

2018 IL App (2d) 170854-U
No. 2-17-0854
Order entered July 13, 2018

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

GERRI KOTAS,)	Appeal from the Circuit Court
)	of Du Page County.
Plaintiff-Appellant,)	
)	
v.)	No. 13-L-1096
)	
EDWARD PEKALA, SANDRA PEKALA,)	
HALEY PEKALA, and MICHAEL KOTAS,)	
)	
Defendants)	Honorable
)	Ronald D. Sutter,
(Haley Pekala, Defendant-Appellee).)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* Where plaintiff failed to present sufficient evidence that defendant exercised care, control or custody of a dog, the jury's verdict in favor of defendant was not against the manifest weight of the evidence; circuit court affirmed.

¶ 2 Plaintiff, Gerri Kotas, filed a two-count amended complaint in the circuit court of Du Page County against defendants, Haley Pekala and her parents, Edward Pekala and Sandra Pekala, seeking recovery for personal injuries allegedly sustained when plaintiff was attacked in her home by a dog. The first count alleged liability under section 16 of the Illinois Animal

Control Act (Act) (510 ILCS 5/16 (West 2014)), and the second count alleged common-law negligence. Haley filed a complaint against plaintiff's husband, Michael Kotas, Sr., seeking contribution. Haley filed an affirmative defense of contributory negligence alleging that plaintiff breached her duty to exercise ordinary and reasonable care for her own safety by provoking the dog in attempting break up a dog fight and by failing to remove the dog when she knew he had been aggressive in the past.

¶ 3 The trial court dismissed Haley's parents from the proceedings. The matter proceeded to a jury trial against Haley (hereinafter, defendant) and third-party defendant, Michael Kotas, Sr. The trial court entered judgment on the jury's verdict in favor of Haley on both counts. On appeal, plaintiff seeks a new trial essentially contending that the verdict was against the manifest weight of the evidence and that the trial court erred by failing to give certain jury instructions tendered to the trial court. We affirm.

¶ 4 I. BACKGROUND

¶ 5 The following facts are taken from the testimony provided at trial.

¶ 6 Defendant testified as follows. In February 2010, defendant obtained a pit bull puppy and brought it to her parent's house where she lived with her boyfriend, Michael Kotas, Jr. Both defendant and Kotas, Jr. cared for the dog; they walked him, fed him, took him to the vet, and paid for his food and treats. Defendant took the dog, whose name was "Chooch," to a training class for one week. About one year later, in February 2011, and in March 2011, Chooch attacked defendant's father, Edward. Edward suffered injuries to his arm and leg requiring emergency medical treatment and physical therapy. Shortly after the second attack, defendant's parents and a police officer told defendant that she should find another home for the dog.

¶ 7 Kotas, Jr., testified as follows. Gerri and Michael, Sr., are his parents. In May 2012 Kotas, Jr., was living at the Kotas' home with his girlfriend, defendant. In May 2010 defendant

bought Chooch in Chicago for \$250. Haley brought Chooch to her parent's home, and she took care of the dog. After Chooch attacked Ed the second time, Ed and Sandra Pekala told Haley that Chooch had to be removed from their home. Haley could not find a place to live on her own, and could not find someone to take Chooch. She did not want to take the dog to a shelter. Kotas, Jr., told plaintiff that they "would like to bring the dog there so it wouldn't end up at a shelter," and plaintiff said "no." Plaintiff did not give permission to bring Chooch into her home. Haley asked Kotas, Jr., to bring Chooch to plaintiff's home even though plaintiff had not given her permission, because it was the only option.

¶ 8 Edward Pekala testified that he was attacked by Chooch on two occasions, once in the arm and once on the leg, requiring hospitalizations and surgeries, and leaving him with a slight limp.

