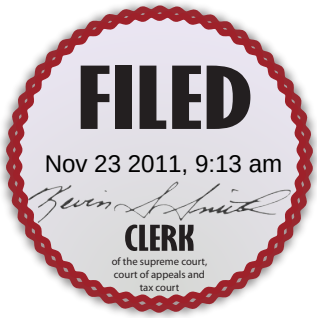

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IN THE
COURT OF APPEALS OF INDIANA

CHRISTINA FRANCIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-1104-OV-303
	)	
CITY OF INDIANAPOLIS,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable David J. Certo, Judge
Cause No. 49F12-1101-OV-1130

November 23, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Christina Francis challenges the trial court's judgment finding her in violation of Indianapolis-Marion County Ordinance No. 531-102 for having a dog at large. Upon appeal, Francis raises several challenges to this judgment. We affirm.

FACTS AND PROCEDURAL HISTORY

For eleven years, Francis has operated Luv-A-Dog, a nonprofit dog-rescue organization, at her home on Ashland Avenue in Indianapolis. In 2010, Francis adopted out 190 dogs. Francis has both outdoor and indoor dog enclosures on her property, with the outdoor enclosures surrounded by five and six-foot fencing, reinforced with hog paneling wire to prevent the dogs from pushing through. On November 18, 2010, one of Francis's rescue dogs escaped, perhaps by climbing up on the hog paneling to jump over the fence. The dog was discovered in a neighbor's yard standing in some brush, where Francis's neighbor Kelly Hornaday observed it, from a distance of approximately twelve to fifteen feet. According to Hornaday, the dog's front paws "came up," and it lunged at her, trying to run at her. Tr. p. 15. Hornaday did not know if the dog was caught in the brush. The dog was barking and growling aggressively, with its teeth out and mouth open. Animal control officers responded to the scene, where Francis acknowledged ownership of the dog and provided documentation of rabies vaccinations.

That day, the City issued Francis a citation for violating sections 531-102(c)(2) and 531-728 of the Revised Code of the City of Indianapolis and Marion County. At a March 9, 2011 hearing on the matter, the City moved to dismiss the section 531-728 violation, and the trial court found Francis in violation of section 531-102(c)(2) and assessed the minimum fine

of $250. As a result of its finding, the trial court advised Francis, pursuant to section 531-728, that she was no longer permitted to own more than two dogs and must therefore cease operation of the shelter. The parties agreed to an August 10, 2011 compliance date, which the trial court subsequently stayed pending this appeal.

DISCUSSION AND DECISION

Francis first challenges the trial court's finding her in violation of section 531-102. On appeal of claims tried by the court without a jury, the court on appeal shall not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. Ind. Trial R. 52(A). A judgment is clearly erroneous if there is no evidence to support the findings, the findings do not support the judgment, or the trial court applies the wrong legal standard. *Fraley v. Minger*, 829 N.E.2d 476, 482 (Ind. 2005). Findings of fact are reviewed under the clearly erroneous standard, but appellate courts do not defer to conclusions of law, which are reviewed de novo. *Id.*

Section 531-102 states, in pertinent part, as follows:

> (a) An owner or keeper of an animal commits a violation of the Code if that animal is at large[1] in the city.
>
> ***
>
> (c) If, while the animal is at large in violation of this section at a location other than its owner's or keeper's property or in the public right-of-way, it:
>
> (1) Attacks another animal; or
>
> (2) Chases or approaches a person in a menacing fashion or apparent attitude of attack;

[1] Section 531-101 defines "at large" as "not confined without means of escape of any portion of the animal's body in a pen, corral, yard, cage, house, vehicle or other secure enclosure and under the control of a competent human being."

> then the violation shall be subject to the enforcement procedures and penalties provided in section 103-3 of the Code, and the fine imposed shall not be less than two hundred fifty dollars ($250.00), or five hundred dollars ($500.00) if another animal or person is injured as a result of the animal's actions. If the violation results in serious injury to any person, the court upon request shall order the animal forfeited and/or destroyed.
>
> When finding Francis in violation, the trial court stated as follows:
>
> Section 531-102 provides that an owner or keeper of an animal commits a violation if that animal is at-large in the city. That issue itself has been resolved by the testimony I've received today. The animal was, in fact, at large and Ms. Hornaday was confronted by the animal with easy access to her on her own property.
>
> I cannot conclude anything other than the city has demonstrated beyond a preponderance of the evidence that Ms. Francis is, in fact, accountable for her dog's conduct under section 531-102-c-2.

Tr. p. 59.

I. Strict Liability

According to Francis, the trial court erred by interpreting section 531-102 to impose strict liability. Francis contends that section 531-102 contains an implicit mens rea requirement. Francis relies upon multiple criminal cases to support this argument. While there is certainly precedent for the proposition that mens rea elements may be implicit in crimes, this is not a criminal case. To the contrary, as this court recently concluded in *Boss v. State*, 944 N.E.2d 16, 23 (Ind. Ct. App. 2011), section 531-102 is civil in nature. More to the point, it is a strict liability offense and does not require a finding of scienter or mens rea. *See id.* at 24. Significantly, the *Boss* court was interpreting a prior, more forgiving version, of section 531-102, which stated that it was unlawful for the owner or keeper of an animal to "cause, suffer, or allow" that animal to be at large. Here, the amended ordinance states that

the owner/keeper is in violation simply whenever the animal is at large. Given the conclusions in *Boss* and the plain language of the current ordinance, we are unpersuaded that there is an implicit mens rea requirement in section 531-102.

