

IN THE SUPREME COURT OF OHIO

City of Toledo,

Appellant,

v.

Paul Tellings,

Defendant-Appellee.

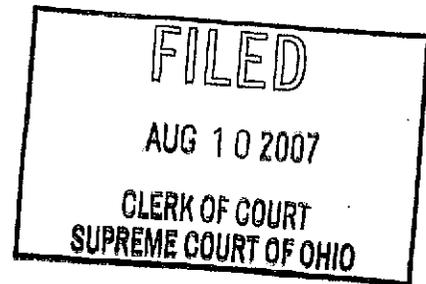
* On Appeal from the
* Lucas County Court of Appeals,
* Sixth Appellate District
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* Supreme Court Case No. 2006-0690
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* Court of Appeals Case No. L-04-1224
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**AMICUS AMERICAN CANINE FOUNDATION'S
SUPPORTING MEMORANDUM
FOR RECONSIDERATION**

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AMICUS AMERICAN CANINE FOUNDATION'S
MEMORANDUM IN SUPPORT OF RECONSIDERATION

EVERY dog that actually engages in vicious behavior, or has engaged in harming humans unprovoked would, by consensus of the majority, not be a good tempered nor safe dog in society. We all want the same thing, generally speaking; we all would like to see dogs which are temperamentally sound.

Regulating this topic addresses two elements: one--the dog, and two--the owner. It would seem much simpler and make more sense to put owners on notice of what dog behavior may constitute a crime, than to brand certain dog breeds as "dangerous" or "vicious" simply because we know that ALL dogs of any "one" breed or type are not ALL the same. Dogs are not manufactured on assembly lines. The dog OWNER'S input into the raising and caring and training of the dog is paramount. This is not that much different than raising a child. You cannot expect to damage a child (i.e., abuse, starvation, neglect) and have the child turn out perfectly sound.

But yet, we expect to take a dog breed and claim the breed is "vicious" when the scientific, behaviorist, and dog expert community all tell us differently? Lay opinion is no match for those in the canine expert field. So why do so many of us think we are experts in canine behavior, genetics, and assessment? We are not. Yet when canine laws are constructed, canine experts are not usually consulted.

And woe unto those who devise these canine laws out of simple bias, prejudice, or other presumption which is fallacy-based. What results is canine law cases that could easily have been avoided in the first place. A well-drafted canine law will contain no preconceived "breed" traits. Using "breed" as a determination for "actions" of a dog are not interchangeable. If one desires to eliminate undesirable canine behavior, then one needs to state what behavior is unacceptable.

Many states have generic dangerous dog laws. And most of those laws specifically were drafted to refrain from using dog "breed" because it is not the "breed" that needs regulating, it is the action of each individual dog. The canines are distinctly different from other so called safety and welfare regulated categories, such as alcohol or guns. Alcohol in the human body is measurable, even despite individual factors. Thus a law limiting measurable limits of alcohol poses few problems. Guns are manufactured pieces of machinery and in all probability, it is known which caliber and type can kill a human. What the possessor of a gun does with that item is regulated (i.e., shoot targets, shoot people, etc.) In most instances, safety regulation is aimed at the *person* who is using that regulated item.

But for some reason, when we look at canine laws aimed to regulate dogs, many seem hell-bent on attempting to regulate the dog's behavior by its *breed*, rather than by the dog's *actual behavior*, and considering the owner's conduct. Herein lies the big problem which has caused a great deal of harm both to dog owners, and dogs alike, including innocent dogs. A law CAN regulate owners who DON'T do what they should, and it can regulate owners so that bad dog behavior simply will not be tolerated. In fact, bad dog behavior should not be tolerated anywhere; but it *does not require* a dog "breed" to be castigated or unfairly categorized in order to do this. Credible studies already show that breed specific provisions have little and no merit.

