SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3142-21

FRANK BARKOSKY III,
a minor by his Guardian ad Litem,
FRANK BARKOSKY JR., and
FRANK BARKOSKY JR.,
individually,

Plaintiffs-Respondents,

v.

WEBER'S TRAINING SCHOOL
and DAVID A. HOROWITZ,
individually,

Defendants-Appellants,

and

3440 BRUNSWICK PROPERTIES,
DAVID A. HOROWITZ and
CAROL HETTI HOROWITZ, as
Executors of the ESTATE OF
MARJORIE HOROWITZ,

Defendants,

and

WEBER'S TRAINING SCHOOL

and DAVID A. HOROWITZ,

Defendants/Third-Party
Plaintiffs-Appellants,

v.

JESSICA BARKOSKY,

Third-Party Defendant-
Respondent.

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Submitted January 11, 2023 – Decided June 23, 2023

Before Judges Firko and Natali.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-0786-21.

Sweeney & Sheehan, PC, attorneys for appellants (Gaetano Mercogliano, of counsel and on the briefs; Sean Robins, on the briefs).

Stark & Stark, PC, attorneys for respondents Frank Barkosky Jr. and Jessica Barkosky (Domenic B. Sanginiti, Jr., of counsel and on the brief).

PER CURIAM

In this dog bite case, defendants Weber's Training School (Weber's) and David A. Horowitz appeal, on leave granted, from an April 8, 2022 Law Division order dismissing their counterclaim and third-party claim for failure to state a claim pursuant to Rule 4:6-2(e). Relying on New Jersey's dog bite statute,

N.J.S.A. 4:19-16, defendants contend the victim's parents, plaintiff Frank Barkosky, Jr., and third-party defendant Jessica Barkosky,[1] are liable for the injuries suffered by their son after he was attacked by their family dog, which they adopted from defendants. Defendants argue the court erred in concluding their claims for contribution and indemnification were precluded by parental immunity and because plaintiffs did not plead their cause of action as a dog bite case.

After careful consideration of the parties' contentions against the applicable law, we agree with defendants' arguments. We accordingly reverse.

I.

On January 4, 2020, the Barkoskys adopted a rottweiler named "Blaze" from Weber's, a dog training school located in Princeton, which boarded and trained Blaze for ten months. Frank Jr. brought Blaze home several days later. Two days after Frank Jr. brought him home, Blaze attacked the Barkoskys' minor son, plaintiff Frank Barkosky III, while he was at their home and in his grandmother's care. According to plaintiffs, Blaze "shook [Frank III] from side to side attempting to rip off his arm" and did not let go of his arm until a police

[1] Because Frank Jr. and Jessica share a surname, we refer to them by their first names, intending no disrespect.

officer arrived and repeatedly struck Blaze with his baton. Frank III was medevacked to a hospital where he underwent multiple surgeries for his injuries.

Frank III, by his guardian ad litem, Frank Jr., and Frank Jr., individually, filed a complaint in the Law Division against Weber's and its owner, defendant David A. Horowitz, alleging negligence, misrepresentation, and violation of the New Jersey Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -227, which they later amended. In their second amended complaint, plaintiffs claimed defendants falsely represented to them "that Blaze was good with children and adults and that Blaze's previous owners had children." They also alleged defendants were aware "Blaze had previously exhibited dangerous behavior" and intentionally failed to disclose Blaze's "vicious propensities" or that they "had not given Blaze a professional temperament test."

Defendants answered the amended complaint, denied plaintiffs' allegations, and asserted a counterclaim for contribution and indemnification against Frank Jr. Relying on the dog bite statute, defendants claimed Frank Jr., as Blaze's owner, was "primarily and wholly liable for any and all injuries and damages arising from the . . . dog bite attack upon his son." Defendants also filed a third-party complaint against Jessica, alleging she too was liable for her son's injuries as Blaze's owner. The Barkoskys moved to dismiss defendants'

counterclaim and third-party complaint pursuant to Rule 4:6-2(e), arguing defendants' claims were precluded by the parental-immunity doctrine.

The court heard oral argument on the Barkoskys' motion, during which the Barkoskys relied on Foldi v. Jeffries, 93 N.J. 533 (1983), and contended they were immune from liability for Frank III's injuries because defendants did not allege those injuries resulted from their willful and wanton actions. They also argued plaintiffs did not plead their cause of action as a dog bite case, but rather alleged fraudulent misrepresentation and false advertisement related to their adoption of Blaze.

Defendants opposed the motion to dismiss and relied on Dower v. Goldstein, 143 N.J. Super. 418 (App. Div. 1976), and Goldhagen v. Pasmowitz, 247 N.J. 580 (2021). In doing so, they contended the dog bite statute's strict liability provisions are "not abrogated by any sort of immunity," particularly parental immunity.

