[Cite as *Kovacks v. Lewis*, 2010-Ohio-3230.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DAVID KOVACKS, JR., by and through his Mother and Natural Guardian, SHERRY SHOEMAKER, et al.

Plaintiffs-Appellants

-vs-

DAWN MARIE LEWIS, et al.

Defendants-Appellees

JUDGES:
Hon. W. Scott Gwin, P. J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. 2010 AP 01 0001

O P I N I O N

CHARACTER OF PROCEEDING: Civil Appeal from the Court of Common Pleas, Case No. 2008 CT 08 0616

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: July 8, 2010

APPEARANCES:

For Plaintiffs-Appellants

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Wise, J.

{¶1} Plaintiffs-Appellants David Kovacks, Jr., by and through his mother and natural guardian, Sherry Shoemaker, Sherry Shoemaker and David Kovacks, Sr. appeal the June 24, 2009, decision of the Tuscarawas County Court of Common Pleas granting summary judgment in favor of Defendants-Appellees Donald Walter and Corinne Walter.

STATEMENT OF THE FACTS AND CASE

{¶2} On or about September 4, 2005, David Kovacks, Jr., the minor son of Plaintiffs-Appellants, Sherry Shoemaker and David Kovacks, Sr., was bitten by a dog while visiting the home of Dawn and Rick Lewis, located at 3231 State Route 516 in Dover, Ohio.

{¶3} Defendants-Appellees Donald and Corinee Walter are the parents of Dawn Lewis. The Walters are the owners of the property located at 3231 State Route 516. Such property was purchased in June, 2004, with the intention of having the Lewises live there and pay rent until such time as they can obtain their own financing and purchase the property from the Walters. According to Donald Walter, a verbal agreement existed wherein the Lewises would pay $915.00 per month in rent, which was the amount of the mortgage payment, in addition to the property taxes and insurance. To avoid commingling their finances, Mr. Walter even set up a separate bank account at Citizen's Bank where he would deposit the money he received from the Lewises. (Donald Walter Depo. at 6-8). If a penalty arose as a result of the Lewises making their monthly payments late, the Walters expected them to pay a late fee. (Donald Walter Depo. at 13). Additionally, the Lewises had the utility bills for the State

Route 516 address, such as gas, water and electric, placed in their names and assumed those obligations.

{¶4} In addition to the payments outlined above, it was expected that the Lewises would do the yard work and otherwise maintain the property. (Donald Walter Depo at 19).

{¶5} At the time of the incident in September, 2005, the Lewises were current on all of their obligations to the Walters. (Corrine Walter Depo at 14; Donald Walter Depo. at 15).

{¶6} In either January or February of 2005, the Lewises acquired the dog in question. The Walters admit that they knew about the dog and that Mrs. Walter had even co-signed for the loan for the purchase of the dog. (Corinne Walter Depo. at 17-18). However, they stated that they were not the owners of the dog. They further stated that they were not in possession or control of the home or the dog when the dog bite occurred on September 4, 2005. Further, they stated that prior to this incident, the dog never showed any propensity for violence and had never bitten or harmed anyone. (Corrine Walter Depo. at 24; Donald Walter Depo. at 21).

{¶7} The depositions of Donald and Corrine Walter establish that they resided at 213 W. Jefferson, Stone Creek, Ohio, at the time of the incident. (Depo. of Corrine Walter at p. 6.) This was 13-15 miles away from the 3231 State Route 516, Dover, Ohio street address where the incident occurred. (Depo. of Donald Walter at p. 27.)

{¶8} On August 13, 2008, Plaintiffs-Appellants David Kovacks, Jr., by and through is mother and natural guardian, Sherry Shoemaker, Sherry Shoemaker and David Kovacks, Sr. filed a Complaint in the Tuscarawas Common Pleas Court naming

Donald and Corrine Walter as the landlords/owners of the property and Dawn and Richard Lewis, as the tenants of the property. Dawn and Richard Lewis failed to answer the complaint and a default judgment was taken against them by the Plaintiffs. A timely answer was filed on behalf of Donald and Corrine Walter.

{¶9} Following discovery, Defendants-Appellees filed a motion for summary judgment.

{¶10} On May 26, 2009, this motion came before the trial court on a non-oral hearing.

{¶11} By Judgment Entry filed June 24, 2009, the trial court granted the Walters' motion for summary judgment.

{¶12} Thereafter, Plaintiffs filed a motion for a default judgment against the Lewises on August 13, 2009.

{¶13} In October, 2009, the trial court granted the motion for default and scheduled the matter for a hearing on damages for November 12, 2009 at 9:00 a.m.

