

MEMORANDUM IN SUPPORT OF JURISDICTION

IN THE SUPREME COURT OF OHIO

Yoshanta Beckett, et al.	:	
	:	
Appellants,	:	On Appeal from the Cuyahoga
	:	County Court of Appeals,
v.	:	Ninth Appellate District
	:	
Richard Warren, et al.	:	Court of Appeals
	:	Case No. 23909
Appellees.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANTS YOSHANTA BECKETT ET AL.

COUNSEL FOR PLAINTIFF-APPELLANTS

MICHAEL J. O'SHEA, 0039330
 Beachcliff Market Square
 19300 Detroit Road - Suite 202
 Rocky River, Ohio 44116
 (440) 356-2700 - phone
 (440) 331-5401 - fax

COUNSEL FOR DEFENDANT-APPELLEES
 Don Wiley
 BAKER, DUBLIKAR, BECK, WILEY
 & MATHEWS
 400 South Main Street
 North Canton, OH 44720
 (330) 499-6000
 (330) 499-6423 - fax

FILED
 OCT 29 2008
 CLERK OF COURT
 SUPREME COURT OF OHIO

TABLE OF CONTENTS

	<u>Page</u>	
<u>EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.....</u>	1	
STATEMENT OF THE CASE AND FACTS.....	1	
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....	5	
<u>First Proposition of Law:</u>		
Ohio courts have a reciprocal duty to monitor inadequate jury awards in the same manner as excessive jury awards.....		5
<u>Second Proposition of Law:</u>		
Trial courts may not admit medical bills when the presenting party does not meet the requirements of Ohio law		7
CONCLUSION.....	9	
PROOF OF SERVICE.....	10	

APPENDIX

Judgment Entry and Opinion of the Ninth District
Court of Appeals - 09/17/2008

Journal Entry of the Ninth District Court of Appeals
10/21/2008

EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST AND
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

STATEMENT OF THE CASE AND FACTS

This case comes before this Court on an appeal from a trial court jury award of **only \$5,000** after a 12-year-old minor child (Timeasha Beckett) suffered painful, severe and long lasting injuries after a terrifying mauling by a large Rottweiler dog (which had a previously documented history of attacking people).¹ Essentially, the Rottweiler tore off half of the scalp of the minor child, causing the child to bleed profusely, and leaving a pronounced and permanent scar on the minor child's forehead. This appeal involves a vicious dog attack case in which the trial court made two serious mistakes of law, thus inviting the jury to misunderstand the facts, and, in turn, return a outrageously low jury award (essentially a defense verdict).

First, the trial court permitted medical bills, over the objection of the plaintiffs, to be used at trial by the defendant dog owners without being properly authenticated as evidence. During the trial, counsel for the defendants was permitted to examine the mother of the mauled child on a Medicaid-paid medical

¹ Color photographs of the serious injuries to the minor child were admitted into evidence and were part of the trial court record.

bill which had not been presented by the plaintiffs in their case, and that medical bill was admitted without any of the required evidentiary foundation required by Ohio law (the mother did not recognize the bill and the defendants' counsel did not authenticate the bill by the methods required under Ohio law). In order to admit medical bills at trial, the proper procedure and authentication foundation must be utilized per RC § 2317.421, RC 2317.40, and Ohio R. Evid. 803(6).

Second, the trial court required the plaintiffs, over strenuous objection, to "choose" to proceed to trial under one of the following methods:

- A. Admitted liability per RC 955.28(B),² but with no ability to pursue punitive damages (the dog had attacked another person approximately a month earlier); or
- B. Disputed liability, notwithstanding RC 955.28(B), and with the ability to pursue punitive damages.

Under objection, the plaintiffs chose the "admitted liability" choice, and proceeded to trial without the ability to advise the

² § 955.28. Dog may be killed for certain acts; owner liable for damages

(B) The owner, keeper, or harbinger of a dog is liable in damages for any injury, death, or loss to person or property that is caused by the dog, unless the injury, death, or loss was caused to the person or property of an individual who, at the time, was committing or attempting to commit a trespass or other criminal offense on the property of the owner, keeper, or harbinger, or was committing or attempting to commit a criminal offense against any person, or was teasing, tormenting, or abusing the dog on the owner's, keeper's, or harbinger's property.

jury of the prior dog attack and without the ability to pursue or request punitive damages.³

The trial court jury, after all of this, returned a verdict of only \$5,000.00 - with \$3,000.00 of that verdict being for medical bill reimbursement and only **\$2,000.00** being for all of the non-economic damages for the minor child.

