Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-19-00568-CV

John Brad **OSBURN**,
Appellant

v.

Scott **BAKER** and Kathryn Baker,
Appellees

From the 451st Judicial District Court, Kendall County, Texas
Trial Court No. 18-144
Honorable Kirsten Cohoon, Judge Presiding

Opinion by: Beth Watkins, Justice

Sitting: Luz Elena D. Chapa, Justice
Beth Watkins, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: May 13, 2020

REVERSED AND REMANDED

Appellant John Brad Osburn sued appellees Scott and Kathryn Baker to recover damages for personal injuries he sustained after the Bakers' dog bit him. The trial court rendered a summary judgment in the Bakers' favor. On appeal, Osburn argues genuine issues of material fact exist as to each of his claims. We agree, so we reverse the trial court's judgment and remand the cause for further proceedings consistent with this opinion.

BACKGROUND

Osburn visited the home where the Bakers lived with several dogs, including a fifty-five pound male border collie named Bady, to provide a pool maintenance quote. After Osburn met with the Bakers, he walked out of the house and Bady bit his leg. Osburn sued the Bakers, asserting claims for negligence, gross negligence, and strict liability.

The Bakers filed a hybrid motion for summary judgment, arguing there was no evidence Bady had a dangerous propensity or that they knew of any dangerous propensity as would be required to impose strict liability or gross negligence liability on them. The Bakers further argued they were not negligent or grossly negligent as a matter of law because they complied with a Kendall County ordinance requiring owners to restrain their dogs in a fenced area, and they restrained Bady behind an electric fence. To support their motion, the Bakers attached excerpts from their deposition testimony.

Osburn asserted fact issues existed as to each of his claims, and he attached additional excerpts from the Bakers' deposition testimony as well as excerpts from his own deposition testimony. According to Osburn, these excerpts showed Bady was a herding dog that exhibited a dangerous propensity abnormal to his breed and the Bakers knew Bady was possessive of family members, "leery" around strangers, and had nipped at people's heels and ankles. Knowledge of these characteristics caused Mrs. Baker to tell her husband to put Bady up as Osburn approached their fence, but Mr. Baker believed Bady would be fine, so they did not restrain him.

The trial court granted the Bakers' motion without stating its basis. Osburn now appeals.

ANALYSIS

Standard of Review

We review a trial court's grant of summary judgment de novo. *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39, 45 (Tex. 2017). When a trial court's order granting

summary judgment does not specify the grounds relied upon for its ruling, we must affirm the judgment if any of the theories advanced are meritorious. *Id*. When a party files a hybrid motion, we first consider the no-evidence motion. *Id*. This is because if the nonmovant fails to meet its burden under the no-evidence standard, then there is no need for us to address a challenge to the traditional motion because the challenge necessarily fails. *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 219 (Tex. 2017).

In a no-evidence motion for summary judgment, "the movant must first assert that no evidence exists as to one or more elements of a claim the nonmovant would have the burden of proof at trial." *Covarrubias v. Diamond Shamrock Ref. Co.*, 359 S.W.3d 298, 301 (Tex. App.—San Antonio 2012, no pet.) (citing TEX. R. CIV. P. 166a(i)). "Once the movant has alleged no evidence exists as to one or more elements, the burden is then shifted to the nonmovant to present more than a scintilla of evidence which raises a genuine issue of material fact on each of the challenged elements." *Id*. More than a scintilla of evidence exists if the evidence would allow reasonable and fair-minded people to differ in their conclusions. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003).

No-Evidence Summary Judgment – Strict Liability

Osburn first argues the trial court erred in granting summary judgment as to his strict liability claim because there was more than a scintilla of evidence that Bady had dangerous propensities and the Bakers had actual or constructive knowledge of those propensities, as would be required to impose strict liability. In response, the Bakers argue they are entitled to affirmance on appeal because Osburn failed to challenge all of the grounds asserted in their motion. The Bakers further contend there is no evidence Bady had a dangerous propensity abnormal to his class or that they knew Bady had dangerous propensities.

Applicable Law

To recover on a claim of strict liability for injury by a dangerous domesticated animal, Osburn had to prove: (1) the Bakers were owners or possessors of Bady; (2) Bady had dangerous propensities abnormal to his class; (3) the Bakers knew or had reason to know Bady had dangerous propensities; and (4) those propensities were a producing cause of his injury. *See Marshall v. Ranne*, 511 S.W.2d 255, 258 (Tex. 1974) (citing RESTATEMENT OF TORTS § 509 (1938)); *Bolton v. Fisher*, 528 S.W.3d 770, 777 (Tex. App.—Texarkana 2017, pet. denied).

Application

The Bakers' motion alleged no evidence of the second and third elements existed. Accordingly, to avoid a no-evidence summary judgment on his strict liability claim, Osburn had to present more than scintilla of evidence to raise a genuine issue of material fact as to each of these elements. *See Covarrubias*, 359 S.W.3d at 301.

The summary judgment evidence shows a friend gave Bady to the Bakers because he was "too playful" to serve as a working herding dog. The friend told Mr. Baker that border collies are high-strung and prone to nipping at ankles and heels to get attention, and this particular border collie "did not want to work on a ranch" or follow commands like his other herding dogs. Mr. Baker knew Bady was an alpha dog that was possessive of the family and although he had never drawn blood, he had nipped at people's ankles and heels for attention. When Osburn came to the Bakers' house, Mrs. Baker told him Bady was "leery" around strangers and she expressed concern about Bady being loose during Osburn's visit. Specifically, Mrs. Baker told her husband Bady should be put away in a pen because "the dog had issues of nipping at people." Mr. Baker told Mrs. Baker that Bady would be fine, so the Bakers left Bady out.

The summary judgment evidence shows Bady, unlike a typical herding dog, refused to take commands, was "too playful" to serve as a working dog, and was known to be particularly

possessive of his family. *See Edmonds v. Cailloux*, No. 04-05-00447-CV, 2006 WL 398033, at *2 (Tex. App.—San Antonio Feb. 22, 2006, no pet.) (mem. op) (holding evidence that dog was hyperactive, ran through house, and was known to be "crazy" was more than a scintilla of evidence that dog had dangerous propensity abnormal to his class); RESTATEMENT (SECOND) OF TORTS § 509 cmt. i ("If the possessor knows that his dog has the playful habit of jumping up on visitors, he will be liable without negligence when the dog jumps on a visitor, knocks him down and breaks his hip."). The evidence also shows the Bakers knew Bady was "leery" around strangers. While the Bakers argue Bady had never bit anyone, that argument is contrary to the summary judgment evidence—Mr. Baker testified Bady had nipped at people "usually around your ankle or heel." We conclude Osburn produced more than scintilla of evidence that Bady had dangerous propensities abnormal to his breed and that the Bakers knew or had reason to know about such propensities.[1] *See King Ranch*, 118 S.W.3d at 751; *Covarrubias*, 359 S.W.3d at 301. We therefore hold the trial court erred in granting a no-evidence summary judgment in favor of the Bakers on Osburn's strict liability claim.

No-Evidence Summary Judgment – Negligence

Osburn next contends the trial court erred in granting summary judgment on his negligence claim because there was more than a scintilla of evidence that the Bakers breached a duty owed to him by negligently handling Bady when they did not put him away. For support, Osburn points to the same summary judgment evidence described above.

The Bakers counter they did not have a duty to restrain Bady because Bady had not shown any prior dangerous propensities. The Bakers further contend they exercised ordinary care as a

[1] To the extent the Bakers contend Osburn did not challenge each of the strict liability elements raised in their motion in his appeal, we disagree. In his appellate brief, Osburn specifically argued summary judgment was inappropriate because the evidence raised fact issues "about whether Bady had dangerous propensities and whether the Bakers had reason to know about them."

matter of law by properly restraining Bady within an electric fence in compliance with their local ordinance.

Applicable Law

To recover on a claim of negligent handling of an animal, Osburn had to prove: (1) the Bakers owned Bady; (2) the Bakers owed a duty to exercise reasonable care to prevent Bady from injuring others; (3) the Bakers breached that duty; and (4) the Bakers' breach proximately caused his injury. *See Marshall*, 511 S.W.2d at 259; *Allen ex rel. B.A. v. Albin*, 97 S.W.3d 655, 660 (Tex. App.—Waco 2002, no pet.).

Application

In their no-evidence motion, the Bakers argued there was no evidence they "had actual or constructive knowledge of facts that would put an ordinary person on notice that the animal could cause harm" or they "were negligent in their handling of the animal." To defeat that motion, Osburn was required to present evidence to raise a fact issue on each of these elements. *See Covarrubias*, 359 S.W.3d at 301. Whether a duty exists, however, is a threshold question of law we must first determine from the facts surrounding the case. *Thapar v. Zezulka*, 994 S.W.2d 635, 637 (Tex. 1999). Texas jurisprudence has long recognized that domestic dog owners owe a duty to exercise reasonable care to prevent their dogs from injuring others. *See Marshall*, 511 S.W.2d at 259 (applying section 518 of the First Restatement of Torts to impose strict liability on domestic dog owners).

The Bakers contend that because Bady had never shown any prior dangerous propensities, they did not owe Osburn any duty to restrain Bady. This contention ignores the general duty owed by domestic dog owners by incorrectly assuming a finding of viciousness is necessary in a negligence claim. *See id.* (pointing out animal owners can be subject to negligence even if their animal is not vicious). It also ignores the summary judgment evidence showing the Bakers actually

knew the way Bady acted around strangers put them at risk. *See* RESTATEMENT (SECOND) OF TORTS § 518 cmt. h (pointing out injury from a non-vicious domestic animal may be foreseeable even though animal may not have exhibited such behavior in past). We therefore conclude the Bakers owed Osburn a duty as a matter of law. *See Marshall*, 511 S.W.2d at 259.

