IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-302

No. COA21-521

Filed 3 May 2022

Cabarrus County, No. 21 CVS 409

GENEVIT MANCILLA CAMPOS, by and through her Guardian Ad Litem, EDITH MANCILLA, Plaintiff,

v.

JEFFERY P. HAUSLER, and wife MARY E. HAUSLER, and BRIANNA LYNN HAUSLER, Defendants.

Appeal by plaintiff from order entered 14 June 2021 by Judge Lora Cubbage in Cabarrus County Superior Court. Heard in the Court of Appeals 23 March 2022.

Cecil Jenkins, Jr., for plaintiff-appellant.

Hedrick Gardner Kincheloe & Garofalo LLP, by C. Andrew Dandison and M. Duane Jones, for defendants-appellees.

ZACHARY, Judge.

¶ 1 Plaintiff Genevit Mancilla Campos, by and through her guardian *ad litem*, Edith Mancilla, appeals from the trial court's order granting Defendants' motion to dismiss with prejudice. After careful review, we affirm.

Background

¶ 2 The relevant facts are few. Plaintiff, a minor child, and her family were neighbors of Defendants Jeffery and Mary Hausler, and their daughter, Brianna. Brianna had an Australian Shepherd dog. On 10 February 2018, Plaintiff was playing in her yard when she "saw [Brianna]'s black and white dog run towards her." As Plaintiff attempted to retreat into her house, the dog crossed into Plaintiff's yard, jumped on her, and bit her on her left calf. Plaintiff needed medical treatment for her injuries.

¶ 3 On 4 February 2021, Plaintiff filed a complaint against Brianna, Jeffery, and Mary Hausler (collectively, "Defendants"), alleging that her injury in the dog biting incident "was directly and proximately caused by the negligence of . . . Defendants." Specifically, Plaintiff alleged that Defendants failed to exercise a reasonable standard of care "in securing the dog"; "fail[ed] to keep [the] gate to their yard closed and fastened securely"; "fail[ed] to keep a proper lookout for the safety of . . . Plaintiff"; and "fail[ed] to keep the dog on a chain while outside their home." Plaintiff also contended that "Defendants did know or should have known that the dog had just recently been neutered and her personality could have changed."

¶ 4 On 8 March 2021, Brianna filed a motion to dismiss the complaint pursuant to Rule 12(b)(1), (2), (4), (5), (6), and (7) of the North Carolina Rules of Civil Procedure. Jeffery and Mary filed a motion to dismiss pursuant to Rule 12(b)(1), (6), and (7) on 8 April 2021.

¶ 5 Defendants' motions came on for hearing on 21 May 2021 in Cabarrus County Superior Court. At the hearing, Defendants argued that the trial court should dismiss Plaintiff's case pursuant to Rule 12(b)(6) because Plaintiff failed to state a claim upon which relief could be granted. They asserted that Plaintiff failed to allege any facts regarding the dog's propensity for violence or Defendants' knowledge of such a propensity, as required for a negligence claim involving domestic animals. Plaintiff's counsel conceded that "we don't know the propensity of this dog," nor did they "know if [the dog has] bitten someone in prior previous acts." But her counsel argued that discovery would reveal the dog's propensity and that the trial court should deny the Rule 12(b)(6) motion. After Plaintiff rested her case and Defendants provided their rebuttal, Plaintiff's counsel stated to the trial court that Plaintiff was "going to voluntarily take a dismissal without prejudice[.]" Nevertheless, the trial court granted Defendants' motion to dismiss, and entered an order dismissing Plaintiff's complaint with prejudice on 14 June 2021.

¶ 6 Plaintiff timely filed notice of appeal.

