



Sinking Your Teeth Into Michigan Dog Bite Law

By Barbara H. Goldman

I. STATUTORY LIABILITY

Nature of Claim

Dog bite statutes

HISTORICAL PERSPECTIVE. Michigan's first dog-bite statute appeared in the 1838 statutory compilation, as Chap. 12, § 9:

Every owner or keeper of any dog shall forfeit to any person injured by such dog, double the amount of the damage sustained by him, to be recovered in an action of trespass; and in such action, the defendant may plead the general issue, and give any special matter in evidence, in excuse or justification.

The forerunner of the current statute was first enacted as 1850 PA 161 and was codified in the first compiled statutes as §1645. It provided:

If any dog shall have killed or assisted in killing, wounding or worrying any sheep, lamb, swine, cattle or other domestic animal, or that shall assault or bite or otherwise injure any person while traveling in the highway, or out of the enclosure of the owner or keeper of such dog, such owner or keeper shall be liable to the owner of such property or person injured, in double the amount of damages to be sustained, to be recovered in an action of trespass or on the case; and it shall not be necessary, in order to sustain an action, to prove that the owner or keeper knew that such dog was accustomed to do such damage or mischief; and upon the trial of any cause mentioned in this section, the plaintiff and defendant may be examined under oath, touching the matter at issue, and evidence may be given as in other cases; and if it shall appear to the satisfaction of the court by the evidence, that the defendant is justly liable for the damages complained of, under the provisions of this act, the court shall render judgment against such defendant for double the amount of damages proved, and costs of suit; but in no case shall the plaintiff recover more than five dollars costs.

The same language appeared in the 1871 compiled statutes as § 2065, and in the 1882 compilation as § 2119.

Statutory dog-bite liability disappeared in the late nineteenth and early twentieth centuries. Compare Mich Comp L (1929), §§ 5262-5265.

See 396 Mich 58-59 for an overview of the history of Michigan's dog-bite statutes.

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Upcoming Event

Friday, October 1, 2010

2-4 p.m.

Annual Animal Law Section Meeting at the State Bar of Michigan Annual Meeting at the Amway Grand Plaza Hotel in Grand Rapids.

Chair's Corner

By Anna Scott



The last newsletter featured a message from our outgoing chair, Rose Stern. Let me just take this opportunity to thank Rose again for all of her service to the Animal Law Section and to wish her all of the best in her ongoing endeavors.

Also, let me take this opportunity to introduce myself to those of you who do not know me. I am a 2005 graduate of Michigan State University College of Law, where I had the honor of completing extensive coursework with Professor David Favre, including animal law, wildlife law, and international environmental law. I was also the president of the Student Animal Legal Defense Fund for two and a half years and was happy to meet and become involved with the Animal Law Section as a student.

For my day job, I am a solo practitioner in the Lansing area with my office in Eaton Rapids. Perhaps like many of you, spending my days helping individuals dissolve their marriages and fight with their mortgage companies is not what I envisioned myself doing when I started law school, which is why staying involved with the Animal Law Section helps to keep me energized.

The members of the Animal Law Section have had a lot to be energized about lately. In March we had a wonderful annual symposium, which featured two of our section

members, Sharon Noll Smith and Nicole Quandt, who updated us on the good work done in conjunction with our Animal Legal Lifeline. As part of the Lifeline update, Nicole informed us that a large percentage of the calls received are related to veterinary issues, which was a great introduction to our other nationally known speakers, including Michigan's own Julie Fershtman and Professor David Favre, as well as Adam Karp of Washington State and Chris Green of Illinois. For those who were unable to attend, materials are available on the section's website under the "Events & Conferences" tab. The symposium planning committee continues to try to improve the symposium each year, and I would be happy to hear any feedback that you have about past or future symposiums.

In April, four current members and one former member of the section's council attended (at their own expense) The Future of Animal Law conference at Harvard Law School. As usual, the Animal Legal Defense Fund did not fail in providing an information-packed and cutting-edge program that inspired and rejuvenated its attendees. It is amazing to be in the presence of so many animal law scholars at one time.

I also felt proud to represent Michigan and the section, especially given the state's recent recognition as being in the top five in the country for animal protection laws. However,

Editor's Note

Welcome to the first issue of the newsletter for 2010. This is the largest issue of the newsletter ever published.

This newsletter contains the definitive article on dog bite law in Michigan by section member Barbara Goldman. She presented an earlier version of the article several years ago at the annual symposium, and this version is updated to December 2009. I was impressed by her presentation at the symposium, and I hope that you will take time to read the article. It is clearly the longest article that we have ever published in the newsletter.

We have several short articles on other topics such as the Treasurer's reports for FY 2009 and 2010. The newsletter includes a summary of and photographs from the March 2010 symposium.

The next newsletter should arrive in August and be comprised of shorter informational articles as well as the Nominating Committee report for the upcoming section council elections.

This is your newsletter, too. Helpful articles are always needed. In fact, if I can get one good main article for each issue, I can do the rest. Please consider writing an article that will be of interest to your fellow section members.

Donald Garlit, Newsletter Editor
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I hope that you join me in my desire to see the Michigan legislature continue to improve the laws affecting all of Michigan's animals.

The section's council and Legislative Committee continue to track and analyze pending animal legislation in Michigan. The section's position on pending legislation can be found on our website under the "Public Policy" tab. This spring, I and three members of the Legislative Committee met with key members of the State House and Senate in Lansing to remind the legislators of what the section is and the services that we offer. Many issues affecting animals are truly bipartisan, as demonstrated by legislators on both sides of the aisle telling us of animals that have truly touched their lives. We hope that these legislators will be allies to the animals in the future.

Given these positive interactions and experiences that section members have been having, we hope to use this energy and positive momentum to continue to work for and help the animals of Michigan.

If you have any questions or concerns, please do not hesitate to contact me. 🐾



Dog Bite Law ... continued from page 1

CURRENT STATUTE. In 1939 the legislature passed 73 PA 1939, § 1, which remains the controlling statute.

MCL 287.351 is the Michigan "dog-bite law." It provides:

(1) If a dog bites a person, without provocation while the person is on public property, or lawfully on private property, including the property of the owner of the dog, the owner of the dog shall be liable for any damages suffered by the person bitten, regardless of the former viciousness of the dog or the owner's knowledge of such viciousness.

(2) A person is lawfully on the private property of the owner of the dog within the meaning of this act if the person is on the owner's property in the performance of any duty imposed upon him or her by the laws of this state or by the laws or postal regulations of the United States, or if the person is on the owner's property as an invitee or licensee of the person lawfully in possession of the property unless said person has gained lawful entry upon the premises for the purpose of an unlawful or criminal act.

Strict liability of owner

The statute imposes strict liability on dog owners for dog bites, eliminating the common law requirement that that owner be aware of the animal's "vicious nature." As the Court stated in *Cox v Hayes*, 34 Mich App 527, 528; 192 NW2d 68 (1971), "Society no longer allows the canis familiaris one free bite." "The dog-bite statute places absolute liability on the dog owner, except where the dog bites after having been provoked." *Hill v Sacka*, 256 Mich App 443, 448; 666 NW2d 282 (2003), *lv denied*. "Absolute liability equates to liability without fault." *Id.* In *Wojewoda v Rybarczyk*, 246 Mich 641, 642; 225 NW 555 (1929), referring to the 1915 version of the statute, the Supreme Court explained, "[t]he basis of liability is not negligence in the manner of keeping and confining the animal but in keeping him at all."

The leading analysis of strict liability under the current statute is *Nicholes v Lorenz*, 396 Mich 53; 237 NW2d 468 (1976). The defendant's dog was chained in the back yard when the plaintiff, a six-year-old, stepped on its tail and it bit her. At trial, the plaintiff offered testimony regarding the dog's "reputation." The Supreme Court held that the evidence was irrelevant. The dog-bite statute "creates an almost absolute liability." "Plaintiff is not required to establish the dog's character or the owner's knowledge of any reprehensible act."

The Court did not apply the rule of strict liability, however, in *Elliott v Herz*, 29 Mich 202 (1874). The defendant's dog, which had rabies, killed and injured several of the plaintiff's sheep. The Supreme Court held, "[t]he injury from the bite of a rabid dog must be classed with those from inevitable accident, which the law always leaves to rest where they chance to fall, because, as no one was in fault, there is no basis for an assessment of damages against any one." What a rabid dog "does in his frenzy is wholly involuntary, and there is no such thing as his being accustomed to the mischief of madness, for the frenzy itself exists but once, and terminates his life."

Continued on next page

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Issues in a dog bite action under MCL 287.351

Ownership

DEFINITION OF “OWNER.” MCL 287.351 does not define “the owner of the dog.” No other statutes referring to the “owner” of a dog defines “owner.” MCL 287.321(c), which deals with “dangerous animals,” defines “owner” as “a person who owns or harbors a dog or other animal.” In *Trager v Thor*, 199 Mich App 223; 501 NW2d 251 (1993), *rev'd in part on other grounds* 445 Mich 95; 516 NW2d 69 (1994), however, the court expressly rejected the argument that the definition of “owner” in MCL 287.261(2)(c) should be read into MCL 287.351.

IMMUNITY OF OWNER

Parental immunity

In *Thelen v Thelen*, 174 Mich App 380; 435 NW2d 495 (1989), the plaintiff was a child who was bitten by a dog belonging to her father and stepmother when she was visiting them. The defendants argued that the doctrine of “parental immunity” should bar the claim. The Court of Appeals allowed the case to proceed as a negligence action but did not directly address whether parental immunity would overcome a claim under the dog-bite statute.

Mayberry v Pryor, 422 Mich 579; 374 NW2d 683 (1985), although best known for abrogating the common law doctrine of “intrafamily tort immunity,” involved a dog-bite action. The plaintiff was the defendants’ four-year-old foster child. He was attacked “by a german shepherd dog while sitting alone on the front porch of the Pryors’ home” and seriously injured. The dog did not belong to the foster parents. The Supreme Court held that the doctrine of parental immunity did not bar a suit by the child against the foster parents.

Governmental immunity

The plaintiff in *Tate v Grand Rapids*, 256 Mich App 656; 671 NW2d 84 (2003), was a bystander at a crime scene who was bitten by a police dog that its handler was unable to control. He alleged strict liability under the dog-bite statute, but the court held that his claim was barred by governmental immunity (MCL 691.1407(1)). See also *Christopher v Baynton*, 141 Mich App 309; 367 NW2d 378 (1985), holding that a mail carrier could not sue the City’s “pound master,” although the plaintiff apparently did not claim under the dog-bite statute.

