

2011 IL App (2d) 101233-U
No. 2-10-1233
Order filed September 13, 2011

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

MARY SUZANNE DIERKS,)	Appeal from the Circuit Court
)	of Stephenson County.
Plaintiff-Appellee,)	
)	
v.)	No. 06-L-47
)	
JOAN BARTHA,)	Honorable
)	David L. Jeffrey,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Birkett concurred in the judgment.

ORDER

Held: Defendant forfeited her contentions, which lacked merit in any event, by failing to raise them in the trial court.

¶ 1 Following a jury trial, judgment was entered in favor of plaintiff, Mary Suzanne Dierks, in the amount of \$149,351.28 on her negligence claim against defendant, Joan Bartha. Defendant appeals, arguing that (1) she discharged any duty that she had to plaintiff, and (2) plaintiff's assumption of the risk was a total bar to plaintiff's recovery in negligence. For the reasons that follow, we affirm.

¶ 2 BACKGROUND

¶ 3 In November 2007, plaintiff filed her five-count third amended complaint. Counts 1 through 3 were claims against defendant for negligence (count 1), violation of the Animal Control Act (510 ILCS 5/1 *et seq.* (West 2004)) (count 2), and premises liability for an incident involving a dog that belonged to defendant's son and lived with defendant. Counts 4 and 5 were brought against defendant's son, James Bartha, who was later dismissed from the case.

¶ 4 The evidence presented at trial was as follows. On March 15, 2005, plaintiff and her sister Peggy traveled to Orangeville, Illinois, to visit defendant at her home. The sisters arrived at defendant's home at approximately 9 a.m. and parked in the driveway. As plaintiff approached the stairs leading to the front door of the house, defendant was standing at the top of the stairs holding the collar of her son's six-month-old Siberian Husky puppy, Sasha. Sasha was positioned between defendant and the railing on the right side (for someone ascending) of the staircase. There was no railing on the left side of the staircase. Sasha was excited and was barking, yipping, wiggling, and lunging. According to plaintiff, as she was ascending the stairs, she told defendant to take the dog away, but defendant assured plaintiff that she had a hold of Sasha. As she neared the top of the stairs, plaintiff moved to the left side in order to avoid Sasha. Plaintiff testified that Sasha then lunged to within two feet of her, startling plaintiff and causing her to lose her balance and fall off of the stairs. Both parties agreed that Sasha never made contact with plaintiff. As a result of her fall, plaintiff suffered injuries to her left arm, including a comminuted complex supracondylar humerus fracture and a proximal ulnar fracture. The injuries required surgery and physical therapy.

¶ 5 The jury found in favor of plaintiff on count 1, concluding that she incurred damages of \$213,358.98, but was 30% at fault, and reducing the judgment accordingly as instructed. On counts 2 and 3, the jury found in favor of defendant.

¶ 6 Following an unsuccessful posttrial motion, defendant filed this timely appeal.

¶ 7 ANALYSIS

¶ 8 On appeal, defendant contends that (1) she discharged any duty that she had to plaintiff, and (2) plaintiff's assumption of the risk was a total bar to plaintiff's recovery in negligence. Because defendant has forfeited review of both of these contentions—which we also find to lack merit—we affirm.

¶ 9 Defendant first contends that she discharged any duty that she had to plaintiff when she held onto Sasha at all times. In essence, defendant argues that the jury's conclusion that defendant breached her duty to plaintiff was against the manifest weight of the evidence. Defendant did not, however, preserve this issue for review because she failed to include it in her posttrial motion. Illinois Supreme Court Rule 366(b)(2)(iii) (eff. Feb. 1, 1994) prohibits an appellant in a jury case from raising on appeal an issue that was not included in a posttrial motion in the trial court, and Section 2-1202(b) of the Code of Civil Procedure (735 ILCS 5/2-1202(b) (West 2010)) requires that the posttrial motion specify the grounds on which the appellant seeks relief from the judgment. The failure to comply with these requirements results in the forfeiture of the claim on appeal. *Blue v. Environmental Engineering, Inc.*, 215 Ill. 2d 78, 100 (2005). Defendant filed a posttrial motion, but contended only that plaintiff had failed to plead and prove that Sasha was vicious and that defendant knew of Sasha's vicious tendency. Nowhere in the motion did defendant contend that she discharged her duty to plaintiff by holding onto Sasha at all times. Accordingly, defendant has forfeited this contention.

