

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

Jessica Guerra

Court of Appeals No. OT-05-016

Appellant

Trial Court No. 03-CVC-193

v.

Troy J. Kresser, et al.

DECISION AND JUDGMENT ENTRY

Appellees

Decided: December 9, 2005

* * * * *

Kevin J. Zeiher, for appellant.

Philip S. Heebsh, for appellees.

* * * * *

SKOW, J.

{¶ 1} Appellant, Jessica Guerra, appeals the Ottawa County Court of Common Pleas' grant of summary judgment to Catawba Island Club ("CIC"), appellee. For the following reasons, we affirm.

{¶ 2} On July 9, 2001, appellant was riding on the backseat of a motorcycle, driven by Troy Kresser, on County Road No. 30 in Catawba Township in Ottawa County, when the motorcycle collided with Scooby, a dog co-owned by Cassie Thomas and

Jonathon Harrold.¹ Thomas, along with three other residents and co-workers, lived in a rental property leased from their employer, CIC. For reasons unknown to its owners, Scooby had gotten loose and had run into the road in front of Kresser's motorcycle. Kresser testified that he could not avoid hitting the dog; although it was a clear, dry night, on straight, even pavement, there were no street lights, it was dark, and the dog was black. The accident report diagram shows that the motorcycle skidded along the road before coming to rest. Both Kresser and appellant were removed from the scene by ambulance. Scooby was fatally injured.

{¶ 3} On July 7, 2003, appellant filed the instant complaint seeking compensation for her injuries incurred in the accident. She raised three theories in support of her claim against CIC: (1) that CIC was liable as a "harborer" of the dog pursuant to R.C. 955.28(B); (2) that CIC was liable under the common law of negligence; (3) that CIC was liable under the doctrine of respondeat superior for the actions of its employees in keeping Scooby. After some discovery, CIC moved for summary judgment.

{¶ 4} The trial court's judgment entry of April 11, 2005, granted summary judgment to CIC on the grounds that it was not a harborer of the dog at the time of the accident and that Thomas and Harrold were not keeping the dog within the course and scope of their employment. Appellant timely filed an appeal, raising three assignments of error for review:

¹Kresser, Thomas, and Harrold were also named defendants in appellant's complaint.

{¶ 5} "(1) The trial court erred in granting the Defendant/Appellee's motion for summary judgment because there exists a genuine issue of material fact concerning whether the Defendant/Appellee is liable as a harbinger pursuant to R.C. 95.11 et seq. [sic]

{¶ 6} "(2) The trial court erred in granting the Defendant/Appellee's motion for summary judgment because there exists a genuine issue of material fact concerning whether the Defendant/Appellee is liable under common law for negligence.

{¶ 7} "(3) The trial court erred in granting the Defendant/Appellee's motion for summary judgment because there exists a genuine issue of material fact concerning whether the Defendant/Appellee is liable under the theory of respondeat superior."

{¶ 8} In her first assignment of error, appellant renews arguments made before the trial court that R.C. 955.28 renders appellee liable for her injuries. That statute states in relevant part:

{¶ 9} "The owner, keeper, or harbinger 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 harbinger, 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 harbinger's property." R.C. 955.28(B).

{¶ 10} Pursuant to this statute, an owner of a dog which runs into a roadway and causes an accident has been held strictly liable for all damage caused. *Bullis v. Valentine* (June 2, 2000), 6th Dist. No. WD-99-076; *Ohio Casualty Ins. Co. et al. v. Robison*

(1982), 5 Ohio App.3d 223. However, neither *Bullis* nor *Robison* considered the liability of the dog owner's landlord. Cases which have considered a landlord's liability for damage caused by a tenant's dog involve dog bites or other acts which involve a consideration of the animal's viciousness and whether the landlord knew of that propensity. See *Parker v. Sutton* (1991), 72 Ohio App.3d 296; *Godsey v. Franz* (Mar. 13, 1992), 6th Dist. No. 91-WM-08.

