

NOTICE

Decision filed 05/20/16. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2016 IL App (5th) 150295-U
NO. 5-15-0295
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

MELINDA PARK,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	St. Clair County.
)	
v.)	No. 14-SC-2576
)	
E.H. PARKER BROTHERS, LTD.,)	
d/b/a Spencer Kennel,)	Honorable
)	Ellen A. Dauber,
Defendant-Appellant.)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Goldenhersh and Moore concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's finding of negligence against the defendant is affirmed where the economic loss doctrine did not prevent the plaintiff's recovery under a theory of negligence and the defendant was negligent in its treatment and care of the plaintiff's dog while the dog was boarded at the defendant's boarding facility.

¶ 2 The defendant, E.H. Parker Brothers, Ltd., d/b/a Spencer Kennel (Spencer Kennel), appeals from the order of the circuit court of St. Clair County awarding the plaintiff, Melinda Park, \$1,225.13 for reimbursement of veterinary expenses incurred following an eight-day stay of the plaintiff's approximately three-year-old dog, Tiger, at

Spencer Kennel. For the reasons which follow, we affirm the decision of the circuit court.

¶ 3 This case commenced on September 4, 2014, when the plaintiff filed a *pro se* small claims complaint against the defendant seeking reimbursement for veterinary expenses that were incurred after the defendant boarded her dogs at Spencer Kennel for eight days. Although the defendant argues that the plaintiff presented the case as a breach of contract action, it is not clear from the complaint whether the plaintiff was seeking damages based on a theory of contract law or negligence. On April 15, 2015, a bench trial was held in the case. The plaintiff appeared *pro se*. The evidence at the trial indicated as follows. The plaintiff boarded her two dogs at Spencer Kennel for a period of eight days over the 2014 Fourth of July holiday while she was on vacation. This was the first time the plaintiff had used the services of Spencer Kennel. The plaintiff signed a boarding contract with Spencer Kennel when she dropped her dogs off for boarding, which attested to the fact that the dogs were in good health and gave permission for the kennel to administer medication or other advisable attention or call a veterinarian if the dogs became injured or ill.

¶ 4 On Sunday, July 6, the plaintiff returned early from her vacation and contacted Spencer Kennel to inquire about picking up her dogs that day. Although Spencer Kennel did not normally have pick-up hours on Sunday, an exception was made for the plaintiff because there had been a problem with Tiger's eyes during his stay. The plaintiff was informed that Tiger's eyes had been matted shut with discharge and there had been "such a struggle" when they had attempted to wash out his eyes.

¶ 5 That same day, the plaintiff picked up Tiger and immediately noticed that his right eye was swollen and turning gray. The owner of Spencer Kennel, Michelle Parker, told the plaintiff that Tiger's eye was infected and had been matted shut and they had attempted to treat the condition with Terramycin, an over-the-counter antibiotic ointment. The plaintiff acknowledged that Tiger had previously been diagnosed with dry eye syndrome by a veterinarian at Four Paws Animal Hospital and the veterinarian had prescribed prescription eye drops to help alleviate the condition. Although the plaintiff was told to give the eye drops for the rest of Tiger's life, she was no longer giving him the drops at the time that she dropped him off for boarding because he had a reaction to them. She explained that the veterinarian told her to stop giving Tiger the eye drops when she reported Tiger's reaction to the treatment. She believed that Four Paws was trying to make money by prescribing the eye drops for life and that there was not anything wrong with Tiger's eyes.

¶ 6 The plaintiff explained that Tiger was not displaying any symptoms of dry eye syndrome or any other issues with his eyes when she dropped him off at the boarding facility. She did not tell any of the Spencer Kennel employees that Tiger had previously been prescribed eye drops or that he had any problems with his eyes. She acknowledged that the boarding contract that she signed with Spencer Kennel stated that Tiger was in good health. She explained that she did not inform them about Tiger's eye condition because he was fine without the eye drops.

