STATE OF MICHIGAN

COURT OF APPEALS

SHIRLEY GOODYKE,

Plaintiff-Appellant,

v

JOAN WOLFE,

Defendant-Appellee.

UNPUBLISHED
February 19, 2004

No. 244520
St. Joseph Circuit Court
LC No. 00-000836-NO

Before: Murray, P.J., and Murphy and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting a directed verdict in favor of defendant in this dog-bite action. We affirm in part, reverse in part, and remand for further proceedings.

Plaintiff, a motor route driver for a newspaper, was bitten in the leg and hand by a dog while delivering newspapers in front of defendant's house at approximately 4:00 a.m. on December 27, 1999. Plaintiff testified that she did not see the dog clearly because of the darkness, and that the only clear view she got was of the dog's underbelly when she tried to pull her hand away and the dog got up on its hind legs. According to plaintiff, the dog's underbelly was white with huge, full breasts. The next day, Officer Miller of St. Joseph County Animal Control accompanied plaintiff to defendant's house to view defendant's three dogs. Miller testified during trial that one of the dogs, a small female beagle, was pregnant. According to plaintiff, during the visit to defendant's house she told Miller that defendant's pregnant beagle was not the dog that bit her. However, plaintiff stated that she made the statement because she could not see the dog's underbelly at the time. After she and Miller looked throughout the neighborhood for another dog to no avail, plaintiff then indicated to Miller that she believed defendant's dog was the dog that bit her, but that she could not be one-hundred percent sure.

Plaintiff thereafter filed a two-count complaint against defendant. Count I alleged that defendant had violated MCL 287.351, which provides that a person is strictly liable if his or her dog bites another person without provocation. Count II alleged that defendant had acted with willful and wanton disregard. At the close of proofs, the circuit court granted defendant's motion for a directed verdict as to both counts.

A trial court's decision on a motion for directed verdict is reviewed de novo. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). This Court

summarized the standard to be applied when reviewing a trial court's decision on a motion for directed verdict in *Cacevic v Simplimatic Engineering Co (On Remand)*, 248 Mich App 670, 679-680; 645 NW2d 287 (2001):

> In reviewing the trial court's decision, we view the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, granting that party every reasonable inference, and resolving any conflict in the evidence in that party's favor to decide whether a question of fact existed. *Thomas v McGinnis*, 239 Mich App 636, 643-644; 609 NW2d 222 (2000). A directed verdict is appropriately granted only when no factual questions exist on which reasonable jurors could differ. *Meagher* [*v Wayne State Univ*, 222 Mich App 700, 708; 565 NW2d 401 (1997)]. If reasonable jurors could reach conclusions different than this Court, then this Court's judgment should not be substituted for the judgment of the jury. *Wickens v Oakwood Healthcare System*, 242 Mich App 385, 389; 619 NW2d 7 (2000).

Plaintiff first asserts that the trial court erred in granting defendant's motion for a directed verdict as to count I of plaintiff's complaint by applying this Court's ruling in *Barlow v John Crane-Houdaille, Inc*, 191 Mich App 244, 250; 477 NW2d 133 (1991), and concluding that plaintiff's statement to Miller that defendant's dog was not the dog that bit her could not be explained and was binding upon plaintiff. In *Barlow*, this Court, quoting *Gamet v Jenks*, 38 Mich App 719, 726; 197 NW2d 160 (1972), stated:

> "As a result of his own deposition testimony, plaintiff's ability to present a case was challenged. His affidavit merely restated his pleadings. Deposition testimony damaging to a party's case will not always result in summary judgment. However, when a party makes statements of fact in a 'clear, intelligent, unequivocal' manner, they should be considered as conclusively binding against him in the absence of any explanation or modification, or a showing of mistake or improvidence."

We first note that a distinguishing feature of *Barlow* and *Gamet* is that the discussion of the above-quoted principle is within the context of a motion for summary disposition, where documentary evidence in the form of sworn testimony or sworn statements was presented. Such is not the case here. Regardless, this Court has recognized that the principle set forth in *Gamet* and restated in *Barlow* is not fatal to a plaintiff's cause of action being submitted to a jury when, despite the plaintiff's own damaging testimony, there is other evidence to support the plaintiff's cause of action. *Braman v Bosworth*, 112 Mich App 518; 316 NW2d 255 (1982). In the present case, such evidence exists, including, but not limited to, the proximity of defendant's home to the scene of the attack, defendant's ownership of several dogs, and testimony by Miller describing defendant's female beagle as being visibly pregnant and having a light underbelly, which description was consistent with plaintiff's description. Moreover, and importantly, even if we were to conclude that the principle stated in *Barlow* applied in the present case, we believe plaintiff correctly asserts that the trial court erred in holding that plaintiff's statement to Miller could not be explained, as plaintiff testified during trial that she could not see the underbelly of defendant's dog at the time she made the statement. In its simplest form, this case merely presents a situation where a witness, here a party, reached an initial belief, and upon further

