

NOTICE

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2017 IL App (4th) 150945-U

NO. 4-15-0945

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

January 13, 2017

Carla Bender

4th District Appellate Court, IL

JODI MOSCARDELLI,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	Sangamon County
JULIE NEWBERRY, a/k/a JULIE SEXTON,)	No. 15L8
Defendant-Appellee.)	
)	Honorable
)	John P. Schmidt,
)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.

Justice Appleton concurred in the judgment.

Justice Holder White dissented.

ORDER

¶ 1 *Held:* The appellate court reversed the trial court's grant of defendant's motion for summary judgment where a genuine issue of material fact existed as to whether plaintiff was an "owner" as defined under the Animal Control Act (510 ILCS 5/1 to 35 (West 2012)).

¶ 2 In January 2015, plaintiff, Jodi Moscardelli, filed a complaint against defendant, Julie Newberry, a/k/a Julie Sexton, after being bitten while feeding defendant's dog. In July 2015, defendant filed a motion for summary judgment, asserting plaintiff was precluded from recovery because plaintiff was acting as the dog's "owner" as that term is defined under the Animal Control Act (Act) (510 ILCS 5/2.16 (West 2012)), when she sustained her injuries. Following a November 2015 hearing, the trial court granted defendant's motion for summary judgment.

¶ 3 Plaintiff appeals, asserting the trial court erred by granting defendant's motion for summary judgment. For the following reasons, we reverse and remand.

¶ 4 I. BACKGROUND

¶ 5 A. Undisputed Facts

¶ 6 The undisputed facts in this case come from plaintiff's discovery deposition. At the time of the occurrence, plaintiff and defendant had known each other for about one year, as their daughters were friends. Defendant had recently moved to a new home on Teal Street in Springfield, a couple of blocks from plaintiff's home. Plaintiff had not visited in defendant's new home prior to the occurrence. Plaintiff had been around defendant's dog, an Akita, on two to three prior occasions. On those occasions, plaintiff had not witnessed the dog engaging in any aggressive behaviors, nor had she heard anyone say the dog had aggressive tendencies.

Plaintiff's daughter, Lili, had been around the dog on numerous occasions without any problems. Plaintiff was also a dog owner, and she never noticed defendant's dog behaving aggressively around her dog.

¶ 7 On January 31, 2013, defendant's family had to leave town on an emergency basis due to a death in the family. Defendant's daughter asked Lili to watch her dog. That evening, Lili went to defendant's home to provide food and water for the dog, but she called plaintiff and stated the dog had jumped on her and frightened her. As a result, plaintiff agreed to go to defendant's house to feed and water the dog.

¶ 8 When she arrived at the house, plaintiff called defendant and asked for further instructions on how to care for the dog. Defendant explained where the dog food was located and how much to use. Defendant also stated her boyfriend would take care of the dog starting later that evening, so plaintiff would only need to feed and water him once.

¶ 9 After the telephone call, plaintiff went to the basement to retrieve the dog's food. The dog's food and water bowls were located outside on the deck, which was just off of the kitchen area. The dog was confined in the kitchen by a baby gate. Plaintiff stepped over the baby gate and walked to the back door to retrieve the food bowl so she could fill it with fresh food. At that time, the dog was running back and forth excitedly beside her. When plaintiff opened the door to refill the food bowl, the dog followed her onto the deck.

¶ 10 As plaintiff reached down for the food bowl, the dog bit her on the face. He snarled and growled just before biting her. As she pushed away, the dog also bit her elbow. Plaintiff ran back into the house and shut the door, leaving the dog on the deck. Plaintiff then left defendant's home.

¶ 11 **B. Trial Court Proceedings**

¶ 12 In January 2015, plaintiff filed a complaint, alleging a cause of action under section 16 of the Act. Plaintiff alleged she suffered injuries after defendant's dog bit her face and elbow.

¶ 13 In July 2015, defendant filed a motion for summary judgment. In her motion, defendant alleged that by feeding defendant's dog, plaintiff became the dog's "owner" as that term is defined under the Act (510 ILCS 5/2.16 (West 2012)), and thus, she is prevented from pursuing an action under section 16 of the Act.

¶ 14 In October 2015, plaintiff filed a memorandum in opposition to defendant's motion for summary judgment, asserting a question of material fact existed as to whether plaintiff's actions rose to the level of care and control sufficient for her to be considered an "owner" under the Act.

