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w/app

SUPREME COURT OF FLORIDA

KURT WIPPERFURTH,

Petitioner,

vs.

PATRICIA A. HUIE,

Respondent,
_____/

CASE NO.: 83,476

PETITIONER'S INITIAL BRIEF

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STATEMENT OF THE CASE

Patricia Huie (Huie), the Plaintiff/Respondent, brought suit against Gary Bessett (Ormond Pet and Kennel Club) and Kurt Wipperfurth (Wipperfurth) based on Section 767.04 for injuries sustained when a dog, owned by Wipperfurth, but that was being boarded by Bessett pursuant to a contract between Wipperfurth and Bessett. (R-15). At the time of her alleged injuries, Huie was employed by Bessett. The trial court subsequently granted summary judgment in favor of Kurt Wipperfurth. (R-199). Ormond Pet and Kennel is not a party to this appeal.

Huie appealed the matter to the Fifth District Court of Appeal which reversed the lower court in Huie v Wipperfurth, 632 So. 2d 1109 (Fla. 5th DCA 1994). The court certified these two issues to this Honorable Court as being of great public importance.[1]

On April 7, 1994, this Honorable Court postponed its decision on jurisdiction and ordered that Petitioner file this brief on the merits.

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[1]. Additionally, by virtue of the Fifth District Court of Appeal's decision which is in direct conflict with Wendland v Akers, this Court also has jurisdiction under Fla.R.App.P. 9.030(a)(2)(A)(iv) which provides discretionary jurisdiction where the decision of one district court "expressly and directly conflict(s) with a decision of another district court of appeal."

STATEMENT OF THE FACTS

The facts are not in dispute in this case. Huie was employed by Bessett. (R-15). Her duties included bathing, grooming, feeding, exercising and medicating the animals at the kennel, (R-15) including "Duke", the dog owned by Wipperfurth.

"Duke" was boarded at the kennel in January 1990 for the purpose of receiving care and obedience training while Wipperfurth was out of town on vacation. (R-15). On the afternoon of January 30, 1990, while Huie was walking Duke, Duke jumped up on Huie's arms and chest. Huie said "no, off," and she stepped back and Duke then dropped to the ground. (R-55). When Huie turned to leave, Duke jumped on her back and bit her on the back and on the right arm and shoulder. (R-55). To Huie's knowledge, Duke never before had behaved in a hostile or otherwise unusual manner. (R-58).

SUMMARY OF ARGUMENT

Petitioner argues that this Honorable Court should answer both questions posed by the District Court in the affirmative. The strict liability of a dog owner under the statute is identical to the strict liability of a owner under the dangerous instrumentality doctrine. Therefore, the principles of law should be analogous.

The dangerous instrumentality doctrine does not extend to instances where an owner delivers the instrumentality to an independent contractor. Likewise, it has been held that the statute, 767.04, which forms the basis of this cause of action, does not extend to instances where an owner delivers possession and complete control to a professional third party, in this case a veterinarian. Further, the purpose behind the statute would actually be enhanced rather than thwarted under such a holding, since it would place responsibility where it belongs, on the party having the most ability to control and restrain the animal.

This Court has not definitively addressed who would be considered an owner under Section 767.04. A pragmatic, flexible approach should be adopted. Florida law embraces a variety of definitions for owner. The intent of the statute is to place responsibility on persons whose dogs cause injury to people. The statutory burden should fall on those who have complete dominion over their animals. Thus, the trial court should be affirmed.

ARGUMENT

I - INTRODUCTION

The Fifth District Court of Appeal certified to this Court two questions:

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, Fla. Stat?

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 owner pursuant to an agreement with the dog's actual owner?

Huie v. Wipperfurth, 632 So. 2d 1109 (Fla. 5th DCA 1994). The questions certified by the appellate court spring from the issue of whether an owner, who contracts with a dog care professional is liable when the dog bites an employee of the professional under Section 767.04 of the Florida Statutes (1989). The appellate court applied the statute, ignoring the relationship between the parties and the concomitant creation of duties arising by virtue of that relationship and in particular, the rules of law which have evolved with regard to the dangerous instrumentality doctrine.

II. THE HOLDING OF WENDLAND V AKERS APPLIES AND BARS RECOVERY UNDER THE STATUTE.

A. The historical background of the statute.

Initially, it is clear that the first question has been answered affirmatively in Wendland v. Akers, 356 So. 2d 368 (Fla. 4th DCA 1978) cert. denied, 378 So. 2d 362 (Fla. 1979). An understanding of Wendland, begins with a historical review of Section 767.04. At common law, knowledge of the dog's vicious

propensities by the owner was a necessary element of any cause of action against a dog owner. In 1949, the legislature enacted Section 767.04, which provides

> 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 owner's 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 has 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'.

Section 767.04, Fla. Stat. (1989) (The "statute). This statute was passed to modify the harshness of the first dog bite statute. Unlike Section 767.01, Section 767.04 provides for certain defenses such as provocation and the posting of a "Bad Dog" sign. Further, proximate cause continued to be a required element under Section 767.04. See Wendland, at 370.

Nonetheless, The statute superseded the common law and imposed a form of strict liability on the dog owner. The question presented by this appeal and in particular, the first certified question is whether the statute applies under all circumstances.

The trial court, relying on Wendland v Akers, 356 So.2d 368 (Fla. 4th DCA 1978), cert. denied, 378 So.2d 362 (Fla. 1979), held that the petitioner was not liable under Section 767.04. The appellate court, in reversing the trial court, held that Wendland has been impliedly overruled by subsequent cases.

