STATE OF MICHIGAN

COURT OF APPEALS

TIMMY LEE STOLL, Plaintiff-Appellant,	UNPUBLISHED June 12, 2008
v	No. 278013 Midland Circuit Court
DAVE STOBBY, WAYNE GILBERT BEEHR and BEEHR'S TOWING, INC., Defendants-Appellees.	LC No. 05-009235-NO

Before: Gleicher, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Plaintiff injured his neck in an encounter with defendant Dave Stobby's dog, and reinjured it six months later when defendant Wayne Beehr's wrecker backed into plaintiff's car. Plaintiff filed suit asserting strict liability, negligence and premises liability claims against Stobby, and seeking Beehr's payment of noneconomic damages under the no-fault act. The circuit court granted defendants' motions for summary disposition, and plaintiff now appeals as of right. We affirm.

I. Facts and Proceedings

On January 14, 2004, Stobby invited plaintiff to play darts at Stobby's home, but when plaintiff arrived he discovered that Stobby was too intoxicated to play. As plaintiff stepped out on a porch to warn another arriving guest of Stobby's intoxication, Stobby's two dogs "[came] charging up the porch into the house." According to plaintiff, one of the dogs ran between his legs and "spun" him around, causing him to fall from the porch and strike his neck on a parked car. Plaintiff admitted at his deposition that the dogs did not attack, growl at, or bite him, and had never before "charged into" him or anyone else.

Plaintiff first sought treatment for his neck injury several weeks later. A magnetic resonance imaging (MRI) scan revealed a herniated cervical disc and spinal cord compression. In March 2004, Dr. William Diefenbach performed anterior cervical fusion surgery and placed an intervertebral biomechanical device, called a BAK cage, in plaintiff's neck. Plaintiff commenced a postoperative course of physical therapy and was "getting better" when the second accident occurred.

On July 1, 2004, plaintiff parked his car in the driveway of Beehr's Towing, opened his car door, and began to exit his vehicle. Plaintiff recalled that he suddenly heard his passenger scream, "[h]e's backing up," and that Beehr's tow truck "plowed into my car." Plaintiff described that the impact "whipped my head backwards," reinjuring his neck.

Plaintiff filed suit against Stobby on December 21, 2005, alleging Stobby's strict liability "for all injuries proximately caused by the attack of his animal" pursuant to MCL 287.351. The complaint further asserted that Stobby "was negligent due to the fact that his dog was not being controlled so as not to pose a danger to the community at large and Plaintiff Timmy Lee Stoll in particular." On July 20, 2006, plaintiff filed a first amended complaint adding a no-fault gross negligence claim for noneconomic damages against Beehr and Beehr's Towing. The first amended complaint also enlarged plaintiff's negligence allegations against Stobby as follows:

> When Defendant Dave Stobby's loose dog jumped on Plaintiff Timmy Lee Stoll, and because there were no safety rails on the front porch of Defendant's house, the force of Defendant's dog jumping on Plaintiff forced Plaintiff to fall off Defendant's porch, causing him severe injuries as more fully set forth below.

On October 13, 2006, the circuit court granted plaintiff leave to file a second amended complaint, which again modified plaintiff's factual allegations regarding the events at Stobby's home. The second amended complaint averred that one of Stobby's dogs "collide[ed]" with, rather than "jump[ed] on," plaintiff, and added a claim for premises liability arising from Stobby's failure "to exercise ordinary care and caution in and about the maintenance of the premises and property under its [sic] control and . . . to keep the same in a reasonably safe condition . . . ."

After discovery closed, defendants sought summary disposition pursuant to MCR 2.116(C)(10). Stobby contended that because no evidence showed that his dogs had any history of aggressive behavior, plaintiff could not establish the requisite elements of either a strict liability or a negligence claim. Stobby additionally argued that the presence of his dogs and the absence of a porch rail constituted open and obvious dangers, mandating dismissal of plaintiff's premises liability claim pursuant to *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001). Beehr's motion alleged that plaintiff's collision with the tow truck did not result in a serious impairment of a body function, as required under *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004). The circuit court granted both motions, and plaintiff now appeals.

II. Summary Disposition Standard of Review

This Court reviews de novo a circuit court's summary disposition ruling. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, *supra* at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, *supra* at 183.

