

FILED
COURT OF APPEALS
BY: *Om*

NO. 36488-3

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JENNIFER LOU CARR, individually and as Limited Guardian for
JOSEPH MICHAEL CARR, a minor,

Plaintiffs,

v.

MARGARET A. KOEPPLIN, and JOHN DOE KOEPPLIN, wife and
husband, and the marital community composed thereof, and RUTH
THOMPSON and HERBERT THOMPSON wife and husband, and
the marital community composed thereof, and ED QUESNELL, and
JANE DOE QUESNELL, husband and wife, and the OWNERS of
Berry Lake Mobile Home Park, and the marital community
composed thereof,

Defendants.

RESPONDENT'S BRIEF

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Ed Quesnell and the
Owners of Berry Lake Mobile
Home Park

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I. STATEMENT OF THE CASE

The Quesnells accept the Carrs' statement of the case as far as it goes. However, there are additional facts the Court should be aware of with respect to the issues raised by the Carrs.

Clinton Carr, Joseph's father, testified in his deposition that he and Joseph had stayed with his parents, defendants Thompson, for a week and a half the summer before the incident. (CP 94). Mr. Carr was aware that Brady lived across the street and was often tied up outside. (CP 94-95). His children, including Joseph, had prior contact with Brady many times in his and appellant Jennifer Carr's presence. He stated that Brady "seemed like a real friendly dog, never had any problems. . ." (CP 95). Mr. Carr testified that the dozens of prior occasions where Joseph had contact with Brady, he would never have thought twice about worrying about the safety of his children. (CP 95-96). On these prior occasions the children would pet and talk with Brady, and Mr. Carr would get down on his knees and almost have face to face contact with Brady. (CP 96). Mr. Carr further testified that he never observed any

indication that Brady was prone to viciousness or might snap at a child (CP 97). In fact, Brady would not even bark when they passed by. (CP 97). According to Mr. Carr, Brady seemed real happy, her tail wagging, and she would come right up to Mr. Carr and his children. (CP 98). Mr. Carr observed other children playing with Brady or petting her on approximately five occasions. On each occasion, Brady reacted in a friendly positive way to those kids. (CP 98). Mr. Carr was not aware of anyone making complaints about Brady. (CP 101).

Joseph's mother, Jennifer Carr, testified in her deposition that there was nothing about Brady that caused her any concern for Joseph's safety. (CP 104-105).

Ruth Thompson, Joseph's grandmother, testified at her deposition that she had seen Brady with people, including herself prior to the incident. She had no reason to think that Brady would have bitten Joseph. (CP 104-105). Ms. Thompson observed Brady's relationship with people was always very good, and that many of the residents' grandchildren would visit and play with Brady. (CP 105). Ms. Thompson never saw Brady get violent or show any propensity for vicious behavior towards anyone. (CP 105). According to Ms. Thompson, she

had previously seen her grandchildren pet Brady, get down near Brady and nuzzle the dog. Brady would respond by licking the child. (CP 105-106). Ms Thompson testified that from everything she had observed about Brady's behavior she had no indication Brady might bite Joseph. (CP 107).

Margaret Koeplin, a defendant and Brady's owner testified in her deposition that she had previously seen Joseph playing with Brady and that they got along fine. (CP 110). She testified that she had not seen Brady behave in an aggressive manner towards people or other pets. She was not aware of Brady ever attacking, biting, or growling at anyone. (CP 112- 113).

Eldon Hill, a resident and the park's caretaker, testified in his deposition that there have been no control issues with dogs in the park. (CP 116). Mr. Hill testified that none of the park's pets have ever been aggressive toward him. (CP 117). Mr. Hill was not aware of the reason for a size restriction. (CP 57). Mr. Hill did not tell his employer he believed Brady was in violation of the park's rules. (CP 60). He did tell his employer that Brady's leash was longer than allowed but was not concerned about the length. (CP 60).

