute in its language. Obviously, the actual owner is the intended focus of the statute. Kennel owners or veternarians are not owners under any legal or equitable theory. That cannot sell or dispose of the animal and, upon demand would be required to return the animinal to its true owner. Under the circumstances of this case, the second certified question should be answered in the negative unless and until the legislature amends the statute and expands the definition which has been interpreted consistent with the language of ownership for some time.

CONCLUSION

The Supreme Court, if it decides that the certified questions are adequate for resolution by the Court, should answer both questions in the negative. While HUIE does not oppose an expansion of the definition of ownership to include custodians such as kennels or veternarians, she does not believe that that was the legislative intent or that such an interpretation would be consistent with the historical case law regarding this statute and, therefore, requests that both certified questions be answered in the negative and that the matter be remanded to the Trial Court for Trial on the issue of damages.

Respectfully submitted,

By: _____
WILLIAM A. PARSONS

CERTIFICATE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 16th day of June, 1994, to J. Richard Boehm, Esquire, Post Office Box 6511, Daytona Beach, Florida 32122.

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