In Wendland, the owner of a german shepherd left his dog with a veterinarian for treatment. Id. at 368. The vet's assistant was holding the dog as the vet tried to give it a shot. Id. The dog bit the assistant who in turned sued the legal owner of the dog. Id.

While recognizing that Section 767.04 created a form of strict liability for dog owners, the court held that the statute did not apply when the proximate cause of the injury was the intervening negligence of a third party. Id at 371. The court initially noted that the legislature in enacting Section 767.04, recognized the fact that society had passed from an agrarian society, and thus, Section 767.01 should be viewed, "not only for the purposes of protecting those damaged by acts of dogs but to relieve the owners of dogs used for pets and protection of owners in modern society from the harshness of the strict liability created by the former statute." Id at 370. Indeed, the court looked to the fact that the legislature had set forth the defense of provocation within the statute for the protection of an owner who is free from fault or negligence which proximately causes the injury. Id. In sum, the court held:

> The owner of a dog is not liable to a third party for damages from being bitten or

> otherwise injured by such dog subsequent to the delivery of possession and control of the dog to a qualified veterinarian for care or treatment and the acceptance of such employment and possession by the veterinarian, in the absence of a showing of active negligence by the owner which contributes directly to and becomes the proximate cause of said injury.

Id at 371.

As stated above, the question of proximate causation, is an important factor in determining liability under Section 767.04. In Jones v. Utica Mutual Insurance Company, 463 So. 2d 1153, 1156-1157 (Fla. 1985), this Court stated "We reject the view that the Legislature intended strict liability for dog owners in every instance where the actions of a dog are a factor in an injury. Clearly the rules of ordinary causation should apply." Thus the basis of Wendland stands. Relying on the principles gleaned from the dangerous instrumentality doctrine, Wendland held that strict liability should not apply, since proximate is lacking, due to the assumption of control by a third party.

B. The principles surrounding the dangerous instrumentality doctrine have direct application to this case.

Florida Courts have long recognized that the owner of a dangerous instrumentality is strictly liable for damages caused by that instrumentality. Thus, the owner of the automobile, for example, becomes liable for the negligent operation of that automobile by one who drives with his express or implied permission. The dangerous instrumentality doctrine creates a principle-agent relationship between owner and user. "In other

words, as a matter of law, the relationship of principal and agent is raised out of the factual situation. When one permits another to operate his automobile under his license, he becomes as a matter of law the principal and the driver becomes his agent for the purpose." Weber v. Porco, 100 So. 2d at 146,149 (Fla. 1958). Thus, just as in the case of the statute, under the doctrine, an owner is held strictly liable for damages caused by an instrument simply by virtue of ownership. The liability lies rooted in policy. See, Anderson v. Southern Oil Co., 73 Fla. 432, 74 So. 475 (1917).

However, this doctrine has not been extended to situations where the dangerous instrumentality is in the control of an independent contractor. Florida Power and Light Co. v. Price, 170 So. 2d 293 (Fla. 1964) clearly enunciated the applicable exception:

> We hold that liability flowing from the operation of the doctrine of dangerous instrumentalities and inherently dangerous work is subject to the exception that where the defendant owner contracts with an independent contractor for the performance of inherently dangerous work and the latter's employee is injured by a dangerous instrumentality owned by the defendant which is negligently applied or operated by another employee of the independent contractor but wholly without any negligence on the part of the defendant owner, the latter will not be held liable.

Id. at 298. Thus, the dangerous instrumentality doctrine is not intended to create liability on the part of the owner "solely by reason of ownership" for the negligent operation by one employee resulting in injury to another employee when the instrumentality is

turned over to an independent contractor. Fry v. Robinson Printers, Inc., 155 So. 2d 645 (Fla. 2d DCA 1963); Price at 296.

Since the basis for the dangerous instrumentality doctrine is the recognition that an owner of a dangerous instrumentality should ensure the public's safety when entrusting it to someone else, Florida courts, including this Honorable Court have refused to extend liability where an owner relinquishes that control to a third party. In such case, the owner has lost the ability to ensure public safety, and should not be held liable under the doctrine. Castillo v. Buckley, 363 So. 2d 792,793 (Fla. 1970). Under an independent contract, responsibility for the dangerous instrumentality passes to the contractor. "The exception...grows out of the relationship created by the independent contract and the assumption of risks that are necessarily concomitant." Price, 170 So.2d at 298.

The Wendland court drew a parallel between a strict statutory liability of a dog owner and the common law dangerous instrumentality doctrine applicable to an automobile and stated "The rule of law growing out of these cases, is very analogous to that which has arisen out of the statutes [767.01;767.04] above discussed. Liability flowing from the operation of a dangerous instrumentality and inherently dangerous work is subject to the exception of independent contractors". Wendland, at 371. Wendland noted that when a pet owner takes the dog to a veterinarian, he is in essence relinquishing control of the animal to a person who holds himself out to the public as a professional. Id at 371. By

virtue of the contract between the animal owner and a veterinarian, the veterinarian has the status of an independent contractor. Thus "his employment and complete control over performance of a contract" makes any alleged negligence of the owner remote and unrelated to the proximate cause of the plaintiff's injury. Id.

The court aptly summed up the logic of applying these holdings to Section 767.04 in Wendland:

> He (the veterinarian) was a person of superior knowledge and in possession and control of the agency which inflicted the injury. He was presumed to have superior knowledge of the proper manner of performing the duties of his profession. He was an independent contractor under the law. 'The right of control as to the mode of doing the work contractor for is one of the principle considerations in determining whether one employed as an independent contractor or a servant." Gulf Refining Co. v. Wilkinson, 94 Fla. 644,114 So. So. 503. Also see American Jurisprudence 2d, Independent Contractor, paragraph 6. The veterinarian determined absolutely the method of treating and handling of the dog.