Discussion

¶ 7 On appeal, Plaintiff argues that the trial court "erred in granting summary judgment because [Plaintiff] did show there are genuine issues of material facts in dispute." However, as Defendants note in their brief, they filed motions to dismiss, and not motions for summary judgment; thus, "Plaintiff has misidentified and

misapplied the appropriate standard of review of this appeal before this Court." Accordingly, our review concerns whether the trial court properly dismissed Plaintiff's complaint pursuant to Rule 12(b)(6). We conclude that it did.

¶ 8 Plaintiff also argues that the trial court erred in dismissing her claim with prejudice because her counsel stated to the court at the motions hearing, just prior to the court's ruling, that Plaintiff was "going to voluntarily take a dismissal without prejudice[.]" Plaintiff abandons this argument on appeal.

I. Standard of Review

¶ 9 "In considering a motion to dismiss under Rule 12(b)(6), the Court must decide whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51, 790 S.E.2d 657, 659 (2016) (citation and internal quotation marks omitted). Dismissal pursuant to Rule 12(b)(6) is proper "when (1) the complaint, on its face, reveals that no law supports the plaintiff's claim; (2) the complaint, on its face, reveals an absence of facts sufficient to make a good claim; or (3) some fact disclosed in the complaint necessarily defeats the plaintiff's claim." *Blow v. DSM Pharm., Inc.*, 197 N.C. App. 586, 588, 678 S.E.2d 245, 248 (2009), *disc. review denied*, 363 N.C. 853, 693 S.E.2d 917 (2010). On appeal, we review de novo a trial court's grant of a motion to dismiss pursuant to Rule 12(b)(6). *CommScope Credit Union*, 369 N.C. at 51, 790 S.E.2d at 659.

II. Rule 12(b)(6) Motions

¶ 10 There are three primary legal theories by which a plaintiff may pursue a claim for personal injuries involving domestic animals: common law negligence, statutory strict liability, and negligence *per se*. We now review the sufficiency of Plaintiff's allegations under each of these theories.

A. Common Law Negligence

¶ 11 To recover damages on the ground of common law negligence for injuries inflicted by a domestic animal, a plaintiff must show "(1) that the animal was dangerous, vicious, mischievous, or ferocious, or one termed in law as possessing a vicious propensity; and (2) that the owner or keeper knew or should have known of the animal's vicious propensity, character, and habits." *Sellers v. Morris*, 233 N.C. 560, 561, 64 S.E.2d 662, 663 (1951).

¶ 12 "In order to determine whether the owner of the animal is negligent, the size, nature, and habits of the animal are taken into account." *Ray v. Young*, 154 N.C. App. 492, 495, 572 S.E.2d 216, 219 (2002). For large domestic animals or certain animals of known danger, "the owner or keeper will . . . be charged with knowledge of the general nature of the species or breed." *Thomas v. Weddle*, 167 N.C. App. 283, 287, 605 S.E.2d 244, 247 (2004); *see also Hill v. Williams*, 144 N.C. App. 45, 55, 547 S.E.2d 472, 478 (concluding that the defendants in a negligence action were "chargeable with the knowledge of the general propensities of the Rottweiler animal" where the

evidence showed that the breed was "very strong, aggressive and temperamental, suspicious of strangers, protective of its space, and unpredictable" (citation and internal quotation marks omitted)), *disc. review denied*, 354 N.C. 217, 557 S.E.2d 531 (2001).

¶ 13 However, for injuries inflicted by normally gentle or tame domestic animals, "[i]f the plaintiff establishes that an animal is in fact vicious, the plaintiff must then demonstrate that the owner knew or should have known of the animal's dangerous propensities." *Ray*, 154 N.C. App. at 494, 572 S.E.2d at 219. "The test of liability of the owner does not contemplate the intentions of the animal but whether the owner should know from past conduct that the animal is likely, if not restrained, to do an act in which the owner could foresee injury to person or property." *Harris v. Barefoot*, 206 N.C. App. 308, 310, 704 S.E.2d 282, 283, *disc. review denied*, 364 N.C. 618, 705 S.E.2d 359 (2010).