Further, it has been shown via scientific study and educational work that eliminating bad dog behavior is a matter of persistent community education and awareness, concentrating on the acts/omissions of the errant bad owners *rather* than on specific breeds. In addition, these *same factors* (such as not behavior training a dog or not socializing it) have been shown to result in dogs and even cats—which are more likely to be abandoned into an animal shelter!

With less 'bad' dog owners, we would see fewer dog bites, and decreased dog related incidents. This is apparent by reviewing any highly educated or more affluent areas where dog owners are usually responsible. We thus tend to have problems with canines where owners may

not take proper care of the animals, or possibly even neglect them. As an example, most people are against dog fighting and animal cruelty. But dog fighting and animal cruelty are not the everyday norm for the dog incidents or bites that happen across the country. * [Fatal attacks by canines are rare and it is documented that such fatalities have remained fairly consistent and low over 30 years; if we were to believe that "breed" actually had something to do with this, a reliable, credible study would need to have ALL elements necessary to make such documentation viable—and that criteria would be the same as any valid study done in an organized fashion via statistical methods—not conjecture, guesswork, or biased opinion.]

It has been shown that most dog bite incidents involve a dog known to the victim, and many victims are children. If this is what we are seeking-- to reduce dog bites-- then we need regulation aimed at controlling dog behavior, *which is predicated and dependent upon the OWNER*, not the dog breed. Unfortunately, media hype and misrepresentation have greatly contributed to the belief that dog "breed" is at fault rather than owners!

We note both Justices O'Connor and O'Donnell dissented in *State v Cowan*, 103 Ohio St.3d 144, 814 N.E.2d 846 (Ohio 2004) and it is readily apparent that Justice O'Connor understands canine reality as evidenced by her remarks in *Tellings*.

In the current case, it is amazing that the Court announces *Cowan* differs from *Tellings* in regard to the "vicious" label, only by stating that there is no concern about unilateral administrative decision-making on a case by case basis. Even when a dog was determined to be "vicious" under R.C. 955.11(A)(4)(a), the Supreme Court Justices in *Cowan* still held that procedural due process requires the owner have notice and opportunity to be heard before dog owner is charged with a crime. Yet in *Tellings*, because the Assembly has created an irrebuttable presumption of "vicious", the Ohio Supreme Court states that dog owners of the specific breed type are thus denied the same opportunity for due process that the Court stated is warranted in *Cowan*.

What this Court has glossed over, is the fact that the intent of the ordinance presuming such dogs are “vicious”, was created to regulate the breed type because of their allegedly “dangerous” temperament. Since the trial court has already found that the breed is not inherently dangerous, the ordinance itself is instead regulating human misconduct or negligence in ownership.

Accordingly, the Appellate Court found that a law regulating the breed only on the basis of *mere ownership* is arbitrary, unreasonable and discriminatory. The Appellate Court further stated that even if a legitimate concern was raised that such dogs were used by criminals, *evidence had already been presented that breed specific laws have had virtually no effect in abating or preventing dog fighting or other crimes.*

The Appellate Court in *Tellings* clearly found objective, scientific, credible and foundation-laid facts, testified to by experts—which explained clearly, that the dogs in question—do not bite more frequently than other breeds, nor are they inherently dangerous.

This being the case, that clear, provable, credible scientific facts were shown regarding the dog breed type in question----then how does it support a conclusion where the Assembly has used a *predetermined belief* finding the breed of dog as "vicious", when the **actual evidence shows completely otherwise?**

CONCLUSION

Although the General Assembly enjoys the position of presumption, that presumption has already been proven to be very incorrect. By stating that dogs "deemed" vicious by government personnel deserve a hearing via due process, but that dogs deemed vicious (an incorrect irrefutable presumption) by the Assembly do not deserve such a hearing--- it appears that the conclusion in reversing the *Tellings* case is not supported by the evidence. The trial court and the Appellate Court *did not find* that the dogs caused unsafe conditions for the public.