¶ 15 Following a November 2015 hearing, the trial court entered a written order granting defendant's motion for summary judgment. The court found no issue of material fact and determined, as a matter of law, plaintiff was acting as an "owner" of the dog under the Act at the time she was bitten because she voluntarily assumed the responsibility of feeding and watering the dog. The court further determined that as an "owner," plaintiff was precluded from recovering damages from the attack.

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 On appeal, plaintiff asserts the trial court erred by granting defendant's motion for summary judgment. Specifically, she contends her actions on January 31, 2013, did not make her an "owner" of the dog as that term is defined under the Act.

¶ 19 A. Summary Judgment and the Standard of Review

¶ 20 Summary judgment is appropriate where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2014). "On a motion for summary judgment, the trial court has a duty to construe the record strictly against the movant and liberally in favor of the nonmoving party." *Seymour v. Collins*, 2015 IL 118432, ¶ 42, 39 N.E.3d 961. "Summary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt." *Id.* "Where a reasonable person could draw divergent inferences from undisputed facts, summary judgment should be denied." *Id.*

¶ 21 We review the granting of a motion for summary judgment *de novo*. *Id.* ¶ 49.

¶ 22 Having established the appropriate standard of review, we now turn to the language of the Act.

¶ 23 B. The Act

¶ 24 The Act eliminated the common law "one-bite rule," which required the plaintiff to prove the owner either knew or should have known his or her dog had a propensity to injure people. *Docherty v. Sadler*, 293 Ill. App. 3d 892, 894, 689 N.E.2d 332, 333 (1997) (citing *Harris v. Walker*, 119 Ill. 2d 542, 547, 519 N.E.2d 917, 918 (1988)). The Act focuses on the importance of protecting the public from harm by encouraging tight control over animals. *Wilcoxon v. Paige*, 174 Ill. App. 3d 541, 543, 528 N.E.2d 1104, 1106 (1988). To this end, "the Act imposes penalties against not only an animal's legal owner, but also against anyone who places himself in a position of control akin to an owner." *Id.*

¶ 25 Under section 16 of the Act, "[i]f 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 2012). An "owner" is broadly defined under the Act as "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 2012). A person who falls under the definition of "owner" under the Act "has no cause of action *** if such person is injured by the animal he or she 'owns' or controls." *Hassell v. Wenglinski*, 243 Ill. App. 3d 398, 400, 612 N.E.2d 64, 65 (1993).

¶ 26 The Act, which derogates the common law "one-bite rule," must be "narrowly construed in favor of those who are subject to the statute's operation." *Harris*, 119 Ill. 2d at 547,

519 N.E.2d at 919. Our supreme court has stated that "the legislature intended only to provide coverage under the statute for plaintiffs who, by virtue of their relationship to the owner of the dog or other animal or the lack of any such relationship, may not have any way of knowing or avoiding the risk that the animal poses to them." *Id.*

¶ 27 We now turn to the merits of plaintiff's appeal.

¶ 28 C. The Propriety of Summary Judgment

¶ 29 As noted, plaintiff maintains that her actions on January 31, 2013, did not make her the dog's "owner" as defined under the Act, and the trial court therefore erred by granting defendant's motion for summary judgment.

¶ 30 Whether a person is an "owner" under the Act is generally a question of fact to be determined by the trier of fact. See *Thompson v. Dawson*, 136 Ill. App. 3d 695, 699, 483 N.E.2d 1072, 1075 (1985); *Severson v. Ring*, 244 Ill. App. 3d 453, 457, 615 N.E.2d 1, 4 (1993). Here, the trial court found, as a matter of law, that plaintiff met the Act's definition of an "owner" and was therefore precluded from recovering damages under the Act.

¶ 31 Although cited by neither party, we find *Thompson* instructive. In that case, the plaintiffs brought an action under the Act against the defendants after a dog ran in front of their motorcycle and caused an accident. *Thompson*, 136 Ill. App. 3d at 695-96, 483 N.E.2d at 1072. At trial, the evidence showed that several days prior to the accident, the wife of the defendant, James Stubblefield, took a stray dog home and let it loose in their yard. *Id.* at 696, 483 N.E.2d at 1073. While she testified that she put out bowls of food and water for the dog, it was their intention to find the dog a home or take it to an animal shelter. *Id.* On the third day after bringing the dog home, the Stubblefields left on a three-day trip and asked the codefendant, Dave

Dawson, to keep food and water under a tree for the dog, which he did. *Id.* The accident occurred while the Stubblefields were away on their trip. *Id.* at 695-96, 483 N.E.2d at 1073.