¶ 14 Here, Plaintiff's complaint contains no allegations regarding the dog's propensities, dangerous or otherwise. Plaintiff did not allege that Australian Shepherds, as a breed, are "very strong, aggressive and temperamental, suspicious of strangers, protective of [their] space, and unpredictable." *Hill*, 144 N.C. App. at 55, 547 S.E.2d at 478. Nor did she assert that Defendants "knew or should have known of the animal's dangerous propensities" based on the dog's past behavior. *Ray*, 154 N.C. App. at 494, 572 S.E.2d at 219. Indeed, at the hearing, Plaintiff's counsel

conceded that "we don't know the propensity of th[e] dog[.]" Furthermore, although Plaintiff contended in her complaint that "Defendants did know or should have known that the dog had just recently been neutered and her personality could have changed[,]" Plaintiff did not allege that the dog became more aggressive or temperamental after the procedure. Indeed, Plaintiff's assertion that the dog's "personality could have changed[,]" even if true, does not lend itself to such a conclusion. The dog could have become more docile, nervous, confused, or withdrawn after the procedure, and none of these possibilities necessarily suggests that "the animal [wa]s likely, if not restrained, to do an act in which [Defendants] could foresee injury to person or property." *Harris*, 206 N.C. App. at 310, 704 S.E.2d at 283.

¶ 15 Therefore, because Plaintiff alleged neither (1) that the dog was "dangerous, vicious, mischievous, or ferocious" nor (2) that Defendants knew or should have known of the dog's allegedly dangerous propensities, *Sellers*, 233 N.C. at 561, 64 S.E.2d at 663, Plaintiff's "complaint, on its face, reveals an absence of facts sufficient to make a good claim" under common law negligence, *Blow*, 197 N.C. App. at 588, 678 S.E.2d at 248.

B. Strict Liability

¶ 16 Our General Statutes provide that "[t]he owner of a dangerous dog shall be strictly liable in civil damages for any injuries or property damage the dog inflicts upon a person, his property, or another animal." N.C. Gen. Stat. § 67-4.4 (2021). A

dog is deemed to be a "dangerous dog" when: (1) the dog "has killed or inflicted severe injury on a person" without provocation; (2) the dog has participated in dog fighting; or (3) an appropriate official or governing body has designated the dog to be "potentially dangerous."[1] *Id.* § 67-4.1(a)(1)(a)–(b). A dog inflicts "severe injury" on a person when it causes "any physical injury that results in broken bones or disfiguring lacerations or required cosmetic surgery or hospitalization." *Id.* § 67-4.1(a)(5).

¶ 17 In the instant case, Plaintiff's complaint did not allege that the Australian Shepherd was a "dangerous dog" as defined by statute. Taking the allegations of Plaintiff's complaint as true, as we must, the dog may have severely injured Plaintiff without provocation by biting her on the leg, which is one of the statutory definitions of a "dangerous dog." *See id.* § 67-4.1(a)(1)(a)(1). However, to state a claim under a theory of strict liability, Plaintiff must have alleged that the dog had killed or severely injured another person prior to the 10 February 2018 incident. *See Mims v. Parker*, 269 N.C. App. 489, 493, 839 S.E.2d 433, 436 ("The General Assembly hinging strict liability on the dog having been classified a dangerous dog prior to the incident in question is . . . consistent with our caselaw holding an essential element in dog-bite

[1] A "potentially dangerous dog" is one that has either inflicted severe injury on a person through a bite, killed or severely injured another domestic animal not on the dog owner's property, or "[a]pproached a person when not on the [dog] owner's property in a vicious or terrorizing manner in an apparent attitude of attack." N.C. Gen. Stat. § 67-4.1(a)(2)(a)–(c).

cases is prior knowledge of the animal's vicious propensity."), *disc. review denied*, 376 N.C. 532, 851 S.E.2d 619 (2020). Plaintiff's complaint contains no such allegations; in fact, Plaintiff's counsel admitted at the hearing that they "don't know if [the dog has] bitten someone in prior previous acts." Moreover, the complaint contains no references to N.C. Gen. Stat. § 67-4.4, and Plaintiff did not allege that Defendants were strictly liable for her injuries.

