[Cite as *Diaz v. Henderson,* 2012-Ohio-1898.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

JAIME DIAZ, Individually and as Father and Next Friend of Jaretzy Diaz, a minor, Plaintiff-Appellant, - vs - DAVID HENDERSON, et al., Defendants-Appellees.	: : : : : : : : :	CASE NO. CA2011-09-182 O P I N I O N 4/30/2012

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2010-12-5011

McKinney & Namei, Kerry Holleran and Firooz T. Namei, 15 East Eighth Street, Cincinnati, Ohio 45202-2087, for plaintiff-appellant, Jaime Diaz, and third-party defendant, Sandra Parga

Eagan & Wycoff Co., L.P.A., John R. Wykoff, 403 Vine Street, Suite 200, Cincinnati, Ohio 45202, for defendants-appellees, David Henderson and Charlotte Henderson

Richard Hurchanik, 110 North Third Street, Hamilton, Ohio 45011, for defendant/third-party plaintiff, Diane Huffman

HUTZEL, J.

{¶ 1} Plaintiff-appellant, Jaime Diaz, appeals a decision of the Butler County Court of Common Pleas granting summary judgment to defendants-appellees, David and Charlotte Henderson, in a personal injury action involving a dog attack.

{¶ 2} The Hendersons are the owners of a single-family residence located on North E Street in Hamilton, Ohio. In July 2006, Diane Huffman rented the residence from the Hendersons. At the time she started renting the residence, Huffman owned a dog which she kept at the residence. The record indicates that the Hendersons were aware of the dog's presence in the residence. Diaz asserts that the dog is a pit bull. The record shows that Huffman registered the dog as a mixed breed Labrador. In her deposition, Huffman testified that the last time she took the dog to an animal clinic, she noticed it had listed the dog as a pit bull. The parties did not provide documentation from the animal clinic.

{¶ 3} On June 29, 2010, Diaz's three-year-old daughter, Jaretzy, was brutally attacked by Huffman's dog in either Huffman's front yard or side yard. The parties' versions as to how it happened differ.

{¶ 4} According to Diaz, Jaretzy and her older sister, Talia, were playing outside at Huffman's residence with Huffman's granddaughter, Sydney, when the dog suddenly attacked Jaretzy, knocking her off the chair on which she was sitting.

{¶ 5} According to Huffman and her granddaughter, Sydney and Talia were playing on the sidewalk in front of Huffman's house when Huffman told Talia to go home. A few minutes later, Huffman took the dog out of the house and chained him to the backyard fence with a 30-foot leash. The dog lay down and went to sleep. Moments later, Jaretzy wandered into Huffman's yard, tripped over her shoes, and fell onto the dog. Startled, the dog bit Jaretzy in the face. Jaretzy suffered several lacerations on the face which required surgery.

{¶ 6} In December 2010, Diaz filed a complaint against the Hendersons and Huffman alleging both strict liability and common law negligence claims. The Hendersons moved for summary judgment on the ground they were not liable for Jaretzy's injuries because they were not the owner, keeper, or harborer of the dog. Huffman also moved for summary judgment. On August 30, 2011, the trial court denied Huffman's motion but granted the

Hendersons' motion. The trial court found that the Hendersons did not harbor the dog, and therefore, were not liable for Jaretzy's injuries under either a strict liability or common law negligence claim.

{¶ 7} Diaz appeals, raising one assignment of error:

{¶ 8} THE TRIAL COURT ERRED IN FINDING THE HENDERSONS DID NOT HARBOR THE PIT BULL.

{¶ 9} Diaz argues that the trial court erred in granting summary judgment to the Hendersons because (1) there were genuine issues of material fact as to whether the Hendersons had possession and control of the residence, (2) the Hendersons acquiesced to the dog's presence, and (3) as landowners, the Hendersons failed to exercise reasonable care by allowing Huffman to restrain her dog by leash only.

{¶ 10} We review a trial court's decision granting summary judgment de novo. *Burgess v. Tackas*, 125 Ohio App.3d 294, 296 (8th Dist.1998). Summary judgment is proper when there is no genuine issue of material fact remaining for trial, the moving party is entitled to judgment as a matter of law, and reasonable minds can only come to a conclusion adverse to the nonmoving party, construing the evidence most strongly in that party's favor. *See* Civ.R. 56(C); *see also, Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66 (1978). The movant bears the initial burden of informing the court of the basis for the motion and demonstrating the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. Once this burden is met, the nonmovant has a reciprocal burden to set forth specific facts showing a genuine issue for trial. *Id.*