¶ 9 About two months after Chooch attacked Edward in March 2011, Kotas, Jr., brought Chooch to plaintiff's home. Plaintiff was home at the time. Kotas, Jr., took Chooch to a bedroom and closed the door. Plaintiff did not want Chooch at her home and she "blatantly" said so, "instantly." Kotas, Jr., continued to live at the Pekala's house. "Everyday" his parents called him and asked him to remove Chooch from their home. Kotas, Jr., told Haley that plaintiff did not want Chooch at her home. When plaintiff and Kotas, Sr., were not home, Haley visited Chooch at plaintiff's home a "handful of times." Haley also took Chooch to the vet a couple of times and took him for walks. Haley did not take Chooch home and never brought him food.

¶ 10 During cross examination, Kotas, Jr., testified as follows. Chooch was not always kept in the bedroom in the Kotas' house; he was allowed free run of the house from time to time. Chooch ate food that the Kotas's bought for the other two dogs. Kotas, Sr., let Chooch out in the backyard. Haley visited Chooch five or six times. Plaintiff was attacked on May 8, 2012, and blamed Kotas, Jr., for Chooch being there.

¶ 11 Kotas, Sr., testified as follows. Plaintiff was attacked in his kitchen on May 8, 2012. Chooch was defendant's dog. At the time of the attack, he and plaintiff owned two other pit bull dogs, Chance and Diamond; they ran free in the house. Chooch was kept in a closed bedroom. Chooch did not get along with Chance and Diamond. Kotas, Jr., was not living at home. In 2010 he was "kicked out" of the house because he did not "follow the rules." Kotas Sr., did not give permission to Hale or Kotas, Jr., to bring Chooch to his home. He learned that Chooch was in Kotas, Jr.'s, bedroom when he got home from work. Kotas, Sr., did not want Chooch in his house; he knew about Chooch's attack of Edward Pekala. He told Kotas, Jr., he did not want Chooch in his home, but he did not tell Haley. Kotas, Sr., fed Chooch once a day, pet him, threw a ball to him in the backyard a "couple of times," and let him out to do his business separately from the other dogs. He did not want Chooch to interact with the other dogs. Plaintiff did not do anything for Chooch. Plaintiff called "animal control" to try to get rid of Chooch.

¶ 12 Kotas, Sr., also testified as follows. Just before the attack, he was downstairs with Chance and Diamond. Plaintiff was in the kitchen, and Chooch was on the deck because Kotas, Sr., had let him and Chance out. The pizza delivery man rang the front door, and "the dogs went nuts." Kotas, Sr., put Diamond in the laundry room and closed the door and Chance started toward the front door. Then, plaintiff screamed, "Chooch, stop, Chooch." Chance and Chooch were not fighting. Plaintiff was lying on the floor holding her leg, while Chooch was biting her. Kotas, Sr., tried to get Chooch to release his bite by punching him, kicking him, and hitting him with mop and broom handles, to no avail. Finally, Chance attacked Chooch and Chooch ran away from plaintiff. Kotas, Sr., removed his bloody wife from the kitchen. Police arrived and tased Chooch because he could not be controlled. Plaintiff was taken to the hospital where she was treated for her wounds for seven days.

¶ 13 During cross examination Kotas, Sr., testified that he took care of Chooch for at least eight or nine months. When Chooch first moved in, Kotas, Sr., allowed Chooch to integrate with Chance and Diamond. Kotas, Sr., may have recalled that plaintiff told him that she let Chooch out from time to time.

¶ 14 Plaintiff testified as follows. In May 2012 Kotas, Jr., age 22 at the time, lived with defendant. Plaintiff knew defendant because she was dating her son, Kotas, Jr., and plaintiff was “not fond of” defendant. Plaintiff came home from work one evening and Chooch was there. She was told that Haley needed a new home for Chooch because Chooch had bitten her father twice. Chooch was brought to plaintiff’s home shortly after Chooch bit Edward Pekala the second time. She never gave permission to Kotas, Jr., or defendant to bring Chooch to her home. She never agreed to take care of Chooch. Chooch stayed in Kotas, Jr.’s, bedroom.

