[Cite as *Good v. Murd*, 2014-Ohio-2216.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Todd M. Good, etc.	Court of Appeals No. L-13-1235
Appellant	Trial Court No. CI0201201910
v.	
Romaine Murd	**DECISION AND JUDGMENT**
Appellee	Decided: May 23, 2014

* * * * *

D. Lee Johnson and D. Scott Williams, for appellant.

Cormac B. DeLaney, for appellee.

* * * * *

SINGER, J.

{¶ 1} This case is before the court as an accelerated appeal. Appellant, Todd M. Good, appeals from the October 18, 2013 judgment of the Lucas County Court of Common Pleas granting summary judgment to appellee, Romaine Murd, and dismissing the action filed by appellant, Todd Good. Because we find the trial court properly granted summary judgment to Murd, we affirm.

{¶ 2} Todd Good, on behalf of his son Austin Good, brought a statutory action against Murd. Good alleged Murd was strictly liable, pursuant to R.C. 955.28 (B), for the injuries suffered by Austin Good when he was severely injured on Murd's property by two dogs which belonged to Michael Shambarger who was leasing the property from Murd.

{¶ 3} Murd moved for summary judgment arguing that he was not liable for the damage because he was only a landlord out of possession. Appellant opposed the motion. The trial court granted Murd's motion and dismissed the action. Appellant filed an appeal from the court's judgment. On appeal, appellant asserts the following sole assignment of error:

> The Trial Court erred by granting summary judgment on the issue of strict liability of a landowner for a dog attack, where multiple factors raised questions of material fact regarding possession and control of the premises where the dog attack occurred.

{¶ 4} The appellate court reviews the grant of summary judgment under a de novo standard of review. *Doe v. Shaffer,* 90 Ohio St.3d 388, 390, 738 N.E.2d 1243 (2000), citing *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Applying the requirements of Civ.R. 56(C), we uphold summary judgment when it is clear that:

> (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that

> reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co., Inc.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

{¶ 5} The following deposition testimony was introduced in support of the motion for summary judgment. Shambarger testified at his deposition that he has lived on Murd's property for approximately three years with his wife, Brittany, and their son. Murd is Brittany's great uncle. The Shambargers live in the home on the property without a lease, on a month-to-month basis, but with an arrangement to pay $300 a month in rent. Occasionally, Shambarger would forgo payment of a portion of the rent in order to make an improvement on the house. The arrangements for the lease of the home were made by Brittany's grandfather. The rent was normally paid by delivering a check to Brittany's grandfather made payable to Murd. They never talked to Murd about anything. The Shambargers did not pay taxes on the property or insure the property, although they carried personal renters insurance.

{¶ 6} In August 2010, Shambarger installed a kennel on the property to house his two American bulldogs who weighed approximately 100 pounds each. Prior to that time, Shambarger had an invisible fence to keep the dogs in the yard. Shambarger never spoke to Murd to obtain permission to keep the dogs.

{¶ 7} Shambarger further testified that in November 2011, Austin Good was attacked by the dogs while in the yard by himself. Shambarger was surprised by the behavior of the dogs as they knew the Goods.

{¶ 8} Appellant asserts on appeal the trial court erred by granting summary judgment to Murd because there is a material question of fact as to whether Murd was in control and possession of the property and therefore liable under the statute as a "harborer." Relying upon *Hill v. Hughes*, 4th Dist. Ross No. 06CA2917, 2007-Ohio-3885, appellant asserts the trial court failed to consider the following relevant facts: the close family ties between Shambarger and the Murd family; the property where the dog lived is contiguous with Murd property and can be seen from the Murd property; there was no written lease and the rent was low; and Shambarger testified he would not have built the kennel or owned dogs if Murd had objected.

