2015 IL App (1st) 142977-U

SIXTH DIVISION
Order filed: November 6, 2015

No. 1-14-2977

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

CATHY AKIVA,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	No. 12 M2 2784
	)	
SUSAN JURENCI, d/b/a The Clipper's Edge Pet Spa & Boutique,	)	
	)	Honorable
	)	Roger G. Fein,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the trial court is affirmed where its entry of a directed finding in the defendant's favor on the plaintiff's claims of negligence, consumer fraud, and breach of bailment was not against the manifest weight of the evidence. The appellate court lacked jurisdiction as to whether the trial court erred in dismissing counts II and IV of the plaintiff's original complaint where the notice of appeal fails to mention it.

¶ 2 The plaintiff, Cathy Akiva, brought the instant action against the defendant, Susan Jurenci, doing business as The Clipper's Edge Pet Spa & Boutique (Jurenci), for damages arising from the death of her dog. The plaintiff appeals the trial court's order dismissing her claims for

fraudulent misrepresentation and conversion pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2012)). She also appeals the trial court's order granting a directed finding in favor of the defendant on her claims of negligence, breach of bailment, and consumer fraud. For the following reasons, we affirm in part and dismiss in part.

¶ 3 The essential facts giving rise to this case are not in dispute. On October 10, 2012, the plaintiff delivered her two dogs, Lavan (a seven-year-old bichon frise) and Motic (a three-year-old poodle), to Jurenci for grooming. While under Jurenci's care, Lavan was attacked and killed by another dog.

¶ 4 The plaintiff filed her original five-count complaint against Jurenci in December 2012. Count I alleged premises liability (for failing to maintain safe premises); count II alleged fraudulent misrepresentation (for statements Jurenci made regarding the safety of her facility); count III alleged fraudulent concealment (for withholding information about the attack); count IV alleged conversion (for failing to return Lavan); and count V alleged negligence in the alternative (for failing to keep Lavan safe).

¶ 5 In April 2013, Jurenci filed a motion to dismiss all five counts of the plaintiff's complaint pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615, 2-619 (West 2012)). In June 2013, the trial court entered a written order granting Jurenci's section 2-615 motion dismiss as to counts I-IV, but denied the motion as to count V, negligence. The court's order did not specify whether it was dismissing counts I-IV with or without prejudice.

¶ 6 In July 2013, the plaintiff filed an amended complaint. Count I alleged negligence (for failing to keep Lavan safe); count II alleged breach of bailment (for failing to return Lavan); and count III alleged consumer fraud (for Jurenci's statements regarding the safety of her facility and

for concealing the fact that she was not licensed or authorized to operate her business). The plaintiff also re-pled counts I-IV of her original complaint to preserve those claims "for review on appeal."[1] In August 2014, the cause proceeded to a bench trial on counts I-III of her amended complaint, claims for negligence, breach of bailment, and consumer fraud.

¶ 7 At trial, the plaintiff called Jurenci to testify as an adverse witness. Jurenci testified that she is the sole owner of The Clipper's Edge Pet Spa & Boutique, a dog grooming and daycare business, which she operates out of her residence in Glenview, Illinois. She has a general business license from the Village of Glenview (Village) which is displayed on a wall in her residence. Jurenci disputed whether the Village's zoning ordinance prohibits her from operating a dog grooming and daycare business out of her home. She also disputed whether she is required to obtain a "kennel license" from the Department of Agriculture. She testified that she does not board animals or keep them overnight and, thus, does not operate a kennel. Jurenci stated that she has been in business for 26 years and has over 500 clients. In a typical day, she schedules between 0 and 20 clients and accepts walk-in appointments.

