

IN THE CIRCUIT COURT OF GRANT COUNTY, WEST VIRGINIA

FREDDIE CHRIS JENKINS and
ELISHA CHASTITY JENKINS,
Plaintiffs,

v.

Case No. 11-CAP-1
Judge Lynn A. Nelson

RON DURHAM and
RHONDA DURHAM,
Defendants.

**FINAL ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND
ORDERING THE HUMANE EUTHANIZATION OF DEFENDANTS' DOG**

Now comes this Court, the Honorable Lynn A. Nelson presiding, after due consideration of the pleadings, motions, and in consideration of the testimony presented during the trial before this Court on March 17, 2011, and would make the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

1. On September 18, 2010, Plaintiff Elisha Jenkins hosted a birthday party for her daughter Felicity, who turned 3 on September 27, 2010, at the family's home in Sheer, West Virginia. Defendants and their son Matthew were guests of the Jenkins' family. When the Durhams were ready to leave the party, their son Matthew requested to stay later at the party and Mrs. Jenkins agreed to take Matthew back to the Durham residence after the party ended.
2. At approximately 7:00 p.m., Mrs. Jenkins, her daughter Felicity, and Mrs. Jenkins's brothers, Isaiah and Gavin, took Matthew back to the Durham residence. Defendant Rhonda Durham was also having a birthday at that time and the parties arrived at and were invited guests to her birthday party/cookout. Mrs. Durham testified that this was not to be a "kid" party, but nevertheless did not request Mrs. Jenkins leave the residence with her young daughter.

3. At approximately 10:00 p.m., while Mrs. Jenkins and Mrs. Durham and other individuals were on the porch of the Defendants' residence, Felicity went into the Defendants' yard where two dogs were tied out on separate dog chains. The dogs were tied in such a manner that they had their own separate tie-out circles and could touch nose to nose, but could not otherwise interact physically with one another. One dog was a Great Dane mix named Runt which the Defendant Ron Durham testified was a physically abused as a puppy and was rescued by Defendant Durham. The other dog is a Rottweiler mix. Both dogs were fully grown.

4. For some unknown reason, Felicity was attacked by the dogs. None of the parties, nor any witness presented to the Court observed the initial attack; however Felicity suffered extensive and serious injuries, to-wit: the top of the child's scalp was ripped from her head from behind the bangs line, from ear to ear, and half way down the back of her head; bites to her waist, thighs, and back¹.

5. The witnesses agree that at some point during the attack Felicity screamed and the witnesses agree that the area was lit poorly by the porch light and the light from a bon fire nearby. The witnesses do not agree on the order in which they arrived at the dog area to assist Felicity.

6. Gavin Judy, Mrs. Jenkins 14 year old brother, testified that he was one of the first (if not the first) person on the scene and observed both dogs holding onto Felicity. The Rotweiller had her waist and the Great Dane had her head. He testified that he kicked the dogs and that the Defendant Ron Durham grabbed Felicity and put him into his arms and he gave the girl to Mrs. Jenkins when she arrived.

¹ The Defendants stipulated to the severity of the injuries to keep the pictures out of evidence. The pictures were introduced in the magistrate court and were later located in the court file. To date, Felicity has been hospitalized for approximately four weeks and has additional surgery scheduled to repair her injuries. The Court takes judicial notice of the observable injury to Felicity inasmuch as she was a very well behaved spectator at the hearing.

7. Isaiah Judy likewise testified that both dogs had Felicity and that he was kicking the dogs.
8. Elisha Jenkins testified that when she came upon the scene it appeared that both dogs had her daughter.
9. Rhonda Durham testified that she did not see the incident and met Mrs. Jenkins coming back towards the house with her daughter and began to assist in Felicity's care.
10. Ron Durham testified that he was the first person on the scene and observed his Great Dane dog have Felicity on the ground while the Rottweiler was barking. He testified that he picked up the girl, gave her to Gavin to take from the area, and pinned both the Great Dane and the Rottweiler to the ground by their collars. Mr. Durham further testified that the dogs were being kicked by Isaiah Judy and possibly other people and that he was also being kicked and/or hit, causing him to let the Great Dane go². At that point the Great Dane lunged for Felicity and tore her scalp off while she was in Gavin's arms. Mr. Durham further testified that he removed the Great Dane to another tie out area further away from the trailer and that he did not allow anyone back into the area out of concern for the safety of other people on his property. Mr. Durham testified that he did escort the town policeman to the yard area to search for Felicity's scalp³.
11. Rachel Shahan testified that she was an ex-girlfriend of Isaiah Judy and that he sent her a text message from the hospital the night of the incident stating that "one dog" had attacked Felicity.

