

RENDERED: NOVEMBER 8, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-000148-MR

MARY VIRGINIA NICOL

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN BAILEY SMITH, JUDGE
ACTION NO. 18-CI-002187

DAVID STEVENSON

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: ACREE, DIXON, AND JONES, JUDGES.

DIXON, JUDGE: Mary Virginia Nicol appeals from an opinion and order granting David Stevenson's motion for summary judgment entered on January 7, 2019, by the Jefferson Circuit Court. Following review of the record, briefs, and law, we affirm.

Nicol agreed to watch Stevenson's two large dogs at his home while he was away for a weekend. Nicol had cared for Stevenson's dogs at his home, without issue, during a prior weekend trip. However, on the subsequent occasion, one of the dogs knocked Nicol down, fracturing her wrist. Consequently, Nicol sued Stevenson, pursuant to KRS¹ 258.235(4), alleging strict liability. Discovery, including party depositions, was conducted. Stevenson moved the trial court for summary judgment. Stevenson claimed Nicol also qualified as the dog's statutory owner under KRS 258.095(5)(b)2 because the dog was in Nicol's care at the time of the incident and, as such, one dog owner cannot be liable to another for injuries sustained within the latter owner's control. The trial court granted summary judgment in favor of Stevenson. This appeal followed.

Summary judgment is appropriate "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." CR² 56.03. An appellate court's role in reviewing a summary judgment is to determine whether the trial court erred in finding no genuine issue of material fact exists and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916

¹ Kentucky Revised Statutes.

² Kentucky Rules of Civil Procedure.

S.W.2d 779, 781 (Ky. App. 1996). A grant of summary judgment is reviewed *de novo* because factual findings are not at issue. *Pinkston v. Audubon Area Community Services, Inc.*, 210 S.W.3d 188, 189 (Ky. App. 2006) (citing *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000)).

On appeal, Nicol argues that she is not a statutory owner under KRS 258.095(5). Nicol attempts to distinguish the instant case from *Jordan v. Lusby*, 81 S.W.3d 523 (Ky. App. 2002), a case in which a dog groomer was found to be a statutory dog owner and barred from recovery by the statute, as well as on grounds of assumption of the risk. Nicol contends that her situation is different from *Jordan* because she received no payment, was not a trained professional offering pet services, and did not watch the dogs on her property. Nevertheless, we find the *Jordan* court's analysis to be instructive and applicable to the case at hand.

The applicable statute defines an "owner" of a dog 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 premises owned by him." KRS 258.095(5). The statute was designed to expand liability to those parties who keep dogs, such as kennel owners, veterinarians, and other persons who keep dogs owned by others in their care, as well as any person who keeps a dog owned by another on their property. "Owner" in this case does not simply mean a person with a property interest in the dog, for reasons of public policy.

Id. at 524. The *Jordan* court did not qualify "other persons who keep dogs owned by others in their care" or limit those "persons" only to those receiving

remuneration or compensation, having specialized skill or training, or on their own property.

The *Jordan* court further held:

the Kentucky statute, in defining “owner” as any person who accepts custody of a dog, operates to insulate the legal owner from liability against another “owner” of the dog. By becoming an “owner” of a dog under our statute one is responsible for injuries inflicted by the dog to persons or animals. The statute does not make a distinction between the legal owner or a second party owner; we see no reason to create one here.

Id. Applying this logic to the case at bar, Nicol was a “second party owner” and, as such, was responsible for injuries inflicted by the dog to herself. Similarly, just as the dog groomer assumed the risk of being bitten in *Jordan*, Nicol assumed the risk of being pushed down and injured when she offered to care for Stevenson’s dogs in his absence. Furthermore, “this type of assumption of the risk is not subsumed by comparative fault and, hence is a complete defense.” *Id.* at 525 (quotation marks and citations omitted). Moreover, Nicol’s argument that a dog’s statutory first or second party owner must have a property interest in the dog **and** the dog in one’s care is unavailing as such an argument was specifically dispensed with in *Jordan*. It is obvious that the dog groomer in *Jordan* had no property interest in the dog; yet, the groomer was still found to be the statutory second party owner and precluded from recovering from the primary dog owner as a matter of

public policy. We are aware of no changes to this public policy, nor does this situation call for a departure from it.

Nicol also argues that *Benningfield ex rel. Benningfield v. Zinsmeister*, 367 S.W.3d 561 (Ky. 2012) precludes her from statutory ownership and, subsequently, liability. In that case, the court concluded, “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. However, that was a case where ownership was premised on permission for the dog to remain on the property. The court held, if that is the case, “there must be an element of tenancy, even if for a short period of time, and not simply a passing use of the property” and “[l]iability does not extend to temporary excursions onto another’s property, even when done so with the landowner’s permission.” *Id.* The foregoing notwithstanding, Nicol’s statutory ownership arose from her care of the animal under KRS 258.095(5)(b)2 as opposed to her ownership of the premises under KRS 258.095(5)(b)3 or 4. Consequently, Nicol’s reliance on *Benningfield* is misplaced.

In the instant case, no genuine issue of material fact exists, and the trial court properly granted summary judgment. Therefore, and for the foregoing reasons, the order entered by the Jefferson Circuit Court is AFFIRMED.

ALL CONCUR.

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