After the verdict, the plaintiffs filed a motion for a new trial based upon the inadequate jury award. The trial court overruled that motion.

The Ninth District Court of Appeals reversed the trial court judgment. A copy of the September 17, 2008 Judgment Entry and Opinion is attached hereto in the Appendix. The Court of Appeals only addressed the issue of the trial court's inappropriate requirement that plaintiffs choose between admitted liability (and foregoing punitive damages) and negligence. The Court of Appeals thereafter deemed the other two assignments of error moot (i.e. the assignment of error concerning the low jury verdict and the assignment of error concerning the improper admission of unauthenticated medical bills).

Pursuant to Ohio App.R. 25, the defendants moved the Ninth District Court of Appeals to certify a conflict between the

³ This assignment of error is being separately presented to this Court via a Ohio Supreme Court Rule IV certification of conflict. A copy of the October 21, 2008 Ninth District Court of Appeals Journal Entry certifying the conflict (at the request of the defendants) is attached hereto and made a part hereof in the Appendix.

judgment in the Ninth District Court of Appeals' September 17, 2008 opinion and the opinion set forth in *Rodenberger v. Wadsworth* (Nov. 25, 1983), 6th Dist. No. Ot-83-18. The Ninth District Court of Appeals granted that motion by way of a Journal Entry dated October 21, 2008 (copy attached hereto in the Appendix), and it is expected that the defendants will file a Ohio Supreme Court Rule IV (Section 1) notice with this Court in short order.

This Memorandum in Support of Jurisdiction is being filed to comply with all of the procedural requirements of Ohio Supreme Court Rule IV in order to procedurally request that this Court (in the event that this Court determines that the conflict requested by the defendant dog owners exists) set all of the issues raised in the Ninth District Court of Appeals appeal to be briefed to this Court. It would be a travesty of justice to have this Court only address any putative "conflict" issues and then have the plaintiffs barred from having this Court address the issued mooted by the Court of Appeals.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

First Proposition of Law:

Ohio courts have a reciprocal duty to monitor inadequate jury awards in the same manner as excessive jury awards

Ohio has no case law or statute that deals directly with **specific** guideposts for inadequate jury awards. All Ohio law currently has to address this issues is vague and generalized holdings such as:

"To set aside a damage award as inadequate and against the manifest weight of the evidence, a reviewing court must determine that the verdict is so gross as to shock the sense of justice and fairness, cannot be reconciled with the undisputed evidence in the case, or is the result of an apparent failure by the jury to include all the items of damage making up the plaintiff's claim."

White v. Bennett, 2006 Ohio 3600. See also Hook v. Brinker, 2006 Ohio 5583; Drehmer v. Fylak (2005), 163 Ohio App.3d 248; Henricks v. Front Row Theater, 1994 Ohio App. LEXIS 5667 (8th Dist. 1994); Bible v. Kerr (1991), 81 Ohio App.3d 77; and Perry v. Whitaker, (June 22, 2001) Wood App. No WD-00-065.

This and other appellate courts have dealt often with the concept of what can sometimes be excessive damages. See Barnes v. Univ. Hosps. of Cleveland (2008), 119 Ohio St. 3d 173 - citing BMW of North America, Inc. v. Gore (1996), 517 U.S. 559, 116 S. Ct. 1589. Further, the Ohio General Assembly has also entered the legal discourse on excessive damages by issuing statutory limitations on compensatory and punitive damages. See RC 2315.18

and RC 2315.21. However, there has been no guidance by this Court on the other end of the spectrum - i.e. low or no damages.

