

## MEMORANDUM

**To:** Sue Attorney, Attorney at Law

**From:** Trish Dilliner

**Re:** Our client, Chester Bigwig, File No. 2009 – 89

**Date:** March 12, 2009

### **I. Issues**

1.) Under Michigan's dog bite statute, is a young girl considered lawfully on the property when she returns the same day after attending a group function, and upon finding no one home, enters the back of the property through a gate to retrieve an item left in the house?

2.) Under Michigan's dog bite statute, is it provocation when a ceramic is planter knocked over and accidentally causes a sleeping dog to awake and attack?

3.) Under Michigan common law strict liability, is a dog owner liable for damages sustained by a young girl bitten by a dog with no known previous history of viciousness?

4.) Under Michigan common law negligence, when a fence is used to contain a dog, the owner has no knowledge of previous viciousness, and a young girl enters the yard uninvited, does the dog owner owe a duty of care to the girl to further restrain and control his dog and prevent injuries from the dog?

## **II. Statement of Facts**

Chester Bigwig is the owner of a pit-bull that he bought to provide protection for his family. The dog had not shown any aggressiveness towards the family. About a month ago, his wife Marla, a Brownie leader, held a meeting at the Chester home. Jane Jones, whom is a good friend of Chester's daughter and had been at Chester's house on many occasions, returned to the Bigwig home to retrieve a book she had left behind. When no one came to the door, she went around back to see if the kitchen was open. As Jane went through the backyard gate, she knocked over a ceramic planter that was about 5 yards from the house. As the planter hit the ground it shattered and startled the dog from sleep. The dog then jumped at Jane and bit her. Jane's injuries were not severe, but she did get stitches on her arm and she has a prominent scar. The doctor thinks there is not much that can be done about the scar. Jane has also been having nightmares and she is afraid to walk to school because of the dogs that live along the way.

## **III. Analysis**

### **A. Lawfully on Property**

The statute dealing with dog bite liability in the state of Michigan is MCL 287.351, which states in part, "if a dog bites a person, without provocation while the person is...lawfully on private property...the owner of the dog shall be liable". Section 2 of this statute goes into some detail as to what constitutes "lawfully on...property" as one who was either invited or has a job to do as required by the law. Primarily, barring provocation, if the victim has permission to be on the property the owner of the dog who bites and causes harm to the victim is liable for all damages.

The Michigan Court of Appeals has interpreted what is meant by “lawfully on private property” by addressing the definition of the terms “licensee” and “invitee”. The Michigan statute, MCL 287.351 states that: “

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.

The Court explained in Cox v Hayes, 34 Mich App 527; 192 NW2d 68 (1971), that a “licensee” is someone who enters the property of another for their own benefit and was not told they could not be there. The Court further held that permission could be implied, and ruled that, when the plaintiff, a 3-year-old deaf and mute girl that was a neighbor of the Defendant, wandered into the backyard of the Defendant and received injuries after being bitten by the defendant’s dog, she was not a trespasser. This decision was based on the fact that the plaintiff had on previous occasions played with the defendant’s daughter and entered the property for short periods.

In COX, the child injured in a dog bite incident had been playing in the front yard of the Defendant with several other neighborhood children throughout the day. The dog that had bitten the Plaintiff was attached to a chain in the backyard of the Defendant’s property at the time of the attack. The Defendant stated that they had never invited the Plaintiff over previously, had instructed their daughter not to extend any invitations, and although the Plaintiff had been on the property previously, it was never for more than a few moments.

However, in Alvin v Simpson, 195 Mich App 418; 491 NW2d 604 (1992), the court ruled that when the plaintiff, a 10 year old boy, climbed over the defendant’s fence to retrieve a ball

and was bitten by the defendant's dog on his way back over, he was indeed trespassing which cleared the defendant of liability for the dog bite. While one of the friends the Plaintiff was playing ball with that day had been given permission previously to enter the Defendant's yard to retrieve balls, the Defendant himself had never previously had permission to do so. Added to the previous facts, the plaintiff was aware that he did not have permission to enter the defendant's property.

In the present case, Jane entered the back of the Chester's property, after finding no one home when knocking on the front door. The case is similar to the Cox case because both children had on previous occasions played with the children of the dog owner on the dog owner's property. This case is also similar to the Alvin case as well as the Cox case because all three children were on the property at the time of attack without the knowledge of the dog owner. In Alvin as with the Bigwig case, there was no one home at the time of the attack. Similar to the present case, the girl in Cox had previously been on the property playing with the defendant's daughter. Because the girl in the present case has played with Bigwig's daughter on previous occasions and has been on the property on several previous occasions, it is likely that the court will decide that the girl had implied permission based on previous visits to Bigwig's property with permission and thereby she would be deemed to be lawfully on the property. This would leave the Bigwig liable for all damages barring provocation.

## **B. Provocation**

The dog bite statute of Michigan, MCL 287.351, states that the only defense to liability for a dog bite is provocation. Thus, for the dog owner to be cleared of all liability, the girl would have to have provoked the dog in some manner.

