FOURTH DIVISION
August 21, 2014

No. 1-14-0455

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DAWN KLEIN,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	12 L 6863
	)	
JOHN BURKE and MARILYN BURKE,	)	Honorable
	)	John P. Callahan, Jr.,
Defendants-Appellees.	)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Epstein concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's order dismissing with prejudice plaintiff's third amended complaint, which alleged she was injured by a dog, is affirmed in part and reversed in part. In the common law negligence claim in Count I, plaintiff failed to allege that defendants' dog had mischievous propensities and that defendants were aware of those propensities as is required to recover damages for an injury caused by a domestic animal; therefore, Count I was properly dismissed. However, in Count II, which was brought pursuant to section 16 of the Animal Control Act, 510 ILCS 5/16 (West 2008), where plaintiff alleged she grabbed the dog's collar to protect her children from an attack or attempted attack by the dog when her injury occurred, her attempt to defend the children did not constitute provocation so as to prevent recovery under the Act.

¶ 2 In her third amended complaint, Plaintiff Dawn Klein alleged she was injured on October 31, 2010 after a dog owned by defendants John Burke and Marilyn Burke darted out from their house and began barking, baring its teeth and running around children who were trick-or-treating on defendants' doorstep. Plaintiff claimed that defendants had a duty to restrain their dog to prevent it from causing injuries like those suffered by plaintiff. The two-count complaint included one count for common law negligence and one count for a violation of section 16 of the Animal Control Act (the Act). 510 ILCS 5/16 (West 2008). Defendants moved to dismiss the third amended complaint with prejudice pursuant to section 2-615 of the Code of Civil Procedure (the Code). 735 ILCS 5/2-615 (West 2008). The trial court granted defendants' motion to dismiss with prejudice, and plaintiff filed this appeal.

¶ 3 BACKGROUND

¶ 4 Count I of plaintiff's third amended complaint alleges that plaintiff, her sister, and their three children were trick-or-treating on October 31, 2010 when they approached defendants' home. When defendant John Burke opened the front door to greet the children, defendants' dog, which was four feet tall, darted outside and began running in and out of the children while barking and baring his teeth. The dog also tried to jump on the children, but was unable to do so because plaintiff's sister blocked him. After approximately ten minutes of the dog running, barking, and baring his teeth, the children walked down the stairs to exit defendants' property. The dog ran after the children, while still barking and baring his teeth. As a result of this behavior, "plaintiff ran up five or six stairs leading to the porch and grabbed the dog by the collar to protect the children and to restrain the dog from further frightening and chasing the children down the front stairs. Plaintiff turned the dog's head away from the children and towards the front door. After the dog took one step towards the front door, the dog suddenly and forcefully

turned around and started chasing the children again who were already completely off the stairs. As the dog again started down the stairs after the children, it caused Plaintiff, who was still holding onto the dog's collar, to suddenly twist around until she was facing away from the front door and to fall down the stairs." As a result of this fall, plaintiff injured her knee.

¶ 5 Count I for negligence further alleges that defendants had a duty to exercise reasonable care to prevent their dog from coming unrestrained within inches of minor children who appeared on their porch trick-or-treating, a duty to take action to move their dog away from minor children who appeared on their porch trick-or-treating if the dog came within one or two inches of said children, a duty to restrain and prevent their dog from interfering and frightening children who were lawfully trick-or-treating on their premises, a duty to keep their dog confined to the inside of their residence when young children appeared on their porch for trick-or-treating, and a duty to prevent their dog from approaching and frightening young children who appeared on their porch for trick-or-treating. Plaintiff alleges that these duties were breached when defendants allowed their dog to dart out of their home and approach the children while barking and showing his teeth without restraining him. Count I does not contain any allegations that defendants' dog had mischievous or vicious propensities or that defendants' were aware of any such mischievous or vicious propensities.

¶ 6 Count II, which alleged a violation of section 16 of the Act, incorporated all the allegations made in Count I and made the additional allegations that "Plaintiff was lawfully on Defendants' front porch at the time she was injured" and that "Defendants are liable to Plaintiff under 510 ILCS/6 [*sic*] for damages for her injury."

