2019 IL App (1st) 180393-U

FIFTH DIVISION
Order filed: February 22, 2019

No. 1-18-0393

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

DENNIS PORTNEY, Plaintiff and Counterdefendant-Appellee, v. EUGENE FRANKOWSKI, Defendant and Counterplaintiff-Appellant.	)	Appeal from the Circuit Court of Cook County No. 15 L 3374 Honorable Joan E. Powell, Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held*: Finding that the circuit court's judgment is not against the manifest weight of the evidence, we affirm: (1) the $8,303 judgment entered against the defendant on the plaintiff's claim for battery over the defendant's argument that the circuit court erred in finding that he failed to prove that he acted in self-defense; (2) the judgment entered in favor of the plaintiff on the defendant's counterclaim for assault; and (3) the denial of the defendant's motion for reconsideration.

¶ 2 The defendant, Eugene Frankowski, appeals from the circuit court's order of September 12, 2017: (1) finding that he had not acted in self-defense and entering an $8,303 judgment against him on the plaintiff, Dennis Portney's claim for battery; and (2) entering judgment in favor of the plaintiff, as counterdefendant, on his counterclaim for assault. The defendant also appeals from the circuit court's order denying his motion to reconsider. For the reasons which follow, we affirm.

¶ 3 The following facts relevant to our disposition of this appeal were adduced from the pleadings and orders of record.

¶ 4 On April 2, 2015, the plaintiff filed a three-count complaint against the defendant. Count I alleged battery, count II alleged assault, and count III alleged willful and wanton misconduct. The complaint alleged that on March 14, 2015, the plaintiff was walking in a public field at or near "1630 W. Barry Avenue, Chicago, [Illinois]," accompanied by his unleashed dog, when the defendant: (1) yelled at him to put his dog on a leash; (2) chased him as he was calling for his dog and walking away; and (3) punched him in the face without provocation. He further alleged that the defendant threatened to strike him again. The complaint sought compensatory damages for the injury to the plaintiff's face, medical care, pain and suffering, plus an award for punitive damages.

¶ 5 On September 29, 2015, the defendant filed: (1) a motion to dismiss count III of the plaintiff's complaint alleging willful and wanton misconduct; (2) an answer and affirmative defenses to counts I and II of the plaintiff's complaint asserting self-defense, defense of another, and provocation; and (3) a two-count counterclaim seeking damages for assault and intentional infliction of emotional distress. In his counterclaim, the defendant alleged that on March 14, 2015, the plaintiff's unleashed dog charged towards, and aggressively jumped in the direction of,

his 14-year-old daughter. The counterclaim further alleged that when he repeatedly told the plaintiff to restrain his dog, the plaintiff responded with expletives, turned away momentarily and turned back toward him "in a fighting stance," raising his right arm in an apparent attempt to strike.

¶ 6 On October 2, 2015, the plaintiff withdrew count III of his complaint. On October 27, 2015, the plaintiff filed his two-count first amended complaint asserting claims for battery and assault and also filed his answer to the defendant's affirmative defenses. On December 21, 2015, the defendant filed his answer to the plaintiff's first amended complaint along with the affirmative defenses of self-defense, defense of another, and provocation.

¶ 7 The matter proceeded to a bench trial on September 8, 2017. During that trial, the defendant withdrew count II of his counterclaim for intentional infliction of emotional distress. Following the bench trial, the circuit court entered a single-page written order on that date: (1) finding in favor of the plaintiff on his claim for battery and entering a $8,303 judgment against the defendant on that claim only; and (2) finding in favor of the plaintiff and against the defendant on the defendant's counterclaim for assault. The record on appeal contains no transcript of the proceedings held on September 8, 2017. However, on September 12, 2017, the circuit court entered a 12-page memorandum opinion and order setting forth what it found to be the uncontested facts adduced at trial, a summary of the testimony of each witness who testified, its credibility findings, and its findings of fact. In that memorandum opinion and order, the circuit court: (1) found that the plaintiff had met his burden on his claim for battery and again entered an $8,303 judgment in favor of the plaintiff and against the defendant on that claim; (2) found in favor of the defendant on the plaintiff's claim for assault; and (3) found in favor of the plaintiff on the defendant's counterclaim for assault.

¶ 8 On October 6, 2017, the defendant filed his motion to reconsider the circuit court's September 12, 2017 order. It appears that on January 22, 2018, the circuit court entertained argument on the defendant's motion. The record contains neither a written order entered by the circuit court on January 22, 2018, nor a transcript of the proceedings on that date. On February 21, 2018, the defendant filed his notice of appeal from the circuit court's September 12, 2017 memorandum opinion and order and the circuit court's January 22, 2018 order denying his motion to reconsider. On April 25, 2018, the circuit court entered a written order denying the defendant's motion to reconsider.