This Court needs to set a specific bench mark on how lower courts can address inadequate trial court awards in personal injury cases. It appears patently unfair to have this Court consistently address the alleged arbitrary nature of large verdict awards on constitutional grounds yet leave the issue of low verdicts open to arbitrariness. This seriously unbalances scales of justice - essentially ignoring the "equal protection" clauses of the Federal and Ohio constitutions. The only persons hurt by this unfair and unbalanced/unequal arrangement are the innocently injured. We know that case law or statutes which place caps on damage awards inure only to big business and insurance interests. Appellants pray this Court infuse balance and fairness into this legal debate.

Second Proposition of Law:

Trial courts may not admit medical bills when the presenting party does not meet the requirements of Ohio law.

In order to admit medical bills at trial, the proper mandatory procedure and authentication foundation must be utilized per RC § 2317.421,⁴ RC 2317.40,⁵ and Ohio R. Evid. 803(6)⁶. Appellate courts

⁴ **§ 2317.421. Personal injury or wrongful death action**

In an action for damages arising from personal injury or wrongful death, a written bill or statement, or any relevant portion thereof, itemized by date, type of service rendered, and charge, shall, *if otherwise admissible*, be prima-facie evidence of the reasonableness of any charges and fees stated therein for medication and prosthetic devices furnished, or medical, dental, hospital, and funeral services rendered by the person, firm, or corporation issuing such bill or statement, provided, that such bill or statement shall be prima-facie evidence of reasonableness *only if* the party offering it delivers a copy of it, or the relevant portion thereof, to the attorney of record for each adverse party not less than *five days before trial*.

⁵**§ 2317.40. Records as evidence**

As used in this section "business" includes every kind of business, profession, occupation, calling, or operation of institutions, whether carried on for profit or not.

A record of an act, condition, or event, in so far as relevant, is competent evidence if the *custodian or the person who made such record* or under whose supervision such record was made testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event, and if, in the opinion of the court, the sources of information, method, and time of preparation were such as to justify its admission.

This section shall be so interpreted and construed as to effectuate its general purpose to make the law of this state uniform with those states which enact similar legislation.

⁶ Ohio Evid.R. 803(6) provides:

(6) Records of regularly conducted activity.

A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, *a person with knowledge*, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by *the testimony of the custodian* or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term

have ruled that these statutes and rules are mandatory, and a presenting party and/or a trial court do not have discretion to ignore them. See Stuber v. Baker, 2005 Ohio 3230; Dellenbach v. Robinson (1993), 95 Ohio App. 3d 358; WUPW TV-36 v. Direct Results Marketing, Inc. (1990), 70 Ohio App. 3d 710; Hardesty v. Corrova (1986), 27 Ohio App. 3d 332; Benjamin v. KPMG Barb., 2005 Ohio 1959; and Great Seneca Fin. v. Felty (2006), 170 Ohio App. 3d 737.

However, despite what appears as only appellate court discussion, this Court has yet to directly deal with how a trial court is to deal with a failure to adhere to the requirements set forth in RC § 2317.421, RC 2317.40, and Ohio R. Evid. 803(6). Are the requirements of those statutes and rule mandatory, or can a trial court ignore them (as argued by the defendant dog owners at the Court of Appeals) in its "discretion." Are these laws mandatory or discretionary? Further, what must a trial court do if one party fails to meet the obligations set forth in these statutes and this rule, and the other party objects? Given the flurry of both statutory and evidentiary rules which surround this issue, it would be of great general assistance to litigants and lowers courts for this Court to interpret this area of law and provide clear guideposts for the application of Ohio law.

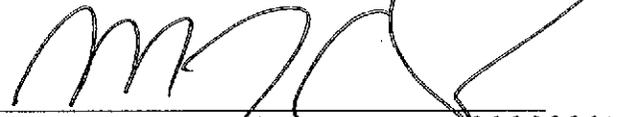
"business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court take jurisdiction on the propositions of law set forth above, and order the parties to brief the issues for this Court.

Respectfully submitted:

O'SHEA & ASSOCIATES CO., L.P.A.



