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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

MICHAEL MONTALBANO and)	Appeal from the Circuit Court
DIANE F. MONTALBANO,)	of Lake County.
)	
Plaintiffs-Appellants,)	
)	
v.)	Nos. 09-AR-2790
)	11-AR-816
)	
RODNEY A. GELLER and GAIL GELLER,)	Honorable
)	Diane E. Winter,
Defendants-Appellees.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices McLaren and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's determination that defendants were not liable to plaintiffs was not against the manifest weight of the evidence; plaintiffs failed to present sufficient evidence of provocation by defendants' dog or that defendants' dog had attacked other dogs in the past. Plaintiffs also presented insufficient evidence that defendants failed to inspect and maintain their fence, or that they knew or should have known the fence would not contain their dog. We affirmed the judgment of the trial court.

¶ 2 In 2009, plaintiff, Diane F. Montalbano, filed suit against defendant, Rodney A. Geller, seeking recovery for property damage and the negligent infliction of emotional distress (case No. 09-

AR-2790). Plaintiff sought damages as a result of defendant's German Shepherd, Prince, attacking and injuring plaintiff's Chihuahua, Cha Chi. Plaintiff was later given leave to amend her complaint and added a third count seeking recovery under section 16 of the Animal Control Act (510 ILCS 5/16 (West 2010)). In Case No. 11-AR-816, plaintiff, Michael Montalbano, filed suit against defendants, Rodney A. Geller and Gail Geller, seeking similar recovery. Both cases proceeded to arbitration, and both parties rejected the rulings. Plaintiffs requested the trial court to consolidate the cases, and the trial court granted the request. The matter proceeded to a bench trial, and the trial court found defendants not liable and ruled in their favor on all counts. Following the trial court's denial of their posttrial motion, plaintiffs timely appeal. We affirm.

¶ 3 The certified bystander's report reflects that plaintiffs reside at 516 Middlebury Drive in Lake Villa and defendants reside at 520 Middlebury Drive in Lake Villa. Defendants have a fenced back yard. There is one residence in between the homes; this neighbor has a fenced back yard.

¶ 4 On May 1, 2009, at approximately 4:30 p.m., Diane returned home from her job at a veterinary clinic. Diane opened her back door and let out three of her dogs, one of them being Cha Chi. At approximately the same time, Rodney returned home from work and let out two of his dogs, one of them being Prince. Diane observed Cha Chi in the neighbor's yard and went to the neighbor's to retrieve the dog. As Diane entered the yard, she observed defendants' two dogs in the neighbor's yard. Diane then observed Prince attack and maul Cha Chi. Diane ran at Prince, and Prince showed his teeth and growled but then turned away.

¶ 5 Michael was at home and heard screams and went outside. Michael observed Diane with Cha Chi and he observed Prince and the other dog running through the broken wooden fence toward defendants' house. Diane observed a door open at defendants' home, and the two dogs enter it.

¶ 6 Michael bundled Cha Chi in a towel, and plaintiffs transported the dog to the animal hospital. Cha Chi underwent surgery and survived. One of Cha Chi's legs had to be amputated in surgery. Michael and Diane returned home and went to defendants' house, but no one answered the door. Michael took photographs of defendants' back yard and fence, showing the missing slat. Michael took photographs of Cha Chi after surgery and during the dog's recovery. The total cost for veterinary services was \$13,342.70; of that amount, plaintiffs paid \$3,965.19; approximately \$6,500 was reported as income and plaintiffs paid taxes on that amount.

¶ 7 Diane admitted that Cha Chi had escaped their yard before. Prior to the attack on Cha Chi, Diane did not have any fears of German Shepherds; she claims to suffer from post-traumatic stress disorder. Diane admitted that she continues to work with dogs every day; has not missed any work as a result of the stress disorder; is not on medication; did not suffer any fatigue or weight loss; and does not attend therapy.

¶ 8 Michael admitted that defendants' dogs had never been trouble prior to this incident and that defendants' fence was adequate to contain them. Michael also admitted that Cha Chi worked for three days to get through the slat in the fence to escape.

¶ 9 Defendants' fence was erected in 2002 or 2003, and Rodney claimed that the dogs had never escaped the yard. Rodney learned of the Prince's attack on Cha Chi at approximately 7 to 7:30 p.m. on May 1, 2009. Rodney admitted that Prince is not friendly to strangers. Defendants inspected the fence and found that one slat had moved to the left. Rodney admitted that he had not replaced the slat but that Gail had nailed the slat back to the fence the following day. Gail helps to maintain the lawn in the back yard, and she looks at the fence while she mows to determine whether anything seems out of the ordinary.

