

NOTICE
Decision filed 07/20/16. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2016 IL App (5th) 150223-U

NO. 5-15-0223

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

TAMARA R. WATSON,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Madison County.
)	
v.)	No. 11-L-1416
)	
ARLENE MARBERRY,)	
)	
Defendant-Appellee,)	
)	
and)	
)	
STEVEN S. MAIN,)	Honorable
)	Dennis R. Ruth,
Defendant.)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Justices Welch and Chapman concurred in the judgment.

ORDER

¶ 1 *Held:* This court has jurisdiction over this appeal where the appellant is granted leave to supplement the record on appeal with the circuit court's finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016) that there is no just reason for delaying appeal of its order granting summary judgment in favor of one defendant, as the appellant's premature notice of appeal is rendered effective upon the entry of such order. The circuit court was correct in granting summary judgment in favor of the defendant on the plaintiff's claim for common law negligence in causing her injuries from a dog attack, as the record clearly establishes that the defendant did not own

the dog, was not present at the time of the attack, and had no knowledge of the dog's dangerous propensities.

¶ 2 The plaintiff, Tamara R. Watson, appeals from the May 19, 2015, order of the circuit court of Madison County which granted a summary judgment in favor of defendant Arlene Marberry on the plaintiff's complaint for common law negligence in causing the plaintiff injuries from a dog attack. On June 10, 2016, the plaintiff filed an agreed motion to supplement the record on appeal with the circuit court's April 15, 2016, finding, pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016), that there is no just reason to delay the appeal. This motion prompted this court to require additional briefing on the issue of this court's jurisdiction. For the following reasons, we grant the agreed motion to supplement the record on appeal, find that this court has jurisdiction to consider this appeal, and affirm the order of the circuit court.

¶ 3 **FACTS**

¶ 4 On December 22, 2011, the plaintiff filed a complaint in the circuit court of Madison County, naming Arlene Marberry, as well as Steven S. Main and the Otter Lake Water Commission, an Illinois public corporation, as defendants. Count I of the complaint states a cause of action against Steven S. Main pursuant to section 16 of the Animal Control Act (510 ILCS 5/16 (West 2010)). In count I, the plaintiff alleges that she leased a campsite at Otter Lake Campground near Girard. On September 5, 2010, the plaintiff was walking in the common areas of the campground when Steven S. Main's dog "Chance," without provocation, ran out and attacked the plaintiff, knocking her down, scratching and clawing her legs and biting and wounding her face.

¶ 5 Count II of the complaint, which is directed toward Arlene Marberry, is the count that is at issue in this appeal. Count II alleges that Arlene Marberry was the lessor of a campsite at Otter Lake Campground, where Steven S. Main and his dog "Chance" were present as guests. According to count II, Arlene Marberry's negligence contributed to cause the plaintiff's injury in that she was in violation of ordinances and regulations of the Otter Lake Campground. In particular, count II alleges that she permitted a domestic pet to be present at her campsite unleashed and she permitted Steven S. Main and his dog "Chance" to be present at her campsite in her absence and without her supervision. According to count II, Ordinance 2008-01 of the Otter Lake Campground requires the leashing of domestic pets and requires that a tenant accompany guests at all times. Count III of the complaint, which alleged a cause of action against Otter Lake Water Commission, was later voluntarily dismissed.

¶ 6 On December 4, 2013, Arlene Marberry filed a motion for a summary judgment as to count II of the plaintiff's complaint. According to the motion for a summary judgment, in a common law negligence claim involving injuries inflicted by a dog, a plaintiff needs to establish that the defendant had prior knowledge of the dog's viciousness. The motion for a summary judgment indicated that Arlene Marberry testified that she was not aware of any prior incidents involving the dog in question, and that said testimony had not been disputed by the plaintiff or contradicted by any of the pleadings or discovery.

¶ 7 Steven S. Main's answers to interrogatories were attached as Exhibit A to the motion for a summary judgment. These answers to interrogatories established that

Steven Main owned the dog in question and that Arlene Marberry was not present during the time of the occurrence.

