

IN THE SUPREME COURT OF OHIO

City of Toledo,

Appellant,

v.

Paul Tellings,

Appellee,

* On Appeal from the
Lucas County Court of Appeals,
Sixth Appellate District

*
* Supreme Court Case No. 2006-
0690
* Court of Appeals
* Case No. L-04-1224
*

APPELLEES MERIT REPLY BRIEF

Paul Tellings Pro-se
Po Box 299
Cardington, Ohio, 43315
Pro-se



OHIO ATTORNEY GENERAL

John T Madigan, Acting Director of Law
(0023614)

Adam Loukx, Senior Attorney (Counsel of Record)
(0037074)

City of Toledo Law Department
One Government Center, Suite 1710
(419) 245-1020
Fax No.: (419) 245-1090

COUNSEL FOR APPELLANT

Jim Petro (0022096)
Stephen P. Carney (0063460)
30 East Broad St, 17th Floor
Columbus Ohio, 43215
614 466 8980
916 466 5087 fax

COUNCIL FOR CLEVELAND
Victor R. Perez (0074127)
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44114
216 664 4850
216 664 4399 fax

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STATEMENT OF FACTS

This is a case that stems from a Ohio Statute created by the Ohio Legislature in 1987 (O.R.C. 955:11/995:22) where flawed data was presented by animal rights organizations to regulate and control specific breeds of canines using the argument that specific breeds are vicious. (refer to ACF amicus brief) Since the movement to ban and restrict ownership rights to specific breeds of canines started over 27 breeds have become the target of unconstitutional legislation in various parts of the country. Ohio is the only state where a statute declares a specific breed as vicious. 14 states prohibit banning or restricting specific breeds and the movement to ban and restrict ownership of canines is a movement created by extreme animal rights organizations (refer to amicus brief American Canine Foundation)

In 2003 the Appellee Mr Tellings a resident of Toledo with a family including two young children was cited for violating 4 counts of the Ohio Revised Code 955:11 / 995:22 and the Toledo Municipal Code TMC 505.14 Mr Tellings at the time owned two American Pit Bull Terriers and one American Bull Dog not related to the American Pit Bull Terrier. Mr Tellings with the assistance of the American Canine Foundation brought forth a motion to dismiss his charges arguing his constitutional rights addressing his rights to own property are being violated.

At the trial level Mr Tellings provided the Toledo Municipal Court with testimony from the countries most credentialed expert authorities on canine. The experts included a US Government Scientist and professor of animal ecology, two professors of veterinarian

medicine, one a genetics expert, the other an expert on canine behavior, two professors of canine behavior both Ph'D's, a local veterinarian with a degree in canine behavior, the chief cruelty investigator of the Toledo Humane Society, a former Ohio Dog Warden and panel member of the Ohio Dog fighting Task Force, a judge from a major dog registry, and a representative from the American Canine Foundation who's an expert authority on canine breeding and fatal dog attacks. At trial it was proven with cross examination that the Appellants / Toledo's experts credibility was extremely questionable.

All together through the coarse of several months testimony and evidence was presented at trial which proves that American Pit Bull Terriers and no breed is inherently dangerous or vicious. The trial court ruled that even though the laws being challenged are unfair they are not unconstitutional and the trial court failed to refer to all the evidence presented in the case presented by Mr Tellings. Therefore Mr Tellings entered a plea of No –Contest and filed an appeal with the Sixth District Court of Appeals. On March 3rd 2006 the Appeals Court ruled ORC:955:11- 955:22 and the TMC 505.14 violated Mr Tellings constitutional rights.

The City of Toledo appealed the case to this court and filed their Merit Brief on October 9, 2006. The City of Cleveland and the Ohio Attorney General filed amicus briefs to support Toledo the Appellant. (Toledo v Tellings, 2006 WL 513946 (Ohio App. 6 Dist.)

ARGUMENT
DEFENDANTS REPLY BRIEF
TELLINGS CASE

The only real question is in this case, is a breed of canine inherently dangerous or vicious. The appellee with memorandums, affidavits, evidence and testimony proved no breed of canine is inherently dangerous or vicious including the American Pit Bull beyond a reasonable doubt. American Pit Bull Terrier and all other breeds of canines are not inherently dangerous or vicious. No evidence with any credibility or scientific value was presented in this case by Appellants and the four experts that testified four the Appellants had no credibility, this is addressed in the arguments below

PRECEDENCE

In this case credible experts presented scientific testimony and evidence to prove American Pit Bull Terriers and all breeds of canines are not inherently dangerous or vicious. Never before in a constitutional challenge was scientific data, Ohio's dog bite data, Ohio's fatal dog attack data and testimony given in a trial like that of the Tellings case

In fact in *Vanater v Village of South Point*, 717 F.Supp. 1236 (1989) which the Appellants cite in their Merit Brief and in the Appellants supporting amicus briefs, the Appellant fails to point out to the court that no scientific evidence was used in *Vanater*. Appellants cite 13 cases almost all related to constitutional challenges pertaining to

American Pit Bull Terriers. The majority of these cases 20 years old. Appellee has reviewed all cases Appellant cited we find no evidence of scientific data entered in those cases. Most of the testimony was based on opinions from parties who had no expert qualifications and no documentation to support any conclusions

Appellants cite precedence claiming years ago supreme courts and appeals court found breed specific laws constitutional. 33 or more cases heard by the United States Supreme Court have been overturned. Payne v Tennessee 501 U.S. 808 (1991). In Payne the court states that in constitutional cases where correction through legislative action is practically impossible or governing decisions are badly reasoned courts do not have to follow precedent. New data that was scientific overturned a 9 year old Ohio State Supreme decision. State v Koss (1990) 49Ohio St.3d 213. In Tellings for the first time accurate scientific data was presented before and at trial by Telling's experts which included a US Government Scientist, several college professors of veterinarian medicine, PhD's in animal behavior and dog training all university professors, a member of the Ohio Dog Fighting Task force who was a former Ohio Dog Warden, a Chief Cruelty Investigator from the Toledo Humane Society and a local Veterinarian with a degree in canine behavior. These experts proved beyond a reasonable doubt no breed of canine is inherently vicious or dangerous.

The Lucas County Dog Warden when faced with cross examination (refer to Trial Tr Tom Skeldon pg 100-106) admitted he had no expertise in canine genetics, in fact when asked if he studied genetics he stated he read a book and the newspapers. Tom Skeldon

testified during the trial attempting to claim that American Pit Bull Terriers are genetically dangerous, when reviewing Skeldon's cross examination one would find no competent knowledge of canines exists outside of the ability to impound and euthanize canines as a Dog Warden in the State of Ohio. In one sentence Tom Skeldon states the Pit Bull can inflict severe damage when attacking and then he turns around and admits the Chow in Toledo is responsible for the most sutures. Refer to (Tom Skeldon Trial Tr. pg 100) Tom Skeldon also testified he does not know the different types of canine aggression (Tom Skeldon Trail Tr. pg 107) Tom Skeldon's cross examination testimony not only proves Ohio's Revised Codes 955:11- 955:22 and T.M.C. 505 .14 are violative of the 14th Amendment but that they bring about erratic arbitrary enforcement.

Dr Peter Borchelt PhD testified for the Appellant (Toledo). Dr Borchelt on his resume claimed to be a board certified animal behavioralist. Under cross examination he admitted hc was not (Refer to Trial Tr Borchelt pg 81) Dr Borchelt presented outdated studies that had no real scientific value to canines, the data was from the 1960's and was erroneous by todays scientific standards. Dr Borchelt attempted to testify about canine genetics and under cross examination he admitted he never studied genetics. (Refer to Trail Tr Borchelt pg 68) Dr Borchelt PhD admitted he has never obedience trained dogs (refer to Trail Tr.Borchelt pg 69), from looking at his testimony he is an expert in house breaking canines and giving people with minor behavioral problems advice, in no way does he qualify as an expert to testify about inherited genetic traits, dog attacks, or the behaviors of the American Pit Bull Terriers. In one instant Dr Borchelt testified American Pit Bull Terriers were dangerous when they attack and then he turned around and agreed

they have a stable temperament (refer to Trail Tr. Borchelt pg 76) Evidence was presented at trial to directly link Dr Borchelt to the animal rights movement (refer to Trail Apellees / Defendants Exhibit R/ Q)

Lucas County Deputy Dog Warden Karla Hamlin who testified for the Appellant (Toledo) out of the four experts Toledo presented is a professional dog trainer who operates an obedience training school in Toledo. Karla Hamlin testified for Toledo however under cross examination she admitted she agreed with all the testimony of the Appellees experts, she also admitted that after Ohio's ORC 955:11 – ORC 955:22 were enacted that problems began with American Pit Bull Terriers being impounded not for biting people and acting vicious but for violations of the breed specific laws. (Refer to Trail Tr all cross examination K Hamlin)

Toledo Veterinarian Dr Wright testified for Toledo. Dr Wright appeared to be coached to testify, he admitted he had never done any studies, had no scientific proof or other evidence to support his opinions.