¶ 7 On January 14, 2014, the trial court dismissed both counts of plaintiff's third amended complaint with prejudice pursuant to section 2-615 of the Code and this appeal followed.

¶ 8 ANALYSIS

¶ 9 On review of a section 2-615 dismissal, this court must determine whether the allegations contained in the complaint, when interpreted in the light most favorable to the plaintiff, sufficiently set forth a cause of action on which relief may be granted. 735 ILCS 5/2-615 (West 2008); *Janis v. Graham*, 408 Ill. App. 3d 898, 900 (2011). A section 2-615 motion should be granted only if the plaintiff can prove no set of facts to support the alleged cause of action. *Id.* As such, we accept all well-pled facts as true and draw all reasonable inferences in favor of the plaintiff. *Cwikla v. Sheir*, 345 Ill. App. 3d 23, 29 (2003). Our review of a section 2-615 dismissal is *de novo. Janis*, 408 Ill. App. 3d at 900.

¶ 10 Count I: Common Law Negligence

¶ 11 Under the common law, a dog is presumed to be tame, docile, and harmless. *Domm v. Hollenbeck*, 259 Ill. 382, 385 (1913); *Lucas v. Kriska*, 168 Ill. App. 3d 317, 320 (1988). Accordingly, in a negligence action, a plaintiff allegedly injured by an animal is required to allege and 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) (a common-law cause of action for negligence involving injuries caused by an animal requires an allegation that the animal had a mischievous propensity to commit such injuries and that the owner had knowledge of the propensity); *Goennenwein v. Rasof*, 296 Ill. App. 3d 650, 654 (1998) (citing *Lucas*, 168 Ill. App. 3d at 320) ("In Illinois, reviewing courts have presumed that a dog is tame, docile, and harmless absent evidence that the dog has demonstrated vicious propensities.")). 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,* 259 Ill. at 385; *Lucas,* 168 Ill. App. 3d at 320.

¶ 12 Plaintiff argues that although she did not allege the owner knew or should have known that the dog had vicious or mischievous propensities, the trial court improperly dismissed her common law negligence claim. Plaintiff argues her claim is solely based upon defendants' conduct in failing to restrain their dog as opposed to the dog's conduct. Plaintiff concedes that in this case, "the dog did not act in any way inconsistent with its presumed tame and docile nature." Rather, plaintiff states that "[t]he duty in question is whether or not the Defendant should have been reasonably expected to restrain his dog or keep it inside his home during Halloween when many small vulnerable children would be frequenting the Defendant's property." For this reason, plaintiff argues that the pleading requirements that apply to a negligence action arising out of an injury caused by an animal, namely that the plaintiff must allege that the "animal had a mischievous propensity to commit such injuries and that the owner had knowledge of the propensity," do not apply here pursuant to this court's ruling in *Meyer v. Naperville Manner, Inc.*, 285 Ill. App. 3d 187 (1996). We disagree.

¶ 13 Plaintiff's reliance on *Meyer* in support of her argument that she does not have to allege defendants' dog had a mischievous propensity and that defendants were aware of this propensity prior to plaintiff's injury is misplaced. In *Meyer,* the minor plaintiff fell from a runaway horse at the defendant's horseback riding academy. *Meyer*, 285 Ill. App. 3d at 188. The plaintiff alleged negligence in that the defendant: (1) failed to warn her that a riding technique that she had previously learned was dangerous to use with the defendant's horses; (2) promoted her from the status of beginner through advanced when she had not safely learned to handle the defendant's horses; and (3) entrusted child students to a 17-year-old instructor who had no training or

instruction in teaching and no prior teaching experience; and that as a result, the horse that she was riding ran away, causing her to fall and injure herself. *Id.* The plaintiff argued that she did not have to allege that the horse had a mischievous propensity because "a cause of action exists where a defendant is entrusted to teach and care for children safely and negligently fails to do so." *Id.* at 189. Based upon these allegations, this court found that since the plaintiff had alleged "that the inadequate instruction provided by the defendant was the cause of her injury[,] [] the fact that the horse in this cause had no predisposition to mischief may have no bearing on the issue of inadequate instruction and thus may not be a necessary element to the plaintiff's negligence cause of action in this case if the cause of action is otherwise pleaded properly." *Id.* at 192. In the *Meyer* case, the animal was merely the instrument by which the plaintiff's injury occurred as the result of the defendant's negligence for providing inadequate instructions and training as opposed to any alleged mischievous behavior of the horse.

