Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2020-049

JUNE TERM, 2020

Amber Bradley*, Billy Noyes* & Tyler A. Noyes* v. John A. Bradley & Sharon Bradley	}	APPEALED FROM:
	}	Superior Court, Caledonia Unit, Civil Division
	}	DOCKET NO. 179-8-17 Cacv
	}	Trial Judge: Robert R. Bent

In the above-entitled cause, the Clerk will enter:

Plaintiffs appeal from the trial court's summary judgment decision in defendants' favor in this dog-bite case. Plaintiffs argue that a jury should decide if defendants knew, or should have known, that their dog was a probable source of danger. We agree. We therefore reverse and remand for additional proceedings.

Plaintiffs Amber Bradley, Billy Noyes, and their son Tyler Noyes, sued defendants, John and Sharon Bradley, after Tyler was injured in a dog attack on defendants' property.[*] Defendants are Amber's parents and Tyler's grandparents. Plaintiffs argued that defendants negligently allowed their dog to attack Tyler.

Defendants moved for summary judgment and filed a separate statement of undisputed facts in support of their request, relying on deposition testimony from Amber, Billy, Sharon, and John. Plaintiffs filed a motion in opposition but failed to file a separate, discrete statement of undisputed facts consisting of numbered paragraphs, or a separate statement disputing any of defendants' facts as required by Vermont Rule of Civil Procedure 56(c)(1)(A). Given this, and the fact that defendants relied on deposition testimony that plaintiffs had submitted into evidence, the court accepted as true defendants' statement of undisputed facts. The court further found that plaintiffs relied on an unsworn statement from Chris Bradley, the dog's prior owner, and an unsworn expert report from Dr. Milani, DVM. It explained that these unsworn statements were not admissible evidence and they therefore could not be used to withstand a summary judgment motion. See V.R.C.P. 56(c); Johnson v. Harwood, 2008 VT 4, ¶ 10, 183 Vt. 157, 163 ("Rule 56's purposes are served equally well by sworn statements other than affidavits, provided that those statements meet the rule's other requirements." (emphasis added)); In re M.W.R., 143 Vt. 6, 10 (1983) ("[T]he pretrial statement was unsworn. Therefore, it was inadmissible as substantive evidence . . . .").

[*] Because some of the parties share the same last name, we use the parties' first names for clarity.

The court thus relied on the following undisputed material facts identified by defendants. Defendants have five children, including Amber and Chris, and fourteen grandchildren, including Tyler. The family members see each other often. In early 2013, John took ownership of a dog called "Bobo" from Chris. John thought Bobo was a hunting dog but he wasn't sure of its breed. Chris gave Bobo away because he had an "off" feeling about it after the dog had growled at his ten-year-old son. John took the dog because Chris said he would euthanize it otherwise. John knew Bobo had growled at Chris's son but believed Chris's son tended to "antagonize" dogs to the point of a reaction. The son had done this to John's other dogs, one of which had also growled at him. John did not think that the one-time growling was reason to keep the dog from his grandchildren.

Sharon was equally unconcerned by the one-time growl and by Chris's desire to get rid of the dog. Chris had many dogs and they had taken other dogs from Chris for various reasons. Sharon explained that during the two months they had Bobo, they had had houseguests over without incident; the grandchildren also pet Bobo on numerous occasions, though not necessarily Tyler. John also "tested" the dog over a three-day period to be sure he was safe around his grandchildren. John had a fourteen-year history of breeding dogs for profit. Sharon said John would kick and hit these dogs occasionally. She did not recall if he did this to Bobo. Defendants did not take Bobo to the veterinarian during the two months that they had him. John did not tell plaintiffs the circumstances under which he had obtained the dog. Amber and her children had not seen Bobo before the day in question.

In late April 2013, Amber and her children went to defendants' property to clean out a trailer that they planned to move into. When they entered the trailer, Amber showed the children defendants' dogs, which were inside the trailer, and the children pet them and got to know them. The children were running back and forth, checking out their soon-to-be new home, while Amber cleaned. After two hours inside the trailer, Amber and the children went outside. John brought Bobo out and hooked him next to the garage on a sixteen-foot leash, adjacent to where everyone was standing. John did not muzzle the dog. He stated that he had no reason to believe that his grandchildren were unsafe around Bobo. Sharon similarly did not feel a need to warn the grandchildren about Bobo.

