

STATE OF MICHIGAN
COURT OF APPEALS

BRIAN BENJAMIN STACEY,
Plaintiff-Appellant,

UNPUBLISHED
December 15, 2011

v

COLONIAL ACRES ASSOCIATES, L.L.C. and
NEWBURY MANAGEMENT CO.,

No. 300955
Kalamazoo Circuit Court
LC No. 2009-000382-NO

Defendants-Appellees.

Before: WILDER, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition in defendants' favor in this negligence action. Because defendants owed no duty to plaintiff, we affirm.

Plaintiff, a 16-year-old resident of manufactured home community owned and operated by defendants, visited another residence in the community, owned by Damon and Michelle Young, on August 25, 2006. Plaintiff had been to this residence numerous times without incident, as the Young's teenage son, Houston Payne, was his best friend. On that particular date, however, the Young's pit bull dog suddenly and without provocation bit plaintiff in the face, causing him serious injuries that required stitches and left him scarred. Plaintiff initiated the instant action against defendants asserting that they were negligent in, primarily, failing to warn plaintiff of a prohibited, dangerous dog, and protect him from the same.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(10) contending that they owed no duty to plaintiff to protect him from being bitten by a dog in a private residence when they neither owned or possessed the dog, nor knew of its presence or violent propensities. Defendants also asserted that no action on their part was the proximate cause of plaintiff's injuries. The trial court found that defendants owed no duty to plaintiff and entered an order granting summary disposition in defendants' favor. This appeal followed.

We review a grant of summary disposition de novo. *Besic v Citizens Ins Co of the Midwest*, 290 Mich App 19, 23; 800 NW2d 93 (2010). A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of the plaintiff's complaint. *Robinson v Ford Motor Co*, 277 Mich App 146, 150; 744 NW2d 363 (2007). When reviewing a motion under subrule (C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine

issue of material fact exists warranting a trial. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). A motion for summary disposition under MCR 2.116(C)(10) is properly granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Campbell v Human Servs Dep't*, 286 Mich App 230, 235; 780 NW2d 586 (2009).

On appeal, plaintiff contends that genuine issues of fact exist concerning whether defendants knew of the dog's presence in the Youngs' manufactured home, and whether defendants knew that the dog had dangerous propensities such that defendants owed plaintiff a duty to warn of and to protect him from the dog. While the trial court found that defendants owed no duty to plaintiff concerning the dog that bit him, plaintiff asserts that this conclusion was reached through the court's misapplication of pertinent case law to the facts of this case. Thus, plaintiff avers the trial court erred in its ultimate conclusion. We disagree.

In order to make out a prima facie case of negligence, a plaintiff must prove four elements: (1) duty, (2) breach of that duty, (3) causation, and (4) damages. *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007). The existence of a legal duty is a question of law. *Valcaniant v Detroit Edison Co*, 470 Mich 82, 86; 679 NW2d 689 (2004). "Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person." *Brown*, 478 Mich at 552, quoting *Moning v Alfonso*, 400 Mich 425, 438-439; 254 NW2d 759 (1977).

Plaintiff contends that the first case relied upon by the trial court, *Feister v Bosack*, 198 Mich App 19; 497 NW2d 522 (1993), is inapplicable to the instant matter. The facts in *Feister* are distinguishable from the facts at hand. The trial court, however, did not *rely* upon that case, but instead only briefly mentioned *Feister* as standing for the principal that statutory liability for dog bites attaches only to dog owners and that *Feister* (and other cases) indicate that a landlord generally has no duty to protect third parties from injuries inflicted by a tenant's pet. Because the trial court did not rely on *Feister*, it cannot be said because of *Feister* its ultimate conclusion was in error.

The trial court did cite extensively to *Szkodzinski v Griffin*, 171 Mich App 711; 431 NW2d 51 (1988), which, contrary to plaintiff's contention otherwise, does provide guidance in and is relevant to the instant matter. In *Szkodzinski*, the landlord rented a home to a tenant who, with the landlord's knowledge, owned an Akita dog and kept him in the home's fenced-in backyard. When the tenant was away, a child climbed the fence into the backyard to retrieve a ball. The dog attacked the child, causing serious injuries. The child's parents sued the landlord, among others, under a theory of common law negligence. The trial court granted summary disposition in the landlord's favor and this Court affirmed, noting that "[u]nder common law, the owner or keeper of an animal could be held liable only if he knew of its vicious nature. Similarly, the only possible way that [the landlord] could be held liable on a common law negligence theory would be if he knew of the dog's vicious nature." *Szkodzinski*, 171 Mich App at 714. A review of the evidence revealed that all who had known and interacted with the dog had never seen him act aggressively and had, in fact, viewed him as friendly and playful. This Court thus agreed that plaintiff failed to show any genuine issue of material fact regarding the landlord's awareness of the vicious nature of the dog and that summary disposition was thus appropriate in the landlord's favor.

