HEATHER M. SIMMONS,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 99-00,767
	:	
GARY L. STRYKER and	:	
NORMA J. STRYKER, his wife,	:	
	:	
Defendants	:	PETITION FOR RECONSIDERATION

Date: July 19, 2000

OPINION and ORDER

The matter presently before the Court is the Motion for Reconsideration filed by Plaintiff Heather M. Simmons (hereinafter "Plaintiff") regarding this Court's Opinion and Order filed February 17, 2000, wherein we granted Summary Judgment in favor of Defendants Gary L. and Norma J. Stryker (hereinafter collectively "Defendants").

In the underlying Complaint, Plaintiff asserted that Defendants were liable to her for injuries she sustained when Defendants' dog bit her June 14, 1997, while Plaintiff was visiting Defendants' home.[1] In determining the Summary Judgment motion, we began our analysis by acknowledging that a dog owner who knows or has reason to know of a dog's vicious propensities must exercise reasonable care in securing the dog. February 17, 2000, Opinion p. 2. Plaintiff had averred that Defendants knew or should have known the dog was of a dangerous and vicious nature and was accustomed to attacking and biting humans. Complaint paragraph 5. Plaintiff argued the summary judgment motion should be denied

[1] As noted in our earlier Complaint, Plaintiff is the daughter of Gary L. Stryker.

because of evidence that the dog was known to jump up on people, growl and bare its teeth during play, and once during play after the incident in question had "grazed" the hand of Plaintiff's (then) brother-in-law. Reviewing the evidence in the light most favorable to Plaintiff, we determined that Plaintiff had failed to produce any evidence that Defendants knew or should have known of the dog's vicious propensities. We found that for Defendants to be on notice of the dog's vicious propensities, the notice must be of similar character and related to the type of vicious propensity complained of. February 17, 2000, Opinion p. 4.

This principle of Pennsylvania law was set forth in the case of ***Andrews v. Smith***, 188 A. 146 (Pa. 1936), another dog bite case. In ***Andrews***, defendants kept a German shepherd to protect their property, which was allowed to run at large in the evening. One night, plaintiff John Andrews was walking by defendants' residence when the dog ran across the road and bit him. Mr. and Mrs. Andrews sought damages for injuries resulting from the bite. The trial court entered judgment of compulsory nonsuit in favor of defendants at the end of trial. The plaintiff filed a motion to take off the nonsuit, which was argued before the court *en banc*. The court denied the motion, finding that the evidence failed to establish defendants had knowledge the dog was vicious and ferocious.[2] The Supreme Court affirmed the decision, stating:

> [A]n owner's liability for the vicious acts of his dog cannot be predicated upon ownership alone, but it must be based also on an owner's knowledge of his dog's viciousness and his failure then to take proper steps to prevent that viciousness displaying itself to the hurt of human beings.

Andrews at 148.

[2] Interestingly, the trial judge dissented.

In the instant case, Plaintiff originally argued that prior instances of the dog jumping up on her (and others) when she came to visit gave Defendants the requisite notice. We found this behavior insufficient to give notice, agreeing with the reasoning of the Court of Common Pleas of Perry County in the dog bite case of ***Rowe v. Landvater***, 27 D.&C. 4th 380 (Perry County 1994). In ***Rowe***, defendants admitted that the dog had a known propensity to jump up on people and that this tendency was a dangerous propensity. However, the defense argued, and the trial court agreed, that plaintiff's injury was not caused by this behavior, but rather by the dog biting plaintiff. The ***Rowe*** court found that the notice must be related to the type of dangerous propensity the dog exhibited. In so finding, the court relied upon the case of ***Mann v. Wieand***, 81 ½ Pa. 243 (Pa. 1875), wherein the Pennsylvania Supreme Court stated that one instance of a given behavior may be sufficient to demonstrate a vicious propensity which would make the owner liable for any subsequent act *of similar character.*

Here, as in ***Rowe***, the injury was caused by the dog biting Plaintiff, rather than by the dog jumping up on her. Accordingly, the prior instances of the dog jumping up on Plaintiff or others did not provide Defendants with notice that the dog had a propensity to bite people.

