

[Cite as *Pickett v. Ohio Dept. of Rehab. & Corr.*, 2001-Ohio-3960.]

IN THE COURT OF CLAIMS OF OHIO

LATTIMORE PICKETT :
Plaintiff : CASE NO. 2000-02755
v. : DECISION
DEPARTMENT OF REHABILITATION : Judge Russell Leach
AND CORRECTION :
Defendant :
: : : : : : : : : : : : : : : : :

This case was tried to the court on the sole issue of liability. Plaintiff asserts that defendant is liable under theories of negligence and strict liability pursuant to R.C. 955.28(B) for injuries he sustained on defendant's premises as a result of a dog bite.

At all times relevant to this action, plaintiff was an inmate in the custody and control of defendant at the Madison Correctional Institution (MCI) pursuant to R.C. 5120.16. Plaintiff was housed in Unit J-B and worked as a dog handler in the Pound Puppy Program operated by MCI in conjunction with the Madison County Humane Society (MCHS). The program was designed for inmates to train dogs up to 1½ years old in basic obedience.

Inmates who volunteered to work in the program underwent training conducted by defendant that included instructional videos, classes and a written packet of instructions. Each inmate was assigned to one dog, which was to be kept in a cage at

the foot of the inmate's bed. Dog food and supplies were provided by MCHS and distributed to the inmates by defendant. After ninety days of training, the dog would become eligible for adoption either by inmates, defendant's employees, or patrons of MCHS. Although inmates volunteered to participate in the program, they were paid approximately \$22 per month for their work as dog handlers.

Sergeant Martha Crabtree had been involved with the dog training program since approximately 1995. She was responsible for receiving the dogs from MCHS and assigning them to the inmates. Sgt. Crabtree testified that MCHS sent her a piece of paper with each dog's age, breed, and record of immunizations.

By September 1998, plaintiff had been working in the program for approximately nine months and had trained three dogs. On September 16, 1998, a Dalmatian was assigned to plaintiff. However, that dog displayed violent tendencies and was returned to MCHS. Eventually, plaintiff was assigned an adult Norwegian Elkhound. According to plaintiff, the dog looked like a haggard wolf. Plaintiff took the dog to his cubicle and gave it a treat.

When plaintiff picked up some remaining crumbs, the dog lunged at him.

Plaintiff's cell mate told Sgt. Crabtree about that incident. Afterwards, Sgt. Crabtree, Sgt. Terry Campbell, and Corrections Officer (CO) Arthur Smith went to plaintiff's cubicle and spoke to plaintiff about the dog. According to plaintiff, the dog then lunged at Sgt. Crabtree when she gave it a biscuit.

Plaintiff testified that Sgt. Crabtree assured him that the dog would only be there a couple of days and that he should stick

with it. Plaintiff further testified that Sgt. Crabtree did not offer to return the dog to MCHS but instructed plaintiff to feed the dog in its cage.

The next day, plaintiff walked the dog in the yard and took the dog into the bay area of the dormitory. He told the dog to sit. When plaintiff reached for the dog's leash, the dog bit him in the face, causing severe injuries. Plaintiff was transported to a hospital for treatment.

Sgt. Crabtree testified that plaintiff's cell mate came to her and stated that the dog was behaving strangely in the cubicle, and that the dog had snapped at plaintiff. She testified that the dog barked but did not snap at her when she went to plaintiff's cubicle. She also testified that she offered to return the dog to MCHS but that plaintiff and his cell mate stated that they wanted to work with the dog.

Plaintiff maintains that defendant is strictly liable pursuant to R.C. 955.28(B). Defendant argues that R.C. 955.28(B) does not apply in this case because an owner, harborer, or keeper of a dog cannot state a statutory cause of action for a dog bite.

R.C. 955.28(B) states:

(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 a trespass or other criminal offense on the property of the owner, keeper, or harborer, 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 harborer's property.

An owner is the person to whom a dog belongs, while a keeper has physical control over the dog. *Garrard v. McComas* (1982), 5 Ohio App.3d 179, 182. Additionally, a harborer is one who has possession and control of the premises where the dog lives, and silently acquiesces to the dog's presence. See *Flint v. Holbrook* (1992), 80 Ohio App.3d 21.

