

STATE OF MICHIGAN
COURT OF APPEALS

RENEE BURNETT, Next Friend of KALYNN
BURNETT, Minor,

UNPUBLISHED
March 14, 2013

Plaintiff-Appellant,

v

No. 309373
Kalamazoo Circuit Court
LC No. 2010-000669-NO

CRYSTAL CLARKE, RHP PROPERTIES, INC.
and WOLVERINE PROPERTY INVESTMENT
LTD PARTNERSHIP,

Defendants,

and

HILLCREST ACRES ASSOCIATES, L.L.C.,

Defendant-Appellee.

Before: GLEICHER, P.J., and O'CONNELL and MURRAY, JJ.

PER CURIAM.

Plaintiff Renee Burnett, as next of friend for her daughter Kalynn Burnett, appeals as of right the trial court's order granting defendant Hillcrest Acres Associates, L.L.C.'s motion for summary disposition.¹ We affirm.

I. FACTUAL PROCEEDINGS

This case arises from a pit bull attack. Plaintiff, Kalynn, and defendant Crystal Clarke lived in defendant's manufactured home community. Defendant prohibited several types of dog within its community, including pit bulls. In May 2006, plaintiff sent Kalynn, who was then 12 years old, to the Clarke home to look for her younger sister. Kalynn knocked on Clarke's front

¹ As later noted, a default judgment was entered against defendant Crystal Clarke. Defendants RHP Properties, Inc. and Wolverine Property Investment Ltd Partnership were dismissed by stipulation of the parties. Thus, defendant refers to Hillcrest only unless otherwise noted.

door and when the door opened, Clarke's pit bull, Bruno, suddenly lunged at Kalynn, bit her on the right side of her cheek, and ran away. The cut from the bite required stitches and left a scar on Kalynn's face.

Officer Brett Hake, from the Kalamazoo Township Police Department, investigated the dog bite. Upon arriving at the scene, Hake spoke with Kalynn's father and animal control removed Bruno from Clarke's home. Approximately two weeks before Bruno bit Kalynn, Hake had been called to the Clarke residence regarding a pit bull chasing a child. However, during his investigation, Hake discovered that the child had been attempting to catch the pit bull. Additionally, while standing outside of the Clarke residence, Hake observed the pit bull growling and barking while bouncing against Clarke's front window.

Following the dog bite, plaintiff commenced this action. Plaintiff's first amended complaint alleged that Clarke was negligent as Bruno's owner and that defendant was negligent as the landowner. Subsequently, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Defendant asserted that it did not owe a duty to plaintiff because it was not the owner of the dog and it had no knowledge of the dog's vicious nature. Defendant also asserted that it was not the proximate cause of Kalynn's injuries.

After oral argument, the trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). In a thorough and well-written opinion, the trial court concluded that defendant did not owe a duty to plaintiff and that, regardless, defendant was not the proximate cause of plaintiff's injury:

Although [plaintiff] claims [defendant] should have removed Bruno from the community, [plaintiff] does not claim that [defendant] had the authority to enter the Clarke home and remove the dog. The police and Animal Control personnel, who did have the authority, did not remove the dog from the home even after observing him directly. [Defendant]'s authority was limited to evicting Clarke for violating the community rules, but there is no dispute that process would have taken at least 30 days. Even if [defendant] had began the eviction process after allegedly learning on May 6 that Bruno behaved aggressively, the Clarkes and Bruno could have still been in the community when Kalynn was bitten on May 22. Eviction proceedings would not have prevented this incident. Even if [plaintiff] could establish that [defendant] had a particular duty regarding Bruno, [plaintiff] has failed to establish that there is a genuine issue of material fact that a breach of that duty by [defendant] was a proximate cause of Kalynn's injuries.

Following entry of a default judgment against Clarke, the trial court entered an order of judgment and closed the case. Plaintiff now appeals as of right the trial court's order granting defendant's motion for summary disposition.

