STATE OF MINNESOTA
IN COURT OF APPEALS
A10-278

Robin Knake,
Appellant,

vs.

Fred Hund, et al.,
Respondents.

Filed August 10, 2010
Affirmed
Worke, Judge

Kandiyohi County District Court
File No. 34-CV-09-652

William F. Bannon, Bannon Law Firm and Mediation Services, PLLC, Willmar, Minnesota (for appellant)

Paul A. Rajkowski, Jessica L. Becker, Rajkowski Hansmeier, Ltd., St. Cloud, Minnesota (for respondents)

Considered and decided by Johnson, Presiding Judge; Halbrooks, Judge; and Worke, Judge.

U N P U B L I S H E D O P I N I O N

WORKE, Judge

Appellant challenges the district court's grant of summary judgment, arguing that respondents are strictly liable or liable under a common-law-negligence theory for

injuries she sustained when she fell on an icy sidewalk after respondents' dog walked in front of her on their property. We affirm.

FACTS

Appellant Robin Knake provided house-cleaning services for respondents Fred Hund and Kathryn J. Nelson. On March 25, 2009, respondents were out of town when appellant arrived to clean their home. On this day, "an unseasonable [] ice storm" hit the area producing "freezing rain and drizzle." As appellant exited her vehicle, she was greeted by respondents' dog, Zoe, an "unrestrained farm dog" who "runs freely about [respondents'] property." Appellant was familiar with Zoe and played with the dog for "a few minutes" before proceeding toward the front door of respondents' home. Zoe walked alongside appellant but cut in front of her to get in the garage ahead of appellant. Appellant slipped on ice, fell, and broke her ankle. Appellant sued respondents, alleging that respondents' dog caused her to fall and suffer injury. Respondents moved for summary judgment and attached a transcribed recorded statement from March 30, 2009, that appellant made to an insurance claims adjuster. When asked how appellant was injured, the following colloquy occurred:

> Q. So did the dog cause you to fall or was it the ice?
> A. It was the ice.
> Q. The ice?
> A. Yes.
> Q. Where was the dog at when you had fallen?
> A. Walking with me and she went to go in front of me to get to the garage before I did, [] and she just [kind of] walked in front of me and I tried to move and before I knew it I slipped on the ice and was on my butt.
> Q. Okay. So do you think if it had not been for the ice, [you] would have not fallen?

A. Oh, no, I would not have fallen.

Appellant was asked again if the dog or ice caused her to fall, to which she replied, "it was the ice."

The district court found that there were no material facts in dispute and that respondents were entitled to summary judgment because appellant "unequivocally state[d] . . . that the ice caused the fall and that she would not have fallen if the sidewalk had not been icy," and that "the icy sidewalk was clearly an attenuating link in the causal chain."

D E C I S I O N

Timeliness

Respondents challenge the timeliness of appellant's brief. When an appeal does not include a transcript, as is the case here, "appellant shall serve and file a brief and appendix with the clerk of the appellate courts within 30 days after the filing of the notice of appeal." Minn. R. Civ. App. P. 131.01, subd. 1. The appeal here was filed by mail on February 9, 2010. The clerk's office filed the appeal on February 11. Because there was no transcript, appellant's brief was due 30 days after the appeal was filed. The thirtieth day fell on Saturday, March 13; thus, the briefing period expired on Monday, March 15. *See* Minn. R. Civ. App. P. 126.01 (incorporating Minn. R. Civ. P. 6.01); Minn. R. Civ. P. 6.01 (stating that in computing time the day of the event from which the designated period of time begins to run shall not be included and the last day of the period shall be included, unless it is a Saturday, a Sunday, or a legal holiday). Appellant's brief was served and filed by mail on March 15; therefore, the brief was timely. *See* Minn. R. Civ.

App. P. 125.01 (authorizing filing by mail; filing is accomplished when the papers are deposited in the mail within the time fixed for filing); .03 (authorizing service by mail; service by U.S. mail is complete on mailing).

Summary Judgment

In reviewing the district court's grant of summary judgment, this court examines whether any genuine issue of material facts exist and whether the district court erred in applying the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). This court views the evidence in the light most favorable to the party against whom summary judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). This court "review[s] de novo whether a genuine issue of material fact exists" and "whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002).

Strict Liability

Appellant argues that respondents are liable under Minn. Stat. § 347.22 (2008), which provides:

> If a dog, without provocation, attacks or injures any person who is acting peaceably in any place where the person may lawfully be, the owner of the dog is liable in damages to the person so attacked or injured to the full amount of the injury sustained.

When these elements are established, the statute imposes absolute liability upon the dog owner. *Seim v. Garavalia*, 306 N.W.2d 806, 812 (Minn. 1981).

