[Cite as *Mason v. Hallowell*, 2013-Ohio-834.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Carol Mason

Plaintiff

v.

William Hallowell, et al.

Appellants

v.

Cincinnati Ins. Company

Appellee

Court of Appeals No. L-12-1239

Trial Court No. CI0201007239

DECISION AND JUDGMENT

Decided: March 8, 2013

* * * * *

Terry J. Lodge, for appellants.

Stephen C. Roach, for appellee.

* * * * *

JENSEN, J.

{¶ 1} Appellants William and Judith Hallowell appeal the judgment of the Lucas County Court of Common Pleas granting appellee, Cincinnati Insurance Company's, motion for summary judgment. At issue is whether appellants are entitled to coverage

under their homeowners' insurance policy for bodily injury caused to plaintiff, Carol Mason, when she was attacked by a dog owned by appellants' live-in adult daughter. For the reasons that follow, we affirm.

{¶ 2} Pamela Danyko is the adult daughter of William and Judith Hallowell. On June 1, 2007, Danyko moved, with her dog, into her parents' home on East Dudley Street in Maumee, Ohio. A few hours after their arrival, Danyko hosed the leashed dog down to cool him off. The Hallowell's next door neighbor, Carol Mason, invited Danyko to allow the dog to run around in Mason's fenced in backyard. Danyko accepted the invitation. When Ms. Mason "suddenly" reached her hand over the gate to open it, the dog nipped at her, drawing blood.

{¶ 3} For months thereafter, the dog was kept in the Hallowells' detached garage. From time to time, Danyko would open the garage door and place the dog on a long tether. While tethered, the dog would have access to the area in and about the garage. In the spring of 2008, a friend of the Hallowells stopped by the house to harvest rhubarb that grows in a patch near the garage. When the man bent over, the tethered dog, unprovoked, nipped him on his rear end, drawing blood.

{¶ 4} In the morning of December 15, 2009, Danyko went to the garage to tether the dog. Before Danyko could attach the tether, the dog bolted out of the door. Danyko followed. She heard the neighbor, Carol Mason, calling for help. Danyko went to the neighbor's yard and saw the dog with a grip on Ms. Mason's arm. After hitting the dog in the mouth, the dog released Ms. Mason's arm from its jowls and Danyko was able to

escort the dog back into her parents' garage. Danyko then called 911 and reported the attack to dispatchers. Ms. Mason suffered and was treated for physical injury.

{¶ 5} The dog was surrendered and euthanized.

{¶ 6} In October 2010, Ms. Mason filed suit against the Hallowells and their daughter seeking compensation for the injuries incurred on December 15, 2009. In turn, the Hallowells filed a third-party complaint against Cincinnati Insurance Company seeking a declaration of rights under their homeowners' policy. The insurance company filed a counterclaim for declaratory judgment and moved for summary judgment. On January 4, 2012, the trial court ruled in favor of Cincinnati Insurance Company concluding it was not obligated to provide the Hallowells with insurance coverage or a defense.

{¶ 7} The Hallowells appeal the trial court's entry of summary judgment, asserting the following assignment of error:

> Ambiguity in the meaning of "provocation" and "teasing" was ignored by the trial court along with evidence that the dog was under reasonable control of its owner, and summary judgment was improperly granted [Cincinnati Insurance Company].

{¶ 8} Appellate courts review a trial court's granting of summary judgment de novo. *Brown v. Scioto Cty. Commrs.*, 87 Ohio App.3d 704, 711 622 N.E.2d 1153 (4th Dist.1993). In *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 667 N.E.2d 1197 (1996), the Supreme Court of Ohio held:

> Before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made.

{¶ 9} If the moving party satisfies this burden, then the nonmoving party has the burden to provide "specific facts showing that there is a genuine issue for trial." Civ.R. 56(E). If the nonmoving party does not satisfy this burden, summary judgment shall be entered against the party. *Id.*

{¶ 10} In the sole assignment of error, the Hallowells contend the trial court erred by concluding that the homeowners' insurance policy did not obligate Cincinnati Insurance Company to provide insurance coverage and tender a defense.

