

ORIGINAL

IN THE SUPREME COURT OF OHIO

Yoshanta Beckett, et al.	:	Case No. 2008-2106
	:	
Appellants,	:	On Appeal from the Summit
	:	County Court of Appeals,
v.	:	Ninth Appellate District
	:	
Richard Warren, et al.	:	Court of Appeals
	:	Case No. 23909
Appellees.	:	

MERIT BRIEF OF
APPELLEES YOSHANTA BECKETT ET AL.

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

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

FILED
 JUL 06 2009
 CLERK OF COURT
 SUPREME COURT OF OHIO

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iii
INTRODUCTION.....	1
STATEMENT OF THE FACTS	3
STATEMENT OF THE CASE	5
LAW AND ARGUMENT.....	7
 <u>PROPOSITION OF LAW NO. 1</u> - Ohio permits the pursuit of common law and statutory causes of action, and permits recovery on both.	
 A. Common law actions survive codifications of that area of law unless the Ohio General Assembly specifically declares otherwise.....	
	7
 B. Parties to litigation have always been permitted to simultaneously plead and prove and simultaneously recover under "alternative" or "different types" of theories of liability.....	
	10
 C. This Court will not modify or reverse its prior holdings unless there is a "special justification".....	
	13
 D. In keeping wit this Court's prior holdings, the Appellate Court's decision below correctly held that Ohio law permits the pursuit of common law and statutory causes of action, and permits recovery on both.....	
	15
 CONCLUSION.....	 18
PROOF OF SERVICE.....	19
APPENDIX - same as Appellants' Brief	

STATUTES/RULES

RC 955.28.....	1, 2, 5, 8, 15, 16
RC 1.51	10
Ohio Civ.R. 8	10
Ohio Civ.R. 54	11
Ohio Civ.R. 42	11

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Beckett v. Warren</u> , 2008 Ohio 4689.....	8
<u>Bowman v. Stott</u> , 2003 Ohio 7182.....	9
<u>Bresnik v. Beulah Park Ltd. Partnership, Inc.</u> (1993), 67 Ohio St. 3d 302.....	8
<u>Brown v. L. A. Wells Const. Co.</u> (1944), 143 Ohio St. 580.....	12
<u>Burket v. Claypool</u> (1941), 39 N.E.2d 873.....	12
<u>Carrel v. Allied Products Corp.</u> (1997), 78 Ohio St. 3d 284.....	7
<u>Flint v. Holbrook</u> (1992), 80 Ohio App.3d 21.....	9
<u>Frantz v. Maher</u> (1957), 106 Ohio App. 465.....	7
<u>Globe Indem. Co. v. Wassman</u> (1929), 120 Ohio St. 72.....	12
<u>Goodson v. McDonough Power Equipment, Inc.</u> (1983), 2 Ohio St. 3d 193.....	12
<u>Hayes v. Smith</u> (1900), 62 Ohio St. 161, 56 N.E. 879.....	5
<u>Khamis v. Everson</u> (1993), 88 Ohio App. 3d 220.....	17
<u>Knoblauch v. Coufal</u> (1940), 18 Ohio Op. 35.....	12
<u>Koruschak v. Smotrilla</u> , 2001 Ohio 3326.....	9
<u>Lisk v. Hora</u> (1924), 109 Ohio St. 519	12
<u>Luthman v. Minster Supply Co.</u> , 2008 Ohio 165.....	8
<u>Myers v. Linn</u> (July 19, 1985), 6th Dist. No. L-85-009 [also cited at 1985 Ohio App. LEXIS 6966].....	9
<u>New 52 Project, Inc. v. Proctor</u> , 2008 Ohio 465.....	8
<u>Rodenberger v. Wadsworth</u> (Nov. 25, 1983), 6th Dist. No. OT-83-18.....	8

Rothenbusch-Rhodes v. Mason, 10th Dist. No. 02AP-1028,
2003 Ohio 4698..... 9

Shay v. Shay (2007), 113 Ohio St. 3d 172..... 14

State v. Frost (1979), 57 Ohio St. 2d 121..... 10

State ex rel. Davis v. Public Empl'es. Ret. Bd. (2008),
120 Ohio St. 3d 386..... 12

State v. Kalish (2008), 120 Ohio St. 3d 23..... 14

State v. Simpkins (2008), 117 Ohio St. 3d 420..... 14

Teachers Assn. v. SERB (1998), 81 Ohio St. 3d 392..... 12

Thompson v. Irwin (Oct. 27, 1997), Butler App. No.
CA97-05-101, unreported [also cited at 1997 Ohio App.
LEXIS 4728]..... 9

Tynan v. Hanlon (1959), 110 Ohio App. 77; 159 N.E.2d 769... 5

Vaccariello v. Smith & Nephew Richards, Inc. (2002),
94 Ohio St. 3d 380..... 7

Voltz v. Hudson (2001), 115 Ohio Misc. 2d 63,
761 N.E.2d 711..... 5

Warner v. Wolfe (1964), 176 Ohio St. 389..... 8

Whitehead v. Gen. Tel. Co. (1969), 20 Ohio St. 2d 108..... 12

Westfield Ins. Co. v. Galatis (2003), 100 Ohio St. 3d 216.. 13

INTRODUCTION

This case involves (i) the vicious bloody mauling¹ of a young girl by a large dog with a previous history of attacking people and (ii) how the trial court and the court of appeals dealt with Ohio law (a combination of common law and statutory law) on dog maulings. The Appellants (the "Dog Owners")² convinced the trial court that if the Appellees Beckett Family (the "Beckett Family") pursued strict liability under RC 955.28(B),³ Ohio law then barred the simultaneous pursuit of a common law negligence action for dog

¹Interesting enough, Appellants refer to this vicious dog mauling as a "dog bite." How insulting it is that the bloody permanent injuries and scars suffered by the minor child are described this way. Her scalp was torn from her head, the dog continued to attack her in another room, and the Appellants testified at trial that the blood from the attack took days to clean up.

²The merit brief filed by the Dog Owners is called the "Merit Brief of Appellees/Cross-Appellants Richard Warren and Mary Truitt." However, a reading of the rules leads the undersigned to conclude that, because they appealed to this Court, the Dog Owners are the "Appellants" for purposes of this Supreme Court of Ohio proceedings. In order to eliminate any ambiguity on this wording issue, this brief shall refer to the Appellants as the "Dog Owners" and the Appellees as the "Becket Family."

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

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

attacks (thus barring the introduction of evidence a prior dog attack and punitive damages). The Beckett Family argued that Ohio law permitted them to pursue their statutory rights under RC 955.28(B) **and** also their common law rights (as Ohio has **always** provided). The trial court agreed with the Dog Owners - but the court of appeals, on matters of law, did not.

And now this Court must decide how the law should have been applied. A summary of the Dog Owners' brief reveals that the Dog Owners are attempting to have this Court (i) ignore the age-old dogma of Ohio law that holds that complete or partial codification of common law does not abrogate common law actions or defenses, and (ii) ignore the historical principle that a party may plead, prove and recover under a number of causes of action or theories of recovery. As will be described further below, this Court must reject these attempts, and instead maintain consistency with long-standing principles of Ohio law by issuing a pronouncement that Ohio permits the pursuit of common law and statutory causes of action, and permits recovery on both.

STATEMENT OF THE FACTS

The facts of this case were set forth in the record provided to the Court of Appeals. On March 24, 2006, the 12-year-old minor child of the Beckett Family was spending the night at a friend's house on Flora Avenue in Akron, Ohio. This house on Flora Avenue was owned by the Dog Owners. A large rottweiler dog named Roly Poly also resided at this home, and the dog was present on the night of March 24. This same dog had attacked another person at that home just weeks earlier, but the jury was prevented from hearing this fact due to one of the trial court's pre-trial rulings. At some point in the evening, the minor child was dancing to some music at the Dog Owners' home when she was brutally and viciously attacked by the dog Roly Poly. The dog bit the minor child on the top of her head and, in a manner similar to tearing off the skin of an orange, ripped off her scalp. The dog thereafter proceeded to chase the minor child to an adjacent room where the dog again bit her, this time in the thigh.

During this brutal and unprovoked attack, the minor child bled so profusely throughout the house that it took weeks to clean up. The Dog Owners (who were asleep upstairs) heard the minor child's loud screams and followed the screams downstairs. The Dog Owners first attempted to apply bandages to the wound, then finally took the minor child to the emergency room.

The minor child arrived at the Akron medical emergency room in a blood-soaked towel and in a wheelchair. She had a U-shaped laceration which began at the hairline and extended back toward the vertex of her scalp. At the emergency room, it was required that the doctors staple the head wound shut in order to keep the hair locked in place. It was imperative to use staples because if the doctors used anything less, there was a great chance that the wound would not remain closed. The minor child remained in the emergency room for approximately six or seven hours. The mother of the minor child had to witness all of the ER treatment.

Subsequently, the minor child underwent numerous medical treatments to repair her head trauma. She experienced extensive swelling and leaking from the head. She underwent a 4-week period of initial healing. In fact, the scar continued to ooze brown fluids for many months after the attack. Despite receiving medical treatment, the minor child still has a large scar on her head to this very day.

STATEMENT OF THE CASE

The Beckett Family filed their personal injury case on July 31, 2006. Prior to trial,⁴ the trial court required the Beckett Family, over strenuous objection, to "choose" to proceed to trial under one of the following methods:

- A. Admitted liability per RC 955.28(B), but with no ability to pursue a simultaneous common law negligence claim and punitive damages; or
- B. Common law negligence claim (with the ability to present evidence of the prior dog attack and the ability pursue punitive damages).⁵

Under objection, the Beckett Family chose the "admitted liability" choice, and proceeded to trial without the ability to advise the jury of the prior dog attack and without the ability to pursue or request punitive damages. It is this "choose-a-cause-of-action" assignment of error that is before this Court in this appeal.

After a jury trial, with the severe limitations placed up the presentation of the facts and other errors by the trial court

⁴ Prior to the commencement of trial, the mother of the minor child voluntarily dismissed her loss of parental consortium claims against the Dog Owners.

⁵ Punitive damages are appropriate in a dog bite case where the owners know that the dog has previously attacked others: Voltz v. Hudson (2001), 115 Ohio Misc. 2d 63, 761 N.E.2d 711; Tynan v. Hanlon (1959), 110 Ohio App. 77; 159 N.E.2d 769; and Hayes v. Smith (1900), 62 Ohio St. 161, 56 N.E. 879.

(further explained in the following paragraph), the jury awarded the Beckett Family minor child only \$5,000.00 in damages.

It should be noted for background purposes only, that during the initial appeal of this case to the Ninth District Court of Appeals, the Beckett family asserted two other independent assignment of errors. First, during the trial, counsel for the Dog Owners were permitted to examine the minor child's mother on a Medicaid-paid medical bill which had not been presented by the minor child in her case-in-chief, and that medical bill was admitted without any of the required evidentiary foundation required by Ohio law (the mother did not recognize the bill and the Appellants Dog Owners's counsel did not authenticate the bill by the methods required under Ohio law). The Beckett Family appealed these violations of the proper procedure and authentication foundations set forth in RC 2317.421, RC 2317.40, and Ohio R. Evid. 803(6). Second, the Beckett Family also appealed the grossly inadequate damage award (which they asserted was the result of the errors associated with the required-to-choose and the medical bill issues). However, given the reversal by the Court of Appeals on the "choose-a-cause-of-action" assignment of error, the Court of Appeals deemed the other two assignments of errors moot and did not address them. In response to the Dog Owners' certified conflict petition to this Court on the "choose-a-cause-of-action" assignment

of error,⁶ the Becket Family requested this Court take up these other assignments of error for purposes of the appeal to this Court. However, this Court declined that request.

