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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court of Appeals

NO. 2007-CA-000787-MR

JANET H. JONES — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 04-CI-01505

GLEN AND MARILYN SCHNEIDERS;
JAMES AND JENNIFER TURNER;
AND HUMANA HEALTH PLAN,INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND NICKELL, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

ACREE, JUDGE: Janet Jones appeals from an order of the Fayette Circuit Court granting summary judgment to the Appellees, Glen and Marilyn Schneiders and James and Jennifer Turner, and dismissing her cause of action. We affirm.

Jones and the Schneiders live next door to one another. Before she married, while still living with her parents, the Schneiders, Jennifer Turner acquired a

[1] 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 Kentucky Revised Statutes (KRS) 21.580.

dog she named Marley. The Schneiders installed an underground "invisible" electric fence to keep Marley on their property. The incident that is the subject of this litigation and appeal occurred about six months after Turner married and moved from her parents' house, taking Marley with her.

On April 22, 2003, around 10:00 p.m., Jones went outside her home to cover some plants in her front and side yard due to a frost advisory that had been issued. While outside, Jones was startled by the bark of a dog, fell, and fractured her wrist. After she fell, Jones looked up and saw a dog standing over her. She recognized the dog. It was Marley. Marley then chased after a dog that was nearby. Thereafter, Jones had her daughter and husband take her to the emergency room.

On April 6, 2004, Jones filed a complaint against the Schneiders and the Turners alleging negligence. On August 17, 2006, Jones amended her complaint, alleging negligence *per se* premised upon Marley's violation of several local ordinances, namely Lexington-Fayette Urban County Government (LFUCG) Local Ordinance § 4-19 or as it is more commonly known, the leash law.[2]

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[2] §4-19 states:

> (a) It shall be unlawful for any dog to run at large within the urban county; provided that a hound or hunting dog may be unrestrained when engaged in lawful hunting activities while on private or public property designated or authorized for that purpose.
> (b) Dogs shall be confined behind a fence or within an enclosed area or otherwise securely restrained at all times while on the owner's or harborer's property. A dog may be unconfined or unrestrained while on the owner's or harborer's property where the dog is in the company of the owner or harborer and the dog is under the owner's or harborer's direct control and supervision.
> (c) A dog shall be permitted off the owner's or harborer's property only if it is restrained by a chain or leash.
> (d) Any dog found to be unconfined or unrestrained on public or private property, unattended by the owner or harborer, shall be presumed to be running at large and may be impounded by the division of animal control as set forth in section 4-21.
> (e) The owner or harborer of any dog found running at large in violation of this section shall be fined not less than ten dollars ($10.00) nor more than fifty dollars ($50.00) for each offense.

Appellees subsequently filed a motion to dismiss, or in the alternative, a motion for summary judgment. After hearing arguments of counsel, the Fayette Circuit Court dismissed Jones' negligence *per se* claim and granted summary judgment on her original negligence claim. This appeal followed.

Kentucky Rules of Civil Procedure (CR) 12.02(f) sets forth the standard for dismissing a complaint for failure to state a claim.

> The court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim. In making this decision, the circuit court is not required to make any factual determination; rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?

*James v. Wilson*, 95 S.W.3d 875, 883-84 (Ky.App. 2002)(internal quotation omitted).

We review *de novo* dismissals under CR 12.02 for failure to state a claim, accepting as true the plaintiff's factual allegations and drawing all reasonable inferences in the plaintiff's favor. *Gall v. Scroggy*, 725 S.W.2d 867, 868-69 (Ky.App. 1987).

Jones contends the Appellees' alleged violation of LFUCG Local Ordinance §4-19 is negligence *per se.* However, the trial court found that there was no legal theory upon which the case could go forward. We agree.

KRS 446.070 codifies the doctrine of negligence *per se* in Kentucky. *Davidson v. American Freightways, Inc.*, 25 S.W.3d 94 (Ky. 2000). That statute provides that

> A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation.

KRS 446.070. The availability of a civil remedy for violation of "any statute in KRS 446.070 has been held to be limited to Kentucky statutes and not to . . . local

ordinances." *T & M Jewelry, Inc. v. Hicks ex rel. Hicks*, 189 S.W.3d 526, 530 (Ky. 2006), *citing Baker v. White*, 251 Ky. 691, 65 S.W.2d 1022 (1933) and *Alderman v. Bradley*, 957 S.W.2d 264 (Ky.App. 1997). The Kentucky Supreme Court has held that an ordinance does not impose liability upon an individual property owner to another party. The duty to obey ordinances is a duty owed to the municipality, not to another party. *Schilling v. Schoenle*, 782 S.W.2d 630, 632-33 (Ky. 1990).

Here, Jones brought her claim against the Appellees for allegedly violating the local leash law. However, this claim is not justiciable under Kentucky law because the ordinance does not entitle Jones to a private cause of action against the Appellees. Accordingly, we affirm the trial court's dismissal.

We next turn to the trial court's summary dismissal of Jones' common law negligence claim. The standard of review on appeal when a trial court grants a motion for 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); CR 56.03. "The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky.App. 2001), *citing Steelvest v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480-82 (Ky. 1991). "Impossible," as set forth in the standard for summary judgment, is meant to be "used in a practical sense, not in an absolute sense." *Lewis* at 436.

The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." *Steelvest* at 480. "The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the

burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.'" *Lewis* at 436, *citing Steelvest* at 482. Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue de novo. *Scifres* at 781.

To recover on a negligence claim in Kentucky, there must be a duty on the defendant's part, a breach of that duty, and consequent injury. *Mullins v. Commonwealth Life Ins. Co.*, 839 S.W.2d 245 (Ky. 1992). The scope of duty includes a foreseeability component involving whether the risk of injury was reasonably foreseeable. *See, e.g., Lewis and B & R Corporation*, 56 S.W.3d 432 (Ky.App. 2001); *Fryman v. Harrison*, 896 S.W.2d 908 (Ky. 1995); *Standard Oil Co. v. Manis*, 433 S.W.2d 856 (Ky. 1968); *Commonwealth, Dept. of Highways v. Widner*, 388 S.W.2d 583 (Ky. 1965). Reasoning that a fall resulting from hearing a dog bark was not a foreseeable consequence of letting one's dog outside without a leash, the trial court granted summary judgment to the Appellees on this issue. We agree with the trial court's analysis and find it impossible, as that term is used in this context, for Jones to establish negligence on the part of the Appellees.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES, GLEN AND MARILYN SCHNEIDERS:

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NO BRIEF FOR HUMANA HEALTH PLAN, INC.