No. 325091

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

JAY RHODES,

Plaintiff - Appellant,

v.

RODNEY MacHUGH,

Defendant – Respondent

BRIEF OF RESPONDENT

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I. INTRODUCTION

This lawsuit stems from an unfortunate incident that caused injuries to Appellant Jay Rhodes ("Rhodes"). Rhodes had permitted his neighbor and friend, Appellant Rodney MacHugh ("MacHugh"), to keep a male sheep ("buck sheep" or "ram") on Rhodes' property. On August 20, 2012, Rhodes went into his yard to turn on the water. He saw the buck sheep and there were no indications it was acting abnormally. Rhodes had his back to the sheep while he reached up to open the water valve. Without any warning, the buck sheep butted him from behind and knocked him to the ground and continued to inflict injuries until Rhodes was able to get away.

Because there was no evidence that MacHugh knew or had reason to know that the animal had dangerous tendencies, MacHugh moved for summary judgment. At the lower court, Rhodes argued that strict liability should apply and that liability without *scienter* be imposed on the owner of a ram. Summary judgment in favor of MacHugh was granted and this appeal ensued. On appeal, Rhodes urges this court to expand the scope of animal liability and to adopt a rule of strict liability for harm caused by a ram. Because precedent should be followed and because Washington law should not be changed in this manner, the decision of the lower court should be affirmed.

II. STATEMENT OF THE CASE

Pursuant to RAP 10.3(b), Respondent is satisfied with the statement of the case in the brief of Appellant and no additional statement is needed.

III. ARGUMENT

A. Washington Law Requires *Scienter*

Since the time of early cases, Washington courts have required proof that an owner have knowledge that a domestic animal had dangerous propensities that were abnormal to its class, or *scienter*, in order to impose strict liability for harm caused by that animal. In the case of *Lynch v. Kineth*, 36 Wash. 368, 78 P. 923 (1904), the Washington Supreme Court articulated and adopted the following rule:

> The owner or keeper of a domestic animal not naturally inclined to commit mischief, while bound to exercise ordinary care to prevent injury being done by it to another, is not liable for such injury if the animal be rightfully in the place when the mischief is done, unless it is affirmatively shown, not only that the animal was vicious, but that the owner or keeper had knowledge of the fact. When such *scienter* exists, the owner or keeper is accountable for all the injury such animal may do, without proof of any negligence or fault in the keeping, and regardless of his endeavors to so keep the animal as to prevent the mischief.

Id. at 370-1. Under this standard, an owner is not liable in negligence if the animal is not trespassing or running loose, but the owner may be held strictly liable if the owner has knowledge that the animal was "vicious."

More modern cases have adopted the Restatement standard for animal liability. *See Arnold v. Laird*, 94 Wn. 2d 867, 621 P.2d 138 (1980). The *Arnold* case involved an attack by a dog and the court wrote as follows:

> The Restatement (Second) of Torts (1977) recognizes two separate causes of action regarding injury caused by animals. First, according to section 509, if the dog has known dangerous propensities abnormal to its class, the owner is *strictly liable*. Second, section 518 provides that if there are no known abnormally dangerous propensities, the owner is liable only if he is *negligent* in failing to prevent the harm.

Id. at 871 (emphasis in original). With respect to strict liability, the Restatement reads as follows:

> (1) A possessor of a domestic animal that he knows or has reason to know has dangerous propensities abnormal to its class, is subject to liability for harm done by the animal to another, although he has exercised the utmost care to prevent it from doing the harm.
> (2) This liability is limited to harm that results from the abnormally dangerous propensity of which the possessor knows or has reason to know.

Restatement (Second) of Torts § 509 (1977). As with traditional Washington cases, strict liability is only imposed if the owner of the animal has prior knowledge that the animal has abnormally dangerous propensities. In other words, *scienter* is required to impose strict liability for harm caused by a domestic animal.

In this case, there is no evidence that MacHugh knew or had reason to know the buck sheep was dangerous. As a result, summary judgment was required under Washington law.

B. Washington Law Should not be Changed

1. A Restatement Comment is Insufficient to Warrant a Change in the Law.

Because Washington law does not support Rhodes' claims, this appeal invites the court to change the law to impose liability without proof of *scienter*. There is no primary authority cited to support the request to expand the law and the only support is a suggestion for change contained in a Restatement comment. This suggestion is part of the following passage:

> [Domestic] animals are not, as a general matter, sufficiently dangerous to justify strict liability; it is only particular animals among more general species that turn out to have abnormally dangerous tendencies. This assumption is generally sound. It can be argued, however, that there are special cases that the law should recognize. For example, while cattle (apart from trespassing) do not involve a high danger level, bulls can be assessed as inherently dangerous... Overall, the common law has been satisfied with the generalization that livestock and dogs are not excessively dangerous and has applied this generalization to all livestock and dogs. In the future, courts might wish to give consideration to particular genders or breeds of a species that involve danger levels uncommon for the species itself. If so, it might be appropriate to impose strict liability, without individualized scienter, on the owner of such an animal.

