

[Cite as *Buettner v. Beasley*, 2004-Ohio-1909.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
No. 83271

ANNIE BUETTNER,	:	
Plaintiff-Appellant	:	JOURNAL ENTRY
vs.	:	AND
WAYNE D. BEASLEY,	:	OPINION
Defendant-Appellee	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	APRIL 15, 2004
	:	
CHARACTER OF PROCEEDING	:	Civil appeal from Common Pleas Court Case No. CV-468230
JUDGMENT	:	AFFIRMED
DATE OF JOURNALIZATION	:	
APPEARANCES:		
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ANNE L. KILBANE, P.J.

{¶1} Annie Buettner appeals from a jury verdict, following a trial before Judge Kenneth R. Callahan, that found in favor of Wayne Beasley on her claim for damages arising out of dog bite injuries. She claims that when a dog causes injury, Ohio imposes strict liability upon its owner and it was error to deny her motion for a directed verdict, that the verdict was against the manifest weight of the evidence, and that the judge failed to give the proper jury instructions. We affirm.

{¶2} From the record we glean the following: Ms. Buettner and Beasley lived together for over six years at 22401 Ivan Avenue in Euclid and, although Beasley was the sole owner of the home and paid all utilities and expenses, she had a key to the residence,

could come and go as she pleased, received all her mail there, and considered it her permanent residence. She did not pay rent to Beasley, and was reimbursed for household utility bills.

{¶3} In March 1999, she purchased two basset hounds as a gift for Beasley that he named Sniffer and Barney. The dogs lived with the couple for over two years with Beasley providing their primary care. In his absence, Ms. Buettner cared for, fed, walked the dogs, and took them to the veterinarian.

{¶4} In February 2002, while Beasley was in the kitchen with his son, she entered their bedroom, found Sniffer lying on the bed, and bent down to kiss him. The dog attacked her, biting completely through her upper lip and puncturing her gums. The injuries required twenty-eight stitches inside and outside her mouth. She currently has no feeling in her lips, and her mouth and face are scarred and disfigured.

{¶5} Beasley gave Sniffer away and, several months later, the couple split up, and Ms. Buettner moved and took Barney with her. She then brought suit against Beasley alleging strict liability and negligence. Beasley answered with a general denial and, among affirmative defenses, alleged contributory negligence, assumption

of the risk, and that Ms. Buettner was a harbinger or keeper of the animal.

{¶6} Both parties moved for partial summary judgment, however, each was denied. During the trial, each party moved for directed verdicts, which were also denied. Over objection, the judge rejected Ms. Buettner's jury instructions. When she asked that an interrogatory be submitted addressing whether she was a "harborer or keeper" of the dog, her request was denied because the judge held she had not prepared and submitted it in conformity with local rules. No other objections were made to the instructions.

{¶7} Ms. Buettner's assignments of error are set forth in the Appendix to this opinion.

DIRECTED VERDICT

{¶8} Ms. Buettner claims the judge should have granted her motion for a directed verdict on the issue of strict liability under R.C. 955.27 because the evidence proved that she did not own the dog, the house was only her temporary residence, she lacked control of the house, and Beasley's presence at the time of the incident negated any finding that she was a keeper or harbinger.

{¶9} Before we address this argument, we first evaluate

Beasley's assertion that it was waived for purposes of appeal by Ms. Buettner's failure to preserve her motion for a directed verdict on the record. A review of the record's partial transcript refutes this contention.

{¶10} Directed verdicts are governed by Civ.R. 50, and we review the grant or denial of a motion for directed verdict de novo.¹ As the Ohio Supreme Court held in determining whether to direct a verdict, the judge does not engage in a weighing of the evidence, nor does he evaluate the credibility of witnesses.² Rather, the judge is confronted solely with a question of law: Was there sufficient material evidence presented at trial on this issue to create a factual question for the jury?³

{¶11} In construing the evidence most strongly in favor of the nonmoving party, the judge must give the nonmoving party the benefit of all reasonable inferences that may be drawn from the

¹*Steppe v. KMart Stores* (1999), 136 Ohio App.3d 454, 737 N.E.2d 58.

²*Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66, 67-68, 430 N.E.2d 935, 937.

