IN THE COURT OF APPEALS OF IOWA

No. 8-080 / 07-0929
Filed April 30, 2008

WANDA L. CRABTREE and CLINTON NATIONAL BANK, Conservator for CHRISTOPHER B. CRABTREE, a Minor,
Plaintiffs-Appellants,

vs.

RAYMOND JOHNSON and MARK JOHNSON,
Defendants-Appellees.

RAYMOND JOHNSON,
Third-Party Plaintiff,

vs.

WILLIAM W. FREY, a/k/a WILLIAM W. FREY, III,
Third-Party Defendant.

Appeal from the Iowa District Court for Clinton County, Nancy M. Tabor, Judge.

Plaintiffs appeal a directed verdict ruling. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

A. John Frey, Clinton, for appellant.

Brian Fairfield of Brooks & Trinrud, Rock Island, Illinois, for appellees.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

VAITHESWARAN, J.

A dog bite precipitated a lawsuit and a subsequent directed verdict in favor of one of the defendants. The plaintiffs appeal that directed verdict ruling. We affirm in part, reverse in part, and remand.

I. Background Facts and Proceedings

Mark Johnson's girlfriend gave him a German Shepherd puppy named Cotton. Mark later moved into an apartment house owned by his father, Raymond Johnson. The house adjacent to the apartment house was separated by a field and was occupied by Wanda Crabtree and her son Christopher.

Mark sometimes chained Cotton in the yard of the apartment house. On one occasion, the dog broke loose and bit Wanda Crabtree. After this incident, Mark applied for and was granted a permit to build a fence around the back yard of his father's apartment house. Mark built the fence with some help from his father. The fence was six feet tall and had a steel door that locked with a padlock. When the fence was built, Raymond asked Mark to give up Cotton. Mark declined to do so. Raymond expressed concern about having the dog on his property.

Mark was jailed on matters unrelated to Cotton. Mark's girlfriend remained in the apartment house with Cotton. Eventually, Raymond evicted her. Cotton was left in the fenced-in back yard. Raymond informed Mark he wanted Cotton removed from the property. Mark responded by threatening to commit suicide, and Raymond relented.

Mark's girlfriend occasionally came by and threw food over the fence, as did Raymond. An animal control service was called more than once, in response to complaints that no one was caring for the dog.

After some time, Wanda Crabtree's brother, Bill Frey, moved into the apartment house and began caring for Cotton. One day, while Frey was feeding the dog, the canine escaped and ran directly toward Wanda's son, Christopher, who was leaving his house. The dog severely bit Christopher.

Wanda filed a lawsuit against Mark and Raymond Johnson on behalf of herself and her son.[1] She urged three theories of liability: (1) a dog owner's liability under Iowa Code § 351.28 (2005), (2) a landowner's liability, and (3) negligence. Later, Clinton National Bank, conservator for Christopher, was substituted as a plaintiff.

The district court granted a directed verdict in favor of Raymond on all three claims. A jury found against Mark and awarded Christopher and Wanda damages of almost $240,000.

The sole issue on appeal is whether the district court erred in directing a verdict in favor of Raymond Johnson. *Yates v. Iowa West Racing Ass'n*, 721 N.W.2d 762, 768 (Iowa 2006) ("We review the district court's rulings on motions for directed verdict for correction of errors at law.").

II. Analysis

A. Statutory Liability under Iowa Code § 351.28

Iowa Code section 351.28 provides that a dog owner is strictly liable for injuries caused by the dog:

[1] A third defendant was dismissed.

> The owner of a dog shall be liable to an injured party for all damages done by the dog, when the dog . . . is attacking or attempting to bite a person, except when the party damaged is doing an unlawful act, directly contributing to the injury. This section does not apply to damage done by a dog affected with hydrophobia . . . .

Iowa Code § 351.28. The plaintiffs argue Raymond effectively became the dog's owner after Mark went to jail, subjecting him to strict liability under this statutory provision.

The problem with their argument is that an "owner" has been narrowly defined as "the person to whom the dog legally belongs." *Alexander v. Crosby*, 143 Iowa 50, 53, 119 N.W.2d 717, 718 (1909). In *Alexander*, the court specifically stated "nothing in other decisions indicates a construction of the word 'owner' as including those who may harbor dogs." *Id. See also Fouts v. Mason*, 592 N.W.2d 33, 37 (Iowa 1999) ("[T]he word 'owner' in section 351.28 now means legal owner as the court in *Alexander* had concluded.").