reflection, came to another conclusion. Under the circumstances, and particularly an unexpected dog bite in the darkness, the change in plaintiff's conclusion as to the identity of the dog is understandable. The testimony regarding plaintiff's statements, and the basis of those statements, is certainly subject to scrutiny by the jury and within the jury's realm of determining credibility, but it does not support a directed verdict in favor of defendant.

We next note that the trial court initially indicated that it was inclined to deny defendant's directed verdict motion as to count I because plaintiff stated that at the time of trial she believed defendant's dog was the dog that bit her, that there were three dogs outside defendant's house the night she was bitten, that she heard the dogs barking and running toward defendant's house after she was bitten, and because testimony at trial confirmed that defendant owned three dogs. However, after further deliberation and reviewing *Barlow*, the trial court stated that it had changed its mind, stating that it did not believe that reasonable minds could differ in concluding that defendant's dog was not the dog that bit plaintiff because plaintiff's ultimate basis for concluding that defendant's dog was the dog that bit her was that she had not found another dog during her search with Miller. The trial court's ruling in this regard was erroneous, as plaintiff's burden to survive a motion for a directed verdict is to present evidence sufficient to create a factual question on which reasonable jurors could differ. *Cacevic*, *supra* at 679-680. The basis upon which plaintiff herself originally concluded that it was defendant's dog that bit her is not material to whether she carried her burden during trial. The trial court's decision interfered with the jury's role of determining credibility and resolving conflicting evidence. For the reasons initially stated by the trial court, among others,[1] we believe that the evidence presented during trial, viewed in the light most favorable to plaintiff, created a factual question upon which reasonable jurors could differ as to whether plaintiff was bitten by defendant's dog. As such, we conclude that the trial court's decision to grant defendant's motion for a directed verdict with respect to count I of plaintiff's complaint was erroneous.

Plaintiff next asserts that the trial court erred in granting defendant's motion for a directed verdict with respect to count II of her complaint because, by granting a motion in limine to exclude evidence that defendant's dogs had been seen running loose throughout the neighborhood on occasions other than the night plaintiff was bitten, the trial court effectively precluded her from establishing a prima facie case of willful and wanton misconduct.

"A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion." *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001), citing *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998). "Generally, all relevant evidence is admissible, and irrelevant evidence is not." *People v Coy*, 258 Mich App 1, 13; 669 NW2d 831 (2003), citing MRE 402. Relevant evidence is that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. "Relevant evidence thus is evidence that is material (related to any fact that is of consequence to

[1] We again note the consistency in Miller's and plaintiff's testimony regarding the lightness of the dog's underbelly and her pregnant condition.

the action) and has probative force (any tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence)." *People v Sabin (After Remand)*, 463 Mich 43, 57; 614 NW2d 888 (2000)(citation omitted).

Our Supreme Court has stated that "willful and wanton misconduct is made out only if the conduct alleged shows an intent to harm or, if not that, such an indifference to whether harm will result as to be the equivalent of a willingness that it does." *Burnett v City of Adrian*, 414 Mich 448, 455; 326 NW2d 810 (1982). In granting defendant's motion, the trial court stated that it believed the testimony offered by plaintiff would be relevant to showing willful and wanton misconduct "if the dogs had bit someone else, and the owner, of course, were aware of it." We find that the trial court's ruling on this issue was not an abuse of discretion, because, arguably, testimony that the dogs had been seen running free on other occasions, without evidence that the dogs had bitten someone else, does not tend to make the fact that defendant engaged in willful and wanton misconduct more or less probable. Although there may be reasonable disagreement on the relevancy of the evidence, it cannot be said that the trial court's ruling was "so palpably and grossly violative of fact and logic that it evidence[d] perversity of will, a defiance of judgment, or the exercise of passion or bias." *Barrett*, *supra* at 325 (citations omitted). Accordingly, there was no error in granting a directed verdict in favor of defendant on the claim of willful or wanton misconduct.[2]

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ William B. Murphy
/s/ Jane E. Markey

[2] We also hold that the trial court did not abuse its discretion in rejecting the evidence of defendant's dogs roaming free for purposes other than the willful and wanton claim. Of course on remand, should defendant testify, the evidence might be utilized for impeachment purposes dependent on the nature of defendant's testimony.