¶ 7 Later that night, the plaintiff noticed that Tiger's eye had started to bleed, that he had a bloody stool, and that he was resisting any kind of human contact, which was

unusual. Because the eye continued to worsen, the plaintiff took Tiger to Dr. Goss at the Animal Hospital in O'Fallon, Illinois, the following day. According to the summary of care introduced into evidence by the plaintiff, Dr. Goss reported that Tiger's eyes were extremely matted with "exudates," that the tissue around the right eye was swollen, and that the "globe was clearly ruptured with iris protruding." Dr. Goss notified the plaintiff that the eye would most likely need to be removed, but that a specialist may be able to offer other options. After speaking with an ophthalmologist, it was confirmed that the eye would need to be removed.

¶ 8 The plaintiff decided to move forward with the eye-removal surgery and, in preparation for the surgery, Dr. Goss drew blood from Tiger's neck on July 8, 2014. The plaintiff reported that Tiger's head and neck were swollen. On July 10, Dr. Goss performed the surgery, noting that the swelling around Tiger's head had "somewhat reduced." During the surgery, it was discovered that Tiger had a full-thickness laceration of approximately one centimeter in length in his upper right eyelid. Dr. Goss opined that the laceration along with the swelling indicated that the cause of the rupture was some kind of trauma. Dr. Goss indicated that the exact nature of the trauma could not be determined from observation.

¶ 9 The plaintiff testified that the laceration could not be seen before the surgery because Tiger's hair was covering the wound. Once the hair around his right eye was shaved, the laceration was discovered. The plaintiff testified that Dr. Goss speculated that an employee of Spencer Kennel had been holding Tiger's neck so tightly when attempting to administer the eye drops that Tiger's eye "popped out" and then they had

attempted to put it back in the socket. The plaintiff requested reimbursement for the veterinarian expenses and a refund for the cost of the boarding. The plaintiff introduced into evidence Tiger's medical bills relating to the eye surgery, which she had already paid in full.

¶ 10 Curtis Pierce, the kennel manager at Spencer Kennels, testified that he checked in Tiger when the plaintiff dropped him off for boarding. He described the check-in procedure for new customers as follows: verification of customer's information; filling out of the pet information form and the kennel card by the customer, which gives the kennel basic information regarding the animals that are being boarded and contact information for the customer; and signing of the boarding contract by the customer, indicating that by signing the agreement, the customer has disclosed any medical issues with the dogs and whether any medications may need to be given. Curtis testified that the plaintiff indicated that Tiger did not have any medical issues and was not on any medication.

¶ 11 Curtis explained that while being boarded, the plaintiff's dogs were housed in their own individual pen with their own run. On approximately the third day of the stay, Curtis noticed that Tiger's eye was completely matted shut with discharge. He notified his boss, Michelle Parker, and they attempted to clean out the eye. They initially used a warm compress, but when that was unsuccessful, they took Tiger to the bath area and sprayed some water on his eye. They were able to loosen up the discharge in the eye and wipe it out. After cleaning out the eye, they applied Terramycin ointment for the inflammation and redness.

¶ 12 Curtis explained that this procedure had been used many times in the past for other boarded dogs. They continued this course of treatment every morning and evening until the plaintiff picked up Tiger. Curtis described Tiger as weighing approximately eight pounds and being eight to nine inches tall. Curtis indicated that he has experience dealing with dogs that resist handling and treatment. When a dog is resistant to treatment, he handles the dog in a particular way to avoid any injury to the dog's neck, *i.e.*, one person places one arm underneath the dog's belly and the other arm over the side of the back to keep the dog "from wiggling" while the second person puts ointment on their finger or the ointment applicator and places it in the corner crease of the eye, rubbing and spreading the ointment out.

¶ 13 Curtis did not observe a puncture wound over Tiger's eye. He acknowledged that the last time that he observed Tiger, the eye was inflamed, red, swollen, and "oozing." However, he did not observe the "grayish appearance" that was noticed by the plaintiff. He explained that the kennel will call a veterinarian for boarded dogs when the dog is in severe pain or if there is a life-threatening injury. However, he did not believe that Tiger's eye condition was life-threatening. He explained as follows: "I've seen this many, many times so we just assumed it was, you know, eye gunk, we see it with allergies, we see it with inflammation. And the way we treat it is the way we've treated many, many, many dogs prior to that." He explained that he did not contact the plaintiff about the situation because the boarding contract gives the kennel "full permission to take care of the dog as [they] see fit."

