COURT OF APPEALS DECISION DATED AND FILED

August 3, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP1785

Cir. Ct. No. 2015CV256

STATE OF WISCONSIN **IN COURT OF APPEALS DISTRICT IV**

DAVID A. JACKSON,

PLAINTIFF-RESPONDENT,

SYLVIA MATHEWS BURWELL, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, THE PYRAMID LIFE INSURANCE COMPANY AND NETWORK HEALTH INSURANCE CORPORATION,

INVOLUNTARY-PLAINTIFFS,

V.

ARDYCE E. DOUGLAS AND MCMILLAN-WARNER MUTUAL INSURANCE COMPANY,

DEFENDANTS-APPELLANTS,

ABC INSURANCE COMPANY, JEFFREY J. DOUGLAS AND NICOLE I. DOUGLAS,

DEFENDANTS.

APPEAL from an order of the circuit court for Waupaca County: PHILIP M. KIRK, Judge. *Reversed.*

Before Lundsten, P.J., Blanchard and Kloppenburg, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. David Jackson filed this action alleging that he was bitten by a dog owned by Jeffrey Douglas at Jeffrey's residence and that Ardyce Douglas, Jeffrey's mother and the owner of the property where the incident occurred, is liable for the resulting injuries.[1] Ardyce moved for summary judgment dismissing Jackson's claims against her on the ground that she was not an owner of the dog under WIS. STAT. § 174.02 (2015-16) and, therefore, cannot be held liable for damages for any injuries caused by the dog.[2] The circuit court denied the motion, and Ardyce appeals. We conclude that under controlling law the undisputed facts establish that Ardyce was not an owner under the statute. Therefore, we reverse.

¶2 We review a summary judgment decision using the same standards and method as is applied by the circuit court. ***Augsburger v. Homestead Mut. Ins. Co.***, 2014 WI 133, ¶14, 359 Wis. 2d 385, 856 N.W.2d 874. Summary judgment

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[1] Jackson also alleged claims against Jeffrey Douglas and his wife, but this appeal does not concern those claims.

For ease of discussion, we refer to the members of the Douglas family by their first names, and we refer both to Ardyce individually and to Ardyce and her insurer, McMillan-Warner, collectively as "Ardyce."

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

"shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2). Whether Ardyce can be held liable under WIS. STAT. § 174.02 is a question of statutory interpretation that we review de novo. ***Augsburger***, 359 Wis. 2d 385, ¶15.

¶3 WISCONSIN STAT. § 174.02 imposes strict liability on "the owner of a dog" for damages caused by the dog. WIS. STAT. § 174.02(1)(a). The statute defines "owner" as "any person who owns, harbors or keeps a dog." WIS. STAT. § 174.001(5). The parties agree that Ardyce did not "own" or "keep" the dog under § 174.001(5). The only issue on summary judgment is whether Ardyce "harbored" the dog.

¶4 Our supreme court has held that "the totality of the circumstances determines whether the legal owner of the property has exercised the requisite control over the property to be considered a harborer and thus an owner under the statute." ***Augsburger***, 359 Wis. 2d 385, ¶3. The "focus is on the amount of control the landowner exerts over the premises on which the dog is kept—whether the dog's legal owner is more akin to a houseguest or a tenant." ***Id.***, ¶30. Only in the former circumstance might the landowner be deemed to exercise the requisite control over the property where the dog is kept to be considered a harborer and thus an owner of the dog under the statute. ***Id.***, ¶¶24, 30, 44-45. "[W]hether the landowner lives on the premise with the dog is an important factor in" determining whether an individual is a harborer. ***Id.***, ¶22.

¶5 The following relevant facts are undisputed.

¶6 Ardyce owned the property where her son Jeffrey's dog allegedly bit Jackson, and she allowed Jeffrey and his family to live there after Jeffrey lost his job and Jeffrey and his family lost their house. Jeffrey and his family brought the dog with them when they moved to the property. They had been living at the property for approximately two years at the time of the incident. There was no lease or rental agreement, Ardyce told Jeffrey to pay what he could in rent, and Ardyce gave Jeffrey money each month for general living expenses and property maintenance. Jeffrey paid to repair a window at the property, took care of snow removal and yard work, and contacted Ardyce about issues with the property when he thought it was necessary. Ardyce lived approximately fifty miles away, at a separate residence that she owned, and visited Jeffrey and his family twice before the dog bite incident.