Id. at 370. In contrast, Huie refused to apply Wendland's rational. The court stated, "Because of applicable Florida Supreme Court precedents, we reluctantly conclude the trial court erred in applying the common law defense in an action brought under 767.04 Fla. Stat. (1989)." Huie, 632 So. 2d at 1109. The Court's decision is flawed in several respects.

Contrary to the appellate court's holding, Wendland can be reconciled with both the case and statutory law. Initially, the district court chose to characterize Wendland as creating a "defense" under Section 767.04. However, Wendland does not create a defense to the statute, rather it simply places an interpretation

on 767.04 which would avoid its application is certain instances.

In other words, Wendland simply does not apply the statute. This is an important point. In Huie, the court based its decision on the fact that this Honorable Court has expressly refused to consider defenses to dog bite cases that were not contained in the statue. Huie, 632 So. 2d at 1109. However, this is different than a determination that the statute does not apply in a certain scenario. Thus, the Fifth District Court of Appeal is mistaken in its characterization of Wendland's holdings. Since Wendland did not create an additional "defense", it is not overruled by subsequent cases.

An affirmative defense is one which "bars or voids the cause of action asserted by an opponent in the preceding pleading." Storchwerke v Thiessen's Wallpaper, 538 So.2d 1382, 1383 (Fla. 5th DCA 1989); H. Trawick, Trawick's Florida Practice and Procedure, 193-194 (1993). Wendland did not create a "confession and avoidance", but analyzed Section 767.04 and found that it did not apply. Simply put, Wendland did not create a defense which excuses a dog owner from liability, but holds that the statue does not even apply to an owner who transfers complete control to an independent contractor. The reasoning in Wendland is sound and should be approved by this Honorable Court.

Statutory intent is the polestar in any analysis of Wendland and Huie. As stated above, the policy behind the statute was to balance the difficulty of proving negligence, with the harshness of the earlier statute, in view of modern urban society. Donner v.

Arkwright Boston Manufacturers Mutual, 358 So. 2d 21 (Fla. 1978). In Donner, this Court noted that the Florida Legislature enacted the dog bite statute in order to eliminate the element of scienter because this element is so difficult, sometimes impossible, to prove. Id at 23. Thus, under the statute, the dog's owner becomes the insurer of damage done by the dog without regard to this element. In Donner, the plaintiff was petting a 60 pound female doberman pincher. The dog had no prior history of vicious propensities but was in heat. The owner informed the plaintiff, however he continued to pet her and was bitten on the lip. The defendant owner argued that the defense of assumption of the risk should be applied, thus relieving him of liability for the dog bite.

Donner refused to apply this defense, and in finding that the common law defenses were superseded, noted that the legislature intended to supplant the common law negligence type action by making the dog's owner the insurer of damage done by his dog except in the few enumerated circumstances. See also, Carroll v. Moxley, 241 So. 2d 681 (Fla. 1970).

As opposed to overruling Wendland, these decisions are entirely consistent with it. The Wendland court recognized that a dog owner is typically liable for his dog, and that indeed a form of strict liability is imposed. This is because the owner is in control of the dog. But, when the dog is transferred to another person, especially a dog care professional, for an extended period of time, it would be contrary to the statutory intent, as well as

logic to hold the dog owner liable. The owner would still bear the risk of liability, although he has absolutely no control over the dog. On the other hand, the veterinarian/kennel owner, who now has total, absolute control over the animal, has absolutely no responsibility for the manner in which he controls that animal.[2] If the purpose of the statute is to make the owner responsible for ensuring the safety of the dog, the policy is not implemented by holding him strictly liable where a dog is out of his control for an extended period of time.

In fact, the Huie court recognized the logic of Wendland when it stated:

> We agree that, absent active negligence by a dog owner, the owner should be relieved of liability for injuries caused his dog where the owner has contracted for the professional, such as a veterinarian or kennel owner, for the care, custody, and control of the dog and, while in the professionals custody, the dog bites an employee of the professional.

Huie, 632 So. 2d at 1109. However, because the court felt constrained by the precedent of Carroll and its progeny, the Fifth District Court of Appeal reached a different result.

However, the result in Wendland, can be reconciled with the cases cited by the appellate court. In both Donner and Carroll, as well as Belcher Yacht, Inc. v Stickney, 450 So.2d 1111 (Fla. 1984), the dog was under the control of the legal owner. Both owners attempted to assert non-statutory defenses. This Court has

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[2] Although the veterinarian would still theoretically, be liable for negligence, scienter would be virtually impossible to prove. Thus, he could allow the dog to bite everybody on the staff, secure in the comfort that the owner will be responsible.

consistently refused to allow such affirmative defenses.[3]

However it is incorrect to state that this Court has refused to apply other legal doctrines which affected a dog owner's liability. For example, an estoppel theory was and applied in Noble v. Yorke, 490 So. 2d 29 (Fla. 1986) to prevent a statutory defense to be asserted by the dog owner.

In Noble, the owner of the dog had invited the plaintiff to her house in order to purchase some clothing from him. She told him to ignore the "beware of the dog" sign on the front of her door because the dog would be secured. However, when Mr. Yorke arrived at her house, the dog was not secured and bit the plaintiff on the finger. The court noted that this Mrs. Noble had one of the statutorily enumerated defenses, the "Bad Dog" sign, available to her. However, the Yorkes argued that the doctrine of equitable estoppel should bar this statutory defense. The court agreed with the Yorkes.