III. Summary Disposition Analysis

A. The Dog-Related Accident

1. Strict Liability

Plaintiff contends in his appellate brief that because he introduced some evidence that Stobby's dogs had a "habit of jumping and making contact with other people" and would become "rowdy" when Stobby entertained guests, the circuit court improperly dismissed his strict liability claim arising from Stobby's dog's collision with plaintiff's legs.

A common law claim of strict liability for injuries caused by a dog requires proof that the defendant possessed the animal with knowledge of the dog's "abnormal dangerous propensities," and that the plaintiff's injuries result "from the dangerous propensity that was known or should have been known." *Trager v Thor*, 445 Mich 95, 99; 516 NW2d 69 (1994). "A plaintiff need not prove that the owner or custodian knew that his or her domestic animal had already attacked human beings when unprovoked to make a prima facie case of strict liability." *Rickrode v Wistinghausen*, 128 Mich App 240, 245; 340 NW2d 83 (1983). However, a plaintiff must present evidence that the "owner knew or had reason to know that the animal had a dangerous tendency that is unusual and not necessary for the purposes for which such an animal is usually kept." *Id.* at 245-246, citing 3 Restatement Torts, 2d § 509, comment c, p 16. In *Hiner v Mojica*, 271 Mich App 604, 609-610; 722 NW2d 914 (2006), this Court explained that "[t]he theory underlying common-law strict liability is that the liable party is deemed to have chosen to expose those around him to the abnormal danger posed by the animal he chooses to keep and must, as a consequence, shoulder any costs resulting from that danger." (Internal quotation omitted).

Viewed in the light most favorable to plaintiff, the instant record reveals no evidence that Stobby's dogs had ever before caused an injury or behaved in an aggressive or dangerous manner. Plaintiff's friend, Edward Plummer, testified that during a previous visit to Stobby's home the dogs "jumped on me a lot," but Plummer agreed that they "[b]asically" did so "because they wanted to play." Robert Ross, another previous guest of Stobby's, acknowledged that the dog that ran between plaintiff's legs appeared to be "excited to get out of the house," and Ross added, "I think he was just running out, trying to get outside."[1] None of the witnesses described defendant's dogs as dangerous or ill-tempered in any fashion, and nothing else in the record demonstrates that Stobby knew or had reason to know that his dogs presented any unusual risk to guests. Therefore, the circuit court properly determined as a matter of law that plaintiff failed to establish that the dogs possessed an "abnormal dangerous propensity," and properly dismissed plaintiff's strict liability claim.

[1] According to Plummer, the dogs were running into the house from Stobby's yard when the accident occurred.

2. Negligence

Plaintiff next contends that Stobby had a duty to control his dogs and to prevent them "from running or jumping into people." According to plaintiff, Stobby's breach of this duty establishes a common law negligence claim. Whether a duty exists is a question of law for the court. *Burnett v Bruner*, 247 Mich App 365, 368; 636 NW2d 773 (2001). "If there is no duty, summary disposition is proper." *Laier v Kitchen*, 266 Mich App 482, 496 (opinion by Neff, J.); 702 NW2d 199 (2005).

In *Trager*, *supra*, our Supreme Court recognized that under certain circumstances, an animal owner may be held liable for injuries caused by the animal if the owner negligently failed to prevent the injuries. The Court in *Trager* explained that "[i]n 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." *Id*. at 105. According to the Court in *Trager*, dogs generally are so unlikely to cause substantial harm that no duty exists "to keep them under constant control." *Id*. at 105-106. Therefore, "a mere failure" to keep a dog under constant control does not constitute a breach of any duty of care. *Id*. at 106. An animal possessor's duty changes, however, if the possessor knows of a "dangerous propensity unique to the particular animal," or that if placed in a certain situation, "a danger of foreseeable harm might arise." *Id*. The standard of care requires that the animal's owner exercise the amount of control "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*. (internal quotation omitted).