After considering the parties' submissions and oral arguments, the court entered an April 8, 2022 order granting the Barkoskys' motion and dismissing defendants' counterclaim and third-party complaint with prejudice. In an oral opinion, the court concluded the authority relied upon by defendants did not provide a basis to abrogate "parental immunity[, which] would defeat any claim

for contribution." It specifically rejected defendants' reliance on Goldhagen, finding the facts in that case distinguishable, and further determined "this is not a dog bite case despite the fact that a dog bite is part of the subject matter of this litigation." This interlocutory appeal followed.

II.

"We review a grant of a motion to dismiss a complaint for failure to state a cause of action de novo, applying the same standard under Rule 4:6-2(e) that governed the motion court." Wreden v. Twp. of Lafayette, 436 N.J. Super. 117, 124 (App. Div. 2014). That standard is whether the pleadings even "suggest[]" a basis for the requested relief. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989). As a reviewing court, we assess only the "legal sufficiency" of the claim based on "the facts alleged on the face of the complaint." Green v. Morgan Props., 215 N.J. 431, 451 (2013) (quoting Printing Mart-Morristown, 116 N.J. at 746). Consequently, "[a]t this preliminary stage of the litigation [we are] not concerned with the ability of plaintiffs to prove the allegation contained in the complaint," Printing Mart-Morristown, 116 N.J. at 746, rather the facts as pled are considered "true" and accorded "all legitimate inferences," Banco Popular N. Am. v. Gandi, 184 N.J. 161, 166, 183 (2005).

III.

Before us, defendants contend the court erred in holding parental immunity precludes their claims for contribution and indemnification. They argue their claims are cognizable under the dog bite statute because the Barkoskys owned Blaze and Blaze bit Frank III while he was lawfully present on their property. And, according to defendants, claims brought under the dog bite statute "are unaffected by the doctrine of parental immunity."

Additionally, defendants maintain "the [court] wrongly conclude[d] that the legal theory or theories under which the [plaintiffs] brought their claims against [defendants] . . . control[led] the legal basis upon which [defendants] may assert counterclaims and cross-claims." Finally, defendants assert if they are prohibited from bringing their counterclaim and third-party claim in this matter, the entire controversy doctrine "will preclude them forever from doing so."

We initially note, before us, the Barkoskys do not support the court's dismissal based on plaintiffs' decision not to plead a cause of action under the dog bite statute, an argument they asserted before the court and which it relied in part in granting their motion. Instead, they reprise their argument parental immunity precluded defendants' claims. In doing so, they again rely on Foldi

and argue parental immunity "precludes defendants from asserting claims for contribution and indemnification based upon the Barkoskys' liability under the dog bite statute," absent evidence of "willful or wanton conduct" on their part. According to the Barkoskys, because defendants failed to establish their claims satisfy any exception to parental immunity, "the Barkoskys[] are removed from the category of possible tortfeasors, and therefore [d]efendants cannot bring claims for contribution and indemnification."

"When it adopted the Dog Bite Statute, the Legislature expanded the liability of dog owners by imposing a standard of strict liability in dog-bite cases meeting the statutory terms." Goldhagen, 247 N.J. at 594. The statute "imposes liability on dog owners in personal injury actions arising from dog bites in certain settings, 'regardless of the former viciousness of such dog or the owner's knowledge of such viciousness.'" Id. at 585 (quoting N.J.S.A. 4:19-16). Specifically, it provides:

> The owner of any dog which shall bite a person while such person is on or in a public place, or lawfully on or in a private place, including the property of the owner of the dog, shall be liable for such damages as may be suffered by the person bitten, regardless of the former viciousness of such dog or the owner's knowledge of such viciousness.
>
> [N.J.S.A. 4:19-16.]

Accordingly, "[f]or liability to attach under the statute, three elements must be proven[:]" (1) "the defendant must be the owner of the dog[;]" (2) "the dog must have bitten the injured party[;]" and (3) the bite must have occurred "while such person is on or in a public place, or lawfully on or in a private place, including the property of the owner of the dog." DeRobertis v. Randazzo, 94 N.J. 144, 158 (1983) (quoting N.J.S.A. 4:19-16). "Satisfaction of the elements of the statute imposes strict liability . . . ." Pingaro v. Rossi, 322 N.J. Super. 494, 503 (App. Div. 1999).

In adopting the dog bite statute, the Legislature "contemplated that all dogs, even those ordinarily harmless, have a potential for biting, and that owners should as the social price of keeping them compensate those innocently sustaining injury in that fashion." Tanga v. Tanga, 94 N.J. Super. 5, 14 (App. Div. 1967). "The Legislature imposes strict liability on a dog owner because the owner has the authority and opportunity to control the behavior and location of the dog." Robinson v. Vivirito, 217 N.J. 199, 214 (2014).

