

BRUBAKER V. McCOY

Reggie Brubaker is suing his brother-in-law, Alphonse McCoy, for personal injuries which Reggie allegedly sustained as a result of an attack upon him by two wolfhounds, "Spike" and "Butch," owned by Alphonso. Alphonso owns and operates the Gusty Sands Motel, a Virginia corporation, located at 111 Ocean Avenue, on the North end of Willowby Spit Beach in the City of Norfolk. Reggie, a resident of Maryland, was helping his brother-in-law do some "winter work" on Alphonso's motel, when on December 10, 2007, Reggie went inside the motel and up to the second floor where he saw the two dogs. Soon thereafter, while working outside the motel on the second floor, Reggie was attacked, bitten and pushed over the second floor porch where he was working and hit the ground below. Reggie was hospitalized for one month and he returned to work five weeks later.

Plaintiff's Witnesses:

- | | | | |
|----|-----------------|---|--|
| 1. | Reggie Brubaker | - | Plaintiff |
| 2. | Dr. Upton | - | Attending physician at the Willowby Hospital (Stipulate) |
| 3. | Dr. Sam Walker | - | Retired naval officer |

Defendant's Witnesses

- | | | | |
|----|----------------|---|---|
| 1. | Alphonse McCoy | - | Defendant; owner and operator of Gusty Sands Motel |
| 2. | Robert Baker | - | Owner and Operator of the Sands Club |
| 3. | Clyde Clark | - | Owner and operator of Clyde's Pet Pavilion pet shop (Stipulate) |

STANDARD INSTRUCTIONS APPLY

Time: 61 minutes

Brubaker	-	9	direct,	8	cross
Walker	-	8	direct,	7	cross
McCoy	-	8	direct,	8	cross
Baker	-	7	direct,	6	cross

REGGIE BRUBAKER

I, Reggie Brubaker, age 38, live at 2301 Pacific Avenue, Towson, Maryland. On December 10, 2007, my brother-in-law, Alphonso McCoy, asked me to help him make some repairs at his motel. I was not working at the time and agreed to do it. I work for Lawn Doctor and we take December off. We had no specific agreement about how I would be paid. I assumed I would get what other employees were paid for similar work. At the time, I was visiting .at Virginia Beach.

Alphonso picked me up on December 10 at about 3:00 p.m. On the way he mentioned that he had two dogs but said nothing to me that indicated that they were dangerous. After we arrived at the motel, he told me to go to the second story to take down a broken shutter. On the way, I saw the two dogs asleep near the office door. I took a step ladder and climbed up to take off the shutter. As I was taking it off, I noticed the two dogs start running for the end of the building. I didn't realize it at the time but they were going for the stairway to the second floor. When they started for the stairs I got worried and thought maybe I should get off the ladder, but then I though they wouldn't bother me, since I passed them on the way up. I was wrong. They dashed right for me and started biting my legs. I lost my balance and fell over the banister. I remember nothing until after I arrived at the hospital. I was in the hospital for one month.

I had a lot of expenses. My old boss called the next week and told me I could come back to work but I wasn't able to go back 'until nine weeks after the accident. I make about \$160 a week at that job as an assistant to the Lawn Doctor.

The left side of my face and left ear were cut. My left leg was really cut up badly and the bone was broken near my knee. The bones of the middle and index fingers were broken. The rabies shots for the dog bites were the most painful part of my treatment. Of course, my left leg really hurts a lot too. I refuse to have an operation on this leg.

NOTE: You injured your left leg several weeks earlier on the Lawn Doctor job. You saw a doctor (not Upton) who told you to rest and see if it got okay. He told you he was afraid that you had damage to a tendon behind the left knee. You did not tell Dr. Upton because different insurance was paying that.

All of my medical bills have been paid by Lawn Doctor's group medical and disability plan. It has also paid 50% of my loss of wages since this accident. It did not pay for wage losses on the first accident because it happened on the job. Since I have been hurt, Alphonse told me he was sorry and he has gotten rid of those dogs.

DR. UPTON

Hospital physician - 55 years old.

