2013 IL App (5th) 120295-U

NO. 5-12-0295

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

KATHY SCHILLING, Plaintiff-Appellee, v. BENJAMIN SCHILLING and JENNIFER SCHILLING, Defendants-Appellants.	)	Appeal from the Circuit Court of Madison County. No. 11-AR-618 Honorable William A. Mudge, Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justice Goldenhersh concurred in the judgment.
Presiding Justice Spomer dissented.

ORDER

¶ 1 *Held*: In this action under the Animal Control Act, the circuit court did not err in granting summary judgment in favor of the plaintiff where a dog unexpectedly darted out across the plaintiff's path, causing her to trip and fall over the dog's leash, resulting in personal injury.

¶ 2 The defendants, Benjamin Schilling and Jennifer Schilling, appeal from a summary judgment entered against them by the circuit court of Madison County in this action brought by the plaintiff, Kathy Schilling, to recover under section 16 of the Animal Control Act (510 ILCS 5/16 (West 2010)) for injuries she received when the defendants' dog, while attached to one end of a leash, darted in front of her, causing her to trip and fall over the leash, fracturing her wrist. Section 16 of the Animal Control Act (the Act) provides as follows:

"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 plaintiff sought damages in excess of $50,000.

¶ 3 The following evidence was before the court on the plaintiff's motion for summary judgment. The plaintiff is the mother of the defendant, Benjamin Schilling. On May 6, 2011, the defendants were out of town and the plaintiff and her husband went to the defendants' residence to mow their lawn. The defendants' dog was in the yard, attached to a chainlink fence with a 20-foot leash. After mowing part of the lawn, the plaintiff's husband had to move the dog to another area of the lawn in order to finish. The plaintiff's husband moved the dog on its leash across the yard, hooking the leash to the chainlink fence. The plaintiff followed with the dog's water bucket, which she hooked to the fence. The plaintiff was walking away just behind her husband when the dog "went around in front of [her] and it was like a trip wire, [she] fell over the leash." The plaintiff's husband was just a few steps in front of the plaintiff.

¶ 4 The dog unexpectedly darted in front of the plaintiff and its leash became entangled and wrapped around some landscaping bricks that were approximately one foot high. As a result, the leash pulled tight and "acted as a trip wire" that the plaintiff did not see. As the plaintiff was walking, the leash struck her just above the ankle, causing her to fall to the ground, fracturing her wrist. There were no witnesses to the incident except the plaintiff and her husband.

¶ 5 The dog was very playful and got excited around people. The plaintiff was not afraid of the dog and the dog did not make contact with her.

¶ 6 Hearing was held on the motion on June 8, 2012. Arguments were heard but no evidence was taken. The hearing was not transcribed.

¶ 7 On that same date, the circuit court entered its order granting the plaintiff's motion for summary judgment. The court found that the following facts were not in dispute. The defendants' dog was leashed when it unexpectedly darted out creating a trip wire over which the plaintiff tripped and fell. The plaintiff was lawfully upon the premises, peacefully conducting herself, and did not provoke the dog. The court rejected the defendants' argument that a reasonable jury could find that the plaintiff's actions, rather than the actions of the dog, caused the injury, distinguishing the two cases relied upon by the defendants: *Bailey v. Bly*, 87 Ill. App. 2d 259 (1967), and *King v. Ohren*, 198 Ill. App. 3d 1098 (1990). The court found that, in those two cases, there had been no overt action on the part of the dog. In *Bailey*, the dog was simply lying on the floor when the plaintiff tripped over it. In *King*, the plaintiff changed her direction of travel in order to avoid a dog that was walking next to her, injuring herself. In neither case did the dog take any action toward, or interfering with, the plaintiff. In the case at bar, the dog unexpectedly darted out in front of the plaintiff's path, creating a trip wire that she fell over. Accordingly, the court granted the plaintiff's motion for summary judgment. The defendants appeal.

¶ 8 Our review of a grant of summary judgment is *de novo*. *Alderson v. Fatlan*, 231 Ill. 2d 311, 318 (2008). Summary judgment is appropriate where the pleadings, depositions, affidavits, and admissions on file show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Alderson*, 231 Ill. 2d at 318.

¶ 9 Under section 16 of the Act, there are only four elements which must be proved: (1) injury caused by an animal owned by the defendants, (2) lack of provocation, (3) peaceable conduct of the person injured, and (4) the presence of the injured person in a place where she has a legal right to be. *Robinson v. Meadows*, 203 Ill. App. 3d 706, 710 (1990). There need not be an attack by the animal in order to recover under the Act; any action by the animal which causes injury will suffice, even if that action is harmless in itself. See *Chittum v.*

Evanston Fuel & Material Co., 92 Ill. App. 3d 188, 191 (1980).

¶ 10 The defendants do not dispute that they owned the dog and that the plaintiff was peaceably conducting herself in a place where she had a lawful right to be and did not provoke the dog. The defendants argue only that the circuit court erred in granting summary judgment where a genuine issue of fact exists as to whether the action of the dog was the proximate cause of the plaintiff's injuries or whether the plaintiff herself caused the accident. The defendants argue that a reasonable jury could have found that the actions of the plaintiff and her husband in moving the dog's leash to this part of the yard, rather than the actions of the dog, created the "trip wire" danger, or that the plaintiff could have and should have avoided tripping over the leash.