Within five minutes of exiting the trailer, Tyler approached Bobo from behind. Bobo was chained and standing next to John. Amber was not concerned about Tyler's safety as he approached Bobo. Nothing about Bobo's interaction with her children inside the trailer had alarmed her. When Tyler went to touch Bobo on his back, Bobo whipped around and grabbed Tyler, threw him up in the air and then down on the ground and continued to attack him. John kicked the dog off Tyler and Amber picked Tyler up and rushed him to the hospital. Billy, Tyler's father, was not present during this incident. Tyler suffered severe facial injuries from the attack.

Based on these findings, the court concluded that defendants were entitled to judgment in their favor as a matter of law. It explained that "Vermont law has long required proof of an owner's negligence to establish liability for injuries caused by dog bites." Martin v. Christman, 2014 VT 55, ¶ 7, 196 Vt. 536. Ordinary domestic dogs are not considered to pose an unreasonable risk to the public. Gross v. Turner, 2018 VT 80, ¶ 12, 208 Vt. 112. Thus, a dog owner "is not liable for injuries to persons and property unless the owner had some reason to know the animal was a probable source of danger." Id. ¶ 22 (quotation omitted). If an owner knows that his or her dog is dangerous, he or she "has a duty to exercise reasonable control and restraint of the dog to avoid injury to others." Id. (quotation omitted).

The court concluded, as a matter of law, that plaintiffs failed to show that defendants knew or had reason to know that Bobo was a probable source of danger. It cited Gross, where this Court upheld a summary judgment ruling for the defendants following a dog attack. In Gross, the plaintiff was bitten by a dog as he stood on the sidewalk outside a home. A guest visiting the home had inadvertently let the occupants' dogs out. The plaintiff sued the landlord and the guest. We concluded that the landlord was entitled to summary judgment because the plaintiff failed to show that she "knew of any prior aggressive behavior by the dogs" or was "aware of facts that would lead a reasonable person to believe that the dogs were vicious." Id. ¶ 15. In the absence of such evidence, she owed no duty to plaintiffs. See id. As to the guest, he knew that the dogs occasionally growled if someone got too close to them, but the dogs had never bitten anyone. The guest allowed his children to play with the dogs and "never feared for their safety." Id. ¶ 25. We held that "[n]o reasonable jury could conclude from this evidence that [the guest] knew the dogs posed an abnormal danger to the public." Id.

The trial court contrasted Gross with Davis v. Bedell, 123 Vt. 441, 441 (1963), where the defendants were on notice of their dog's vicious propensities. They knew "their dog harassed pedestrians at the roadside by jumping and chasing after them, and barking. [They] had observed some of these instances and on these occasions called the dog and shut it in." Id. As we explained, "[t]he question in each case is whether the dog's past behavior has been such as to require a person of reasonable prudence to foresee harm to the person or property of others." Id. at 443. We concluded that "[t]he circumstances afforded adequate justification for a finding by the jury that [the defendants] had reasonable and sufficient opportunity for knowing that their dog was a source of danger to persons passing by their premises on foot, as the plaintiff was doing at the time of her injury." Id. This "establish[ed] a duty on the part of the [defendants] to exercise reasonable control and restraint of the terrier to avoid the very injury which did occur." Id.

In the instant case, the court concluded that plaintiffs failed to show that defendants knew or had reason to know that Bobo was a probable source of danger based on his past behavior. It asserted as an undisputed fact that defendants knew only that the dog had once growled at Chris's son and that Chris had an "off" feeling about the dog. The court relied on defendants' explanation that they had taken in other dogs from Chris for a variety of reasons and thus, were not concerned about Bobo. It stated that there was no evidence that defendants knew of any other prior incidents where Bobo bit, jumped on, chased after, barked at, or otherwise physically attacked or attempted to attack any person or other dog. Defendants' houseguests had interacted with Bobo without incident. Defendants had allowed their grandchildren to play with the dog, including Tyler, without any fear for their safety. The court concluded that no reasonable jury could conclude from this evidence that defendants knew the dog posed an abnormal danger to the public based on its prior behavior. To hold otherwise, the court reasoned, would impose an unreasonable duty on owners of dogs that growled occasionally, or had fearful and nervous tendencies but had not otherwise displayed violent tendencies. The court rejected the notion that a more stringent duty should be imposed on defendants because they had owned Bobo only for a few months. It explained that the standard was one of knowledge based on a dog's past behavior, not the amount of time that an owner possessed the dog. The court thus granted judgment to defendants as a matter of law on plaintiffs' negligence claims, which also disposed of Amber and Billy's personal claims against defendants. This appeal followed.