Plaintiff seeks reconsideration of our prior determination, arguing that genuine issues of material fact do exist concerning Defendants' prior notice which entitle Plaintiff to have her serious claim resolved on the merits by a fact finder. Plaintiff claims that deposition testimony, not previously presented to the Court for consideration, establishes at least a disputed material fact that Defendants had prior notice that: (1) Defendants were aware, prior to the incident, that both Defendants' dog and Plaintiff's sister's dog "Tigger," who was also on

the premises, were agitated and had the potential to be aggressive toward people and each other; (2) Defendants knew only they had ever disciplined or restrained their dog in the garage; (3) Defendant Norma Stryker knew Plaintiff was going to restrain Defendants' dog and in fact told her it was okay to do so; (4) Defendants had notice their dog was being aggressive just prior to the incident and took no action to prevent Plaintiff from being bitten; rather, they encouraged Plaintiff to take care of the dog.

We granted reconsideration because it is appropriate to give Plaintiff every opportunity to demonstrate Defendants' prior notice of the dog's vicious propensities, which would entitle her to bring her case before a jury. Unfortunately, having reviewed the transcripts submitted in light of Plaintiff's current argument, the Court finds Plaintiff has misinterpreted and misapplied the testimony given by Plaintiff and Defendants in their depositions, and the reconsideration request will be denied.

With respect to Plaintiff's first contention, obviously Defendants were aware both animals were on the premises and there is also testimony to the effect that one or both dogs were "agitated." *See, e.g.*, Deposition of Norma J. Stryker N.T. 37. The Court notes Plaintiff testified that at the time, she did not believe there was any tension or aggressiveness building in either dog; it was only when she looked back at it that she believed "that is probably maybe what was happening." Deposition of Plaintiff, N.T. 20. Nevertheless, accepting as true that one or both dogs were agitated, there is nothing in the evidence to support Plaintiff's conclusion that Defendants therefore knew either dog had the potential to be aggressive toward each other, let alone to people. If the dog's agitation can be bootstrapped to infer potential aggression, the most that can be said of this is that Defendants had notice of the dog's

propensity to be aggressive toward Plaintiff's sister's *dog*, not to other people, including Plaintiff. In fact, assuming the dogs were together all day and were agitated, there is no evidence that either dog actually displayed any aggressive tendency, particularly towards a person. If anything, this was an indication to Defendants that their dog would *not* attack Plaintiff.

At oral argument, in further support of their contentions Plaintiff's counsel also pointed to the statement of Defendant Norma J. Stryker that "Kelly called and asked…if they could bring Tigger over which we really didn't care for that." Deposition of Norma J. Stryker N.T. 37. The Court fails to see how we can infer prior notice from this statement. There is simply no indication that the reason Defendants didn't want Tigger brought over was because he would make their dog aggressive, particularly towards people.

Concerning Plaintiff's second contention that Defendants knew only they had ever disciplined or restrained their dog, the Court does not consider this a disputed material fact. Accepting the statement as true, it has no bearing on whether Defendants had prior notice of any vicious propensity in the dog.

Plaintiff's third and fourth contentions are factually intertwined, as they assert Defendants knew their dog was aggressive just prior to the incident, yet permitted or encouraged Plaintiff to take care of the dog.

With respect to "encouraging" Plaintiff to take care of the dog, Plaintiff herself testified that no one asked her to take the dog in; rather, she volunteered. Deposition of Plaintiff, N.T. 17. Defendant Norma J. Stryker stated that it was Plaintiff who indicated she was going to go and get the dog and bring him in; Defendant told her not to, but when Plaintiff

repeated her intention, she replied "well, if that's what you want to do, fine." Deposition of Norma J. Stryker N.T. 40-41. Admittedly, the facts concerning exactly what happened when Plaintiff went to get the dog may be in dispute, but these facts are not material as to whether a duty arose such that Defendants were obligated to protect Plaintiff from a dog with known vicious propensities. For such a duty to be imposed, Defendants needed to be aware of more than that their dog was "aggressive" just prior to the incident. The duty arises where there are facts and circumstances establishing that Defendants knew the dog posed a danger to people. As discussed in reviewing Defendants' first and second contentions, the undisputed facts establish no such knowledge or corresponding duty.

Plaintiff also argued that notice of the dog's vicious propensities to humans was given to Defendants because during play, the dog would growl and bare its teeth. We noted in our earlier Opinion that this behavior was at most aggressive play, engaged in only when Plaintiff's brother-in-law, Michael Wood, played "tug of war" with the dog. The dog never displayed this behavior at any other time, but only in response to the game initiated, on more than one occasion, by Mr. Wood. If the dog's behavior had ever been threatening rather than playful during these instances, he certainly would not have repeatedly initiated the game.

