Legal Writing Course
Prof. Chodorow
Assignment: single-issue office memorandum

In this assignment, imagine you are an associate at a law firm. Please prepare an office memorandum per the below assignment of the partner, Mark Porteus.

Since Mark is generally familiar with the facts of the case, the **Facts** section of your memorandum can be condensed, similar to the sample in Neumann, p. 72. Also, you can omit the **Conclusion** section; instead, summarize your discussion in your **Brief Answer** section.

This is a "closed" assignment. You must limit your research to the attached materials (statute, cases, and civil procedure rule). Don't do any outside research, including using outside books, Westlaw, or other internet sources. The only exception is that you may consult an English or legal dictionary.

Students may collaborate on the assignment only to the extent permitted by the Ethics Guidelines.

Austin, Martin, and Riddley, Ltd.
Law Offices
Evanston, Illinois

M E M O R A N D U M

To: [You]
From: Mark Porteus
Date: Feb. 27, 2014
File: *Woodley v. Androcles* (File # 2014-128)
Re: Assignment: Office Memorandum Needed on Motion to Dismiss

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I have filed a complaint under the Illinois "Dog Bite Statute" in the Kane County Courthouse in Elgin, Illinois. Our clients, the plaintiffs, are 5-year-old Harvey Woodley and his father, Ralph. The defendant is Arthur Androcles. The facts set forth in the complaint are consistent with the attached factual summary.

Now, the defendant has filed a motion to dismiss on the grounds that the complaint fails to state a claim upon which relief can be granted. When the motion is heard, Judge Brouwer will assume, for purposes of the motion only, that all facts alleged in the complaint are true. I need you to write an office memorandum predicting whether or not the motion to dismiss will be granted.

Factual Summary:

On February 1, our firm's client, Ralph Woodley, was visiting the privately owned "Randolph Zoo" in Elgin, Illinois, with his 5 year old son, Harvey. The zoo consists of several brick buildings containing exhibits of reptiles, fish, and other small animals.

After a few hours of wandering from one exhibit to another, Ralph decided that he and Harvey would visit one more and then leave for home. He spotted a brick building, somewhat set apart from the other buildings, and he set off for it on a pathway across the ice and snow with his son in tow.

Ralph and Harvey found a walk leading to the front door of the building. When they were about 10 yards away from the front door, a large German Shepherd suddenly appeared from behind a snow-covered hedge located five yards to the left. The dog was running loose. He ran up to Ralph and Harvey and nuzzled them playfully.

After a minute or two, Ralph and Harvey resumed their progress to the front door of the brick building. Harvey ran on ahead, picked up some snow, fashioned a snowball, and lobbed it at his father. Ralph ducked and turned and saw the snowball hit the German Shepherd on the back. Although the snowball did not have much velocity, and could not have caused any pain whatsoever, it sprayed the dog with snow and appeared to startle him.

The German Shepherd immediately set upon Harvey and bit him four times, with great force, on his right elbow.

Harvey's elbow was severely lacerated and required 117 stitches. I have had several phone calls from Ralph concerning this matter and he is, to put it mildly, distraught.

Mr. Woodley's friend, Seymour Spyer, went to the Randolph Zoo a week after these events and learned that the structure in front of which Harvey was mauled is not, in fact, an exhibition building. It is the private residence of the zoo's groundskeeper, Arthur Androcles. Mr. Androcles is provided the residence, and the yard in which these events took place, as part of his compensation.

Ralph says that there were no signs informing him that Androcles' building was a residence rather than another exhibition structure. He insists that there were no fences, borders or barriers setting Androcles' residence off from the rest of the zoo, and also insists that the residence looks like the exhibition buildings. He admits, however, as noted above, that Androcles' home is somewhat set apart from the other brick buildings in the zoo.

Ralph has told me there were no signs warning of dogs on the premises.

I have discussed this matter with Androcles' attorney over the telephone. He admitted that Androcles owns the dog. He stated, rather vehemently, that the dog had never bitten or harassed anyone before this episode. He said Androcles was away from the zoo that day and did not witness the events. He suggested that the dog would not

have attacked if he had not been struck by the snowball, and he has refused all our demands for compensation. He admitted there were no signs warning of dogs.

§ 366 Liability of owner of dog attacking or injuring person

If a dog or other animal, without provocation, attacks or injures any person who is peaceably conducting himself in any place where he may lawfully be, the owner of such dog or other animal is liable in damages to such person for the full amount of the injury sustained.

P.A. 78–795, § 16, eff. Oct. 1, 1973.

MESSA v. SULLIVAN

Court of Appeals, 1965.
61 Ill. App. 2d 386, 209 N.E.2d 872.

