[Cite as *Weisman v. Wasserman*, 2018-Ohio-290.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105793

OLIVIA WEISMAN, ET AL.

PLAINTIFFS-APPELLANTS

vs.

THOMAS WASSERMAN, JR., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-16-859652

BEFORE: Kilbane, P.J., S. Gallagher, J., and Blackmon, J.

RELEASED AND JOURNALIZED: January 25, 2018

ATTORNEYS FOR APPELLANTS

Christian R. Patno
Colin Ray
McCarthy, Lebit, Crystal & Liffman Co.
101 West Prospect Ave., Suite 1800
Cleveland, Ohio 44115

ATTORNEYS FOR APPELLEES

Robert J. Koeth
Anne E. Leo
Koeth, Rice & Leo Co., L.P.A.
1280 West Third Street
Cleveland, Ohio 44113

Danamarie Pannella
1343 Sharon-Copley Road
P.O. Box 345
Sharon Center, Ohio 44274

MARY EILEEN KILBANE, P.J.:

{¶1} Plaintiffs-appellants, Olivia and Brian Weisman, individually and as the parents of Wyatt and Aiden Weisman (collectively referred to as "the Weismans"), appeal the trial court's decision granting summary judgment in favor of defendant-appellee, Thomas Wasserman, Jr. ("Wasserman"). For the reasons set forth below, we reverse and remand.

{¶2} In February 2016, the Weismans brought an action against Wasserman, the city of Lakewood ("the City"), Erin Meisenbach ("Meisenbach") and Adam Valley ("Valley"), alleging that six-year old Wyatt was attacked and bitten by Valley's pit bull when the pit bull lunged at him as he opened the door to the second floor unit of a two-unit rental property owned by Wasserman and located in Lakewood. Wyatt lived next door and came over to Meisenbach's to play with Valley's children. Wyatt was bitten in the face and sustained severe injuries, which required stitches and plastic surgery.

{¶3} At the time of the incident, Meisenbach rented the second floor unit from Wasserman. Valley owned the pit bull and lived with Meisenbach, who was his girlfriend at the time. The Weismans alleged that Meisenbach and Valley failed to register the pit bull with the City and falsely claimed the pit bull was an "emotional support dog" to avoid the vicious dog ban imposed by the City. The Weismans further alleged that Wasserman was aware that the pit bull was kept in common areas of his

rental property. With respect to the City, the Weismans alleged that the City knew that the pit bull was vicious and was not a service animal exempt from the City ordinance.

{¶4} Following discovery, the Weismans voluntarily dismissed the City, without prejudice in November 2016. Meisenbach and Valley moved for summary judgment and Wasserman separately moved for summary judgment. The trial court denied Meisenbach and Valley's motion, but granted Wasserman's motion. In granting his motion for summary judgment, the trial court stated, in part:

> It is well-established in Ohio that a suit for damages resulting from dog bites can be instituted under both statute and common law. *Warner v. Wolfe* (1964), 176 Ohio St. 389, 393, 199 N.E.2d 860. R.C. 955.28(B) imposes strict liability on the owner, keeper, or harborer of a dog "for any injury, death, or loss to person or property that is caused by the dog." The application of R.C. 955.28 requires three issues to be determined by the trier of fact in order to find one strictly liable: (1) whether one is the owner, keeper, or harborer of the dog; (2) whether the actions of the dog were the proximate cause of damage; and (3) the monetary amount of damage. *Hirschauer v. Davis* (1955), 163 Ohio St. 105, 109, 126 N.E.2d 337. Thus, summary judgment is proper if no genuine issues of fact exist on either of these first two issues. *Thompson v. Irwin*, 1997 Ohio App. Lexis 4728 (12th Dist.). Thus, the Weismans are required under the dog bite statute R.C. 955.28(B) for strict liability to show that Wasserman harbored the dog. Under the common law, the Weismans must show Wasserman * * * harbored the dog with knowledge of its vicious tendencies. *Burgess v. Tackas*, 125 Ohio App.3d 294, 708 N.E.2d 285, (8th Dist. 1998).
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> In order to show that Weisman harbored Tyson [the pit bull], the Weismans must show that Wasserman, as landlord, permitted the dog in the common areas. *Id.* at 7-8. In resolving the issue of harboring, the Eighth District, citing *Thompson*, has held that a landlord can and should only be liable if the dog attacks someone in the common areas or in an area shared by both the landlord and the tenant. *Id.* In *Burgess*, the appellate court upheld the granting of a landlord's motion for summary judgment where the dog bite occurred in a tenant's trailer. The court reasoned that to hold the landlords liable would make them quasi owners and possessors of the tenant's trailer. It is well established that a lease transfers both possession and control of the