Finally, in the current Motion for Reconsideration, as in the original opposition to the Summary Judgment Motion, Plaintiff asks this Court to consider an incident which occurred *after* the dog had bitten Plaintiff in determining whether Defendants had notice of the dog's dangerous propensity. The subsequent incident involved an occasion when Mr. Wood was running and playing with the dog while holding a toy. The dog jumped up to get a toy and

as he did so, he nipped or grazed the back of Mr. Wood's hand with his teeth. Mr. Wood yelled at him, and the dog snarled in response.

In the current Motion, Plaintiff continues to argue that subsequent evidence is relevant and admissible as notice of the dog's dangerous propensity. However, Plaintiff now points to testimony by Defendant Norma Stryker regarding the dog's behavior since the incident in question. Ms. Stryker testified that there were times when she attempted to put the dog in the garage, as Plaintiff was attempting to do when the dog bit her, and the dog "kind of" jumped up on her and "kind of" came after her; she further stated that she was scared of the dog after the biting incident. Plaintiff's Supplemental Brief p. 7. Plaintiff argues that this "after bite aggressive behavior," viewed in the light most favorable to Plaintiff, "would be admissible [presumably, at trial] to show the Defendants knew or should have known of the aggressive disposition of the dog. This is a question of fact for the finder's determination, and should not have been summarily removed from the jury's consideration." ***Ibid***.

Plaintiff claims this position is supported by the case of ***Crance v. Sohanic***, 496 A.2d 1230 (Pa.Super. 1985). In ***Crance***, the trial Court permitted plaintiff to introduce, during the trial, subsequent incidents of biting and attacks by the dog that had attacked plaintiff. The jury found for plaintiff, and the defendant appealed, arguing (in relevant part) that the admission of subsequent acts constituted error. The Superior Court affirmed the trial court, however, stating that the evidence was relevant in determining whether the dog had a vicious disposition. Specifically, the Court stated:

> Pennsylvania courts, to our knowledge, have never discussed whether evidence of a dog's subsequent bites is properly admissible in a dog bite case. The plaintiff argues that the evidence was relevant to whether the defendants knew the dog was

> vicious, and that evidence of vicious behavior after the bite which led to this suit would tend to show the defendants *knew* the animal was prone to bite.
>
> The trial court held that evidence of subsequent bites was probative on the issue of the dog's nature. Under the circumstances of this case, where the plaintiff was using the evidence to show the dog had a vicious nature, the evidence was relevant.

Id. at 1233. If this completed the finding of the Superior Court on the issue, we might be tempted to agree with Plaintiff's position and interpret this finding to mean that subsequent incidents could be used to demonstrate prior notice to Defendants of the dog's dangerous propensity to bite. However, the Superior Court took the time and trouble to add the following footnote:

> Ordinarily, of course, evidence of subsequent events is not admissible to show knowledge of a condition prior to an accident. It is not relevant to the issue of whether the defendant knew, *at the time of the accident*, that the accident could occur.

Id. at 1233, fn. 1 (emphasis in original). It is exceedingly clear to this Court that the Superior Court intended to distinguish use of a dog's subsequent behavior at trial to show the dog's dangerous propensity to bite, which is allowed, with use of the subsequent behavior to show notice, which is not. Instantly, had Plaintiff successfully demonstrated notice, she then would then have been entitled to utilize the subsequent incidents, at trial, as evidence of the dog's vicious nature. However, this is not the issue before us. Rather, Plaintiff asks this Court to find that subsequent incidents infer prior notice. This we simply cannot do.

There is absolutely nothing in the transcripts to indicate Defendants had prior notice on the day of the incident of the dog's vicious propensity to bite or otherwise injure people.[3] Accordingly, the following Order is entered:

ORDER

AND NOW, this 19th day of July 2000, Plaintiff's Motion to Reconsider is HEREBY DENIED.

BY THE COURT:

William S. Kieser, Judge

cc: Court Administrator
Joseph Musto, Esquire
David M. Chuprinski, Esquire
Judges
Nancy M. Snyder, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)

[3] Notably, Plaintiff herself stated she had no notice prior to the dog bite that the dog was dangerous or aggressive, nor any reason to believe Defendants had prior notice. Deposition of Plaintiff, N.T. 31-32.