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Torts

Biteless Prior Incident Enough for Punitives Claim in Dog-Bite Case

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A common pleas court judge will allow a plaintiff in a dog-bite case to pursue punitive damages based on alleged notice of vicious propensity, even though the dogs had not bitten anyone before the incident.

In his decision in *Bitting v. Schaffner*, Dauphin County Court of Common Pleas Judge William T. Tully held that a jury should be able to consider whether a prior incident in which three boxers owned by the defendant acted aggressively toward a package delivery employee was sufficient to place the dog owner on notice regarding the dogs' vicious propensity.

According to Thomas J. Newell, who represented plaintiff Mandy S. Bitting in the case, the decision is the first instance of a judge allowing a plaintiff to seek punitive damages in a cases where the dog had not previously bitten people.

The decision also held that Bitting could pursue recovery of medical costs based on strict liability claims, as opposed to claims involving negligence or negligence per se, and allowed Bitting to introduce evidence regarding a post-incident event that involved a co-worker of Bitting's nearly being bitten by the same dogs after the owner had been charged with failing to restrain them, Newell said.

"It really talked about three separate ways of recovery that in my view had not been granted previously," Newell said. "This gives much greater viability to our claims, and if there's greater exposure to punitive damages, that has to cause an insurance company to think twice before taking a hard line."

According to Tully's June 30 opinion, Bitting, who was a Federal Express delivery driver, attempted to deliver a parcel to the home of defendant Clifford M. Schaffner in November 2012. She entered Schaffner's property in compliance with Federal Express policy to leave the parcel on a recipient's front door when no drop box is provided at the front of the property. Three adult boxers that Schaffner owned attacked Bitting and bit her multiple times on the torso and lower extremities, Tully said.

Bitting, along with her husband, Kristopher Bitting, sued Schaffner, alleging negligence and violations of the Pennsylvania Dog Law and the Pennsylvania Rabies Prevention and Control in Domestic Animals and Wildlife Act.

Bitting sought punitive damages based on Dog Law Section 459-102, and argued that the word "attack" did not require the dogs to have previously bitten a person, but only required that the dogs had previously pursued someone to establish notice of a vicious propensity, Newell said.

The plaintiffs' complaint indicated that approximately one month before Bitting was bitten, her co-worker Joel Rosato had attempted to deliver a package to Schaffner's home. The dogs, the complaint said, acted aggressively and "ripped" the parcel from Rosato's hands. The complaint said Rosato "believes that the boxers would have bitten him" if a woman had not come from Schaffner's home and intervened.

The complaint said that on the day of Bitting's alleged attack, Schaffner admitted to Bitting that he knew his boxers had been aggressive toward her co-worker about a month before.

The complaint also said the dogs were unrestrained and acted aggressively toward Rosato on Jan. 21, 2013, despite Schaffner being found guilty of violating the Dog Law and Rabies Prevention Act on Jan. 10, 2013.

Schaffner filed preliminary objections, arguing that the plaintiffs needed to prove negligent or negligent per se violations of the Dog Law, and that a strict liability claim was legally insufficient. Schaffner also argued that the previous incident of the dogs acting aggressively was insufficient to put him on notice, and that violation of the Rabies Prevention Act did not provide for a punitive damages claim.

Tully held that a jury should be able to determine the sufficiency of the strict liability claim and the punitive damages arguments based on the prior incident. Tully additionally found that juries should be able to hear about Schaffner pleading guilty to a summary offense in connection with the incident.

"Defendant argued that a guilty plea to a prior summary offense is inadequate to support a claim based on collateral estoppel. However, plaintiff's plea for punitive damages is not based entirely on defendant's admission to the incident, but also on the underlying facts of the previous incident, which ultimately resulted in defendant being charged with the prior offense," Tully said. "Therefore, we do not find that the admission or the guilty plea is necessary to prove the previous incident. Instead, we find that prior charges and their resolution are merely a part of the facts that may be considered by the fact finder for the limited purpose of notice."

Regarding the Rabies Prevention Act, Tully sided with the defendant and held that the act did not support a punitive damages claim.

"Although this court is sympathetic to the trauma resulting to any person bitten by an unvaccinated animal, we do not find that the statute supports recovery for punitive damages," Tully said.

Attorney Michael Rosenzweig, a partner at Edgar Snyder & Associates who also teaches advanced torts, including dog-bite law, at the University of Pittsburgh School of Law, said he hadn't heard of punitive damages claims based on incidents that did not involve an actual dog bite before, but that he wasn't surprised that the claims would pass the preliminary objections stage.

Rosenzweig said the "one-bite rule," which generally holds that a dog can bite a person once before the owner has notice of a vicious propensity, is a misconception.

"If a dog chased down a Fed Ex employee and the Fed Ex employee throws the package down ... how's that any different than if he wasn't able to run and get out?" Rosenzweig said. "Because the first one played track in high school doesn't change the responsibility or prevent the owner from having to confine his animals."

Schaffner's attorney, John A. Lucy of Johnson, Duffie, Stewart & Weidner in Lemoyne, Pa., did not return a call for comment.

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(Copies of the six-page opinion in Bitting v. Schaffner, PICS No. 14-1124, are available from Pennsylvania Law Weekly. Please call the Pennsylvania Instant Case Service at 800-276-PICS to order or for information. [Account holders can use the online form to order.](#)) •

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