LIABILITY OF ONE OTHER THAN OWNER

Landlord/lessor

In *Feister v Bosack*, 198 Mich App 19; 497 NW2d 522 (1993), the plaintiff was bitten by a dog and sued the lessor

of the house rented by the dog’s owner. The court held that the dog-bite statute did not apply because the landlord was not the owner of the dog.

Babysitter

In *Trager v Thor*, 199 Mich App 223; 501 NW2d 251 91993), *rev'd in part* 445 Mich 95; 516 NW2d 69 (1994), the defendant was the father/father-in-law of the defendants, who was babysitting for his grandchildren when the family dog bit another child. The Court of Appeals held that he could not be liable under the dog-bite statute because he was not the “owner” of the dog.

Parent

The Court of Appeals held that a father who did not act quickly enough to protect his two-year-old son from the defendants’ dog could not, under the dog-bite statute, be held partially at fault for the child’s injuries. *Hill v Sacka*, 256 Mich App 443; 666 NW2d 282 (2003), *lv denied*.

In *Veal v Spencer*, 53 Mich App 560; 220 NW2d 158 (1974), decided before the application of comparative negligence in Michigan, a three-year-old was bitten when his mother allegedly let him go to the home of another child, whose family dog was known to be vicious. The jury found for the child but not the mother individually. The court affirmed because the issue was not preserved, but held that contributory negligence is not a defense to an action maintained under the dog-bite statute.

Social host

In *Klimek v Drzewiecki*, 135 Mich App 115; 352 NW2d 361 (1984), the plaintiff was a child who was visiting his uncle. While he was outside, unsupervised, he was bitten by a neighbor’s dog. The court noted that the uncle would have no liability under the dog-bite statute.

Animal control officer

In *Moore v Jergovich*, unpublished opinion per curiam (Docket No. 167309, rel'd 5/10/96), the defendant owned a golden retriever which attacked a child. The incident was reported to two local animal control officers. The owner gave the dog to another man. Over a year later, while the plaintiff, a child, was visiting the new owner, the dog attacked him. The new owner sued the former owner and the two animal control officers. He alleged that the animal control officers “breached their statutory duty to adequately investigate and prosecute the first attack, and, because of this, were liable in tort for the second attack.” The court held that the dog-bite statute did not require that the animal control officers “issue a citation, summons or appearance ticket...” after the

first attack. The panel “sidestep[ped] the thorny question of to whom the citation should be issued—the dog or the owner—should the statute be found to prohibit dogs from attacking people.” [Note: While the animal control officers apparently did not raise governmental immunity as a defense, if they were public employees, they would have been liable only for “gross negligence” as defined in MCL 691.1407(2) (c) (“conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results”) which was also “the proximate cause” of the injury.]

Status of plaintiff

DEFINITION. The plaintiff in *McAuliffe v Harris*, unpublished opinion per curiam (Docket No. 240963, rel’d 11/18/03) sued under the dog-bite statute, and the trial court added the standard jury instructions on “licensee” and “trespasser.” The jury found in favor of the defendant. The Court of Appeals held “neither of the standard instructions explains the phrase ‘lawfully on,’ despite the fact that the statute indicates that this phrase refers to individuals on a dog owner’s property as invitees or licensees.” “[T]he trial court did not abuse its discretion in giving the jury the information it needed to make a determination,” and “the definition of trespasser adequately conveyed the concept to the jury....”

PLAINTIFF “LAWFULLY ON PREMISES” AS LICENSEE OR IMPLIED LICENSEE. The plaintiff in *Cox v Hayes*, 34 Mich App 527, 528; 192 NW2d 68 (1971) was a three-year-old deaf child who lived next door to the defendant. She said she had never invited the child onto the property and any invitation must have been made by her teenage daughter. The plaintiff’s sister testified that the children had been in the neighbors’ yard before and had not been asked to leave. The court held that the plaintiff was an “implied licensee” because the daughter, “although not the owner of the property in question, had a lawful possessory interest in that land.”

In *Leiding v Blackledge*, unpublished opinion per curiam (Docket No. 243850, rel’d 5/13/04), the plaintiff, a seven-

year-old girl, was playing in the defendants’ yard, although she did not know the defendants and did not have permission to be on the property. The defendants’ dog was tied up, and the child teased it. The rope broke and the dog chased the child. She fell and was bitten by the dog. The court held that there was no evidence that the child had either express or implied permission to be on the defendants’ property, so that she was not “lawfully on the premises.”

The plaintiff in *Durecki v Alcock*, unpublished opinion per curiam of the Court of Appeals, issued (Docket No. 263640, 11/17/05) thought the defendants’ garage was on fire and ran onto their property. He was bitten by one of the defendants’ dogs and sued under the dog-bite statute. The trial court granted the defendants’ motion for summary disposition, finding that the plaintiff was a trespasser, but the Court of Appeals reversed. The Court held that the plaintiff, as a volunteer or “Good Samaritan,” was an “implied licensee.” “There is no evidence suggesting that Leonard was on defendants’ property for any reason other than to warn defendants of a perceived impending threat or danger in the form of a fire or to assist in extinguishing the fire.” The Court noted, however, that the trial court could still address the question of whether the dog had been provoked.

PLAINTIFF NOT “LAWFULLY ON PREMISES.” The plaintiff in *Alvin v Simpson*, 195 Mich App 418; 491 NW2d 604 (1992) was a 10-year-old who climbed into the defendants’ fenced backyard to retrieve a ball and was bitten by their dog. The court held the dog-bite statute did not apply because the plaintiff was a trespasser, not an “implied licensee.”

Arnett v Benton, unpublished opinion per curiam (Docket No. 211158, rel’d 10/15/99) involved a business invitee who became a trespasser. The plaintiff had been directed to enter the defendants’ business by the front door and not to go into the “garage,” because there were dogs there. He went in the building through a rear door, then into an “interior work area” which turned out to be the “garage.” The court held that the plaintiff “exceeded the scope of his invitation and became a trespasser...” The court also held that the defendants were not liable for keeping dangerous dogs on the premises. “[I]n light of defendants’ explicit instruction to Arnett not to enter the garage and their warning to Arnett of the presence of the dogs in the garage, we reject plaintiffs’ argument that defendants should have known that Arnett would enter the garage and be confronted by the dogs.”

Provocation

The Court of Appeals resolved the issue of whether “provocation” as a defense to strict liability under the dog-bite statute must be “intentional.” In *Brans v Extrom*, 266



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Mich App 216; 701 NW2d 163 (2005), the Court of Appeals held that “unintentional” provocation should be recognized as well. The plaintiff was walking backwards when she stepped on the defendants’ “elderly australian shepherd.” The dog bit her leg. She sued, alleging both strict liability under MCL 287.351 and common law negligence. At trial, the Court gave an instruction “that provocation can be either intentional or unintentional.” The jury found for the defendants on the statutory claim. It also found that the defendants “knew or should have known of” the dog’s “dangerous propensities,” but that the injury “did not result from the abnormally dangerous propensities of the dog.” The Court of Appeals affirmed. “Had the Legislature intended only an intentional act to bar recovery it could have so specified.” The Court concluded, “A person can commit unintentional acts that are sufficiently provocative to relieve a dog owner of liability under the dog-bite statute.” However, “[t]he question of provocation is a question of fact to be determined by the jury based on the circumstances of each case.”

The defendants in *Koivisto v Davis*, 277 Mich App 492; 745 NW2d 824 (2008) owned two dogs which escaped from a kennel and attacked the plaintiff and her cats. The dogs “started to tear . . . apart” one of the cats. Trying to rescue the cats, the plaintiff was bitten 28 times and suffered permanent damage to her hand. The owners claimed provocation, and the trial court dismissed the case against them. The Court of Appeals reversed.

That plaintiff’s response to the dogs’ violent and aggressive behaviors was intentional and violent in kind does not change the fact that the dogs were already in a provoked state—they were in a state of attack—when she responded to their behaviors. We discern no requirement that plaintiff had to retreat from or submit to the will of these dogs. . . .

It is irrelevant that plaintiff’s response may have been in defense of her cats. She could have been defending a neighbor’s baby, the newspaper, or a rose bush and she still would be entitled to a recovery for her injuries under these circumstances. . . .

[R]esponding to or reacting to a dog’s vicious and aggressive behavior does not constitute provocation. . . . [277 Mich App 497-499.]

In *Bradacs v Jacobone*, 244 Mich App 263; 625 NW2d 108 (2001), the 12-year-old plaintiff was playing with a football in the yard of defendants’ home while their dog was eating. She dropped the ball, and the dog bit her as she tried to pick it up. The court held that an unintentional act may constitute provocation under the statute, but that the plaintiff’s actions did not amount to “provocation.” The court borrowed language from an Illinois case, that provocation is “any action or activity, whether intentional or unintentional, which would be reasonably expected to cause a normal dog in similar circumstances to react in a manner similar to that shown by the evidence.” The dog’s response “was out of proportion to plaintiff’s actions,” and she had “no warning of the risk” because the dog did not growl or threaten her. “There must be some action directed toward the animal or, if not, the animal’s response must be proportional to the victim’s action.” Judge Sawyer, concurring, urged the court to decide whether “provocation” requires intentionality.

In *Hill v Sacka*, 256 Mich App 443; 666 NW2d 282 (2003), *lv denied*, the plaintiff was a two-year-old who approached the defendants’ dog when it was chained to a tree. He waved his arms and made noises. His father yelled at him to stop and attempted to intervene, but the dog attacked the child before his father reached him. The court did not decide whether the child could have been liable for “provocation” of the dog.

The plaintiff in *Palloni v Smith*, 167 Mich App 393; 421 NW2d 699 (1988), *rev’d* 431 Mich 871, 429 NW2d 593 (1988) was a two-year-old boy who was bitten by the defendants’ dog when he attempted to hug it. Another child had been teasing the dog, but the dog was sitting quietly at the time the child approached him. The Court of Appeals held that an unintentional act can constitute provocation and granted the plaintiff a new trial. The Supreme Court reversed the Court of Appeals, stating that it was within the trial court’s discretion to find that the verdict was contrary to the great weight of the evidence. The Supreme Court did not address whether “provocation” must be intentional, and the issue remains undecided in Michigan; see *Brans v Extrom*, *supra*.



Pre-1939, the leading case is *Grummel v Decker*, 294 Mich 71; 292 NW 562 (1940). The plaintiff was visiting the defendants when she stooped over to play with their dog and it bit her face and fingers. The court held that provocation of the dog would constitute contributory negligence, a complete defense to the action under the statute, but did not address the issue of whether the plaintiff's "stooping" over the dog would amount to provocation.

