

IN THE SUPREME COURT OF OHIO

CARLA DUNN,	:	S.C. Case No.: _____
	:	
Plaintiff-Appellant,	:	C.A. Case No. 14 CA 0101
	:	
v.	:	<i>On Appeal from the Licking County</i>
	:	<i>Court of Appeals, Fifth Appellate District</i>
LICKING COUNTY HUMANE	:	
SOCIETY,	:	
	:	
Defendant-Appellee.	:	

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT CARLA DUNN**

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STATEMENT OF GROUNDS FOR JURISDICTIONAL APPEAL

This case is of public or great general interest because of the large number of pet owners that it could potentially impact, depriving them of any remedy should their pets be seized by a county humane society while being groomed or boarded by a third party, as here. In the United States, individuals currently own 85,800,000 cats, 77,800,000 dogs, and 7,500,000 horses as pets.¹ These pet owners routinely board and have their dogs and cats groomed off-site with a third party, at a cost of \$5.24 billion annually.²

In Ohio, more than 100,000 dogs are impounded annually.³ 70% of these are redeemed or adopted, and 30% are euthanized.⁴ The result of the Fifth District's decision is deeply troubling because if the impounded animal is transferred to a private humane society, as here, and the humane society refuses to return the pet to a lawful owner who had no involvement in or knowledge of the neglect or abuse of the pet, as here, the lawful pet owner has no recourse.

In the present case, Defendant-Appellee Licking County Humane Society ("Appellee" or "LCHS") refused to return ten Labradoodle puppies owned by Plaintiff-Appellant Carla Dunn ("Appellant" or "Mrs. Dunn") to her after the Licking County Sheriff and LCHS had seized the dogs from another person, Samantha Magers, who was later charged with animal abuse. Mrs. Dunn had left nine adult Labradoodles with Ms. Magers to be artificially inseminated, but (it is undisputed) Mrs. Dunn had no knowledge of or involvement in their alleged neglect by Ms. Magers. One of Mrs. Dunn's adult dogs had given birth to the ten puppies at issue after the adult

¹ 2015-16 American Pet Products National Pet Owners Survey (Appendix, p. 24).

² Appendix, p. 22.

³ Mary Beth Lane, "Kill Rates Vary Widely at Ohio Dog Shelters." *The Columbus Dispatch*, July 16, 2015 (Appendix, p. 25).

⁴ *Id.*

dogs were transferred to Ms. Mager's care. When Mrs. Dunn approached LCHS to claim the adult dogs and puppies, LCHS returned Ms. Dunn's adult dogs to her, but not the ten puppies.

The trial court granted Mrs. Dunn's motion for summary judgment, finding that LCHS was not entitled to immunity from civil prosecution as a "political subdivision" based on its interpretation of R.C. Chapter 2744, which generally grants immunity to political subdivisions engaged in governmental functions. The Trial Court then found LCHS liable for conversion. The Fifth District Court of Appeals reversed, finding LCHS immune from civil liability under Chapter 2744.

As is demonstrated below, there is nothing in the statutory scheme of Chapter 2744 that would mandate or even suggest that a humane society that refuses to return a pet to a lawful owner was intended by the legislature to be immune. Mrs. Dunn does not contest the immunity that humane societies enjoy for their involvement in the "governmental function" of seizing neglected pets from their abusers. She does contend, however, that she and numerous other pet owners who board or groom their pets in Ohio should not be at risk of losing their pets because, as here, of the arbitrary decision of a humane society to deny the claim of a lawful owner.⁵ By comparison, this case would seem to be of even greater public or general interest than a prior case accepted for review by this Court, involving claims arising out of a county livestock competition. *See Greene Cty. Agricultural Soc. v. Liming*, 89 Ohio St. 3d 551 (2000).

STATEMENT OF THE CASE AND FACTS

On or about August 9, 2013, Mrs. Dunn delivered nine adult Labradoodles from her home in Benton, Kentucky, to Samantha Magers for breeding purposes on Ms. Magers's

⁵ Perhaps nothing fits the definition of "arbitrary" better than LCHS's decision to return Ms. Dunn's adult dogs to her care but not her puppies. Moreover, the trial court found that LCHS had engaged in "wanton and reckless" conduct by not returning her puppies to her. Trial Court Decision and Entry Granting Plaintiff's Motion for Summary Judgment, October 28, 2014, p. 9.

property in Licking County, Ohio . (Affidavit of Carla Dunn (“Dunn Afd.”), ¶ 2). Mrs. Dunn delivered the nine adult Labradoodles to Ms. Magers at a mall parking lot just off of Interstate 70 near Dayton, Ohio. Accordingly, Mrs. Dunn did not observe the conditions for the dogs. (Dunn Afd., ¶ 3).