BURMAN, PRESIDING JUSTICE.

Betty Messa brought this action against James Sullivan, Helen Sullivan and the Keyman's Club, an Illinois not for profit corporation, to recover damages for the bodily injuries which she sustained as the result of being bitten by the defendants' dog. The complaint was based on two theories: first, a common law action for the keeping of a vicious animal and, second, an action based on what is commonly known as the "Dog Bite Statute" (Ill. Rev. Stat. 1963, ch. 8, § 12d). The parties waived a jury and the case was tried by the court. On the common law count, the trial court held for the defendants because he found that the plaintiff was contributorily negligent. No appeal has been taken from the judgment entered on that issue. On the statutory count, however, the court concluded that the plaintiff should recover and therefore he entered judgment awarding the plaintiff damages only against James Sullivan and the Keyman's Club in the amount of $3,000. From this judgment these two defendants appeal. They contend that the plaintiff failed to prove, as she was required to prove in order to recover under the statute, that she was lawfully on the defendants' premises and that she did not provoke the dog to attack. Alternatively the defendants contend that the amount of the damage award is not supported by the evidence.

The plaintiff suffered her injuries in the Keyman's Club building, 4721 West Madison Street in the City of Chicago. Located on the lower

level and on the first and second stories of this building were the following: a bowling alley, a barber shop, a cocktail lounge, banquet and meeting rooms, a ballroom and various other businesses and offices. A labor union office occupied the third floor and the fourth floor was vacant. James Sullivan, the president of the Club and the manager of its building for over twenty years, and his wife, Helen, occupied the fifth floor as their residence. No other use was made of the fifth floor. The Sullivans' apartment contained a safe in which the receipts from the operation of the building were kept. In addition, the apartment contained the defendants' furniture, personal property and their three year old German Shepherd dog, named "K.C.", which was kept there to protect the Club's property in the apartment. The various businesses located in the building were advertised by signs on the exterior of the structure and on a building directory which was located in the building lobby. There were, however, no notices anywhere that the fifth floor was used as a residence and not for commercial or business purposes.

All the floors of the building were served by an automatic elevator which could be reached on the ground floor by entering the building from Madison Street and by walking through the building lobby past the building office, which was located on the left of the lobby as one entered the building.

The plaintiff and the defendant, James Sullivan, testified concerning the events which occurred on the day in question. The plaintiff, who was a deaf mute, testified that at about two o'clock on the afternoon of June 12, 1961, she entered the defendants' building for the purpose of selling printed cards depicting the deaf and dumb alphabet. She said that this was the first time she had been in the building; that as she walked through the lobby she saw a woman at a telephone switchboard in the building office, that she entered the elevator and rode it to the fifth floor. When she got to that floor, the door on the elevator itself opened automatically. The plaintiff said that before she could step out of the elevator she had to manually open a second door which swung outward. She opened this door, which she said was heavy. She stepped out into the fifth floor hall and turned to the left where there was a door. At this point the defendants' dog ran out of the door and jumped on the plaintiff. She testified: " * * * the dog bit me on the leg, and he bit me on the body, and he bit me on the arm, and I tried to cover my face. And the dog was big, and the dog was bigger than I was, and he was on top of me, and three times he bit me." The plaintiff stated that she finally managed to get back to the elevator and to ride down to the lobby where she told the woman at the switchboard what had happened.

During her testimony, the plaintiff was shown plaintiff's exhibit number one, a picture of a sign reading in large letters:

WARNING
KEEP OUT
VICIOUS
POLICE DOGS
INSIDE

She identified the exhibit as a picture of a sign which was posted on the manually operated elevator door which swung outward into the fifth floor hall. However, she denied having seen the sign because, in her words, " * * * the door was so heavy. I was pushing the door, it was a sliding door, and I did not see the sign."

Concerning her injuries, the plaintiff identified two exhibits as accurate pictures of the large marks and wounds inflicted by the dog on her leg, on her right side and on her right arm. The plaintiff testified that the bites left "holes" in her arm, that she felt pain for about two months after the occurrence and that she could not sleep for two weeks after the events in question.