¶ 32 After hearing the evidence in a bench trial, the trial court ruled in favor of the defendants, concluding that their actions of feeding and providing water for the dog did not establish either defendant met the statutory definition of "owner." *Id.* at 697, 483 N.E.2d at 1073. The plaintiffs appealed the court's finding that the defendants were not "owners" of the dog. *Id.* at 697, 483 N.E.2d at 1074. After examining the language of the Act and legal authority interpreting the statutorily-defined term "owner," this court affirmed, stating: "[W]e conclude that the evidence presented a question of whether the defendants exercised the requisite degree of custody and control over the dog so as to bring them within the definition of 'owner' under the Act." *Id.* at 699, 483 N.E.2d at 1075.

¶ 33 Here, plaintiff's exercise of custody and control of defendant's dog was even more limited than was the case in *Thompson*. As noted, plaintiff had only been around defendant's dog on two or three prior occasions. On the evening of the incident, plaintiff went to defendant's home only after her daughter—who had agreed to care for the dog—became frightened when it jumped on her. While at defendant's house, plaintiff called defendant for further instructions. Upon speaking to defendant, plaintiff agreed to feed the dog on that one occasion. This was the only time plaintiff was to feed the dog because defendant had made other arrangements for the dog's future care starting later that same evening. Unfortunately, it was while plaintiff was attempting to feed defendant's dog on this single occasion that it attacked her.

¶ 34 Just as this court found in *Thompson*, where, as here, the evidence demonstrates a party's limited involvement in feeding or providing water for an animal, the question of ownership is a question properly left for the trier of fact. This is so because reasonable persons

could draw different inferences from the undisputed facts with regard to whether plaintiff's actions on this one occasion transformed her into an "owner" under the Act.

¶ 35 Defendant cites several cases where the plaintiffs' claims were rejected after they were found, as a matter of law, to be owners under the Act. However, these cases share a common characteristic that distinguishes them from the facts in this case—the plaintiffs admitted to being an "owner" or "custodian" of the dogs that injured them.

¶ 36 For example, in *Docherty*—the case relied upon by the trial court here—the minor plaintiff agreed to care for the defendant's dog while the defendant, a neighbor, was out of town for five days. *Docherty*, 293 Ill. App. 3d at 893, 689 N.E.2d at 333. While caring for the dog, the minor plaintiff let it out into the yard, where it ran around the house and, on its return, collided with the minor plaintiff. *Id.* The minor plaintiff's father sought damages under the Act for injuries sustained by the minor plaintiff as a result of the collision. *Id.* The defendant filed a motion to dismiss the complaint, alleging that the minor plaintiff was an "owner" under the Act and was thereby exempt from protection. *Id.* The trial court agreed and dismissed the complaint. *Id.* at 894, 689 N.E.2d at 333. On appeal, the plaintiffs acknowledged the minor was an owner, as reflected by this court's framing of plaintiffs' argument that "the minor's status as 'owner' under the Act ought not exempt him from protection" because the injury " 'was the result of a freak occurrence which was not a risk appreciated by or knowingly assumed by the [minor] plaintiff.' " *Id.* at 894, 689 N.E.2d at 333. This court disagreed and held that the minor plaintiff's status as "owner" under the Act excluded him from the protections provided under the Act. *Id.* at 896-97, 689 N.E.2d at 335.

¶ 37 Similarly, in *Wilcoxon*—a case relied upon by the *Docherty* court—the plaintiff, who operated a grooming and boarding business, sustained injuries when the dog she was

boarding for the defendant attacked her. *Wilcoxon*, 174 Ill. App. 3d at 542, 528 N.E.2d at 1105. She sought damages for her injuries from the defendant pursuant to the Act. *Id.* The defendant filed a motion for summary judgment, asserting the plaintiff was barred from bringing suit under the Act since, at the time of the injury, she was an "owner" of the dog as defined under the Act. *Id.* The trial court agreed and granted the defendant's motion for summary judgment. *Id.* at 542, 528 N.E.2d at 1106. On appeal, the plaintiff acknowledged she was a "keeper or harbinger" of the dog that bit her (thus bringing her under the Act's definition of "owner"), but she claimed her status as such should not preclude her from pursuing a cause of action under the Act "when the keeper is an employee of the owner." *Id.* As in *Docherty*, the *Wilcoxon* court disagreed and held that one who is an "owner" of a dog may not maintain a cause of action against the legal owner. *Id.* at 543, 528 N.E.2d at 1106. Accordingly, the court affirmed the trial court's summary judgment in favor of the defendant. *Id.*

