STATE OF MICHIGAN

COURT OF APPEALS

BERNARD KIBBE and DONNA KIBBE,

Plaintiffs-Appellants,

v

JAMIE RICHIE,

Defendant-Appellee,

and

J & R BUILDING MOVERS, INC,

Defendant.

UNPUBLISHED
November 8, 2012

No. 306270
Emmet Circuit Court
LC No. 10-002675-NO

Before: FITZGERALD, P.J., and METER and BOONSTRA, JJ.

PER CURIAM.

Plaintiffs appeal as of right the order denying their motion for partial summary disposition and granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant Jamie Richie[1] in this personal injury action brought under theories of common law strict liability, violation of a county ordinance, and premises liability.[2] We affirm.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff Bernard Kibbe (hereinafter plaintiff) is Richie's father and lives across the street from her. On July 11, 2009, Richie and her husband were out of town to attend a wedding. As she had on previous occasions, Richie asked plaintiff to look after her property while she was away. Richie's grandmother looked after Richie's three dogs: a St. Bernard, a white Labrador, and a black Labrador. At approximately 8:30 a.m. on July 11, plaintiff drove to Richie's house to check on the property. As he drove down the driveway toward the house, plaintiff noticed the dogs running loose. He pulled his car near the garage and noticed the dogs coming up the hill

[1] Defendant J & R Building Movers, Inc., was voluntarily dismissed with prejudice.

[2] The summary dismissal of the premises liability count is not at issue in this appeal.

behind the car. Plaintiff walked around the house toward the side door of the garage. As he neared the door he was struck from behind, causing him to fall to the ground and sustain injuries.

Plaintiff filed a three-count suit. With regard to the strict liability count, plaintiff alleged that Richie knew that her dogs had a dangerous propensity not normal to their class to knock people down. Plaintiff alleged that in the fall of 2008 Richie was knocked down by the dogs and was injured. With regard to the second count, plaintiff alleged that defendant violated the county animal control ordinance that makes it unlawful for a dog to run at large at any time or to attack or bite another person. Plaintiff alleged that Richie's violation of the ordinance constituted negligence that proximately caused plaintiff's injuries. The third count, premises liability, is not relevant to this appeal.

Plaintiff moved for partial summary disposition pursuant to MCR 2.116(C)(10) with regard to the strict liability count, asserting that there was no genuine issue of material fact with regard to the Richie's strict liability for the injuries caused by her dogs. Plaintiff asserted that Richie knew or had reason to know of her dogs' abnormal dangerous propensity to knock people down because she had previously been knocked down by two of her dogs. Plaintiff also asserted that he suffered harm as a result of the abnormal dangerous propensity.

Richie then moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). In support of her motion with regard to the strict liability claim, Richie asserted that plaintiff admitted that he did not know which of Richie's three dogs contacted him from behind. Richie also asserted that no record evidence existed suggesting that any of her dogs were or are vicious or had any dangerous propensities. Rather, the evidence showed that the dogs were playful, not aggressive, and did not have any habit of jumping on anyone. Additionally, Richie asserted that the incident in which her dogs were playing and accidentally bumped into her, causing her to fall, involved her St. Bernard and her black lab. Her white lab, which is the only dog that plaintiff acknowledged seeing near to the time of his fall, was not one of the two dogs that was playing and made contact with Richie. Lastly, Richie asserted that there was no genuine issue of material fact indicating that Richie had knowledge that her white lab, or any of her dogs, was vicious or had a dangerous propensity to cause foreseeable harm. With regard to the ordinance violation claim, Richie asserted that plaintiff admitted that he was neither attacked nor bitten by a dog. Richie also asserted that her dogs were legally and lawfully on her property and were not "running at large" so as to be in violation of a local ordinance. She further asserted that violation of an ordinance does not create a private cause of action.

