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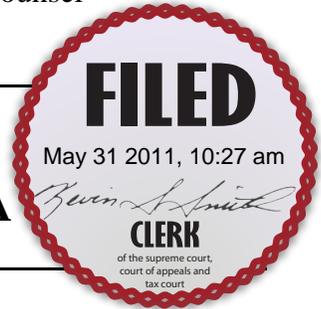
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**IN THE
COURT OF APPEALS OF INDIANA**



DAVID LANDAU,)
)
Appellant-Defendant,)
)
vs.)
)
CITY OF INDIANAPOLIS,)
)
Appellee-Plaintiff.)

No. 49A02-1011-OV-1249

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Dylan A. Vigh, Judge Pro Tempore
Cause No. 49F12-1008-OV-37346

May 31, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issue

David Landau appeals the trial court's judgment finding that he violated the animal control ordinance of the City of Indianapolis. Landau raises a single issue for our review, which we restate as whether the trial court's judgment is clearly erroneous. Concluding the trial court's findings of fact are supported by the evidence and the trial court correctly interpreted and applied the pertinent ordinance, we affirm.

Facts and Procedural History

The evidence favorable to the judgment shows that on the morning of July 18, 2010, Landau was walking his four dogs along a public sidewalk in Indianapolis, using two leashes to do so. Gwendolyn Adams was walking along the same sidewalk, in the opposite direction and approaching Landau and his dogs.

Adams saw that Landau and his dogs were "taking up the entire sidewalk" and Landau "wasn't making any attempt to move" aside. Transcript at 5-6. Adams moved to the right side of the sidewalk. As Landau's dogs passed Adams on her left, one of the dogs "jumped up to bite [Adams]." *Id.* at 7. As Adams saw the dog jump, she extended her left arm in front of her for protection, exposing her underarm. The dog ripped through Adams's T-shirt and made contact with her skin below her armpit. Adams and Landau exchanged words and walked away in opposite directions. Adams noticed that her skin was bleeding and had two "line[]"-type marks with nearby bruising. *Id.* at 10. Shortly after 4:00 p.m. that day, after consulting with her husband and a neighbor, Adams reported the incident to City authorities. On July 26, an Animal Care and Control officer met with Adams and noticed bruising on her

underarm.

The City cited Landau for violating its animal control ordinance (the “Ordinance”) regarding owner responsibility for animal attacks. A bench trial was held. The trial court took the matter under advisement and, on November 19, 2010, entered its judgment, which states in pertinent part:

The City of [Indianapolis] having cited [Landau] for a violation of Revised City-Code, as amended, Sec 531-109 – Owner Responsibility for Animal Attacks – and after the ambit of evidence and acknowledgment by each counsel that the Code does not define the words “attacks and injures,” the Court, having utilized the plain and ordinary meaning consistent [with] each dictionary definition NOW FINDS AS FOLLOWS:

- 1.) That the City has met its burden of proof that [Landau]’s dog(s) did attack and injure [Adams.]
- 2.) That the Court, after careful consideration, assessed the credibility of each testifying witness; and finds [Landau]’s elicited testimony that the dog in question only contacted [Adams]’s kneecaps not credible. However, the Court is troubled by [Adams]’s recitation that she was bitten as no remedial measures were utilized and/or documentary evidence proffered to substantiate the same. Notwithstanding, the Court finds that [Landau]’s dog(s) “attacked” and “injured” [Adams] as those terms are defined.

Appellant, David Landau’s Appendix at 4-5. The trial court fined Landau \$500 and, pursuant to the Ordinance, required him to remove two of his dogs from his residence.

Landau now appeals.

Discussion and Decision

I. Standard of Review

In entering its judgment, the trial court explained its decision in a manner we consider to constitute findings of fact. When a trial court enters findings of fact and conclusions thereon without being required to do so by rule or request, the specific findings control only

as to issues they cover, and a general judgment standard applies to any issues upon which the trial court has not made findings. Perdue v. Murphy, 915 N.E.2d 498, 504 (Ind. Ct. App. 2009). The trial court's findings and judgment will be set aside only if clearly erroneous. Ind. Trial Rule 52(A). In determining whether findings are clearly erroneous, we consider only the evidence favorable to the judgment and we neither reweigh the evidence nor assess the credibility of witnesses. Nelson v. Marchand, 691 N.E.2d 1264, 1267 (Ind. Ct. App. 1998). A judgment is clearly erroneous if there is no evidence to support the findings, the findings fail to support the judgment, or the trial court applies the wrong legal standard to properly found facts. Fraley v. Minger, 829 N.E.2d 476, 482 (Ind. 2005). Conclusions of law, such as the interpretation of a municipal ordinance, are reviewed de novo. 600 Land, Inc. v. Metro. Bd. of Zoning Appeals of Marion County, 889 N.E.2d 305, 309 (Ind. 2008).

