2013 IL App (5th) 120074-U

NO. 5-12-0074

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

TRENA WELLS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 10-L-952
	)	
MATTHEW COOPER and AMY COOPER,	)	Honorable
	)	Clarence W. Harrison II,
Defendants-Appellants.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Presiding Justice Spomer and Justice Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in denying defendants' motion for a new trial or, in the alternative, judgment notwithstanding the verdict.

¶ 2 Plaintiff, Trena Wells, filed a multiple-count complaint against defendants, Matthew Cooper and Amy Cooper, plaintiff's brother and sister-in-law, in the circuit court of Madison County for injuries she received after being bitten by defendants' dog, Tank. A jury awarded plaintiff $140,000 and the trial court entered judgment on the verdict. Defendants filed a posttrial motion seeking a new trial or, in the alternative, judgment notwithstanding the verdict. The trial court denied defendants' posttrial motion. Defendants filed a timely notice of appeal. The issues we are asked to address are: (1) whether the trial court erred in denying defendants' motion for a new trial and (2) whether the trial court erred in denying defendants' request for judgment not withstanding the verdict. We affirm.

¶ 3 FACTS

¶ 4 On November 24, 2008, plaintiff went to defendants' home. The parties lived only a few blocks apart and plaintiff would visit frequently. Defendant's owned a lab-husky mix named Tank. Plaintiff was well acquainted with Tank, who by all accounts was a friendly and nice dog who was also good with defendants' young children. Plaintiff occasionally watched Tank at her own house and once looked after him for a week while defendants were on a trip. However, plaintiff owned two dogs, Storm and Cooper, and had no ownership interest in Tank.

¶ 5 After arriving at defendants' home on the date in question, plaintiff played with Tank. At one point, Tank escaped out the front door, but Amy went outside and brought him back inside. As plaintiff attempted to talk with Amy, Tank kept wanting to play. Amy put Tank in his crate, but Tank did not settle down, and Amy eventually put Tank in the backyard so she and plaintiff could finish their conversation. The backyard was fenced, but Tank escaped.

¶ 6 As plaintiff and Amy were talking, Amy announced Tank had been hit. Amy saw Tank roll out from underneath a truck. Plaintiff and Amy ran outside. Plaintiff was scared and worried about Tank and wanted to make sure he was okay. Both Amy and plaintiff started calling for Tank, and he came into the yard. Tank was moving slower than he normally did, but plaintiff did not observe any broken bones or blood. While plaintiff assumed the dog was injured, she did not see anything wrong with him and did not recall Tank whimpering or barking. As plaintiff got closer to Tank, he started to turn back toward the street. Plaintiff put her arms around Tank's chest to try to stop him from walking back out into the street where he could get hit again.

¶ 7 As plaintiff put her arms around Tank, he collapsed on her hands. When she tried to extricate her hands, Tank bit her on each thumb. He tore plaintiff's right thumb apart and put

two puncture marks into plaintiff's left thumb. Tank then died. Plaintiff required four surgical procedures on her right thumb. The injuries left a scar and have limited plaintiff's ability to care for her newborn child and participate in activities she formerly enjoyed.

¶ 8 After hearing all the evidence, the jury returned a verdict in the amount of $140,000, itemized as follows: $5,000 for disfigurement resulting from the injury; $45,000 for loss of normal life; $50,000 for pain and suffering; $40,000 for reasonable medical expenses. The trial court entered judgment on the verdict. Defendants filed a motion for a new trial or, in the alternative, judgment notwithstanding the verdict. The trial court denied defendants' posttrial motion. Defendants filed a timely notice of appeal.

¶ 9 ANALYSIS

¶ 10 I. New Trial

¶ 11 The first issue we are asked to address is whether the trial court erred in denying defendants' motion for a new trial. Defendants contend the jury was not adequately instructed as to the issue of a dog's "custodian" for purposes of the Animal Control Act (Act) (510 ILCS 5/1 to 35 (West 2008)). Defendants insist that when plaintiff put her arms around Tank to prevent him from going back into the street, she became Tank's custodian and was, therefore, an "owner" within the meaning of the Act and cannot recover for her injuries. Plaintiff responds that defendants have waived this issue by failing to properly preserve it. Assuming *arguendo* the issue is not waived, plaintiff responds that the trial court properly instructed the jury as to the issue of who is a "custodian" under the Act, it was a question of fact for the jury to determine whether plaintiff was acting as a custodian, and the jury's verdict should stand. After reviewing the argument on the merits, we agree with plaintiff that the jury was adequately instructed and, therefore, defendants are not entitled to a new trial.

¶ 12 Section 16 of the Act, the basis for defendants' liability, provides:

"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 2008).

¶ 13 Section 2.16 of the Act defines "owner" in pertinent part as follows:

" 'Owner' means 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 2008).

The Act encourages tight control of animals in order to protect the public from harm. While there is not absolute liability under the Act, there must be a factual or reasonable basis for liability such that if a person accepts responsibility for controlling an animal, he or she cannot maintain a cause of action for injuries resulting from her own failure to control the animal. *Wilcoxen v. Paige*, 174 Ill. App. 3d 541, 543, 528 N.E.2d 1104, 1106 (1988). The question of ownership is a question of fact for the trier of fact and will not be set aside unless contrary to the manifest weight of the evidence. *Thompson v. Dawson*, 136 Ill. App. 3d 695, 699-700, 483 N.E.2d 1072, 1075 (1985).

