WAYNE D. EVANS, Plaintiff vs. WAYNE ALLEMAN and THELMA ALLEMAN, Defendants, Franklin County Branch, Civil Action - Law No. A.D. 1995-224

Evans v. Alleman

Summary Judgment - Negligence - Duty of Care - Landlord/Tenant - Trustee

1. Summary judgment is proper if, after the completion of discovery, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action which in a jury trial would require the issues to be submitted to a jury.

2. If the non-moving party fails to produce evidence of facts essential to the cause of action, no genuine issue of fact exists and the granting of summary judgment is proper.

3. To prevail on a claim of negligence, a plaintiff must prove a duty of care owed to the plaintiff, a breach of that duty by the defendant, and injuries that were proximately caused by the breach.

4. If defendants neither owned nor had custody and control of a dog which caused plaintiff's injuries, they owed no duty of care to plaintiff.

5. Where discovery is complete and all deposition testimony indicated that the dog was owned and controlled by the daughter of the defendants, no genuine issue of material fact exists regarding the ownership of the dog and defendants are entitled to judgment as a matter of law.

6. Where the parcel of land upon which the defendants and their daughter separately reside is owned by the family trust, no landlord-tenant relationship exists between them such as to impute liability to the defendants.

7. Although a trustee may be held liable for negligent acts he commits during the administration of the trust, the plaintiff must show that the trustee was negligent while performing duties related to the trust.

8. Where the trustee's daughter's dog chases and injures a bicyclist, the defendant trustee cannot be said to have been performing duties related to the trust.

Daniel S. Weinstock, Esquire, Attorney for plaintiff
Peter D. Solymos, Esquire, Attorney for defendants

OPINION AND ORDER

Walker, P.J., December 27, 1996:

FACTUAL AND PROCEDURAL BACKGROUND

This case arises form an accident which occurred on June 10, 1993. The plaintiff, Wayne D. Evans, was injured when a large half Grant Dane, half Golden Retriever dog named Rex chased him as he rode his bicycle along Two Turn Road in Southampton Township, Franklin County. The plaintiff avers that he was

startled by the dog, swerved his bicycle into the side of a passing car and was thrown to the roadway. As a result, the plaintiff suffered severe injuries.

On May 30, 1995, plaintiff filed a Writ of summons naming Wayne Alleman and Thelma Alleman as defendants. Subsequently a Complaint was filed on August 14, 1995 in which it was alleged that the defendants were the registered owners of the dog, Res. He further claimed that the defendants had possession, custody and control of the dog. The plaintiff maintained that the defendants were negligent and/or reckless in failing to control and restrain the dog. On October 18, 1995, defendants filed an Answer and New Matter in which they specifically denied that they owned or controlled the dog involved in the accident.

Depositions were scheduled and conducted upon the plaintiff, who testified that he could not remember anything that happened from 15 minutes prior to the accident until the time of the accident. Also deposed were Daniel Ott, the driver of the car which struck the plaintiff; the defendants; and Jill L. Dunmire, the daughter and neighbor of the defendants, who testified that she and her husband were the owners of Rex. On August 28, 1996, the defendants filed a motion for summary judgment pursuant to Pa.R.C.P. 1035. Briefs and argument of counsel were considered, and this matter is not ripe for disposition.

DISCUSSION

The court initially points out that the rule governing summary judgment has been amended effective July 1, 1996. Pennsylvania Rules of Civil Procedure Rule 1035.2 now provides:

> After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law
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> (1) whenever there is no genuine issue of material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
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> (2) if, after the completion of discovery relevant to the motion, including the production of expert reports,

> an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.C.P. No. 1035.2

After the revisions to Rule 1035 were adopted, but before they became effective, the Pennsylvania Supreme Court decided the case of *Ertel v. Patriot-News Co.,*____ Pa.____, 674 A.2d 1038 (1996). In *Ertel,* the Supreme Court held that after a motion for summary judgment , the non-moving party, if he carries the burden of proof at trial on an issue essential to his case, must present evidence sufficient for a jury to return a verdict in his favor in order to rebut the motion. If the non-movant fails to produce such evidence, no genuine issue of material fact exists and the granting of summary judgment is proper. *Id.* at 1042. Thus, the burden not is placed on the non-moving party to offer evidence which negates the motion. The Supreme Court stated that it believes that, "Allowing non-moving parties to avoid summary judgment where they have no evidence to support an issue on which they bear the burden of proof runs contrary to the spirit of Rule 1035." *Id.* It is upon this new standard that the court bases its decision.

The three elements that the plaintiff must prove in order to prevail on a claim of negligence are proof of a duty of care owned to plaintiff; breach of that duty by defendant; and injuries which were proximately caused by the breach. *Zanine v. Gallagher,* 345 Pa.Super. 119, 497 A.2d 1332 (1985). Because the court finds that the plaintiff has failed to establish the first element, the defendants' motion for summary is granted.