II. Dog Attack and Injury

To prevail in its claim of an ordinance violation, the City was required to prove Landau's violation of the Ordinance by a preponderance of the evidence. See Ind. Code § 34-28-5-1(e) (providing that a prosecution for an ordinance violation must be proven by a preponderance of the evidence). Landau was cited for violating section 531-109 of the Ordinance, which states in pertinent part:

- (a) An owner or keeper of an animal commits a violation of the Code if that animal attacks and injures a person who did not provoke the animal prior to the attack.

* * *

- (d) The liability imposed by this section shall not reduce, substitute for or in any manner be deemed to be in derogation of the rights accorded victims of dog bite injury or property damages as provided for at IC 15-5-12, et seq. or by common law.

Revised Code of the Consolidated City of Indianapolis and Marion County, Title III, Chapter 531, Article I.¹ The definitional section of the Ordinance provides:

Provoke means the infliction of bodily harm on the animal or another person, or conduct that constitutes a substantial step toward the infliction of bodily harm on the animal or another person.

Id. § 531-101. However, the terms “attack[]” and “injure[]” are not defined.

Landau argues that “attack” and “injure” as applied to dog attacks require a finding that a dog bit a person and that there is no such finding in this case. While Landau is correct that the trial court did not find Adams was bitten, we disagree with Landau’s attempt to narrow the language of the Ordinance to exclude other injuries a dog might inflict. When a word or phrase is undefined in an ordinance, we give it its plain and ordinary meaning unless a contrary legislative purpose is clearly shown. Stewart v. City of Indianapolis, 798 N.E.2d 863, 866 (Ind. Ct. App. 2003). In ascertaining the plain and ordinary meaning, we may look to English language dictionaries as well as to the relationship of the term or phrase with other words and phrases. Id. Here, the trial court was correct to apply the plain and ordinary meaning of “attack” and “injure.” The reference to “dog bite injury” in section 531-109(d) of the Ordinance forms part of a limiting reference to separate bodies of law – statute and common law – and is not a synonym for the scope of incidents that trigger liability under the

¹ The Ordinance has not been included in the appellate record, so we have accessed it from the City’s website, <http://www.indygov.org/eGov/City/DCE/Resources/Pages/municode.aspx> (last visited May 11, 2011). See Ind. Evidence Rule 201(b) (providing a court may take judicial notice of law, including codified ordinances of municipalities).

Ordinance.²

“Attack” means “1. To set upon with violent force 4. To begin to affect harmfully.” The American Heritage Dictionary of the English Language at 84 (1981). “Injure” means “1. To cause harm or damage to; hurt.” *Id.* at 676. Applying these definitions, the evidence presented in this case supports the trial court’s finding that Landau’s dog attacked Adams when it jumped up on her with enough force to tear her shirt and break her skin. The evidence also supports the trial court’s finding that Adams was injured: Adams testified that her underarm area was bruised and bleeding and that the dog left two “line[]”-type marks on her skin. Tr. at 10. Adams’s testimony regarding her bruises was corroborated by the testimony of the Animal Control officer that the bruises were still visible nearly one week later. Even if Adams’s wounds did not result from a dog bite, they were an injury resulting from a dog attack as those terms are used in the Ordinance.³

As Landau points out, the trial court in its findings appeared to discount Adams’s testimony that Landau’s dog bit her. Yet the trial court was more explicit in rejecting, as not credible, Landau’s account that the dog merely touched Adams on her kneecaps. Thus, in the trial court’s assessment of weight and credibility, the preponderance of the evidence tipped in

² The current statute that establishes civil and criminal liability for dog bites and attacks, Indiana Code chapter 15-20-1, “does not limit the power of . . . a political subdivision to adopt a rule or an ordinance that does not conflict with this chapter.” Ind. Code § 15-20-1-1. Thus the City is free to adopt, and has adopted, an ordinance providing broader liability for dog attacks than would exist under the state statute alone.

³ In his reply brief, but not in his opening appellate brief, Landau argues that the trial court should have found Adams provoked the dogs. Any claim of error not made in an appellant’s opening brief is waived on appeal. *Monroe Guar. Ins. Co. v. Magwerks Corp.*, 829 N.E.2d 968, 977 (Ind. 2005). Regardless, there was no evidence that Adams inflicted or took a substantial step toward inflicting any physical harm, as the definition of “provoke,” set forth above, requires. At most, Adams failed to yield the sidewalk to Landau and his dogs, though Adams’s testimony was that she did yield part of the sidewalk.

favor of a conclusion that the City met its burden to show an attack by Landau's dog and a resulting injury, even if no bite, but an appreciable scratching or other harmful contact, occurred. We may not and will not reweigh the evidence or reassess the witnesses' credibility to conclude otherwise. Rather, we conclude the evidence supports the trial court's findings of fact, the trial court correctly interpreted the Ordinance, and as a result the findings support the judgment that Landau violated the Ordinance. The trial court's judgment is not clearly erroneous, and we therefore affirm.

Conclusion

The trial court's judgment that Landau violated the Ordinance is not clearly erroneous and is affirmed.

Affirmed.

NAJAM, J., and CRONE, J., concur.