SUPREME COURT OF FLORIDA

KURT WIPPERFURTH,

Petitioner,

vs.

PATRICIA A. HUIE,

Respondent,

_____/

CASE NO.: 83,476

PETITIONER'S REPLY BRIEF

FRANCIS J. CARROLL, JR., ESQUIRE
ALLISON MORRIS, ESQUIRE
BOEHM, BROWN, RIGDON, SEACREST
& FISCHER, P.A.
435 S. Ridgewood Avenue
Post Office Box 6511
Daytona Beach, FL 32122
Telephone: (904)258-3341
Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

ARGUMENT

I

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?

Respondent argues in her brief that both certified questions should be answered in the negative, based on the proposition that because the §767.04 supersedes all common law defenses, then the independent contractor "defense" is likewise superseded. Although Wendland v. Akers, 356 So.2d 368 (Fla. 4th DCA), cert. denied, 378 So.2d 342 (Fla. 1979), clearly holds otherwise, Respondent dismisses the decision as merely "an aberration in the history of the interpretation of the statute and is inconsistent with earlier or later opinions by the Supreme Court." (Respondents Brief at p. 13.). Respondent is incorrect that Wendland created an affirmative defense. Wendland is consistent with this Court's interpretation of Section 767.04.

A. The independent contractor "defense" is not a defense but relates to the issue of proximate cause.

Initially, Petitioner agrees that this Honorable Court has established that section 767.04 supersedes the assertion of common law defenses. See Kilpatrick v. Sklar, 548 So.2d 215 (Fla. 1989).[1]

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[1] These holdings have recently been called into question. Contrary to Respondent's assertion, Section 767.04 has been amended since 1970. (Answer Brief at p. 11). In fact, effective October 1, 1993, Section 767.04 was amended to read in part, "The remedy provided by this section is in addition to and cumulative with any other remedy provided by statute of common law."

Thus, the long line of cases in Florida, stating that it was the Legislature's intent to provide an exclusive statutory remedy,

However, the question posed by the instant case is whether Wendland involves a common law defense. Traditional affirmative defenses are a matter of confession and avoidance. In other words, "It confessed the plaintiff's cause of action and avoided the confession by legal justification of action." H. Trawick, Trawick's Practice and Procedure, §11-4 (1993).

On the contrary, the cases cited by Respondent, Donner v. Arkwright-Boston Manufacturers Mutual Insurance Co., 358 So. 2d 21 (Fla. 1978) (assumption of the risk), English v. Seacoard, 243 So. 2d 193 (Fla. 4th DCA 1971), Reed v. Bowen, 512 So. 2d 198 (Fla. 1987) and Kilpatrick v. Sklar, 548 So. 2d 215 (Fla. 1989)("Fireman's Rule"), all fall within the accepted definition of affirmative defenses. See Storchwerke, GMBH v Mr. Thiessen's Wallpaper Supplies, Inc., 538 So.2d 1382 (Fla. 5th DCA 1989). Huie does not cite any authority for the proposition that Wendland should be construed as a defense. As cited in the Petitioner's brief, Wendland simply did not apply the statute to the owner.

B. Strict liability should terminate when the dangerous instrumentality doctrine is transferred to an independent contractor.

As was discussed in the initial brief, Wendland held that by

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is inconsistent with Section 767.04, in light of the recent legislative pronouncement that the statute is cumulative. c.f. Gay v Canada Dry Bottling Co. of Fla., 50 So.2d 788 (Fla. 1952). At the very least, it shows an intention that the scope of the statute is to be construed more broadly so that it includes legal concepts not necessarily enunciated within its text.

virtue of the statue, a dog owner becomes strictly liable for injuries caused by the dog. Thus, a dog owner's liability is analogous to the liability of an owner of a dangerous instrumentality. Wendland merely recognized and applied the exception, which is well grounded in Florida law, that strict liability terminates when the instrumentality is delivered into the hands of an independent contractor because the chain of proximate causation is broken. (See generally Initial Brief at pp 7-10). [2] In fact, Florida Courts have consistently held that the rule of absolute liability has limits. See Smith v. Allison, 332 So. 2d 631 (Fla. 3d DCA 1976). Huie has not advanced any argument against that interpretation.

As stated in the initial brief, Wendland is consistent with the intent of the statute. The statute imposed strict liability so that the person best able to control the dog is responsible for damages caused by the dog. As recognized by Wendland, when the dog is under the exclusive control of a professional custodian pursuant to a contract to render services, the person best able to control that animal is the professional custodian. The actual owner has absolutely no ability to control the animal. Thus Wendland

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[2] Huie contends that the Wendland decision is, in reality, grounded in the provocation exception to the dog bite statute. However, the actions which are allegedly aggravating are not as readily distinguishable as Appellee asserts. The factors that the Wendland court focused on were the fact that the german shepherd was in a strange surrounding, with strange owners and held by two people he had never seen. Certainly, Duke was in a similar situation. His owner had left him in a strange location with strange people while he was away on vacation with his family. The Wendland court found that a dog in a strange place, away from its owner, is per se provocative.

recognizes that in this limited circumstance, statutory liability does not apply the owner.

II

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

As the Respondent acknowledges, "Section 767.04 does not define the term 'owner'". (Answer Brief at p. 13). Respondent further concedes that the definition of owner can be expanded to include a professional custodian of the dog in stating,"Huie does not question, dispute or oppose 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 content which makes the owner the insured of the dog." (Answer Brief at p.14).

