

HEATHER M. SIMMONS,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 99-00,767
	:	
GARY L. STRYKER and NORMA J.	:	
STRYKER, his wife,	:	
	:	
Defendants	:	MOTION FOR SUMMARY JUDGMENT

OPINION and ORDER

Defendants Gary L. Stryker and Norma J. Stryker (hereinafter “Defendants”) filed a Motion for Summary Judgment in the above captioned matter September 30, 1999. seeking to dismiss Plaintiff Heather M. Simmon’s (hereinafter “Plaintiff”) Complaint that seeks to recover damages suffered by Plaintiff when bitten by a dog owned by Defendants. The basis of the Summary Judgment motion was that Plaintiff had failed to produce any evidence that Defendants knew or should have known the dog was of a dangerous and/or vicious nature or was accustomed or should have been known to attack and bite humans.¹

This action arose out of an incident, which occurred June 14, 1997. While Plaintiff was visiting Defendants that day, Defendants’ dog bit Plaintiff around the nose and mouth, causing injuries for which Plaintiff now seeks damages through her Complaint, filed May 20, 1999.² Plaintiff avers that “Defendants knew or should have known that the Dog was of a dangerous and vicious nature and was accustomed to attacking and biting humans.” Complaint paragraph 5.

A dog owner who knows or has reason to know of a dog’s vicious propensities must exercise reasonable care in securing the dog. *Rowe v. Landvater*, 27 D.&C. 4th 380 (Perry County 1994), citing *Andrews v. Smith*, 188 A.2d 146 (Pa. 1936). “Proof of negligence...is the vehicle by

¹ Oral argument was held December 23, 1999 and the parties have filed briefs in support of their respective positions.

² The Plaintiff, Heather M. Simmons, is the daughter of Gary L. Stryker.

which accountability for injury sustained because of a dog bite is to be established.” *Deardorff v. Burger*, 606 A.2d 489, 493 (Pa.Super. 1992).

Defendants’ Summary Judgment motion asserts that with discovery now having been completed, Plaintiff is entirely without any evidence to support her claims that liability should be imposed on Defendants for her having to suffer a dog bite on the basis that Defendants had some prior knowledge, or should have had some prior knowledge, of the dangerous propensity of the dog. In support of the Summary Judgment motion, Defendants attached various affidavits of people acquainted with the dog, including each Defendants’ statements that they had no such prior knowledge, together with an affidavit of the dog’s owner and breeder that the dog’s bloodlines were noted for sound and peaceful disposition. Defendants further submit Plaintiff’s answers to Interrogatories, wherein she states she did not personally witness or observe the dog attacking or biting any person prior to the date of the incident, as well as her admission that she had never heard from any person that the dog had attacked or bitten any person prior to the date of the incident when she was bitten. Defendants therefore assert that since no evidence exists that the dog had ever engaged in conduct evidencing that it was vicious, dangerous or aggressive prior to biting Plaintiff, and since there was no genuine issue of material fact controverting this assertion, Defendants are entitled to have the claims of Plaintiff dismissed as a matter of law.

Plaintiff did not file a response to the Summary Judgment motion, but did submit a Brief in Opposition to the Summary Judgment Motion, which was filed December 14, 1999. Attached to the brief are the depositions of Plaintiff’s sister, Kelly Stryker (also the daughter of Defendant Gary Stryker) and of the Defendant Gary Stryker. Counsel agreed at oral argument that this Court could consider these depositions in determining the issues raised in the Summary Judgment motion. From those depositions, Plaintiff argues there is evidence in this case creating a disputed material fact, inasmuch as the depositions contain several different examples of the dog’s behavior, prior to Plaintiff’s being bitten, which would have put Defendants on notice of the dog’s vicious propensities.

These vicious propensities were known to Defendants, Plaintiff asserts, because of the dog's known behavior of jumping up on individuals and also of growling, baring its teeth and being aggressive when playing a tug-of-war game with a rope or other toy.³

First, Plaintiffs point out that Ms. Stryker testified that when she visited Defendants' home, the dog would jump on her and she did not do anything to stop the behavior for fear the dog would bite her. Plaintiff's Brief p. 4. However, "[m]ere fear of a dog does not prove that the dog that excites the fear is vicious." *Fink v. Miller*, 330 Pa. 193, 195 (Pa. 1938).

Moreover, the dog's jumping up on people is insufficient behavior to put Defendants on notice of any vicious propensities. In the case of *Rowe v. Landvater*, *supra*, the Court of Common Pleas of Perry County considered a summary judgment motion in a case wherein defendants admitted that a dog's tendency to jump up on people was a dangerous propensity. Defendants and the trial court pointed out, however, that this tendency to jump up on people did not cause plaintiff's injury; rather, the fact that the dog bit plaintiff's ear caused the injury. The trial court found that notice must be related to the type of vicious propensity the dog has exhibited. The court cited *Mann v. Weiland*, 81½ Pa. 243 (1875), wherein the Pennsylvania Supreme Court stated "one instance may show such unmistakable evidence of a vicious propensity as to make the owner of the dog, with notice, liable for any subsequent act *of a similar character*." *Rowe* at 384, citing *Mann* at 254 (emphasis supplied). Further, "the act done must be such as to furnish a reasonable inference that the animal is likely to commit an act of the kind complained of." *Mann* at 384, citing *Andrews v. Smith*, 188 A.2d 146 (Pa. 1936).