¶ 11 The defendants correctly point out that what constitutes the proximate cause of an injury in a particular case is ordinarily a question of fact to be determined from all the attending circumstances, and it can only be a question of law when the facts are not only undisputed but also such that there can be no difference in the judgment of reasonable men as to the inferences to be drawn from them. *Hooper v. County of Cook*, 366 Ill. App. 3d 1, 11 (2006). Ordinarily, the question whether the injury was caused by the conduct of the dog or by some independent act of the plaintiff or others is a question of fact to be decided by the jury. *Taylor v. Hull*, 7 Ill. App. 3d 218, 219 (1972). An animal is the proximate cause of injury to a person only if the injury was caused by the conduct of the dog and not by some independent act of the plaintiff or others. *King v. Ohren*, 198 Ill. App. 3d 1098, 1101 (1990) (citing *Taylor*, 7 Ill. App. 3d at 219).

¶ 12 In support of their position on appeal, the defendants rely exclusively on *Taylor v. Hull*, 7 Ill. App. 3d 218 (1972). In that case, the plaintiff was injured when the automobile he was driving struck a dog owned by the defendant, causing the car to go out of control and overturn. The dog had been walking or trotting on or across the highway when it was struck.

The plaintiff brought suit under section 16 of the Act and, on cross-motions for summary judgment, the circuit court entered judgment for the defendant. The plaintiff appealed and this court reversed the summary judgment, holding that, unlike the situation in *Bly*, where the plaintiff had tripped over a dog that was lying passively on a step, the dog in *Taylor* had performed an overt act and was not a mere passive force. 7 Ill. App. 3d at 220. Therefore a triable issue of fact had been raised as to whether the action of the dog in walking or trotting on or across the highway was the proximate cause of the injury.

¶ 13 We find *Taylor* to be of limited application to the case at bar. In *Taylor*, there were fact questions as to what caused the car to strike the dog in the first place and what caused it to overturn resulting in injuries. There is no indication that the dog unexpectedly darted out in front of the car. Nor does it seem inevitable that the mere act of striking a dog with a car would cause one to lose control of the car to such an extent that it overturned. In *Taylor*, there existed questions of fact as to whether it was the plaintiff's driving, rather than the actions of the dog, which caused the plaintiff to strike the dog, thereby losing control of the car.

¶ 14 To the contrary, in the case at bar, the evidence is undisputed that the dog unexpectedly darted in front of the plaintiff as she was walking across the yard, stretching its leash at ankle level across the plaintiff's path, causing her to trip and fall. There does not seem to be any question of fact as to whether the actions of the dog in unexpectedly darting across the plaintiff's path, or the actions of the plaintiff in walking across the lawn, caused the accident. The defendants point to no facts which indicate that the plaintiff's fall may have been the result of her own actions, and not those of the dog. We note that principles of contributory or comparative negligence have no relevance to a claim under section 16 of the Act. See *Johnson v. Johnson*, 386 Ill. App. 3d 522, 539 (2008).

¶ 15 We find, as did the circuit court, that the facts are not only undisputed but also such

that there can be no difference in the judgment of reasonable men as to the inferences to be drawn from them with respect to the proximate cause of the plaintiff's accident. See *Hooper v. County of Cook*, 366 Ill. App. 3d 1, 11 (2006). Accordingly, we affirm the circuit court's summary judgment against the defendants.

¶ 16 We briefly address an argument raised by the plaintiff on appeal. The plaintiff argues that, because the defendants did not include in the record on appeal a transcript of the hearing on the motion for summary judgment, it must be presumed that the order of the circuit court was in conformity with the law and the facts. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). We do not agree that the defendants failed to present a complete record on appeal. The cause was before the court on a motion for summary judgment, both parties had filed memoranda in support of or opposition to the motion, and no new evidence was presented at the hearing. Accordingly, all of the evidence and argument that was presented to the circuit court has also been presented to us. In any event, having found that the judgment of the circuit court was correct based on the record before us, we need not presume its propriety.

¶ 17 Finally, we note the point of dissenting Justice Spomer that any liability on the part of the defendants might have been extinguished if the plaintiff had accepted responsibility to control the dog who caused the injury. See *Docherty v. Sadler*, 293 Ill. App. 3d 892, 895 (1997). This is a point not raised by either party in the circuit court or in this court. The record contains no evidence that the plaintiff herself had, in fact, accepted responsibility to control the dog. Although the plaintiff was present on the property while her husband mowed the lawn, and did move the dog's water bowl, there is no evidence that she had accepted any responsibility to control the dog. In any event, any argument not raised before the circuit court or this court on appeal is deemed waived and cannot serve as a basis for reversal. See *DOD Technologies v. Mesirow Insurance Services, Inc.*, 381 Ill. App. 3d 1042, 1050 (2008).

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

¶ 19 Affirmed.

¶ 20 PRESIDING JUSTICE SPOMER, dissenting:

¶ 21 I respectfully dissent. I would find that there is a genuine of material fact as to proximate cause, precluding summary judgment on the question of liability under section 16 of the Animal Control Act (510 ILCS 5/16 (West 2010)). I believe that reasonable minds could differ as to whether the actions of the dog in this case, or the plaintiff and/or her husband in moving the location of the dog and its chain, were the proximate cause of the plaintiff's injuries. Additionally, although not raised as an issue on appeal, I must point out that this issue would be obviated by the requirement that a plaintiff, in order to recover, must not have accepted a responsibility to control the animal who caused the injury. See *Docherty v. Sadler*, 293 Ill. App. 3d 892, 895 (1997). Accordingly, I would find further issues of fact regarding whether the plaintiff and her husband, in taking upon themselves to move the animal, exercised control over the animal such that recovery is precluded. For these reasons, I would reverse the order which granted a summary judgment in favor of the plaintiff as to liability, and would remand for further proceedings.