¶ 10 The parties presented their written closing arguments, and on August 17, 2012, the trial court issued its written order. In its order, the trial court admitted into evidence plaintiffs' exhibit No. 4, which was a paid bill of veterinary care for Cha Chi and noted that additional testimony of reasonableness was not necessary. With respect to plaintiffs' count alleging negligence, the trial court found in favor of defendants. The trial court found insufficient evidence presented that defendants failed to inspect and maintain their fence, or that they knew or should have known the fence would not contain Prince. The trial court further found that Prince never previously escaped defendants' yard or acted in a threatening manner prior to the incident. With respect to plaintiffs' count alleging negligent infliction of emotional distress, the trial court found in favor of defendants. With respect to plaintiffs' count alleging an ordinance violation, the trial court found in favor of defendants. The trial court found no evidence as to provocation, since no witness testified they observed the initial contact between the dogs. The trial court further found that Cha Chi was not lawfully in the neighbor's yard and was at large and unrestrained at the time of the incident.

¶ 11 Following the trial court's denial of their posttrial motion, plaintiffs filed a timely notice of appeal. Plaintiffs challenge the trial court's rulings on each of the three causes of action and contend that the trial court's rulings were against the manifest weight of the evidence.

¶ 12 The standard of review we apply when a challenge is made to a trial court's ruling following a bench trial is whether the trial court's judgment is against the manifest weight of the evidence. *Eychaner v. Gross*, 202 Ill. 2d 228, 251 (2002); *Wildman, Harrold, Allen & Dixon v. Gaylord*, 317 Ill. App. 3d 590, 598 (2000). A trial court's judgment will be found against the manifest weight of the evidence when its findings appear to be unreasonable, arbitrary, or not based on evidence. *Id.* at 599. This court must resolve questions of testimonial credibility in favor of the prevailing party and

draw from the evidence all reasonable inferences in support of the trial court's judgment. *Id.* (citing *H&H Press, Inc. v. Axelrod*, 265 Ill. App. 3d 670, 679 (1994)). We will not reverse a trial court's decision if differing conclusions can be drawn from conflicting testimony unless an opposite conclusion is clearly apparent. *Id.* (citing *Buckner v. Causey*, 311 Ill. App. 3d 139, 144 (1999)).

¶ 13 This court gives great deference to the trial court's findings because the trial court, as the trier of fact, is in an optimum position to observe the demeanor of witnesses while testifying, to judge their credibility, and to determine the weight their testimony and other evidence should receive. *Habitat Co. v. McClure*, 301 Ill. App. 3d 425, 440-41 (1998). We may affirm the trial court's decision on any basis supported by the record. *Reedy Industries, Inc. v. Hartford Insurance Co. of Illinois*, 306 Ill. App. 3d 989, 997 (1999).

¶ 14 Plaintiffs' first contention challenges the trial court's ruling regarding defendants' alleged violation of the Lake County ordinance. The ordinance provides:

“If a dog, cat or other animal, without provocation, attacks or injures any person or animal who is peaceably conducting himself in any place where he may lawfully be, the owner of such dog, cat or other animal is liable for damages to such person for the full amount of injury and damages sustained. Lake County Ordinance § 2401.1 (eff. May 1, 2009).

¶ 15 The trial court first found no evidence as to provocation because no witness testified that he or she observed the initial contact between the dogs. Second, the trial court found that Cha Chi was not lawfully in the neighbor's yard and was at large and unrestrained at the time of the incident. Plaintiffs' argument focuses on the second reason that the trial court found in favor of defendants, *i.e.*, Cha Chi was not lawfully in the neighbor's yard. Plaintiffs acknowledge that none of the parties

testified that Cha Chi was not lawfully in the neighbor's yard and that neither party testified that the dogs were in an area they were not allowed to be. Plaintiffs point us to an attachment in their postjudgment motion, which is an affidavit from their neighbor reflecting permission for the dogs to be in his yard. Defendants object to our consideration of the neighbor's affidavit because it was not a part of the evidence presented at trial.

¶ 16 We conclude that the trial court's ruling was not against the manifest weight of the evidence. In relevant part, plaintiffs were required to establish that Prince, (1) without provocation; (2) attacked or injured Cha Chi; and that Cha Chi (3) was peaceably conducting himself; (4) in any place where he may lawfully be. See Lake County Ordinance § 2401.1 (eff. May 1, 2009). In their argument, plaintiffs do not challenge and have largely ignored the first stated reason that the trial court found in defendants' favor: there was no evidence of provocation presented. In its ruling, the trial court found that no one observed the initial contact between the dogs. In their argument, plaintiffs merely state that "it is undisputed that the attack on Cha Chi occurred *** without provocation." Defendants do, however, dispute the element of provocation. In their brief, defendants counter that plaintiffs failed to present any evidence as to which dog started the altercation, and there was no witness to observe how the altercation began. Defendants argue that it cannot be presumed that Prince started the altercation merely because he was the larger dog; similarly, they argue that it cannot be proved that there was no provocation by Cha Chi. In their reply brief, plaintiffs point to the trial court's notes taken during Diane's testimony that "[Diane] was about 20 feet away; when shepherd grabbed chachi; heard scream." Clearly, the trial court was well aware of Diane's testimony based on its notes, yet it still found that no one observed the initial contact between Prince and Cha Chi such that the trial court was required to find a lack of provocation by Cha Chi. The