On or about October 3, 2013, Annabella (Bella) Rose delivered ten puppies on Ms. Magers’s property. (Dunn Afd., ¶ 5). On October 29, 2013, all of the dogs on Ms. Magers’s property were seized as evidence pursuant to a Licking County Municipal Court action for animal cruelty against Ms. Magers. (Dunn Afd., ¶ 6).

Upon learning that her nine adult and ten puppy Labradoodle dogs had been seized, on October 30, 2013, Mrs. Dunn contacted the Licking County Sheriff’s office to claim ownership and to seek to have her dogs returned to her. (Dunn Afd., ¶ 7).

On November 3, 2013, Mrs. Dunn met with Assistant Law Director Amy Weeks, Lori Carlson, LCHS’s Executive Director, and LCHS’s Humane Agent Evans to execute written verification of Mrs. Dunn’s ownership of her dogs. (Dunn Afd., ¶ 10 & Exhibit B). Assistant Law Director Weeks supported releasing the nine adult dogs to Mrs. Dunn because she “didn’t feel that she was an active participant in the inhumane treatment of these animals on Samantha’s [Magers] property.” (Weeks Dep., 34:9-11).

LCHS refused, however, to return Mrs. Dunn’s puppies to her at the conclusion of their November 3, 2013, meeting. (Dunn Afd., ¶ 13). When Mrs. Dunn asked Ms. Carlson why she was refusing to return her puppies, Ms. Carlson stated only that she was “uncomfortable” doing so. (Dunn Afd., ¶ 14). LCHS refused to return Mrs. Dunn’s puppies to her despite Ms. Weeks’ and Ms. Evans’ knowledge that the ten Labradoodle puppies were born to one of Mrs. Dunn’s adult dogs. (Weeks Dep., 39:9-13; Evans Dep., 62:10-63:63:15 & Exhibit 5 (the mother of the

ten Labradoodle puppies was Mrs. Dunn's dog Sugar Plum)).

On November 8, 2013, Mrs. Dunn through counsel faxed a letter to LCHS's Executive Director, Ms. Carlson, requesting that LCHS contact her counsel to arrange for the return of her puppies by the close of business on Monday, November 11, 2013, to avoid legal action. ((Dunn Afd., ¶ 19 & Exh. F). Instead of contacting Mrs. Dunn or her counsel regarding her claim to ownership of the puppies, LCHS entered into adoption agreements and permitted all of the puppies to be adopted on November 11, 2013. (Dunn Afd., ¶ 21). November 11, 2013, was Veterans Day, a legal holiday, and the courts were closed. (Weeks Dep., 51:10-16). LCHS admits that it was aware that Mrs. Dunn claimed ownership of the puppies when it permitted them to be adopted on November 11, 2013. (Defendant's Response to Plaintiff's Request for Admission No. 3 [mis-numbered as No. 1], on file herein).

The next day, November 12, 2013, Mrs. Dunn filed her original Complaint in this action along with a Motion for Temporary Restraining Order, Preliminary and Permanent Injunction. All of these filings were based on the information available to her at the time, which was that the Labradoodle puppies in dispute were in the custody of LCHS. (Dunn Afd., ¶ 24).

That same day, the Court granted Mrs. Dunn's Motion for Temporary Restraining Order prohibiting LCHS from permitting the adoption of the puppies. The Court set a Preliminary Injunction hearing for November 22, 2013. On the day before the Preliminary Injunction hearing, however, LCHS's counsel informed Mrs. Dunn's counsel that the puppies had already been adopted, on November 11, 2013. (Dunn Afd., ¶ 25).

The market value of the puppies that LCHS refused to return to Mrs. Dunn is \$1,500 each. (Dunn Afd., ¶ 26). One of the puppies was worth far more than \$1,500 due to the distinctive coloring of its nose (chocolate brown), which indicates that it could have had more

puppies with that distinctive coloring over the course of its lifetime. (Dunn Afd., ¶ 27). LCHS received adoption fees of \$240.00 for each of the ten puppies. (Defendant's Response to Plaintiff's Request for Admission No. 2 (mis-numbered as No. 1), on file herein). Mrs. Dunn has suffered severe emotional distress requiring medical care due to LCHS's refusal to return the Labradoodle puppies to her. (Dunn Afd., ¶ 28).

The trial court held that LCHS was not entitled to immunity as a political subdivision as follows:

Chapter 2744 separates the actions of political subdivisions into "governmental" and "proprietary" functions. R.C. § 2744.01(G)(1)(a). "The enforcement or nonperformance of any law" is a governmental function. R.C. § 2744.01(C)(2)(i). Thus, when collaborating with law enforcement officials and prosecutors to enforce animal abuse laws by seizing neglected or abused animals, humane societies are political subdivisions engaging in a governmental function.