² Mr. Durham testified that he had recently had abdominal surgery and was not as strong as he normally was as a result which also contributed to him letting go of the dog.

³ There was some testimony on cross-examination that Mr. Durham prevented the paramedics from searching his property for the scalp when they initially arrived to transport Felicity. Mr. Durham testified that he would not let them search the area without him to supervise. It would appear, for whatever reason, that the paramedics did not retrieve and transport the scalp to the hospital with the child and that it was subsequently recovered that night by the town policeman.

12. Although it would appear that the Town of Bayard police officer was present at the location on the night of the incident, no formal statements were taken by any police officer that evening. The matter was reported to the Grant County Sheriff and a deputy did phone the residence while the emergency responders were there, however, no formal investigation was ever conducted of this incident by a law enforcement agency.

13. In the days following the incident, the Durhams voluntarily took the Great Dane to a veterinarian to be euthanized and had the testing performed to verify whether the dog had rabies. The dog tested negative.

14. On January 31, 2011, the Plaintiffs filed this civil suit in the Grant County Magistrate Court under W.Va. Code §19-20-20 requesting that the Rottweiler likewise be killed for its participation in the attack. After a six hour hearing, Magistrate Earle ordered the Rottweiler to be put down. It is from this decision that the Defendants' appeal.

15. W.Va. Code § 19-20-20 states as follows:

Except as provided in section twenty-one of this article⁴, no person shall own, keep or harbor any dog known by him to be vicious, dangerous, or in the habit of biting or attacking other persons, whether or not such dog wears a tag or muzzle. Upon satisfactory proof before a circuit court or magistrate that such dog is vicious, dangerous, or in the habit of biting or attacking other persons or other dogs or animals, the judge may authorize the humane officer to cause such dog to be killed.

16. W.Va. Code § 19-20-19 states as follows:

A person who violates any of the provisions of this article for which no specific penalty is prescribed is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than one hundred dollars, or imprisoned in the county jail not more than thirty days, or both fined and imprisoned. Magistrates shall have concurrent jurisdiction with the circuit courts to enforce the penalties prescribed by this article.

⁴ Section 21 of this article allows a person to purchase a special license to keep a dog considered to be vicious and requires the owner to secure the animal for the protection of others.

17. The Defendants have moved to dismiss the action alleging that it is improperly plead. The Defendant relies upon Jividen v. Law⁵, 194 W.Va. 705, 461 S.E.2d 451 (1995) to support their proposition that the Plaintiffs could only sue the Defendants civilly under a claim of strict liability or the common law tort of negligence. Defendants cite State v. Molisee, 180 W.Va. 551, 378 S.E.2d 100 (1989), in support of their argument that W.Va. Code § 19-20-20 is a purely criminal statute and does not afford the relief to the Plaintiffs that they have requested.

18. The Court has reviewed the entirety of Article 19, Chapter 20. It is important to note that this article governs agriculture and this specific chapter covers the regulation of dogs and cats. This chapter covers everything from requirements for dog licenses to kennel operation; dogs killing livestock to dogs in heat – a real hodgepodge of laws designed to govern both animals and their owners.

19. Particularly relevant to this issue in this case is whether W.Va. Code § 19-20-20 is a criminal statute only. The Court finds that it is not. The first sentence of the statute reads as follows: “Except as provided in section twenty-one of this article, no person shall own, keep or harbor any dog known by him to be vicious, dangerous, or in the habit of biting or attacking other persons, whether or not such dog wears a tag or muzzle.” This section of the statute governs the dog owner and has been considered a criminal statute and recognized as such by the Court in Molisee, 180 W.Va. at 522, 378 S.E.2d at 101⁶.