The Noble court noted that, "Significantly, the statute neither expressly disallows application of the doctrine nor contains language suggesting such a result." Id. at 31. This Court looked to the purpose behind the statute, and noted that although a "Bad Dog" sign must be prominent and easily readable in order to make certain that before a dog owner will be relieved of liability, the attempt to give notice that a bad dog is on the

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[3] Conversely, courts have allowed the statutory defense of provocation to be asserted where it was not available under the common law, as where the child is under six years of age. See Reed v. Bowen, 512 So. 2d 198, 200 (Fla. 1987) and Porter v. Allstate Ins. Co., 497 so. 2d 927 (Fla. 5th DCA 1986).

premises must be genuine and bonafide. This Court, while acknowledging the fact that the Nobles were in compliance with the statute, did not apply the defense. Thus, this court created an "exception" to the strict statutory application of the defenses in order to avoid reaching an absurd result. [4]

This court's validation of the Wendland rationale does not fly in the face of the enunciated policy or the reason the legislature created strict liability under Section 767.04. In fact, it would promote public policy in that the person who can best control the dog is responsible and bears the risk of that dog's behavior. This court should affirm the application of the independent contractor exception to the dangerous instrumentality doctrine as applied by the trial judge.

III. THE KENNEL OWNERS BECOME THE OWNER OF DUKE BY VIRTUE OF THE CONTRACT BETWEEN THEM AND DUKE'S OWNER, AND THUS THE FLA. STAT. 767.04 APPLIES TO THEM.

The Fifth District Court of Appeal also certified the following question to this court: "Under Section 767.04, does the

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[4] If this court were to apply the statute strictly to the present case, the Wipperfurths would be relieved from liability if their dog bit someone at the kennel as long as they had a bad dog sign posted at their residence. The statute does not require that the injury occur on the premises for the defense to apply. The statute further does not require that the injured person actually read the sign. See, Register v. Porter, 557 So. 2d 214 (Fla. 2d DCA 1990). Obviously, this is an absurd result and one which would never be upheld by this court. Thus a commonsense interpretation should be employed in interpreting the statute. The Florida Courts have long held that a statute should avoid being construed so that it creates a ridiculous result. State v Miller, 468 So.2d 1051 (Fla. 4th DCA 1985), pet. for rev. den., 479 So.2d 118 (Fla. 1985).

term owner include a kennel owner or veterinarian who undertakes the care, custody and control of a dog pursuant an agreement with the dog's actual owner?" Huie, 632 So. 2d at 1113. This court should answer the question in the affirmative. The lower court held that owner means only the legal owner and looked primarily to Belcher Yacht, Inc. v. Stickney, 450 So. 2d 1111 (Fla. 1984) in support of this position.

In Belcher, the defendant owned and operated a marina. He employed security guards and kept one or two guard dogs loose on the premises. The plaintiff, Stickney, was to take out a yacht for the day. He went to the guard house to procure the keys from the security guard, Herner. As Stickney and Herner spoke, one of the dogs bit Stickney in the crotch, causing severe testicular injury.

The Belcher court stated that because 767.04 is silent as to the custodian or keeper or a dog who is not the owner, it neither created liability on the part of the security guard nor exonerated him because of the posted signs. Belcher at 1112. The court further noted that the statute imposes absolute liability on the owner of a dog absent provocation or bad dog sign, but declined to go into the history of the statute from common law requirements through absolute liability to the present day evolution which imposes liability with certain statutory exceptions. Belcher at 1113. The Court was aware of the purpose of the statute and the reason the scienter element was eliminated.

Initially, Belcher did not provide a definition of "owner". Thus, Belcher should not be interpreted to restrict "owners" under

the statute conclusively to title holders. In Belcher, the security guard should not be considered the owner of the dog. The security guard was not in exclusive control or possession of the dog. The dog owner owned the premises on which the dog was kept as well as the dog. He had hired the security guard to patrol the land, not control the dogs. Finally, the guard had no specialized training in how to control a rather specialized and dangerous animal. By holding the security guard liable, the person who should bear the responsibility of the dog's misbehavior, the owner, escapes liability.

In the present case, as in Wendland, the legal owner of the dog transferred control of his animal to someone who held himself as having the skill to care for and train it, and thus presumably, to control a dog. The dog is no longer on the owner's premises and is now completely beyond the control of the legal owner.

The owner has contracted with a professional to care for the dog. The professional, whether veterinarian or a kennel owner, receives compensation from this contract. Where the owner remains a legal owner, the professional becomes the functional equivalent of the beneficial owner. That is, he derives a direct monetary benefit from having the animal in his care and custody. In contrast, the primary goal of the security guard in Belcher was to keep the marina premises safe; this was the complete nature of his employment contract. In both Wendland and the present case, the primary goal of the contract was to care for the dog. Inherent in that contract was that exclusive care, custody and control of the

dog would be transferred, albeit it temporarily, so that services could be rendered. When the Bessetts contracted with Wipperfurth, they accepted the responsibility of that animal.

