

***Give Chance a Chance*—Provocation in Dangerous Animal Cases Under MCL 287.321 is Assessed on a Wholly Objective Standard**

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The Legislature enacted the dangerous animal statute, MCL 287.321, in 1988 and for nearly 38 years neither the Supreme Court nor the Court of Appeals, in a published decision, had addressed the statutory definition of provocation governing dangerous animal cases. This August, the Court of Appeals addressed “provocation” in § 287.321 head on in a published decision involving an 80-pound American Bulldog. In doing so, the Court provided much needed clarification for how provocation is analyzed under a “wholly objective standard” when determining if a person’s actions constitute adequate provocation that triggers behaviors such as dog bites.

The facts of this dangerous animal case are straightforward, though they highlight how one should *not* treat an animal. The dog in question—Chance—was a three-year-old American Bulldog that weighed approximately 80 pounds. *In re Chance*; slip op. 1-2. Chance lived with the petitioner, Ms. Wickings, her boyfriend, and her granddaughter. *Id.*, slip op. 2. On the date of the incident, a guest of Ms. Wickings’ home noticed her shoe by Chance. *Id.* The guest then approached the dog, got down on the floor, put her face within six inches of the dog’s face, and began loudly scolding the dog. *Id.* Although it was disputed whether the guest was waving her shoe in Chance’s face, upon the scolding of the dog, Change bit a portion of the guest’s nose off. *Id.*

Litigation arose, not in the civil liability context, but under Michigan’s dangerous animal statute, MCL 257.321, *et seq.* The petitioner in the case, the animal control officer for the local police department, petitioned for euthanizing Chance under MCL 287.322. The District Court held that Chance was subject to an order for euthanasia because he was a “dangerous animal” according to MCL 287.322. *Id.* According to the District Court judge, the guest did not “provoke” Chance, and she had suffered permanent and serious disfigurement. *Id.*, slip op. 2. The respondent, Chance’s owner,

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For the first time, Michigan’s Court of Appeals has established binding precedent on the meaning of the provocation exception that can prevent an animal from being classified as “dangerous” and, therefore, subjected to euthanasia under MCL 287.321, *et seq.* That is, provocation under the dangerous animal statute is analyzed under a “wholly objective standard,” similar to how traditional common-law negligence claims are analyzed under a reasonable prudent person standard. *In re Chance*, slip op. 4. With the Court having established a workable framework for provocation in dangerous animal cases, the next question will be whether such analysis can be equally applied to civil liability dog bite cases under the common law or MCL 287.351.

appealed to the Circuit Court, but the Circuit Court affirmed. *Id.* The Court of Appeals granted leave and reversed the District Court’s ruling.

The significance of the Court of Appeals’ ruling is not necessarily with the outcome of the case, but with the analysis and much needed guidance when courts squarely address provocation in statutorily based dangerous animal cases. Until this case was decided, there was no published authority concerning MCL 287.321(d)’s definition of what it means to “provoke” a dangerous animal. *In re Chance*, *supra*; slip op. 3.

Given that “provoke” is defined in MCL 287.321(d) as “to perform a willful act or omission that an *ordinary and reasonable person* would conclude is likely to precipitate the bite or attack *by an ordinary dog or animal*[,]” the panel in *In re Chance* understood that the statutory inclusion of “ordinary and reasonable person” was “a legal term of art that denotes an *objective standard*.” *In re Chance*, *supra*; slip op. 4 (emphasis added.) Borrowing from prior case law, the panel noted that courts had rejected the use of a “subjective” standard or focused inquiry. *Id.* (citing e.g., *Guider v Smith*, 431 Mich 559, 569-570 (1988) (rejecting the use of a “subjective” focus and explaining that the proper inquiry was “whether a *reasonable* man in the defendant’s position could have believed his actions were consistent with the law[]”).) The panel recognized that in traditional common-law negligence cases, the standard of care “is always the care which a person of reasonable prudence would exercise under the circumstances as they existed.” *Id.* (quoting *Antcliff v State Employees Credit Union*, 414 Mich 624, 631-632 (1982)).

Therefore, much like the traditional common-law negligence inquiries, the provocation standard in dangerous animal cases under MCL 287.321, *et seq.* requires courts to analyze provocation under the same “wholly objective standard.” *Id.*, slip op. 4. Turning to the instant dog bite at issue with Chance, the Court of Appeals found the trial court’s analysis involved subjective standards or elements. According to the Court of Appeals, the proper inquiry—under a purely objective standard—should have been whether the victim’s conduct of getting down on the ground and placing one’s face approximately six inches from the face of a large dog that had a chewable object nearby, while simultaneously scolding the dog in a loud voice and possibly waving a shoe above the dog’s head—constituted a willful act or omission that an *ordinary and reasonable person* would conclude is likely to precipitate a bite or attack *by an ordinary dog or animal*. *Id.*, slip op. 4. The District Court did not analyze the dog bite under this standard and instead incorporated the subjective thoughts and feelings of the victim. *Id.*, slip op. 5.

Although the decision in *In re Chance* was purely within the realm of the dangerous animal statute, MCL 287.321 and § 322 involving proceedings to euthanize dangerous animals, this decision and the purely objective standard for determining whether provocation exists, has the potential for two main effects for future cases and related litigation. First, this decision seems to strengthen the provocation defense which is available to animal owners in dangerous animal proceedings. By a purely objective standard for determining provocation, the decision prevents courts from dismissing provocation claims simply because the victim did not intend to provoke the animal or believed their actions were safe. Where an ordinary and reasonable person would conclude that a victim’s willful conduct was likely to precipitate a bite by an ordinary dog, the provocation exception applies, regardless of the victim’s subjective state of mind. This is significant because in cases involving common human behaviors around dogs or other dangerous animals (i.e., such as getting close to the animal’s face, scolding, using loud voices, or handling objects near a dog), the objective standard mandates courts to assess whether these behaviors, viewed from the perspective of a reasonable person, would be expected to provoke an ordinary dog.

Beyond statutory dangerous animal cases, the panel's reasoning in *In re Chance* is likely to influence how courts analyze provocation in civil dog bite cases under MCL 287.351. While the two statutes use different language—MCL 287.351 does not define “provocation” and does not require a willful act—but both have been interpreted to require an objective assessment of the victim's conduct. See *Brans v Extrom*, 266 Mich App 216, (2005). The objective framework articulated in *In re Chance* reinforces existing case law under MCL 287.351 holding that provocation is assessed from the perspective of how an average dog would react to the victim's conduct, not from the victim's subjective perspective.

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