Plaintiffs argue on appeal that there were facts from which a reasonable jury could conclude that defendants knew or should have known that the dog was likely dangerous. In support of their position, they cite: Chris's reason for giving Bobo to defendants and his statement that he would euthanize the dog if defendants did not take it; the brief period between defendants' acquisition of

Bobo and the attack; John's decision to tether the dog adjacent to Tyler; defendants' failure to disclose the circumstances under which they obtained Bobo; defendants' "inexcusable neglect" of Bobo; John's dog-breeding history and history of abusing his dogs; defendants' immediate euthanasia of the animal after the attack; defendants' failure to muzzle the animal; and the unsworn opinion of a canine behaviorist. Citing Demag v. Better Power Equip., Inc., 2014 VT 78, 197 Vt. 176, plaintiffs also suggest that we should view this case through the lens of premises liability law and consider whether a reasonable actor in defendants' position would have acted differently.

We review the trial court's decision "de novo, using the same standard as the trial court: summary judgment is appropriate if the moving party shows that the material facts are not genuinely disputed and that he or she is entitled to judgment as a matter of law." Gross, 2018 VT 80, ¶ 8. We give the nonmoving party "the benefit of all reasonable doubts and inferences" in deciding if "a genuine dispute of material fact exists." Id. (quotation omitted). "Once a claim is challenged by a properly supported motion for summary judgment, the nonmoving party may not rest upon the allegations in the pleadings, but must come forward with admissible evidence to raise a dispute regarding the facts." Id. (emphasis added); see also V.R.C.P. 56(c) (requiring factual assertions at summary judgment stage to be supported by admissible evidence). We conclude that, giving plaintiffs the benefit of all reasonable doubts and inferences, a material dispute of fact exists. Thus, defendants are not entitled to summary judgment.

At the outset, we reject plaintiffs' assertion that their status as "invited guests" somehow changes the applicable standard here. We held in Demag that a landowner's "duty is to use reasonable care for the safety of all . . . persons invited upon the premises, regardless of the status of such individuals." 2014 VT 78, ¶ 26. To determine if defendants used "reasonable care" to ensure the safety of their guests, we must determine if "a rational jury could find that [d]efendants had some reason to know [the dog] was a probable source of danger to [p]laintiff[s]." Carvalho v. Grzankowski, 36 F. Supp. 3d 423, 429 (D. Vt. 2014) (quotation omitted) (reaching same conclusion in response to similar argument based on Demag). The applicable standard is that set forth in Gross and our other dog-bite cases.

Applying this legal standard, we agree with plaintiffs that a genuine dispute of fact exists as to whether defendants "had some reason to know the animal was a probable source of danger." Gross, 2018 VT 80, ¶ 22 (quotation omitted). We need not discuss most of the arguments put forth by plaintiff in support of their position, some of which rely on inadmissible evidence. We conclude that John's statements alone are sufficient to create a genuine dispute of fact. John admitted in his deposition that Chris gave him the dog because Chris had a feeling that "it could be aggressive or whatever because it growled when his son went by it." John acknowledged that Chris "had always had off feelings about that dog." It is not clear from John's statement if the dog growled at Chris's son once or more than once. These specific warnings about the dog's temperament and behavior distinguish this case from Gross. We note, moreover, that when John first got the dog, he found it necessary to "test" the dog to see if it would be safe around children and he chained the dog by his side while indoors. Reasonable people could disagree whether defendants had sufficient information to know that Bobo was "a probable source of danger." Id. Defendants' subjective rationale for dismissing Chris's warnings—that Chris's son tended to antagonize dogs and that Chris had gotten rid of numerous dogs for a variety of reasons—cannot be treated as a matter of undisputed fact. A jury must determine if defendants had reason to know the dog was probably dangerous. Where, as here, reasonable people could draw different inferences from the undisputed facts, summary judgment is inappropriate. See Stamp Tech, Inc. ex rel. Blair v. Ludall/Thermal Acoustical, Inc., 2009 VT 91, ¶ 17, 186 Vt. 369 (so holding and citing 10A C. Wright, et al., Federal Practice and Procedure § 2725, at 433–37 (3d ed. 1998) (collecting cases and noting that

"if the evidence presented on the motion is subject to conflicting interpretations . . . summary judgment is improper")).

Reversed and remanded for additional proceedings.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

William D. Cohen, Associate Justice