MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jeffrey Daugherty,
Appellant-Petitioner,

v.

Steve Vaseloff, John W. Godfrey, and John W. Godfrey Revocable Trust,
Appellees-Respondents.

August 23, 2021

Court of Appeals Case No. 21A-CT-794

Appeal from the Hendricks Superior Court

The Honorable Mark A. Smith, Judge

Trial Court Cause No. 32D04-1812-CT-193

Bailey, Judge.

Case Summary

[1] Jeffrey Daugherty ("Daugherty") appeals the trial court order granting summary judgment to John W. Godfrey ("John") and Godfrey Revocable Trust (collectively "Godfrey") on Daugherty's negligence claims related to a dog bite. The only issue Daugherty raises on appeal is whether there are genuine issues of material fact that precluded summary judgment for Godfrey.

[2] We affirm.

Facts and Procedural History

[3] From approximately 2010 through 2020, Steven Vaseloff ("Vaseloff") rented a unit on property owned by Godfrey[1] ("the Property"). The Property was a commercial building consisting of five separate units. Vaseloff used part of his unit as a commercial garage from which he operated an auto repair shop. Vaseloff used the space above the garage as a residence, where he lived with his large dog, Leroy ("Leroy").

[4] John maintained the lawns of the Property, and he inspected the Property if a renter had "a problem" or someone moved out of a unit. Appellant's App. at 62. John sometimes went to the Property to collect a rent check. "[T]wo or three times" John took his vehicle to Vaseloff's garage for service. *Id*. at 68.

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[1] John was the Trustee of the Godfrey Revocable Trust, and both John and the Godfrey Revocable Trust owned the Property and leased it to Vaseloff.

When at the Property, John sometimes saw the dog, Leroy. At those times, Leroy was usually in Vaseloff's truck. "Once in a while" Leroy was outside the truck and on a leash. *Id*. at 69. John never saw Leroy roaming the Property freely without a leash. Leroy was never aggressive toward John, John never received any complaints about Leroy, and Daugherty never informed John of any instances when Leroy was aggressive. Vaseloff's lease of the Property did not prohibit him from having dogs on the Property.

[5] Daugherty and Vaseloff were friends, and Daugherty visited Vaseloff at the Property approximately "[t]wo or three times a week" prior to March 12, 2018. *Id*. at 15. When Daugherty visited the Property, Leroy was always present and freely roaming the Property without a leash. Leroy was friendly to Daughtery, often licking his face "or laying on" him. *Id*. at 18. Daugherty had "a lot of interactions" with Leroy, including petting the dog. *Id*. Leroy "never exhibited any sort of aggressive or dangerous behaviors" toward Daugherty. *Id*. at 18, 19. Leroy barked at strangers and tried to run toward them when they came on the Property. At those times, either Vaseloff put Leroy on a leash or else Daugherty held Leroy.

[6] On March 12, 2018, Daugherty was repairing a motorcycle at John's garage when Leroy bit Daugherty on the right arm. Daugherty suffered a torn bicep and artery.

[7] On December 10, 2018, Daugherty filed a complaint in which he sought damages for the alleged negligence of Vaseloff and Godfrey. Godfrey filed a

motion for summary judgment on March 11, 2021, and the trial court granted that motion in an order dated April 12, 2021.[2] The trial court further found "no just reason for delay" and entered the judgment as "final and appealable." Appealed Order. Daugherty now appeals.

Discussion and Decision

[8] Daugherty challenges the trial court order granting summary judgment to Godfrey on Daugherty's negligence claims. We review a grant or denial of a motion for summary judgment under the same standard used by the trial court; that is,

> [t]he moving party bears the initial burden of making a prima facie showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. Summary judgment is improper if the movant fails to carry its burden, but if it succeeds, then the nonmoving party must come forward with evidence establishing the existence of a genuine issue of material fact. In determining whether summary judgment is proper, the reviewing court considers only the evidentiary matter the parties have specifically designated to the trial court. *See* Ind. Trial R. 56(C), (H). We construe all factual inferences in the non-moving party's favor and resolve all doubts as to the existence of a material issue against the moving party. The fact that the parties have filed cross-motions for summary judgment does not alter our standard for review, as we consider each motion separately

[2] The summary judgment motion was made solely by Godfrey, not Vaseloff, and Vaseloff does not participate in this appeal.