{¶ 11} In Ohio, "a suit for damages resulting from dog bites can be instituted under both statute and common law." *Thompson v. Irwin*, 12th Dist. No. CA97-05-101, 1997 WL 666079, *3 (Oct. 27, 1997), citing *Warner v. Wolfe*, 176 Ohio St. 389 (1964). R.C. 955.28(B) imposes strict liability upon the owner, keeper, or harborer of a dog "for any injury, death, or

loss to person or property that is caused by the dog." In an action for damages under R.C. 955.28(B), a plaintiff must prove (1) ownership, keepership, or harborship of the dog, (2) the actions of the dog were the proximate cause of damage, and (3) the monetary amount of damages. *Kovacks v. Lewis*, 5th Dist. No. 2010 AP 01 0001, 2010-Ohio-3230, ¶ 25, citing *Hirschauer v. Davis*, 163 Ohio St. 105 (1955). Summary judgment is appropriate if no genuine issue of material fact exists as to either of the first two issues. *Richeson v. Leist*, 12th Dist. No. CA2006-11-138, 2007-Ohio-3610, ¶ 10.

{¶ 12} "Under common law, a plaintiff suing for injuries inflicted by a dog must show that the defendant owned or harbored the dog, that the dog was vicious, that the defendant knew of the dog's viciousness, and that the defendant was negligent in keeping the dog." *Flint v. Holbrook*, 80 Ohio App.3d 21, 25-26 (2nd Dist.1992).

{¶ 13} In the case at bar, Diaz filed his complaint under both a common law claim and a statutory claim (R.C. 955.28). On appeal, he does not contend that the Hendersons were the owner or keeper of the dog, but rather, that they harbored the dog. Because a determination of whether summary judgment was appropriate as to either claim depends upon whether the Hendersons harbored the dog, we address both claims together.

{¶ 14} In determining whether a defendant is a harborer of a dog, the central focus of a court's analysis "shifts from possession and control over the dog to possession and control of the premises where the dog lives." *Flint* at 25. "[A] 'harborer' is one who is in possession and control of the premises where the dog lives, and silently acquiesces in the dog's presence." *Id.* "In a situation involving a landlord and a tenant, a landlord cannot be a harborer of a dog that is kept on premises that the tenant has sole control over." *Jones v. Goodwin*, 1st Dist. No. C-050568, 2006-Ohio-1377, ¶ 6.

{¶ 15} With respect to landlord-tenant relationships, it is well-established that a lease transfers both possession and control of the leased premises to the tenant. *Richeson*, 2007-

Ohio-3610 at ¶ 13. For a landlord to be liable as a harborer for injuries inflicted by a tenant's dog, "the plaintiff must prove that the landlord permitted or acquiesced in the tenant's dog being kept in the common areas or areas shared by the landlord and tenant." *Stuper v. Young*, 9th Dist. No. 20900, 2002-Ohio-2327, ¶ 13. If the leased property at issue consists of a single-family residence situated on a normal-sized city lot, there is a presumption that the tenants possessed and controlled the *entire* property. *See Engwert-Loyd v. Ramirez*, 6th Dist. No. L-06-1084, 2006-Ohio-5468, ¶ 11; *Richeson* at ¶ 13.

{¶ 16} As stated earlier, Huffman rented the single-family residence at issue from the Hendersons. The record indicates Huffman was in sole possession and control of the property throughout her tenancy. In their affidavits, the Hendersons both stated that "[a]t all times on or about [the day of the attack]," Huffman "was in full control and possession of the premises." In turn, Huffman stated in her deposition that (1) she was the sole tenant of the residence, (2) she had possession and control of the house, (3) she had the authority and power to control who came onto the property while she lived there, and (4) there were no areas on the property that other people were permitted to use.

{¶ 17} Consequently, because Huffman had sole control and possession of the property where her dog lived, and because the dog was kept in areas on the property that were neither common areas nor shared by the Hendersons and Huffman, the Hendersons did not harbor the dog. *Jones*, 2006-Ohio-1377 at ¶ 7-9.

{¶ 18} Diaz nevertheless argues that the Hendersons were harborers of the dog because (1) Huffman admitted that when tied to its 30-foot leash, her dog could reach the public sidewalk in front of her house, and (2) the Hendersons retained control over the property because they came to the residence to collect rent and to make repairs and had been to the residence over 100 times during Huffman's tenancy.

{¶ 19} Contrary to Diaz's assertion, Huffman never testified that her dog could reach

the public sidewalk when tied to its leash. To the contrary, Huffman twice testified that her dog *could not* reach the public sidewalk when on its leash. Huffman further testified that when tied to its leash, her dog could only go to her side porch.