LAW AND ARGUMENT

I. **PROPOSITION OF LAW NO. 1 - Ohio permits the pursuit of common law and statutory causes of action, and permits recovery on both.**

A. **Common law actions survive codifications of that area of law unless the Ohio General Assembly specifically declares otherwise.**

As stated by this Court in Vaccariello v. Smith & Nephew Richards, Inc. (2002), 94 Ohio St. 3d 380, 384 (in citing and ratifying this Court's decision in Carrel v. Allied Products Corp. (1997), 78 Ohio St. 3d 284):

"[C]odification does not thereby abrogate the common law. Carrel v. Allied Products Corp. (1997), 78 Ohio St. 3d 284, 287, 677 N.E.2d 795, 798-799. In Carrel, we stated that 'in the absence of language clearly showing the intention to supersede the common law, the existing common law is not affected by the statute, but continues in full force.' Id. at 287, 677 N.E.2d at 798. We further stated that 'there is no repeal of the common law by mere implication.' Id. at 287, 677 N.E.2d at 798-799, quoting Frantz v. Maher (1957), 106 Ohio App. 465, 472, 7 Ohio Op. 2d 209, 213, 155 N.E.2d 471, 476."

In Vaccariello, *supra*, this Court held that the common law "learned intermediary" defense survived the codification of a number of defenses to product liability actions - even though it was not

⁶ This appeal is before this Court on a certification of a conflict solely on the "choose-a-cause-of-action" assignment of error.

specifically listed in the newly enacted codified defenses.⁷ In Carrel, *supra*, this Court stated:

"[T]he common-law action of negligent design survives the enactment of the Ohio Products Liability Act, R.C. 2307.71 et. seq.' ... '[A]ccording to principles of statutory construction, the General Assembly will not be presumed to have intended to abrogate a common-law rule unless the language used in the statute clearly shows that intent.' Id. at 287, citing *State ex rel. Morris v. Sullivan* (1909), 81 Ohio St. 79, 90 N.E. 146, 7 Ohio L. Rep. 408, paragraph three of the syllabus."

This Court had also issued this statute-does-not-abrogate-common-law principle in Bresnik v. Beulah Park Ltd. Partnership, Inc. (1993), 67 Ohio St. 3d 302. In Bresnik, *supra*, this Court cited a 100-year-old case from this Court [State v. Sullivan (1909), 81 Ohio St. 79] which stated:

"Statutes are to be read and construed in the light of and with reference to the rules and principles of the common law in force at the time of their enactment, and in giving construction to a statute the legislature will not be presumed or held, to have intended a repeal of the settled rules of the common law unless the language employed by it clearly expresses or imports such intention."

Ohio Appellate Courts have also ratified this principle. See Luthman v. Minster Supply Co., 2008 Ohio 165; and New 52 Project, Inc. v. Proctor, 2008 Ohio 465.

⁷ It should be noted that subsequent to this Court's decision in Vaccariello, *supra*, the Ohio General Assembly, by 2004 SB 80 (effective April 7, 2005), amended the Ohio Product Liability Act to provide: ... "Sections 2307.71 to 2307.80 of the Revised Code are intended to abrogate *all common law product liability causes of action.*" (Emphasis supplied). Obviously, this further ratifies the principle that nothing in the common law changes **unless** the General Assembly specifically says so.

Most importantly, this Court in the 25-year-old ruling of Warner v. Wolfe (1964), 176 Ohio St. 389, has specifically held that the codification of dog attack liability law in RC 955.28 did not abrogate the common law negligence action for dog attacks:

"This section does not abrogate the action which exists under the common law for damage or injuries inflicted upon property or a person by a vicious dog against a person who owns or harbors such a vicious dog, when he knows or should know those propensities of the dog."

Warner, *supra*, and the other appellate cases⁸ that cite to it, have formed the logical precedent and reasoning behind the decision of the appellate court in this appeal:

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 P36; Bowman at P20; Flint, 80 Ohio App.3d at 25; Thompson v. Irwin, 12th Dist. No. CA97-05-101, 1997 Ohio App. LEXIS 4728, at *2; Koruschak v. Smotrilla 7th Dist. No. 99-CA-320, 2001 Ohio 3326, at *3; Myers v. Linn (July 19, 1985), 6th Dist. No. L-85-009, 1985 Ohio App. LEXIS 6966, at *1.

See Beckett v. Warren, 2008 Ohio 4689 ¶ 9. As this Court is aware, the Court of Appeals in Beckett, *supra*, acknowledged that there was a lone court of appeals case (i.e. Rodenberger v. Wadsworth (Nov. 25, 1983), 6th Dist. No. OT-83-18 [also cited as 1983 Ohio App.

