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RENEE BURNETT, Next Friend of KALYNN BURNETT, Minor,	UNPUBLISHED March 14, 2013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

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[1] As later noted, a default judgment was entered against defendant Crystal Clarke. Defendants RHP Properities, 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

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[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 brining 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 where 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.

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[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.

S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

RENEE BURNETT, Next Friend of KALYNN BURNETT, Minor, Plaintiff-Appellant,	UNPUBLISHED March 14, 2013
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.

GLEICHER, J., (*dissenting*).

On May 22, 2010, a pit bull named Bruno bit 12-year-old plaintiff Kalynn Burnett in the face. Kalynn and her mother sued Bruno's owner, Crystal Clarke, and defendant Hillcrest Acres Associates, L.L.C., a manufactured home community in which both Clarke and Kalynn resided.[1] The majority holds that Hillcrest owed Kalynn no duty of care, despite that Hillcrest knew of Bruno's vicious tendencies and maintained a rule prohibiting pit bulls on the premises. I respectfully disagree with the majority's duty analysis and would hold that material fact questions preclude summary disposition.

I. UNDERLYING FACTS

Hillcrest provides its tenants with a document titled "Rules and Regulations." The "welcome" paragraph states: "We are committed to providing our Residents pleasant

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[1] The circuit court entered a default judgment against Clarke.

surroundings within a well-governed, peaceful and attractive manufactured home community." According to rule 10, "Every effort will be made by Management to ensure that the Rules and Regulations are enforced and that the quiet enjoyment and comfort of all Residents is not disturbed. Ignorance of a Rule or Regulation cannot be accepted as an excuse." Rule 8 states in relevant part, "Failure to comply with the Rules and Regulations or other laws may result in the termination of tenancy as provided by law."

Tenants who break Hillcrest's rules first receive a "Notice of Rule Violation." Upon receipt of a notice,

> it is expected that the violation will be corrected by the date stated on the Notice. Failure or refusal to correct a violation or chronic or repeated violations of the Rules and Regulations may lead to eviction proceedings. Please note that compliance with the Rules and Regulations is absolutely essential to provide you and your neighbors pleasant and peaceful surroundings.

Pursuant to the rules and regulations, Hillcrest permits its tenants two "registered 'domesticated' pets per household with Management's prior approval." However, Hillcrest's rules specifically prohibit pit bulls:

> Exotic pets such as snakes, wild animals or farm classed animals are strictly prohibited. Certain breed 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.

The rules further provide, "Failure to abide by the Rules and Regulations pertaining to pets will result in the loss of pet privileges or termination of the tenancy."

Wayne Howard managed Hillcrest at the time Kalynn was bitten. Howard testified that Clarke owned two pit bulls before she acquired Bruno and one after, had been "told not to have dogs," and had been twice "written up" because of her pit bull ownership. Howard elaborated:

> I don't remember the dates, but I'd write her up for one, she'd get rid of that dog and then she'd have another one the following week or so. And then she'd get rid of that one. It was like we'd tell her to get rid of them, there were different dogs, different places. The one that bit the kid I never seen.

Howard estimated that the first write-up occurred "within months" of the date on which Bruno bit Kalynn. "Every time [Clarke] got a writeup," Howard claimed, "she got rid of the dog." Howard admitted that he had not "written up" Clarke after Bruno's first transgression, the chase of the child through the trailer park. Howard claimed that he lacked any knowledge of this event, despite the responding officer's testimony to the contrary and a written report authored by a Kalamazoo County Animal Services officer indicating that he or she had discussed Clarke's pit bull situation with the "Park Manager."

Howard did issue a warning to Clarke after Bruno bit Kalynn, but by then Bruno was gone; Kalamazoo County Animal Services seized the animal the same day he attacked the child. Despite Clarke's flagrant rule-breaking, Hillcrest made no effort to evict her until she acquired

yet another pit bull. When Howard discovered the newest pit bull in Clarke's yard he served her with an eviction notice. Clarke left the manufactured home community less than 30 days thereafter.

