If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN

COURT OF APPEALS

LILLY COSTANZA, by Next Friend MICHAEL MELDRUM,

Plaintiff-Appellant,

v

DYLAN LIMON,

Defendant-Appellee.

UNPUBLISHED
March 11, 2021

No. 353910
Macomb Circuit Court
LC No. 2019-000453-NO

Before: LETICA, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

In this statutory and common law dog-bite action, plaintiff, as next friend of his minor daughter, LC, appeals as of right the trial court's order granting summary disposition in favor of defendant. Plaintiff contends that the trial court erred in dismissing his statutory claim because genuine issues of material fact existed as to whether the dog at issue was provoked. Plaintiff further contends that the trial court erred in dismissing his additional two common-law claims because defendant failed to address them below, and because there were genuine issues of material fact as to whether the dog had a known history of aggressive behavior. We affirm in part and reverse in part.

I. FACTUAL BACKGROUND

This case arises out of an incident in which defendant's dog bit LC on the face and injured her. At the time of the incident, plaintiff and his wife, Megan Meldrum, were living with defendant. Plaintiff had joint physical custody of LC, who was visiting plaintiff and Meldrum for Christmas. The undisputed evidence provides that, on December 29, 2018, the parties were at home when plaintiff and Meldrum heard defendant's dog, Taco, growl, and heard LC scream. Plaintiff and Meldrum then found LC in the doorway of the kitchen with a bite mark on her cheek, and found Taco lying on a dog bed in the same room. Plaintiff and Meldrum both testified that when they asked LC what happened, LC responded that she had attempted to hug Taco and was bitten. LC was taken to the hospital and received stitches.

Plaintiff brought a claim under the dog-bite statute, MCL 287.351, as well as common-law claims of strict liability and negligence. Defendant moved for summary disposition, contending that plaintiff was barred from recovering under MCL 287.351 because LC provoked Taco. Defendant also sought dismissal of plaintiff's common-law claims on the basis that there was no evidence that Taco had a propensity for aggression that defendant was or should have been aware of. The trial court granted defendant's motion and this appeal followed.

II. ANALYSIS

"The trial court's ruling on a motion for summary disposition is reviewed de novo on appeal." *ZCD Transp, Inc v State Farm Mut Auto Ins Co*, 299 Mich App 336, 339; 830 NW2d 428 (2012). In this case, defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), however, the parties looked beyond the pleadings in arguing for and against the motion, and accordingly, this Court treats the motion as though it was made pursuant to MCR 2.116(C)(10) only. *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 544; 904 NW2d 192 (2017). Summary disposition pursuant to MCR 2.116(C)(10) is appropriate where "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). A (C)(10) motion considers documentary evidence and "tests the *factual* sufficiency of the complaint." *Dalley v Dykema Gossett*, 287 Mich App 296, 304 n 3; 788 NW2d 679 (2010), citing *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "A genuine question of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing the motion, "this Court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, in a light most favorable to the party opposing the motion." *Sanders v Perfecting Church*, 303 Mich App 1, 4; 840 NW2d 401 (2013) (quotation marks and citation omitted).

We review the interpretation of statutes de novo, *Titan Ins Co v Hyten*, 491 Mich 547, 567; 817 NW2d 562 (2012), as well as the interpretation of common-law doctrines, *Bertin v Mann*, 502 Mich 603, 608; 918 NW2d 707 (2018).

Ultimately, we conclude that the trial court erred in granting summary disposition as to plaintiff's statutory claim because reasonable minds could differ with respect to the issue of provocation. With respect to the common-law claims, there was no genuine issue of material fact as to whether Taco had a history of or propensity for aggression that defendant was or should have been aware of. Accordingly, the trial court did not err in dismissing those claims.

A. THE STATUTORY CLAIM

Plaintiff contends that the trial court erred in dismissing his statutory claim because there was no conclusive evidence for the trial court to determine that provocation existed within the meaning of the dog-bite statute. We agree.

Plaintiff's statutory claim was brought pursuant to MCL 287.351(1), which provides:

> If a dog bites a person, without provocation while the person is . . . lawfully on private property, including the property of the owner of the dog, the owner of

> the dog shall be liable for any damages suffered by the person bitten, regardless of the former viciousness of the dog or the owner's knowledge of such viciousness.

