

**COURT OF APPEALS
DECISION
DATED AND FILED**

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Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 00-0401

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

ALISON LAUX,

PLAINTIFF-RESPONDENT,

V.

LEONARD LEWINS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County:
DENNIS J. BARRY, Judge. *Reversed.*

¶1 SNYDER, J.¹ Leonard Lewins appeals from a judgment entered in favor of Alison Laux in the amount of \$2301.09 for injuries inflicted upon Laux's dog. Lewins argues that the trial court erred in ruling that he was not

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1997-98). All statutory references are to the 1997-98 version.

justified in shooting Laux's dog when it attacked and killed one of his chickens. Lewins argues that pursuant to WIS. STAT. § 174.01(1)(b) and the common law, he was permitted to defend his chickens because "immediate action" was necessary. We conclude that Lewins satisfied the requirements of § 174.01(1)(b) and therefore reverse the trial court's judgment.

STATEMENT OF FACTS

¶2 Lewins and Laux own adjoining properties in the town of Waterford. Lewins is a farmer with approximately thirty-five acres upon which he raises chickens. Laux owns a residential home on five acres where she keeps her dog, a German shepherd.

¶3 At trial, Lewins testified that on December 28, 1998, he was awakened from an afternoon nap by noises in his backyard. He went to the backyard where he heard "squawking." Lewins hustled back inside the house, grabbed his shotgun and came outside where he saw a dog with a chicken in its mouth. He waved his hand and shouted in an attempt to drive away the dog. At first, the dog dropped the chicken and began to move away, but the dog then turned back to pick up the chicken. Lewins shot the dog. Laux's dog survived but sustained injuries to its leg and neck. The remains of Lewins's chicken were found approximately two to three months later.

¶4 Lewins testified that he only shot the dog once because he did not want to kill it. He indicated that after the dog attack, there were feathers scattered "all over." Lewins stated that he had had numerous encounters with dogs on his property which have harassed or killed his chickens. He further noted that the Lauxes had never told him about their dog.

¶5 Laux acknowledged that her dog had been on Lewins's property at the time of the shooting but stated that it was the first incident that she was aware of where her dog had been on his property. Laux testified that there was no evidence that her dog had in fact attacked Lewins's chicken. She offered hearsay evidence from a neighbor who claimed that he saw "no evidence of any chickens." However, the neighbor did not appear at trial to testify. Laux also testified that Lewins never told her that her dog had ever bothered his chickens in the past.

¶6 Laux's husband also testified that Lewins had never mentioned that their dog had been on his property or bothered his chickens. Mr. Laux stated that when he first bought the dog as a puppy, he told Lewins that if he ever had any problems with the Lauxes' dog he should contact him. Mr. Laux explained that he had spoken to Lewins because he had heard that Lewins previously shot a dog that was disturbing his chickens.

¶7 A friend of Lewins's, Karmen Kautz, testified that she had been taking care of Lewins's chickens prior to and at the time of the incident and that on several occasions she had observed a German shepherd on Lewins's property. Kautz stated that she had seen what appeared to be Laux's dog six months before and several days before the shooting incident. Kautz also testified that prior to December 28, 1998, there were twenty-two chickens and that after the incident there were only twenty-one.

¶8 In December 1999, Laux filed suit against Lewins in small claims court for the costs involved in treating her dog. In a separate action, Lewins countersued for the costs associated with the death of his chicken.

¶9 Upon hearing the parties' testimony, the trial court expressed its concern that unlike "the fields of Texas or ... where there may be farms of 120 or

more acres and you really don't know who your neighbors are," Lewins lived only a couple hundred yards from his neighbors, he only had a few neighbors and, in the court's words, "it seems to me not unreasonable to expect you to do a little investigating to determine who the owner of the dog was that was causing you problems."

¶10 The court then reviewed WIS. STAT. § 174.01(1)(b) which states:

Restraining action against dogs. (1) KILLING A DOG.

....

