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# IN THE COURT OF APPEALS OF INDIANA

Matthew Marchino, as next best friend of Marcellus Marchino,
*Appellant-Plaintiff,*

v.

Woodrow J. Stines and Rex Lott,
*Appellees-Defendants.*

January 31, 2022

Court of Appeals Case No. 21A-CT-1197

Appeal from the Marion Superior Court

The Honorable Marc T. Rothenberg, Judge

Trial Court Cause No. 49D07-2006-CT-18753

**Pyle, Judge.**

## Statement of the Case

[1] In this interlocutory appeal, Matthew Marchino ("Father"), as the next best friend of his son, Marcellus Marchino, ("Marcellus"), appeals the trial court's order that granted Rex Lott's ("Lott") motion for summary judgment. Father argues that the trial court erred in granting Lott's summary judgment motion.

Concluding that the trial court did not err in granting Lott's summary judgment motion, we affirm the trial court's judgment.

[2] We affirm.

## Issue

> Whether the trial court erred in granting Lott's summary judgment motion.

## Facts

[3] Lott owns a duplex in Indianapolis that serves as a rental property. In early 2020, Father and his family rented one side of this duplex, and Woody Stines ("Stines") rented the other side. Stines owned a Pit Bull named Boy ("Boy").

[4] At some point, a neighbor told Lott that Boy, who had chased the neighbor to the bus stop, was a threat. In February 2020, Boy nipped a maintenance man who was repairing a toilet in Stines' side of the duplex. When Lott discovered that Boy had nipped the maintenance man, Lott asked Stines to remove Boy from the premises. However, Lott was also aware that Stines was gravely ill with leukemia and did not further pursue the matter when Stines failed to remove Boy from the premises.

[5] In early March 2020, Father and Marcellus were leaving their side of the duplex at the same time that Stines was leaving his side of the duplex with Boy. Boy got loose and bit Marcellus ("the dog bite incident").

[6] In June 2020, Father, as the next best friend of Marcellus, filed a negligence action against Lott and Stines. In the complaint, Father alleged that Lott knew of Boy's dangerous propensities but did not allege that Lott was in control of the premises.

[7] Four months later, in October 2020, Lott filed a summary judgment motion. In support of his motion, Lott designated his affidavit wherein he had stated that, at the time of the dog bite incident, Stines had "leased the . . . property from [Lott] and had [had] exclusive possession and control of said property." (App. Vol. 2 at 19). Therefore, according to Lott, Lott owed "no duty of care to [Marcellus] and, therefore, c[ould] have [had] no liability to him as a matter of law." (App. Vol. 2 at 26).

[8] In January 2021, Father filed a motion in opposition to Lott's summary judgment motion. In support of his motion, Father designated Lott's deposition as well as Lott's responses to Father's requests for production of evidence. These responses included a lease agreement between Lott and Stines, which had been entered into on January 1, 2020, and an identical lease agreement between Lott and Stines, which had been entered into on January 3, 2008. Both lease agreements included the following provision:

> Rights of Inspection: Lessor and his agents shall have the right at all reasonable times during the term of the lease and any renewals thereafter to enter the Demised Premises for the purpose of inspecting the premises and all buildings and improvements thereon.

(App. Vol. 2 at 66-67, 71-72). Both lease agreements also included the following provision: "No pets unless stated and approved by Lessor." (App. Vol. 2 at 69, 74). Father argued that the designated materials established a genuine issue of material fact regarding whether "Lott had some control of the [duplex] at the time of the alleged dog bite, and further, that Lott was aware of the dog's dangerous propensities." (App. Vol. 2 at 79).

[9] In Lott's response to Father's motion, Lott argued that Father had "fail[ed] to designate any evidence that Lott [had] retained control over the property at any time during Stines' tenancy, let alone at the time of the dog bite [incident]." (App. Vol. 2 at 82).

[10] At the March 2021 hearing on Lott's summary judgment motion, Lott conceded that, based upon Father's designated evidence, there was a question of fact regarding Lott's knowledge of Boy's dangerous propensities. However, Lott argued that Father's designated evidence established no question of fact regarding the control of the premises.

[11] Following the hearing, the trial court issued an order granting Lott's summary judgment motion in June 2021. Father now appeals.

## Decision

[12] Father argues that the trial court erred in granting Lott's summary judgment motion. When reviewing the grant of a summary judgment motion, our well-settled standard of review is the same as it is for the trial court. *Goodwin v. Yeakle's Sports Bar and Grill, Inc.*, 62 N.E.3d 384, 386 (Ind. 2016). Specifically,

we must determine whether there is a genuine issue of material fact, and whether the moving party is entitled to judgment as a matter of law. *Id.* The party moving for summary judgment has the burden of making a prima facie showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Id.* Once the moving party has met these two requirements, the burden shifts to the non-moving party to demonstrate a genuine issue of material fact by setting forth specifically designated facts. *Id.* In deciding whether summary judgment is proper, we consider only the evidence the parties specifically designated to the trial court. Ind. Trial Rule 56(C), (H). We construe all factual inferences in favor of the nonmoving party and resolve all doubts regarding the existence of a material issue against the moving party. *Carson v. Palombo*, 18 N.E.3d 1036, 1041 (Ind. Ct. App. 2014). "Summary judgment should be granted only if the evidence sanctioned by Indiana Trial Rule 56(C) shows there is no genuine issue of material fact and that the moving party deserves judgment as a matter of law." *Goodwin*, 62 N.E.3d at 386.