Here, the record establishes that Stobby's dogs had no known unusual or dangerous propensities, and had never before injured any of Stobby's guests. Based on this record, we conclude as a matter of law that Stobby had no duty to prevent his dogs from running into or out of his house, or to keep them under constant control. As our Supreme Court held in *Trager*, a duty to constantly control one's animal arises only if the animal's behavior creates a foreseeable risk of harm. Although Stobby's dogs had playfully jumped on other guests, no record evidence tended to establish that the dogs reasonably might knock someone down while running into or out of their owner's house, or reasonably might cause any other foreseeable injury. The circuit court thus correctly granted summary disposition of plaintiff's negligence claim against Stobby pursuant to MCR 2.116(C)(10).

3. Premises Liability

Plaintiff next contends that the circuit court erred by granting Stobby summary disposition of his premises liability claim. In a bench opinion, the circuit court found that Stobby owed no duty to "put up a handrail" around the porch of his home, and that the property lacked any special aspect "that would get around the open and obvious danger doctrine" discussed in *Lugo*, *supra*. Plaintiff insists on appeal that the absent railing and the "loose dog" comprised "unreasonably dangerous" "special aspect[s]" of Stobby's premises that render the open and obvious doctrine inapplicable as a bar to his claim.

Plaintiff concedes that he was a licensee on Stobby's premises, and that as a general rule, a premises possessor has no duty to protect a licensee against open and obvious dangers. In *Stitt*

v Holland Abundant Life Fellowship, 462 Mich 591, 596; 614 NW2d 88 (2000), our Supreme Court explained,

> A landowner owes a licensee a duty only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved. The landowner owes no duty of inspection or affirmative care to make the premises safe for the licensee's visit.

Because the absence of a guardrail does not amount to a hidden danger, we conclude that Stobby had no duty to warn plaintiff regarding his use of the porch. Plaintiff additionally has failed to demonstrate the existence of any duty on the part of Stobby to erect a handrail or a guardrail around the porch, which reached a height of approximately three feet above the ground. Plaintiff presented no evidence that an applicable building code or ordinance required a railing, and according to the principles discussed in *Stitt*, Stobby otherwise had no affirmative legal obligation to improve his premises to make them safer for social guest licensees. *Id*.

Further, we decline to find that the "loose dog" on the unguarded porch created either a duty to warn or to protect plaintiff from injury. A danger may present an unreasonable risk of harm despite being open and obvious if a special aspect of the premises creates an unavoidable danger or an unreasonably high risk of severe injury. *Lugo*, *supra* at 516-518. A dog running into or out of its master's home embodies neither an unavoidable danger nor an unreasonably high risk of severe injury. Plaintiff's reliance on *Klimek v Drzewiecki*, 135 Mich App 115; 352 NW2d 361 (1984), is entirely misplaced. In *Klimek*, this Court held that the defendant landowner had a duty to warn a minor social guest about, or to protect him from, "a loose, unsupervised and dangerous dog" roaming the defendant's land. *Id*. at 118-119. Here, plaintiff is an adult, and no evidence tends to prove that Stobby's dogs constituted a danger. We conclude that the circuit court properly granted Stobby summary disposition of plaintiff's premises liability claim.

B. The Auto Negligence Claim

Plaintiff next contends that "a plethora of questions of fact" exist regarding the extent of the injuries he sustained in the collision with Beehr's wrecker, precluding summary disposition of his claim for noneconomic damages. Plaintiff maintains that the accident aggravated the neck injury caused by the fall from Stobby's porch, and resulted in a serious, even if a temporary, impairment of body function.

The Legislature has limited tort liability for noneconomic loss to no-fault cases in which an injured plaintiff has suffered a "serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). A "serious impairment of body function" means "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7).

In *Kreiner*, *supra*, the Michigan Supreme Court articulated a multistep process to guide a trial court's consideration whether a plaintiff has sustained a threshold injury. *Id*. at 131. The trial court must first determine whether a factual dispute exists concerning the nature and extent of the plaintiff's injuries. If there is no dispute, or if a dispute exists that is immaterial to whether a plaintiff has endured a serious impairment of a body function, the court must determine whether "an 'important body function' of the plaintiff has been impaired." *Id*. at 131-132. To merit further inquiry, a court must determine that "an important body function has in