¶7 The facts set forth above are indistinguishable in any significant way from the facts in ***Augsburger***, where our supreme court held on summary judgment that the owner of the property where his daughter and her family resided could not be held liable as a "harborer" for the injuries caused by his daughter's dogs on that property. ***Id.***, ¶¶1-4, 14, 19. In that case, George Kontos owned the property where the injuries occurred, having purchased it for his daughter and her family to live in. ***Id.***, ¶5. Kontos lived in a separate residence seven miles away and did not often visit his daughter's family at their residence. ***Id.***, ¶45. While there was no formal rental agreement, and the daughter's family did not pay rent due to its financial circumstances, there was nothing in the record to indicate that Kontos prescribed rules for his daughter's family to follow, and they performed repairs and general maintenance on the property. ***Id.***, ¶¶44-45. Our supreme court determined that these facts showed that "Kontos did not exercise control over the ... property," that he "provided the property for his daughter with the intention that

she treat it as her home," and that his daughter's family "lived on the ... property, maintaining it as if it were their own residence." ***Id.***, ¶46. Considering the totality of these circumstances, the court concluded that Kontos was not a harborer of the dogs, explaining, "Although Kontos provided shelter for his daughter and family by buying the house for them to live in, he exercised no control over that property and maintained a separate residence. Ultimately, it was his daughter who provided shelter to the dogs." ***Id.***, ¶47.

¶8 The similar facts that led our supreme court to conclude that Kontos did not exercise the requisite control over the property where his daughter and her family resided to be deemed "a harborer and thus an owner under the statute," ***id.***, ¶3, compel us to reach the same conclusion as to Ardyce: Ardyce owned the property and let her son and his family live there when her son lost his job and the family lost their house; Ardyce lived in a separate residence approximately fifty miles away and rarely visited her son's family at their residence; and while there was no formal rental agreement, and Ardyce's son's family did not regularly pay rent due to its financial circumstances, Ardyce's son performed repairs and general maintenance on the property. Because, under the reasoning of ***Augsburger***, the undisputed facts here establish that Jeffrey and his family were more akin to tenants, treating and maintaining the property as if it were their own residence, we conclude that Ardyce was not a "harborer" and thus not a statutory owner of Jeffrey's dog.

¶9 Jackson argues that certain significant factors distinguish this case from ***Augsburger*** and make Jeffrey and his family more akin to houseguests than tenants. We are not persuaded.

¶10 First, Jackson points out that while Kontos in ***Augsburger*** purchased the property for his daughter and her family, here, Ardyce had been living at the property until Jeffrey and his family lost their home, at which point she moved to her other property, and Jeffrey testified that the arrangement was only temporary. However, Jackson does not explain why where Ardyce lived before she let Jeffrey and his family move to the property is relevant to the control Ardyce exercised over the property after she left and Jeffrey and his family moved in. Further, Jeffrey's complete testimony demonstrates that Ardyce was actually ceding day-to-day control over the property so long as Jeffrey and his family lived there: Jeffrey testified that Ardyce said that he and his family could stay at the property until he "can get back on [his] feet, and eventually she would like to fix up the place and sell it."

¶11 Second, Jackson points out that Ardyce left household furniture and appliances at the property when she moved to her other residence. Jackson argues that Ardyce's allowing Jeffrey and his family to use those items is more consistent with a homeowner-houseguest relationship than that of a landlord and tenant. However, Jackson does not persuasively distinguish that situation from situations in which landlords rent furnished residences or residences with appliances.

¶12 Third, Jackson argues that Ardyce's financial support of Jeffrey and his family amounts to a level of financial investment in the home that is more like that of a homeowner than a landlord. However, our supreme court in ***Augsburger*** held that similar evidence of financial support because of the child's family's situation did not make the child and her family akin to houseguests in light of the other circumstances present in that case, and, as we have explained, those other circumstances are also present here.

¶13 Finally, Jackson points to the fact that Ardyce had Jeffrey euthanize the dog after the incident, so that Ardyce could obtain new homeowner's insurance for the property after her prior insurance policy was terminated, as evidence that Ardyce had "ultimate control" over the dog's fate, and, therefore, over the property. However, Jackson does not attempt to distinguish this situation from that in which a landlord, who is sued and faces the prospect of liability, might require a tenant to remove a dog from the premises. In that situation, as here, the property owner's requiring the person residing on the property to remove the person's dog to minimize risk does not bring to mind how a property owner would treat a houseguest. In short, Jackson does not explain how the fact that Ardyce took action to ensure that her property was insured makes her less like a landlord.

By the Court.—Order reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.