¶ 14 Michelle Parker, the owner of Spencer Kennel, testified that they removed Tiger from his kennel to begin treatment once they noticed that his eyes were matted shut. She testified that Tiger did not have a puncture wound when he left her facility. She explained that puncture wounds are noticeable on a dog, even one with long hair, because there would be blood and the wound often opens up the skin.

¶ 15 Michelle explained that she was the last employee to see Tiger when he left the kennel. She acknowledged that Tiger "looked rough" when the plaintiff picked him up as they had just finished cleaning out his eye. She explained that Tiger's eye discharge was constant and that they had to clean out his eye numerous times during the day. She testified that the kennel has multiple boarders that have been diagnosed with dry eye syndrome and that they had treated the condition on multiple occasions. She explained that the treatment depended on the dog, but that it could be anywhere from over-the-counter dry eye drops to prescription eye drops. Michelle believed that Tiger's condition required prescription eye drops and they did not have the prescription medication at the facility and it was not available to her as the plaintiff was out of town. She acknowledged that they could have taken Tiger to the veterinarian and gotten prescription eye drops if it had been an emergency, but she did not believe that the situation was an emergency as the eye was not gray when Tiger left the facility. She explained that Tiger would have been taken to the veterinarian if she had believed that his condition was life-threatening.

¶ 16 Michelle testified that the plaintiff contacted her after Tiger was taken to the veterinarian. The plaintiff informed Michelle that Tiger had a swollen neck. Thereafter,

Michelle contacted O'Fallon Pet Hospital and requested the X-rays in regard to the swollen neck. She was told by Dr. Goss that there were no X-rays because they did not believe that it was necessary to take X-rays.

¶ 17 Following the testimony, the trial court entered an order finding in favor of the plaintiff and against Spencer Kennel. The court concluded that the plaintiff had proven that Spencer Kennel was negligent in its treatment and care of Tiger. The court found that the testimony was uncontradicted that Tiger was fine upon admission to the kennel, but that his eyes, especially the right eye, was matted and inflamed when the plaintiff picked him up at the kennel approximately one week later. The court noted that the plaintiff had testified that Tiger's eye was also gray and bulging, which was shown in the pictures that the plaintiff introduced as evidence. Although Spencer Kennel's witnesses denied this, the court found the plaintiff's testimony to be credible.

¶ 18 The trial court further noted that the plaintiff had presented a statement from the veterinarian who had treated Tiger indicating that he believed Tiger's injuries were due to trauma, not untreated dry eye syndrome. The court concluded that Spencer Kennel should have taken Tiger to the veterinarian or notified the plaintiff of Tiger's eye condition before it got as "bad as it was" when the plaintiff picked him up on Sunday. The court noted that Spencer Kennel was aware that Tiger had an eye issue soon after he came to the kennel and that they had treated it, as they had a right to do under the contract, but failed to call the plaintiff or a veterinarian when the eye continued to worsen. Furthermore, the court noted that the defendant argued that Tiger had untreated dry eye syndrome, but did not present any evidence that untreated dry eye syndrome

would lead to a ruptured globe with protruding iris and a full-thickness laceration to the dog's eyelid. Thus, the court entered judgment in favor of the plaintiff in the amount of \$1,057.13, which represented reimbursement for veterinarian expenses, plus court costs of \$168, totaling \$1,225.13. The defendant appeals.

¶ 19 Initially, the defendant argues that the economic loss doctrine prohibited the plaintiff from recovering purely economic damages, *i.e.*, reimbursement of the veterinary expenses, on a theory of negligence. In support of this position, the defendant cites Illinois Supreme Court case *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill. 2d 69, 86 (1982), which held that a plaintiff cannot recover for solely economic loss under a negligence theory. The defendant argues that the plaintiff's damages consisted solely of economic losses from diminished commercial expectations and that the trial court's finding in favor of the plaintiff based on negligence was in error. The defendant argues that the only way that the plaintiff can recover from solely economic losses based on diminished commercial expectations is by bringing her suit as a breach of contract action. Thus, the defendant argues that the plaintiff cannot recover any of her alleged contract damages under a theory of negligence.

