IN THE COURT OF APPEALS OF IOWA

No. 0-716 / 10-0566
Filed December 22, 2010

ROD E. PATTERSON,
Plaintiff-Appellant,

vs.

MARIAH MARIE RANK, JOSHUA A. RAUHAUSER, MICAH R. BARTLETT, and REBECCA L. BARTLETT,
Defendants-Appellees.

Appeal from the Iowa District Court for Webster County, Thomas J. Bice, Judge.

Rod Patterson appeals from the district court's order granting Micah and Rebecca Bartlett's motion for summary judgment. **AFFIRMED.**

Jerry L. Schnurr III, Fort Dodge, for appellant.

Joel T.S. Greer of Cartwright, Druker & Ryden, Marshalltown, and Mark R. Crimmins of Bennett, Crimmins & Smith, Fort Dodge, for appellees.

Heard by Eisenhauer, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.

I. Background Facts and Proceedings

Micah and Rebecca Bartlett owned a single-family house in Fort Dodge that they rented to Mariah Rank and Joshua Rauhauser. The Bartletts entered into a lease with Rank and Rauhauser on July 1, 2009. Before Rank and Rauhauser signed the lease, they discussed their dog with Micah Bartlett. Rank and Rauhauser paid an extra thirty dollars per month for their pet, a pit bull named Chopper, pursuant to the terms of their lease.

Before Rank and Rauhauser moved onto the property, they had never had any issues with Chopper. After they moved onto the property, Chopper bit a dog from a neighboring house that was loose and ran onto the property. The dog sustained a small cut on his lip, but "nothing major" according to Rauhauser.

On September 6, 2009, Rod Patterson crossed the street to talk to Rank, who was sitting on the steps in front of her house. Patterson approached Chopper on the sidewalk leading up to the front door and reached down toward Chopper. Chopper bit Patterson's hand, causing injury.

On October 26, 2009, Patterson filed a petition against Rank, Rauhauser, and the Bartletts seeking damages to compensate him for his injuries. We are concerned here only with Patterson's action against the Bartletts. Patterson's petition alleged the Bartletts were negligent for failing to take reasonable precautions to protect those on the common areas of the property, for failing to warn of the presence of a dangerous dog on the property, and for failing to act as reasonable and prudent landlords under the circumstances.

On February 17, 2010, the Bartletts filed a motion for summary judgment alleging they owed no duties to third parties because they did not maintain control of any common areas on the property, they did not control the dog, and they did not know of any vicious propensities of the dog.

On April 5, 2010, the district court issued an order granting the Bartletts' motion for summary judgment. Patterson appeals, arguing the district court erred in granting the Bartlett's motion for summary judgment.

II. Standard of Review

We review rulings on motions for summary judgment for the correction of errors at law. *City of Cedar Rapids v. James Props., Inc.*, 701 N.W.2d 673, 675 (Iowa 2005). "Summary judgment is appropriate only when the entire record demonstrates that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 827 (Iowa 2007). We examine the record in the light most favorable to the nonmoving party and draw all legitimate inferences the evidence bears in order to establish the existence of questions of fact. *Mason v. Vision Iowa Bd.*, 700 N.W.2d 349, 353 (Iowa 2005). "A party resisting a motion for summary judgment cannot rely on the mere assertions in his pleadings but must come forward with evidence to demonstrate that a genuine issue of fact is presented." *Stevens*, 728 N.W.2d at 827.

III. Summary Judgment

"The elements of a negligence claim include the existence of a duty to conform to a standard of conduct to protect others, a failure to conform to that standard, proximate cause, and damages." *Van Essen v. McCormick Enters.*

Co., 599 N.W.2d 716, 718 (Iowa 1999). Though negligence cases are seldom capable of summary adjudication, the question as to the existence of a duty is a question of law for the court and may be adjudicated on a motion for summary judgment. *Rieger v. Jacque*, 584 N.W.2d 247, 250 (Iowa 1998).

The Bartletts argued in their motion for summary judgment that under Iowa law, "landlords owe no duty to third parties bitten by a tenant's dog, when the landlords do not control the dog or know of any vicious propensities." The district court agreed and determined the Bartletts had no duty of care, quoting *Allison by Fox v. Page*, 545 N.W.2d 281, 283 (Iowa 1996), for its conclusion that "[t]he landlords did not have any right to control their tenant's dog . . . [t]herefore . . . the landlords have no liability for the injuries caused by their tenants' dog." We agree with Patterson that the district court erroneously focused on the control of the dog rather than the control of the premises.

In *Allison*, the supreme court considered whether a landlord was liable for an injury inflicted by a tenant's dog in the tenant's fenced-in yard when the landlord knew or had reason to know the dog was dangerous. 545 N.W.2d at 282. The tenant in *Allison* had acquired the dog after having taken possession of the premises. *Id.* at 283. The court considered that as a general rule an owner who has leased property to another without an agreement to repair is not liable for personal injuries sustained because of an unsafe condition on the premises arising after the tenant takes possession. *Id.* The court determined in *Allison* that because the landlords did not have any right to control their tenant's dog, acquired after the tenants took possession, the landlords were not liable for injuries caused by the dog. *Id.*

We find that the general rule of landlord nonliability cited in *Allison* is not applicable to this case because the condition in question here arose at the time of the lease. In *Allison*, the dog came onto the premises *after* the property was leased. *Id.* In the present case, the dog came to the property at the time it was leased, and the Bartletts were aware of this. Thus, we disagree with the district court's reliance on *Allison* in concluding that the Bartletts had no duty of care.