⁸ See Rothenbusch-Rhodes v. Mason, 10th Dist. No. 02AP-1028, 2003 Ohio 4698; Bowman v. Stott, 2003 Ohio 7182; Flint v. Holbrook (1992), 80 Ohio App.3d 21, 25-26, 608 N.E.2d 809; Thompson v. Irwin (Oct. 27, 1997), Butler App. No. CA97-05-101, unreported [also cited at 1997 Ohio App. LEXIS 4728]; Koruschak v. Smotrilla, 2001 Ohio 3326; and Myers v. Linn (July 19, 1985), 6th Dist. No. L-85-009 [also cited at 1985 Ohio App. LEXIS 6966].

LEXIS 12028]) that essentially ignored Warner and held that a plaintiff must "choose" between a common law action and a statutory action. However, the Beckett Court rejected the lone reasoning of Rodenberger - which is why this Court is reviewing this case now.

This same non-abrogation rationale applies to a comparison of older enacted legislation and newly enacted legislation involving the same subject matter. In State v. Frost (1979), 57 Ohio St. 2d 121, 124, this Court stated:

"It has been a long-standing rule that courts will not hold prior legislation to be impliedly repealed by the enactment of subsequent legislation unless the subsequent legislation clearly requires that holding. (Citation omitted.) This rule of statutory construction was codified in 1972 in R.C. 1.51."

As stated in State v. Frost, *supra*, RC 1.51⁹ has now codified this long-standing principle.

B. Parties to litigation have always been permitted to simultaneously plead and prove and simultaneously recover under "alternative" or "different types" of theories of liability.

Ohio Civ. R. 8(A) specifically provides that "Relief in the

⁹ § 1.51. **Special or local provision prevails over general; exception**

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

alternative or of several different types may be demanded."

Further, Ohio Civ. R. (E)(2) specifically provides:

"(2) A party may set forth two or more statements of a claim or defense **alternatively** or hypothetically, either in one count or defense or in **separate counts or defenses**. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. **A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or equitable grounds**. All statements shall be made subject to the obligations set forth in Rule 11." (Emphasis supplied).

Further still, Ohio Civ.R. 54(B) and (C) together provide:

(B) Judgment upon multiple claims or involving multiple parties.

When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, and whether arising out of the same or separate transactions, or when multiple parties are involved, **the court may enter final judgment as to one or more but fewer than all of the claims** or parties only upon an express determination that there is no just reason for delay. In the absence of a determination that there is no just reason for delay, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. (Emphasis supplied).

(C) Demand for judgment.

A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, **every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled**, even if the party has not demanded the relief in the pleadings. (Emphasis supplied).

These subsections of Ohio Civ.R. 8 and Ohio Civ. R. 54 make it unambiguously clear that a party may recover on all or some of that party's multiple causes of action. Further still, pursuant to Ohio Civ.R. 42(B), a trial court may, in the interests of convenience and to avoid prejudice, order that separate theories of recovery be tried separately. **Nothing** in the Ohio Civil Rules states that a trial court may hold that one cause of action bars a litigant from recovering simultaneous compensation under another similar cause of action.

Further, the 100-year-old history of Ohio case law holds that plaintiffs are permitted to plead, prove and recover under multiple theories (i.e. counts) of liability - and that it is clear error for a trial court to require a party to elect to pursue only one theory of recovery. See Globe Indem. Co. v. Wassman (1929), 120 Ohio St. 72; Burket v. Claypool (1941), 39 N.E.2d 873; and Brown v. L. A. Wells Const. Co. (1944), 143 Ohio St. 580. See also all of the case history citing to and following Warner, *supra*, which were discussed above. Of course, Ohio case law even before Warner, *supra*, held the same thing. See Lisk v. Hora (1924), 109 Ohio St. 519, 143 N.E. 545; and Knoblauch v. Coufal (1940), 18 Ohio Op. 35.

Lastly, it is well know that the doctrine of *res judicata* makes it clear that not only **may** a plaintiff file and pursue multiple causes of action in a single lawsuit, a plaintiff is actually **required** to pursue all possible theories of liability or be forever

barred from subsequently pursuing those theories of liability. See this Court's pronouncements in Whitehead v. Gen. Tel. Co. (1969), 20 Ohio St. 2d 108; Goodson v. McDonough Power Equipment, Inc. (1983), 2 Ohio St. 3d 193; Teachers Assn. v. SERB (1998), 81 Ohio St. 3d 392, 692 N.E.2d 140; and State ex rel. Davis v. Public Emples. Ret. Bd. (2008), 120 Ohio St. 3d 386.