[13] "To prevail on a claim of negligence the plaintiff must show: (1) duty owed to plaintiff by defendant; (2) breach of duty by allowing conduct to fall below the applicable standard of care; and (3) compensable injury proximately caused by defendant's breach of duty." *Goodwin*, 62 N.E.3d at 386. (internal citations omitted). Issues of duty are generally questions of law for the court to decide. *Olds v. Noel*, 857 N.E.2d 1041, 1043 (Ind. Ct. App. 2006). "Summary judgment in a negligence case is particularly appropriate when the court determines that

no duty exists because, absent a duty, there can be no breach, and therefore, no negligence." *Id*. (internal citations omitted).

[14] Further, the law is well settled that, in a dog bite case, the duty of reasonable care imposed upon a landowner who did not own the dog is measured by the landowner's control or possession of the property and the landowner's actual knowledge that the dog had dangerous propensities. *McCraney v. Gibson*, 952 N.E.2d 284, 289 (Ind. Ct. App. 2011), *trans. denied*. *See also Baker v. Weather ex rel. Weather*, 714 N.E.2d 740, 741 (Ind. Ct. App. 1999). The absence of either component will result in a finding for the landowner. *Morehead v. Deitrich*, 932 N.E.2d 1272, 1276 (Ind. Ct. App. 2010), *trans. denied*.

[15] Here, Lott conceded at the summary judgment hearing that there was a question of fact regarding his knowledge of Boy's dangerous propensities. Therefore, the sole issue for our review is whether Father's designated materials show a genuine issue of material fact regarding Lott's control over the duplex. "'As a general rule, in the absence of statute, covenant, fraud or concealment, a landlord who gives a tenant full control and possession of the leased property will not be liable for personal injuries sustained by the tenant or other persons lawfully upon the leased property.'" *Olds*, 857 N.E.2d at 1044 (quoting *Pitcock v. Worldwide Recycling, Inc.*, 582 N.E.2d 412, 414 (Ind. Ct. App. 1991).

[16] Father argues that the lease agreements between Lott and Stines established a genuine issue of material regarding Lott's control of the duplex. Specifically, Father contends that there is a question of fact regarding Lott's control of the

duplex because "Lott retained control over the presence of pets in his rental unit with a Lease clause which says: 'No pets unless stated and approved by Lessor.'" (Father's Br. 11). However, as acknowledged by Father, we rejected a similar argument in *Morehead*, 932 N.E.2d at 1276.

[17] Father also argues that the right of inspection provision that allowed Lott to enter the duplex at reasonable times to inspect the premises establishes a genuine issue of material fact regarding Lott's control of the duplex. However, as again acknowledged by Father, we rejected this argument in *Olds*, 857 N.E.2d at 1041. Indeed, we specifically explained in *Olds* that "such a provision is common in most every lease" and is not the equivalent to substantial control and possession of the premises. *Id*.

[18] Lastly, Father contends that "[t]here is a genuine issue of fact as to whether Lott or [an ill] Stines, regardless of physical possession of the premises and Boy, was in the best position to protect the next-door neighbor child, Marcellus, from Boy's admittedly well-known vicious properties." (Father's Br. 11). However, in *Olds*, 857 N.E.2d at 1046-47, we explained that "the question of duty turns not on the characteristics of the tenant but on the characteristics of the rented premises." We further explained that "to the extent that a landlord has transferred control and possession of the premises to a tenant, the tenant is

liable[,]" and "[t]he injured party has a cause of action *against the tenant*." *Id*. at 1047. (emphasis in the original).[1]

[19] In conclusion, Lott negated the element of duty when he designated evidence that Stines was in exclusive possession and control of the premises. It was, therefore, incumbent on Father to come forward with contrary evidence establishing a genuine issue of material fact concerning Lott's control of the duplex. Father failed to do so. Accordingly, the trial court did not err in granting Lott's summary judgment motion.[2]

[20] Affirmed.

May, J., concurs in result.

Brown, J., concurs.

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[1] Father further argues that "[a] rule which conditions liability on the Defendant's control of the place of the injury seems illogical and contrary to general negligence principles[.]" (Father's Br. 13). However, as previously stated, the law is well settled that, in a dog bite case, the duty of reasonable care imposed upon a landowner who did not own the dog is measured by the landowner's control or possession of the property and the landowner's actual knowledge that the dog had dangerous propensities. *See McCraney*, 952 N.E.2d at 284. *See also Baker*, 714 N.E.2d at 740. We, therefore, decline Father's implicit request that we change the law. We also deny Father's request that we follow the law of another state.

[2] Father also directs us to *Brown by Brown v. Southside Animal Shelter, Inc.*, 158 N.E.3d 401, 405 (Ind. Ct. App. 2020), *adhered to on reh'g, trans. denied*, wherein this Court stated that "the owner or keeper of an animal is liable when that animal injures someone[]" and argues that there is a question of fact regarding whether Lott was Boy's keeper. However, because Father has designated no evidence that Lott was Boy's keeper, his argument fails.