

RENDERED: JANUARY 6, 2012; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2010-CA-001761-MR

CARL BRISCOE, JR.

APPELLANT

v. APPEAL FROM POWELL CIRCUIT COURT  
HONORABLE FRANK ALLEN FLETCHER, JUDGE  
ACTION NO. 09-CI-00350

HAYDON JOHNSON

APPELLEE

OPINION  
REVERSING AND REMANDING

\*\* \*\* \* \*\* \* \*\*

BEFORE: ACREE, CLAYTON, AND WINE, JUDGES.

WINE, JUDGE: Carl Briscoe, Jr., appeals from a summary judgment of the Powell Circuit Court dismissing his claims against Haydon Johnson arising from a dog attack. He argues that genuine issues of material fact remain. Upon review, we agree and reverse the judgment of the Powell Circuit Court.

## History

In March or April of 2009, Briscoe was attacked by a pit bull dog being housed on a property neighboring his. Briscoe was on a deck on his own property when the attack occurred. The same dog had attacked Briscoe on prior occasions and numerous complaints had been made to the local dog warden about the animal.

Briscoe alleges that the dog was owned by individuals renting the property neighboring his, and that the property in question was owned by Johnson. Before the attack occurred, Briscoe had previously complained to Johnson about the dog. Johnson indicated that he would speak with the renters about removing the dog. Thereafter, Johnson did in fact speak with the renters and the dog was removed. However, the dog was later returned to the property. Sometime after the dog returned, Briscoe was attacked.

Eventually, through a criminal action, Briscoe succeeded in having the dog euthanized. Thereafter, Briscoe, *pro se*, filed a civil action against Johnson in the Powell District Court. The claim was later removed to the Powell Circuit Court due to the amount of damages being claimed.

In his complaint, Briscoe alleged that Johnson leased the property to renters. The complaint further alleged that the renters housed the dog on their property, although the dog would often roam onto his property. Briscoe averred that Johnson allowed the renters to keep the pit bull on the property even after being made aware of the dog's vicious tendencies.

Johnson answered and filed a motion for summary judgment, alleging that he did not own the property in question and was, therefore, not liable for any damages caused by the dog. At the hearing, counsel for Johnson claimed to have a deed showing that Johnson was not the owner of the property; Briscoe's counsel claimed to have a deed showing Johnson was the property owner.

At the hearing, the trial judge indicated that he was going to grant summary judgment in favor of Johnson. The judge stated,

I'm gonna grant the Motion for Summary Judgment, uh, based on the fact that Mr. Johnson did, in fact, warn these people they had to get rid of the dog. It wasn't his dog. And, secondly, there's a question as to whether, who owned the property in question, as well. . . . I think this gentleman acted in good faith and did everything that he could.

Thereafter, the trial court entered a written judgment granting Johnson's motion.

The court's written judgment stated, in pertinent part,

The Court finds that Mr. Johnson was not the owner of the dog in question and [Briscoe] was not [Mr. Johnson's] renter. Mr. Johnson may or may not have been the true owner of the real estate at the time of the alleged incident and owed no legal duty to [Briscoe].

Briscoe now appeals from the summary judgment. On appeal, Briscoe claims that there was a genuine issue of material fact as to the ownership of the property.

Briscoe argues that the trial court erred by "ignoring" the question of ownership despite applicable caselaw to the contrary. Briscoe also argues that the court could not decide the case on the basis of whether Briscoe acted in good faith, or acted reasonably, as this poses a question for the jury rather than the court.

## Analysis

Upon review of a summary judgment, we ask “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). In considering whether any genuine issues of fact remain, we review the record “in a light most favorable to the party opposing the motion for summary judgment” and resolve any doubts in their favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). This presents a question of law, reviewed by the Court *de novo*. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

Briscoe cited the case of *McDonald v. Talbott*, 447 S.W.2d 84 (Ky. 1969), to the trial court for the proposition that a landowner may be held liable in a dog attack case, even if the dog does not belong to the landowner, where the landowner knows of the animal’s dangerous propensities. In *McDonald*, the high Court found liability could exist for a non-owner landlord. The Court recognized in *McDonald* that a landlord is not ordinarily liable for the negligence of his tenants on a leased premises. However, the landlord in the *McDonald* case had received numerous complaints about a dog that belonged to his renter’s daughter, who was a frequent visitor of the residence, although she did not live there. Based upon prevailing precedent in other jurisdictions, the Court held that whether a landlord who had knowledge of the vicious propensities of an animal took

appropriate steps to prevent injury or attack, was a question of material fact. *Id. at* 86. Thus, the Court remanded for further proceedings.

We find *McDonald* to be directly on point with the present case. The trial court erred by finding that there was no duty without first determining whether Johnson was the landowner/landlord. The question of whether a duty arose, such as could create liability for Johnson, rests first upon whether Johnson was the landowner/landlord. A genuine issue of material fact remains as to this question. Thus, it was error for the trial court to grant summary judgment in favor of Johnson.

We note, as an aside, that we have not considered the deeds attached to Johnson's brief in arriving at our decision today, as they are not contained in the record.<sup>1</sup> Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(vii).

In conclusion, we reverse the summary judgment of the Powell Circuit Court and remand for further proceedings consistent with this opinion, including a determination of whether Johnson was the landowner and/or landlord of the property in question. We make no determination regarding whether a duty actually existed or was breached in this case, however.

ALL CONCUR.

---

<sup>1</sup> Regardless, even though we did not consider these deeds in arriving at our conclusion, we have been informed that the deed purporting to convey Johnson's interest in the property to his grandchildren clearly states that he reserved a life estate in the property. Thus, the deeds would not have supported his position anyway because a holder of a life estate in real property has the exclusive right to occupy and control property. *Hammons v. Hammons*, 327 S.W.3d 444, 452 (Ky. 2010).

BRIEFS FOR APPELLANT:

Charnel M. Burton  
Booneville, Kentucky

BRIEF FOR APPELLEE:

Monica S. Lacy  
Stanton, Kentucky