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FEBRUARY 11, 2009
(FILE NO. 2008-SC-0517-D)

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000547-MR

RONALD G. FETCHKO

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. C. MCKAY CHAUVIN, JUDGE
ACTION NO. 05-CI-009741

JONATHAN MORGAN,
ASHLEY EDMUNDS,¹ AND
KAY MORGAN

APPELLEES

AND

NO. 2007-CA-000562-MR

ASHLEY EDMUNDS

CROSS-APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. C. MCKAY CHAUVIN, JUDGE
ACTION NO. 05-CI-009741

¹ Ashley Edmunds's name was misspelled on the Notice of Appeal filed by Ronald Fetchko. We have corrected the misspelling for purposes of this opinion, as her last name should be spelled "Edmunds," according to Ms. Edmunds's Notice of Cross-Appeal.

RONALD G. FETCHKO,
JONATHAN MORGAN, AND
KAY MORGAN
AND

NO. 2007-CA-000585-MR

CROSS-APPELLEES

KAY MORGAN²

CROSS-APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 05-CI-009741

RONALD G. FETCHKO AND
JONATHAN MORGAN

CROSS-APPELLEES

OPINION
AFFIRMING IN PART AND
REVERSING AND REMANDING IN PART

² We note that, in Kay Morgan’s Notice of Cross-Appeal, the caption erroneously names Ashley Edmunds as the Cross-Appellant, and Kay Morgan as a Cross-Appellee, even though the body of the Notice of Cross-Appeal lists Kay Morgan as the party bringing this particular cross-appeal. Because Kay Morgan is listed in the body of the Notice of Cross-Appeal as the party bringing this cross-appeal, and because Ashley Edmunds previously filed a cross-appeal in this case (see above caption in case number 2007-CA-000562-MR), we list Kay Morgan as the Cross-Appellant in the above caption for case number 2007-CA-000585-MR. We also note that, in the body of Kay Morgan’s cross-appeal in case number 2007-CA-000585-MR, she does not name Ashley Edmunds as a Cross-Appellee, even though a copy of the Notice of Cross-Appeal was certified to have been sent to Ashley Edmunds’s counsel, and the body of the cross-appeal awkwardly reads: “The names of the other Cross-Appellees are Ronald G. Fetchko, Jonathan Morgan and they are all represented by the counsel identified in the certificate below, except that Jonathan Morgan is pro se and without counsel.” Regardless of whether counsel intended to list Ashley Edmunds as a Cross-Appellee in Kay Morgan’s Notice of Cross-Appeal, she was not listed as such anywhere within the document and, therefore, she is not a Cross-Appellee in case number 2007-CA-000585-MR. See Kentucky Rule of Civil Procedure (CR) 74.01 (stating that the Civil Rules applicable to regular appeals also apply to cross-appeals); *Clark Equipment Co. v. Bowman*, 762 S.W.2d 417, 419 (Ky. App. 1988) (“It is manifest that a participant at the trial level who is not named in the notice of appeal is not a party to the appeal.”).

BEFORE: LAMBERT AND MOORE, JUDGES, AND BUCKINGHAM,³
SENIOR JUDGE.

MOORE, JUDGE: Ronald G. Fetchko, an animal control officer, appeals the Jefferson Circuit Court's order granting summary judgment against him in this dog bite case. After a careful review of the record, we affirm the circuit court's order in part, reverse it in part, and remand that part for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

Ashley Edmunds and Jonathan Morgan ("J. Morgan") owned a pit bull dog named "Bandit." One evening, at the residence occupied by Edmunds and J. Morgan, Bandit attacked their infant child. Following the attack, Louisville Metro Animal Control was contacted to pick up Bandit.

Fetchko was employed as a Louisville Metro Animal Control Officer. The morning following the attack on the infant, Fetchko arrived at work and checked the records of the calls from the previous night. Fetchko noticed that there was one call logged as a "'10-25' (dog bite) / '10-22' (pick up owner dog)" for the residence occupied by Edmunds and J. Morgan on Nanz Avenue. There was no other information about the dog or the incident. Fetchko responded to the call without any additional information available to him about the incident.

Fetchko parked his truck approximately two blocks from the Edmunds/J. Morgan residence and called the home to advise them that he was on

³ Senior Judge David C. Buckingham, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

his way to retrieve Bandit. No one answered the telephone, so Fetchko called dispatch personnel, who informed him that “the dog owner’s mother would be at the address to assist [him] in receiving the restrained dog.”