¶ 18 Consequently, Plaintiff's "complaint, on its face, reveals an absence of facts sufficient to make a good claim" under the strict liability theory. *Blow*, 197 N.C. App. at 588, 678 S.E.2d at 248.

C. Negligence Per Se

¶ 19 To successfully assert a claim of negligence *per se*, a plaintiff must allege:

> (1) a duty created by a statute or ordinance; (2) that the statute or ordinance was enacted to protect a class of persons which includes the plaintiff; (3) a breach of the statutory duty; (4) that the injury sustained was suffered by an interest which the statute protected; (5) that the injury was of the nature contemplated in the statute; and, (6) that the violation of the statute proximately caused the injury.

Hardin v. York Mem'l Park, 221 N.C. App. 317, 326, 730 S.E.2d 768, 776 (2012) (citation omitted), *disc. review denied*, 366 N.C. 571, 738 S.E.2d 376 (2013).

¶ 20 In the present case, although Plaintiff alleged that Defendants "fail[ed] to keep [the] gate to their yard closed and fastened securely[,]" "fail[ed] to keep a proper

lookout for the safety of . . . Plaintiff[,]" and "fail[ed] to keep the dog on a chain while outside their home[,]" she did not allege that such actions constituted a breach of duty created by law. Indeed, Plaintiff's complaint is completely devoid of reference to any statute, ordinance, or regulation. She thus failed to state a claim upon which relief can be granted under a theory of negligence *per se*. *See CommScope Credit Union*, 369 N.C. at 51, 790 S.E.2d at 659.

D. Summary

¶ 21 Common law negligence, statutory strict liability, and negligence *per se* are the three primary legal theories by which a plaintiff may pursue a claim for personal injuries involving domestic animals. After reviewing the sufficiency of the allegations in Plaintiff's complaint, we conclude that Plaintiff failed under each of these theories "to state a claim upon which relief can be granted[.]" *Id.* (citation omitted). Accordingly, the trial court did not err by dismissing Plaintiff's complaint with prejudice pursuant to Rule 12(b)(6).

III. Voluntary Dismissal

¶ 22 The totality of Plaintiff's argument regarding the trial court's dismissal of her complaint with prejudice is as follows: "[Plaintiff] asked for a motion to dismiss without prejudice prior to the Judge's ruling. Therefore, this Court should reverse the [trial c]ourt's order because [Plaintiff] should have been granted a dismissal without prejudice since it was timely requested prior to the ruling of the court."

¶ 23 In fact, after the trial court heard the parties' arguments, Plaintiff's counsel announced to the court that he was "going to voluntarily take a dismissal without prejudice at this time[,]" and explained to the court that "[w]e'll have one more year to re-file this claim." On appeal, Plaintiff fails to furnish this Court with a legitimate argument as to why the trial court was constrained to dismiss her complaint without prejudice as a consequence of counsel's announcement. Nor does she set forth any argument or cite any case law in support of this claim.

¶ 24 "It is not the job of this Court to create an appeal for Plaintiff[, or] to supplement an appellant's brief with legal authority or arguments not contained therein." *Lasecki v. Lasecki*, 257 N.C. App. 24, 47, 809 S.E.2d 296, 312 (2017) (citation and internal quotation marks omitted); *see* N.C.R. App. P. 28(b)(6). Thus, this argument is abandoned.

Conclusion

¶ 25 For the reasons stated herein, we affirm the trial court's order dismissing Plaintiff's complaint with prejudice pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

AFFIRMED.

Judges COLLINS and WOOD concur.

Report per Rule 30(e).