STATE OF MICHIGAN

COURT OF APPEALS

BRENDA MOORE, Next Friend of NICHOLAS MOORE, minor, and THOMAS MOORE,

Plaintiffs-Appellants,

v

JOHN JERGOVICH, RONALD MILLER, and KELLY TROWHILL,

Defendants-Appellees.

UNPUBLISHED
May 10, 1996

No. 167309
LC No. 92-205367 NO

Before: Wahls, P.J., and Reilly and O'Connell, JJ.

PER CURIAM.

Plaintiffs appeal as of right the orders granting summary disposition in favor of John Jergovich, Ronald Miller, and Kelly Trowhill. We affirm.

John Jergovich owned a golden retriever named Tuggs. On July 1, 1990, Tuggs attacked a child, seriously injuring him. Although no formal complaint was ever filed, the incident was reported to the Sanilac County Sheriff's Department. Deputy Animal Control Officers Kelly Trowhill and Ronald Miller compiled a written report pertaining to the incident.

Jergovich conveyed Tuggs to John Sayotovich. Sayotovich was made fully aware of the incident, although not, apparently, by Jergovich. However, because Sayotovich had no children and planned to use Tuggs only as a hunting dog, he was untroubled by Tuggs' past. On September 23, 1991, while plaintiffs were visiting Sayotovich, Tuggs attacked minor Nicholas Moore, injuring him. Tuggs was subsequently destroyed.

Plaintiffs filed suit, naming as defendants Jergovich as the prior owner of Tuggs, and Deputy Animal Control Officers Trowhill and Miller.[1] With respect to defendants Trowhill and Miller, plaintiffs alleged that the two officers had breached their statutory duty to adequately investigate and prosecute the first attack, and, because of this, were liable in tort for the second attack. With respect to defendant Jergovich, plaintiffs claimed that he owed them a common law duty to have Tuggs destroyed following the first attack, a duty that was not vitiated by the transfer of the dog.

Trowhill and Miller moved for summary disposition, contending, *inter alia*, that plaintiffs relied on provisions of unrelated acts in an attempt to suggest that defendants owed plaintiffs a statutory duty. Reading the only pertinent legislation, defendants argued, it was clear that the Legislature had imposed no duty on defendants in favor of plaintiffs. The trial court agreed, and granted the motion pursuant to MCR 2.116(C)(8).

Jergovich then moved for summary disposition, arguing that there existed no common law duty to destroy an animal that had attacked a human, and, further, that under both Michigan common and statutory law, liability for the acts of an animal could be imposed only on the owner or possessor of the animal. Because he was not the owner or possessor of Tuggs at the time of the incident, Jergovich submitted that he owed no duty to plaintiffs. Again, the court agreed, and granted Jergovich's motion pursuant to MCR 2.116(C)(8).

On appeal, the grant or denial of a motion for summary disposition is reviewed de novo. *Michigan Mutual Ins Co v Dowell*, 204 Mich App 81, 86; 514 NW2d 185 (1994). Considering only the pleadings and accepting all of the plaintiff's well-pleaded factual allegations as true, the motion should be granted where the plaintiff has failed to allege a claim upon which relief can be predicated. *Duran v Detroit News, Inc*, 200 Mich App 622, 628; 504 NW2d 715 (1993). A duty is said to exist where a relationship between an actor and an injured person gives rise to a legal obligation on the actor's part for the benefit of the injured person. *Mieras v DeBona*, 204 Mich App 703, 708; 516 NW2d 154 (1994), lv granted 448 Mich 927 (1995). Because whether a duty exists is, generally, a pure question of law, summary disposition is appropriate where the court concludes that the defendant owed the plaintiff no legal duty. *Fisher v Johnson Milk Co*, 383 Mich 158, 162; 174 NW2d 752 (1970).

I

Plaintiffs contend that a duty on the part of Trowhill and Miller arose by operation of statute, specifically, by the conjunction of the Dog Law of 1919, MCL 287.261 *et seq*.; MSA 12.511 *et seq*., and MCL 287.351; MSA 12.544(1). According to plaintiffs, MCL 287.351(1); MSA 12.544(1), "prohibits a dog from biting a person."[2] The Dog Law of 1919 provides that "[a]n animal control officer or a law enforcement officer of the state shall issue a citation, summons or appearance ticket for the violation of this act." MCL 287.264; MSA 12.514. Finally, the Dog Law of 1919 also provides that "[a]ny person or police officer, violating or failing or refusing to comply with any of the provisions of this act shall be guilty of a misdemeanor . . . ." MCL 287.286; MSA 12.536.

Plaintiffs argue that, because a violation of the act occurred when Tuggs attacked the first child, defendants Trowhill and Miller were bound to issue a citations, summons or appearance ticket. Because Trowhill and Miller failed to do so, it is contended, they breached a statutorily imposed duty. (The fact that this inaction allegedly constitutes a misdemeanor is, presumably, meant to emphasize that such a duty is inarguably recognized at law.)

