COURT OF APPEALS DECISION DATED AND FILED

February 22, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2047

Cir. Ct. No. 2014CV470

STATE OF WISCONSIN **IN COURT OF APPEALS DISTRICT III**

JUDY C. DREXLER, SURVIVING SPOUSE OF JEROME E. DREXLER,

PLAINTIFF-APPELLANT,

V.

MCMILLAN WARNER MUTUAL INSURANCE COMPANY AND JAMES R. WEILAND,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Marathon County: GREGORY E. GRAU, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 HRUZ, J. Judy Drexler, surviving spouse of Jerome Drexler, appeals a summary judgment granted in favor of James Weiland and his insurer.[1] We conclude ***Smaxwell v. Bayard***, 2004 WI 101, 274 Wis. 2d 278, 682 N.W.2d 923, bars Drexler's common law negligence claim because it is undisputed Weiland was not the owner or keeper of the horse that caused Jerome's death. Accordingly, we affirm.

BACKGROUND

¶2 Drexler commenced this common law negligence action seeking to recover damages for the alleged wrongful death of her husband, which occurred on July 22, 2011. She alleged that as Jerome was traveling on his motorcycle on State Highway 97 in Marathon County, he struck one of four horses that were running loose. The horses were allegedly kept on nearby property that Weiland owned. The complaint alleged Weiland was a "keeper" of the horses and had negligently failed to maintain the fences on his property so as to prevent the horses' escape. In his answer, Weiland asserted the horse involved in the accident was owned by Edward Schwartz, who had leased Weiland's property and was responsible for maintaining the fence around it.[2]

¶3 The following facts are undisputed. Schwartz bought some hay from Weiland in late 2010. Schwartz was later unable to pay Weiland for the hay, so they orally agreed that Schwartz's debt would be forgiven and that Weiland would

[1] In the remainder of this opinion, we refer to Judy Drexler as "Drexler" and to Jerome Drexler by his first name.

[2] Schwartz was not a named party to Drexler's lawsuit and, apparently, could not be located during the pendency of this action.

allow Schwartz to pasture his horses on Weiland's land in exchange for Schwartz re-roofing Weiland's home. The twelve-acre pasture was surrounded by a fence.[3] Schwartz's horses had escaped once prior to the accident at issue in this case, and Weiland had told Schwartz to fix the fence. After renting the pasture land to Schwartz, Weiland did not provide feed for the horses, did not check on the horses, and did not go out to the pasture.

¶4 Following depositions, Weiland filed a motion for summary judgment, asserting that because he was not the owner or keeper of the horse, he could not be liable for Jerome's injuries. Drexler opposed summary judgment, arguing Weiland had a duty to maintain and repair his fence, Weiland was a "harborer" of horses, and any public policy determination barring liability was best reserved for after a trial.[4] The court rejected Drexler's arguments in a written decision and granted Weiland summary judgment. The circuit court relied on case law "holding that, as a matter of public policy, landlords cannot be held liable for harm caused by an animal unless they are the animal's owner or keeper." Drexler appeals.

[3] Weiland testified variously that he and Schwartz had "kind of agreed [Schwartz] would be taking care of the fence," and that Weiland assumed Schwartz was responsible for keeping the fence in good repair since he was leasing the premises. As we explain *infra* ¶8 n.6, the identity of the party who bore responsibility for repairing or maintaining the fence is not a material fact that would preclude summary judgment.

[4] On appeal, Drexler has abandoned her argument that Weiland bears any sort of "harborer" liability for Schwartz's horses. The circuit court observed that the common law imposes liability only against an animal's owner or keeper; a person who merely harbors an animal is not liable for injuries the animal causes.

DISCUSSION

¶5 "We review a grant of summary judgment de novo, employing the same methodology as the circuit court, and benefiting from the court's analysis." ***Ladewig ex rel. Grischke v. Tremmel***, 2011 WI App 111, ¶7, 336 Wis. 2d 216, 802 N.W.2d 511. Summary judgment is warranted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2015-16).

¶6 In ***Smaxwell***, our supreme court concluded, on public policy grounds, that "common-law liability of landowners and landlords for negligence associated with injuries caused by dogs is limited to situations where the landowner or landlord is also the owner or keeper of the dog causing injury." ***Smaxwell***, 274 Wis. 2d 278, ¶¶2, 39. The court determined that permitting recovery for negligence claims against landlords who are not owners or keepers "would simply have no sensible or just stopping point." ***Id.***, ¶47.