Defendant contends that no statutory cause of action exists in this case because plaintiff, as a dog handler, was the "keeper" of the dog. In *Khamis v. Everson* (1993), 88 Ohio App.3d 220, the Montgomery County Court of Appeals held that a "keeper" is not within the class of people that the legislature intended to protect in enacting the strict liability provision contained in R.C. 955.28(B). It is defendant's position that MCHS was the "owner" of the dog; defendant was the "harborer"; and, plaintiff was the "keeper." In *Khamis*, plaintiff was working as a volunteer at a kennel when he was bitten by a dog that had been left in his care. The court held that plaintiff was the "keeper" of the dog, and as such, could not state a statutory cause of action. Based upon that rationale, this court concludes that plaintiff cannot successfully pursue a cause of action for strict liability pursuant to 955.28(B). Therefore, plaintiff's statutory claim must fail.

However, "keepers" or "harborers" of dogs may still maintain a common-law cause of action against the dog's owner. See *Khamis, supra*; *Warner v. Wolfe* (1964), 176 Ohio St. 389, 392-393.

Defendant argues that it was a harbinger of the dog and not its owner, therefore, it is not liable for injuries caused by the dog. Nevertheless, even if defendant be a harbinger and not an owner, an injured plaintiff can maintain an action against a harbinger where the harbinger has knowledge of the dog's vicious propensities. See 3 Restatement of the Law 2d, Torts (1976) 11, Sections 507-514.

Betty Ann Peyton, a volunteer and board member of MCHS, testified that MCHS received a call on August 21, 1998, that an unlicensed male, Norwegian Elkhound had bitten a child. MCHS subsequently recovered the dog. On September 17, 1998, an adult Norwegian Elkhound from MCHS bit plaintiff. The dog was then euthanized. Peyton testified that although she did not know whether the dog that bit plaintiff was the one that had bitten the child, those are the only records that MCHS had regarding a Norwegian Elkhound.

Sgt. Crabtree testified that she did not have knowledge of the documentation from MCHS regarding a Norwegian Elkhound. However, Sgt. Crabtree also testified that plaintiff's cell mate reported to her that the dog had lunged at plaintiff. Plaintiff also testified that he informed her that the dog had lunged at him. Defendant's general rules for the Pound Puppies Program provide: "Notify the Correctional Counselor/Unit Manager immediately if the dog shows any aggressive behavior toward any person." Assuming, *arguendo*, that defendant did not have notice of the dog's history from MCHS, plaintiff and his cell mate both notified Sgt. Crabtree, Sgt. Campbell and CO Smith that the dog had lunged at plaintiff. At that point, defendant should have

taken the dog from plaintiff and returned it to MCHS, as was done with the Dalmatian. The greater weight of the evidence shows that defendant had actual notice of the vicious propensity of the dog, and its failure to remove the dog from the program constitutes a breach of ordinary care towards plaintiff. That breach proximately caused plaintiff's injuries.

Defendant alleges that plaintiff's damages were proximately caused by his own wrongful acts and omissions because Sgt. Crabtree offered to return the dog to MCHS but that plaintiff and his cell mate wanted to continue working with the dog. Ohio's comparative negligence statute, R.C. 2315.19, bars a plaintiff from recovery if his or her own negligence is greater than defendant's. "Contributory negligence" means "any want of ordinary care on the part of the person injured, which combined and concurred with the defendant's negligence and contributed to the injury as a proximate cause thereof, and as an element without which the injury would not have occurred." *Joyce-Couch v. DeSilva* (1991), 77 Ohio App.3d 278, 290. After reviewing all the evidence and evaluating the credibility of the witnesses, the court finds that Sgt. Crabtree's testimony regarding plaintiff's desire to continue working with the dog lacks credibility and was not substantiated by either Sgt. Campbell or CO Smith. Defendant has not produced any other specific instance of plaintiff's conduct that constitutes contributory negligence in this case. Therefore, judgment shall be rendered in favor of plaintiff on his common-law theory of negligence.

RUSSELL LEACH
Judge

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Plaintiff : CASE NO. 2000-02755
v. : JUDGMENT ENTRY
DEPARTMENT OF REHABILITATION : Judge Russell Leach
AND CORRECTION :
Defendant :
: :

This case was tried to the court on the sole issue of liability. The court has considered the evidence, and for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of plaintiff in an amount to be determined after the second phase of the trial dealing with the issue of damages. The court shall issue an entry in the near future scheduling a date for the trial on the issue of damages.

RUSSELL LEACH
Judge

Entry cc:

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