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IN THE COURT OF APPEALS OF INDIANA

Damon Daniels,
Appellant-Plaintiff,

v.

Jeffrey Drake and Lisa Drake,
Appellees-Defendants.

September 9, 2022

Court of Appeals Case No. 22A-CT-68

Appeal from the Franklin Circuit Court

The Honorable J. Steven Cox, Judge

Trial Court Cause No. 24C01-2011-CT-635

Altice, Judge.

Case Summary

[1] Damon Daniels appeals from the trial court's entry of summary judgment in favor of Jeffrey and Lisa Drake on his claim for damages stemming from an unprovoked dog bite incident. Daniels contends that a genuine issue of

material fact exists regarding whether the Drakes had actual or constructive knowledge of their dog's dangerous or vicious propensities.

[2] We reverse and remand.

Facts & Procedural History

[3] The facts most favorable to Daniels, the nonmovant, follow. The Drakes live on about sixteen acres of rural property in Brookville, Indiana, and do not have neighbors. At the time of the incident, the couple owned five dogs, including Max – a 2-year-old, male Great Dane. Max was 140 pounds, and his head came to Lisa's waist. Max was allowed to roam the property unrestrained. In the year prior to the incident, Max had been to the vet once without incident and had been taken inside Lowes and Home Depot, but he had not encountered visitors on the Drakes' property, aside from delivery people, at whom he regularly barked.

[4] On the afternoon of September 24, 2020, Daniels, a FedEx driver, pulled up to the Drakes' residence to make a delivery. He had not previously been to the property. When he saw Max in the yard, Daniels honked his horn a couple times, which caught Lisa's attention. As she walked over, Max ran to her, and Daniels, from inside the vehicle, asked if the dog was "okay." *Appendix Vol. II* at 175. Lisa gave Daniels a thumbs up, and then he retrieved the package before exiting the vehicle. Daniels walked toward Lisa and began to hand her the small package. At the same time, Max barked once and then bit Daniels in

the abdomen. According to Daniels, the bite "was a clamp, like bite down real hard and release real quick." *Id*. at 179.

[5] When Daniels exclaimed, along with some profanites, that he had just been bitten, Lisa responded, "Are you sure?" *Id*. at 64. She believed Daniels was exaggerating and that Max had only sniffed him, but she took Max to a crate on the front porch and closed him inside. Meanwhile, Daniels entered his vehicle and attempted, unsuccessfully, to call his boss. When Lisa returned, she continued to question Daniels and insist on seeing his injuries. Daniels felt that she was being "rude about it" and "didn't care." *Id*. at 188. He lifted his shirt for her to see, not wanting to look himself, and then left for the hospital.

[6] Daniels drove to a nearby hospital in Richmond and then was transported by ambulance to Methodist Hospital in Indianapolis, where he stayed overnight for treatment. Daniels suffered three puncture wounds to his abdomen and a one-centimeter laceration to his abdominal wall, as well as a hematoma and substantial swelling.

[7] On November 16, 2020, Daniels filed a complaint against the Drakes seeking damages related to the dog bite. After engaging in discovery, the Drakes filed a motion for summary judgment and designated, among other things, their own depositions and an affidavit from Max's veterinarian. Through their designated evidence, the Drakes sought to establish that they did not have actual knowledge of any dangerous or vicious propensities of Max prior to the incident involving Daniels.

[8] Daniels opposed the motion for summary judgment and included among his designated evidence an affidavit of Robert Brandau, a canine behavioral expert and animal control officer. Based on his education, training, and experience, as well as a review of certain pleadings, depositions, and records in this case, Brandau averred in relevant part:

> 3. Great Danes were bred to be guard dogs and to hunt wild boars.
>
> ***
>
> 6. Great Danes have a natural propensity to be weary [sic] of strangers.
>
> 7. Great Danes as a breed have natural propensity to be territorial.
>
> 8. A dog that is territorial means that the dog has a tendency to become attached to a locality and to defend this locality.
>
> 9. A dog that is territorial might reasonably be expected to cause injury if a stranger approaches it at its home/locality.
>
> 10. A dog that is territorial has the propensity to be dangerous in circumstances where a stranger is approaching it in its own yard.
>
> 11. A Great Dane has a tendency to be territorial which might endanger the safety of a stranger when that stranger approaches it on its owners' property.

12. A dog is even more likely to become territorial if it does not have a lot of visitors at home.

13. Isolation will increase the territorial aggressive tendencies of a dog.

14. Allowing a dog to roam unrestrained on a property will increase the territorial aggressive tendencies of a dog.

15. Socialization is very important with Great Danes because of their territorial nature, weariness [sic] of strangers and the size of the breed.

