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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001006-MR

PAULA TERRY, ADMINISTRATRIX
OF THE ESTATE OF ALLEN TERRY — APPELLANT

v.

APPEAL FROM CLARK CIRCUIT COURT
HONORABLE WILLIAM G. CLOUSE, JR., JUDGE
ACTION NO. 10-CI-00455

JAMES ELAM AND
BARBARA ELAM — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, TAYLOR, AND THOMPSON, JUDGES.

KELLER, JUDGE: Paula Terry, administratrix of the estate of Allen Terry, appeals from the Clark Circuit Court's entry of summary judgment in favor of James and Barbara Elam, the defendants below, in a wrongful death action. After careful review, we affirm.

Facts and Procedural History

This appeal arises out of a single-vehicle automobile accident that occurred on October 7, 2009, on Bybee Road in Clark County, Kentucky. The driver of the vehicle, Allen Terry, died as a result of injuries sustained in the accident. The evidence reflects that Allen's vehicle left the road and collided with a metal fence, several fence posts, and a brick mailbox. The accident occurred adjacent to rental property at 5235 Bybee Road that was owned by the Elams.

The Elams had rented the property to Daniel and Betty Ferguson for more than nine years, but the parties had never entered into a written lease agreement. At the time of the accident, the Fergusons owned two "outside" dogs and three "house" dogs. Although they are not mentioned in the police incident report, two of the "house" dogs – "Taco" and "Izzy" – were subsequently found dead on Bybee Road just north of the accident scene.

On June 10, 2010, Terry's estate ("the Estate") filed a wrongful death complaint against the Fergusons and the Elams in the Clark Circuit Court. The Estate alleged that the accident was the result of a collision with the Fergusons' dogs, which were "running at large" on Bybee Road due to negligent ownership and control by both the Fergusons *and* the Elams. The complaint set forth that the Elams were liable for negligence *per se* pursuant to Kentucky Revised Statutes (KRS) 258.095 and 258.235, as well as local ordinance. The Estate also asserted a common-law negligence claim against the Elams.

On February 2, 2011, the trial court granted partial summary judgment to the Elams as to the Estate's statutory and ordinance-based claims of negligence *per se*. The Estate did not challenge this decision on appeal. After further briefing, the trial court entered an order on May 10, 2011, granting the Elams summary judgment as to the Estate's common-law negligence claim. The court justified its decision as follows:

> Assuming the following facts in the best light for the plaintiff: the landlord knew of the tenant's dogs, the dogs were running at large and the dogs caused the auto accident (a large hurdle in and of itself), Kentucky case law makes recovery unfeasible as to the landlord.
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> ***
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> … First, the tort occurred on property not controlled by the tenant – a public highway. Second, there is no showing of *dangerous propensities*. All the favorable evidence indicates that the tenant's dogs from time to time were allowed to run at large. This activity may have violated the ordinances and/or laws but certainly is not the landlord's fault. Even if the landlord was aware of this activity running at large is not the same as a *dangerous propensity*. Common law makes this distinction. ***Ergo*, the Court grants summary judgment as to the landlord in this case.**

(Emphasis in original.) It is from this order that the Estate now appeals.

Standards of Review

The standards for reviewing a trial court's entry of summary judgment on appeal are well-established and were concisely summarized by this Court in *Lewis v. B & R Corporation*, 56 S.W.3d 432 (Ky. App. 2001):

> The standard of review on appeal when a trial court grants a motion for summary judgment is "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." The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial."

Id. at 436 (internal footnotes omitted). Because summary judgments involve no fact finding, we review the trial court's decision *de novo*. *3D Enterprise Contracting Corp. v. Louisville & Jefferson County Metropolitan Sewer Dist.*, 174 S.W.3d 440, 445 (Ky. 2005); *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

The Estate contends that the trial court failed to view the record in the light most favorable to it because the court failed to assume that the Elams knew that the Fergusons' dogs were allowed to run at large. However, the trial court's order reflects its belief that "[e]ven if the landlord was aware of this activity running at large is not the same as a *dangerous propensity*." Thus, the court appeared to take this fact into account in reaching its decision. The Estate also argues that the trial court applied an improper legal standard in considering the Elamses' motion for summary judgment and failed to properly articulate Kentucky

law as it applies to the facts at hand. For reasons that follow, we disagree with those assertions.