fact been impaired," and that the impairment qualifies as objectively manifested. *Id*. at 132. A plaintiff who has sustained an objectively manifested impairment of an important body function bears the burden of demonstrating that the impairment affects his or her general ability to lead a normal life. *Id*. "In determining whether the course of the plaintiff's normal life has been affected, a court should engage in a multifaceted inquiry, comparing the plaintiff's life before and after the accident as well as the significance of any affected aspects on the course of the plaintiff's overall life." *Id*. at 132-133. This analysis must be followed by an objective determination of "whether any difference between the plaintiff's pre-and post-accident lifestyle has actually affected the plaintiff's 'general ability' to conduct the course of his life." *Id*. at 133. The *Kreiner* Court summarized that "[a]lthough some aspects of a plaintiff's entire normal life may be interrupted by the impairment, if, despite those impingements, the course or trajectory of the plaintiff's normal life has not been affected, then the plaintiff's 'general ability' to lead his normal life has not been affected." *Id*. at 131.

The circuit court accepted as true that plaintiff's aggravated injuries impaired an important body function and were objectively manifested. In a lengthy and detailed written opinion granting summary disposition, the circuit court focused on the last of the *Kreiner* inquires, whether plaintiff's July 2004 injuries affected his general ability to conduct his normal life. The circuit court observed that plaintiff provided "few direct insights into how his overall life has been changed by the aggravated injuries," and concluded that plaintiff failed to demonstrate that the injuries he sustained in the wrecker collision altered the overall trajectory of his life, even for a temporary period. Accordingly, we review only that issue, and accept that plaintiff otherwise established an objectively manifested, serious impairment of an important body function.

Plaintiff alleges that the aggravation of his neck injuries following the July 2004 collision caused him to (1) reduce his college course load from full- to half-time, (2) spend less time observing his children's sporting events, and (3) limit certain unspecified "activities due to the radiating numbness in his arms." The record reveals that plaintiff began receiving social security disability benefits in 1990, after sustaining an electrocution injury. His only employment over a period of 18 years predating this case consisted of arranging yard maintenance jobs for his children to perform. In 1993, plaintiff had an initial cervical fusion surgery. In 2002, plaintiff was assaulted and again injured his neck. He had enrolled in a physical therapy program before his fall from Stobby's porch, and had reported continuing neck problems nine days before the encounter with Stobby's dog.

After his March 2004 neck fusion, plaintiff developed "postsurgical fusion pain syndrome." His pain continued through June 2004, the month before the accident involving Beehr. According to plaintiff's deposition testimony, during June 2004 his pain level fluctuated from six to seven on a scale of one to 10, and he attended physical therapy three times a week. As a result of his pain and postsurgery problems, plaintiff "had to drop from full time to half time" at college. He described his activities in June 2004 as, "I just mainly stayed at home and took my meds and dealt with my children." Plaintiff claimed that during June 2004 he attempted to attend his children's sporting events, but "couldn't make it through all of them because of my pain levels." Although he felt that he was "getting better" by participating in physical therapy, plaintiff described that during the month before the car accident he continued to feel weak, had no energy, and had a doctor-imposed restriction against lifting anything over three pounds.

Plaintiff admitted that after the July 2004 car accident he did not seek medical attention until he attended a regularly-scheduled physician visit. According to plaintiff, Dr. Amarish Potris extended his physical therapy for a few months, increased the dosage of his pain medications, and prescribed a two-week course of steroids. Plaintiff last received physical therapy for his neck in the Fall of 2004, several months after his accident with Beehr.

Given this record, we conclude that the circuit court properly found that plaintiff failed to demonstrate a change in his general ability to lead his normal life. Plaintiff was disabled at the outset of 2004, and in March 2004 underwent a second neck fusion surgery. Before and after that surgery, plaintiff engaged in a limited repertoire of activities that included part-time college attendance, spending time with his children, and transporting friends and others. After the July 2004 accident, plaintiff continued to participate in these activities. The record simply contains no evidence that the July 2004 aggravation of plaintiff's neck injuries affected his general ability to lead his life, and instead shows that the July 2004 collision impacted his life only in de minimus and temporary respects. "Considered against the backdrop of his preimpairment life," plaintiff's condition and activities after the July 2004 accident reflect a continuation, and not a change. *Kreiner*, *supra* at 136.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra