ORIGINAL

IN THE SUPREME COURT OF OHIO

YOSHANTA BECKETT, et al,

Appellant/Cross-Appellees,

vs.

RICHARD WARREN, et al.,

Appellee/Cross-Appellants.

CASE NO. 2008-2106

On Appeal from the
Summit County Court of Appeals,
Ninth Appellate District
Court of Appeals
Case No. CV 2006 07 4759

MERIT BRIEF OF APPELLEES/CROSS-APPELLANTS RICHARD WARREN AND MARY TRUITT

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STATEMENT OF FACTS

The plaintiffs/cross-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 plaintiffs/cross-appellees, the court required they make an election as to which theory would be presented to a jury. The plaintiff-appellees chose the statutory theory.

Following the presentation of evidence, a verdict in favor of the plaintiffs/cross-appellees in the amount of $5,000 was rendered. This included $500 for medical expenses incurred to date; $2,500 for potential future medical expenses; $1,500 for past pain and suffering; and, $500 for future pain and suffering. 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 plaintiffs/cross-appellants to make an election, and remanded the case for a new trial. The Ninth Appellate District Court certified that its opinion was in conflict with a Sixth District Court of Appeals' decision, and this court recognized the conflict to review the election of remedy issue.

LAW AND ARGUMENT

I. Proposition of Law No. I: The plaintiff in a dog bite case may file a complaint alleging a statutory cause of action and a negligence theory, but to avoid 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.

A. Overview

It has been noted that the close association between humans and domesticated dogs began at least twelve thousand years ago. Weiss HB, Friedman D, Coben JH Incidence of Dog Bite Injuries Treated in Emergency Departments. JAMA 1998; 279:51-53, citing Davis SJM, Valla FR, Evidence for Domestication of the Dog Twelve Thousand Years Ago and the Natufian of Israel. Nature. 1978; 276:608-610. Since then, "people have been intimately involved in domesticating the wild dog into hunter, guard and companion." Id. As of 1998, 39% of all American households had dogs as pets. See APPMA, 1999-2000 APPMA National Pet Owner Survey 21, 91. In the Weiss article, supra, it is noted that over 300,000 dog bite injuries annually are treated in hospital emergency rooms. It has been estimated that the overall economic cost exceeds one billion dollars, and that the annual cost to liability insurers is about two hundred fifty million dollars. See Stephen Budiansky, The Truth About Dogs, Atlantic Monthly, July 1999 at 39. It has been reported that one out of every three bodily injury claims against homeowners insurers involves dog bites. See Larry Lachman and Frank Michadeit, Dogs On The Couch: Behavioral Therapy For Training and Caring For Your Dog 147 (1999). Accordingly, every state has developed, by way of either case law, statutory enactment, or a combination of the two, various methods of dealing with dog injuries and dog owner liability.

The general theory of liability, in the absence of a statute, is expressed in the Restatement of Torts 2d §509, where it is stated that an owner of a domestic animal that the owner "knows or has reason to know has dangerous propensities" is subject to liability for harm done by the animal. This is sometimes referred to as the "one free bite rule", and was followed in *Poy v. Grayson,* 273 So.2d 491, 494 (1973), where the Mississippi State Supreme Court held that, ". . . there [must] be some

proof that the animal has exhibited some dangerous propensity or disposition prior to the attack complained of, and, moreover, it must be shown that the owner knew or reasonably should have known of this propensity or disposition and knew or reasonably should have foreseen that the animal was likely to attack someone."