{¶ 20} With regard to Diaz's second argument, we note that similar arguments have been rejected by appellate courts. In *Richeson*, we stated:

> [W]e find no authority for the proposition that such routine and common acts by a landlord [such as having the authority to approve or disapprove any structural changes, being responsible for making repairs, and having the power to evict the tenant] constitute "control" for purposes of liability in tort. The control necessary as the basis for liability in tort implies the power and right to admit people to an area on the leased premises and to exclude people from it. Having leased the residence to [the tenant], [the landlord] clearly surrendered this power and right at the time she entered into the lease with him. Accordingly, we find no merit in appellants' argument that [the landlord] retained sufficient control over the leased premises to support a finding she was a "harborer" of [the tenant's] dog. (Citation omitted.)

Richeson, 2007-Ohio-3610 at ¶ 15. *See also Kovacks*, 2010-Ohio-3230.

{¶ 21} Next, Diaz argues that the trial court erred by granting summary judgment to the Hendersons because they acquiesced to the dog's presence. In support of his argument, Diaz asserts that (1) the record shows the dog was able to reach the public sidewalk in front of the residence at issue while on its leash, and (2) the Hendersons knew Huffman's dog was a pit bull, that is, a "vicious dog" pursuant to R.C. 955.11(A)(4); yet, they did nothing.

{¶ 22} Because we found that the Hendersons were not in control and possession of the property where the dog was kept, we need not determine whether they acquiesced to the dog's presence. *Jones*, 2006-Ohio-1377 at ¶ 9. In addition, Huffman's deposition clearly states that the dog could not reach the public sidewalk in front of the residence when on its leash. Rather, it could only reach the side porch when so tied. In addition to Huffman's deposition, Diaz also relies on a letter from a neighbor which he attached to his

memorandum opposing the Hendersons' motion for summary judgment. However, the unsworn, un-notarized letter is not proper evidence under Civ.R. 56(C) and (E) and it was not considered by the trial court. See *Fuson v. Fisher*, 12th Dist. No. CA97-05-013, 1998 WL 65690 (Feb. 17, 1998) (documents submitted in opposition to a summary judgment motion which are not sworn, certified, or authenticated by affidavit have no evidentiary value and cannot be considered).

{¶ 23} As for the assertion that the Hendersons knew Huffman's dog was a pit bull, the record does not support the assertion. In her deposition, Huffman testified that while the Hendersons saw the dog when they came to the residence, they never discussed the dog's breed. In addition, the Hendersons both stated in their affidavits that on or before the day of the attack, they "had no knowledge or information that would indicate the dog * * * was vicious, out of control or in any other way a threat to anyone's safety or good health." *Flint*, 80 Ohio App.3d at 25-26.

{¶ 24} Finally, Diaz argues that as landowners, the Hendersons failed to exercise reasonable care by allowing Huffman to restrain her dog by leash only. Diaz contends that a landlord "has a duty to inquire into the possibility of a harmful condition on their property when there are circumstances that suggest that a harmful condition exists." Once again, Diaz asserts that the Hendersons knew a pit bull was on the premises and "chose not to act." Diaz cites *Drexler v. Labay*, 155 Ohio St. 244 (1951); and *Lampe v. Magoulakis*, 159 Ohio St. 72 (1953) in support of his argument.

{¶ 25} As we stated above, there is no evidence in the record that the Hendersons knew that Huffman's dog was a pit bull and/or a vicious dog, or that they were aware of any incidents involving the dog prior to its attack on Diaz's daughter. While all dogs can be dangerous regardless of their size or breed, such a generalized awareness does not establish that a landlord is aware of the dog's alleged vicious and dangerous propensities.

Richeson, 2007-Ohio-3610 at ¶ 19. In her deposition, Huffman testified that she has owned the six-year-old dog since it was a puppy, and that prior to this incident, the dog had never attacked or threatened someone or displayed aggressiveness.

{¶ 26} As for the two cases cited by Diaz, we find that they are inapplicable to the case at bar. *Drexler* involves a teenager who was injured while helping someone repair a roof. *Lampe* addresses whether a ladder is inherently dangerous and defines the legal obligations resulting from loaning a defective and injurious chattel.

{¶ 27} We find no evidence in the record demonstrating that a genuine issue of material fact exists as to whether the Hendersons harbored the dog as required under R.C. 955.28(B), or harbored the dog with knowledge of its vicious propensities under common law. As a result, the trial court properly granted summary judgment to the Hendersons as to both Diaz's statutory and common law claims. Diaz's assignment of error is overruled.

{¶ 28} Judgment affirmed.

HENDRICKSON, P.J., and PIPER, J., concur.