S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

RENEE BURNETT, Next Friend of KALYNN BURNETT, Minor, Plaintiff-Appellant,	UNPUBLISHED March 14, 2013
v	No. 309373 Kalamazoo Circuit Court
CRYSTAL CLARKE, RHP PROPERTIES, INC. and WOLVERINE PROPERTY INVESTMENT LTD PARTNERSHIP, Defendants,	LC No. 2010-000669-NO
And	
HILLCREST ACRES ASSOCIATES, L.L.C., Defendant-Appellee.	

Before: GLEICHER, P.J., and O'CONNELL and MURRAY, JJ.

GLEICHER, J., (*dissenting*).

On May 22, 2010, a pit bull named Bruno bit 12-year-old plaintiff Kalynn Burnett in the face. Kalynn and her mother sued Bruno's owner, Crystal Clarke, and defendant Hillcrest Acres Associates, L.L.C., a manufactured home community in which both Clarke and Kalynn resided.[1] The majority holds that Hillcrest owed Kalynn no duty of care, despite that Hillcrest knew of Bruno's vicious tendencies and maintained a rule prohibiting pit bulls on the premises. I respectfully disagree with the majority's duty analysis and would hold that material fact questions preclude summary disposition.

I. UNDERLYING FACTS

Hillcrest provides its tenants with a document titled "Rules and Regulations." The "welcome" paragraph states: "We are committed to providing our Residents pleasant

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[1] The circuit court entered a default judgment against Clarke.

surroundings within a well-governed, peaceful and attractive manufactured home community." According to rule 10, "Every effort will be made by Management to ensure that the Rules and Regulations are enforced and that the quiet enjoyment and comfort of all Residents is not disturbed. Ignorance of a Rule or Regulation cannot be accepted as an excuse." Rule 8 states in relevant part, "Failure to comply with the Rules and Regulations or other laws may result in the termination of tenancy as provided by law."

Tenants who break Hillcrest's rules first receive a "Notice of Rule Violation." Upon receipt of a notice,

> it is expected that the violation will be corrected by the date stated on the Notice. Failure or refusal to correct a violation or chronic or repeated violations of the Rules and Regulations may lead to eviction proceedings. Please note that compliance with the Rules and Regulations is absolutely essential to provide you and your neighbors pleasant and peaceful surroundings.

Pursuant to the rules and regulations, Hillcrest permits its tenants two "registered 'domesticated' pets per household with Management's prior approval." However, Hillcrest's rules specifically prohibit pit bulls:

> Exotic pets such as snakes, wild animals or farm classed animals are strictly prohibited. Certain breed of dogs, including but not limited to Pit bulls, Bull Mastiff, Dobermans, Rotweillers, Chows, Akitas, and German Shepards will not be approved by Management and may not be brought into the community.

The rules further provide, "Failure to abide by the Rules and Regulations pertaining to pets will result in the loss of pet privileges or termination of the tenancy."

Wayne Howard managed Hillcrest at the time Kalynn was bitten. Howard testified that Clarke owned two pit bulls before she acquired Bruno and one after, had been "told not to have dogs," and had been twice "written up" because of her pit bull ownership. Howard elaborated:

> I don't remember the dates, but I'd write her up for one, she'd get rid of that dog and then she'd have another one the following week or so. And then she'd get rid of that one. It was like we'd tell her to get rid of them, there were different dogs, different places. The one that bit the kid I never seen.

Howard estimated that the first write-up occurred "within months" of the date on which Bruno bit Kalynn. "Every time [Clarke] got a writeup," Howard claimed, "she got rid of the dog." Howard admitted that he had not "written up" Clarke after Bruno's first transgression, the chase of the child through the trailer park. Howard claimed that he lacked any knowledge of this event, despite the responding officer's testimony to the contrary and a written report authored by a Kalamazoo County Animal Services officer indicating that he or she had discussed Clarke's pit bull situation with the "Park Manager."

Howard did issue a warning to Clarke after Bruno bit Kalynn, but by then Bruno was gone; Kalamazoo County Animal Services seized the animal the same day he attacked the child. Despite Clarke's flagrant rule-breaking, Hillcrest made no effort to evict her until she acquired

yet another pit bull. When Howard discovered the newest pit bull in Clarke's yard he served her with an eviction notice. Clarke left the manufactured home community less than 30 days thereafter.