16. The fact that Max has not had the opportunity to interact with people, other than the [Drakes], at [their] home for the year prior to the incident causes an increase in aggression toward strangers as well as the dog's territorial instincts which will increase the dog's dangerous propensities toward strangers.

17. The lack of socialization of Max in the year before the incident increased the territorial aggressive tendencies of the dog.

18. Male dogs are much more dangerous than female dogs.

19. The Great Dane is listed on the Merritt Clifton Report as the 10th most dangerous dog in the United States and Canada.

20. The Merritt Clifton Report is relied upon by experts in my field to determine the dangerous propensities of different breeds of dog.

Appendix Vol. III at 48-50.

[9] Following a hearing on the summary judgment motion, the trial court granted summary in favor of the Drakes on December 16, 2021. Daniels now appeals. Additional information will be provided below as needed.

Standard of Review

[10] Summary judgment is appropriate where the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Perkins v. Fillio*, 119 N.E.3d 1106, 1110 (Ind. Ct. App. 2019) (citing Ind. Trial Rule 56(C)). It is intended to end litigation about which there can be no factual dispute. *Id.* Once the movant has established that no genuine issue of material fact exists, the nonmovant may not rest on the pleadings but must set forth specific facts which show the existence of a genuine issue for trial. *Id.*

[11] We review summary judgment de novo, applying the same standard as the trial court and considering only those matters specifically designated by the parties below. *Id.* Further, we will not reweigh the evidence but, rather, will liberally construe all designated evidentiary material in the light most favorable to the nonmoving party to determine whether there is a genuine issue of material fact for trial. *Id.* The party who lost below has the burden to persuade us that the trial court erred, as the trial court's grant of summary judgment is clothed with a presumption of validity. *Id.*

[12] Our Supreme Court has observed that summary judgment is a "relatively high bar," and we should "consciously err[] on the side of letting marginal cases

proceed to trial on the merits, rather than risk short-circuiting meritorious claims." *Hughley v. State*, 15 N.E.3d 1000, 1004 (Ind. 2014). Further, negligence actions are generally not appropriate for disposal by summary judgment." *Perkins*, 119 N.E.3d at 1111.

Discussion & Decision

[13] Indiana law has specifically addressed the question of liability for injury caused by domestic animals. In *Pozanski v. Horvath*, 788 N.E.2d 1255 (Ind. 2003), our Supreme Court rejected the notion that a first-time, unprovoked biting is sufficient by itself for a jury to infer that the dog's owner knew, or should have known, of the dog's dangerous or vicious tendencies. *Id*. at 1259. In so holding, the Court explained that owners may be liable for harm caused by their domestic pet "but only if the owner knows or has reason to know that the animal has dangerous propensities." *Id*. Such knowledge, however, may be constructive rather than actual. *Id*. As is particularly relevant here, the Court explained as follows:

> [T]he owner is bound to know the natural tendencies of the particular class of animals to which the dog belongs. If the propensities of the class to which the dog belongs are the kind which one might reasonably expect would cause injury, then the owner must use reasonable care to prevent injuries from occurring.
>
> Thus, where there is no evidence of an owner's actual knowledge that his or her dog has dangerous propensities, *the owner may nonetheless be held liable provided there is evidence that the particular breed to which the dog belongs has dangerous propensities*. And this is

> so even where the owner's dog has never before attacked or bitten anyone. *See, e.g.*, *Holt v. Myers*, 47 Ind.App. 118, 93 N.E. 1002, 1002-03 (1911) (observing that the ferocious nature of a bulldog was sufficient to provide the owner with constructive notice of the dog's dangerous propensities).

Id. at 1259-60 (internal quotations and citation omitted) (emphasis supplied). Thus, while a jury may not infer knowledge from a first-time, unprovoked biting, it "may infer that the owner knew or should have known of the dog's dangerous or vicious propensities [] where evidence shows that the particular breed to which the owner's dog belongs is known to exhibit such tendencies." *Id*. at 1260; *see also Tucker v. Duke*, 873 N.E.2d 664, 669 (Ind. Ct. App. 2007) (observing that knowledge may be constructive where evidence shows that the particular dog breed is known to exhibit dangerous or vicious propensities), *trans. denied*.

[14] In the present case, the Drakes designated evidence supporting their claim that, prior to Max biting Daniels, they lacked actual knowledge that Max had any dangerous or vicious propensities. That is, he had not acted aggressively toward any person and had never needed to be muzzled, be restrained, or take calming aids. Max had barked at delivery drivers before but never growled or been aggressive, and his veterinarian averred that Max was not aggressive when being vaccinated and neutered earlier that year.