We have defined "provocation" as " '[t]he act of inciting another to do a particular deed.' " *Brans v Extrom*, 266 Mich App 216, 219; 701 NW2d 163 (2005), quoting Black's Law Dictionary (4th ed). We have further noted:

> The definition of "provocation" does not take into account the intent of the actor; rather, the definition focuses on the nature of the act itself and the relationship between that act and an outcome. Thus, an unintentional act could constitute provocation within the plain meaning of the statute because some actions, regardless of intent, may be more than sufficient to relieve a dog owner of liability. [*Id.*]

In order for an act to constitute provocation, "there must be some action directed toward the animal or, if not, the animal's response must be proportional to the victim's action." *Bradacs v Jiacobone*, 244 Mich App 263, 276; 625 NW2d 108 (2001).

At the outset, plaintiff seems to suggest that the issue of provocation in dog-bite cases is an issue that must always be left to the jury. That is, plaintiff essentially argues that summary disposition pursuant to MCR 2.116(C)(10) is not possible in dog-bite cases in which provocation is an issue. Plaintiff cites *Brans* for this proposition. In that case, the plaintiffs were visiting the defendant's home to help assist for a wedding when one of the plaintiffs accidentally stepped backward onto the defendant's dog and was bitten. *Brans*, 266 Mich App at 219. The plaintiffs asserted a claim on the basis of MCL 287.351 and common-law negligence. *Id*. The defendant argued that the plaintiffs could not prevail on the statutory claim because the dog was provoked, but the plaintiffs contended that the provocation was unintentional and therefore did not bar the claim. *Id*. at 217-218. Over the plaintiffs' objection, the trial court sided with the defendant and instructed the jury that provocation could be either intentional or unintentional. *Id*. at 218. The jury thereafter concluded that the statutory claim was barred because the dog was provoked. *Id*. The plaintiffs appealed, and this Court noted that the issue in the case was "whether the trial court erred by instructing the jury that an unintentional act can constitute provocation under the dog-bite statute." *Id*. We concluded that intent was irrelevant. *Id*.

While we noted in *Brans* that the question of provocation is generally one for a jury, nothing about *Brans* supports plaintiff's suggestion that summary disposition is inappropriate in cases in which there are no genuine issues of material fact. See MCR 2.116(C)(10); *Maiden*, 461 Mich at 121 (parties opposing motions for summary disposition must "set forth specific facts at the time of the motion showing a genuine issue for trial"). Thus, to the extent that plaintiff has attempted to raise this argument, it is without merit.

Plaintiff next argues that a child's act of hugging a dog cannot be considered provocation for the purposes of the dog-bite statute. For this, plaintiff relies on *Palloni v Smith*, 167 Mich App 393, 394-395; 421 NW2d 699 (1988), rev'd 431 Mich 871 (1988). We disagree that *Palloni* stands for the proposition that a child's act of hugging a dog cannot, as a matter of law, constitute provocation. That having been said, the case does, at the very least, suggest that, given the particular evidence in this case, the issue of provocation should have been left for the jury.

In *Palloni*, the plaintiff was walking with her two-year-old son when she "observed the defendant's cocker spaniel walking loose in the defendant's yard without a leash and barking at the girls next door." *Palloni*, 167 Mich App at 395. The plaintiff witnessed a girl "teasing the dog by standing in the defendant's driveway and stamping her feet at the dog," and "warned the girl to move away because the dog might bite." *Id*. The plaintiff then began speaking with her daughter, who was playing outside, and during that time, the plaintiff's son "walked over to the dog, bent down, and attempted to hug it." *Id*. Prior to touching the dog, the plaintiff's son was bit in the face. *Id*.

After a jury returned a verdict of no cause of action, the plaintiff moved for a new trial, arguing that the verdict was against the great weight of the evidence. *Id*. The trial court granted the motion and the defendant appealed. *Id*. at 395-396. This Court reversed, concluding that there was competent evidence to support the jury's verdict. *Id*. at 398. We noted that "[a]lthough the plaintiff claims that [her son] meant only to hug the dog," provocation need not be intentional for the purposes of the dog-bite statute. *Id*. Our Supreme Court reversed, noting simply that it "perceived no abuse of discretion on the part of the trial judge in determining that the verdict in th[e] case was contrary to the great weight of the evidence." *Palloni v Smith*, 431 Mich 871, 871 (1988).

