LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JOURNAL ENTRY
Hon. D. Chris Cook, Judge

Date April 17, 2018 Case No. 16CV191055

DARRIUS RANDLEMAN, *ET AL.*
Plaintiff

Christine LaSalvia
Plaintiff's Attorney

VS

TISHA BROOKS, *ET AL.*
Defendant

Thomas Coughlin
Defendant's Attorney

This matter is before the Court on separate Defendants, Mohammad Sohrabi and Oberlin Estates, Ltd., Motion For Summary Judgment, filed November 14, 2017; Plaintiffs' Brief in Opposition, filed December 7, 2017; Defendants' Reply Memorandum, filed December 15, 2017; and Defendants' Supplemental Authority In Support of Motion For Summary Judgment, filed February 23, 2018.

THE COURT RULES THAT: There are no genuine issues of material fact in dispute as to moving Defendants. As such, separate Defendants, Mohammad Sohrabi and Oberlin Estates, Ltd.'s, Motion For Summary Judgment is well-taken and hereby GRANTED. All claims against these two Defendants are hereby dismissed.

This matter remains pending as to separate Defendant, Tisha Brooks, service having been perfected on December 5, 2017. Plaintiffs are ordered to file for Default Judgment within 30 days of the date of this Entry or the claims against Defendant Brooks will be dismissed for want of prosecution.

See Judgment Entry. No Record.

IT IS SO ORDERED.

JUDGE D. Chris Cook

cc: LaSalvia, Esq.
Coughlin, Esq.

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INTRODUCTION

This matter is before the Court on separate Defendants, Mohammad Sohrabi and Oberlin Estates, Ltd., Motion For Summary Judgment, filed November 14, 2017; Plaintiffs' Brief in Opposition, filed December 7, 2017; Defendants' Reply Memorandum, filed December 15, 2017; and Defendants' Supplemental Authority In Support of Motion For Summary Judgment, filed February 23, 2018.

STATEMENT OF PERTINENT FACTS

The facts of this case are, for the most part, undisputed.

On May 7, 2016, separate Plaintiff, Darrius Randleman ("Darrius"), a minor, was bitten by a dog(s)[1] ("The Incident") owned by separate Defendant, Tisha Brooks ("Brooks"). Plaintiff, Chastity Thomas ("Thomas") is Darrius' mother and Plaintiff, Flynn Randleman ("Flynn"), is Darrius' father.

Defendant, Mohammad Sohrabi ("Sohrabi"), owns Defendant, Oberlin Estates, Ltd. ("Oberlin Estates" or "The Property") where Darrius and his family reside.

The Incident occurred in front of Darrius' townhouse, Unit 21 ("The Premises") while he sat outside. The attack caused serious injuries.

[1] Defendant's allege in their Brief that Darrius was attacked by Brooks' "dogs." Plaintiffs allege in their Brief that Darrius was attacked by ". . . a pit bull owned by [Brooks] . . ."

Brooks lived next door to Darrius in Unit 20 and despite a "No Pet" policy, Brooks had two or three dogs there, including the one (or two) that bit Darrius.

Brooks signed her lease sometime between six and twelve months before The Incident. Sometime in February, 2016, Sohrabi learned that Brooks was keeping dogs at The Premises and verbally admonished her to remove them.

In March, 2016, Sohrabi served Brooks with a three-day notice to vacate and served her with a 30-day notice of lease termination.[2] Brooks' last day at The Property was supposed to be April 30, 2016.

On May 7, 2016, The Incident occurred when Brooks' dog(s) were inadvertently released from The Premises and attacked Darrius.

The area where The Incident occurred, in the front yard of Darrius' townhouse (the front yard of The Premises), was not a "common area" but an area under the possession and control of Plaintiffs.

SUMMARY JUDGMENT STANDARD OF REVIEW

The standard of review for summary judgment in Ohio is well-settled. The Ninth District Court of Appeals has recently stated the standard of review for summary judgment. "This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). This Court uses the same standard that the trial court applies under Civ.R. 56(C), viewing the evidence in the light most favorable to the nonmoving party and resolving any doubt in favor of the non-moving party. See *Viock v. StoweWoodward Co.*, 13 Ohio App.3d 7, 12 (6th Dist.1983).