In *Wojewoda v Rybarczyk*, 246 Mich 641; 225 NW 555 (1929), the defendant was walking his dog home. They passed the plaintiff, an 11-year-old boy, who was playing baseball in the street. The first base marker was "near the sidewalk." Some witnesses said that the plaintiff "ran over first base and upon the dog," which bit him. The jury found for the defendant, and the plaintiff appealed. The court held that he was entitled to a new trial, "because of the lack of evidence that plaintiff willfully ran into the dog." "The law of canine self-defense does not relieve the owner of liability for damages because the injured person inadvertently stepped on the dog."

In *Fagan v. Lomupo*, unpublished opinion per curiam of the Court of Appeals, issued 3/15/07 (Docket No. 264270), the plaintiff went to visit the defendant, who owned a 110-pound german shepherd named "Ramses." There was "bad blood" between the plaintiff and the dog, who often acted in an "antagonistic manner" toward the dog. The dog "was barking and growling" at the plaintiff as he approached the owner's fenced yard. The plaintiff "put a magazine over" the dog's head. The dog knocked him over and bit his leg. The Court of Appeals held that the plaintiff's actions could be found to have "provoked" the dog, but that the actual trial testimony showed that the dog's reaction was "not proportional to [the] plaintiff's act..." Judge Murray dissented, noting testimony from the dog owner's wife that the plaintiff "was bitten as his arm was coming forward (with the magazine in his hand) onto the gate."

Factual issues

HISTORY OF DOG. In *Nicholes v Lorenz*, 396 Mich 53; 237 NW2d 468 (1976), at the trial of a dog-bite case, the plaintiff offered extensive testimony regarding the dog's past behavior. The Supreme Court held that the evidence was irrelevant.

IDENTITY OF DOG. The plaintiff in *Goodyke v Wolfe*, unpublished opinion per curiam (Docket No. 244520, rel'd 2/19/04) was a newspaper carrier who was bitten by one of the defendant's three dogs, but all she could identify was a large belly. She initially told an animal control officer that one of the defendant's dogs, a pregnant beagle, was not the one that had bitten her, but then changed her mind and said that it was, in part because she and the animal control officer could not find another dog that might have bitten her. She

explained the change by saying she could not see the dog's underbelly when she went back to look at the defendant's dogs. She sued under the dog-bite statute. The Court of Appeals held, "[u]nder the circumstances, and particularly an unexpected dog bite in the darkness, the change in plaintiff's conclusion as to the identity of the dog is understandable." "The basis upon which plaintiff herself originally concluded that it was defendant's dog that bit her is not material to whether she carried her burden during trial."

In *Newton v Gordon*, 72 Mich 642, 40 NW 921 (1888), the defendant's dog apparently attacked the plaintiff's horse while the plaintiff and his family were traveling in a wagon. The court found it insignificant that the plaintiff could not establish which of the defendant's several dogs was the culprit. "If any one did the damage, or caused the injury to plaintiff, and the animal belonged to the defendant, the judgment is right, and should not be disturbed."

The plaintiff in *Granger v Darling*, 156 Mich 31; 120 NW 32 (1909) was attacked on the front steps of the defendant's home. At trial, she identified the dog that bit her, but it was not the defendant's dog. The jury found in the plaintiff's favor anyway, and the defendant appealed. The Supreme Court affirmed, finding no error in an instruction that the jury could "give [the plaintiff's testimony] such weight as you think it is entitled to," even if part of it was false.

In *Mulvey v Stevenson*, 138 Mich 63; 100 NW 1126 (1904), the plaintiff was bitten by a dog. The defendant said it was not his dog. Without presenting the evidence for either party, the Supreme Court affirmed a verdict for the plaintiff.

INJURY

Injury as dog bite

In *Knapp v Card*, unpublished opinion per curiam of the Court of Appeals, issued 7/20/04 (Docket No. 248468), the plaintiff alleged that one of the defendant's five dogs jumped a five-foot high chain link fence with a top rail, bit her on the back, and jumped back into the defendant's yard, all before the plaintiff could turn around to see which dog it was. The defendant and two other neighbors testified that none of the dogs had been known to jump the fence. The evidence appeared to show that the plaintiff had been scratched by one of the dogs, and the jury found for the defendant. The Court of Appeals held that the defendant "was...not required to affirmatively prove that plaintiff's injury was the result of a dog scratch rather than a dog bite." "The jury saw the photographs of plaintiff's injury and apparently concluded that the injury could have been from a dog's paw rather than its teeth, and decided that plaintiff did not prove her case by a preponderance of the evidence." "The fact that the doctor who treated plaintiff diagnosed a dog bite is not dispositive, as plaintiff argues, because the diagnosis was made on the basis of plaintiff's version of the incident."

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In *Cull v Nielsen*, unpublished opinion per curiam of the Court of Appeals, issued 2/22/00 (Docket No. 212728), the plaintiff was a child who alleged that she was bitten by the defendant's dog during the "cherry festival" in Traverse City. The Court of Appeals held that the evidence supported a finding that the child had been scratched rather than bitten. The jury "was under no obligation to accept [the father's] opinion that defendant's dog pulled [the] child to the ground with its teeth." In addition, the jury was shown photographs of the child's injuries. "[I]t is clear that reasonable jurors could have developed differing opinions about whether defendant's dog bit plaintiff child."

The plaintiff in *Danison v Velazquez*, unpublished opinion per curiam of the Court of Appeals, issued 11/15/96 (Docket No. 176420) alleged that she had been bitten by the defendant's dog, but the defendant said that the dog had only "bumped" the plaintiff's face with his "face or teeth." The Court held, "The only conclusive evidence presented by plaintiff to support her theory that her injuries were caused by an actual bite was her own testimony which the jury was free to accept or reject." "[R]easonable jurors using their common sense and understanding could have found that plaintiff's injuries were caused by contact other than a bite."

Bite as cause of injury

The plaintiff in *Fye v Chapin*, 121 Mich 675; 80 NW 797 (1899), was a four-year-old girl who was bitten by the defendant's saint bernard at her own house. She alleged epilepsy as a result of the attack, as well as other injuries. The court ordered a remittitur, because it found the plaintiff's evidence that the dog bite caused her epilepsy was not "clear and convincing."

In *Jenkinson v Coggins*, 123 Mich 7; 81 NW 974 (1900), a dog belonging to the defendant's son bit the plaintiff's horse, causing the horse to kick the plaintiff and injure him. The plaintiff prevailed at trial, and the defendant appealed. The Court held that the statute in effect at the time "[did] not indicate that the person must be bitten by the dog to entitle him to recover" and so "[was] broad enough to cover such a case as this one."

In *Monroe v Rose*, 38 Mich 347 (1878), the plaintiff was injured when the defendant's dog bit the plaintiff's horse and caused an accident. He sued under the dog-bite statute. The Supreme Court reversed and remanded for a new trial, holding that the statute did not authorize a cause of action for injuries that were not "caused by" the dog. The opinion suggests, however, that the plaintiff would have a common law claim if it were pled correctly.

In *Ryan v City of Port Huron*, 234 Mich 648; 209 NW 101 (1926), the plaintiff's father was a city street cleaner. He

was on his way to a garage to take shelter from a rainstorm when he was bitten by a dog. He later died from the injury, and his daughter filed for workers' compensation benefits. The court decided that the decedent was not injured in the course of employment. "The risk of being bitten by a dog was no greater to him because of his employment than it was to any member of the public, who chanced to be in the locality."

Nature and extent of injury

In *Kennett v Engle*, 105 Mich 693; 63 NW 1009 (1895), the plaintiff was bitten by a dog belonging to his doctor. The court remanded for a new trial because the trial court had admitted irrelevant testimony on the subject of the plaintiff's injuries.

The plaintiff in *French v Wilkinson*, 93 Mich 322; 53 NW 530 (1892), was bitten on the leg by the defendant's dog. In a brief opinion, the Supreme Court reversed a verdict for the plaintiff, based on several evidentiary rulings, mostly related to the nature and severity of the plaintiff's injuries.

Taylor v Mobley, 279 Mich App 309; 760 NW2d 234 (2008), involved an attack by a pit bull. The dog jumped into a car where the plaintiff, a 16-year-old girl, was a passenger and bit her abdomen and right inner thigh, but she did not go to the hospital until three days later and received only limited treatment. At the trial, the court excluded mention of the dog's breed, although it did allow evidence of its size and the nature of the attack. The jury awarded only medical expenses and no damages for "fright and shock." The Court of Appeals held that the ruling was "a close question," but affirmed. Judge Gleicher dissented.

Evidence**Admissibility**

The defendant's dog in *Nicholes v Lorenz*, 396 Mich 53; 237 NW2d 468 (1976), was chained in the back yard when the plaintiff, a six-year-old, stepped on its tail and it bit her. At trial, the plaintiff offered testimony regarding the dog's "reputation." The Supreme Court held that the evidence was irrelevant and inflammatory. "The witnesses paraded to the stand by plaintiff offered inflammatory testimony concerning Wolf, yet the testimony did not go to a substantive issue."

Under the earlier statutes, the owner was only liable when the dog was "on public property." In *Walacz v Kucharski*, 257 Mich 359; 241 NW 157 (1932), the plaintiff was a nine-year-old girl who was bitten on the leg by the defendant's dog. The child testified that she was on the sidewalk; other witnesses said she was in the defendant's yard. On appeal, the defendant argued that a verdict for the plaintiff was against the weight of the evidence, but the Supreme Court held that

the jury was entitled to believe the plaintiff's testimony and affirmed the verdict.

The plaintiff in *Danison v Velazquez*, unpublished opinion per curiam (Docket No. No. 176420, rel'd 11/15/96), alleged that she had been bitten by the defendants' dog. The court affirmed the trial judge's exclusion of evidence that the dog had bitten its owner after the incident with the plaintiff.

Violation of other statute or ordinance

The plaintiff in *Zaitzeff v Raschke*, 31 Mich App 87; 187 NW2d 564 (1971), was bitten by the defendant's dog. The defendant was convicted under a city ordinance of "harboring a vicious dog" as a result of the same incident that led to the dog-bite action. The trial court refused to admit evidence of the conviction, and the jury found for the defendants. The Court of Appeals affirmed. "In light of the dissimilarity between civil and criminal proceedings—different issues, different evidential rules, and different degrees of proof, etc.—we find no abuse of discretion in excluding this evidence."

