

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 23, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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Appeal No. 2005AP2340

Cir. Ct. No. 2005SC271

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

DANIEL J. LORGE,

PLAINTIFF-APPELLANT,

CANDACE K. LORGE,

PLAINTIFF,

V.

RANDY FINGER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waupaca County:
PHILIP M. KIRK, Judge. *Affirmed.*

¶1 VERGERONT, J.¹ Daniel and Candace Lorge filed this small claims action alleging that Randy Finger shot to kill their dog, intending to shoot Ray Sheppard's dog, which looked like their dog. They incurred veterinarian bills as a result of their dog's injuries and sought \$5000 in damages. The circuit court dismissed the complaint after a trial, and the Lorges appeal. They contend the court erred because it excluded evidence they offered, disregarded the applicable statute, and made a decision contrary to the greater weight of the credible evidence. For the reasons we explain below, we conclude the court did not err, and we therefore affirm.

¶2 At the trial, the Lorges and Finger appeared without counsel. The Lorges presented testimony that on December 2, 2004, their nine-year-old black lab dog was badly wounded by a gunshot in the shoulder; as a result, the dog lost his shoulder and one leg and the veterinary bills were in excess of \$4000. Neither of the Lorges witnessed the shooting. However, Candace testified that on the morning of the incident she let their dog out about 11:00 a.m., and the dog went into their woods as usual. About 11:15 or 11:30 a.m. she heard a loud gunshot, went to the door, and looked out. She saw part of a male figure, from the hips down, walking past the pole barn on Finger's property; the top part of the figure was obscured by trees.² The person was about a hundred feet away. A short time later the dog returned, limping, to the Lorges' house, and when it came inside and

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

² The testimony showed that the Lorges' property abuts, on the south and east side, the twenty-four acres that Finger owns, and the Lorges' woods are connected to Finger's woods.

lay down she saw a lot of blood. She went to get Daniel, who was at work, and they took their dog to the veterinarian.

¶3 Finger admitted that he shot at a black lab on that same day, but he did not know if the dog he shot at was the Lorges' dog. His account, which was largely corroborated by his wife's testimony, was as follows. They had been having problems with a black lab chasing his wife and their three small children. For that reason on this morning, about 7:00 a.m., they drove their seven-year-old child down their driveway, which is about a quarter mile long, to the bus stop. While the child was standing at the bus stop, a black lab came from the north and ran toward her. The dog was barking; it had its mouth opened and Finger thought it was going after his child. Finger made the dog go away by yelling and waving his arms, and the dog ran back towards Finger's woods. The bus picked up the child in about three to five minutes, and Finger turned the truck around and drove back toward the house. According to Finger's wife, they were getting out of the truck when the dog came running toward them. Finger testified he saw the dog running through the woods; he got out of the truck, at which time the dog started to come toward him, barking at him in a threatening manner. Finger had a gun in the back of his truck because it was deer season, and he grabbed the gun. He felt threatened by the dog coming toward him and shot at it when it was about twenty-five yards away. After the first shot the dog ran away in Finger's woods, and Finger thought he had missed it.

¶4 Finger testified that he could not have been the person that Candace saw later that morning because he was not at home at that time. He and his wife went to pick up one of their children at 11:00 a.m. from preschool in Clintonville and then went to Fleet Farm. They do allow hunters on their property, he testified,

and usually the hunters stop to tell him they will be hunting, but not always. That morning no hunters told Finger they would be hunting on his property.

¶5 In an attempt to show that Finger could not have shot and hit their dog when driving back from the bus stop, the Lorges presented the testimony of their son. He testified that he stopped by his parents' house that morning at about 7:30 a.m. to get his father for work and saw their dog then. In cross-examining Finger, the Lorges suggested that Finger was angry with them because Daniel had told Finger he could not build a driveway on their property. Finger denied he was angry about that.

