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ATTORNEYS FOR APPELLANTS:

THOMAS C. DOEHRMAN
DANIEL J. BUBA
Doehrman Chamberlain
Indianapolis, Indiana

ATTORNEYS FOR APPELLEES:

MARK D. ULMSCHNEIDER
ANDREW L. TEEL
WILLIAM A. RAMSEY
Steele, Ulmschneider & Malloy, L.L.P.
Fort Wayne, Indiana

IN THE
COURT OF APPEALS OF INDIANA

HENRY A. LEOPOLD and ANDREA LEOPOLD,	)	
	)	
Appellants-Plaintiffs,	)	
	)	
vs.	)	No. 06A04-0904-CV-205
	)	
ROBERT S. BOONE and NANCY D. BOONE,	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE BOONE CIRCUIT COURT
The Honorable J. Jeffrey Edens, Judge Pro Tempore
Cause No. 06C01-0807-CT-645

September 4, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Henry and Andrea Leopold appeal from the trial court's grant of summary judgment to Robert and Nancy Boone. The Leopolds raise a single issue for our review, which we restate as whether a genuine issue of material fact precludes summary judgment in favor of the Boones on the Leopolds' claims for negligence.

We affirm.

FACTS AND PROCEDURAL HISTORY

On July 10, 2007, at about 7:45 p.m., Henry was riding his bicycle with a friend in Sheridan, near property located at 11854 East State Road 38. As the cyclists passed that property, two dogs, each weighing about twenty pounds, ran off of the property and into Henry's path, causing him to crash. Henry landed on his head and suffered a serious brain injury.

The property from which the dogs emerged consists of several acres and is owned by the Boones, but they have leased that property to their forty-three-year-old daughter, Kelly Burnell, since November of 2004. Burnell owned and cared for the two dogs involved in the accident and, at the Boones' request, she kept the dogs outside of the house on that property. The Boones visited Burnell at the property once or twice a week.

Two of Burnell's neighbors, Monica Wood and Lisa Haughey, frequently saw the dogs roaming freely on the property. Haughey saw the dogs chase motorcyclists and bicyclists on State Road 38 about ten times. One day, the dogs destroyed some of Haughey's personal property that she had kept outside. Haughey, who also rented from the Boones, complained to Robert when he came to her residence to collect that same

month's rent. Also prior to the accident, Wood saw Robert building a fence along the property's edge along State Road 38.

On September 10, 2007, the Leopolds filed their complaint against Burnell for "failing to keep her dogs properly restrained." Appellee's App. at 1. On April 18, 2008, the Leopolds amended their complaint to add the Boones as additional defendants, although the Leopolds acknowledged in their amended complaint that the dogs "were owned and cared for by . . . Kelly Burnell." Appellant's App. at 18-19. On July 30, the Boones filed their answer and motion for summary judgment. After briefing, the trial court held a hearing on the Boones' summary judgment motion on February 2, 2009, and, on March 4, the court granted the Boones' motion. On March 14, the court ordered that the judgment in favor of the Boones was a final judgment. This appeal ensued.

DISCUSSION AND DECISION

Standard of Review

Our standard of review is well established:

> When reviewing a grant or denial of summary judgment our well-settled standard of review is the same as it is for the trial court: whether there is a genuine issue of material fact, and whether the moving party is entitled to judgment as a matter of law. Summary judgment should be granted only if the evidence sanctioned by Indiana Trial Rule 56(C) shows that there is no genuine issue of material fact and the moving party deserves judgment as a matter of law. All evidence must be construed in favor of the opposing party, and all doubts as to the existence of a material issue must be resolved against the moving party. However, questions of law are reviewed de novo.

Florio v. Tilley, 875 N.E.2d 253, 255 (Ind. Ct. App. 2007) (citations omitted).

The Leopolds contend that the Boones maintained a hazardous condition on their property and acted negligently in their use of the property they rented to Burnell.