Michael J. O'Shea, Esq. (0039330)
michael@moshea.com
19300 Detroit Road - Suite 202
Rocky River, Ohio 44116
(440) 356-2700
(440) 331-5401 - fax

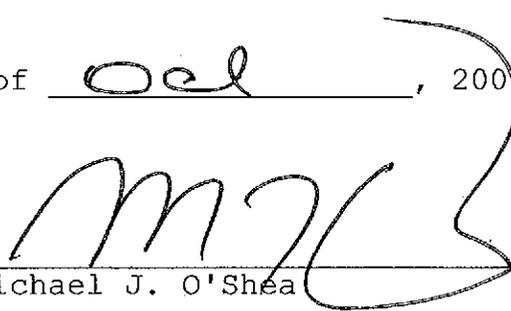
Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following persons and parties:

Donald P. Wiley, Esq.
400 South Main Street
North Canton, Ohio 44720

by regular U.S. Mail this 28 day of Oct, 2008.



Michael J. O'Shea

COURT OF APPEALS
DANIEL M. HERRIGAN

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO)
COUNTY OF SUMMIT)

2008 SEP 17 11:41 AM

YOSHANTA BECKETT et al.

SUMMIT COUNTY
CLERK OF COURTS

C.A. No. 23909

Appellants

v.

RICHARD WARREN et al.

Appellees

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV-2006-07-4759

DECISION AND JOURNAL ENTRY

Dated: September 17, 2008

Per Curiam.

{¶1} Appellant, Yoshanta Beckett (“mother”), on behalf of minor child Timeasha Beckett, appeals the judgment issued in Beckett’s favor in the Summit County Court of Common Pleas. We reverse.

{¶2} On July 31, 2006, mother and Beckett filed an action for personal injury against Appellees, Richard Warren and Mary Wood for injuries Beckett sustained when Warren and Wood’s dog (Roly Poly, a Rottweiler/Shar-Pei mix) bit Beckett on the head in March of 2006. The complaint set forth two causes of action for negligence and one cause of action for strict liability under Chapter 955 of the Ohio Revised Code. The case proceeded to trial on August 13, 2007, and resulted in a jury verdict in favor of Beckett and a \$5,000.00 damages award. The jury award consisted of \$500.00 for past medical expenses, \$2,500.00 for future medical expenses, \$1,500.00 for past pain and suffering, and \$500.00 for future pain and suffering. On August 17, 2007, Beckett moved the court for a new trial pursuant to Civ.R. 59(A)(4) and (6) and argued

that the damages award was inadequate and not sustained by the weight of the evidence. On September 12, 2007, the trial court denied Beckett's motion.

{¶3} Beckett timely appealed and raises three assignments of error. We have rearranged the assignments of error to facilitate our review.

ASSIGNMENT OF ERROR 3

“THE TRIAL COURT ERRED IN REQUIRING THE MINOR CHILD TO CHOOSE STRICT LIABILITY (AND THUS NO PUNITIVE DAMAGES OR EVIDENCE OF PRIOR ATTACKS/BITES) OR MAKING THEM PROVE NEGLIGENCE IN ORDER TO SEEK PUNITIVE DAMAGES[.]”

{¶4} In this assignment of error, Beckett argues that the trial court erroneously required her to choose between pursuing a statutory claim under R.C. 955.28 and a common law claim for negligence. A common law claim for negligence would allow evidence of prior attacks/bites¹ and a jury to award punitive damages, while a statutory claim would not. Beckett chose to pursue a statutory claim. Beckett relies upon *Rothenbusch-Rhodes v. Mason*, 10th Dist. No. 02AP-1028, 2003-Ohio-4698, for the proposition that a victim of a dog bite attack can simultaneously pursue both common law and statutory claims, including a claim for punitive damages.

{¶5} “The decision of whether a remedy is available and appropriate is a question of law, which is reviewed de novo.” *Telxon Corp. v. Smart Media of Delaware, Inc.*, 9th Dist. Nos. 22098, 22099, 2005-Ohio-4931, at ¶93, citing *Entergy Ark., Inc. v. Nebraska* (C.A.8, 2004), 358 F.3d 528, 553-54.

¹ Dominique Wood testified, without objection, that Roly Poly had bitten another child on a prior occasion, so this information was known to the jury.