Similarly, plaintiff testified that he had known Houston Payne since he was in 5th grade and that Payne's family had owned the dog since that time. Plaintiff testified that he had been to Houston's house on an almost daily basis and had always seen the dog. According to plaintiff, the dog was usually outside, but it had also been loose in the house when he was there. Plaintiff testified that he had pet the dog a couple of times before and was not afraid of it. Plaintiff testified that on the date of the incident, he was sitting on the floor petting the dog and that the dog seemed happy to be petted. According to plaintiff, as he withdrew his hand from petting the dog, the dog suddenly bit him in the face.

As in *Szkodzinski*, no evidence was presented to the trial court indicating that this dog had a vicious nature or that defendants had knowledge of any such nature. Plaintiff was well aware of the dog's presence and had been for many years. There is no indication that he reported the dog's presence or complained of the dog to defendants. Instead, he repeatedly went to the dog's location, interacted with the dog and, according to his testimony, was not afraid of the dog. The sole basis plaintiff presents for imputing knowledge of the dog's vicious propensities is found in the written "Rules and Regulations" issued by defendant Colonial Acres. The relevant rule provides as follows:

30. Pets

A. Residents may have not more than two (2) registered "domesticated" pets per household with Management's prior approval. Please check with Management before acquiring a pet to ensure that you will be permitted to bring and keep your pet in the community. Pets, which are not approved by Management, may not be kept within the confines of this mobile home community. If Management determines that Resident has an unregistered pet, the pet will not be approved by Management and must be permanently removed and Resident will not be permitted additional pet privileges for a period of one (1) year.

E. 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.

While plaintiff states that "since defendants set forth in their Rules and Regulations that certain breeds of dogs 'may be dangerous to others in the community' they acknowledged that pit bulls have dangerous propensities." Defendants, however, did not specify that certain dogs may be dangerous to the community; rather, they simply prohibited certain dog breeds from being brought into the community.

It is true that certain breeds of dog are thought to be more inclined toward vicious behavior than others. However, an inclination does not equate with a certainty, as no general notion is without exceptions. Moreover, while several other jurisdictions have imposed liability on landlords for their tenants' dog attacks against third parties, what these cases share in common is that liability attaches only where the landlord had actual knowledge of the *particular* dog's vicious propensities and not a general conception of vicious propensity based on breed alone. See *Alaskan Village, Inc v Smalley*, 720 P 2d 945, 947-948 (Alaska, 1986)(the owner of a mobile home park which had a lease provision prohibiting tenants from keeping vicious dogs and requiring a tenant to immediately remove annoying pets had a duty to protect others from injury from the tenant's dog when the owner had actual knowledge of prior incidents involving the dogs); *Matthews v Amberwood*, 351 Md 544; 719 A 2d 119 (1998) ("no pets" clause in lease creates duty on the part of the landlord to protect tenant's social guests from injury from the tenant's pit bull dog when the landlord had notice of previous dangerous incidents involving the dog). Assuming, without deciding, that defendants were aware of the dog's presence, plaintiff must still have demonstrated that defendants were aware that this particular dog had a vicious nature, and plaintiff failed to present any evidence establishing or even creating a question of fact regarding such awareness.