{¶14} By Judgment Entry filed December 7, 2009, the trial court entered a default judgment against the Lewises in the amount of $31,374.00.

{¶15} Appellants now appeal the trial court's Judgment Entry granting summary judgment in favor of the Walters, raising the following assignment of error:

ASSIGNMENT OF ERROR

{¶16} "I. THE TRIAL COURT INCORRECTLY GRANTED SUMMARY JUDGMENT CONCLUDING THAT NO GENUINE ISSUES OF MATERIAL FACT EXISTED REGARDING WHETHER OWNERS OF REAL PROPERTY WHERE THE DOG LIVED WERE HARBORERS OR OWNERS OF DOG."

I.

{¶17} In their sole assignment of error, Appellants argue that the trial court erred in granting Appellees' motion for summary judgment. We disagree.

{¶18} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36. Civ.R. 56(C) provides, in pertinent part:

{¶19} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, 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, such party being entitled to have the evidence or stipulation construed most strongly in his favor."

{¶20} Pursuant to the above rule, a trial court may not enter a summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot

support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 1997-Ohio-259, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107.

{¶21} It is based upon this standard that we review Appellants' assignment of error.

{¶22} There are two bases for recovery in Ohio for injuries sustained as a result of a dog bite: common law and statutory. "At common law, the keeper of a vicious dog could not be liable for personal injury caused by the dog unless the person [keeper] knew of the dog's 'vicious propensities.' " *Bora v. Kerchelich* (1983), 2 Ohio St.3d 146, 147, 443 N.E.2d 509, quoting *Hayes v. Smith* (1900), 62 Ohio St. 161, 56 N.E. 879, paragraph one of the syllabus. Thus, in a common law action for bodily injuries caused by a dog, a plaintiff must show that (1) the defendant owned or harbored the dog, (2) the dog was vicious, (3) the defendant knew of the dog's viciousness, and (4) the dog was kept in a negligent manner after the keeper knew of its viciousness. *Hayes* at paragraph one of the syllabus. In a common law action for bodily injuries caused by a dog, as in any other common law tort action, punitive damages may be awarded. *McIntosh v. Doddy* (1947), 81 Ohio App. 351, 359, 77 N.E.2d 260.

{¶23} The statutory cause of action arises under R.C. §955.28, which provides:

{¶24} "The 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, unless the injury, death, or loss was caused to the person or property of an individual who, at the time, was committing or attempting to commit a trespass or other criminal offense on the

property of the owner, keeper, or harborer, or was committing or attempting to commit a criminal offense against any person, or was teasing, tormenting, or abusing the dog on the owner's, keeper's, or harborer's property."

{¶25} The statutory cause of action "eliminated the necessity of pleading and proving the keeper's knowledge" of the dog's viciousness. *Bora v. Kerchelich* (1983), 2 Ohio St.3d 146, 147, 443 N.E.2d 509. Consequently, in an action for damages under R.C. §955.28, the plaintiff must prove (1) ownership or keepership [or harborship] of the dog, (2) that the dog's actions were the proximate cause of the injury, and (3) the damages. *Hirschauer v. Davis* (1955), 163 Ohio St. 105, 126 N.E.2d 337, paragraph three of the syllabus. Thus, the defendant's knowledge of the dog's viciousness and the defendant's negligence in keeping the dog are irrelevant in a statutory action. *Beckett v. Warren*, 124 Ohio St.3d 256, 258, 2010-Ohio-4.

{¶26} In the case sub judice, Plaintiffs-Appellants asserted both a common law and a statutory claim.[1] Appellants claim that the Walters, as co-signers of a purchase loan for the dog and owners/landlords of the property with knowledge of the dog, can and should be considered "harborers" of the dog for purposes of liability arising from the dog biting the minor child in this case.

{¶27} A "harborer" is someone who has possession and control of the premises where the dog lives and silently acquiesces to the dog's presence. *Bowman v. Scott,* Summit App. No. 21568, 2003-Ohio-7182;*Thompson v. Irvin* (1997), Butler App. No.

[1] The Ohio Supreme Court in *Beckett v. Warren*, 124 Ohio St.3d 256, 2010-Ohio-4, recently held that a plaintiff may, in the same case, pursue claims for a dog bite injury under both R.C. §955.28 and common law negligence.

CA97-05-101. The hallmark of control is the ability to advent or to exclude others from the property. *Flint v. Holbrook* (1992), 80 Ohio App.3d 21.