Accordingly, some jurisdictions follow the "one free bite rule", and deny compensation to victims all together if the dog has not previously displayed some form of dangerous propensity. In fact, in "Modern Status of Rule of Absolute or Strict Liability for Dog Bites" 51 ALR 4th 446, it is noted that in the following cases, courts have held or recognized that under common law principles, strict liability is to be imposed upon a dog owner for injuries caused by a dog bite only on proof of the owner's knowledge of the dog viciousness: *Sinclair v. Okata* (1994, D.C. Alaska) 874 F.Supp. 1051 (applying Alaska law), *Jones v. Manhart* (1978), 120 Ariz. 338, 585 P.2d 1250; *Strange v. Stovall* (1977), 261 Ark. 53, 546 SW2d 421; *Young v. Proctor* (1985 NE), 495 A.2d 828; *Lavin v. Carroll* (1994, Mo. App.) 871 SW2d 465; *De Robertis v. Randazzo* (1983) 94 NJ 144, 462 A.2d 1260; *Strunk v. Zoltanski* (1984) 62 NY2d 572, 468 NE2d 13; *Sappington v. Sutton* (1972, Okla.) 501 P.2d 814; *Westbury v. Blackwell* (1978), 282 OR 129, 577 P.2d 75; *Arlington Funeral Home v. Taylor* (1971, Tex. Civ. App. Eastland) 474 SW2d 299; and *Arnold v. Laird* (1980), 94 Wash.2d 867, 621 P.2d 138.

At least thirty-two states have enacted dog bite statutes.[1] These statutes, however, vary widely in their interpretation and effect. For example, the Alabama statute holds the dog owner

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[1] See: §3-6-1, Ala. Code 1975; A.R.S.§§11-1025 and 11-1026 (Ariz.); Civil Code §3342 (Calif); §13-21-124, C.R.S. 2007 (Colo.); General Statutes §22-357 (Conn.); 7 Del. C. §1711; §767.04 Florida Stat. (1997); O.C.C.A. 51-27 (Ga.); 510 I.L.C.S. 5/16 (West 2006)(Ill.); Indiana Code §15-5-12-1; Iowa Code Section 351.28; K.R.S. 258.235(4) (Ky.); LSA-C.C. arts. 2315 and 2316 (La.); 7 M.R.S.A. §3961 (Me.); G.L.C. 140, §155 (Mass.); M.C.L. 287.351 (Mich.); Minn. Stat. §347.22 (2004); §27-1-715 M.C.A. (Mont.); Neb. Rev. Stat. §54-601 (Reissue 2004); R.S.A. 466:19 (N.H.); N.J.S.A. 4:19-16 (N.J.); New York Agriculture and Markets Law, §121; Ohio Rev.Code §955.28; 4 O.S. 1991 §42.1 (Okla.); 3 P.S. §459-501-A through §459-507-A (Pa.); G.L. 1956 §4-13-16 (R.I.); South Carolina Code Ann. §47-3-110; T.C.A. Section 44-8-413 (Tenn.); Utah Code Ann. §18-1-1; R.C.W., 16.08.040 (Wash.); West Virginia Code §19-20-13; and, Wis. Stat. §174.02.

liable only if the victim had been lawfully on the dog owner's property and was either bitten there or chased from there and then bitten. §3-6-1- Ala. Code 1975. To the complete contrary, Rhode Island Supreme Court summarized that state's dog bite statute (G.L. 1956 §4-13-16) in the following ten words: "Strict liability attaches for any injury occurring outside the dog's enclosure." *Johnston v. Poulin* (2004), 844A.2d 707, and West Virginia's statute only imposes liability upon an owner or keeper of a dog, "who permits such dog to run at large." West Virginia Code §19-20-13. The Colorado statute creates different classes of dog bite victims which, when coupled with that state's "cap" on non-economic damages, determine what each plaintiff has to prove and how much money they can recover. §13-21-124, C.R.S. 2007.