¶6 The Lorges presented the testimony of Ray Sheppard, who also owned a black lab and whose property was east of Finger's, across the road. Sheppard described an encounter with Finger that occurred before the Lorges' dog was injured. Finger came to Sheppard's house and said Sheppard's dog was threatening his family and he was going to shoot it if Sheppard did not keep it away. Sheppard said he responded that he did not think it was his dog, it would not hurt anyone, but Finger did have a right to protect his family. The Lorges suggested in their questioning of Sheppard that Finger could have construed Sheppard's comments as telling Finger he could shoot his dog. Finger's cross-examination of Sheppard acknowledged that he did tell Sheppard to keep his dog off his property because it was threatening his wife and children.

¶7 The Lorges presented three additional witnesses. The animal control officer testified there had been no complaints about either the Lorges' or Sheppard's dog. A neighbor who lived across the road from the Lorges testified that their dog had not bothered him or his children. Finally, the officer who investigated the Lorges' complaint described his interview with Finger, which was

consistent with Finger's trial testimony, and his interview with Sheppard, which was consistent with Sheppard's testimony. In response to the court's question, the officer said that he could not reconcile the testimony of the shot heard by Candace and Finger's testimony of the time he shot at the black lab, except that the shot Candace heard might have been from a hunter.

¶8 Finger testified that he received a letter from the district attorney's office that there would be no charges, and it appears he provided it to the court. Daniel testified that he had received a letter that there was not enough evidence, and he then had a conversation with that person, apparently from the district attorney's office, who said he would look into it further.

¶9 After the testimony and argument, the court issued its decision. It began by concluding that WIS. STAT. § 174.01, to which the Lorges had referred, did not apply because that imposed a sanction for killing a dog.³ The court then

³ WISCONSIN STAT. § 174.01 provides in part:

Restraining action against dogs. (1) Killing a dog.

(a) Except as provided in par. (b), a person may intentionally kill a dog only if a person is threatened with serious bodily harm by the dog and:

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

(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

(continued)

explained that in its view the Lorges' claim was for negligence. The court noted the discrepancy in the time that Finger testified he shot at a black lab and the time Candace heard the shot and saw their injured dog, and it also noted Finger's testimony that he thought he had not hit the black lab. However, the court did not explicitly answer the question of whether it was Finger or someone else who hit the Lorges' dog. Instead the court viewed the significant question as this: assuming Finger shot and hit the Lorges' dog, did he act reasonably under all the circumstances? The court determined that he had. The court noted Finger's testimony that the dog had approached him in a threatening manner after he had just witnessed the dog running toward his daughter in what he believed to be a threatening manner. The court also noted the undisputed testimony that Finger had previously complained about the black lab to Sheppard and told him to keep it off his property. In the court's view this showed that Finger was not acting precipitously or out of malice, but did want to protect his family. Concluding that the Lorges had not met their burden of proving that Finger was liable for their dog's injuries, the court dismissed the complaint.

ANALYSIS

¶10 The Lorges first argue that the court did not permit them to present certain photographs, documents, and testimony that were necessary to their case. We evaluate the circuit court's conduct of the trial on these points in light of its duty and authority in small claims actions, and we conclude the court fulfilled its duty and reasonably exercised its authority.

2. Immediate action is necessary.

¶11 In recognition of the fact that the parties in small claims actions are frequently unrepresented by counsel, the legislature has given the circuit court more latitude than in a large claims action and has relaxed the procedural rules. Thus, the proceedings are to be conducted informally, WIS. STAT. § § 799.209(1); they are not governed by the rules of evidence, with certain exceptions, § 799.209(2); and the court is to “ensure that the claims or defenses of all parties are fairly presented,” § 799.209(3). Although the court is to admit all (with certain exceptions not applicable here) evidence having reasonable probative value, *see* § 799.209(2), it also has the authority to “establish the order of trial and the procedure to be followed in the presentation of evidence and arguments in an appropriate manner consistent with the ends of justice and the prompt resolution of the dispute on its merits according to the substantive law.” Section 799.209(4). The decision of what evidence to accept and in what form is committed to the circuit court’s discretion, and we affirm discretionary decisions if the court acted reasonably. *See Staskal v. Symons Corp.*, 2005 WI App 216, ¶15, ___ Wis. 2d ___, 706 N.W.2d 311.