¶ 8 Jurenci explained that her facility is separated into three areas: a grooming area, a daycare area, and a "boutique" area in which she sells merchandise. The boutique area is located in front where clients enter and exit the facility. The grooming area is "around the corner" and has eight grooming stalls. Jurenci also has a fenced-in backyard for dogs in the daycare program. She testified that dogs in grooming remain in the grooming area and do not interact with dogs in daycare. Jurenci explained that when a dog needs to relieve itself, her practice is to

[1] Although the plaintiff renumbered her negligence claim from count V to count I, she did not renumber counts I-IV of her original complaint. Thus, her amended complaint contains two count I's, two count II's, two count III's, and a single count IV.

walk the dog to a tree in the front yard. In 26 years of doing business, she has never received any complaints about this practice.

¶ 9 Jurenci testified that, on October 10, 2012, at approximately 8:30 a.m., the plaintiff dropped off her two dogs, Lavan and Motic, for grooming. She stated that she put the dogs in a grooming stall and told the plaintiff to come back around 2 p.m. When asked if she told the plaintiff that the facility was safe, Jurenci said she could not recall, but if she was asked, she would have said, "yes." Jurenci also stated that the plaintiff never told her she could not take Lavan outside.

¶ 10 Jurenci further testified that the plaintiff's dogs were in her facility for about 20 minutes when she noticed that Lavan needed a bathroom break. Jurenci leashed Lavan and walked him outside to the tree in her front yard. While she was outside with Lavan, she observed an unfamiliar man park his vehicle in her driveway. Jurenci also noticed a large dog, which she later described as a "lab-pit mix," in the backseat of the man's vehicle. She testified that the man exited his vehicle and opened the back door when his dog suddenly lunged out of the car and attacked Lavan. Jurenci explained that the dog traveled 10 feet and she had no time to pick up Lavan. She attempted to push the dog off of Lavan while the man pulled on the dog's leash and yelled, "duke" or "dude."

¶ 11 After the attack, Jurenci took Lavan to the Glenview Animal Hospital for emergency treatment, but the veterinarian was not able to resuscitate him. Jurenci called the plaintiff from the animal hospital and told her that Lavan had been attacked and killed by another dog. She heard the plaintiff scream and cry over the phone and could tell the plaintiff was upset. Jurenci waited at the animal hospital for the plaintiff to arrive. Upon arrival, Jurenci apologized, offered to pay the veterinarian bill, and told the plaintiff that the man said he "would take care of it."

¶ 12 Jurenci left the animal hospital and returned to her residence to check on the other dogs. She looked through some old mailing lists and cards to see if she had any clients with a dog named "dude" or "duke." Jurenci was not able to identify the man or his dog and the man never called Jurenci as he said he would. Jurenci testified that a police officer stopped by and interviewed her about the incident. During the interview, the plaintiff and her daughter returned to Jurenci's residence to pick up their other dog, Motic.

¶ 13 On cross-examination, Jurenci explained that anyone could have pulled into her driveway that day and she had no way of knowing whether the person had an aggressive dog. When asked on re-direct why she did not take Lavan to the fenced-in backyard, Jurenci explained that the backyard is for dogs in daycare, which is separate from grooming.

¶ 14 Veterinarian Manuel Kanter testified that he was working at Glenview Animal Hospital on October 10, 2012, when he observed Jurenci enter the clinic with Lavan. He examined Lavan and determined that Lavan was not breathing. Kanter attempted to resuscitate the dog but was not successful. He performed a postmortem exam and determined that Lavan suffered a fractured neck.

¶ 15 Glenview police officer Thomas Frederick testified that he was working patrol on October 10, 2012, when he received a call about a dog bite. He drove to Glenview Animal Hospital, spoke with the plaintiff, and then drove to Jurenci's residence to interview her about the attack. While inside Jurenci's residence, Officer Frederick observed three or four other dogs in the grooming area, but they were not acting aggressively and he was not afraid of them. Officer Frederick testified about the information he gathered from Jurenci. He said that Jurenci described the man's vehicle as "green-colored" and his dog as a "golden retriever." Jurenci also

told Officer Frederick that the man did not have an appointment and she did not recognize him or his dog.