Restatement (Third) of Torts, § 23, cmt. e (2010). The reporter's notes contain no case citations to support the suggestion to impose strict liability on "particular genders or breeds." This comment is not a restatement of what the law is, but rather an argument about what the author thinks the law ought to be.

2. There is no Case Law Support for a Change in the Law

In addition to the fact that no case is cited to support the proposal to expand liability, research of U.S. jurisdictions revealed no case where strict liability was imposed for harm caused by the male of a species, but not the female. In at least one state, though, the argument has been made and rejected. In the case of *Mosely v. Barnes*, 538 S.E. 2d 873 (Ga. App. 2000), the trial court denied summary judgment and the decision was appealed. The court of appeals found "that Bullwinkle [the bull] had never acted aggressively toward anyone, that he was, to the contrary, uncommonly gentle, and that the Moseleys [defendants] had no knowledge of any aggressive behavior by Bullwinkle." *Id.* at 874. The plaintiff's claim was based on strict liability; however, the court declined to hold that bulls are abnormally dangerous and required proof of *scienter*.

Because there was no such proof, the lower court was reversed and summary judgment in favor of the defendants was granted.

It should also be noted that the Washington Supreme Court has examined the concept of whether there is a different standard for the male of a species. In the case of *Lander v. Shannon*, 148 Wash. 93, 268 P. 145 (1928), the court wrote that it cannot "be said as a matter of law or that it is judicially known, that bulls, as a class, are dangerous." *Id.* at 98. *Lander* involved an argument that the plaintiff assumed the risk of his injuries by being near a bull; however, the court concluded that there was no evidence that the plaintiff was aware that the bull that attacked him was more "vicious" than other bulls. Thus, Washington law seems to require *scienter* of abnormally dangerous propensities for a particular animal despite the fact that it is the male of the species.

3. Requirements to Overturn Precedent Have Not Been Met

In addition to the lack of legal support for changing the law, the requirements to overturn precedent have not been satisfied. The Washington Supreme Court has explained the role of precedent as follows:

> Stare decisis is a doctrine developed by courts to accomplish the requisite element of stability in court-made law, but is not an absolute impediment to change. Without

> the stabilizing effect of this doctrine, law could become subject to incautious action or the whims of current holders of judicial office.

In re Rights to Waters of Stranger Creek, 77 Wn. 2d 649, 653, 466 P.2d 508 (1970). In the *Stranger Creek* case, the court noted the importance of *stare decisis*, but also recognized that sometimes the law needs to be changed due to circumstances. The court held that before such changes occur, *stare decisis* "requires a clear showing that an established rule is incorrect and harmful before it is abandoned." *Id.* In this case, the requirement that the current rule be incorrect before being abandoned has not been met. As noted above, research found no jurisdiction that imposes liability on the male of a species without *scienter* and the current Washington rule is consistent with the rest of the country. There is also no evidence that the current rule is harmful. Certainly, the result of the rule is that Rhodes does not recover tort damages from MacHugh; however, there is no evidence of a widespread problem. There is no epidemic of uncompensated victims of ram attacks and no evidence of harm that would support abandoning the rule.

4. Uncertain Consequences Justify not Changing the Law

Finally, the court should consider the consequences of a decision to radically change tort law. A decision to expand the law to impose strict

liability for injuries caused by a male domestic animal will have consequences beyond the result of one case. The impact on affected farmers and ranchers and the general public is unknown and could be far reaching. Will expanded liability result in increased insurance costs? Will expanded liability result in increased costs to confine or otherwise handle animals? Will it cause some to leave the enterprise of animal husbandry? How will the food supply be affected? Will out-of-state farmers and ranchers have a competitive advantage due to less liability exposure?

These are but a few of the questions raised by a proposal to expand liability. If such a change is to be considered, the ramifications should be completely understood and such action is most properly left to the legislature.

VI. CONCLUSION

Washington law requires that the owner of a domestic animal have knowledge that the animal has dangerous propensities that are abnormal to its class. Based on this standard, summary judgment was properly granted in this case. Rhodes respectfully requests that this court abandon that rule and expand liability. For the reasons discussed above, that invitation should be declined the decision of the lower court affirmed.

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Dated this 3rd day of October, 2014

LAW OFFICE OF BARRY J. GOEHLER

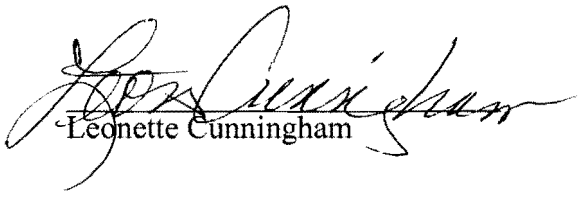
By: _____
Barry J. Goehler, WSBA No. 37660
Of Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of October, 2014, I served the foregoing BRIEF OF RESPONDENTS on the following attorney by mailing a true copy thereof, certified as such, contained in a sealed envelope, with postage paid, addressed to:

David A. Williams
Attorney at Law
9 Lake Bellevue Drive, Suite 104
Bellevue WA 98005
Attorney for Appellant

and deposited in the post office at Portland, Oregon on this 3rd day of October, 2014.



Leonette Cunningham