¶12 The Lorges contend that the court effectively excluded photographs and a report they offered as evidence because the court ignored them or did not “receive” them as exhibits. The photographs were of blood that, Daniel testified, he found on their property the next morning and proved the dog was shot on their property. The report was from the veterinarian, which, Daniel testified, showed the dog was shot from the back and so could not have been shot by Finger when the dog was running toward him. The trial transcript shows that, during his testimony, Daniel stated he had the photographs and the report and explained what they showed. He did not ask to have them, or any other documents he referred to, admitted into evidence or made a part of the court record, and they are not in the

record before us. The transcript shows that the court was given copies of drawings, a list of damages, and the police reports by the Lorges, and, at the close of evidence gave them back to the Lorges after ascertaining that they had not been marked as exhibits.

¶13 The Lorges suggest that the court had a duty to look at every document they referred to and formally admit them into evidence, even though they did not request that. We do not agree that the rules for small claims actions require this. The circuit court heard Daniel's testimony of where he found blood and why this showed their dog was injured on their property. Daniel does not explain why the photographs would have added to his testimony. None of the other testimony conflicted with Daniel's assertion that he found blood on his property the next morning. Similarly, there was no dispute over their dog's injuries. In the absence of a request for the court to look at the photographs and report and have them admitted into evidence for a purpose not served by Daniel's testimony, the court could reasonably decide that it was not necessary to do that. The court could reasonably decide that it had heard the contents of the documents and that looking at them or reading them would not add anything to Daniel's description of the contents.

¶14 The Lorges refer to two points in their questioning of witnesses where, they assert, the court improperly prevented them from asking the questions they wanted to ask. The first is when the investigating officer began to testify. The Lorges asked the officer if he investigated the incident and he said "yes"; they asked him if he "disagree[d] with anything that was said here so far today" and he said "no." At that point the court stated: "Just tell me what you did. We'll expedite this." The officer then summarized his investigation, after which Daniel asked him questions, concluding with "I have no further questions." The

transcript shows that the court had the police report, referred to it, and asked questions about it.

¶15 The Lorges assert in their brief that they wanted to establish through their questioning of the officer “why he didn’t believe the Randy Finger story.” However, the transcript does not show they were prevented from doing so. The court had the authority to ask the officer to begin with a summary of his investigation and acted reasonably in doing so. That summary facilitated, rather than impeded, the Lorges’ opportunity to present their claim, because it aided the court in its understanding of the facts. The Lorges were then free to elicit from the officer the evidence they wanted the court to hear.

¶16 The second instance the Lorges refer to is when the Lorges asked Finger whether he was a former police officer. Finger did not answer, objecting that it had nothing to do with the case. The Lorges explained that “it shows he should know the law.” The court stated: “All right. That’s unnecessary. Another question.” The Lorges contend on appeal that they wanted to establish that, because Finger was a police officer he should have known the law and followed it by reporting his trouble with the dog to the animal control officer.

¶17 We conclude the court acted reasonably in not permitting this line of questioning. The court could reasonably decide that ordinary citizens know, generally, that they can report problems with other people’s dogs to a government official and know that it is not lawful to shoot someone else’s dog without justification. Thus, the court could reasonably decide that inquiring into Finger’s prior employment as a police officer was not sufficiently probative of the issues in dispute to warrant the additional time and likely irrelevant testimony involved in pursuing that line of questioning.

¶18 In summary, we are satisfied that the court did not prevent the Lorges from presenting relevant evidence. The court allowed the Lorges ample opportunity to testify, question witnesses, and explain their case; it facilitated that by its own questions; and it imposed no unreasonable limitations on the Lorges' questioning of witnesses.

¶19 The Lorges next contend the court erred in ruling that WIS. STAT. § 174.01 did not apply because their dog was injured but not killed. Apparently this statute was cited in the police report and Daniel referred to it in his testimony. The Lorges argue that Finger tried to kill their dog without meeting the conditions in the statute that a person be "threatened with serious bodily harm by the dog," and either "other restraining actions were tried and failed" or immediate action was necessary. Section 174.01(1)(a).