¶ 14 Here, despite plaintiff's best efforts to frame the issue as one dealing with defendant's actions rather than the dog's actions, that is simply not the case. Plaintiff argues that she was injured when the dog pulled her down defendants' stairs. Plaintiff's allegation that defendant should have restrained the dog does not change the fact that it was the dog's act in pulling plaintiff down the stairs that caused plaintiff's injury. Thus, the plain and clear allegations in the third amended complaint show that it was the action of the dog in pulling plaintiff down the stairs, and not those of defendants, that caused her to fall and sustain injuries. The plaintiff in *Meyer* alleged that it was the defendant's conduct (negligent training and instruction), not that of the animal, that caused her to fall from the horse and sustain her injuries. *Meyer*, 285 Ill. App. 3d at 192. Thus, the type of recovery discussed in *Meyer* is not applicable to the facts alleged in

this case, especially since there are no allegations that defendants somehow failed to instruct plaintiff as to how she should handle their dog. See *Janis*, 408 Ill. App. 3d at 903-05.

¶ 15 Accordingly, because plaintiff was required to allege that defendants' dog had mischievous propensities and that defendants' knew of those mischievous propensities prior to plaintiff's injury, see *Beckert*, 33 Ill. 2d at 46, and those allegations are clearly and admittedly absent from the third amended complaint, we affirm the trial court's dismissal of plaintiff's negligence claim (Count I) with prejudice.

¶ 16 Although plaintiff's failure to allege mischievous propensities and defendants' knowledge of those propensities is sufficient to warrant the dismissal of Count I, we note that our courts have also warned against imposing duties upon domesticated pet owners to keep pets secured at all times, which is the exact duty that plaintiff has indirectly asked us to apply here. See *Beckert v. Risberg*, 50 Ill. App. 2d 100, 106 (1964) *rev'd on other grounds*, 33 Ill. 2d 44 (1965) ("Certainly the failure to keep a dog secured was not in itself sufficient to establish liability at common law for damages caused by such animal.").

¶ 17 We further note there is no proposed amended pleading in the record and nothing in the record indicates plaintiff sought leave to file an amended Count I. As such, we affirm the trial court's dismissal of Count I of plaintiff's third amended complaint with prejudice.

¶ 18 Count II: Section 16 of the Animal Control Act

¶ 19 Section 16 of the Animal Control Act (the Act) provides for civil damages for injuries caused by dogs and other animals, whether running at large or not:

> "[i]f 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 2008).

This cause of action provided in the Act is not negligence based, nor does it impose strict liability on an owner. *Janis*, 408 Ill. App. 3d at 901; *Beggs v. Griffith*, 393 Ill. App. 3d 1050, 1054 (2009). To establish a cause of action under section 16 of the Act, a plaintiff must prove four elements: (1) injury caused by an animal owned by the defendant; (2) the lack of provocation; (3) peaceable conduct of the person injured; and (4) the presence of the injured person in a place where he has a legal right to be. *Severson v. Ring*, 244 Ill. App. 3d 453, 456 (1993).