³*Malone v. Courtyard by Marriott L.P.*, 74 Ohio St.3d 440, 445, [1996-Ohio-311](#), 659 N.E.2d 1242, 1247.

evidence.⁴ In determining whether to direct a verdict, the judge does not engage in a weighing of the evidence, nor does he evaluate the credibility of witnesses.⁵ Rather, the judge is confronted solely with a question of law: Was there sufficient material evidence presented at trial on this issue to create a factual question for the jury?⁶ When the record contains substantial competent evidence favoring the nonmoving party so that reasonable minds might reach different conclusions, he must deny the motion.⁷

{¶12} Dog bites are governed by R.C. 955.28(B) which states in pertinent part:

"The owner, keeper, or harbinger of a dog is liable in damages for any injury, death, or loss to person or property that is caused by the dog, unless the injury, death, or loss was caused to the person or property of an individual who, at the time, was committing or attempting to commit a trespass or other criminal offense on the property of the

⁴*Broz v. Winland*, 68 Ohio St.3d 521, 526, [1994-Ohio-529](#), 629 N.E.2d 395, 399.

⁵*Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St. 2d 66, 67-68, 430 N.E.2d 935, 937.

⁶*Malone v. Courtyard by Marriott Ltd. Partnership*, 74 Ohio St. 3d 440, 445, [1996-Ohio-311](#), 659 N.E.2d 1242; *Ruta*, supra at 68-69, 938.

⁷*Ramage v. Cent. Ohio Emergency Service, Inc.*, 64 Ohio St.3d 97, [1992-Ohio-109](#), 592 N.E.2d 828.

owner, keeper, or harborer, or was committing or attempting to commit a criminal offense against any person, or was teasing, tormenting, or abusing the dog on the owner's, keeper's, or harborer's property."

{¶13} In order to maintain a strict liability action under R.C. 955.28(B), Buettner must establish: (1) that the defendant is the owner, keeper, or harborer of the dog; (2) that the injury was proximately caused by the dog's actions; and (3) the monetary amount of the damages.⁸ In the past, courts held that this section of the revised code imposes strict liability on the dog owner unless one of the exceptions enumerated in the statute applies.⁹ However, many Ohio courts have since expanded the breadth of the exceptions and held that a victim who is an owner, keeper, or harborer of the offending dog cannot generally recover for injuries inflicted by it.¹⁰ Ms. Buettner submits that she neither owned, kept, nor harbored the dog, and that at all times Sniffer was under

⁸*Hirshauer v. Davis* (1955), 163 Ohio St. 105, 126 N.E.2d 337, paragraph three of the syllabus.

⁹*Montgomery v. Zalud* (August 20, 1998), Cuyahoga App. No. 73021, citing *Dragonette v. Brandes* (1939), 135 Ohio St. 223, 20 N.E.2d 367.

¹⁰*Khamis v. Everson* (1993), 88 Ohio App.3d 220, 227, 623 N.E.2d 683; *Bowman v. Scott*, Summit County App. No. 21568, [2003-Ohio-7182](#).

the sole control of Beasley.

{¶14} The terms "owner," "harborer" and "keeper" are not statutorily defined, but rather we refer to case law for their definitions. An "owner" is the person to whom the dog belongs.¹¹ A "keeper" is the person who has physical care or charge of the dog.¹² And finally, a "harborer" is one who, "has possession and control of the premises where the dog lives, and silently acquiesces to the dog's presence."¹³ However, it is clear that there is no ironclad definition of the term "keeper." Many courts have used the elements of physical control, care and custody of the animal to determine whether someone meets the requirements of a keeper, but each case is distinguishable on its facts and each case must be considered on its own merits.¹⁴ This is the province of the jury, and the judge properly reserved this determination for their

¹¹*Garrard v. McComas* (1982), 5 Ohio App.3d 179, 182, 450 N.E.2d 730.

¹²*Id.*

¹³ *Khamis* at 226, citing *Flint v. Holbrook* (1992), 80 Ohio App.3d 21, 25, 608 N.E.2d 809.

¹⁴*McComas, Holbrook, and Khamis* supra; *Johnson v. Allonas* (1996), 116 Ohio App. 3d 447, 449, 688 N.E.2d 549; *Manda v. Stratton*, (Apr. 4, 1999), Trumbull App. No. 98-T-0018.

review.