As of the filing of this brief, counsel for the cross-appellants has been unable to locate a decision from any state supreme court which addresses the exact issue here: that is, whether a statutory and common law cause of action can be pursued simultaneously. Keeping in mind that state statutes vary greatly, the fact patterns of at least the following cases indicate that both causes of action can be pursued simultaneously: *Brans v. Extrom* (2005), 266 Mich.App.216; and *Drake v. Dean* (1993), 15 Cal.App.4th 915. On the other hand, the following quotation is found in a number of Connecticut cases which would seem to indicate that an election must be made:

> A person injured by a dog has for election one of two causes of action to pursue. One such action is in negligence at common law, and the other is under the statute . . . . *Gretkowski v. Coppola* (1966), 26 Conn. Supp. 294, 222 A.2d 41.

B. Ohio Overview and Argument

The above discussion demonstrates that many states have developed their own own approach to the handling of dog bite claims. Ohio's experience dates back to the first reported case concerning a dog bite, *Kleybolte v. Buffon* (1913), 89 Ohio St. 61. There, the court noted that Ohio recognized a common law action for dog bites which required the plaintiff to prove that the dog owner was aware of vicious propensities. In that case, however, the plaintiff had failed to aver that the dog was vicious or that the owner had knowledge of vicious propensities and the court therefore determined

that the right of action must have been predicated upon the statute in force at the time, which was then Section 4212-2 of Ohio's Revised Statutes. That law provided:

> Any animal of the dog kind that chases, worries, injures, or kills any . . . person, may be killed by any person, at any time or place. And the owner, owners or harborers of any animal of the dog kind that chases, worries, injures or kills any . . . person, shall be jointly and severally liable to any person so damaged to the full amount of the injury done. . . .

The court held that the statute in question was in derogation of common law, that it did not make provision for the award of punitive damages, and that therefore a person pursuing a cause of action under the dog bite statute could not recover exemplary or punitive damages.[2] The court also significantly held:

> The trial court should have limited the inquiry to the ownership of the dog, the injury inflicted and the actual damages sustained, and the admission of evidence tending to show that the dog in question had bitten another person prior to the time of the alleged biting of defendant in error and that plaintiff in error had knowledge thereof was inadmissible, as it did not relate to any issue made in the case.

Given these errors, the court ordered a new trial.

This court next addressed the applicability of Ohio's dog bite statute in *Lisk v. Hora* (1924), 109 Ohio St. 519. The statute had then been amended and was known as Section 5885, General Code and provided:

> A dog that chases, worries, injures or kills a person, can be killed at any time or place. . . . The owner or harborer of such dog shall be liable to a person damaged for the injury done.

In *Lisk*, the plaintiff had filed a petition alleging that the defendant was negligent in keeping and harboring a dog, "well knowing the same to be vicious and liable to attack persons at any time." The opinion notes that at the beginning of the trial of the case, counsel for defendant asked that plaintiff be required to elect whether he was prosecuting his action under the statute or at common law. The

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[2] Many cases have since held that being in derogation of common law, the statute must be strictly construed. *Khamis v. Everson* (1993), 88 Ohio App.3d 220; *Myers v. Lynn* (July 19, 1985), Lucas App. No. L-85-009; *Johnson v. Allanas* (1996), 116 Ohio App.3d 447; and *Lewis v. Chovan*, 2006-Ohio-3100.

court stated, "Without requiring such election, the court held that the action was under favor of Section 5838, General Code. The trial proceeded with the limitations prescribed by the court." The plaintiff then presented evidence without attempting to introduce any testimony with reference to the known viciousness of the dog. (There was evidence presented that the same dog had previously bitten another person, but, "this, apparently, was for the purpose of showing the ownership." Id. at 520-521). The court of appeals reversed the verdict in favor of the plaintiff, holding that the action should have proceeded under the common law rules. The supreme court disagreed, stating:

> It should, however, be here stated that an action for injuries is not necessarily based upon the statute. On the contrary, it is our view that 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, but that a plaintiff may sue either under the statute or at common law.
>
> It is our conclusion, therefore, that no error prejudicial to the defendant's rights was committed by the trial court in directing that the trial proceed upon the theory that the action was based upon the provisions of the statute, and that the reversal of the judgment upon that ground was not warranted. (Emphasis added).