C. This Court will not modify or reverse its prior holdings unless there is a "special justification."

When it comes to stare decisis principles, this Court has been very consistent. In the very recent decision of Westfield Ins. Co. v. Galatis (2003), 100 Ohio St. 3d 216, this Court in its official headnote held:

A prior decision of the Supreme Court may be overruled where (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.

In justifying this pronouncement, this Court analyzed the doctrine of stare decisis:

The doctrine of stare decisis is designed to provide continuity and predictability in our legal system. We adhere to stare decisis as a means of thwarting the arbitrary administration of justice as well as providing a clear rule of law by which

the citizenry can organize their affairs. *Rocky River v. State Emp. Relations Bd.* (1989), 43 Ohio St.3d 1, 4-5, 539 N.E.2d 103. Those affected by the law come to rely upon its consistency. *Helvering v. Hallock* (1940), 309 U.S. 106, 119, 60 S. Ct. 444, 84 L. Ed. 604. Accordingly, *stare decisis* is long revered. See, e.g., 1 Blackstone, *Commentaries on the Laws of England* (1765) 70 ("precedents and rules must be followed, unless flatly absurd or unjust * * *"). However, a supreme court not only has the right, but is entrusted with the duty to examine its former decisions and, when reconciliation is impossible, to discard its former errors. *State v. Jenkins* (2000), 93 Hawaii 87, 112, 997 P.2d 13; see, also, *Mitchell v. W.T. Grant Co.* (1974), 416 U.S. 600, 627-628, 40 L. Ed. 2d 406, 94 S. Ct. 1895.

"The doctrine of *stare decisis* is of fundamental importance to the rule of law. Like the United States Supreme Court, we recognize that our precedents are not sacrosanct, for we have overruled prior decisions where the necessity and propriety of doing so has been established. **But any departure from the doctrine of *stare decisis* demands special justification.**" *Wampler v. Higgins* (2001), 93 Ohio St.3d 111, 120, 2001 Ohio 1293, 752 N.E.2d 962 (Internal citations and quotations omitted). This principle is universally accepted and unquestioned. Reasonable disagreement may arise only over which circumstances constitute "special justification." (Emphasis supplied).

This Court has recently cited the *stare decisis* principles of *Westfield Ins. Co. v. Galatis*, *supra*, in some even more recent decisions. See *State ex rel. Davis v. Public Emples. Ret. Bd.*, *supra* ¶38; *State v. Kalish* (2008), 120 Ohio St. 3d 23, 27, ¶22; *State v. Simpkins* (2008), 117 Ohio St. 3d 420, 424, ¶19/footnote no.2; and *Shay v. Shay* (2007), 113 Ohio St. 3d 172, 178, ¶s 27-30. In *Shay*, *supra*, this Court again explained the importance and justification for *stare decisis*:

As we stated in *Galatis*, whenever possible we must maintain and reconcile our prior decisions to foster predictability and continuity, prevent the arbitrary administration of justice, and provide clarity to the citizenry. *Galatis*, 100 Ohio St.3d

216, 2003 Ohio 5849, 797 N.E.2d 1256, at P43. That understanding is perhaps particularly true in cases driven by statutory interpretation and any legislative response to that interpretation. See Square D Co. v. Niagara Frontier Tariff Bur., Inc. (1986), 476 U.S. 409, 424, 106 S.Ct. 1922, 90 L.Ed.2d 413, quoting Burnet v. Coronado Oil & Gas Co. (1932), 285 U.S. 393, 406, 52 S.Ct 443, 76 L.Ed. 815, 1932 C.B. 265, 1932-1 C.B. 265 (Brandeis, J., dissenting) ("As Justice Brandeis himself observed * * * in commenting on the presumption of stability in statutory interpretation: 'Stare decisis is usually the wise policy because in most matters, it is more important that the applicable rule of law be settled than that it be settled right. * * * This is commonly true, even where the error is a matter of serious concern, provided correction can be had by legislation'").