Francis argues that failure to imply a mens rea element renders the ordinance unconstitutional on due process grounds because it "criminalizes" wholly passive conduct. We have already stated that section 531-102 is not criminal in nature. More importantly, Francis's conduct was not wholly passive. She voluntarily ran an animal shelter, selected dogs, housed them, and did so with apparently inadequate fencing, at least on one occasion. The fact that Francis's actions perhaps were not negligent does not render them involuntary. Accordingly, we cannot accept Francis's contention that her conduct was wholly passive. To the extent Francis's due process argument rests upon this premise, it is unpersuasive.

Francis argues that interpreting section 531-102 to impose strict liability for animals at large leads to absurd results, such as the existence of a violation whenever a pet is loose, irrespective of negligence by its owner or harm caused by the pet. In interpreting a statute or ordinance, we assume that its drafters intended logical application of the language so as to avoid unjust or absurd results. *Bolin v. Wingert*, 764 N.E.2d 201, 204 (Ind. 2002). The City does not dispute that myriad scenarios exist in which pet owners could be found in violation of the ordinance because their pets become accidentally unconfined, if even for a moment. There can be little question that the ordinance casts a broad net. But, as the City points out, violations are only harmless, and perhaps seemingly absurd, when the animal creates no problem and causes no threat. Common experience dictates, however, that unconfined

animals may cause unforeseen problems on an unpredictable basis. Given the City's obvious efforts to implement an effective and widespread solution to these problems, we are not convinced that strict liability for pet owners is an absurd result.

II. Sufficiency of the Evidence

Francis next challenges the sufficiency of the evidence to support her being found in violation of section 531-102(c)(2). In determining the sufficiency of the evidence, this Court on review may only consider that evidence and the reasonable inferences therefrom which support the trial court's judgment. *Field v. Area Plan Comm. of Grant Cnty, Ind.*, 421 N.E.2d 1132, 1139 (Ind. Ct. App. 1981). If there is any probative evidence to support the trial court's decision, it is the duty of this court to affirm. *Id.*

Pursuant to section 531-102(c)(2), an owner/keeper is subject to certain enforcement procedures and a $250 fine if, while her animal is at large and in a location other than her property or a public right of way, it chases or approaches a person in a menacing fashion or apparent attitude of attack. Francis contends that there was no evidence her dog chased or approached a person. In making this argument, Francis points to evidence that the dog was in an area filled with brush and could have been stuck there, unable to approach.

To the extent Hornaday suggested that the dog may have been entangled in the brush, the trial court was entitled to reject her theory. The photographic exhibits demonstrate that the brush is not overwhelmingly tall or tangled, and the dog appears to be short-haired and relatively strong, supporting a conclusion that it was not caught in the brush. In any event, the brush did not prevent the dog, who was approximately twelve to fifteen feet away, from

lunging at Hornaday with its paws raised, "trying to run at [her]." Tr. p. 15. These actions are adequate to satisfy the "approach" element of the above section. "Approach" means merely "to come or go near or nearer to in place or time: draw nearer to[.]" WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 106 (1964). Tr. p. 15. Based upon a common understanding of "lunge," which indicates the dog moved in Hornaday's direction, especially given Hornaday's additional testimony that the dog attempted to run "at" her, also suggesting it moved in her direction, there was sufficient evidence to establish that the dog moved nearer to or "approached" her. The fact that its mouth was open, teeth bared, and it was barking and growling satisfies the requirement that it did so in a menacing fashion or in an apparent attitude of attack.

III. Vagueness

Francis further argues that "menacing fashion" and "apparent attitude of attack" are unconstitutionally vague. In Francis's view, these phrases require a determination of the animal's subjective intent, which she argues is too indeterminate a concept to provide a standard for assessing ordinance violations. Francis also argues that differing persons have differing reactions to dogs, and that an ordinance based upon a person's perception of "menacing" behavior or "apparent attitude of attack" is too subjective to establish a discernable standard.

> When reviewing a constitutional challenge to a municipal ordinance, we treat the ordinance as if it stands on the same footing as an act of the legislature. Thus, a municipal ordinance is presumed to be constitutional, and we place the burden upon the party challenging the ordinance to show unconstitutionality. An ordinance is unconstitutionally vague only if individuals of ordinary intelligence cannot adequately comprehend the

> ordinance so as to inform them of the prohibited conduct. An ordinance need not list with exactitude each item of prohibited conduct; rather, an ordinance need only inform an individual of the generally prohibited conduct.