Plaintiff's claims, however, do not arise out of the seizure of her puppies. Rather, they arise out of Defendant's decision not to release them to her, once she had proven ownership of their mother.... [I]n refusing to release the puppies to Plaintiff, Defendant was not enforcing the law.

(Trial Court Decision and Entry Granting Plaintiff's Motion for Summary Judgment, pp. 6-7).

The Fifth District reversed, finding that in "holding" Mrs. Dunn's puppies for adoption, rather than releasing them back to their owner, LCHS was engaged in a governmental function. (Fifth District Opinion, p. 18).

ARGUMENT

Proposition of Law No. 1:

Because the Licking County Humane Society Was Not Engaged in a “Governmental” Function When It Refused to Return Mrs. Dunn’s Puppies to Her, R.C. 2744.02(B)(2)’s “Proprietary Function” Exception Negates LCHS’s Political Subdivision Immunity.

The political subdivision immunity provisions set forth in the Ohio Revised Code should not be interpreted to shield LCHS from liability arising out of its refusal to return Mrs. Dunn’s puppies to her.

Mrs. Dunn does not dispute that a county humane society is a political subdivision for purposes of Chapter 2744’s immunity statutes. Accordingly, as the Fifth District correctly set forth:

A three-tiered analysis is required to determine whether a political subdivision is immune from tort liability pursuant to R.C. 2744. [Citations.] The first tier is the general rule that a political subdivision is immune from liability incurred in performing either a governmental or a proprietary function. [Citations.] That immunity, however, is not absolute. [Citations]. “The second tier of the analysis requires a court to determine whether any of the five listed exceptions to immunity listed in R.C. 2744.02(B) apply to expose the political subdivision to liability.” [Citation]. If one of the five exceptions applies and exposes a political subdivision to liability, the third step is to determine whether any of the additional defenses or immunities contained in R.C. 2744.03 apply. [Citation].

(Opinion of the Fifth District Court of Appeals, p. 12).

Mrs. Dunn argues, however, that the “tier 2” exception to immunity for negligent performance of a proprietary function (R.C. 2744.02(B)(2)) applies. Although the seizure of animals based on allegations of animal cruelty is a governmental function, LCHS’s negligent refusal to return her puppies to her was a proprietary function. The Trial Court rightly distinguished between the two:

[W]hen collaborating with law enforcement officials and prosecutors to enforce animal abuse laws by seizing neglected or abused animals, humane societies are political subdivisions engaging in a governmental function.

Plaintiff's claims, however, do not arise out of the seizure of her puppies. Rather, they arise out of Defendant's decision not to release them to her, once she had proven ownership of their mother.... [I]n refusing to release the puppies to Plaintiff, Defendant was not enforcing the law.

(Trial Court Decision and Entry Granting Plaintiff's Motion for Summary Judgment, pp. 6-7).

The Fifth District, however, refused to differentiate between LCHS's collaboration with law enforcement officials in seizing the animals, which is properly classified as a governmental function, and LCHS's refusal to return Mrs. Dunn's puppies to her. The Fifth District relied on prior court of appeals decisions that had found county humane societies immune from claims brought by the persons from whom the animals had been seized on animal cruelty grounds.⁶ None of the cases upon which the Fifth District relied, however, involved claims brought by lawful owners who had no knowledge of or involvement in the animal abuse by a third party. Despite this, the Fifth District held that LCHS was engaged in a governmental function when it refused to return Mrs. Dunn's puppies to her. (Fifth District Opinion, p. 18).

As this Court has previously held, "some activities of a political subdivision may be governmental functions, while some other activities are not." *Greene Cty. Agricultural Soc. v. Liming*, 89 Ohio St. 3d 551, 560 (2000). In *Greene Cty. Agricultural Soc.*, the Court ruled that, on the one hand, conducting a county fair is a governmental function, but conducting a livestock competition at that same county fair, on the other, is a proprietary function. In reaching that result, the Court reasoned that since "the political subdivision at issue is not one of the bodies

⁶ Studer v. Seneca Cty. Humane Soc. ((3d Dist. 2000), 2000-Ohio-1823, 2000 WL 566738, Earl v. Wood Cty. Humane Soc. (6th Dist. 2002), 2002-Ohio-3156, 2002 WL 1396696, and Patton v. Wood Cty. Humane Soc. ((6th Dist. 2003), 154 Ohio App.3d 670).

specifically mentioned within R.C. 2744.01(F), the exceptions to immunity of R.C. 2744.02(B) should be construed in a way that leads to a finding of immunity for only the central core functions of the political subdivision.” *Id.* The Court explained, “If the exceptions in R.C. 2744.02(B) are interpreted too expansively in this situation, the balance of competing interests reflected in the structure of R.C. Chapter 2744 is undermined.” 89 Ohio St. 3d at 561. The Fifth District failed to follow these principles.

