BARBARA McKENNA, Individually and as next friend of CHRISTOPHER McKENNA,	)	
Plaintiff/Appellant,	)	Sumner Circuit No. 11931-C
VS.	)	Appeal No. 01-A-01-9510-CV-00438
JACKIE JACKSON and EMMA JONES,	)	
Defendants/Appellees.	)	

FILED

March 29, 1996

Cecil W. Crowson
Appellate Court Clerk

IN THE COURT OF APPEALS OF TENNESSEE

MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CIRCUIT COURT OF SUMNER COUNTY

AT GALLATIN, TENNESSEE

HONORABLE THOMAS GOODALL, JUDGE

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AFFIRMED AND REMANDED

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:
SAMUEL L. LEWIS, JUDGE
BEN H. CANTRELL, JUDGE

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O P I N I O N

The captioned plaintiff has appealed from a summary judgment dismissing her suit against Emma Jones for injuries to Christopher McKenna, a minor, by a dog owned and kept by Jackie Jackson on premises rented to her and owned by Emma Jones. Plaintiff's suit against Jackie Jackson resulted in a judgment for the plaintiff from which no appeal has been prosecuted.

Thus, the only issue in this appeal is the liability of the owner-landlord for damage inflicted by a dog owned and kept by a tenant on the premises belonging to the landlord.

The undisputed facts are as follows:

The defendant, Jackie Jackson, is the daughter of the defendant Emma Jones and, at the time of the subject injury, was living in a residence rented from her mother. At the time of the injury, Ms. Jackson owned and kept in a pen on the premises two Rottweiler dogs, a male and a female. Some puppies of the female were in the pen with her. Access to the pen was by a gate which had a latch which would "just drop down." The gate was not locked and was "easy to open."

On June 19, 1992, at about noon, the plaintiff, and her male friend arrived at the home of Jackie Jackson. They desired to prepare and eat lunch and to shower. They were accompanied by the 4 ½ year old son of plaintiff named Chris. Shortly after arrival, Chris

was told to go outside and play in the swing set in the front yard. After a few minutes he "went to go to the dog." He testified:

> I opened the beware of the dog sign gate.

The female Rottweiler attacked and injured Chris. Jackie Jackson testified without contradiction that the female had never attacked or injured anyone before. She testified "about four years ago" (two years before the injury of Chris) before the completion of the fence, the male dog had injured a child in the neighborhood, resulting in payment of emergency room expenses and medicine cost.

The appellee, Ms. Jones, admitted that Ms. Jackson told her of the previous injury of a child by the male Rottweiler.

There is no evidence of a previous vicious act by the female Rottweiler.

As previously stated, the Trial Court granted summary judgment dismissing Ms. Jones. On appeal, plaintiff presents only one issue in the following form:

> 1. Did the trial court err in granting the Motion for Summary Judgment of the defendant landlord, Emma Jones, for injuries and damages sustained by the plaintiffs as result of the plaintiff, Christopher McKenna, being attacked by Rottweiler dogs located on the leased premises?

There is no evidence that Christopher McKenna was attacked by Rottweiler <u>dogs</u> (plural). All of the evidence is that Christopher McKenna was attacked by the female Rottweiler, and <u>not</u> by the male Rottweiler. In fact, appellants' "Statement of the Facts" asserts:

> When Christopher entered the pen, the female Rottweiler dog attacked him causing severe injuries. (Barbara McKenna Depo. Pg. 37).

The owner or keeper is not liable for injury inflicted by his domestic animal unless the owner has notice that the animal was accustomed or disposed to injure persons. However,

where an owner or keeper has notice or knowledge of the disposition of the animal to injure persons, the owner or keeper is obligated to confine or restrain the animal to prevent harm to others. If a person harbors a dog accustomed to bite, or allows it to frequent his premises, he is liable for injuries inflicted by the dog, although not the owner of it. *Missio v. Williams,* 129 Tenn. 504, 167 S.W. 473 (1914); *Sherfey v. Bartley,* 36 Tenn. (4 Sneed) 58 (1856).

A landlord is liable to a guest of the tenant for injuries resulting from the unsafe condition of the premises which was either known to and concealed by the landlord or which, by the exercise of reasonable care and diligence, might have been known to him. *Hines v. Willcox,* 96 Tenn. 328, 34 S.W. 420, 34 A.L.R. 824, 54 Am.St.Rep. 823.

A landlord can be held liable where the injury was made possible by the failure of the landlord to exercise reasonable care under the circumstances. *Tedder v. Raskin,* Tenn. App. 1987, 728 S.W.2d 343.

Generally, a landlord is not liable for injuries inflicted by an animal owned or harbored by a tenant. *Zwinge v. Love,* 325 N.Y.S.2d 107 (1971). However, if, during the term of the leasehold a landlord becomes aware of the fact that his tenant is harboring an animal with vicious propensities, and if he had control of the premises or other capability to remove or confine the animal, he (the landlord) owes a duty to protect third persons from injury. *Cronin v. Chrosniak,* 536 N.Y.S.2d 287 (1988).

No published Tennessee authority is found on the liability of a landlord for injury to a guest of the tenant by an animal owned and or kept by the tenant. However, the foregoing authorities indicate that liability of the landlord requires (1) knowledge or notice of the vicious propensity of the dog in question, and (2) sufficient retained control over the leased premises to afford opportunity to require the tenant to remove the animal or safely restrain it.

In the present case, it does not appear that the landlord, Ms. Jones, had any notice that the female dog which injured the child had ever evidenced any vicious disposition toward a human.

No authority has been cited or found that, where two dogs are confined in the same pen, notice of a vicious act by one of the dogs is notice of a vicious disposition of the other.

It may be argued that the landlord's knowledge that the dogs were kept in an unlocked pen could represent notice that the unlocked pen was a dangerous condition of the premises for which the landlord could be held liable. This Court is not able to agree. There is no showing that the latch on the gate was inadequate to confine the dogs. A gate that could be opened by a 4 ½ year old child is not *ipso facto* a dangerous condition. Until the landlord was on notice of children playing in the vicinity, there could be no reasonable ground to require the landlord to see that the gate was fastened so that a 4 ½ year old child could not open it.

For the reasons stated, the judgment of the Trial Court dismissing the suit against Ms. Jones is affirmed. Costs of this appeal are taxed against plaintiff-appellant. The cause is remanded to the Trial Court for necessary further procedures.

Affirmed and Remanded.

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HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

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SAMUEL L. LEWIS, JUDGE

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BEN H. CANTRELL, JUDGE