In *Hack v Foster*, 89 Mich App 254; 280 NW2d 503 (1979), the plaintiff was walking her miniature schnauzer when it was attacked and killed by the defendant's doberman, which had broken its leash and run off. The plaintiff was knocked to the ground and suffered an injury to her back. She sued the dog's owner, arguing that he had violated a Detroit ordinance prohibiting unleashed dogs. The trial court instructed the jury that violation of the ordinance "has no weight as evidence." The Court of Appeals reversed and remanded for a new trial.

In *Cassibo v Bodwin*, 149 Mich App 474; 386 NW2d 559 (1986), the plaintiff was injured in a bicycle accident, caused by the defendants' dog, which their daughter had allowed to "run loose." The jury found for the defendants, holding their negligence was not the proximate cause of the plaintiff's injury, and he appealed. The Court of Appeals held that the plaintiff should have been permitted to amend his complaint and allege violation of MCL 287.262 (requiring dogs to be leashed), but held that the error was harmless. "While violation of a statute creates a rebuttable presumption of negligence, the plaintiff still must show that such negligence was the proximate cause of his injuries" and did not address the effect of the ordinance.

The plaintiff in *Christopher v Baynton*, 141 Mich App 309; 367 NW2d 378 (1985), was a mail carrier who was attacked by a dog. She sued the city pound master, alleging that he had "received several complaints" about the dog and was negligent "in failing to properly dispose of the animal pursuant to the animal control ordinance." The Court of Appeals agreed with the trial court that the defendant was entitled to governmental immunity and did not address the effect of the ordinance.

Mitchell v Cunningham, unpublished opinion per curiam of the Court of Appeals, issued 3/16/06 (Docket No. 258239). The plaintiff had knocked on the door of the defendants' house and found no one home. As she was walking away, on the sidewalk in front of the house, the defendants' dogs escaped from a side door and ran toward her. She ran away and fell on the sidewalk, injuring her elbow. A local ordinance prohibited dogs "running at large." The trial court directed a verdict for the plaintiff, on the basis that the defendants had violated the ordinance. The court also excluded evidence of the dogs' prior behavior. The Court of Appeals reversed.

Although the violation of the ordinance was some evidence of negligence on defendants' part, [*Trager v Thor*, 445 Mich 95; 516 NW2d 69 (1994)] requires the fact-finder to consider all evidence relevant to "the total situation" at the time of the injury, to determine if defendants' exercised effective and reasonable control of their dogs. . . [T]he trial court erred in directing a verdict for plaintiff on the issue of negligence and in excluding evidence of the past behavior of the dogs and the circumstances surrounding the condition of the side door of defendants' home.

II. COMMON LAW LIABILITY

Statutory basis

MCL 287.288 retains common law liability for all forms of injury caused by dogs:

Nothing in this act contained shall be construed as limiting the common law liability of the owner of a dog for damages committed by it.

Common law action as an alternate remedy to action under statute

"[T]he dog bite statute and the common law can be employed in alternative counts...." *Nicholes v Lorenz*, 396 Mich 53, 59; 237 NW2d 468 (1976).

In *Hill v Hoig*, 258 Mich App 538; 672 NW2d 531 (2003), the defendants' dog was hit by a truck, and the plaintiff attempted to move him to safety. The dog bit her. She sued, alleging both strict liability under the dog-bite statute and common law negligence. The Court of Appeals held that the dog-bite statute did not abrogate recovery under common-law comparative negligence for dog-bite injuries.

The plaintiff in *Veal v Spencer*, 53 Mich App 560; 220 NW2d 158 (1974), was a three-year-old boy who had been visiting neighbors of the defendants when he was bitten by the defendants' dog, which was "tied to a long chain." The plaintiff's mother sued individually and as next friend of the child, under both the dog-bite statute and a common law negligence theory. The trial judge instructed the jury that

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the mother could not recover if she were guilty of contributory negligence for failure to use reasonable care to supervise the child. The jury found for the child but not the mother. Although the court decided that the plaintiff had not properly preserved her objections to the instructions, it “note[d] that a proper approach to this problem would involve a jury instruction which distinguishes between the two counts and the application of the defense of contributory negligence to the same” and suggested that “litigants and trial courts involved in similar situations might indeed feel that the claims are so totally incompatible that at some stage of the proceedings prior to actual trial, plaintiff should be compelled to elect which claim he will pursue and upon which, at trial, he will introduce proofs.”

Liability of “keeper” of dog

Determination of the “keeper” of the dog

In *Burnham v Strother*, 66 Mich 519, 33 NW 410 (1887), the plaintiff was a six-year-old boy who was bitten by the defendant’s dog. The defendant acknowledged ownership but claimed that his father had “enticed” the dog away and kept him. The trial court’s jury instructions stated that “if the evidence in the case shows that this man Burnham treated this dog as living at his house, and undertook to control his actions, then he was the keeper of the dog, provided you find that the dog did make his home there under that arrangement, and irrespective, as I said before, of the consent of [the defendant] or not.” The Supreme Court found the trial judge’s instructions were correct.

The plaintiff in *Fye v Chapin*, 121 Mich 675, 80 NW 797 (1899), was a four-year-old girl who was bitten by the defendant’s saint bernard at her own house. The dog had been brought there by the defendant’s two maids, who were visiting the plaintiff’s mother. The court held that “it cannot be said that the plaintiff’s parents were in any sense the keeper of this dog” and that the negligence of the parents “cannot be imputed” to the child.

The plaintiff in *Robb v Shepard*, 50 Mich 189, 15 NW 76 (1883), was bitten by a dog and prevailed at trial. On appeal, the defendant argued that her husband was the dog’s “keeper.” The court agreed there was insufficient evidence that the defendant “kept” the dog, but held she was estopped from denying it on the basis of a statement she had made to the plaintiff when he asked her who owned the dog.

Temporary “keeper”

The leading modern case on “keeper” liability is *Trager v Thor*, 445 Mch 95; 516 NW2d 69 (1994), *rev’g in part* 199

Mich App 223; 501 NW2d 251 (1993). The plaintiff was a child who was bitten by a neighbor’s dog. The defendant was babysitting for the owners’ children (his grandchildren) at the time. The Court of Appeals held he was not an “owner” under the dog-bite statute, but held that he could be liable on a common-law negligence theory as a “keeper” of the dog. The court also held that “a person who undertakes to care for an animal—even temporarily—must discharge that undertaking with ordinary care under the circumstances.” The Supreme Court reversed in part. It held that, in order to be strictly liable as a “keeper” of an animal, a person “must have sufficient custody and sufficient control of the animal to assess whether a risk is presented by an abnormal propensity and to decide whether an animal should be brought into or remain in the community.” The grandfather was not liable as a “keeper” of the dog. “[T]he temporary supervisory responsibility of the defendant in the present case did not provide him with sufficient proprietary control to attain keeper status.” The court agreed with the Court of Appeals, however, that the defendant might be liable on a theory of common law negligence. “[I]f the possessor of such an animal, including one in temporary possession, has knowledge of some dangerous propensity unique to the particular animal, or is aware that the animal is in such a situation that a danger of foreseeable harm might arise, the possessor has a legally recognized duty to control the animal to an extent reasonable to guard against that foreseeable danger.” The court added, in a footnote, that “the allegations discussed above are also sufficient to permit a trier of fact to find that Robert Thor accepted responsibility for the care of Rachael Trager while at the Thor home, and had been negligent in fulfilling that duty by allowing her to be exposed to an animal with known dangerous propensities.”

The plaintiff in *Mayle v Fuller*, unpublished opinion per curiam (Docket No. 210589, rel’d 10/8/99), a six-year-old boy, was bitten by his parents’ dog while on property that belonged to his grandparents. The grandparents were not on the premises at the time. The Court of Appeals reversed a verdict for the plaintiff. “[D]efendants may have maintained control over the premises, but there was no evidence to suggest that defendants had temporary control of the dog.”

Owner of premises or head of household

In *Jenkinson v Coggins*, 123 Mich 7, 81 NW 974 (1900), a dog belonging to the defendant’s son bit the plaintiff’s horse, causing the horse to kick the plaintiff and injure him. The Supreme Court agreed that the defendant was the “keeper” of the dog because her son lived with her on a farm that she owned, including all the personal property.

The plaintiff in *Slater v Sorge*, 166 Mich 173, 131 NW 565 (1911), was working inside the defendant's house when he was bitten by a bulldog. The dog belonged to the defendant's wife but was cared for by her sister. The defendant apparently did not actually own the house; he worked in Chicago and commuted to St. Joseph on weekends. He argued that he was not the "keeper" of the dog, but the Supreme Court held that "[t]he husband is usually considered the head of the family, and in the absence of proof to the contrary his residence at each week end being shown by the record, was such occupancy as warranted the charge of the court that in law, he was the keeper of the dog."

Papke v Tribbey, 68 Mich App 130; 242 NW2d 38 (1976), involved an attack by a goat, but the court applied a general rule of liability for injuries caused by "domestic animals." Although the evidence supported a verdict against one defendant, "[t]here was no evidence . . . that Mrs. Tribbey owned and controlled the premises."

In *Meilke v Schabble*, 159 Mich 163; 123 NW 552 (1909), the defendant's dog chased colts belonging to the plaintiff through a barbed-wire fence. The dog had allegedly attacked a cow and "other persons and stock." The defendant's son knew about the dog's nature; the defendant argued that that was not enough to charge him with notice of the dog's nature. The Supreme Court held there was "at least enough testimony to carry the case to the jury tending to show the control and management of the farm in question" by the defendant's son.

Landlord/lessor

In *Feister v Bosack*, 198 Mich App 19; 497 NW2d 522 (1993), the plaintiff child was bitten by a neighbor's dog, who slipped off a chain. The plaintiff sued the dog's owner and the lessor of the house where the owner lived. The landlord knew that the tenants had acquired a dog, although he had never formally given them permission to keep it. The dog had allegedly "nipped" the owner's son two days earlier. The Court of Appeals held that the landlord was not liable.

Szkodzinski v Griffin, 171 Mich App 711; 431 NW2d 51 (1988), is factually identical to *Feister*, but the court found the statute did not apply because the landlord was not the "keeper" of the dog.

The plaintiff in *Stout v Carver*, unpublished opinion per curiam (Docket No. 228373, rel'd 3/15/02), was a child who was bitten by a dog belonging to the defendant's tenant. The tenant did not own the dog when she rented the property, and the lease did not prohibit pets. The dog had bitten another child two months earlier. The Court of Appeals affirmed summary disposition for the defendant. "Defendant did not impose any rules that could be interpreted as giving him the power to exercise control over the dog."

