

STATE OF MICHIGAN
COURT OF APPEALS

BERNARD KIBBE and DONNA KIBBE,
Plaintiffs-Appellants,

UNPUBLISHED
November 8, 2012

v

No. 306270
Emmet Circuit Court
LC No. 10-002675-NO

JAMIE RICHIE,

Defendant-Appellee,

and

J & R BUILDING MOVERS, INC.,

Defendant.

Before: FITZGERALD, P.J., and METER and BOONSTRA, JJ.

METER, J. (*concurring in part and dissenting in part*).

Given the specific wording of the county ordinance, I agree with the majority that the trial court properly dismissed plaintiffs' ordinance-violation claim. However, I respectfully dissent from the majority's conclusion that the trial court properly dismissed the strict-liability claim.

As noted in the majority opinion, "[s]trict liability attaches for harm done by a domestic animal where three elements are present: (1) one is the possessor of the animal, (2) one has scienter of the animal's abnormal dangerous propensities, and (3) the harm results from the dangerous propensity that was known or should have been known." *Trager v Thor*, 445 Mich 95, 99; 516 NW2d 69 (1994). The first element is not in dispute, and there are genuine questions of material fact concerning the remaining two elements. With regard to element (2), Jamie Richie testified that in 2008 the black Labrador retriever and the St. Bernard ran into her and knocked her down. Medical records indicate that the dogs "plowed into her" and "tweaked her back," exacerbating an existing back injury and causing "severe pain" that caused her activities to be "very limited." This evidence created a question of fact concerning whether Jamie had "scienter of [her animals'] abnormal dangerous propensities." *Id.* The majority emphasizes that no evidence was presented that the dogs had *intentionally* jumped on Jamie or that they had acted aggressively. That, however, is not the standard from *Trager*. The standard is "abnormal dangerous propensities," *id.*, and a tendency for dogs to run into people and knock them down,

causing injury, could indeed be considered an “abnormal dangerous propensity.” See Restatement Torts, 2d, § 509, comment *i*, p 19 (“[i]f the possessor knows that his dog has the playful habit of jumping up on visitors, he will be liable without negligence when the dog jumps on a visitor, knocks him down and breaks his hip”). With regard to element (3), Jamie’s dogs in fact did knock down Bernard Kibbe, causing several injuries.

The trial court concluded that because Bernard Kibbe testified about “seeing white,” and because there was no prior knowledge of a dangerous propensity with regard to the white Labrador retriever, summary disposition was appropriate. However, Bernard testified that he actually could not say which of the three dogs contacted him. He testified that he saw the dogs “running around” and “coming up towards [him],” and he answered “Yes” when asked, “The *dogs* knocked you from behind?” [Emphasis added.] The use of the plural “dogs” provides some evidence that at least one of the other dogs was involved in the incident. Moreover, if Jamie knew of the dangerous propensity of the black Labrador retriever and the St. Bernard to jump onto people and cause injury, she should also have known that, when these two dogs engaged in rambunctious play with another dog, the three of them would essentially act as a “pack” and pose a danger.

I would remand this case for further proceedings with regard to the strict-liability count.

/s/ Patrick M. Meter