Circuit Court for Charles County
Case No. 08-C-17-000532

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0110

September Term, 2018

KEISHA SWANN

v.

JRW PROPERTIES, LLC, ET AL.

Reed,
Gould,
Sharer, J. Frederick,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Gould, J.

Filed: October 16, 2019

Keisha Swann was attacked by a pit bull right outside of her home. The dog was owned by the son of one of Ms. Swann's neighbors, Lakacha Barnes, who rented her house from defendant JRW Properties, LLC ("JRW"). Ms. Swann sued Ms. Barnes, Ms. Barnes' son, Donte Strong, and JRW for negligence. An order of default was entered against Ms. Barnes and Mr. Strong. JRW, on the other hand, vigorously defended itself and moved for summary judgment. The circuit court granted JRW's motion, finding that JRW owed no duty to Ms. Swann. Ms. Swann noted a timely appeal. Pointing to what she contends is sufficient actual or circumstantial evidence to charge JRW with knowledge of the dog's presence on JRW's property and its violent propensities, Ms. Swann argues that the circuit court erred in finding that JRW owed no duty to her. We disagree, and accordingly, we affirm the judgment of the circuit court.

FACTS AND LEGAL PROCEEDINGS[1]

[1] Because we are reviewing an order granting a motion for summary judgment, our examination of the record is cabined to the summary judgment record before the court when it made its decision, with one exception: when Ms. Swann filed her opposition to the motion, the transcript of the deposition of Ms. Barnes, which had been taken the day before, had not been prepared yet. Ms. Swann's opposition, therefore, included what could fairly be described as a proffer of her deposition testimony. Ms. Swann did not supplement her opposition by filing any part of deposition transcript, but it appears that her counsel provided the court with a copy of the deposition transcript at the hearing on the summary judgment motion. We will therefore consider the deposition transcript to be part of the summary judgment record. Where Ms. Swann's proffer of Ms. Barnes' deposition testimony is inconsistent with or not fully supportive of Ms. Barnes' testimony, we rely upon the transcript of Ms. Barnes' testimony. Also, assertions of fact in Ms. Swann's summary judgment opposition that were not supported by record evidence are not included in this factual summary.

In 2011, JRW rented the property located at 412 Patuxent Court in La Plata, Maryland (the "Property") to Ms. Barnes. Ms. Barnes' rent was subsidized under a program from the Department of Housing and Urban Development ("HUD") known as "Section 8."[2] The lease agreement prohibited dogs on the Property without JRW's written consent. Joseph Walter, who was responsible for day-to-day operations of JRW, confirmed that JRW never consented to the presence of any dogs on the Property.[3]

On January 9, 2017, Ms. Swann, a resident at 418 Patuxent Court, was attacked right outside of her home by a pit bull owned by Mr. Strong, who was staying with his mother at the Property along with another dog. Ms. Swann sustained injuries from the attack.

Mr. Strong would sometimes stay with his mother at the Property for periods of time of varying length. As Ms. Barnes described it, "[h]e might come for a week. He might come for a month." Ms. Barnes could not say how often Mr. Strong stayed at her house. When questioned about the frequency of his visits, Ms. Barnes testified, "[o]ver the past year I really couldn't say how often because it was, like I said, one minute Donte was there, the next minute Donte wasn't there, so he was always in and out."

According to Ms. Barnes, Mr. Strong always brought one or more dogs when he visited. Ms. Barnes stated, "[w]ell, at one point he had four and I told him basically they had to go. Sometimes it's four dogs he comes with. Sometimes it's one dog he comes with. He's just always with dogs."

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[2] The program was created under Section 8 of the Housing Act of 1937, codified at 42 U.S.C. § 1437(f).

[3] JRW owns the Property as well as several other rental properties. JRW is owned by Joseph Walter and his wife.

When staying with his mother, Mr. Strong would set up a dog crate either in the kitchen or outside on the patio. At some point, he built a dog house in the backyard. The dog house was still there on the date of the attack. The backyard was not fenced in and therefore, Ms. Swann would have us infer that the dog house was visible from the street.

Approximately nine months before the attack, one of Mr. Strong's dogs got loose in the neighborhood and two neighborhood girls, aged seven or eight, brought the dog back to Ms. Barnes' house. The record does not identify which dog got loose.

Under the Section 8 housing program, HUD inspected the Property annually, and on occasion, the Town of La Plata also conducted inspections. Mr. Walter estimated that since 2011, there had been a total of eleven inspections. Mr. Walter attended most, if not all of the inspections, and when he did, he stayed for the entire inspection. When asked whether Mr. Strong was "ever [at an inspection] with any of his dogs," Ms. Barnes answered "yes." But the record does not identify which inspection or which dog she was referencing.[4]

Mr. Walter also went to the Property on occasion to make repairs. Ms. Barnes estimated that Mr. Walter made repairs at the Property approximately three times and that

[4] In her summary judgment opposition, Ms. Swann embellished this testimony by contending that Ms. Barnes testified that "the dog" was at the Property. By use of the phrase "the dog," Ms. Swann implied that she was referring to the dog that attacked her. Ms. Barnes, however, did not identify any particular dog.

Mr. Strong had *never* been present with any of his dogs when Mr. Walter was there making repairs.[5]

Ms. Barnes typically paid rent between the 1st and 15th of the month. Mr. Walter sometimes went to the Property to pick up Ms. Barnes' monthly rent payment. When he did, he would knock on her front door, Ms. Barnes would hand him the rent payment, and he would ask if "everything is okay." Mr. Walter testified that he never saw or heard a dog on any of these occasions.

On January 9, 2017, after the attack, the county investigator observed animal tracks and feces in the front yard of the Property. Ms. Swann would have us infer that Mr. Walter must have seen the tracks and feces when he came to pick up the January rent payment, but the record does not reflect how long these were visible or when or how Ms. Barnes paid her January 2017 rent.[6]

[5] In her summary judgment opposition, Ms. Swann contended that when Mr. Walter was making repairs, the "dog crates and other evidence of dogs being present was not concealed." Ms. Barnes provided no such testimony, and we could not find support for this assertion anywhere in the record. Even if we could locate this support, it is irrelevant because Ms. Barnes testified that Mr. Strong was never present when the repairs were made and there is no evidence that Mr. Strong kept the dog crates at the house when he was not there.

[6] Ms. Swann's summary judgment opposition implied that it could be reasonably inferred that from Mr. Walter's practice regarding rent payments that he picked up the January rent at a time when the animal tracks and feces were conspicuously visible. On appeal, Ms. Swann makes this argument expressly.

Ms. Swann filed suit against Ms. Barnes, Mr. Strong, and JRW in the Circuit Court for Charles County, claiming that their negligence caused her injuries.[7] A default order was entered against Ms. Barnes and Mr. Strong for failing to respond to the complaint.

JRW moved for summary judgment, arguing that it did not owe any duty to Ms. Swann and therefore, was not liable for her injuries. JRW supported its summary judgment motion with, among other items, an affidavit from Mr. Walter in which he testified that JRW had no knowledge that any person had "pets or animals" at the Property.

In opposition to JRW's motion, relying on Mr. Walter's attendance at the inspections, his visits to the Property to pick up Ms. Barnes' rental payment and to make repairs, and the physical evidence of the presence of dogs, Ms. Swann contended that Mr. Walter was at the Property on enough occasions to have noticed that dogs had been living there in violation of the lease. According to Ms. Swann, "there [was] a genuine dispute in material fact that JRW knew of the existence of [the dog that attacked her] on the property and failed to abate this issue."

DISCUSSION

JRW's Motion to Dismiss

JRW argues that this appeal is untimely and should be dismissed. As JRW sees it, Ms. Swann was required to note her appeal within 30 days of the order granting summary judgment, but she instead waited until judgment was entered against the remaining defendants. By that time, JRW contends, it was too late. JRW is mistaken.

[7] Ms. Swann's original complaint named only JRW and Mr. Strong as defendants. Ms. Swann subsequently amended the complaint and added Ms. Barnes as a defendant.

When a judge grants summary judgment in favor of one defendant while claims against other defendants remain, the summary judgment is "an interlocutory judgment . . . with no right of appeal . . . existing." See Picking v. State Finance Corp., 257 Md. 554, 574 (1970). Rule 2-602(a) specifically provides:

> Except as provided in section (b)[8] of this Rule, an order or other form of decision, however designated, that adjudicates fewer than all of the claims in an action (whether raised by original claim, counterclaim, cross-claim, or third-party claim), or that adjudicates less than an entire claim, or that adjudicates the rights and liabilities of fewer than all the parties to the action:
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> (1) is not a final judgment;
>
> (2) does not terminate the action as to any of the claims or any of the parties; and
>
> (3) is subject to revision at any time before the entry of a judgment that adjudicates all of the claims by and against all of the parties.

"The purpose of Rule 2-602(a) is to prevent piecemeal appeals, which, beyond being inefficient and costly, can create significant delays, hardship, and procedural problems." Smith v. Lead Indus. Ass'n, Inc., 386 Md. 12, 25 (2005); see also Planning Bd. of Howard Cty. v. Mortimer, 310 Md. 639, 653 (1987) (absent certification pursuant to Rule 2-602(b), the court's order that "adjudicated the rights and liabilities of fewer than all the parties to the action . . . was not a final judgment for appeal purposes").