Analysis

The Estate contends that entry of summary judgment was inappropriate as to its negligence claim against the Elams. The Estate specifically contends that a landlord can be held liable in negligence for injuries caused by his tenant's dogs where the landlord is aware of the dogs' propensity to "run at large." In considering this issue, we emphasize that we have been presented solely with the question of whether the trial court erred in granting summary judgment as to the Estate's *common-law negligence* claim. The question of the applicability of KRS 258.095 and 258.235 – the dog-injury liability statutes – or any local ordinance in this case is not before us.[1]

"As a general proposition, it has been written often that a landlord is not liable for the negligence of his tenants in the use of leased premises." *McDonald v. Talbott*, 447 S.W.2d 84, 85 (Ky. 1969). However, there are

[1] In *Benningfield ex rel. Benningfield v. Zinsmeister*, 367 S.W.3d 561 (Ky. 2012), a case involving injuries caused by a dog attack, our Supreme Court held that "a landlord can be the statutory owner of a tenant's dog for the limited purpose of establishing the landlord's liability under KRS 258.235(4), if the landlord has permitted the dog to be on or about the premises." *Id.* at 569. The Supreme Court further determined that under the applicable statutes, "[t]he landlord's ownership status and resulting liability are limited by the scope of the landlord's permission, meaning liability can only arise for attacks occurring on or about the premises." *Id.* A plurality of the Court held that the language "on or about" meant "on the property or so close to it as to be within immediate physical reach. Thus, it would include an attack that occurs immediately adjacent to the property – for example, on the sidewalk or just off the curb – but nothing farther away." *Id.* at 568. It does not appear, however, that the Court's Justices could agree as a majority on the precise meaning or scope of this language. *See id.* at 573-75 (Venters, J., concurring in part but dissenting as to result).

exceptions to that rule. *Id.* Of particular relevance to this case, our courts have historically recognized that landlords may be held liable in negligence for injuries caused by a tenant's dog, but only in very specific circumstances. In order to establish a duty on the part of a landlord with respect to a tenant's dog for purposes of a common-law negligence action, the plaintiff must establish that the landlord had: (1) knowledge of the dog's vicious or mischievous propensities and (2) control over the area where the incident in question occurred. *See Benningfield*, 367 S.W.3d at 573 (Schroder, J., dissenting in part but concurring in result); *see also McDonald*, 447 S.W.2d at 85-86; *Ireland v. Raymond*, 796 S.W.2d 870, 871-72 (Ky. App. 1990).[2]

The trial court determined that the Elams could not be held liable in this case since the subject accident occurred on a public roadway, *i.e.*, in an area out of the control of the Elams. The Estate contends that the trial court's determination was erroneous because there is "a genuine issue of material fact regarding whether the accident occurred on or off the leased premises." However, this argument was never raised before the trial court or, if it was, the Estate has not directed us to where it was preserved. Instead, the Estate consistently argued below that Allen Terry's death "was a direct and proximate result of [the Fergusons'] dogs being at large in the roadway." It is well-established that an appellant "will not be permitted to feed one can of worms to the trial judge and

[2] The Estate argues that Kentucky's statutory scheme regarding dog-related injuries evidences an intention to broaden avenues of recovery for those injured by dogs in the Commonwealth. This is perhaps true, but as we are dealing with a common-law negligence claim and not the statutes in question, the standards traditionally associated with such negligence claims are applicable.

another to the appellate court." *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), *overruled on other grounds by Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010). Therefore, we assume that the accident did, in fact, occur on a public road.

In *Ireland*, this Court considered whether a landlord could be held liable for injuries resulting from an attack by his tenant's dogs when the attack did not take place on the rented premises. The circuit court in that case determined that the landlord could not be held liable, and we affirmed, holding that because "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," summary judgment was appropriate. 796 S.W.2d at 871.

Based on *Ireland*, the Elams could not be held liable as a matter of law because the subject accident was a direct result of the Fergusons' dogs being on Bybee Road, an area that was not within the Elamses' control. We note, however, that the road in question is immediately adjacent to the Elamses' rental property in what appears to be a rural area. In light of the plurality opinion in *Benningfield* and Justice Venters' dissenting views in that case,[3] we believe that a

[3] In challenging the plurality opinion's conclusions regarding what constituted "on or about the leased property" for purposes of landlord liability in dog-injury cases, Justice Venters wrote the following:

> In the context of the typical residential neighborhood with average-sized lots, limiting the area "about" a residential lot to the length of a person's arm is inconsistent with the everyday language involved. A dog running out into the street in front of his master's yard or across to the other side of the street, is "about" the property. Neighborhood dogs, once outside the boundary fence of their master's yard, rarely stay within an arm's length thereof

reasonable argument could be made that the accident occurred in close enough proximity to the property to create a question of liability. We decline to reach a definitive holding on that question, however, because it is apparent that no actionable "dangerous" or "mischievous propensities" – or knowledge of such by the Elams – were demonstrated in this case.