¶ 9 Although neither party has raised the issue, this court is obligated to examine its jurisdiction and dismiss an appeal if jurisdiction is lacking. *St. Elizabeth's Hospital v. Illinois Workers' Compensation Comm'n*, 371 Ill. App. 3d 882, 883 (2007). Illinois Supreme Court Rule 303(a)(1) provides that, if a timely posttrial motion directed against a judgment is filed, a notice of appeal must be filed within 30 days after the entry of the order disposing of the last pending postjudgment motion. Ill. S. Ct. R. 303(a)(1) (eff. July 1, 2017). That same rule provides that "[a] notice of appeal filed after the court announces a decision, but before the entry of the judgment or order, is treated as filed on the date of and after the entry of the judgment or order." *Id*. The only posttrial motion filed in this case was the defendant's timely motion for reconsideration of the circuit court's order of September 12, 2017. Although the circuit court entertained argument on that motion on January 22, 2018, it did not enter its written order denying the motion until April 25, 2018. However, before the circuit court entered its written order denying the defendant's motion to reconsider, he filed his notice of appeal on February 21, 2018. Pursuant to the provisions of Illinois Supreme Court Rule 303(a)(1), the notice of appeal filed by the defendant on February 21, 2018, is treated as filed on the date of and after the entry

of the circuit court's April 25, 2018 order. Consequently, we have jurisdiction to entertain the defendant's appeal from the court's orders of September 12, 2017, and April 25, 2018.

¶ 10 Ordinarily, when the appellant fails to furnish this court with a record containing either a report of proceedings or a bystander's report prepared in accordance with Illinois Supreme Court Rule 323(c) (eff. July 1, 2017), we would resolve the incompleteness of the record against the appellant and presume that the circuit court's order was supported by competent evidence adduced at trial and was in conformity with the applicable law. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). In its September 12, 2017 memorandum opinion and order, the circuit court set forth what it found to be the uncontested facts adduced at trial and a summary of the testimony of each witness who testified. Neither party has contested the accuracy of either, and in the absence of a transcript of the trial proceedings, we presume that the circuit court's factual recitation is supported by the evidence introduced at trial. Based upon the facts recited by the circuit court in its written memorandum opinion and order, we have a sufficient basis to consider the merits of this appeal. See *100 Roberts Road Business Condominium Association v. Khalaf*, 2013 IL App (1st) 120461, ¶ 24.

¶ 11 According to the circuit court's September 12, 2017 memorandum opinion and order, the following facts were uncontested. On March 14, 2015, the defendant and his 14-year-old daughter, Morgan, were playing catch in Burling School's playground/park, which is a rectangular, fenced area. The plaintiff entered the park with his dog through an opening in the fence and walked along the periphery. The plaintiff's dog ran across the park area towards Morgan. The dog charged at Morgan, jumped at her and circled her, but never actually touched her. The defendant witnessed the dog run and jump at his daughter and shouted to the plaintiff to restrain and leash the dog. The defendant made repeated demands as he moved closer to the

plaintiff. However, the dog remained unleashed. The defendant punched the plaintiff in the face, and the plaintiff fell to the ground. The plaintiff then walked to a bench on the other side of the park and remained seated while the defendant called the police. When the police arrived, the plaintiff demanded that the defendant be arrested. Neither man was arrested; instead, the plaintiff was issued a ticket for failure to keep his dog on a leash.

¶ 12 The following is a summary of the testimony adduced at trial as recounted by the circuit court. The plaintiff testified that, after entering the park, his dog ran towards, Morgan, and then ran back towards him. He called to the dog, but he did not make any attempt to restrain the dog or get close to either the dog or Morgan. The plaintiff stated that he was bending down, attempting to put a leash on his dog when the defendant, "unexpectedly and without provocation," punched him in the face. He was surprised when the defendant punched him and "couldn't believe he had hit [him]." The plaintiff denied raising his arm across his chest. According to the plaintiff, after he was punched, the defendant threatened to hit him again if he tried to leave the park before the police arrived. Both men walked across the field to a park bench where the plaintiff remained sitting, and the defendant stood nearby waiting for the police.