¶ 20 In the third amended complaint, plaintiff alleged she was lawfully on defendants' property escorting children who were trick-or-treating when she observed defendants' dog run out of the house. Plaintiff alleged that defendants' dog was baring its teeth and barking inches from the faces of the children. Construing plaintiff's allegations liberally and in the light most favorable to plaintiff, the dog's conduct constituted an attack or an attempted attack within the meaning of the Act. 510 ILCS 5/16 (West 2008). Plaintiff alleged that she grabbed the dog's collar to prevent further attacks or attempted attacks on the children when she was injured. We find that this allegation is akin to self-defense and, specifically, akin to the self-defense that was found in *Steichman v. Hurst*, 2 Ill. App. 3d 415, 418-19 (1971), and later recognized in *VonBehren v. Bradley*, 266 Ill. App. 3d 446, 450-51 (1994). In *Steichman*, the victim was delivering mail to the defendant's home when the defendant's dog came after her. *Steichman*, 2 Ill. App. 3d at 418. In an attempt to ward off an assault by the dog, the victim sprayed the dog in the face with repellant. *Id*. The court there held that the "[p]laintiff's acts in spraying [the dog]

were not unpeacable or provocative but were reasonable measures for self protection evoked by the dog's actions and deterring him only momentarily." *Id*. at 419; see also *VonBehren*, 266 Ill. App. 3d at 450-51 (recognizing that "the use of a repellent spray on an attacking dog by a mail carrier was not provocation but a reasonable measure for self-protection."). Because plaintiff alleged that she was attempting to protect the children by forcing the dog away from them at the time she was injured, we find that such allegations are sufficient to show that her actions were not unpeacable or provocative but rather were reasonable measures taken to protect the children from further attacks or attempted attacks. See *Hurst*, 2 Ill. App. 3d at 418-19. As such, we find that plaintiff has sufficiently plead a cause of action pursuant to section 16 of the Act. 510 ILCS 5/16 (West 2008); *Robinson v. Meadows*, 203 Ill. App. 3d 706, 710-11 (1990) (noting that "obtaining redress for injuries caused by an animal should be easier under the Act than it was under the common law.").

¶ 21 Defendants argue that plaintiff was not acting peaceably when she was injured because plaintiff provoked the dog by attempting to take control of it. Defendants argue that plaintiff's attempt to control the animal is sufficient to preclude recovery under the Act, and cite to *Wilcoxen v. Paige*, 174 Ill. App. 3d 541 (1988), in support of this argument. In *Wilcoxen*, the plaintiff was prevented from recovering for an injury caused by a dog because, at the time she was injured, the plaintiff had assumed control as an owner of the dog by boarding and grooming the dog. *Wilcoxen*, 174 Ill. App. 3d at 543. However, we find *Wilcoxen*, and similar cases cited by defendants regarding assumed control of an animal, to be distinguishable from the facts of this case because here defendants did not board or groom their dog with plaintiff, or give plaintiff any similar type of control over their dog. Rather, plaintiff grabbed defendants' dog's collar in an effort to defend the children. Therefore, we conclude that plaintiff in this case did

not assume the role of owner as defined by the Act and, accordingly, is not precluded from recovering where she attempted to take control of the dog in an effort to prevent an attack on children. As such, we find the *Wilcoxen* line of cases to be inapplicable to the facts alleged in this case.

¶ 22 In Count II of plaintiff's third amended complaint we note there are no specific allegations that defendants' dog was not provoked or that plaintiff was peaceably conducting herself at the time of the injury. However, section 2-603 of the Code of Civil Procedure states that "[p]leadings shall be liberally construed with a view to doing substantial justice between the parties." 735 ILCS 5/2-603(c) (West 2008). Therefore, to determine whether the elements of a cause of action under the Act were alleged, we must look to paragraphs 1-20, which are contained in Count I of the third amended complaint. In light of section 2-603's requirement of liberally construing the complaint, and the fact that on review of a motion to dismiss pursuant to section 2-615 of the Code we must interpret all well pled facts and any reasonable inferences from those facts in the light most favorable to the plaintiff, (*Cwikla*, 345 Ill. App. 3d at 29), we find that plaintiff's third amended complaint sufficiently alleged a cause of action under section 16 of the Act, thus precluding dismissal at the pleading stage.

¶ 23 CONCLUSION

¶ 24 For the reasons stated above, we affirm the dismissal of plaintiff's third amended complaint with prejudice with respect to Count I, but reverse the trial court's dismissal with prejudice with respect to Count II.

¶ 25 Affirmed in part; reversed in part.