{¶6} R.C. 955.28(B) states that, “[t]he owner, keeper, or harbinger of a dog is liable in damages for any injury, death, or loss to person or property that is caused by the dog, unless the injury, death, or loss was caused to the person or property of an individual who, at the time, was *** teasing, tormenting, or abusing the dog on the owner’s, keeper’s, or harbinger’s property.” R.C. 955.28 does not provide for the award of punitive damages. *Tynan v. Hanlon* (1959), 110 Ohio App. 77, 79. “R.C. 955.28 does not establish negligence per se. Rather, the statute establishes liability without regard to fault or the dog owner’s negligence.” *Allstate Ins. Co. v. U.S. Assoc. Realty, Inc.* (1983), 11 Ohio App.3d 242, 246, citing *Hirschauer v. Davis* (1954), 98 Ohio App. 479, affirmed (1955), 163 Ohio St. 105; *Silverglade v. Von Rohr* (1923), 107 Ohio St. 75. “In order to maintain a strict liability cause of action under R.C. 955.28(B), the plaintiff must establish: (1) that the defendant is the owner, keeper or harbinger of the dog; (2) that the injury was proximately caused by the dog’s actions; and (3) the monetary amount of the damages.” *Bowman v. Stott*, 9th Dist. No. 21568, 2003-Ohio-7182, at ¶8, citing *Hirschauer v. Davis* (1955), 163 Ohio St. 105, paragraph three of the syllabus; *Stuper v. Young* (May 15, 2002), 9th Dist. No. 20900, at *4.

{¶7} “Under the common law, a plaintiff suing for damages inflicted by a dog under a theory of general negligence must show: (1) the defendant owned or harbored the dog; (2) the dog was vicious; (3) the defendant knew of the dog’s viciousness; and (4) the defendant was negligent in keeping the dog.” *Bowman* at ¶19, citing *Flint v. Holbrook* (1992), 80 Ohio App.3d 21, 25-26. Punitive damages may be awarded in a common law action against the dog owner. *Rothenbusch-Rhodes*, supra, at ¶38, citing *Tynan*, 110 Ohio App. at 79.

{¶8} The trial court required Beckett to choose between two theories upon which to proceed at trial, statutory or common law, based on the authority of *Rodenberger v. Wadsworth*

(Nov. 25, 1983), 6th Dist. No. OT-83-18. Beckett chose to proceed on the statutory claim, but preserved the issue for appeal. Warren and Wood then stipulated that Beckett was bitten by their dog and suffered injuries, establishing the first two elements of the statutory claim as set forth in *Bowman*. Thus, the trial proceeded solely on the third element of a statutory claim, compensatory damages.

{¶9} We initially note that this is an issue of first impression in our appellate district although other appellate districts, including this one, have cited *Warner v. Wolfe* (1964), 176 Ohio St. 389 for the proposition that a party may pursue both statutory and common law claims for dog bite injuries, albeit in dicta. See, e.g., *Rothenbusch-Rhodes* at ¶36; *Bowman* at ¶20; *Flint*, 80 Ohio App.3d at 25; *Thompson v. Irwin*, 12th Dist. No. CA97-05-101, at *2; *Koruschak v. Smotrilla* (July 16, 2001), 7th Dist. No. 99-CA-320, at *3; *Myers v. Linn* (July 19, 1985), 6th Dist. No. L-85-009, at *1.

{¶10} It is true that in *Rodenberger*, supra, the Sixth District Court of Appeals held that a plaintiff must choose which cause of action he or she will pursue. In reaching that decision, however, the *Rodenberger* court relied on the dicta from the syllabus in *Warner*, supra. In *Warner*, the Supreme Court considered whether adoption of Section 955.28 of the Ohio Revised Code abrogated the common-law right of action for damage or injury caused by a dog. The Supreme Court held that it did not. *Warner*, 176 Ohio St. at 392. The question of whether a plaintiff may pursue both a common-law claim and a statutory claim in the same lawsuit was not before the court. Thus, to the extent the last sentence of the syllabus in that case appears to say that a plaintiff must choose between the common-law claim and the statutory claim, it is dicta.