Ed Quesnell is a member of the LLC which owns the mobile home park and a respondent. Mr. Quesnell testified at his deposition that he had three contacts with Ms. Koeplin prior to the date of the incident regarding Brady. The first time was when Brady was on a leash and Mr. Koeplin was standing on the leash when Brady pulled loose from Ms. Koeplin's control. Mr. Quesnell explained to Ms. Koeplin that she need to control her dog and be in control with the leash. (CP 121). On another occasion Mr. Quesnell learned Brady was on a leash but not under human control. Mr. Quesnell told Ms. Koeplin that she needed to be present with the dog. As far as Mr. Quesnell knows, Ms. Koeplin complied. (CP 122). Lastly, Mr. Quesnell testified that he was once told by Mr. Hill that Brady had gotten off the leash. (CP 122-123). With regard to Brady's size, Mr. Quesnell testified that he had entered into a written agreement with Ms. Koeplin allowing her to keep Brady despite exceeding the park's size limitation. (CP 125).

Mr. Quesnell had no concern for residents' safety with respect to Brady. (CP 45).

II. ARGUMENT

A. The Standard of Review.

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR56. In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. *Sherman v. State*, 128 Wn.2d 164, 183, 905 P.2d 335 (1995), *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989), citing *LaPlante v. State*, 85 Wn.2d 154, 158, 521 P.2d 299 (1975). The courts view the facts in the light most favorable to the nonmoving party, but should nevertheless grant summary judgment whenever reasonable minds could reach but one conclusion. *Ruff v. County of King*, 125 Wn.2d 697, 703-4, 887 P.2d 886 (1995) (quoting *Hartley v. State*, 103 Wn.2d 768, 698 P.2d 22 (1995)). In defending against such a motion, the nonmoving party must make a showing sufficient to establish the existence of each essential element to that party's case on which that party will bear the burden of proof at trial. *Young v. Kay Pharmaceuticals, Inc.*, 112 Wn.2d at 225, 770 P.2d 182 (1989). If the nonmoving party fails to establish each

essential element of its case, summary judgment should be granted to the defendant. *Id.* at 225.

Whether a defendant owes a duty is a question of law. *Brown v. Hauge*, 105 Wn. App. 800, 805, 21 P.3d 716 (2001).

B. The Quesnells Owed No Duty To Joseph Carr Under The Rental Contract.

At page 9 of their brief the Carrs assert that a landlord may be liable for a tenant's injury through a violation of the rental agreement, a violation of a common law duty, or a violation of various statutes regulating the landlord-tenant relationship.

First, the Carrs have not alleged or proven violation of any relevant landlord-tenant statute.

Second, with respect to a violation of the common law, the Carrs appear to concede that Washington law is unfavorable to their claims.

The seminal case in this regard is *Frobig v. Gordon*, 124 Wn.2d 732, 881 P.2d 226 (1994).

In *Frobig*, the plaintiff was injured by Gordon's tiger. The tiger was kept on property which Gordon had leased from the Branches. The Court first pronounced the rule in Washington

that the owner, keeper, or harbinger of a dangerous or vicious animal is liable; the landlord of the owner, keeper or harbinger is not. In its analysis, the Court made no distinction between a commercial versus a residential lease. Residential cases are cited in support of its ruling.

The Frobig Court next referred to the consistency between the rule and the common law. It reiterated the common law which held a dog owner who knows of vicious propensities to be strictly liable and that an owner, without such knowledge, may be negligent if he fails to reasonably prevent harm. Of course, here, no ownership or control of the dog is alleged against these defendants.

The Court next discussed the consistency of the rule with the analogous law governing landlord liability to third parties for defects on leased premises. Bare in mind, however, that the court does not adopt the law governing a landlord's duty to third parties on the premises in regards to our types of cases.

To the contrary, the Supreme Court's decision refers to the Court of Appeals finding that the landlord in Frobig might be

liable because they knew their tenant would have a dangerous animal on the premises before they rented their property to her.