> leased premises to the tenant. *Id.*, citing *Thompson*, supra, 1997 Ohio App. Lexis 4728 at * 6-7.
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> While the Weismans argue that the attack could have occurred outside of the apartment unit and in the common area of the rental home, the record is devoid of any evidence to support that contention. Valley's affidavit says he saw the dog attacking Wyatt in his apartment. Wasserman testified at deposition that almost all of the blood at the scene of the attack was inside the apartment. [The Weismans] attempt to argue that because Wasserman also testified that he saw a couple of drops of blood in the hallway, that is direct testimony that the attack could have taken place in the hallway. Even construing the evidence most strongly in favor of the Weismans, this court disagrees and finds that reasonable minds can come but to one conclusion, and that conclusion is that the dog bite occurred inside of the apartment. As such, under the rule laid out in *Burgess*, Wasserman cannot be said to have harbored Tyson. Therefore, the Weismans have not shown a genuine issue of material fact for trial with regard to their claims under R.C. 955.28 strict liability or under common law against defendant Wasserman.
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> For the forgoing reasons, defendant Wasserman's motion for summary judgment is well taken and hereby granted. Defendant Wasserman's case is hereby dismissed with prejudice.

{¶5} It is from this order that Weismans appeal, raising the following single assignment of error for review.

Assignment of Error

> The trial court erred in granting summary judgment to [Wasserman].

{¶6} We review an appeal from summary judgment under a de novo standard of review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241; *Zemcik v. LaPine Truck Sales & Equip. Co.*, 124 Ohio App.3d 581, 585, 706 N.E.2d 860 (8th Dist.1998). In *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367,

369-370, 1998-Ohio-389, 696 N.E.2d 201, the Ohio Supreme Court set forth the appropriate test as follows:

> Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp.*, 73 Ohio St.3d 679, 1995-Ohio-286, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264.

{¶7} Once the moving party satisfies its burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E); *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 1996-Ohio-389, 667 N.E.2d 1197. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 1992-Ohio-95, 604 N.E.2d 138.

{¶8} The Weismans argue the trial court erred when it found that Wasserman did not violate Lakewood Codified Ordinance 506.01 ("L.C.O. 506.01") because Wasserman knowingly allowed Valley to keep a pit bull on the premises. L.C.O. 506.01 provides that: "[n]o person shall keep, harbor or own any dangerous or vicious animal within the City of Lakewood, or permit any dangerous animal to be kept within the City of Lakewood except in accordance with the provisions in Section 506.04." They further

argue the trial court erred when it found that the attack occurred inside the apartment and not in a common area.

