COURT OF APPEALS
DECISION
DATED AND FILED

April 7, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1499 **Cir. Ct. No. 2013CV639**

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

THOMAS M. SMITH AND CARY G. SMITH,

PLAINTIFFS-APPELLANTS,

V.

WISCONSIN MUTUAL INSURANCE COMPANY AND AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for La Crosse County: ELLIOTT M. LEVINE, Judge. *Affirmed*.

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Thomas and Cary Smith's pet dog was attacked and badly injured by a larger dog owned by neighbors. Liability was not contested. The dispute here is over damages. The Smiths incurred significant

veterinary bills and related costs in an apparently successful attempt to save their dog. The Smiths sought damages totaling over $12,000, which they argued were subject to doubling under WIS. STAT. § 174.02(1)(b).[1] The circuit court, however, in keeping with normal limits in property damage cases, limited damages to the cost of a replacement dog of the same breed, which the parties agreed would have cost $2,695. The court doubled that amount.

¶2 On appeal, as before the circuit court, the Smiths in effect ask for an extension of existing law. They argue that family pets are like heirlooms, keepsakes, and family pictures that have greater emotional and sentimental value than the value such property has on the open market. They point to a Wisconsin case allowing more than fair market value damages when it comes to such heirlooms and keepsakes, and they ask us to extend that law to family pets. Like the circuit court, we decline to do so. In addition, we reject other damages arguments the Smiths make. We affirm.

Background

¶3 The Smiths' claim arises out of an incident in which their approximately 11-year-old dog was attacked by another dog belonging to neighbors Aaron and Julie Foglia. As a result of the attack, the Smiths' dog sustained severe injuries and could not move its rear legs. The Smiths, who live in Onalaska, transported their dog to an animal hospital in Madison, where doctors performed multiple procedures, including at least two surgeries. The dog's treatment required multiple trips between Onalaska and Madison. The medical

[1] All references to the Wisconsin Statutes are to the 2013-14 version, the current version. There have been no pertinent changes to the statute since the time of the injury here.

bills totaled $9,535.59. Additional related expenses, including travel and lost wages, totaled over $2,700.

¶4 The Smiths sued the Foglias under WIS. STAT. § 174.02, a statute pertaining to dog owner liability. Liability was not a significant issue. The parties disputed damages. The Smiths argued that they were entitled to recover all veterinary expenses and related expenses totaling over $12,000. The Smiths contended that the attacking dog's owners had notice that the dog had previously caused injury and, therefore, the Smiths' full damages were subject to doubling under § 174.02(1)(b).

¶5 The Foglias' insurers sought a declaratory ruling.[2] The insurers argued that, under Wisconsin law, a plaintiff's recovery for damage to a dog was no different than recovery for damage to any other property. As such, according to the insurers, the Smiths' maximum recovery under the circumstances here was the lesser of the dog's "cost of repair" and the dog's pre-injury fair market value. The circuit court agreed with the insurers.

¶6 The parties agreed that a replacement puppy of the same breed would cost $2,695, and the insurers argued that this amount was the best estimate of pre-injury fair market value. Thus, the insurers argued that $2,695 was the limit on damages. The circuit court agreed with this argument. The insurers conceded that, because of the dangerous dog notice provision in WIS. STAT. § 174.02(1)(b), that amount could be doubled. Accordingly, the circuit court limited the Smiths'

[2] By stipulation of all parties, the Foglias were dismissed from the Smiths' action, leaving insurers Wisconsin Mutual and American Family to defend. The insurers' arguments overlap, and we refer to their arguments collectively rather than attributing specific arguments to a specific insurer.

damages to $2,695, an amount that was doubled to $5,390 pursuant to the doubling provision.

Discussion

¶7 As noted, the Smiths effectively argue that we should extend a special damages rule—a rule that has been applied in Wisconsin to heirlooms and keepsakes—to pets. "The determination of the proper measure of damages for a specific claim presents a question of law which this court reviews independently of the trial court." ***W.H. Fuller Co. v. Seater***, 226 Wis. 2d 381, 385, 595 N.W.2d 96 (Ct. App. 1999).

¶8 The Smiths begin their arguments by pointing to language in WIS. STAT. § 174.02. That statute imposes liability on a dog's owner "for *the full amount of damages* caused by the dog injuring or causing injury to a person, domestic animal or property." *See* § 174.02(1)(a) (emphasis added). The Smiths do not appear to argue that this statutory language provides support for applying a special damages rule to pets. Rather, they seem only to say that the statute imposes no independent limitation on the damages otherwise available. We discuss the statutory language no further.

¶9 The Smiths appropriately concede that, under Wisconsin law, dogs are personal property. *See* ***Campenni v. Walrath***, 180 Wis. 2d 548, 557, 509 N.W.2d 725 (1994); ***Hagenau v. Millard***, 182 Wis. 544, 548, 195 N.W. 718 (1924). Further, the Smiths appear to concede that, when it comes to damaged personal property that is repairable, the general rule is that recovery for property damage is limited to the lesser of (1) the diminution in value and (2) the cost of repair, but that, in any event, recovery is limited to pre-injury fair market value. *See* WIS JI—CIVIL 1804. Indeed, the Smiths direct our attention to ***Gould v.***

Merrill Railway & Lighting Co., 139 Wis. 433, 121 N.W. 161 (1909), where the court applied this general rule to injured work horses, and limited recovery to the "actual value of the horse on the day the injuries were received." *See* ***id.*** at 447.