Pursuant to Civ.R. 56(C), summary judgment is proper if: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. Citing, *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327 (1977)." *Petroskey v. Martin,* 9th Dist. Lorain No. 17CA011098, 2018-Ohio-445, at ¶ 15.

The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio

[2] Surprisingly, it is not clear what reason(s) were given Brooks to support the 3-day notice or 30-day termination letter.

St.3d 280, 292 (1996). Specifically, the moving party must support the motion by pointing to some evidence of the type listed in Civ.R. 56(C). *Id.* at 292-293. If the moving party satisfies this burden, then the non-moving party has the reciprocal burden to demonstrate a genuine issue for trial remains. *Id.* at 293. The non-moving party may not rest upon the mere allegations or denials in their pleadings, but must point to or submit evidence of the type specified in Civ.R. 56(C). Id. at 293; Civ.R. 56(E). *Petroskey* at ¶ 16.

Once the moving party satisfies this burden, the non-moving party has a reciprocal burden to "set forth specific facts showing that there is a genuine issue for trial. * * * The non-moving party may not rest upon the mere allegations or denials in his pleadings, but instead must submit evidence as outlined in Civ.R. 56(C). *Id.* at 293; Civ.R. 56(E). Additionally, expressions of speculation or assumptions in deposition testimony and affidavits are insufficient to sustain the non-movant's burden. See *Dailey v. Mayo Family Ltd. Partnership*, 115 Ohio App.3d 112, 117 (7th Dist.1996). *Messer v. Summa Health System,* 9th Dist. Summit No. 28470, 2018-Ohio-372, at ¶ 31.

ANALYSIS

Plaintiffs bring their claims based upon two causes of action, to wit: 1) a strict liability statutory claim pursuant to RC 955.28; and 2) common law negligence.

The gravamen of Defendants' position argued in their summary judgment motion is germane to both causes of action, that is, as Defendants Sohrabi and Oberlin Estates were not "harborers" of Brooks' dogs, they cannot be held liable for The Incident.

As noted, *supra,* this matter presents what should be a relatively simple dog bite case – it is not.

RC 955.28 STATUTORY STRICT LIABILITY

The Ninth District has opined on numerous occasions the standard of review for RC 955.28 claims.

"R.C. 955.28(B) imposes strict liability on the owner, keeper, or harborer of a dog for any injury to person or property, which is caused by the dog, unless certain exceptions apply. R.C. 955.28(B) provides:

> The owner, keeper, or harborer of a dog is liable in damages for any injury, death, or loss to person or property that is caused by the dog, unless the injury, death, or loss was caused to the person or property of an individual who, at the time, was committing or attempting to commit a trespass or other criminal offense

on the property of the owner, keeper, or harborer, or was committing or attempting to commit a criminal offense against any person, or was teasing, tormenting, or abusing the dog on the owner's, keeper's, or harborer's property."

Stuper v. Young, 9th Dist., Summit No. 209000, 2002-Ohio-2327 (5/15/2002), at ¶ 10-11.

"Thus, in order to maintain a strict liability cause of action under R.C. 955.28(B), the plaintiff must establish: 1) that the defendant was the owner, keeper, or harborer of the dog; 2) that the injury was proximately caused by the dog's actions; and 3) the monetary amount of damages sustained by the plaintiff. *Thompson v. Irwin* (Oct. 27, 1997), 12th Dist. No. CA97-05-101." *Id.* at ¶ 12.

"An owner is the person to whom the dog belongs, while the keeper is the person who has physical control over the dog." *Flint v. Holbrook* (1992), 80 Ohio App.3d 21, 25, 608 N.E.2d 809. "In determining whether a person is a harborer of the dog within the meaning of R.C. 955.28, the focus shifts from possession and control of the dog to possession and control of the premises where the dog lives." *Godsey v. Franz* (Mar. 13, 1992), 6th Dist. No. 91WM000008. "[A] harborer is one who has possession and control of the premises where the dog lives, and silently acquiesces to the dog's presence." (Emphasis omitted.) *Flint,* 80 Ohio App.3d at 25, 608 N.E.2d 809. With respect to whether a landlord can be held liable as a harborer under R.C. 955.28(B) for injuries inflicted by a tenant's dog, the plaintiff must prove that the landlord permitted or acquiesced in the tenant's dog being kept in the common areas or areas shared by the landlord and tenant. *Godsey,* supra.