Huie, however, maintains that it is exclusively the legislature's province to define "owner". (Answer Brief at p. 14). An interpretation of "owner", where the statute is silent, is based on the ordinary language of the words and is a question of law for the court. State v Stewart, 374 So.2d 1381 (Fla. 1979).

The simplistic, mechanical interpretation of "owner", urged by the Petitioner ignores the intent of the statute in that the owner in this situation has absolutely no ability to control the dog. Ultimately, the issue of statutory liability boils down to the question of who should bear the cost for paying for damages done by dogs, where a professional has assumed the control and custody of

the animal.

Contrary to Huie's contention, Belcher Yacht Club v. Stickney, 450 So.2d 1111 (Fla. 1984) does not deal with the concept of custody and control in a manner that would bar a professional custodian from the scope of this definition. In Belcher, the security guard was not hired for the purposes of caring for or controlling the dog, but rather to provide security for the marina. The owner of the marina also owned the dog, and kept the dog on the marina premises as a security measure. Id at 1112. The dog was not delivered into the care of a person or business who accepts compensation for vetting, training or boarding.

The security guard was not a custodian of the dog in a manner contemplated by Wendland and Huie. In Wendland and Huie, the veterinarian and the kennel did not become "owners" as contemplated by the statute, solely by virtue of the fact that they had the dog in their possession, but because they had custody and control of the dog pursuant to a contract with the actual owner complete with consideration.

Huie cites Smith v. Allison, 332 So. 2d 631 (Fla. 3d DCA 1976) and Flick v. Malino, 356 So. 2d 904 (Fla. 1st DCA 1978) for the proposition that the statute applies only the actual, legal owner of the dog. Initially, it should be noted that these decisions come from the First and Third District Courts of Appeal respectively. Aside from the fact that this Court is not bound by these decisions, it is within the discretion of this court to interpret, affirm, comment on and/or limit the holdings and dicta

of those cases. Both of the cases are distinguishable from applicable the present case.

Smith did not involve a determination of ownership, but actually involved a question of causation. The court actually held that the defendant was entitled to a directed verdict, as there was insufficient evidence of causation. The court only observed in passing that a plaintiff must show ownership and not mere custody.

Flick, while addressing the definitional problem of "owner", actually illustrates the pernicious results that can occur fro a mechanistic interpretation of owner. In Flick, the dog in question bit a three year old girl. Flick, 356 So. 2d at 905. The actual owner of the dog was deceased, and his widow was sued as the defendant. Id.

The appellate court reluctantly refused to apply 767.04 to the widow, and noted that because she was not the actual owner of dog, she was not subject to the statute. Id. The court noted the absurdity of this result when it stated, "The apparent anomaly of exonerating the dog-owner but exposing his spouse to liability as a landowner results from developments in the common law which have outpaced the modest purpose of the 1949 statute." Id at 906. A definition of "owner", as espoused in this appeal would prevent such a result. As in Flick, the appellate court in Huie, while acknowledging the illogic and unjustness caused by a literal interpretation of the statute, still applied the statute.

The legislature's intent to make the dog's owner the insurer of damage caused by his dog is furthered by considering the

professional custodian the owner of the dog. An insurer is one who must bear the risk of damages- either by virtue of the fact they have contracted to bear this risk or they are in a position to guard against the risk. A professional custodian fills both of these rolls.

If a dog owner is hundreds of miles away from his pet, has paid money to a kennel or a vet, and delivered his dog to them for care and training, he has no ability to control its actions. Under Huie's interpretation, if the dog bites one of the staff, then the kennel owner will only be liable on common law grounds, i.e. negligence. Thus there is no incentive for a person, who holds themselves out to the public as possessing superior skills in animal care, and indeed accepts money for performing all of the duties of an owner, to exercise those very skills in a manner that would prevent the dog from biting someone. The fact remains that many of the services which the kennel was providing were similar to those provided by an owner, a point not lost on Huie. (Answer Brief at p. 11).

Simply put, a person in the business of providing services of boarding a dog for a fee has contracted to bear the owner's responsibility to control the animal, should assume the mantle of an owner's burden under §767.04, and be liable for damage done by a dog in their custody.

CONCLUSION

The Petitioner urges this Honorable Court to answer both of the questions certified by the Fifth District Court of Appeals in the affirmative.

BOEHM, BROWN, RIGDON, SEACREST & FISCHER, P.A.

FRANCIS J. CARROLL, JR.
Fla. Bar. No. 363928

and

ALLISON MORRIS
435 S. Ridgewood Avenue
Post Office Box 6511
Daytona Beach, FL 32122
Telephone: (904)258-3341
Fla. Bar No. 931160
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail this 30th day of ~~May~~ June, 1994 to William A. Parsons, Esquire, 2001 S. Ridgewood Avenue, South Daytona, FL 32119.

BOEHM, BROWN, RIGDON, SEACREST & FISCHER, P.A.

FRANCIS J. CARROLL, JR.
Fla. Bar. No. 363928

and

ALLISON MORRIS
435 S. Ridgewood Avenue
Post Office Box 6511
Daytona Beach, FL 32122
Telephone: (904)258-3341
Fla. Bar No. 931160
Attorneys for Petitioner