With these legal principles as our polestar, we conclude the court erred in dismissing defendants' counterclaim and third-party claim for contribution and indemnification based on its determination parental immunity precluded those claims. The court's decision is contrary to our opinion in Dower, in which we

held the parental-immunity doctrine is inapplicable to claims for liability under the dog bite statute, 143 N.J. Super. at 422, as well as our Supreme Court's opinion in Goldhagen, which explained the dog bite statute does not evince legislative intent to preclude any category of dog owner from the statute's strict liability provisions, 247 N.J. at 599. Furthermore, we reject the Barkoskys' reliance on Foldi, as we are satisfied its holding is entirely consistent with Dower and the facts in Foldi are clearly distinguishable from those presented here.

In Dower, the minor plaintiff "was bitten and seriously injured by his parents' German Shepherd dog." 143 N.J. Super. at 420. Pursuant to the dog bite statute, the plaintiff, by his guardian ad litem, filed a complaint for damages against his parents, who "moved for summary judgment, arguing that [they] were immune from civil liability" under the parent-child-immunity doctrine. Ibid. We affirmed the Law Division's denial of that motion and concluded "the defense of intrafamily immunity [is not] available in this type of action." Id. at 422. In doing so, we recognized "the legislative intent that dog owners will be liable to persons for damages when the injured person" is lawfully on the owner's property. Ibid.

As noted, our Supreme Court's holding in Goldhagen is also instructive. In that case, the plaintiff, a dog groomer, filed a complaint under the dog bite statute alleging the defendant dog owner "downplayed the risk that the dog presented" before she boarded her dog at the kennel where the plaintiff worked. 247 N.J. at 585. In affirming the Law Division's grant of summary judgment in favor of the defendant, we relied on Reynolds v. Lancaster County Prison, 325 N.J. Super. 298, 323-26 (App. Div. 1999), where, based on "principles of primary assumption of the risk," we recognized an exception to statutory liability under the dog bite statute for injuries suffered by independent contractors hired to care for a dog. Goldhagen, 247 N.J. at 586. The Court reversed, however, and held, rather than precluding her recovery under the dog bite statute entirely, the plaintiff's status as a dog care professional was "relevant to an allocation of fault under" the Comparative Negligence Act, N.J.S.A. 2A:15-5.1 to -5.8. Ibid.

Applying statutory construction principles, the Court concluded nothing in the statute's plain language "suggest[ed] that the Legislature intended to exclude any category of dog owners from statutory liability." Id. at 599. Similarly, it stated, "the Legislature's choice not to incorporate assumption of the risk into the Dog Bite Statute for independent contractors -- or any other

category of plaintiffs -- signals its intent not to limit the statute's strict liability rule." Id. at 600.

Although the Court did not specifically address parental immunity, we are satisfied its pronouncement that the statute's plain language lacks evidence of legislative intent "to exclude any category of dog owners from statutory liability" applies with equal force to parents as it does to any other category of dog owners. There is simply no evidence in the statute to conclude the Legislature intended to limit the strict liability provisions in the way proposed by the Barkoskys. See State v. D.A., 191 N.J. 158, 164 (2007) (explaining when engaging in statutory construction, our "overriding goal is to give effect to the Legislature's intent.").

We disagree with the Barkoskys that Foldi extends parental immunity to the circumstances presented here. In that case, decided after Dower, the minor plaintiff, while under her mother's supervision, wandered into her neighbor's yard where she was bitten by her neighbor's dog. 93 N.J. at 535. The plaintiff, by her guardian ad litem, filed a complaint against her neighbors, who then filed a third-party complaint against the plaintiff's parents, alleging contributory negligence and seeking indemnification. Id. at 536. The plaintiff also amended her complaint, adding her parents as defendants. Ibid.

Although it recognized the "'steady movement away from immunity' in this State," id. at 544 (quoting Willis v. Department of Conservation & Economic Development, 55 N.J. 534, 538 (1970)), the Court retained "parental immunity in the areas involving the exercise of parental authority or the provision of customary childcare," id. at 546. The Court held "the doctrine of parental immunity will continue to preclude liability in cases of negligent supervision, but not for a parent's willful or wanton failure to supervise his or her children." Id. at 549. In doing so, however, the Court did not extend the doctrine's applicability to all claims brought under the dog bite statute, see id. at 546, or purport to overturn Dower, which the Court noted involved strict liability under the dog bite statute as opposed to "a situation of negligent supervision," id. at 542.

