

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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Barking, Growling and Lunging Toward Strangers Do Not Make a Dog Vicious

By James Swaim

In *Hiner v. Mojica*, a published decision of the Michigan Court of Appeals, Plaintiff (a cable service provider) and his partner were attacked by Defendant's dog while walking across Defendant's lawn. The dog had acted aggressively toward Plaintiff's partner on a past visit, at which time Defendant was requested to restrain the dog. The dog was seen barking, snarling, and lunging at the cable workers shortly before it gained access to the yard and began running toward them. Plaintiff managed to escape without being bitten, but while fleeing slipped and fell on the muddy ground and tore one of his Achilles tendons.

Plaintiff subsequently filed suit alleging the three causes of action typically associated with dog bite actions: statutory liability, common-law liability, and negligence. All three theories were dismissed by the trial court. Plaintiff did not appeal the ruling on the statutory claim.

Under common-law liability, a pet owner is strictly liable for damage done by the animal if he or she knows or has reason to know of the animal's vicious nature. A pet owner who does not have such knowledge can still be held liable under a negligence theory if he or she fails to exercise ordinary care under the circumstances to control or restrain the animal.

In *Hiner*, the Court of Appeals opined "the mere fact that a dog barks, growls, jumps, or approaches strangers in a somewhat threatening way is common canine behavior." The Court concluded that "such behavior will ordinarily be insufficient to show that a dog is abnormally dangerous or unusually vicious." Accordingly, the evidence was found to be insufficient to raise a genuine issue of whether Defendant's dog had displayed unusually aggressive tendencies, and

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Most dog bite actions are brought primarily under the dog bite statute, which provides for near-strict liability against dog owners. Common-law liability and negligence are traditionally pled as alternative theories of liability and become more important to a plaintiff if the dog was under the control of a keeper, not the actual owner. Keepers include people walking the dog, or "dog sitting". Few defendants acknowledge that their dog was "vicious" for purposes of common-law liability, so plaintiffs typically rely on their own observations in an attempt to establish the animal was unusually aggressive. The *Hiner* decision should make it more difficult for plaintiffs to establish the owner or keeper knew of the vicious nature of the dog.

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summary disposition was granted on the common-law liability claim.

The Court of Appeals denied summary disposition on the negligence claim, finding there was sufficient evidence for reasonable minds to conclude that Defendant was negligent in failing to properly control or restrain her dog.

The open and obvious defense was also raised by Defendant, but was found inapplicable due to the fact Plaintiff's claims were based on ordinary negligence, not premises liability.

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