STATE OF MICHIGAN

COURT OF APPEALS

DALE TIEMAN,

Plaintiff-Appellant,

v

JOSEPH GRINSTEINER,

Defendant-Appellee.

UNPUBLISHED
October 27, 2011

No. 300265
Menominee Circuit Court
LC No. 09-012879-NO

Before: STEPHENS, P.J., and SAWYER and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff, Dale Tieman, appeals as of right from the trial court's grant of summary disposition in favor of defendant, Joseph Grinsteiner, in this cause of action arising out of a dog bite. We affirm.

The relevant facts of this case are largely undisputed. On June 24, 2008, plaintiff drove his vehicle up the driveway at defendant's farm. Approximately six to eight years earlier, plaintiff had purchased straw from defendant's predecessor in interest. Plaintiff did not know that the same man no longer owned the farm and was hoping to purchase more straw. When plaintiff pulled into the driveway, defendant's two dogs ran to the vehicle while barking. Defendant was not home at the time. Plaintiff saw the barking dogs and testified that he began talking to them from inside his vehicle. Plaintiff indicated that he thought of the adage that "a barking dog never bites" and decided to exit his vehicle. One of the dogs, an Australian Shepherd, subsequently bit plaintiff on his side. Plaintiff promptly turned his body and got back into his vehicle. In the process, plaintiff allegedly injured his knee.

After defendant's dog bit him, plaintiff apparently sought treatment. It does not appear that the actual wound from the bite was severe. However, plaintiff further asserts that when he turned to escape the dog, he injured his knee. Plaintiff contends that he intended to have his knee treated. However, as of September 2008, he had not yet received the necessary treatment. During that month, plaintiff was working with a router. In the process of working with the router, plaintiff was placing all of his weight on his injured knee. His knee gave out, causing his hand to slide forward and come into contact with the router. One of plaintiff's fingers was severed and two others were injured.

Plaintiff filed a complaint alleging two distinct counts. The first count in the complaint was a statutory claim in which plaintiff alleged that defendant was liable for his dog's actions

pursuant to MCL 287.351. The second count alleged a common law claim which stated that defendant knew that his dog had a propensity to bite and was therefore liable because he allowed plaintiff to enter his property.

Defendant sought summary disposition pursuant to MCR 2.116(C)(10). In his brief in support of the motion, defendant argued that the statutory claim could not be maintained because the statute in question applied to invitees and licensees and plaintiff was properly classified as a trespasser. Regarding the common law claim, defendant asserted that summary disposition was proper because he had no knowledge that his dog had a propensity to bite or was dangerous. Defendant further asserted that even if summary disposition was not granted, plaintiff was seeking excessive damages to the extent that he asserted defendant was liable for the injuries to his fingers.

The trial court held a hearing on the motion for summary disposition on May 4, 2010. At the hearing, the court explained that it agreed with the arguments in defendant's motion for summary disposition. Specifically, the court held that defendant was entitled to summary disposition on each count because plaintiff was properly classified as a trespasser and because defendant did not know that his dog had a propensity to bite. The court also granted plaintiff the opportunity to amend his complaint.

Plaintiff ultimately filed an amended complaint in which he asserted that defendant was liable for his damages because defendant violated the leash law, MCL 287.262, when he allowed his dogs to roam free. Subsequently, defendant filed a second motion for summary disposition pursuant to MCR 2.116(C)(10). In the accompanying brief, defendant argued that he did not violate the leash law when he allowed his dogs to roam on his own property while unleashed. The trial court ultimately agreed and found that the leash law did not require an owner to restrain a dog while that dog was on the owner's property. Consequently, the trial court granted defendant summary disposition. Plaintiff now appeals as of right and asserts that summary disposition was improper regarding each count of his first amended complaint.

Plaintiff first asserts that the trial court erred in granting summary disposition regarding his statutory claim pursuant to MCL 287.351. We disagree. This Court reviews a trial court's decision regarding summary disposition pursuant to MCR 2.116(C)(10) de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper when, upon examining the affidavits, depositions, pleadings, admissions and other documentary evidence, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1997).

Pursuant to MCL 287.351(1), a dog's owner is liable when a dog, without provocation, bites a person who is lawfully present on private property. MCL 287.351(2) provides that:

> 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…

In this instance, there is no allegation that plaintiff was present on defendant's property to perform a duty imposed upon him. Rather, plaintiff asserts that was lawfully present on the property because he is properly classified as a licensee. Our Supreme Court has stated that "A 'licensee' is a person who is privileged to enter the land of another by virtue of the possessor's consent. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). "Such consent may be either express or implied. Permission may be implied where the owner, or person in control of the property, 'acquiesces in the known, customary use of property by the public.'" *Pippin v Atallah*, 245 Mich App 136, 142; 626 NW2d 911 (2001), quoting *Alvin v Simpson*, 195 Mich App 418, 420; 491 NW2d 604 (1992). In contrast, "A 'trespasser' is a person who enters upon another's land, without the landowner's consent." *Stitt*, 462 Mich at 596.

