2012 IL App (1st) 122798-U

FOURTH DIVISION
May 23, 2013

No. 1-12-2798

IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SHOU FANG LIN, as Mother and Next Friend of ERIC ZHEUNG, a minor,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant,	)	No. 09L1799
v.	)	
JUNHANG AN LI and GUISHI LI, the OWNERS and Controllers of the Dog,	)	The Honorable Richard Elrod, Judge Presiding.
Defendants-Appellees.	)	

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Lavin and Justice Epstein concurred in the judgment.

Held: Plaintiff appeals from a judgment in favor of defendants, but fails to provide an adequate record on appeal from which this court can review her claimed errors. The judgment of the circuit court of Cook County is affirmed.

¶ 1 ORDER

¶ 2 Appellant Shou Fang Lin, mother and next friend of Eric Zheung, a minor, appeals from a judgment following a jury verdict in favor of appellees Junhang An Li and Guishi Li (the Lis)

after Lin brought suit against the Lis to recover damages for injuries Eric sustained when the Lis' dog bit him. On appeal, Lin challenges the circuit court's denial of her motion for a directed verdict, as well as the circuit court's denial of her motion for judgment notwithstanding the verdict. We conclude herein that Lin has failed to provide an adequate record on appeal to review her alleged errors and, accordingly, we affirm the judgment of the circuit court.

¶ 3 I. BACKGROUND

¶ 4 The record on appeal discloses the following uncontested facts: In October 2008, four year old Eric was walking with his uncle, Daoyin Huang, and Huang's small dog. Huang's dog was on a leash. Huang's dog approached a fence, behind which was a larger dog. Huang's dog stopped near the fence and, although Huang called for it to move, it remained stationary. Eric then approached Huang's dog and reached down to move it. As he did so, the larger dog bit Eric on the finger and hand. Eric and Huang were the only people to witness the incident.

¶ 5 Lin brought suit against the Lis under the Animal Control Act (510 ILCS 5/1, *et seq.* (2010)), alleging that the Lis' dog attacked Eric and Eric sustained various injuries. This Act (known as the dog-bite statute) provides, in pertinent part:

> "Sec. 16. Animal attacks or injuries. If a dog or other animal, without provocation, attacks, attempts to attack, or injures any person who is peaceably conducting himself or herself in any place where he or she may lawfully be, the owner of such dog or other animal is liable in civil damages to such person for the full amount of the injury proximately caused thereby." 510 ILCS 5/16 (West

2010).

The Lis responded, in pertinent part, that Eric provoked the dog into biting him.

¶ 6 The case proceeded to a jury trial.[1] The record on appeal contains no transcript of the trial proceedings.[2] Although there is no transcript of the trial, it appears from the briefs on appeal that Eric, his father, and his uncle Huang all testified at trial. At the close of plaintiff's evidence, Lin filed a motion for a directed verdict, arguing:

> "Now that the Court has heard all of the testimony, the Plaintiff submits that the testimony and law support only one conclusion on the issue of liability, thereby requiring a directed verdict."
>
> * * *
>
> "The entirety of the testimony in this case does [not] provide any support for the defendant to meet its burden in establishing provocation. A reasonable jury cannot conclude that a 4 year-old-child, bending down to move his own dog along, amounts to a provocation sufficient to justify an attack. The only purpose the defendant submits this defense to the jury is to confuse and shift attention from the proper determination of damages for

[1] According to appellant, the jury trial lasted three days.

[2] The appendix to appellant's brief contains copies of portions of the trial transcript wherein Eric and his father, Hui Zheung, testify.

> this vicious attack. Without legal sufficiency, the Defendant's affirmative defense fails an a directed verdict for the Plaintiff is appropriate."

The circuit court denied the motion for a directed verdict.

¶ 7 At the close of evidence, the circuit court instructed the jury, including giving Illinois Pattern Jury Instruction No. 110.04, which deals with the liability of an owner or keeper of a dog. It states as follows:

> "The law provides that the owner of an animal is liable in damages for injuries sustained from any attack or injury by the animal on a person peacefully conducting himself in a place where he may lawfully be unless that person provoked the animal.
>
> The term 'provoked' means any action or activity, whether intentional or unintentional, which would reasonably be expected to cause a normal animal in similar circumstances to react in a manner similar to that shown by the evidence." IPI Civil (2010) No. 110.04.

