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Washington Court Opinions

325276MAJ

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Court of Appeals Division II
State of Washington

Opinion Information Sheet

Docket Number: 32527-6-II
Title of Case: Lynette Lichenstein, Appellant v. Angela M. Wagner etal, Respondents
File Date: 07/20/2005

SOURCE OF APPEAL

Appeal from Superior Court of Pierce County
Docket No: 04-2-09083-6
Judgment or order under review
Date filed: 10/15/2004
Judge signing: Hon. Linda Cj Lee

JUDGES

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LYNETTE LICHENSTEIN, a single person,   No. 32527-6-II

Appellant,

v.

ANGELA M. WAGNER and MATTHEW WAGNER, husband and wife,

Defendants,

MARVIN NELSON and JANE DOE NELSON, husband and wife; WINDERMERE-PUYALLUP/CANYON ROAD, L.L.C., a regular limited   UNPUBLISHED OPINION

liability corporation;
WINDERMERE PROPERTY
MANAGEMENT/WPM, INC. a for
profit corporation,

Respondents.

Hunt, J. Lynette Lichenstein appeals the trial court's summary judgment dismissal of her claim for damages against the landlords and property managers of rental property whose tenants owned a wolf-dog hybrid that attacked and injured her. She argues that the trial erred in applying Frobig v. Gordon, 124 Wn.2d. 732, 881 P.2d 226 (1994), to preclude assigning liability to the property owner1 for Lichenstein's dog-bite injuries, in spite of their possible awareness of (1) wolf-dog hybrids on the property and (2) a defect in the fence around the property. Agreeing with the trial court that Frobig confines liability to the animal's owner or controller, we affirm.

FACTS

Angela and Mathew Wagner rented a Tacoma house owned by Marvin and Janice Nelson (Nelsons). Windermere-Puyallup/Canyon Road, L.L.C. and Windermere Property Management/WPM, Inc., managed the Nelsons' rental property.

The Wagners owned a wolf-dog hybrid, which apparently escaped from the rental property's fenced backyard and attacked Lynette Lichenstein as she walked by her own home nearby. She suffered injuries requiring emergency room treatment at the hospital.

Lichenstein sued the Wagners, Windermere, and the Nelsons. She alleged that the Nelsons and Windermere were liable because the fence on the Nelsons' rental property was in such disrepair that it did not confine the Wagners' wolf-dog hybrid.

The trial court granted Windermere's and the Nelsons' motion to dismiss under CR 12(b)(6), ruling that Frobig controlled.

Lichenstein appeals.2

ANALYSIS

I. Standard of Review

We review de novo the propriety of a trial court's dismissal of an action under CR 12(b)(6). Burton v. Lehman, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). Dismissal is appropriate under CR 12(b)(6) only if 'it appears beyond doubt that the plaintiff cannot prove any set of facts which would justify recovery.' Burton, 153 Wn.2d at 422 (quoting Tenore v. AT &

T Wireless Servs., 136 Wn.2d 322, 329-30, 962 P.2d 104 (1998)). For purposes of our review, we presume the plaintiff's allegations are true, and we may 'consider hypothetical facts not included in the record.' Burton, 153 Wn.2d at 422 (quoting Tenore, 136 Wn.2d 329-30.)

II. Liability for Animals

It is well settled in Washington that liability for a dangerous dog3 or wild animal4 'flows from ownership or direct control' of that animal. See e.g., Frobig, 124 Wn.2d at 735; Clemmons v. Fiddler, 58 Wn. App. 32, 37, 791, P.2d 257, review denied, 115 Wn.2d 1019 (1990). In addition, local legislative bodies may create different rules with respect to animal liability in order to protect public safety, where such rules do not conflict with more general state laws. Rhoades v. City of Battle Ground, 115 Wn. App 752, 763, 63 P.3d 142 (2002), review denied, 149 Wn.2d 1028 (2003).