Here, the evidence established as a matter of law that Mark Johnson, not Raymond, was Cotton's legal owner. Specifically, it was undisputed that Mark received the dog as a gift and did not transfer ownership of the dog to anyone else. Because (1) section 351.28 only holds "[t]he owner" strictly liable for dog bites, (2) case law defines "owner" as "legal owner," and (3) Raymond was not the legal owner, the district court did not err in granting Raymond's motion for directed verdict on this claim.

B. Common Law Dog Bite Claim

Although pled as a "landowner's liability" claim, the plaintiffs next raise a common law claim based on harboring a dangerous dog. Specifically, they

argue "the trial court should have allowed the jury to decide whether Raymond Johnson was strictly liable . . . because he kept a dog which he knew or should have known to have dangerous tendencies on his property . . . ." To support their argument, they rely on dicta contained in *Wenndt v. Latare*, 200 N.W.2d 862, 869-70 (Iowa 1972). There, the court stated, "The owner or keeper of domestic animals is liable for injuries inflicted by them only where . . . the injuries are the result of known vicious tendencies or propensities." *Wenndt*, 200 N.W.2d at 869-70. As a preliminary matter, we must address Johnson's argument that "*Wenndt* did not create an alternative theory of liability," and "liability is appropriately addressed by § 351.28." The district court rejected this argument noting "the common law theory survives if properly pled and proven." We agree with this reasoning because our supreme court has addressed common law theories of liability in addition to the statutory theory of liability set forth in section 351.28. *See Fouts*, 592 N.W.2d at 39. *Accord Allison v. Page*, 545 N.W.2d 281, 283-4 (Iowa 1986) (examining common law liability for dog bites). Returning to the common law theory articulated in *Wenndt*, the plaintiffs note that the language on which they rely is consistent with the Restatement (Second) of Torts, section 509. That provision states:

> (1) A possessor of a domestic animal that he knows or has reason to know has dangerous propensities abnormal to its class, is subject to liability for harm done by the animal to another, although he has exercised the utmost care to prevent it from doing the harm.
>
> (2) This liability is limited to harm that results from the abnormally dangerous propensity of which the possessor knows or has reason to know.

The comments to this section are instructive. Comment c states,

> [O]ne who keeps a large dog which he knows to be accustomed to fawn violently upon children and adults is liable under the rule stated in this Section for harm done by its dangerous playfulness or over-demonstrative affection.

Comment d states:

> One who keeps a domestic animal which to his knowledge is vicious, or which though not vicious possesses dangerous propensities that are abnormal, thereby introduces a danger which is not usual to the community and which, furthermore, is not necessary to the proper functioning of the animal for the purposes that it serves.

Comment f states:

> Although dogs, even hunting dogs, have no material utility comparable to cattle, horses and other livestock, they have from time immemorial been regarded as the friends and companions of man. The great majority of dogs are harmless and the possession of characteristics dangerous to mankind or to livestock are properly regarded as abnormal to them. Consequently the possessor of a dog is not liable for its biting a person or worrying or killing livestock unless he has reason to know that it is likely to do so.

Comment g states:

> A dog is not necessarily regarded as entitled to one bite. It is enough that the possessor of the animal knows that it has on other occasions exhibited such a tendency to attack human beings or other animals or otherwise to do harm as should apprise him of its dangerous character.

Restatement (Second) of Torts § 509 at 15-18 (1965). This Restatement provision is consistent with the common law of our state. *See Allison*, 545 N.W.2d at 283 ("Under the common law, *owners or keepers* of animals could be held liable for injuries caused by their animals under certain conditions."); *Coakley v. Dairy Cattle Congress*, 228 Iowa 1130, 1135, 293 N.W.2d 457, 459 (1940) (stating owners and keepers of domestic animals with known vicious propensities can be held liable for injuries resulting from such tendencies).

Applying the provision, we are convinced the plaintiffs generated a fact question on this claim. Although Raymond was not an owner of Cotton, a reasonable fact-finder could conclude he was a "possessor" of the dog after Mark left the apartment house and Raymond evicted Mark's girlfriend. *See, e.g.*, *Nathan Lane Assocs., L.L.P. v. Merchants Wholesale of Iowa, Inc.*, 698 N.W.2d 136, 138 (Iowa 2005) (holding where tenant left personal property behind after lease ended, landlord was free to remove the property from the premises). Raymond allowed the dog to stay in the pen, fed and watered it sometimes, and responded to calls from animal control services. He did not remove the dog after the animal control service visited his property, but instead attempted to feed and water Cotton more regularly. Frey testified he agreed to care for the dog in return for Raymond's $50 deduction in his rent. Raymond provided the food for Cotton. Frey further testified Raymond gave him a key to the pen that Cotton lived in. Raymond admitted he was concerned about keeping Cotton on the property after the dog bit Wanda Crabtree. Based on this evidence, we conclude the claim should have been submitted to the jury for resolution. Accordingly, we reverse the district court's grant of a directed verdict as to this issue.