¶ 8 The jury returned a verdict in favor of the Lis and against Lin. On June 21, 2012, the court entered judgment on the verdict.

¶ 9 Lin appeals.

¶ 10 II. ANALYSIS

¶ 11 *A. Motion for a Directed Verdict*

¶ 12 On appeal, Lin contends that the "undisputed testimony and factual record are devoid of any acts or evidence of provocation" such that the circuit court erred in denying her motion for a directed verdict. In her brief, she quotes Eric's purported testimony in support of her argument, although the transcript of this testimony is not a part of the record on appeal:

> "[THE WITNESS ERIC ZHEUNG] A: I saw my dog Kaloo stop and Kaloo and I, neither of us make any noises. He stopped. I went to pick up Kaloo and then the dog–I didn't know that dog has a long neck and then he bite me. And the gap between the fences is so big and the dog can reach out with his head." [3]

¶ 13 Although appellees do not contest the sufficiency of the record presented on appeal, this court is compelled to do so. As we have noted, there is no transcript or bystander's report of the trial included in the record on appeal. Our supreme court has repeatedly held that the burden is on the appellant to present a sufficiently complete record of the trial proceedings to support a claim of error on appeal. *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156 (2005); *Webster v. Hartman*, 195 Ill. 2d 426, 432 (2001); *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). "From the very nature of an appeal it is evident that the court of review must have before it the record to review in order to determine whether there was the error claimed by the appellant."

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[3] The documents attached to the appendix to an appellate brief that are not included in the record are not an acceptable substitute for filing a complete record and will not be considered. *Standard Bank and Trust Co. v. Madonia*, 2011 IL App 103516, ¶23; *Department of Transp. ex. rel. People v. Interstate Brands Corp.*, 251 Ill. App. 3d 785, 787 (1993).

Foutch, 99 Ill. 2d at 391. An appellant has the burden of presenting this court with a record which is sufficient to support his claims of error. *Foutch*, 99 Ill. 2d at 391. Any doubts or deficiencies arising from an incomplete record will be construed against the appellant. *Foutch*, 99 Ill. 2d at 391. When presented with an insufficient record, we will indulge every reasonable presumption in favor of the judgment appealed from. *Smolinski v. Vojta*, 363 Ill. App. 3d 752, 757-58 (2006). Accordingly, in the absence of a complete record supporting the plaintiff's claim of error, we will resolve "[a]ny doubts which may arise from the incompleteness of the record *** against the appellant." *Foutch*, 99 Ill. 2d at 392.

¶ 14 " '[V]erdicts ought to be directed and judgments [notwithstanding the verdict] entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand.' " *Robinson v. Chicago Park District*, 325 Ill. App. 3d 493, 497 (2001) (quoting *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967)); see also *Harris v. Thompson*, 2012 IL 112525 (2012) ("Although motions for directed verdicts and motions for judgments *n.o.v.* are made at different times, they raise the same questions and are governed by the same rules of law"); *Sullivan v. Edward Hosp.*, 209 Ill. 2d 110, 112 (2004) (quoting *Jones v. O'Young*, 154 Ill. 2d 39, 47 (1992) (" 'In directing a verdict, the trial court determines *as a matter of law* that there are no evidentiary facts out of which the jury may construe the necessary fact essential to recovery' ")). "A motion for directed verdict should be granted where there is no evidence demonstrating a substantial factual dispute or where the assessment of the credibility of witnesses or the determination of conflicting evidence is not decisive to the outcome." *Robinson*,

325 Ill. App. 3d at 497 (citing *Maple v. Gustafson*, 151 Ill. 2d 445, 453-54 (1992)). We review the trial court's decision on a motion for a directed verdict *de novo* because the trial court does not weigh the evidence or judge the credibility of witnesses. *Robinson*, 325 Ill. App. 3d at 497, citing *Dunlap v. Alcuin Montessori School*, 298 Ill. App. 3d 329, 340 (1998); see also *Moller v. Lipov*, 368 Ill. App. 3d 333, 341 (2006). "The evidence must be reviewed in the light most favorable to the non-moving party, and all inferences will be drawn in favor of the non-moving party." *Dunlap*, 298 Ill. App. 3d at 340.