This Court has never squarely addressed the issue of whether the "owner of a dog" refers to both the legal and the beneficial owner. Florida jurisprudence has recognized both types of ownership. C.F. Palmer v. R. S. Evans, Jacksonville, Inc., 81 So. 2d 635 (Fla. 1955). Rather, than a rigid, mechanistic definition, Petitioner urges that this Honorable Court adopt a more flexible, pragmatic definition such as found in current statute Section 767.11 of the Florida Statutes (1993).[5]

Other jurisdictions have reviewed definitional problem of "owner" from a more pragmatic point of view. Teschida v. Berdusco, 462 N.W. 2d 410 (Minn. Ct. App. 1990); Wilcoxen v. Paide, 528 N.E. 2d 1104 (Ill. App. Ct. 1988). While the wording of the statutes differ, the reasoning is certainly analogous to the present case.

In Wilcoxen, the plaintiff owner and operated a dog boarding and grooming business. Id. at 1105. While the Plaintiff was boarding the defendant's dog for a fee, the dog attacked and seriously injured the plaintiff. Id. The trial court found that the plaintiff was barred from pursuing the cause of action against the defendant by voluntarily accepting responsibility for controlling the dog. Id. at 1106. The appellate court read the

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[5] Predicating liability on the tenuous thread of naked legal ownership can lead to pernicious results which actually thwart the statute's purpose. See, Flick v. Malino, 356 So. 2d 904 (Fla. 1st DCA 1978).

statute as a whole and found that the act revealed that the legislature, "values prevention over cures". Id at 1106. The court noted that, "The thrust of the act is to encourage the tight control of animals in order to protect the public from harm, and thus the act imposes penalties. The statutorily mandated liability provides first a strong incentive to prevent one's animals from harming others." Id at 1106. The court noted that this was the reason the act imposed penalties on any one who places himself in a position of control akin to an owner.

Certainly, the same could be said for Section 767.04 even though it does not specifically define "owner". The purpose of the statute is for the person in control of the animal to be responsible for the injuries caused by that animal. While the current definition of owner found in Section 767.11(7), Fla. Stat. (Supp. 1990), is not binding upon this Court in this case, it certainly clarifies this issue and extends an invitation to this Court to accept this definition across the breadth of the statute. This definition is illustrative of the legislature intents of the meaning of "owner", especially in light of the fact it had never previously defined this term. Indeed, this Court has stated,

> In determining our pole star, legislative intent, we are not to analyze the statute in question by itself, in a vacuum; we must also account for other variables. Thus it is an accepted maxim of statutory construction that a law should be construed and in harmony with any other statute relating to the same purpose, even though the statutes were not enacted at the same time.

Wakulla County v Davis, 395 So.2d 540, 542 (Fla. 1981).

The definition of owner should be interpreted to apply to the kennel owner in the present situation by virtue of the contract entered into between the dog owner and the kennel owner. Inherent in this case was a shift of the risk involved in controlling the dog. The intent of the statute is to make the person who owns the dog responsible for that dog's behavior. When the dog is kept by a person other than his owner for an extended period of time who holds himself out to be a professional animal care taker, he is in control of the dog. By virtue of the contract between the parties, he agrees to assume the risk of liability for the dog's action. Therefore, this court should find that the "owner" of Duke, for purposes of Section 767.04 is not the Petitioner.

CONCLUSION

This court should answer in the affirmative both of the Fifth District Court of Appeal certified questions. In either case, a new defense is not created, rather the statute is not applied to Wipperfurth. Thus, the Petitioner's position does not conflict with case law holding that the statute supersedes common law. The decision of the appellate court in inconsistent with the intent of the statute and should be quashed and the trial court's Order affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail this 16th day of May, 1994 to William A. Parsons, Esquire, 2001 S. Ridgewood Avenue, South Daytona, FL 32119.

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that the presumption afforded in section 316.1934(2)(c), Florida Statutes (1991), should not have been available to the state.

[2] Our review of the record has, however, revealed a basis for affirming the trial court. In addition to the inadmissible blood alcohol evidence, the state introduced the results of the medically compelled blood test. In *State v. Quartararo*, 522 So.2d 42 (Fla.2d DCA), *rev. denied*, 531 So.2d 1354 (Fla.1988), we interpreted *State v. Strong*, 504 So.2d 758 (Fla.1987), to permit test results without regard to the requirements of section 316.1933, provided that the blood sample is drawn for a medical purpose by a qualified healthcare professional, and provided further that the state establishes the traditional predicate for admissibility: the test's reliability, the examiner's qualifications, and the meaning of the test results. *See Robertson v. State*, 604 So.2d 783, 791 n. 13 (Fla.1992). Having reviewed the record of these proceedings, we conclude for the following reasons the trial court properly allowed the .196 blood-alcohol reading. First, in compliance with the implied consent law, a qualified healthcare provider extracted Michie's blood. *See* § 316.1933(2)(a), Fla.Stat. (1991). Second, that sample was tested by a medical lab technician licensed to conduct and interpret "serum blood tests," which, according to the testimony of experts in the field of toxicology, accurately measure the concentration of alcohol in a person's blood serum. As explained by the experts, although "[s]erum alcohol concentration is not the same as a blood alcohol concentration and serums are typically in the range of about 20 percent higher than a corresponding whole blood measurement," a serum measurement of .196 still represents a blood alcohol level well above .10, falling somewhere between .145 and .178. It follows that competent evidence established that Michie operated his vehicle with an unlawful blood alcohol level. Accordingly, we have determined beyond a reasonable doubt that the evidence of questionable admissibility did not affect the verdicts rendered.

[3] Turning our attention to the second question, we find we must vacate one conviction and sentence for each offense. In reliance upon *Hallman v. State*, 492 So.2d 1136, 1138 (Fla. 2d DCA 1986), Michie argues, and we agree, that traffic offenses such as driving under the influence or driving with a suspended license are "continuing offenses" permitting a single conviction per episode. *See Boutwell v. State*, 631 So.2d 1094 (Fla.1994) (regardless of the number of injured persons, there can be only one conviction arising from a single accident). The trial court should therefore have merged the two counts of each offense. Separate convictions and penalties, in these circumstances, violate double jeopardy.