Howard testified that other residents also brought non-conforming canines into the trailer park. In his experience, "they would remove the dog" after he spoke with them. During the approximately five years that Howard managed the premises, no one was actually evicted because of a dog.

Kalamazoo Township police officer Brett Hake was dispatched to Hillcrest after Kalynn was bitten. Hake had encountered Bruno once before. On May 6, 2010, Hake received a call "that a pit bull was chasing a child." His investigation revealed "a large white and brown pit bull, very aggressive," that he believed was the "same dog that bit the kid in the face." Hake described Bruno's behavior at their first meeting as follows:

> [I]f you're looking at the front of the trailer they have kind of a large picture window which are not very thick or very strong. The dog would, just bouncing off of that, barking and growling, trying to get through the window [to] people standing outside. Even going to the door to knock on the door and they had the interior door closed and they got a screen door would just go crazy against that door, too. So, he would come up in the front window, you could see him just a large pit bull.
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> * * *
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> Based on my experience of doing a lot of search warrants over the years being on the drug team, pit bulls are very aggressive any ways. . . . Pit bulls, on a scale of one to ten are a ten for aggressiveness, and yes, there's no doubt in my mind if I had gone into that house if that dog had gotten loose it would have come after somebody, if not me.

Hake testified that other pit bulls had gotten loose on Hillcrest's premises, and related that he and other officers had spoken with Howard "just to let him know there are people that have pit bulls that are getting loose, let alone that they have pit bulls getting loose in the park." According to Hake, "we tend to have a fair amount of pit bulls get loose up there. . . . [T]here tends to be a lot of pit bulls in that park. . . . We get dogs that are loose and aggressive, nine out of ten of them have been pit bulls in my experience."

II. ANALYSIS

The majority commences its legal analysis with a primer on premises liability. This is not a premises liability case; the duty alleged here arises from a rule voluntarily assumed by Hillcrest rather than by common-law principles governing the duties owed by a premises possessor to a tenant. Bruno was not a dangerous "condition on the land" giving rise to a duty of care. Rather, he was an inherently dangerous animal specifically banned by Hillcrest's own policy. In promulgating that policy Hillcrest both foresaw the risks posed by pit bulls and assumed a duty to protect its tenants from those dangers.

Next, the majority concludes that "there is not a genuine issue of material fact regarding whether defendant was negligent" as the evidence fails to demonstrate that "defendant was aware of Bruno's viciousness." Again, the majority fundamentally misapprehends the nature of this case. Hillcrest's negligence arises from its failure to enforce its own safety rule. That rule *presumes* that pit bulls are vicious. Why else ban them? The operative question is not whether Hillcrest knew of Bruno's viciousness, but whether it knew Bruno lived in the manufactured home community.

Finally, relying in part on *Braun v York Props, Inc*, 230 Mich App 138; 583 NW2d 503 (1998), the majority holds that Hillcrest owed Kalynn no duty of care, despite Hillcrest's rule prohibiting pit bulls. In my view, the majority misapprehends *Braun* as well as the tort law governing duty.

In *Braun*, 230 Mich App at 144-145, this Court discussed at length the Supreme Court of Alaska's decision in *Alaskan Village, Inc v Smalley*, 720 P2d 945 (Alaska, 1986), holding that a trailer park's owner bore a duty to exercise reasonable care to enforce its rules and regulations, which included a prohibition against "vicious dogs." The Alaska Supreme Court partially grounded its decision in Restatement Torts, 2d, § 323, p 135, which provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking. [*Alaskan Village*, 720 P2d at 947[2].]

The *Alaskan Village* Court set forth the following factors to be considered in determining whether an actionable duty of care exists:

> (1) the foreseeability of harm to plaintiff, (2) the degree of certainty that plaintiff suffered injury, (3) the connection between defendant's conduct and plaintiff's injury, (4) the moral blame attached to defendant's conduct, (5) the policy of preventing future harm, (6) the burden on the defendant and consequences to the community of imposing the duty, and (7) the availability, cost and prevalence of insurance for the risk. [*Id.* at 947-948.]

