ROGER H. GILBERT, Plaintiff, v. MELVIN L. WELSH III, Defendant, C.P. Franklin County Branch, Civil Action No. 2000-1838

Pit Bull — Dog Law — Negligence Per Se — Dangerous Dog — Propensity to Attack — Assumption of Risk

1. One bite may itself prove the propensity to attack required by the Dangerous Dog Statute.

2. An unexcused violation of the Dog Law is negligence per se.

3. A statute may be implemented in a personal injury action if the statute's purpose is to protect the class of which plaintiff is a member and to protect a particular interest at issue against the particular harm at issue.

4. A violation of the Dangerous Dog Statute, as part of the larger Dog Law, is negligence per se, regardless of criminal repercussions.

5. Assumption of risk is a matter of law to be decided by the court as part of its duty analysis.

6. Should the facts presented indicate that a defendant's duty was not absolved due to plaintiff's assumption of risk, the matter should proceed on a comparative negligence theory.

7. As a matter of law, one does not assume the risk of dog attack by playing fetch on a hot day with a pit bull terrier.

Appearances:
Philip S. Cosentino, Esq., Attorney for Plaintiff
Jered L. Hock, Esq., Attorney for Defendant

OPINION

Walker, P.J., March 16, 2001

Introduction

On June 5, 1999, Plaintiff Roger H. Gilbert was allegedly bitten by Defendant Melvin L. Welsh III's pit bull terrier, sustaining injuries to both his upper and lower lips which required emergency care at the Chambersburg Hospital and subsequent plastic surgery. Plaintiff thereafter commenced this action by complaint filed May 30, 2000. A pre-trial conference was held on February 19, 2001, where the parties raised several issues which require resolution prior to the commencement of trial.

Discussion

The outstanding issues to be determined are as follows:

1. Should defendant's response to paragraph 13 of the complaint be deemed an admission? If so, may defendant amend his response?

2. May a violation of 3 P.S. §459-502-A be considered negligence per se in a civil action?

3. As a matter of law, did plaintiff assume the risk of injury?

1. Admission

Paragraph 13 of the complaint avers that defendant had knowledge of his dog's vicious propensities because he had been advised by "others in the neighborhood" that the dog was going to hurt someone. Defendant responded in his answer that he was without knowledge or information sufficient to form a belief as to the truth of the plaintiff's averment. Plaintiff maintains that such a vague response constitutes an admission, as defendant knew whether the averment was true due to his prior possession of a witness statement of Robert Mills. Mr. Mills' statement, prepared for Aegis Security Insurance Company, verifies that he had warned defendant that his dog was going to hurt someone. Conversely, defendant essentially proposes that Mr. Mills' recollection is in err, which is corroborated by his own deposition testimony.

Given the structure and phrasing of paragraph 13, defendant's answer was justified. Paragraph 13 did not provide the identity of the person, Mr. Mills, that allegedly warned defendant of the dog. Moreover, it refers to "others," which could realistically be interpreted to express that **several** people had warned defendant of the dog's nature. While this court generally does not favor the pat answer given by defendant, the vagueness of the complaint necessitated the response. Further, the court must agree with defendant that, due to the obvious discrepancies between Mr. Mills' statement and his own testimony, the issue presents a question of fact that the jury must resolve at trial. Hence, the court is very reluctant to deem defendant's response an admission and as such, defendant need not amend his pleading at this time.

2. Dog Law/Negligence Per Se

Instantly, plaintiff asserts that he is entitled to a jury instruction on defendant's negligence per se due to defendant's alleged violation of the Dangerous Dog Statute. Defendant conversely argues that the Dangerous Dog Statute is inapplicable to the instant civil matter because it is criminal in nature. The Dangerous Dog provision of the Dog Law, amended in 1996, states the following elements:

> § 459-502-A. Registration
>
> (a) Summary offense of harboring a dangerous dog. — Any person who has been attacked by one or more dogs, or anyone on behalf of such person, a person whose domestic animal has been killed or injured without

provocation, the State dog warden or the local police officer may file a complaint before a district justice, charging the owner or keeper of such a dog with harboring a dangerous dog. The owner or keeper of the dog shall be guilty of the summary offense of harboring a dangerous dog if the district justice finds beyond a reasonable doubt that the following elements of the offense have been proven:

(1) The dog has done one or more of the following:

(i) Inflicted severe injury on a human being without provocation on public or private property.
(ii) Killed or inflicted severe injury on a domestic animal without provocation while off the owner's property.
(iii) Attacked a human being without provocation.
(iv) Been used in the commission of a crime.

(2) The dog has either or both of the following:

(i) A history of attacking human beings and/or domestic animals without provocation.
(ii) A propensity to attack human beings and/or domestic animals without provocation. A propensity to attack may be proven by a single incident of the conduct described in paragraph (1)(i), (ii), (iii) or (iv).

(3) The defendant is the owner or keeper of the dog.