{¶ 9} R.C. 955.28(B) provides that: "[t]he owner, keeper, or harborer of a dog is liable in damages for any injury, death, or loss to person or property that is caused by the dog * * *." To establish strict liability, appellant was required to prove: "(1) defendant owned, kept, or harbored the dog, (2) the dog's actions proximately caused the damage, (3) the monetary value of damages." *Beckett v. Warren*, 124 Ohio St.3d 256, 2010-Ohio-4, 921 N.E.2d 624, ¶ 11. *Accord Hirschauer v. Davis*, 163 Ohio St. 105, 126 N.E.2d 337 (1955), paragraph three of the syllabus.

{¶ 10} Generally, to harbor a dog, a landlord must be in possession or control of the premises where the dog lives. Because a typical lease agreement (which does not

expressly give the landlord the right to admit or exclude anyone from the property) transfers possession and control of the premises to the tenant, a landlord out of possession cannot be a harborer of the tenant's dog. *Kovacks v. Lewis*, 5th Dist. Tuscarawas No. 2010 AP 01 0001, 2010-Ohio-3230, ¶ 28; *Engwert-Loyd v. Ramirez*, 6th Dist. Lucas No. L-06-1084, 2006-Ohio-5468, ¶ 9; *Johnson v. Hanley*, 6th Dist. Lucas No. L-00-1229, 2001 WL 256157 (Mar. 16, 2001); and *Flint v. Holbrook*, 80 Ohio App.3d 21, 26, 608 N.E.2d 809 (2d Dist.1992). The yard of a single-family home is considered to be part of the tenant's property to possess and control. *Engwert-Loyd*, at ¶ 11.

{¶ 11} However, a landlord will be considered to have harbored a tenant's dog if the tenant's dog causes injury while in a common area where the landlord intentionally acquiesced to the presence of the tenant's dog. *Stuper v. Young*, 9th Dist. Summit No. 20900, 2002-Ohio-2327, ¶ 13, and *Godsey v. Franz*, 6th Dist. Williams No. 91WM000008, 1992 WL 48532, *4 (Mar. 13, 1992). A landlord who does not authorize the lessee to have a dog or any pet, did not know the dog existed, and never visited the property after it was leased has not acquiesced to the presence of the dog and cannot be said to have harbored the dog. *Uhl v. McKoski*, 9th Dist. Summit No. 27066, 2014-Ohio-479, ¶ 11-15.

{¶ 12} The only court to have rendered a decision which appears contrary to the prevailing case law is *Hill v. Hughes*, 4th Dist. Ross No. 06CA2917, 2007-Ohio-3885, cited by appellant. In that case, the court held that a question of fact existed as to whether the landlord was still in possession and control of the premises based on his deposition

testimony that he believed he had a right to tell his tenant to get rid of his dog. Even if we agreed that a landlord can retain superior possession and control rights because of a unique relationship between the landlord and lessee, that situation did not exist in the case before us. In this case, the only evidence presented was the deposition testimony of the lessee Shambarger who testified that he would probably have gotten rid of the dogs if Murd had told him he could not keep them on the property. However, Shambarger also testified that he never spoke to Murd to obtain permission to keep the dogs in the first place. Therefore, Shambarger did not believe that Murd had any right to control his decision to harbor dogs on the property, but Shambarger might have respected Murd's request to remove the dogs simply because of the family relationship. Unlike the *Hill* case, there is no evidence that Murd, as landlord, believed he had any superior right of possession or control. Thus, we find there was no evidence that Murd retained any superior possession and control over the leased property. *See also Coontz v. Hoffman*, 10th Dist. Franklin No. 13AP-367, 2014-Ohio-274, ¶ 18, which also distinguished the *Hill* case.

{¶ 13} In the case before us, the evidence establishes that Shambarger's dogs injured Austin Good while he was on Shambarger's leased property. Shambarger leased the property from Murd, who did not retain any right to possess and control the property. Therefore, we find that the trial court properly granted summary judgment to Murd because he was a landlord out of possession. Appellant's sole assignment of error is found not well-taken.

{¶ 14} Having found that the trial court did not commit error prejudicial to appellant, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE