IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

ERIC HENRY McCUTCHIN,	:	
by his Guardian *ad Litem*,	:	**C.A. No: 08C-01-027 (RBY)**
Dierdre McCutchin,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
CHRISTOPHER BANNING	:	
and PETSMART, INC.,	:	
	:	
Defendants.	:	

Submitted: December 18, 2009
Decided: January 5, 2010

Upon Consideration of Defendant Petsmart, Inc.'s
Motion for Summary Judgment
GRANTED

OPINION AND ORDER

Nicholas H. Rodriguez, Esq., Schmittinger & Rodriguez, P.A., Dover, Delaware, for Plaintiff.

Stephen P. Casarino, Esq., Casarino, Christmas & Shalk, Wilmington, Delaware for Defendant Banning.

Thomas Gerard, Esq., Marshall, Denehey, Warner, Coleman & Goggin, Wilmington, Delaware for Defendant Petsmart, Inc.

Young, J.

SUMMARY

Defendant Petsmart, Inc. ("PetSmart") moves this Court to grant summary judgment in its favor. This is a suit for damages arising out of a dog bite sustained by the minor Plaintiff on March 5, 2006. Minor Plaintiff Eric McCutchin ("Plaintiff") was bitten by co-defendant Christopher Banning's ("Banning") dog, Chester, while Plaintiff was standing in the check-out line on PetSmart's premises. Because there is nothing in the record to indicate that PetSmart breached any duty to become aware that Chester presented a danger to its customers, PetSmart's Motion is **GRANTED.**

FACTS

On March 5, 2006, Banning traveled to Rockville, Maryland to acquire Chester, a large Golden Retriever-Labrador mixed breed dog. Chester's previous owners were moving to a new neighborhood, and could no longer properly care for Chester. After obtaining Chester, Banning returned to Delaware, and headed straight to the PetSmart in Dover, Delaware.

PetSmart encourages pet owners to bring their animals into the store. A sign at the entrance of the store indicates that "[v]accinated and [l]eashed [d]ogs [a]re [w]elcome.." There is no formal enforcement mechanism of this policy, but all store associates and managers are trained to monitor the visiting animals during their visit. All non-compliant owners and animals are asked to leave.

On that same day, March 5, 2006, eleven-year-old Plaintiff was with his mother, Dierdre McCutcheon ("Plaintiff's Mother"), and his sister at the same PetSmart. While in PetSmart, Plaintiff and Plaintiff's Mother encountered Banning and Chester in one of the store aisles. Plaintiff's Mother petted Chester, and remarked at his beauty. Including Plaintiff and Plaintiff's Mother, Chester evidently

interacted with approximately six people that day in PetSmart. During all of those exchanges, Chester did not display any signs of aggressive behavior.

Upon the completion of their retail excursion, Plaintiff and Plaintiff's Mother proceeded to the cashier area. They were in one check-out line when Banning and Chester entered an adjoining check-out line. As the parties were waiting to pay the cashier, Chester bit Plaintiff.

Plaintiff's allegations against PetSmart are: (1) that it knew or reasonably had notice of the likelihood that Chester would attack business visitors in the store; (2) that it did not check animals entering the store to ensure against vicious propensities; and (3) that it failed to take action to prevent the attack, though it had adequate notice that the attack would occur.

Discovery in this case is closed. PetSmart contends that there is no evidence to support the allegations against it. PetSmart further avers that any arguments made by Plaintiff at this point in the litigation are based upon mere speculation, and are inadequate to allow the case to proceed to trial.

STANDARD OF REVIEW

When considering a motion for summary judgment, the Court must determine if there are genuine issues of material fact.[1] If there are none, and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate.[2] If, when considering the facts in a light most favorable to Plaintiff, the Court determines that no reasonable trier of fact would find in favor of Defendant, summary judgment

[1] Super. Ct. Civ. R. 56(c).

[2] *Id.*

is also appropriate.[3]

Negligence claims add requirements to summary judgment. In order for Plaintiff's negligence claim to survive summary judgment, he must show that the Defendant was under a legal obligation – a duty – to protect plaintiff from the risks which led to the injury.[4] Whether a legal duty exists is a question of law.[5] The existence of a duty and its standard of care are determined by statutes, rules, principles, and precedents.[6] If the Court determines that a duty exists, the Court must then determine whether that duty was breached by determining whether the proper standard of care was followed.[7] Additionally, this breach must be the proximate cause of Plaintiff's injuries.[8]

DISCUSSION

In Delaware, it is well-settled law that business owners have a duty to exercise reasonable care to protect patrons from foreseeable danger.[9] As set forth in Restatement (2d) of Torts Section 344 (1965), the applicable legal standard provides that:

[a] possessor of land who holds it open to the public for entry for his

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[3] *Matas v. Green*, 171 A.2d 916, 918 (Del. Super. June 7, 1961).