Lutz v. City of Indpls., 820 N.E.2d 766, 768 (Ind. Ct. App. 2005) (citations omitted).

We cannot agree that a plain reading of the ordinance requires ascertainment of the animal's subjective state of mind. This would create an absurd standard, and stands contrary to a plain-language interpretation of the ordinance which imposes strict liability on a pet owner/keeper for the pet's menacing behavior and/or "apparent attitude of attack." "Menacing" simply means "threatening," and "apparent attitude" of attack means that the animal is "readily perceptible" as being in a "position … indicating action," here, of an attack. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1409, 102, 141 (1964). Neither includes the animal's state of mind as a necessary part of its definition. We will not proceed under the assumption that the City-County Council sought only to regulate pets whose malicious intentions led them astray.

Francis also argues that the ordinance is too vague because it creates violations based on standards such as "menacing fashion" and "apparent attitude" of attack, which she claims are highly subjective and too dependent upon different individuals' varying reactions to dogs. Given the above definitions, these phrases reasonably convey the prohibited conduct at issue, namely an animal acting in a threatening manner or assuming a threatening position.

To the extent Francis argues that such situations are too subjective to support an ordinance, the law permits such subjective standards in other contexts, and there is no reason why it should not similarly permit them here. *See Littler v. State*, 871 N.E.2d 276, 279 (Ind.

2007) (observing that the self-defense statute requires subjective belief that force is necessary); *Ransom v. State*, 850 N.E.2d 491, 498 (Ind. Ct. App. 2006) (observing that subjective feeling of confinement is relevant for purposes of determining whether criminal confinement occurred). The mere fact that there is a subjective component to the statute does not render it overly vague. Indeed, statutes or ordinances are often based upon the level of threat a perpetrator presents to his/its victim, which is often a subjective consideration. Ultimately, it is for the fact finder to determine whether a particular act fits within the definition of a statute or ordinance. We are unpersuaded that a subjective component renders this ordinance unconstitutionally vague.

In any event, as Francis acknowledges, hers is a claim that the ordinance is facially unconstitutional, meaning it is impermissibly vague in all applications. A plaintiff who engages in conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982). A court should therefore examine a plaintiff's conduct before analyzing other hypothetical applications of the law. *Id.*

To the extent that the ordinance might be vague, it is not in this case. According to Hornaday, the dog was barking, growling, and lunging, its mouth was open and its teeth bared. These actions fall squarely within the ordinary understanding of "menacing" and "apparent attitude" of attack. Francis's vagueness challenge warrants no relief.

IV. Overbreadth of Section 531-728

A. Injunction

Section 531-728 imposes additional restrictions for persons found in violation of section 531-102 and states as follows:

> (a) It shall be unlawful for any person who has been found in violation of sections 531-102 (at large), 531-103 (animals in heat), 531-109 (animal attacks), 531-204 (nuisance), 531-206 (unlawful use), 531-401 (care and treatment), 531-402 (abandonment), 531-404 (animal fights) or article V of this chapter, to own or keep more than two (2) dogs in the city or to own or keep any dog:
>
> (1) That has not been spayed or neutered by a veterinarian; or
>
> (2) That has not been implanted with a microchip with a registered identification number.
>
> (b) A person who has been found in violation of sections 531-102(c) (at large), 531-109 (animal attacks), 531-206 (unlawful use), 531-404 (animal fights), or article V of this chapter commits a violation of the code if any dog owned or kept by that person is outside a structural enclosure sufficient to confine the dog without means of escape, unless the dog is on a leash and under the control of a competent adult.

Because the trial court found Francis in violation of section 531-102, it informed Francis that she was no longer permitted to keep more than two dogs and must dissolve her animal shelter.

Francis argues that the trial court imposed an injunction which was not narrowly tailored to remedy the harm. The City counters, and we agree, that the trial court did not impose an injunction but merely ordered compliance with the plain language of the ordinance. We therefore decline to consider Francis's arguments premised upon the assumption that an injunction was issued.

B. Proportionality

Francis argues that the imposition of a two-dog limitation pursuant to section 531-728 violates the proportionality clause of Article 1, Section 16 of the Indiana Constitution. Article 1, Section 16 provides as follows: "Excessive bail shall not be required. Excessive fines shall not be imposed. Cruel and unusual punishments shall not be inflicted. All penalties shall be proportioned to the nature of the offense."

As previously mentioned, section 531-102 is civil in nature. Section 531-728, which imposes regulatory restrictions upon persons found in violation of section 531-102, appears similarly civil in nature. Francis presents no authority that Article 1, Section 16's proportionality requirement applies in the civil context. In any event, we find no proportionality problem in barring pet owners who are unable to keep their dogs confined from owning more than two dogs at once. For the protection of the community, it simply makes sense to limit dog ownership by persons who permit dog violations to occur. That said, we recognize the trial court's reluctance to impose this ordinance in light of Francis's good work for local stray dogs. Unfortunate as the restrictions may be in this case, we cannot conclude they are unconstitutional.

The judgment of the trial court is affirmed.

ROBB, C.J., and BARNES, J., concur.