

RENDERED: DECEMBER 7, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000188-MR

KIMBERLY PAIGE AND
ANTHONY PAIGE

APPELLANTS

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE ANDREW C. SELF, JUDGE
ACTION NO. 14-CI-00560

JESSE MCCORD

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JOHNSON,¹ SMALLWOOD AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Kimberly Paige and Anthony Paige appeal from a summary judgment of the Christian Circuit Court in favor of Jesse McCord. The issue on appeal is whether Jesse can be liable under Kentucky Revised Statute (KRS) 258.235(4) or under common law negligence for injuries Kimberly

¹ Judge Robert G. Johnson concurred in this opinion prior to the expiration of his term of office. Release of the opinion was delayed by administrative handling.

sustained when a dog owned by Roger McCord entered the roadway causing Anthony's motorcycle to wreck and then bit Kimberly on her leg. We conclude the dog was not "on or about" the premises owned by Jesse as required under KRS 258.095(5) and, therefore, Jesse could not be strictly liable as the dog's statutory owner. We further conclude that under common law negligence principles, Jesse had no duty to control or otherwise prevent the dog from entering the roadway or from biting Kimberly when Jesse had no knowledge of the dog's vicious propensity.

Roger, Jesse's nephew, resides at 13940 Moore Road on property owned by Jesse and two other individuals. Jesse also resides on Moore Road and owns property on both sides of the road. The road is not marked down the middle but is wide enough for two vehicles to pass by each other.

When Roger moved to Moore Road, he brought his dog, Chico, with him. Roger's three children resided with him and sometimes cared for the dog. He testified that the dog was kept on a chain and was unsure how the dog was unchained before the motorcycle wreck and attack on Kimberly occurred. Roger testified that prior to the allegations in the Paige's complaint, the dog had never snapped or bitten anyone.

Jesse testified he knew Roger kept the dog on the premises and that it was always chained. He saw the dog almost daily and had never seen the dog aggressive.

On May 20, 2013, Anthony decided to drive his motorcycle down Moore Road with Kimberly as a passenger. He testified when he first saw the dog, it was standing in the middle of the road. The dog did not run away as Anthony approached and ran in front of the motorcycle's tire causing Anthony to lose control of the motorcycle. Anthony and Kimberly sustained superficial injuries from the wreck.

Anthony testified that immediately after the wreck, he was unsure what happened to the dog. He picked his motorcycle up and pushed it out of the middle of the road to the right side, on the opposite side from Roger's residence, and placed the kickstand down.

Kimberly testified that as she walked behind Anthony while he pushed the motorcycle to the right side of the road, she observed the dog coming back onto the road. She testified the dog came across the road, walked up behind her, and grabbed her left leg. The dog then attempted to pull her across the road from the right-hand side toward Roger's yard on the left-hand side. There was testimony that the dog drew Kimberly closer to Roger's yard with the dog's feet touching the ditch in front of the residence.

The standards for reviewing a trial court's entry of summary judgment on appeal are well established and summarized in *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky.App. 2001) (footnotes omitted):

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.”

Our review of the present case requires the interpretation of two statutes. KRS 258.235(4) creates a form of strict liability in dog bite cases. It provides as follows: “Any owner whose dog is found to have caused damage to a person, livestock, or their property shall be responsible for that damage.” *Id.*

In 2013, KRS 258.095(5) defined “owner” as “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 the premises owned or occupied

by him[.]”² In *Benningfield v. Zinsmeister*, 367 S.W.3d 561 (Ky. 2012), the Court concluded the General Assembly intended that not only owners of dogs could be strictly liable under KRS 258.235(4) but, in certain circumstances, non-owners could also be subject to such liability.

In *Benningfield*, the Court addressed whether a landlord could be deemed an owner of a dog permitted to be kept on the leased property. In that case, a child was walking in his neighborhood, approached by the dog in the middle of the street, and attacked. The attack occurred on the sidewalk across the street from the leased property.