THE SIXTH DISTRICT COURT OF APPEALS DID NOT ERROR WHEN IT HELD THAT TOLEDO MUNICIPAL CODE § 505.14 AND OHIO REVISED CODE §§ 955.11 AND 955.22 WERE UNCONSTITUTIONAL BECAUSE THE STATUTES VIOLATE THE DEFENDANT'S RIGHTS TO PROCEDURAL DUE PROCESS.

In our country at this time an irrational movement which started back in the 1980's is sweeping our country calling for bans on over 27 breeds of canines at this time. This has been addressed in the Memorandums and trial testimony in this case. The Honorable Ohio Supreme with its decision in the case before it will have great weight on the future

of canine ownership in our country.

What exactly is a dog? Celebrated as "man's best friend", a dog may be typified by the important roles it plays in everyday American life. The value of the dog has increased over the years. The industry involving canines generates 36 billion dollars per year. There are dog magazines, dog food companies, service dogs, police dogs, therapy dogs, search and rescue dogs, drug detection dogs, companion dogs, dog kennel businesses, dog registries, dog shows and some dogs are sold for as much as 30 thousand dollars, one in 5 families own a dog in the United States of America and there are over 70 million dogs that live with us in our country. An American Pit Bull Terrier the breed at question in this was a famous World War One Hero his name was Sgt. Stubby.

To the majority, a dog becomes a beloved member of the family. Tragically, for the owners of American Pit Bull Terriers , the laws do not protect that relationship in Ohio. Rather, the laws demonize the American Pit Bull Terrier, based entirely upon false data and not upon credible statistics and scientific evidence. This has resulted in the unnecessary destruction of thousands of canines, including one of the family pets belonging to the Appellee, Paul Tellings. This has also resulted in the needless conviction and penalization of Mr. Tellings, a responsible dog owner and thousands of other Ohio citizens who own dogs.

In this case it was proven the majority of American Pit Bull Terriers are residing in homes with responsible owners, family's with children and other pets, including Mr

Tellings who had three canines, one that was an American Bull Dog. In this case it was proven that the American Pit Bull Terrier is just as safe as all other breeds of canines. The most decorated canine war hero in existence was an American Pit Bull Terrier. In this case it was proven that American Pit Bull Terriers are registered in national registries that register all other breeds. It was proven the American Pit Bull Terrier is used in competition dog shows, obedience trials, therapy work, service work and police work.

Unfortunately the breed is used in illegal dog fighting, it was proven in this case that many other breeds are used for illegal dog fighting and that because of felony laws that prohibit dog fighting only a small percentage of the breed is used for illegal activities at this time. No data was presented in this case to prove that O.R.C. 955:11 – 955:22 or T.M.C. 505.14 have been responsible for controlling illegal activities involving canines. Nowhere in the Country is there any documented proof that any type of breed specific legislation reduces or controls illegal activity involving canines. Refer to transcript (Tom Skeldon) On page 105 the Dog Warden testifies German Shepherds fight and end up with scars all over. The Dog Warden is then asked if the dogs he sees that are bred to fight are the Pit Bull, he answers with an “Uhm” and then admits he does not know what the Pit Bulls in Lucas County are bred for but if they look like Pit Bull they will act like Pit Bulls. Evidence in this case proves beyond a reasonable doubt that before Ohio Revised Code 955:11 and 955:22 were enacted that many other breeds of canines in Ohio had been responsible for attacking and killing people at a much higher percentage than American Pit Bull Terriers. The legislature in 1987 failed to take that in to consideration and perhaps the legislature was not made aware of Ohio’s accurate fatal dog attack data

in 1987. Refer to Appellees (Appellees Exhibit C) These fatal dog attack studies were done with credible documentation and show that numerous other breeds in Ohio were responsible for fatal attacks before the state law declaring the Pit Bull vicious was enacted. Evidence was also entered and testimony given to prove a dogs breed can't be a determining factor in fatal dog attacks. (Glen Bui T 9-10 / 173- 182 / 199-211)

Ohio's fatal dog attack statistics were entered into evidence along with national data on fatal dog attacks (Glen Bui Transcript T 172-182) Ohio's dog bite data was entered into evidence to prove that American Pit Bull Terriers are not biting anymore than any other breed of dog and in fact were not the highest on the list. It was also proved that there are more American Pit Bull Terriers in Ohio then in 1987 when O.R.C. 955:11 was enacted declaring a "Pit Bull" vicious.

The City of Cleveland in their Amicus Brief (refer to Cleveland Amicus Brief pages 1 and 7) attempt to mislead this court which only proves beyond a reasonable doubt that O.R.C. 95511:/ O.R.C. 955:22 serves no legitimate governmental purpose. Cleveland attempts to make this court believe that between 2000- 2005 vicious dog charges increased 324%.

Cleveland fails to submit any evidence or proof that the increase in vicious dog charges are attributable to American Pit Bull Terriers biting and attacking people, in fact Cleveland can't submit evidence to that extent because it does not exist. Cuyahoga County Board of Health collects dog bite data from everywhere in the county including Cleveland, it was submitted at trial in this case and it shows Cleveland's claims in their

Amicus Briefs are frivolous (Refer to Appellees Ex B)

Cleveland submits one newspaper story and document titled Executive Summary Vicious Dog Policy (ESVDP) and in the contents of the document was much of the same flawed data that the Appellant Toledo attempted to present at trial in this case. In fact the ESVDP cites the Humane Society of the United States (HSUS) this is a radical animal rights organizations that funds the Animal Liberation Front and supports the end to domestic pet ownership. The animal rights movement if under federal investigation (refer to Amicus American Canine Foundation)

Fatal dog attacks are cited in the ESVDP and its admitted the data came from newspapers and HSUS. On page 16 of Cleveland's ESVDP they address physical space for kennels and Appellee notes there is no mention for special housing to confine American Pit Bull Terriers, however the Lucas County Dog Warden testified he has to house Pit Bulls in special kennels because they are vicious and destroy ordinary dog kennels. This along with all the other data Cleveland provides only proves beyond a reasonable doubt that ORC 95511: / 955:22 serve no legitimate governmental purpose and what Cleveland is really saying in their ESVDP is because of the breed specific laws we are seizing more American Pit Bull Terriers and need more kennels, they have not submitted any evidence that they are citing owners of American Pit Bull Terriers for attacking people any more than any other breed. The Cleveland dog bite data in the ESVDP comes a from a bias Dog Warden who supports breed specific legislation and conflicts with the dog bite data entered at trial in this case. As testimony was given in this case at trial by Lucas County Deputy Dog Warden Karla Hamlin the problems with American Pit Bull Terriers began

after ORC 955:11 / 955:22 were passed in 1987. Karla Hamlin, admitted that any problems with Pit Bulls in the City of Toledo did not occur until after O.R.C. §§955.11 and 955.22 were passed. (Refer to K Hamlin T 279 –280) The problems referred to are seizing the dogs for violation of O.R.C. 955.22 and not for attacking and biting. Cleveland's ESVDP has no evidence in its contents to support any conclusion that the American Pit Bull Terrier is the dog of choice among gangs drug dealers and dog fighters. ESVDP attempts to claim there is a high content of back yard breeding going on with American Pit Bull Terriers, yet they submit no evidence to support this and although Cleveland appears to attempt to create a better ordinance for the welfare of animals however they are being provided with flawed data from animal rights organizations which when used to draft legislation only creates problems instead of solving them. The real facts are what the breed specific laws are causing in Ohio is dogs that have no aggression are being impounded and euthanized resulting in wasted government funding and needless criminal charges are being brought upon innocent US Citizens.

Ownership of a dog constitutes a property interest, which is protected by the Constitutions of Ohio and United States. Appellee contends that TMC 505.14, ORC 955:11 and 955:22 failure to provide pre-seizure hearings. Dogs are in Ohio are determined to be valuable property and are protected by the Due Process clause of the Fourteenth Amendment to the United State Constitution.

In determining whether state action has violated an individual's right to procedural due process, a court must address two questions. First, it must decide whether the state action has deprived the individual of a protected interest, life, liberty, or property. Finding such

a deprivation, the court must then determine whether the state procedures available for challenging the deprivation satisfy the requirements of due process. See *Logan v Zimmerman Brush Co.*, 1982, 455 U.S. 422 *Fuentes v Shevin*, 407 US 67 *Parrot v Taylor* 451 US 527.