Plaintiff argues that he should be classified as a licensee because defendant impliedly consented to plaintiff's use of defendant's driveway. Plaintiff asserts that because defendant failed to post a sign in the driveway warning potential entrants, he acquiesced to a known and customary use of the property by the public. Plaintiff offers no authority for the notion that an individual cannot trespass on a driveway that lacks a warning sign. Plaintiff argues that it is known that members of the public, such as delivery persons and people seeking directions, generally utilize driveways in order to perform their tasks and provide services. Plaintiff's argument is not persuasive. Accepting plaintiff's argument would require this Court to over-broadly apply the term "known, customary use." In support of plaintiff's argument that the public was known to use defendant's driveway, he cites the fact that defendant hosts an annual country music festival on his property, that UPS makes occasional deliveries to the property, and the tenants from defendant's rental properties come to the farm to pay rent after first calling defendant. Defendant derives a direct benefit from the presence of the tenant paying rent and the UPS person delivering a package, which is a typical implied permission licensee. In the case of the festival attendees, defendant explicitly invited the general public to enter his property. In this instance, defendant did not benefit from plaintiff's presence, did not explicitly invite him onto the property and was wholly unaware that plaintiff would be in his driveway. Furthermore, plaintiff has failed to show the frequency at which the public utilizes defendant's driveway. Consequently, we are unable to say that the alleged usage amounts to a known and customary use. Therefore, plaintiff is properly classified as a trespasser, no genuine issue of material fact remains and the trial court did not err in granting summary disposition regarding the claim brought pursuant to MCL 287.351.

Next, plaintiff asserts the trial court erred in granting summary disposition pursuant to MCR 2.116(C)(10) regarding the common law claim. We disagree.

In order to establish a common law claim for injuries arising out of a dog bite, a plaintiff must show that the owner of the animal had scienter, or knowledge, of the dog's "abnormal dangerous propensities." *Trager v Thor*, 445 Mich 95, 99; 516 NW2d 69 (1994), citing Restatement Torts, 2d, § 509, p. 15. In the present case, there is no allegation that defendant's dog had previously bit anybody. Rather, plaintiff cites to defendant's deposition testimony, in which he stated that the Australian Shepherd breed as a whole tended to be protective of personal property and family. Plaintiff contends that the testimony demonstrates that defendant knew his dog had a dangerous propensity. Plaintiff's position is not consistent with the case law addressing this topic. In *Trager*, our Supreme Court explained "if the possessor of such an animal ... has knowledge of some dangerous propensity *unique to the particular animal* . . . the

possessor has a legally recognized duty to control the animal to an extent reasonable to guard against that foreseeable danger." *Id*. at 106 (emphasis added). This Court cited to that same proposition in *Hilner v Mojica*, 271 Mich App 604, 612-613; 722 NW2d 914 (2006). In contrast, plaintiff cites to no case in support of the theory that an individual dog can be considered to have a dangerous propensity merely because of its breed. As a result, because no evidence has been presented demonstrating a dangerous propensity "unique to the particular animal," the trial court properly concluded that there is no genuine issue of material fact relating to the common law claim. Summary disposition was properly granted.

Finally, plaintiff contends that the trial court erred in granting summary disposition pursuant to MCR 2.116(C)(10) relating to plaintiff's claim that defendant violated the leash law, MCL 287.262. We disagree.

MCL 287.262 provides:

> It shall be unlawful . . . for any owner of any female dog to permit the female dog to go beyond the premises of such owner when she is in heat, unless the female dog is held properly in leash . . . or for any owner to allow any dog, except working dogs such as leader dogs, guard dogs, farm dogs, hunting dogs, and other such dogs, when accompanied by their owner or his authorized agent, while actively engaged in activities for which such dogs are trained, to stray unless held properly in leash.

Webster's New World Dictionary, Second College Edition (1970) defines "stray," in part, as "to wander from a given place, limited area, direct course, etc., esp. aimlessly; roam; rove." In stating that an owner may not permit his dog "to stray unless held properly in leash," the statute fails to name the given place that a dog is permitted to roam when unleashed. As a result of that omission, plaintiff argues that a dog must be on a leash at all times that it is not with its owner, even if the dog is on the owner's property. However, it is well-established that when interpreting a statute, this Court must read that statute in whole. *Herman v Berrien Co*, 481 Mich 352, 366; 750 NW2d 570 (2008). Further, "The primary objective of statutory interpretation is to ascertain and give effect to the intent of the Legislature from the plain language of the statute." *Yono v Carlson*, 283 Mich App 567, 569; 770 NW2d 400, 401 (2009). Here, the controlling statute indicates that a female dog that is in heat only needs to be leashed if it is "beyond the premises" of the owner. As a result, it is evident that the legislature did not intend to require an owner to leash its dog if that dog remained on the owner's property. Therefore, the term stray, as used by the statute, refers to a dog that is wandering or roaming an area of land that does not belong to its owner. Because there is no allegation that defendant's dogs were off of his property when plaintiff was bit, the trial court properly granted defendant's motion for summary disposition.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Kirsten Frank Kelly