The Court noted that prior case law discussing a landlord’s liability for an attack by a tenant’s dog omitted any reference to the definition of owner in KRS 258.095(5) and focused only on common law negligence principles. *Id.* at 564. Ultimately, it concluded that under the then existing statutory law, a landlord can be included as an “owner” as used in KRS 258.235(4). The Court reasoned the General Assembly intended to expand liability to landlords to decrease the

² KRS 258.095 (5) was amended in 2017 and now defines owner as follows:

“Owner,” when applied to the proprietorship of a dog, includes:

- (a) Every person having a right of property in the dog; and
- (b) Every person who:
 - 1. Keeps or harbors the dog;
 - 2. Has the dog in his or her care;
 - 3. Permits the dog to remain on or about premises owned and occupied by him or her; or
 - 4. Permits the dog to remain on or about premises leased and occupied by him or her[.]

likelihood of dog attacks by discouraging landlords from permitting dogs to be kept on leased premises and increase the likelihood that an innocent dog-attack victim can be made whole by providing a possible defendant who had procured homeowners insurance. *Id.* at 566.

However, the Court held the landlord, as the statutory owner of the dog, does not stand in the shoes of the dog's actual owner. *Id.* at 567. The landlord must permit the dog to be kept on the premises. *Id.* Additionally, "a landlord's liability [does not] track wherever the dog may roam or be taken." *Id.* Deciding there must be some limit on the landlord's liability, the Court found that limitation in the statutory language.

"Because liability depends on ownership, which under the statute depends on permission, then a landlord's liability is limited by the scope of the permission, so that it exists only when the attack occurs 'on or about' the premises." *Id.* at 568. Although when an attack occurs on the leased premises the landlord's liability is easily resolved, the same is not true when the attack occurs off the premises. The question then becomes the meaning of "about."

The Court ultimately defined the phrase "on or about" as "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.* Under the

facts before it, the Court held the landlord could not be liable. “The attack in [that] case, occurring across the street, was outside the limited range of ‘on or about’ the premises.” *Id.*

Like the landlord in *Benningfield*, Jesse cannot be liable under KRS 258.235(4). Anthony and Kimberly’s description of the attack was that it occurred off the premises owned by Jesse and on the opposite side of the road. While the attack may have ended closer to the property than where it began, it nevertheless did not occur on or about the premises where Jesse gave permission for Roger to keep the dog. Jesse cannot be strictly liable for any injury caused by Roger’s dog.

Absent application of KRS 258.235(4), dog bite cases are governed by common law negligence. *Maupin v. Tankersley*, 540 S.W.3d 357, 359 (Ky. 2018). At common law, a dog owner is not liable absent knowledge of the dog’s vicious propensities, *i.e.*, the “one free bite” rule. *Dykes v. Alexander*, 411 S.W.2d 47 (Ky. 1967).

Under common law, a landlord may be liable if it is established that the landlord (1) knew of the dog’s vicious or mischievous propensities and (2) had control over the area when the attack occurred. *McDonald v. Talbott*, 447 S.W.2d 84, 85-86 (Ky. 1969); *Ireland v. Raymond*, 796 S.W.2d 870, 871-72 (Ky.App. 1990).

In *Ireland*, this Court affirmed a summary judgment for a property owner on a common law negligence claim when a tenant's dog bit the plaintiff while on her own property or in the public roadway. The Court held that the landlord could not be liable where it was not shown that he had knowledge that the dog had previously bitten a person. *Ireland*, 796 S.W.2d at 871.

Kentucky is in accord with “virtually every court considering this issue . . . that the landlord has actual knowledge of the dog’s dangerous propensities[.]” *Park v. Hoffard*, 111 Or. App. 340, 345, 826 P.2d 79, 81 (1992). As the Court observed in *Gill v. Welch*, 136 A.D.2d 940, 524 N.Y.S.2d 692 (1988), “[t]he facts that the dog was kept enclosed in a yard or chained . . . and that it strained on its chain and barked when people approached the premises, are insufficient to create an inference that the dog was vicious.”

Although, in *Benningfield*, the Court was critical of the omission of any discussion of KRS 258.095(5)’s definition owner, *McDonald* and *Ireland* still have “common law precedential value.” *Benningfield*, 367 S.W.3d at 566. Roger testified that prior to the attack alleged in this case, the dog had never snapped at nor bitten anyone. More importantly, Jesse testified that he had never known the dog to be vicious. To defeat Jesse’s summary judgment motion, the Paige’s were required to submit some affirmative evidence that Jesse had actual knowledge of

the dog's vicious propensity. Having failed to do so, Jesse was entitled to summary judgment as a matter of law.

The summary judgment of the Christian Circuit Court is affirmed.

ALL CONCUR.

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