"At common law, 'the dog was regarded as a tame, harmless, and docile animal, and its owner not responsible for any vicious or mischievous act it might do, unless he had a previous knowledge of the mischievous or vicious propensities.'" *May v. Holzknecht*, 320 S.W.3d 123, 126 (Ky. App. 2010) (*quoting Koestel v. Cunningham*, 97 Ky. 421, 30 S.W. 970, 17 Ky.L.Rptr. 296 (1895)); *see also Brown v. Weathers*, 247 Ky. 306, 57 S.W.2d 4, 4 (1933). Accordingly, in order to prevail, it is incumbent upon the claimant to present a *prima facie* case of such propensities in the animal(s) in question – including showing that "the animal was inclined to commit an injury of the class complained of." *Ewing v. Prince*, 425 S.W.2d 732, 733 (Ky. 1968).

The terms "vicious propensities," "dangerous propensities," or "mischievous propensities" are generally used interchangeably in our case law and have never been fully defined by Kentucky courts, but their meaning has been

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> especially when there are cars or children to chase. With modest homes on typical suburban lots, as appears to be the case here, the area "about" the subject property reasonably extends 25-30 feet beyond the boundaries of the lot into the street and the surrounding properties.

Benningfield, 367 S.W.3d at 574-75 (Venters, J., concurring in part but dissenting as to result).

summarized as "the tendency of a dog to injure persons, whether the dog acted out of anger, viciousness, or playfulness." *Bush v. Anderson*, 360 S.W.2d 251, 256 (Mo. Ct. App. 1962). Definitions recently offered for the terms by a Connecticut appellate court explained them as "'a propensity or tendency of an animal to do any act that might endanger the safety of the persons and property of others in a given situation'" and "'any propensity on the part of a domestic animal, which is likely to cause injury to human beings under the circumstances in which the party controlling the animal places him[.]'" *Vendrella v. Astriab Family Ltd. Partnership*, 36 A.3d 707, 720 (Conn. App. Ct. 2012) (*quoting* 3 B C.J.S. *Animals* § 323 (2003)).

Under this perspective, "an animal that behaves in a manner that would not necessarily be considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at risk of harm, can be found to have vicious propensities – albeit only when such proclivity results in the injury giving rise to the lawsuit." *Collier v. Zambito*, 1 N.Y.3d 444, 447, 807 N.E.2d 254, 256 (N.Y. 2004); *see also Vendrella*, 36 A.3d at 720-21. "[T]he law makes no distinction between an animal dangerous from viciousness and one merely mischievous or dangerous from playfulness, but puts on the owner of both the duty of restraint when he knows of the animal's propensities." *Owen v. Hampson*, 62 So.2d 245, 248 (Ala. 1952).

The trial court determined that "running at large" does not constitute a dangerous propensity that is actionable in negligence. Although this particular

issue has never been addressed by a Kentucky court in a published opinion, New York courts have recognized that a plaintiff cannot recover from injuries resulting from the presence of a dog in a public roadway "absent evidence that the defendant was aware of the animal's vicious propensities or of its habit of interfering with traffic." *Staller v. Westfall*, 225 A.D.2d 885, 639 N.Y.S.2d 147, 148 (N.Y. App. Div. 1996); *see also Rigley v. Utter*, 53 A.D.3d 755, 756, 862 N.Y.S.2d 147, 148-49 (N.Y. App. Div. 2008). Those courts have further recognized that "[p]roof that a dog roamed the neighborhood or occasionally ran into the road is insufficient, although proof that the dog had a habit of chasing vehicles or otherwise interfering with traffic could constitute a vicious propensity." *Rigley*, 53 A.D.3d at 756; *see also Alia v. Fiorina*, 39 A.D.3d 1068, 1069, 833 N.Y.S.2d 761, 763 (N.Y. App. Div. 2007).

Here, there is no evidence that the Elams knew of any incidents where the Fergusons' dogs had ever charged or chased vehicles on Bybee Road or impeded the flow of traffic. Nor is there evidence that they had received any complaints that the dogs had ever interfered with traffic on the road in any way. Had such proof been presented, we believe summary judgment would have been inappropriate. At most, the Estate produced evidence that some of the Fergusons' dogs left the property – and perhaps crossed the road – from time to time. Such running at large, without more, is not enough to constitute a dangerous propensity. Moreover, in the absence of more substantive proof in this regard, there was nothing from which a trier of fact could reasonably infer that the Elams had actual

knowledge of the dogs' allegedly dangerous propensities so as to impose a duty of care. Consequently, summary judgment was appropriate. Having reached this conclusion, we need not address the additional grounds for affirming raised by the Elams.

Conclusion

For the foregoing reasons, the judgment of the Clark Circuit Court is affirmed.

THOMPSON, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT:

L. Brooke Bowman
Richmond, Kentucky

BRIEF FOR APPELLEE:

R. David Clark
Lauren L. Crosby
Lexington, Kentucky