Following a hearing on the competing motions, the trial court denied plaintiff's motion for partial summary disposition and granted summary disposition in favor of Richie. With regard to the strict liability claim, the court opined:

> The plaintiff's theory here is that he was knocked down by one or more of the dogs owned by the Defendant. The Plaintiff's testimony, however, is clear that he does not know what caused him to fall. He said he was knocked down from behind by the dogs, but he also admits he can't say which one or more of the dogs knocked him down. In fact, reading between the lines, it appears to the Court not only does he not know for sure which dog knocked him down, he

doesn't' even know for sure if it was a dog that knocked him down. He's assuming that the dogs knocked him down, but he doesn't really know.

He says that he saw white and so that if we were dealing with the *Skinner* [*v Square D Co*, 445 Mich 153; 516 NW2d 475 (1994)] standard might arguably be proof of causation by the white dog sufficient to get Defendant past the equally balanced probability that it was all three dogs or two out of the three, it I think might allow the Plaintiff to say that they've presented circumstantial evidence that tips the balance beyond the 50% that it was the white dog. But there's no evidence that the white dog had never knocked anybody down before, and the Court finds that there's no genuine issue of material fact that gets beyond pure speculation that either the black dog or the brown dog, where there was some prior evidence of the dog – the dogs playfully causing an injury before, where there's just no causation evidence sufficient to show that one of those dogs was involved in this case. Even if they were, the Court agrees with the Defendant's analysis that the evidence here doesn't show the requisite propensity knowledge by the Plaintiff [sic: defendant] that these dogs would injure somebody because in a playful incident once before, there was an injury to the Defendant. That doesn't get you to Plaintiff [sic: defendant] having knowledge that there's a propensity of these dogs to injure someone sufficient to support strict liability.

So for both those reasons, the Court grants summary disposition to the Defendants as to Count I.

Count II asserts a violation of County ordinance. First off, the Court does not agree that the evidence supports a violation of the ordinance because the Court does not believe the evidence shows that the dogs were running at large or that they attacked or bit anyone. Even if there was such evidence to support the conclusion that there was a violation of the ordinance, that would only be some evidence of negligent conduct; that is a breach of duty. But that would not get Plaintiff past her [sic: his] inability to prove causation by the two dogs that had any history if you will, and beyond mere speculation. So the Court grants summary disposition as to Count II.

II. COMMON LAW STRICT LIABILITY

Plaintiff challenges the trial court's s decision to grant Richie summary disposition of his strict liability claim, asserting that Richie's dogs had "dangerous propensities" and posed a risk of harm. We review de novo a trial court's summary disposition ruling. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). Because the parties attached and referenced documentary evidence and deposition testimony beyond the pleadings, we treat their motions as governed by the standards set forth in MCR 2.116(C)(10). "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 Gen 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*, 263 Mich App 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*, 469 Mich at 183.

At common law, strict liability for harm done by an animal attaches when three elements exist: "(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*, 445 Mich 95, 99; 516 NW2d 69 (1994). Plaintiff contends that, when viewed in the light most favorable to him, the facts establish all three elements. The record belies plaintiff's assertion. Despite the large size of the dogs, no record evidence suggests that either animal ever exhibited "abnormal[ly] dangerous propensities." At most, the evidence reveals that two of Richie's three dogs were playing with each other in the yard on one occasion and in the midst of their play made contact with Richie while she was in the yard. No evidence was presented that the dogs intentionally jumped on her. Essentially, the only evidence presented regarding the dogs' behavior was the testimony of plaintiff, his wife, Donna Kibbe, and Richie that the dogs are playful and that none of the dogs have ever acted aggressively or bitten or attacked anyone. After our careful review of the record evidence concerning Richie's dogs, we detect no basis whatsoever for a finding that they harbored abnormally dangerous propensities. Therefore, we affirm the circuit court's grant of summary disposition to defendants with regard to plaintiff's strict liability claim.