The defendant, James Sullivan, testified that on the day in question he and an office girl were in the building office; that he observed the plaintiff walk into the lobby and proceed directly to the elevator without looking at the directory; that he saw the plaintiff board the elevator; and that he noticed the elevator go to the fifth floor. He said that the door on the elevator itself opened automatically; that when this door opened on the fifth floor, there was a second door which must be opened outward by hand to gain entrance to the hall; and that a thirty inch high sign warning of the presence of vicious dogs was posted on this manually operated door so that the bottom of the sign was about three and one-half to four feet from the floor. He also stated that the door to his apartment on the fifth floor was to the right of the elevator door about fifteen feet down the hall. The defendant testified further that he saw the plaintiff after she came down from the fifth floor; that he tried to administer first-aid for the scratches on the plaintiff's arm; and that he observed a tear in her dress. In his discovery deposition, the defendant testified that there was no sign in the elevator itself regarding vicious dogs and that the manually operated elevator door on the fifth floor could be locked by a key, but that it was unlocked on the day of the occurrence.

The "Dog Bite Statute" with which this appeal is principally concerned provides:

> If a dog, without provocation, attacks or injures any person who is peaceably conducting himself in any place where he may lawfully be, the owner of the dog is liable in damages to the person so attacked or injured to the full amount of the injury sustained. The term "owner" includes any person harboring or keeping a dog. The term "dog" includes both male and female of the canine species. (Ill. Rev. Stat. 1963, ch. 8, § 12d)

This court, in *Beckert v. Risberg*, 50 Ill. App. 2d 100, 199 N.E.2d 811, set forth the four elements of an action under this statute as follows:

(1) injury caused by a dog owned or harbored by the defendant;

(2) lack of provocation;

(3) peaceable conduct of the person injured, and

(4) the presence of the person injured in a place where he has a legal right to be.

There is no dispute that the plaintiff was bitten by a dog owned by the defendants and hence there is no question concerning the first element above. The defendants contend that the other elements are not satisfied, however, because the plaintiff's entry onto the fifth floor past a large sign warning her of the presence of the dog which bit her constituted an unlawful entry by the plaintiff and constituted provocative behavior on her part.

We do not agree that the plaintiff was not lawfully on the defendants' premises. From all indications on the exterior of the defendants' building, in its lobby and on the inside of the elevator cab itself, people like the plaintiff could only surmise that the entire building was devoted to business purposes and that it was intended that they should come there on business. No notices anywhere indicated that any part of the premises was used as a private residence. It is clear, therefore, that when she entered the building, crossed its lobby, entered the elevator and rode it to the fifth floor, the plaintiff was lawfully on the premises. In addition, we believe that she was also lawfully on the premises when she entered the fifth floor hall where she was attacked. Persons entering the building and riding its elevator would have no reason to believe that the fifth floor was used for residential purposes or that vicious dogs were kept there. The sole warning to this effect was posted in a place where it could be seen only split seconds before one would enter the danger area and only at a time when the elevator passenger would be concerned with pushing open the heavy door in order to step into the hall and continue on with his business there. We agree with the trial court that under these circumstances the warning sign was in the wrong location, that it did not give adequate warning of the danger and that hence the sign gives no grounds for holding that persons who enter the hall have no legal right to be there.

The cases primarily relied on by the defendants are distinguishable on their facts and are not applicable here. In *Fullerton v. Conan*, 87 Cal. App. 2d 354, 197 P.2d 59, the California District Court of Appeal affirmed a judgment for the defendant in a case brought by a five year old child to recover for injuries she received when bitten by the defendant's dog. She had sued under the California "Dog Bite Statute" which, like our own statute, required that the plaintiff lawfully be on the dog owner's premises. In that case, however, unlike the present case, it appears that the child had been given a direct, oral instruction

not to go into the yard where the dog was. In another California dog bite case, *Gomes v. Byrne*, 51 Cal. 2d 418, 333 P.2d 754, the court affirmed a judgment for the defendant. That case is not like the case at bar because there the plaintiff saw and heard the dog before he entered the yard where the dog was kept. We do not believe that the other cases cited by the defendants are controlling and it would serve no useful purpose to extend this opinion by discussing them at length.

Next the defendants argue that the plaintiff was guilty of provocative behavior at the time she was attacked. They reason that the plaintiff approached the apartment and the dog without giving a warning as to the nature of her visit; that this act represented a threat to the security of the apartment; that the dog resented this threat and that the plaintiff should have known such conduct would be likely to provoke a dog to attack. We do not agree. Here the plaintiff had a legal right to be in the hallway. Her only actions at that point consisted of stepping off the elevator and walking a short distance toward the defendants' apartment door. We do not believe that the term "provocation" in the statute was intended to apply to a situation like this and thereby relieve from responsibility the owner of a vicious dog, which is specifically kept for protection, merely because the dog interprets the visitor's movements as hostile actions calling for attack.