{¶11} In *Rodenberger* the court also reasoned that, because evidence that the dog's owner knew it was vicious was necessary for a plaintiff to succeed on the common-law claim but

immaterial to the statutory claim, “[a]ssuming that the plaintiff introduced evidence of the dog’s viciousness or the owner’s negligence, but could not prove all the elements necessary under the common law, a judgment in favor of such plaintiff under statutory liability would prejudice defendant and be subject to reversal due to the introduction of inadmissible evidence.” *Id.* at *2. This Court does not agree that a reversal would be required under the scenario suggested by the court in *Rodenberger*. It is often true that evidence immaterial to one cause of action is admissible because that cause of action is being jointly tried with a separate cause of action for which the evidence is material. The logical extension of the rationale relied upon by the court in *Rodenberger* is a conclusion that separate causes of action requiring different evidence can never be tried together. Such, however, is not the law.

{¶12} Admittedly, as Judge Vukovich has acknowledged, “it is going to be a daunting task for a jury of lay people to sift through the evidence and properly assign it to one of the two causes of action” in a dog-bite case. *Koruschak*, *supra*, at *4 (Vukovich, J., concurring). The answer, however, is not to force a plaintiff to choose between her two valid causes of action. Rather, “it is incumbent upon the trial court to bring clarity out of chaos through its instructions to the jury.” *Id.*

{¶13} Based on the foregoing, we hold that a party may simultaneously pursue claims for a dog bite injury under R.C. 955.28 and common law negligence. The trial court erred in requiring Beckett to choose which claim to pursue. Beckett’s third assignment of error is sustained.

ASSIGNMENT OF ERROR 1

“THE TRIAL COURT ERRED IN FAILING TO GRANT A NEW TRIAL WHEN THE JURY AWARD WAS INADEQUATE AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE[.]”

ASSIGNMENT OF ERROR 2

"THE TRIAL COURT ERRED IN ADMITTING MEDICAL BILL EXHIBITS WHICH WERE NOT STIPULATED TO AND WHICH WERE NOT PROPERLY AUTHENTICATED UNDER OHIO LAW[.]"

{¶14} As the resolution of the third assignment of error renders moot the first and second assignments of error, we decline to address them.

{¶15} This matter is remanded for a new trial on both Beckett's statutory and common-law claims.

{¶16} Judgment reversed and remanded for proceedings consistent with this opinion.

Judgment reversed
and cause remanded.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellees.



CARLA MOORE
FOR THE COURT

MOORE, P. J.
DICKINSON, J.
CONCUR

SLABY, J.
DISSENTS, SAYING:

{¶17} I respectfully dissent from the majority's resolution of Beckett's last assignment of error. I would hold that the trial court properly required Beckett to choose between a claim under R.C. 955.28 and a common law negligence claim, based on the authority of *Warner v. Wolfe* (1964), 176 Ohio St. 389.

{¶18} In *Warner*, the Supreme Court of Ohio held that, "[t]he right to maintain an action at common law for damages resulting from injuries, which by his negligence the owner of a dog suffers such animal to commit, has not been abrogated by statute and such suit may be maintained either under the statute or at common law." (Emphasis added.) *Id.*, quoting *Lisk, Adm'r, v. Hora* (1924), 109 Ohio St. 519, paragraph one of the syllabus. Accord, *Manda v. Stratton* (1999), 11th Dist. No. 98-T-0018, at *5; *Myers v. Lynn* (1985), 6th Dist. No. L-85-009, at *2.

{¶19} The Sixth District Court of Appeals relied upon *Warner* for the conclusion that a plaintiff must choose his theory of liability. *Rodenberger v. Wadsworth* (Nov. 25, 1983), Sixth Dist. No. OT-83-18, at *2. The *Rodenberger* court held that "the words, 'either under the statute or at common law' indicate that the plaintiff in a dog bite case may not proceed under both theories of liability[.]" *Id.* The *Rodenberger* court concluded that common law and statutory claims could not be maintained simultaneously because:

“in an action under the statute, ‘evidence tending to show that the dog had bitten another person prior to the time that the plaintiff was bitten, and that defendant had knowledge thereof, is inadmissible.’ Thus, if a plaintiff were allowed to proceed under both theories of liability, evidence needed to establish the element of viciousness necessary under the common law theory would be inadmissible if the theory of statutory liability were also pursued. *** [T]he trial court did not err in requiring the appellants to elect which theory they desired to pursue at trial.” *Rodenberger* at *2, quoting *Kleybolte v. Buffon* (1913), 89 Ohio St. 61.