3 P.S. §459-502-A(a)(1)-(3).

The chief case plaintiff relies upon is *Commonwealth v. Hake*, which holds an isolated bite may prove the propensity to attack required by (2)(ii) of the 1996 amendments. *Commonwealth v. Hake*, 738 A.2d 46 (Pa.Super. 1999). Thus, it appears the General Assembly has drafted a statute to address some of the growing public concerns about breeds such as pit bull terriers and rottweilers. Unfortunately, as drafted the statute will hold a dog owner strictly liable for harboring a dangerous dog if his seven-year-old chihuahua happens to bite someone and inflict a "severe injury" or "attack" someone unprovoked. Either scenario is foreseeable, and this court is reluctant to agree that such an owner should be strictly liable in such a circumstance or that such a dog may be realistically classified as "dangerous." Nonetheless, the statute as drafted ostensibly allows a dog to be retroactively classified as dangerous based upon its very first bite.

Though perhaps illuminating, *Hake* does not address the instant issue,

and we must agree with defendant that there are no cases squarely on point. Rather, the cases discuss the **criminal** application of the Dangerous Dog statute. However, other provisions of the overall Dog Law have been utilized in civil actions to establish a negligence per se standard. In *Miller v. Hurst*, the Superior Court explicitly held that "an unexcused violation of the Dog Law is negligence per se." *Miller v. Hurst*, 302 Pa.Super.235, 244, 448 A.2d 614, 618 (1982). The specific provision of the Dog Law at issue in *Miller* was what is now §459-305, which essentially provides that dog owners must not allow their dogs to freely rove the public streets. *Id.* at 302 Pa.Super. 242, 448 A.2d 617. In determining that §459-305 may be used in a civil matter, the Superior Court relied upon §286 of the Restatement (Second) of Torts, which allows a court to adopt a statute as the conduct of a reasonable man so long as the statute's purpose is (1) to protect a class of which the plaintiff is a member and (2) to protect a particular interest at issue (3) against the particular harm at issue. *Id.* at 302 Pa.Super. 243, 448 A.2d 618. The court resolved that the statute was applicable in *Miller* because the Dog Law was enacted to, among other things, protect the public from personal injury caused by dogs. *Id.*

Ergo, the true issue instantly is whether §459-502-A of the Dog Law may also be applied to a civil action, given the court's holding in *Miller*. After careful deliberation, we find no reason to hold otherwise. Though §459-305 creates a distinct duty to prohibit one's dog from free roam of public streets while §459-502-A addresses the harboring of "dangerous" dogs only, both essentially establish that an owner must **control** his or her dog. If not, that owner will be held liable and sanctioned appropriately. Moreover, it is clear that both sections also share the same design, to protect the public from injury.

In *Miller*, the court conclusively stated that a violation of the overall Dog Law, and not solely §459-305, was negligence per se. Additionally, the court concluded that the overall design of the Dog Law was to protect the public from personal injury only after a "cursory reading of the **entire** statute..." *Id.* (emphasis added). Though defendant may argue that the Dangerous Dog section of the statute was not added until approximately eight (8) years after *Miller*, it is of no matter, for we nevertheless presume the legislature added the Dangerous Dog section to the Dog Law in full light of *Miller*. If it did not agree that a violation of the Dangerous Dog section is likewise negligence per se, the legislature would have so commented or not placed it within such a statutory framework.

3. Assumption of Risk

Finally, defendant asks the court to find that plaintiff assumed the

risk of injury because he played with a pit bull on a hot day. There has been no motion for summary judgment or compulsory nonsuit filed, but the court will nevertheless resolve the issue in the interests of expediency. Assumption of risk is not a matter for jury deliberation, but is a question of law to be decided by the trial court. *Staub v. Toy Factory, Inc.*, 749 A.2d 522, 526 (Pa.Super. 2000). No longer is assumption of risk an affirmative defense, but rather part of the court's duty analysis. *Id.* If the facts disclose that defendant owed plaintiff no duty of care because he or she voluntarily and knowingly proceeded in the face of a dangerous condition, a nonsuit may be entered. *Id*, citing *Struble v. Valley Forge Military Academy*, 445 Pa.Super. 224, 665 A.2d 4, 6 (1995). If the facts do not indicate that a defendant was absolved of any duty under a particular set of circumstances, the case should proceed on a comparative negligence theory. *Howell v. Clyde*, 533 Pa. 151, 620 A.2d 1107 (1993) (plurality).

Instantly, defendant maintains that plaintiff assumed the risk of injury because he played fetch with a pit bull, known both objectively and subjectively as a dangerous breed. While the argument may indeed have some practical merit, particularly in light of the amendments to §459-502-A, we believe that defendant paints with too broad a brush. There is no question that pit bulls have an immediate public relations problem, whether scientifically warranted or not. But they are, at the end of the day, domestic animals. It is not as if plaintiff's injuries were inflicted by a lion, grizzly bear or some other wild animal. Further, plaintiff was playing fetch with the dog, not antagonizing it. Perhaps he may have assumed the risk of injury had he relentlessly teased the dog, but simply playing fetch with a dog on a hot day or otherwise is not, as a matter of law, assumption of the risk of attack.

ORDER OF COURT

March 16, 2001, having considered the post-conference briefs submitted by Plaintiff Roger H Gilbert and Defendant Melvin L. Welsh III, the court enters the following order:

1. Defendant need not amend his answer to the complaint, as his response to paragraph 13 of the complaint was **not** an admission.

2. Plaintiff may use 3 P.S. §459-502-A to establish defendant's statutory duty, and is entitled to jury instruction 3.30 of the Pennsylvania Suggested Standard Civil Jury Instructions.

3. Plaintiff did not assume the risk of injury as a matter of law, and the case shall proceed on a comparative negligence theory.

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