Finally the defendants contend that the award of $3,000 is not supported by the evidence and that it is excessive. Our courts have consistently held that a damage award to a plaintiff in a personal injury case will not be set aside unless it is so palpably excessive as to indicate passion or prejudice on the part of the trier of fact (*Holsman v. Darling State Street Corp.*, 6 Ill. App. 2d 517, 128 N.E.2d 581, and cases there cited; *Eizerman v. Behn*, 9 Ill. App. 2d 263, 132 N.E.2d 788; *Lau v. West Towns Bus Co.*, 16 Ill. 2d 442, 158 N.E.2d 63) or unless it is so large as to shock the judicial conscience (*Barango v. E.L. Hedstrom Coal Co.*, 12 Ill. App. 2d 118, 138 N.E.2d 829; *Smelcer v. Sanders*, 39 Ill. App. 2d 164, 188 N.E.2d 391; *Myers v. Nelson*, 42 Ill. App. 2d 475, 192 N.E.2d 403). The record shows that the plaintiff sustained multiple wounds on her body, arms and legs and that she suffered great pain. We find nothing here to indicate passion or prejudice on the part of the trial judge and we do not believe that under the circumstances the award can be considered shocking to the judicial conscience. Hence we cannot substitute our judgment for that of the trial judge and set aside the award.

The judgment should be affirmed.

Affirmed.

MURPHY, J., and KLUCZYNSKI, J., concur.

DOBRIN v. STEBBINS

Court of Appeals, 1970.
122 Ill. App. 2d 387, 259 N.E.2d 405.

LEIGHTON, JUSTICE.

In a non-jury trial, plaintiff recovered a judgment against defendant for personal injuries he suffered when he was bitten by defendant's dog. Although plaintiff, who is the appellee in these proceedings has not filed a brief, we will review this appeal on the merits. *Daley v. Jack's Tivoli Liquor Lounge*, Inc., 118 Ill. App. 2d 264, 254 N.E.2d 814.

The facts are not in dispute. On July 16, 1964 defendant was the owner of a toy German Shepherd. He chained it to a pipe so that the dog was confined within defendant's property at 6225 West 79th Street in the City of Chicago. Plaintiff, then 17 years of age, was selling magazines. There was no sign or posted notice on defendant's property warning salesmen or others to keep off. Plaintiff went to defendant's home. He walked up a dirt path that led from the sidewalk. When plaintiff was within five or ten feet of the door, defendant's dog jumped on plaintiff, bit him in the abdomen and on the thigh. After getting away, plaintiff was taken to a nearby clinic where he received treatment for his injuries. Later in the day he visited his family doctor who replaced the bandages and gave him a tetanus shot. Pain from the dog bites lasted three or four days. Plaintiff's doctor submitted a bill which was paid.

Plaintiff filed suit against defendant and invoked what is colloquially the "Dog Bite Statute," Ill. Rev. Stat. 1963, ch. 8, sec. 12d which provides:

> Dogs attacking or injuring person—Liability of owner. If a dog, without provocation, attacks or injures any person who is peaceably conducting himself in any place where he may lawfully be, the owner of the dog is liable in damages to the person so attacked or injured to the full amount of the injury sustained. The term "owner" includes any person harboring or keeping a dog. The term "dog" includes both male and female of the canine species.

After hearing evidence, the trial judge awarded plaintiff damages in the sum of $750.00. Defendant appeals. He contends that plaintiff was a trespasser when he entered defendant's property; therefore no judgment could be recovered under the statute. In the alternative defendant contends that the damage award was excessive.

A trespasser is one who does an unlawful act or a lawful act in an unlawful manner to the injury of the person or property of another. 87 C.J.S. Trespass § 1; see *People v. Goduto*, 21 Ill. 2d 605, 174 N.E.2d 385. By this definition, plaintiff was not a trespasser on defendant's land when he went there during the ordinary hours of the day to solicit magazine subscriptions.

An owner of property who provides a path or walk from the public way to his door, without some indication (sign, posting of notice or words) warning away those who seek lawful business with him extends a license to use the path or walk during the ordinary hours of the day. Persons who thus make use of the path or walk are licensees. Restatement, Second, Torts, sec. 332, Comment b; *Stacy v. Shapiro*, 212 App. Div. 723, 209 N.Y.S. 305 (1925); *Reuter v. Kenmore Building Co.*, 153 Misc. 646, 276 N.Y.S. 545 (1934). Our decision in *Messa v. Sullivan*, 61 Ill. App. 2d 386, 209 N.E.2d 872 supports this view. Therefore, plaintiff was a licensee on defendant's land when he was bitten by defendant's dog. He was in a "[p]lace where he may lawfully be. * * *" within the meaning of Ill. Rev. Stat. 1963, ch. 8, sec. 12d.