The court also quoted *Kleybolt* with favor at 89 Ohio St. 61, 66 in that the issue of negligence on behalf of the dog owner and such a statutory action is "wholly immaterial."

Ohio then amended the dog bite statute again, this time as Section 955.28 of the Ohio Revised Code. In *Warner v. Wolfe* (1964), 176 Ohio St. 389, the plaintiff alleged that the defendant owned and harbored animals, "for the sole and only purpose of injuring the plaintiff and others . . .". Suit was brought under a common law action and a verdict in favor of the plaintiff was rendered. On appeal, the court of appeals held that the trial court had erred in failing to grant a motion for judgment notwithstanding the verdict, reversed the judgment of the trial court, and rendered final judgment for the defendant upon the ground that Section 955.28 provides the exclusive remedy to one injured by a dog, and held that the common law action for damages based upon negligence no longer existed. The supreme court reversed.

Relying upon *Lisk, supra*, the supreme court in *Wolfe* held that the common law cause of action for dog bites has not been abrogated by statute. In reaching this conclusion, the court cited

with favor 3 *Corpus Juris Secundum* 1257, Animals, 2. Injuries By Dogs, Section 151, (b) Statutory Liability (1) In General, as follows:

> The common law rule of liability may be altered or extended by statutes imposing an absolute duty upon the owner or keeper of dogs.
>
> * * *
>
> Although such statutes operate to create a new and different cause of action in no way dependent upon common law principles, ordinarily they are not regarded as abrogating the common law right of action for injuries caused by dogs, and suit may be maintained <u>either</u> under the statutes <u>or</u> at common law. . . . (Emphasis added).

The syllabus of *Warner v. Wolfe*, then, states that, "A suit may be instituted <u>either</u> under the statute <u>or</u> at common law." (Emphasis added).

The current version of the statute is R.C. 955.28(B), which provides:

> The 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 committing or attempting to commit criminal trespass or another criminal offense other than a minor misdemeanor on the property of the owner, keeper, or harborer, or was committing or attempting to commit a criminal offense other than a minor misdemeanor against any person, or was teasing, tormenting, or abusing the dog on the owner's, keeper's, or harborer's property.

Rodenberger v. Wadsworth (Nov. 25, 1983), Ottawa Cty. App. No. OT-83-18 addresses the issue now before the court. There it was noted that while the *Wolfe* statement of "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, it appears that most dog bite cases in Ohio proceed under either the common law theory of negligence or statutory liability. This procedure is 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. This, by definition, invites error.

It is also respectfully submitted that by combining the two causes of action into one trial before the same jury defeats the very obvious legislative purpose of R.C. 955.28. That is, when the legislature enacted this statute, it took away the requirement of "scienter", or knowledge of the dog's vicious propensities. In other words, it gave a right of recovery to a plaintiff who had no such right of recovery at common law if the dog had not previously displayed vicious propensities. In exchange for this new cause of action, the legislature did <u>not</u> permit the plaintiffs to recover punitive damages under the statutory scheme. (Indeed here, the compensatory damage issue has been resolved by way of a jury verdict, and were the court of appeals decision to stand, the only remaining issue to consider is that of punitive damages.) By allowing the two causes of action to be tried together, the plaintiffs would be permitted to take advantage of a cause of action which requires a lesser degree of proof, but hold a claim for punitive damages over the dog owner.