1. ¶ 14 In the instant case, the trial court recognized that the issues of Tank's ownership and whether plaintiff was acting as his custodian were questions for the jury to decide. Defendants contend that the trial court erred in refusing to give defendants' proposed instructions 8 and 9. Defendants' proposed number 8 states: "A person having control over an animal may not recover against the animal's legal owner for injuries sustained while the person has such control." Defendants' proposed number 9 states: "Nothing in the law requires a person to exercise care or custody of an animal for a set period of time in order to meet the definition of 'owner.' " While

the trial court did not give these instructions, it gave defendants' number 10, over plaintiff's proposed number 10, both of which were modified versions of Illinois Pattern Jury Instruction No. 20.01, which address the burden of proof. Defendant's number 10 stated as follows:

"The plaintiff claims that she was injured and sustained damage, and that defendants violated the following statute: If a dog or other animal without provocation, attacks or injures any person who is peaceably conducting himself in any place where he may lawfully be, the owner of such dog or other animal is liable in damages to such person for the full amount of the injuries sustained.

The defendants admit that their dog bit the plaintiff, and that the dog bites were the proximate cause of plaintiff's injuries.

The defendants admit that plaintiff was lawfully on their property.

The defendants claim that plaintiff provoked the dog.

The defendants further claim that plaintiff was acting as the dog's custodian when the bites occurred." (Emphasis added.) See Illinois Pattern Jury Instructions, Civil, No. 20.01 (2011) (hereinafter IPI Civil (2011)).

The trial court explained it was giving defendants' number 10 over plaintiff's number 10 "because it has the issue of ownership and custodian only in one place as opposed to two places." The trial court also agreed, over plaintiff's objection, to give defendants' number 7, which contained the definition of the term "owner" and was taken directly from section 2.16 of the Act as set forth above. See 510 ILCS 5/2.16 (West 2008).

¶ 15 Therefore, our review of the record and the instructions shows that the jury was told to consider whether plaintiff was acting as Tank's custodian. Defendants concede this point but then argue that the instructions failed to inform the jury that if plaintiff was acting as Tank's custodian, she was precluded from recovery under the Act. Again, we disagree.

¶ 16 Defendants' proposed instructions 8 and 9 were non-IPI instructions. Such instructions should only be given when the pattern jury instructions are inadequate or lacking. *Erickson v. Muskin Corp.*, 180 Ill. App. 3d 117, 127, 535 N.E.2d 475, 481 (1989). Even if the general pattern instructions are inadequate, it does not necessarily follow that the trial court erred in refusing to accept a defendant's instructions. The test for determining whether jury instructions are proper is (1) whether they form a clear and adequate picture of the applicable law when viewed in their entirety and (2) whether they fully, fairly, and comprehensively inform a jury of the applicable legal principles without overly emphasizing a particular factor. *Schwartz v. Sears, Roebuck & Co*., 264 Ill. App. 3d 254, 266, 636 N.E.2d 642, 650 (1993). Whether to provide a particular jury instruction is within the discretion of the trial court, and we are not to disturb that determination absent a clear abuse of discretion. *Webber v. Wight & Co.*, 368 Ill. App. 3d 1007, 1020, 858 N.E.2d 579, 591 (2006). A new trial will be granted based upon the trial court's refusal to give a proposed instruction only when that refusal has caused serious prejudice to a litigant's right to a fair trial. *Webber*, 368 Ill. App. 3d at 1021, 858 N.E.2d at 592.

¶ 17 The trial court, over plaintiff's objection, gave the instruction which defined "owner" directly from the Act. The jury was instructed that an "owner" is "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." The facts show that plaintiff had no ownership interest in Tank. She had two dogs of her own. Nevertheless, defendants argued plaintiff should not be allowed to recover because plaintiff was acting as Tank's custodian. The jury simply did not believe defendants' theory. After careful consideration, we cannot say that the trial court abused its discretion in refusing defendants' proposed instructions 8 and 9, nor can we say that the trial court erred in denying defendants' motion for a new trial. The record shows that the instructions gave a clear and adequate picture of the applicable law and that the jury was

fully, fairly, and comprehensively informed of the applicable legal principles involved in the instant case. Failure to give defendants' proposed instructions 8 and 9 does not constitute reversible error as we do not believe defendants were denied a fair trial.

¶ 18 II. Judgment Notwithstanding the Verdict

¶ 19 The other issue we are asked to address is whether the trial court erred in denying defendants' request for judgment notwithstanding the verdict. Defendants contend they are entitled to a judgment notwithstanding the verdict because the jury disregarded all evidence of provocation. Defendants insist Tank was provoked either by plaintiff's act of putting her arms around him after he got hit or by the automobile itself. Plaintiff responds that the jury found for plaintiff on the issue of provocation and its verdict should not be disturbed.

