COURT OF APPEALS
DECISION
DATED AND FILED

July 29, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2165 **Cir. Ct. No. 2011CV76**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

ANN MARIE SCHROEDER,

PLAINTIFF-APPELLANT,

V.

AMERICAN FAMILY MUTUAL INSURANCE CO., JEFFREY A. KISTNER AND JODY MARIE KISTNER,

DEFENDANTS-RESPONDENTS,

BAYFIELD COUNTY HEALTH AND HUMAN SERVICES AND COMPCARE HEALTH SERVICES INSURANCE CORPORATION,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Bayfield County: JOHN P. ANDERSON, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Hoover, P.J., Mangerson and Kessler, JJ.

¶1 MANGERSON, J. Ann Schroeder was attacked by a pack of dachshunds belonging to Jeffrey and Jody Kistner. Despite evidence of two previous attacks involving the same pack of dachshunds, the trial court concluded Schroeder was not entitled to double damages under the dog injury statute, WIS. STAT. § 174.02(1)(b).[1] The trial court also denied Schroeder's motion for additur following a jury verdict awarding her nothing for non-economic damages, such as pain and suffering.

¶2 We reverse in part and conclude Schroeder was entitled to double damages. Under the circumstances of the present case, the availability of double damages under WIS. STAT. § 174.02(1)(b) is not contingent upon proof that the specific dog or dogs that caused Schroeder's injuries also caused previous injuries. It is sufficient that the dogs were part of the same group that had participated in previous attacks. Accordingly, we remand so that the trial court may calculate the appropriate damages amount.

¶3 However, we affirm the trial court's decision on Schroeder's additur motion. Schroeder reasons that because she suffered economic damages, she must necessarily be entitled to non-economic damages. As we explain, this is contrary to Wisconsin law. Further, Schroeder has failed to establish the jury's failure to award non-economic damages shocks the judicial conscience.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted. The 2011-12 version of WIS. STAT. § 174.02 is the same as the 2009-10 version that was in effect when the injury occurred.

BACKGROUND

¶4 On September 21, 2009, Schroeder arrived at the Kistners' home with her show dog, Neko. She knocked on the front screen door and the Kistners' eleven dachshunds rushed to the noise. The pack, working in concert, was able to push open the door and escape. Once loose, the dogs attacked Neko and bit her. Schroeder tried to intervene and pull Neko away, and she was bitten on her hands and leg. The Kistners heard Schroeder screaming and pulled their dogs away while a neighbor, John Hoiby, helped take Neko to safety.

¶5 Schroeder filed suit against the Kistners. Before trial, Schroeder requested that the circuit court decide whether she could pursue a double damages claim under WIS. STAT. § 174.02(1)(b), because the Kistners' dogs had engaged in two previous attacks. The attacks involved Hoiby and another of the Kistners' neighbors, Michael Olson.

¶6 Hoiby stated at deposition that the dachshunds had attacked his dog in May or June of 2009, resulting in a puncture wound to the paw. Jeffrey Kistner was present when the attack occurred and recalled that at least one of the dachshunds involved in the attack was red and would be a dog the Kistners still had when Schroeder was hurt. Hoiby stated he could not identify the specific dachshund that injured his dog because all the dachshunds belonging to the Kistners looked alike. Hoiby believed the dachshunds were bred for killing.

¶7 Olson testified he had been attacked by the Kistners' dogs prior to September 21, 2009. He saw Jeffrey in the Kistners' backyard and asked if the dogs were out. Jeffrey responded that they were not, and Olson walked over. Olson and Jeffrey talked for about ten to fifteen minutes before the dachshunds were let loose:

> Jody must have let the [dachshunds] out because they come running around the corner, and I seen the one going to bite me in the leg, so I slapped him, but he got my hand. One bit me in the calf, and I got the one off my hand, and another one bit my hand. Jeff is kicking them away, and then … he's pushing them away, and … I know where the electric fence is, so I went up beyond that. The dogs weren't in the yard when I was talking to Jeff. They were let out.

Olson was bitten three times, twice on the hand and once on the calf. He stated he could not count the number of dogs that attacked him, but he estimated around nine or ten dogs, and maybe more. Olson could not remember any distinguishing features of the dogs except that some were black and some were brown. Olson believed the dachshunds were trained to attack and would hunt in groups, stating, "[I]f one bites, they're all going to bite."

¶8 The pack of dogs that attacked Schroeder was generally composed of the same individual dogs that engaged in the two previous attacks. The evidence established that one dog in the group was euthanized before the incident involving Schroeder.

¶9 The Kistners opposed Schroeder's motion, asserting that to be liable for double damages under WIS. STAT. § 174.02(1)(b), Schroeder had to show the dogs that caused her injuries were the specific dogs that had bitten Hoiby's dog and attacked Olson. Under the Kistners' theory, Schroeder's double damages request would fail because none of the victims of the attacks could identify the specific dogs that caused their injuries. The court agreed with the Kistners and denied Schroeder's motion, citing § 174.02(1)(b)'s plain language and reasoning that "the legislature limited this statute by applying it to a particular dog in the singular sense."

¶10 The case proceeded to trial. The parties stipulated that the Kistners were liable for Schroeder's injuries, and they agreed to economic damages, including medical expenses, in the amount of $2,491.15. The matter of non-economic damages, including pain, suffering, disability, and disfigurement, was left for trial. The jury awarded no such damages, and Schroeder filed a post-verdict motion for additur, reasoning that it was undisputed she was injured and she was therefore necessarily entitled to some amount for her pain and suffering. The court denied the motion, and Schroeder now appeals.

DISCUSSION

¶11 On appeal, Schroeder presents two arguments. First, she argues the trial court erred when interpreting WIS. STAT. § 174.02(1)(b), and she asserts she is entitled to double damages. Second, Schroeder asserts the trial court erred when denying her motion for additur.

1. Double damages under WIS. STAT. § 174.02(1)(b)

¶12 This case requires us to interpret WIS. STAT. § 174.02(1)(b) and apply it to undisputed facts. We review the interpretation and application of the statute de novo. ***Gasper v. Parbs***, 2001 WI App 259, ¶8, 249 Wis. 2d 106, 637 N.W.2d 399. We begin with the language of the statute and interpret it according to the plain meaning of its terms. ***Id.*** If the statute is clear and unambiguous, we apply it to the facts at hand without further analysis. ***Id.*** The statute will not be construed in a manner that leads to absurd or unreasonable results, and we strive to interpret a statute in a way that advances its purposes. ***Id.***

¶13 With these principles in mind, we turn to the statute's language. WISCONSIN STAT. § 174.02(1) creates a strict-liability penalty scheme for owners

whose dogs cause injury. ***Pawlowski v. American Family Mut. Ins. Co.***, 2009 WI 105, ¶17, 322 Wis. 2d 21, 777 N.W.2d 67. Under § 174.02(1)(a), an owner is liable for the full amount of damages "caused by the dog injuring or causing injury to a person …." Paragraph (b) makes an owner liable for double damages if he or she "was notified or knew that the dog previously injured or caused injury to a person, domestic animal or property." WIS. STAT. § 174.02(1)(b).

¶14 The primary dispute in this case revolves around how the double damages provision of the statute should be interpreted as it relates to a pack of dogs.[2] The statute is written in the singular: "a dog," and "the dog injuring or causing injury." *See* WIS. STAT. § 174.02(1)(b). The Kistners argue this means Schroeder must present evidence that the specific dogs that caused her injuries also caused a previous injury. Because Schroeder failed to make such a showing, the Kistners argue she is not entitled to double damages.

¶15 The obvious problem with this construction is that oftentimes it is impossible to pinpoint which specific dog in a pack caused an injury. A group of uncontrolled dogs no doubt engenders confusion and panic in the victim, and if the dogs are similar in appearance, even the calm individual's perception might fail. In this case, for example, the two previous victims of the Kistners' dachshunds could not identify the dog or dogs that caused their injuries. Schroeder concedes she cannot do so either.

[2] Schroeder cites numerous cases addressing whether a particular person was the statutory owner of a dog, asserting courts have liberally construed the definition of "owner" to satisfy the purpose of the statute. The definition of an owner is not germane to this case, and we will not consider these authorities.

¶16 This situation is not unique in the law of Wisconsin. In our view, ***Nelson v. Nugent***, 106 Wis. 477, 82 N.W. 287 (1900), and ***Johnson v. Lewis***, 151 Wis. 615, 139 N.W. 377 (1913), two cases concerning such "group attacks," definitively resolve the issue and require an award of double damages in this case.