(b) A person may intentionally kill a dog if a domestic animal that is owned or in the custody of the person is threatened with serious bodily harm by the dog and the dog is on property owned or controlled by the person and:

1. Other restraining actions were tried and failed; or
2. Immediate action is necessary.

¶11 Pursuant to the statute, the court concluded that Lewins had failed to try other "restraining actions" before shooting the dog. The court also determined that "immediate action" was not necessary in this case. The court commented: "Might not shouting at the dog be just as effective? Might not shooting a gun in the air be just as effective? Might not sacrificing the chicken be? Maybe there's no duty to do that but then you might sue for the cost of the chicken at that point in time."

¶12 The court further commented that while Lewins had a right to protect his animals, he had to do so in a reasonable manner. In this case, Lewins had "jumped the gun" because he had already been put on notice that there was a German shepherd apparently on his property two or three times in the six months before this incident, there were not many homes near Lewins so he could have likely discovered who owned the dog, and the Lauxes had previously cautioned

Lewins that if he had a problem with their dog he should call them. The trial court ordered Lewins to reimburse Laux \$2240.09 for her dog's medical bills plus costs. As to Lewins's countersuit, the court found Laux liable for the death of Lewins's chicken, which was valued at \$50, and awarded Lewins a total of \$181 including costs. Lewins appeals.

DISCUSSION

¶13 Lewins argues that he was justified in shooting Laux's dog as permitted under WIS. STAT. § 174.01(1)(b). He contends that even if his "restraining actions"—waving his arms and yelling—were insufficient to satisfy § 174.01(1)(b)1, immediate action was necessary because the dog had the chicken in its grasp. Lewins further claims that if immediate action was not necessary in this case, then the statutory language would have no real meaning.

¶14 Laux counters that there is no definitive evidence in the record to show that her dog killed Lewins's chicken. She maintains that the trial court was correct in holding Lewins liable for the injuries to her dog.

¶15 A trial court's findings of fact will be affirmed unless they are clearly erroneous and due regard shall be given to the opportunity of the trial court to evaluate the credibility of the witnesses. *See* WIS. STAT. § 805.17(2). A trial judge's findings of fact will not be overturned unless they are against the great weight and clear preponderance of the evidence. *See Noll v. Dimiceli's, Inc.*, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983). However, whether the facts as determined by the court fulfill a particular legal standard is a question of law. *See Nottelson v. DILHR*, 94 Wis. 2d 106, 115-16, 287 N.W.2d 763 (1980). Therefore, an appellate court can make a de novo determination as to whether the statute was correctly applied to the facts as found by the trial court.

¶16 We first address Laux's factual dispute as to the cause of the chicken's death. In its ruling, the court made ultimate findings of fact that Lewins shot and injured Laux's dog, and that Laux's dog killed Lewins's chicken. Laux now contends that her dog did not in fact kill Lewins's chicken. Laux's position lacks merit. Lewins was the only eyewitness to the dog attack. He stated that he saw the chicken in the dog's mouth, and that the dog dropped the chicken but then turned back to pick it up again. Lewins also pointed out that there were feathers scattered over the yard following the incident, and Kautz testified that Lewins was one chicken short after the attack. While Laux states that her neighbor was an eyewitness who saw "no evidence of any chickens," this person was never called to testify and there is no indication that he observed anything prior to Lewins's shooting of the dog. We are satisfied that the trial court's finding was not erroneous.

¶17 We now consider whether Lewins's conduct falls within WIS. STAT. § 174.01(1)(b). The only issues contested by the parties are (1) whether other restraining actions were tried and failed, and (2) whether immediate action was necessary.² Lewins need only demonstrate one of these considerations to prove his case. The trial court focused on the question of necessary immediate action and found that Lewins could have first shouted at the dog, could have shot his gun in the air or could have simply sacrificed his chicken.

¶18 As to the first consideration under WIS. STAT. § 174.01(1)(b), Lewins testified that he waved his arm and shouted at the dog before he pulled the

² Laux does not dispute that a chicken qualifies as a "domestic animal" under WIS. STAT. § 174.01. See 31 Op. Att'y Gen. 201 (1942) (concluding that chickens are included within the term "other domestic animals" under § 174.01 (1941)).

trigger. The trial court did not address this testimony even though it goes directly to the court's comment that Lewins could have first shouted at the dog. Lewins's testimony stands largely uncontested. The only evidence Laux presents to dispute Lewins is her neighbor's statement that he did not hear Lewins shout or see him wave his arms. The neighbor, however, did not claim to be looking in Lewins's yard until after Lewins shot the dog. Moreover, Lewins noted that the neighbor was approximately 450 feet away at the time of the incident.

