IN THE MUNICIPAL COURT OF APPEALS
OF THE CITY OF EL PASO, TEXAS

IN THE MATTER OF	§	
A Canine	§	
	§	**No. 14-MCA-3788**
"CHANCHO"	§	
	§	**Cause No. 45000001 (on remand)**
	§	

OPINION

This is the second time that this case is before this Court. Previously, this Court reversed and remanded this case to the Trial Court because the Reporter's Record, although requested by Appellant, could not be found. On retrial, the Trial Court reaffirmed its previous determination that "Chancho" was a "dangerous dog" as that term is defined by Section 822.041(2), Tex. Health & Safety Code. It further found that the owner of the dog had failed to comply with the requirements for the owner of a dangerous dog under Section 822.042(a) of the Texas Health & Safety Code, which specifically requires the owner to:

1. Register the dangerous dog with the Animal Control authority for the area in which the dog is kept;
2. Restrain the dangerous dog at all times on a leash in the immediate control of a person or in a secure enclosure;
3. Obtain liability insurance coverage or show financial responsibility in an amount of at least $100,000.00 to cover damages resulting from an attack by the dangerous dog causing bodily injury to a person and provide proof of the required liability insurance coverage or financial responsibility to the Animal Control authority to the area in which the dog is kept; and
4. Comply with an applicable municipal or county regulation requirement or restriction on dangerous dogs.

Pursuant to Section 822.042(c), application was made to the Municipal Court which found that the owner of Chancho, a "dangerous dog," had failed to comply with the above requirements. The Court ordered the Animal Control Authority to seize the dog and issued a

warrant authorizing the seizure. Pursuant to that order and warrant, Chancho was seized on March 21, 2014.

The Court then is required, as directed by Section 822.0423, to set a hearing to determine whether the dog was a dangerous dog and whether the owner of the dog had complied with the above requirements of Section 822.042(a). The hearing must be held not later than the tenth (10th) day after the date on which the dog is seized, thus, the significance of the date of seizure. The hearing in this case was not set until the twelfth (12th) day after the date of seizure, but this Court has determined that such delay in the hearing does not require reversal despite the mandatory language of the section relating to the setting of that hearing.

At that hearing, if the Court finds the owner has not complied with the requirements of Section 822.042(a) before the 11th day after the date the dog was seized, the Court shall order the Animal Control authority to humanely destroy the dog. And if the Court finds compliance by the owner, it shall order that the dog be returned to the owner. See Sec. 822.04(e).

In this appeal, a Reporter's Record has been filed with this Court and has been reviewed by this Court. In reviewing the evidence that was introduced before the Trial Court as reflected in the Reporter's Record, this Court is mindful that the Trial Court is the ultimate fact-finder, and that this Court cannot substitute its judgment for that of the Trial Court. It is the Trial Court's primary and sole responsibility to judge the credibility of the witnesses and the weight to be given to their testimony. The Trial Court, and not this Court, is in a better position to perform that function and is the ultimate arbitrator of the facts. It is the Trial Court's responsibility to decide factual disputes and those factual determinations cannot be legally disturbed on appeal.

So, the question remains - were the requirements for the owner of the dangerous dog under Section 822.042 met and complied with by the owner?

The first requirement of that section requires that the dog be registered with the Animal Control Authority. The Animal Control officer testified that prior to the Animal Control Authority seizing the dog, it had not been registered with the City as a dangerous dog, and in fact, was in violation of the requirements to be so registered. The owner admitted that the dog had not been registered as a dangerous dog in 2013. That registration is required to be in effect continuously since the determination that the dog is dangerous, which in this case, had been since 2009. Also the registration must be done yearly. Clearly, there was evidence to show that the owner was not in compliance with that requirement.

Additionally, the owner is required to restrain a dangerous dog at all times on a leash in the immediate control of a person or in a "secure enclosure." A secure enclosure is defined in Section 822.041(4) and means a fenced area or structure that is:

(A) locked;
(B) capable of preventing the entry of the general public, including children;
(C) capable of preventing the escape or release of a dog;
(D) clearly marked as containing a dangerous dog; and
(E) in conformance with the requirements for enclosures established by the local Animal Control Authority.