> To prevail on a claim of negligence a plaintiff is required to prove: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty by the defendant; and (3) an injury to the plaintiff proximately caused by the breach. A negligent act is the proximate cause of an injury if the injury is a natural and probable consequence, which in light of the circumstances, should have been foreseen or anticipated.
>
> Summary judgment is rarely appropriate in negligence cases. Issues of negligence, contributory negligence, causation, and reasonable care are more appropriately left for the determination of a trier of fact. Nonetheless, the issue of proximate cause becomes a question of law where only a single conclusion can be drawn from the facts.

Id. at 255-56 (citations omitted).

We also note that the trial court made extensive findings and conclusions in its summary judgment order. In an appeal from a summary judgment, the trial court's findings and conclusions may be helpful but they are not controlling. See Madison County Bd. of Comm'rs v. Town of Ingalls, 905 N.E.2d 1022, 1025 (Ind. Ct. App. 2009), trans. denied. Here, the Leopolds spend a significant portion of their brief taking issue with several of the court's findings and asserting that various issues of fact preclude summary judgment. But summary judgment is precluded only when there are genuine issues of material fact. See id. "A fact is 'material' for summary judgment purposes if it bears on the ultimate resolution of relevant issues." Yin v. Soc'y Nat'l Bank Ind., 665 N.E.2d 58, 64 (Ind. Ct. App. 1996), trans. denied. As discussed below, there are no genuine issues of material fact in this appeal.

Boones' Duty to Henry

The crux of this appeal is whether the Boones, as lessors of the property, owed a duty to Henry to prevent the dogs from entering onto State Road 38. The Boones rely upon Blake v. Dunn Farms, Inc., 274 Ind. 560, 413 N.E.2d 560 (Ind. 1980), for the

proposition that only the owner and keeper of the dogs, and not the lessor of the property on which the dogs are kept, can be held liable for injuries caused by the dogs. The Leopolds attempt to distinguish Blake on several grounds. We agree with the Boones that Blake is controlling authority and stands for the proposition that the Boones did not owe a duty to Henry.

The issue before the court in Blake was whether there existed a "duty of the landowner to persons on an adjacent public road, particularly as that duty applies to the ownership and keeping of domestic animals." 413 N.E.2d at 561. In light of that question, our Supreme Court stated as follows:

> Plaintiff Blake was a passenger in an automobile which struck a horse at night. The accident occurred on a portion of a state highway running through Dunn's land. Plaintiff was severely injured and brought action against Love, the owner of the horse, and Dunn Farms, the landowner. . . .
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> * * *
>
> . . . There was evidence that, in their trips to the house and building area, one or more of the owners (Dunns) saw some horses in the fields.
>
> . . . The uncontroverted evidence showed that Dunn Farms was neither the owner nor the custodian of the horse in question, had no material relation to such horse, and had no material relation to the owner-keeper of such horse. Although there was evidence that Love's horses had been out [on] the pastures before, there was no evidence that Dunn Farms' owners had any knowledge of these incidents.
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> * * *
>
> Thus, it is the duty of the owner and the keeper of the animal to keep him confined, and the mere possession or ownership of land from which an animal strays is not sufficient to make the landowner liable, so long as the landowner is not the keeper of such animal. This is and has always been the law in Indiana. See Cook v. Morea, (1870) 33 Ind. 497. If the landowner is neither the owner nor keeper, he has no duty to confine or restrain the animal. If an animal is allowed by its keeper to escape from its

> confinement and harm results, that damage results from the negligent confinement, not from the condition of the land. To the extent that the condition of the land made it inadequate or unsuitable for confinement, the responsibility for selecting an adequate method of confinement is upon the keeper, not upon the landowner who neither owned nor kept the animal.
>
> The fact that Dunn Farms, in the person of one or more of their officers, had casually observed horses in the field on their property created no duty in them to be concerned that the horses might escape and cause injury; thus, Dunn Farms had no duty to take action to prevent or guard against such an occurrence. . . .
>
> The facts in this case do not bring it within the rule set out in Pitcairn v. Whiteside, (1941) 109 Ind. App. 693, 34 N.E.2d 943, where it was held to be the duty of a property owner adjacent to a highway to exercise reasonable care to prevent injury caused by the property's defective or dangerous condition. The defective or dangerous condition in Pitcairn was heavy smoke going across the traveled portion of the highway, caused by a railroad, through its employees, in burning off the right-of-way. We emphasize that in that case, the railroad itself was causing the dangerous condition . . . .
>
> Though we agree with the decision in Pitcairn, that case in no way parallels the facts and circumstances in the case before us. Here, the owner of the property had no relationship to the agency causing the problem, and no duty to investigate to determine if there was a problem, emergency, or dangerous condition. To hold otherwise would place a duty on a property owner to continually inspect the perimeters of his property, particularly along an adjacent highway, to make sure that dangerous conditions do not arise for those traveling on the highway. . . .