¶20 Whether the court properly interprets a statute presents a question of law, which we review de novo. *Hess v. Fernandez*, 2005 WI 19, ¶36, 278 Wis. 2d 283, 692 N.W.2d 655 (citation omitted). When we interpret a statute we begin with the language of the statute, and if it has a plain meaning, we apply that plain meaning. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶¶45-46, 271 Wis. 2d 633, 681 N.W.2d 110.

¶21 WISCONSIN STAT. § 174.01 addresses "intentionally kill[ing]" a dog. It is undisputed that the Lorges' dog was not killed. There is no suggestion in the language of the statute that it applies to injuries to a dog that do not result in death. We conclude the court correctly ruled that the statute does not apply to the facts of this case.

¶22 The Lorges suggest that, if WIS. STAT. § 174.01 does not apply, the court should have applied WIS. STAT. § 951.02, which provides:

Mistreating animals. No person may treat any animal, whether belonging to the person or another, in a cruel manner. This section does not prohibit bona fide experiments carried on for scientific research or normal and accepted veterinary practices.

However, the Lorges did not bring this statute to the attention of the circuit court. A circuit court's obligation in a small claims action is to resolve the dispute "according to the substantive law." WISCONSIN STAT. § 799.209(4) does not require it to conduct its own research to determine if statutes apply that no party has brought to its attention. We also observe that there is no reasonable probability the court would have determined Finger violated this statute, given its factual findings, which we discuss and uphold in the following paragraphs.

¶23 The Lorges contend that the preponderance of the evidence does not support the circuit court's decision that Finger was not negligent. Rather, they assert, the evidence shows that he shot their dog with the intent to kill it without justification. In their view, Finger was lying when he testified about the events with a black lab at about 7:00 a.m. and instead he shot and injured their dog about 11:15 or 11:30 a.m. on their property.

¶24 When we review the findings of fact made by a court sitting as trier of fact, we accept those findings unless they are clearly erroneous. WIS. STAT. § 805.17(2). The credibility of witnesses and weight of the evidence, as well as the inferences to be drawn from the evidence, are for the circuit court to make, not this court. *Rivera v. Eisenberg*, 95 Wis. 2d 384, 388, 290 N.W.2d 539 (Ct. App. 1980). We affirm the circuit court's determination if, accepting the reasonable inferences from the evidence drawn by the fact finder, a reasonable fact finder could have come to the same conclusion. *Id.*

¶25 Applying this standard, we conclude a reasonable fact finder could decide that Finger was not liable for the injuries to the Lorges' dog. The court believed Finger's testimony about what occurred with a black lab earlier in the morning and believed his testimony that he was not at home later in the morning when Candace testified she heard the shot. This was a credibility determination for the circuit court to make, and we may not disregard it. Based on this credibility determination, the court implicitly found that if the Lorges' dog was injured later in the morning, Finger did not do it. That finding would not be inconsistent with either the testimony of the Lorges' son or the testimony of Candace, who did not see who injured the dog; and it was reasonable to infer from the record that a hunter could have shot and injured the dog at the time Candace heard the shot.

¶26 The court made an alternative analysis, based on his assessment of Finger's credibility, that if Finger did injure the Lorges' dog, it occurred when he shot at the black lab earlier in the morning.⁴ Although this scenario would conflict with the testimony of the Lorges' son and of Candace, it was the court's role to choose between conflicting testimony. Accepting the court's credibility determinations and the reasonable inferences it drew from the evidence, we conclude that its determination—if Finger did injure the Lorges' black lab around 7:00 a.m., he acted reasonably—is a reasonable one. While it may be that other fact finders would have made different credibility assessments and viewed the

⁴ Accepting the court's credibility assessment of Finger, the record also supports a finding that the black lab Finger shot at around 7:00 a.m. was either not the Lorges' dog or, if it was the Lorges' dog, Finger did not hit the dog.

evidence differently, that is not a basis for reversing this circuit court's determination.

CONCLUSION

¶27 The circuit court did not ignore or exclude relevant evidence, did not disregard the correct law, and its determination that Finger was not negligent or otherwise liable was not based on clearly erroneous factual findings. We therefore affirm.

By the Court.—Order affirmed.

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