This Court addressed the issue of whether a landlord who promulgates rules and regulations regarding tenants' dogs owes a third party a duty to use reasonable care to enforce those rules in *Braun v York Properties, Inc*, 230 Mich App 138; 583 NW2d 503 (1998). In *Braun*, a child was bitten by his neighbors' Labrador dog while playing inside the neighbors' mobile home. The child's parents brought suit against the neighbors as well as the managers and owners of the mobile home park alleging negligence. A jury ultimately entered a verdict in the plaintiff's favor and against the managers/owners of the mobile home park. The managers/owners appealed, challenging the conclusion that they owed the plaintiff a duty of care. On appeal, the plaintiff admitted that no one knew of the dog's dangerous proclivities, "rightly conced[ing] that he cannot recover under the common law theory identified in *Szkodzinski . . .*" *Braun*, 230 Mich App at 143. Instead, 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 to use reasonable care to enforce their rules to protect third parties from tenants' dogs that do not satisfy the criteria." *Id.* at 144. This Court applied seven analytical factors found in *Alaskan Village, Inc v Smalley*, 720 P 2d 945, 947-948 (Alaska, 1986) to conclude that the defendants did not have a duty to enforce its rules and regulations under the circumstances of the case.

As indicated by plaintiff, the *Braun* Court focused on the fact that the Labrador that had bitten the child was in violation of the size restriction contained in the rules and regulations and while "the size restrictions may in some way protect others from harm, their purpose is primarily to protect against harm to the premises." *Braun*, 230 Mich App at 148. Here, on the other hand, the dog at issue was in violation of the breed restriction contained in the rules. In that sense, *Braun* is distinguishable from the instant matter. However, the size of the dog was not the only consideration examined by the Court. The *Braun* Court looked at several factors which, when taken together, led the Court to conclude that the landlord's promulgation of rules for its mobile home community and/or failure to enforce the same did not create a duty on the landlord's part.

Applying the same seven analytical factors to the facts of this specific case, we reach the same conclusion. (1) the foreseeability of harm to plaintiff: There was no indication that anyone, including defendants had any knowledge of the dog's dangerous proclivities; (2) the degree of certainty that plaintiff suffered injury: There is no question that plaintiff was injured; (3) the connection between defendant's conduct and plaintiff's injury: Plaintiff's injuries were related to defendants' failure to enforce their rules and regulations only in the sense that if defendants had enforced them, the dog would not have been in the mobile-home park; (4) the moral blame attached to defendants' conduct: Again, there is no indication that defendants knew the dog at issue was dangerous; (5) the policy of preventing future harm: As in *Braun*, our policy is to encourage owners to enforce their rules to prevent harm to others lawfully on the premises (*Id.* at 145); (6) the burden on the defendant and consequences to the community of imposing the duty: The burden on defendants to enforce their rules and regulations is not necessarily high, though it does raise potential issues concerning the privacy of its tenants in their homes; and (7) the availability, cost and prevalence of insurance for the risk: Defendants may obtain insurance or require tenants who own certain breeds of dogs to do so if available. See, *Braun*, 230 Mich App at 147-148.

Considering all of the above factors as a whole, we conclude that no actionable duty of care exists in this case. Moreover, as in this case, the rules themselves may place the duty and any associated risk concerning the ownership of pets squarely upon the owners themselves. Here, the rules specifically stated that "residents are solely and totally responsible for the behavior of their pet." It could be argued then, that defendants explicitly declined any responsibility for the behavior of its tenants' pets.

Again relying upon the rules established by defendants, plaintiff contends that defendants explicitly assumed a duty to protect plaintiff by including a provision in the rules that "every effort will be made by management to ensure that rules and regulations are enforced." Plaintiff asserts that defendants breached this duty by failing to enforce the rule prohibiting certain breeds of dogs in the manufactured home community. This argument goes far beyond plaintiff's common law negligence claim. What plaintiff encourages is essentially akin to a strict liability standard whereby whenever a manufactured home community has a rule and the rule is not enforced, the landlord is strictly liable for the consequences, no matter what the factual scenario.

Plaintiff also contends that the trial court erred in finding that plaintiff was a guest on defendant's property and, as such, was only an incidental beneficiary of the rules and regulations of the mobile home community. However, this conclusion was one reached by the trial court only in response to defendants' first motion for summary disposition. On plaintiff's motion for reconsideration, the trial court still granted summary disposition in defendants' favor, but held: "[t]he plaintiff, the Court now concludes, was a resident and can be viewed as an intended beneficiary of the rules and regulations as they apply to all who live within the community." The trial court thus corrected its prior finding to that which was consistent with plaintiff's position (though plaintiff's residency status ultimately played no role in the trial court's ultimate ruling). We thus need not consider plaintiff's argument on this issue.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Michael J. Talbot
/s/ Deborah A. Servitto