

FILED

STATE OF INDIANA ) IN THE SUPERIOR COURT NO. 5  
 ) SS:  
COUNTY OF HAMILTON ) 2007 MAR -2 AM 9:29 OF HAMILTON COUNTY

CLERK, HAMILTON COUNTY COURTS

JASON BAKER, )  
 )  
 ) Plaintiff )  
 )  
 ) v. ) CAUSE NO. 29D05-0605-SC-1055  
 )  
 )  
HELEN KUCHLER (MIDDLETON), )  
 )  
 ) Defendant )

**J U D G M E N T**

This matter came before the Court for a contested hearing on the Plaintiff's small claims complaint. The Plaintiff appeared in person, and the Defendant appeared in person and by counsel, Jeffrey Halbert, and the Defendant advises that her last name is now "Middleton". Evidence was received from both sides, and the Court took the matter under advisement to review possible relevant ordinances and to consider the evidence. Having done so, the Court now enters its ruling.

Plaintiff sues the Defendant to recover for damages caused to his property by cats allegedly owned by the Defendant. The Defendant contests this claim by asserting that she bears no responsibility for any damages caused.

As in all civil cases, the burden of proof is on the Plaintiff to establish a legal theory under which the law permits him to recover and to prove by a preponderance of the evidence those facts that permit recovery under the theory of law. In this case, the primary legal theory upon which the Plaintiff could recover is negligence. To prove negligence, the Plaintiff must have proved that the Defendant was under a duty recognized by law that she conform to a certain standard of conduct for the protection of others against unreasonable risks. He must prove that the Defendant breached that

duty by doing an act that a reasonable person would not have done under the same circumstances or failing to do an act that a reasonable person would have done under the same circumstances. Finally, the Plaintiff must prove he suffered damages and those damages were proximately caused by the Defendant's action or inaction.

From the evidence presented, the Court finds that the Defendant did feed and provide water to a group of four cats, those being one adult cat and three kittens that grew to adulthood during the relevant period of time between May of 2005 and the filing of this lawsuit in May of 2006. Further, although there was no eyewitness to the damage being done, the Court finds that the circumstantial evidence is overwhelming that this group of cats did cause extensive damage to the Plaintiff's residence. This damage included destruction of insulation and a Visqueen vapor barrier, destruction of duct work, and the creation of an unsanitary condition from urination and defecation in the crawl space area of the Plaintiff's residence. The Court further finds that the Plaintiff incurred monetary damages in the amount of \$1,991.00 which included repairs and the cost of preventative work to stop future access to the crawl space.

Having determined that the cats involved caused the damage to the Plaintiff's property, the more essential question is whether the Defendant was under a legal duty to take reasonable care in this situation, whether she breached that duty, and whether her actions caused the Plaintiff's damages.

A Carmel ordinance and a Hamilton County ordinance were both referenced during the testimony that was presented. The Court notes from the outset that the Defendant has not been cited by either Carmel officials, or Hamilton County officials, for a violation of either ordinance, and this case is not an action brought under either one of these ordinances. Neither one provides for enforcement by private citizens. The

only relevance of either ordinance is to the extent it defines a duty, and a standard of care, that applies to the Defendant. If a duty exists under either ordinance, and if the Defendant violated a standard of care provided for in either ordinance, then that would be evidence of negligence. It is with that in mind that the Court reviews both ordinances.

The Carmel ordinance was introduced as Plaintiff's Exhibit 6, and the relevant portion is Section 6-99 on General Animal Care. The Court's review does not find any repeal of that section or any amendments since its 1998 enactment. The relevant portions of that ordinance reads as follows:

"Every person responsible for any animal located within the City shall ensure that such animal:

...

(g) Does not become a public nuisance . . .

...

(j) Is prevented from running at large . . .

...

(m) Does not defecate on the property of another . . . "

This is the ordinance that Plaintiff would have the Court apply because his residence lies within the Carmel city limits.

Before examining the Hamilton County ordinance, the Court finds that the cats involved in this case are not domesticated animals but rather are feral cats. This is important because the Carmel city ordinance has no specific reference to feral cats while the Hamilton County ordinance devotes much of its language to dealing with them. It is also important to note that the Hamilton County ordinance defines "county" as the incorporated and unincorporated areas of the county. Based upon the standard rules of construction that more specific statutes govern over less specific ones, and the language of the Hamilton County ordinance that applies it to areas in the county, both

incorporated and unincorporated, the Court now finds that the Hamilton County ordinance controls. (Moreover, the Court notes that even if it were to apply the Carmel city ordinance, the evidence does not support a finding that the Defendant was a "person responsible" for the animals in question in this case.)