Property interests are afforded constitutional protection through explicit prohibitions against undue deprivation: Appellees experts submitted a great deal of evidence and testimony which indicates that the enactment of TMC 505.14, ORC 955:11 and 955:22 was irrational. The Trial court found “little” “if any” evidence that the American Pit Bull Terrier is dangerous. The court also found the breed does not exhibit a punishing bite with 2000lbs of jaw pressure as previous cases had cited. Appellee proved at trial there is “ no evidence “ that American Pit Bull Terriers or any breed of canine is inherently dangerous or vicious

While it is true that the ownership of dogs is subject to police power regulation, any interference by the government is only justified when "necessary for the protection of its citizens". *Sentell v. New Orleans & Carrollton R.R.*, 166 U.S. at 704. Accordingly, the Supreme Court approved the principle that legislatures have broad police powers to regulate all dogs to protect the public against the nuisance caused by a dog, which with due process of law has been declared vicious or a danger to people or property. *Id.* at 705. (Emphasis supplied).

Before a dog owner may be deprived of his property, the owner must be given a meaningful opportunity to be heard. Appellant on page 14 of their Merit Brief cite

Nicchia v People of New York, however Appellant fails to acknowledge that the US Supreme makes it very clear that the requirement of dog licenses does not take away due process so regulation and control of canines requiring licensing is constitutional.

Appellee is challenging the right to life, liberty, due process and property interest. *Nicchia v. People of State of New York*, 254 U.S. 228 (1920). While the Nicchia case is referring to the licensing of dogs, the U.S Supreme Court does address due process and makes it very clear that the requirement of dog licenses does not **take one mans property and give it to another, nor does it deprive dog owners of liberty without due process of law**. The US Supreme Court supports a finding from a New York Appeals Court case *Fox v. Mohhawk & H.R. Humane Society* (1901) The broad power to regulate and control dogs that the US Supreme Court means is a menacing dog can be destroyed without due process, however the dog has to be dangerous and it does not refer to specific breeds of dogs. The Nicchia case clearly supports a finding that dog owners have a **right to liberty and due process**. The Toledo Ordinance TMC 505.14 and the Ohio Revised Codes 955:11 – 955.22 take away due process and liberty by declaring a Pit Bull vicious with no evidence to prove the breed is vicious.

A New York appellate court refused to allow a plaintiff in a personal injury case to use judicial notice to prove the alleged vicious propensities of specific dog breeds defined under the "umbrella term" of "Pit Bull". *Carter v. Metro North Assocs.* (1998), 255 A.D.2d251; 680 N.Y.S.2d 229. That court determined that the alleged propensities of pit bull terriers to behave more viciously than other breeds had not been authoritatively established to be a matter of common knowledge. *Carter*, 680 N.Y.S.2d at 240. Such assertions require definite proof. *Id. at 241.* **"A court may only apply judicial notice to matters 'of common and general knowledge, well established and authoritatively settled, not doubtful or uncertain**

The statutes and ordinance in question are unconstitutional because (1) TMC 505.14 automatically imposes criminal penalties upon anyone who owns more than one pit bull;

and (2) T.M.C. 505.14 and O.R.C.955:11 – 955:22 gives the dog warden license to confiscate and destroy a family pet regardless of the actual dangerousness of the dog. No determination is made as to whether the animal has previously engaged in dangerous or vicious behavior. Instead, the dog's breed is used as *prima facie* evidence against them. While the trial court intimates that this presumption of viciousness is rebuttable, it would still require a person to be subjected to criminal prosecution and potential loss of freedom and property before any such determination is made. (3) O.R.C. 955:22 requires liability insurance and because the Pit Bull is declared vicious its next to impossible to obtain insurance which results in criminal charges and convictions.

In a very recent decision, the Ohio Supreme Court found such requirements to be untenable and violative of the Appellants due process rights. *State v. Cowan*, 103 Ohio St.3d 144, 2004-Ohio-4777.

In *Cowan*, two of the Defendant's three dogs were implicated in a biting incident. *Id.* at ¶1. The Defendant was charged under R.C. §§955.22(D) and (E) for failing to confine a vicious dog and for not carrying liability insurance on them, both misdemeanors of the first degree. *Id.* at ¶3. The Defendant was ultimately convicted, fined and sentenced to a year in jail. *Id.* at ¶3. All three of her dogs were destroyed, including one that had not even been implicated as being involved in the biting incident. *Id.* at ¶4.

The Ohio Supreme Court found that this procedure violated *Cowan*'s rights to due process because she was not given an opportunity to be heard prior to the interference with her property rights. *Id.* at ¶5. As the Court noted:

...it was not until Appellee was formally charged as a criminal defendant that she could conceivably challenge the viciousness designation under R.C. 955.22. We find it inherently unfair that a dog owner must defy the statutory regulations and become a criminal defendant, thereby risking going to jail and losing her property, in order to challenge a dog warden's unilateral decision to classify her property.

Accordingly, we find that R.C. 955.22 violates procedural due process insofar as it fails to provide dog owners a meaningful opportunity to be heard on the issue of whether a dog is "vicious" or "dangerous" as defined in R.C. 955.11(A)(1)(a) and (A)(4)(a). (Emphasis supplied). The predicament Ms. Cowan found herself in is hardly distinguishable from that of the Appellant, Paul Tellings.

Like Ms. Cowan, Mr. Tellings was also subjected to criminal prosecution. Unable to secure a ruling that the statute was unconstitutional, Appellant Tellings had no choice but to enter a plea in his criminal case. Paul Tellings was convicted, fined and given a suspended jail sentence. Additionally, he was ordered to obtain liability insurance. insurance.

On the other hand, Appellant Tellings situation is distinguishable from that of Ms. Cowan in at least one important way. His dogs were never accused of biting anyone. Also the trial court found there was little if any evidence to prove the American Pit Bull Terrier is dangerous if socialized. It's common knowledge that all dogs no matter what the breed must be trained and socialized. Rather, Mr. Tellings was reported by a health department

employee checking his house for lead paint for having more than one "vicious" dog. As a result, the Appellant suffered the loss of two of his dogs before being given a meaningful opportunity to be heard. Therefore, pursuant to Cowan, *supra*, the conviction of Mr. Tellings must be reversed. Appellee's witness Deputy Dog Warden Karla Hamlin (K Hamlin T 284- 288) agreed with Appellants experts who gave testimony that American Pit Bull Terriers along with all other breeds of dogs are not inherently dangerous. Karla Hamlin is a professional dog trainer who owns and operates an obedience school for canines in the Toledo area. What we are saying is it has now been proven that American Pit Bull Terriers have never been inherently vicious or dangerous and therefore the Cowan theory applies when it states a dog has to fall under the definition of dangerous or vicious defined in the Ohio Revised Codes.

Appellant submitted affidavits on genetics v environment, fatal dog at tacks, dog bite reports, an amicus brief used in the Alabama Supreme Court, temperament test studies done on Pit Bulls, and a video showing Pit Bulls in different situations and how they behave. All this data most of scientific published by PhD's and Professors of Veterinarian Medicine all proves American Pit Bulls Terriers and all other breeds of dogs that exist today are not inherently vicious or dangerous and that it's the owners that are responsible for the behavior of the individual dog. Refer to all Trial Transcripts, Table of Contents 1-15 and exhibits A-T entered in this case and evidence addressed below.

Evidence in this case proves that American Pit Bull Terriers are not responsible for the majority of reported dog bites in Ohio or Toledo. Evidence in this case proves beyond a reasonable doubt that American Pit Bull Terriers are not responsible for the majority of

fatal dog attacks in Ohio refer (to Appellees Trail exhibit C) Testimony from qualified experts of which both the trial court and appeals court confirmed prove that the CDC Study on fatal dog attacks can't be used because it does not have the populations of the breed listed for committing fatal attacks.

No evidence was submitted by the Lucas County Dog Warden that American Pit Bull Terriers are the dog of choice owned by criminals. In fact the evidence entered and the testimony of the Lucas County Dog Warden (refer to Trail Trans Tom Skeldon pg 115-116) proves there is no evidence to make a finding in urban areas the American Pit Bull Terrier poses a danger to the citizens of a community. Tom Skeldon is asked under cross examination how many drug cases involved Pit Bulls and he evades the question, then he attempts to claim 50 Pit Bulls were shot or maybe more within a 5 year time period. If this were true then Tom Skeldon would have brought to the trial court the data from police reports to support his testimony. The fact is he did not and when police go out to serve a warrant any breed of canine on the premises will most likely be shot regardless of the situation because of the threat the canine poses to the safety of the officers lives in being able to quickly enter the residence and secure it.

THE SIXTH DISTRICT COURT OF APPEALS DID NOT ERROR WHEN IT HELD THAT TOLEDO MUNICIPAL CODE § 505.14 AND OHIO REVISED CODE §§ 955.11 AND 955.22 WERE UNCONSTITUTIONAL BECAUSE THE STATUTES VIOLATE THE DEFENDANT'S RIGHTS TO EQUAL PROTECTION AND SUBSTANTIVE DUE PROCESS BECAUSE THERE IS NO RATIONAL BASIS TO SINGLE OUT THE AMERICAN PIT BULL TERRIER AS INHERENTLY DANGEROUS.