¶ 15 Plaintiff was afraid of Chooch, and she already had two other dogs to take care of. She told Kotas, Jr., and Kotas, Sr., that she did not want Chooch in her home. She told Kotas, Jr., to tell defendant to come get Chooch. Plaintiff also called animal control and the police about Chooch. Neither animal control nor the police came to get Chooch out of plaintiff’s house. The police “didn’t know what to tell me.”

¶ 16 Plaintiff never fed Chooch, played with him, bought treats for him, or let him out in the yard, and never took Chooch to the veterinarian. Kotas, Sr., let Chooch out in the yard and fed him. Plaintiff did not remove Chooch from her home because she was afraid. Plaintiff did not let Chooch walk out the front door because there was an elementary school down the street and she did not want to put children in danger.

¶ 17 On May 8, 2012, Chooch attacked plaintiff. Plaintiff owned three other pit bulls at the time of the attack, Chance, Diamond, and a puppy named, Blue. Kotas, Jr., brought Diamond home when he was a puppy and brought Chance home “as a rescue,” and “we agreed to keep

[them].” Blue is the offspring of Diamond and Chance. Before April 7, 2012, plaintiff worked as a “food server and a bartender.” She had been employed in that manner for the last 20 to 25 years. Due to her injuries, plaintiff no longer worked; she was “on disability” due to nerve damage to her lower left leg.

¶ 18 At the time of the attack, plaintiff was in the kitchen washing dishes. Chooch was outside in the back yard. Kotas, Sr., was downstairs. The pizza deliveryman rang the doorbell, and Chooch ran past plaintiff’s leg. Chance and Diamond were on the basement landing at the top of the stairs. Plaintiff yelled, “Stop, Chooch, Chooch.” Plaintiff “didn’t want [Chooch] to interact with my other [dogs].” After plaintiff called Chooch’s name, what happened next “pretty much is a blur. [Chooch] did not stop and the next thing I remember I was on the kitchen floor. I got knocked down. *** Chooch was on my leg. Chooch bit me on my left leg, between the ankle and the calf.” At this point in the proceedings plaintiff showed the jury visible markings of the wound.

¶ 19 Plaintiff testified that as Chooch continued to bite her, she tried to get Chooch off of her and screamed for Kotas, Sr., who then tried to get Chooch away. Plaintiff testified that there was no interaction between Chooch and her dogs. There was blood all over the kitchen. Eventually paramedics arrived and took her to the hospital. Plaintiff was hospitalized for seven days; she needed surgery and physical therapy and has permanent nerve damage in her foot, requiring regular cortisone shots.

¶ 20 During cross examination, plaintiff testified that neither she nor Kotas, Sr., took Chooch to animal control or to a shelter. There was no muzzle placed on Chooch.

¶ 21 Roselle police officer Rachel Bata testified that she and plaintiff “talked about the incident that occurred that night, about trying to stop the dog from attacking the other dog and her being severely injured as a result.”

¶ 22 On September 28, 2017, the jury returned a verdict in favor of defendant on both counts. Plaintiff filed her notice of appeal on October 24, 2017.

¶ 23 II. ANALYSIS

¶ 24 Plaintiff argues on appeal that “the trial court’s finding[s] were counter to the clear and convincing evidence presented at trial and contrary to the law, that the Defendant was [(1)] not the dog’s owner at the time of the attack and was thus not guilty under the Animal Control Act, and [(2)] not negligent in her ownership of the dog or her failure to find a willing and capable owner.” Plaintiff also contends that the trial court erred by refusing certain tendered jury instructions. Plaintiff urges this court to reverse the trial court’s entry of judgment on the jury verdict and to remand for a new trial.