¶10 As we understand their briefing, the Smiths' primary argument is that this general limitation should not apply to pets (or at least not to mature pet dogs) because such pets have value to their owners, but typically have no market value. They assert, and point to case law from other states observing, that mature pets are typically given away, not sold. On this basis, the Smiths ask us to extend to pets Wisconsin case law providing a different damages rule for property that only has value to an owner.

¶11 The Smiths point to ***Harvey v. Wheeler Transfer & Storage Co.***, 227 Wis. 36, 277 N.W. 627 (1938). ***Harvey*** is not an easy read, but in part it addresses the loss of irreplaceable "heirlooms" and "keepsakes, family pictures, and the like," which only have value to an owner. *See* ***id.*** at 42. ***Harvey*** holds that owners "may be compensated to the extent of the reasonable special value of such [property] to the owner." ***Id.*** In determining this amount, consideration may be given to "the description of the article, its original cost, and facts relative to its association with the owner or his family, as well as the opinion of the owner." ***Id.***

¶12 We decline to extend Wisconsin's "keepsakes" rule to pets. It seems to us that there are obvious and significant differences between an unrepairable and lost forever keepsake and an injured but "repairable" pet. For that matter, here, the Smiths are not seeking to measure their damages by looking to the factors listed in ***Harvey***. They are primarily seeking "repair costs." Accordingly, we move on to the Smiths' other arguments.

¶13 In seeming contrast with other parts of their briefing, the Smiths contend that they do not seek a change in the law, but rather simply request the application of plainly applicable existing law. The Smiths point to case law stating that, "[w]here the chattel damaged has no ascertainable market value, the cost of repairs is the measure of damages." *See* ***Krueger v. Steffen***, 30 Wis. 2d 445, 450, 141 N.W.2d 200 (1966). However, we agree with a different statement in the Smiths' briefing. Elsewhere the Smiths state that the question of whether the "costs incurred to restore a family pet back to health [are recoverable] has not been decided in Wisconsin." Indeed, as the Smiths acknowledge, our supreme court has expressly declined to address how to measure damages relating to a dog that was shot by police. We turn our attention to that case, ***Rabideau v. City of Racine***, 2001 WI 57, 243 Wis. 2d 486, 627 N.W.2d 795.

¶14 In ***Rabideau***, the court commented sympathetically on the companionship value that humans place on dogs. *See* ***id.***, ¶¶3-4. This commentary is obviously true, and it provides some support for the Smiths' position. But the ***Rabideau*** court's bottom line was to continue treating dogs no differently from other personal property. Specifically, the court declined to permit damages based on emotional distress to an owner caused when police shot the owner's dog. *See* ***id.***, ¶¶1-2, 7, 20-24.

¶15 Moreover, ***Rabideau***'s discussion of public policy factors appears to disfavor expanding liability for damage to pets. The court stated that "it would be difficult to cogently identify the class of companion animals because the human capacity to form an emotional bond extends to an enormous array of living creatures." ***Id.***, ¶31. The Smiths offer no persuasive guidance for overcoming this practical problem. Perhaps more to the point, given the prevalence of pets and the ever-expanding capacity of the animal medical profession to "repair" injured pets,

we agree with the insurers that the Smiths' request for a significant expansion of financial liability in this area is better left to our supreme court. *See* ***Blum v. 1st Auto & Cas. Ins. Co.***, 2010 WI 78, ¶50, 326 Wis. 2d 729, 786 N.W.2d 78 (explaining that court of appeals is primarily an error-correcting court).

¶16 The Smiths ask us to embrace a more owner friendly approach to pet damages like that adopted in some other states. For example, they point to Kansas and California cases that authorize damages for reasonable veterinary care and treatment but do not limit such damages to the market value of the pet. *See* ***Martinez v. Robledo***, 147 Cal. Rptr. 3d 921, 922, 925-26 (Cal. Ct. App. 2012); ***Burgess v. Shampooch Pet Indus.***, 131 P.3d 1248, 1252-53 (Kan. Ct. App. 2006). But the insurers point to other states, such as Minnesota and Ohio, that essentially apply the damages rule that the circuit court applied here. *See* ***Soucek v. Banham***, 524 N.W.2d 478, 481 (Minn. Ct. App. 1994); ***Sokolovic v. Hamilton***, 960 N.E.2d 510, 513-14 (Ohio Ct. App. 2011). These cases from other jurisdictions highlight the unique nature of family pets, and offer some of the pros and cons of adopting a different rule in Wisconsin, but they do not persuade us one way or the other.

¶17 Finally, the Smiths appear to argue that, regardless of property damage limitations, they have additional damages that are not property damages. These alleged damage items include the cost of a pet crate ($84.39), a pet pen ($65.40), mileage for repeated trips of significant distance between the Smiths' home and the location of veterinary care ($1,242), lost wages for missing work to attend to the dog's care ($810), and "nominal" damages that Cary Smith suffered in missing her stepson's high school graduation ($500). As to the crate, pen, mileage, and missed work, we agree with the insurance companies that these simply are property damages subject to the property damage limitation. They are expenses incurred by the Smiths to facilitate "repairing" their dog. As to the $500

in alleged "nominal" damages, the Smiths fail to cite any authority addressing nominal damages. Thus, the Smiths have provided no support for adding that $500 amount to their damages.

Conclusion

¶18 For the reasons stated above, we affirm the judgment.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.