

STATE OF MICHIGAN
COURT OF APPEALS

PAULA G. MITCHELL,

Plaintiff-Appellee,

v

FREDDIE CUNNINGHAM and MARGARET
MOONEY,

Defendants-Appellants.

UNPUBLISHED

March 16, 2006

No. 258239

Ingham Circuit Court

LC No. 03-001495-NO

Before: Smolenski, P.J., Whitbeck, C.J., and O’Connell, J.

PER CURIAM.

Defendants appeal as of right a jury trial verdict for plaintiff in this negligence action. We reverse and remand for a new trial.

Plaintiff was injured after she approached defendants’ home while canvassing for a local candidate. After knocking on the door to defendants’ home and receiving no answer, plaintiff walked back to the city sidewalk and stopped to mark on a canvassing card that no one was home at defendants’ address. Defendants’ two dogs, which plaintiff heard barking inside the home when she knocked on the door, escaped from a side door of defendants’ home and came running toward her. Plaintiff testified that she began running away from the dogs and fell on the sidewalk, landing on her elbow and causing a severe injury. Plaintiff testified that the dogs never bit or touched her, but they were right at her heels while she was running away from them. Defendants did not dispute that the dogs were able to get out of their home on that day.

Defendant argues that the trial court erred in directing a verdict for plaintiff on the issue of negligence and for excluding evidence of the past behavior of their dogs and information concerning the side door from which the dogs exited the home. We agree.

We review a trial court’s decision on a directed verdict de novo. *Smith v Foerster-Bolser Constr, Inc*, ___ Mich App ___, ___; ___ NW2d ___ (2006). A directed verdict is appropriate only when, viewing the evidence in the light most favorable to the nonmoving party and drawing all inferences in that party’s favor, no factual question exists upon which reasonable jurors could differ. *Id.* Further, we review a trial court’s evidentiary decisions for an abuse of discretion. *Dep’t of Transportation v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999). An abuse of discretion might result when a trial court operates under an incorrect legal framework. *People v Hine*, 467 Mich 242, 250-251; 650 NW2d 659 (2002).

In *Trager v Thor*, 445 Mich 95, 105; 516 NW2d 69 (1994), our Supreme Court recognized the right to bring a negligence action in domestic animal injury cases. The Court noted that “[d]ogs, and some other domestic animals are generally regarded as so unlikely to do substantial harm that their possessors have no duty to keep them under constant control. Consequently, a mere failure to do so would not constitute breach of any duty of care.” *Id.* at 105-106. Instead, under the common law,

“[A] negligence cause of action arises when there is ineffective control of an animal in a situation where it would reasonably be expected that injury could occur, and injury does proximately result from the negligence. The amount of control required is that which would be exercised by a reasonable person based upon the total situation at the time, including the past behavior of the animal and the injuries that could have been reasonably foreseen.” [*Id.* at 106, quoting *Arnold v Laird*, 94 Wash 2d 867, 871; 621 P2d 138 (1980).]

In this case, the trial court directed a verdict for plaintiff on the issue of negligence because it determined that there was no question that defendants had violated a local ordinance that prohibited dogs from running at large and a common law duty to control one’s animals. The court also ruled that the past history of the dogs was not relevant to the case because there was no dispute that defendants did not have their dogs under control when the accident occurred. However, *Trager* held that, in a negligence action resulting from a domestic animal injury, to determine the amount of control required, the fact finder must consider “‘the total situation . . . including the past behavior of the animal and the injuries that could have been reasonably foreseen.’” *Id.* The Court did not limit the application of this general standard of care to cases where there were no ordinances prohibiting dogs from running at large in effect. Further, the violation of an ordinance, if proved, is merely *evidence* of negligence on the part of defendants. *Rickrode v Wistinghausen*, 128 Mich App 240, 247; 340 NW2d 83 (1983) (finding that evidence of a violation of an ordinance, along with other evidence, including the past behavior of an animal, was sufficient to submit the case to the jury for consideration.). It is not “in itself sufficient to impose a legal duty cognizable in negligence.” *Summers v Detroit*, 206 Mich App 46, 52; 520 NW2d 356 (1994). Thus, the existence of the ordinance did not alter the nature and extent of defendants’ common law duty to control their animals.

Although the violation of the ordinance was some evidence of negligence on defendants’ part, *Trager* requires the fact-finder to consider all evidence relevant to “the total situation” at the time of the injury, to determine if defendants’ exercised effective and reasonable control of their dogs. *Trager, supra* at 106. Consequently, the trial court erred in directing a verdict for plaintiff on the issue of negligence and in excluding evidence of the past behavior of the dogs and the circumstances surrounding the condition of the side door of defendants’ home.

We reverse and remand for a new trial consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ William C. Whitbeck
/s/ Peter D. O’Connell