¶ 15 To recover under the Animal Control Act, a 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; (4) the presence of the injured person in a place where he has a legal right to be." *Biggs v. Griffith*, 393 Ill. App. 3d 1050, 1054 (2009) (quoting *Meyer v. Naperville Manner, Inc.*, 262 Ill. App. 3d 141, 147 (1994).

¶ 16 The question then, in the case at bar, is whether plaintiff sufficiently proved lack of provocation such that the evidence " 'so overwhelmingly favor[ed] movant that no contrary verdict based on that evidence could ever stand.' " *Robinson*, 325 Ill. App. 3d at 497 (quoting *Pedrick*, 37 Ill. 2d at 510). However, without access to the transcripts of the proceeding below, we have no basis upon which to review this argument, as the argument completely depends upon the evidence presented at trial. Consequently, without the benefit of the transcripts of the proceeding below, we can only speculate as to what evidence was before the court when it denied the motion for a directed verdict. Such speculation is not an adequate basis upon which we may conclude that the circuit court incorrectly denied the motion for a directed verdict. Accordingly,

under the circumstances of this case, we must presume that the circuit court's ruling had a sufficient factual basis and was in conformity with the law. See *Corral*, 217 Ill. 2d at 156.

¶ 17 *B. Judgment Notwithstanding the Verdict (JNOV)*

¶ 18 Next, plaintiff contends that the evidence so overwhelmingly favored plaintiff that the jury's contrary verdict cannot stand. Specifically, plaintiff contends that the circuit court erroneously denied plaintiff's motion for judgment notwithstanding the verdict where the jury improperly decided the issue of provocation. Plaintiff argues that the issue of provocation should never have reached the jury because, as a matter of law, there was no provocation under the facts of this case.

¶ 19 We begin by noting that we review orders granting JNOV under a *de novo* standard of review. *Harris v. Thompson*, 2012 IL 112525, ¶14 (citing *Evans v. Shannon*, 201 Ill. 2d 424, 427 (2002)); see also *Ries v. City of Chicago*, 242 Ill. 2d 205, 215 (2011). In doing so, we ask the same questions the circuit court asked in the first instance in determining whether to grant such a motion. *Harris*, 2012 IL 112525, ¶14; *Ries*, 242 Ill. 2d at 215; see also *Gaffney v. City of Chicago*, 302 Ill. App. 3d 41, 48 (1999). A motion for JNOV may be granted only if all the evidence and inferences therefrom, viewed in the light most favorable to the nonmoving party, so overwhelmingly favor the movant that no contrary verdict based upon the evidence could ever stand. *Harris*, 2012 IL 112525, ¶14 (citing *Pedrick v. Peoria & Eastern R. R. Co.*, 37 Ill. 2d 494, 510 (1967)); *Ries*, 242 Ill. 2d at 215; see also *Gaffney*, 302 Ill. App. 3d at 48.

¶ 20 The resolution of this argument ultimately rests on a review of the evidence presented at trial. Given the record on appeal before us, which does not contain a transcript or a bystander's

report of the proceeding at issue, it is impossible for this court to determine whether the circuit court erred in denying plaintiff's motion for judgment notwithstanding the verdict. Without that information before us, this court cannot determine whether the jury verdict was against the manifest weight of the evidence or whether the evidence, when viewed in the light most favorable to the defendants, so overwhelmingly favored plaintiff that no contrary verdict could ever stand. The responsibility for preserving a sufficiently complete record to show error in the proceedings below rests with the appellant (*People v. Banks*, 378 Ill. App. 3d 856, 861 (2007)), and any doubts arising from presentation of the record will be resolved against the appellant (*Foutch*, 99 Ill. 2d at 392 (1984)).

¶ 21 III. CONCLUSION

¶ 22 In sum, Lin has failed to present a record on appeal adequate to review the alleged errors. Accordingly, under the circumstances of this case, we must presume that the circuit court had a sufficient factual basis for its rulings and that its orders conformed with the law. See *Corral*, 217 Ill. 2d at 156.

¶ 23 For all of the aforementioned reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 24 Affirmed.