Appellant argues that the statute covers the injury that she claims was caused by Zoe's conduct. In *Lewellin v. Huber*, the supreme court interpreted the meaning of the

statutory phrase "attacks or injures." 465 N.W.2d 62, 63-64 (Minn. 1991). In *Lewellin*, a family went on vacation, leaving their dog and house in the care of a 16-year-old girl. *Id.* at 63. She was driving a vehicle with the family's dog in the back seat when the dog attempted to get in the front seat. *Id.* The dog-sitter became distracted while attempting to get the dog settled, the car went off the road, and ran over a 9-year-old boy who was lying in a ditch. *Id.*

The supreme court reasoned that the legislature intended the word "injures" to cover "a dog's affirmative but nonattacking behavior which injures a person who is immediately implicated by such nonhostile behavior." *Id.* at 64. The court stated that legal causation under the statute must be "direct and immediate, *i.e.*, without intermediate linkage." *Id.* at 65. The court determined that there was no direct, immediate connection between the dog's conduct and the child lying in the ditch because the dog's conduct was focused on the driver of the vehicle. *Id.* at 66. The court held that although there may have been "causation in fact," the chain of events was too attenuated to constitute legal causation for the kind of strict liability provided under the statute. *Id.*

Appellant relies on two consolidated cases to demonstrate that Zoe's conduct was injuring-causing conduct under the statute. In *Morris v. Weatherly*, we held that the strict-liability statute applied to two dogs' conduct that directly and immediately caused the injuries of two individuals. 488 N.W.2d 508, 510 (Minn. App. 1992), *review denied* (Minn. Oct. 28, 1992). In *Morris*, a man was riding his bicycle when he saw a dog approaching him from behind in a "dead run, running low to the ground, with his ears laid back." *Id.* at 509 (quotation marks omitted). As the man dismounted his bike, he fell

and twisted his shoulder, tearing a rotator cuff. *Id.* In the second case, a mail-carrier noticed a dog running toward him "flying through the air." *Id.* at 510. The dog ran past him, causing him to spin around, which injured his back. *Id.* We held that the injuries were the "direct and immediate result" of the dogs' actions, even though no physical contact occurred. *Id.*

Appellant claims that her case is like *Morris* because, while there was no physical contact, her injuries were a result of Zoe's conduct. In *Morris*, we stated that Morris was injured "as he attempted to protect himself from attack by a large [dog] running toward him in an aggressive manner." *Id.* We stated that the mail-carrier was injured because a large dog approached "at a fast pace" when it ran "past or around him." *Id.* Here, appellant did not protect herself from Zoe's conduct and Zoe did not approach appellant at "a fast pace." Appellant and Zoe walked together on an icy sidewalk when Zoe maneuvered to get to the garage before appellant. This case is more like *Lewellin* because in that case the dog was focused on getting in the front seat and, in so doing, distracted the driver to the point that she drove the vehicle off the road. 465 N.W.2d at 63. Here, Zoe was not focused on appellant; Zoe, as appellant explained, was focused on getting "to the garage."

In *Mueller v. Theis*, we determined that the dog-owner-liability statute did not apply to a situation when a motorist was injured when he swerved to avoid hitting a dog in the road. 512 N.W.2d 907, 909, 910-11 (Minn. App. 1994), *review denied* (Minn. Apr. 28, 1994). This court stated that in order for the statute to apply, there must be "affirmative" conduct on the part of the dog that is "focused on the injured party," and

the injury must be the "direct and immediate result of that focus." *Id.* at 910-11. The court ruled that the dog's presence in the road was not focused on the driver; therefore, the driver's injuries cannot be considered a result of the dog's conduct. *Id.* at 911.

In *Mueller* and *Lewellin*, the dogs' conduct may have been a "cause in fact" but was not the direct and immediate cause of the victims' injuries. Likewise here, the statute does not apply to the dog's conduct; therefore, the district court did not err in granting summary judgment.

Common-law Negligence

Appellant alternatively sued under a theory of common-law negligence. A prima facie case of negligence requires evidence of a duty owed, a breach of that duty, causation, and damages. *Hudson v. Snyder Body, Inc.*, 326 N.W.2d 149, 157 (Minn. 1982). In a common-law-negligence action, a plaintiff can recover from the dog owner by showing that the dog owner failed to use reasonable care in controlling the dog. *Lewellin*, 465 N.W.2d at 65. Causation is established by showing that the injuries were the natural and proximate result of the negligence. *Id.*

Appellant claims that a genuine issue of material fact exists as to what caused her to fall, the dog or the ice. A genuine issue of material fact exists if the evidence would "permit reasonable persons to draw different conclusions." *Gradjelick v. Hance*, 646 N.W.2d 225, 231 (Minn. 2002). But appellant fails to meet the burden of showing that a question of fact exists because the record reflects that appellant stated that she fell due to slipping on the ice. Approximately one week after the injury, she was asked whether the ice or the dog caused her to fall, and she stated in no uncertain terms that "it was the ice."

Her affidavit, in which she claimed that the dog caused her fall, was produced only after the summary-judgment motion and was a self-serving thread relative to the dog that lacks adequate support to go to a jury. *See Banbury v. Omnitrition Int'l, Inc.*, 533 N.W.2d 876, 881 (Minn. App. 1995) (stating that a party may not avoid summary judgment through a self-serving affidavit that contradicts deposition testimony). Although appellant's earlier statement was not given during a deposition, she did clearly state that the ice, and not the dog, caused the fall that injured her. Because there is no genuine issue of material fact, appellant's common-law-negligence claim fails and the district court did not err in granting summary judgment.

Affirmed.