{¶20} I find the reasoning of the Sixth District Court of Appeals persuasive. Even had the Supreme Court of Ohio not expressly stated that a party could maintain either a statutory claim or a common law negligence claim, if both claims were allowed to proceed to trial and the evidence necessary to establish the negligence claim were admissible despite the requirements to establish a claim under R.C. 955.28, it would be nearly impossible for a judge to construct a proper jury instruction. Such jury instruction would need to adequately explain the law of both theories and then instruct on how to apply one rule of law to some facts and another rule of law to other facts, while ignoring the first set of facts. A trial court would need to instruct a jury that they could consider the dog’s vicious propensity related to the negligence claim, but must forget that evidence when considering the statutory claim.

{¶21} Based on the foregoing and given the *Warner* Court’s notation that a victim of a dog bite may recover under either R.C. 955.28 or pursuant to a common-law negligence claim, I would hold that the trial court did not err in requiring Beckett to so choose and would affirm this portion of the judgment of the trial court. Because of my conclusion as to the third assignment of error, Beckett’s first two assignments of error would not be moot and I would address them.

APPEARANCES:

MICHAEL J. O’SHEA, Attorney at Law, for Appellants.

DONALD P. WILEY, and JULIE A. BICKIS, Attorneys at Law, for Appellees.

STATE OF OHIO)
COUNTY OF SUMMIT)

YOSHANTA BECKETT, et al.
Appellants

v.

RICHARD WARREN, et al.
Appellees

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

C.A. No. 23909

JOURNAL ENTRY

Appellees have moved, pursuant to App.R. 25, to certify a conflict between the judgment in this case, which was journalized on September 17, 2008, and the judgment of the Sixth District Court of Appeals in *Rodenberger v. Wadsworth* (Nov. 25, 1983), 6th Dist. No. OT-83-18. Appellants have not responded to the motion.

Article IV, Section 3(B)(4) of the Ohio Constitution requires this Court to certify the record of the case to the Ohio Supreme Court whenever the “judgment *** is in conflict with the judgment pronounced upon the same question by any other court of appeals in the state[.]” “[T]he alleged conflict must be on a rule of law -- not facts.” *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St. 3d 594, 596.

Appellant has proposed that a conflict exists among the districts on the following issue:

1. Whether “a plaintiff pursuing a claim for bodily injury damages in a case involving a dog are required to elect between pursuing a statutory claim under R.C. 955.28 and a common law claim for negligence.”

We find that our decision is in conflict with the judgment of the Sixth District Court of Appeals in *Rodenberger*, supra. In *Rodenberger*, the Sixth District held as follows:

“In light of the holding in *Lisk*, supra, and *Warner*, supra, that a suit may be instituted either under the statute or at common law, and considering that evidence needed to establish the elements of a common law action are inadmissible under the statutory cause of action, we conclude that the trial court did not err in requiring the appellants to elect which theory they desired to pursue at trial.” Id. at *2.

In contrast, in the instant matter, this Court held:

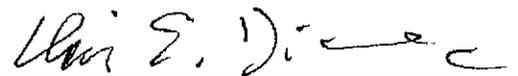
“It is true that in *Rodenberger*, supra, the Sixth District Court of Appeals held that a plaintiff must choose which cause of action he or she will pursue. In reaching that decision, however, the *Rodenberger* court relied on the dicta from the syllabus in *Warner*, supra.

“[W]e hold that a party may simultaneously pursue claims for a dog bite injury under R.C. 955.28 and common law negligence.” Id. at ¶10 and ¶13.

Accordingly, we find that a conflict exists. Appellees’ motion to certify a conflict is granted.



Judge



Judge