Here, the court's grant of summary judgment in JRW's favor did not conclude the matter; the claims against Ms. Barnes and Mr. Strong remained. Further, the court did not certify its decision. As a result, the court's summary judgment order was not appealable until final judgment was entered against the remaining defendants. See Hanna v. Quartertime Video & Vending Corp., 78 Md. App. 438, 442-43 (1989), aff'd, 321 Md. 59

[8] Rule 2-602(b) provides that a court can certify an interlocutory decision for appeal.

(1990) (quoting Rule 2-602(a)(3)) ("An adjudication that determines the rights and liabilities of fewer than all of the parties is 'not a final judgment' and is subject to 'revision at any time before the entry of a judgment that adjudicates all of the claims by and against all of the parties.'"). Ms. Swann's appeal is therefore timely and JRW's motion to dismiss is denied.[9]

Standard of Review

Maryland Rule 2-501 provides that a motion for summary judgment is appropriate when "there is no genuine dispute as to any material fact and [the moving] party is entitled to judgment as a matter of law." A "material fact is a fact the resolution of which will somehow affect the outcome of the case." King v. Bankerd, 303 Md. 98, 111 (1985).

As stated by the Court of Appeals:

> The question of whether a trial court's grant of summary judgment was proper is a question of law subject to *de novo* review on appeal. In reviewing a grant of summary judgment under Md. Rule 2-501, we independently review the record to determine whether the parties properly generated a dispute of material fact and, if not, whether the moving party is entitled to

[9] There is some confusion about the precise argument JRW made in its brief. JRW states that Ms. Swann originally filed a notice of appeal after the summary judgment was granted, but withdrew the notice and then subsequently filed a notice of appeal after judgment was entered against Ms. Barnes and Mr. Strong. That notice initially referenced the summary judgment order and then was amended to instead reference the judgment entered against Ms. Barnes and Mr. Strong. Regardless of JRW's argument, as explained above, Ms. Swann's appeal is timely. At oral argument, JRW seemed to abandon its untimeliness argument and instead challenged whether Ms. Swann appropriately appealed the ruling on the motion for summary judgment given that her notice of appeal did not refer to the summary judgment ruling and referenced only the date of the final judgment against Ms. Barnes and Mr. Strong. JRW's new theory fares no better than its original. "Notices of appeal filed pursuant to Rule 8-202 are not required to specify the points an appellant expects to argue on appeal, and, even if an appellant does set forth in a notice of appeal proposed points the appellant wishes to argue, we treat that language as surplusage and non-limiting." Harding v. State, 235 Md. App. 287, 294 (2017).

> judgment as a matter of law. We review the record in the light most favorable to the nonmoving party and construe any reasonable inferences that may be drawn from the facts against the moving party.

Myers v. Kayhoe, 391 Md. 188, 203 (2006) (internal quotations omitted); see also D'Aoust v. Diamond, 424 Md. 549, 574 (2012) (quoting Messing v. Bank of America, N.A., 373 Md. 672, 684 (2003)) (we review the circuit court's decision to decide "whether the trial court's legal conclusions were legally correct").

The party opposing the summary judgment motion "must present admissible evidence demonstrating the existence of a dispute of material fact." Hines v. French, 157 Md. App. 536, 549 (2004). "[T]he non-moving party must provide detailed and precise facts that are admissible in evidence." Appiah v. Hall, 416 Md. 533, 546 (2010) (quoting Beatty v. Trailmaster Prods., Inc., 330 Md. 726, 737-38 (1993)). And, while inferences may be based on circumstantial evidence, they "must be based on reasonable probability, rather than speculation, surmise, or conjecture." Ward v. Hartley, 168 Md. App. 209, 218 (2006) (citation omitted).

As stated by the Court in Cavacos v. Sarwar, 313 Md. 248, 258-59 (1988) (quoting Fowler v. Smith, 240 Md. 240, 246-47 (1965)) (internal citations omitted):

> Negligence is a relative term and must be decided upon the facts of each particular case. Ordinarily it is a question of fact to be determined by the jury, and before it can be determined as a matter of law that one has not been guilty of negligence, the truth of all the credible evidence tending to sustain the claim of negligence must be assumed and all favorable inferences of fact fairly deducible therefrom tending to establish negligence drawn. And Maryland has gone almost as far as any jurisdiction that we know of in holding that meager evidence of negligence is sufficient to carry the case to the jury. The rule has been stated as requiring submission if there be any evidence, however slight, *legally sufficient* as tending to prove negligence, and the weight and value of such evidence will be left to the jury. However,

> the rule as above stated does not mean, as is illustrated by the adjudicated cases, that all cases where questions of alleged negligence are invoked must be submitted to a jury. The words 'legally sufficient' have significance. They mean that a party who has the burden of proving another party guilty of negligence, cannot sustain this burden by offering a mere scintilla of evidence, amounting to no more than surmise, possibility, or conjecture that such other party has been guilty of negligence, but such evidence must be of legal probative force and evidential value.