¶ 20 In *Moorman*, 91 Ill. 2d at 86, 91, our supreme court adopted the economic loss doctrine, and held that a products liability plaintiff could not recover solely economic loss under the tort theories of strict liability, negligence, and innocent misrepresentation. Instead, the court held that the plaintiff had to pursue its remedies under a theory of contract. *Id.* at 86. According to *Moorman*, "[t]ort theory is appropriately suited for personal injury or property damage resulting from a sudden or dangerous occurrence"

while the "remedy for economic loss, loss relating to a purchaser's disappointed expectations due to deterioration, internal breakdown or nonaccidental cause, on the other hand, lies in contract." *Id.* The court described "economic loss" as damages for inadequate value, costs of repair and replacement of a defective product, or consequent loss of profits without any claim of personal injury or damage to other property. *Id.* at 82. Furthermore, the court noted that an economic loss can also be expressed as the diminution in the value of the product because it is inferior in quality. *Id.*

¶ 21 Thereafter, in *Anderson Electric, Inc. v. Ledbetter Erection Corp.*, 115 Ill. 2d 146, 153 (1986), the supreme court extended the economic loss doctrine to the provision of services contract. The economic loss doctrine is applicable to the service industry where the duty of the party performing the service is defined by the contract that he executes with the client. *Congregation of the Passion, Holy Cross Province v. Touche Ross & Co.*, 159 Ill. 2d 137, 162 (1994). The economic loss doctrine does not prohibit recovery in tort for the negligent breach of a duty where the duty arises outside of the contract. *Id.*

¶ 22 However, in order to recover pure economic loss under a negligence theory, the plaintiff must show harm above and beyond disappointed expectations. *Mars, Inc. v. Heritage Builders of Effingham, Inc.*, 327 Ill. App. 3d 346, 351 (2002). "[T]he economic-loss rule is founded on the theory that parties to a contract may allocate their risks by agreement and do not need the special protections of tort law to recover damages caused by a breach of contract." *Id.* This policy originates from the theory that tort law affords a remedy for losses related to personal injuries or damages to one's property while

contract law offers the appropriate remedy for economic losses related to diminished commercial expectations, which are not coupled with injury to person or property. *Id.*

¶ 23 *In re Chicago Flood Litigation*, 176 Ill. 2d 179 (1997), (provides an example of an economic loss that is above and beyond a plaintiff's commercial expectations. 176 Ill. 2d 179 (1997). In *Chicago Flood Litigation*, our supreme court concluded that the economic loss rule did not bar recovery in tort for plaintiffs who lost perishable inventory as a result of interrupted electrical service, finding that such a loss is above and beyond plaintiffs' disappointed commercial expectation in continuous electrical service. *Id.* at 202.

¶ 24 We decline to extend the economic loss doctrine to the particular circumstances of the present case as we find that the plaintiff's harm did not fall within the definition of economic loss as set forth by *Moorman* for the purposes of the economic loss doctrine. This is not a case where the plaintiff is claiming damages for inadequate value, cost of repair and replacement of a defective product, consequent loss of profits without any claim of personal injury or damages to other property, or the diminution in the value of a product because it is inferior in quality. The service provided by the defendant was boarding and daily care of the plaintiff's dogs while she was out of town on vacation. During this stay, the employees at the kennel administered medication and determined a course of treatment for an issue suffered by Tiger. As a result of the kennel's action in providing treatment to Tiger without contacting either the plaintiff or a veterinarian when the condition worsened, the plaintiff suffered damage to her personal property, *i.e.*, her dog.

¶ 25 Although we acknowledge that the defendant's duty to the plaintiff was defined by the contract, we further conclude that the plaintiff's harm, if purely economic loss as defined by *Moorman*, was above and beyond her disappointed commercial expectations. The contract provided for the possibility of the kennel calling the plaintiff or a veterinarian if the plaintiff's dogs became injured or ill. Thus, in a situation where a dog becomes ill or injured while being boarded and the treatment plan determined by the kennel is not correcting the condition, a plaintiff would have a reasonable expectation that the kennel would contact either the plaintiff or a veterinarian in order to prevent the condition from worsening and resulting in more damage.