There was evidence introduced by the Animal Control officer that the front entrance to the property, although gated, was not locked and therefore was not a "secure enclosure." He testified that all he had to do to open the gate was to unlatch the latch and open the door, and concluded that the gate was not secure even though closed. He further testified that in his professional opinion that the conditions that he found relating an unlocked gate would not qualify as a "secure enclosure" under the Code because a child or a person or other member of

the public could clearly open the gate and the dog could easily escape. On cross examination, he clearly stated that "secured" means "locked."

Appellant testified that there was a padlock and a door knob that locked as well as a latch which could be padlocked "if you wanted it to be." He further testified that the way the door system is set up, if it is latched, the door knobs cannot be unlocked. Further, to open the gate you have to unlock the latch, if it is latched, as well as twist the door knob. But he never equivocally testified that the front gate was always locked, or that it was locked contrary to the testimony of the Animal Control officer. As stated above, it was for the Trial Court to resolve the conflicting evidence presented and obviously, chose to give greater weight and credibility to the testimony of the City's witness rather than Appellant. That was a judgment for the Trial Court to make, and not this Court. The Trial Court's determination that Appellant failed to restrain the dangerous dog at all times in a "secure enclosure" is supported by the evidence.

The next requirement is that an owner of a dangerous dog must obtain liability insurance coverage or show financial responsibility in an amount of at least $100,000.00 to cover damages resulting from an attack by the dangerous dog causing bodily injury to a person and to provide evidence of that insurance coverage to the Animal Control authority for the area in which the dog is kept. The City's evidence in reference to this requirement is scant at best, but there was evidence presented that proper documentation, which included insurance had never been presented to the Animal Control authority after the March 21st hearing.

Appellant's evidence relating to the insurance is not much better, but certainly more confusing as to whether he in fact had insurance. He contends he did, but when it was effective is difficult to ascertain. Certainly, the proof offered by Appellant was insufficient to establish compliance with this requirement, and the Court had no way to determine if liability insurance was actually in effect. As part of Appellant's Brief, he has exhibits from Prime Insurance

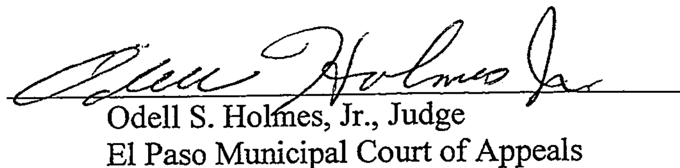
Company which reflect that there was a policy issued on March 27, 2014, and then a reinstatement notice from the same insurance company saying that the insurance had been reinstated effective April 3, 2014. There is nothing in the record to show any liability coverage before those periods of time.

A failure to show compliance with any one of the requirements of Section 822.042(a) is sufficient to show noncompliance, and authorize the Court to order the Animal Control Authority to humanely destroy the dog.

This Court is not unmindful of the seriousness of this issue and the fact that this dog's life weighs in the balance. But it is the responsibility of this Court only to review the findings of the Trial Court based on the law and the evidence presented to it and not to substitute its judgment for that of the Trial Court. As the Trial Judge said so aptly, her decision was not an easy one to make, nor has it been for this Court, but ultimately, the decisions made by the Trial Court and this Court were necessitated by what the owner of this dog did not do. The owner had one last chance to save this dog pursuant to Section 822.042(e) and he failed to show compliance with the requirements of the law or to offer adequate proof to show such compliance.

Accordingly, the decision of the Trial Court is hereby affirmed.

SIGNED this 18th day of November, 2014.

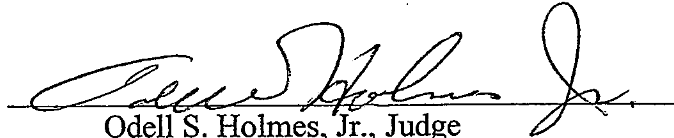


Odell S. Holmes, Jr., Judge
El Paso Municipal Court of Appeals

JUDGEMENT

This case came on to be heard on the Transcript of the Record of the Court below, the same being considered, it is ORDERED, ADJUDGED and DECREED by the Court that the case is affirmed.

SIGNED this 18th day of November, 2014.



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