STATE OF MICHIGAN

COURT OF APPEALS

KEYWAN ADAMS, a minor, through his next friend and natural mother LAKEISHA MALLORY,

Plaintiffs-Appellants,

v

COLETTE WOOLDRIDGE and SHELBY WOOLDRIDGE,[1]

Defendants-Appellees,

and

CAROLINE WILLIAMS, JUSTIN WILLIAMS, STEVEN NELSON WILLIAMS, and DONNA WILLIAMS,

Defendants.

UNPUBLISHED
April 23, 2013

No. 308506
Macomb Circuit Court
LC No. 2010-002963-NI

Before: BECKERING, P.J., and METER and RIORDAN, JJ.

PER CURIAM.

In this case involving a dog that attacked and bit plaintiff Keywan Adams, plaintiffs appeal as of right from the trial court's grant of summary disposition to defendants Colette and Shelby Wooldridge (defendants).[2] We affirm.

We review de novo a trial court's grant of summary disposition under MCR 2.116(C)(10).[3] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The trial court

[1] Shelby Wooldridge is a minor and is represented by a guardian ad litem, Peter Ruggirello.

[2] The remaining defendants were dismissed from the case and are not parties to this appeal.

[3] Although defendants moved for summary disposition under both MCR 2.116(C)(8) and (10), because the trial court looked outside the pleadings in granting the motion, we review this case under the standard for MCR 2.116(C)(10).

must consider the "affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Maiden*, 461 Mich at 120. "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id*. "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 v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). Statutory interpretation also presents a question of law reviewed de novo. *Hoffman v Boonsiri*, 290 Mich App 34, 39; 801 NW2d 385 (2010).

Plaintiffs argue that the trial court erred in granting summary disposition to defendants because they were liable under MCL 287.351 as "keepers and possessors" of the dog that bit Keywan. We disagree.

MCL 287.351 states:

> (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.
>
> (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.

It is simply not in dispute that defendants did not own the dog in question.[4] Instead, they were helping to look after the dog while its owners were away from the house where the dog was living. Plaintiffs contend that defendants should be held liable as "keepers and possessors." However, as stated in *Rinke v Potrzebowski*, 254 Mich App 411, 414; 657 NW2d 169 (2002):

> The rules of statutory construction require the courts to give effect to the Legislature's intent. This Court should first look to the specific statutory language to determine the intent of the Legislature. The Legislature, of course, is presumed to intend the meaning that the words of the statute plainly express. If . . . the language is clear and unambiguous, the plain and ordinary meaning of the statute reflects the legislative intent and judicial construction is neither necessary nor permitted. [Citation omitted.]

[4] In fact, plaintiffs concede on appeal that the dogs were owned by Justin and Caroline Williams.

The statute plainly refers to an "owner"—not a "keeper" or "possessor"—and neither defendant owned the dog.

Plaintiffs suggest that we should rely on MCL 287.261(2)(c), which states: "'Owner' when applied to the proprietorship of a dog means every person having a right of property in the dog, and every person who keeps or harbors the dog or has it in his care, and every person who permits the dog to remain on or about any premises occupied by him." However, MCL 287.261(2) clearly states that the definitions contained therein are "[f]or the purpose of this act," i.e., the Dog Law of 1919. The strict-liability statute relied on by plaintiffs is *not* part of the Dog Law of 1919. In *Trager v Thor*, 199 Mich App 223, 229-231; 501 NW2d 251 (1993), reversed in part on other grounds 445 Mich 95 (1994), the Court of Appeals explicitly ruled that the definition from MCL 287.261(2)(c) does not apply to MCL 287.351(1). The Court ruled that a person who was babysitting some children and had temporary "care and control" of a dog that bit one of the children could not be held liable under the strict-liability statute because he was not the dog's owner. *Trager*, 199 Mich App at 225-226, 229-233. In light of the controlling law, the trial court did not err in granting defendants summary disposition with respect to any claim under MCL 287.351.