Id. at 562-64 (emphases added; some citations omitted). That law is clear and mandates summary judgment in favor of the Boones, and the Leopolds do not suggest on appeal that Blake was wrongly decided or that its holding should be changed.[1]

Rather, in order to avoid application of Blake, the Leopolds suggest several points of distinction between their case and the facts of Blake. First, the Leopolds assert that "in

[1] Not that such an argument would prevail in this court. See Horn v. Hendrickson, 824 N.E.2d 690, 695 (Ind. Ct. App. 2005) ("[T]he Court of Appeals is well aware of the controlling precedents of our supreme court and has no desire to proceed in conflict with them. We are an intermediate appellate court.").

this case . . . the Dogs were never confined. Consequently, Blake, which involved an animal that was confined and escaped, does not apply here." Appellant's Brief at 17. But whether animals on the leased property were or were not confined is immaterial to the Blake court's holding that "[i]f the landowner is neither the owner nor keeper, he has no duty to confine or restrain the animal." 413 N.E.2d at 563.

Next, the Leopolds assert that Blake is distinguishable because "the Boones knew the Dogs roamed unrestrained both on and off the Property." Appellant's Brief at 17. In Blake, however, our Supreme Court expressly acknowledged that the landowner-lessor "had casually observed" the horses unrestrained on the leased property. 413 N.E.2d at 562-63. Nonetheless, the court held that the landowner did not owe a duty to those on the nearby road. We must, therefore, reach the same conclusion here.

Finally, the Leopolds contend that Blake is distinguishable because "the animal owner in this case is the Boones' daughter and tenant, and thus [the Boones] had a material relationship with the animal owner." Appellant's Brief at 18. It is true that, in Blake, our Supreme Court noted that the landowner did not have a "material relation" with the animal or to the owner-keeper of the animal. 413 N.E.2d at 562. The court made that statement in comparing the facts of Pitcairn, in which this court held that an employer was liable to those on a road near the employer's property for damage resulting from the use of that property by the employer's employees. Id. at 564 (discussing Pitcairn, 34 N.E.2d at 943). But neither a parent-child relationship nor a landowner-tenant relationship is equivalent to an employer-employee relationship, where an employer is usually liable for the conduct of an employee under the doctrine of

respondeat superior. As such, the Leopolds' third attempt to distinguish Blake must also fail.[2]

While we hold that Blake requires that we affirm the trial court's grant of summary judgment for the Boones, we briefly address the Leopolds' two remaining arguments. First, the Leopolds contend that the Boones could have used the presence of the dogs on the premises as a reason to terminate the lease with Burnell. Because they did not terminate the lease, the Leopolds continue, the Boones must accept liability for the consequences arising from the fact that Burnell kept the dogs. But the Leopolds' reasoning would impute liability to the landowner as if he were the keeper of the dogs, an outcome that is foreclosed by our Supreme Court's decision in Blake. 413 N.E.2d at 563. And, second, the Leopolds assert that the Boones are liable under a nuisance theory. But the Leopolds did not assert a nuisance claim in their complaint against the Boones, and they are, therefore, foreclosed from invoking that theory on appeal as grounds for reversing the trial court's summary judgment order.

Affirmed.

KIRSCH, J., and BARNES, J., concur.

[2] The Leopolds also argue that Pitcairn and numerous, similar cases are controlling authority. For the same reasons that Blake controls our holding in this case, Pitcairn and similar cases do not.