Plaintiff further points to the testimony of Kelly Stryker that she observed the dog growling and showing his teeth to her then husband on occasions prior to Plaintiff's having been bitten. Plaintiff's Brief p. 4. Plaintiff, and Ms. Stryker in her testimony, characterized this as

³ The relevant pages of the deposition of Kelly Stryker relied upon by Plaintiff consist of Ms. Stryker's statements at pages 11-16 and 27-31, copies of which are attached hereto as Appendix A.

“aggressive” behavior. *Id.* at p. 5. The relevant testimony is set forth at page 14 of Ms. Stryker’s deposition, as follows:

Q. When you were around your dad’s property, did you ever see anyone else playing with Charlie?

A. Yes.

Q. Who was that?

A. I’ve seen my husband play with the dog.

Q. And how would you describe the dog’s behavior toward your husband?

A. I don’t know. I’d say at times aggressive.

Q. And what do you mean by aggressive?

A. Maybe, you know, show his teeth a little, you know, something like that. Growl.

On cross-examination, Ms. Stryker amplified this testimony:

Q. And what would Mike be doing which would precipitate the growling or showing of teeth?

A. Maybe pulling. You know, playing tug-of-war, pulling on a toy with him.

Q. Was that all the occasions? Was it always that Mike was pulling on a tug of war type toy and Charlie would be on the other end growling back?

A. Yes.

Deposition of Kelly Stryker pp. 29-30. Ms. Stryker further indicated there were no occasions other than during these tug of war games that the dog would growl or show his teeth and that during these games the dog never lunged at her husband, nor attempted to bite him. *Id.* at pp. 30-32.

Viewing this testimony in the light most favorable to Plaintiff as the nonmoving party, it is nevertheless clear that the aggressiveness testified to by Kelly Stryker was aggressive play, rather than a display of aggressive behavior which would put Defendants on notice of any vicious propensity. It was only during tug of war games that the dog was observed growling or showing his teeth, in apparent response to the playful activity initiated, on more than one occasion, by Ms. Stryker’s

husband. There is no testimony to indicate the dog displayed this behavior on any other occasion, prior to biting Plaintiff. We find the dog's behavior during this game is insufficient to put Defendants on notice of the dog's vicious propensity.

There is testimony by both Ms. Stryker and also Defendant Gary L. Stryker concerning the dog's behavior *after* the dog had bitten Plaintiff. Mr. Stryker stated that on one occasion, Kelly Stryker's husband was running and playing with the dog when the dog jumped up to get the toy and "grazed" the back of her husband's hand, apparently with his teeth. Deposition of Gary L. Stryker pp. 35-36. When her husband yelled at the dog, the dog snarled at him. *Id.* at 36. Ms. Stryker did not recall this incident. Deposition of Kelly Stryker p. 41. Ms. Stryker was able to testify about another subsequent incident she had been told about by her father where the dog had nipped at her stepmother, Defendant Norma J. Stryker, or that he did "something similar" to what he did to Plaintiff. Deposition of Kelly Stryker pp. 15-16, 39-40. Defendant Gary L. Stryker also testified regarding this incident. *See* Deposition of Gary L. Stryker p. 39. Plaintiff argues this evidence of subsequent bites is relevant and admissible on the issue of whether the dog had a vicious disposition, citing *Crance v. Sohanic*, 496 A.2d 1230 (Pa.Super. 1985). In *Crance*, the trial court permitted the plaintiff to introduce evidence of biting and attacks by the dog who had attacked plaintiff, which had occurred after the incident in question. The trial court held this evidence was probative of the dog's nature. The Superior Court affirmed this decision, stating the evidence was relevant to the issue of whether the dog had a vicious disposition. *Crance* at 1233, fn. 1. However, the *Crance* Court further clarified that "[o]rdinarily, of course, evidence of subsequent events is not admissible to show knowledge of a condition prior to an accident. It is not relevant to the issue of whether the defendant knew, *at the time of the accident*, that the accident could occur. *Ibid.*

In the instant case, the evidence concerning subsequent incidents of the dog's allegedly aggressive behavior would be admissible at trial as they would be relevant to the question of whether the dog had a vicious disposition. Nevertheless, they cannot properly be considered by this Court to

determine whether Defendants knew or should have known of any vicious or dangerous propensity of their dog prior to its biting Plaintiff.

Pursuant to Pa.R.C.P. No. 1035.2, 42 Pa.C.S., any party may move for summary judgment as a matter of law after the relevant pleadings are closed whenever there is no genuine issue of any material fact as to a necessary element of the cause of action (or defense) which could be established by additional discovery or expert report. In the instant case, Plaintiff has failed to establish that Defendants knew or had reason of the dog's dangerous propensity to bite humans prior to the dog biting the Plaintiff. We are constrained to grant Defendants' motion for summary judgment.

ORDER

AND NOW, this 15th day of February 2000, based upon the foregoing Opinion, Defendants' Motion for Summary Judgment is **HEREBY GRANTED**. Plaintiff's Complaint is dismissed.

BY THE COURT:

William S. Kieser, Judge

cc: Court Administrator
David M. Chuprinski, Esquire
Joseph R. Musto, Esquire
Judges
Nancy M. Snyder, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)