¶17 In ***Nelson***, the plaintiff commenced an action under a predecessor statute to WIS. STAT. § 174.02. ***Nelson***, 106 Wis. at 478-79. The trial evidence established that thirteen of Nelson's sheep were killed, and others injured, by two dogs, one of which belonged to the defendant. ***Id.*** at 478. The other dog's owner was not known. ***Id.*** The court instructed the jury that "each owner of a dog which is concerned in or engaged in the killing, wounding, and worrying of sheep is liable for the whole amount of damages which his dog was concerned or engaged in doing." ***Id.*** at 479. The defendant challenged this instruction on appeal.

¶18 Our supreme court determined the instruction was a proper statement of the law, and set forth several principles that guide our conclusion that double damages are appropriate in this case. First, the court recognized, as we have, that dogs have a propensity to attack in groups, and it is often a fool's errand to attempt to identify which dog in a pack caused a specific injury:

> It is practically impossible, in most cases, to tell what damage was done by one dog and what by the other. The difficulty in apportioning the damage led the legislature to adopt the language set forth in the statute, making the owner or keeper of a dog doing injury … liable for all the damage so done. The circumstance that another dog was engaged in the same act does not lessen the liability, unless we are to apportion the damage done by each dog. The impossibility of doing so is manifest.

Id. Second, the court determined that holding "each owner of a dog engaged in doing the damage … liable for the whole amount of damage done" was in accord with the "terms and spirit of the statute." ***Id.*** at 480. Any other holding would

emasculate the statute and deprive the injured party of the protection the statute was designed to give. ***Id.***

¶19 In ***Johnson***, 151 Wis. at 616, a small dog owned by the defendant and a hound owned by the defendant's brother-in-law attacked and injured or killed the plaintiff's sheep. The jury stated it could not separate the two dogs, and it was given a second set of instructions. ***Id.*** at 617. The jury then returned a verdict that our supreme court determined was "consistent with the theory that, although both dogs may have been engaged in the chase of the sheep and lambs, the hound dog, by reason of superior strength or speed, was the dog which killed, wounded, or worried the sheep." ***Id.*** The supreme court found the verdict inconsistent with ***Nelson*** and ordered a new trial: "If the small dog joined in the chase with the hound and participated throughout to the best of his ability, his owner would be liable notwithstanding the hound outstripped him in pursuit, reached the quarry first, and inflicted the more deadly or distressing wounds." ***Johnson***, 151 Wis. at 618.

¶20 ***Nelson*** and ***Johnson*** stand for the proposition that when a group of dogs attack, the owner or owners of all dogs that participated in the attack are jointly and severally liable for all the damage caused, regardless of which dog caused a specific injury. It stands to reason that when the owner of a group of dogs has notice that the group previously attacked and caused an injury, the owner is liable for double damages subsequently caused by all dogs in that pack. The practical difficulties inherent in identifying which specific dog in a pack caused a particular injury allow no other rule. *See* ***Nelson***, 106 Wis. at 479-80; *see also* ***Gasper***, 249 Wis. 2d 106, ¶8 (statutes will not be construed in a manner that leads to absurd or unreasonable results).

¶21 This holding also comports with the purpose of WIS. STAT. § 174.02(1)(b). The double damages provision's objectives are to punish those who harbor or keep a dog with a known propensity for unprovoked assaults and to deter others from doing the same. ***Gasper***, 249 Wis. 2d 106, ¶11 (citing ***Sprague v. Sprague***, 132 Wis. 2d 68, 72, 389 N.W.2d 823 (Ct. App. 1986)). Here, it is undisputed that the owners of all the possible culprits in each attack were the same. We see no reason to disregard the concept of group liability established in ***Nelson*** when a group owned by the same individual or individuals attacks as a unit on multiple occasions. When such group attacks repeatedly occur, double damages are appropriate under § 174.02(1)(b), regardless of whether the victim or witnesses can identify the specific dog that caused injury. In these situations, imposing liability under § 174.02(1)(b) advances the statute's punishment and deterrent objectives, because a contrary holding would effectively gut the statutory disincentive for harboring a pack of dangerous animals when they all look alike to the victims.[3]

¶22 The Kistners primarily argue we should defer to the statute's plain, singular language, which they read to require identification of the specific injury-causing dog. This argument is fatally undercut by another clear legislative command, however. Under WIS. STAT. § 990.001(1), we will construe statutes so

[3] In addition to deterring others from keeping dogs with a known propensity for unprovoked assaults, ideally the availability of double damages under WIS. STAT. § 174.02(1)(b) will also deter those who already own such dogs from allowing the dogs to cause subsequent injury.

that "[t]he singular includes the plural, and the plural includes the singular."[4] We must apply this rule of interpretation unless it would "produce a result inconsistent with the manifest intent of the legislature." *See* WIS. STAT. § 990.001. As we have explained, imposing double damages in "group attack" cases is in keeping with the legislative purpose of WIS. STAT. § 174.02(1)(b).

