

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-0745

**RON DURHAM AND RHONDA
DURHAM, Petitioners**

V.)

Appeal from a final order
of the Circuit Court of Grant County
(11-Cap-1)

**FREDDIE CHRIS JENKINS, and
Elisha Chastity Jenkins, Plaintiffs
Below, Respondents**

Petitioners' Brief

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ASSIGNMENTS OF ERROR

The Circuit Court Erred by application of West Virginia Code Section 19-20-20 to a civil matter.

STATEMENT OF THE CASE

On or about the 18th day of September, 2011, the Petitioners hosted a birthday party at their residence. The event took place at their home in Gorman, Grant County, West Virginia. The Petitioners' home is situated on a large unfenced lot that fronts a river. The birthday party was an adult only party and the incident that has caused this Court to review this matter occurred at 10:00 o'clock at night.

Sometime before 10:00 o'clock p.m. Elisha Jenkins arrived at the gathering with two of her brothers and her son Garvin and her two year old toddler daughter Felicity Jenkins. While the adults enjoyed their evening, about 10:00 o'clock p.m. the toddler girl, Felicity Jenkins, separated herself from the gathering and walked unsupervised away from the party in the direction of the river bank and into an area where two dogs were chained. There was an attack on the child, the child screamed, and adults arrived finding one of the dogs standing and posturing over the child. The dog standing over the child was named Runt, he was a Great Dane mixture weighted about 83 lb., and was a mutt.

Testimony later revealed that before being adopted by the Plaintiffs, Runt was an abused puppy. The Plaintiffs adopted him. The other dog, Duke, was also a mutt, but a Rottweiler mixture, and was chained in his own area. The two dogs were chained in such a way so that they could not interact with one another and that there was a gap between their areas.

When, in the middle of the night, a high pitch of the two year old Felicity Jenkins' scream was heard the parties ran to the area of the dogs to discover that Felicity Jenkins had wandered into the general area where the two dogs were chained and that Runt was standing over her posturing in an aggressive manner. The testimony of who arrived first and what they witnessed differs depending on which party testified. The Respondents claim that what they witnessed were two dogs that were playing "tug of war" with the child. The Petitioners claim that due to the layout of the dog area and the length of the chains it was impossible for the two dogs to interact, as one dog's area did not overlap with the others, and that it was Runt who had the child when the Respondent, Ron Durham, arrived.

At this point, although Runt was standing over the child, no one could conclusively state whether the child had any injuries from a dog attack. After the child was retrieved, and while the Petitioner, Ron Durham, was holding both dogs down to the ground by their collars, having to stretch out his arm to do so as the area of the dogs did not overlap, the Respondent's brother began to kick Runt, and the Petitioner, Ron Durham. Due to the kicking Runt slipped out of the hold that the Petitioner had of him. Then, Runt lunged at Felicity Jenkins once more, as she was being held in her brother's arms. The Respondent, Elisha Chastity Jenkins, testified that it was Runt who grabbed the toddlers hair.

Felicity Jenkins sustained serious injuries and was rushed to the hospital. Later it was discovered that a part of her scalp had been torn off, which was retrieved by the Petitioners and Emergency Response Personnel. In the course of the next few days the Petitioners euthanized Runt.

The Respondents filed suit against the Petitioners in Magistrate Court, Grant County, West Virginia asking the Court to euthanize the other dog, Duke, pursuant to West Virginia Code Section 19-20-20. After a bench trial, the Court found that the Respondents could use West Virginia Code Section 19-20-20 as basis for a civil cause of actions, and ordered the dog Duke to be euthanized. The Plaintiffs appealed to the Circuit Court of Grant County West Virginia. Again, the Plaintiffs argued that West Virginia Code Section 19-20-20 was not a statute that would allow the Respondents to sue the Plaintiffs in civil court. Upon a hearing before the Circuit Court where Plaintiffs' Motion to Dismiss was argued and denied, as well as evidence and testimony was presented, the Circuit Court found that West Virginia Code Section 19-20-20 did give Respondents civil grounds to enforce a regulatory statute and force the Petitioners to euthanize Duke.

SUMMARY OF ARGUMENT

West Virginia Code Section 19-20-20 is a criminal statute with no legislative intent to create a tort action. A civil cause of action cannot be created, and individuals cannot be compelled to euthanize a dog in a civil action pursuant to W.Va. Code 19-20-20.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument in this matter is not necessary pursuant to the criteria in Rule (18) of the Rules of Appellate Procedure and that this case may be disposed by memorandum decision.