In Buono v. Scalia, 179 N.J. 131, 137-38 (2004), the Court explained its retention of the parental-immunity doctrine in Foldi was "limited," as that doctrine applies only in "certain circumstances" which "implicate[] customary child-care issues or a legitimate exercise of parental authority or supervision." It further stated, "any conduct that does not reflect a legitimate child-rearing decision is excluded from the immunity doctrine altogether, preserving in all respects a traditional negligence claim." Id. at 145. The Court also reaffirmed

that the doctrine does not "apply when the parent's conduct is willful or wanton." Id. at 138.

The standards enunciated in Foldi, and reaffirmed in Buono, are inapplicable here where the source of parental liability, as pled in the counterclaim and third-party complaint, is not through alleged negligent supervision, but instead due to the Barkoskys' ownership of Blaze. Unlike the parents in Foldi, the Barkoskys own the dog that bit their child and are therefore subject to strict liability under the dog bite statute. N.J.S.A. 4:19-16. Accordingly, the facts presented here are akin to those in Dower, rather than Foldi.

Additionally, even were we to accept that Foldi extended the parental-immunity doctrine to claims brought against parents under the dog bite statute, we are satisfied dismissal of defendants' claims at the pleading stage was premature. "Ultimately, whether conduct implicates parental decision-making, or whether it satisfies the 'willful or wanton' exception to the immunity doctrine, will depend on the totality of circumstances in a given case, subject to a fact-sensitive analysis by the trial [court] and, when warranted, by a jury." Buono, 179 N.J. at 138.

In determining whether to apply the parental-immunity doctrine, the Court has utilized a four-step analysis. Id. at 139. First, the court must determine what parental acts or omissions the factfinder "could reasonably find were the proximate cause of the child's injury[;]" second, the court must determine whether that conduct "involves the exercise of parental authority or the provision of customary childcare;" third, if it does, the court must then "determine whether the conduct constitutes a lack of parental supervision[;]" and fourth, if it does, the court must determine whether a factfinder "could reasonably find that the conduct was willful or wanton thereby removing it from the immunity." Ibid. (quoting Murray v. Shimalla, 231 N.J. Super. 103, 106 (App. Div. 1989)).

The court did not engage in that four-step analysis and the pleadings are insufficient to determine whether the Barkoskys engaged in any conduct that "involves the exercise of parental authority or the provision of customary childcare" or, in doing so, willfully or wantonly failed to supervise Frank III. Rather, the pleadings only provide that Frank III was in his grandmother's care during the attack. Without more, such as information with respect to his grandmother's capacity to care for Frank III and whether Blaze exhibited dangerous propensities in the two days the Barkoskys owned him prior to the

attack, the pleadings alone did not support dismissal based on parental immunity in any event.

As noted, the court also observed plaintiffs did not plead their cause of action as a dog bite case. To the extent the court relied on that finding in dismissing defendants' claims, we find nothing in the plain language of the dog bite statute to support that result. To the contrary, the statute unambiguously provides that dog owners "shall be liable for such damages as may be suffered by the person bitten." Our courts have consistently interpreted that language as evincing legislative intent that dog owners be held primarily liable for dog bite injuries, see e.g., Goldhagen, 247 N.J. at 599-600; Robinson, 217 N.J. at 214; Tanga, 94 N.J. Super. at 14, and the statute does not reveal any intent to render its strict liability provisions inapplicable to counterclaims or third-party claims. We also observe it would be contrary to the Legislature's intent to allow dog owners to evade liability under the statute simply because claims were pled against them as counterclaims or third-party claims, as opposed to direct claims.

In sum, we conclude neither defendants' counterclaim nor third-party claim is precluded by parental immunity and the court therefore erred in its dismissal. Nothing in our opinion should be construed as an expression of our views regarding the merits of the substantive claims and defenses raised by the

parties. Nor does our conclusion that defendants are entitled to bring their counterclaim and third-party claim in any way inhibit plaintiffs' ability to recover damages arising from defendants' alleged misrepresentation and false advertising. See Peterson v. Tolstow, 184 N.J. Super. 84, 88-89 (App. Div. 1982) (explaining a dog owner held strictly liable under the dog bite statute "may nonetheless recover contribution from another tortfeasor" pursuant to the Joint Tortfeasors Contribution Act, N.J.S.A. 2A:53A-1 to -48).

In light of our reversal, we need not address defendants' contention with respect to the entire controversy doctrine. To the extent we have not specifically addressed or referenced any of the parties' remaining arguments, it is because we have concluded they are without sufficient merit to warrant discussion in this opinion. R. 2:11-3(e)(1)(E).

Reversed and remanded. We do not retain jurisdiction.