

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000943-MR

ALBERTA SPICER

APPELLANT

v. APPEAL FROM GALLATIN CIRCUIT COURT
HONORABLE RICHARD A. BRUEGGEMANN, JUDGE
ACTION NO. 15-CI-00087

EDDIE MCCORD

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, NICKELL AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: Alberta Spicer (“Appellant”) appeals from an order of the Gallatin Circuit Court granting summary judgment in favor of Eddie McCord (“Appellee”). Appellant argues that the circuit court erred in determining that Appellee was not an “owner” of the dog for imputing common law or statutory

liability for damages caused by the dog. For the reasons addressed below, we find no error and AFFIRM the order on appeal.

Appellee owns a parcel of real property situated in Glencoe, Kentucky, which he leased to Esteban Estrella¹ for Estrella's use as an automobile repair garage. On January 23, 2015, Appellant stopped at Estrella's garage to have a tire repaired. Upon returning to the garage to pick up the repaired tire, Appellant noticed a dog which is described in the record as "overly friendly." The dog jumped on Appellant, putting its paws on her shoulders. A short time later, the dog again jumped on Appellant, this time causing her to lose her balance. Appellant fell and sustained a broken wrist and laceration to her head. Appellant was transported to the hospital for treatment.

Sheriff Josh Neal came to the scene and detained the dog so that it could be given to animal control personnel. Neal would later testify that he knew Estrella, had never known Estrella to keep a dog and saw no evidence that Estrella was harboring the animal. Estrella testified that he did not own or keep any dog on the premises, and that he had never before seen this dog before that day. Estrella said he did not like large dogs. Kentucky State Police Trooper Brandon Maupin also came to the scene, and saw no evidence that a dog was being harbored on the property. Estrella said that the dog was a stray. When Gallatin County Dogcatcher

¹ Esteban Estrella is sometimes referred to in the record as Steven Estrella.

Bobby Nunn came to take possession of the dog, it had allegedly escaped and could not be found. One passerby stated that she saw Estrella placing the dog into a blue car. Nunn stated that he frequented the area and had never seen the dog at the garage.

On June 23, 2015, Appellant filed a complaint against Appellee and Estrella pursuant to Kentucky Revised Statute (“KRS”) 258.095(5)² (definition of dog owner) and KRS 258.235(4) (liability of owner for dog causing damages). The matter proceeded in Gallatin Circuit Court, whereupon Appellant and Estrella filed motions for summary judgment. In support of the motion, Appellee argued that he never gave permission to Estrella to keep the dog, and that Appellant had produced no evidence that Estrella owned, harbored or kept the dog on the premises. Appellee asserted that he could not be defined as the dog’s owner under KRS 258.095, and was not subject to an owner’s strict liability as set out in KRS 258.235.

Upon considering the matter, the circuit court determined that the burden rested with Appellant to prove the veracity of her claim, and that she must rely upon more than mere conjecture. It concluded that under the facts presented, Appellant could not establish that Appellee had a duty or breach under common

² Amended by 2019 Kentucky Laws Ch. 184 (SB 67).

law negligence or statutory liability as to Appellant. Accordingly, it granted Appellee's motion for summary judgment. This appeal followed.³

Appellant now argues that the Circuit Court erred in determining that Appellee did not permit dogs to be kept on the leased premises, and that as such summary judgment was not warranted. She directs our attention to KRS 258.235(4), which provides that the "owner" of a dog is strictly liable for damages caused by the dog. Citing KRS 258.095(5), she also notes that the owner of a dog is broadly defined to include owners and landlords of occupied premises.

Appellant points to *Benningfield ex rel. Benningfield v. Zinsmeister*, 367 S.W.3d 561 (Ky. 2012), wherein the Kentucky Supreme Court held that a landlord can be characterized as an "owner" of a dog harbored on leased premises if he has given to the lessee permission to harbor the dog. Appellant goes on to argue that there is ample evidence to conclude that Estrella owned the dog in question, that Appellee owned the parcel, and that there were no restrictions in place that would have prevented Estrella from harboring the dog. She further asserts that there was no written lease, that Appellee never told Estrella he could not own a dog, and that permission to own a dog may be implied from the circumstances. In sum, Appellant argues that the circuit court erred in granting summary judgment, and

³ The circuit court denied Estrella's motion for summary judgment, and he was later dismissed by a stipulation of dismissal. He is not a party to this appeal.

that the question of whether Appellee permitted dogs to be kept at the premises should be decided by a jury.

Summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56.03. “The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). 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. *Id.* “Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact.” *Id.* Finally, “[t]he standard of review on appeal of a 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.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

The primary question for our consideration is whether the circuit court correctly found that there were no genuine issues as to any material fact and that

Appellee was entitled to judgment as a matter of law. After closely considering the record and the law, we must answer this question in the affirmative. Appellant correctly asserts that there was no written lease preventing Estrella from owning or harboring a dog, and that the oral agreement between the parties also contained no such limiting provision. The dispositive inquiry is whether Appellee's failure to expressly bar Estrella's ownership of a dog is tantamount to Appellee having given permission for Estrella to own a dog. We conclude that it is not.

In *Benningfield, supra*, the landlord gave oral permission for the lessee to own several dogs including a Rottweiler which severely injured a child. Though the *Benningfield* landlord later testified that he revoked the permission, the Kentucky Supreme Court noted that the landlord lived next door to the leased parcel and certainly knew that the lessee had failed to remove the animals. This, the Court found, was the functional equivalent of having never effectively revoked the lessee's permission to harbor the dogs. The *Benningfield* Court then found that a landlord could be characterized as an "owner" of the dog for the purpose of imputing liability.

The facts before us are distinguishable from those of *Benningfield*. In the instant case, no evidence was adduced that Appellee gave Estrella written or verbal permission to own or harbor a dog on the parcel. Similarly, and in contrast to *Benningfield*, knowledge of the dog's presence at the property cannot be

imputed to Appellee. Whereas the *Benningfield* lessor lived next door to the lessee and was presumed to have knowledge of the numerous dogs on the leased parcel, nothing in the record demonstrates that Appellee was aware of a dog on the leased parcel. Further, the record does not demonstrate that the dog had ever been on the property previously. Additionally, two law enforcement officers and the dogcatcher testified either that there was no evidence of a dog being harbored on the parcel, or that they were acquainted with Estrella and never knew him to own or harbor a dog.

We conclude that when the record is viewed in a light most favorable to Appellant and resolving all doubts in her favor, the circuit court correctly found that there were no genuine issues as to any material fact and that Appellee was entitled to judgment as a matter of law. Appellant did not demonstrate that Appellee gave Estrella permission to harbor a dog, nor that Appellee knew that Estrella harbored a dog which constituted tacit permission as in *Benningfield*. The circuit court did not err in its disposition of this matter, and we find no error.

For the foregoing reasons, we AFFIRM the order of the Gallatin Circuit Court granting summary judgment in favor of Appellee.

ALL CONCUR.

BRIEF FOR APPELLANT:

Corey Britt
Cincinnati, Ohio

BRIEF FOR APPELLEE:

Jake A. Thompson
Carrollton, Kentucky

James M. Crawford
Carrollton, Kentucky