STATE OF MICHIGAN

COURT OF APPEALS

CATHERINE C. LIEDING, as Next Friend of MAEVA CARNEVA, a Minor,

Plaintiff-Appellant,

v

JAMES BLACKLEDGE and BARBARA BLACKLEDGE,

Defendants-Appellees.

UNPUBLISHED
May 13, 2004

No. 243850
Washtenaw Circuit Court
LC No. 01-000901-NO

Before: Murray, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendants. We affirm.

I. Material Facts and Proceedings

In September 2000, seven-year-old Maeva Carneva was bit on her back by defendants' German shepherd dog. Carneva was playing with friends on defendants' property; however, she had never met defendants previously, had never been on defendants' property previously, and had never seen defendants' dog prior to the incident. Carneva was eating a peanut butter and jelly sandwich for lunch and drinking a bottle of juice while playing with her friends. Carneva and her friends were playing in defendants' yard,[1] attempting to build a tent out of sticks, near defendants' dog. According to Carneva, the dog was barking, and was on a metal leash.[2] The dog was pulling on its leash, and raised its front legs off the ground.

At one point, one of Carneva's friends went to the dog and began to tease it by motioning back and forth toward the dog. Carneva then went over toward the dog, and the dog's leash

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[1] Although defendants' yard was not fenced, Carneva testified that none of the houses in the neighborhood had a fence.

[2] Barbara indicated in her answers to the interrogatories that the dog was tied up with a nylon rope.

broke. Carneva and her friend ran away from the dog, but Carneva tripped over a stick and the dog bit her on her back.

Defendants initially moved for summary disposition of plaintiff's statutory and common law claims for a dog bite injury. Following oral argument, the trial court granted summary disposition in favor of defendants on those claims. The trial court dismissed the statutory claim for dog bite liability because Carneva was trespassing on defendants' property at the time of the incident. The trial court also determined that Carneva was not an implied licensee. The trial court then found that even if Carneva had not been trespassing and was an implied licensee, she provoked the dog and could not therefore recover. Regarding the claim for common law dog bite liability, the trial court concluded that there was no admissible evidence demonstrating that the dog had vicious or aggressive propensities, and concluded that summary disposition was also proper on this claim.

Defendants subsequently brought a motion for summary disposition of plaintiff's attractive nuisance claim. Following oral arguments, the trial court granted defendants' motion. The trial court first concluded that there was no evidence that defendants knew or should have known that any child, including Carneva, would have trespassed on the property where the dog was tied up. Finally, the trial court determined that, because there was no prior indication that the dog was aggressive or that it had previously bitten another person, that there was no reason for defendants to know the dog presented an unreasonable risk of harm to Carneva.

II. Standard of Review

Plaintiff contends that the trial court erred in granting summary disposition in favor of defendants. Where a motion for summary disposition is brought under both MCR 2.116(C)(8) and (C)(10), but the parties and the trial court relied on matters outside the pleadings, review is appropriate as if granted only under (C)(10). *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997). This Court applies the following standard in reviewing the propriety of a trial court's decision made pursuant to MCR 2.116(C)(10):

> A trial court's decision regarding a motion for summary disposition is reviewed de novo. *Singerman v Muni Service Bureau, Inc*, 455 Mich 135, 139; 565 NW2d 383 (1997). Summary disposition may be granted pursuant to MCR 2.116(C)(10) when, except with regard to the amount of damages, there is no genuine issue about any material fact. When deciding a motion for summary disposition pursuant to MCR 2.116(C)(10), a court must consider all pleadings, affidavits, depositions, and other documentary evidence in the light most favorable to the nonmoving party. *Ritchie-Gamester v Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). The nonmoving party has the burden of rebutting the motion by showing, through evidentiary materials, that a genuine issue of disputed fact does exist. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). [*Old Kent Bank v Kal Kustom Enterprises*, 255 Mich App 524, 528-529; 660 NW2d 384 (2003).]

III. Statutory Liability

Plaintiff first argues that the trial court improperly granted summary disposition in favor of defendants on her claim of statutory dog bite liability. We disagree.

Plaintiff brought suit under the dog bite statute, which provides as follows:

> (1) 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 any damages suffered by the person bitten, regardless of the former viciousness of the dog or the owner's knowledge of such viciousness.
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> (2) A person is lawfully on the private property of the owner of the dog within the meaning of this act if the person is on the owner's property in the performance of any duty imposed upon him or her by the laws of this state or by the laws or postal regulations of the United States, or if the person is on the owner's property as an invitee or licensee of the person lawfully in possession of the property unless said person has gained lawful entry upon the premises for the purpose of an unlawful or criminal act. [MCL 287.351.]

"The dog bite statute places absolute liability on the dog owner, except where the dog bites after having been provoked." *Hill v Sacka*, 256 Mich App 443, 448; 666 NW2d 282 (2003).