{¶9} As the trial court stated in its decision, a suit for damages resulting from a dog bite can be instituted under both statute and common law. *Warner v. Wolfe*, 176 Ohio St. 389, 393, 199 N.E.2d 860 (1964). R.C. 955.28(B) imposes strict liability on 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 order to find one strictly liable under R.C. 955.28, the following three issues must be determined by the trier of fact: (1) whether one is the owner, keeper, or harborer of the dog; (2) whether the actions of the dog were the proximate cause of damage; and (3) the monetary amount of damage. *Hirschauer*, 163 Ohio St. at 109, 126 N.E.2d 337 (1955); *Thompson v. Irwin*, 12th Dist. Butler No. CA97-05-101, 1997 Ohio App. LEXIS 4728, 4 (Oct. 27, 1997). Therefore, under the strict liability statute, R.C. 955.28(B), the Weismans are required to show that Wasserman harbored the dog. Under common law, the Weismans must show Wasserman harbored the dog with knowledge of its vicious tendencies. *Burgess v. Tackas*, 125 Ohio App.3d 294, 708 N.E.2d 285 (8th Dist. 1998).

{¶10} At issue in the instant case, is whether Wasserman harbored the dog. In order to show that Wasserman harbored the pit bull, the Weismans must show that Wasserman, as the landlord, permitted the dog in the common areas. *Burgess* at 297, citing *Thompson* at 4, citing *Flint v. Holbrook*, 80 Ohio App.3d 21, 25, 608 N.E.2d 809 (2d Dist.1992).

> *Thompson*, in resolving the issue of harboring, explained that a landlord can and should only be liable if the dog attacks someone in the common areas or in an area shared by both the landlord and the tenant. 1997 Ohio App. LEXIS 4728 at *7-8. If 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. *Id.* *Thompson* clearly limits the landlord's responsibility to the common areas or shared areas by both the landlord and tenant.

Id. Therefore, for a landlord to be liable_as a harborer, the plaintiff must demonstrate that the landlord permitted the tenant's dog in common areas since a landlord is not in possession and control of the tenant's premises. *Id.* at 297-298; *Brown v. FMW RRI NC LLC*, 10th Dist. Franklin No. 14AP-953, 2015-Ohio-4192.

{¶11} In the instant case, the trial court concluded that the record is devoid of any evidence to support the contention that the attack occurred in a common area, stating that almost all of the blood at the scene of the attack was inside the apartment. We disagree, and based on our de novo review of the record, we find that reasonable minds cannot conclude that the attack occurred inside the apartment only.

{¶12} A review of the record reveals that Wasserman believed the dog to be a pit bull. He had a discussion with Meisenbach about the dog because the City has a ban on pit bulls. Meisenbach represented to Wasserman that the dog was an emotional support dog for Valley's children. On the date of the incident, Wyatt went upstairs where he was attacked and bitten in the face by Valley's dog. In his affidavit, Valley states that Wyatt was attacked by his pit bull in his apartment and in front of his two children. However, Valley also states that he was outside when the attack occurred and ran upstairs after hearing screams. Upon entering his apartment, he observed that Wyatt was injured.

{¶13} Wasserman testified at his deposition that he arrived to his rental property after the incident. Wasserman testified that there was blood both in the hallway and the kitchen, with more blood in the kitchen. Specifically, he stated that as he walked to the upstairs unit, he observed blood droplets on the ground in the hallway. There was blood on the stair landing and on one of the steps. He also observed "some blood droplets on the kitchen wall doorway, kind of, and maybe some smears."

{¶14} The details of the attack consist of Valley's and Wasserman's after-the-fact account of the incident. Based on their accounts, there is evidence that the attack could have occurred in the hallway, which is a common area. When viewing this evidence in favor of the Weismans, we find genuine issues of material fact exist as to where the attack occurred. An attack in a common area would subject Wasserman, as the landlord, to liability as a harborer of the pit bull. Therefore, we find that summary judgment was improperly granted in favor of Wasserman.

{¶15} Accordingly, the sole assignment of error is sustained.

{¶16} Judgment is reversed and the matter is remanded for further proceedings consistent with this opinion.

It is, therefore, considered that said appellants recover of said appellees their costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, PRESIDING JUDGE

SEAN C. GALLAGHER, J., and
PATRICIA ANN BLACKMON, J., CONCUR