> to determine whether the moving party is entitled to judgment as a matter of law.

Reed v. Reid, 980 N.E.2d 277, 285 (Ind. 2012) (case quotations and citations omitted).

[9] Daugherty alleged that Godfrey, as lessor of the Property on which the injury occurred, was liable for the injury Daugherty sustained from a bite by the tenant's (i.e., Vaseloff's) dog. To recover under a theory of negligence, a plaintiff must establish three elements: (1) the defendant's duty to conform his conduct to a standard of care arising from his relationship with the plaintiff, (2) a failure of the defendant to conform his conduct to that standard of care, and (3) an injury to the plaintiff proximately caused by the breach. *Morehead v. Deitrich*, 932 N.E.2d 1272, 1276 (Ind. Ct. App. 2011), *trans. denied.* To prevail against a landowner for the acts of a tenant's dog, a plaintiff must demonstrate that the landowner both retained control over the property and had actual knowledge that the dog had dangerous propensities. *Id.*; *see also, e.g., Byers v. Moredock*, 31 N.E.3d 1016, 1021 (Ind. Ct. App. 2015). Failure to prove either part of the latter two-part test will result in a finding for the landowner. *Id*.

[10] At common law all domestic dogs, "regardless of breed or size, are presumed to be harmless domestic animals…. To overcome that presumption,… one must point to a known vicious or dangerous propensity of the animal in question." *Penske Truck Leasing Co., L.P. v. Dalton-McGrath*, 157 N.E.3d 5, 14 (Ind. Ct. App. 2020) (quoting *Royer v. Pryor*, 427 N.E.2d 1112, 1117 (Ind. Ct. App. 1981)). "A dangerous or vicious propensity is 'a propensity or tendency of an animal to do

any act which might endanger the safety of [a] person or property in a given situation.'" *Byers*, 31 N.E.3d at 1021 (quoting *Baker v. Weather ex rel. Weather*, 274 Ind. 560, 565, 413 N.E.2d 560, 563 (1980)).

[11] Here, Godfrey designated evidence that establishes, prima facie, that John had no actual knowledge that Leroy was a dog with dangerous propensities. John provided deposition testimony that he never saw Leroy behave aggressively and he was never told that Leroy had done so. John further stated in his affidavit in support of Godfrey's motion for summary judgment that John "did not have any knowledge that Vaseloff's dog had any vicious or dangerous propensities prior to Jeffrey Daugherty's dog bite on or around March 12, 2018." Appellee's App. at 38.

[12] Daugherty designated no evidence controverting Godfrey's prima facie showing. Daugherty merely notes that John had always seen Leroy "confined" at the garage and asserts that fact "should have given [John] some indication as to the dangerous propensities of the dog." Appellant's Br. at 12. However, "[t]here is generally not a high degree of foreseeability that leasing property to an owner or keeper of a dog, *even where the dog may generally need to be restrained*, will result in injury to third parties." *Byers*, 31 N.E.3d at 1022 (emphasis added) (citing *Morehead*, 932 N.E.2d at 1280). Thus, the fact that John always saw Leroy restrained was not, alone, evidence showing that Leroy had a propensity to cause injury, much less evidence that John foresaw or had knowledge of the same. *Id*.

[13] Godfrey designated evidence establishing that John had no actual knowledge of any dangerous propensities of Vaseloff's dog, and Daugherty failed to come forward with any evidence that would support an inference otherwise. Because the material facts do not establish the second part of the two-part test for determining a landowner's liability for the acts of a tenant's dog, Godfrey was entitled to summary judgment.[3] *See McCraney v. Gibson*, 952 N.E.2d 284, 289 (Ind. Ct. App. 2011) (affirming summary judgment for the landowner where there was no evidence in the record of landowner's actual knowledge of the dog's violent propensity), *trans. denied*; *Jones v. Kingsbury*, 779 N.E.2d 951, 953 (Ind. Ct. App. 2002) (same).

[14] Affirmed.

Crone, J., and Pyle, J., concur.

[3] Thus, we need not, and do not, address the first part of the test, i.e., whether John retained control over the Property. *See, e.g.*, *Morehead*, 932 N.E.2d at 1276.