Howard testified that other residents also brought non-conforming canines into the trailer park. In his experience, "they would remove the dog" after he spoke with them. During the approximately five years that Howard managed the premises, no one was actually evicted because of a dog.

Kalamazoo Township police officer Brett Hake was dispatched to Hillcrest after Kalynn was bitten. Hake had encountered Bruno once before. On May 6, 2010, Hake received a call "that a pit bull was chasing a child." His investigation revealed "a large white and brown pit bull, very aggressive," that he believed was the "same dog that bit the kid in the face." Hake described Bruno's behavior at their first meeting as follows:

> [I]f you're looking at the front of the trailer they have kind of a large picture window which are not very thick or very strong. The dog would, just bouncing off of that, barking and growling, trying to get through the window [to] people standing outside. Even going to the door to knock on the door and they had the interior door closed and they got a screen door would just go crazy against that door, too. So, he would come up in the front window, you could see him just a large pit bull.
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> Based on my experience of doing a lot of search warrants over the years being on the drug team, pit bulls are very aggressive any ways. . . . Pit bulls, on a scale of one to ten are a ten for aggressiveness, and yes, there's no doubt in my mind if I had gone into that house if that dog had gotten loose it would have come after somebody, if not me.

Hake testified that other pit bulls had gotten loose on Hillcrest's premises, and related that he and other officers had spoken with Howard "just to let him know there are people that have pit bulls that are getting loose, let alone that they have pit bulls getting loose in the park." According to Hake, "we tend to have a fair amount of pit bulls get loose up there. . . . [T]here tends to be a lot of pit bulls in that park. . . . We get dogs that are loose and aggressive, nine out of ten of them have been pit bulls in my experience."

II. ANALYSIS

The majority commences its legal analysis with a primer on premises liability. This is not a premises liability case; the duty alleged here arises from a rule voluntarily assumed by Hillcrest rather than by common-law principles governing the duties owed by a premises possessor to a tenant. Bruno was not a dangerous "condition on the land" giving rise to a duty of care. Rather, he was an inherently dangerous animal specifically banned by Hillcrest's own policy. In promulgating that policy Hillcrest both foresaw the risks posed by pit bulls and assumed a duty to protect its tenants from those dangers.

Next, the majority concludes that "there is not a genuine issue of material fact regarding whether defendant was negligent" as the evidence fails to demonstrate that "defendant was aware of Bruno's viciousness." Again, the majority fundamentally misapprehends the nature of this case. Hillcrest's negligence arises from its failure to enforce its own safety rule. That rule *presumes* that pit bulls are vicious. Why else ban them? The operative question is not whether Hillcrest knew of Bruno's viciousness, but whether it knew Bruno lived in the manufactured home community.

Finally, relying in part on *Braun v York Props, Inc*, 230 Mich App 138; 583 NW2d 503 (1998), the majority holds that Hillcrest owed Kalynn no duty of care, despite Hillcrest's rule prohibiting pit bulls. In my view, the majority misapprehends *Braun* as well as the tort law governing duty.

In *Braun*, 230 Mich App at 144-145, this Court discussed at length the Supreme Court of Alaska's decision in *Alaskan Village, Inc v Smalley*, 720 P2d 945 (Alaska, 1986), holding that a trailer park's owner bore a duty to exercise reasonable care to enforce its rules and regulations, which included a prohibition against "vicious dogs." The Alaska Supreme Court partially grounded its decision in Restatement Torts, 2d, § 323, p 135, which provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking. [*Alaskan Village*, 720 P2d at 947[2].]

The *Alaskan Village* Court set forth the following factors to be considered in determining whether an actionable duty of care exists:

> (1) the foreseeability of harm to plaintiff, (2) the degree of certainty that plaintiff suffered injury, (3) the connection between defendant's conduct and plaintiff's injury, (4) the moral blame attached to defendant's conduct, (5) the policy of preventing future harm, (6) the burden on the defendant and consequences to the community of imposing the duty, and (7) the availability, cost and prevalence of insurance for the risk. [*Id.* at 947-948.]