Accordingly, we reverse one conviction each of simple DUI and driving with a suspended license, and vacate the judgments and sentences entered on those counts; in all other respects we affirm.

DANAHY and SCHOONOVER, JJ., concur.

Beau Jason STAPLES, Appellant,

v.

STATE of Florida, Appellee.

No. 92-03793.

District Court of Appeal of Florida, Second District.

March 2, 1994.

Defendant sought suppression of statements made to corrections officer. The Circuit Court, Pinellas County, Claire K. Luten, J., declined to suppress statements, and defendant appealed. The District Court of Appeal, Hall, Acting C.J., held that statements defendant made to corrections officer in response to questioning which took place while defendant was in custody at county detention facility were made while defendant was subject to custodial interrogation and thus defendant should have been advised of his *Miranda* rights.

Reversed and remanded.

1. **Criminal Law ⇐412.2(2)**

Statements defendant made to corrections officer in response to questioning which took place while defendant was in custody at county detention facility were made while defendant was subject to custodial interrogation and, therefore, defendant should have been advised of his *Miranda* rights.

2. **Criminal Law ⇐412.2(2)**

Miranda applies to inmates who are in custody and under interrogation by corrections officer.

James Marion Moorman, Public Defender, and Andrea Norgard, Asst. Public Defender, Bartow, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Brenda S. Taylor, Asst. Atty. Gen., Tampa, for appellee.

HALL, Acting Chief Judge.

[1] The appellant, Beau Jason Staples, contends the trial court erred in failing to suppress statements he made to a corrections officer in response to questioning, which took place while Staples was in custody at a county detention facility. Staples argues that because he was subject to a custodial interrogation, the officer should have advised him of his *Miranda* rights. We agree and reverse.

[2] As this court held in *Rossi v. State*, 506 So.2d 1136 (Fla. 2d DCA 1987), *Miranda* applies to inmates who are in custody and under interrogation by a corrections officer. We, therefore, find that the trial court erred in failing to suppress the statements Staples made to the corrections officer in the instant case without receiving *Miranda* warnings.

Accordingly, the instant case is reversed and remanded for further proceedings.

THREADGILL and BLUE, JJ., concur.

Patricia A. HUIE, Appellant,

v.

Kurt WIPPERFURTH and Ormond Kennel and Pet Center, Inc., Appellees.

No. 93-1665.

District Court of Appeal of Florida, Fifth District.

March 4, 1994.

Kennel employee, who was bitten by dog while it was boarded at kennel for obedience training, brought action against dog owner. The Circuit Court of Volusia County, John V. Doyle, J., held that "repairman" or independent contractor exception to dangerous instrumentality doctrine applied to bar employee's recovery. Employee appealed. The District Court of Appeal, Diamantis, J., held that: (1) statute governing dog owner's liability for damages to person bitten provided employee with exclusive statutory civil remedy against dog owners and superseded all defenses not specifically numerated therein, including repairman or independent contractor exception to dangerous instrumentality doctrine, and (2) kennel owner was not a "dog owner" under statute.

Reversed and remanded.

1. **Animals ⇐68**

Statute governing dog owner's liability for damages to person bitten provided kennel

A chemical analysis of the person's blood to determine the alcoholic content thereof must have been performed substantially in accordance with methods approved by the Department of Health and Rehabilitative Services and by an individual possessing a valid permit issued by the department for this purpose. The Department of Health and Rehabilitative Services may approve satisfactory techniques or methods, ascertain the qualifications and competence of individuals to conduct such analyses, and issue permits which will be subject to termination or revocation at the discretion of the department.

employee bitten by dog boarded for obedience training with exclusive statutory civil remedy against dog owner and superseded all defenses not specifically enumerated therein, including "repairman" or independent contractor exception to dangerous instrumentality doctrine. West's F.S.A. § 767.04.

2. Animals ⇐72

Kennel owner, whose employee was bit by dog which was boarded for obedience training pursuant to agreement with dog's actual owner, was not a "dog owner" under statute providing persons bitten by dogs with exclusive statutory civil remedy against dog owners. West's F.S.A. § 767.04.

See publication Words and Phrases for other judicial constructions and definitions.

William A. Parsons of Woerner & Parsons, South Daytona, for appellant.

J. Richard Boehm, Allison Morris and Francis J. Carroll, Jr. of Boehm, Brown, Rigdon, Seacrest & Fischer, P.A., Daytona Beach, for appellee Wipperfurth.

No appearance, for appellee Ormond Kennel and Pet Center, Inc.

DIAMANTIS, Judge.

Patricia A. Huie, an employee of Ormond Pet and Kennel Club, appeals the trial court's final summary judgment rendered in favor of Kurt Wipperfurth, the owner of a dog which bit Huie while it was boarded at the kennel for obedience training. The trial court concluded that the "repairman" or independent contractor exception to the dangerous instrumentality doctrine applied to bar Huie's recovery. Because of applicable Florida Supreme Court precedent, we reluctantly conclude that the trial court erred in applying this common-law defense to an action brought under section 767.04, Florida Statutes (1989); thus, we reverse and remand for further proceedings consistent with this opinion.