¶ 26 Because Spencer Kennel failed to notify the plaintiff or the veterinarian about Tiger's eye condition, the plaintiff was unable to seek veterinarian care for Tiger until she returned from vacation. As a result of the kennel's actions, the plaintiff suffered damage to her property, *i.e.*, the loss of Tiger's eye, and had to pay the veterinarian bills for the eye-removal surgery. We find that this harm was above and beyond her commercial expectations in boarding her dogs at Spencer Kennel. Thus, we do not find that this particular situation falls within the purview of the economic loss doctrine. Because we find that the economic loss doctrine does not bar the plaintiff's negligence claim against Spencer Kennel, we conclude that the plaintiff can recover for reimbursement of her veterinarian expenses if she has established that the defendant acted negligently.

¶ 27 Thus, we now turn to whether the trial court's finding of negligence was against the manifest weight of the evidence. The plaintiff must establish the following essential elements to prevail on a negligence claim: the defendant owed a duty; the defendant

breached that duty; and the defendant's breach was the proximate cause of injury to the plaintiff. *Suchy v. City of Geneva*, 2014 IL App (2d) 130367, ¶ 20. There can be no recovery for negligence unless a duty is owed. *Id.* The existence of a duty is a question of law to be determined by the trial court and is subject to *de novo* review by the reviewing court. *Ward v. K mart Corp.*, 136 Ill. 2d 132, 140 (1990); *Suchy*, 2014 IL App (2d) 130367, ¶ 19. The inquiry as to whether the law will impose an obligation of reasonable conduct on a defendant for the benefit of a plaintiff depends on the nature of their relationship. *Bezanis v. Fox Waterway Agency*, 2012 IL App (2d) 100948, ¶ 14. The following factors have been identified as relevant to the determination of the existence of a duty: (1) the reasonable foreseeability of the injury; (2) the likelihood of injury; (3) the magnitude of the burden of guarding against the injury; and (4) the consequences of placing the burden on defendant. *Ward*, 136 Ill. 2d at 140. A duty sufficient to support liability in tort may be supported by the existence of a contractual obligation undertaken by a defendant. *Kurtz v. Wright Garage Corp.*, 262 Ill. App. 3d 1103, 1107 (1994).

¶ 28 In the present case, the plaintiff signed the defendant's boarding contract, which stated as follows:

"All dogs are boarded and/or daily cared for by Spencer Kennel, its owners, staff or volunteers, without liability on their part for loss or damage from diseases, death, running away, theft, fire, injury to persons, other dogs or property by said dog, or other unavoidable causes, due diligence and care having been exercised. I understand that I am solely financially responsible for any damage or harm caused

by my dog(s) while under the care of Spencer Kennel. I agree that in admitting my dog(s) to Spencer Kennel, they have relied on my representation that my dog(s) are in good health, and have not harmed or shown aggressive or threatening behavior towards any person or any other dog. If my dog becomes injured or ill, Spencer Kennel shall have the right to call a Veterinarian, as designated below, or to call a Veterinarian of their choice: or administer medication or give other advisable attention, or within their discretion and judgment, and such expenses, being reasonable in amount shall be paid promptly by me, the owner of the dog."

¶29 The plaintiff entrusted Spencer Kennel with the care of her dogs while on vacation. She testified that the dogs were both in good health when she dropped them off for boarding, a fact that was uncontradicted. Although Tiger had been diagnosed with dry eye syndrome, he was not experiencing any symptoms when the plaintiff dropped him off for boarding. On the third day of an eight-day stay, an employee of Spencer Kennel noticed a problem with Tiger's eyes and treatment was started immediately. Without knowing the cause of the eye condition, employees administered medication to help alleviate the problem, an action that was permissible under the boarding contract. However, the treatment plan did not correct the condition, and Tiger's eyes, especially his right eye, continued to worsen during the stay. Despite the fact that the eye condition continued to worsen, the kennel did not notify the plaintiff nor did it contact a veterinarian as they were allowed to do under the boarding contract. Instead, they continued with their current plan of treatment, assuming that it was "eye gunk" associated with allergies or inflammation.

