STATE OF MICHIGAN

COURT OF APPEALS

KATHLEEN KINNEY and ARCHIE KINNEY, Plaintiffs-Appellants, v JACQUELINE RENEE CRANE and BOYD CRANE, Defendants-Appellees.	UNPUBLISHED June 24, 2014 No. 314191 Wayne Circuit Court LC No. 09-012270-NI

Before: JANSEN, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's final order granting defendants' motion for summary disposition under MCR 2.116(C)(10). We affirm.

Plaintiffs were jogging on a sidewalk in Plymouth. Just prior to the incident, Mrs. Kinney saw defendants' son in the front yard holding onto a Rottweiler puppy. Immediately after, an adult dog ran towards plaintiffs and, when it reached them, it "jumped" up on its hind legs, with its front paws landing on Mrs. Kinney's shoulders. This action caused Mrs. Kinney to fall backwards; however, her attentive husband caught her before she hit the ground. The adult dog did the same act again. Thereafter the dog "circled" plaintiffs as defendants' son held the puppy. According to plaintiffs, neither dog ever growled, snarled or barked at them, nor did either dog bite or snip at them. A few minutes later Mrs. Crane retrieved the dogs, and plaintiffs continued on their jog or walk.

As a result of this her encounter with defendants' dog, plaintiff claimed that a back injury was re-aggravated, that she suffered scratches (none that broke the skin) and emotional distress. Plaintiffs initially asserted statutory strict liability and negligence claims, but eventually dismissed the statutory strict liability claim because the dog never bit anyone. After discovery, defendants moved for summary disposition, which the trial court granted.

The only issue is whether plaintiff produced sufficient admissible evidence in support of her negligence claim to withstand defendants' motion for summary disposition under MCR 2.116(C)(10). We review this issue de novo. *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011).

Trager v Thor, 445 Mich 95, 105; 516 NW2d 69 (1994), was the first Supreme Court decision to recognize negligence actions in "domestic animal injury cases", i.e., cases in which a dog bites a person. Critical to any negligence case, and so therefore also to these common law dog cases, is the existence of a duty. The *Trager* Court specified that in assessing the legal issue of duty, a court must "keep in mind the normal characteristics of the animal that caused the injury, as well as any abnormally dangerous characteristics of which defendant has knowledge." *Id*. As to the "normal characteristics", the Court pointed out that dogs are "generally regarded as so unlikely to do substantial harm that their possessors have no duty to keep them under constant control. Consequently, a mere failure to do so would not constitute breach of the duty of care." *Id*. at 105-106. Accord: *Hiner v Mojica*, 271 Mich App 604, 612-613; 722 NW2d 914 (2006) and *Szkodzinski v Griffin*, 171 Mich App 711, 714; 431 NW2d 51 (1988).

Because there is no duty for an owner to have constant control over the dog, something more must be in evidence for a duty to arise. According to *Trager* and subsequent cases, for a duty to arise the owner must have "knowledge of some dangerous propensity unique to the particular animal, or [be] aware that the animal is in such a situation that a danger of foreseeable harm might arise." *Trager*, 445 Mich at 106. See, also, *Hiner*, 271 Mich App at 612-613. Here, there is simply no evidence that the dog had *any* history of aggressive behavior, and even if there were such evidence (and there clearly is not), there is likewise no evidence that defendants had any knowledge of that behavior.

Moreover, the evidence submitted regarding what occurred on the day of the incident was barren of any suggestion that the dog was aggressive, dangerous or vicious. Plaintiff testified in her deposition that the dog never barked, growled, snipped, bit or otherwise portrayed any other vicious behavior. The published decisions since *Trager* contain facts where either the plaintiff or other property was minimally bitten by the defendant's dog, see *Koivisto v Davis*, 277 Mich App 492, 494-494; 745 NW2d 824 (2008) (dogs escaped from kennel and attacked, bit, and tore apart plaintiff's cat) and *Bradacs v Jiacobone*, 244 Mich App 263, 264-265; 625 NW2d 108 (2001) (dog bit 12-year-old plaintiff), or the dog exhibited vicious behavior, *Hiner*, 271 Mich App at 607-608. No similar facts exist in this case. And, although plaintiff testified that the dog jumped up, placing its front paws up onto her shoulders, and then "circled" her and her husband on the sidewalk, these are both normal dog traits. See *Hiner*, 271 Mich App at 611-612.

In sum, Michigan law does not allow for a negligence case under these undisputed facts, because defendants did not breach any duty to plaintiff. No reasonable juror could conclude that defendants were negligent when their dog was let out the front door (by their adolescent son), proceeded to the sidewalk right in front of the house, and the dog merely "jumped" up to plaintiff's shoulders, knocking her backwards (but not all the way to the ground). No biting, no barking, no snarling, no growling, no snipping. And, nothing in the dogs past revealed any suggestion that the dog had any aggressive or vicious tendencies. The trial court properly granted defendants' motion for summary disposition.

Affirmed. Defendants may tax costs, having fully prevailed on appeal. MCR 7.219(A).

/s/ Christopher M. Murray
/s/ Mark T. Boonstra

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JANSEN, P.J. (*concurring in part and dissenting in part*).

I concur with the majority's determination that plaintiffs failed to factually support their claim of common-law strict liability and that the only issue in this appeal is whether they presented sufficient admissible evidence to withstand summary disposition of their negligence claim.

I respectfully dissent, however, from the majority's conclusion that defendants were entitled to summary disposition with respect to the negligence claim. Both parties, as well as the circuit court, appear to have been confused regarding the nature of common-law actions against dog owners in Michigan. Establishing a dog's propensity for viciousness is central to maintaining a claim of common-law strict liability. *Hiner v Mojica*, 271 Mich App 604, 609; 722 NW2d 914 (2006). But propensity, alone, is not central to a negligence claim. Indeed, this Court has held that a plaintiff may maintain a negligence action against "the owner of a domestic animal who does *not* have knowledge of the animal's dangerous propensities . . . ." *Id*. at 612 (emphasis in original).

In this case, there was evidence that the dogs approached plaintiffs in an aggressive manner, knocked plaintiff Kathleen Kinney nearly to the ground, scratched her, and continued to circle around her until defendant Boyd Crane removed the animals. There was also evidence that this aggravated plaintiff Kathleen Kinney's preexisting back injury. For purposes of plaintiffs' negligence claim, as opposed to their strict-liability claim, it is not dispositive that the dogs did not growl, bark, snarl, bite, or snip. "To make a prima facie showing of negligence, a plaintiff need only establish that the defendant failed to exercise ordinary care under the circumstances to control or restrain the animal." *Id*. at 613. This was a question for the trier of fact. In my opinion, reasonable minds could conclude that defendants failed to exercise ordinary care, and

were therefore negligent, in failing to properly control and restrain their dogs under the circumstances of this case. *Id.* at 614; see also *Trager v Thor*, 445 Mich 95, 107; 516 NW2d 69 (1994). I would reverse the circuit court's grant of summary disposition in favor of defendants on plaintiffs' negligence claim.

/s/ Kathleen Jansen