

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CIVIL ACTION - LAW

SCOTT WESCOTT, III,	:
Plaintiff	:
	:
vs.	: No. 09-3500
	:
BRENDA WHITE,	:
Defendant	:

Robert G. Bauer, Esquire	Counsel for Plaintiff
Richard D. Adamson, Esquire	Counsel for Defendant

Nanovic, P.J. - June 24, 2011

MEMORANDUM OPINION

Plaintiff, Scott Wescott, III, has commenced an action against the Defendant, Brenda White, for an incident where Defendant's dog bit Plaintiff causing injury. The claims brought against Defendant are one count for common law negligence and negligence *per se* and one count for violation of the Pennsylvania Dog Law. Plaintiff also seeks punitive damages. Defendant has made a motion for summary judgment with respect to the Plaintiff's claims.

FACTUAL AND PROCEDURAL BACKGROUND

A complaint commencing this action was filed by Plaintiff on November 19, 2009. The complaint followed an incident where a Rottweiler owned by Defendant attacked and bit the Plaintiff. In Count I, Plaintiff asserts a claim for

negligence, inclusive of negligence *per se* for alleged violations of Sections 459-305 (the "Leash Law") and 459-502-A (the "Dangerous Dog Law")¹ of the Pennsylvania Dog Law, 3 P.S. §§459-101 through 459-908. In Count II, Plaintiff again asserts a claim for violation of Section 459-305 of the Dog Law, 3 P.S. §459-305. Plaintiff has also made claim for punitive damages.

The incident, which occurred on November 12, 2008, is not in dispute. At the time of the incident Plaintiff was considering taking Defendant's dog after a series of conversations in which Defendant told Plaintiff that she was no longer interested in keeping the dog. Plaintiff owned a Rottweiler which he had purchased from the same breeder that Defendant purchased her dog from. Before deciding whether to take Defendant's dog, Plaintiff first wanted to acquaint himself with the dog. Defendant had earlier told Plaintiff that the dog barked at people who were on the property. The dog was also reportedly protective of the Defendant, and Defendant had concerns with letting the animal out of its kennel when others were on the property.

On the day of the incident, Plaintiff had come to the residence of Defendant to take the dog for a walk and familiarize himself with the animal. Defendant was not present

¹ In the complaint, Plaintiff erroneously cites 7 P.S. § 37.1 et. al. as the Dangerous Dog law. This is an incorrect citation. The statute that it's presumed the Plaintiff wanted to proceed under is listed above.

at the time of Plaintiff's arrival. When Defendant returned to her residence that day she found Plaintiff walking the dog.

The walk with the dog went smoothly for Plaintiff. However, upon returning the dog to its kennel, the dog escaped and headed for Defendant's open garage. Plaintiff later learned that this occurred because the dog's food was kept in the garage and there was also a second kennel in the garage where the dog would stay at night.

Defendant caught the dog, put it on a leash, and returned the dog to the kennel. On the return trip to the kennel, while leashed by Defendant, the dog bit Plaintiff on his right arm. This injury required surgery.

Plaintiff alleges that Defendant knew of the dog's aggressive tendencies and should have warned him that the dog could be dangerous. Defendant denies that the dog ever exhibited aggressive behavior before and claims this was the first time the dog bit anyone.

On March 3, 2010, Defendant responded to the complaint with an answer and new matter. Defendant denied the principal claims and further asserted that the claims were barred by the statute of limitations, limited by comparative negligence, and that no legal duty was owed to Plaintiff. Plaintiff replied to Defendant's new matter on April 15, 2010.

On September 10, 2010, Defendant filed a motion for summary judgment claiming that there are no facts of record to support a finding of negligence, a violation of the Dog Law, or warranting an award of punitive damages. Plaintiff's response was filed on October 7, 2010. Plaintiff's responsive brief does not address Defendant's arguments on either the statutory grounds for negligence *per se* or punitive damages. The parties agreed to submit arguments on briefs. The Court must now decide the merits of Defendant's motion for summary judgment.

DISCUSSION

Summary judgment may be granted only in cases where "the record clearly shows that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law." Bombar v. West American Ins. Co., 932 A.2d 78, 86 (Pa.Super. 2007). The burden of proving that there is no genuine issue of material fact is upon the moving party. See id. The trial court must "view the record in the light most favorable to the non-moving party and must resolve all doubts...against the moving party." Id.

Dangerous Dog Law

Plaintiff claims that a violation of the Dangerous Dog Law is negligence *per se* and that Defendant is negligent for having harbored a dangerous dog in violation of Section 459-502-

A(a) of the Dog Law. (Complaint, ¶9(1)). This statute requires, *inter alia*, that for a dog to be deemed dangerous, the following must be established: (1) the dog attacked or inflicted severe injury on a human being or domestic animal without provocation; and (2) the dog has either a history or a propensity of attacking human beings or domestic animals without provocation. Because Plaintiff has failed to present any evidence with respect to the second element, this claim cannot be sustained.