(emphasis in original) (internal citations omitted); see also Barrett v. Nwaba, 165 Md. App. 281, 296 (2005) (quoting Myers v. Bright, 327 Md. 395, 399 (1992)).

We now apply these principles to JRW's motion.

Analysis

To sustain a claim for negligence, the plaintiff must prove "(1) that the defendant was under a duty to protect the plaintiff from injury, (2) that the defendant breached that duty, (3) that the plaintiff suffered actual injury or loss, and (4) that the loss or injury proximately resulted from the defendant's breach of the duty." Warr v. JMGM Group, LLC, 433 Md. 170, 181 (2013) (quotations omitted). Here, the circuit court granted JRW's summary judgment motion due to Ms. Swann's lack of evidence to satisfy the duty element. Our analysis, therefore, is likewise limited to whether JRW owed Ms. Swann a duty.

To hold a landlord responsible for injuries sustained from an attack by a dog owned by a tenant, the plaintiff has the burden of proving that the landlord: (1) had control over the dog's presence at the Property; (2) was aware of the presence of the dog at the Property; and (3) was aware that the dog had vicious propensities. See Solesky v. Tracey, 198 Md. App. 292, 310-11, aff'd, 427 Md. 627 (2012), abrogated on other grounds by CJ&P § 3-

1901 (quoting Danny R. Veilleux, Landlord's Liability to Third Person for Injury Resulting from Attack on Leased Premises by Dangerous or Vicious Animal Kept by Tenant, 87 A.L.R.4th 1004, 1012 (1991)); see also Matthews v. Amberwood Assocs. Ltd. P'ship, 351 Md. 544, 566 (1998).[10]

Here, the attack occurred on the victim's property, not the landlord's. In this situation, therefore, a plaintiff has the additional burden of satisfying the elements articulated in § 18.4 of the Restatement (Second) of Property, which provides:

> A landlord is subject to liability for physical harm to persons outside the leased property caused by activities of the tenant or others on the leased property after the landlord transfers possession only if:
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> (1) the landlord at the time of the lease consented to the activity or knew that it would be carried on; and
>
> (2) the landlord knew or had reason to know that it would unavoidably involve an unreasonable risk, or that special precautions necessary to safety would not be taken.

[10] In Tracey v. Solesky, 427 Md. 627 (2012), the Court of Appeals modified its prior holdings in Matthews, 351 Md. 544, Shields v. Wagman, 350 Md. 666, 687-88 (1998), and Ward, 350 Md. 666, by imposing strict liability on the owner of a pit bull or any other person with "the right to control the pit bull's presence on the subject premises." Tracey, 417 Md. at 652-53. This decision prompted the General Assembly to enact Md. Code, Cts. & Jud. Proc. I ("CJ&P") § 3-1901 (2014), which went into effect on April 8, 2014. Relevant here, CJ&P § 3-1901(b) provides:

> In an action against a person other than an owner of a dog for damages for personal injury or death caused by the dog, the common law of liability relating to attacks by dogs against humans that existed on April 1, 2012, is retained as to the person without regard to the breed or heritage of the dog.

Here, because JRW did not own the dog that attacked Ms. Swann, the common law existing on April 1, 2012 applies. Ms. Swann was therefore required to present evidence of JRW's knowledge of the dog's vicious propensities.

Restatement (Second) of Property § 18.4 (Am. Law Inst. 1977); see also Solesky, 198 Md. App. at 330 (applying this section to a dog bite case that occurred outside of the landlord's property).

Combining the elements of this Restatement provision with the elements set forth in Matthews, 351 Md. at 566, and Solesky, 198 Md. App. at 310-11, Ms. Swann had the burden of presenting evidence that JRW: (1) had control over the premises rented by Ms. Swann; (2) knew that the pit bull had vicious tendencies; and (3) was not only aware of the presence of the pit bull at the Property, but also consented to its presence at the time it entered into the lease with Ms. Swann and either knew (i) that it would entail an unreasonable risk or (ii) that reasonable safety precautions would not be taken.

