

IN THE SUPREME COURT OF OHIO

YOSHANTA BECKETT, et al,)	CASE NO.: 2008-2106
)	
Appellees,)	On Appeal from the
)	Summit County Court
v.)	of Appeals, Ninth
)	Appellate District
RICHARD WARREN, et al,)	Court of Appeals
)	Case No. CV 2006 07 4759
Appellants.)	

JURISDICTION MEMORANDA OF APPELLEE-CROSS APPELLANT

Donald P. Wiley (0016389)
Baker, Dublikar, Beck, Wiley & Mathews
400 South Main Street
North Canton, Ohio 44720
(330) 499-6000
Fax No. (330) 499-6423
dwiley@bakerfirm.com

COUNSEL FOR CROSS APPELLANTS, RICHARD WARREN AND MARY TRUITT

Michael J. O'Shea (0039330)
O'Shea & Associates, LPA
19300 Detroit Road
Suite 202
Rocky River, Ohio 44116
(440) 356-2700
Fax No. (440) 331-5401
michael@moshea.com

COUNSEL FOR APPELLEES, YOSHANTA BECKETT AND TIMESHA BECKETT

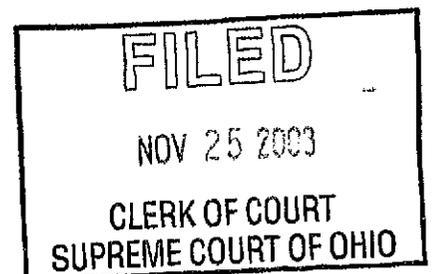


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**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC
OR GREAT GENERAL INTEREST**

[NOTE: The Ninth District Court of Appeals has certified a conflict of opinions, and a notice to that effect has been separately filed.]

Despite the co-existence of statutory and common law causes of action for dog bites in this state for almost one hundred years, this case gives the court an opportunity to decide an issue never before clarified by the Supreme Court: that is, whether a plaintiff must make an election before trial of which cause of action will be presented to a jury. In addition to having never been directly addressed by this court, the only two appellate cases directly on point have reached different conclusions.

For years, litigants and courts have assumed that such an election must be made, because these causes of actions involve evidence that is admissible under one theory, but inadmissible under another. One appellate court has held that because of this evidentiary contradiction, an election must be made. *Rodenberger v. Wadsworth* (Nov. 25, 1983), 6 Dist. No. OT-83-18, at *2. In reaching this decision, the appellate court relied upon language from two supreme court cases - one from 1924 and the other from 1964 - in which this court stated that such a suit, “. . . may be maintained either under the statute or at common law.” *Warner v. Wolfe* (1964), 176 Ohio St. 389, quoting *Lisk v. Hora* (1924), 109 Ohio St. 519, paragraph 1 of the syllabus, emphasis added. However, the supreme court has never expressly ruled that an election of remedies must be made before presenting the case to a jury.

Now, in the only other appellate opinion on point, the Ninth Appellate District sitting in Akron has ruled that a party may simultaneously present to a jury causes of action for a dog bite injury under both statutory and common law theories. A motion to certify a conflict amongst the Court of Appeals has been granted, a notice of same separately filed.

Dog bite cases are routinely filed in every county throughout this state. The coexistence of dogs with humans is the subject of routine litigation and statutory enactment. Nevertheless, the requirement of an election of remedies before trial has never been directly addressed by this court, and has only been directly addressed by two appellate courts, whose opinions are in conflict. In order to resolve this conflict and bring clarity and uniformity to the trial of such common issues throughout the state of Ohio, it is most respectfully submitted that this case presents a case of great general interest, and therefore should be accepted on appeal.

STATEMENT OF THE CASE AND FACTS

The plaintiff-appellees filed a complaint in the Summit County Court of Common Pleas alleging injuries to a nine year old girl proximately caused by a dog bite. The complaint alleged liability under a negligence theory, and under R.C. §955.28. Prior to trial, and over objection of the plaintiff-appellees, the court required the plaintiff to make an election as to which theory would be presented to a jury. The plaintiff-appellees chose a statutory theory.