Plaintiff first contends that summary disposition was improper because there was no evidence that plaintiff provoked the dog. However, regardless of whether provocation occurred in this case, summary disposition remains proper because there was no genuine issue of material fact that Carneva was not lawfully on defendants' property at the time of the incident. A trespasser is "a person who enters upon another's land, without the landowner's consent." *Wymer v Holmes*, 429 Mich 66, 71 n 1; 412 NW2d 213 (1987). A licensee is "a person who enters on or uses another's premises with the express or implied permission of the owner or person in control thereof." *Alvin v Simpson*, 195 Mich App 418, 420; 491 NW2d 604 (1992). An example of implied permission is where the owner "acquiesces in the known, customary use of the property." *Alvin*, *supra*.

Here, there was no evidence presented to support plaintiff's contention that defendants gave Carneva implied permission to enter their land. Carneva admitted that she did not have defendants' express permission to be on their property. Additionally, nothing suggests that Carneva had implied permission to be on defendants' property. Carneva had never met defendants previously, had never been on defendants' property previously, and had never seen defendants' dog prior to the incident. Additionally, Barbara stated that it was unusual for Carneva to be on defendants' property because she had never been there before. Reviewing the evidence in a light most favorable to plaintiff, we find that the trial court properly dismissed plaintiff's claim for statutory dog bite liability because Carneva was not lawfully on the premises.

IV. Common Law Liability

We also disagree with plaintiff's next argument, that the trial court improperly granted summary disposition in favor of defendants on her claim for common law dog bite liability.

The Michigan Supreme Court has set forth the following test regarding common law dog bite liability:

> A common-law action for damages against an animal's owner was based on the theory that "whoever keeps an animal accustomed to attack and injure mankind, with knowledge that it is so accustomed, is *prima facie* liable in an action on the case at the suit of any person attacked and injured by the animal, without any averment of negligence or default in the securing and taking care of it." *Brooks v Taylor*, 65 Mich 208; 31 NW 837 (1887).
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> The common law requires proof that the owner or keeper of an animal knew of its vicious nature. *See Knowles v Mulder*, 74 Mich 202; 41 NW 896 (1889), *Kennett v Engle*, 105 Mich 693; 63 NW 1009 (1895), *Grummel v Decker*, 294 Mich 71; 292 NW 562 (1940). [*Nicholes v Lorenz*, 396 Mich 53, 59 n 3; 237 NW2d 468 (1976).]

In elaborating on this principle, the Michigan Supreme Court more recently clearly delineated the test utilized in determining whether there is an actionable claim for dog bite liability:

> Strict 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).]

Regarding plaintiff's claim for common law liability, we find that summary disposition was proper. Plaintiff failed to present any evidence that defendants knew or should have known of a dangerous propensity. In fact, the only evidence presented on this issue demonstrates that defendants had no knowledge of any dangerous propensities of the dog, and that the dog had never bitten or attacked any other individual. Accordingly, the trial court properly dismissed plaintiff's claim for common law dog bite liability.

To the extent that plaintiff argues her claim sounds in negligence, in reliance upon the principle in *Trager*, *supra*, that a cause of action for negligence may arise even if the keeper lacked scienter of the animal's dangerous propensities, we find such argument to be meritless. Although plaintiff mentioned the word "negligence" in stating her common law dog bite liability claim, it is evident that plaintiff's claim was not based on a theory of negligence, as plaintiff focused on her claim that defendants knew or should have known that the dog "was vicious, violent, or prone to attack persons or property," and failed to provide any facts supporting the elements of negligence.[3] Accordingly, summary disposition of plaintiff's common law liability claim was proper.

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[3] In fact, plaintiff failed entirely to enumerate any of the elements (or facts in support thereof) of negligence, which requires that there be a duty, a breach, causation, and damages. See *Case v*
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V. Attractive Nuisance

Finally, plaintiff argues that the trial court improperly dismissed her claim for attractive nuisance. Again, we disagree.

Attractive nuisance has been defined as follows:

> A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land, if
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> (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
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> (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
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> (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
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> (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved and
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> (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children. [*Rand v Knapp Shoe Stores*, 178 Mich App 735, 740-741; 444 NW2d 156 (1989) (citations omitted); see also Restatement Torts, 2d, § 339.]

"All five conditions must be met in order for a possessor of land to be held liable for injury to a trespassing child." *Rand*, *supra* at 741.

Without determining whether a dog tied up in a person's yard can be categorized as an artificial condition upon the land, we find that summary disposition was proper in the instant case. First, there was no evidence that the place where the dog was tied up on defendants' property was one upon which defendants knew or had reason to know that children were likely to trespass. Barbara indicated that Carneva had never been on her property in the backyard before. Likewise, Carneva admitted that she had never been on defendants' property prior to the day of the accident. There was no other evidence indicating that children frequently trespassed on defendants' property to support this element.

Further, as the trial court aptly noted, there was no evidence that defendant knew or had reason to know that the dog would present an unreasonable risk of death or serious bodily harm to Carneva. The undisputed evidence demonstrated that defendants' dog had never behaved in

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Consumers Power Co, 463 Mich 1, 6; 615 NW2d 17 (2000).

an aggressive manner before, and that the dog had never bitten or attacked any other individual. Accordingly, there was no evidence that defendants knew or had reason to know that the dog would bite Carneva. Therefore, the trial court properly granted summary disposition in favor of defendants on plaintiff's attractive nuisance claim.

Affirmed.

/s/ Christopher M. Murray
/s/ Janet T. Neff
/s/ Pat M. Donofrio