In the instant case, the plaintiff alleges in his complaint that the defendants owed him a duty of care by virtue of their ownership or custody and control of the dog. It is axiomatic that unless the defendants either owned or exercised custody and control of the dog, they owed no duty to the plaintiff.

In applying the Pennsylvania Supreme Court's legal standard for determining whether summary judgment is proper to the defendants' motion, the court must determine whether the plaintiff

has presented sufficient evidence to show that there is a genuine issue of material fact as to the ownership or control of the dog. Here the plaintiff has offered no evidence that the dog belonged to the defendants. In fact, all of the testimony of the defendants and of Jill Dunmire indicates that the dog belonged to and was controlled by the Dunmires. Ms. Dunmire testified that she and her husband purchased Rex in 1987 from the Cumberland Valley Humane Society. She also stated that she and her husband were responsible for the daily care of the dog and that they personally paid for the dog's veterinary care and dog license. (Deposition of Jill L. Dunmire, pp. 9-10.) Defendant Wayne Alleman testified that the dog stayed in a dog house located adjacent to the Dunmire's home located approximately one-half mile from the Alleman's home. (Deposition of Wayne Alleman and Thelma Alleman, p.17.)

To counter this testimony, the plaintiff offers only the notes made by the insurance adjuster during a telephone conversation with Thelma Alleman. The notes indicates Ms. Alleman stated that her daughter, Jill (Dunmire) witnessed the accident while she was hanging up clothes. At the time of the telephone conversation, the daughter was away from home. Ms. Alleman told the adjuster that she could call her daughter for more information when she returned, as Ms. Alleman did not know much about what happened. The note continues: "...but she was told their dog startled person on bike & bike ran into veh." (Plaintiff's Brief in Support of His Response to Defendants' Motion For Summary Judgment, Exhibit "A").

Plaintiff argues that the adjuster's use of the adjective "their" suggests that the dog belonged to the Allemans. The court finds this argument unconvincing. The plain meaning of the word "their" could just as easily refer to the Dunmires as owners since Ms. Alleman was telling the adjuster that it was Ms. Dunmire who witnessed the accident.

The plaintiff offers no other evidence that the defendants were the owners of the dog. He speculates that the dog might have been a working farm dog but offers nothing to support this conclusion. In fact Wayne Alleman testified that the dog served

no other function than as a pet. (Deposition of Wayne Alleman and Thelma Alleman p. 18.)

The court finds that the plaintiff has not offered any evidence that the dog belonged to the defendants in this case. He certainly has not offered sufficient evidence to meet his burden of proof at trial such that a jury could award a verdict in his favor. Therefore, there is no genuine issue of material fact regarding the ownership of the dog and the defendants are entitled to judgment as a matter of law.

Plaintiff argues alternatively that the defendants may be liable for the actions of the dog in their role as landlords or as trustees. These arguments have no merit. The defendants and the Dunmires were not engaged in a landlord-tenant relationship. The parcel of farm lane upon which the Allemans and the Dunmires separately reside is owned by a family trust with the Allemans and the Dunmires functioning as co-trustees. The Dunmires cannot be tenants of the Allemans because the Allemans do not own the property, nor do they maintain exclusive control over it. Therefore, the defendants owed no duty to the plaintiff and incurred no liability as a result of the actions of the Dunmires's dog.

As for the argument that the defendants may be liable for the plaintiff's injuries personally by virtue of their role as trustees, the court again is unpersuaded. Plaintiff cites the case of *Miller v. Jacobs,* 361 Pa. 492, 65 A.2d 362 (1949) as authority for the notion that a trustee may be found liable for negligent acts he or she commits during the administration of the trust. In this regard the case holds that when a tort is committed by the trustee in the course of administering the trust, the trustee, rather than the trust itself, is the proper defendant. However, of course, in order to be found liable under this theory, the trustee must have been negligent in some way while performing duties related to the thrust. The fact that the defendants' daughter's dog chased a bicyclist in no way imputes negligence to these defendants.

CONCLUSION

The court finds that the plaintiff simply brought this case against the wrong defendants. His effort now to assign ownership

of the dog to the defendants is unconvincing. Therefore, the court finds that, in viewing the facts in the light most favorable to the non-moving party, the plaintiff has failed to adduce sufficient evidence to show that the defendants owned or exercised custody and control over the dog, Rex. Absent a showing of ownership or control of the dog by the defendants, the plaintiff cannot demonstrate a legal duty owed him by the defendants. Because the plaintiff bears the burden of proof at trial of this issue which is essential to his case, the court finds that, based upon the standard set forth in *Ertel,* there is no genuine issue as to any material fact and that the defendants are entitled to summary judgment as a matter of law.

ORDER OF COURT

December 27, 1996, the defendants' motion for summary judgment is granted.