As noted above, we disagree with plaintiff that the outcome in *Palloni* stands for the proposition that a child's hugging of a dog can never constitute provocation under the dog-bite statute. We noted in *Brans* that *Palloni* stands simply for the proposition that, under the specific circumstances of that case, the trial judge did not abuse its discretion in determining that the jury verdict was against the great weight of the evidence. *Brans*, 266 Mich App at 221. As we further noted in *Brans*, the intent of the victim is irrelevant under the dog-bite statute. *Id*. at 219. "[T]he definition [of provocation] focuses on the nature of the act itself and the relationship between that act and an outcome." *Id*. And, even accepting plaintiff's suggestion that *Palloni* is more instructive as to the issue of hugging as provocation than it actually is, in light of the aforementioned, there may be significant distinctions between the hug from *Palloni* and the hug in this case. It was undisputed in *Palloni* that, in addition to the dog exhibiting some signs of aggression prior to the bite, the plaintiff's son never actually touched the dog. *Palloni*, 167 Mich App at 395.[1] In this case, on the basis of the available evidence, whether the same is true is unclear. This is precisely why summary disposition was not appropriate.

Reasonable minds could differ about whether the alleged provocation in this case was adequate for the purposes of the dog-bite statute.[2] Plaintiff testified that LC told him that "she

---

[1] In *Brans*, we referred to the action in *Pollani* as "a child's *attempt* to hug a dog." *Brans*, 266 Mich App at 221 (emphasis added).

[2] As an aside, we note plaintiff's suggestion that the trial court's admission that this was not an easy case to resolve necessarily requires a determination that genuine issues of material fact existed. First, the trial court did not express that it had difficulty determining the issues of fact in this case, but instead expressed that the tragedy of LC being bitten made the case difficult in light of the ruling it felt it was required to make after reviewing the applicable law. Second, however,

went into the kitchen and Taco was laying on his bed and she *went to* give him a hug and he bit her." Meldrum corroborated the same, testifying that when she asked LC what happened, LC told Meldrum that she "just *tried* to give [Taco] a hug." Viewed in a light most favorable to plaintiff, these statements do not definitively establish provocation.[3] With the above in mind, we conclude that reasonable minds could have differed as to the issue of provocation, and that the issue should have been left for the jury.[4]

B. THE COMMON-LAW CLAIMS

Plaintiff also contends that the trial court erred in dismissing his common-law claims of negligence and strict liability because the claims were not addressed by defendant in relation to his motion for summary disposition, and because there were genuine issues of material fact as to whether defendant should have had prior knowledge of Taco's potential for aggressive behavior. With this, we disagree.

With respect to the common-law theory of strict liability, our Supreme Court has noted that "[a] possessor of a domestic animal that he knows or has reason to know has dangerous propensities abnormal to its class, is subject to liability for harm done by the animal to another, although he has exercised the utmost care to prevent it from doing the harm." *Trager v Thor*, 445 Mich 95, 99; 516 NW2d 69 (1994) (quotation marks and citation omitted).

> Strict liability attaches for harm done by a domestic animal when three elements are present: (1) one is the possessor of the animal, (2) one has scienter of the animal's abnormal dangerous propensities, and (3) the harm results from the dangerous propensity that was known or should have been known. [*Id*.]

---

and notwithstanding that fact, plaintiff provides no support for his contention that trial courts should not "deliberate" when disposing of motions made under MCR 2.116(C)(10) because, in essence, the result should be obvious from the outset. Plaintiff argues that such decisions "should be without deliberation based upon the Judge['s] firm conviction that every single juror that might be impaneled on the Jury will think exactly the same way as the judge." We feel it prudent to acknowledge that we decline to adopt this logic. That the trial court admitted to spending time reviewing and deliberating over this case—as it should—is not itself evidence that genuine issues of material fact existed.

[3] It is worth noting that all three adults testified that they had never seen Taco behave in a manner that would lead them to believe he was aggressive, and plaintiff and Meldrum testified that they had personally witnessed LC hug Taco. However, plaintiff and Meldrum also testified that they had witnessed Taco growl at plaintiff, and although neither plaintiff nor Meldrum were particularly alarmed by the growling, their description of the same could lead reasonable minds to differ as to whether that evidence tends to make it more or less likely that Taco could have attacked LC without being provoked within the meaning of the dog-bite statute.

[4] In light of our conclusion as to the provocation issue, we need not address plaintiff's argument concerning whether Taco's reaction was proportionate to the alleged unintentional provocation.