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[2] This Court has also recognized the voluntary assumption of duty doctrine. See *Zine v Chrysler Corp*, 236 Mich App 261, 277; 600 NW2d 384 (1999) ("When a person voluntarily assumes a duty not otherwise imposed by law, 'that person is required to perform it carefully, not omitting to do what an ordinarily prudent person would do in accomplishing the task.'"); *Zychowski v A J Marshall Co*, 233 Mich App 229, 231; 590 NW2d 301 (1998) ("A party may be under a legal duty when it voluntarily assumes a function that it is not legally required to perform.").

In *Buczkowski v McKay*, 441 Mich 96, 101 n 4; 490 NW2d 330 (1992), our Supreme Court explained that Dean Prosser described that these same factors "consistently go to the heart of a court's determination of duty[.]"

In applying the first factor, the Alaska Supreme Court noted that "ample evidence" supported the defendant's "knowledge of prior incidents involving" the offending dogs, rendering it "clearly foreseeable" that a person such as the plaintiff might be harmed. *Alaskan Village*, 720 P2d at 948. In *Braun*, 230 Mich App at 147, this Court explained that "[u]nlike in *Alaskan Village,* defendants did not know of the dog's dangerous proclivities, and therefore, it was no more foreseeable that plaintiff would be harmed by his neighbor's dog than any other dog[.]" This Court further determined that factor (4), "the moral blame attached to defendant's conduct," lacked applicability because the "defendants did not know of the dog's dangerous nature and the size of a dog is not necessarily related to its propensity to bite[.]" *Id.* at 148. "Upon consideration of these factors," the *Braun* Court concluded that the defendants did not owe the plaintiff any duty of care. *Id.*

Application of the *Alaskan Village/Braun* factors in this case leads to the opposite conclusion. Here, defendant knew full well that pit bulls are dangerous; this is precisely why defendant's rules and regulations prohibited pit bulls. Moreover, defendants knew that Clarke owned a series of pit bulls. And defendant knew or should have known that Bruno's misconduct in chasing a child two weeks before biting Jalynn had brought the police to the premises.

The majority concedes that a landlord can be liable for injuries caused by a tenant's dog if the landlord knew of the dog's vicious nature. The majority rejects that the evidence supported Bruno's viciousness, citing case law positing that the "mere fact that a dog barks, growls, jumps, or approaches strangers in a somewhat threatening way" does not suffice to demonstrate that a dog is "abnormally dangerous or [un]usually vicious." In my view, Hake's testimony that Bruno was "very aggressive" created a question of fact on this issue, but our disagreement on this point is irrelevant. Hillcrest determined that pit bulls on the premises would imperil tenants and their guests. Hillcrest judged that pit bulls as a breed posed unacceptable risks. Thus, whether Bruno was a good dog or a bad dog was of no concern to Hillcrest.

Hillcrest's absolute rule prohibiting pit bulls embodies a judgment that pit bulls are inherently dangerous animals. The Supreme Court of Kansas has described pit bulls as follows:

> [P]it bull dogs represent a unique public health hazard not presented by other breeds or mixes of dogs. Pit bull dogs possess both the capacity for extraordinarily savage behavior and physical capabilities in excess of those possessed by many other breeds of dogs. Moreover, this capacity for uniquely

> vicious attacks is coupled with an unpredictable nature. [*Hearn v City of Overland Park*, 244 Kan 638, 650; 772 P2d 758 (1989).[3]]

The majority incorrectly characterizes my citation of this authority as endorsement of the imposition of strict liability. To the contrary, this authority merely supports that Hillcrest accurately predicted the dangers pit bulls represent and appropriately promised its tenants stern measures of prevention. In other words, Hillcrest elected to impose on *itself* liability for guarding the premises against pit bulls.

Pursuant to *Braun,* Restatement (Second) of Torts § 323, and basic tort principles, I believe that Hillcrest bore an actionable legal duty to plaintiff to enforce its pit bull prohibition. As the Supreme Court elucidated in *In re Certified Question,* 479 Mich 498, 505; 740 NW2d 206 (2007), "the ultimate inquiry in determining whether a legal duty should be imposed is whether the social benefits of imposing a duty outweigh the social costs of imposing a duty." This calculus involves considering "the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented." *Id.* (quotation marks and citation omitted). Hillcrest engaged in precisely this analysis when it promulgated its rules and regulations regarding pets, banned pit bulls, and deliberately undertook a duty to enforce those rules.