¶ 20 A motion for judgment notwithstanding the verdict should only be granted when all of the evidence, when viewed in the light most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on the evidence could ever stand. *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510, 229 N.E.2d 504, 513-14 (1967). *Pedrick* emphasizes that parties have a right to have substantial factual disputes resolved by a jury. A trial court's ruling on a motion for judgment notwithstanding the verdict is subject to *de novo* review. *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 132, 720 N.E.2d 242, 257 (1999).

¶ 21 The facts are clear that when plaintiff came to visit on the day in question, Amy had difficulty controlling Tank. First, Tank escaped out the front door, but he was quickly brought back indoors. Amy put Tank in his crate, but he barked, making it difficult for plaintiff and Amy to talk. Second, Amy put Tank out in the backyard, which was fenced, but Tank again escaped. During his second escape, Tank was hit by a truck. Amy and plaintiff rushed outside. When it appeared Tank was going back into the street and might get hit again, plaintiff put her arms around Tank. Defendants contend that plaintiff's act of putting

her arms around the injured Tank constituted provocation or that Tank was provoked by the automobile which hit him.

¶ 22 A plaintiff seeking recovery under the Act has the burden of proof with regard to the issue of provocation. 510 ILCS 5/16 (West 2008); *Guthrie v. Zielinski*, 185 Ill. App. 3d 266, 269, 541 N.E.2d 178, 180 (1989). If an animal was provoked, there can be no recovery as a matter of law, even if another person or outside stimulus causes the behavior which results in an injury to the plaintiff. *Forsyth v. Dugger*, 169 Ill. App. 3d 362, 366, 523 N.E.2d 704, 706 (1988). If reasonable people differ on the facts supporting the issue of provocation, then the issue is one to be determined by the jury. *Beggs v. Griffith*, 393 Ill. App. 3d 1050, 1056, 913 N.E.2d 1230, 1237 (2009).

¶ 23 The jury was given, without objection, 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 (2011) No. 110.04.

The notes on this instruction state that "[t]his instruction should be used in an action to recover for injuries caused by animals other than those inherently dangerous." IPI Civil (2011) No. 110.04, Notes on Use. The notes further state that "[t]his instruction should be accompanied by appropriate issues and burden of proof instructions." IPI Civil (2011) No. 110.04, Notes on Use. The trial court followed the Notes on Use and both issues and burden-of-proof instructions were given to the jury.

¶ 24 It was for the jury to determine whether plaintiff's actions or the automobile itself provoked Tank. The jury weighed all of the evidence and judged the credibility of the witnesses and found in favor of plaintiff on the issue of provocation. When the facts are viewed in the light most favorable to plaintiff, it is clear that the jury could have found in favor of plaintiff. In support of our determination, we rely on *Robinson v. Meadows*, 203 Ill. App. 3d 706, 561 N.E.2d 111 (1990).

¶ 25 In *Robinson*, the four-year-old plaintiff started screaming after one of the defendant's dogs began barking. The dog responded with a vicious attack to the plaintiff which included tearing off a portion of the plaintiff's lip. In that case, this court held that while the plaintiff's scream triggered the attack on her by the defendant's dog, the scream could not be regarded as having been sufficient to account for the savagery of the dog's assault. Thus, as a matter of law, no provocation could have existed. *Robinson*, 203 Ill. App. 3d at 713, 561 N.E.2d at 116. Defendants insist that *Robinson* is inapplicable because here, unlike the dog in *Robinson*, Tank had just been hit by a truck and was mortally wounded. Defendants insist that plaintiff should have expected to be bitten when she placed her arms around a mortally injured dog. However, as was pointed out in *Robinson*, the purpose of the Act was to make it easier to obtain redress for injuries caused by animals and if "provocation could be established merely by showing that an animal's attack resulted from some outside stimulus and was not merely spontaneous, just the opposite would happen. A plaintiff would almost never be able to prevail." *Robinson*, 203 Ill. App. 3d at 711, 561 N.E.2d at 114. With this in mind, we believe the testimony heard at trial was sufficient to establish lack of provocation on the part of plaintiff.

¶ 26 It was undisputed that Tank was a handful on the date in question. He escaped out the front door and later escaped out the back gate only to be hit by a passing truck. When it looked like Tank might try to go back out into the street, plaintiff put her arms around Tank

to try to restrain him. Tank then bit plaintiff's thumbs, causing substantial damage. In both the *Robinson* case and the instant case, neither plaintiff's actions were sufficient provocation to elicit a vicious response from the dog.

¶ 27 CONCLUSION

¶ 28 While it certainly can be argued that plaintiff's act of restraining Tank constituted provocation, the jury's verdict indicates that it did not believe defendants had tight control over Tank on the day in question. Simply put, the jury did not believe either that plaintiff was Tank's custodian or that plaintiff's attempt to protect Tank from getting hit a second time amounted to provocation. Had defendants exercised better control over Tank, plaintiff would not be injured. In light of the evidence adduced at trial, the jury's verdict is reasonable, and we will not usurp the jury's function and overturn its verdict.

¶ 29 For the foregoing reasons, the judgment of the circuit court of Madison County is hereby affirmed.

¶ 30 Affirmed.