

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1614

TRAVUS HEALY

vs.

THOMAS L. GAGNE.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff brought the instant action alleging negligence and strict liability under G. L. c. 140, § 155, against the defendant for serious injuries caused the plaintiff by the defendant's dog. A timely answer was filed. Under the statute "[i]f any dog shall do any damage to either the body or property of any person, the owner or keeper . . . shall be liable for such damage, unless such damage shall have been occasioned to the body or property of a person who, at the time such damage was sustained, was committing a trespass or other tort, or with teasing, tormenting or abusing such dog." Id. It is the plaintiff's burden to prove that he "was not teasing, tormenting or abusing the dog." Audette v. Commonwealth, 63 Mass. App. Ct. 727, 734 (2005).

The plaintiff alleged that he was not teasing, tormenting or abusing the dog at the time it caused injury to him and, in his answers to interrogatories, he stated that he was bitten when he "leaned down to pet the dog." The defendant in his answers to interrogatories purported to assert that "[t]he plaintiff intruded upon the sleeping dog by arousing him from sleep, by [deliberately] stepping on his tail and repeatedly swinging a heavy [medallion] on a heavy chain, [purposefully] [striking] the abusively awakened dog with the sharply pointed [medallion] in or near his eye."<sup>1</sup>

On September 28, 2017, the plaintiff served a motion for summary judgment. The defendant did not serve an opposition within the twenty-one days prescribed by Superior Court Rule 9A. Seven days following the expiration of that time, the plaintiff, in compliance with Rule 9A, filed with the court his motion for summary judgment along with an affidavit stating that he had not

---

<sup>1</sup> The plaintiff notes that the police report from the night of the incident contains a party admission that includes none of these details and says merely that the defendant "explained that [plaintiff] was patting the dog and the dog turned and bit him." He also notes that it is undisputed that the dog was euthanized because of the incident, which, he asserts, is not consistent with the statement in the defendant's answers to interrogatories. To the extent the plaintiff thereby suggests that the defendant's interrogatory responses are not credible, we note that credibility questions are not appropriate for resolution on summary judgment since the evidence and all the reasonable inferences that may be drawn therefrom must be viewed in the light most favorable to the nonmoving party, in this case the defendant.

received a response from counsel for the defendant. This was docketed on October 26, 2017. In the motion, the plaintiff argued that the defendant's "unsigned answers to interrogatories claim that [the plaintiff] stepped on [the dog's] tail and swung a heavy medallion at the dog. . . . [A]s the answers are not in compliance with the rules of Civil Procedure, they should not be considered as evidence."

On Friday, November 3, 2017, the defendant filed a motion with the Superior Court dated November 1, 2018, to be permitted to answer and contest the plaintiff's motion for summary judgment late. In it he stated, "Grounds for this motion are . . . that counsel was vacationing in California for several weeks visiting friends and relatives in early October and was not aware of the Plaintiff's motion for summary [judgment] until his recent return." His cover letter stated, "I had been on an extended vacation in California and my client and a percipient witness were not available to file affidavits until the last couple of days." We note that the motion did not say that he was out of town on the date of service, nor did it specify when he returned and whether it was before the summary judgment motion was filed in late October. That motion was docketed on Monday, November 6, 2017. It was returned to the defendant's counsel by mail on November 9, 2017, with a notation that the

submission did not comply with Superior Court Rule 9A or Mass. R. Civ. P. 11, as amended, 456 Mass. 1401 (2010).

On Wednesday, November 8, 2017, before he could have received that returned filing, the defendant filed a notice of request to allow the late filing of opposition to motion for summary judgment, together with an opposition, an affidavit of the defendant dated November 1, 2017, purporting to explain his failure to sign his answers to interrogatories initially and swearing under pains and penalties of perjury that they were true, and an affidavit of a purported percipient witness whose versions of events mirrored those articulated by the defendant in his answers to interrogatories. This motion was also returned to defense counsel by mail with a notation that the submission did not comply with Superior Court Rule 9A or with Mass. R. Civ. P. 11.

Finally, on November 10, 2017, the defendant filed a third similarly corrected motion to be permitted to answer and contest the plaintiff's motion for summary judgment late. That motion was also returned to counsel with a notation that the submission did not comply with Superior Court Rules 9 or 9A. It appears that these motions were rejected by the office of the Clerk of the Superior Court, and were never presented to any judicial officer.