The plaintiff in *Braun v York Properties, Inc.*, 230 Mich App 138; 583 NW2d 503 (1998), was a 12-year-old boy who lived in a mobile home park. He was bitten by his neighbors' dog, inside the neighbors' home. He sued the owner of the park, "for negligently failing to enforce rules and regulations regarding dogs in the mobile-home park." The Court of Appeals held that the defendant was entitled to a directed verdict because it owed no duty to the child. Although the mobile home park regulated the size of dogs permitted, the purpose of the rule was "primarily to protect against harm to the premises." The Court rejected the plaintiff's argument that, by regulating dogs on the premises, it had "undertaken to render services" to him, within the meaning of §324A of the Restatement of Torts.



Franchisor/principal

In *Clark v Texaco, Inc.*, 55 Mich App 100; 222 NW2d 52 (1974), the plaintiff was bitten by a German shepherd guard dog owned by the owner of a gas station. The dog "had a history of attacking customers, but no precautions had been taken to ensure their protection." The plaintiff sued Texaco, alleging that it was liable to her both as landlord of the station and as principal of the dog's owner. The Court of Appeals held that the plaintiff "may be able to prove . . . that Texaco was more than merely passively involved with its dealer's business." The opinion did not indicate whether the Court considered Texaco potentially liable under the dog-bite statute or common law.

Former owner of dog

In *Moore v Jergovich*, unpublished opinion per curiam (Docket No. 167309, rel'd 5/10/96), the defendant owned a golden retriever which attacked a child. He gave the dog to another man who had no children and planned to use the dog for hunting. Over a year later, while the plaintiff, a child, was visiting the second man, the dog attacked him. He sued

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Michigan and National Speakers Combine to Make 2010 Animal Law Section Symposium a Success!

By MaryAnn Kozlowski

The annual Animal Law Symposium was held on Friday, March 5, 2010, in the Castle Boardroom of the Michigan State University College of Law. This year, speakers traveled from as far away as the state of Washington and as near as down the hall from the event.

There were about 45 attendees, who were greeted by Charles Toy, president of the State Bar of Michigan.

Speakers and topics included the following.

UPDATES AND SUCCESSES FROM THE ANIMAL LEGAL LIFELINE

Nicole Quandt, a section member and an attorney with the U.S. Department of Defense, kicked off the event with an overview of the Animal Law Section's Animal Legal Lifeline. Ms. Quandt has handled the lifeline since 2006. She described the types of calls that come in to the Legal Lifeline and the process that occurs to assure that the issues are resolved in a timely and efficient manner. Ms. Quandt volunteers her time to the section and is an example of the hard work that goes into making the Animal Law Section a success. She is also a volunteer foster caregiver for the Michigan Humane Society.

Sharon Noll Smith, section member and a solo practitioner with offices in Bloomfield Hills, followed Ms. Quandt and described a case that she handled in assisting an individual successfully resolve a custody case involving Cocoa the cat. Without attorneys like Ms. Smith responding to calls to the Animal Legal Lifeline, many cases involving animals would go unresolved. In many situations, attorneys respond to the Animal Legal Lifeline and receive little or no compensation for their time. Ms. Smith is a member of Attorneys for Animals and is a member of the Animal Law Section Council. We will have an article about Cocoa the cat in the next issue of the newsletter.

PRACTICAL CONSIDERATIONS RELATED TO LITIGATING ANIMAL LAW DISPUTES AND UPDATE ON TORTS RELATED TO ANIMAL LAW

Julie Fershtman, section member and vice president of the State Bar of Michigan, discussed the above topic in great detail. Ms. Fershtman also discussed her interest in equine law and the time and effort she devoted to expanding her legal practice in this area. Ms. Fershtman is the co-author of a new book available from the American Bar Association entitled *Litigating Animal Law Disputes*.



(L to R) Speaker Professor David Favre, Speaker Adam Karp, Section Chair and Symposium Organizer Anna Scott, Symposium Organizer Bee Friedlander, and Speaker Chris Green

DISCUSSION OF VETERINARY MALPRACTICE LIABILITY IN THE AREA OF COMPANION ANIMALS

Chris Green expanded the national scope of the symposium, having traveled from Illinois. Mr. Green divides his time between New York City and Illinois, where he manages a farm that has been in his family for 173 years. Mr. Green is vice chair of the ABA Animal Law Committee. He graduated from Harvard Law School and the University of Illinois, where he created the school's environmental science degree program. He discussed the value that Americans place on their animals. Mr. Green has consulted on animal legal issues for CBS News, Dateline NBC, *SmartMoney* magazine, the *Chicago Tribune*, and the *Washington Post*.

DISCUSSION OF VETERINARY MALPRACTICE CASES AND DEVELOPING AND RUNNING AN ANIMAL LAW PRACTICE

Adam Karp traveled from the state of Washington to speak at the symposium. Mr. Karp discussed developing and running an animal law practice. He shared with the audience several of the cases he had personally been involved in fighting for the protection of animals. He has successfully argued animal law cases before the State of Washington Court of Appeals and Ninth Circuit Bankruptcy Appellate Panel. Mr. Karp founded and served as first chair of the Washington State Bar Association's Animal Law Section.

THINKING ABOUT LEGAL RIGHTS FOR WILDLIFE

Professor David Favre of the MSU College of Law concluded the symposium by speaking on legal rights for wildlife. Michigan is fortunate to have Professor Favre, a world recognized expert on animal law, teaching at MSU. Professor Favre's website, www.animallaw.info, is in its eighth year and contains updates on cases and topics on animal law.

The Animal Law Section recognizes all members who contributed to making the 2010 symposium a success. A special thank you goes to Anna Scott, MaryAnn Kozlowski, and Bee Friedlander, who organized the symposium. Richard Angelo, Donald Garlit, and Margo Miller made calls to



(L to R) Speaker and Section Member Sharon Noll Smith, Symposium Organizer Bee Friedlander, and Speaker and Section Member Nicole Quandt



Section Chair and Symposium Organizer Anna Scott (L) and Speaker and Section Member Julie Fershtman (R)

all section members to encourage them to attend the event. The State Bar of Michigan helped with the promotional campaign. The MSU College of Law provided valuable support and coordination to permit the symposium to run smoothly. Doreen Dobias of the State Bar of Michigan helped attendees with on-site registration, materials, and badges.

Thank you to the presenters as well as those that attended the event. 🐾

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the former owner, alleging that he should have had the dog put down after the first attack. The court held that the original owner did not have a duty that would run to the plaintiff to warn the second owner of the dog's dangerousness. It determined that [the defendant's] "lack of possession" of the dog was dispositive of his liability.

The defendant in *Wetzel v Bolster*, 169

Mich 43, 134 NW 1099 (1912), owned a dog. He gave it to another man with the agreement that the defendant could sell the dog if he found a buyer. Six weeks later, the dog bit the plaintiff while outside the second man's business. The defendant allegedly told the plaintiff's lawyer that the dog was his and that he did not want the other man to have to take responsibility for it. The plaintiff, however, pled that the defendant was both the "owner" and the "keeper" of the dog. He prevailed at trial and the defendant appealed. The court held that only the second man could be liable, because he was the "keeper" of the dog.

Adoption agency

In *Richardson v Michigan Humane Soc*, 221 Mich App 526; 561 NW2d 873 (1997), the plaintiff's parents adopted a dog from the defendant. The dog was described as "good with kids," "good on a leash," and "sits on command." Several days after they took the dog home, it bit the plaintiff,



a six-year-old child. He sued for "negligence, misrepresentation, detrimental reliance, and breach of warranty." The Court of Appeals noted that that the statement the dog was "good with kids" was not false when it was made and that the "Pet Adoption Agreement" expressly excluded any warranty of the dog's temperament.

"Vicious propensity" of dog

Requirement of scienter

In *Veal v Spencer*, 53 Mich App 560; 220 NW2d 158 (1974), the plaintiff was a three-year-old boy who had been visiting neighbors of the defendants when he was bitten by the defendants' dog, which was "tied to a long chain." There was evidence that the dog had bitten another child. The court held that it was a question of fact whether the dog was "vicious." "Plaintiff has not offered the court any compelling authority for the proposition that once a dog has bitten or attacked a person it should be considered vicious as a matter of law."

The plaintiff in *Mayle v Fuller*, unpublished opinion per curiam (Docket No. 210589, rel'd 10/8/99), a six-year-old boy, was bitten by his parents' dog while on property that belonged to his grandparents. The dog was chained at the time and had no history of viciousness. The Court of Appeals reversed a verdict for the plaintiff. "[I]t is undisputed that the dog had never bitten anyone previously and had been nothing but friendly with people." In addition, there was no evidence that "defendants knew or should have known that the dog posed an unreasonable risk of harm" to the plaintiff. The fact that the defendants had warned children in the neighborhood to stay away from the dog was not significant. "Just because defendants exercised extra caution by warning children to stay away from the dog does not mean that it was foreseeable that the dog would viciously attack plaintiff." The Court concluded, "A cautious dog owner should not be subject to liability merely because he recognizes that even the most tame of domesticated animals might attack if provoked or that a large dog might cause a child injury merely by knocking the child down."

In *Shaw v Wilson*, unpublished opinion per curiam (Docket No. 228732, rel'd 4/23/02), the plaintiff, a three-year-old, was walking her family's dog with her six-year-old brother past the defendants' yard in a condo complex when one of the defendants' four pit bulls ran through a hole in the fence and bit her. The dog in question had once "barked aggressively" but had never attacked anyone. She sued the condo association and an investment company that owned the unit in which the defendants lived. The Court of Appeals affirmed summary disposition for the association and the

investment company, stating that they had no notice of the dog's "vicious propensities."

In *Witt v Smith*, unpublished opinion per curiam (Docket No. 210398, rel'd 6/18/99), the defendant's collie startled a horse, which injured the plaintiff. "Plaintiff claimed that the dog's propensity to chase horses around the field and down the road was abnormally dangerous." The court affirmed summary disposition for the defendants, holding that "[E]ven if plaintiff could show that chasing the horses was an abnormally dangerous characteristic, this would not constitute notice of the dog's alleged 'propensity' to bark and lunge at the horses in the barn, which was the characteristic that allegedly caused the harm...."

In *Grummel v Decker*, 294 Mich 71; 292 NW 562 (1940), the plaintiff lived in the upper flat of a two-family house and the defendants, with their dog, lived in the lower apartment. The plaintiff was visiting the defendants when she stooped over to play with the dog and it bit her face and fingers. She sued the defendants. The judge found insufficient evidence that the dog "was of a vicious, dangerous, or ferocious nature...."

