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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

DIXIE CARR and DAVID BRADY, Appellees,	)	Filed February 14, 1977
vs.	)	3
HAROLD ROCKZIEN, Appellant.	)	No. 2-57454

Appeal from Jones District Court -- Robert Osmundson, Judge

Appellee was awarded damages to an auto as a consequence of hitting the defendant's dog. Suit was filed under common law negligence and §351.28, The Code. Appellant appeals.

AFFIRMED.

Shuttleworth & Ingersoll, of Cedar Rapids, Robert R. Rush, counsel for appellant.

Goodenow & Wright, of Maquoketa, Ken Wright, counsel for appellees.

Heard by Allbee, C. J., Donielson, Snell and Oxberger, JJ; Carter takes no part, J.

DONIELSON, J.

Essentially the facts are not in dispute. On November 7, 1972, at approximately 1:00 p.m., the plaintiff-Dixie Carr, age 21, accompanied by her infant son, borrowed plaintiff-David Brady's 1968 Karmann Ghia automobile. At approximately 7:30 p.m. on that date, she was traveling in Jones County on Highway 64 with her car lights on, as it was dark, and she was traveling on a good and fair day with dry roads. She was traveling in this automobile at about 55 miles an hour.

A dog belonging to the appellant-Harold Rockzien "jumped" out in front of an oncoming auto and then jumped back in front of the appellee-Dixie Carr. The dog was a black German Shepard, 10 or 12 years old. She hit the dog, doing considerable damage to the automobile and sustaining some personal injury resulting in her medical treatment by a doctor.

There is no evidence that the dog charged or attacked the automobile, and the record reflects that this dog had no history of chasing autos or attacking or biting persons.

The appellees sued on two basis:

1. Common law negligence based upon the defendant-Rockzien permitting his dog to run at large on a public highway.
2. Under §351.28, The Code, which states:

> "The owner of any dog, whether licensed or unlicensed, shall be liable to the party injured for all damages done by said dog, except when the party damaged is doing an unlawful act, directly contributing to said injury. This section shall not apply to any damage done by a dog affected with hydrophobia unless the owner of such dog had reasonable grounds to know that such dog was afflicted with said malady, and by reasonable effort might have prevented the injury."

The trial court found §351.28, to be of "dog-bite" statute but held for the appellee and granted recovery based on the negligence issue.

We affirm, however, our affirmation is based upon the belief that the trial court granted proper relief but for the wrong reason. The relief should have been granted under §351.28, The Code. We decide that the trial court reached what we consider to be the right result but for the wrong reason. This court may affirm under the authority of Denniston and Partridge Co. vs. Mingus, 179 N.W.2d 748, at 755 (Iowa 1970) where it states:

> "... 'if the trial court reached the right result any error in its reasoning or findings is deemed not prejudicial and is of no avail to defendants here.' See Lautenbach vs. Meredith, 240 Iowa 166, 168, 35 N.W.2d 870, 871. Since we conclude the trial court reached the right result on defendant's appeal from the decree awarding plaintiff judgment, error, if any, in its findings does not help defendant on this appeal."

I

The court found for the appellee by finding the appellant negligent in failure to restrain his dog and permitting it to run at large while not using ordinary care under the circumstances.

We will not give undue discourse to this area of the common law negligence theory. Since there is no evidence in the record to indicate the dog was vicious or mischievous and that the owner had either actual or constructive notice of this vicious or mischievous propensity. Brown vs. Moyer, 186 Iowa 1322, 1325, 171 N.W. 297 (1919). See also Alexander vs. Crosby, 143 Iowa 50, 52, 119 N.W. 717 (1909) and Trumble vs. Happy, 114 Iowa 624, 628, 87 N.W. 678 (1901).

Dogs indeed by Iowa law have been free commoners and the owners had no duty to restrain the dogs. Brown vs. Moyer, *supra;*

see Melicker vs. Sedlacek, 189 Iowa 946, 957, 179 N.W. 197 (1920); 3A C.J.S. *Animals* §186 at 685 (1973); 4 Am.Jur.2d *Animals* §114 at 365 et sequence (1962).