This prior knowledge of the landlords, however, has no significance. Under Washington law, the landlords would not be liable to the tenant for the tiger's attack so should not be liable to third parties for injuries inflicted by the animal. [citation omitted]. The wild animals were [the tenant's] alone, and under **Washington law liability resulting from the ownership and management of those animals rests with [the tenant] alone.** Frobig, at 737.

And further, at 740-741,

The issue of [the landlord's] duty to [plaintiff] however, is not a question of fact, as the Court of Appeals found, nor is it a question of morality, as the Court in Uccello suggests. Rather, the issue is a matter of law, and we conclude that **landlords have no duty to protect third parties from a tenant's lawfully owned but dangerous animal.**

There was no violation of any common law duty owed to Joseph Carr by the Quesnells.

The Carrs instead focus upon the purported violation of the park's rental agreement with respect to pets. Brief of Appellant, p. 9-13.

None of the cases cited by the Carrs involve dog bites or lease provisions regarding pets. All the cases cited involve covenants to repair and injuries sustained as the result of

physical defects in the premises. Even if analogous, the cases do not support plaintiff.

For example in *Brown v. Hauge*, 105 Wn. App. at 804-805, the court discussed the landlord's duty under a covenant to repair in a lease. The court followed the rule that where a landlord covenants to maintain the premises in good repair but fails to do so he may be liable to the tenant for injuries sustained if he failed to take reasonable action to repair an unsafe defect that had been called to the landlord's attention. The defect must have created an unreasonable risk of harm to the tenant. The *Brown* court ordered summary judgment for the landlord.

In the case, the admissible evidence does not support that Brady presented an unreasonable risk of harm to any tenant or guest. There is no evidence of any complaints about Brady's behavior prior to this incident. The Quesnells simply had no notice that Brady constituted an unreasonable risk of harm to anyone.

With respect to the particular lease provision involved here the Carrs conveniently choose to ignore that the Quesnells granted a written waiver to Ms. Koeplin to have a

pet that exceeded the size limits in the PETS clause. There was no violation of the park rules because of Brady's size. Brady was an authorized pet. There were no complaints about Brady from park residents. Brady was not aggressive or vicious. There is no evidence that Brady interfered with the health, welfare, safety or peaceful enjoyment of others. The Quesnells had no reason to exercise their discretion to have Brady removed from the park.

The Quesnells point out that this issue was raised and addressed by the Court in *Frobig v. Gordon*. The *Frobig* Court considered this type of argument and rejected it. *Frobig v. Gordon*, 124 Wn.2d at 737-739.

Finally, the Quesnells point out that the Carrs are engaging in rank speculation as to what the Thompsons might have done with respect to Joseph or their reliance on anything in the park rules. Brief of Appellant, P. 13.

C. The Quesnells Owed No Duty Under the Gratuitous Assumption of Duty Doctrine.

The Carrs cite no Washington case for this portion of their argument with respect to pets. In fact, their cases, characterized by *Rossiter v. Moore*, 59 Wn.2d 22, 370 P.2d 250

(1962), concern situations where the landlord voluntarily undertook repairs not otherwise required to perform. *Rossiter* involved a fall from a porch by a tenant's guest after the landlord had removed a railing. The Court held that the landlord's actions must create an undue risk of injury. Mere inaction by a landlord does not create liability, the inaction must create liability, the inaction must create a danger. *Rossiter v. Moore*, 59 Wn.2d at 725.

The primary problem with this argument by the Carrs is that they fail to show what gratuitous assumption of a duty the Quesnells undertook. Their argument comes back to the PETS provision. Before of Appellant, p. 18 – 19.

The Carrs have failed to point to any evidence in the record that the Quesnells gratuitously undertook any action that created an undue risk of injury to anyone.

Appellants rely upon two cases from other jurisdictions to bolster this argument. According to the Carrs, *Alaskan Village, Inc. v. Smalley*, 720 P.2d 945 (Alaska 1986) is “strikingly similar” to this case. Brief of Appellant, p. 16. Not correct. What the Carrs fail to mention is that the *Alaskan Village* Court in upholding the landlord's liability noted there

was ample evidence that the landlord had actual knowledge of prior incidents involving the tenant's dogs and, therefore, it was foreseeable that a person such as the plaintiff would be harmed. *Alaskan Village, Inc. v. Smalley*, 720 P.2d at 948.