The plaintiff in *Bejger v Zawadzki*, 252 Mich 14; 232 NW 746 (1930), was a 12-year-old boy who was bitten by a dog that was off the defendant's property. An earlier version of the dog-bite statute, which also incorporated a strict liability provision and permitted double damages for a finding of liability, was repealed after the suit was filed. The Supreme Court held that the plaintiff had only a common law right of

action, but remanded to allow the plaintiff to plead and prove that the defendant knew the dog was vicious.

In *Thompen v Verhage*, 54 Mich 304; 20 NW 53 (1884), the defendant's dog attacked the plaintiff's sheep. The Supreme Court agreed that the plaintiff was not required to prove the dog's "vicious nature" and was entitled to double damages under the statute.

The defendant in *Giouroukos v Jungling*, unpublished opinion per curiam of the Court of Appeals, issued 9/27/05 (Docket No. 255462) was a painter who was working on the plaintiff's house. His dog was tied to the defendant's truck, but when he barked at the plaintiff, she ran away. Both the dog and the truck were on an adjoining property at the time. The plaintiff fell and broke her arm. She sued, alleging "strict liability" for the dog's "abnormally dangerous propensity" to bark aggressively. The trial court granted summary disposition for the defendant, and the Court of Appeals affirmed.

Although plaintiff's assertion that defendant knew of the propensity of his dog to bark is supported by evidence, defendant's awareness does not give rise to strict liability because barking, approaching strangers, and tugging on a leash are all common dog behaviors and thus are not "abnormally dangerous." In addition, the trial court's record is devoid of evidence tending to show that this dog's behavior was vicious or dangerous during the incident that caused plaintiff's injury.

The Court also held that the owner did not have a duty to prevent the dog from barking.

Aside from plaintiff's unfortunate injury, plaintiff failed to show another instance where mere barking caused a passerby injury. Rather, plaintiff's reaction to the dog's barking was unusual and unexpected. Because the dog's barking was not dangerous, defendant had no duty to prevent the barking.

The panel also concluded that "it is unforeseeable for a person to flee in a panic from a leashed dog...."

KNOWLEDGE OF DOG'S TEMPERAMENT

Prior behavior

The plaintiff in *Willet v Goetz*, 125 Mich 581; 84 NW 1071 (1901), was driving a horse and buggy past the defendant's house when his dog "jumped over into the road, and with a bark jumped at the horse's head." The horse "whirled around to escape the dog" and the plaintiff was thrown to the ground and injured. The plaintiff offered evidence of several other instances in which the dog had "run out after" passing horses, but the defendant denied knowing of the dog's "character." The Supreme Court affirmed a verdict for the plaintiff, citing a case from Pennsylvania. "[W]here the facts



Dog Bite Law ... continued from page 15

concur of previous manifestations of malicious disposition by the dog, and knowledge of this fact by the keeper, the general peaceable disposition of the dog from thence on becomes immaterial.”

Rickrode v Wistinghausen, 128 Mich App 240; 340 NW2d 83 (1983), involved a cat, but the court applied the common law rule on “vicious propensities.” The plaintiff was a seven-year-old child who was attacked by the defendant’s cat, “Maynard,” outside the defendant’s home. The girl had put down a bowl of water for the cat, called, and began to approach him. He “jumped on her head and lacerated her forehead.” She sued, alleging “strict liability because defendant knew or had reason to know that Maynard had violent propensities.” There was evidence that the cat had scratched other children. The Court of Appeals reversed a directed verdict for the defendant, holding that the plaintiff “need only present proof that the owner knew or had reason to know that the animal had a dangerous tendency that is unusual and not necessary for the purposes for which such an animal is usually kept.”

The plaintiff in *Myers v Myers*, No. 241298 (Mich. App. Oct. 21, 2003), was a 74-year-old woman who was injured when her son’s unrestrained 180-pound great dane “bolted through a doorway, caught his head in her purse strap, and dragged her backwards down two steps onto a concrete patio.” The court affirmed the denial of a motion to amend the complaint, holding that the dog’s behavior of running out when the door was opened did not represent a “dangerous propensity” of which the defendants should have been aware. “[T]he dog engaged in very ordinary and normal canine behavior....”

In *Knowles v Mulder*, 74 Mich 202; 41 NW 896 (1889), the plaintiff and an employee were leading several horses past the defendant’s property when one of his dogs ran out and attacked one of the horses. The horse was frightened and caused a chain-reaction type accident that injured the plaintiff. There was considerable evidence of “the vicious propensity of this dog to run out into the street, and bark at and attack teams of those traveling by.”

The plaintiff in *Swift v Applebone*, 23

Mich 252 (1871), was an immigrant child who was bitten by the defendants’ dogs, a bulldog and a “shepherd.” He sued under both common law and the dog-bite statute. A stage coach driver testified that the dogs regularly “came out after” the horses when he passed the defendant’s house, and another witness also testified that the dogs had attacked his horse. The Supreme Court held, “One who knowingly subjects every person who passes his house to the risk of being torn by a savage beast, cannot demand, as a right, that the recklessness of his conduct shall be excluded from the jury when compensation to the injured party is being estimated.” “The sense of injury suffered will depend very largely upon the disposition shown by the owner of the dog to respect or disregard the rights of others.”

Constructive knowledge

In *Knowles v Mulder*, 74 Mich 202; 41 NW 896 (1889), the plaintiff and an employee were leading several horses past the defendant’s property when one of his dogs ran out and attacked one of the horses. The horse was frightened and caused a chain-reaction type accident that injured the plaintiff. The Supreme Court found evidence “from which the jury was warranted in drawing the inference that defendant knew of this vicious habit of the dog.” The Court in effect held a dog owner can be charged with “constructive knowledge” of the dog’s temperament, if the jury finds that he “he was negligent in not knowing” about the dog’s habit “of barking at, chasing, worrying, or attacking passing teams in a ferocious manner . . .” for a long enough time.

Papke v Tribbey, 68 Mich App 130; 242 NW2d 38 (1976), involved an attack by a goat, but the court stated without reservation that “[t]he . . . owner or custodian of a domestic animal can[] be held liable on a negligence theory for failing to control or restrain the animal.” “The evidence could have supported a finding that [the defendant] had knowledge of the vicious propensities of the goat....”

Characteristics of breed

The plaintiff in *Massengile v Piper*, 294 Mich 653; 293 NW 897 (1940), was a maid who worked for the defendants. The dog, a chow kept as a watch dog, growled at her regularly when she came to the house and jumped on plaintiff and visitors to the house. A vet testified that chows were “temperamental, undependable, and treacherous,” and a kennel owner said that “the chow breed was not reliable, had a bad and untrustworthy disposition.” The Supreme Court held that, given the evidence, “it was a question for the jury to determine whether defendants knew or had reasonable grounds to believe that the dog in question had vicious propensities.” One justice, in a concurring opinion, stated, “Knowledge of



viciousness of a dog does not necessarily await a first bite.” Three justices, dissenting, said “[T]he testimony as to the characteristics of the breed of chow dogs together with other evidence submitted considered in the light of what plaintiff must establish is so incomplete that a verdict rendered upon the same would be the result of conjecture.”

In *Witt v Smith*, unpublished opinion per curiam (Docket No. 210398, rel'd 6/18/99), the defendant's collie startled a horse, which injured the plaintiff. “Plaintiff claimed that the dog's propensity to chase horses around the field and down the road was abnormally dangerous,” but acknowledged that the dog, as a collie or herding dog, was essentially bred to chase animals.” The court held that “[t]his propensity thus could be considered a normal characteristic of this particular dog, and this type of dog in general...” The court concluded, “The dog's barking and lunging at the horse was an unforeseeable event that did not give rise to any duty on defendants' part.”

Defenses

Provocation

Rickrode v Wistinghausen, 128 Mich App 240; 340 NW2d 83 (1983), involved a cat, but the court held the plaintiff had stated a claim for “failure to control” a domestic animal. The plaintiff was a seven-year-old child who was attacked by the defendant's cat, “Maynard,” outside the defendant's home. The girl had put down a bowl of water for the cat, called, and began to approach him. He “jumped on her head and lacerated her forehead.” She sued, alleging “failure to control” the cat. The Court of Appeals reversed a directed verdict for the defendant and remanded for retrial, adding “[o]nly the defenses of willful provocation or gross negligence by Dawn would preclude recovery....”

Comparative negligence

MCL 600.2959 requires damages to be reduced “by the percentage of comparative fault of the person upon whose injury or death the damages are based....” In addition, if the plaintiff's “percentage of fault is greater than the aggregate fault of the other person or persons, whether or not parties to the action,” the plaintiff cannot get noneconomic damages, and his economic damages will be reduced by the percent of his comparative negligence.

Rickrode v Wistinghausen, 128 Mich App 240; 340 NW2d 83 (1983), involved a cat, but the court held the plaintiff had stated a claim for “failure to control” a domestic animal. The plaintiff was a seven-year-old child who was attacked by the defendant's cat, “Maynard,” outside the defendant's home. The girl had put down a bowl of water for the cat, called, and began to approach him. He “jumped on her head and lacerated her forehead.” She sued, alleging “failure to control” the

cat. The Court of Appeals reversed a directed verdict for the defendant and remanded for retrial, adding, “When considering whether defendant was negligent, the jury may also consider whether Dawn was negligent or at fault, and if so, apply the doctrine of comparative negligence.”

Gross negligence

Rickrode v Wistinghausen, 128 Mich App 240; 340 NW2d 83 (1983), involved a cat, but the court held the plaintiff had stated a claim for “failure to control” a domestic animal. The plaintiff was a seven-year-old child who was attacked by the defendant's cat, “Maynard,” outside the defendant's home. The girl had put down a bowl of water for the cat, called, and began to approach him. He “jumped on her head and lacerated her forehead.” She sued, alleging “failure to control” the cat. The Court of Appeals reversed a directed verdict for the defendant and remanded for retrial, adding “[o]nly the defenses of willful provocation or gross negligence by Dawn would preclude recovery. . . .”

Commission of a felony

MCL 600.2955b(1) requires the court to dismiss any action for injuries occurring during the “commission, or flight from the commission, of a felony” or if the plaintiff's “acts or flight from acts that the finder of fact in the civil action finds, by clear and convincing evidence, to constitute all the elements of a felony.” The plaintiff will also be required to pay the defendant's “costs and actual attorney fees” for defending the action.