{¶ 11} *Parker* found a landlord not liable for damage caused by a tenant's dog when it bit a minor child, mainly resting on the point that the landlord thought the dog had been destroyed prior to the incident. Additionally, because the landlord's knowledge of the dog's vicious propensities was central to that case, the test for liability therein is inapposite to these facts. *Parker*, supra, at 300. In *Godsey*, albeit in a different factual context, we applied the definition of "harbor" from *Sengel v. Maddox* (1945), 16 Ohio Supp. 137, 31 O.O. 201, 203:

{¶ 12} "The word 'harbor' as a transitive verb is defined by Webster:

{¶ 13} "'To afford lodging to; to entertain as a guest; to shelter; to receive; to give refuge to; to contain.'" Therefore, "[a] person who is in possession and control of the premises where the dog lives, and silently acquiesces in the dog being kept there by the owner, can be held liable as a 'harborer' of the dog." *Id.*, at paragraph two of the syllabus." *Godsey*, supra at 3.

{¶ 14} Appellant points to the disputed fact that appellee knew of Scooby's presence as evidence that it qualifies as a "harborer" under the statute. However, appellant does not dispute that, in the spring of 2001, Mr. Schenk, a CIC manager, met

with Thomas and informed her that keeping Scooby was in violation of her lease agreement and that she would have to find another place to live. In *Godsey*, however, we stated that "acquiescence" is "essential to 'harborship' and requires some intent" and that merely allowing a dog to stay temporarily on the premises is insufficient, by itself, to establish that person as a "harborer." Although, as appellant argues, CIC may have taken more affirmative acts to remove appellant from the property, Thomas testified that CIC did not, at the time of the accident, acquiesce in Scooby's habitation of the premises. Further, the evidence establishes that CIC was not in possession and control of the premises, the second essential element for landlord liability as a "harborer," simply because it retained the right to inspect the premises; nothing in the record can overcome application of the general rule that the lease transferred possession and control of the premises to the tenants. See *Flint v. Holbrook* (1992), 80 Ohio App.3d 21. After reviewing the record and construing all inferences in appellant's favor, reasonable minds could only conclude that CIC was not "harboring" Scooby at the time of the incident. Appellant's first assignment of error is not, therefore, well taken.

{¶ 15} Appellant's second assignment of error argues that CIC is liable under common law theories of negligence. Appellant cites cases which, as above, require consideration of whether the landlord had knowledge of a dog's vicious character in order to impose liability. Here, the parties do not contend that Scooby had a vicious nature, or that a vicious nature factored into the circumstances. Appellant points to Schenk's testimony that he had viewed Scooby running loose as evidence that CIC acquiesced in Scooby's presence and that it had knowledge of his wanderlust; however, CIC told

Thomas in no uncertain terms that she was not allowed to keep Scooby after Schenk had witnessed him (Scooby) running loose. Further, as in *Thompson v. Irwin* (Oct. 27, 1997), 12th Dist. No. CA-97-05-101, CIC did not acquiesce in Scooby running loose, much less acquiesce in allowing Scooby into a "common area." Thus, appellant's second assignment of error is also not well taken.

{¶ 16} Lastly, appellant argues that CIC is liable under the doctrine of respondeat superior, since Thomas and Harrold were CIC employees and were living on CIC property. Appellant advances no evidence that Thomas or Harrold kept Scooby within the course and scope of their employment beyond living in the house rented to them by CIC, although she correctly states the rule that the crucial element in a vicarious liability case is whether the tortious conduct was in furtherance or in promotion of the employer's interests. See *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 59. The trial court properly concluded that Thomas and Harrold were not acting within the course and scope of their employment when they failed to keep Scooby properly confined. See, e.g., *Wrinkle v. Cotton*, 9th Dist. No. 03CA008401, 2004-Ohio-4335; *Smith v. Troyer Potato Products, Inc.* (July 29, 1999), 8th Dist. No. 74522. We find, as did the trial court, that appellant's assertion warrants no further scrutiny. The third assignment of error is not well taken.

{¶ 17} For the foregoing reasons, the judgment of the Ottawa County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Ottawa County.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

William J. Skow, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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