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19-P-1159

Appeals Court

VICTOR CREATINI vs. MARK McHUGH.

No. 19-P-1159.

Essex. November 6, 2020. - January 27, 2021.

Present: Massing, Kinder, & Grant, JJ.

Dog. Negligence, One owning or controlling real estate, Duty to prevent harm, Foreseeability of harm. Practice, Civil, Notice of appeal, Summary judgment.

Civil action commenced in the Superior Court Department on February 2, 2017.

The case was heard by Timothy Q. Feeley, J., on a motion for summary judgment, and a motion for reconsideration was considered by him.

Helen G. Litsas for the plaintiff.
Robert J. Gizmunt for the defendant.

KINDER, J. In this negligence action we address the question whether a landowner has a legal duty to protect passers-by from a dog kept on the landowner's property, but owned by the landowner's tenant. The plaintiff, Victor Creatini, was injured when he fell from his bicycle on a public

way near property owned by the defendant, Mark McHugh.

Creatini's complaint alleged that the injury occurred when a pit bull terrier (pit bull) owned by McHugh's tenant, Sean Mills, chased and attacked the dog that Creatini had on a leash.

Creatini claimed that McHugh breached a legal duty to protect Creatini from Mills's pit bull. A Superior Court judge disagreed and, in a comprehensive written decision, allowed summary judgment for McHugh, concluding that "reasonable persons would not recognize such a duty." On appeal, Creatini argues that his injury was a "foreseeable consequence[] of McHugh not ensuring the proper storage of the pit bull on his property, and McHugh therefore owed Creatini a duty of reasonable care." We affirm the summary judgment for McHugh.¹

Background. We summarize the undisputed material facts in the light most favorable to Creatini, the party who opposed summary judgment. See Sarkisian v. Concept Restaurants, Inc., 471 Mass. 679, 680 (2015). McHugh owned a multifamily dwelling on Superior Street in Swampscott, where he lived on the second floor. Mills, McHugh's tenant, lived on the first floor.

McHugh had known for over a year that Mills kept a dog at his apartment and had asked Mills to "get rid of the dog." McHugh described the dog as "a mixed breed" and that "[p]itbull

¹ Creatini also filed claims against Mills. Those claims were settled and Mills is not a party to this appeal.

could have been one of the breeds." The judge concluded that the breed of the dog was a disputed fact. Like the judge, we assume for summary judgment purposes that the dog was a pit bull.

On June 13, 2015, Creatini, who was unknown to McHugh, was riding his bicycle on Superior Street with his dog running on a leash beside the bicycle. As Creatini passed McHugh's property, Mills's unleashed pit bull ran from McHugh's unfenced yard into Superior Street and attacked Creatini's dog. The ensuing dog fight caused Creatini, who was still holding his dog's leash, to fall from his bicycle and suffer injuries. Creatini was not attacked or bitten by Mills's pit bull.

Discussion. 1. Appellate jurisdiction. We first address a threshold procedural issue. McHugh claims that we lack jurisdiction over this appeal because Creatini did not file a valid, timely notice of appeal. See DeLucia v. Kfoury, 93 Mass. App. Ct. 166, 170 (2018) ("A timely notice of appeal is a jurisdictional prerequisite to our authority to consider any matter on appeal"). More specifically, McHugh argues that Creatini's first notice of appeal on January 15, 2019, was ineffective because it was filed before there was a final judgment in the case, and that the second notice of appeal, filed on June 13, 2019, was not timely. Creatini concedes that both notices of appeal were premature. Nevertheless, he asks

that we consider the merits of his appeal because the issues are important and have been fully briefed. See ZVI Constr. Co. v. Levy, 90 Mass. App. Ct. 412, 418 (2016) (appellate court has discretion to consider premature appeal where issues are important and fully developed). The Supreme Judicial Court has "recognized that a decision on the merits should not be avoided on the technicality that a premature notice of appeal was or may have been filed, where no other party has been prejudiced by that fact." Swampscott Educ. Ass'n v. Swampscott, 391 Mass. 864, 865-866 (1984). Mindful of this principle and of McHugh's concession that a decision on the merits is in the interests of judicial economy, we exercise our discretion to reach the merits.²

2. Summary judgment. We review a grant of summary judgment de novo to determine "whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991). The moving party may prevail by showing that the nonmoving party "has no reasonable expectation of proving an essential element of" his claim at

² Deciding the case as we do, we need not address McHugh's argument that Creatini waived his right to appeal by filing an amended complaint that only included claims against Mills, after summary judgment was allowed for McHugh.

trial. Kourouvacilis v. General Motors Corp., 410 Mass 706, 716 (1991).