II. VIOLATION OF COUNTY ORDINANCE

Plaintiff alleged that Richie's violation of a county ordinance that makes it unlawful for "(b) any dog . . . to run at large at any time . . ." or for "(f) any dog . . . to attack or bite any person" constitutes negligence that proximately caused the damages sustained by plaintiff. He argues that the trial court erred by granting summary disposition in favor of Richie based on the court's finding that there was no question that Richie did not violate a local ordinance that prohibited dogs from running at large or from attacking or biting another person and that, even assuming a violation of the ordinance, plaintiff failed to establish the remaining elements on a negligence action.

"The rules of statutory construction apply to ordinances[.]" *Wayne Co v Wayne Co. Retirement Comm*, 267 Mich App 230, 244; 704 NW2d 117 (2005). "When interpreting statutory language, the primary goal is to discern and give effect to the legislative intent that may reasonably be inferred from the language of the statute." *Id.* at 243. When language is unambiguous, courts must apply the provision as written. *Id.* We accord words used in a provision their common and ordinary meanings and "must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *Id.* at 244.

We agree with the trial court that the there was no evidence to support a finding that the dogs were running at large or attacked or bit another person. Contrary to plaintiff's argument, the ordinance's prohibition against a dog "running at large" does not require a dog to be restrained at all times regardless of the dog's location. Had the county intended for all dogs to be restrained on an owner's property at all times, it would have stated that it shall be unlawful for "any dog . . . to be unrestrained at any time." Additionally, the undisputed evidence reveals that

plaintiff was not attacked or bitten by any dog. Accordingly, the trial court properly granted summary disposition of plaintiff's ordinance violation claim.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Mark T. Boonstra

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METER, J. (*concurring in part and dissenting in part*).

Given the specific wording of the county ordinance, I agree with the majority that the trial court properly dismissed plaintiffs' ordinance-violation claim. However, I respectfully dissent from the majority's conclusion that the trial court properly dismissed the strict-liability claim.

As noted in the majority opinion, "[s]trict liability 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*, 445 Mich 95, 99; 516 NW2d 69 (1994). The first element is not in dispute, and there are genuine questions of material fact concerning the remaining two elements. With regard to element (2), Jamie Richie testified that in 2008 the black Labrador retriever and the St. Bernard ran into her and knocked her down. Medical records indicate that the dogs "plowed into her" and "tweaked her back," exacerbating an existing back injury and causing "severe pain" that caused her activities to be "very limited." This evidence created a question of fact concerning whether Jamie had "scienter of [her animals'] abnormal dangerous propensities." *Id*. The majority emphasizes that no evidence was presented that the dogs had *intentionally* jumped on Jamie or that they had acted aggressively. That, however, is not the standard from *Trager*. The standard is "abnormal dangerous propensities," *id*., and a tendency for dogs to run into people and knock them down,

causing injury, could indeed be considered an "abnormal dangerous propensity." See Restatement Torts, 2d, § 509, comment *i*, p 19 ("[i]f the possessor knows that his dog has the playful habit of jumping up on visitors, he will be liable without negligence when the dog jumps on a visitor, knocks him down and breaks his hip"). With regard to element (3), Jamie's dogs in fact did knock down Bernard Kibbe, causing several injuries.

The trial court concluded that because Bernard Kibbe testified about "seeing white," and because there was no prior knowledge of a dangerous propensity with regard to the white Labrador retriever, summary disposition was appropriate. However, Bernard testified that he actually could not say which of the three dogs contacted him. He testified that he saw the dogs "running around" and "coming up towards [him]," and he answered "Yes" when asked, "The *dogs* knocked you from behind?" [Emphasis added.] The use of the plural "dogs" provides some evidence that at least one of the other dogs was involved in the incident. Moreover, if Jamie knew of the dangerous propensity of the black Labrador retriever and the St. Bernard to jump onto people and cause injury, she should also have known that, when these two dogs engaged in rambunctious play with another dog, the three of them would essentially act as a "pack" and pose a danger.

I would remand this case for further proceedings with regard to the strict-liability count.

/s/ Patrick M. Meter