

STATE OF MICHIGAN
COURT OF APPEALS

TERRY WITT, Next Friend of ANGELA WITT, a
Minor,

UNPUBLISHED
June 18, 1999

Plaintiff-Appellant,

v

No. 210398
Clinton Circuit Court
LC No. 97-008511 NO

CHAD SMITH and TAMMY SMITH,

Defendants-Appellees.

Before: Neff, P.J., and Hood and Murphy, JJ.

PER CURIAM.

Plaintiff appeals by right from an order granting defendants summary disposition of his negligence claim pursuant to MCR 2.116(C)(10). The trial court held that defendants owed no duty to plaintiff's minor because it was not foreseeable that defendants' dog would startle a horse inside the barn, and that the horse would injure plaintiff's minor as a result. We affirm.

I

To establish a prima facie case of negligence, a plaintiff must show that (1) the defendant owed a legal duty to the plaintiff; (2) defendant breached this duty; and (3) the breach was a proximate cause of the damages suffered by the plaintiff. *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993). On appeal, plaintiff argues that he presented sufficient evidence on the "duty" element of his negligence claim to withstand summary disposition. We disagree.

The existence of a legal duty is a question of law for the court to decide. *Trager v Thor*, 445 Mich 95, 105; 516 NW2d 69 (1994). In *Trager*, a case involving a child bitten by a friend's dog, our Supreme Court noted:

In assessing whether duty exists in a negligence action of this type, it is necessary to keep in mind the normal characteristics of the animal that caused the injury, as well as any abnormally dangerous characteristics of which the defendant has knowledge. . . . Dogs . . . 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 a breach of any duty of care. However, if the possessor of such an animal . . . has knowledge of some dangerous propensity unique to the particular animal, or is aware that the animal is in such a situation that a danger of foreseeable harm might arise, the possessor has a legally recognized duty to control the animal to an extent reasonable to guard against that foreseeable danger. [*Id.* at 105-106 (citations omitted; footnote omitted).]

In the present case, we agree with the trial court that plaintiff failed to establish that the dog had any abnormally dangerous propensities. Plaintiff claimed that the dog's propensity to chase horses around the field and down the road was abnormally dangerous. However, plaintiff acknowledged that the dog, as a collie or herding dog, was essentially bred to chase animals. This propensity thus could be considered a normal characteristic of this particular dog, and this type of dog in general. Accordingly, such behavior would not be an abnormally dangerous characteristic from which defendants had a duty to protect plaintiff's minor.

Moreover, even if plaintiff could show that chasing the horses was an abnormally dangerous characteristic, this would not constitute notice of the dog's alleged "propensity" to bark and lunge at the horses in the barn, which was the characteristic that allegedly caused the harm to plaintiff's minor. Plaintiff and his daughter both testified that they had had no problems with the dog while in the barn. Furthermore, other than plaintiff expressing his concern to defendants regarding the dog's safety, and his comment about the dog chasing the horses down the road, plaintiff never complained to defendants regarding the dog's behavior. There is simply nothing in the record that indicates that defendants knew or should have known of any abnormally dangerous propensities that would have imposed on them a duty to control the dog. In other words, defendants could not have reasonably expected that an injury would result from the dog's wandering in and out of the barn. *Trager, supra* at 106. The dog's barking and lunging at the horse was an unforeseeable event that did not give rise to any duty on defendants' part.

II

Plaintiff next argues that the court failed to apply the proper tests in determining whether plaintiff provided factual support for the negligence claim. After reviewing the record, we disagree.

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. When deciding a motion for summary disposition, the court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence available to it. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The trial court had before it the parties' deposition testimony, and referred to portions of this testimony in its ruling. It is clear that the trial court determined that the dog's previous behavior outside the barn did not provide notice to defendants that they should be concerned about the dog barking and lunging at a horse inside the barn, and that defendants could not have had a reasonable expectation that plaintiff would be injured inside the barn.

Plaintiff argues that this was an improper factual determination. 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 defendants had a reasonable expectation that harm would occur goes directly to the issue of whether a duty exists, *Trager, supra* at 106, which is a question of law for the court. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995); *Trager, supra* at 105. Accordingly, the trial court's determination was not an improper finding of fact.

III

Finally, plaintiff argues that although this case did not fall under the Michigan dog bite statute, MCL 287.351; MSA 12.544, defendants should still be held strictly liable for the harm caused by their dog. Because plaintiff asserts this theory of liability for the first time on appeal, we decline to review this claim. *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). We briefly note, however, that in the absence of proof that the dog had an abnormally dangerous propensity of which defendants had notice, strict liability will not apply. *Trager, supra* at 99.

Affirmed.

/s/ Janet T. Neff

/s/ Harold Hood

/s/ William B. Murphy