Where a statute is challenged on nonprocedural grounds as violative of due process, the test is whether there is some fair, just reasonable connection between the statute and the

promotion of the health, comfort, safety and welfare of society. (Reptile Prods. Assn. v. Diamond, 401 US 969). (Williamson v Lee Optical Co., 348 US 483).

The Appellant submitted no evidence which would demonstrate the rationality or reasonableness of the statutes challenged.

The Appellee produced clear and convincing evidence that there is no legitimate state interest in classifying Pit Bull Terriers as inherently vicious. According to the trial court little if any evidence was produced. Raymond Motor Transportation, INC v Rice, 434 U.S. 429 1978) In the Raymond case the court looked at the credibility of the evidence before it and struck down a state statute declaring 55 ft Piggy Back Trailers dangerous because Raymond Motor Company provided evidence to prove the trailers were no more dangerous than other vehicles traveling on the highways.

To pass constitutional muster, the means adopted by the statute must be suited to the ends in view and bear a real and substantial relation to its purpose. The Appellant has touted the restrictions as being "necessary" for the protection of the community. The statutes are under-inclusive, arbitrary, capricious and fail to adequately address public safety because they focus on one specific breed of dog to the exclusion of others. Appellants own experts gave testimony to prove the American Pit Bull Terrier is not dangerous. The statutes are also over-inclusive in that they punish all owners of pit bulls and testimony was given to prove the majority of Pit Bulls seized were because of failures to comply with the statutes. No evidence was submitted by the Appellants to prove a significant number of Pit Bulls seized in the last 17 years were vicious or dangerous when taken into custody.

First, the Appellant produced overwhelming evidence to demonstrate that American Pit Bulls are not an inherently dangerous breed. Defendants presented 13 experts ranging from a U.S. government scientist, university professors that teach canine genetics, anatomy and canine behavior and experts involved in regulation and control of dogs in Ohio. Dr I Lerh Brisbin PhD US Government Scientist/University Professor , Dr M Nitschke PhD Canine Behavior/ University Professor, Dr Lora Goldman PhD Canine Behavior, Glen Bui (BS) Genetic Engineering/ American Canine Foundation, Cindy Cooke United Kennel Club, Dr Al Stinson DVM Canine Behavior/ Anatomy/ University Professor/ Board of Directors ADOA, Dr George Padgett DVM (Canine Genetics) University Professor, Jed Mignano Toledo Humanc Society, Tammy Price (Ohio Dog Fighting Task Force), Harry George (EBA), Dr Esplin DVM, and Karl Herkoster (American Temperament Test Society). All these experts have studied American Pit Bull Terriers and some have published journals on, genetics, behavior and anatomy of American Pit Bull Terriers.

Evidence was presented with testimony, exhibits, documents and memorandums to refute the ongoing myth that the American Pit Bull Terrier constitutes a vicious breed. The trial court, in its findings of fact, even agreed there was "little evidence" "if any" to show the breed itself is dangerous. The Sixth District Court of Appeals found no evidence to find that the American Pit Bull Terrier or any breed of canine is inherently dangerous or vicious.

At trial, the Appellant was unable to contradict Appellees evidence with any credible evidence. The Appellant presented the testimony of the County Dog Warden who testified about the genetic make up of pit bulls. Under cross examination he was asked if he studied DNA, he said he read a book and could provide no proof he ever studied or participated in genetic studies. (Tom Skeldon T 103) Appellees presented non-bias genetics experts who teach at Universities. These experts provided testimony using published scientific journals and hands on experience. Refer to all documents and exhibits entered by Appellant in this case.

The Dog Warden also could not provide any evidence that dogs seized by his officers acted in a vicious manner. In fact the Dog Warden was asked if the Pit Bulls he seizes are mainly dogs bred to fight, he answers he does not know what they are bred for. (Tom Skeldon T 105) The Dog warden also gave testimony that the Pit Bulls housed in his shelter had to be kept in special confinement because of aggression. Four issues of serious concern (1) The majority of these dogs were seized because of violations of the breed specific laws and in society were not aggressive. (2) No other shelter Appellee knows of in the United States has to keep Pit Bulls in special confinement. (3) Testimony by Toledo Humane Society Officer, Jed Mignano, demonstrated that American Pit Bull Terriers housed at the Humane Society (1) never act vicious; and (2) are not housed in a separate area. (Jed Mignano T – all pages) (4) Appellant's own expert Dr Borchelt testified about Pit Bulls being in shelters and being adopted out. (Dr Borchelt T –84).

The Appellants other primary witness, Dr. Borchelt, provided contradictory testimony. Dr. Borchelt first contradicted himself by agreeing that an American Pit Bull Terrier can bite with a soft hold and then claiming that the breed will not retreat when attacking, but will bite and hold its victim. Dr. Borchelt relied on outdated research from the 1950's to 1970's in presenting his testimony. Moreover, Dr. Borchelt admitted that he had never done research or studied the Pit Bull (Dr Borchelt T 84) and was not even familiar with current dog bite fatality statistics. Additionally, the evidence established that pit bulls are no more likely to bite than any other dog. Dr Borchelt testified about Appellants (Plaintiffs) Exhibits 7,8,9,10,11 and 12 which were studies done in the 50's – 60's and the majority were done on other species that had nothing to do with canines. This material is outdated and should not be considered. Appellees expert Dr Brisbin who has done jaw pressure studies testified with scientific evidence to prove Pit Bulls do not bite with tremendous jaw pressure and he explained why. (Dr Brisbin T 16-29)

Also Dr Brisbin testified about the use of American Pit Bull Terriers for the U.S. Government because of their ability to control their bite. (Dr Brisbin T 13 , 28, 29)

The Trial courts finding of facts (2) state the Pit Bull possesses individual characteristics unique to that breed. Appellee produced evidence that countless breeds resemble Pit Bulls and that can be found in the testimony and in (Appellees / Defendants Trail exhibit P) This exhibit shows many other breeds that look just like an American Pit Bull Terrier

The Trial Court finding of facts (3) state that the Pit Bull possesses great strength and gameness with an ability to bite and hold. Appellee's experts presented testimony to prove otherwise. Cindy Cooke a lawyer from the United Kennel Club testified that a

Poodle in weight pull competitions pound for pound had beat all other breeds of dogs including the American Pit Bull Terrier (Cindy Cooke T- 59 -60) Appellants expert Tom Skeldon testified he believed it was difficult to breed gameness but really did not understand what it is (Tom Skeldon T- 65) Appellees expert Dr I Lehr Brisbin best defined gameness as does Webster's Dictionary. (Dr Brisbin T 35-37) From evidence entered it proves very few Pit Bulls inherit gameness and when they do its directed at other animals not humans. (Glen Bui T 184-185)

The Trial court in the Findings of Fact (4). Found there was little, if any evidence that the breed of American Pit Bull Terrier is dangerous when trained and socialized. Training and socialization apply to every canine in existence. Without it canines would not be domestic. The finding of the Trial Court that the American Pit Bull Terrier is not dangerous brings us to O.R.C. 955:11 Transfer of ownership or possession of dog.

(1) (a) "Dangerous dog" means a dog that, without provocation, and subject to division (A)(1)(b) of this section, has chased or approached in either a menacing fashion or an apparent attitude of attack, or has attempted to bite or otherwise endanger any person, while that dog is off the premises of its owner, keeper, or harborer and not under the reasonable control of its owner, keeper, harborer, or some other responsible person, or not physically restrained or confined in a locked pen which has a top, locked fenced yard, or other locked enclosure which has a top.

Under existing state law O.R.C. 955.11 is the definition of a dangerous dog. The Trial Court findings of facts (4) clearly provides proof that under the current O.R.C. 955:11 the Pit Bull does not meet the requirement to establish it as a dangerous dog. Experts for the Appellee provided evidence with testimony and published exhibits with research done by PhD's, Professors of Veterinarian Medicine, Humane Officers, genetics experts and

D.V.M.s to prove its genetically impossible for a specific breed of dog to be inherently vicious or dangerous. Experts provided data to prove socialization and environment create behavior of all breeds and that behavior is not based on breed but an individual dog. Refer to Transcripts of (Glen Bui T 183-192) (Dr Brisbin T 236-241)

(Dr Padgett T 120) (Dr Goldman T 143 – 145) (Dr Esplin T 149-151)

(C Herkstroeter T 66 – 75) (Dr A Stinson T 139-141) (Dr M Nitschke T 108-111)

Appellants own expert (K Hamlin T 284- 288) agreed with Appellees experts who gave testimony that American Pit Bull Terriers along with all other breeds of dogs are not inherently dangerous.