¶23 Although the trial court erred in determining the proper measure of damages, we see no need to remand for a new trial. The parties stipulated to the amount of economic damages, and a full trial was held on the issue of non-economic damages. Accordingly, all that is left for the circuit court to do is double the damages award and calculate the appropriate amount of costs. We therefore reverse the judgment and remand to the circuit court to determine the appropriate damages in accordance with this opinion.

2. Additur

¶24 Schroeder claims the circuit court erred by denying her motion for additur under WIS. STAT. § 805.15(6) and argues she is entitled to a new damages trial as a matter of law. Under § 805.15(6), if a trial court determines a verdict is inadequate, not due to perversity or prejudice or as a result of error during trial, it

[4] Schroeder has cited WIS. STAT. § 990.001(1) for the first time in her reply brief. Ordinarily, we do not address arguments raised for the first time in a reply brief. *See* ***State v. Reese***, 2014 WI App 27, ¶14 n.2, 353 Wis. 2d 266, 844 N.W.2d 396. However, this is a rule of administration only and does not compromise our ability to reach the merits. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 493, 588 N.W.2d 285 (Ct. App. 1998). In this case, we choose to exercise our discretion to address § 990.001(1); doing so will provide guidance for other cases, *see* ***Reese***, 353 Wis. 2d 266, ¶14 n.2, and fulfills both our primary error-correcting function and our secondary function of defining and developing the law, which includes statutory interpretation, *see* ***Cook v. Cook***, 208 Wis. 2d 166, 188, 560 N.W.2d 246 (1997).

shall determine a reasonable amount and give the other party the option of accepting that amount or conducting a new damages trial.

¶25 As an initial matter, we reject Schroeder's claim that she is entitled to a new damages trial as a matter of law. Even if Schroeder is correct and the amount of her damages was inadequate, the remedy would be to remand to the trial court so that it may determine a reasonable amount of damages. It would then be the Kistners' decision whether to accept that amount or proceed to a new damages trial.

¶26 We need not linger on the proper remedy, though, because Schroeder has not demonstrated error. "In reviewing jury awards, this court may not substitute its judgment for that of the jury but, rather, determines whether the awards are within reasonable limits." ***Brain v. Mann***, 129 Wis. 2d 447, 455, 385 N.W.2d 227 (Ct. App. 1986). The award must be so unreasonably low that it shocks the judicial conscience. ***Id.*** The decision whether to grant additur is within the trial court's discretion and will not be disturbed absent an erroneous exercise of that discretion. *See* ***Martz v. Trecker***, 193 Wis. 2d 588, 594, 535 N.W.2d 57 (Ct. App. 1995).

¶27 Here, Schroeder asserts the mere fact of injury obligated the jury to award something for her pain, suffering, disability, and disfigurement, because there was no dispute she suffered injuries.[5] However, a verdict is not

[5] Schroeder does not indicate what evidence, specifically, tended to establish that she was entitled to an award for pain and suffering. She cites only to her appendix, which is impermissible. *See* WIS. STAT. RULE 809.19(1)(e) (argument must be accompanied by citations to the record). As a result of this violation of the Rules of Appellate Procedure, we cannot tell whether the jury was aware of the cited materials, including the deposition testimony of a doctor. It is the appellant's obligation to ensure the record is complete and provide appropriate citations (continued)

unreasonable or inconsistent simply because "it allows damages for medical expenses and denies recovery for personal injuries or pain and suffering." ***Jahnke v. Smith***, 56 Wis. 2d 642, 653, 203 N.W.2d 67 (1973). While pain and suffering are generally compensable where there are medical bills and loss of services, our supreme court has declined to hold this is true in all cases as a matter of law. *See* ***Dickman v. Schaeffer***, 10 Wis. 2d 610, 616, 103 N.W.2d 922 (1960).