Fetchko logged his call to the residence on his telephone log. He then saw a woman walking toward him with one dog on a leash and another dog “walking at her feet that was not restrained.” Totally unknown to Fetchko, the woman with the dogs was Kay Morgan (“K. Morgan”), the mother of one of Bandit’s owners, and the person Fetchko was supposed to meet at the Nanz Avenue residence. Also unknown to Fetchko, the unleashed dog was Bandit. K. Morgan stopped next to the truck and motioned for Fetchko to come to her, which Fetchko later attested was not unusual because citizens who see the truck and his uniform often stop him to ask him questions. When Fetchko saw Bandit and K. Morgan, he was still about two blocks away from the residence where he was initially heading to respond to the dog bite call from the previous night.

Fetchko attested in his affidavit that both of the dogs that were with K. Morgan “appeared to be calm and docile” but, nevertheless, he “intended on advising [K. Morgan] that it was unlawful to walk a dog unless it was on a leash.” As Fetchko climbed out of his truck, K. Morgan advised him “that the unleashed dog was the dog that had bitten her grandchild the previous evening.” However, Fetchko did not understand what K. Morgan meant because he did not know the unleashed dog next to K. Morgan was the dog that he was in the neighborhood to retrieve. And the call log did not state that it was a child who was bitten the

previous evening. Fetchko attested in his affidavit that “[a]t that moment, Bandit became aggressive and started circling [him] and then turned and began growling and snapping at [his] legs.” Fetchko began backing away from the dog and kicking at him, and Bandit then attacked him and knocked him to the ground. According to Fetchko, the dog bit him and “claw[ed] at [his] torso attempting to get to [his] neck.” At one point, Fetchko was “on [his] hands and knees when the dog bit [him] hard on the top of [his] head.” The dog also bit him on the face multiple times. Fetchko was ultimately able to get into his truck, but as he did so, Bandit bit his left arm.

Fetchko filed his complaint in the circuit court, alleging claims of negligence, negligence per se, and strict liability against, *inter alia*, Edmunds, J. Morgan, and K. Morgan.⁴ The defendants filed motions for summary judgment, and Fetchko opposed those motions. The circuit court found that it “[could] not conclude that [K.] Morgan [was] not an ‘owner’ of [Bandit],” pursuant to Kentucky Revised Statute (KRS) 258.095(5). The court also determined that, as an animal control officer, Fetchko had “assumed the risk of being bitten or injured by one of the animals he transports.” Finally, concerning Edmunds’s argument that the “Firefighter’s Rule” should apply to Fetchko’s cause of action, “thereby exempting all of the Defendants from liability” for Fetchko’s injuries, the court declined to extend the Firefighter’s Rule to the facts presented in this case. In

⁴ Fetchko also brought his complaint against the owners of the residence that was occupied and rented by Edmunds and J. Morgan, *i.e.*, Gregory and Susan Westerman, but his claims against the Westermans were dismissed by the circuit court as settled. Thus, the claims against the Westermans are not before us.

doing so, the court also noted that it was unnecessary to address the Firefighter's Rule because the court had determined that Fetchko assumed the risk of being bitten. Therefore, the circuit court granted the motions for summary judgment.

Fetchko now appeals, claiming the facts of *Jordan v. Lusby*, 81 S.W.3d 523 (Ky. App. 2002), upon which the circuit court relied in finding that Fetchko assumed the risk, are distinguishable from the present case.

Edmunds cross-appeals, claiming that the circuit court erred in rejecting the application of the Firefighter's Rule. Kay Morgan also cross-appeals, alleging that: (1) she is not an owner of the dog pursuant to KRS 258.095; and (2) Fetchko's claim is barred by the Firefighter's Rule.

II. STANDARD OF REVIEW

“The standard of review on appeal 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*, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment should be “cautiously applied . . . in actions involving allegations of negligence.” *Poe v. Rice*, 706 S.W.2d 5, 6 (Ky. App. 1986) (citations omitted). “The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Serv. Ctr.*, 807 S.W.2d 476, 480 (Ky. 1991). “Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact.” *Id.* Further,

“the movant must convince the court, by the evidence of record, of the nonexistence of an issue of material fact.” *Id.* at 482.

III. ANALYSIS

A. CLAIMS REGARDING K. MORGAN’S OWNERSHIP OF BANDIT

Kentucky Revised Statute 258.095(5) provides: “‘Owner,’ when applied to the proprietorship of a dog, includes every person having a right of property in the dog and every person who keeps or harbors the dog, or has it in his care, or permits it to remain on or about premises owned or occupied by him.”

Further, KRS 258.235(4) provides as follows: “Any owner whose dog is found to have caused damage to a person . . . shall be responsible for that damage.”

In the present case, the circuit court found that on the day Bandit bit Fetchko, K. Morgan had been “asked by Ms. Edmunds to be at the Edmunds/Morgan residence to meet the animal control officer and release the dog into [his] possession. Ms. Morgan accepted care of the dog and, therefore, may be deemed an ‘owner’ of the dog on the day Mr. Fetchko was injured.” Therefore, the court reasoned that, taking “the record in the light most favorable to Mr. Fetchko,” the circuit court could not “conclude that Ms. Morgan [was] not an ‘owner’ of the dog.”