In *Stuper, supra,* a Great Dane canine injured a person in a bar parking lot. The owner of the bar was aware of the presence of the dog, but not aware that it ever roamed freely. Without more, the court concluded that the owner did not acquiesce to the dog being kept at the bar and thus, was not a "harborer."

In *Bowman v. Stott,* 9th Dist., Summit No. 21568, 2003-Ohio-7182 (12/31/2003), at ¶ 11, the Ninth District again discussed the standard for harboring under RC 955.28. The court noted, "In Ohio, the terms owner, keeper, and harborer, as used in R.C. 955.28, have been defined by case law. An owner is the person to whom the dog belongs. *Garrard v. McComas* (1982), 5 Ohio App.3d 179, 182, 450 N.E.2d 730. The keeper has physical charge or care of the dog. *Id. Johnson v. Allonas* (1996), 116 Ohio App.3d 447, 449, 688 N.E.2d 549. In determining whether a person is a harborer of the dog, the focus has been said to shift from possession and control of the dog to possession and control of the premises where the dog lives. *Godsey v. Franz* (Mar. 13, 1992), 6th Dist. No. 91WM000008. A harborer is one who "has possession and control of the premises

where the dog lives, and silently acquiesces to the dog's presence. *Khamis,* at 226, 623 N.E.2d 683, citing *Flint v. Holbrook* (1992), 80 Ohio App.3d 21, 25, 608 N.E.2d 809. 'Acquiescence' is essential to 'harborship' and requires some intent. *Thompson v. Irwin* (Oct. 27, 1997), 12th Dist. No. CA97–05–101, citing *Godsey v. Franz* (Mar. 13, 1992), 6th Dist. No. 91WM000008." *Bowman, supra.*

In *Bowman,* the trial court granted summary judgment to a property owner where the plaintiff lived with the dog owner (and dog) and was bitten not once, but twice by the dog. Reversing the trial court's determination that the plaintiff was a harborer of the dog that bit her, the Ninth District said, "The determination as to whether Bowman was a harborer of the dog, depends on whether Bowman had possession and control of the premises where the dog lived and whether she silently acquiesced in the dog's presence. *Id.*" *Bowman,* at ¶ 12.

In determining that the plaintiff in *Bowman* was not a harborer (thus, summary judgment was inapposite), the court stated, "Therefore, construing the evidence most strongly in favor of Bowman as the nonmoving party, we cannot conclude that there remain no genuine issues of material fact that Bowman was in possession and control of the premises and that she silently acquiesced to the presence of the dog." *Id.* at ¶ 18.

The Ninth District next addressed this issue in *Young v. Robson Foods,* 9th Dist., Lorain No.08CA009499, 2009-Ohio-2781 (6/15/2009). In *Young,* the Ninth District upheld the trial court's granting of summary judgment to the defendant property owner. The facts in *Young* and the case at bar are on point.

In *Young,* the landlord had a no-pet policy, but verbally agreed to allow the tenant to have a dog. The tenant's dog bit a child inside the home while she was visiting causing injuries. The trial court found in favor of the defendants holding, ". . . they are not liable under Section 955.28(B) because they did not own, keep, or harbor Max . . . they are not liable for negligence because they did not own or harbor Max and because they had no knowledge of Max's vicious propensity." *Id.* at ¶ 4.

The Ninth District agreed. The court went on to discuss the rationale for relieving the landlords from liability in these cases. "Regarding the relationship between a landlord and tenant, 'it is well-established that a lease transfers both possession and control of the leased premises to the tenant.' *Richeson v. Leist,* 12th Dist. No. CA2006-11-138, 2007-Ohio-3610, at ¶ 13 * * * Accordingly, "[i]f the tenant's dog is confined only to the tenant's premises, the landlord cannot be said to have possession and control of the premises on which the dog is kept. *Godsey, supra.* For a landlord to be liable as a harborer for injuries inflicted by a tenant's dog, 'the plaintiff must prove that the landlord permitted or acquiesced in the tenant's dog being kept in the common areas or

areas shared by the landlord and tenant.' *Stuper,* 2002-Ohio-2327, at ¶ 13 * * * '[If] the leased property at issue consists of a single-family residence situated on a 'normal-sized city lot, there is a presumption that the tenants possessed and controlled the *entire* property.' *Richeson,* 2007-Ohio-3610, at ¶ 13 (quoting *Engwert-Loyd v. Ramirez,* 6th Dist. No. L-06-1084, 2006-Ohio-5468, at ¶ 11)." *Young* at ¶ 7.