The definition of provocation is not given in the above statute. The question remaining is what exactly qualifies as provocation? Can it be an unintentional act? According to this statute, it would seem that provocation is an intentional act, yet the courts have interpreted it differently.

The Michigan Court of Appeals decided, Koivisto v Davis, 277 Mich App 492; 745 NW2d 824 (2008), a case dealing with provocation. When a woman was attacked by dogs who entered her property and pursued her cats, she tried to protect her cats from the attacking dogs, they turned their attack onto her. The court held that because provocation is the only possible defense to the dog bite statute of Michigan, MCL 287.351, that a more clearly defined explanation of what it meant to provoke was necessary. In Koivisto, 277 Mich App 492, 496, the court referenced an earlier case that listed the definition given in *Black's Law Dictionary* (4<sup>th</sup> ed), stating "that 'provocation' is '[t]he act of inciting another to do a particular deed. That which arouses, moves, calls forth, causes, or occasions.'" The defendant in that case claimed that the dog bite victim had provoked the dogs by poking them in the eyes and kicking them. The court ruled these actions were not considered provocation in part due to the fact that the dogs were already in a state of attack therefore her actions in defending her cats did not provoke the dogs.

In Brans v Extrom, 266 Mich App 216; 701 NW2d 163 (2005), the plaintiff, sister-in-law to the defendant, accidentally stepped on the tail of the defendant's dog, which then bit her in the leg. The plaintiff at the time was helping set the defendant's yard up for a wedding. They had removed a portion of the dog's kennel, and the plaintiff stepped back and accidentally landed on the tail of the dog. The plaintiff argued in this case, that because the provocation of the dog was accidental, it was not a defense under the dog bite statute. The court further stated that "[t]he intent of the victim is immaterial." Brans, 266 Mich App 216, 219. The court held that while the plaintiff did not intend to provoke the dog, the action of stepping on the dog's tail did indeed

constitute provocation when considering the plain meaning of the word. Accordingly, provocation can be anything that causes an animal to behave in a manner that would be reasonably expected in similar circumstances.

The court dealt with the issue of provocation in Bradacs v Jicaobone, 244 Mich App 263; 625 NW2d 108 (2001). The case of Bradacs involved an incident in which a 12-year-old girl was bitten while playing with a friend, the daughter of the plaintiff. The plaintiff dropped a football about six inches from the dog and then reached down to pick it up. The plaintiff argued that her actions “unintentionally provoked” the dog. Bradacs, 244 Mich App 263, 265. In that case, the court discussed whether provocation included unintentional acts. Specifically, if dropping a football near a dog could be considered provocation when it resulted in the dog biting the plaintiff when she reached down to pick the ball up. While they concluded that provocation could be unintentional, the act of dropping a football and subsequently picking the football up was not enough to cause any reasonable dog to react in the same manner. Provocation was further explained in Bradacs to include unintentional acts as long as those actions in were in some way directed at the dog, or that similar acts would cause any reasonable dog to react in the same manner.

In the present case, the girl knocked a ceramic planter over as she entered the dog owner’s backyard through a gated fence. The sound of the planter shattering on the ground awoke the dog that was sleeping approximately five yards away, which then lunged at the girl and bite her. While none of the above listed cases are completely on point, the case that seems the most similar is the Bradacs case where the girl dropped a football near the dog that then bit her when she bent down to pick up the ball. In Koivisto the dogs were already in a state of attack when they entered the Plaintiff’s property. In Brans the woman stepped on the dog’s tail. The

court has been consistent in stating that provocation can be unintentional, as would be the situation with our case, but it is possible that because the girl was some distance from the dog and did not physically come in contact with the dog prior to the bite that the court could rule that it is not provocation.

### **C. Common Law Strict Liability**

Under Michigan common law strict liability, “a dog owner is liable for damage done by the dog only if he or she knows or has reason to know of the dog’s vicious nature.” Nicholes v Lorenz, 396 Mich 53, 59; 237 NW2d 468 (1976). The elements of common law strict liability are given by the court as 1) the owner or possessor of a dog, 2) who has knowledge of should have knowledge about the dangerous nature of the dog, 3) and the nature of the dog in question causes injuries in Trager v Thor, 445 Mich 95, 99; 516 NW2d 69 (1994).

The fact that Mr. Bigwig is the owner or possessor of the dog is not in question. Mr. Bigwig further stated in his initial interview that his dog had no history of viciousness, and in fact had a rather sweet temperament with the family. The question therefore remains, should Chester Bigwig have known there was a possibility of his dog attacking and biting another person in similar circumstances? If Mr. Bigwig’s dog has a vicious nature, are Jane Jones’ injuries a direct result of that nature?