¶ 8 Exhibit D to the motion for a summary judgment was a copy of Arlene Marberry's campsite lease. The lease specified that the tenant was required to abide by park rules and regulations as set forth in Otter Lake Water Commission ordinance number 2008-1 and to cause all of the guests to abide by these regulations as well. This ordinance was attached to the motion as Exhibit E and was entitled "An Ordinance Pertaining to the Campground at Otter Lake, Macoupin County, Illinois," and was adopted by the Otter Lake Water Commission on January 10, 2008. One of the provisions of that ordinance states that:

"No person shall bring or allow horses, cattle, livestock or domestic pets in the Campground, except that cats and dogs are allowed within a Permitted Camping Vehicle or on a leash no more than 10 feet in length that prevents the animal from Crossing the boundary line of the Campsite."

¶ 9 With regard to seasonal campsite leases, which is the lease that Arlene Marberry possessed, the ordinance provided that "[t]he tenant's guests have a revocable license from the Commission to use the Campground in accordance with the regulations of this Ordinance." The ordinance provided that:

"The legal occupants of the Campsite shall be limited to the tenant and the tenant's guests. The tenant's guests shall be accompanied by the tenant at all times. Guests shall abide by this Ordinance and the Recreation Ordinance, and their failure to do so shall be treated as a breach by the tenant of the lease."

¶ 10 Although not appended to the motion for a summary judgment, there is an excerpt of the deposition of Arlene Marberry appended to a previously filed motion to file a cross-claim for contribution against Steven S. Main. Ms. Marberry testified that she did not know Mr. Main, who is her grandson, would have his dog at her campsite on the day in question, although had she known, she would have welcomed the dog, as she was aware of no prior incidents involving the dog. Another excerpt of Ms. Marberry's deposition testimony is appended to the motion for a summary judgment as Exhibit G. In that excerpt, Ms. Marberry testified that she was at church when the incident occurred and was unaware of the ordinance requiring that she accompany her guests at all times.

¶ 11 On December 19, 2013, the plaintiff filed a motion for a summary judgment as to liability on count I of the complaint directed against Steven Main, contending that there was no genuine issue of material fact regarding the essential elements of the plaintiff's Animal Control Act claim. 510 ILCS 5/16 (West 2010). The plaintiff also filed a response to Arlene Marberry's motion for a summary judgment on count II, arguing that Marberry's knowledge of the propensities of the dog at issue is not required in this case because the negligence claim stated in count II is predicated on Marberry's failure to abide by her campsite lease and the applicable Otter Lake Water Commission ordinances, and as such, is a proper claim for negligence *per se*, or at least presents a question of fact as to negligence.

¶ 12 On February 7, 2014, a hearing was held on Arlene Marberry's motion for a summary judgment as to count II of the plaintiff's complaint, and the court took the matter under advisement. On September 12, 2014, a hearing was held where further

argument was made regarding Arlene Marberry's motion for a summary judgment on count II, and the plaintiff's motion for a summary judgment as to liability on count I against Steven Main was heard as well. Both matters were taken under advisement.

¶ 13 On May 19, 2015, the circuit court entered a detailed order in which it granted a summary judgment in favor of Arlene Marberry as to count II of the plaintiff's complaint. Further, the circuit court granted a partial summary judgment in favor of the plaintiff as to count I of the plaintiff's complaint directed toward Steven Main on the issue of his liability under the Animal Control Act. The circuit court further set a case management conference for the purpose of scheduling a hearing on the issue of damages as to count I of the plaintiff's complaint.

¶ 14 On June 8, 2015, the plaintiff filed a notice of appeal from the circuit court's May 19, 2015, order granting a summary judgment in favor of Arlene Marberry on count II of the plaintiff's complaint. On June 10, 2016, the plaintiff filed an "Agreed Motion to Supplement Record on Appeal," seeking to supplement the record on appeal with an "April 15, 2016, finding that there was no just reason to delay the appeal." In response to the motion, this court entered an order on June 15, 2016, directing the parties to address, in supplemental legal memoranda, the potential jurisdictional issue raised by the motion to supplement the record. Further, this court dispensed with oral argument pursuant to Illinois Supreme Court Rule 352(a) (eff. Feb. 6, 2013). The parties submitted their supplemental legal memoranda, and this decision follows.