{¶ 11} Section II, entitled "Liability Coverages," states that the insurance company will pay on behalf of the insured the ultimate loss which the insured is legally obligated to pay as damages for bodily injury arising out of an occurrence to which the insurance applies. Specifically excluded from the policy, however, are damages caused by occurrences arising out of the "actions of a vicious dog."

{¶ 12} "The interpretation of a written contract is a question of law." *Time Warner Entertainment Co., L.P. v. Kleese-Beshara-Kleese*, 11th Dist. No. 2009-T-0010,

2009-Ohio-6712, ¶ 27, citing *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146 (1978), paragraph one of the syllabus. We must give the language of an insurance policy its plain and ordinary meaning. *Karaban v. State Automobile Mut. Ins. Co.*, 10 Ohio St.3d 163, 166-167, 462 N.E.2d 403 (1984). It is only when a provision in a policy is reasonably susceptible to more than one interpretation that an ambiguity exists in which the provision must be resolved in favor of the insured. *Hacker v. Dickman*, 75 Ohio St.3d 118, 119, 661 N.E.2d 1005 (1996).

{¶ 13} The policy defines "vicious dog" as a dog that, at the time of injury had previously caused injury to any person. Explicitly excluded from the "vicious dog" definition is a dog that "caused injury with provocation." Under the terms of the policy, "with provocation" means "the dog was teased, tormented or abused by the person who was injured." The policy does not define the word "teased."

{¶ 14} The Ohio Jury Instructions Committee of the Ohio Judicial Conference cites *Ramsy v. King*, 14 Ohio App.3d 138, 470 N.E.2d 241 (12th Dist.1984) when it defines "teasing" as "to annoy or to trouble or worry persistently, to be troublesome or to pester." 1 Ohio Jury Instructions 409.03, Section 5 (2012). Appellants invite us to construe the term "teased" as it is defined in the Merriam-Webster's Online Dictionary: "tease" means "[t]o disturb or annoy by persistent irritating or provoking especially in a petty or mischievous way," and "to tantalize especially by arousing desire or curiosity often without intending to satisfy it." Merriam-Webster's Online Dictionary, http://www.merriam-webster.com/ dictionary/tease (accessed Feb. 25, 2013).

{¶ 15} As to the first attack on Ms. Mason, the evidence reveals that Ms. Mason was bitten when she made a sudden movement to open her gate. Appellants argue that Ms. Mason's sudden movement might "provoke a bite in a dog which has arrived in unfamiliar surroundings only hours before." However, as the trial court pointed out, Danyko conceded in her deposition testimony that Ms. Mason did not tease, torment or abuse the dog before it bit Ms. Mason as she attempted to open the gate. On appeal, appellants fail to point to any evidence that Ms. Mason's action was persistent irritating, persistent provoking, persistent troubling or worrying, annoying, troublesome, or done in a tantalizing way to arouse desire or curiosity. "Persistent" means "constantly repeated." *Webster's New World College Dictionary* 1074 (4th Ed.2008). "Tantalize" is defined as teasing "by promising or showing something desirable and then withholding it." *Id.* at 1463. The evidence is clear; Ms. Mason made *one* sudden movement in her attempt to open the gate. The movement was not annoying or troublesome. She did not promise or show anything that could have been desirable to the dog. Accordingly, there is no evidence the dog was teased by Ms. Mason prior to the first bite.

{¶ 16} Even if this court were to find that questions of material fact remain as to whether Ms. Mason teased the dog before the first bite, there is absolutely no evidence that the man harvesting rhubarb provoked the dog before he was nipped in the rear end. Thus, the dog was a vicious dog and the bodily injury it caused Ms. Mason on the morning of December 15, 2009, was specifically excluded by the policy of insurance.

{¶ 17} The judgment of the Lucas County Court of Common Pleas is affirmed.

Appellants Hallowell are ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J.
CONCUR. _____
JUDGE