¶28 As such, we must reject Schroeder's assertion that she was entitled to an award for non-economic damages simply because she sustained an injury. On appeal, it is Schroeder's burden to establish that the evidence before the jury was such that the jury's finding of no damages shocks the judicial conscience. *See* ***Heikkinen v. United Servs. Auto. Ass'n***, 2006 WI App 207, ¶59, 296 Wis. 2d 438, 724 N.W.2d 243. We will affirm "if there is any credible evidence that under any reasonable view supports the jury finding as to the amount of damages, and this is especially true when the verdict is sustained by the circuit court." ***Water Quality Store, LLC v. Dynasty Spas, Inc.***, 2010 WI App 112, ¶47, 328 Wis. 2d 717, 789 N.W.2d 595; *see also* ***Heikkinen***, 296 Wis. 2d 438, ¶59.

¶29 Here, beyond simply pointing to the fact that she was injured, Schroeder has not identified what specific evidence of her past or future pain, suffering, disability, and disfigurement was presented to the jury. Her failure to effectively brief the issue has foreclosed further review of the issue. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals will not consider inadequately briefed issues or arguments supported only by general statements).

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to that record. *See* ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986); WIS. STAT. RULE 809.19(1)(e).

¶30 Furthermore, even if someone—presumably Schroeder—provided relevant testimony, the jury was not required to credit that testimony. The credibility of witnesses and the weight to be given their testimony is within the province of the jury. ***Schwalbach v. Antigo Elec. & Gas, Inc.***, 27 Wis. 2d 651, 658, 135 N.W.2d 263 (1965). The issue of compensation for non-economic damages "boil[s] down to the jury's assessment of … credibility and the jury [is] not obligated to find [the plaintiff's] testimony credible regarding pain and suffering." ***Staehler v. Beuthin***, 206 Wis. 2d 610, 623, 557 N.W.2d 487 (Ct. App. 1996). The pain, if any, Schroeder suffered may not have been considered by the jury to be sufficient to warrant monetary compensation. ***Id.*** It is also possible the jury concluded the amount awarded for economic damages was sufficient compensation for whatever damages may have been suffered. *See* ***Jahnke***, 56 Wis. 2d at 653.

¶31 In any event, Schroeder's failure to cite specific evidence establishing her entitlement to non-economic damages means we must give particular weight to the trial court's decision. *See* ***Roy v. St. Lukes Med. Ctr.***, 2007 WI App 218, ¶10 n.1, 305 Wis. 2d 658, 741 N.W.2d 256 (appellate court has no duty to scour the record to review arguments unaccompanied by adequate record citations; appellate court will accept findings made by the trial court in the absence of record support). The court determined the evidence at trial was consistent with the jury verdict:

> In this particular case, the jury heard all the testimony. There didn't appear to be any hindrance by the jury to weigh the credibility and the believability of the witnesses, which is well within the jury's purview.
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> ….
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> I can't say, as a matter of law, that the jury's verdict shocked this Court's conscience after I heard all the

> testimony and … watched the witnesses and looked at the evidence.
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> ….
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> [W]hile the plaintiff was testifying, the plaintiff appeared to be fully recovered. There didn't appear to be any overt scarring or injury that was noticeable to a trier of fact.
>
> I understand the plaintiff is extremely disappointed and feels badly about the outcome, but the outcome is certainly well within what was a possibility based upon the strength of the claim.

¶32 The trial court, which sees and hears the witnesses, is in the best position to observe and evaluate the evidence and proceedings. *See* ***Carlson & Erickson Bldrs., Inc. v. Lampert Yards, Inc.***, 190 Wis. 2d 650, 669, 529 N.W.2d 905 (1995); ***Goff v. Seldera***, 202 Wis. 2d 600, 614, 550 N.W.2d 144 (Ct. App. 1996). The trial court appropriately construed the facts, and inferences from those facts, in favor of the prevailing party and reached a reasonable decision. *See* ***Carlson & Erickson Bldrs.***, 190 Wis. 2d at 669. Accordingly, we will not disturb the trial court's decision on Schroeder's motion for additur. *See* ***Water Quality Store***, 328 Wis. 2d 717, ¶47 (verdict sustained by trial court entitled to significant deference).

¶33 Neither party is allowed costs on appeal. *See* WIS. STAT. RULE 809.25.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.