[4] *Bryant v. Delmarva Power & Light Co.*, 1995 WL 653987, at *2 (Del. Super. Oct. 2, 1995).

[5] *Id.*

[6] *Id.*

[7] *Russell v. K-Mart Corp.*, 761 A.2d 1, 5 (Del. 2000).

[8] *Id.*

[9] *DiOssi v. Maroney*, 548 A.2d 1361, 1364 (Del. Super. 1988).

> business purposes is subject to liability to members of the public while they are upon the land for such a purpose[;]for physical harm caused by the accidental, negligent, or intentional harmful acts of third persons or animals[;] and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

The binary linchpin of this provision hinges upon foreseeability and reasonable care. Therefore, Plaintiff must demonstrate that PetSmart knew or should have known that Chester presented an unreasonable danger to its customers or had vicious propensities.

There is nothing in the record to indicate that PetSmart had any reason to know that Chester would bite on March 5, 2006. He quietly entered the store, and peacefully interacted with every individual he encountered that day. Prior to the bite, Chester simply did not exhibit any violent tendencies while in the store. Absent a trigger – some outward display of aggressiveness or territoriality – there was no way for PetSmart to guard against the events that transpired.

As to Plaintiff's argument that PetSmart had a duty to perform a more thorough inspection of the animals entering the store, the facts indicate that, upon spotting Chester with his owner in an aisle in the store, Plaintiff's Mother ambled over, petted him, and commented about his physical attractiveness. When Plaintiff's Mother walked away from that interaction, she left with the impression that Chester was a well-behaved, docile dog. A reasonable inspection conducted by an employee-agent of PetSmart would not have included any measures or provided any information regarding Chester's propensities which the "de facto agent", Plaintiff's Mother, did.

The New York case of *D.C. v. Petco Animal Supplies, Inc.*[10] is instructive. The *D.C.* case mirrors the case *sub judice*. In *D.C.*, a five-year-old infant plaintiff was bitten in the face by a Rottweiler while shopping in a retail pet supply chain store ("Petco"). Minor plaintiff, through her parents, brought suit against Petco and the dog owner. Both defendants filed motions for summary judgment, and both motions were granted.

The *D.C.* court stated that, while "Petco clearly has an implied duty to its customers to afford them protection from exposure to harm by third parties..., foreseeability determines the scope of defendant's duty."[11] The court concluded that there was no evidence in the record to establish that it would have been reasonably foreseeable that the Rottweiler would present a danger to the young plaintiff on the day of the incident. The court summarily dismissed plaintiff's other contentions as well:

> "[a]s to those suggestions that Petco had a duty to warn its customers in some manner by placing signs near the entrance, even were the Court to find such signs would be a reasonable precaution for Petco to take, there is no evidence in the case at bar that the lack of such a warning sign was a substantial factor in causing the occurrence, nor can the Court infer such a causal connection without the resort to speculation .... [a]s to plaintiff's argument that Petco had a duty to "vet" each customer and their [sic] pet as they [sic] entered the store to determine if the animal demonstrated vicious propensities, such a precaution would be unreasonable as a matter of law under the circumstances when balanced with the duty owed by a reasonably prudent business owner."[12]

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[10] 847 N.Y.S.2d 895 (N.Y. Sup. Ct. July 16, 2007)

[11] *Id.*

[12] *Id.*

While hypothesizing lines of reasoning to make Plaintiff's claim viable, the D.C. court concluded that the lack of evidence for support was fatal to plaintiff's case under a common law negligence theory.[13]

The dearth of evidence here proves fatal to Plaintiff's case here as well. Plaintiff has failed to establish that it was foreseeable that Chester would bite Plaintiff, or that, through the exercise of reasonable care, PetSmart would have discovered that Chester presented a danger.

Co-defendant argued additionally that a more global analysis applies. That is, since PetSmart encourages pets to enter, and since "everyone knows" that, if provoked, any dog is apt to bite, an essentially strict liability circumstance ought to be in effect. There is no law, or in this Court's view, good reason, supporting such an argument.

For these reasons, PetSmart's Motion for Summary Judgment is **GRANTED**.

SO ORDERED this 5th day of January, 2010.

/s/ Robert B. Young

J.

RBY/sal

cc: Opinion Distribution

[13] *Id.*