The facts are not in dispute. Huie was employed by Gary Besset at the Ormond Pet and Kennel Club. Huie's duties included bathing, grooming, feeding, exercising, and medicating the animals at the kennel. Wipperfurth's dog, a 60– to 70–pound Doberman pinscher named "Duke," was boarded at the kennel in January 1990 for the purpose of receiving obedience training from Besset. While on duty, Huie was responsible for feeding, walking, and cleaning Duke. On the afternoon of January 30, 1990, while Huie was walking Duke, Duke jumped on Huie's chest and arms. Huie said "no, off," and she stepped back. Duke then dropped to the ground. When Huie turned to leave, however, Duke jumped on her back and bit her several times on the back and on the right arm and shoulder. To Huie's knowledge, Duke never before had behaved in a hostile or otherwise unusual manner.

[1] We agree with Huie's contention that section 767.04, Florida Statutes (1989), provided persons bitten by dogs with an exclusive statutory civil remedy against dog owners and that the statute superseded all defenses not specifically enumerated therein. In January 1990, when Huie's injury occurred, section 767.04 provided in pertinent part:

> 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.... [P]rovided, 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."

§ 767.04, Fla.Stat. (1989).

In *Carroll v. Moxley*, 241 So.2d 681, 682 (Fla.1970), the supreme court concluded that section 767.04 superseded the common law in those situations covered by the statute. Accordingly, the court held that a plaintiff did not have a cause of action against a dog

owner under both the statute and the common law. In *Donner v. Arkwright–Boston Manufacturers Mutual Insurance Co.*, 358 So.2d 21 (Fla.1978), the supreme court was faced with the corollary issue of whether common-law defenses were superseded by the statutory defenses of section 767.04. In answering this question in the affirmative, the court stated:

> Consistent with our reasoning in *Moxley*, ... 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 acts 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.

Donner, 358 So.2d at 24. Accordingly, the court held that the trial court erred in giving the jury a separate instruction on the defense of assumption of risk because the court should have limited its instructions to the defenses expressed in the statute. *Id.* at 23. The court overruled earlier decisions of the District Courts of Appeal to the extent that they expressed or implied "the existence of a separate defense predicated upon assumption of risk." *Id.* at 26.

Since deciding *Moxley* and *Donner*, the supreme court consistently has reaffirmed the principle that chapter 767 supersedes the common law in actions against dog owners for injuries caused by their dogs. In *Reed v. Bowen*, 512 So.2d 198, 200 (Fla.1987), the court held that section 767.04 modified the common-law rule that a child under six was legally incapable of negligence. Thus, even if the dog-bite victim was under six years of age, the defendant could assert the statutory defense of provocation. *Accord Porter v. Allstate Insurance Co.*, 497 So.2d 927, 930 (Fla. 5th DCA 1986). More recently, in *Kilpatrick v. Sklar*, 548 So.2d 215, 218 (Fla. 1989), the supreme court held that the common-law Fireman's Rule was not a defense to actions brought under sections 767.01 [1] and 767.04, Florida Statutes (1981).

In applying the independent contractor exception to bar recovery in the present case, the trial court relied upon the fourth district's decision in *Wendland v. Akers*, 356 So.2d 368 (Fla. 4th DCA 1978), *cert. denied*, 378 So.2d 342 (Fla.1979).[2] In *Wendland*, the plaintiff, a veterinarian's assistant, was bitten by a large German shepherd while the plaintiff assisted her employer in extracting blood from the dog's leg. At the time the plaintiff was bitten, she had her arms around the dog's neck to immobilize its front leg for insertion of a needle while the veterinarian pressed the dog's head down. The court held that the owners of the dog were not liable to the plaintiff because the plaintiff and the veterinarian provoked the dog as a matter of law and, alternatively, because the veterinarian was an independent contractor who was in complete control of the "inherently dangerous work" of treating and handling the dog. *Id.* at 371. In relieving the owners of liability for injuries caused by the dog absent a showing of active negligence by the owners, the court concluded that "[l]ogic and reason compel ... that [the independent contractor] exception should be applied here." *Id.*

If we were not bound by supreme court precedent, we would follow *Wendland* under the limited circumstances of this case. We agree that, absent active negligence by a dog owner, the owner should be relieved of liability for injuries caused by his dog where the owner has contracted with a professional, such as a veterinarian or kennel owner, for the care, custody, and control of the dog and, while in the professional's custody, the dog bites an employee of the professional. Thus, absent evidence of Wipperfurth's negligence, we do not believe that Huie should be permitted to maintain the present action against Wipperfurth for injuries which Huie sustained while Duke was in the care, custody,

1. Section 767.01 provides, as it did in 1981, that: Owners of dogs shall be liable for any damage done by their dogs to sheep or other domestic animals or livestock, or to persons. § 767.01, Fla.Stat. (1993).

2. The supreme court decided *Donner* on April 8, 1978. The fourth district decided *Wendland* on March 14, 1978, and it denied rehearing on April 7, 1978.

and control of Huie's employer, the kennel. Nevertheless, the Florida Supreme Court's precedent prior to and subsequent to *Wendland* has made it clear that, until the legislature mandates otherwise, section 767.04 supersedes the common law and provides both the exclusive remedy and defenses in a dog-bite action.[3] 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.

[2] We also have considered whether we can uphold the trial court's order on the theory that, pursuant to its contract with the actual owner, the kennel became an owner of Duke when the kennel undertook Duke's care, custody, and control. Again, however, because of applicable supreme court precedent, we conclude that the kennel could not be considered a dog owner under section 767.04.