III. OTHER CAUSES OF ACTION

Nuisance

In *Christopher v Baynton*, 141 Mich App 309; 367 NW2d 378 (1985), the plaintiff was a mail carrier who was attacked by a dog. She sued the city pound master, alleging that he had “received several complaints” about the dog and was negligent “in failing to properly dispose of the animal pursuant to the animal control ordinance.” The court held that the plaintiff had failed to state a claim for nuisance. “[P]laintiff ha[s] failed to allege that the City of Taylor participated in the creation of the nuisance or had any interest in or right of control over it.”

Premises liability

The plaintiff in *Klimek v Drzewiecki*, 135 Mich App 115; 352 NW2d 361 (1984), was a child who was visiting his uncle. While he was outside, unsupervised, he was bitten by a neighbor's dog. The court held that “a loose, unsupervised and dangerous dog either on defendant's land or in close proximity to defendant's land without any obstacle to prevent it from entering defendant's land is a ‘condition on the land’ . . . [and the defendant] owed to plaintiff and her child the

duty specified in 2 Restatement of Torts (2d), § 342, p 210.”

In *Williams v Wolf*, unpublished opinion per curiam (Docket No. 229734, rel'd 5/31/01), the plaintiff was bitten by a dog owned by the tenants of the defendants. The defendants “presented affidavits stating that they were not aware that their tenants had a dog on the premises prior to the attack, and their agent had never witnessed the dog behaving in a vicious or threatening manner.” The Court of Appeals affirmed summary disposition for the defendants, because the plaintiffs had exclusive possession and control of the premises and “[e]ven if defendants had the duty to evict their tenants, there was insufficient time to execute an eviction where the attack took place within weeks of the tenants assuming occupancy.”

In *Feister v Bosack*, 198 Mich App 19; 497 NW2d 522 (1993), the plaintiff child was bitten by a neighbor’s dog, who slipped off a chain. The plaintiff sued the dog’s owner and the lessor of the house where the owner lived. The court held that “[a] landlord has no duty to protect third parties from injuries inflicted by a tenant’s pet that occur away from the leased premises.” Without a legislative requirement, “[a] landlord has no duty to inspect the premises to discover the existence of a tenant’s dangerous animal.”

“Failure to control” animal

Rickrode v Wistinghausen, 128 Mich App 240; 340 NW2d 83 (1983), involved a cat, but the court held the plaintiff had stated a claim for “failure to control” a domestic animal. The plaintiff was a seven-year-old child who was attacked by the defendant’s cat, “Maynard,” outside the defendant’s home. The girl had put down a bowl of water for the cat, called, and began to approach him. He “jumped on her head and lacerated her forehead.” She sued, alleging “failure to control” the cat. The Court of Appeals reversed a directed verdict for the defendant, stating citing a city ordinance, prohibiting cats from “running at large,” and stating “[t]hat proof, plus the proof that defendant knew Maynard



had recently scratched small children and suffered from a painful disease was sufficient prima facie evidence of negligent control to warrant submission of that claim to the jury.”

Papke v Tribbey, 68 Mich App 130; 242 NW2d 38 (1976), involved an attack by a goat, but the court applied a general rule of liability for injuries caused by “domestic animals.” The defendants’ two school-age sons let the family’s “large male goat” out of its pen. It followed them to the plaintiff’s house, where it jumped a fence and attacked him. He died later. The Court of Appeals held that it was “reversible error for the trial judge to instruct the jury that Mr. Tribbey was not responsible for personal injuries caused by the goat if it escaped by means beyond his control.” “The . . . owner or custodian of a domestic animal can[] be held liable on a negligence theory for failing to control or restrain the animal.” “If the injured party is unable to prove the vicious propensities of the domestic animal and that the owner or custodian knew of such propensities, then the owner’s negligence in controlling or restraining the animal becomes an issue.”

In *Myers v Myers*, No. 241298 (Mich. App. Oct. 21, 2003), the plaintiff was a 74-year-old woman who was injured when her son’s unrestrained 180-pound great dane “bolted through a doorway, caught his head in her purse strap, and dragged her backwards down two steps onto a concrete patio.” The Court of Appeals found the plaintiff had not shown that the dog posed an “unreasonable risk of harm” or that the defendant “ineffectively controlled the dog in a situation where it would reasonably be expected that injury could occur.”

Negligent infliction of emotional distress

A close relative who witnesses an attack by a dog may have a claim for negligent infliction of emotional distress. “A plaintiff may recover for negligent infliction of emotional distress where (1) the injury threatened or inflicted on the third person is a serious one, of a nature to cause severe mental disturbance to the plaintiff, (2) the shock results in actual physical harm, (3) the plaintiff is a member of the third person’s immediate family, and (4) the plaintiff is present at the time of the accident or suffers shock ‘fairly contemporaneous’ with the accident.” *Taylor v Kurapati*, 236 Mich App 315, 360; 600 NW2d 670 (1999). Note, however, that the Supreme Court has never formally recognized either negligent or intentional infliction of emotional distress as a cause of action in Michigan.

Wolf-dogs

Definition

The “wolf-dog cross act,” 2000 PA 246, is codified at MCL 287.1001 et seq. It defines “wolf-dog cross” as “a canid

resulting from the breeding of . . . (i) [a] wolf with a dog; (ii) [a] wolf-dog cross with a wolf; (iii) [a] wolf-dog cross with a dog; or (iv) [a] wolf-dog cross with a wolf-dog cross.”

Liability for injuries

MCL 287.1012 provides for specific liability of the owner of a “wolf-dog cross.” Subsections (1) and (2) track the language of MCL 287.351(1) and (2):

(1) The owner or person temporarily in possession of a wolf-dog cross is liable in a civil action for the death or injury of a human and for property damage, including, but not limited to, the death or injury of another animal, caused by the wolf-dog cross. This act does not limit the common law liability of the owner or person temporarily in possession of a wolf-dog cross for the death or injury of a human or for property damage caused by the wolf-dog cross.

(2) If a wolf-dog cross bites an individual without provocation while the individual is on public property or lawfully on private property, including the property of the owner or person temporarily in possession of the wolf-dog cross, the owner or person temporarily in possession of the wolf-dog cross is liable for any damages suffered by the individual bitten, regardless of the former viciousness of the wolf-dog cross or the owner’s or person temporarily in possession’s knowledge of such viciousness. For the purposes of this subsection, an individual is lawfully on the private property of the owner or person temporarily in possession of the wolf-dog cross if the individual is on that property in the performance of any duty imposed upon him or her by the laws of this state or by the laws or postal regulations of the United States, or if the individual is on that property as an invitee or licensee of the person lawfully in possession of the property, unless the individual has gained lawful entry upon the property for the purpose of an unlawful or criminal act.

Liability for escape of wolf-dog cross

MCL 287.1012(3) requires the owner or keeper of a wolf-dog cross to pay for the expenses of capturing the animal if it escapes. MCL 287.1012(4) allows the owner or keeper to recover:

If a wolf-dog cross escapes or is released, intentionally or unintentionally, the owner or person temporarily in possession of the wolf-dog cross shall immediately contact a law enforcement officer of the local unit where the escape or release occurred to report the loss,

escape, or release. The owner or person temporarily in possession of the wolf-dog cross is liable for all expenses associated with efforts to recapture the wolf-dog cross that is released or escapes.

Indemnification

MCL 287.1012(4) permits the owner or keeper of a wolf-dog cross to recover the cost of a civil judgment or the expense of recapture from anyone who releases the animal or lets it escape:

The owner or person temporarily in possession of the wolf-dog cross may bring against a person who is responsible in whole or part for the escape or release of the wolf-dog cross a civil action for damages, including, but not limited to, damages and expenses under subsection (1), (2), or (3).

There have not yet been any cases construing this statute.

IV. OTHER REMEDIES

In addition to the civil liability provided for in the dog-bite statute, the victim of a dog bite can take action to have the animal that injured him confined or destroyed.

Dogs

MCL 287.286a allows the victim of a dog bite to file a complaint in district court, seeking to have the dog euthanized.

A district court magistrate or the district or common pleas court shall issue a summons . . . to show cause why a dog should not be killed, upon a sworn complaint that:

- (b) A dog...has destroyed property or habitually causes damage by trespassing on the property of a person who is not the owner.
- (c) A dog...has attacked or bitten a person.
- (d) A dog has shown vicious habits or has molested a person when lawfully on the public highway.

The court may “order the dog killed, or confined to the premises of the owner....” MCL 287.286a(2).

“Dangerous animals”

MCL 287.322(3) permits the destruction of a “dangerous animal” if it “is found to be a dangerous animal that caused serious injury or death to a person or a dog...” or if “the animal is a dangerous animal that did not cause serious injury or death to a person but is likely in the future to

cause serious injury or death to a person or in the past has been adjudicated a dangerous animal.”

If the animal is a “dangerous animal” but it “has not caused serious injury or death to a person,” MCL 287.322(4) requires the court to notify the local animal control authority and to order the owner to “do one or more of the following”:

- (a) [H]ave an identification number tattooed upon the animal, at the owner’s expense, by or under the supervision of a licensed veterinarian. The identification number shall be assigned to the animal by the Michigan Department of Agriculture and shall be noted in its records pursuant to Act No. 309 of the Public Acts of 1939, being sections 287.301 to 287.308 of the Michigan Compiled Laws. The identification number shall be tattooed on the upper inner left rear thigh of the animal by means of indelible or permanent ink.
- (b) Take specific steps, such as escape proof fencing or enclosure, including a top or roof, to ensure that the animal cannot escape or nonauthorized individuals cannot enter the premises.
- (c) Have the animal sterilized.
- (d) Obtain and maintain liability insurance coverage sufficient to protect the public from any damage or harm caused by the animal.
- (e) Take any other action appropriate to protect the public.

MCL 287.321(1) removes from the definition of “dangerous animal:”

- (i) An animal that bites or attacks a person who is knowingly trespassing on the property of the animal’s owner.
- (ii) An animal that bites or attacks a person who provokes or torments the animal.
- (iii) An animal that is responding in a manner that an ordinary and reasonable person would conclude was designed to protect a person if that person is engaged in a lawful activity or is the subject of an assault.

This statute has not yet been construed.

Criminal liability

Ownership of “dangerous animal”

The owner of a “dangerous animal” may be found guilty

of a felony or a misdemeanor, depending on the degree of injury caused by the animal and whether it had been “previously adjudicated” as dangerous. MCL 287.323.

Dog as weapon

The Court of Appeals held in *People v Kay*, 121 Mich App 438; 328 NW2d 424 (1982) that a dog may be a “dangerous weapon” within the meaning of MCL 750.82(1) (felonious assault).