¶ 38 In *Hassell*—also a case relied upon by the *Docherty* court—the plaintiff was an employee of the defendant who cared for the defendant's mother in the defendant's home. *Hassell*, 243 Ill. App. 3d at 399, 612 N.E.2d at 64-65. The plaintiff agreed to take the defendant's two dogs for a walk, and while she was doing so, the dogs lunged forward, pulling on their leashes and caused the plaintiff to fall. *Id.* at 399, 612 N.E.2d at 65. She brought suit under the Act, seeking to recover damages from the defendant for injuries she sustained in the fall. *Id.* The defendant filed a motion for judgment on the pleadings, which the trial court granted. *Id.* at 399, 612 N.E.2d at 64. On appeal, the plaintiff argued she should not be precluded from recovery as an "owner" under the Act even though she acknowledged the dogs were in her custody at the time of her injury. *Id.* at 402, 612 N.E.2d at 66. The appellate court

disagreed, finding the plaintiff was an "owner" under the Act, noting in relevant part the plaintiff's admission that the dogs were "in her custody" at the time of her injury. *Id.*

¶ 39 Here, unlike in *Docherty* and *Wilcoxon*, plaintiff disputes that she was an owner of the dog that bit her. Further, unlike in *Hassell*, plaintiff disputes that she was the dog's custodian at the time it bit her. While judgment as a matter of law may be appropriate in cases where the plaintiff concedes his or her status as an owner or custodian under the Act—thereby removing any doubt that he or she is precluded from recovering under the Act by virtue of his or her "owner" status—this is not one of those cases. Here, a question of fact remains as to whether plaintiff's limited involvement in attempting to feed defendant's dog on a single occasion transformed her into an "owner" as defined under the Act.

¶ 40 Based on our review of the record and the relevant authority, we conclude that reasonable minds could draw different inferences as to whether plaintiff was an "owner" of the dog under the Act. As such, summary judgment in favor of the defendant on this issue was not appropriate.

¶ 41 III. CONCLUSION

¶ 42 For the reasons stated, we reverse the trial court's grant of summary judgment and remand for further proceedings.

¶ 43 Reversed and remanded.

¶ 44 JUSTICE HOLDER WHITE, dissenting.

¶ 45 I respectfully dissent. The trial court's entry of summary judgment in this matter should be affirmed. Summary judgment is proper where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Seymour*, 2015 IL 118432 ¶ 42, 39 N.E.3d 961. As noted by the majority, the material facts in this case are undisputed. In finding that the issue of whether plaintiff is an owner under the Act is a question of fact, the majority relies on a non-summary-judgment case from this court, *Thompson*, 136 Ill. App. 3d at 695, 483 N.E.2d at 1072. This reliance is misplaced. First, the appeal in *Thompson* stemmed from the trial court's entry of judgment in favor of the defendants following a bench trial, not an order for summary judgment. *Id.* at 696, 483 N.E.2d at 1072-73. Second, the facts in *Thompson* are so strikingly different from those before us that they must be more thoroughly detailed.

¶ 46 In *Thompson*, the plaintiffs brought suit to recover for injuries sustained when a dog ran into the road striking their motorcycle. *Id.* at 695-96, 483 N.E.2d at 1072. The dog involved in *Thompson* ran freely in the rural McLean County area for months. *Id.* at 696, 483 N.E.2d at 1073. The defendants, Betty and James Stubblefield, observed the dog jumping on people at church, so they placed the dog in their truck to keep it from jumping on the small children nearby. *Id.* Once they returned to their property, the Stubblefields released the dog. *Id.* Although they released the dog, Betty put out food and water near a tree so the stray dog would not go hungry. *Id.* The Stubblefields had a dog of their own, which they kept inside at night. *Id.* On Monday, the stray dog came and went freely from the Stubblefield property. *Id.* On Tuesday, they did not see the dog, and it had not been to their property to eat. *Id.* On Wednesday morning, the Stubblefields went out of town. *Id.* James observed the dog on the barn lot when they left. *Id.*

¶ 47 As was customary, Betty made arrangements for Dave Dawson to care for the Stubblefields' animals during their absence. *Id.* Betty specifically told Dawson to refrain from looking for the stray dog, as it would be taken to an animal shelter if no one had taken it by the time they returned. *Id.* Dawson testified he never actually saw the dog eat or drink at the Stubblefield property. *Id.* He went on to state, "the extra food he put out would disappear at night sometimes, but other times would not." *Id.* He saw the dog on the Stubblefields' barn lot one day when he went to take care of their animals, but other than that, he had nothing to do with the dog and never petted or came into contact with the dog. *Id.* at 696-97, 483 N.E.2d at 1073. The accident occurred when the dog ran into the road from Dawson's property, one-half mile from the Stubblefield property. *Id.* Dawson testified he had not observed the dog on his property prior to the accident. *Id.* at 697, 483 N.E.2d at 1073.