¶ 15 Prior to considering the merits of the plaintiff's appeal, we must consider the plaintiff's motion to supplement the record on appeal with the circuit court's April 15,

2016, order, which made a finding, pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016), that there is no just reason to delay this appeal, as well as the jurisdictional issue presented thereby. "Subject to certain exceptions, an appeal may be taken only after the trial court has resolved all claims against all parties." *Harreld v. Butler*, 2014 IL App (2d) 131065, ¶ 11. One such exception is stated in Rule 304(a), which provides that, in matters involving multiple parties and claims, an appeal may be taken when the circuit court has entered a final order to one or more parties or claims, but fewer than all, if the circuit court makes an express finding that there is no just reason to delay enforcement or appeal or both. Ill. S. Ct. R. 304(a) (eff. Mar. 8, 2016). Here, the circuit court's May 19, 2015, order disposed of count II of the plaintiff's complaint, but only partially disposed of count I, leaving the issue of the plaintiff's damages to be determined. Accordingly, the order was not final at the time it was entered, and did not contain the language required by Rule 304(a). As a result, at the time the June 8, 2015, notice of appeal was filed, this court was without jurisdiction to consider this appeal.

¶ 16 In 2007, Illinois Supreme Court Rule 303(a)(2) (eff. May 1, 2007) was amended to include a savings provision, which "protects the rights of an appellant who has filed a premature notice of appeal." (Internal quotation marks omitted.) *Harreld*, 2014 IL App (2d) 131065, ¶ 25 (Zenoff, J., specially concurring) (citing Ill. S. Ct. R. 303, Committee Comments (adopted Mar. 16, 2007)). This savings provision applies in situations where a notice of appeal is filed before the last pending postjudgment motion is resolved or when a notice of appeal is filed when other claims remain pending. *Id.* In the case where a notice of appeal is filed when other claims remain pending, the savings provision

provides that a prematurely filed notice of appeal "becomes effective" when a final judgment as to all pending claims is entered. *Id.* Our colleagues in the Second District have interpreted this savings provision to find that if a litigant files a notice of appeal from a final judgment as to fewer than all parties or claims, and the trial court subsequently enters a Rule 304(a) finding as to that judgment, then the notice of appeal becomes effective when the finding is entered. *Id.* ¶¶ 18, 28 (citing *In re Marriage of Valkiunas*, 389 Ill. App. 3d 965, 969 (2008)). Based upon this line of precedent, we hereby grant the agreed motion to supplement the record with the circuit court's Rule 304(a) finding of April 15, 2016, and deem the previously filed notice of appeal to be effective to confer jurisdiction on this court as of April 15, 2016.

¶ 17 We now turn to the merits of this appeal, beginning with a statement of our standard of review. We apply a *de novo* standard of review to the circuit court's decision to grant a summary judgment. *Hernandez v. Alexian Brothers Health System*, 384 Ill. App. 3d 510, 519 (2008). " 'Summary judgment is proper where, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file reveal that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' " *Id.* at 518 (quoting *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 305 (2005), citing *General Casualty Insurance Co. v. Lacey*, 199 Ill. 2d 281, 284 (2002)). "In order to survive a motion for summary judgment, the nonmoving party must present a factual basis that would arguably entitle [her] to a judgment." *Id.* With these standards in mind, we turn to count II of the plaintiff's complaint.

¶ 18 Count II of the plaintiff's complaint alleges a cause of action against Arlene Marberry based on common law negligence. Unlike in count I, which is directed toward the owner of the dog, Steven Main, the plaintiff is not attempting to state a cause of action against Arlene Marberry based on the Animal Control Act (510 ILCS 5/16 (West 2010)) because there is no question that she is not the legal owner of the dog and does not fit within the definition of an "owner" under the Animal Control Act. 510 ILCS 5/2.16 (West 2010). Illinois law is clear that to impose common law negligence liability on someone other than the dog's owner or keeper, the plaintiff must show that a defendant property owner had prior knowledge of the dog's viciousness. *Lucas v. Kriska*, 168 Ill. App. 3d 317, 320 (1988). The record consists of no evidence that Arlene Marberry had any prior knowledge that the dog at issue was present at the campsite or that it had any propensities to bite or attack. The only evidence on this point is Arlene Marberry's uncontested testimony that she had no such knowledge.