¶7 Drexler does not argue Weiland was an owner or keeper of the horse that caused her husband's death, nor does she argue that ***Smaxwell***'s reasoning is limited to cases involving dogs.[5] As to the latter point, Drexler concedes that although she made such an argument in the circuit court, she is "expressly withdraw[ing]" that argument. Instead, Drexler's only argument for Weiland's

[5] We would reject both arguments in any event. The undisputed facts of record demonstrate Weiland neither owned the horses nor shouldered any of the responsibilities typically associated with "keeping" such animals, such as feeding or care. *See* ***Pawlowski v. American Family Mut. Ins. Co.***, 2009 WI 105, ¶30, 322 Wis. 2d 21, 777 N.W.2d 67. As to the distinction between dogs and other animals, ***Ollhoff v. Peck***, 177 Wis. 2d 719, 503 N.W.2d 323 (Ct. App. 1993), establishes that WIS JI—CIVIL 1391 (2016) should be given in all common law negligence cases in which an owner or keeper is alleged to be liable for injuries caused by his or her animal. ***Ollhoff***, 177 Wis. 2d at 724.

liability in this case is the "common law duty of a landlord to maintain his premises," which, she asserts, is not susceptible to the same public policy analysis set forth in ***Smaxwell***.

¶8 Drexler argues that as a landlord, Weiland had a duty to use ordinary care to maintain and repair the fence surrounding his property. However, "in Wisconsin, even if all the elements for a claim of negligence are proved, or liability for negligent conduct is assumed by the court, the court nonetheless may preclude liability based on public policy factors." ***Id.***, ¶39. "***Smaxwell*** explicitly forecloses landlord liability on a broad basis, regardless of a plaintiff's theory of a landlord's duty of care, unless the landlord has a role, separate from that of landlord, which involves exercising control or custody over the dog so as to qualify as an owner or keeper of the dog." ***Ladewig ex rel. Grischke***, 336 Wis. 2d 216, ¶25; *see also* ***Smaxwell***, 274 Wis. 2d 278, ¶39. This is a categorical rule. Thus, even if Weiland had a duty to maintain and repair the fence on his property, he cannot be liable in this case under ***Smaxwell***'s reasoning. Drexler's attempt to recast Weiland's duty in this case as one of maintaining his property as opposed to controlling a tenant's animal does not defeat this proposition.[6]

¶9 Drexler contends ***Smaxwell*** is distinguishable because that case (and similar cases) involved injuries that occurred on the premises on which the animals were kept. While this is a factual difference between the cases, we

[6] Drexler does not dispute that Weiland was a landlord, nor does she contest the fact that Weiland entered into an oral rental agreement that permitted Schwartz to pasture his horses on Weiland's property. Rather, she challenges only the scope of the agreement between Schwartz and Weiland as to which party bore responsibility for repairing or maintaining the fence. The identity of the party who bore these responsibilities under the lease, while disputed, is not a material fact that would preclude summary judgment. The dispositive points are that Weiland was a landlord who neither "owned" nor "kept" Schwartz's horses.

conclude the distinction is immaterial. Wisconsin's common law subjects only owners and keepers of animals to liability for the animals' injurious acts, wherever those injuries occurred. *See* ***Smaxwell***, 274 Wis. 2d 278, ¶42. Indeed, when an animal causes injuries off-premises, the justification for removing liability for a landlord who is not also the animal's owner or keeper becomes even stronger.

¶10 Moreover, ***Smaxwell***'s public policy analysis undercuts the distinction Drexler advances. The supreme court expressly reasoned landowners who are not owners or keepers of an animal should not be forced to fence in their property. ***Id.***, ¶¶48-49.[7] The facts in ***Smaxwell***, broadly speaking, were similar to the facts in this case: a tenant who kept dogs with the landlord's permission on a wooded parcel adjacent to a parcel containing apartments failed to secure the dogs' kennel, and the dogs caused serious injury to a visitor on the occupied parcel when they escaped. ***Id.***, ¶¶3-7.

¶11 Further, the ***Smaxwell*** court remarked that, in most cases, the purpose for bringing an action against a landlord who neither owns nor keeps the animal in question is to reach a deep pocket. ***Id.***, ¶53.

> [L]imiting the liability of landlords when they are neither owners nor keepers of dogs causing injury on or around their property fosters the sound policy of ensuring that liability is placed upon the person with whom it belongs rather than promoting the practice of seeking out the defendant with the most affluence.

Id. Weiland is not the party to whom Drexler must look for a remedy.

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[7] Our supreme court appears to conclude that a landlord's fencing in of his or her property would be sufficient to satisfy his or her duty of ordinary care. *See* ***Smaxwell v. Bayard***, 2004 WI 101, ¶49, 274 Wis. 2d 278, 682 N.W.2d 923.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.