Following the presentation of evidence, a verdict in favor of the plaintiffs in the amount of \$5,000 was rendered. The plaintiffs had argued for damages exceeding \$300,000. A motion for a new trial was overruled. On appeal, the Ninth Appellate District, sitting in Akron, ruled that it was error for the trial court to require the plaintiff-appellants to make an election, and remanded the case for a new trial. **A motion to certify a conflict amongst courts of appeals has been granted by**

the Ninth District Court of Appeals. This memorandum is filed to request that the court consider the issue of an election of remedy, an issue which has never been decided directly by this court to date.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No.1: The plaintiff in a dog bite case may file a complaint alleging a statutory cause of action and a negligence theory, but to avoid a confusion of issues and the presentation of evidence which is admissible in one action and inadmissible in another, the plaintiff must elect which cause of action will be pursued at trial.

At common law, plaintiffs suing for injuries caused by a dog need to allege and prove that the defendant owned or harbored the dog; that the dog was vicious in nature; that the defendant knew of the vicious nature of the dog; and that the defendant was negligent in keeping the dog. See *McIntosh v. Doddy* (1947), 81 Ohio App.351. Under the provisions of R.C. 955.28, however, the victim of a dog bite may recover damages, so long as the victim was not trespassing, teasing or tormenting the dog. Under the statute, the viciousness of the dog and the owner's knowledge thereof is immaterial as the statute imposes a rule of absolute liability upon the owner of a dog for damage or injury caused by such dog.

In 1924, this court stated in *Lisk v. Hora* (1924), 109 Ohio St. 519:

The 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.

In 1964, the supreme court revisited this issue and again stated, in the syllabus, that "A suit may be instituted either under the statute or at common law." *Warner v. Wolfe* (1964), 176 Ohio St.

389.

In *Rodenberger v. Wadsworth* (Nov. 25, 2983), Ottawa Cty. App. No. OT-83-18, the court noted that while 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, “. . . there does not appear to be any case law in Ohio exactly on point.” Accordingly, the court turned to *Kleybolte v. Buffon* (1913), 89 Ohio St. 61, where the court held that 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 the defendant had knowledge thereof, is inadmissible.

The court therefore concluded:

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 was also being pursued. Assuming 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. 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.

Prior to the case at issue, the only other appellate court which seems to have directly addressed the issue failed to come to a conclusion. In *Koruschak v. Smotrilla* (July 16, 2001), Mahoning Cty. App. No.99 CA 320, the trial court instructed the jury on the issue of general negligence, which consisted of 76 lines in the transcript. “Buried” in those general negligence instructions was a single, three-line sentence sounding vaguely in strict liability. *Id.* at 1. Finding this situation confusing, the appellate court reversed the finding for the defendant and remanded the

case for a new trial. The concurring opinion of Judge Vukovich is instructive of the situation which could be cured by the acceptance of this matter for consideration by this court:

Although we do not now hold that a plaintiff in a dog bite case should make an election prior to trial as to whether they are proceeding pursuant to a negligence theory or with a so-called strict liability statutory cause of action, this case is illustrative of the difficulties which occur when they fail to do so. Since the elements of proof for each of the aforementioned causes of action are separate and distinct, their comingling at trial invites confusion for the trier of fact. That is, the trial court will inevitably be called upon to decide the admissibility of evidence that might be proper under one theory, but inadmissible under another. While that process might not be too cumbersome relative to a dog bite case tried to a court, 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 before it. Therefore, it is incumbent upon the trial court to bring clarity out of chaos through its instructions to the jury.

Here, the jury instructions given by the trial court were, at best, confusing. While counsel for plaintiffs must assume some of the responsibility for that fact by its failure to clearly delineate prior to trial which theory they were going to try, they were not asked to or compelled to do so.

In the case *sub judice*, the Ninth District Court of Appeals has held that a dog bite plaintiff may simultaneously pursue claims for a dog bite injury under R.C. 955.28 and common law negligence. In response to the argument that the theories presenting compatible and mutually inadmissible forms of evidence, the Court of Appeals echoed the language set forth above, stating that it is incumbent upon the trial court to “bring clarity out of chaos.”

It is therefore clear that throughout the years, most dog bite cases are filed under alternative theories of liability. At trial, however, most dog bite cases proceed against either the common law theory of negligence or statutory liability. This procedure has been followed due to language in supreme court cases from 1924 and 1964 stating that the plaintiff may proceed with “either” one

theory “or” another. The Sixth District Court of Appeals in *Rodenberger* confirmed this procedure in 1983. Until now, no other supreme court case or appellate court case appears to have directly addressed this point. Now, the Ninth District Court of Appeals has held that both causes of action may be presented to a jury. This of course invites the presentation of evidence which is admissible under one theory, but inadmissible under another. The fact that two different courts of appeals have reached two different conclusions of this issue means that different litigants throughout this state will achieve different results in cases which are commonly filed throughout Ohio. Because this is an issue which so commonly appears in trial courts throughout this state, because this issue has never been directly addressed by this court, and because the two courts of appeals which have directly addressed this issue have reached differing results, it is most respectfully submitted that this case presents an issue of great public or general interest, and is worthy of consideration for a hearing by this Honorable Court.