II. ANALYSIS

Plaintiff contends that the trial court erred in granting defendant's motion for summary disposition because defendant owed a duty to plaintiff. This Court reviews the trial court's

ruling on a motion for summary disposition de novo. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). When deciding a motion for summary disposition under MCR 2.116(C)(10), we consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition should be granted when “there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.”² *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Whether a duty exists is a question of law that is reviewed de novo. *Hill v Sears, Roebuck & Co*, 492 Mich 651, 659; 822 NW2d 190 (2012).

A. COMMON LAW DUTY

“In a premises liability action, a plaintiff must prove (1) that the defendant owed a duty to the plaintiff, (2) that the defendant breached the duty, (3) that the defendant’s breach of the duty caused the plaintiff’s injuries, and (4) that the plaintiff suffered damages.” *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007). A tenant is an invitee of a landlord, *Benton v Dart Props, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006), and “[i]n general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land[.]” *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). “[A] loose, unsupervised and dangerous dog either on defendant’s land or in close proximity to defendant’s land without any obstacle to prevent it from entering defendant’s land is a ‘condition on the land[.]’” *Klimek v Drzewiecki*, 135 Mich App 115, 119; 352 NW2d 361 (1984). However, where a landlord leases property to a tenant, the landlord, while holding a reversionary interest, surrenders possession of the land and only retains the duty to maintain the portions of land still under the landlord’s control. *Williams v Detroit*, 127 Mich App 464, 468; 339 NW2d 215 (1983).

“Under common law, the owner or keeper of an animal could be held liable only if he knew of its vicious nature.” *Szkodzinski v Griffin*, 171 Mich App 711, 714; 431 NW2d 51 (1988). “Similarly, the only possible way that [the landowner] could be held liable [for injuries to a third party sustained by his tenant’s dog] on a common law theory would be if he knew of the dog’s vicious nature.” *Id.* In determining whether a dog exhibits vicious behavior, this Court has noted that “the mere fact that a dog barks, growls, jumps, or approaches strangers in a

² Plaintiff’s brief on appeal failed to cite to the appropriate test when it relied upon *Jesson v Gen Tel Co of Mich*, 182 Mich App 430, 432; 452 NW2d 836 (1990), for the proposition that the test under MCR 2.116(C)(10) is “whether the record which might be developed at trial, giving the benefit of any reasonable doubt to the non-moving party, will leave open an issue upon which reasonable minds might differ.” (Emphasis deleted.) Since at least 1999 trial courts have not been permitted to deny summary disposition on the basis that a record “might be developed” that could cause reasonable minds to differ. *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999); *Grand Trunk W R, Inc v Auto Warehousing Co*, 262 Mich App 345, 350; 686 NW2d 756 (2004).

somewhat threatening way is common canine behavior. Thus, such behavior will ordinarily be insufficient to show that a dog is abnormally dangerous or usually vicious.” *Hiner v Mojica*, 271 Mich App 604, 612; 722 NW2d 914 (2006).

In this case, when viewing the material facts in the light most favorable to plaintiff, there is not a genuine issue of material fact regarding whether defendant was negligent. As pointed out by the dissent, Clarke previously owned various other pit bulls and she removed those dogs upon being written up by Wayne Howard, defendant’s park manager. However, this evidence does not establish a question of material fact regarding whether defendant was aware of Bruno’s viciousness. Although it was alleged that Bruno had been chasing a child through the park, Howard denied knowing that Bruno had been chasing a child and Hake’s investigation of the incident revealed that the child was attempting to catch Bruno — apparently Bruno was actually running from the child. Moreover, while Hake did use the term “very aggressive” during his deposition testimony to describe Bruno’s behavior, his subsequent description of Bruno’s behavior as growling and barking while bouncing against Clarke’s front window describes behavior that is “somewhat threatening.” *Hiner*, 271 Mich App at 612. Consequently, this evidence does not create a question of material fact regarding whether Bruno’s behavior was “abnormally dangerous or usually vicious.” *Id.* Additionally, Bruno bit Kalynn on Clarke’s front porch after she knocked on the front door of Clarke’s residence. Since Kalynn was bitten on land under the control of Clarke, a duty on defendant — who did not have control over that portion of the land — cannot be imposed. *Williams*, 127 Mich App at 468.