Ms. Swann established that JRW had control over the Property through its lease with Ms. Barnes which had a "no pets" clause. See Matthews, 351 Md. at 556-57. Thus, she established the first element. See id. Ms. Swann failed, however, to adduce evidence to satisfy the other elements.

To be sure, a plaintiff is entitled to meet its burden through circumstantial evidence, and Ms. Swann argues that she did so here. But, the lack of circumstantial evidence of JRW's knowledge is apparent when compared to other Maryland cases in which courts have deemed circumstantial evidence of the landlord's knowledge to be sufficient.

In Matthews, 351 Md. at 561, the landlord's knowledge of the dog's vicious propensities was established because, for example, "[n]umerous employees of the defendant testified that they knew of the pit bull, were afraid of the pit bull, witnessed attacks by the dog, and were unable to carry out their duties, both in the leased premises

and in the common areas, because of the presence of the pit bull." In Solesky, 198 Md. App. at 325, the landlord had acknowledged concern about the tenant's pit bulls—both of which were generally left in a pen in the back of the tenant's property—by including an indemnification clause in the renewal lease that shifted all risk of liability to the tenant. In addition, testimony from neighbors established that "'anybody' who walked near these dogs would experience aggression from the dogs." Id.

Similarly in Shields, 350 Md. at 687-88, the Court noted that it was reasonable to conclude the landlord knew of the pit bull's vicious propensities because (1) the landlord knew that the dog was present on the premises; (2) there was evidence that the dog was vicious; (3) the landlord had told the tenant not to keep the dog there; (4) the landlord had thought that the dog "*would be a threat to people* on the premises and people would be frightened by it" (emphasis in original); and (5) that the landlord had indicated that the dog "was too dangerous to have around." As stated by the Court, "given the testimony of [the landlord's] frequent visits to the premises and given the testimony of other witnesses that [the dog] was always present and that they had often seen [the dog] act viciously, a jury could conclude that [the landlord] also had the opportunity to observe [the dog's] viciousness." Id. at 688-89.

In contrast, evidence of the landlord's knowledge was found insufficient in Ward, where, as here, there was no evidence that the pit bull had previously displayed vicious propensities. In Ward, an owner shouting "Get the dog" before opening a door is opened did not lend itself to a non-speculative inference that the dog was vicious. Ward, 168 Md. App. at 218. Further, although the dog's owner referred to the dog as "that [expletive]

dog," she did so in the same conversation in which she stated that the dog had previously never attacked anyone. Id. at 218. Thus, the Court found that the statement did "not support a legitimate inference that [the dog owner] knew, prior to the incident, that the dog was vicious." Id. at 218. Moreover, the Court held that such evidence, even if it had been sufficient to infer that the dog had vicious propensities, did not show that the landlord knew it was vicious. Id. at 219.

Here, as in Ward, Ms. Swann's evidence does not permit a reasonable inference that JRW had knowledge of the presence of a dangerous or vicious dog at *any* time before Ms. Swann was attacked, let alone when it entered into the lease agreement with Ms. Barnes. At best, Ms. Swann's evidence would allow for the inference that JRW knew or should have known a dog of an unspecified type with unknown behavioral tendencies had sometimes been staying at the Property—but, even that inference would be a reach.[11] Even if fully credited, that inference is not enough for Ms. Swann to create an issue of fact that the landlord had knowledge of the dog's vicious propensities. See Solesky, 198 Md. App. at 318-19. In fact, there is no evidence in this record that Mr. Strong's pit bull had *ever* displayed vicious tendencies towards *anyone* at *any* time prior to the attack. Ms. Swann

[11] For example, because the record does not reflect when and how the January rent was paid or when the tracks and feces were left on the front yard, the inference that Ms. Swann would have us make would require us to impermissibly speculate. See Carter v. Shoppers Food Warehouse MD Corp., 126 Md. App. 147, 164 (1999) ("there was no evidence in the instant case as to how long the carpet had been turned up and allegations of knowledge of the condition on the part of appellee are merely speculation and conjecture").

cannot overcome JRW's motion by filling the evidentiary void with speculation. See Ward, 168 Md. App. at 218.

Here, not only was there no evidence that JRW had ever known about the dog that had attacked the victim, there was also no evidence that either Ms. Barnes, Mr. Strong, or the victim, Ms. Swann, had any knowledge of any vicious propensities of the dog. As such, like Ward, the circuit court correctly granted summary judgment. Id.

CONCLUSION

The circuit court was legally correct in finding that Ms. Swann did not establish a genuine dispute of material fact and that, as a matter of law, JRW owed no duty to her. Accordingly, the circuit court was legally correct in granting summary judgment in JRW's favor. We affirm.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.