Proposition of Law No.2: The amount of medical bills may be properly considered by a jury in assessing damages, and a jury’s assessment of damages will not be disturbed on appeal absent a showing of passion or prejudice.

The appellants memorandum in support of jurisdiction includes arguments for the acceptance of this appeal on two (2) issues that the Ninth District Court of Appeals deemed to be “moot”. Namely, the jury’s consideration of medical bills and the amount of the jury’s verdict. For the reasons set forth below, appellee-cross appellant respectfully submits that these are not issues that need to be determined by this Court under the facts of this case.

First of all, it is well settled in this State that under Civ. R. 59, a trial court may grant a new trial on the grounds of “excessive or inadequate damages, appearing to have been given under the

influence of passion or prejudice.” Ohio law is well settled that the mere size of the verdict, without more, is insufficient to prove passion or prejudice. *Airborne Express, Inc. v. Systems Research Laboratories, Inc.* (1995), 106 Ohio App. 3d 498. See, also, *Schumaker v. Crawford* (1991), 78 Ohio App. 3d 53; *Poske v. Mergl* (1959), 169 Ohio St. 70; *Verbon v. Pennese* (1982), 7 Ohio App. 3d 182. Certainly many other cases could be cited in support of this proposition. Appellee-cross appellant respectfully submits that the law in this area is well settled, there is no evidence of passion or prejudice in the trial court below, and that this proposition of law need not be considered by this honorable court.

Similarly, the appellant claims that this matter should be considered for the proposition that medical bills of the plaintiff should not have been considered by the jury in this matter. Here, too, Ohio law is well settled. Evidence Rule 402 provides that all relevant evidence is admissible. R.C. 2317.421 provides, in pertinent part, that in a personal injury action, a bill or any statement or any part thereof which is itemized by day, type of service rendered, and charge, shall, if otherwise admissible, be *prima facie* evidence of the reasonableness of any charges and fees . . .”. This statement, therefor, must be otherwise admissible, and to meet this requirement, it is necessary only to prove “that the medical services for which he was billed were made necessary by the injuries the defendant caused.” *Bennett v. Broadwater* (Aug. 31, 1994), Summit No. 16724, citing *Wood v. Elzoheary* (1983), 11 Ohio App. 3d 27, 29. Original bills are considered to be evidence of the value of the medical providers themselves place upon their services. *Robinson v. Bates* (2006), 112 Ohio St. 3d 17.

In this case, the jury was permitted to consider the plaintiff’s emergency room bills and follow-up bills for treatment with other physicians. It is respectfully submitted that the law in Ohio

is well settled that in a personal injury action, a jury may consider the amount of the plaintiff's bills in assessing damages, and it is further respectfully submitted that the jury should be able to consider the amount of bills even if the plaintiff does not wish them to do so.

In any event, defendant does not believe that the cross appellant's assignments of error raise this case to an issue of such great public interest that it should be considered by this Court. However, appellee-cross appellant does believe that the ruling of the Court of Appeals below with regard to choosing a cause of action warrant review by this honorable Court.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. The appellants request that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,



Donald P. Wiley (0016389)
Baker, Dublikar, Beck, Wiley & Mathews
400 South Main Street
North Canton, Ohio 44720
Telephone: (330) 499-6000
Fax: (330) 499-6423
E-mail: dwiley@bakerfirm.com
COUNSEL FOR CROSS APPELLANTS,
RICHARD WARREN AND MARY TRUITT

PROOF OF SERVICE

A copy of the foregoing Memorandum In Support of Jurisdiction was sent by ordinary U.S. mail this 24TH day of November, 2008, to:

Michael J. O'Shea, Esq.
O'Shea & Associates, LPA
19300 Detroit Road
Suite 202
Rocky River, Ohio 44116

COUNSEL FOR APPELLEES,
YOSHANTA BECKETT AND TIMESHA BECKETT



Donald P. Wiley
COUNSEL FOR CROSS APPELLANTS,
RICHARD WARREN AND MARY TRUITT