

STATE OF MICHIGAN
COURT OF APPEALS

CHRISTOPHER A. FAGAN,

Plaintiff-Appellant,

v

MICHAEL A. LOMUPO and RHONDA L.
LOMUPO,

Defendants-Appellees.

UNPUBLISHED

March 15, 2007

No. 264270

Muskegon Circuit Court

LC No. 03-042636-NO

Before: Fort Hood, P.J., and Smolenski and Murray, JJ.

PER CURIAM.

In this dog bite case, plaintiff appeals as of right the trial court's order denying his motion for partial summary disposition and the trial court's denial of his motion for a directed verdict. We affirm the trial court's decision denying the motion for partial summary disposition, but we reverse the trial court's decision denying the motion for a directed verdict. We remand for a new trial on damages.

In June 2003, plaintiff drove to defendants' house to bring a magazine to defendant Michael A. Lomupo. As plaintiff stood outside the gate to defendants' fenced-in backyard, Ramses, defendants' 110-pound German Shepard, attacked plaintiff. Ramses bit plaintiff's shirt and leg. Plaintiff subsequently sued defendants claiming that they were liable for the injuries he sustained from the attack, including the aggravation of a preexisting injury allegedly caused by his fall. Plaintiff sought recovery under the dog bite statute, see MCL 287.351(1) and under theories of strict liability and negligence.

Plaintiff filed a motion for partial summary disposition pursuant to MCR 2.116(C)(10) on his statutory liability claim. He argued that any movement he made at the gate did not provoke Ramses. The trial court, concluding that reasonable minds could differ regarding whether plaintiff's movement provoked Ramses, denied the motion for partial summary disposition. After the close of proofs, plaintiff moved for a directed verdict on his statutory liability claim, arguing that he did not provoke Ramses. The trial court again determined that reasonable minds could differ on whether plaintiff provoked Ramses and denied plaintiff's motion. Upon the conclusion of the trial, the jury returned a verdict of no cause for action and the trial court entered judgment accordingly.

On appeal, plaintiff claims that the trial court erred in denying his motion for partial summary disposition. We review a trial court's decision on a motion for summary disposition de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). Summary disposition is proper under MCR 2.116(C)(10) if the affidavits and documentary evidence presented, viewed in the light most favorable to the non-moving party, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

MCL 287.351(1) provides:

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.

The dog bite statute has consistently been interpreted as creating "an almost absolute liability" in the dog owner, except in cases where the dog has been provoked. *Tate v Grand Rapids*, 256 Mich App 656, 658; 671 NW2d 84 (2003). Intentional acts, as well as unintentional acts, may constitute provocation. *Brans v Extrom*, 266 Mich App 216, 219; 701 NW2d 163 (2005). For an unintentional act to constitute provocation, it must either be directed at the dog or the dog's response must be proportional to the victim's unintentional act. *Bradacs v Jiacobone*, 244 Mich App 263, 276; 625 NW2d 108 (2001).

At her deposition, Rhonda testified that Dawn Achterhoff, a neighbor who witnessed the attack, saw plaintiff put the magazine over Ramses's head after he walked up to the gate. Rhonda further testified that she too saw plaintiff put the magazine over Ramses's head. There was no evidence suggesting that plaintiff merely rested his arms on the gate and that the magazine inadvertently hovered over Ramses's head. Based on this evidence, a trier of fact could infer that plaintiff's conduct of extending the magazine over the gate was directed toward Ramses. This inference is strengthened by Michael's deposition testimony that Dawn told him Ramses was barking and growling at plaintiff as plaintiff approached the gate. Further, because Michael averred that there was "bad blood" between plaintiff and Ramses and that plaintiff often acted in an "antagonistic manner" toward Ramses, a trier of fact could infer that plaintiff put the magazine over Ramses's head to taunt Ramses. Accordingly, viewing the evidence in the light most favorable to defendants, the non-moving party, a trier of fact could conclude that plaintiff provoked Ramses when he placed the magazine over Ramses's head. The trial court properly denied plaintiff's motion for partial summary disposition.

Plaintiff also claims that the trial court erred in denying his motion for a directed verdict. We review a trial court's decision to grant or deny a motion for a directed verdict de novo. *Tobin v Providence Hosp*, 244 Mich App 626, 642; 624 NW2d 548 (2001). A directed verdict is appropriate only when no factual question exists on which reasonable jurors could differ. *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 428; 711 NW2d 421 (2006). We consider the evidence in the light most favorable to the non-moving party, making all reasonable inferences in favor of the non-moving party. *Tobin, supra* at 643.

The evidence presented at trial, specifically the evidence regarding Ramses's location when plaintiff extended the magazine over the gate, was significantly different than the evidence presented to the trial court when it ruled on plaintiff's motion for partial summary disposition. At trial, no one testified that Ramses was at the gate when plaintiff extended the magazine over the gate. According to Dawn, Ramses ran to the gate from "around the corner" after plaintiff raised the magazine up and moved the gate's chain. Similarly, Brian Achterhoff, Dawn's husband, testified that Ramses ran toward the gate after plaintiff extended his hands over the gate. Rhonda testified that Ramses was running toward plaintiff as he extended the magazine over the gate. But, more importantly, Rhonda testified that plaintiff's action of extending the magazine over the gate was not directed toward Ramses but, rather, it was done to enable plaintiff to rest his arm on the gate. Accordingly, the evidence presented at trial established that plaintiff's extension of the magazine over the gate was not directed toward Ramses. In addition, no evidence was presented at trial that plaintiff made any quick or threatening gestures toward Ramses when he extended the magazine over the gate. Thus, we find the present case indistinguishable from *Stroop v Day*, 271 Mont 314; 896 P2d 439 (1995), in which the Montana Supreme Court held that the plaintiff did not provoke the dog when the plaintiff, upon leaning against the fence, merely extended his hands and forearms across the fence.

Further, we conclude that Ramses's response of biting plaintiff's shirt and leg was not proportional to plaintiff's act of extending the magazine over the gate. Ramses may have perceived plaintiff's presence immediately outside the fenced-in backyard and the extension of the magazine over the gate as threatening to his territory. But, although Dawn testified that plaintiff moved the gate's chain, there was no evidence presented that plaintiff actually unlatched the chain or opened the gate. Thus, there was no evidence that plaintiff entered the fenced-in backyard. In addition, as already stated, there was no evidence that plaintiff made any sudden gestures that may have taunted Ramses. See *Bradacs, supra* at 273. Because plaintiff remained on the opposite side of the gate as Ramses, we conclude that Ramses's reaction of biting plaintiff's shirt and leg was out of proportion to any motion made by plaintiff.

Because plaintiff's motion was not directed toward Ramses and because Ramses's response was out of proportion to plaintiff's motion, the trial court erred in denying plaintiff's motion for a directed verdict. *Bradacs, supra* at 276. Because plaintiff did not provoke Ramses, defendants are liable for damages suffered by plaintiff. MCL 287.351(1). We remand for a new trial on damages.

Affirmed in part, reversed in part, and remanded for a new trial on damages. We do not retain jurisdiction.

/s/ Karen M. Fort Hood

/s/ Michael R. Smolenski