This being so, proof that plaintiff while peaceably conducting himself and without provocation, was injured by defendant's dog justified entry of judgment in favor of plaintiff and against defendant. *Beckert v. Risberg*, 50 Ill. App. 2d 100, 199 N.E.2d 811; *Bailey v. Bly*, 87 Ill. App. 2d 259, 231 N.E.2d 8.

The damages the trial judge awarded plaintiff were within the limits of fair and reasonable compensation. *Johnson v. Eckberg*, 94 Ill. App. 634; *Sesterhenn v. Saxe*, 88 Ill. App. 2d 2, 232 N.E.2d 277. Judgment is affirmed.

Judgment affirmed.

STAMOS, P.J., and DRUCKER, J., concur.

SUPPLEMENTAL OPINION

LEIGHTON, JUSTICE.

Defendant petitions for rehearing on the ground that when plaintiff came upon defendant's property, he saw the dog that bit him. Defendant argues that the best warning a property owner can give to those who may come upon his land is his dog chained, in plain view and standing guard. Defendant contends that presence of his dog in this way was constructive notice to the plaintiff that he could enter defendant's property only at his peril.

We agree that a dog chained to guard its owner's property where it can be seen, is notice that entry on the land is forbidden. However, the record in this case does not support defendant's contention. Both plaintiff and the defendant testified that there were bushes on either side of the front door to defendant's home. Plaintiff testified that he never saw defendant's dog before it bit him because it "must have come out of the bushes * *." In other words, defendant's dog was not where plaintiff could see it. The petition for rehearing is denied.

Petition for rehearing denied.

STAMOS, P.J., and DRUCKER, J., concur.

SIEWERTH v. CHARLESTON

Court of Appeals, 1967.
89 Ill. App. 2d 64, 231 N.E.2d 644.

SULLIVAN, PRESIDING JUSTICE.

Plaintiff appeals from a judgment in his favor in the amount of $500.30, and asks that the judgment be reversed and remanded for a new trial on the question of damages only. Plaintiff contends that the damages allowed are totally inadequate and not supported by the record.

Defendant filed a cross-appeal and asks that the judgment in favor of the plaintiff be reversed.

Roy Siewerth, a minor, by Ralph Siewerth, his father and next friend, filed this action against Ruben Charleston for injuries sustained when the defendant's dog bit the plaintiff on or about the face.

Section 1 of "AN ACT to establish the liability of a person owning or harboring a dog which attacks or injures a person", (Ill. Rev. Stat. 1963, chap. 8, par. 12d) provides in part as follows:

> "If a dog, without provocation, attacks or injures any person who is peaceably conducting himself in any place where he may lawfully be, the owner of the dog is liable in damages to the person so attacked or injured to the full amount of the injury sustained. * * *"

The facts are these: on June 8, 1963, the plaintiff, Roy Siewerth, who was at that time seven years old, was playing with a playmate, Kevin Charleston, on the front porch or front stoop of the defendant's home. The boys were playing a game known as tic-tac-toe and were lying on the porch or stoop which was approximately 5 feet by 3 feet in area. A Rhodesian Ridgeback dog was also lying on the porch or stoop. The dog weighed approximately 100 pounds and when standing was about 27 inches high at the shoulders. Early in 1963, this female dog had given birth to a litter of nine puppies. About two or three weeks before June 8, 1963, the dog had been struck by an automobile and it was confined to a local animal hospital, where six stitches were placed upon its hind quarter. June 8, 1963, the day the occurrence took place, was extremely hot, nearing 100 degrees.

The evidence also showed that the plaintiff pushed or kicked the dog in the stomach twice prior to the occurrence. His playmate, Kevin Charleston, pushed or kicked the dog about two minutes after the plaintiff had pushed or kicked the dog the second time. The dog growled at plaintiff after each time he kicked or pushed the dog in the stomach, although the dog had never growled at him before, and the boys had played with the dog on many occasions. Plaintiff testified that when he pushed the dog with his feet the dog growled each time and he knew that he made the dog angry each time.

Kevin Charleston's mother, Barbara Charleston, was in the living room at the time of the occurrence and prior thereto. She had called to the boys to get off the porch when the dog first growled. Roy Siewerth, the plaintiff, testified that he heard Mrs. Charleston yell at him and Kevin to get off the porch only once. The boys remained on the porch. The evidence, however, showed that Mrs. Charleston told the boys to get off the porch twice just before the incident. After the dog growled the second time Mrs. Charleston told Roy Siewerth, the plaintiff, to go home. Roy Siewerth heard her but made no attempt to leave the porch. Prior to the date of the occurrence Mrs. Charleston told Roy Siewerth's mother that she did not want children on the porch. Mrs. Siewerth, the plaintiff's mother, also told her own children many times to stay off the Charleston porch. Shortly thereafter, Mrs. Charleston was prompted to go to the front door and noticed the plaintiff bleeding from the face and walking to his home. The evidence showed that the plaintiff, while lying on the porch, bent his head toward the dog and the dog's mouth came in contact with plaintiff's face. The dog's teeth had cut the plaintiff on the forehead partly back of the hairline, and also at the corner between the nose and right eye.