¶ 19 The plaintiff argues that her common law negligence cause of action against Arlene Marberry can withstand a summary judgment because Arlene Marberry's duty was created by the ordinances governing her campsite as well as her lease which incorporates said ordinances. In particular, the plaintiff argues that Arlene Marberry's lack of compliance with the ordinances requiring her to accompany her guests at all times and that all dogs be on a leash can give rise to common law negligence liability on her part for the plaintiff's injury. The violation of a statute or ordinance designed to protect human life or property is *prima facie* evidence of negligence. *Janis v. Graham*, 408 Ill. App. 3d 898, 902 (2011). "A party that is injured as a result of a violation of such a

statute or ordinance may recover upon a showing that (1) the violation proximately caused the injury; (2) the statute or ordinance was intended to protect the class of persons to which the party belongs; and (3) the injury suffered was of the type that the statute or ordinance was designed to protect against." *Id.*

¶ 20 In its detailed order granting a summary judgment in favor of Arlene Marberry, the circuit court found that there is no genuine issue of material fact as to whether Marberry violated the ordinance requiring dogs to be on leashes, as the undisputed evidence establishes that she was not present at the time and did not know the dog was present. Further, the circuit court found that although Marberry violated the ordinance requiring her to accompany guests at her campsite at all times, this violation did not proximately cause the plaintiff's injury. For the following reasons, we agree with the conclusion reached by the circuit court.

¶ 21 While what constitutes the proximate cause of an injury in a particular case is ordinarily a question of fact, when the facts are undisputed and no reasonable person could differ on the inferences to be drawn from the facts, the issue of proximate cause becomes a question of law. *Merlo v. Public Service Co. of Northern Illinois*, 381 Ill. 300, 318 (1942). Here the pertinent facts are undisputed. Arlene Marberry was not present when Steven Main's dog attacked the plaintiff. Allowing Steven Main to be unaccompanied at her campsite violated an ordinance enacted by the Otter Lake Water Commission and incorporated into her lease agreement. However, she did not know that Steven Main was bringing his dog to her campsite.

¶ 22 If a person's alleged negligence does nothing more than furnish a condition by which the plaintiff's injury is made possible and the injury is caused by the subsequent, independent act of a third person, the creation of the condition is not the proximate cause of the injury. *Merlo*, 381 Ill. at 316. In other words, in order for proximate cause to be present, the defendant's negligence must be a material and substantial element in bringing about the injury, and the injury must be of a type that a reasonable person would see as a likely result of her conduct. *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 258-59 (1999).

¶ 23 Viewing the undisputed facts in a light most favorable to the plaintiff, Arlene Marberry's inviting her grandson Steven Main to her campsite and allowing him to be there in her absence, at most, furnished the condition by which he brought the dog and let the dog off the leash, injuring the plaintiff. No reasonable person could dispute that the plaintiff's injury was caused by the independent act of Steven Main in unleashing his dog. In that it is undisputed that Marberry did not know of the dog's presence at her campsite, no reasonable person could find that the plaintiff's injury is a type that Marberry would see as a likely result of her conduct in allowing Steven Main at her campsite in her absence. For these reasons, we find that the circuit court was correct in granting a summary judgment in favor of Marberry on count II of the plaintiff's complaint.

¶ 24

CONCLUSION

¶ 25 For the foregoing reasons, we grant the agreed motion to supplement the record on appeal with the circuit court's April 15, 2016, finding, pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016), that there is no just reason to delay the appeal. Further,

we affirm the circuit court's May 19, 2015, order which granted a summary judgment in favor of Arlene Marberry on count II of the plaintiff's complaint.

¶ 26 Affirmed; motion granted.