We note at the outset that the claim against McHugh is not governed by the so-called "dog bite statute" under which the owner or keeper³ of a dog is strictly liable for damage done by the dog. See G. L. c. 140, § 155.⁴ This statute applies only to Mills, the dog's owner, and Creatini's claims against Mills have been resolved. Because McHugh's conduct is not governed by statute, we apply common-law negligence principles. See Andrews v. Jordan Marsh Co., 283 Mass. 158, 162 (1933) (if no statute applies, liability for injuries caused by dogs is determined by general principles).

To prevail on a negligence claim, Creatini must prove that McHugh owed him a duty of reasonable care, that McHugh breached that duty, that damage resulted, and that there was a causal

³ A keeper of a dog has been defined as one who "harbor[s] with an assumption of custody, management and control of the dog." Brown v. Bolduc, 29 Mass. App. Ct. 909, 910 (1990), quoting Maillet v. Mininno, 266 Mass. 86, 89 (1929). Nothing in the summary judgment record suggests that McHugh was the dog's keeper.

⁴ "If any dog shall do any damage to either the body or property of any person, the owner or keeper . . . shall be liable for such damage, unless such damage shall have been occasioned to the body or property of a person who, at the time such damage was sustained, was committing a trespass or other tort, or was teasing, tormenting or abusing such dog." G. L. c. 140, § 155.

link between the breach of the duty and the damage. See Jupin v. Kask, 447 Mass. 141, 146 (2006), citing J.R. Nolan & L.J. Sartorio, Tort Law § 11.1 (3d ed. 2005). Generally, negligence claims are not resolved through summary judgment because the question of negligence is one of fact to be determined by the jury. Roderick v. Brandy Hill Co., 36 Mass. App. Ct. 948, 949 (1994). "However, the existence or nonexistence of a duty is [a] question of law, and is thus an appropriate subject of summary judgment." Jupin, supra. "If no such duty exists, a claim of negligence cannot be brought." Remy v. MacDonald, 440 Mass. 675, 677 (2004).

"As a general rule, a landowner does not owe a duty to take affirmative steps to protect against dangerous or unlawful acts of third persons." Luoni v. Berube, 431 Mass. 729, 731 (2000). There is an exception to this general rule where there is a special relationship between the landowner and a plaintiff in which a plaintiff would reasonably expect a landowner to take steps to protect the plaintiff from harm. See, e.g., Fund v. Hotel Lenox of Boston, Inc., 418 Mass. 191, 192 (1994) (hotel and guests); Mullins v. Pine Manor College, 389 Mass. 47, 56 (1983) (college and students); Kane v. Fields Corner Grille, Inc., 341 Mass. 640, 641 (1961) (tavern owner and patrons). We have previously held that such a special relationship exists between a residential landlord and a tenant, such that a

landlord has a duty of reasonable care to protect a tenant from harm by another tenant's pit bull on the premises. See Nutt v. Florio, 75 Mass. App. Ct. 482, 486 (2009). However, no Massachusetts appellate court has extended such a duty to a passer-by injured by a tenant's dog after the dog leaves the landlord's property. We decline to do so here.

The Supreme Judicial Court has described "duty" in negligence actions in the following way:

"The concept of 'duty . . . is not sacrosanct in itself, but is only an expression of the sum total of . . . considerations of policy which lead the law to say that the plaintiff is entitled to protection. . . . No better general statement can be made than that the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists.'"