¶ 10 Defendant contends that sufficiency-of-the-evidence claims need not be raised in a posttrial motion. The only authority defendant cites for that proposition, however, is a criminal case. Unlike

in the civil context, sufficiency-of-the-evidence claims in criminal cases have been specifically exempted from the posttrial-motion requirement. *People v. Enoch*, 122 Ill. 2d 176, 190 (1988). But *cf. Blue*, 215 Ill. 2d at 100 (failure to raise sufficiency-of-the-evidence claim in posttrial motion foreclosed review of it on appeal). Defendant also argues that, in contending on appeal that she discharged her duty to plaintiff, she is merely developing her posttrial contention that plaintiff failed to establish that defendant owed a duty to plaintiff. We disagree. The term duty does not appear anywhere in defendant's posttrial motion, and the question of whether plaintiff was required to prove that Sasha was vicious is unrelated to the question of whether defendant did all that she was required to do under the circumstances. Accordingly, plaintiff has forfeited this claim

¶ 11 Moreover, considerations of forfeiture aside, defendant's claim that she discharged her duty to plaintiff and that it was error for the jury to find otherwise is without merit. Defendant contends that review of this claim is *de novo* because she is contending that she discharged her duty to plaintiff as a matter of law. Review of defendant's brief, however, reveals that her contention is nothing more than a claim that the jury erred in finding that defendant breached her duty to plaintiff. "Questions of negligence, breach of duty, and proximate cause are preeminently questions of fact to be determined by the jury." *Kapsouris v. Rivera*, 319 Ill. App. 3d 844, 853 (2001). Accordingly, we will not disturb a jury's finding on these matters unless it is against the manifest weight of the evidence, *i.e.*, the finding is unreasonable, arbitrary, or not based on the evidence. *Vancura v. Katris*, 238 Ill. 2d 352, 374 (2010).

¶ 12 The jury was instructed that defendant owed plaintiff a duty of ordinary care, *i.e.*, that defendant would act in the manner a reasonably careful person would under the circumstances. The jury's finding that defendant breached this duty was not against the manifest weight of the evidence.

As plaintiff approached the staircase, Sasha was barking, yipping, and lunging toward plaintiff. Although defendant had a grip on Sasha's collar, Sasha was still lunging at plaintiff and pulling on defendant. Plaintiff told defendant to remove Sasha from the top of the stairs, but defendant did not do so. Defendant knew that plaintiff always used the railing when ascending stairs, yet defendant placed Sasha closest to the only available railing, requiring anyone using the railing to ascend the stairs directly toward the lunging Sasha. This caused plaintiff to move away from the railing, toward the side of the staircase that did not have a railing. Given Sasha's exuberant behavior, the availability of railings, and plaintiff's known need to use a railing, we conclude that it was not against the manifest weight of the evidence for the jury to conclude that defendant did not exercise ordinary care in allowing Sasha to continue to lunge at plaintiff while she ascended the stairs, despite the fact that defendant had a grip on Sasha's collar.

¶ 13 Defendant's second contention on appeal is that plaintiff's assumption of the risk should have acted as a complete bar to plaintiff's recovery on the negligence claim. Defendant is foreclosed from raising this issue on appeal because she never raised it in the trial court. See *Vine Street Clinic v. HealthLink, Inc.*, 222 Ill. 2d 276, 301 (2006). At no point during any of the trial court proceedings did defendant contend that the affirmative defense of assumption of the risk, if proven, would act as a complete bar to plaintiff's recovery on the negligence claim. To the contrary, during the trial, defendant submitted an instruction, which was ultimately given to the jury upon defendant's agreement, that stated that, if the jury found that plaintiff assumed the risk of injury from Sasha, the jury was to compare plaintiff's percentage of fault to defendant's percentage of fault. Defendant cannot contend in the trial court that a finding that plaintiff assumed the risk results in the comparison of fault between plaintiff and defendant and then complain on appeal that plaintiff's

assumption of the risk should have been a complete bar to recovery. See *Colella v. JMS Trucking Co. of Illinois, Inc.*, 403 Ill. App. 3d 82, 95 (2010) (“the doctrine of invited error prohibits a party from complaining of an error on appeal which that party induced the court to make or to which that party consented” (internal quotation marks omitted)). Moreover, defendant did not include this contention in her posttrial motion, which, as discussed above, also results in the forfeiture of the contention on appeal. *Blue*, 215 Ill. 2d at 100.

¶ 14

CONCLUSION

¶ 15 For the reasons stated, the judgment of the circuit court of Stephenson County is affirmed.

¶ 16 Affirmed.