¶ 30 When the plaintiff picked Tiger up, approximately one week later, she observed that Tiger's right eye was gray and bulging, a fact that the trial court found was supported by the pictures that the plaintiff introduced into evidence. The defendant's witness acknowledged that Tiger looked rough when the plaintiff picked him up, but denied that the eye was gray and bulging. However, the trial court found the plaintiff's testimony credible and we give great deference to the trial court's credibility determinations. See *People v. Frazier*, 248 Ill. App. 3d 6, 13 (1993) (we give great deference to a trial court's credibility determination because the trial court is in the best position to observe the witnesses' credibility, determine the weight to be accorded their testimony, decide the inferences to be drawn from the evidence, and resolve any conflicts in the evidence).

¶ 31 During eye-removal surgery, it was discovered that Tiger suffered from a ruptured globe with protruding iris and a full-thickness laceration to his eyelid. An injury that, according to the veterinarian, was caused by trauma, not untreated dry eye syndrome. The defendant did not present any evidence that the injury was caused by dry eye syndrome. Pursuant to the boarding contract, Spencer Kennel had a duty to act with due diligence and care while Tiger was housed within their boarding facility. Based on the record and the trial court's credibility determinations, we find that Spencer Kennel breached this duty of care.

¶ 32 We have concluded that the defendant had a duty to the plaintiff and had breached that duty, thus, the next issue is whether the defendant's breach was the proximate cause of injury. Proximate cause is established where the injury occurs through a natural and continuous sequence of events unbroken by any effective intervening cause. *Smith v.*

Armor Plus Co., 248 Ill. App. 3d 831, 840 (1993). There may be more than one proximate cause for an injury, and a defendant may be liable even if his negligence is not the sole proximate cause of the plaintiff's injuries. *Id.* In order to establish that a defendant's negligence proximately caused a plaintiff's injury, the following two prongs must be proven: (1) whether the defendant's negligence was the cause in fact of the injury; and (2) whether the defendant's negligence was sufficiently closely connected with the injury so that, given consideration of justice or policy, the defendant should be held liable for the injury. *Id.* The plaintiff must prove both prongs to satisfy the proximate-cause element. *Id.*

¶33 In the present case, the defendant argues that the plaintiff has failed to establish the proximate-cause element of negligence in that she "virtually admitted" that the defendant could not be liable for Tiger's lacerated eyelid when she testified that the laceration was not discovered until three days after Tiger had been boarded at Spencer Kennel due to the hair covering the wound. Thus, the defendant argues that the plaintiff has relieved Spencer Kennel of any liability for not noticing the laceration. Notwithstanding the fact that Tiger's hair was covering the laceration, Spencer Kennel was aware that there was a problem with Tiger's eye on the third day of his stay. The plaintiff testified that there was nothing wrong with Tiger's eyes when she dropped him off for boarding, but that when she picked him up, his right eye was swollen and turning gray. Instead of calling the plaintiff or a veterinarian, the kennel continued with that course of treatment even though the problem continued to worsen and it was a "struggle" to clean out Tiger's eyes. The veterinarian who performed the eye-removal surgery

indicated that Tiger suffered from a laceration on his eyelid, which was caused by trauma. The trial court found the plaintiff's testimony credible, and as we have previously explained, we give great deference to a trial court's credibility determination. Thus, we conclude that the plaintiff has proven the proximate-cause element of negligence. Accordingly, the trial court's finding that the defendant was negligent was not against the manifest weight of the evidence. See *Apcon Corp. v. Dunn*, 204 Ill. App. 3d 865, 868 (1990) (where a trial court, sitting without a jury, makes a finding of negligence in favor for a plaintiff, such a finding will not be overturned unless it is against the manifest weight of the evidence).

¶ 34 For the foregoing reasons the judgment of the circuit court of St. Clair County is hereby affirmed.

¶ 35 Affirmed.