¶ 16 The plaintiff testified that, on October 10, 2012, at approximately 8:45 a.m., she brought her two dogs to Jurenci's business for grooming. When she entered the facility, she observed four or five dogs that were downstairs and "barking very excessively." The plaintiff was concerned because the dogs appeared to be "very aggressive" and were trying to "get to" her and her dogs. The plaintiff asked Jurenci about the dogs, but Jurenci said, "they're fine, they're in daycare, they should be okay." When asked if Jurenci made any other safety assurances, the following colloquy occurred:

> "A. I just, you know—all I did is asked her not to clip the dogs too close and she said that they will be fine, they will be okay.
>
> Q. Did you understand that to mean any kind of safety issue would be addressed?
>
> A. I assumed that there was, you know—like I had been in there before, I assumed that there was safety there, but I did see that those dogs were extremely aggressive that particular day and very loud."

The plaintiff also testified that she "assumed" and "expected" that Jurenci would keep her dogs "in the grooming area the entire time." She stated that she never authorized Jurenci to take her dogs to the front yard or anywhere outside of the facility. The plaintiff acknowledged, however, that she never discussed where her dogs would go to the bathroom. The plaintiff left her dogs with Jurenci and drove home.

¶ 17 The plaintiff testified that, around 9:45 a.m., she received a phone call from Jurenci informing her that Lavan was attacked and killed by another dog. Jurenci told the plaintiff she

was at Glenview Animal Hospital. The plaintiff drove to the animal hospital and was directed to a room where she observed Lavan laying on a table, dead. Jurenci, who was also in the room, was crying. The veterinarian informed the plaintiff that Lavan suffered a broken neck. When asked what happened next, the plaintiff explained that she left the animal hospital and drove to Jurenci's residence to pick up her other dog, Motic.

¶ 18 The plaintiff stated that she received a bill from Glenview Animal Hospital in the amount of $259.50. Although the plaintiff cannot put a price on Lavan, she testified she would have paid $25,000 to keep him alive. The plaintiff stated that Jurenci charges $65 per dog for grooming and neither Lavan nor Motic were groomed that day. The record is unclear as to whether Jurenci actually charged the plaintiff for grooming services that day. Finally, the plaintiff testified that having a business license and following the law is important and she would not have used Jurenci's services had she not been properly licensed.

¶ 19 At the close of the plaintiff's case-in-chief, Jurenci moved for a directed finding on all counts.[2] The trial court granted the motion for a directed finding and entered judgment for Jurenci on the plaintiff's claims for negligence, breach of bailment, and consumer fraud. This appeal followed.

¶ 20 Initially, we note that Jurenci did not file an appellee brief in this matter. However, when an appellee fails to file a brief, reversal is not automatic. See *Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 131 (1976). Here, we are capable of addressing the

[2] We note that defense counsel actually moved for a "directed verdict." Normally, a party moves for a directed verdict in a jury trial (735 ILCS 5/2-1202 (West 2012)) and a directed finding in a bench trial (735 ILCS 5/2-1110 (West 2012)). Although it would have been more appropriate for Jurenci to move for a directed finding as a bench trial was held in this case, the content of a motion, not its title or label, determines its character. See *Padilla v. Vazquez*, 223 Ill. App. 3d 1018, 1023 (1991).

issues raised in the plaintiff's appeal because the record is simple and the claimed errors can be easily decided without the benefit of the appellee's brief. See *id.* at 33.

¶ 21 The plaintiff's first contention on appeal is that the trial court erred in granting Jurenci's motion for a directed finding on her claims of negligence, consumer fraud, and breach of bailment.

