

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001979-MR

BRANDON BENNINGFIELD, by
and through his mother and next friend,
LAURIE BENNINGFIELD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH MCDONALD BURKMAN, JUDGE
ACTION NO. 06-CI-004201

WADE AND HELEN ZINSMEISTER

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, MOORE AND VANMETER, JUDGES.

CLAYTON, JUDGE: Brandon Benningfield, a minor, by and through his mother, Laurie Benningfield (Benningfield), appeals the September 18, 2008, order of the Jefferson Circuit Court. That order granted summary judgment to Wade and Helen Zinsmeister (Zinsmeister), in Benningfield's personal injury action against them.

Because we hold that the trial court correctly found that there were no genuine issues of material fact and that the Zinsmeisters were entitled to judgment as a matter of law, we affirm.

On July 3, 2005, Benningfield was walking in his neighborhood when he was attacked by a male Rottweiler. The dog was owned by Dominic Harrison (Dominic) and was being kept by his parents, Sheila Harrison (Sheila) and Ed Roach (Roach), at a single family residence located at 1702 Chester Lane, Louisville, Kentucky. Harrison and Roach leased the property from the Zinsmeisters, who resided next door at 1700 Chester Lane.

As a result of the attack, Benningfield suffered numerous injuries, requiring hospitalization and surgery. On May 10, 2006, Benningfield brought suit against the Zinsmeisters and Dominic, alleging negligence and strict liability. The Zinsmeisters filed a motion for summary judgment and that motion was subsequently granted, in an order entered by the trial court on September 18, 2008. This appeal followed.

Circuit court decisions as to the grant or denial of summary judgment are reviewed *de novo*. *Gainsco Companies v. Gentry*, 191 S.W.3d 633 (Ky. 2006). The appellate Court must determine “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment is proper when it appears that it would be impossible for the adverse party to produce evidence at trial supporting a judgment

in his favor. *James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co.*, 814 S.W.2d 273, 276 (Ky. 1991). An appellate Court must review the record in a light most favorable to the party opposing the motion and must resolve all doubts in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

The applicable statute for the case *sub judice* is Kentucky Revised Statutes (KRS) 258.235(4), which states: “any owner whose dog is found to have caused damage to a person, livestock, or other property shall be responsible for that damage.” On appeal, Benningfield argues that the Zinsmeisters are “owners” of the dog, pursuant to KRS 258.095, and are therefore subject to strict liability. KRS 258.095(5) states, in pertinent part:

‘Owner,’ when applied to the proprietorship of a dog, includes every person having a right of property in the dog and every person who keeps or harbors the dog, or has it in his care, or permits it to remain on or about premises owned or occupied by him[.]

KRS 285.095(5). Benningfield argues that the statute extends liability to landlords, specifically in this case, because the Zinsmeisters were aware of the presence of the dog and allowed it to remain on the premises. We do not agree. A panel of this Court previously held that a duty of care could not be extended to a landlord without proof that the landlord knew of their tenant’s dog *and its dangerous propensities*. *Ireland v. Raymond*, 796 S.W.2d 870 (Ky. App. 1990) (emphasis in original). In support of its decision, the Court in *Ireland* stated:

the injuries were not received on the leased premises, and there is nothing to indicate that the landlords had any control of the area where the injuries were received. It would be unthinkable to extend the liability of a landlord to include any area to which a tenant's dog might roam. Kentucky cases cannot be stretched to cover such a situation.

Id. at 871.

Benningfield argues that *Ireland* should be overturned in light of the plain meaning of KRS 258.095(5). However, it is the opinion of this Court that to do so would create a slippery slope of liability which the legislature did not intend. To apply the plain meaning suggested by Benningfield would create a society in which property owners would no longer allow dogs on public and private property, for fear of being sued. Benningfield points to the fact that the Zinsmeisters testified that they were aware of the dog and that they had requested its removal. However, their personal preference for the removal of the dog from their rental property does not make them liable for its damages. In summation, while we agree with Benningfield's assertion that dog owners are the best parties to be held liable for the injuries and damages caused by their dogs, we do not agree that the definition of "owner" should be extended to include landlords, unless the elements of *Ireland* are also met.

Benningfield also argues that if landlords are not strictly liable for the injuries inflicted by the dogs of their tenants, they can still be held liable if they had reason to believe that Benningfield would be in the vicinity of the dog and they had failed to exercise ordinary care to control the dog. Again, we disagree.

Although this may stand true if Benningfield had been injured on the rental premises, this is not the situation before us. As indicated by the Court in *Ireland*, a landlord must be in control of the area where the injuries took place and must also be aware of a dog's dangerous propensities. It is impractical to expect landowners to exercise control over all adjoining pieces of property, including streets and sidewalks. Furthermore, not only did the Zinsmeisters testify that they were unaware that the dog had dangerous propensities; they also testified that they were aware that the dog had been previously returned to its yard by neighborhood children. If anything, this testimony could be used to corroborate what appeared to be the dog's *lack* of dangerous propensities.

Because Benningfield failed to satisfy the elements of *Ireland*, we hold that the trial court correctly found that there were no genuine issues of material fact and that the Zinsmeisters were entitled to judgment as a matter of law. Accordingly, the September 18, 2008, order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Vanessa B. Cantley
John L. Smith
Louisville, Kentucky

BRIEF FOR APPELLEE:

Douglas B. Taylor
Louisville, Kentucky