Our review of the statutory authority, however, reveals that plaintiffs have misinterpreted the law upon which they rely. In short, while the Dog Law of 1919 does mandate that animal control officers and police officers issue citations for violations of the act, the statutory provision that plaintiffs allege was

violated is not part of that act. What we have referred to as the "Dog Law of 1919" is actually the short title of 1919 PA 339, MCL 287.261(1); MSA 12.511(1), as amended. MCL 8.8(2); MSA 2.219(2). In contrast, the provision that plaintiffs have summarized as standing for the proposition that a dog may not bite a person, MCL 287.351(1); MSA 12.544(1), is part of 1939 PA 73. While the acts are related inasmuch as they pertain to dogs, they remain distinct acts. Because of this distinction, defendants Trowhill and Miller were under no duty to issue a citation, summons or appearance ticket pursuant to MCL 287.351(1); MSA 12.544(1), under the present facts. Accordingly, summary disposition pursuant to MCR 2.116(C)(8) was warranted because plaintiffs failed to allege a recognized legal duty. *Fisher*, *supra*. If defendants Trowhill and Miller owed any duty to plaintiffs, it is not that which plaintiffs have pleaded.

Because we have concluded that defendants Trowhill and Miller did not owe the duty plaintiffs alleged in their complaint, there are several issue that we need not reach. First, we need not address the public duty doctrine, *see, e.g., Harrison v Director of Dep't of Corrections,* 194 Mich App 446, 456-457; 487 NW2d 799 (1992), to which plaintiffs have devoted the bulk of their effort on appeal. Second, it is unnecessary that we address defendants' persuasive argument that summary disposition is also appropriate pursuant to MCR 2.116(C)(10) because plaintiffs have failed to present evidence establishing causation. Finally, we leave to another panel to determine whether MCL 287.351(1); MSA 12.544(1), does, in fact, prohibit a dog from biting a person. We thereby sidestep the thorny question of to whom the citation should be issued -- the dog or the owner -- should the statute be found to prohibit dogs from attacking people.

II

We also find that plaintiffs have failed to allege any actionable duty on the part of defendant Jergovich. Plaintiffs present two arguments on appeal concerning the issue of defendant Jergovich's alleged duty. First, plaintiffs contend that defendant Jergovich had a duty to warn Sayotovich of the alleged dangerous propensities of Tuggs before transferring the dog to Sayotovich. Plaintiffs' argument is unconvincing, primarily because plaintiffs have offered no authority suggesting that such a duty, assuming it exists, would be owed to *plaintiffs* rather than to the transferee, Sayotovich. The most analogous decision we have found on this issue is that of *Jackson v New Center Community Mental Health Services*, 158 Mich App 25, 36; 404 NW2d 688 (1987), in which this Court held that a psychiatrist did not have a duty to protect the victims of a patient of his who went on a shooting spree. Plaintiffs have not distinguished the present case from *Jackson*. Therefore, if any duty existed on the part of Jergovich to warn Sayotovich, plaintiffs have demonstrated no reason why this Court should conclude that the duty was owed to any beyond Sayotovich.

Plaintiffs also present some type of argument to the effect that Jergovich should not be able to escape liability merely because he transferred ownership of Tuggs to Sayotovich fourteen months prior to the attack giving rise to this litigation. Our review of the relevant authority indicates that possession, rather than ownership, of an animal appears to be the primary criterion. See *Trager v Thor*, 445 Mich 95, 104-105; 516 NW2d 69 (1994); 3 Restatement Torts, 2d, § 518(b), p 30. It is uncontested that defendant Jergovich was not in possession of Tuggs at the time of the second attack. Therefore, while plaintiffs may be correct in that Jergovich's lack of ownership of Tuggs is not dispositive, his lack of

possession *is* dispositive. Accordingly, because plaintiffs have failed to allege any recognized duty on the part of defendant Jergovich, summary disposition pursuant to MCR 2.116(C)(8) was appropriate. *Fisher, supra*.

III

We have taken pains, above, to emphasize that we do not review the body of Michigan law to determine whether plaintiffs had any viable theories of recovery, but review only the theories of recovery actually pleaded by plaintiffs. Plaintiffs' final argument on appeal pertains to this issue. They contend that, "[i]f the trial court could not grasp the issues . . . from the pleadings on file, pursuant to MCR 2.116(I)(5) the court was obligated to give [plaintiffs] an opportunity to amend their pleadings to clarify the issues. The trial court provided no such opportunity."

Plaintiffs' are correct in their assertion that, following a defendant's motion for summary disposition pursuant to MCR 2.116(I)(5), "the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118 . . . ." MCR 2.118(A)(2) provides that "[l]eave shall be freely given when justice so requires."

However, in the present case, plaintiffs did not seek leave to amend their complaint in response to defendants' motion. In other words, plaintiffs did not exercise their opportunity to amend their pleadings. To the extent that plaintiffs' argument implies that the court must *sua sponte* affirmatively suggest that the parties amend their pleadings, we find this position contrary to common sense and, more importantly, unsupported by the court rules. The burden to amend pleadings falls squarely on the shoulders of the party who would benefit from such amendment, not on the disinterested shoulders of the court. Therefore, while MCR 2.116(I)(5) mandates that the court give the parties an opportunity to amend their pleadings, this rule is not violated when a party fails to move to amend his or her pleadings.

Affirmed.

/s/ Myron H. Wahls
/s/ Maureen Pulte Reilly
/s/ Peter D. O'Connell

[1] Plaintiffs also named several other defendants not relevant for purposes of this appeal.

[2] MCL 287.351(1); MSA 12.544, provides as follows:

> If a dog bites a person, without provocation while the person is on public property, or lawfully on private property, including the property of the owner of the dog, the owner of the dog shall be liable for the damages suffered by the person bitten, regardless of the former viciousness of the dog or the owner's knowledge of such viciousness.