In addition to the foregoing, plaintiff testified that Kevin made the statement to one of two men who had taken statements from Kevin and the plaintiff, that "Lucy was right there and I was kicking him." When the man asked, "Who was kicking him?" Kevin said, "We both were." When the man asked the plaintiff whether he was kicking Lucy too, he said, "Me and him did." When the man asked Kevin how many times he kicked her, Kevin said, "About two or three times." When the man asked the plaintiff whether he kicked her more than once, the plaintiff nodded his head. He also stated that he remembered kicking the dog twice.

We will first discuss the cross-appeal of the defendant. The defendant raises only one point, namely, that the plaintiff failed to prove all of the necessary elements of the cause of action set forth in the complaint.

In *Beckert v. Risberg*, 50 Ill. App. 2d 100, 106, 199 N.E.2d 811, 814, the court said:

> "The elements of a cause of action under the statute are (1) injury caused by a dog owned or harbored by the defendant; (2) lack of provocation; (3) peaceable conduct of the person injured, and (4) the presence of the person injured in a place where he has a legal right to be."

The defendant argues that the plaintiff was guilty of provocation and that the attack by the dog was with provocation. The kicking or pushing of the dog by the plaintiff on two occasions, plus the kicking and pushing of the dog by Kevin Charleston, his playmate, sufficiently provoked the dog to constitute a complete bar to this statutory cause of action.

The plaintiff contends that he was bitten by a dog owned by the owner of the home without any provocation on the part of the plaintiff. He further argues that there was no provocation on the part of the plaintiff, as provocation needs intent and there was nothing in the record to show that the minor plaintiff intended to provoke the dog into the action of biting the plaintiff. This contention is without merit. The plaintiff testified that the dog growled after he was pushed or kicked by the plaintiff on each occasion, and that when the dog growled he knew that that made the dog angry. He further stated that the dog had never growled at him before. Even if, as the plaintiff argues, the provocation in the statute needs intent, the record shows intent on the part of the plaintiff. The plaintiff further argues that since he kicked or pushed the dog only twice, after each of which occasion the dog growled, and that subsequently the dog, before biting the plaintiff, was kicked by his playmate, Kevin Charleston, that the bite by the dog was not caused by the provocation of the plaintiff. With this contention we cannot agree. The kicking or pushing of the dog on two occasions by the plaintiff, and subsequently by Kevin Charleston, his playmate, constituted continuous provocation.

The conduct of the plaintiff, coupled with the conduct of Kevin Charleston, was completely sufficient to constitute provocation as contemplated by the statute.

Defendant also argues that the plaintiff failed to prove other necessary elements of the statutory cause of action. The other necessary elements argued by the defendant are that the person injured must be peaceably conducting himself and the person injured must be in a place where he may lawfully be. It is argued that the plaintiff was not peaceably conducting himself by his own admission, and that he was not in a place where he may lawfully be, because he was told to go home by Mrs. Charleston, the defendant's wife, before the dogbite occurred. We think it unnecessary to discuss these points further, in view of the fact that we are constrained to hold that the attack by the dog was not without provocation.

In view of our holding on the question of liability, it will be unnecessary for us to discuss the plaintiff's appeal on the grounds that the damages awarded were inadequate. The judgment in favor of the plaintiff is reversed.

Judgment reversed.

SCHWARTZ and DEMPSEY, JJ., concur.

NELSON v. LEWIS

Court of Appeals, 1976.
36 Ill. App. 3d 130, 344 N.E.2d 268.

KARNS, PRESIDING JUSTICE.

Plaintiff, by her father and next friend, brought an action under the Illinois "dog-bite" statute (Ill. Rev. Stat. 1973, ch. 8, par. 366) for

injuries inflicted upon her by defendant's dog. From judgment entered on a jury verdict for the defendant, she appeals.