¶19 Furthermore, the neighbor's statement is hearsay because it was offered to prove the truth of the matter asserted and was made by someone other than the declarant. *See* WIS. STAT. § 908.01(3). While hearsay is permitted in small claims court, "[a]n essential finding of fact may not be based solely on a declarant's oral hearsay statement unless it would be admissible under the rules of evidence." WIS. STAT. § 799.209(2). Whether Lewins shouted before shooting is essential to his argument that restraining actions were taken. And Laux does not contend that this hearsay would otherwise be admissible under the rules of evidence. Therefore, we conclude that Lewins's testimony that he shouted and waved his arm before shooting was supported by the great weight and clear preponderance of the evidence. Lewins's waving and shouting constitute restraining actions that were intended to stop the dog from killing his chicken. When the dog returned to pick up the chicken, Lewins's restraining actions had failed. We are convinced that the first consideration is met.

¶20 As to the second consideration, the evidence supports Lewins's immediate action of shooting the dog. Lewins found his chicken in the mouth of Laux's dog. Although the dog initially dropped the chicken, it turned back to pick it up, despite Lewins's waving and shouting. Seeing the dog proceed to grab the chicken, Lewins was justifiably concerned about the chicken's well-being.

Lewins had already taken measures to scare off the dog but was unsuccessful. He could have allowed the dog to finish off his chicken and then pursued reimbursement from the dog's owner at a later time. But if that were the appropriate remedy, the statute would have no effect. Killing a dog would never be permitted because the owner of the domestic animal would always be obliged to wait and seek remuneration later. The statute, however, permits the killing of a dog where a domestic animal is threatened with serious bodily harm and immediate action is necessary. If immediate action was unwarranted when Lewins's chicken was being attacked by Laux's dog, when would such action be justified?

¶21 This case is similar to *Skog v. King*, 214 Wis. 591, 254 N.W. 354 (1934). There, a farmer was awakened at night to the sound of dogs fighting in his yard. Upon hearing the ruckus, the farmer grabbed his shotgun, went outside and discovered the neighbor's dog attacking his dog. The farmer attempted to shoot the neighbor's dog but instead shot and killed both dogs. The farmer testified that prior to the shooting incident, his sheep had been worried by dogs and seven of them had been killed. The supreme court first determined that it would not apply WIS. STAT. § 174.01 (1931) because a dog was not technically a "domestic animal" under the statute.³ The court, nonetheless, ruled that the farmer had a common law right to protect his property, including his dog. *See Skog*, 214 Wis. at 593. Quoting from *Coleman v. Minor*, 82 So. 42, 42-43 (Ala. Ct. App. 1919), the court observed: "One may protect his animate property from the vicious attacks of other animals and, if there exists an impending necessity therefor, may

³ WISCONSIN STAT. § 174.01 (1931) stated that "[a]ny person may ... kill any dog found killing, wounding or worrying any horses, cattle, sheep, lambs or other domestic animals."

kill the attacking animal to save his own from death or serious harm.” *Skog*, 214 Wis. at 593-94.

¶22 Lewins was put in a similar situation as the farmer in *Skog*. Both cases involve a farmer’s livestock that had previously been disturbed or worried by dogs. To Lewins’s credit, he took restraining actions before shooting the dog. Whether intended or not, Lewins also did not kill Laux’s dog. While Laux might place a greater value on her dog as compared with Lewins’s chicken, the statute does not differentiate between types of domestic animals.

¶23 Finally, we appreciate the trial court’s concern about the use of guns to defend one’s animals in a community where neighbors reside closely together. We also join in the court’s concern that Lewins should have been more aware of the identity of his neighbors’ dogs, particularly when dogs had been bothering his chickens in the past. The statute, however, allows that one may “intentionally kill” a dog under appropriate circumstances. Given that Lewins lives on a farm with livestock, observed his chicken in the mouth of Laux’s dog and took restraining actions to scare off the dog, we believe the statute permitted his actions in this case.

By the Court.—Judgment reversed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