Regardless, even if we were to determine that Hake’s observations of Bruno created a genuine issue of material fact regarding whether defendant knew of Bruno’s vicious behavior, defendant could still not be held liable for Kalynn’s injuries because it could not have lawfully exercised control over Bruno. In *Feister v Bosack*, 198 Mich App 19, 23; 497 NW2d 522 (1993), this Court held that for a landowner to be liable for a tenant’s dog, the landowner must have knowledge of the dog’s vicious nature and control over the premises:

The general rule is that, in conventional settings in which premises are rented by a tenant who acquires exclusive possession and control, the landlord is not liable for attacks by animals kept by the tenant on those premises where the landlord had no knowledge of the animal or its dangerous proclivities at the time of the initial letting of the premises

The principle with respect to the liability of a landlord whose tenant comes into possession of the animal after the premises have been leased [is] (that to establish liability it must be shown that the landlord had knowledge of the vicious propensities of the dog *and had control of the premises or other capability to remove or confine the animal*) [Citations omitted and emphasis in the original.]

The *Feister* Court rejected the plaintiff’s argument that the landowner-defendant could have exercised control over the dog by evicting the tenant because “[h]olding landlords liable for the actions of their tenants’ vicious dogs by requiring them to evict tenants with dangerous dogs would merely result in the tenants’ moving off to another location with their still dangerous animals” 198 Mich App at 25 (quotation marks and citation omitted). Moreover, even

though the *Feister* Court rejected the plaintiff's theory that the landowner could control the premises through eviction, it noted that even if it had accepted the plaintiff's theory, two days was not sufficient time to reject the tenant, and "[i]f a third party is injured before the landlord lawfully could have evicted the tenant, the landlord cannot be liable, even if he knew about the dog's vicious nature." *Id.* at 25-26. Pursuant to *Feister*, we conclude that because the alleged child chasing incident occurred two weeks before Kalynn was bitten by Bruno, defendant could not have lawfully exercised control over Bruno by evicting Clarke within this timeframe. *Id.* at 26 (a tenant has at least 30 days' notice before eviction).

B. THE VOLUNTARY ASSUMPTION OF A DUTY

Plaintiff and the dissent also contend that defendant, through its rules and regulations prohibiting pit bulls on its premises, voluntarily assumed a duty of care. According to defendant's rule 30.E., tenants were not allowed to keep any pit bulls within the community:

Exotic pets such as snakes, wild animals or farm classed animals are strictly prohibited. Certain breeds of dogs, including but not limited to Pit bulls, Bull Mastiff, Dobermans, Rotweillers, Chows, Akitas, and German Shepards will not be approved by Management and may not be brought into the community. Management reserves the right to determine whether a mixed breed dog will be approved.

In *Braun v York Props, Inc*, 230 Mich App 138; 583 NW2d 503 (1998), this Court determined that the rules and regulations of a manufactured home community did not impose a duty upon the premises owner to third parties. In *Braun*, one of the plaintiffs, a 12-year-old child, was bitten by his neighbor's dog within the manufactured home community. The plaintiffs sued the defendant premises owner, asserting that the defendant's rules and regulations regarding tenants' dogs created a duty of care. After a jury trial, the defendant was found liable and appealed to this Court. *Id.* at 140-141. On appeal, the plaintiff argued that "by promulgating rules and regulations governing their tenants' possession of dogs, including breed and size restrictions, defendants voluntarily assumed a duty of care to enforce their rules to protect third parties from tenants' dogs that do not satisfy the criteria." *Id.* at 144. In support of this argument, the plaintiff primarily relied upon *Alaskan Village, Inc v Smalley*, 720 P2d 945 (1986). *Id.* But, while the *Braun* Court ultimately used factors similar to those found in *Alaskan Village* in concluding that the defendant had not voluntarily assumed a duty of care towards the plaintiff by promulgating rules and regulations regarding tenants' dogs, the *Braun* Court found that "[d]uty is a question [of] 'whether the defendant is under any obligation for the benefit of the particular plaintiff and concerns the problem of the relationship between individuals that imposes upon one a legal obligation for the benefit of the other.'" *Id.* at 147, quoting *Premo v Gen Motors Corp*, 210 Mich App 121, 124; 533 NW2d 332 (1995). The factors to consider in determining whether a duty should be imposed include: 1) the foreseeability of harm; 2) the degree of certainty of injury; 3) the closeness of connection between the conduct and the injury; 4) the moral blame attached to the conduct; 5) the policy of preventing future harm; and 6) the burdens and consequences of imposing a duty and the resulting liability for breaching the duty. *Id.*

