RENDERED: October 24, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001304-MR

BENJAMIN L. MITCHELL, INFANT,
BY AND THROUGH HIS MOTHER AND
NEXT FRIEND, CARLA McCUDDY — APPELLANT

v.

APPEAL FROM CLARK CIRCUIT COURT
HONORABLE WILLIAM T. JENNINGS, JUDGE
ACTION NO. 99-CI-00533

VIRGINIA LEE ABNEY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; KNOPF AND SCHRODER, JUDGES.

SCHRODER, JUDGE. This appeal involves an action by a minor child who was seriously, physically injured when he was attacked by the appellee's two dogs. After a jury trial, a verdict was returned in favor of the appellee/dog-owner. We believe that a directed verdict was not warranted in this case, and that partial summary judgment as to the issue of liability was properly denied. Thus, we affirm.

The controlling facts in this case are not disputed. Benjamin Mitchell, then a three-year-old child, was riding his

bicycle on the sidewalk in front of the appellee, Virginia Abney's, home. Ms. Abney's house is situated at the end of the street, and her driveway is often used as a place to turn around by neighborhood children on their bicycles. At the end of Ms. Abney's driveway, which slopes downhill, is a gate to her fenced backyard. Although Ms. Abney was not home at the time of this incident, she testified that before she left, she put her two dogs in the backyard and closed the gate. As Benjamin Mitchell approached Ms. Abney's driveway on his bicycle, his uncle and aunt, Justin and Marci Newhart, stood on the porch of their home a few doors down and watched the toddler. Benjamin turned into the Abney driveway, but because of a line of shrubs, they were unable to see what occurred next. Moments later, Benjamin began screaming and the Newharts rushed to the Abney driveway. They found Benjamin about 30 yards inside the Abney's fenced backyard, and the gate to the backyard appeared to have been forced open. Ms. Abney's two dogs were attacking Benjamin as he lay on the ground. The young child suffered multiple lacerations to his face, arms and legs. Although no one eye witnessed the event, the reasonable conclusion is that Benjamin was unable to stop his bike in Ms. Abney's driveway and crashed through the closed gate to the backyard, where he encountered the two dogs.

Benjamin's mother, Carla McCuddy, filed suit against Ms. Abney on behalf of her son (hereinafter, the "Mitchells"), seeking damages. Before trial, the Mitchells entered a motion for partial summary judgment as to Ms. Abney's liability, which was denied. The case was submitted to a jury with the threshold issue included in the following instruction as to liability:

> Even though you may believe that Benjamin L. Mitchell was on the defendant's property without her permission or knowledge, if you believe from the evidence that Virginia Abney should reasonably have anticipated or expected that someone like the plaintiff would come into contact with her dogs, then the defendant, Virginia Abney, is responsible for any injuries inflicted on Benjamin Mitchell by her dogs.

The jury returned a verdict in Ms. Abney's favor. The Mitchells entered a motion for a judgment notwithstanding the verdict, which was denied. The Mitchells now enter this appeal, asserting two errors.

The Mitchells first assert that the jury verdict was against the weight of the evidence and therefore, clearly erroneous. "In reviewing the evidence supporting a judgment entered upon a jury verdict, our role is limited to determining whether the trial court erred in failing to grant the motion for a directed verdict." <u>Inn-Group Management Services, Inc. v. Greer</u>, Ky. App., 71 S.W.3d 125, 127 (2002). All evidence which favors the prevailing party must be taken as true and the

reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions of the trier of fact. Kentucky & Indiana Terminal R. Co. v. Cantrell, 298 Ky. 743, 184 S.W.2d 111 (1944). The prevailing party is entitled to all reasonable inferences that may be drawn from the evidence. Upon appellate review, the pertinent question is whether the verdict rendered is "palpably or flagrantly" against the evidence so as to "indicate that it was reached as a result of passion or prejudice." NCAA v. Hornung, Ky., 754 S.W.2d 855, 860 (1988). If such is not the case, then the judgment must be affirmed.

In the present case, the jury was presented with evidence that Ms. Abney should not have reasonably anticipated a three-year-old child would come into contact with her dogs. It was uncontroverted that Ms. Abney had locked the gate to her backyard, where the two dogs remained, prior to leaving the house. Ms. Abney also testified that a three-year-old child had never before come into her backyard when it was locked. To support a finding that Ms. Abney should have anticipated a child like Benjamin coming into contact with her dogs, the Mitchells relied on Ms. Abney's own admission that neighborhood children often used her backyard without permission as a shortcut to some empty fields beyond her property. The Mitchells also presented evidence that the latch to Ms. Abney's backyard gate was faulty.