On December 10, 2007, I was working on the day shift at Willowby Hospital when I received a call at 3:45 p.m. to come to the emergency room. I was there when the orderlies brought in Mr. Brubaker. He needed certain emergency treatment which I immediately administered (i.e. suturing up various contusions, shots for rabies, etc.). Mr. Brubaker was conscious and visibly in pain when brought in. His left leg was severely bitten although not severely maimed. Several bones were broken and his face was badly bleeding and damaged from the fall I assume. Although there were no internal injuries of any serious nature, I did anticipate severe scar disfigurement of his face, hands and left leg. I immediately gave him a sedative and he fell asleep around 6:30 p.m. He remained in the hospital for a month. I performed minor surgery on his leg and hands after the bones healed. I also did various scar repairing to his face, ears, hands and left leg. Most of this was done after the patient was released on January 10, 2008, and for a period of some eight months thereafter. Mr. Brubaker complained of, and still complains of, recurring headaches, loss of sleep, etc. even though he is still on mild medication. I would anticipate future treatment of more scar repairs by a specialist and also frequent visits to combat the headache problem, possibly costing upwards around \$7,000. In addition, Mr. Brubaker has agreed to pay me \$500 to appear in court for him in any possible litigation concerning the described injuries. I graduated from U.Va. and U.Va. Medical School and have been on the staff at Willowby for some 20 years. I had heard of Mr. Brubaker but had never actually been acquainted with him before I treated him. Mr. Brubaker has also paid my bill of \$12,000.

SAM WALKER

Retired naval officer - 63 years old.

I live just two blocks from the Gusty Sands Motel; and I haven't been personally acquainted with any of the parties to this case prior to the incident. On December 10, 2007, I was taking my afternoon stroll around 3:15 p.m. and as I passed by the Gusty Sands, I saw two large dogs attack this man on the second floor porch. I yelled warnings and for help, but I guess it was too late. He was pushed through the railing and hit the ground below - a dirt driveway. The next time I looked, the dogs had disappeared (I guess into the motel), and I ran towards Mr. Brubaker. He was unconscious and bleeding. Mrs. Murphy, who lived next door, was on her way out but I shouted to her to call an ambulance. I gave Brubaker the first aid I learned in the Navy (restore normal breathing, stop the profuse bleeding, recline his body and put my coat over him). Pretty soon he regained consciousness. Mr. McCoy had come out in the meantime and said to Brubaker, "What the hell did you do to provoke those dogs?" No one answered him and the ambulance arrived. I scribbled my name and address on a piece of paper, gave it to him and told him that I saw the whole thing. I left immediately. About 10 days or two weeks later, Mr. Brubaker called me up and told me that he was recovering satisfactorily and asked me if I would be a witness for him in his suit against Mr. McCoy. I agreed. I have seen those two vicious animals several times before as I walked by the motel. I don't see how Gusty Sands attracts any guests. I have seen them bark at people, and one time I saw them growl at the mailman - he just turned and ran - didn't even bother to deliver that day. The dogs chased him for a block nipping at his heels. I saw him jump for a 15-foot tree limb. He missed it. However, he caught it coming down and just hung there a while until the dogs got tired and left. I don't think Mr. McCoy should be allowed to keep those two dogs. I have never seen a leash on them, and if they were ever leashed, they would probably pull you around like a pack of wild horses.

I do recall that McCoy was at the window of his office when the incident involving the mailman occurred.

ALPHONSO McCOY, DEFENDANT

Owner and operator of Gusty Sands Motel - 45 years old.

I have been in the motel business for more than 20 years. I married Veronica, the sister of Reggie Brubaker's wife Hortense, about 10 years ago. Reggie has always said that I should have a few pets and that if I ever wanted one, he could get me a good deal through the SPCA where he works.

For the past two years, there have been increased break-ins and thefts around our area of Willowby Spit Beach. The Sands Club nearby attracts every undesirable and degenerate kid at the Beach. Those kids get drunk or high off drugs, throw beer cans at the motel, knock over our furniture and throw trash all over the lawn. I have reported several break-ins and thefts, but this hasn't changed anything. I went to the Sands Club owner, Mr. "Bob" Baker and asked him what could be done. He was polite, but said that he couldn't be responsible for the actions of any of his patrons after they left his premises. He suggested that I go over and see Clyde Clark, a friend of his, who ran a pet shop on the other end of the Beach; and that he knew Clyde could get me some good watch dogs. I went over to see Clyde and he just happened to have two wolfhounds, "Spike" and "Butch" who were raised by a little old lady on a farm in Tennessee. Clyde said the little old lady said they couldn't harm a flea. They seemed friendly so I bought two leashes and took them to the motel. This was just about May 19 (same year as incident), just before the summer season. I guess Reggie resented my not coming to him first, but I didn't think that he could get me any watchdogs.