On the date of her injury, plaintiff Jo Ann Nelson, a two and a half year old, was playing "crack-the-whip" in defendant's backyard with his daughter and other children. Jo Ann was on the end of the "whip." The testimony shows that after she had been thrown off the whip, Jo Ann fell or stepped on the dog's tail while the dog was chewing a bone. The dog, a large Dalmatian, reacted by scratching the plaintiff in her left eye. There was no evidence that plaintiff or anyone else had teased or aggravated the dog before the incident, nor was there evidence that the dog had ever scratched, bitten, or attacked anyone else. According to its owner, the dog had not appeared agitated either before or after the incident. As a result of her injuries, Jo Ann incurred permanent damage to a tear duct in her left eye. It was established that Jo Ann's left eye will overflow with tears more frequently and as a result of less irritation than normal, but that her vision in the eye was not affected.

Our statute pertaining to liability of an owner of a dog attacking or injurying persons provides:

> If a dog or other animal without provocation, attacks or injures any person who is peacefully conducting himself in any place where he may lawfully be, the owner of such dog or other animal is liable in damages to such person for the full amount of the injury sustained. Ill. Rev. Stat. 1973, ch. 8, par. 366.

Under this statute there are four elements that must be proved: injury caused by a dog owned or harbored by the defendant; lack of provocation; peaceable conduct of the person injured; and the presence of the person injured in a place where he has a legal right to be. *Siewerth v. Charleston*, 89 Ill. App. 2d 64, 231 N.E.2d 644 (1967); *Messa v. Sullivan*, 61 Ill. App. 2d 386, 209 N.E.2d 872 (1965); *Beckert v. Risberg*, 50 Ill. App. 2d 100, 199 N.E.2d 811 (1964) *rev'd on other grounds* 33 Ill. 2d 44, 210 N.E.2d 207 (1965). There is no dispute but that the dog caused the plaintiff's injury; the defendant owned the dog; the plaintiff's conduct was peaceable; and she was injured in a place where she had a legal right to be. The issue presented is whether plaintiff's unintentional act constitutes "provocation" within the meaning of the statute.

It appears that this issue has not been passed upon by an Illinois court. The statute does not distinguish between intentional and unintentional acts of provocation and thus, defendant argues, an unintentional act, so long as it provokes an animal or dog, may constitute provocation. Defendant's position, that the mental state of the actor who provokes a dog is irrelevant is consistent with the commonly understood meaning of provocation. Provocation is defined as an act or process of provoking, stimulation or incitement. Webster's Third New International Dictionary. Thus it would appear that an unintentional act can constitute provocation within the plain meaning of the statute.

Only three reported decisions have considered the question of provocation within the meaning of this statute. In *Siewerth v. Charles-*

ton, supra, the court held there was provocation where the injured boy and his companion kicked a dog three times. The argument was there raised that provocation meant only an intentional act, but the court did not pass upon this contention as it found the injured boy's acts in kicking the dog clearly intentional and provoking. In *Messa v. Sullivan, supra,* the court found no provocation on the part of the plaintiff where she walked into a hallway patrolled by a watch dog that attacked her on sight. The court held the acts of the plaintiff did not constitute provocation within the intent of the statute and that plaintiff had a right to be on the defendant's premises. While plaintiff argues that in *Messa* the plaintiff did not intend to provoke the dog and there was no provocation found, it appears that the court's holding was based on a determination that plaintiff's actions and conduct were not of a provoking nature, not on any determination of the intent with which plaintiff's acts were done. The court stated that it did not believe "provocation" within the meaning of the statute was intended to apply to a situation where a vicious dog interpreted a visitor's non-threatening movements as hostile actions calling for attack. Similarly in *Steichman v. Hurst,* 2 Ill. App. 3d 415, 275 N.E.2d 679 (1971), it was held that the acts of a postal carrier in spraying the defendant's dog with a repellant was not provocation. Although language in the decision might be read to mean that absence of intent by the plaintiff to provoke is material, we do not believe that this is an accurate reading of the opinion. In *Steichman* the letter carrier had previous difficulties with defendant's dog and had made several efforts to avoid the dog on the day she was attacked. The court characterized her conduct as "reasonable measures for self protection evoked by the dog's actions and deterring him only momentarily." Thus, the plaintiff's acts, although intentional, did not amount to an incitement or provocation of the dog, triggering the attack.

In the present case, it was admitted that the plaintiff jumped or fell on the dog's tail; that the dog was of a peaceful and quiet temperament; and that the dog was gnawing on a bone when the incident occurred. Under these circumstances, we believe that the dalmatian was provoked, although the provocation was not intentional.

Plaintiff argues that since her act was unintentional, or that because she was of an age at which she could not be charged with scienter, she did not provoke the dog within the meaning of the act. Although her counsel presents a strong argument for interpreting the instant statute to impose essentially strict liability upon a dog owner for injuries caused to a child of tender years, we cannot agree that the public policy of this State compels the adoption of such a standard.