The Trial Court in the Findings of Fact (6) claimed there was substantial evidence to prove the Pit Bull bite causes more fatalities amongst dog breeds. In the Trial Courts opinion it addressed that the experts without having the number of dogs of a breed could not determine percentages to compare breeds to determine which breed may be responsible for a higher percentage of fatalities. Appellees experts entered evidence that in the state of Ohio Pit Bulls were not the breed of dog responsible for the majority of fatal attacks. Refer to Appellants (Defendants Exhibit C) These studies were done with credible documentation and show that numerous other breeds in Ohio were responsible for fatal attacks before the state law declaring the Pit Bull vicious was enacted. Evidence was also entered and testimony given to prove a dogs breed can't be a determining factor in fatal dog attacks. (Glen Bui T 9-10 / 173- 182 / 199-211)

The Trail Court in the Findings of Fact (7-8) Found the America Pit Bull Terrier poses

a danger in urban areas where children are present. No evidence is on the record in this case to uphold that fact. Evidence was presented to prove beyond a reasonable doubt there is no rational basis to make such a determination. Appellants expert Dr Borchelt testified he had witnessed Pit Bulls in urban areas and they were all well behaved. (Dr Borchelt T 75-76) Appellants provided no evidence that in Toledo or Ohio children were in danger or that there is a problem in urban areas. Ohio's fatal dog attack statistics were entered into evidence along with national data on fatal dog attacks (Glen Bui Transcript T 172-182) Ohio's dog bite data was entered into evidence to prove that American Pit Bull Terriers are not biting anymore than any other breed of dog and in fact were not the highest on the list. It was also proved that there are more American Pit Bull Terriers in Ohio then in 1987 when O.R.C. 955:11 was enacted declaring a "Pit Bull" vicious. The Lucas County Dog Warden also failed to prove a high number of American Pit Bull Terriers taken into custody in Toledo were because of attacking people or illegal dog fighting.

Nowhere in the Country is there any documented proof that any type of breed specific legislation reduces or controls illegal activity involving canines. Refer to transcript (Tom Skeldon) On page 105 the Dog Warden testifies German Shepherds fight and end up with scars all over. Then Skeldon goes on to say when dogs of any breed get into fights they like it and it becomes addicting, this is only more proof that the claim that the American Pit Bull Terrier is a dog bred for fighting and is dangerous in urban areas is false data. It would appear all other breeds if not controlled correctly could present a danger anywhere in any part of our country.

The Dog Warden is then asked if the dogs he sees that are bred to fight are the Pit Bull, he answers with an “Uhm” and then admits he does not know what the Pit Bulls in Lucas County are bred for but if they look like Pit Bull they will act like Pit Bulls.

When Appellants expert Tom Skeldon was asked how many Pit Bulls are taken in that were owned by responsible owners he evades the question and claims he can’t read the dog signals. Yet the Appellants expert claims to be an experienced dog trainer. (Tom Skeldon T 84). Also Tom Skeldon claims when dogs are chained chances are the animal will become more aggressive. Ohio’s Revised Code 955:22 requires vicious dogs to be chained (tether) so if Tom Skeldon’s opinion is of any credible fact then why for so many years has not an attempt been made to change Ohio’s Revised Code concerning confinement of dangerous or vicious dogs.

§ 955.22. Confinement or restraint of dog; liability insurance; debarking or surgically silencing dog.

(1) Keep the dog physically confined or restrained upon the premises of the owner, keeper, or harborer by a leash, tether, adequate fence, supervision, or secure enclosure to prevent escape;

Appellants expert Dr Borchelt made claims that behavior is highly hereditary and therefore American Pit Bull Terriers are more dangerous than other breeds because of their fighting ability. Appellees experts testified many breeds have been used for fighting and exist in our society without being classified as vicious because all dogs have to be trained to fight. We found the research Dr Brochelt referred to is outdated research and in part of it Dr Borchelt failed to read (refer to Behavior Genetics J Fuller pg 65) that through out- crossing heritability can be increased, he also failed to state that animals

that can be selective bred for aggressiveness such as guard dogs, hunting dogs. (refer to Aggression in Man and Animals R Johnson pg 87) direct their aggression at other animals and not humans: Dr Brochelt contradicts his claims that irresponsible owners are not the blame for dogs that have behavioral problems and vicious temperaments and his testimony from his documentation would lead us to believe that all hunting dogs could also be vicious. (refer to aggression in Man and Animals pg. 87) which is ludicrous.

Dog bite statistics and fatal dog attack studies show us its not the breed of dog but the owners and irresponsible parents that are to blame for the majority of incidents that occur resulting in injury or death.

Dr Borchelts claim that Pit Bulls are dangerous because they are bred for fighting is not supported by the evidence presented at trial. Overwhelming evidence was presented by Appellees experts and even testimony was given by some of the Appellants experts that environment, training and socialization all play a greater part in the temperament of an individual dog than inherited traits.

Defendants / Apellees proved that there are 3 major dog registries in the United States. Testimony was given that the United Kennel Club registers apx. 81,000 American Pit Bull Terriers's (APBT) per year, the American Dog Breeders Association this year has registered apx 300,000 (refer to transcript H George) APBTs in 2003 and the average is 200,000 per year, the American Kennel Club registers several thousand each year. Multiplying these numbers by 10 and adding shelter numbers we can estimate apx 4.8 million APBT's exist in the United States. The Humane Society of the United States who

has no credibility claims 250,000 Pit Bulls are used for fighting nation wide (refer to ACF amicus brief). Appellants failed to provide any evidence as to the numbers of APBT's trained for fighting in Toledo. It was proven that the American Pit Bull Terrier takes up apx 9.6 percent of the dog population in this country, and when adding up the number of fatal attacks by Pit Bulls it places the breed at the bottom of the list for the dog most likely to kill somebody or cause severe injury. (Refer to Appellees Trail Tr. Glen Bui T 173-182)

Mr. Tellings was the owner of three dogs, none of which had ever exhibited signs of viciousness. Yet, Mr. Tellings was criminally prosecuted for merely owning the dogs. This is because the City of Toledo and the State of Ohio unreasonably and arbitrarily classified Mr. Tellings' dogs as vicious based exclusively upon their breed. Such a classification violates the equal protection clause, procedural due process and substantive due process of the Fourteenth Amendment.

Municipalities shall have the authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

However, this power is not absolute. To withstand scrutiny, the exercise of police powers must bear "a real and substantial relation to the public health, safety, morals or general welfare of the public" and not be "unreasonable or arbitrary". *Benjamin v. Columbus* (1957), 167 Ohio St. 103 at syllabus.

To survive a constitutional challenge, the statutes in question were required to bear a substantial relationship to the safety of the public. *Id.* Additionally, the requirements must be reasonable. *Id.* To assess a statute, the Ohio Supreme Court set forth some general guidelines:

The means adopted must be suitable to the ends in view, they must be impartial in operation and not unduly oppressive upon individuals, must have a real and substantial relation to their purpose, and must not interfere with private rights beyond the necessities of the situation.

Froelich v. Cleveland, 99 Ohio St. 376 (1919), at Syllabus. The statutes in question fail to satisfy these requirements. The statutes also fail to meet a mere-rationality standard imposed by the Fourteenth Amendment.

The Appellee produced clear and convincing evidence that there is no legitimate state interest in classifying American Pit Bull Terriers as inherently dangerous or vicious. Other breeds of dogs are responsible for more bites and fatal attacks. Evidence was entered that there is no breed of dog that's inherently dangerous or vicious and it's the environment and owners that are accountable for the dogs behavior.

A statute or ordinance violates substantive due process when it constitutes an arbitrary, capricious and unreasonable exercise of the police power. The statutes in question are unreasonable and arbitrary because they limit the ownership of an American Pit Bull Terrier to one dog and declare the breed vicious, regardless of that owner's level of responsibility. While the trial court seemed to acknowledge that this result is unfair, it

nevertheless dismissed those concerns from a public safety standpoint. Interference with property rights is reviewed under a rational basis standard. Yet, as has been demonstrated herein, a ban or restriction on the ownership of pit bulls does not bear a rational relation to the goal of public safety.

To properly establish the reasonable and rational basis, the court must review competent evidence, presented during a trial on the merits. Rather than looking to the overwhelming evidence presented in this case, the trial court looked to an argument found in a Law Review article published in 1988 as providing an "excellent rebuttal" to the Appellees argument concerning the unconstitutionality of the statutes. This article suggested that the "disproportionate number of pit bull...attacks" somehow justified infringing upon the rights of otherwise responsible dog owners. However, this article's conclusory statements cannot and should not be used to override the overwhelming evidence presented at trial which proved there never has been a disproportionate number of Pit Bull attacks in the state of Ohio or anywhere in the United States. The Sixth District Court of Appeals clearly reviewed all the evidence in this case and relied on it to find the statutes unconstitutional.

The evidence in the case at hand, presented by experts possessing impressive qualifications, proved that (1) the American Pit Bull Terrier (APBT) is not inherently dangerous; (2) the APBT does not bite more often than other dogs; (3) the APBT is not responsible for the majority of fatal attacks; (4) the APBT does not cause more severe injury than other breeds (6) the APBT does not lock its jaws and bite with tremendous jaw pressure and (5) environment plays a greater part in the temperament of a dog than

inherited traits. An outdated article based on questionable data should not be allowed to undercut this testimony.