In applying these duty determination factors, the *Braun* Court found that the defendant had not voluntarily assumed a duty of care towards the plaintiffs by promulgating rules and regulations regarding tenants' dogs. 230 Mich App at 147-148. Rather, the purpose of the rule was "to protect against harm to the premises." *Id.* at 148. The *Braun* Court also noted:

The landlords were not in breach of the "no pets" provision; the tenant was in breach. Clauses in lease contracts creating a duty on the part of tenant to the landlord, unless specifically designed to do so, do not create obligations on the part of landlords to third parties. Contract law provides that the beneficiary of a clause has no obligation to enforce the contract provision, but could waive the provision by his conduct. . . . In this case, the landlords, who were the beneficiaries of the "no pets" clause, had no duty to third parties to enforce the rule. [*Id.* at 148-149 (citation omitted).]

Application of the *Braun* Court's six duty determining factors reveals that defendant did not voluntarily assume a duty of care by promulgating rule 30.E. First, the harm was not foreseeable because Bruno had not previously exhibited vicious behavior. Second, the injury was certain because Kalynn was bitten. Third, there is a loose connection between the injury and defendant's failure to enforce its rules because, although there is no evidence that Clarke would have removed this dog, there was evidence that she had previously removed similar dogs. Fourth, defendant's failure to enforce its rules does not demonstrate a blatant disregard of safety because Bruno had not previously displayed vicious tendencies. Fifth, defendant's policy does prevent future harm. And finally, the burden on defendant to enforce the rule is slight and they could insure against the risk. Thus, in considering these factors, the most that can be said is that defendant's rule 30.E. created a duty on the part of the tenant to the landlord because defendant's rule prohibited tenants from bringing pit bulls on the land. *Braun*, 230 Mich App at 147-148.

Finally, while judicial decisions from foreign jurisdictions may be persuasive on Michigan courts, but never binding, *Hiner*, 271 Mich App at 612, we disagree with the dissent's suggestion, citing *Hearn v City of Overland Park*, 244 Kan 638, 650; 772 P2d 758 (1989) and *Tracey v Solesky*, 427 Md 627, 652; 50 A2d 1075 (2012), that strict liability should be imposed upon a landowner when the landowner promulgates a rule or regulation prohibiting pit bulls on its premises. While it may be true that pit bulls are inherently dangerous creatures, no Michigan court has imposed strict liability upon a *landowner* based on its regulations, and strict liability against a dog owner is imposed by statute, specifically MCL 287.351.³ Thus, if Michigan were to impose a duty of strict liability on landowners to protect against a tenant's dog, the creation of such a duty would be for the Legislature, and not this Court.

³ MCL 287.351(1) provides, "[i]f 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 trial court correctly granted defendant's motion for summary disposition.⁴

Affirmed.

/s/ Peter D. O'Connell
/s/ Christopher M. Murray

⁴ We do not consider plaintiff's argument that defendant proximately caused Kalynn's injury because once it is clear that no duty exists, a negligence claim fails as a matter of law. *Hill*, 492 Mich at 664.