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[2] This Court has also recognized the voluntary assumption of duty doctrine. See *Zine v Chrysler Corp*, 236 Mich App 261, 277; 600 NW2d 384 (1999) ("When a person voluntarily assumes a duty not otherwise imposed by law, 'that person is required to perform it carefully, not omitting to do what an ordinarily prudent person would do in accomplishing the task.'"); *Zychowski v A J Marshall Co*, 233 Mich App 229, 231; 590 NW2d 301 (1998) ("A party may be under a legal duty when it voluntarily assumes a function that it is not legally required to perform.").

In *Buczkowski v McKay*, 441 Mich 96, 101 n 4; 490 NW2d 330 (1992), our Supreme Court explained that Dean Prosser described that these same factors "consistently go to the heart of a court's determination of duty[.]"

In applying the first factor, the Alaska Supreme Court noted that "ample evidence" supported the defendant's "knowledge of prior incidents involving" the offending dogs, rendering it "clearly foreseeable" that a person such as the plaintiff might be harmed. *Alaskan Village*, 720 P2d at 948. In *Braun*, 230 Mich App at 147, this Court explained that "[u]nlike in *Alaskan Village,* defendants did not know of the dog's dangerous proclivities, and therefore, it was no more foreseeable that plaintiff would be harmed by his neighbor's dog than any other dog[.]" This Court further determined that factor (4), "the moral blame attached to defendant's conduct," lacked applicability because the "defendants did not know of the dog's dangerous nature and the size of a dog is not necessarily related to its propensity to bite[.]" *Id.* at 148. "Upon consideration of these factors," the *Braun* Court concluded that the defendants did not owe the plaintiff any duty of care. *Id.*

Application of the *Alaskan Village/Braun* factors in this case leads to the opposite conclusion. Here, defendant knew full well that pit bulls are dangerous; this is precisely why defendant's rules and regulations prohibited pit bulls. Moreover, defendants knew that Clarke owned a series of pit bulls. And defendant knew or should have known that Bruno's misconduct in chasing a child two weeks before biting Jalynn had brought the police to the premises.

The majority concedes that a landlord can be liable for injuries caused by a tenant's dog if the landlord knew of the dog's vicious nature. The majority rejects that the evidence supported Bruno's viciousness, citing case law positing that the "mere fact that a dog barks, growls, jumps, or approaches strangers in a somewhat threatening way" does not suffice to demonstrate that a dog is "abnormally dangerous or [un]usually vicious." In my view, Hake's testimony that Bruno was "very aggressive" created a question of fact on this issue, but our disagreement on this point is irrelevant. Hillcrest determined that pit bulls on the premises would imperil tenants and their guests. Hillcrest judged that pit bulls as a breed posed unacceptable risks. Thus, whether Bruno was a good dog or a bad dog was of no concern to Hillcrest.

Hillcrest's absolute rule prohibiting pit bulls embodies a judgment that pit bulls are inherently dangerous animals. The Supreme Court of Kansas has described pit bulls as follows:

> [P]it bull dogs represent a unique public health hazard not presented by other breeds or mixes of dogs. Pit bull dogs possess both the capacity for extraordinarily savage behavior and physical capabilities in excess of those possessed by many other breeds of dogs. Moreover, this capacity for uniquely

> vicious attacks is coupled with an unpredictable nature. [*Hearn v City of Overland Park*, 244 Kan 638, 650; 772 P2d 758 (1989).[3]]

The majority incorrectly characterizes my citation of this authority as endorsement of the imposition of strict liability. To the contrary, this authority merely supports that Hillcrest accurately predicted the dangers pit bulls represent and appropriately promised its tenants stern measures of prevention. In other words, Hillcrest elected to impose on *itself* liability for guarding the premises against pit bulls.

Pursuant to *Braun,* Restatement (Second) of Torts § 323, and basic tort principles, I believe that Hillcrest bore an actionable legal duty to plaintiff to enforce its pit bull prohibition. As the Supreme Court elucidated in *In re Certified Question,* 479 Mich 498, 505; 740 NW2d 206 (2007), "the ultimate inquiry in determining whether a legal duty should be imposed is whether the social benefits of imposing a duty outweigh the social costs of imposing a duty." This calculus involves considering "the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented." *Id.* (quotation marks and citation omitted). Hillcrest engaged in precisely this analysis when it promulgated its rules and regulations regarding pets, banned pit bulls, and deliberately undertook a duty to enforce those rules.