On Monday, November 13, 2017, without a hearing, a judge of the Superior Court allowed in part the plaintiff's motion for summary judgment. The judge endorsed the motion, "There being no opposition filed, and no genuine issue of material fact demonstrated, the motion is allowed." The next day summary judgment on liability only entered. The judgment read:

"This action came before the court . . . upon motion of the above named plaintiff(s), for Summary Judgment pursuant to Mass. R. Civ. P. 56. The parties having been heard and/or the court(s) having considered the pleadings and submissions, finds there is no genuine issue as to material fact and that the plaintiff(s) is entitled to a Judgment as a matter of law.

"It is ORDERED:

"Judgment for the plaintiff(s) named above against the defendant(s) named above, on LIABILITY ONLY.

"This action will be dismissed if the plaintiff(s) does not file the following motion(s) by 12/14/2017:  
Motion for assessment of damages."

Before that date, the plaintiff filed an emergency motion to extend the time for filing a motion for assessment of damages, which was allowed by a second judge of the Superior Court, and, on December 22, 2017, the plaintiff's motion for assessment of damages entered on the docket. Between the entry of the partial summary judgment and the hearing on assessment of damages on April 26, 2018, the only document filed by the defendant that is reflected in the docket was a motion to reschedule that hearing.

In open court, at the hearing in April, the defendant filed a motion for reconsideration of the order partially allowing the motion for summary judgment. Defense counsel twice candidly stated that he had "screwed up," and said that the failure to act promptly following the entry of the partial summary judgment the previous November was "on me." On May 8, 2018, the second judge issued an order that the plaintiff was required to file his opposition on or before June 1, 2018, and directing the clerk to present the pleadings to the original motion judge for consideration. The second judge also awarded damages after the hearing of \$75,000.

On June 1 the opposition to the motion for reconsideration was filed. On June 5 the original motion judge denied it, writing "[u]pon consideration, the motion for reconsideration is Denied." On June 7, the second judge issued final judgment which, including prejudgment interest, filing fees, and costs, totals \$92,976.54. On July 6, 2018, the defendant filed a notice of appeal.

Discussion. At the outset we are faced with a question of jurisdiction. The plaintiff argues that the notice of appeal was untimely because it was entered well beyond thirty days after the allowance of summary judgment on liability. It is, however, as the defendant points out, well established that "[a] decision of the issue of liability which excludes damages is

normally not a final decision which is ripe for appellate review." New England Canteen Serv., Inc. v. Ashley, 372 Mass. 671, 677 (1977). The notice of appeal was filed within 30 days of the entry of final judgment in this case and therefore the appeal of the entry of summary judgment against the defendant is properly before us.

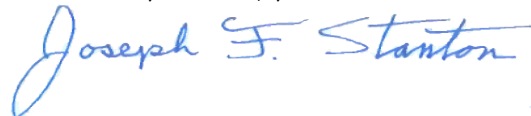
The defendant argues that the court should not have ruled on the motion for summary judgment without considering his three November filings, and that the judge abused his discretion in denying the defendant's motion for reconsideration. The plaintiff responds that it was not an abuse of discretion for the judge to have failed to consider the three filings of the defendant that were rejected for failure to comply with Rule 9A. The defendant contends that they should have been treated as so called emergency motions under the rule, which may be filed in certain circumstances without compliance without the cumbersome, otherwise applicable provisions of the rules. However, they were not marked as such and there was no abuse of discretion or other error of law in failing to accept them for filing. Nor, to the extent the issue is before us, do we see any error in the judge not considering unsigned interrogatory answers which are not admissible evidence under Mass. R. Civ. P. 56, 365 Mass. 824 (1974).

Likewise the plaintiff contends that it was not an abuse of discretion to have denied the motion to reconsider the November 13, 2017, order, since it was not filed until five months after the partial summary judgment order. Although defense counsel's dilatory actions have had the serious consequence for his client of the loss of opportunity for a trial on the merits of liability, we cannot say that the refusal to reconsider the partial summary judgment order, when that reconsideration was not sought until five months later, literally during the trial on damages designed to resolve finally the case, and was unsupported by any affidavit documenting the reasons for either the original missed deadline or the long delay in seeking reconsideration, was an abuse of discretion.

Consequently, the judgment is affirmed.

Judgment affirmed.

By the Court (Vuono, Rubin & Sacks, JJ.<sup>2</sup>),



Clerk

Entered: April 21, 2020.

---

<sup>2</sup> The panelists are listed in order of seniority.