¶ 25 Defendant responds that plaintiff’s failure to file a posttrial motion precludes her from raising these issues on appeal. We agree. Plaintiff’s failure to file a posttrial motion following the jury trial amounted to a failure to preserve any matters for review. Section 2-1202(e) of the Code of Civil Procedure (735 ILCS 5/2-1202(e) (West 2016)) provides that a party who does not seek a new trial in her posttrial motion “waives the right to apply for a new trial, except in cases in which the jury has failed to reach a verdict.” By not filing a posttrial motion, plaintiff failed to preserve any matters for review. *Barry Mogul & Associates, Inc. v. Terrestris Development Co.*, 267 Ill. App. 3d 742, 755 (1994) (this court holding that cross appellant failed to preserve issues on appeal because he failed to file a posttrial motion after a jury trial). See also *Arient v. Shaik*, 2015 IL App (1st) 133969, ¶ 32 (holding that, in a jury case, failure to file a posttrial motion results in forfeiture).

¶ 26 Even if her claims were not forfeited, we would still affirm the judgment. We first consider plaintiff’s contention that the trial court’s finding that defendant was not the owner of

the dog pursuant to the Animal Control Act was counter to the clear and convincing evidence, and contrary to the law.

¶ 27 Plaintiff fails to recognize that the trial court made no findings here; rather, the jury reached a verdict. It is well established that when reviewing a jury verdict we may not reweigh the evidence or substitute our judgment for that of the jury. See *Snelson v. Kamm*, 204 Ill. 2d 1, 35 (2003). Indeed, we may reverse a jury verdict only if it is against the manifest weight of the evidence. See *id.* “A verdict is against the manifest weight of the evidence where the opposite conclusion is clearly evident or where the findings of the jury are unreasonable, arbitrary, and not based upon any of the evidence.” *Id.*

¶ 28 In order to recover under the Act, the plaintiff must prove four elements: ““(1) an injury caused by an *animal owned by the defendant*; (2) lack of provocation; (3) the peaceable conduct of the injured person; and (4) the presence of the injured person in a place where he has a legal right to be.’ ” (Emphasis added.) *Beggs v. Griffith*, 393 Ill. App. 3d 1050, 1054 (2009) (quoting *Meyer v. Naperville Manner, Inc.*, 262 Ill.App.3d 141, 147 (1994)).

¶ 29 Plaintiff insists that defendant was the sole owner of the dog under the Act because neither plaintiff nor her husband, Michael Kotas, Sr., accepted ownership of the dog and defendant did not relinquish ownership of the dog.

¶ 30 The Act defines “owner” as “any person having a right of property in an animal, or who keeps or harbors an animal, or who has it in his care, or acts as its custodian, or who knowingly permits a dog to remain on any premises occupied by him or her.” 510 ILCS 5/2.16 (West 2016). Thus, legal ownership, alone, is not always sufficient to impose liability under the act. See *Hayes v. Adams*, 2013 IL App (2d) 120681, ¶ 20, and *Papesh v. Matesevac*, 223 Ill. App. 3d 189, 192 (1991). In *Hayes*, we held that the defendant who was the legal owner of a dog that bit the plaintiff was not the owner under the Act because the dog was not in defendant’s care,

custody, or control at the time of the injury. *Hayes*, 2013, IL App (2d) 120681 ¶ 17. We explained that at the time of the injury the defendant was not in a position to control the dog or prevent the injury. *Id.* ¶ 20. Similarly, in *Papesh v. Matesevac*, 223 Ill. App. 3d 189, 192 (1991), the appellate court held that the defendant, who was the legal owner of a dog, was not liable for a dog bite because the dog no longer lived in the defendant's home. The defendant bought the dog for her son, who lived with his father. The appellate court held that the defendant was not the owner under the Act, stating that the Act "contemplates some level of care, control, or custody." *Id.*

¶ 31 Here, the evidence revealed little evidence that, at the time of the attack, defendant exercised sufficient care, control, or custody of Chooch. Although defendant purchased or obtained the dog in 2010, at the time of the attack, the dog lived at plaintiff's home. Further, plaintiff's husband fed the dog, let the dog out in their backyard, and occasionally pet and played with the dog. Indeed, the dog lived at plaintiff's home for eight to nine months prior to the attack. In light of these facts, the jury's finding in favor of defendant was not against the manifest weight of the evidence regarding plaintiff's count under the Act.