It is respectfully submitted that Ohio's method of dealing with dog bite injuries is both fair and appropriate for dog owners and the victims of dog bites. Under the Ohio system, a plaintiff may pursue the traditional common law theory if evidence can be produced concerning prior vicious propensities of the animal in question. If desired, and if warranted by facts developed in discovery,

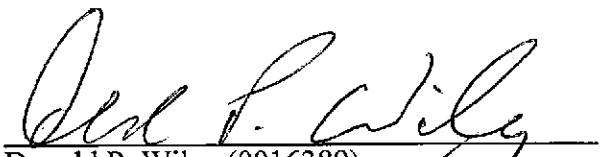
the plaintiff in such a situation may pursue not only compensatory but also punitive damages. On the other hand, even if a plaintiff cannot meet this burden of proof, Ohio - unlike some jurisdictions - provides a remedy. Under the statute, the plaintiff merely has to prove that they were injured by the dog. The defendant then must come forward with evidence to prove that the plaintiff was either teasing, tormenting or trespassing at the time of the injury. If the defendant cannot produce such evidence, then the plaintiff is entitled to an award of compensatory damages.

In exchange for this greatly reduced burden of proof, the Ohio statute does not permit recovery of punitive damages, and evidence of prior "bad acts" of the dog in question is considered inadmissable. Ohio courts have therefore traditionally required the plaintiff to elect which theory they would proceed to try once the matter is submitted to a jury. Permitting both theories to be presented at the same time would necessarily result in the presentation of evidence that would otherwise be considered inadmissable under the statutory scheme. The Mahoning County experience teaches that such a co-mingling of theories of recovery is fraught with the potential for confusion of issues. For all of these reasons, it is respectfully submitted that the decision of the Ninth District Court of Appeals below should be overturned, and that the court should issue a ruling consistent with that of the Sixth District Court of Appeals in *Rodenberger*: that is, to conclude that before proceeding to present evidence to a jury, the victim of an alleged dog bite must make an election as to whether they will present their case under the statutory or common law scheme.

CONCLUSION

In conclusion, it is respectfully submitted that the cross-appellants' proposition of law should be adopted by this court, and the court of appeals reversed on this issue.

Respectfully submitted,



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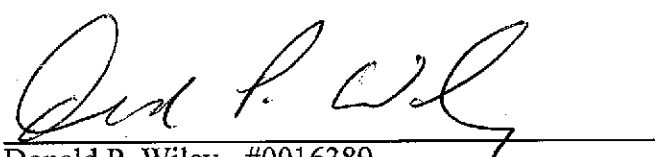

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APPENDIX

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

FILED
MAR 25 2009
CLERK OF COURT
SUPREME COURT OF OHIO

The Supreme Court of Ohio

COURT OF APPEALS
2009 MAR 31 AM 10: 10
SUMMIT COUNTY
CLERK OF COURTS

Yoshanta Beckett, et al.

v.

Richard Warren, et al.

Case No. 2008-2106

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court accepts the cross-appeal on Proposition of Law No. I and the Court declines jurisdiction to hear the appeal and dismisses the appeal as not involving any substantial constitutional question.

Upon consideration of appellee/cross-appellants' motion to clarify the docket,

It is ordered by the Court that the motion is granted. The Court determines that a conflict exists and the Court will answer the certified question in this case. The parties are to brief the issue stated at page 1 of the court of appeals Journal Entry filed October 21, 2008, as follows:

"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.'"

It is further ordered that the Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Summit County, and the parties shall brief this case in accordance with the Rules of Practice of the Supreme Court of Ohio.

(Summit County Court of Appeals; No. 23909)

THOMAS J. MOYER
Chief Justice

COURT OF APPEALS
DANIEL M. HORRIGAN
2008 SEP 17 AM 7:09
SUMMIT COUNTY
CLERK OF COURTS

STATE OF OHIO)
)ss:
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

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/bites[1] 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.

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[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 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. "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 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, 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.

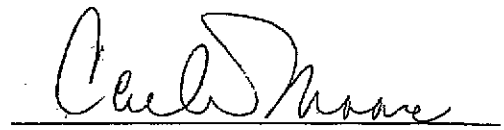
Judgment reversed
and cause remanded.

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.