Substantive due process has been violated because the Appellee has been denied the freedom to own a dog of his choosing without appropriate governmental justification. Additionally, the statutes in question, R.C. §§ 955.11 and 955.22 as well as TMC § 505.11, unduly burden owners of pit bulls by making it difficult, if not impossible, for most citizens to own or sell an American Pit Bull Terrier as classified by law. As has been shown, there is no rational basis or justification for these laws. The intent of the law appears to be the prevention of ownership of a specific breed, based upon manipulated data from animal rights groups and media hype, rather than a legitimate goal of public safety.

The American Canine Foundation has researched and compiled data on fatal dog attacks. In a study of fatal dog attacks over a period of time spanning thirty (30) years, more than thirty breeds of dogs have been responsible for fatal attacks. Accurate statistics demonstrate that mixed breed dogs, not pit bulls, have been responsible for the majority of fatal attacks since 1970. (Defendants Ex C) Some journals have erroneously attributed these fatal attacks to "pit bull type" of dog, even though its breed had not been determined and at least 15 other breeds resemble the pit bull. Additionally, the majority of these fatal attacks have been shown to be caused by irresponsible parents leaving their children unattended with dogs. There can be no rational basis to ban or restrict the American Pit Bull Terrier when other breeds bite more frequently and when it has been proven that irresponsible ownership and negligent parenting practices cause the fatal dog

attacks. Evidence was entered to show the Center For Disease and Control Study on fatal dog attacks had left out 89 fatal attacks during the years of the study. (Appellees Defendants Trail Ex C) Also the CDC is now under investigation for providing false data on many studies its done including one recent study on obesity.

The Appellant has tried to justify the statutes in question by pointing to (1) the perceived dangers of allowing American Pit Bull Terrier's in an urban setting; and, (2) the supposed utilization of the American Pit Bull Terriers for dog fighting and other criminal activities. However, the Appellants contentions are unsupported by the evidence. The City of Toledo failed to provide any substantial proof that there was or is a problem with pit bulls attacking and biting the citizens of Toledo, or in the entire State of Ohio, more than other breeds, either before or after O.R.C. §§ 955.11, 955.22 and TMC § 505.11 were passed. In fact, as the trial court noted "...local statistics indicate that, for example, the Chow bites more frequently than the Pit Bull". The Appellants own witness, Karla Hamlin, admitted that any problems with Pit Bulls in the City of Toledo did not occur until after O.R.C. §§955.11 and 955.22 were passed. (Refer to K Hamlin T 279 – 280) The problems refered to are seizing the dogs for violation of O.R.C. 955.22 and not for attacking and biting. Furthermore, the Appellants County Dog Warden, Tom Skeldon, was unable to provide any credible evidence that any of the pit bulls seized over the 17 years could even be considered vicious. Finally, the Appellant failed to provide any statistical evidence of the involvement of pit bulls in criminal activity in the City of Toledo.

Other communities have abandoned or refused to enact breed-specific legislation.

The Appellant has claimed that laws constraining the ownership of the American Pit Bull Terrier have become commonplace in our society, this belies current trends. To properly establish the reasonable and rational basis, the court must review competent evidence, presented during a trial on the merits. Substantive due process has been violated because the Appellant has been denied the freedom to own a dog of his choosing without appropriate governmental justification. Additionally, the statutes in question, R.C. §§ 955.11 and 955.22 as well as TMC §

It is well settled that a citizen has a property interest in his or her own dog and their conversion or injury constitutes an actionable event. The statutes in question are unconstitutional in that they permit the government to seize a person's property, in this case a dog, without first requiring the dog to be shown as vicious. Such an action can be accomplished without so much as a search warrant. While the police powers of the state permit such an action to be taken, it will only be upheld against constitutional challenge if the action "bears a real and substantial relation to the public health, safety, morals, or general welfare of the public and is neither unreasonable nor arbitrary".

Appellee's expert Tom Skeldon testified (refer to T Skeldon transcript pg 105-106 lines 15-25/1-3) if it looks like a Pit Bull we will bring it forward for a case. Appellee's admit they don't care about the breed and are seizing all breeds that look like American Pit Bulls Terriers which means they can seize somebody's property by simply claiming the dog looked like a Pit Bull.

THE SIXTH DISTRICT COURT OF APPEALS DID NOT ERROR WHEN IT HELD THAT TOLEDO MUNICIPAL CODE § 505.14 AND OHIO REVISED CODE §§ 955.11 AND 955.22 WERE UNCONSTITUTIONAL BECAUSE THE STATUTES VIOLATE THE DEFENDANT'S RIGHTS TO DUE PROCESS BECAUSE THERE IS NO RATIONAL BASIS TO POSITIVELY IDENTIFY A PIT BULL AND THE LUCAS COUNTY DOG IS RESPONSIBLE FOR ARBITRARY LAW ENFORCEMENT.

The Appellant attempts to argue that the Appellee Mr Tellings had no standing to challenge the vagueness of ORC 955:11 -- 955:22 and TMC 505.14

Evidence in this case proves Paul Tellings was cited for owning what was claimed to be one mixed breed and two American Pit Bull Terriers. The dog labeled as a mixed breed was an American Bull Dog. Mr Tellings never testified in this case, he could of admitted he owned American Pit Bull Terriers and claimed that his two American Pit Bull Terriers were not covered by the laws being challenged. Mr Tellings for the record did make it very clear that he owned an American Bull Dog to the judge at the beginning of the trial. Tellings has standing because he clearly owned one American Bull dog which on the citation is identified as a mix breed. Tellings has standing to challenge vagueness of the laws because at no time on the record did he admit his dogs were covered by the laws
See State v Peters, 534 So.2d 760, 766 n. 10 (Fla.Dist.Ct.App. 1988)

Evidence was entered beyond a reasonable doubt that The Lucas County Dog Warden is responsible for arbitrary irrational enforcement of TMC ORC 955:11 and ORC 955:22
Refer to Sixth District Court of Appeals Decision March 3rd 2006 Toledo v Tellings pg 10 - # 30

The due process clauses of the Fourteenth Amendment requires that any state or municipality, in making an enactment, must “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.”

Grayned v City of Rockford, 408 US 104, 108; United States v. Marriss, 347 US 612.

In addition, an enactment should not encourage arbitrary and discriminatory enforcement.

Appellees experts entered scientific evidence that many breeds have phenotypic characteristics of the American Pit Bull Terrier, pictures were provided into evidence of numerous other breeds that are registered with national registries that have no relation to the American Pit Bull Terrier but look exactly like it. Appellants experts provided scientific testimony and proof there is no such breed as a Pit Bull or Pit Bull type dog.

Refer to Appellants /Defendants exhibits P and study by Dr Irene Stur pg 3

“Identification Possibilities” that was entered into this case before trial in the memorandums.

Appellants have proven the phrase “commonly known as a pit bull dog” applies to many other breeds and it was proven there is no difference between the jaw of the American Pit Bull Terrier and other breeds. It was proven that the bite pressure of the APBT is the same as all other breeds of comparable size and that there is no scientific way to measure bite pressure, (refer to published study from South Carolina Academy of Science Ex F) Testimony was given that other breeds bite, hold and breaking sticks are used with other breeds. With the American Pit Bull Terriers the only breaking sticks were ever used was in “pit fighting” to be able to quickly separate the dogs to allow them to continue.

Evidence was entered (refer to ACF video Ex T), that APBT’s can release when biting

quite easily with no hesitations and show good control. Defendants provided proof APBT's are capable of many tasks other breeds are well known for. Appellants experts did not submit any credible evidence backed by scientific research or data to counter Appellee evidence.

Appellee's expert Tom Skeldon testified (refer to Tom Skeldon transcript pg 105-106 lines 15-25/1-3) He does not know what the Pit Bulls in Lucas County are bred for and if the dog had Pit Bull in it but did not look like a Pit Bull he would never be in front of the judge, but if it looks like a Pit Bull we will bring it forward for a case. The the Lucas County Dog Warden goes on to admit that many young canines could resemble a Pit Bull but when they grow up they turn out to be something else. Appellee's admit they don't care about the breed and are seizing all breeds that look like American Pit Bulls Terriers. This proves beyond a reasonable doubt the Ohio Revised Code 955:11/22 and Toledo Municipal Code 505.14 are unconstitutionally void for vagueness, it proves the laws encourage arbitrary and erratic arrests and convictions, it makes criminal activities that by modern standards are normally innocent, and it places almost unfettered discretion in the hands of the police. 49 states allow due process for dogs who bite or act aggressive and cause severe injury. Defendants proved there are over 15 breeds that have characteristics of the American Pit Bull Terrier, it was also proven the breed is not dangerous. *Papachrista v. Jacksonville*, 405 U.S. 156, 168 (1972) *Kolender v Lawson* (1983), 461 U.S. 352, 357 Refer to Sixth District Court of Appeals 111. #71 - #77

CONCLUSION

In Appellants response brief they cite Ohio v Cowan (2004) 103 Ohio St. 3d 144; 814 N.E. 2d 846. They claim that the Cowan opinion does not address pit bull terriers and is very narrow. We would tend to believe the Ohio Supreme Court knew what they were doing when they decided Cowan. What we argue is that since 1987 O.R.C. 955.11 has declared a breed of dog vicious, with proof that the breed in question is not vicious, in this case the American Pit Bull Terrier then Cowan applies to the Appellee. Appellee proved with no question in a very rational defense that no breed of canine is inherently dangerous or vicious.