At common law in Illinois, one injured by a dog could recover from the owner only if he could prove that the dog had manifested a disposition "to bite mankind" and that the dog's keeper or owner had notice of this disposition. *Chicago and Alton Railroad Co. v. Kuckkuck,* 197 Ill. 304, 64 N.E. 358 (1902); *Domm v. Hollenbeck,* 259 Ill. 382, 102 N.E. 782 (1913); *Klatz v. Pfeffer,* 333 Ill. 90, 164 N.E. 224 (1928). He

could not recover for an injury resulting from his own contributory negligence either by knowingly exposing himself to the dangerous dog *Chicago and Alton Railroad Co. v. Kuckkuck, supra*) or by provoking the dog. *Keightlinger v. Egan,* 65 Ill. 235 (1872). A dog owner's liability rested upon negligence, and he could be liable only if he harbored a "vicious" dog. Thus, one injured by a dog bore a substantial burden of proof.

The instant statute, and its immediate predecessor, substantially eased this burden imposed by the common law. It eliminates the requisite proof that the dog was vicious towards humans and that the owner knew of this disposition, and made irrelevant questions of the injured person's contributory negligence (other than provocation). *Beckert v. Risberg,* 33 Ill. 2d 44, 210 N.E.2d 207 (1965). We do not believe, however, that it was meant to impose strict liability on dog owners for all injuries caused by dogs, except those intentionally provoked. Instead this act was apparently drawn to eliminate as much as possible any inquiry into subjective considerations. Whether the injured person was attacked or injured while conducting himself in a peaceful manner in a place where he could lawfully be are all matters which require no inquiry into a person's intent. We believe that the determination of "provocation" should also be made independently of such considerations. A determination of provocation does not require consideration of the degree of wilfulness, which motivates the provoking cause. Had the legislature intended only intentional provocation to be a bar to recovery we think it would have so specified. Its conclusion apparently was that an owner or keeper of a dog who would attack or injure someone without provocation should be liable. This implies that the intent of the plaintiff is immaterial. Nor do we think that the plaintiff's status as a child of tender years should relieve her of all responsibility for a provoking act. Our Supreme Court in *Beckert v. Risberg,* 33 Ill. 2d 44, 210 N.E.2d 207 (1965), sanctioned a jury instruction in the language of the statute where the plaintiff was a three year old boy. Although the court did not specifically address the issue, it appears by implication that a young child is not exempted from responsibility for his or her acts which provoke a dog under this statute.

We have been referred to decisions from other jurisdictions which permit an injured person to recover for unintentional acts which "provoke" a dog. Two of these cases, however, were decided on common law negligence theories, the courts concluding that these unintentional acts did not constitute contributory negligence. *Smith v. Pelah,* 2 Strange 1264, 93 Eng. Rep. 1171 (1795); *Fake v. Addicks,* 45 Minn. 37, 47 N.W. 450 (1890). Another case applied a statute which provided for strict liability for injuries inflicted by a dog unless the injury was voluntarily brought on by plaintiff with full knowledge of the probable consequences. *Wojewoda v. Rybarczyk,* 246 Mich. 641, 225 N.W. 555 (1929). These decisions are inapposite in that while they arise from

similar factual situations they were decided upon legal theories which placed emphasis upon the injured person's scienter.

Although we believe that the instant statute does not impose liability upon a dog owner whose animal merely reacts to an unintentionally provocative act, the present appeal does not involve a vicious attack which was out of all proportion to the unintentional acts involved. *E.g. Messa v. Sullivan, supra.* The dalmatian here apparently only struck and scratched plaintiff with a forepaw in response to the plaintiff's stepping or falling on its tail while it was gnawing on a bone, an act which scarcely can be described as vicious. Therefore we hold that "provocation" within the meaning of the instant statute means either intentional or unintentional provocation; that the defendant's dog was provoked by the plaintiff's unintentional acts and did not viciously react to these acts; and that no reversible error was committed in the trial court.

For the foregoing reasons, the judgment of the Circuit Court of St. Clair County is affirmed.

AFFIRMED.

JONES and GEORGE J. MORAN, JJ., concur.

Illinois Rule on Motion to Dismiss
for Failure to State a Claim

A defendant's motion to dismiss for failure to state a claim will be granted if, assuming the truth of the allegations and drawing all reasonable inference from them, those facts do not constitute each element of a claim. Ill. R. Civ. P. 12(b)(6); *DeMuria v. Hawkes*. The court may not consider any matters outside the complaint. *See Chambers v. Time Warner, Inc.*