{¶15} The second assignment of error lacks merit.

II. MANIFEST WEIGHT

{¶16} Ms. Buettner claims that the jury's verdict was against the manifest weight of the evidence because Beasley admitted he owned the dog and was responsible for it, denied she was a joint owner,

{¶17} and nothing contradicted her testimony that she was not a keeper or harbinger of the dog, and that her temporary residence with Beasley negated any finding that she was a keeper or harbinger.

{¶18} In evaluating a challenge to the verdict based on manifest weight of the evidence presented at trial, a court sits as the thirteenth juror and intrudes its judgment into proceedings which it finds to be fatally flawed through misinterpretation or misapplication of the evidence by a jury which has "lost its way."¹⁵ This power is subject to strict and narrow constraints.

"Weight of the evidence concerns `the inclination of the greater amount of credible evidence offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief.' " ***

¹⁵ *State v. Thompkins*, 78 Ohio St.3d 380, [1997-Ohio-52](#), 678 N.E.2d 541.

“The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.”¹⁶

{¶19} An owner, keeper, or harbinger cannot be held liable to another owner, keeper, or harbinger as under R.C. 955.28(B), and although both parties testified that Beasley was the sole owner of the house, was solely responsible for all maintenance and bills, and that he was the sole owner of both dogs, it also reflects that, although Ms. Buettner did not “own” the dogs, she had voluntary control of the animals during the two plus years that the dogs lived with her. She fed them, walked them, and cared for them on a daily basis. She took them to the veterinarian on numerous occasions where she listed herself as the owner.

{¶20} There is no indication that she wanted Sniffer removed or that she feared him. On the contrary, the record shows that before the attack, she was bending down to kiss a dog that frequently slept with them. Although Ms. Buettner testified that she

¹⁶Id. at 387.

purchased the dogs as a gift, that she did not own the home, and that she was reimbursed for her care of the dogs, this evidence is insufficient to prove she could not be a harbinger or keeper of them.

{¶21} Buettner cites *Montgomery v. Zalud*¹⁷ in support, but it is distinguishable not only because it involved a reversal on a summary judgment motion, but it involved a tenant occupying a house for a defined two-month period of time and where the victim had been specifically advised to stay away from the dog.

{¶22} As recognized in *Khamis*, supra, the legislature, in enacting R.C. 955.28, did not intend to protect an owner, keeper, or harbinger of a dog who, by the language of the statute, has an absolute duty to control the animal.¹⁸ We cannot say that the jury lost its way in finding against Ms. Buettner. This first assignment of error lacks merit.

PROPOSED JURY INSTRUCTIONS

{¶23} Ms. Buettner asserts the judge erroneously instructed the jury on the definitions of a "keeper" and of a "harbinger." She

¹⁷(Aug. 20, 1998), Cuyahoga App. No. 73021.

¹⁸*Khamis*, supra at 227.

claims the jury should have been initially instructed that a keeper's duties end when an owner is present and, secondly, that she was not a harborer because she was Beasley's guest.

{¶24} The proper standard of review for an appellate court is whether a refusal to give a requested jury instruction constituted an abuse of discretion under the facts and circumstances of the case.¹⁹ A judge has discretion as to the language of the instructions to the jury and is not bound by the requested language of counsel.²⁰ The court ordinarily should give a requested jury instruction if it is a correct statement of law, which is applicable to the facts in the case, and reasonable minds might reach the conclusion sought by the specific instruction.²¹

{¶25} It is incumbent upon a judge to provide the jury a plain, distinct and unambiguous statement of the law applicable to the

¹⁹*State v. Wolons* (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443.

²⁰*Jenkins v. Clark* (1982), 7 Ohio App.3d 93, 100, 7 OBR 124, 454 N.E.2d 541, paragraph five of the syllabus.

²¹*Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 591, 575 N.E.2d 828, citing Markus & Palmer, *Trial Handbook for Ohio Lawyers* (3 Ed.1991) 860, Section 36:2.

evidence presented by the parties.²² He can be found to have committed reversible error only where it can be determined the instructions given misled the jury.²³ The Ohio Supreme Court provided this guidance in *Murphy v. Carrollton Mfg. Co.*,²⁴

"It is well established that the trial court will not instruct the jury where there is no evidence to support an issue. However, the corollary of this maxim is also true. Ordinarily, requested instructions should be given if they are correct statements of the law applicable to the facts in the case and reasonable minds might reach the conclusion sought by the instructions."