Moreover, in determining duty, "[t]he most important factor to be considered is the relationship of the parties." *Id.* As a Hillcrest tenant, Kalynn and Hillcrest enjoyed a special relationship. See *Murdock v Higgins*, 454 Mich 46, 53; 559 NW2d 639 (1997). A landlord owes its tenant the obligation to maintain the premises in a safe condition. *Lipsitz v Schechter*, 377 Mich 685, 687-688; 142 NW2d 1 (1966). The Supreme Court has explained the general nature of a duty arising from a special relationship as follows:

> The rationale behind imposing a duty to protect in these special relationships is based on control. In each situation one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself. The duty to protect is imposed upon the person in control because he is best able to provide a place of safety. [*Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988).]

Pursuant to its rules and regulations, Hillcrest retained control of the dog population on its premises by specifically barring pit bulls and several other breeds, and by advising tenants that possession of the forbidden pets would subject the tenant to eviction. Hillcrest undertook this obligation for the safety of its tenants and their guests. It was readily foreseeable that Bruno and

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[3] The Court of Appeals of Maryland, that state's highest Court, has established a strict liability standard in relation to attacks by pit bulls, and imposes that standard on owners and any other person who have "the right to control the pit bull's presence on the subject premises (including a landlord who has the right and/or opportunity to prohibit such dogs on leased premises[.])" *Tracey v Solesky*, 427 Md 627, 652; 50 A3d 1075 (2012).

his breed could cause serious injuries, particularly to children. Indisputably, these realities are at the heart of Hillcrest's policy banning pit bulls. Thus, the risk of permitting a pit bull to remain on the premises was readily foreseeable, and Hillcrest was in a far better position to address this risk than was Kalynn. Guided by *In re Certified Question*, I conclude that Hillcrest had a duty to enforce its "no pit bull" rule. And viewed in the light most favorable to Kalynn, the evidence supports that Hillcrest repeatedly failed to enforce its policy banning pit bulls.

Although the majority claims to decide this case solely on duty grounds,[4] it also supports its ruling based on a purported absence of but-for causation, averring that defendant would not be liable for Kalynn's injuries because it "could not have lawfully exercised control over Bruno by evicting Clarke" before Kalynn was attacked. This conclusion assumes that only an eviction would have rid Hillcrest of Bruno. But the evidence is decidedly to the contrary. According to Howard, Clarke had divested herself of her two previous pit bulls when he had "written up" Clarke for violating Hillcrest's rules. But Howard failed to issue a warning to Clarke after Bruno chased the child through the park, despite evidence that he knew of the event.

A reasonable jury could find that had Howard issued Clarke a "write-up" immediately after Bruno's first offense, the second would not have occurred. A plaintiff's causation evidence suffices "if it 'establishes a logical sequence of cause and effect, notwithstanding the existence of other plausible theories[.]'" *Skinner v Square D*, 445 Mich 153, 159-160; 516 NW2d 475 (1994) (citation omitted). Circumstantial proof is acceptable, as long as it "facilitate[s] reasonable inferences of causation, not mere speculation." *Id* at 163-164. "While the court decides questions of duty, general standard of care and proximate cause, the jury decides whether there is cause in fact and the specific standard of care[.]" *Moning v Alfono*, 400 Mich 425, 438; 254 NW2d 759 (1977).

Given that Clarke responded to all other "write-ups" by getting rid of the offending dog, it is reasonable to conclude that she would have behaved in the same manner when caught harboring Bruno. In other words, the record evidence supports that had Howard made an effort to enforce Hillcrest's rules after Bruno chased the child through the premises, Bruno would have been gone before he had the opportunity to bite Kalynn. In my view, a jury should resolve this issue.

/s/ Elizabeth L. Gleicher

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[4] "We do not consider plaintiff's argument that defendant proximately caused Kalynn's injury because once it is clear that no duty exists, a negligence claim fails as a matter of law."