¶ 22 In a bench trial, section 2-1110 of the Code allows the defendant, at the close of the plaintiff's case-in-chief, to move for a directed finding in his or her favor. 735 ILCS 5/2-1110 (West 2012). In ruling on such a motion, a trial court must engage in a two-step analysis. *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 275 (2003). First, the court must determine as a matter of law whether the plaintiff has presented a *prima facie* case—*i.e.*, did the plaintiff present some evidence on every element essential to the cause of action. *Id.* at 275. Second, if the plaintiff has presented some evidence on each element, the court then must consider and weigh the totality of the evidence presented, including evidence which is favorable to the defendant. *Id.* at 275-76. After weighing all the evidence, the court should determine, applying the standard of proof required for the underlying cause, whether sufficient evidence remains to establish the plaintiff's *prima facie* case. *Id.* at 276.

¶ 23 If the trial court finds that the plaintiff has failed to present a *prima facie* case as a matter of law, the standard of review is *de novo*. *Id.* at 275. If, however, the court considers the weight and quality of the evidence and finds that no *prima facie* case remains, the court's decision will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Zannini v. Reliance Insurance Company of Illinois*, 147 Ill. 2d 437, 449 (1992).

¶ 24 In granting Jurenci's motion for a directed finding, the trial court stated:

> "This was obviously a tragic thing for [the plaintiff]. She's very saddened. I've had dogs before and I know we hate to lose them whether it's natural or unnatural causes. But this is a case where you're trying to accuse somebody of being liable for it, and the Court has to agree with the defendant on its motion for a directed verdict. I believe its arguments are persuasive and well-grounded in law and in fact and so I am going to grant the directed verdict on all three counts for negligence, bailment, and consumer fraud."

Here, the court weighed the evidence and found Jurenci's arguments "well-grounded in law and in fact." Consequently, we must determine whether the court's ruling was against the manifest weight of the evidence.

¶ 25 The plaintiff argues that the trial court erred when it entered a directed finding in favor of Jurenci on her negligence claim.

¶ 26 In order to recover on a claim for negligence, a plaintiff must show a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by the breach. *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 256 (1999). At common law, a plaintiff allegedly injured by an animal was required to prove 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).

¶ 27 In her brief before this court, the plaintiff argues that she did not need to prove that dogs on Jurenci's premises had vicious or mischievous propensities or that Jurenci knew or should have known about the dangerous propensity. Rather, she argues that her claim is based solely upon the defendant's conduct in failing to keep her dog safe and inside the facility at all times. She cites *Anzalone v. Kragness*, 356 Ill. App. 3d 365 (2005), in support of her argument.

¶ 28 In *Anzalone*, the plaintiff brought an action against an animal hospital for breach of bailment, negligence, breach of fiduciary duty, and intentional infliction of emotional distress after her cat was attacked and killed by a rottweiler while boarded at the hospital. The trial court dismissed her complaint for failure to adequately allege damages and the plaintiff appealed. On appeal, the court addressed the sole issue of whether the plaintiff could recover sentimental or emotional damages resulting in the death of her cat; it did not discuss the sufficiency of the plaintiff's negligence allegations. As such, *Anzalone* is inapposite.

¶ 29 As discussed above, the plaintiff had to present some evidence to overcome the presumption that dogs are tame, docile and harmless. Our review of the trial record shows that the plaintiff failed to present any evidence regarding the unknown dog's vicious or mischievous propensities. She presented no evidence that the unknown dog previously attacked other dogs or otherwise behaved in a threatening manner. *Lucas*, 168 Ill. App. 3d at 321 (the trial court erred in not granting judgment notwithstanding the verdict in light of the complete absence of evidence of prior bites by the dog); *Goennenwein*, 296 Ill. App. 3d at 655 (appellate court considered whether the dog had previously attacked, "growl[ed], snarl[ed], or threaten[ed] anyone"). Moreover, completely absent from the record is any evidence that Jurenci knew or should have

known that the unknown dog posed a special danger or hazard to other people or dogs. Jurenci testified that she did not recognize the dog and had no way of knowing whether its presence exposed Lavan to a risk greater than he experienced normally in his daily life. The evidence at trial shows Jurenci kept Lavan secure and under her control by walking him outside with a leash. When an unknown dog attacked Lavan, Jurenci did all that could be expected to stop the attack—push the unknown dog off of Lavan.