Common law strict liability was discussed at length in Hiner v Mojica; 271 Mich App 604; 722 NW2d 914 (2006). In that case, the Plaintiff and his partner were at the home of the Defendant to complete work for Comcast. The Defendant’s dog exhibited signs of aggressiveness when the men approached the home. The Plaintiff informed the Defendant that her dog did not seem to like him and his partner, to which she agreed. After beginning their work

in the backyard of the Defendant's home, the Plaintiff and his partner headed back to their truck to get more tools. At that time, the dog bolted through the back door of the breezeway and ran towards the Plaintiff and his partner. Although the Plaintiff was able to escape being bitten by the dog, he did slip, fall, and sustain injuries because of running from the dog. The Defendant claims that she had the dog locked in a breezeway on her home, and she could not see how the dog would have escaped.

On the matter of strict liability, the court in the Hiner case held that even though the dog exhibited aggressiveness and signs of being agitated toward the Plaintiff and his partner, the dog was not behaving in a manner deemed unusually vicious. Several cases are listed in Hiner in support of the fact that just because a dog is barking, jumping, or otherwise behaving in a state of excitement does not mean the animal is dangerous or that the owner should believe the dog to be dangerous.

In the present situation with Mr. Bigwig, the dog had not previously shown any propensity toward aggressiveness. The dog had been sleeping when Jane entered the backyard and only attacked her after waking up when the planter Jane knocked over shattered. There are not any similarities between this case and the Hiner case, the explanation regarding common law strict liability helps to show that Jane's case does not have a cause of action based on the required elements. While it is possible that Ms. Jones could argue that because Mr. Bigwig's dog is a pit-bull, he should have been aware of a tendency for the animal to behave viciously, the court ruled in Taylor v Mobley; 279 Mich App 309; 760 NW2d 234 (2008) that the breed or size of the dog does not matter regarding previously known viciousness of a dog. It is likely that the court would decide that Mr. Bigwig did not have any knowledge that his dog had any dangerous propensities and therefore is not liable under Michigan common law strict liability.



#### **D. Common Law Negligence**

Michigan common law negligence states that the owner of a dog, who does not have any knowledge of dangerous characteristics of his or her dog, is liable for damages caused by his or her dog when proper precautions were not taken to restrain or keep the animal from causing injury. The question to be decided in Bigwig's case is whether he had taken proper steps to keep his dog from causing injuries to Jane.

According to the court in Trager v Thor, 199 Mich App 223; 501 NW2d 251 (1993), to prove common law negligence "the Plaintiff need only establish the defendant failed to exercise ordinary care under the circumstances to control or restrain the animal." In the Trager case, the Defendant's dog bit the Plaintiff, a child by the name of Rachel Trager, when she went in the Defendant's house to use the restroom. Prior to the Trager's entrance in the house, Mr. Thor had placed the family's dog in the bedroom so that it would not escape through the front door while some work was being done on the property. Trager was at the Thor's home playing with their daughter. The question to be answered by the court in Trager was whether summary disposition was issued in error. The court held that the Defendant's status of keeper of the animal as well as the level of duty of care he owed to the Plaintiff were genuine issues of fact and therefore the lower court had erred in issuing summary disposition.

Common law negligence holds that the owner or possessor of the animal that causes damages does not need to know of the animal's propensity to do so to be held liable. In the case of Mr. Bigwig, there was no duty of care owed to Ms. Jones because she was on the property without the knowledge of Mr. Bigwig. The dog in question was properly restrained and under

control behind the fence of backyard and was in fact sleeping prior to the attack. In the Trager case, Thor argued that he did not owe Trager a duty of care because she entered the house without his knowledge, the court ruled because he knew she was on the property playing with his granddaughter, he did owe her a duty of care to keep the dog properly restrained and from causing injury. In Bigwig's case, he had no to protect Jane from injuries sustained due to her entrance on his property unlawfully. Considering the facts that no one was home as the time of the attack and that Jane had entered the property of Mr. Bigwig on her own accord, the court will likely rule that Bigwig had no reason to foresee the results of Jane's actions and therefore he could not have taken any steps to prevent the injuries Jane sustained. Therefore, there is no cause of action under Michigan common law negligence.

#### **IV. Conclusion**

In consideration of whether Jane was lawfully on Bigwig's property, it is again likely that due to her previous presence on the property on several occasions, the judge would rule that she had an implied permission to enter the property, thereby allowing for only provocation as a defense. While Michigan law allows for a defense of provocation to the dog bite statute, it is not 100% clear that the actions of Jane in knocking over the planter would constitute provocation. It is likely that a judge would rule in favor of Jane, holding the Bigwig liable in this case.

As far as common law strict liability and common law negligence, it does not appear that Jane would have any cause of action with either theory and if she were to file under a claim under either one, Bigwig could likely file and receive summary disposition.

#### **VI. Recommendations**

It is recommended that depositions be taken with both Jane and the Bigwig, as well as perhaps Bigwig's wife and daughter, to determine the extent of the previous relationship the girl had with the family of the dog owner and the likelihood that the girl would have felt she had permission to enter the property under these circumstances. Further research should be done regarding the definition of provocation.

Regarding common law strict liability and negligence, depositions from family members and family friends pertaining to the disposition of the dog could be used to prove Bigwig's statements that he had not know the dog to behave aggressively on previous occasions.