Evidence was entered into this case at trial to prove that many other breed breeds in Ohio were responsible for more fatal attacks than Pit Bulls (Defendants Exhibit C and Fatal Dog Statistics) (Tr Bui 38) Appellee proved that 1 Malamute, 2 Dobermans, 1 Chow , 3 mixed breeds, 2 Pit Bulls and 2 Rottweilers had killed people before 1987 in Ohio and after O.R.C. 955.11 was amended in 1987 to declare the Pit Bull vicious 2 German Shepherds, 1 Pit Bull, 1 Great Dane and two more mixed breeds killed people. This clearly proves the statue serves no legitimate governmental purpose and does not protect the public. Appellee entered evidence and testimony that a dogs breed can't be used to determine what caused a fatal attack. (Tr Bui 173-183.)

Youngstown v Mitchell (1943), 30 O.O. 122. This case supports the Appellees arguments because the Appellants did not prove there exists a substantial rational relationship to the

public health, safety and welfare of the citizens of Ohio. Appellees proved O.R.C. 955:22 as applied to O.R.C. 955.11 that declares a Pit Bull vicious was when passed in 1987, arbitrary, discriminatory, capricious and unfair, in fact the trial court judge in this case in his decision even found that the law was unfair.

Dog ownership is not a “fundamental right” Appellants cite *Sentell v New Orleans & Carrollton Railraod*, (1896) 166 U.S. and the US Supreme Court makes it clear that at that time there were no laws to protect dogs which is why they were not considered valuable like livestock. The *Sentell* case was heard in 1896 and this is 2005, there are laws and have been for many years that protect dogs and many animal welfare groups are attempting to pass stronger laws for animal cruelty to provide even more protection for dogs. The Ohio Supreme Court in *Ohio v Cowan* found dogs to be of valuable property.

The Appellee proved this case beyond a reasonable doubt, the Appellant’s witness Tom Skeldon testified he seizes anything that looks like a Pit Bull (Tr Skeldon 105 –106) this proves he can’t positively identify an American Pit Bull Terrier, in the Appellees case one of the dogs seized was an American Bull Dog and the Appellant seized it and proceeded with charges, two one of the dogs were Ameircan Pit Bull Terriers. This proves beyond a reasonable doubt that T.M.C. 505.14 and ORC 955:11 as applied to 955.11 declaring the Pit Bull vicious encourages arbitrary and erratic arrests and convictions by the seizure of dogs that are not Pit Bulls because the Appellant did not submit any evidence to prove they could identify a Pit Bull Terrier with 100% percent accuracy.

Appellee did submit evidence that it is impossible to positively identify an American Pit Bull Terrier. (Refer to Defendants exhibit P) Appellees expert Dr Al Stinson a Professor of Veterinarian Medicine who taught canine behavior, canine anatomy, and identification of dog breeds testified that there is not possible to identify a breed of with 100% accuracy (Tr Stinson 141- 144) Appellees experts entered evidence and testified to prove there is no way to positively identify an American Pit Bull Terrier.

Appellee presented testimony and evidence from the countries leading canine experts all whom have had contact with American Pit Bull Terriers involving temperament testing, canine genetics, canine behavior and canine anatomy in laboratory, shelter environments, working environments, obedience training and companionship situations.

All the testimony and evidence presented by Appellee's experts supports the finding that no breed of dog is inherently vicious, that within each individual breed because of socialization and environment there can be dogs with aggression problems. Appellants provided no evidence to prove that a substantial number of Pit Bulls seized by the Dog Wardens in Ohio are trained to fight, owned by drug dealers, or act aggressive to the point of endangering the public any more than any other breed in Ohio. The Appellee proved beyond a reasonable doubt that American Pit Bull Terriers are not inherently dangerous or vicious.

Appellees expert Dr Brisbin testified Pit Bull Terriers are not bred for aggression (Tr Brisbin 39) The Appellants witnesses consisted of two Dog Wardens, one PhD and a veterinarian. The PhD Dr Brochelt under cross examination should be disqualified as an

expert because on his resume he claims to be a board certified behaviorist and he testified under oath that the organization who certified him accredited themselves, the Animal Behavioral Society is not recognized by the American Veterinarian Medical Association or any governing body that accredits Universities or Colleges. Also the Society uses a University address and is no way affiliated with the University or do they have an office at the University. (Tr Borchelt 81-81)

Under cross examination Dr Borchelt admitted to studying Quail for his degree, never did he testify that he did any studies of canines while obtaining his degree in Psychology. He also testified he does not have a degree in genetics and never obedience trained dogs (Tr Borchelt 68-69) Obedience training of dogs consists of the most simple tasks required for the proper socialization of dogs. It teaches a dog to sit and come, something needed to ensure a dog and his owner are responsible. Dr Borchelt has no experience in this field and no experience in behavior genetics. Appellant believes Dr Borchelt to be a Psychologist who studied animal behavior pertaining to non domesticated animals which can't be compared to domesticated dogs. Dr Borchelt also admitted under oath he had never done any specific research on behavior of Pit Bull Terriers and published it. (Tr Brochelt 84). When Dr Borchelt was asked under cross examination if he knew what percentage of Pit Bull Terriers were used for fighting he answered he did not. (Tr Brochelt 92) Dr Borchelt testified at trial German Shepherds were safer than American Pit Bull Terriers, under cross examination he was asked if more German Shepherds were responsible for fatal attacks than Pit Bull Terriers, he replied I don't think so, that I would refer to statistics, of the latest compilation which again haven't read. Dr Borchelt was unfamiliar with fatal dog attack statistics.

Appellees witness's testified that aggressiveness cannot be genetically bred into a breed of dog and even if it could, the heritability ratio is so low, that attempting to do so would be highly inefficient. Appellees appellants experts testified that aggression is not selected for in Pit Bull Terriers (Tr Brisbin 39)

Dr Padgett and Dr Brisbin addressed heritability clearly (Tr Brisbin 235 –239)

Appellants expert Tom Skeldon is not a genetics expert, he holds a bachelors degree in animal science which is the study of animal agriculture, they do not teach canine genetics in animal science. Appellants expert Glen Bui testified about animal science and Appellants did not argue it at trial. (Tr Bui 12)

Tom Skeldon admitted under cross examination that his education on genetics came from reading a book (Tr Skeldon 103) Tom Skeldon gave no testimony to support a finding that he is an expert in canine breeding. Dr Padgett was asked if he read the testimony of Tom Skeldon who claimed Pit Bulls have recessive genes that can't be modified.

Dr Padgett a professor of canine genetics disputed Tom Skeldons testimony by testifying that the only genes that can't be modified are those that cause death.(Tr Padgett 107-108).

Dr Padgett also testified that he believes that even though behavior is inherited it can be highly modified and that most behaviors can be changed. (Tr Padgett 113) he also does not agree with Dr Borchelt and he explains why (Tr Padgett 133 –177) Dr Padgett testifies that as a breed if a Pit Bull is not properly trained or socialized just like 150 other breeds it can be dangerous, but Pit Bulls are not specifically dangerous.

Appellants have argued that appellees experts including Dr Brisbin and Dr Nitschke are

not really experts on American Pit Bull Terriers, Appellee provide the testimony of 12 experts with very high credentials all of whom had experience with American Pit Bull Terriers ranging from scientific studies, temperament tests, shelter impounds, genetics studies, illegal dog fighting, judging dog shows, breeding, training , companionship, fatal attacks, dog bite studies and U.S. Government research.

We ask the court to read Dr Brisbins testimony to understand jaw pressure of canines (Tr Brisbin 8-48) Appellants submitted no evidence or scientific studies that support a finding that American Pit Bull Terriers bite with tremendous jaw pressure. Dr Al Stinson testified there is no difference between the Pit Bulls jaw muscle and other breeds (Tr Stinson 129-132) Appellants expert Tom Skeldon testified it takes more to deter a pit bull from his drive than German Shepherds trained to fight. Appellees would question where Tom Skeldon is obtaining German Shepherds trained to fight. Appellants argue that Pit Bulls have gameness, testimony was given that very few have gameness and that gameness is psychological (Tr Brisbin 31-37)

Experts from both sides agreed the CDC study is of no value because it does not provide the population numbers of the breeds listed for fatal attacks, there is no way to use the study, its inconclusive and testimony was given to show it left out 89 fatal attacks and was bias. Appellants make the argument that other breeds such as the German Shepherd are more popular than the Pit Bull and do not come close to the number of fatal attacks. This argument is misleading the court, Appellants did not provide accurate data to show the population of breeds of dogs and only used data from the American Kennel Club which does not even register the American Pit Bull Terrier.