This Court has sent a clear message with this recent series of case pronouncements that, absent some significant and important "special justification," it will not reverse its prior decisions.

D. In keeping with this Court's prior holdings, the Appellate Court's decision below correctly held that Ohio law permits the pursuit of common law and statutory causes of action, and permits recovery on both.

The Appellate Court, in relying on the principles of law set forth above, held that the trial court erroneously required the Beckett Family to choose between pursuing a statutory claim under RC 955.28 and a common law claim for negligence. By doing so, the Appellate Court followed the clear line of cases (including cases out of this Court, e.g. Warner v. Wolfe) which have held that Ohio law has long permitted the pursuit of common law and statutory causes of action, and permits recovery on both.

Appellant Dog Owners seek to have this Court disregard long-

standing Ohio law and violate well-reasoned Ohio law principles of stare decisis. However, Appellant Dog Owners have failed to provide any "special justification" for doing so.

The Dog Owners' brief goes on at great length about the history of dogs and humans, and actually cites to a number of non-legal authorities about dogs and the insurance/damages costs of dog attacks. It also cites to a number of cases and statutes from states other than the State of Ohio. See pages 2-4 of the Dog Owners' brief. The Dog Owners' brief then goes on to refer to the Warner v. Wolfe, *supra*, decision and concedes that Warner v. Wolfe held that a plaintiff may assert, prove and recover under both the statutory and common law negligence action for dog attack injuries. It then goes on to assert that the minority view of Rodenberger, *supra*, should be the **new** law to be created by this Court. The **only** rationale (i.e. "special justification") that is advanced by the Dog Owners is that simultaneous pursuit of both causes of action will permit the possible jury award of punitive damages in a strict liability context. However, as set forth in the many cases that have addressed and rejected this argument, jury instructions (and the proper application of law if the case is tried to a bench) are designed to eliminate any possible confusion or prejudice on the part of the jury.

In fact, in evaluating the "special justification" analysis required by Ohio stare decisis law, the legislative history and

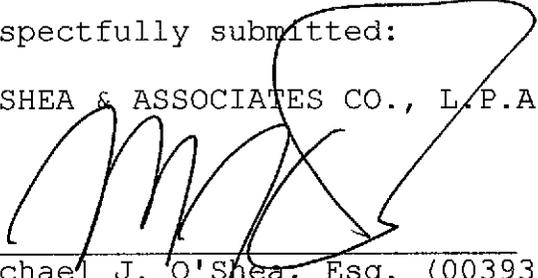
equities clearly support the retention of current Ohio law and the pursuit of both causes of action. The obvious purpose behind RC 955.28 was clearly to further protect and assist victims of dog attacks and to bring the owners of those dogs to task for the injuries inflicted by those dogs. The purpose of the statute was clearly not to protect or insulate the owners of these dogs and/or interfere with an injured party's ability to recover damages for their injuries. See Khamis v. Everson (1993), 88 Ohio App. 3d 220. Further, given the horrible nature of the injuries we have in this case (and in other dog attack cases), it would simply defy the principles of equity to twist and reformulate Ohio law (including the clear protective purpose of RC 955.28) into a barrier to recovery.

CONCLUSION

For all of the foregoing reasons, the Beckett Family respectfully prays that this Court adopt the text and/or principles of the proposition of law asserted by the Beckett Family.

Respectfully submitted:

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



Michael J. O'Shea, Esq. (0039330)
michael@moshea.com

19300 Detroit Road - Suite 202
Rocky River, Ohio 44116
(440) 356-2700
(440) 331-5401 - fax

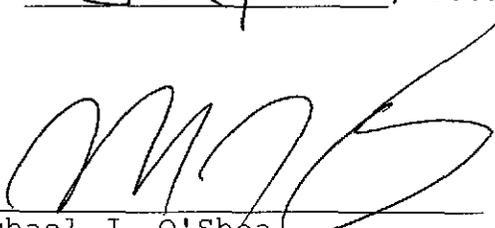
**Attorneys for Appellees
the Beckett Family**

CERTIFICATE OF SERVICE

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

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

by regular U.S. Mail this 6th day of July, 2009.



Michael J. O'Shea