burden rests upon the complaining party to present sufficient evidence as to each element of the cause of action to preclude an adverse judgment. See generally *Klitzka ex rel. Teutonico v. Hellios*, 348 Ill. App. 3d 594 (2004) (concluding that, although the plaintiff presented evidence that the dog was involved in two previous altercations, those did not involve children, and thus, the plaintiff was required to present evidence to show that the defendants knew that the dog was a danger to children). Because the trial court's determination that plaintiffs failed to present sufficient evidence regarding a provocation was not against the manifest weight of the evidence, we uphold the trial court's judgment. See *Gunthorp v. Golan*, 184 Ill. 2d 432, 438 (1998) (noting that a reviewing court can affirm the judgment "on any basis that appears in the record without regard to whether the trial court relied upon such ground or whether the trial court's rationale was correct"). Our conclusion obviates the need to address the additional basis upon which the trial court ruled against plaintiffs.

¶ 17 Plaintiffs' second contention challenges the trial court's ruling regarding defendants' alleged negligence. Plaintiffs argue that they presented sufficient evidence that (1) defendants failed to monitor the dogs in their own yard, and (2) defendants failed to inspect and maintain their fence. In support of their argument that defendants failed to monitor the dogs in their yard, plaintiffs assert that Prince had a propensity to harm strangers and other dogs; and yet, when Rodney let the dogs out in the yard, he did not step out or look outside. In support of their argument that defendants failed to inspect and maintain their fence, plaintiffs assert that Gail was the only party to inspect the fence; Rodney never pushed on the slats to determine whether they loosened over time, even after he power-washed the fence; and Rodney never replaced any slats. Defendants counter that plaintiffs have failed to cite any authority to establish that dog owners have a duty to supervise their own dogs when the dogs are outside in their enclosed fenced yard.

¶ 18 Actions available to recover for an injury caused by a domestic animal include common-law negligence. See, e.g., *Reeves v. Eckles*, 77 Ill. App. 2d 408 (1966). At common law, a plaintiff allegedly injured by an animal was required to prove in a negligence action that “the animal had a mischievous propensity to commit such injuries and that the owner had knowledge of the propensity.” *Beckert v. Risberg*, 33 Ill. 2d 44, 46 (1965). In Illinois, reviewing courts have presumed that a dog is tame, docile, and harmless absent evidence that the dog has demonstrated vicious propensities. *Goennenwein v. Rasof*, 296 Ill. App. 3d 650, 654 (1998) (citing *Lucas v. Kriska*, 168 Ill. App. 3d 317, 320 (1988)). Therefore, when an injury or damages result from a dog’s deviance from its presumed tame, docile, and harmless nature, the dog’s owner is liable under the common law only if the owner knew or should have known that the dog had vicious or mischievous propensities. *Domm v. Hollenbeck*, 259 Ill. 382, 385 (1913).

¶ 19 In the present case, the trial court found insufficient the evidence presented that defendants failed to inspect and maintain their fence, or that they knew or should have known the fence would not contain Prince. We conclude the manifest weight of the evidence supports the trial court’s findings. The evidence reflected Rodney’s testimony that Prince had never escaped defendants’ yard and Michael’s testimony that defendants’ fence was adequate to contain their dogs. The evidence also reflected that Gail inspected the fence on occasion when she would be working in the yard. The trial court further found that Prince never previously escaped defendants’ yard or acted in a threatening manner prior to the incident. This finding is not against the manifest weight of the evidence as well. See *Steinberg v. Petta*, 114 Ill. 2d 496, 500 (1986) (stating that, at common law, a person injured by an animal could not recover unless the injured party could prove that the animal had dangerous propensities, in that the animal had attacked someone before). In *Goennenwein*, the

reviewing court held that the four-year-old plaintiff was required to prove that the defendant dog owner knew or should have known dog was dangerous to children. *Goennenwein*, 296 Ill. App. 3d at 654. Here, plaintiffs were required to establish that defendants knew or should have known that Prince was dangerous to other dogs. Despite plaintiffs' claims to the contrary regarding Prince's alleged propensity to harm strangers, plaintiffs were required to present evidence to establish that Prince had attacked other dogs before. See *Klitzka*, 348 Ill. App. 3d 605-06 (concluding that, despite evidence that the dog was involved in two previous altercations, those did not involve children, and thus, the plaintiff was required to present evidence to show that the defendants knew that the dog was a danger to children). Moreover, the trial court's notes reflect Michael's testimony where he admitted that defendants' dogs had never been trouble prior to this incident and that defendants' fence was adequate to contain them. Accordingly, the trial court's determination was not against the manifest weight of the evidence.