⁵ Defendants have also cited Arbaugh v. Pendleton Co. Bd. of Ed., 214 W.Va. 677, 591 S.E.2d 235 (2003) and Dawson v. Woodson, 180 W.Va. 307, 376 S.E.2d 321 (1988) relating to the recovery of damages for a suit upon a statute. Inasmuch as the Plaintiffs are not requesting damages, the Court does not find these cases relevant.

⁶ “On May 23, 1988, appellant's dog injured a child and the appellant was subsequently charged with the misdemeanor offense of harboring a vicious animal, pursuant to *W.Va.Code*, 19-20-19 and 20 (1981). Following a hearing on June 23, 1988, a magistrate determined that the dog was a vicious animal, and ordered it euthanized. *W.Va.Code*, 19-20-20.” State v. Molisee, 180 W.Va. 551, 552, 378 S.E.2d 100, 101 (1989). The Molisee case is the only case decided relative to this particular code section. However, the decision really had nothing to do with an analysis of the statute, but dealt instead with notice provisions on magistrate court appeals. Therefore, beyond the

20. The second sentence of W.Va. Code §19-20-20 is the operative portion for the purpose of this case. It requires that “[u]pon satisfactory proof before a circuit court or magistrate that such dog is vicious, dangerous, or in the habit of biting or attacking other persons or other dogs or animals, the judge may authorize the humane officer to cause such dog to be killed.” This sentence has nothing to do with a criminal act, but rather is a portion of the statute that governs dogs. The different standard of proof – “satisfactory proof” – rather than proof beyond a reasonable doubt leads this court to conclude that this portion of the statute is not criminal and that dogs are entitled to a “satisfactory proof” standard that the act alleged was committed by the dog.

21. The Court finds further support for this conclusion in the legislative scheme of Chapter 20 – particularly W.Va. Code §19-20-5 which reads as follows:

Every registered dog shall at all times wear a valid registration tag issued as provided in this article. The failure to have displayed or worn on any dog, at any time, of such valid tag shall be prima facie evidence that such dog is not registered and such dog shall be subject to be, and shall be, impounded, sold, or destroyed as hereinbefore or hereinafter provided.

From reading this statute, it is obvious that the statute is regulating the registration of the dog, not by criminally punishing the owner, but by instead seizing and disposing of the dog. The Court finds that the second section of W.Va. Code §19-20-20 functions in the same manner and is a regulation designed to punish bad dog behavior.

22. The next issue is whether the Plaintiffs had a right to bring an action for enforcement under W.Va. Code §19-20-20. The Court finds that the Plaintiffs’ Complaint was properly plead. For whatever reason, a criminal investigation was not conducted by the Grant County

recognition of the case procedural status, this case does not shed any light on the proper application of W.Va. Code §19-20-20.

Sheriff deputy upon being contacted by Grant County dispatch. This omission does not foreclose the Plaintiffs from attempting to have the dog destroyed. After a careful reading of similar language in W.Va. Code §19-20-18⁷, it would appear that the Plaintiffs have attempted to follow the statutory enforcement framework set up for aggrieved parties who have suffered a loss to livestock as a result of a dog attack. Under this statute, a livestock owner is required to put a dog owner on notice that their dog attacked the livestock. If the dog owner does not euthanize their dogs, then the livestock owner may petition the magistrate court for an order directing the sheriff to destroy the dogs. Interestingly, the legislature has established the same burden of proof – “satisfactory proof” – for a dog killing livestock as it has established in W.Va. Code § 19-20-20 for a vicious or dangerous dog. Certainly a parent of an injured child is entitled to the same procedural protections and opportunity to request the destruction of a dangerous dog as are afforded the owner of a dead sheep.