¶ 32 Plaintiff cites *Steinberg v. Petta*, 114 Ill. 2d 496 (1986), to support her argument. In *Steinberg* our supreme court held that an absentee landlord was not an owner under the Act of his tenants' dog because "he did not have the tenants' dog in his care, custody, or control." *Id.* at 502. Thus, *Steinberg* supports defendant in this case, because nothing indicates that defendant had the dog in her care, custody or control at the time of the injury.

¶ 33 Next, plaintiff attacks the jury's verdict regarding her negligence count.¹ To succeed in a negligence action, the plaintiff must prove: (1) the defendant owed a duty of care, (2) the

¹ We note plaintiff argues that "the trial court's finding that the Defendant was not negligent ***

defendant breached that duty, and (3) the plaintiff's resulting injury was proximately caused by the breach. *Stanphill v. Ortberg*, 2017 IL App (2d) 161086 ¶ 30. Plaintiff argues, in part, that defendant, as the dog's owner, breached her duty to plaintiff in numerous ways. However, plaintiff presents no evidence of error by the trial court or any erroneous basis for the jury's decision. There were no special interrogatories and, therefore, it is not possible to determine how the jury reached its verdict in favor of defendant. The jury listened to the evidence and used its best judgment to determine where the truth could be found. See *Snelson*, 204 Ill. 2d at 36. The jury found in favor of defendant and against plaintiff, and we will not usurp the jury's function to substitute our judgment on questions of fact fairly submitted, tried, and determined from the evidence. *Id.* Accordingly, we hold that the jury's verdict was not against the manifest weight of the evidence.

¶ 34 Finally, plaintiff argues that the trial court refused her jury instructions regarding consent and acceptance.

¶ 35 The decision to give or deny a jury instruction is within the trial court's discretion, and a new trial should not be granted unless a party's right to a fair trial has been seriously prejudiced. *Frank v. Edward Hines Lumber Co.*, 327 Ill. App. 3d 113, 119 (2001 (citing *Carey v. J.R. Lazzara, Inc.*, 277 Ill. App. 3d 902, 906 (1996))). "The standard for determining whether a trial court abused its discretion in giving or refusing a jury instruction is whether, taken as a whole, the instructions fully, fairly and comprehensively informed the jury of the relevant legal principles." *Id.* (quoting *Carey*, 277 Ill. App. 3d at 906).

was counter to the clear and convincing evidence presented at trial, and contrary to the law." However, we will discuss this issue as if plaintiff provided the correct standard of review for a jury trial.

¶ 36 Here, plaintiff argues that the trial court erred by failing to give a modified version of Illinois Pattern Jury Instructions, Civil, No. 105.05 (2014) (hereinafter IPI Civil No. 105.05). Plaintiff's modified version provided, in part:

“Before an owner of a dog may give the duties associated with dog owner ship to another, the consent of the other individual to accept the dog and its associated duties must be obtained.”

Plaintiff also contends that the trial court erred by failing to give a modified version of IPI Crim. No. 11.63A, providing: “The word ‘consent’ means a freely given agreement to the act or event in question.”

¶ 37 Plaintiff's proposed jury instructions failed to inform the jury of any relevant legal principles involved in this case. IPI Civil No. 105.05 concerns medical malpractice and the lack of informed consent. Plaintiff contends that these instructions were applicable because each was designed to instruct the jury that one cannot pass a legal responsibility, liability, or duty off on another party without that party's consent. However, neither consent to a battery, nor consent of any kind was a relevant legal issue in this case. Thus, the trial court did not abuse its discretion by failing to give plaintiff's instructions to the jury.

¶ 38

III. CONCLUSION

¶ 39 For the reasons stated, we affirm the trial court's order.

¶ 40 Affirmed.