{¶26} The judge gave the following instruction to the jury:

"A keeper of a dog is a person who has the duty to manage, care or control the dog temporarily or otherwise, even though he or she does not own it."

{¶27} Ms. Buettner contends that the judge should have given an instruction that "when an owner of a dog is present, the keeper's duties end." We disagree.

{¶28} Buettner relies on *Khamis*, supra, where the court noted

²²*Marshall v. Gibson* (1985), 19 Ohio St.3d 10, 12, 482 N.E.2d 583.

²³*Kokitka v. Ford Motor Co.* (1995), 73 Ohio St.3d 89, 93, 652 N.E.2d 671.

²⁴(1991), 61 Ohio St.3d 585, 591, 575 N.E.2d 828.

the distinction in *Bevin*, supra, that the owner was *present* at the time the victim was attacked and, therefore, the victim was not a keeper of the dog within the meaning of the statute.

"In such a case, it can be fairly determined that when the owner is actually present, the "keeper's" duties have ended since the owner has resumed physical control of the dog."²⁵

{¶29} Although *Khamis* may be classified as persuasive authority, and while certain portions of the decision have been adopted by this court, we have yet to adopt the holding that a keeper's duties end when an owner is present. As neither this district, nor the Ohio Supreme Court has adopted this specific holding, the judge did not err in refusing to instruct the jury that a keeper's duties end when the owner is present.

{¶30} Ms. Buettner also asserts error in instructing the jury on the term "harborer." In the judge's instruction to the jury, he stated:

"The harborer of a dog is a person who has possession or control of the property where the dog lives."

{¶31} Buettner has not offered any alternative instruction, but has rather asserted blankly that no instruction should have been

²⁵*Khamis*, supra, at 226.

given because she did not own the home, did not pay rent or any household expenses, and she required Beasley's permission in order to make changes to the home. These assertions of fact do not make the jury instruction a misstatement of the law, but rather leave the jury with the question of whether Ms. Buettner did possess or control the premises. As this question was within the province of the jury, the instruction as to "harborer" did not mislead the jury to such an extent as to cause reversible error.

{¶32} This third assignment of error lacks merit.

{¶33} The judgment is affirmed.

Judgment affirmed.

ANTHONY O. CALABRESE JR., J., concurs.

COLLEEN CONWAY COONEY, J., concurs. (SEE SEPARATE CONCURRING OPINION).

COLLEEN CONWAY COONEY, J., concurring.

{¶34} I concur with the majority opinion and write separately only to clarify that the jury instruction Buettner sought regarding a keeper's duties was not appropriate under the circumstances presented. Beasley was not "actually present" when Sniffer bit Buettner. He was in the kitchen and therefore had not "resumed

physical control" of Sniffer in the bedroom. The facts presented by Buettner demonstrated that she had control of Sniffer when the dog bit her. She was the only person actually present in the bedroom and could have ejected the dog from the bedroom instead of attempting to kiss him.

APPENDIX A

"I. THE JURY'S VERDICT IN FAVOR OF APPELLEE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

"II. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT IN DENYING HER MOTION FOR A DIRECTED VERDICT WHEN APPELLEE FAILED TO ADDUCE ANY EVIDENCE THE REBUT THE IMPOSITION OF STRICT LIABILITY."

"III. THE TRIAL COURT ABUSED ITS DISCRETION TO THE PREJUDICE OF APPELLANT IN FAILING TO GIVE APPELLANT'S PROPOSED JURY INSTRUCTIONS AND GIVING JURY INSTRUCTIONS WHICH WERE CONFUSING AND MISLEAD THE JURY ON THE ISSUE OF STRICT LIABILITY."

It is ordered that appellee shall recover of appellant costs herein taxed.

The court finds that there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANNE L. KILBANE
PRESIDING JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc. App.R.22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E), unless a motion for reconsideration with supporting brief, per App.R. 26(A) is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

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