C. Negligence

Finally, the plaintiffs argue the court erred in directing a verdict in Raymond's favor on his negligence claim. To establish negligence, the plaintiffs had to prove (1) the existence of a duty, (2) breach of that duty, (3) proximate cause, and (4) damages. *Raas v. State*, 729 N.W.2d 444, 447 (Iowa 2007).

We begin with the duty element. The plaintiffs cite *Allison v. Page*, 545 N.W.2d 281, 283 (Iowa 1996) for their assertion that a duty existed. There, the

court was asked to decide whether "a landlord is liable for an injury inflicted by a tenant's dog when the landlord knew or had reason to know that the dog was dangerous." The court was asked to apply Restatement (Second) of Torts section 379A, which subjects a lessor to liability for harm to persons off the land "caused by activities of the lessee or others on the land after the lessor transfers possession," but only if,

> (a) the lessor at the time of the lease consented to such activity or knew that it would be carried on, and
>
> (b) the lessor knew or had reason to know that it would unavoidably involve such an unreasonable risk, or that special precautions necessary to safety would not be taken.

Restatement (Second) of Torts § 379A at 283 (1965). The court "decline[d] the plaintiffs' invitation to apply section 379A to animals not owned or controlled by the landlord." Allison, 545 N.W.2d at 283. Finding that the landlords "did not own or harbor the dog," the court concluded they "owed no duty to third persons to protect them from the dog." *Id.* at 284.

The duty addressed under section 379A applies to lessors, and differs in kind from the duty alluded to in *Wenndt* and articulated in Restatement (Second) of Torts section 509. However, the evidence supporting a duty under 379A overlaps the evidence supporting a duty under section 509. Without detailing that evidence, we conclude the plaintiffs generated a fact question as to whether Raymond owed a duty as lessor under section 379A.

This does not end our inquiry, however, because the plaintiffs also had to show a breach of that duty by Raymond. On this element, the plaintiffs alleged Raymond acted negligently by: (1) allowing a dangerous dog to remain on his

property, (2) allowing the dog to be neglected, (3) failing to properly confine Cotton, (4) failing to properly instruct Bill Frey as to how to care for Cotton and keep the dog from escaping, (5) failing to warn Frey of Cotton's dangerous propensity, and (6) placing Cotton in the care of a person "not suitable to care for the dog." The district court concluded the plaintiffs did not present sufficient evidence to generate a fact issue on any of these specifications.

We agree with the court that the plaintiffs failed to generate a fact issue on three of the six specifications of negligence. Specifically, the plaintiffs presented no evidence on the third specification of negligence that Raymond failed to properly confine Cotton. In fact, the undisputed evidence establishes that Raymond helped erect a six-foot fence around the yard with a padlocked door. The plaintiffs also presented scant, if any, evidence on the fourth specification of negligence that Raymond failed to properly instruct Bill Frey as to how to care for Cotton and keep him from escaping. Finally, the plaintiffs did not present evidence on the sixth specification of negligence that Frey was "not suitable to care for the dog." Therefore, the district court did not err in directing a verdict in favor of Raymond on these specifications of negligence.

Turning to the first and fifth specifications of negligence, we conclude the plaintiffs generated a fact issue that required submission to the jury. Specifically, a reasonable fact-finder could conclude Raymond allowed a dangerous dog to remain on his property, and failed to warn Frey of Cotton's dangerous propensity.

This brings us to the proximate cause element. We conclude the plaintiffs did not generate a fact question on the second specification of negligence, whether Raymond allowed the dog to be neglected. Although there was

evidence of neglect, there was no evidence that the neglect was the proximate cause of the dog bite. Therefore, the district court did not err in directing a verdict for Raymond on this specification. We conclude the plaintiffs generated a fact question on whether the breaches alleged in the first and fifth specifications of negligence were the proximate cause of Christopher Crabtree's damages. *See Rieger v. Jacque*, 584 N.W.2d 247, 251 (Iowa 1998) (stating proximate cause ordinarily for jury to decide absent exceptional circumstances). Accordingly, we reverse the grant of a directed verdict in favor of Raymond on these specifications.

III. *Disposition*

We affirm the district court's grant of a directed verdict in favor of Raymond Johnson on the statutory liability claim. We reverse the district court's grant of a directed verdict in favor of Raymond Johnson on the claim styled "landowners' liability" and remand for further proceedings on this claim. We reverse the district court's grant of a directed verdict in favor of Raymond Johnson on the first and fifth specifications of the plaintiffs' negligence claim and remand for further proceedings on those specifications.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.