

IN THE COURT OF APPEALS OF IOWA

No. 8-437 / 07-1377
Filed August 13, 2008

LARRY WELCHER,
Plaintiff-Appellant,

vs.

KATHLEEN SPEES,
Defendant-Appellee.

Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

A plaintiff in a personal injury action appeals from the jury's verdict in favor of the defendant. **AFFIRMED.**

Jay P. Roberts of Roberts, Stevens & Prendergast, P.L.C., Waterloo, for appellant.

Patrick L. Woodward and Heather L. Carlson of McDonald, Woodward & Ivers, P.C., Davenport, for appellee.

Considered by Miller, P.J., and Vaitheswaran and Eisenhauer, JJ.

VAITHESWARAN, J.

A Waterloo postal carrier filed an action against a dog's caretaker, alleging she was negligent in the "handling of a dangerous animal" and, by reason of the negligence, he "suffered serious injuries and damages." A jury returned a verdict in favor of the defendant. On appeal, the postal carrier challenges the district court's (1) refusal to instruct the jury on two theories and (2) exclusion of certain evidence.

I. Background Facts and Proceedings

Kathleen Spees loved dogs. She took it upon herself to provide food and water for dogs around Waterloo that she believed were in need. One dog Spees tended to was Butchie. Butchie belonged to Michael Aebersold, who gave Spees permission to supplement his care of the dog.

One day, Spees found Butchie tangled in the cable that restrained him in Aebersold's back yard. To untangle him, Spees momentarily unhooked him from the cable. Butchie bolted.

At the same time, postal carrier Larry Welcher was delivering mail in the neighborhood. As he walked back to his vehicle, he heard a noise that he surmised was Butchie breaking free of his chain. He "took off on a dead run," jumped into his truck, and landed on his back.

Welcher sued Spees and the dog's owner, Aebersold. Aebersold was eventually dismissed.

Prior to trial, Spees filed a motion in limine seeking to exclude a sign on the Aebersold property that stated Butchie was not always friendly. The district

court granted the motion. At trial, Welcher made an offer of proof. The court adhered to its earlier ruling.

After the evidence was presented, Welcher's attorney sought jury instructions on Waterloo's leash law and on the applicability of the dog owner statute. The district court declined to submit instructions on these laws.

The jury returned a verdict in favor of Spees, finding Butchie did attempt to bite Welcher, but the attempt was not a proximate cause of the damage to Welcher.

Welcher moved for a new trial based on the court's refusal to instruct the jury as he had requested. The district court denied the motion and this appeal followed.

II. Jury Instructions

"There must be substantial evidence in the record to support the instruction submitted." *Coker v. Abell-Howe Co.*, 491 N.W.2d 143, 150 (Iowa 1992). It is error to submit instructions on issues that have no support in the evidence. *Bride v. Heckart*, 556 N.W.2d 449, 452 (Iowa 1996) (citation omitted).

A. Waterloo Leash Law

Welcher's attorney proposed the following instruction:

I think there should be an instruction on the leash law which says Katherine (sic) Spees has admitted there is a leash law in Waterloo. If she violated the leash law by letting the dog loose, she is liable as a matter of law for the consequences of that.

As noted, the district court declined to give this instruction. We find no error in this ruling, as the record did not contain substantial evidence to support the instruction. First, as Spees points out, the Waterloo leash law was not made part

of the record. See *Weldon v. Zoning Bd. of the City of Des Moines*, 250 N.W.2d 396, 399 (Iowa 1977), *overruled on other grounds by Bontrager v. Auto Serv., Inc. v. Iowa City Bd. of Adjustment*, 748 N.W.2d 483 (Iowa 2008). Second, Spees did not admit to a violation of the leash law as she understood it. The pertinent testimony was as follows:

Q. Well, tell the jury what the leash law means to you. A. Well, it means the dog should be tied all the time.

Q. Tied up? A. Tied up at all times.

Q. And you knew that? A. Yes, I knew that.

Q. Did you, in fact, prior to [the date of this incident], let dogs run loose when you tended to them? A. No.

...

Q. Did you usually carry a leash with you? A. No.

Q. Why? A. Well, he was on a cable. He didn't need a leash. He was on a cable.

Q. Then you knew he needed to be kept restrained? A. Well, yes.

Q. Did you ever take these dogs on walks on a leash? A. Never.

Q. Why? A. I just fed and watered them. I never walked any of these—we never walked any of these dogs, exercise. Never took them out, no.

...

Q. And you had the ability to make the choice of unhooking him or not, correct? A. The only reason I unhooked him was because he was tangled real bad.

We affirm the district court's refusal to instruct the jury on Waterloo's leash law.

B. Iowa Code Section 351.28

Iowa Code section 351.28 states in pertinent part: "the owner of a dog shall be liable to an injured party for all damages done by a dog" Where there is evidence of legal ownership, that evidence controls. *Fouts ex rel. Jensen v. Mason*, 592 N.W.2d 33, 37 (Iowa 1999).

The evidence was undisputed that Michael Aebersold owned Butchie. Welcher alleged this fact in his petition and his questions of Spees were predicated on this fact. Additionally, when Spees was asked if she ever owned

Butchie, she responded, “Never, never.” When she was asked who controlled the dog on the day he bolted, Spees testified, “Well, he had an owner and two kids; but yes I was there that day.”

Assuming this evidence was insufficient to establish legal ownership, Welcher also did not present substantial evidence supporting an alternate definition, which required a showing that Spees harbored the dog on her premises. *See id.* Butchie was in Aebersold’s back yard on the day of the incident and it was undisputed that Spees had never cared for him on her premises.

We conclude the district court did not err in refusing to instruct the jury on the applicability of the dog owner statute.

III. Evidentiary Issue

Spees finally challenges the exclusion of a sign stating Butchie was not friendly. Our review of this ruling is for an abuse of discretion. *Dettman v. Kruckenberg*, 613 N.W.2d 238, 249 (Iowa 2000).

According to an offer of proof, the sign was relevant to establish Spees’s knowledge of Butchie’s vicious propensities. While we do not quarrel with the relevancy of this evidence, we note that it was cumulative. *See Iowa R. Evid.* 5.403 (allowing for exclusion of relevant but cumulative evidence).

Welcher testified that he told Spees not to let Butchie loose because “he’s not very friendly towards me.” He continued, “she understood me perfectly.” Given this duly admitted evidence, we conclude the district court did not abuse its discretion in excluding evidence of the sign.

AFFIRMED.