Additionally, Plaintiff has presented no argument against Defendant's motion for summary judgment in regard to the Dangerous Dog Law. This alone is grounds for granting summary judgment on this claim.

Punitive Damages

In order for punitive damages to be awarded, the Defendant's conduct must be "outrageous," "done with a bad motive," or "with a reckless indifference to the interests of others." Focht v. Rabada, 268 A.2d 157, 159 (Pa.Super. 1970). Nothing in the depositions or in the complaint suggests that the Defendant's conduct rose to this level. The dog was regularly caged while Plaintiff was on the property. (Plaintiff's Deposition, 5/6/2010, p.11). Defendant brought the dog under control when it escaped. Id. at pp.30-31. The dog also was not

acting aggressively at the time of the incident. Id. at p.32. There is no evidence that Defendant disregarded a risk that she knew of or should have known which would make it highly probable that harm would occur accompanied by conscious indifference to or a desire to bring about the consequences. See Evans v. Philadelphia Transp. Co., 212 A.2d 440, 443 (Pa. 1965).

In the absence of such evidence, summary judgment is properly granted to strike punitive damages from the complaint. Again, Plaintiff failed to address this issue in response to the motion for summary judgment. On that basis alone, summary judgment is appropriate on Plaintiff's claim for punitive damages.

Negligence

The elements of common law negligence are "1) a duty or obligation recognized by the law requiring the defendant to conform to a certain standard of conduct for the protection of others against unreasonable risks; 2) defendant's failure to conform to the standard required; 3) a causal connection between the conduct and the resulting injury; 4) actual loss or damage resulting to the plaintiff." R.W. v. Manzek, 888 A.2d 740, 746 (Pa. 2005). The first factor of whether there was a duty owed to Plaintiff is the factor in contention. The dispute is over whether Defendant foresaw the dog's behavior. In determining

whether a duty is owed there is a five factor test: "1) the relationship between the parties; 2) the utility of the defendant's conduct; 3) the nature and foreseeability of the risk in question; 4) the consequences of imposing a duty; and 5) the overall public interest in the proposed solution." Id. at 747.

With respect to dog bite cases, an owner must know of or should have known of the vicious propensity of the animal for liability to attach. See Kinley v. Bierly, 876 A.2d 419, 422 (Pa.Super. 2005). Even if the dog had not previously bitten anyone, a dog is not given one free bite, nor must the owner have actual knowledge of an animal's vicious tendencies. See Snyder v. Milton Auto Parts, Inc., 428 A.2d 186, 188, (Pa.Super. 1981). If the owner should have known that the animal may cause harm, that is the standard for liability to attach. See id. Due to the evidence on record, it appears that reasonable minds could differ as to whether defendant could foresee the dog acting aggressively. Accordingly, summary judgment cannot be granted in favor of Defendant and the negligence claim will stand.

Dog Law

In regard to the claim for a Dog Law violation, 3 P.S. § 459-305(a) states that it is unlawful for the owner of a dog

to fail to keep the dog in the following manners: "1) confined within the premises of the owner; 2) firmly secured by means of a collar and chain or other device so that it cannot stray beyond the premises on which it is secured; or 3) under the reasonable control of some person, or when engaged in lawful hunting, exhibition, performance events or field training."

Because there is no dispute that the incident occurred on Defendant's property, Subsections 1 and 2 of Section 459-305(a) has no applicability. As to Subsection 459-305(a)(3), the dog was properly secured in a kennel prior to Plaintiff walking the dog and the dog was on a leash, under Defendant's control, being returned to the kennel, when, with no indication or advance warning that anything aggressive was about to happen, the dog grabbed Plaintiff's arm causing injury. Under these undisputed facts, we fail to see a violation of Section 459-305(a) of the Dog Law.

In addition, we again note that Plaintiff has presented no argument responsive to Defendant's motion for summary on this claim. Having failed to do so, Plaintiff has waived this issue and summary judgment is properly granted.

CONCLUSION

For the foregoing reasons, Defendant's motion for summary judgment will be granted on Plaintiff's claims of

negligence *per se* pursuant to the Dangerous Dog Law and the Leash Law, Count II with respect to the alleged violation of Section 459-305 of the Dog Law, and Plaintiff's claim for punitive damages. Defendant's motion for summary judgment with respect to Plaintiff's common law claim for negligence will be denied.

BY THE COURT:

P.J.