To establish the Bakers breached this duty and their breach proximately caused his injury, Osburn was required to produce evidence that the Bakers did not exercise reasonable care and as a result, he was injured. *See Colvin v. Red Steel Co.*, 682 S.W.2d 243, 245 (Tex. 1984); *Allen*, 97 S.W.3d at 666. As indicated above, the summary judgment evidence shows that despite their knowledge of Bady's propensities, the Bakers chose to leave Bady loose and as a result, Bady bit Osburn's leg. This is more than scintilla of evidence that the Bakers did not act in an ordinary prudent manner and that their breach of the standard of care caused Osburn's injury. *See Lightning Oil Co.*, 520 S.W.3d at 45; *King Ranch*, 118 S.W.3d at 751; *Colvin*, 682 S.W.2d at 245. Accordingly, we hold the trial court erred in granting a no-evidence summary judgment in favor of the Bakers on Osburn's negligence claim.

No-Evidence Summary Judgment – Gross Negligence

As to his gross negligence claim, Osburn argues the trial court erred in granting summary judgment because there was more than a scintilla of evidence that the Bakers acted with conscious indifference towards his rights, safety, and welfare when they invited him onto their premises. The Bakers counter that Osburn did not preserve this argument for appeal because his response below failed to address their gross negligence arguments. The Bakers alternatively argue there is no evidence they acted with gross negligence.

Osburn's live petition alleged the "Defendants allowed the dog to remain on the premises, when they knew, or by the exercise of reasonable diligence should have known, that the dog was an unreasonably dangerous condition," and "[p]ermitting the dog to remain on the premises under

such circumstances constituted actual conscious indifference to the rights, safety, and welfare of" Osburn. The Bakers' no-evidence motion alleged "no evidence exist[s] that Defendants acted with a conscious indifference towards the right[s], safety, and welfare of others." Osburn's summary judgment response alleged "[s]trict liability and [g]ross negligence are proper because Defendants knew of the dangerous propensities exhibited by their dog and they failed to do anything to warn Plaintiff of such danger," and "Defendants were aware of the dangerous nature of the dog and that they should have taken extra precautions so as to avoid injury to" Osburn. Osburn presented evidence that Mrs. Baker was so worried about Bady's habit of "nipping at people" that she wanted to put him up during Osburn's visit, but decided against doing so on the advice of her husband.

We conclude Osburn properly responded to the gross negligence allegations in the Bakers' no-evidence summary judgment motion and presented evidence showing that they acted with conscious indifference. *See* TEX. R. CIV. P. 166a(i). We further conclude Osburn preserved his challenge to the gross negligence portion of the trial court's summary judgment order on appeal. *See* TEX. R. APP. P. 38.1. Osburn presented some evidence that Mrs. Baker believed Bady was so dangerous that he needed to be put away to protect Osburn. Osburn also presented evidence that, despite this knowledge, the Bakers did not put Bady away. That is some evidence the Bakers acted with conscious indifference towards Osburn's rights, safety, and welfare. *See Turner v. Duggin*, 532 S.W.3d 473, 487 (Tex. App.—Texarkana 2017, no pet.) (concluding owners' failure to secure dog even though they knew it had dangerous propensities constituted some evidence of gross negligence). We therefore hold the trial court erred in granting a no-evidence summary judgment in favor of the Bakers on Osburn's gross negligence claim.

Traditional Summary Judgment

In their traditional motion for summary judgment, the Bakers argued they were not negligent or grossly negligent as a matter of law because they complied with a Kendall County ordinance requiring owners to restrain their dogs in a fenced area.

To prevail on their traditional motion, the Bakers must conclusively negate at least one essential element of Osburn's claims. *See Lightning Oil Co.*, 520 S.W.3d at 45; *Frost Nat. Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010). Because none of Osburn's claims rely on a violation of the Kendall County ordinance, the Bakers' reliance on their compliance with the Kendall County ordinance fails to conclusively negate any of the elements of Osburn's negligence or gross negligence claims. As indicated above, the Bakers owed Osburn a duty to exercise reasonable care to prevent Bady from injuring others as a matter of law. *See Marshall*, 511 S.W.2d at 259. Whether the Bakers enclosed Bady in an electric fence does not conclusively negate the existence of this duty or their breach. *See, e.g., Bolton*, 528 S.W.3d at 775–76 (pointing out landowner owes duty to third parties if he has actual knowledge of animal's dangerous propensities and has ability to control premises). We therefore hold the trial court erred in granting the Bakers' traditional motion for summary judgment.

CONCLUSION

Because Osburn produced more than a scintilla of evidence to support each contested element of his strict liability, negligence, and gross negligence claims, and the Bakers failed to establish their entitlement to judgment as a matter of law, we reverse the trial court's judgment and remand the cause to the trial court for proceedings consistent with this opinion.

Beth Watkins, Justice