23. Now upon consideration of the evidence, the Court believes that satisfactory proof has been introduced to prove that both dogs participated in the attack upon Felicity Jenkins. The Court recognizes that there is conflicting testimony as to what each witness observed, but the Court believes that the location of the bite marks, in the leg/hip area and the scalp tear, indicate

⁷ § 19-20-18. Same--Duty of owner to kill dog; proceeding before magistrate on failure of owner to kill
The owner or keeper of a dog that has been worrying, wounding, chasing or killing any sheep, lambs, goats, kids, calves, cattle, swine, show or breeding rabbits, horses, colts or poultry not the property of the owner or keeper, out of his enclosure, shall, within forty-eight hours, after having received notice thereof in writing from a reliable and trustworthy source, under oath, kill the dog or direct that the dog be killed. If the owner or keeper refuses to kill the dog as hereinbefore provided, the magistrate, upon information, shall summon the owner or keeper of the dog, and, after receiving satisfactory proof that this dog did the mischief, shall issue a warrant on application being made by the owner of the sheep, lambs, goats, kids, calves, cattle, swine, show or breeding rabbits, horses, colts or poultry killed; and give it into the hands of the sheriff, who shall kill the dog forthwith or dispose of by other available methods. The cost of the proceedings shall be paid by the owner or keeper of the dog so killed, including a fee of fifty cents to the officer killing the dog. The owner or keeper of the dog so killed shall, in addition to the costs, be liable to the owner of the sheep, lambs, goats, kids, calves, cattle, swine, show or breeding rabbits, horses, colts or poultry or to the county commission for the value of the sheep, lambs, goats, kids, calves, cattle, swine, show or breeding rabbits, horses or colts or poultry so killed or injured.

the work of more than one animal. The Court likewise finds that the location of the child – in between the two dog tie-outs and not in the Great Dane's tie out area alone – indicate that both dogs certainly had the opportunity to attack the child and unfortunately did. Additionally, the Court believes that if Mr. Durham witnessed the Great Dane grab the child's scalp from her head, he would have made an attempt to retrieve same from the dog's mouth when he secured the dog and removed it to another chain rather than having to search for it much later with the town police officer, leading the Court to believe that Felicity's scalp had already been detached prior to her being picked up from the ground. Based upon the totality of the evidence, the Court finds that by satisfactory proof, that the Rottweiler dog did participate in the attack and is a dangerous dog under W.Va. Code § 19-20-20.

ACCORDINGLY, it is hereby ORDERED:

1. The Defendants *Motion to Dismiss* is DENIED.
2. Objections to any adverse rulings of the Court are hereby SAVED.
3. The Grant County Sheriff shall take custody of the Rottweiler dog owned by Defendants Ron and Rhonda Durham and shall transport same to a licensed veterinarian who shall, upon presentment of this order by the Sheriff, humanly euthanize the animal.
4. Judgment is entered against the Defendants for the costs of these proceedings in both magistrate court and in circuit court and for the costs to euthanize the dog.
5. In anticipation of the Defendants' appeal, the Court will automatically stay the execution of this Order to allow the Defendants the opportunity to pursue an appeal. The Defendants are directed to file a copy of their Notice to Appeal with the Court. If the Notice to Appeal is not filed with the Grant County Circuit Clerk by April 29, 2011, the Stay will be lifted,

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and the Circuit Clerk shall notify the Sheriff of same. If the appeal is docketed, but is ultimately unsuccessful, the Circuit Clerk shall provide a copy of the mandate or opinion from the Supreme Court of Appeals of West Virginia to the Sheriff and the Sheriff shall execute this Order. The Sheriff shall provide proof that the dog was euthanized to the Circuit Clerk to be placed in the file.

6. Defendants are directed to secure the Rottweiler during the pendency of any potential appeal to assure the safety of the public and any invitees or guests to their home.

7. The Circuit Clerk shall provide a copy of this Order to all counsel of record and to Magistrate Earle.

8. The Circuit Clerk shall remove this matter from the docket and place it among the matters ended upon receipt of verification from the Sheriff that the dog has been euthanized.

ENTERED MAR 3 0 2011

ENTERED this ^{30th} day of March 2011.



JUDGE