

STATE OF MICHIGAN
COURT OF APPEALS

CHRISTINA GIOUROUKOS,

Plaintiff-Appellant,

v

WILLIAM JUNGLING,

Defendant-Appellee.

UNPUBLISHED

September 27, 2005

No. 255462

Washtenaw Circuit Court

LC No. 03-001174-NO

Before: Sawyer, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendant. We affirm.

This appeal concerns defendant's duty to control his dog for the purposes of a negligent failure to control action, whether a dog's barking may be considered an "abnormally dangerous propensity" for the purposes of a strict liability action, and whether the barking of a visibly leashed dog could proximately cause plaintiff's injuries. While defendant and his employer were painting plaintiff's house, plaintiff fell and broke her arm when she ran from defendant's barking dog, which was tied by a leash to defendant's truck. All parties concede that the dog and truck were on an adjacent vacant lot and not on plaintiff's property at the time of her injury.

Plaintiff first argues that the trial court erred in granting defendant's motion for summary disposition under the theory of strict liability because defendant was aware of the dog's propensity to bark (evidenced by its previous barking at plaintiff's nephew in defendant's presence) and, thus, satisfies the scienter requirement for strict liability, and because barking is an abnormally dangerous propensity. We disagree.

The trial court rendered summary disposition pursuant to MCR 2.116(C)(10). Under this rule, summary disposition of all or part of a claim or defense may be granted when:

[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.

This Court reviews rulings on motions for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

In *Trager v Thor*, 445 Mich 95; 516 NW2d 69 (1994), the Court held owners of domestic animals (including dogs) strictly liable for the animal's actions if: (1) the owner knows or has reason to know it has dangerous propensities, (2) these propensities are *abnormal for a member of its class*, and (3) plaintiff's injury results from that abnormal and dangerous propensity of which the possessor knows or has reason to know. *Id.* at 99. Although plaintiff's assertion that defendant knew of the propensity of his dog to bark is supported by evidence, defendant's awareness does not give rise to strict liability because barking, approaching strangers, and tugging on a leash are all common dog behaviors and thus are not "abnormally dangerous." In addition, the trial court's record is devoid of evidence tending to show that this dog's behavior was vicious or dangerous during the incident that caused plaintiff's injury.

Second, plaintiff argues that the trial court erred in finding that defendant had no duty to prevent the barking of his dog in her negligence action. We disagree. In *Trager*, our Supreme Court outlined the cause of action for the negligent failure to control one's animal: (1) the owner must breach his duty to effectively control the animal in a situation where it would reasonably be expected that its normal or abnormal propensities could cause injury and (2) the injury does proximately result from the owner's negligence. *Id.* at 105-106. However, dogs, as domestic animals, "are generally regarded as so unlikely to do substantial harm that their possessors have no duty to keep them under constant control." *Id.* at 105-106. Aside from plaintiff's unfortunate injury, plaintiff failed to show another instance where mere barking caused a passerby injury. Rather, plaintiff's reaction to the dog's barking was unusual and unexpected. Because the dog's barking was not dangerous, defendant had no duty to prevent the barking.

Third, plaintiff also argues that the trial court erred in granting defendant's motion for summary disposition on the issue of the causal relationship between the behavior of defendant's dog and plaintiff's injuries because the trial court erroneously made a finding of fact that, even if defendant had been present, the dog would still have barked at plaintiff, frightening her and causing her to fall in her flight. We disagree. Dogs are generally assumed to be safe domesticated animals for the purposes of determining breach of duty in a negligence action, *see Trager, supra* at 99; under that premise, it is reasonable to presume that persons will react to dogs as if they are safe animals. Consequently, our Supreme Court has required a specific showing of evidence that the particular animal or its breed display dangerous propensities of which the defendant-owner was aware or should have been aware in order for the injury to be deemed foreseeable. *Id.* We conclude that it is unforeseeable for a person to flee in a panic from a *leashed* dog, as in the instant case. Moreover, the deposition testimony and affidavit of plaintiff's nephew indicate that, while she did not particularly like dogs, plaintiff was neither afraid of nor aware of any vicious propensity in defendant's dog, such that she would foreseeably flee as she did; this is further substantiated by her willingness to walk by the dog four times just before the incident. While one may certainly sympathize with plaintiff's fearful reaction to the actions of this dog, it does not necessarily follow that her unfortunate fall was a foreseeable result of the incident.

Finally, plaintiff argues that the trial court made an improper finding of fact when it stated that defendant's dog may have barked even if defendant had been present. A court may not make findings of fact when deciding a summary disposition motion. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). However, the question of whether defendant had a reasonable expectation that harm would occur in his absence goes directly to the issue whether a

duty exists under plaintiff's charge of negligence and, therefore, is a question of law. *Trager, supra* at 106. Questions of law must be answered by the trial court. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). Accordingly, the trial court's determination was not an improper finding of fact.

For the foregoing reasons, we affirm the trial court's order granting summary disposition for defendant.

/s/ David H. Sawyer

/s/ Michael J. Talbot

/s/ Stephen L. Borrello