We turn to the other arguments in the summary judgment record to determine whether the Bartletts had a duty to protect others from their tenants' dog. *See Beck v. Phillips*, 685 N.W.2d 637, 646 (Iowa 2004) (stating it is within the court's discretion whether to uphold a summary judgment ruling on grounds urged before but not relied upon by the district court).

Patterson argues the Bartletts had a duty to exercise reasonable care for the safety of others in those portions of the premises over which the Bartletts retained control and in the common areas over which the landlord and tenants had joint control, citing *Fouts v. Mason*, 592 N.W.2d 33, 39–40 (Iowa 1999).

In *Fouts*, the supreme court considered whether a landlord had a duty to keep common areas reasonably safe by excluding a dog with known vicious propensities. 592 N.W.2d at 38. In *Fouts*, a dog bite occurred in a common backyard that was used by both the landlord and the tenant in adjoining properties. *Id*. at 35. As in *Allison*, the court considered the general rule that landlords are not liable for injuries sustained because of unsafe conditions on the premises arising after the landlord leases the property. *Id.* at 38. The court found, however, that one exception to this rule is where the landlord retains control or the landlord and tenant have joint control over the premises where the

injury occurred. *Id.* The court stated, "Generally, this exception applies where the injury is caused by the condition of common areas over which the landlord, alone or jointly with the tenant, has control. . . . Thus, as to this exception, control determines liability." *Id.* The court in *Fouts* held that a landlord had the duty to keep the common areas reasonably safe by excluding a dog known to have vicious propensities. *Id.* at 39. The court limited its holding to only those cases where: (1) the injury occurred in a common area over which the landlord, alone or jointly, had control; and (2) the landlord knew or should have known of the particular dog's vicious propensities. *Id.*

The *Fouts* court distinguished *Allison*, finding that in *Allison* there was no evidence that the landlord retained any control over any part of the property. *Id.* at 39. Therefore, in *Allison*, the common area exception did not apply, nor did any other exceptions to the general rule, and the landlord was not liable. *Id.*

We disagree with Patterson's contention that the Bartletts have a duty of care under *Fouts*. *Fouts* relied on the general rule of landlord nonliability and exceptions to that rule. However, just as in *Allison*, that general rule is not applicable because the dog was present at the start of the lease in this case. Further, the record establishes as undisputed fact that the steps and sidewalk leading up to the steps were not used in common by other tenants and therefore did not fit within the common area exception to the general rule. "Common area" is defined as the "realty that all tenants may use though the landlord retains control and responsibility over it." Black's Law Dictionary 291 (8th ed. 2004). The property involved in this case was a single-family house, and the tenants did not share the use of the property with any other tenants. In addition, the

common area exception does not apply because, as discussed below, the Bartletts did not retain control of the area in which the injury occurred. Thus, the duty of care imposed on landlords in control of common areas did not apply to the Bartletts.

The record establishes the Bartletts did not retain control over the steps and sidewalk leading up to the steps. Patterson asserts the Bartletts retained significant control over the premises because the lease: dictated what the premises could and could not be used for; limited subletting of the premises; forbade tenants from making alterations or improvements without prior written consent of the Bartletts; prevented tenants from having certain dangerous materials on the premises; required tenants to get permission to paint the interior of the house; provided that the Bartletts would retain a key to the premises; and provided that tenants could not change the locks without the Bartletts' written permission. We disagree.

We cannot find that these facts established that the Bartletts retained a sufficient amount of control over the front steps and sidewalk so as to impose upon them a duty to keep the premises safe for third parties. *See Van Essen*, 599 N.W.2d at 720 (finding landlord's contractual obligations to insure the property, obligations to share in the cost of repairs, and receipt of rent based on an equal share of the proceeds generated did not establish a degree of control that warranted its continued responsibility for dangerous conditions on the land); *Hoffnagle v. McDonald's Corp.*, 522 N.W.2d 808, 815 (Iowa 1994) (concluding franchisor, in requiring franchisee to follow general guidelines and business manuals, did not retain sufficient control over a franchisee's operation to impose

a duty of security upon the franchisor). The premises in this case were leased outright to the tenants. *See Burner v. Higman & Skinner Co.*, 127 Iowa 580, 588–89, 103 N.W.2d 802, 805 (1905) (finding landlord retained control of an elevator because it was not leased outright to any of the tenants). "[A] tenant has an interest in the premises and has exclusive legal possession of it. This exclusive legal possession means the tenant, and not the landlord, is in control of the premises." *Bernet v. Rogers*, 519 N.W.2d 808, 811 (Iowa 1994). Because the landlords did not have control of the sidewalk leading up to the house, they did not have a duty to keep this area safe stemming from their control of the property.