Plaintiffs next argue that the trial court's ruling was erroneous because defendants were strictly liable under Michigan common law. As stated in the Supreme Court's *Trager* opinion, "Strict liability [under the common law] 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 (Trager II)*, 445 Mich 95, 99; 516 NW2d 69 (1994). "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." *Id*. at 100; see also *Hiner v Mojica*, 271 Mich App 604, 609-610; 722 NW2d 914 (2006).

There was insufficient evidence here to establish a question of fact regarding whether defendants had scienter of the dog's dangerous nature. Shelby Wooldridge testified that she had never heard Wilbur barking at anyone, that she had never had any problems with him, and that the attack surprised her. Colette Wooldridge provided no evidence that she had knowledge of the dog's dangerous propensity. Keywan testified that *one of the dog's owners* had told him to stay away from the dog because it might bite him, but this was insufficient to infer scienter on behalf of defendants. Lakeisha Mallory, Keywan's mother, specifically testified that she had never seen the dog act aggressively toward a stranger or another person. Additionally, when asked, "Have you ever seen [the dog] exhibit any signs of aggressiveness before this incident?" she answered, "At night he would be barking like trying to get in the house when they were staying there. And like scratching on the door and stuff." Antwan Mallory, Keywan's brother who lived with Keywan, admitted that he had seen Keywan petting the dog in the past. The

evidence, viewed as a whole, did not lead to a question of fact concerning defendants' scienter, and therefore summary disposition regarding common-law strict liability was appropriate.[5]

Plaintiffs next argue that the trial court erred in granting defendants summary disposition because they were liable under common-law negligence principles.[6]

> [A] negligence cause of action arises when there is ineffective control of an animal in a situation where it would reasonably be expected that injury could occur, and injury does proximately result from the negligence. The amount of control required is that 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. [*Trager II*, 445 Mich at 106 (internal citation and quotation marks omitted).]

"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." *Id*. at 105. "Dogs . . . are generally regarded as so unlikely to do substantial harm that their possessors have no duty to keep them under constant control." *Id*. at 105-106. "Consequently, a mere failure to do so would not constitute breach of any duty of care." *Id*. at 106. Given the dearth of evidence that defendants had knowledge of the dog's dangerousness, they were under no duty to keep the dog under constant control. There was insufficient evidence of negligence to survive summary disposition.

Plaintiffs allege that defendants were negligent for violating MCL 287.286a (involving showing cause why a dog should not be killed for behaving in certain ways), MCL 287.321 (defining dangerous animals), and MCL 287.323 (defining criminal penalties in relation to dangerous animals). Plaintiffs also contend that defendants are liable under a city ordinance for "failing to keep the dog Wilbur on a leash, tether him to the ground, or keep him locked in a pen." However, plaintiffs do not explain how these various punitive statutes give rise, in

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[5] Plaintiffs attempted to bolster their evidence by filing two affidavits, *after the grant of summary disposition and in connection with their motion for rehearing*, in which Lakeisha and Antwan stated that they considered the dog to be dangerous and vicious because of having observed him barking, growling, and snarling. There are a number of problems with this evidence. First, a motion for reconsideration addresses palpable errors on behalf of the court and is generally not the appropriate time for presenting new theories and facts. See *Charbeneau v Wayne Co General Hosp*, 158 Mich App 730, 733; 450 NW2d 151 (1987). Secondly, at least in the case of Lakeisha, the affidavit was largely contradictory to her prior deposition answers. Thirdly, evidence of "barking, snarling, and jumping" is insufficient to establish that a dog is abnormally vicious because these are often normal canine behaviors. *Hiner*, 271 Mich App at 611-612. Lastly, the affidavits did not establish any scienter *on the part of defendants*.

[6] It is arguable that this particular issue was properly presented in the complaint, but we will address it regardless.

themselves, to a civil cause of action. "A party may not leave it to this Court to search for authority to sustain or reject its position." *Matter of Keifer*, 159 Mich App 288, 294; 406 NW2d 217 (1987). Plaintiffs seem to be tying their argument concerning these statutes to their argument regarding common-law negligence. As discussed above, there was no question of fact concerning defendants' negligence.

Affirmed.

/s/ Jane M. Beckering
/s/ Patrick M. Meter
/s/ Michael J. Riordan