

STATE OF MICHIGAN
COURT OF APPEALS

CHRISTOPHER A. FAGAN,

Plaintiff-Appellant,

v

MICHAEL A. LOMUPO and RHONDA L.
LOMUPO,

Defendants-Appellees.

UNPUBLISHED

March 15, 2007

No. 264270

Muskegon Circuit Court

LC No. 03-042636-NO

Before: Fort Hood, P.J., and Smolenski and Murray, JJ.

MURRAY, J. (*concurring in part/dissenting in part*).

I concur in the majority's decision affirming the trial court's order denying plaintiff's motion for partial summary disposition. However, I part ways with the majority's decision to reverse the trial court's order denying plaintiff's motion for a directed verdict. In my view, the evidence presented during trial warranted the denial of plaintiff's motion for directed verdict. I would therefore affirm the judgment entered in favor of defendants.

In *Thomas v McGinnis*, 239 Mich App 636, 643-644; 609 NW2d 222 (2000), we set forth the standard for reviewing a decision on a motion for directed verdict:

[A] trial court's ruling with respect to a motion for a directed verdict is reviewed de novo. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). In reviewing the trial court's ruling, this Court views the evidence presented up to the time of the motion in the light most favorable to the non-moving party, grants that party every reasonable inference, and resolves any conflict in the evidence in that party's favor to decide whether a question of fact existed. *Hatfield v St Mary's Medical Center*, 211 Mich App 321, 325; 535 NW2d 272 (1995). A directed verdict is appropriate only when no factual question exists regarding which reasonable minds may differ. *Meagher, supra* at 708.

The majority concludes that there was no question of fact upon which reasonable minds could disagree regarding whether plaintiff provoked defendant's dog, Ramses. According to the majority "[a]t trial, no one testified that Ramses was at the gate when plaintiff extended the magazine over the gate." I disagree. During questioning by the court, Mrs. Lomupo testified as follows:

Q (by the court): Okay. So when Mr. Fagan came to rest at this post, the dog was coming towards him. Is that what you're saying?

A: Yes.

Q: All right. How far away was the dog from him when he rested his hands – on this post?

A: I don't know. I mean it's just kind of a short space.

Q: I mean - -

A: That I had to look.

Q: Like you to the end of the courtroom?

A: No. Closer.

During further questioning from the attorneys, Mrs. Lomupo testified that Ramses was closer to plaintiff when he put his arm on the top of the fence than she was to the court reporter in the courtroom. Although reading the transcript makes it difficult to discern how far that distance was, according to Mrs. Lomupo's testimony, it was clearly less than eight feet. However, more importantly than that is the fact that the jury was fully aware of how close Mrs. Lomupo testified Ramses was to plaintiff when he put his arm down onto the top of the fence. Additionally, during further recross-examination, Mrs. Lomupo more specifically testified that plaintiff was bit by Ramses as he lowered his hand onto the gate:

Q (by Mr. Bosch): When Chris raised his hand at the gate, is that when he got bit?

A: That's when he got bit.

Q: At the end of the motion?

A: It happened very fast. It went down like this, you know.

Q: That's when he got bit?

A: Right.

Q: *When his hand stops at the end of the motion, he's bit?*

A: *Right.* That's how fast it happened. *It's not like he was standing there waiting.* Like I say, when Ramses hears a car come into the driveway, he's out there [emphasis added].

In light of this testimony, there is no question that Mrs. Lomupo testified that plaintiff was bit as his arm was coming forward (with the magazine in his hand) onto the gate. It is also clear that at other times during her testimony, Mrs. Lomupo testified that plaintiff was

motionless as the dog came up and bit plaintiff. In my view, either version presented by Mrs. Lomupo could have been accepted by a reasonable fact finder. This was obviously a quick event, and the jury was in the courtroom and able to discern the veracity of Mrs. Lomupo's versions of events. And, if the jury accepted Mrs. Lomupo's testimony as quoted above, it would certainly support its verdict that plaintiff provoked Ramses into biting him as his hand was coming down towards the dog with a magazine in his hand. That evidence, coupled with the undisputed evidence that Ramses did not like plaintiff, was enough for the jury to conclude that there was provocation in this case.

In light of the foregoing, the evidence did not support the granting of a directed verdict for plaintiff. I would affirm.

/s/ Christopher M. Murray