

ORIGINAL

IN THE SUPREME COURT OF OHIO

YOSHANTA BECKETT, et al,

CASE NO. 2008-2106

Appellant/Cross-Appellees,

vs.

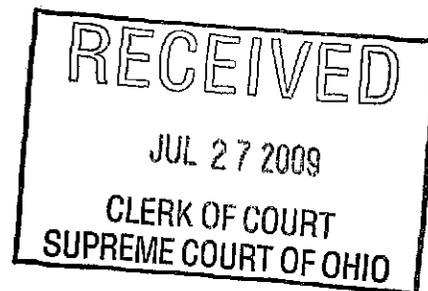
On Appeal from the
Summit County Court of Appeals,
Ninth Appellate District
Court of Appeals
Case No. CV 2006 07 4759

RICHARD WARREN, et al,

Appellee/Cross-Appellants.

REPLY BRIEF OF APPELLEES/CROSS-APPELLANTS
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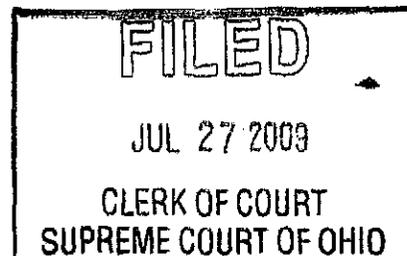


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LAW AND ARGUMENT

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.

As clearly identified in this Court's order accepting jurisdiction of the cross-appeal in this case, the certified question before this Court is:

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

(Entry, March 25, 2009). The issue in this case is not whether the General Assembly, in enacting R.C. 955.28, expressly or implicitly intended to abrogate a common law form of action, in a claim for bodily injury damages in a case involving a dog. Much of the response brief of the cross-appellees is dedicated to the latter issue. Consequently the appellees' brief is limited in its analysis of the substantive matters of inconsistent remedies, juror confusion and the proper presentation of evidence involved in this case, which dictate the election of remedies in this context.

The appellees accurately cite abrogation rules in their brief, as set forth in *Vaccariello v. Smith & Nephew Richards, Inc.* (2002), 94 Ohio St. 3d 384, and *Carrel v. Allied Products Corp.* (1997), 78 Ohio St. 3d 284. As a general rule, “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.*” *Danziger v. Luse*, 103 Ohio St. 3d 337, 2004-Ohio-5227, ¶11 (Italics original). As observed by the Court of Appeals in this case, in *Warner v. Wolfe* (1964), 176 Ohio St. 389, this 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 it did not.” *Beckett v. Warren*, 2008-Ohio-4689, ¶10. However, “[t]he 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.” *Id.*, ¶10. It is instructive, though, that the final sentence of the syllabus in *Warner v. Wolfe* does state that “[a] suit may be instituted either under the statute or at common law.”

Abrogation principles do not address the merits of this case; rather, election of remedies rules are applicable. As a general rule, the doctrine of “election of remedies” is applicable when “there are available to the litigants, two or more co-existing, inconsistent remedies for the assertion of a single right.” *Pella Window & Door Co. v. Tobin* (June 25, 1991), Stark App. No. CA-8381, citing *Norwood v. McDonald* (1943), 142 Ohio St. 299, 315, overruled on other grounds *Grava v. Parkman Twp.* (1995), 73 Ohio St. 3d 379. As recognized by this Court:

An election of remedies or forms of action or procedure does not necessarily involve a choice as between two existing substantive rights. A form of action or remedy is but a means of administering justice rather than an end in itself. There is, therefore, a marked distinction between an election between remedies or forms of action and an election of remedial rights. One goes to the substance and the other to the form. Where the remedies afforded are inconsistent, it is the election of one that bars the other; where they are consistent, it is the satisfaction which operates as a bar. It is the inconsistency of the demands that makes the election of one remedial right an estoppel against the assertion of the other, and not the fact that the forms of action are different.

Frederickson v. Nye (1924), 110 Ohio St. 459, 466. See also, *Welch v. Welch*, 2006-Ohio-7013, ¶20. A party may well be permitted to plead claims under the common law and R.C. §955.28, in the alternative, given the liberal pleading rules of Ohio R. Civ. P. 8(A); however, when inconsistent demands are presented, as in this case, the plaintiff must make an election of one remedial right, prior to trial.

As addressed in the appellants’ merit brief, when the evidence supports proof of actual malice, a punitive damage award may be rendered in a dog bite case, when such claim is pursued under common law negligence principles. However, a punitive damage award is not an available remedy in a dog bite case advanced under the strict liability standard of R.C. 955.28. Both causes of action, particularly when there is the inconsistency of demands, cannot be presented to a jury, without the presentation of evidence which is admissible under one theory, but inadmissible under the other.

There is no dispute that, when the General Assembly enacted R.C. 955.28, it removed the element of “scienter,” or knowledge of the dog’s vicious propensities, in an action to recover for bodily injury involving a dog. Permitting these two causes of action to be tried together, allows a

plaintiff the opportunity to take advantage of a statutorily-created cause of action, which requires a lesser degree of proof, but maintain and present evidence on a claim for punitive damages, when such a remedy is inconsistent with the statutory right in the first instance.

It is worth emphasis that, as addressed in the concurring opinion in *Koruschak v. Smotrilla* (July 16, 2001), Mahoning Cty. App. No.99 CA 320, 2001-Ohio-3326:

Since the elements of proof for each of the aforementioned causes of action [negligence theory or R.C. 955.28] are separate and distinct, their commingling 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 the other. While that process might not be too cumbersome relative to a dog-bite case tried to the 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.

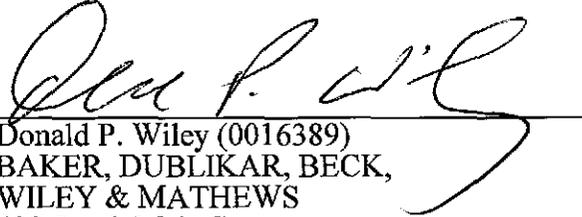
Id. The only meaningful manner in which to address this dilemma is to reverse the decision of the Court of Appeals in this case, and adopt, universally, the rationale and ruling of the Sixth District Court of Appeals in *Rodenberger v. Wadsworth* (Nov. 25, 1983), Ottawa Cty. App. No. OT-83-18.

This case does not call upon this Court to modify or overrule any of its prior holdings, as the appellees suggest. Under *Wolfe*, a plaintiff may still plead alternative theories under the common law and under R.C. 955.28, in a claim involving a dog bite injury. However, if the plaintiff intends to present evidence of a dog's vicious propensities, in pursuit of punitive damages, then the plaintiff must make such election of that right and remedies. Otherwise, such evidence is wholly immaterial to an action premised solely upon R.C. 955.28 and, thus, it should not be admissible for any pursue if the remedies allowed under the statute are pursued.

CONCLUSION

For these additional reasons, 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,

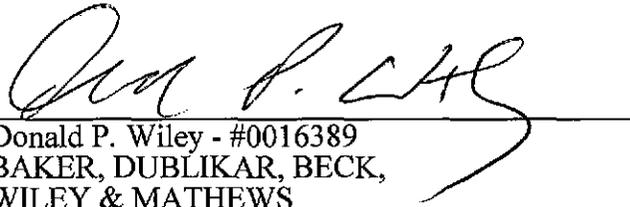


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