STATE OF MICHIGAN

COURT OF APPEALS

LILLIAN HILL, Plaintiff-Appellee, v DONALD HOIG and MARGE HOIG, Defendants-Appellants.	FOR PUBLICATION September 23, 2003 9:10 a.m. No. 240553 Sanilac Circuit Court LC No. 00-027591-NO Updated Copy November 21, 2003

Before: Whitbeck, C.J., and O'Connell and Cooper, JJ.

COOPER, J.

Following a jury trial, the trial court awarded plaintiff Lillian Hill $8,000, plus costs, for injuries that she sustained from a poodle dog belonging to defendants Donald and Marge Hoig. Defendant appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was walking on the sidewalk when she witnessed a truck hit defendants' dog. The dog was lying in the middle of the road and plaintiff decided to move him to safety. In the process of moving the dog, plaintiff sustained a bite on her right hand. Defendants asserted that their dog did not have a history of aggressive behavior or running loose. Plaintiff filed a complaint against defendants alleging liability pursuant to the Michigan dog-bite statute, MCL 287.351, or, in the alternative, common-law negligence.

At trial, defendants requested that the trial court instruct the jury that provocation was a complete defense under both of plaintiff's theories. The trial court denied defendants' request, noting that the case law defendants relied on was decided before Michigan became a comparative negligence state. The trial court concluded that while provocation was clearly an available defense under the dog-bite statute, it would not serve to bar plaintiff's common-law negligence claim. The jury ultimately denied plaintiff's claim under the dog-bite statute because it determined that defendants' dog was provoked. However, the jury granted plaintiff's common-law negligence claim, finding that defendants' negligence was the proximate cause of plaintiff's injuries. The jury did not find any negligence on the part of plaintiff.

On appeal, defendants argue that the trial court erroneously instructed the jury on common-law negligence where the dog-bite statute abrogates such claims. We disagree. Claims of instructional error are reviewed de novo on appeal. *Cox v Flint Bd of Hosp Managers*, 467

Mich 1, 8; 651 NW2d 356 (2002). However, the trial court's determination that a jury instruction is accurate and applicable to the case is reviewed for an abuse of discretion. *Stevens v Veenstra*, 226 Mich App 441, 443; 573 NW2d 341 (1997). "Jury instructions should include 'all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them.'" *Cox, supra* at 8, quoting *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). To the extent this case presents an issue of statutory construction, our review is de novo. *In re RFF*, 242 Mich App 188, 198; 617 NW2d 745 (2000).

Defendants have failed to cite any authority in their appellate brief specifically indicating that the dog-bite statute abrogates recovery under common-law comparative negligence for dog-bite injuries. See *Chapdelaine v Sochocki*, 247 Mich App 167, 174; 635 NW2d 339 (2001). More importantly, when the Supreme Court interpreted the current dog-bite statute in *Nicholes v Lorenz*, 396 Mich 53, 59; 237 NW2d 468 (1976), it noted that "[t]o provide redress for dog-bite victims, the Legislature by statute *retained the common-law remedy* but in addition enacted the [instant dog-bite] statute . . . ." (emphasis added); see also *Bradacs v Jiacobone*, 244 Mich App 263, 265 n 1; 625 NW2d 108 (2001) (noting that the dog-bite statute did not supersede or extinguish a common-law cause of action against negligent dog owners). Consequently, defendants have failed to establish any error.

Defendants further contend that even if common-law negligence is a viable claim, the trial court erroneously refused to instruct the jury that provocation was a complete defense. Again we disagree.

Defendants' argument at trial revolved around *Grummel v Decker*, 294 Mich 71, 77; 292 NW 562 (1940), which held that "[u]nder the common law, contributory negligence upon the part of the plaintiff is a defense" in a dog-bite case. *Grummel* concluded that any provocation by the plaintiff was therefore a complete defense to a common-law negligence action. *Id*. Since the Supreme Court decided *Grummel*, however, Michigan has replaced the doctrine of contributory negligence with the doctrine of comparative negligence. MCL 600.2959; see also *Placek v Sterling Hts*, 405 Mich 638, 650; 275 NW2d 511 (1979). Comparative negligence only serves to reduce the amount of damages a plaintiff may recover to the extent that the plaintiff was negligent, whereas any negligence on the part of the plaintiff would bar recovery under the doctrine of contributory negligence. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 523; 629 NW2d 384 (2001); *Grummel, supra* at 77. Thus, the trial court properly refused to instruct the jury that a finding of provocation would bar plaintiff's recovery under the common law.

Affirmed.

Whitbeck, C.J., concurred.

/s/ Jessica R. Cooper
/s/ William C. Whitbeck