¶ 13 The defendant testified that he and his daughter were playing catch in a park, when the plaintiff entered the park with his unleashed dog, a 60-pound German shepherd. The dog ran across the field toward Morgan, jumped up at her, and started circling her. The defendant was not familiar with the dog and did not know whether the dog had touched Morgan. He testified that he was afraid the dog would bite his daughter. At first, he moved towards his daughter, but she was across the field, so he shouted to the plaintiff to restrain the dog, to call the dog, and to leash the dog. The plaintiff did not respond, but instead, continued walking slowly away from the dog and Morgan. The defendant stated that he continued shouting to the plaintiff to restrain the

dog and began moving closer to the plaintiff, who was about 20 to 25 feet away. The plaintiff shouted expletives, but never called to his dog.

¶ 14 According to the defendant, when he was about 1 to 3 feet away, the plaintiff, in a standing position, turned towards him, and threw back his right arm and hand as if to strike. The defendant admitted that it was at that time that he punched the plaintiff on the right side of his face, after which the plaintiff fell to the ground.

¶ 15 The defendant testified that the plaintiff's dog was too close to his daughter and that he was concerned for her safety as well as his own safety. He stated, "I struck [the plaintiff] because I wanted to protect my daughter. Then, I was directly threatened by [the plaintiff's] forearm and arm action which made me think he was going to hit me. He reeled like he was going to hit me. All of this was occurring simultaneously." (Internal quotation marks omitted.)

¶ 16 When the plaintiff stood up, he gave the dog a command, and the dog ran back towards him and sat. The defendant used his cell phone to call the police. He testified that it appeared that the plaintiff was going to leave, so he stood in the plaintiff's path to prevent him from leaving the scene until the police arrived. The defendant denied touching or threatening the plaintiff after striking him.

¶ 17 Morgan testified that she was in the park with her father, the defendant, playing catch, when the plaintiff entered the park with his unleashed dog. The dog suddenly ran across the field "charging" at her. She was not familiar with the dog and did not know if this was an aggressive action. She was afraid and backed away, covering her chest and face with her hands and arms. According to Morgan, the plaintiff did not call to his dog or try to restrain it. She heard her father shout to the plaintiff to put his dog on a leash; however, the plaintiff continued walking slowly in the opposite direction. Her father walked toward the plaintiff demanding that he restrain his dog.

The plaintiff did not restrain the animal; rather, he yelled expletives in response. Morgan stated that she never saw her father run towards the plaintiff; however, she did see the plaintiff turn to face her father and raise his arm across his chest when her father approached him. She recalled the plaintiff saying something, but she could not hear what he said. Her father then punched the plaintiff, and the plaintiff fell to the ground.

¶ 18 The circuit court found that the plaintiff was not credible when he testified that: (1) he was bent over putting a leash on his dog when the defendant punched him; (2) the defendant threatened him after the punch; and (3) the defendant prevented him from leaving the park. The circuit court found credible the defendant's testimony that, prior to punching the plaintiff, he saw the plaintiff "raise his arm and hand back up and over his chest, that both men were standing and facing each other at the time, and that [the defendant] was in fear of his daughter being injured." However, the circuit court found that:

> "There [was] no testimony that [the plaintiff] made any move beyond raising his right arm up over his chest in what appears to have been an aggressive maneuver. He did not move his body beyond that stance. The men were not in a confined space. [The defendant] is the one who approached [the plaintiff], yelling at him."

The circuit court also found that the defendant was "standing in a large field and had the clear option of walking or moving away from [the plaintiff]." The circuit court concluded that the defendant's punch was "avoidable" and "was not done in self-defense."

¶ 19 For his first assignment of error, the defendant argues that the circuit court committed reversable error when it ruled, "as a matter of law," that he could not have acted in self-defense

where he had the option to walk away and failed to do so. We reject this argument as the circuit court made no such ruling. The circuit court's finding that, prior to punching the plaintiff, the defendant was standing in a large field and had the clear option of walking or moving away from the plaintiff was only one of the facts it relied upon in support of its conclusion that the defendant had not acted in self-defense.

¶ 20 Next, the defendant argues that the circuit court erred when it found that he failed to establish the elements of self-defense and the defense of another. We disagree.

¶ 21 As to the defendant having established defense-of-another as an affirmative defense to the plaintiff's action for battery, suffice it to say that, although the defendant may have feared that his daughter might be injured by the plaintiff's dog, there is no evidence in the record that the plaintiff, in any way, threatened the defendant's daughter. Our analysis of this argument is, therefore, focused on the question of whether the circuit court's conclusion that the defendant had not acted in self-defense when he struck the plaintiff is against the manifest weight of the evidence.