Appellants expert Dr Borchelt who is is not qualified to testify about genetics (Borchelt Tr 68). testified at trial that there is just a small fraction of knowledgeable breeders breeding American Pit Bull Terriers. Then he goes on to say the remaining breeders are breeding the dogs to be dangerous and state various reasons. Appellants submitted no evidence what so ever to make this argument or support it. In fact looking at the statistics from the testimony of both the Dog Warden and Deputy Dog Warden they both stated the majority of Pit Bull Terriers they seize are not aggressive. (Tr Hamlin 284-285) When looking at that data just from the figure of Toledo alone and looking at the dog bite date provided at trial for the state of Ohio, which shows that many other breeds bite more frequently proves they Appellants argument is with error. Appellee provided testimony that there are 4.8 million American Pit Bull Terriers in the United States, testimony was given they are shown in 3 major dog registries and that less then 2 % of the breed is involved in illegal activity. The Dog Wardens could not provide any evidence that even a small majority of American Pit Bull Terriers in Toledo or other parts of Ohio are being used by drug dealers or being fought.

Appellants experts testified that the majority of Pit Bull Terrier owners are average people without the training to properly socialize their pets. This is ludicrous, the vast majority of all dog owners of all breeds are just average every day citizens that treat their dogs like part of their family. Appellants also attempted to testify that the dogs get out from time to time and that if a German Shepherd gets out there may be a bite or two, but if it's a Pit Bull terrier somebody may well be killed. Once again Appellants argument is with error. Appellees entered evidence and testimony to show German Shepherds have

bitten more people and have a history of more people killing people than other breeds including the American Pit Bull Terrier (Refer to Defendants Exhibit C)

Appellants expert Dr Borchelt testified there are better ways to deal with dog attacks than to enact breed specific legislation but it would be very costly to operate, this is misleading the court and completely negligent to make such a statement. Glen Bui who drafts dangerous dog legislation testified that breed specific legislation is a burden financially, does nothing to protect the public or stop illegal activity and gave the court data on effective legislation (Tr Bui 172- 182) 14 states prohibit breed specific legislation and studies entered into evidence show breed specific legislation is costly. The existing O.R.C. addresses dangerous dogs and vicious dogs, the definition of a dangerous dog is a preventive measure to deal with dogs acting aggressive before they bite. The majority of states have preventive laws which when enforced are very effective.

The American Pit Bull Terrier was imported into this country in the 1800's, only 5 percent of the breed made it to the fighting pit to become fighting champions. The majority of the breed ended up as guardians protecting livestock and serving as family companions. The first dog to cross America in a car in 1903 was "Buddy" an American Pit Bull Terrier. The most decorated dog of any war was Srgt. Stubby a WW1 Hero. Appellee proved with qualified genetics experts who teach genetics at University's that all genes can be modified except those that cause death. given that argument the American Pit Bull Terrier was never bred to be human aggressive and it has to be trained to fight or attack just like all other dogs. Cindy Cooke from the United Kennel Club

testifies about other breeds used in illegal dog fighting. (Tr Cooke) Glen Bui testified 25 breeds are used for illegal dog fighting (Tr Bui 215) Appellees experts work with countless breeds of dogs and in Appellants conclusion they mislead the court when addressing the issues in this case. Appellants failed to prove a high percentage of Pit Bull Terriers are being used for illegal activity, or owned by drug dealers, they failed to show us that the Pit Bull Terrier bites with tremendous jaw pressure, no proof was entered to show a vast majority of Pit Bull owners are irresponsible. No proof was entered to show the Pit Bull Terrier is responsible for the majority of fatal attacks or bites. Toledo's own statistics show us that the majority of Pit Bull Terriers seized come from responsible homes such as that of the Appellee. (Tr Hamlin 284- 285).

There is no record available to prove that breed specific legislation is successful in regulating and controlling dangerous dogs. Breed specific laws end up targeting responsible owners criminalizing them for owning dogs with no history of aggression. Irresponsible owners are still able to possess dogs under breed specific legislation. Breed specific legislation does not protect the public and statistics and testimony in this case show us mix breeds are responsible for the majority of injuries that occur from dog attacks. Testimony was given to show mix breeds greatly outweigh purebred dogs, using that fact, if we were to restrict ten pure breeds we still would not reduce dog attacks. Testimony was given that many other breeds in Ohio were responsible for fatalities before 1987. Testimony was given that breed specific legislation is only supported by extreme animal rights organizations who are attempting to end domestic pet ownership. (Tr Dr Goldman all pages) (Tr Bui 15-17) In our country in the last several years we

have witnessed attempts at the state level in many states to ban large numbers of breeds by claiming they are dangerous. All these attempts have failed and resulted in legislation with strong penalties for animal cruelty, dog fighting and dangerous dogs. Dog owners who's dogs are causing fatalities are now being charged with negligent homicide and being given prison sentences.

Breed specific legislation first came about in the 1980's and its had almost 20 years to prove itself, testimony and statistics entered in this case have proven it's a failed attempt at protecting the public, stopping illegal dog fighting and targeting irresponsible dog owners. Its time to move forward with effective canine legislation that's primary focus is directed at irresponsible owners of dangerous dogs of all breeds. In our country over 3 million children every year are victims to dog attacks by hundred of breeds of dogs. irresponsible dog owners need to be held accountable for their dogs behavior with strong penalties to ensure protection to the public.

Breed specific legislation is discrimination, its capricious and arbitrary and there is no purpose for it in our country. This is America and our United States Constitution affords us the right to own and enjoy with Liberty our personal property.. If breed specific type legislation is not stopped it will lead to the genocide of countless breeds of dogs in America and at the same time its placing extreme burden financially due to all the seizures and court proceedings that take place when dogs are seized that are not aggressive under violations of breed specific laws. We ask the court to read all the testimony and evidence presented in this case. We ask the court to find breed specific

legislation unconstitutional.

Respectfully submitted,

Paul Tellings

Paul Tellings, Pro Se

John T Madigan, Acting Director of Law
(0023614)

City of Toledo Law Department

One Government Center, Suite 1710

(419) 245-1020

Fax No.: (419) 245-1090

COUNSEL FOR APPELLANT

I certify that a copy of the foregoing Merit Reply Brief of Appellee Paul Tellings Case No. 2006-0690 was served by US mail on

this 23 day of October 2006, upon the following counsel:

OHIO ATTORNEY GENERAL

Jim Petro (0022096)
Stephen P. Carney (0063460)
30 East Broad St, 17th Floor
Columbus Ohio, 43215
614 466 8980
916 466 5087 fax

COUNCIL FOR CLEVELAND

Victor R. Perez (0074127)
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44114
216 664 4850
216 664 4399 fax

Paul Tellings Pro se

IN THE SUPREME COURT OF OREGON

ORIGINAL

City of Toledo,

Appellant,

Y.

Paul Tellings.

Appellee.

**On Appeal from the
Lucas County Court of Appeals,
Sixth Appellate District**

Supreme Court Case No. 2006-0690

**Court of Appeals
Case No. L-04-1224**

DECLARATION OF PAUL TELLINGS AND AMERICAN CANINE FONDATION

Paul Tellings Pro-se
Po Box 299
Cardington, Ohio, 43315
Pro-se

John T Madigan, Acting Director of Law
(0023614)
Adam Loukx, Senior Attorney (Counsel of Record)
(0037074)
City of Toledo Law Department
One Government Center, Suite 1710
(419) 245-1020
Fax No.: (419) 245-1190

COUNSEL FOR AMPLIANT

OHIO ATTORNEY GENERAL.

Jim Petro (0022096)
Stephen P. Carney(0063460)
30 East Broad St, 17th Floor
Columbus Ohio, 43215
614 466 8980
916 466 5087 fax

COUNCIL FOR CLEVELAND
Victor R. Perez (4074127)
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44114
216 664-4850
216 664-4790 fax

My name is Paul Tellings and I along with the American Canine Foundation (ACF) retained Toledo Ohio attorney Sol Zyndorf to represent me in this case. It has been agreed upon by ACF and myself to dismiss Sol Zyndorf from this case as of November 27, 2006. As my right I for the time being want to move forward representing myself until I can retain counsel.

I ask the Ohio Supreme Clerk to file my Merit Reply Brief

Signed this 27 day of November 2006

Paul Tellings

Paul Tellings

Pro se

Cynthia McCommon

Cynthia McCommon

American Canine Foundation

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Declaration of Paul Tellings and American Canine Foundation