"Scienter" in this context involves "whether the party knew or should have known of a dangerous propensity." *Id*. at 104 n 9.

We have recognized negligence actions in domestic animal cases "as an alternative theory of liability to a strict liability claim when scienter cannot be shown." *Id*. at 105.

> A negligence cause of action arises when there is ineffective control of an animal in a situation where it would reasonably be expected that injury could occur, and injury does proximately result from the negligence. The amount of control required is that which would be exercised by a reasonable person based upon the total situation at the time, including the past behavior of the animal and the injuries that could have been reasonably foreseen. [*Id*. at 106 (quotation marks and citation omitted).]

Whether a duty exists in the context of such a negligence claim involves an inquiry into the "normal characteristics of the animal that caused the injury, as well as any abnormally dangerous characteristics of which the defendant has knowledge." *Id*. at 105.

> Dogs, and some other domestic animals, are generally regarded as so unlikely to do substantial harm that their possessors have no duty to keep them under constant control. Consequently, a mere failure to do so would not constitute a breach of any duty of care. However, if the possessor of such an animal . . . has knowledge of some dangerous propensity unique to the particular animal, or is aware that the animal is in such a situation that a danger of foreseeable harm might arise, the possessor has a legally recognized duty to control the animal to an extent reasonable to guard against that foreseeable danger. [*Id*. at 105-106 (footnotes and citations omitted).]

As a preliminary matter, plaintiff is incorrect that defendant never addressed the common-law claims below. Although defendant noted that the common-law claims could be dismissed on the basis of provocation in defendant's motion for summary disposition, defendant clarified in his brief in support of the motion and at the motion hearing that the common-law claims could be dismissed on the basis that each of the three adults testified at their depositions that they had no reason to believe prior to the incident that Taco was or would be aggressive toward LC or anyone else. The trial court later cited that fact, as well as the issue of provocation, as bases for dismissing the common-law claims.[5]

---

[5] We note plaintiff's additional contention that "the common-law claims c[ould] survive regardless of whether or not provocation exists." Plaintiff fails to support this claim with authority. See *Greater Bethesda Healing Springs Ministry v Evangel Builders & Constr Managers, LLC*, 282 Mich App 410, 413; 766 NW2d 874 (2009) ("An appellant may not merely announce its position and leave it to this Court to discover and rationalize the basis for its claims, unravel or elaborate its argument, or search for authority for its position.").

Defendant contends in the alternative that whether defendant did or should have had reason to know of Taco's propensity for aggression was another issue that should have been left for the jury. We disagree. Nothing in the record suggests that defendant had reason to know that Taco might behave aggressively.

Plaintiff points to his deposition testimony, as well as Meldrum's testimony, that they had witnessed Taco growl at plaintiff. However, we have held before in the context of strict liability and negligence claims that "the mere fact that a dog barks, growls, or jumps, or approaches strangers in a somewhat threatening way is common canine behavior," and is ordinarily insufficient to establish that a dog is abnormally dangerous. *Hiner v Mojica*, 271 Mich App 604, 612; 722 NW2d 914 (2006). Moreover, plaintiff ignores the additional testimony from plaintiff and Meldrum that, despite having witnessed the growling, neither plaintiff nor Meldrum believed that Taco was aggressive or had any concerns about Taco being around LC. Even more importantly, plaintiff fails to explain the fact that nothing about the testimonies of plaintiff and Meldrum suggest that *defendant* ever witnessed such growling or had reason to know of a propensity for aggression. The only testimony related to that issue came from defendant, who testified that he had never witnessed behavior from Taco that would suggest to him a propensity for aggression.

With that in mind, we conclude that the trial court did not err in determining that no genuine issues of material fact existed as to whether defendant knew or had reason to know that Taco may behave with abnormal aggression, and did not err in dismissing plaintiff's common-law claims on that basis. See *Trager*, 445 Mich at 99 (noting that the owner's scienter of abnormally dangerous propensities is an element of strict liability); *Hiner*, 271 Mich App at 612 (noting with respect to dogs that the mere failure of an owner to keep the dog under constant control is not sufficient to show a breach of duty where the owner has no knowledge of a dangerous propensity unique to that particular animal).

Affirmed in part and reversed in part. We do not retain jurisdiction.

/s/ Anica Letica
/s/ Mark J. Cavanagh
/s/ Anica Letica