¶ 30 Based on the record before us, the plaintiff failed to present any evidence that Jurenci knew or should have known that the large dog had vicious propensities, and she cannot establish a *prima facie* case of negligence. Consequently, the trial court correctly granted Jurenci's motion for a directed finding on count I.

¶ 31 The plaintiff also maintains that the trial court erred when it entered a directed finding in Jurenci's favor on count III, claim under the Illinois Consumer Fraud and Deceptive Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq*. (West 2012)).

¶ 32 Section 2 of the Consumer Fraud Act provides, in pertinent part, as follows:

> "Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact *** in the conduct of any trade or commerce are hereby declared unlawful." 815 ILCS 505/2 (West 2012).

In order to establish a violation of the Consumer Fraud Act, the plaintiff must prove: "(1) a deceptive act or practice by the defendant, (2) the defendant's intent that the plaintiff rely on the deception, (3) the occurrence of the deception in the course of conduct involving trade or commerce, and (4) actual damage to the plaintiff, (5) proximately caused by the deception.

Barbara's Sales, Inc. v. Intel Corp., 227 Ill. 2d 45, 72 (2007).

¶ 33 The plaintiff argues that she presented some evidence at trial that Jurenci engaged in a deceptive act or practice. More specifically, she asserts that Jurenci (1) misrepresented the safety of her facility; and (2) concealed the fact that she was not authorized or licensed to operate a dog grooming and daycare business out of her residence.

¶ 34 As to the plaintiff's claim that Jurenci misrepresented the safety of her facility, the testimony at trial established that the plaintiff was concerned about several dogs inside Jurenci's facility. The dogs were in the daycare area and were barking and behaving aggressively. The plaintiff testified that she asked Jurenci about the dogs and Jurenci replied, "they're fine, they're in daycare, they should be okay." The plaintiff also testified that, when she asked Jurenci "not to clip the dogs too close," Jurenci responded, "they will be fine, they will be okay." The plaintiff also testified that she "assumed" the facility was safe and "assumed" her dogs would not go outside. Jurenci testified that she could not recall if the plaintiff asked her whether the facility was safe, but if she was asked, she would have said, "yes."

¶ 35 On this record, we find that the plaintiff has failed to present any evidence demonstrating that Jurenci's statements were false. Jurenci's statement that "everything will be fine" was made in response to the plaintiff directing Jurenci "not to clip the dogs too close." The plaintiff has not pointed to any evidence showing that Jurenci had the intention not to perform this promise—*i.e.*, clip the dogs too close. See *Hassan v. Yusuf*, 408 Ill. App. 3d 327, 349 (2011) ("A promise to perform an act accompanied by an intention not to perform is a misrepresentation upon which fraud can be based if the false promise or representation is alleged to be the scheme employed to accomplish the fraud.") Likewise, Jurenci's statement, "they're fine, they're in daycare, they should be okay," was in response to the plaintiff's concern about the dogs in Jurenci's daycare

facility. No testimony or evidence was presented at trial demonstrating that Jurenci's statement was false. Indeed, there was no testimony or evidence that the dogs inside Jurenci's facility were not "fine," were not "in daycare," or were not "okay." Nor was there any evidence that Jurenci knew her statements were false at the time they were made. As to Jurenci's general statement that she believes her business is safe, we again find no evidence that the statement was untrue. We also doubt whether the statement was even made—the plaintiff certainly did not testify that Jurenci told her the facility was safe; and Jurenci testified to a hypothetical ("if I was asked, I would have said yes, because I believe my business [is] safe."). In sum, the plaintiff points to no acts or statements that are even remotely deceptive or misrepresentative and, consequently, she fails to establish any deceptive act or practice based on Jurenci's representations regarding the safety of her facility.