The Court here ought to reconsider the cited "evidence" which is used in this Court's ruling to uphold the ordinance; it has no foundational basis, no credible correlated data to support

it, no verifiable facts recorded to support it, and no actual witnesses who could verify and corroborate the allegations. In fact, dog warden Skeldon simply made these statements without any foundation or verified facts or data.

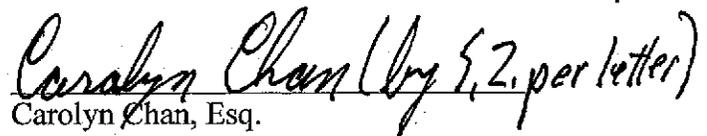
When this testimony was taken into consideration as against the scientific, verifiable, credible facts known to dog experts, the *trial court found* that the evidence re the breed's temperament was considered as updated, *new evidence* to the general older misconceptions held against the dogs, such as the fallacy that the dogs had "locking" jaws, for example. Further, the trial court agreed that the breed type of dog in question as a breed, are not more dangerous than other dog breeds.

After wading through the evidence, the Appellate Court *found specifically* that the trial court had *relied on a law review article which was done in 1988 which used old statistics* and the presumption that pit bulls as a breed were vicious. The Appellate Court found that the trial court had agreed that bare statistics presented in the case *were not* relevant, but yet the trial court *still* relied on the law review's reference to "a disproportionate number of pit bulls" being allegedly involved in serious attacks. The Appellate Court noted that a review of the record revealed no current statistics *since 1996*, and found that the trial court had *improperly relied* on an outdated, *irrelevant*, and inadmissible **source** of factual information to revive the "vicious" pit bull sentiment and justify the finding that the statues and ordinance were constitutional. The overall evidence of the trial court in Tellings *supported the conclusion that the previously believed opinions and myths regarding the dogs was now shown to be fallacy*, due to the credible, scientific, supported, foundation-laid evidence. The Appellate Court subsequently found that the facts shown and proven *at trial did not support a finding* which would deem such dogs as "vicious", contrary to the Assembly's preconceived notion.

Since any dog, whether a specific breed or not, may engage in dog biting, it does not appear at all rational to say that if "not" a pitbull type, one **gets** a due process hearing; "if" a pitbull type, one does **not get** a due process hearing--- simply because the Assembly apparently

believed the dogs of that breed type are all dangerous. After the evidence submitted on the record at the trial level, as clear as it was, and where such evidence was not only credible, but it was also shown to have both a scientific basis as well as a behavioral basis---- it flies in the face of logic and overwhelming foundational evidence to the contrary now, to claim without any supporting, *credible* evidence*, that a particular breed type causes an alleged 'disproportionate' hazard to the public.

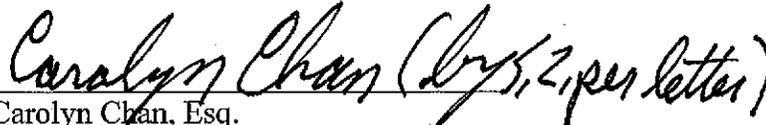
Respectfully submitted,


Carolyn Chan, Esq.
Attorney for Amicus
American Canine Foundation

*If one was to *believe* in the presumption that the breed type of canine "was" vicious, then surely one would *expect* the police to "fire" their weapons more often at such dogs, and subsequently more dogs of the breed type would actually be shot or killed. That in and of itself as "evidence" is not compelling without a foundational basis, and statistics done over time which might or might not actually prove such a theory **was not** submitted to the trial court. As such, all of the items mentioned by dog warden Skeldon relates only to the weight of such allegations, since he did not prove up nor provide any foundational framework for such allegations at trial.

CERTIFICATION

I hereby certify that a copy of the following response to the Motion for a Stay was sent by regular U.S. mail to John T Madigan, Prosecutor for the City of Toledo Ohio One Government Center, Suite 1710, Toledo Ohio, 43604 and Attorney Sol Zyndorf, 2127 Monroe Street, Toledo, Ohio 43604.


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