{¶28} Generally speaking, a landlord will not be held responsible for injury caused by a tenant's dog so long as the tenant is in exclusive possession and control of the premises. Absent a contrary agreement, a lease agreement transfers both the possession and the control of the premises to the tenant. *Burrell v. Iwenofu,* Cuyahoga App. No. 81230, 2003-Ohio-1158; *Hilty v. Topaz,* Franklin App. No. 04AP-13, 2004-Ohio 4859. See *Parker v. Sutton* (1991), 72 Ohio App.3d 296, 299, 594 N.E.2d 659; *Hurst v. Manalo* (Jul. 29, 1999), Cuyahoga App. No. 74270.

{¶29} Regarding the relationship between a landlord and tenant, “it is well-established that a lease transfers both possession and control of the leased premises to the tenant.” *Richeson v. Leist,* 12th Dist. No. CA2006-11-138, 2007-Ohio-3610, at ¶ 13 (citing *Flint,* 80 Ohio App.3d at 25, 608 N.E.2d 809). Accordingly, “[i]f the tenant's dog is confined only to the tenant's premises, the landlord cannot be said to have possession and control of the premises on which the dog is kept.” *Godsey v. Franz,* 6th Dist. No. 91 WM000008, 1992 WL 48532 at *4 (Mar. 13, 1992). 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,* 2002-Ohio-2327, at ¶ 13 (citing *Godsey,* 1992 WL 48532 at *4). “[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.’ ” *Richeson,* 2007-Ohio-3610, at ¶ 13 (quoting *Engwert-Loyd v. Ramirez,* 6th Dist. No. L-06-1084, 2006-Ohio-5468, at ¶ 11).

{¶30} In the instant case, the Walters testified that daughter and son-in-law leased the premises where the attack occurred. This is sufficient to carry their initial summary judgment burden. Typically, landlords do not have sufficient possession over leased premises to control what happens with a tenant's dog.

{¶31} In this case, however, Appellants argue that the fact that the landlords are the mother and father/mother-in-law and father-in-law of the tenants and the lack of a written lease agreement which spells out the rights and responsibilities of each party raise questions as to whether the Walters may have had more possession and control over the rental property than a typical landlord.

{¶32} Here, our review of the record indicates that the Lewises rented the single-family residence at issue from Appellees with the goal of buying it outright at some point in the future when they were more financially stable. The Lewises paid rent to the Walters in an amount equal to the mortgage payment each month and were current in their obligations to the Walters. Appellees stated that the Lewises were in sole possession and control of the property and that they themselves live miles away. Appellees testified that they never lived at the subject residence and that the Lewises, in addition to paying rent, were responsible for paying the utility bills, property taxes and insurance. They also were responsible for maintaining the house and the yard.

{¶33} While Appellants argue that Appellees retained control over the property because they had keys to the property and could come and go as they pleased, Appellees testified that they never used the keys or let themselves in without first letting the Lewises know that they would be doing so.

{¶34} We find no authority for the proposition that such act by a landlord as using a key to let themselves into a property with the knowledge of the tenant constitutes "control" for purposes of liability in tort. "The control necessary as the basis for liability in tort implies the power and the right to admit people to [an area on the leased premises] and to exclude people from it." *Cooper v. Rose* (1949), 151 Ohio St. 316, 319. Having leased the residence to the Lewises, Appellees surrendered this power and right at that time. Accordingly, we find no merit in Appellants' argument that Appellees retained sufficient control over the leased premises to support a finding they were "harborers" of the Lewises' dog.

{¶35} Appellants further contend the trial court erred in finding Mrs. Walter was not a "harborer" because she co-signed for the loan for the purchase of the dog. However, Ms. Walter testified that she never made any payments on the dog, that she did not even know what the purchase price of the dog was, that she did not care for the dog, and further that the Lewises were the one that paid for the dog and filed the license application for the dog.

{¶36} Based on the foregoing, we find that summary judgment in favor of Appellees was proper in this case.

{¶37} Appellant's sole assignment of error is overruled.

{¶38} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas of Tuscarawas County, Ohio, is affirmed.

By: Wise, J.

Gwin, P. J., and

Farmer, J., concur.

/S/ JOHN W. WISE

/S/ W. SCOTT GWIN

/S/ SHEILA G. FARMER

JUDGES

JWW/d 0701

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DAVID KOVACKS, JR., by and through His Mother and Natural Guardian, SHERRY SHOEMAKER, et al	:	
Plaintiffs-Appellants	:	
-vs-	:	JUDGMENT ENTRY
DAWN MARIE LEWIS, et al.	:	
Defendants-Appellees	:	Case No. 2010 AP 01 0001

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Tuscarawas County, Ohio, is affirmed.

Costs assessed to Appellants.

/S/ JOHN W. WISE_____

/S/ W. SCOTT GWIN_____

/S/ SHEILA G. FARMER_____

JUDGES