Finally, Patterson argues on appeal the Bartletts had a duty of reasonable care not to expose third parties to an unreasonable risk of harm in selecting a lessee.[1] In support of this argument, Patterson cites several cases from other jurisdictions. "Whether a duty arises out of a given relationship is a matter of law for the court's determination." *Thompson v. Kaczinski*, 774 N.W.2d 829, 834 (Iowa 2009).

In *Thompson*, the Iowa Supreme Court adopted the framework proposed in the Restatement (Third) of Torts for the determination of the existence of a general duty to exercise reasonable care. 774 N.W.2d at 834–36. Under this framework, an "actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm." Restatement (Third) of Torts: Liab. for Physical and Emotional Harm § 7, at 77 (2010) [hereinafter Restatement

[1] While this argument was emphasized by Patterson on appeal, it was not fully presented to the district court on summary judgment. We address it here since there was no objection by the Bartletts to consideration of this issue on appeal.

(Third)]. "The general duty of reasonable care will apply in most cases, and thus courts . . . need not refer to duty on a case-by-case basis.'" *Thompson*, 774 N.W.2d at 834–35 (citing Restatement (Third) § 7 cmt. a, at 77). Only in exceptional cases in which "an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases" will the general duty to exercise reasonable care be displaced or modified. Restatement (Third) §§ 6 cmt. f, at 69, 7(b), at 77. A ruling that the duty of reasonable care should be displaced or modified in a case "should be explained and justified based on articulated policies or principles that justify" the ruling. *Id.* § 7 cmt. j, at 82. "A lack of foreseeable risk in a specific case may be a basis for a no-breach determination, but such a ruling is not a no-duty determination." *Thompson*, 774 N.W.2d at 835. "[C]ourts should leave [determinations of foreseeable risk] to juries unless no reasonable person could differ on the matter." Restatement (Third) § 7 cmt. j, at 82.

Thus, we consider "whether a principle or strong policy consideration justifies the exemption of [the Bartletts]—as part of a class of defendants—from the duty to exercise reasonable care." *See Thompson*, 774 N.W.2d at 835. We conclude this case is a member of a category of cases in which the general duty to exercise reasonable care is appropriately displaced. *See* Restatement (Third) § 7 cmt. j, at 82 ("A no-duty ruling represents a determination . . . that no liability should be imposed on actors in a category of cases.").

"When land is leased to a tenant, the law of property regards the lease as equivalent to a sale of the land for the term of the lease." Restatement (Second) of Torts § 356 cmt. a, at 240 (1965). Thus, subject to certain exceptions not

applicable in this case, "a lessor of land is not liable to his lessee or to others on the land for physical harm caused by any dangerous condition, whether natural or artificial, which existed when the lessee took possession." *Van Essen*, 599 N.W.2d at 719 (citing Restatement (Second) of Torts § 356, at 240). The reasoning for this rule is that the lessee becomes "for the time being the owner and occupier, subject to all of the liabilities of one in possession." Restatement (Second) of Torts § 356 cmt. a, at 240. This logic is consistent with our supreme court's holding in *Allison* that "liability is premised upon control." Both statutory law and case law impose a duty of care on the dog owner. This duty stems from the dog owner's control over the dog. Because a landowner does not have direct control over the dog, this logic does not support extending such a duty to a landowner. We agree with the court in *Frobig v. Gordon*, 881 P.2d 226, 230 (Wash. 1994), that "a landlord's awareness of a dangerous condition existing when a tenant first takes possession should not create landlord liability when the tenant, who has the opportunity to protect others from the dangerous condition, fails to do so."

We also find persuasive the following language from *Gonzales v. Wilkinson*, 227 N.W.2d 907, 158 (Wis. 1975), a case upon which the supreme court relied in deciding *Allison*: "[T]he law does not require [the landlord], as the owner of the building, to be an insurer for the acts of his tenant." We agree with those courts that have found that imposing a duty on a landowner under these facts is equivalent to a policy of strict liability for the landowner. *See e.g., Frobig*, 881 P.2d at 229–30. Relevant Iowa statutory law does not support such a policy.

Iowa Code section 351.28 (2009) states:

> The owner of a dog shall be liable to an injured party for all damages done by the dog, when the dog is caught in the action of worrying, maiming, or killing a domestic animal, or the dog is attacking or attempting to bite a person, except when the party damaged is doing an unlawful act, directly contributing to the injury.

Thus, our statute imposes a duty only on the dog owner. We believe that determination of policy on the extension of liability to a landowner is a question for the legislature. Currently, our statute does not provide for a landlord's liability in these circumstances.

Finally, we agree with the court's finding in *Gilbert v. Christiansen*, 259 N.W.2d 896, 898 (Minn. 1977), that imposing a duty on the landlord in this case would "render it difficult, either through unavailability or prohibitive cost, for prospective tenants with dogs to find housing."

In light of the case law of other jurisdictions, our limited case law on the matter, our statutory law on the matter, and as a matter of public policy, we find it is appropriate to exempt the Bartletts from the duty to exercise reasonable care in this case. The district court correctly granted summary judgment.

AFFIRMED.