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.	)	

MOTION FOR CLARIFICATION OF DOCKET

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COUNSEL FOR APPELLEES, YOSHANTA BECKETT AND TIMESHA BECKETT

FILED
DEC 01 2008
CLERK OF COURT
SUPREME COURT OF OHIO

This case involves claims for personal injuries suffered by a child as a result of a dog bite. Both parties have filed appeals with the Supreme Court, and the appeals were filed on the same day, October 29, 2008. In addition, just before the appeals were filed, the Ninth District Court of Appeals certified a conflict between its decision in this case and the Sixth District Court of Appeals opinion in *Rodenberger v. Wadsworth* (Nov 25, 1983), Sixth District No. OT-83-18. A copy of the Notice of Certification of Conflict is attached. Attached to that notice was the Court of Appeals Journal Order certifying the conflict. These matters were filed with the Court the day that this party filed its Notice of Appeal and Jurisdictional Memoranda. Accompanying these documents were a Forty Dollar ($40.00) filing fee which was accepted by the Clerk.

When these matters were received by the Clerk, the Clerk's Office contacted this counsel to advise that earlier that morning, the Clerk processed the Notice of Appeal and Jurisdictional Memoranda of the Appellant herein. This counsel was, therefore, informed that his Notice of Appeal would be considered a "cross appeal", and that a new jurisdictional memoranda would have to be filed within the next thirty (30) days. That jurisdictional memoranda has since been filed.

On November 25, 2008, counsel received a telephone call from the Clerk's Office advising that when the Clerk's Office received Notice of Certification of the Conflict by the Ninth District Court of Appeals, it was mistakenly filed as notice that a request for certification had been made. Thus, no new case number was assigned to the certification portion of this case. The Clerk's Office also advised that when the Notice of Certification of Conflict was filed, copies of the lower Court Opinions were not attached to the notice. The Clerk's Office also notified counsel that the Forty Dollar ($40.00) filing fee had been used for the filing of the cross-appeal, and not for the certification notice. The Clerk's Office advised that because more than thirty (30) days has elapsed since the

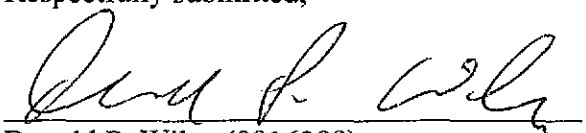
Court of Appeals certified the conflict, and because copies of the lower Court Opinions were not attached, no new case number could be assigned to the certification portion of this appeal.

Counsel most respectfully submits that Rule IV of the Rules of Practice of the Supreme Court provides that, "failure to file the Court of Appeals Order certifying a conflict within thirty (30) days after the date of such order shall divest the Supreme Court of jurisdiction to consider the order certifying a conflict." It is most respectfully submitted that the Court of Appeals' Opinion certifying the conflict was timely filed on October 29, 2008. Copies of the lower Court of Appeals' Opinions are attached to this Motion. Due to the confusion of the simultaneous filings of the appeals, and due to the Clerk's docketing of the certification as merely a notice that certification had been requested, confusion existed and a separate case number for the certification of conflict was not issued.

Based upon all of the above facts, counsel for the appellee-cross appellant most respectfully requests that the docket reflect that a Notice of Certification of Conflict was timely filed and that the Certification of Conflict will be decided in accordance with the Rules of Practice of the Supreme Court of Ohio. Counsel apologizes for failing to attach copies of the lower Court Opinion to the Notice of Certification of Conflict. Counsel respectfully requests the Court to consider that Rule IV of the Rules of Practice of the Supreme Court requires the filing of such opinions, but does <u>not</u> state that the failure to file those opinions divest the Court of jurisdiction. Only the failure to file the Court of Appeal's order certifying a conflict within thirty (30) days divest the Court of jurisdiction to consider the conflict, and in this case, that time period was complied with. Copies of the lower Court Opinions are attached.

For all of the foregoing reasons, counsel is respectfully requesting the Court to consider the Court of Appeals' Order certifying a conflict in accordance with Rules of Practice of the Supreme Court of Ohio.

Respectfully submitted,



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PROOF OF SERVICE

A copy of the foregoing Motion for Clarification was sent by ordinary U.S. mail this 26TH day of November, 2008, to:

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COUNSEL FOR APPELLEES,
YOSHANTA BECKETT AND TIMESHA BECKETT

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

The Supreme Court of Ohio
Office of the Clerk

29232

Receipt

Received From:	Baker, Dublikar, Beck, Wiley, & Mathews
Amount:	$ 40.00
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For:	$40 Filing Fee
Case:	Case No. GEN-2008-2106 Filed: 10/29/2008 Yoshanta Beckett, et al. v. Richard Warren, et al.
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IN THE SUPREME COURT OF OHIO