¶ 36 We next consider the plaintiff's argument that Jurenci concealed material facts from the plaintiff. An omission or concealment of a material fact in the conduct of trade or commerce constitutes consumer fraud. 815 ILCS 505/2 (West 2012). "A material fact exists where a buyer would have acted differently knowing the information, or if it concerned the type of information upon which a buyer would be expected to rely in making a decision whether to purchase." *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 505 (1996). Additionally, "it is unnecessary to plead a common law duty to disclose in order to state a valid claim of consumer fraud based on an omission or concealment." *Id.*

¶ 37 Here, the plaintiff asserts that Jurenci concealed the fact that the Village's zoning ordinance prohibited Jurenci from operating a dog grooming and daycare facility out of her residence. The plaintiff maintains that she would not have sought Jurenci's services and would not have left her dogs in Jurenci's care, if she had known that Jurenci was not authorized to

operate a dog grooming and daycare facility.

¶ 38 Generally, a deceptive representation or omission of law does not constitute a violation of the Act because both parties are presumed to be equally capable of knowing and interpreting the law. *Randels*, 243 Ill. App. 3d at 805. However, the inquiry has "evolved from a strict misrepresentation of fact versus law dichotomy." *Gilmore v. Kowalkiewicz*, 234 Ill. App. 3d 522, 529 (1992). In *Randels*, the court explained that the question is not whether the fact misrepresented or omitted is a "fact" or a "law" but is "whether a defendant's misrepresentations or omissions were discoverable through the exercise of ordinary prudence by the plaintiff, and a finding of liability is made when the defendant misrepresents or omits facts of which he possess[es] almost exclusive knowledge the truth or falsity of which is not readily ascertainable by the plaintiff." *Randels*, 243 Ill. App. 3d at 807.

¶ 39 In *Randels*, the plaintiffs purchased residential real estate, unaware of a village ordinance that required the disconnection of the property's septic system and the hookup with the municipal sewer system at the property owners' expense. The defendants did not disclose the requirement of the village ordinance, but neither did the defendants make any misrepresentations about that requirement. *Id*. at 804. The plaintiffs in that case did not make any inquiries about the requirement to connect the property to the sewer system. *Id*. at 807. The court in that case reasoned:

> "The village ordinance requiring the sewer hookup was a matter of public knowledge, and the ordinance plainly sets out the circumstances under which property owners were required to hook up to public sewers at their expense. Plaintiffs knew the property had a septic system, and a simple review of the applicable village ordinances would have put the plaintiffs on notice that the

hookup was required." *Randels*, 243 Ill. App. 3d at 807.

The court concluded that the "defendants' failure to disclose the ordinance was an omission of law readily discoverable by plaintiffs and therefore did not violate the Consumer Fraud Act because the omission was not of a material fact." *Randels*, 243 Ill. App. 3d at 807.

¶ 40 Similarly here, the evidence presented at trial shows that Jurenci never disclosed the requirements of the Village's zoning ordinance, but nor did she make any misrepresentations about the zoning law. The plaintiff in this case never inquired about whether the zoning ordinance authorized Jurenci to operate a dog grooming and daycare business out of her residence. Like in *Randels*, the Village of Glenview's zoning ordinance (Glenview Municipal Code, § 98-133), is a matter of public knowledge. A simple review of the zoning ordinance would have revealed that Jurenci may have been improperly operating her business. Also, the location and nature of Jurenci's business was readily apparent to the plaintiff, who had been a customer for over 26 years. The evidence at trial did not show that these facts were in Jurenci's exclusive possession; rather, the evidence shows they were readily ascertainable by the plaintiff. As a result, we find that Jurenci's failure to disclose the ordinance was an omission of law readily discoverable by the plaintiff and therefore did not violate the Consumer Fraud Act. *Randels*, 243 Ill. App. 3d at 807; *Stichauf v. Cermak Road Realty*, 236 Ill. App. 3d 557 (1992); see also *City of Aurora v. Green*, 126 Ill. App. 3d 684 (1984) (false allegations by the defendant that property was properly zoned was insufficient to maintain action under the Consumer Fraud Act).