There is no similar circumstance here. There is absolutely no evidence that the Quesnells knew of any prior incidents involving Brady that would lead a reasonable person to foresee that Brady presented a danger to any tenant or the tenant's guest.

Similarly, the Carrs' reliance upon *Wright. Schum*, 781 P.2d 1142 (Nev. 1989) is misplaced. In *Wright*, the landlord had received complaints about the vicious nature of his tenant's pit bull. In response to the complaint, the landlord undertook to require the dog be more securely housed. Those efforts proved ineffective and plaintiff was injured by the dog. *Wright v. Schum*, 781 P.2d at 1146-1147. It was Schum's inadequate undertaking to correct the problem with the dog that led to his liability. The facts here are entirely dissimilar.

A better reasoned application of Restatement (Second) of Torts § 323 and § 324A is to be found in *Braun v. York Properties, Inc.* 230 Mich. App. 138, 583 N.W.2d 503 (1998).

In *Braun* a 12 year old child was bitten by a neighbors' dog while playing in the neighbors' mobile home. The child and his family brought an action against the owners and managers of the mobile home park. The landlord had rules and regulations regarding the tenants' dogs with respect to the breed and size of the dogs. The Michigan court held that the landlord owed no duty to the plaintiffs where neither the child, his parents, the dog's owner, nor the park's manager and owners knew of the dog's dangerous propensities. Further, the failure to enforce the size restrictions in the park rules did not demonstrate a blatant disregard for the tenants' safety. The *Braun* court rejected *Alaskan Village* because the landlord did not know of the dog's vicious propensity making it no more foreseeable that plaintiff would be harmed by the neighbor's dog than any other dog. The Court held that under these facts the landlord did not undertake to render services within the meaning of Restatement (Second) of Torts § 324A. *Braun v. York Properties, Inc.*, 583 N.W.2d at 505-508.

Again, there is no evidence the Quesnells knew of any vicious propensities in Brady.

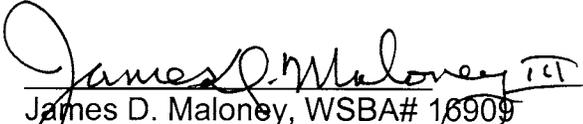
As noted above, contrary to the Carr's argument, the *Frobig* Court did consider the theories advanced here and rejected them as inconsistent with Washington law. *Frobig v. Gordon*, 124 Wn.2d at 737-739.

III. CONCLUSION

For all the reasons set forth above this Court should affirm the trial court's order granting summary judgment because defendants either owed no duty to plaintiffs, nor breached any duty they may have owed.

DATED this 13th day of November, 2007.

ABEL & MALONEY


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Attorney for Respondents

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NO. 36488-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JENNIFER LOU CARR, individually and as
Limited Guardian for JOSEPH MICHAEL
CARR, a minor,

DECLARATION OF SERVICE

Plaintiffs,

v.

MARGARET A. KOEPPLIN, and JOHN
DOE KOEPPLIN, wife and husband, and
the marital community composed thereof,
and RUTH THOMPSON and HERBERT
THOMPSON wife and husband, and the
marital community composed thereof, and
ED QUESNELL, and JANE DOE
QUESNELL, husband and wife, and the
OWNERS of Berry Lake Mobile Home Park,
and the marital community composed
thereof,

Defendants.

I declare under penalty of perjury under the laws of the State of Washington that
the following is true and correct:

I am employed by the law firm of Abel & Maloney and am a resident of the State
of Washington over the age of 18 years old. I mail via UPS overnight delivery upon:

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copie(s) of the following document(s) enclosed:

1. Respondent's Brief

on the date indicated below.

Date: 11/13/07 
Kalli Lehmann
Bothell, Washington