Luoni, 431 Mass. at 735, quoting W.L. Prosser & W.P. Keeton, Torts § 53, at 358-359 (5th ed. 1984). "A precondition to this duty is, of course, that the risk of harm to another be recognizable or foreseeable to the actor." Jupin, 447 Mass. at 147. Here, McHugh and Creatini had no special relationship. Indeed, they had never met. Creatini's injury did not occur on McHugh's property, but on a public street. Nothing in the summary judgment record indicates that McHugh was aware that Mills's dog was aggressive or prone to attack passers-by. In these circumstances, we agree with the judge's conclusion that "[a]n injury to a person running a leashed dog while riding a bicycle on a public street from a dog fight started by an

unleashed dog is not a foreseeable event that warrants the imposition of a duty upon a landlord."

Creatini relies primarily on the Supreme Judicial Court's decision in Jupin, 447 Mass. 141. In Jupin, a police officer was shot by a man who fled during a stop and warrant check. The shooter, who had a history of violence and mental instability, obtained the firearm from the home of Kask, who lived with the shooter's father. The shooter had previously lived at Kask's house and continued to have unfettered access to the house and the gun collection his father stored there. In those circumstances, the Supreme Judicial Court concluded that Kask, as the landowner, "ha[d] a duty to ensure that the firearms [were] properly and safely stored," id. at 156, because "Kask should have foreseen that [the shooter] -- whom she knew had a history of violence, had recent problems with the law, and had been under psychiatric observation -- might use his unsupervised access to the house to take a weapon from the basement gun cabinet, and subsequently use this weapon in the commission of a violent crime." Id. at 149.

In reaching that conclusion, the court relied on the sound public policy requiring due care in the storage of dangerous instrumentalities like firearms. "[A] person with even limited responsibility for or control over a dangerous instrumentality, like a firearm, may[] have a duty to exercise care in a

situation where no such duty would exist if the instrumentality was not considered highly dangerous." Jupin, 447 Mass. at 151. Here, Creatini argues that we should create a new rule declaring pit bulls to be "dangerous instrumentalities" as described in Jupin and imposing a duty of reasonable care on all owners of land where pit bulls are kept. We are not persuaded. While we acknowledge that some pit bulls can be aggressive, see Nutt, 75 Mass. App. Ct. at 487, citing Commonwealth v. Santiago, 452 Mass. 573, 577-578 (2008) (pit bull is breed "commonly known to be aggressive"), we see no reason to treat them as "dangerous instrumentalities" like "firearms, explosives, poisonous drugs, or high tension electricity," which require the landowner's "closest attention and most careful precautions."⁵ Jupin, supra, quoting Restatement (Second) of Torts § 298, comment b (1965).

Finally, the existence of a duty is "determined by reference to existing social values and customs and appropriate social policy." Remy, 440 Mass. at 677, quoting Cremins v. Clancy, 415 Mass. 289, 292 (1993). Legislative enactments in Massachusetts reflect a strong public policy to prevent damage

⁵ We note that dogs cannot be regulated based on their breed. In 2012, Massachusetts amended G. L. c. 140, § 157, to provide in part: "No order shall be issued directing that a dog deemed dangerous shall be removed from the town or city in which the owner of the dog resides. No city or town shall regulate dogs in a manner that is specific to breed."

by uncontrolled dogs. See G. L. c. 140, § 137 (dogs must be registered and licensed); G. L. c. 140, § 145B (dogs must be vaccinated); G. L. c. 140, § 155 (strict liability for damage by dogs). These statutes reflect a public policy that places responsibility for dogs, including pit bulls, on the owners and keepers of those dogs -- not on third-party landowners.

Simply put, while the risk of harm to a passer-by from a tenant's dog might conceivably be reasonably foreseeable to a landlord in some circumstances, it was not here. On this record, we agree with the judge that "[i]t was not McHugh's obligation to prevent Mills'[s] unleashed dog from leaving the premises '[I]t was for the owner-keeper to handle [his] dog.' [Brown v. Bolduc, 29 Mass. App. Ct. 909, 911 (1990)]."

Conclusion. The summary judgment in favor of McHugh is affirmed.

So ordered.