¶ 41 We also reject the plaintiff's argument that Jurenci concealed the fact that she did not have a "kennel license" from the Department of Agriculture. The Illinois Supreme Court has "repeatedly emphasized that in a consumer fraud action, the plaintiff must actually be deceived by a statement or omission. If there has been no communication with the plaintiff, there have

been no statements and no omissions. In such a situation, a plaintiff cannot prove proximate cause." *De Bouse v. Bayer*, 235 Ill. 2d 544, 555 (2009). In this case, the plaintiff presented no evidence at trial that she communicated with Jurenci regarding any kennel license and, therefore, cannot establish proximate cause. Nor did the evidence show that Jurenci knew and actively concealed the fact that she was required to obtain a kennel license. *Cf. Connick*, 174 Ill. 2d at 505 (the plaintiffs alleged that the defendant knew that a vehicle had a tendency to "rollover" but never disclosed this information to consumers in its advertising). Thus, the plaintiff failed to present some evidence at trial that Jurenci concealed material facts.

¶ 42 Accordingly, the plaintiff failed to present some evidence to establish a *prima facie* case under the Consumer Fraud Act and the trial court correctly entered a directed finding in Jurenci's favor on count III.

¶ 43 Next, the plaintiff challenges the trial court's entry of a directed finding in Jurenci's favor on count II, alleging breach of bailment.

¶ 44 A bailment is the delivery of personal property for the accomplishment of some purpose, upon a contract, express or implied, that after the purpose has been fulfilled, the property shall be returned to the bailor. *Wausau Insurance Co. v. All Chicagoland Moving & Storage Co.*, 333 Ill. App. 3d 1116, 1121 (2002). The elements necessary to sustain an action for a bailment include (1) an agreement, either express or implied, to create a bailment; (2) delivery of the property in good condition; (3) acceptance of the property by the bailee; and (4) failure by the bailee to return the property or the bailee's return of the property in a damaged condition. *Tucker v. Soy Capital Bank & Trust Co.*, 2012 IL App (1st) 103303, ¶ 56 (citing *American Ambassador Casualty Co. v. Jackson*, 295 Ill. App. 3d 485, 490 (1998)). With respect to bailments for mutual benefit, generally, the bailee will be liable for losses that are proximately the result of the bailee's

own negligence. 19 Williston on Contracts § 53:5, at 22 (2001); *Brousseau v. Rosenthal*, 443 N.Y.S.2d 285, 285-86 (1980) (boarding a pet at a kennel constitutes a bailment for mutual benefit).

¶ 45 When a plaintiff has established a *prima facie* case, a rebuttable presumption that the defendant acted negligently arises. *Wausau Insurance Co.*, 333 Ill. App. 3d at 1121. The policy that affords the bailor the benefit of the presumption of negligence recognizes that the facts and proof surrounding the property's loss are peculiarly within the knowledge and control of the bailee. Thus, the burden shifts to the defendant-bailee who must present sufficient evidence to support a finding that the presumed fact did not exist and that the defendant was free from fault. *American Ambassador Casualty Co.*, 295 Ill. App. 3d at 490.

¶ 46 If the defendant rebuts the presumption of negligence, the plaintiff must offer evidence sufficient to sustain its negligence action as if the presumption did not exist. *Wright v. Autohaus Fortense, Inc.*, 129 Ill. App. 3d 422, 426 (1984). The plaintiff must establish that the defendant failed to exercise the necessary degree of care; the question is "whether the bailee's conduct was reasonable under the circumstances." *Id*. at 426.

¶ 47 In this case, the evidence adduced at trial shows that in exchange for $65, Jurenci agreed to groom Lavan. On October 10, 2012, at approximately 8:45 a.m., the plaintiff delivered her healthy, eight-year-old dog, Lavan, for grooming at Jurenci's residence. Jurenci testified that she accepted the dog and put him in a grooming stall. Around 10 a.m., Jurenci called the plaintiff and informed her that Lavan was attacked and killed by another dog. Under the facts of this case, we find that the plaintiff presented some evidence to prove the existence of a bailment for mutual benefit and Jurenci's failure to return the bailed dog presumptively establishes her negligence.