In addition, and quite tellingly, the *Young* court held, "[Plaintiff] failed to establish that a genuine issue of material fact exists regarding whether [Defendant] had possession and control of the Swanson property. Because [Defendant] did not have possession or control of the property, **it is immaterial whether he acquiesced in Max's presence**." *Id.* at ¶ 11, emphasis added.

Finally, and by all accounts, the most recent Ninth District case on this issue is *Uhl v. McKoski,* 9th Dist., Summit No. 27066, 2014-Ohio-479 (2/12/2014). In this case, the court again upheld the trial court's granting of summary judgment to the landlords where their tenant's dog bit a passer-by. Unlike the case at bar, the evidence in *Uhl* showed that the landlords were unaware of the presence of a dog at their tenant's residence. The fact that there was a "beware of dog" sign in the tenant's window and that the landlords had failed to register the property with the city as rental property ". . . did not create a material dispute of fact as to whether the [Defendants] knew about the dog." *Id.* at ¶ 12.

In *Uhl,* the issue of possession and control was not raised as the landlords did not even know of the existence of the dog.

DISCUSSION

In the case at bar, it appears quite obvious that liability under a theory of RC 955.28 cannot attach. The first element of this cause of action requires that Defendants be either "owners," "keepers," or "harborers," of the dog(s) that caused The Incident. There is no allegation, let alone evidence, that Defendants owned or kept the dog(s). The allegation is that they harbored them

But to demonstrate harboring, or at least create a genuine issue of material fact on this issue, Plaintiffs must show that Defendants "had possession and control of the premises where the dog lives, and silently acquiesces to the dogs presence." See: *Godsey v. Franz, Flint v. Holbrook, Stuper, Bowman, Young,* and *Uhl, supra.*[3] (Emphasis added.)

[3] Citations omitted.

The only evidence before the Court on the issue of possession and control favors Defendants and is, essentially, conceded by Plaintiffs.[4] As urged by Defendants, ". . . the area where Darrius was injured was within the exclusive control of Thomas." And, ". . . there is no evidence that Sohrabi permitted or acquiesced in Brooks' dogs being kept in the common areas . . ."

As noted by the Ninth District in *Young,* because the Defendants did not have possession or control of The Premises, ". . . it is immaterial whether [they] acquiesced in [the dog(s)] presence." Put another way, pursuant to RC 955.28, a landlord or property owner must have both possession and control of a premises and acquiesce to the presence of a dog before liability can attach pursuant to RC 955.28.

It is worth noting, parenthetically, that the mere fact that a landlord or property owner has the right to inspect the premises or enforce rules does not equate or automatically rise to the level of possession and control of the premises. See: *Young, supra,* at ¶ 10, "A landlord is not 'in possession and control of . . . premises . . . simply because [he] retained the right to inspect [them].'" Citing, *Guerra v. Kresser,* 6th Dist. No. OT-05-016, 2005-Ohio-6524, at ¶ 14. And, *Burgess v. Tackas,* 125 Ohio App.3d 294, 8th Dist. No.71945 (1/20/1998), "A failure to properly enforce park rules does not constitute harboring an animal since the requisite mental intent is lacking. Further, establishing trailer park rules for the maintenance of animals or pets by one's tenants or residents, does not make one an 'owner, keeper or harborer of a dog." *Id.* at pg. 297.

Finally, Plaintiffs cite the Court to the matter of *Jones v. Holmes,* 12th Dist. No. CA 2012-070133 for the proposition that the issue of whether one is a harborer of a dog ". . . is an issue of fact, not a question of law."