Section 767.04 does not define the term "owner". In *Belcher Yacht, Inc. v. Stickney*, 450 So.2d 1111 (Fla.1984), however, the supreme court addressed the question of whether section 767.04 pertains only to the actual owner of a dog as opposed to a custodian or keeper of the dog. The court stated:

> [N]ote that section 767.04 pertains only to the owner. It is silent as to the custodian or keeper of a dog who is not the owner.[2]

2. Compare with section 767.05, Florida Statutes (1979), which specifically refers to "an owner or keeper of any dog...."

Belcher Yacht, 450 So.2d at 1112. In that case, the court held that only the actual owner of the dog faced liability under section 767.04 when the owner's guard dog bit a third party upon the owner's premises. The court further held that the security guard who had custody and control of the guard dog when it bit the third party was not liable under the statute although the security guard might be found liable under common-law negligence principles.

Prior to *Belcher Yacht*, district courts similarly restricted the meaning of "owner" under chapter 767. In *Flick v. Malino*, 356 So.2d 904, 905 (Fla. 1st DCA 1978), the court concluded that the wife of the now deceased dog owner was not an "owner" under section 767.04 even though the dog resided at the residence of the dog owner and his wife. In *Smith v. Allison*, 332 So.2d 631, 634 (Fla. 3d DCA 1976), the court stated that, "[b]ecause of the severe, potential consequences inherent in [section 767.01],[4] there is a clear burden on the plaintiff to show the defendant's actual ownership of the dog in question, and not merely to show possession or custody."

We are aware of cases from other jurisdictions holding that the definition of "owner" includes the veterinarian or kennel owner who undertakes care, custody, and control of a dog. *See Tschida v. Berdusco*, 462 N.W.2d 410 (Minn.Ct.App.1990) (dog owners not liable under Minnesota dog-bite statute when their dog bit veterinarian's employee because both actual owners and veterinarian were statutory owners); *Wilcoxen v. Paige*, 174 Ill.App.3d 541, 124 Ill.Dec. 213, 528 N.E.2d 1104 (Ct.1988) (dog owner not liable under Illinois statute when his dog bit owner/operator of dog boarding and grooming business because both actual owner and business owner were statutory owners of dog). Neither *Tschida*[5] nor *Wilcoxen* are apposite to our decision, however, because both the Minnesota and Illinois dog-bite statutes define "owner" to include both the actual dog owner and any person who acts as custodian or keeper of the dog.

In this regard, we note that the Minnesota and Illinois definitions of owner are comparable to the statutory definition of owner found in the "dangerous dog" act which the Florida legislature enacted in 1990. Ch. 90-180, Laws of Fla. (subsequently codified at §§ 767.10–767.15, Fla.Stat. (Supp.1990)). The "dangerous dog" act's definition of owner includes "any person, firm, corporation, or organization possessing, harboring, keeping, or having control or custody of an animal." § 767.11(7), Fla.Stat. (Supp.1990). The trial court, however, concluded that this definition did not apply to the present case, and we agree. This definition of owner did not take effect until October 1, 1990, approximately eight months after Huie was injured. More importantly, by its terms, section 767.11 states only that its definitions apply to "this act," as opposed to this "chapter." § 767.11, Fla.Stat. (Supp.1990). Further, we note that section 767.15 provides that "[n]othing in this act shall supersede chapter 767, Florida Statutes 1989." § 767.15, Fla.Stat. (Supp.1990).

In accordance with the foregoing authorities, we reverse the final summary judgment entered by the trial court and remand this cause for further proceedings consistent with this opinion; however, because this case involves a matter of great public importance,[6] and because we would follow *Wendland* if not for precedent of the Florida Supreme Court, we certify the following questions to the supreme court:

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?

REVERSED and REMANDED.

COBB and PETERSON, JJ., concur.

3. We note that, effective October 1, 1993, the legislature amended section 767.04 by replacing the defense of provocation with one of comparative negligence and by providing that section 767.04 is "in addition to and cumulative with any other remedy provided by statute or common law." § 767.04, Fla.Stat. (1993). Because the 1993 version does not apply in this case, we need not address the effect of these amendments on the future availability of common-law defenses under the statute.

4. *See supra* note 1.

5. The Minnesota court cited *Wendland v. Akers*, 356 So.2d 368 (Fla. 4th DCA 1978), *cert. denied*, 378 So.2d 342 (Fla.1979), but did not discuss later supreme court opinions which apparently overruled *Wendland*.

6. Although the legislature amended section 767.04 in 1993, this section still fails to define "owner."

Terron WALKER, Appellant,

v.

STATE of Florida, Appellee.

No. 92-3265.

District Court of Appeal of Florida, First District.

March 7, 1994.

Defendant was convicted of second-degree murder, in the Circuit Court, Escambia County, Frank L. Bell, J., and defendant appealed. The District Court of Appeal, Shivers, Senior Judge, held that any error by trial court in prohibiting cross-examination of state witness as to intended victim's reputation for violence was harmless.

Affirmed.

Criminal Law ⇐1170½(5)

Any error by trial court in prohibiting second-degree murder defendant's cross-examination of state witness as to intended victim's reputation for violence was harmless, even though defendant alleged that jury might have found reasonable the defendant's action in arming himself and might have found ensuing homicide excusable had jury known intended victim's reputation, where evidence showed that, at time defendant returned with gun, confrontation with intended victim had ended and defendant had been physically absent from scene for some five minutes, and there was no evidence that, upon defendant's return, intended victim made renewed verbal or physical threats against defendant.

Nancy A. Daniels, Public Defender, and Kathleen Stover, Asst. Public Defender, Tallahassee, for appellant.