During the summer season of 2007 (same year as incident), I kept the dogs leashed at all times. Whenever I went out, they were always leashed. They never barked at one guest. I also had no thefts that summer either. With winter approaching, although we were still open at winter rates, we weren't getting hardly any guests. I kept the leashes on the dogs most of the time but let them free at night to protect the property. I called Reggie one day and asked him to help me with some repairs and he said "What's in it for me?" I told him that maybe he and Hortense could come stay at the motel free next summer season if they wanted to. Later that week he called me over and I picked him up around 3:00 p.m. (December 10). While driving over to the motel, I told him about all the trouble I was having with the kids that went to the Sands Club and about the vandalism that occurred. I told him that I had purchased two dogs as watchdogs from Clyde's Pet Pavilion. He said, "Why didn't you come see me - everyone knows that Clyde is a crook." He related that Clyde has been turned in several times to the SPCA for beating his animals and has been reprimanded several times. Then I said it didn't matter now since they seem to be doing a good job of scaring away any would-be vandals.

When we arrived at the motel I asked Reggie to take down the broken shutters upstairs (second floor), as I had to call Veronica. He went upstairs and the next thing I knew, someone was shouting outside for help. I ran out and Reggie was all messed up. Some man was reviving him and he was soon conscious. I said, "Reggie did you provoke those dogs?" He didn't answer. The ambulance came and took Reggie away. I called the hospital several times during the next week but he wouldn't take my calls. I only heard through my wife, Veronica, that he was doing okay. At the time of the incident, there were no guests in the motel. Sometimes I leashed the dogs inside - sometimes I didn't. I don't recall whether or not they were leashed. I checked back and found one leash was broken at the tip. The other was not. Reggie must have provoked those dogs, because in the seven months that I've had them, they have never attacked anyone. It's a shame what happened to Reggie, but I believe he brought it on himself. I have six other men who work for me around the motel and none of them have ever had any trouble with the dogs. Five years ago I got in a squabble with some neighbors about a dog I had and they took me to court where I was convicted of keeping a dangerous dog on my motel premises.

BOB BAKER

Owner and Operator of "Sands Club" - 45 years old.

Although I have spoken to Mr. McCoy only a few times (mostly on the phone), I am fairly well acquainted with Reggie Brubaker, I'm afraid. McCoy on one hand has been constantly blaming the actions of my patrons for vandalizing his property. He has been a long-time resident of Willowby Beach and his motel was one of the first; and I guess he might have good reason to look to my place as the source of his troubles. On the other hand, I remember his brother-in-law, Brubaker, was the one who tried to prevent me from building the Sands Club because he found out that I had been in prison for five years on a drug rap. My place has been raided several times, and I wouldn't be surprised if Brubaker had instigated them.

Around April of 2007 (year of incident), McCoy came to me and said that he had had enough and what could be done. I suggested that he go see my good buddy, Clyde Clark, who ran Clyde's Pet Pavilion at the other end of the Beach. Clyde and I have done a few capers before and I knew that a deal with Clyde (on my recommendation of course) would solve the situation. Clyde runs a good place - the only pet shop on the Beach - and everyone goes there. I talked to Clyde later after McCoy's visit and Clyde said, "Don't worry buddy, no one will get near that place at night" referring to McCoy's motel.

In late December, I heard that one of the dogs that Clyde had sold to McCoy had bitten Brubaker. I think he knew that McCoy had bought the dogs from my friend Clyde and that Brubaker was resentful of the fact that McCoy didn't go to him. Now Brubaker is suing his own brother-in-law. He must be really bitter.

CLYDE CLARK

Stipulate

Owner and operator of "Clyde's Pet Pavilion" - 49 years old

Around April of 2007 (year of incident), Mr. Alphonso McCoy came to my pet shop and said he was having problems with vandals tearing up his Gusty Sands Motel. He said that he had been over to see "Bob" Baker at the Sands Club. He said Bob sent him over to see me concerning some watchdogs. I told McCoy that at that time, I had no watchdogs which had been specially trained as such, but that I did have two big wolfhounds, "Butch" and "Spike" who growled somewhat but wouldn't hurt anyone. I told him that they were sold to me by a lady from Tennessee who was passing through and who had said, "They're (Butch and Spike) as gentle as a lamb, but they are just getting too big for me to handle." She also said that they had never attacked anyone before and asked me to find a good home for them. Mr. McCoy seemed pleased and bought the two dogs outright for \$150 each, I believe. McCoy did call me subsequent to the sale saying how pleased he was with the dogs.