Under the Hamilton County ordinance, the issue of "responsibility" for, or whether a person is an "owner" is by-passed. With a notable exception that will be discussed below, the ordinance simply says that "It shall be unlawful for a person to provide food, water or shelter to a colony of feral cats." Since the cats in this case do qualify under the county ordinance definition of feral cats, and since a colony means a group of one or more feral cats, then the law imposes a duty on a person not to provide food, water, or shelter to them. As noted, however, there is an exception. The exception is set out in Section 15-2.1-1-9, subsection 4. If a person meets the requirements of this subsection, then the person becomes a feral cat colony caretaker, and in this category, the person's duty changes. The ordinance permits such a person to provide food, water, and shelter but requires that it be in conjunction with the "implementation of trap, neuter, and return methodology" further described by the ordinance. The Court finds that the Defendant complied with the requirements of the Hamilton County ordinance to the extent possible through the processes presently available. As such, the ordinance is not a basis for finding the Defendant negligent.

The Plaintiff's evidence raises two other potential areas of negligence. The first of these is the fact that the Defendant trapped, neutered, and then returned the neutered cats to be released in the same neighborhood, knowing that they would most likely return to their breeding area beneath the Plaintiff's home. On its face, this seems to be a valid argument. The evidence however in this case was that, although the

Defendant may have been the one to trap and have the cats neutered, she was not the individual who returned the cats to the neighborhood. This was done by Indy Feral, Inc., and although the ordinance is silent as to what to do with feral cats after spaying/neutering them, a return to their original area seems to be impliedly accepted given the provision that law enforcement officers can return any feral cats impounded to its managed colony.

Plaintiff's second claim of negligence is based on the widely-based belief that providing food and water for a stray animal is an invitation to that animal either to remain in or return to the area where it is being fed. Again, this is an argument that, on its face, seems to carry some weight. As to this argument, however, according to the testimony of Lisa Tudor, the executive director of Indy Feral, experience and science apparently do not support this conventional wisdom. According to Ms. Tudor, a cat is very territorial and bonds to that territory and will return there and remain there regardless of the conditions. If the cat is not given the basic necessities, it will not leave, but instead, will remain. Defendant's Exhibit E, from the website of Indy Feral, states that it is a myth that cats will go away if you stop feeding them and further states the facts to be that "by not feeding the cats, you will actually create a greater nuisance since cats will be forced to rely on scavenging and foraging for food." The Hamilton County ordinance accepts this position and imposes a duty for the feral cat caregiver to make arrangements for feeding even when that caregiver may not be personally available due to weekends, holidays, and vacations.

For all the above reasons, the Court finds that the Plaintiff has failed to establish that the Defendant was negligent in her actions.

Plaintiff's evidence raises one last issue, and that is the issue of trespass. This

is whether the Defendant entered onto his property without permission in violation of his rights as a property owner. The Court finds that the evidence does not support this claim. There is evidence that the Defendant was permitted to be on the property by the Plaintiff's roommate who would have had apparent authority, at least up through late February of 2006, to grant such permission. After that time, there is no evidence that the Defendant herself came uninvited upon the Plaintiff's property.

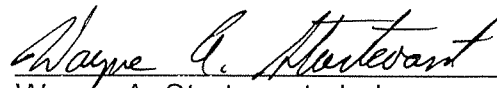
Based upon the above discussion, the Court enters judgment in favor of the Defendant and against the Plaintiff in all particulars.

The Court believes that some additional comments are appropriate. Although judgment is entered here for the Defendant, the Court finds that both parties came to the courtroom with legitimate concerns and supportable positions. Where the parties differed was not in their good faith or in their sincerity of belief but in their focus. The conflict between property rights and animal rights has raged in Indiana since the first prairie farmer endured animal attacks on his livestock and this case is simply the latest, and will not be the last, spawned by that conflict.

In this context, the Hamilton County ordinance admirably addresses the feral cat issue but does little to address the property rights of Hamilton County homeowners. This litigation and Plaintiff's damage could well have been avoided if the ordinance contained a provision requiring anyone registering a feral cat colony to provide notice to homeowners in the area of the colony. The notice would advise homeowners of the colony's existence, the potential for damage from such a colony, and appropriate preventative measures that could be taken. This case points out the need for such a warning. The Plaintiff here was well aware of the cats' existence, perhaps as early as May of 2005. However, it was not until February of 2006 that he understood the

potential for damage. Such a warning given in June of 2005 when the Defendant registered the feral cat colony would have put the Plaintiff on notice and given him the opportunity to protect his property appropriately.

SO ORDERED this 2nd day of March, 2007.

A handwritten signature in cursive script, reading "Wayne A. Sturtevant", is written over a horizontal line.

Wayne A. Sturtevant, Judge  
Hamilton Superior Court No. 5

Distribution:  
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