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

08-2106

NOTICE OF CERTIFICATION OF CONFLICT
BY THE NINTH DISTRICT COURT OF APPEALS

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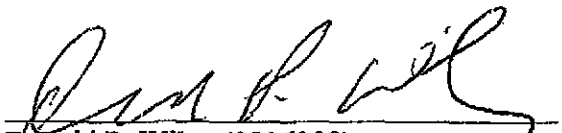
COUNSEL FOR APPELLEES, YOSHANTA BECKETT AND TIMESHA BECKETT

FILED
OCT 29 2008
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF CERTIFICATION OF CONFLICT
BY THE NINTH DISTRICT COURT OF APPEALS

Appellants, Richard Warren and Mary Truitt, hereby gives notice, pursuant to Supreme Court Rule of Practice IV, Section 4(A), that they timely filed a motion to certify a conflict in the Ninth District Court of Appeals below on September 29, 2008. The appellants' motion, regarding whether a plaintiff must elect at trial between a between a statutory cause of action or a negligence theory in a dog bite case, was granted on October 21, 2008. A copy of that Order is attached.

Respectfully submitted,



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Counsel for Appellants,
Richard Warren and Mary Truitt

PROOF OF SERVICE

A copy of the foregoing notice of pending motion to certify conflict was sent by ordinary U.S. mail this 28th day of October, 2008, to:

Michael J. O'Shea, Esq.
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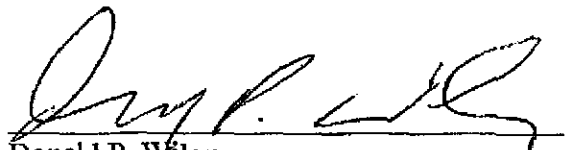
Counsel for Appellees,
Yoshanta Beckett and Timesha Beckett



Donald P. Wiley
Counsel for Appellants,
Richard Warren and Mary Truitt

COURT OF APPEALS
DANIEL M. HORRIGAN
2008 OCT 21 AM 9:21
SUMMIT COUNTY
CLERK OF COURTS

STATE OF OHIO)
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

YOSHANTA BECKETT, et al.

Appellants

v.

RICHARD WARREN, et al.

Appellees

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

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Ninth District, Summit County.
Yoshanta BECKETT et al., Appellants
v.
Richard WARREN et al., Appellees.
No. 23909.

Decided Sept. 17, 2008.

Background: Mother, on behalf of minor child who was bit on the head by a dog, filed personal injury action against dog's owners. The Court of Common Pleas, Summit County, No. CV-2006-07-4759, required mother to choose between pursuing a statutory claim and a common law negligence claim, and ultimately entered judgment on jury verdict awarding mother $5,000. Mother appealed.

Holding: The Court of Appeals held that trial court erred in requiring mother to choose which claim to pursue. Reversed and remanded.

Slaby, J., dissented and filed opinion.

Animals 28 ⚷66.5(1)

28 Animals
28k66 Injuries to Persons
28k66.5 Dogs
28k66.5(1) k. Duties and Liabilities in General. Most Cited Cases
A party may simultaneously pursue claims for a dog bite injury under statute establishing owner's liability for injury caused by dog and common law negligence. R.C. § 955.28.

Appeal from Judgment Entered in the Court of Common Pleas, County of Summit, Ohio CASE No. CV-2006-07-4759.
Michael J. O'Shea, Attorney at Law, for Appellants.
Donald P. Wiley, and Julie A. Bickis, Attorneys at Law, for Appellees.

PER CURIAM.
*1 {¶ 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

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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/bites [FN1] 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.

FN1. Dominique Wood testified, without objection, that Roly Poly had bitten another child on a prior occasion, so this information was known to the jury.

{¶ 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.

{¶ 6}R.C. 955.28(B) states that, "[t]he owner, keeper, or harborer 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 harborer's property."R.C. 955.28 does not provide for the award of punitive damages.*Tynan v. Hanlon* (1959), 110 Ohio App. 77, 79, 159 N.E.2d 769. "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, 464 N.E.2d 169, citing *Hirschauer v. Davis* (1954), 98 Ohio App. 479, 130 N.E.2d 386,affirmed(1955), 163 Ohio St. 105, 126 N.E.2d 337;*Silverglade v. Von Rohr* (1923), 107 Ohio St. 75, 140 N.E. 669. "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 harborer 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, 126 N.E.2d 337, paragraph three of the syllabus; *Stuper v. Young* (May 15, 2002), 9th Dist. No. 20900, at *4.

*2 {¶ 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, 608 N.E.2d 809. Punitive damages may be awarded in a common law action against the dog owner. *Rothenbusch-Rhodes,*supra, at ¶ 38, citing *Tynan,* 110

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Ohio App. at 79, 159 N.E.2d 769.