¶ 48 Accordingly, the burden shifted to Jurenci to prove, by a preponderance of the evidence, that she exercised ordinary care and the loss of Lavan occurred without negligence on her part. The question of whether Jurenci, as bailee, exercised reasonable care under the circumstances is generally a question of fact. *All Chicagoland Moving & Storage Co.*, 333 Ill. App. 3d at 1121. The trial court, as a matter of law, was required to move to the second step of the directed finding analysis and weigh the totality of the evidence presented, including evidence that is favorable to Jurenci, and decide whether it rebutts the presumption of negligence.

¶ 49 As discussed above, Jurenci's unrebutted testimony shows that the loss of Lavan occurred when an unknown dog escaped from his owner's car, raced toward Lavan, and attacked him while he was on a leash with Jurenci. During the attack, Jurenci did everything she was expected to do to stop the attack—she naturally attempted to protect Lavan by pushing and hitting the unknown dog. Since Jurenci did not recognize the dog, she had no way of knowing whether its presence exposed Lavan to a risk greater than he experienced normally in his daily life. Based on these facts, we do not believe that the trial court's determination that the loss of Lavan occurred without negligence on Jurenci's part, was unreasonable, arbitrary, or without basis in the evidence presented. See *Prodromos v. Everen Securities, Inc.*, 389 Ill. App. 3d 157, 170-71 (2009).

¶ 50 We, therefore, conclude that the trial court's directed finding in Jurenci's favor on count II was not against the manifest weight of the evidence.

¶ 51 Lastly, the plaintiff argues that the trial court erred by dismissing counts II and IV of her original complaint which alleged fraudulent misrepresentation and conversion.

¶ 52 Before proceeding to the merits, however, we must address our jurisdiction. A reviewing court has a duty to ascertain its jurisdiction before proceeding in a cause of action and must

dismiss the appeal if the court lacks jurisdiction. *Lebron v. Gottlieb Memorial Hospital*, 237 Ill.2d 217, 251-52 (2010).

¶ 53 Illinois Supreme Court Rule 303(b)(2) (eff. May 30, 2008) provides that a notice of appeal "shall specify the judgment or part thereof or other orders appealed from." A notice of appeal serves two functions: (1) it vests this court with jurisdiction and (2) informs the prevailing party that the losing party is seeking review by a higher court. *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, 144 Ill. 2d 178, 188 (1991). Although we liberally construe the contents of a notice of appeal and will not consider "[m]ere technical defects in form," (*id*. at 189) the notice must "fairly and accurately advise the successful party of the nature of the appeal." (Internal quotation marks omitted.) *In re F.S.*, 347 Ill. App. 3d 55, 71 (2004).

¶ 54 The plaintiff's notice of appeal specified that the appeal was being taken from the trial court's order of August 20, 2014, which granted Jurenci's motion for a directed finding. The plaintiff's notice of appeal fails to mention the court's written order of June 14, 2013, which granted Jurenci's motion to dismiss. This was more than a mere defect in form. The plaintiff's notice failed to apprise Jurenci of the nature of the appeal. By now claiming that the trial court erred in dismissing counts II and IV of her original complaint, the plaintiff improperly tries to appeal a ruling from June 14, 2013, which was not raised in her notice of appeal. Consequently, this court has no jurisdiction to consider an issue not included in the plaintiff's notice of appeal.

¶ 55 For the reasons stated, we affirm the judgment of the trial court as to counts I-III, which granted a directed finding in favor of Jurenci. We lack jurisdiction to consider the trial court's dismissal of counts II and IV of the plaintiff's original complaint, which alleged fraudulent concealment and conversion.

¶ 56 Affirmed in part; dismissed in part.