¶ 48 The plaintiffs sued the Stubblefields as owners of the dog and Dawson as a keeper or harbinger of the dog. *Id.* at 696, 483 N.E.2d at 1072. Following a bench trial, the trial court determined the defendants' actions of feeding and providing water for the dog failed to establish either defendant met the statutory definition of an owner. *Id.* at 696, 483 N.E.2d at 1073. On appeal, this court noted, "[t]he question of ownership, as harboring or keeping, is a question for the trier of fact." *Id.* at 699, 483 N.E.2d at 1075. However, this court affirmed the trial court, concluding the plaintiffs failed to establish the facts necessary for the trier of fact to find the defendants exercised the requisite degree of custody and control over the dog as to bring them within the definition of an owner under the Act. *Id.* at 700, 483 N.E.2d at 1075.

¶ 49 In *Thompson*, the plaintiffs failed to establish the facts necessary to demonstrate the defendants exercised control and custody over the dog as to bring them within the definition of an owner under the Act. Conversely, in the present case, the undisputed facts demonstrate

plaintiff exercised both custody and control over Fozzy Bear. Plaintiff entered defendant's home after specifically agreeing to provide both food and water in defendant's stead. Plaintiff exercised control over Fozzy Bear's movements when she allowed him out of his enclosed area and onto the deck, where plaintiff sustained her injuries after Fozzy Bear bit her. In other words, while in the process of controlling and caring for Fozzy Bear, she sustained her injury.

¶ 50 This situation differs greatly from that in *Thompson*, where the defendants took no action toward controlling the dog's movements after setting him loose. As the *Thompson* case emphasized, the Act hinges on the element of control. *Id.* at 699, 483 N.E.2d 1075. Following the majority's line of thinking, the only cases suitable for summary judgment under the Act would be the ones in which the party admitted to custody and control over the animal.

¶ 51 As suggested by defendant, the facts in this case more closely mirror those contained in this court's decision in *Docherty*, 293 Ill. App. 3d 892, 689 N.E.2d 332. In *Docherty*, the minor plaintiff agreed he would feed, provide water for, and let his neighbor's dog in and out of the yard for a period of five days. *Id.* at 893, 689 N.E.2d at 333. While caring for the dog, the minor plaintiff suffered injuries when he and the dog collided in the backyard. *Id.* The minor plaintiff brought a complaint under the Act. *Id.* The trial court dismissed the minor plaintiff's claim, finding him to be an owner under the Act, and thus precluded from its protection. *Id.* at 894, 689 N.E.2d at 333. We affirmed the court's dismissal. *Id.* at 896-97, 689 N.E.2d at 335.

¶ 52 The majority distinguishes *Docherty*, and cases cited therein, based on the plaintiffs' failure to contest their status as an owner. However, in *Docherty*, we affirmed the dismissal of the plaintiff's suit not because the plaintiff admitted to being an owner, but because we found the plaintiff to be an owner under the Act. *Id.* at 896, 689 N.E.2d at 335. Where the

minor plaintiff voluntarily assumed the care and custody of the dog and sustained an injury while exercising control of the dog, he met the definition of an owner under the Act. *Id.*; see also *Wilcoxon*, 174 Ill. App. 3d at 543, 528 N.E.2d at 1106. Additionally, we found the plaintiff in *Docherty* to be an owner "irrespective of the relatively short period of time he was to care for the dog." *Docherty*, 293 Ill. App. 3d at 896, 689 N.E.2d at 335 (citing *Hassell*, 243 Ill. App. 3d at 402, 1612 N.E.2d at 66). This was because "where one accepts responsibility for controlling an animal, she may not maintain a cause of action for injuries resulting from her own failure to control the animal." *Id.* at 895, 689 N.E.2d at 334.

¶ 53 In this case, plaintiff accepted responsibility for controlling Fozzy Bear, and despite the short period of care, she sustained her injury while Fozzy Bear was undisputably within her custody and control. Accordingly, I would affirm the trial court's decision to grant defendant's motion for summary judgment.