COPY

DANIEL M. HORRIGAN
2008 MAR 31 PM 2:32
SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

YASHONTA D. BECKETT, et al.,	)	CASE NO. CV 2006 07 4759
Plaintiffs,	)	JUDGE MARVIN A. SHAPIRO
vs.	)	
		ORDER NUNC PRO TUNC
RICHARD WARREN, et al.,	)	
Defendants.	)	

This action came on for trial before the Court and a jury on August 13, 2007, and the issues having ben duly tried, the jury having received the case on August 14, 2007 at approximately 11:55 a.m. and the jury having duly rendered its verdict at approximately 1:50 p.m. on August 14, 2007 in favor of the Plaintiff.

WHEREFORE, it is ORDERED, AJUDGED and DECREED that Plaintiff, Yashonta Beckett, recover from Defendants, Richard Warren and Mary Wood, the sum of $5,000.00 as damages. Interest shall accrue at the statutory rate from the date of judgment, no punitive damages or discovery costs shall be awarded, and costs are to be taxed to the Defendants. There is no just reason for delay.

IT IS SO ORDERED.

JUDGE MARVIN A. SHAPIRO

CC: ATTORNEY DONALD P. WILEY
ATTORNEY MICHAEL J. O'SHEA

COPY

DANIEL M. HORRIGAN

2007 AUG 14 PM 2:54

SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

YASHONTA BECKETT, et al.	)	CASE NO. CV 2006 07 4759
Plaintiffs	)	JUDGE MARVIN SHAPIRO
-vs-	)	
RICHARD WARREN, et al.	)	**INTERROGATORY NO. 1**
Defendants	)	

As it applies to Plaintiff Timeasha Beckett, what is the amount of damages caused by the dog attack?

(a) Past medical expenses:	$ 500
(b) Future medical expenses:	$ 2,500
(c) Past pain and suffering:	$ 1,500
(d) Future pain and suffering:	$ 500
TOTAL DAMAGES (the total of (a) through (d) above:	$ 5,000

1. [illegible]
2. [illegible]
3. Sharon Bass
4. Melissa Hutchison
5. [illegible]
6. [illegible]
7. [illegible]
8. [illegible]

MAS-Beckett Int.

955.28
TITLE [9] IX AGRICULTURE -- ANIMALS -- FENCES
CHAPTER 955: DOGS

955.28 Dog may be killed for certain acts - owner liable for damages.

(A) Subject to divisions (A)(2) and (3) of section 955.261 of the Revised Code, a dog that is chasing or approaching in a menacing fashion or apparent attitude of attack, that attempts to bite or otherwise endanger, or that kills or injures a person or a dog that chases, threatens, harasses, injures, or kills livestock, poultry, other domestic animal, or other animal, that is the property of another person, except a cat or another dog, can be killed at the time of that chasing, threatening, harassment, approaching, attempt, killing, or injury. If, in attempting to kill such a dog, a person wounds it, the person is not liable to prosecution under the penal laws that punish cruelty to animals. Nothing in this section precludes a law enforcement officer from killing a dog that attacks a police dog as defined in section 2921.321 of the Revised Code.

(B) The 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 committing or attempting to commit criminal trespass or another criminal offense other than a minor misdemeanor on the property of the owner, keeper, or harborer, or was committing or attempting to commit a criminal offense other than a minor misdemeanor against any person, or was teasing, tormenting, or abusing the dog on the owner's, keeper's, or harborer's property. Additionally, the 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 if the injury, death, or loss was caused to the person or property of an individual who, at the time of the injury, death, or loss, was on the property of the owner, keeper, or harborer solely for the purpose of engaging in door-to-door sales or other solicitations regardless of whether the individual was in compliance with any requirement to obtain a permit or license to engage in door-to-door sales or other solicitations established by the political subdivision in which the property of the owner, keeper, or harborer is located, provided that the person was not committing a criminal offense other than a minor misdemeanor or was not teasing, tormenting, or abusing the dog.

Effective Date: 07-10-1987; 2008 HB71 09-30-2008