ARGUMENT

I. THE CIRCUIT COURT MISAPPLIED A CRIMINAL STATUTE AND ADOPTED A CRIMINAL REGULATION TO COMPEL EUTHANIZATION OF A DOG IN A CIVIL ACTION.

West Virginia Code § 19-20-20 is a regulatory statute that authorizes regulatory agencies to apply to circuit court or magistrate to euthanize an animal upon satisfactory proof that such is vicious, dangerous, or in the habit of biting or attacking others.

More particularly West Virginia Code §19-20-20 states:

“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. 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.”

A further reading of Article 19 of the West Virginia Code reveals that a previous statute West Virginia Code §19-20-19 relates to other statutes of that Article, if those other statutes fail to mention a specific remedy. More particular West Virginia Code §19-20-20 states:

“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.”

In the case at hand, the Respondents attempted to utilize West Virginia Code §19-20-20 to compel the Petitioners to euthanize their dog. The question that arose in the Circuit Court of Grant County, West Virginia, was whether West Virginia Code §19-20-20 can be utilized in a civil suit to allow one party that is not a regulatory agency to compel euthinization. The question is essentially a question of standing. In both the Magistrate Court and the Circuit Court of Grant County, West Virginia, the Petitioner moved to dismiss the civil action for failure to plead a civil cause of action and argued that this particular statute did not in itself create one. The Petitioner argued that West Virginia Code § 19-20-20 is a regulatory statute that can be utilized in conjunction with criminal prosecution for harboring a dangerous animal. It should be noted that a criminal interpretation of W.Va. Code §19-20-20 requires the finding of knowledge by the defendant that a dog is dangerous or vicious, or showing of proof that a dog has a habit of biting.

Alternatively, the Respondents had other civil cause of action to sue the Petitioners, but they were causes of actions where the remedy is financial, not necessarily where an animal can be euthanized. The Supreme Court of Appeals of West Virginia has addressed the issue of bringing forth a tort claim where a domestic animal caused injury. *Jividen v. Law*, 194 W. Va. 705, 707 (1995). In *Jividen v. Law*, the Court said that two separate causes of action could be used by a party injured by a domestic animal. *Id.* The first cause of action is one that is grounded in the doctrine of strict liability and requires that the injured party show that 1) the animal had a dangerous propensity, and 2) that the owner had actual or constructive knowledge of such propensity. *Id.* The second cause of action is one

that is based on the common law tort action of negligence and requires that the plaintiffs prove that the owner failed to exercise ordinary care, such that would be necessary to prevent injury, and that the injury could not be reasonably foreseeable, based on the animals past behavior. *Id.*

In the case at hand the Respondents did not allege in their initial complaint or in the subsequent trials any facts to support their case under the doctrine of strict liability or negligence. The Respondents argument throughout the case was that if a dog attacked a child the Court could utilize West Virginia Code §19-20-20, pursuant to a civil complaint, to compel the owner to euthanize the dog, without the requirement of proving knowledge of dangerous or violent propensity of the Petitioner.

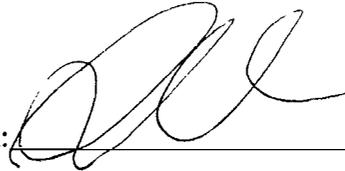
Due to the confusion of application of the statute in a civil matter, the Petitioners moved the Circuit Court for Judicial Notice regarding the exact elements that the Respondents were required to prove to sustain their cause. The Court stated that if the Court found the animal to be vicious, dangerous, or in the habit of biting or attacking other persons, upon satisfactory proof, the Respondents met their burden. The Court did not make knowledge an element of the case, and thus the the Respondents did not have to offer any proof of any knowledge, and did not offer any throughout the course of the trials.

CONCLUSION

The Circuit Court should be reversed on its conclusion that W.Va. Code Section 19-20-20 can be utilized via a civil action by private parties to compel other private

individuals to euthanize their dog, when the alleged attack occurred while the dog was confined in his area and no the Respondents were not required to prove any that Petitioners had any knowledge of dangerous or vicious propensity.

Signed:

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Agnieszka Collins, Attorney (WV Bar #11092)
Counsel of Record for Petitioner

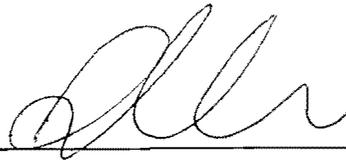
CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of July, 2011, true and accurate copies of the foregoing **Petitioner's Brief** were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

Counsel for Respondent

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Signed: _____



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