Although the Tacoma Municipal Code (TMC) regulates the duties of people who have, keep, maintain, possess, or control dangerous animals, it does not address landlord liability for injuries such animals cause. TMC 5.23.025-.026. And we find nothing in the record to suggest that any other local legislative body has attempted further regulations that would apply here.

Similarly, we find inapposite Lichenstein's emphasis on the landlord's possible knowledge of a defect in the fence on the rental property. Washington has not adopted the Restatement (Second) of Torts sec. 379A (1965), argued by Lichenstein.5 And the Supreme Court in Frobig expressly held that 'landlords have no duty to protect third parties from a tenant's lawfully owned but dangerous animals,' even where the landlord knows that the dangerous animal is present on the property. Frobig, 124 Wn.2d at 740-41. Therefore, Lichenstein's theory of landlord liability, flowing from possible knowledge of the defective fence, would not have justified recovery even if the trial court had denied the defendants' motion to dismiss her action.

Nor do we find persuasive Lichenstein's attempt to distinguish Frobig on the ground that the Wagners' ownership of the animal may have been unlawful. In holding that liability for an animal flows from ownership, the Frobig Court relied on our earlier opinion in Clemmons, 58 Wn. App. at 37, without addressing the issue of whether such ownership was lawful.6 Frobig, 124 Wn.2d at 735. Furthermore, the Frobig Court's reasoning does not indicate that the lawfulness of ownership was material to its decision, noting that the issue of landlord liability for the acts of a tenant's animal is 'not a question of fact' but rather a 'matter of law.' Frobig, 124 Wn.2d at 740.

Following Frobig, we conclude that the possible unlawfulness of the Wagners' ownership of the wolf-dog hybrid has no bearing on the result here. Under Frobig, the operative fact was the Wagners' control and ownership of the wolf-dog hybrid, regardless of whether such ownership was legal or illegal. Thus, if anyone is liable for Lichtenstein's injuries it is solely the Wagners, the wolf-dog hybrid's owners. We hold, therefore, that the trial court properly dismissed Lichtenstein's claims against the property owner and manager.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Morgan, A.C.J.

Armstrong, J.

1 Although the property managers here are not the property owners, all parties seem to treat them as such for liability purposes. Division I previously permitted such treatment in Griffin v. West RS, Inc., 97 Wn. App. 557, 559 n.1, 984 P.2d 1070 (1999) (treating manager's duty as that of the landlord where both parties take that position in their briefing), overruled on other grounds, 143 Wn.2d 81 (2001). We apply similar treatment here.

2 Lichenstein's action against the Wagners is not part of this appeal.

3 RCW 16.08.040:

The owner of any dog which shall bite any person while such person is in or on a public place or lawfully in or on a private place including the property of the owner of such dog, shall be liable for such damages as may be suffered by the person bitten, regardless of the former viciousness of such dog or the owner's knowledge of such viciousness.

4 As the Supreme Court noted in Frobig, we do not treat vicious dogs and wild animals differently under Washington case law: 'We do not believe that a separate rule of law for cases involving wild animal attacks is necessary. Courts have long recognized that a vicious dog and a wild animal are equally dangerous.' Frobig, 124 Wn.2d at 737.

5 Restatement (Second) of Torts sec. 379A (1965) provides:

(a) the lessor at the time of the lease consented to such activity or knew that it would be carried on, and

(b) the lessor knew or had reason to know that it would unavoidably involve such an unreasonable risk, or that special precautions necessary to safety would not be taken.

6 Although the Court in Frobig applied our Clemmons rationale to a lawfully owned tiger, the Court did not overrule our more general Clemmons holding that a landlord's knowledge regarding the viciousness of a tenant's dog was immaterial to a finding of liability, adopting the common law rule that 'only the owner, keeper, or harborer of the dog is liable for {harm caused by the dog}.' Clemmons, 58 Wn. App. at 34, 35. We recognized in Clemmons that Washington statutes outlawed ownership of vicious dogs absent certain conditions, but did not find the issue of unlawful ownership affected liability. Clemmons, 58 Wn. App. at 37.