

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. 00-27591-NO

Updated Copy  
November 21, 2003

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

O'CONNELL, J. (*dissenting*).

I respectfully dissent. In *Grummel v Decker*, 294 Mich 71, 77; 292 NW 562 (1940), our Supreme Court expressly held that provocation was a complete defense to a common-law dog-bite claim. Our Supreme Court has not overturned *Grummel*. The majority opinion essentially concludes that our state's adoption of comparative fault extinguished the defense of provocation in common-law dog-bite cases. But this analysis overlooks the fact that contributory negligence and provocation are distinct defenses. *VonBehren v Bradley*, 266 Ill App 3d 446, 449-450; 640 NE2d 664 (1994). While contributory negligence eliminates a plaintiff's claim because public policy demands that a plaintiff reasonably act to protect his own safety, provocation eliminates a dog owner's duty to prevent the dog from doing damage. *Id.* at 448-450. So the provocation defense resembles the "open and obvious danger" doctrine and other duty-based defenses that remain unaltered by the adoption of comparative fault. *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 403; 491 NW2d 208 (1992); see also *O'Sullivan v Shaw*, 431 Mass 201, 206; 726 NE2d 951 (2000) (listing the authorities and majority jurisdictions that find accordingly).

I again note that our Supreme Court established the defense, so we should resolve any doubt about its continued viability in favor of deference. *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993). In my opinion, the trial court erred when it failed to determine initially whether the defense eliminated the common-law claim and later refused to instruct the jury on the defense's applicability. I would vacate the judgment and remand for a new trial on plaintiff's common-law claim.

/s/ Peter D. O'Connell