In *People v Trotter*, 209 Mich App 244; 530 NW2d 516 (1995), the Court of Appeals held that the legislature intended to codify an aspect of the common-law offense of manslaughter and therefore the mens rea of involuntary manslaughter should be read into the statute. The Court held, however, that the defendant’s act of leaving a two-year-old with two bull terriers that had a known history of biting clearly constituted “gross negligence” for purposes of establishing the elements of involuntary manslaughter.

Dogs trained for fighting

MCL 750.49(2)(a) provides that a person may not “[o]wn, possess, use, buy, sell, offer to buy or sell, import, or export an animal for fighting or baiting . . .” If an animal “trained or used for fighting” causes injury or death, the owner can be liable for a felony or misdemeanor; see MCL 750.49(8)–(14).

V. INSURANCE ISSUES

Coverage

Century Mutual Ins Co v League Gen Ins Co, 213 Mich App 114; 541 NW2d 272 (1995). The underlying plaintiff was bitten by the insureds’ dog when she “leaned into” the insureds’ car. The insureds’ auto insurance carrier filed a declaratory judgment action against their homeowner’s insurer to determine who was responsible for defending the suit. The circuit court found the auto insurer liable, but the Court of Appeals reversed, although it noted that coverage was available under either policy.

Exclusions

In Michigan Insurance Bulletin No 2003-07-Ins, issued September 25, 2003, the Office of Financial and Insurance Services reported:

[S]ome insurance companies licensed to sell home insurance in Michigan deny home insurance, exclude coverage, or cancel home insurance policies of “eligible persons” based on the insureds’ possession of a specific breed of dog. Some of the breeds include rottweilers, german shepherds, doberman pinschers, chows, and bull terriers. Insurance carriers contend certain dog breeds have a propensity toward violent behavior and therefore, refuse to provide coverage to families who have such an animal as a pet.

The commissioner stated that “[t]he presence of a particular breed of dog does not make a person ineligible for home insurance.” An insurer, however, “may nonrenew a policy or deny coverage if the dog on the premises has bitten a person or attacked another animal and has caused a liability claim to be paid under the policy.” If the insurer files an appropriate underwriting rule with the Office of Financial and Insurance Services, “coverage [may] be conditioned [not] on the breed of dog present, but only its bite history related to paid claims and after written notice to the policyholder.”

The commissioner added that policy exclusions for liability “if the insured owns a particular, listed breed of dog” would not be enforceable. “Most home insurance purchasers would reasonably expect coverage under the liability portion of their policy for an accidental action taken by a family pet.”

VI. JURY INSTRUCTIONS

Introduction to M Civ JI 80.01 and 80.02

There are two alternative, inconsistent theories of liability for dog bites recognized in Michigan:

1. Common law, based upon negligence. See MCL 287.288; *Grummel v Decker*, 294 Mich 71; 292 NW 562 (1940); *Knowles v Mulder*, 74 Mich 202; 41 NW 896 (1889).
2. Statutory, imposing strict liability upon the owner. See MCL 287.351; *Nicholes v Lorenz*, 396 Mich 53; 237 NW2d 468 (1976); *Cox v Hayes*, 34 Mich App 527; 192 NW2d 68 (1971).

Provocation is the only defense to an action maintained under the dog-bite statute. Contributory negligence, while a defense at common law, is not a defense except as it may relate to provocation. See *Nicholes*. The Court of Appeals has recognized that this state of the law presents a problem where a plaintiff sues on both theories of liability and the defendant pleads contributory negligence. Without deciding the matter, the Court of Appeals suggested that the problem might be solved either by giving a jury instruction which distinguishes

the two theories of liability and explains the proper application of the defense of contributory negligence, or by compelling a plaintiff to elect which theory he or she will pursue prior to trial. See *Veal v Spencer*, 53 Mich App 560, 566; 220 NW2d 158, 161 (1974).

M Civ JI 80.01 Dog Bite Statute—Explanation

We have a state law, the Dog Owner, Liability for Injuries Statute, which provides that the owner of a dog which without provocation bites a person while such person is [on or in a public place/lawfully on or in a private place] is liable for such damages as may be suffered by the person bitten.

M Civ JI 80.01 was added February 1981.

M Civ JI 80.02 Dog Bite Statute—Burden of Proof

The plaintiff has the burden of proof on each of the following matters:

- that the plaintiff [was injured by/sustained damage from] a dog bite
- that the plaintiff was [on or in a public place/lawfully on the property of the owner/lawfully on the property of one in lawful possession]
- that the biting was “without provocation”
- that the defendant was the owner of the dog

Your verdict will be for the plaintiff if you decide that all of these have been proved.

Your verdict will be for the defendant if you decide that any of these has not been proved. 🐾

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State Bar's 35th Legal Milestone to Focus on Pigeon River Elk vs. Oil Drilling Dispute

The State Bar of Michigan's 35th Legal Milestone "Elk, Oil and the Environment" focused on the decade-long battle in the 1970s over drilling for oil and gas in northeast Michigan's Pigeon River Country Forest.

A dedication ceremony was held June 9 at Treetops Resort Wilderness Cabin just east of Gaylord. The bronze plaque will be permanently installed outside the Otsego County Courthouse located at 225 W. Main St. in Gaylord.

The 91,000-acre forest—home to a substantial elk herd and sitting on huge reserves of oil and natural gas—was the scene of one of the longest, most controversial environmental battles in Michigan history. Oil companies and environmental groups engaged in a series of lawsuits, consent orders, legislation, and compromises.

A 1979 landmark Michigan Supreme Court case (*West Michigan Environmental Action Council, Inc. v. Natural Resources Commission*) eventually led to an extraordinary agreement between state government, the oil industry, and environmental groups. It allowed tightly regulated drilling in the southern one-third of the forest, which decades later has yielded valuable gas and oil reserves while the elk herd has continued to grow.

The State Bar's Michigan Legal Milestone program was developed in 1986 to authenticate and recognize historical landmarks in Michigan's legal history. The program is overseen by the Bar's Michigan Legal Milestones Subcommittee, chaired by Michael Ellis, which is part of the Bar's Law-Related Education and Public Outreach Committee, chaired by Jeffrey Paulsen. 🐾

New Opinion Approves Unbundling Legal Services

The Professional Ethics Committee has determined in RI-347 (http://www.michbar.org/opinions/ethics/numbered_opinions/ri-347.htm), issued April 24, 2010, that, so long as a Michigan lawyer complies with the Michigan Rules of Professional Conduct and other law, the lawyer may, without appearing in a proceeding or otherwise disclosing or ensuring the disclosure of the lawyer's assistance to the court or to other counsel and other parties, assist a pro se litigant by giving advice on the content and format of documents to be filed with the court, including pleadings, by drafting those documents for the litigant, by giving advice about what to do in court, or any combination of these. 🐾

TREASURER'S FINAL REPORT FOR FISCAL YEAR (FY) 2009—THROUGH SEPTEMBER 2009

The purpose of this FY 2009 financial summary is to assure the members that the Animal Law Section is very viable with a healthy financial status and your section dues are being spent responsibly.

The following will provide highlights of the financial status of the section through September 30, 2009 (end of the FY):

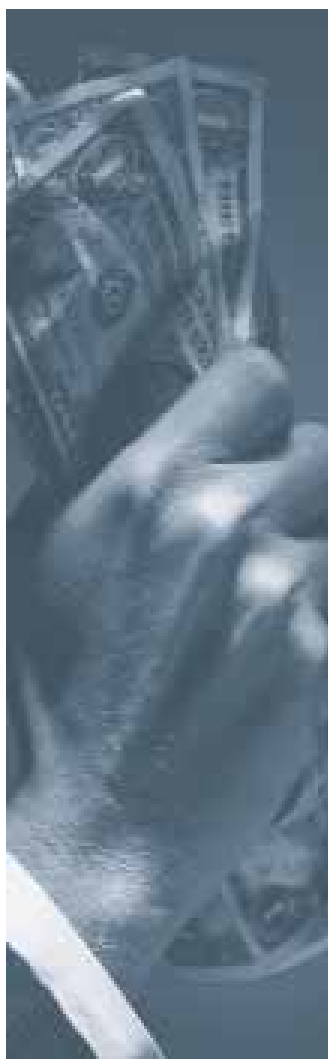
- Membership dues were down by about 4 percent this year compared to FY 2008. This is a reflection of the state of the Michigan economy.
- Expenses have been reasonable and have averaged about \$315 per month. They are primarily for the Brandi Awards ceremony in October, the Legislative Aides lunch in November, the Wanda Nash Award presentation at the University of Michigan Law School, the annual meeting, the newsletters, and the listserv. We continue to have the monthly listserv charge, so please use the listserv as a means of contacting other section members. The annual meeting charges from the Hyatt Regency were \$578 (a prime cost element of which was the teleconference equipment rental), and these costs will need to be watched in the future.
- The seminar generated a surplus of about \$235 as a result of large attendance.
- The section fund balance was \$11,978 at the end of September 2009—an increase of about \$637 from the end of the prior fiscal year on September 30, 2008.

TREASURER'S SUMMARY REPORT FOR FISCAL YEAR (FY) 2010—THROUGH MAY 2010

This is a summary of the section's financial status through May 2010. The purpose of this summary is to assure the members that the Animal Law Section is very viable with a healthy financial status and your section dues are being spent responsibly.

The following will provide highlights of the financial status of the section through May 31, 2010 (8 months of the FY):

- Membership dues are down by about 4 percent this year. This is a reflection of the state of the Michigan economy.
- Expenses have been reasonable and have averaged about \$210 per month and are primarily for expenses related to the Legislative Aides lunch in November, teleconference calls, and the website/listserv. We continue to have the monthly listserv charge, so please use the listserv as a means of contacting other section members.
- The total cost of the symposium was about \$490 (expenses exceeded revenues). Symposium attendance was good, although lower this year as the symposium was aimed primarily at attorneys rather than a broader group which has included animal interest groups in the past. Additionally, we have always approached the symposium as an educational function of the section, not as a profit making endeavor, although we have generated a profit in some years.
- The section fund balance was \$13,613 at the end of May—an increase of \$1,635 from the beginning of the fiscal year on October 1, 2009. 🐾



STATE BAR OF MICHIGAN



ANIMAL LAW SECTION

Treasurer's Reports

By Donald Garlit
June 2010





“Sinking Your Teeth Into Michigan Dog Bite Law” on page 1



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STATE BAR OF MICHIGAN
ANNUAL MEETING
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SAVE THE DATE

Annual Animal Law Section Meeting
October 1, 2010 from 2–4 pm