Robert "Bob" Baker and I have been friends a long time. Once we were arrested for pushing drugs - I beat the rap but he got five years in the pen. I have had no trouble with my animals at the pet shop. I "discipline" them, however, so they won't jump at people who come in to shop or browse. I never had to discipline those dogs though. I had them three months prior to the sale to Mr. McCoy.

I make my living buying and selling animals mostly from tourists. I do get a lot of "strays" which I sell at a reasonable rate. I find homes for these poor animals. The SPCA just kills 'em. They should have named it the "Society for Promotion of Cremating Animals." It's true that I have sold the dogs to a detective agency since this accident.

Instruction No. _____

Credibility of Witnesses

You are the judges of the facts, the credibility of the witnesses, and the weight of the evidence. You may consider the appearance and manner of the witnesses on the stand, their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified, their interest in the outcome of the case, their bias, and, if any have been shown, their prior inconsistent statements, or whether they have knowingly testified untruthfully as to any material fact in the case.

You may not arbitrarily disregard believable testimony of a witness. However, after you have considered all the evidence in the case, then you may accept or discard all or part of the testimony of a witness as you think proper.

You are entitled to use your common sense in judging any testimony. From these things and all the other circumstances of the case, you may determine which witnesses are more believable and weigh their testimony accordingly.

Instruction No. _____
Circumstantial Evidence

Any fact that may be proved by direct evidence may be proved by circumstantial evidence; that is, you may draw all reasonable and legitimate inferences and deductions from the evidence.

Instruction No. _____

**Standard of Proof: Definition of Greater
Weight of the Evidence**

The greater weight of all the evidence is sometimes called the preponderance of the evidence. It is that evidence which you find more persuasive. The testimony of one witness whom you believe can be the greater weight of the evidence.

Instruction No. _____

Definition of Negligence

Negligence is the failure to use ordinary care. Ordinary care is the care a reasonable person would have used under the circumstances of this case.

Instruction No. _____

Fact of Accident is Not Proof of Negligence

The fact that there was an accident and that the plaintiff was injured does not, of itself, entitle the plaintiff to recover.

Instruction No. _____

Invitee's Right to Assume Safe Condition of Premises

An invitee has the right to assume that the premises are reasonably safe for his visit. This assumption does not apply, however, if the invitee knows or should know of an unsafe condition or if the invitee uses the premises in a manner that exceeds the scope of the invitation.

Instruction No. _____

Occupant's Duty to Invitee: General

An occupant of premises has the duty to an invitee:

- (1) To use ordinary care to have the premises in a reasonably safe condition for an invitee's use consistent with the invitation, but an occupant does not guarantee an invitee's safety; and
- (2) To use ordinary care to warn an invitee of any unsafe condition which the occupant knows, or by the use of ordinary care should know about, unless the unsafe condition which is open and obvious to a person using ordinary care for his own safety.

If an occupant fails to perform either or both of these duties, then he is negligent.

Instruction No. _____

Owner Charged With Knowledge of Propensities of the Breed

The owner of a dog must take notice of its general, natural inclinations or characteristics and of the inclinations or characteristics, if any, peculiar to the animal in this case that he knows about or should have known about. If any of those inclinations or characteristics are of a kind likely to cause injury, the owner has a duty to use ordinary care to prevent any reasonably foreseeable injury.

If an owner fails to perform this duty, then he is negligent.

Instruction No. _____

Definition of Assumption of the Risk

If you find by the greater weight of the evidence that the plaintiff fully understood the nature and extent of a known danger, and if he voluntarily exposed himself to it, he assumed the risk of injuring himself from that danger. The plaintiff cannot recover for injuries that proximately resulted from assuming the risk of a known danger.

Instruction No. _____

Assumption of the Risk: Burden of Proof

Where the defendant claims assumption of the risk as a defense, he has the burden of proving by the greater weight of the evidence that the plaintiff fully appreciated the nature and the extent of a known danger; that the plaintiff voluntarily exposed himself to it; and that the plaintiff was injured as a result of the danger assumed. Assumption of the risk may be shown by the defendant's evidence or by the plaintiff's evidence.

Instruction No. _____

Finding Instruction

You shall find your verdict for the plaintiff if he has proved by the greater weight of the evidence that:

- (1) the defendant was negligent; and that
- (2) the defendant's negligence was a proximate cause of the plaintiff's accident and damages.

You shall find your verdict for the defendant if:

the plaintiff failed to prove either or both of the two elements above