¶ 20 Plaintiffs' third contention challenges the trial court's ruling regarding defendants' alleged negligent infliction of emotional distress. Plaintiffs claim that Diane was within the zone of danger of being attacked by Prince. Plaintiffs argue that Diane's emotional injury is not based solely upon observing the attack between Cha Chi and Prince, but also on Diane's fear for her own personal safety at that time.

¶ 21 A plaintiff who claims to be a direct victim of negligently inflicted emotional distress must establish the traditional elements of negligence: duty, breach, cause, and injury. *Cooney v. Chicago Public Schools*, 407 Ill. App. 3d 358, 363 (2010). Whether a duty exists is a matter for the trial court to decide. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 430 (2006). If a plaintiff cannot establish a duty on the part of the defendant, the negligent-infliction-of-emotional-distress claim must fail.

Id.; see also *Washington v. City of Chicago*, 188 Ill. 2d 235, 239 (1999) (stating that, where no duty is owed, there is no negligence). To state a cause of action for negligent infliction of emotional distress, a plaintiff must allege facts establishing he or she suffered a direct impact, which caused emotional distress (*Corgan v. Muehling*, 143 Ill. 2d 296, 312 (1991)) or was a bystander in a zone of danger that caused fear for his or her own safety and the plaintiff suffered physical injury or illness as a result of the emotional distress (*Rickey v. Chicago Transit Authority*, 98 Ill. 2d 546, 555 (1983)). Plaintiffs focus on the latter method.

¶ 22 In *Rickey*, our supreme court set out the standard to determine whether a bystander may recover for negligently inflicted emotional distress. The court stated:

“That standard has been described as the zone-of-physical-danger rule. Basically, under it a bystander who is in a zone of physical danger and who, because of the defendant’s negligence, has reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress. This rule does not require that the bystander suffer a physical impact or injury at the time of the negligent act, but it does require that he must have been in such proximity to the accident in which the direct victim was physically injured that there was a high risk to him of physical impact. The bystander, as stated, must show physical injury or illness as a result of the emotional distress caused by the defendant’s negligence.” *Rickey*, 98 Ill. 2d at 555.

¶ 23 On our review of the record, we conclude the trial court’s determination was not contrary to the manifest weight of the evidence, nor was the opposite conclusion clearly evident or the trial court’s decision unreasonable or arbitrary. Plaintiffs’ argument repeats the evidence presented at trial, which the trial court heard as well. The trial court had determined that plaintiffs had presented

insufficient evidence to establish that defendants failed to inspect and maintain their fence, or that they knew or should have known the fence would not contain Prince. See *Habitat Co.*, 301 Ill. App. 3d at 440-41 (stating that the reviewing court gives great deference to the trial court's findings because the trial court, as the trier of fact, is in an optimum position to observe the demeanor of witnesses while testifying, to judge their credibility, and to determine the weight their testimony and other evidence should receive). We are cognizant of plaintiffs' attachment to their pet, Cha Chi. See *Leith v. Frost*, 387 Ill. App. 3d 430, 436 (2008) (acknowledging the common knowledge that people are prepared to make great sacrifices for the well-being and continued existence of their household pets, to which they have become deeply attached). However, without an established legal duty, there can be no legal recovery. See *Washington*, 188 Ill. 2d at 239. As stated above, we concluded that the trial court's determination finding defendants not liable under a common-law theory of negligence was not against the manifest weight of the evidence. Therefore, plaintiffs are unable to establish that defendants had a greater duty to plaintiffs, or that the lack of this greater duty inflicted emotional distress on Diane. See *Rickey*, 98 Ill. 2d at 555. Accordingly, we hold that the trial court's determination was not against the manifest weight of the evidence.

¶ 24 Our holding obviates the need to address defendants' evidentiary challenge raised in their brief. See *Ferguson v. Patton*, 2013 IL 112488, ¶ 23 (noting that reviewing courts should not pass judgment on mere abstract propositions of law, render advisory opinions, or give legal advice as to future events) (citing *National Marine Inc. v. Illinois Environmental Protection Agency*, 159 Ill. 2d 381, 390 (1994)).

¶ 25 For the foregoing reasons, we affirm the judgment of the circuit court of Lake County.

¶ 26 Affirmed.