While that may be an accurate legal maxim in some instances, it is not applicable to this matter. In the case at bar, as noted *supra,* there is no factual dispute regarding possession and control of the area where The Incident occurred. Here, both parties agree (or at least Plaintiffs do not contest) that The Incident occurred in an area possessed and controlled exclusively by Plaintiffs (their front yard) as opposed to a common area. As such, given that there is no dispute as to where The Incident occurred or who had possession and control of that area, it is left to the Court to apply this fact to the correct legal standard and reach a conclusion of law.

[4] Plaintiffs do not argue in their Brief that The Incident occurred in a common area or area shared by Plaintiffs and Defendants nor do they offer any evidence to rebuke Defendants' allegation that The Incident occurred in an area solely under the possession and control of Plaintiffs.

COMMON LAW NEGLIGENCE

The *Uhl* case also discussed the standard of review for dog bite cases bringing common law negligence claims. "'There are two bases for recovery in Ohio for injuries sustained as a result of a dog bite: common-law and statutory.' *Beckett v. Warren,* 124 Ohio St.3d 256, 921 N.E.2d 624, 2010–Ohio–4, ¶ 7. '[I]n a common-law action for bodily injuries caused by a dog, a plaintiff must show that (1) the defendant owned or harbored the dog, (2) the dog was vicious, (3) the defendant knew of the dog's viciousness, and (4) the dog was kept in a negligent manner after the keeper knew of its viciousness.' *Id.*" *Uhl, supra,* at ¶ 11.

DISCUSSION

Both parties to this action cite the Court to the proper standard of review for bringing a common law dog bite claim for injury to persons or property, though admittedly by way of different cases – no matter.

The first element is unquestionably that the defendant "owned or harbored the dog." We know that the Defendants herein did not own the dog or dogs that injured Darrius. The sole issue becomes then, did the Defendants harbor the dog(s) that caused The Incident?

In response to this inquiry and in support of their dispositive motion, Defendants devote a total of one (1) full paragraph to the issue. Obviously in reliance on their arguments made relative to the strict liability claim, Defendants conclude "Because the undisputed evidence establishes that Defendants were not harborers . . . Plaintiffs' common law negligence claim fails as a matter of law."

Defendants are correct.

In Plaintiffs' reply Brief, they devote their entire analysis on this issue to the propensity of the dog(s) to be vicious. Defendants' knowledge of the dog(s) viciousness, and the manner in which the Defendants failed to ameliorate the problem after learning of it. There is absolutely no discussion, law, or argument on the first element – harboring.

In fact, Plaintiffs argue that "**First**, the fact that the dog at issue attacked another dog requiring vet care, is prima facia evidence of the vicious nature of the dog." (Emphasis added.) But this is not the "first" element of this cause of action – ownership or harboring is.

The Court acknowledges that Plaintiffs do address the "harboring" issue when discussing their RC 955.28 claim and, perhaps, assume that it is "incorporated" into their negligence reply.

Regardless, even under the strict liability section of their Brief, Plaintiffs fail to distinguish this case from other cases where the landlord did not have possession or control of the premises.[5] The cases Plaintiffs do cite, *Mehmert, Sengal,* and *Hill,*[6] can all be distinguished.

In order to proceed on both their strict liability and negligence claims against the moving Defendants, Plaintiffs must demonstrate a genuine issue of material fact as to whether or not Defendants harbored the dog(s) that injured Darrius.

This they have failed to do.

CONCLUSION

After review of the pleadings and extensive briefing, the Affidavits and other Civ. R. 56(E) materials, perusal of Civ. R 56(C) as well as the relevant case law supplied by the parties and Court, the Court finds the following:

There are no genuine issues of material fact in dispute. As such, separate Defendants, Mohammad Sohrabi and Oberlin Estates, Ltd.'s, Motion For Summary Judgment is well-taken and hereby GRANTED. All claims against these two Defendants are hereby dismissed.

This matter remains pending as to separate Defendant, Tisha Brooks, service having been perfected on December 5, 2017. Plaintiffs are ordered to file for Default Judgment within 30 days of the date of this Entry or the claims against Defendant Brooks will be dismissed for want of prosecution.

IT IS SO ORDERED. No Record.

JUDGE D. Chris Cook

[5] The Court would note that Plaintiffs *did* establish facts sufficient to show that Defendants "silently acquiesced" to the presence of the dogs, but without possession and control of The Premises, this fact is immaterial. See: *Young, supra.*

[6] Citations omitted.