Simply put, the jury in this case was more persuaded by Ms. Abney's presentation of evidence, despite her admission that neighborhood children had, in the past, used her property as a shortcut without her permission. It cannot be concluded, though, that the jury's finding is "palpably or flagrantly" against the evidence. Our review reveals that the jury's verdict was, in fact, based upon substantial evidence presented by Ms. Abney, and was not reached as a result of passion or prejudice. The denial of the Mitchells's motion for a directed verdict was, therefore, proper.

The Mitchells next contend that the trial court erred in denying their pretrial motion for partial summary judgment establishing Ms. Abney's liability. Kentucky Rule of Civil Procedure 56.03 allows the trial court to grant a motion for partial summary judgment on the issue of liability alone where the only genuine issue of material fact is the extent of damages. The Mitchells assert that Ms. Abney's admission that neighborhood children used her yard as a shortcut established, as a matter of law, her liability for Benjamin's injuries.

Summary judgment is proper when, viewing the evidence in the light most favorable to the nonmoving party, it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807

S.W.2d 476, 483 (1991). On appeal, the standard of review of a summary judgment is whether "the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law". Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996).

A genuine issue of material fact existed in this case. The Mitchells based their claim on common law principles of liability, which necessarily require a finding that Ms. Abney should have reasonably anticipated someone like Benjamin being exposed to her dogs. Both parties agree that Benjamin was a trespasser on Ms. Abney's property. Therefore, the issue is whether Ms. Abney should have reasonably expected a trespasser to be exposed to her dogs. The only evidence presented by the Mitchells to support this conclusion is Ms. Abney's knowledge that other children would sometimes use her backyard as a shortcut, and thereby trespassed on her property. Even accepting this evidence in the light most favorable to the Mitchells, it cannot be concluded that the Mitchells established Ms. Abney's liability as a matter of law. Knowledge that one's property has been trespassed upon in the past does not, as a matter of law, establish that one should expect future trespassers or establish a duty of care toward the anticipated trespasser. "It is not required to anticipate the intrusion of others." Kentucky Cent. R. Co. v. Gastineau's Adm'r., 83. Ky.

119, 7 Ky. L. Rptr. 3, 3 (1885). Furthermore, the argument that a landowner's knowledge of past trespassers somehow elevates future trespassers to the level of licensee, and thus affording them a greater duty of care, was flatly rejected by the Kentucky Supreme Court in Kirschner v. Louisville Gas & Electric Co., Ky., 743 S.W.2d 840 (1988). In Kirschner, a teenage boy was severely injured by electric shock after he climbed a high voltage transmission tower. The landowner/public utility was not liable for the boy's injuries, despite the fact that the transmission tower stood in an open field often used by neighborhood children as a play area. In affirming a summary judgment in favor of the landowner, the Court stated: "We conclude that Kirschner was a trespasser as a matter of law . . . The argument that somehow Kirschner was a licensee for the reason that LG&E knew children played in the field under the tower is simply not tenable." Id. at 844. Therefore, Ms. Abney's knowledge of prior trespassers does not conclusively establish that she should have reasonably expected Benjamin Mitchell's presence in her backyard. This issue was properly submitted to the jury, and partial summary judgment was not warranted as to the issue of Ms. Abney's liability.

For the foregoing reasons, we affirm the holding of the Clark Circuit Court.

EMBERTON, CHIEF JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS AND FILES SEPARATE OPINION.

KNOPF, JUDGE, CONCURRING: I fully concur in the reasoning and the result reached by the majority. Although the circumstances of this case are tragic, the fact that Abney's dogs attacked a child does not, by itself, impose liability on her. As noted in Johnson v. Brown, Ky., 450 S.W.3d 495 (1970):

> The historical incidence of [KRS 258.275] was briefly sketched in Dykes v. Alexander, Ky., 411 S.W.2d 47 (1967), which expressed the opinion that the legislature did not intend to impose strict liability under any and all circumstances. That case stands for the proposition that one who keeps a dog enclosed or fettered on his own premises will not be liable to an interloper whose presence and exposure to the dog he has no reason to anticipate. Conversely, however, if the person is one whose proximity to the animal he has reason to anticipate, we think the statute abrogates the necessity of proving the ancient hallmark of liability, which was that the owner or keeper had knowledge of its vicious propensities. If the statute did not do that much there would seem to have been very little or no reason for its enactment.

Id. at 495-96.

As the majority correctly notes, there were genuine issues of material fact whether Abney had reason to anticipate trespassing children in her backyard. Although she admitted that some older children had trespassed in her yard in the past, that knowledge does not necessarily translate into a duty to anticipate future

trespasses. Consequently, the issue of Abney’s liability was properly submitted to the jury.

BRIEF FOR APPELLANT:

William K. Moore
Versailles, Kentucky

BRIEF FOR APPELLEE:

Don A. Pisacano
Lexington, Kentucky