Moreover, in determining duty, "[t]he most important factor to be considered is the relationship of the parties." *Id.* As a Hillcrest tenant, Kalynn and Hillcrest enjoyed a special relationship. See *Murdock v Higgins*, 454 Mich 46, 53; 559 NW2d 639 (1997). A landlord owes its tenant the obligation to maintain the premises in a safe condition. *Lipsitz v Schechter*, 377 Mich 685, 687-688; 142 NW2d 1 (1966). The Supreme Court has explained the general nature of a duty arising from a special relationship as follows:

> The rationale behind imposing a duty to protect in these special relationships is based on control. In each situation one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself. The duty to protect is imposed upon the person in control because he is best able to provide a place of safety. [*Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988).]

Pursuant to its rules and regulations, Hillcrest retained control of the dog population on its premises by specifically barring pit bulls and several other breeds, and by advising tenants that possession of the forbidden pets would subject the tenant to eviction. Hillcrest undertook this obligation for the safety of its tenants and their guests. It was readily foreseeable that Bruno and

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[3] The Court of Appeals of Maryland, that state's highest Court, has established a strict liability standard in relation to attacks by pit bulls, and imposes that standard on owners and any other person who have "the right to control the pit bull's presence on the subject premises (including a landlord who has the right and/or opportunity to prohibit such dogs on leased premises[.])" *Tracey v Solesky*, 427 Md 627, 652; 50 A3d 1075 (2012).

his breed could cause serious injuries, particularly to children. Indisputably, these realities are at the heart of Hillcrest's policy banning pit bulls. Thus, the risk of permitting a pit bull to remain on the premises was readily foreseeable, and Hillcrest was in a far better position to address this risk than was Kalynn. Guided by *In re Certified Question*, I conclude that Hillcrest had a duty to enforce its "no pit bull" rule. And viewed in the light most favorable to Kalynn, the evidence supports that Hillcrest repeatedly failed to enforce its policy banning pit bulls.

Although the majority claims to decide this case solely on duty grounds,[4] it also supports its ruling based on a purported absence of but-for causation, averring that defendant would not be liable for Kalynn's injuries because it "could not have lawfully exercised control over Bruno by evicting Clarke" before Kalynn was attacked. This conclusion assumes that only an eviction would have rid Hillcrest of Bruno. But the evidence is decidedly to the contrary. According to Howard, Clarke had divested herself of her two previous pit bulls when he had "written up" Clarke for violating Hillcrest's rules. But Howard failed to issue a warning to Clarke after Bruno chased the child through the park, despite evidence that he knew of the event.

A reasonable jury could find that had Howard issued Clarke a "write-up" immediately after Bruno's first offense, the second would not have occurred. A plaintiff's causation evidence suffices "if it 'establishes a logical sequence of cause and effect, notwithstanding the existence of other plausible theories[.]'" *Skinner v Square D*, 445 Mich 153, 159-160; 516 NW2d 475 (1994) (citation omitted). Circumstantial proof is acceptable, as long as it "facilitate[s] reasonable inferences of causation, not mere speculation." *Id* at 163-164. "While the court decides questions of duty, general standard of care and proximate cause, the jury decides whether there is cause in fact and the specific standard of care[.]" *Moning v Alfono*, 400 Mich 425, 438; 254 NW2d 759 (1977).

Given that Clarke responded to all other "write-ups" by getting rid of the offending dog, it is reasonable to conclude that she would have behaved in the same manner when caught harboring Bruno. In other words, the record evidence supports that had Howard made an effort to enforce Hillcrest's rules after Bruno chased the child through the premises, Bruno would have been gone before he had the opportunity to bite Kalynn. In my view, a jury should resolve this issue.

/s/ Elizabeth L. Gleicher

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[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."