In this instance, appropriate disposition of the case does not require us to change the Iowa negligence law or common law that has been in effect in this state, therefore, we will not do so. Noting, however, that if we were to decide this by established common law negligence, the record is devoid of any evidence of vicious or mischievous conduct by the animal and knowledge either actual or constructive of these characteristics of the animal by the owner as required by the Iowa case law.

II

The trial court held that 351.28, The Code, was a "dog-bite" statute, and, therefore, inapplicable to the facts at hand. We disagree. Historically, the decision to abrogate the common law was decided long ago in Puls vs. Powelson, 142 Iowa 604, at 606, 121 N.W. 1 (1909) where it states:

> "... The action was brought under the statute. The statute creates an absolute liability on the part of the owner of a dog for damages done by him, regardless of knowledge or negligence on the part of the owner. ..."

This was reaffirmed in 1969 in Peters vs. Lyons, 168 N.W.2d 759, at 766 (Iowa 1969) where it states:

> "VII. Kresge also argues that indemnity isn't available here because our dog statute, section 351.28, imposes absolute liability, which is a nondelegable duty. If the dog gets loose the owner cannot shift the blame to another. It is true the statute imposes absolute liability. Puls vs. Powelson, 142 Iowa 604, 606, 121 N.W. 1, so holds: '* * * . The action was brought under the statute. The statute creates an absolute liability on the part of the owner of a dog for damages done by him, regardless of knowledge or negligence on the part of the owner. In this respect

> the statute may be said to be drastic, though in the interest of public policy.'"

The appellant, in support of the lower court's holding, contends the statute should apply only when damage occurs from a dog bite or attack, or in other words, a specific class of injury. In view of the language of the statute and its history, this court cannot accept this interpretation. The statute provides both an absolute and general liability and is not restricted to a specific class of injury.

If indeed the statute is ambiguous as to the class of injury and could be read as only a dog-bite statute, we then refer to our statutory responsibilities pursuant to rule 344(13), Rules of Civil Procedure, and §4.2-4.6, The Code, which requires us to find the legislative intent in such construction.

The legislative history shows that this section in the Iowa Code of 1913 * was substantially more limited in its application.

* "Section 2340. DOGS KILLED. It shall be lawful for any person to kill any dog caught in the act of worrying, maiming or killing any sheep or lamb, or other domestic animal, or any dog attacking or attempting to bite any person, and the owner shall be liable to the party injured for all damages done, except when the party is doing an unlawful act. The provisions of this section shall not apply to any damage done by a dog affected with hydrophobia. ..."

In 1924, the Code was essentially amended to change it to the wording of the statute as it now exists. That reenforces our view that the legislative intent at that time was to broaden the legal accountability of owners of dogs. This comports with the view in other states. See Tasker vs. Arey, 114 Me. 551, 96 A. 737 (1916), which involves a similar Maryland statute and permits recovery where a car swerved acrossed a ditch and tipped over while avoiding a dog. See also Grannis vs. Weber, 107 Conn. 622, 141 A. 877 (1928), under a similar statute where the dog had jumped in front of a car causing the car to swerve and subsequently turning over injuring the plaintiff. See also Malone vs. Steinberg, 138 Conn. 718, 723, 89 A.2d 213 (1952).

We adopt the view of Puls vs. Powelson, 142 Iowa 604, at 606, 121 N.W. 1 (1909), and Peters vs. Lyons, 168 N.W.2d 759, at 766 (Iowa 1969), with respect to absolute liability further viewing the intent of the legislative enactment to have this as a general liablility statute rather than a limited liability statute, with recognition that dogs are getting bigger, cars are getting smaller urban areas are expanding and rural areas are decreasing. All of which gives to this court the belief that the legislative intent and public policy is and was designed to place or limit the free commoner status of dogs in the enactment of §351.28, The Code.

AFFIRMED.