[15] Juxtaposed to the Drakes' evidence of lack of actual knowledge, Daniels designated evidence, via Brandau's expert affidavit, indicating that Max's particular breed – Great Dane – has dangerous propensities, at least under

certain circumstances. *See Perkins*, 119 N.E.3d at 1112 (observing that a dangerous propensity is "a propensity or tendency of an animal to do any act which might endanger the safety of person or property *in a given situation*") (emphasis supplied)); *cf. Gruber v. YMCA of Greater Indpls.*, 34 N.E.3d 264, 267-68 (Ind. Ct. App. 2015) (affirming grant of summary judgment to owner of pig where designated evidence established that the pig had never previously injured anyone or exhibited any dangerous propensities and plaintiffs "designated no evidence that the particular breed to which the pig belonged has dangerous propensities"). Specifically, Brandau averred that Great Danes were bred to be guard dogs and that they have natural propensities to be wary of strangers and to be territorial, which means that Great Danes have a tendency to defend their home/yard and might reasonably be expected to cause injury or become dangerous to a stranger approaching said locality. Further, Brandau explained that a dog's territorial aggressive tendencies will increase where it does not encounter many visitors at home and where it is allowed to roam unrestrained on the property. Brandau also noted that in the Merritt Clifton Report – which he indicated experts in his field rely on to determine the dangerous propensities of various dog breeds – the Great Dane is listed as the tenth most dangerous dog breed in the United States and Canada.[1]

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[1] The Drakes assert in passing that Paragraphs 19 and 20 of Brandau's affidavit, both of which address the Merritt Clifton Report, constitute inadmissible hearsay. However, because the Drakes did not file a motion to strike or otherwise object to any portion of the affidavit during the summary judgment proceedings below, the issue is waived. *See Paramo v. Edwards*, 563 N.E.2d 595, 600 (Ind. 1990); *R.P. Leasing, LLC v. Chemical Bank*, 47 N.E.3d 1211, 1216 n.5 (Ind. Ct. App. 2015).

[16] The Drakes argue, for the first time on appeal, that Brandau's specialized knowledge as a canine behavioral expert is "immaterial" and cannot be used as evidence of what they – as lay people – should have known about Great Danes' alleged tendency to be territorial and, thus, potentially dangerous to strangers coming onto their property. *Appellees' Brief* at 18. The Drakes note that expert testimony, by its very nature, "relate[s] to some field beyond the knowledge of lay persons." *Lytle v. Ford Motor Co.*, 696 N.E.2d 465, 469-70 (Ind. Ct. App. 1998) (citing Ind. Evid. Rule 702(a)[2]), *trans. denied*. In essence, they argue that in order to raise a genuine issue of material fact Brandau needed to state an opinion regarding what a lay person should know about Great Danes.

[17] The Drakes' argument in this regard is novel but unpersuasive. To overcome summary judgment, Daniels needed to present some evidence that Great Danes have dangerous propensities under certain circumstances. *Cf. Gruber*, 34 N.E.3d at 268 (affirming grant of summary judgment where "plaintiffs designated *no evidence* that the particular breed … has dangerous propensities") (emphasis supplied)). Brandau's affidavit cleared this low bar. *See Perkins*, 119 N.E.3d at 1113 (reversing summary judgment where, to show constructive knowledge, defendant designated the affidavit of Dr. Wayne Allen, a veterinarian, in which Dr. Allen "averred that rams are generally territorial and tend to defend

[2] Evid. R. 702(a) provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

themselves, their territory, and females perceived to be in their herd by headbutting unfamiliar animals or persons").

[18] In sum, while Daniels did not designate any evidence that Max had previously exhibited any dangerous tendencies of which the Drakes were aware, Daniels did designate evidence that Great Danes, as a class, have dangerous territorial tendencies, at least under certain circumstances. This evidence created a genuine issue of material fact as to the dangerous tendencies of Great Danes, which, if true, the Drakes are bound to have known. *See id*. This would, in turn, generate a genuine issue as to whether the Drakes took reasonable precautions under the circumstances to prevent Max from causing injury to Daniels, an invitee on their land.[3] *See id*. Accordingly, the trial court erred in granting the Drakes' motion for summary judgment.

[19] We reverse and remand for further proceedings.

Vaidik, J. and Crone, J., concur.

[3] There is no dispute that Daniels was an invitee to whom the Drakes owed a duty to exercise reasonable care for his protection while on their premises.