In her affidavit, K. Morgan attested that she did not “physically remove ‘Bandit’ from the fenced-in backyard . . . , nor did [she] open any gate that would have allowed him to leave that area.” She continued, attesting that she believed the dog “jumped over the fence under his own power,” and “[t]hat at no

time did [she] have possession, control or custody of ‘Bandit’ and was powerless over his actions once he had escaped the fenced-in backyard.”

Despite her assertions, we agree with the circuit court that K. Morgan’s actions were sufficient to statutorily define her as an “owner” of Bandit⁵ at the time of the incident.⁶ Accordingly, we affirm the circuit court on this issue.

B. CLAIMS REGARDING ASSUMPTION OF THE RISK

Fetchko next alleges that the facts of *Jordan*, 81 S.W.3d at 523, upon which the circuit court relied in finding that Fetchko assumed the risk, are distinguishable from the present case. Edmunds and K. Morgan assert, in their cross-appeals, that *Jordan* is applicable and that Fetchko assumed the risk of the dog bite.

Jordan was a dog groomer who had just finished grooming a dog and was carrying the dog when it bit her face. *Jordan*, 81 S.W.3d at 523. This Court held that, under the statutory definition of “owner” provided in KRS 258.095(5), *Jordan* qualified as an “owner” of the dog because she had custody of the dog at the time she was bitten. *See id.* at 524. This Court then concluded “that when *Jordan* accepted the dog for grooming, she assumed the risk of being bitten by the dog.” *Id.* Therefore, the Court stated that summary judgment had properly been granted against *Jordan*. *See id.* at 525.

⁵ For the sake of clarity, on remand K. Morgan, J. Morgan and Edmunds may potentially be held jointly and severally liable for Bandit’s actions.

⁶ *See, e.g., Jordan*, 81 S.W.3d at 524.

Jordan is distinguishable from the present case because Fetchko never accepted custody of Bandit. Rather, Fetchko attested that he was getting out of his truck because K. Morgan motioned for him to come over to her. At that point Bandit bit him. No evidence was presented to show that Fetchko had taken custody or control of Bandit. Therefore, *Jordan* is distinguishable and, consequently, its holding concerning the assumption of the risk is inapplicable to the present case.

C. CLAIMS CONCERNING THE FIREFIGHTER'S RULE

Fetchko asserts that the Firefighter's Rule is inapplicable to this case. However, Edmunds and K. Morgan both contend that the Firefighter's Rule is applicable and that it bars Fetchko's claim.

There are three prongs necessary to the application of the Firefighter's Rule as adopted in Kentucky:

- 1) The purpose of the policy is to encourage owners and occupiers, and others similarly situated, in a situation where it is important to themselves and to the general public to call a public protection agency, and to do so free from any concern that by so doing they may encounter legal liability based on their negligence in creating the risk.
- 2) The policy bars public employees (firefighters, police officers, and the like) who, as an incident of their occupation, come to a given location to engage a specific risk; *and*
- 3) The policy extends only to that risk.

Sallee v. GTE South, Inc., 839 S.W.2d 277, 279 (Ky. 1992).

Assuming, for the sake of argument, that the Firefighter's Rule applies to animal control officers, Fetchko had not yet arrived at the "given location," in this case, the Edmunds/J. Morgan residence, in order to engage the "specific risk" of retrieving Bandit. Rather, Fetchko was approximately two blocks from the house and was motioned by an unknown person (later to be identified as K. Morgan) who was walking with two unknown dogs (one of which was later identified as Bandit). At the time he was bitten, Fetchko was not responding to the call from the prior night. And, at the time the incident occurred, Fetchko was bitten by a then unknown dog. Thus, Fetchko's dog bite incident was in no way related to a specific risk he assumed at a given location. Thus, elements two and three of the Firefighter's Rule are not met in this case. Assuming the rule applies to animal control officers, it would not apply under the circumstances presented in this case.

D. CLAIM THAT FETCHKO WAS AN "OWNER" OF BANDIT

In her appellate brief, K. Morgan contends that the circuit court "determined that Mr. Fetchko, as an Animal Control Officer acting within the scope of his duty, was a statutory owner of the dog." However, her claim is misplaced. First, the circuit court never found that Fetchko was an "owner" of the dog pursuant to KRS 258.095(5). Second, as previously mentioned, Fetchko attested that he had just climbed out of his truck when Bandit bit him, and no

evidence was presented to create an issue of fact that Fetchko had taken custody of the dog. Therefore, K. Morgan's assertion that Fetchko was an "owner" of Bandit lacks all merit.

E. CONCLUSION

Accordingly, the Jefferson Circuit Court's opinion is affirmed on the issue of K. Morgan's ownership of Bandit but reversed on all remaining issues.

This case is therefore remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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