Applying the reasoning of *Greene Cty. Agricultural Soc.* here, a county humane society, like a county agricultural society, is “not one of the bodies specifically mentioned within R.C. 2744.01(F)” as a political subdivision. Therefore, the immunity statutes, including the immunity exception at issue here (R.C. 2744.92(B)(2)), should not be construed expansively, to protect the balance of competing interests in Chapter 2744. *See Green Cty. Agricultural Soc.*, 89 Ohio St. 3d at 560-61.

The conclusion that LCHS assisting a county sheriff in seizing animals who are being abused or neglected meets the statutory definition of “governmental” function is not an overly expansive interpretation of Chapter 2744. That activity fits the statutory definition of “governmental” function, which includes “enforcement or nonperformance of any law.” R.C. 2744.01(C)(2)(i). But Assistant Law Director Weeks testified at great length about how she had no need to retain the puppies for law enforcement purposes. (Weeks Dep., 42:23-44:21; 44:17-21; 65:16-66:6; 66:21-24; 70:21-22). This demonstrates that the decision not to release the puppies therefore had nothing to do with law enforcement.

But to say that LCHS’s refusal to return Mrs. Dunn’s puppies to her is a “governmental” function is an overly expansive interpretation of Chapter 2744. Only the “central core functions” of organizations that are not explicitly listed as “political subdivisions” in R.C. 2744.01(F)

should be categorized as “governmental” functions. *Green Cty. Agricultural Soc.*, 89 Ohio St. 3d at 561. The codified objectives of a humane society “... shall be the inculcation of humane principles and the enforcement of laws for the prevention of cruelty, especially to children and animals.” R.C. 1717.02. These are the “central core functions” of LCHS. But refusing to return Mrs. Dunn’s puppies had nothing to do with inculcating humane principles, nor with enforcement of laws for preventing animal cruelty. The Fifth District thus erred by giving an overly expansive interpretation to Chapter 2744, holding that LCHS’s refusal to return Mrs. Dunn’s puppies – which had nothing to do with its statutory core objectives – was nevertheless a “governmental” function.

LCHS’s actions at issue more closely align with the statutory definition of a “proprietary” function. Chapter 2744 defines a “proprietary function” as something that “promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons.” R.C. § 2744.01(G)(1)(b). By receiving seized abused animals, restoring their health, and offering them for adoption, a humane society is engaging in something that “promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons.” This is a proprietary function, like the other operational functions that are specifically enumerated (in a non-exclusive list) in Section 2744.01(G)(2):

A “proprietary function” includes, but is not limited to, the following:

- (a) The operation of a hospital by one or more political subdivisions;
- (b) The design, construction, reconstruction, renovation, repair, maintenance, and operation of a public cemetery other than a township cemetery;
- (c) The establishment, maintenance, and operation of a utility, including, but not limited to, a light, gas, power, or heat plant, a

- railroad, a busline or other transit company, an airport, and a municipal corporation water supply system;
- (d) The maintenance, destruction, operation, and upkeep of a sewer system;
- (e) The operation and control of a public stadium, auditorium, civic or social center, exhibition hall, arts and crafts center, band or orchestra, or off-street parking facility.

Section 2744.01(G)(2) (emphasis added).

According to *Greene Cty. Agricultural Soc.*, Ohio courts should err in favor of finding a humane society's activity to be a proprietary function, whenever that function is not clearly its "central core function," to protect "the balance of competing interests reflected in the structure of R.C. Chapter 2744...." 89 Ohio St. 3d at 561. Just as this Court distinguished between the conducting of a county fair as a governmental function and the conducting of a livestock competition as a proprietary function in *Greene Cty. Agricultural Society*, so here the Trial Court properly distinguished between the seizing of abused animals as a governmental function and the refusal to release the puppies to their lawful owner as a proprietary function. In reversing, the Fifth District improperly rejected that distinction, leaving thousands of Ohio pet owners and breeders vulnerable to arbitrary decisions of county humane societies, as here.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court grant review of this jurisdictional appeal.

Respectfully submitted,



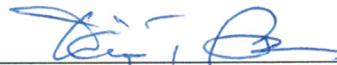
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following via regular U.S. mail this 29th day of July, 2015:

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