¶ 22 When, a challenge is made to a ruling following a bench trial, a circuit court's judgment will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Staes and Scallan, P.C. v. Orlich,* 2012 IL App (1st) 112974, ¶ 35. A judgment is against the manifest weight of the evidence only if the opposite conclusion is clearly apparent from the record (*Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 64 (2006)), or if the factual findings are unreasonable, arbitrary, or not based on the evidence. *Leith v. Frost,* 387 Ill. App. 3d 430, 434 (2008). We will not disturb the findings and judgment of the trier of fact "if there is any evidence in the record to support such findings." *Orlich,* 2012 IL App (1st) 112974, ¶ 34 (citing *Brown v. Zimmerman*, 18 Ill. 2d 94, 102 (1959)).

¶ 23 In determining whether a person acted in self-defense, the factors to consider are whether: (1) the individual was the aggressor; (2) the danger of harm was present; (3) unlawful force, either criminal or tortious, was threatened; (4) the individual actually believed danger existed, his use of force was necessary to avoid harm, and that the amount of force he used was necessary; and (5) the individual's use of force was reasonable even if mistaken. *Boyd v. City of Chicago*, 378 Ill. App. 3d 57, 69 (2007). In this case, it was the defendant who approached the plaintiff. The circuit court found that there was no testimony that, prior to the defendant punching the plaintiff, the plaintiff made any move beyond raising his right arm over his chest in what appeared to have been an aggressive maneuver. The circuit court also found that the plaintiff did not move his body beyond that stance, the men were not in a confined space, and the defendant had the option of walking or moving away from the plaintiff. These facts, when taken as true in the absence of a transcript reflecting the contrary, establish that, prior to the defendant punching the plaintiff: (1) the defendant was not in imminent danger of harm from the plaintiff; (2) the plaintiff did not threaten the defendant; and (3) striking the plaintiff was not necessary to avoid harm to the defendant. We conclude, therefore, that the circuit court's conclusion that the defendant did not act in self-defense is not against the manifest weight of the evidence as an opposite conclusion is not clearly apparent.

¶ 24 Battery is the intentional touching of another without consent of the person touched. *Kling v. Landry*, 292 Ill. App. 3d 329, 339 (1997). The facts in this case establish that the defendant struck the plaintiff in the face and that the plaintiff was surprised by the act. The trial evidence, as found by the circuit court, satisfied the elements of an action for battery, and coupled with the circuit court's finding that the defendant did not act in self-defense, are sufficient to establish the defendant's liability on the plaintiff's claim for battery. The defendant

has asserted no error in the circuit court's damage assessment. Consequently, we affirm the $8,303 judgment entered against the defendant on the plaintiff's claim for battery.

¶ 25 Finally, the defendant argues that the circuit court erred in finding in favor of the plaintiff on his counterclaim for assault. He asserts that the evidence established that he had a reasonable apprehension of receiving a battery from the plaintiff.

¶ 26 Initially, we observe that the defendant failed to cite any authority in support of his argument in this regard. As a consequence, he has forfeited the issue for purposes of appeal. Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018); *TTC Illinois, Inc./Tom Via Trucking v. Illinois Workers' Compensation Comm'n*, 396 Ill. App. 3d 344, 355 (2009).

¶ 27 Forfeiture aside, we find no merit in the argument. To succeed on a claim of assault, the plaintiff must prove that the defendant placed him in reasonable fear of receiving a battery. *S & F Corp. v. Daley*, 59 Ill. App. 3d 1024, 1030 (1978); see also *Parrish by Bowker v. Donahue*, 110 Ill. App. 3d 1081, 1083, (1982). As noted earlier, the circuit court found that there was no testimony that the plaintiff made any move beyond raising his arm over his chest in what appeared to have been an aggressive maneuver and that he did not move his body beyond that stance. The circuit court did not find, as the defendant testified, that the plaintiff threw back his right arm and hand as if to strike him. Based upon these facts, the circuit court could reasonably have concluded that the defendant failed to establish that he was in reasonable fear of receiving a battery. We conclude, therefore, that the circuit court's finding that the defendant failed to prove his counterclaim for assault by a preponderance of the evidence, is not against the manifest weight of the evidence.

¶ 28 Having found that the circuit court's judgment against the defendant on the plaintiff's claim for battery and in favor of the plaintiff on the defendant's counterclaim for assault is not

against the manifest weight of the evidence, it follows that the circuit court did not err in denying the defendant's motion for reconsideration.

¶ 29 Based upon the foregoing analysis, we affirm: (1) the circuit court's $8,303 judgment against the defendant on the plaintiff's claim for battery; (2) the circuit court's judgment in favor of the plaintiff on the defendant's counterclaim for assault; and (3) the denial of the defendant's motion for reconsideration.

¶ 30 Affirmed.