{¶ 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, 199 N.E.2d 860 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, 608 N.E.2d 809;*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, 199 N.E.2d 860. 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, 199 N.E.2d 860. 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.

*3 {¶ 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.

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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.

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, 199 N.E.2d 860.

{¶ 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, 143 N.E. 545, 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.

*4 {¶ 19} The Sixth District Court of Appeals relied upon *Warner* for the conclusion that a plaintiff must choose his

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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, 105 N.E. 192.

{¶ 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.

Ohio App. 9 Dist.,2008.
Beckett v. Warren
Slip Copy, 2008 WL 4227189 (Ohio App. 9 Dist.), 2008 -Ohio- 4689

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Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Sixth District, Ottawa County.
David Rodenberger and Lawrence Rodenberger, APPELLANTS,
v.
William Wadsworth and Tony Wadsworth, APPELLEES.
C. A. NO. OT-83-18.

OT-83-18

November 25, 1983.

APPEAL FROM OTTAWA COUNTY COMMON PLEAS COURT NO. 20989.

DECISION AND JOURNAL ENTRY

PER CURIAM

***1** This cause came on to be heard upon the record in the trial court. Each assignment of error was reviewed by the court and upon review the following disposition made:

This cause comes on appeal from the Common Pleas Court of Ottawa County. Appellant David Rodenberger, a minor, was bitten by the appellees' dog. Appellants filed suit, appellees answered, and the cause proceeded to trial. On the morning of trial, appellees filed a motion in limine requesting that appellants be required to elect whether they were proceeding under the statutorily imposed liability of R.C. 955.28, or upon a common law theory. The trial court granted the motion, and appellants elected to proceed under the statute. The cause proceeded to trial before a jury and the trial court directed a verdict against appellees on the issue of liability. The jury returned a verdict in favor of appellants, awarding appellants damages. From the judgment of the trial court, appellants now appeal.

Appellants' assignments of error state the following:

"1. THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFFS-APPELLANTS BY GRANTING DEFENDANT-APPELLEES' MOTION IN LIMINE REQUIRING PLAINTIFFS-APPELLANTS TO ELECT PRIOR TO THE COMMENCEMENT OF TRIAL OF THEIR INTENTION TO PROCEED UNDER OHIO REVISED CODE § 955.28 OR UNDER THE COMMON-LAW THEORY OF NEGLIGENCE.

"2. THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT IN PERMITTING DEFENDANT'S EXHIBIT 1 TO BE ADMITTED INTO EVIDENCE AND SUBMITTED TO THE JURY.

"3. THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFFS-APPELLANTS BY FAILING TO INSTRUCT THE JURY TO DISREGARD THE COMMENTS OF DEFENSE COUNSEL REGARDING DISPOSITION OF FUNDS TO BE AWARDED, DAVID RODENBERGER, A MINOR."

While we agree with appellants that Civ. R. 8 allows a party to plead multiple and/or inconsistent theories and that the common law doctrine of election of remedies is generally not applicable under the rules of civil procedure,

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the case at bar presents a fact situation which is unique. The case law has held that evidence necessary to establish an element of the cause of action under the common law is inadmissible evidence when proceeding under the statute.

Under the common law, a plaintiff suing for injuries caused by a dog needed 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, 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 or harborer of a dog for damage or injury caused by such dog (subject to certain exceptions not applicable to the case at bar). See Warner v. Wolfe (1964), 176 Ohio St. 389.

It is clear that the common law liability has not been abrogated by the statutorily imposed liability. Id. As stated in Lisk v. Hora (1924), 109 Ohio St. 519:

*2 "1. 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."

The syllabus in Warner, supra, states that 'a suit may be instituted either under the statute or at common law.'" Appellants contend that they should have been permitted to proceed under both the statute and the common law.

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. In Kleybolte v. Buffon (1913), 89 Ohio St. 61, 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 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 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. Appellants' first assignment of error is not well taken.

As to appellants' second assignment of error, we find that no substantial right of the appellants was affected and that the trial court did not abuse its discretion in admitting the photograph of appellees' dog into evidence.

As to appellants' third assignment of error, we note that appellants' counsel also misstated the law and that appellants' counsel did not ask that a curative instruction be given. In any event, we find that the comments referred to did not prejudice appellants. Appellants' third assignment of error is not well taken.

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On consideration whereof, the court finds that substantial justice was done the parties complaining, and judgment of the Common Pleas Court of Ottawa County is affirmed. Cause remanded for assessment of costs against appellants.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See also Supp. R. 4, amended 1/1/80.

John J. Connors, Jr., P.J., Peter M. Handwork, and Alice Robie Resnick, JJ., CONCUR.

Ohio App., 1983.
Rodenberger v. Wadsworth
Not Reported in N.E.2d, 1983 WL 7005 (Ohio App. 6 Dist.)

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