COURT OF APPEALS
DECISION
DATED AND FILED

June 7, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-3263

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

JULIE L. RABIDEAU,

PLAINTIFF-APPELLANT,

V.

CITY OF RACINE,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Affirmed.*

¶1 BROWN, P.J.[1] In this case, Julie L. Rabideau filed a small claims complaint alleging that Officer Thomas Jacobi shot and killed her dog causing her to collapse and seek medical treatment. The complaint was filed against Jacobi's

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

employer, the City of Racine. The trial court dismissed the case, finding that pursuant to WIS. STAT. § 174.01, Jacobi was privileged to shoot Rabideau's dog. The trial court also found that Rabideau failed to state a claim because she could recover no damages for negligent infliction of emotional distress or loss of the property value of her dog. The trial court also sanctioned Rabideau's attorney for bringing a frivolous claim.

¶2 Rabideau argues on appeal that the trial court improperly dismissed this case and also erred in finding the claim to be frivolous. We hold that dismissal was proper because Rabideau could recover no damages for negligent infliction of emotional distress, intentional infliction of emotional distress or loss of the property value of her dog. We also hold that the trial court properly sanctioned Rabideau's attorney for bringing a frivolous claim. Finally, we hold that bringing this appeal was not frivolous for reasons stated later.

¶3 Some of the facts of this case are undisputed while other facts are disputed. The undisputed facts are that Jacobi and Rabideau were neighbors, who were not well acquainted prior to this incident. On March 31, 1999, Rabideau personally observed Jacobi shoot her dog. Two days later, on April 2, upon being informed that her dog died, Rabideau collapsed and sought medical treatment.

¶4 The rest of the facts are disputed. Most of the dispute centers around the facts relating to the shooting. The City's explanation is that Rabideau's dog came onto Jacobi's property and attacked Jacobi's dog. Jacobi, fearing for the safety of his dog, and his wife and child, who were standing nearby, shot at Rabideau's dog and missed. Rabideau's dog continued attacking, so Jacobi fired a second shot and missed. Rabideau's dog retreated into the street but then turned

and began snarling. Jacobi thought Rabideau's dog was getting ready to charge Jacobi, his dog or his family. Jacobi then shot at and killed Rabideau's dog.

¶5 Rabideau's version of why Jacobi shot her dog is different. According to Rabideau, her dog never attacked Jacobi's dog. Rather, her dog was sniffing Jacobi's dog on the grassy area between the sidewalk and the curb in front of Jacobi's house. Rabideau called to her dog and approached it to retrieve it, and Jacobi shot at her dog and missed. Immediately, Jacobi shot again and hit Rabideau's dog. As Rabideau's dog tried to crawl away, Jacobi fired a third shot and missed.

¶6 The small claims complaint alleged the following: "City of Racine Police Officer Thomas Jacobi shot and killed my dog, Dakota, and caused me to collapse and require medical attention." The City filed a motion to dismiss for failure to state a claim upon which relief could be granted. During the hearing, the trial court considered matters outside the pleadings—namely, the affidavits and depositions of the parties. The law is that a motion to dismiss shall be treated as a motion for summary judgment when the trial court considers matters outside the pleadings. *See* WIS. STAT. § 802.06(3). Therefore, we treat this case as a review of a summary judgment.

¶7 We review the trial court's decision to grant summary judgment de novo. *See* ***Barillari v. City of Milwaukee***, 194 Wis. 2d 247, 256, 533 N.W.2d 759 (1995). First, during summary judgment the pleadings are examined to determine whether they state a claim for relief. *See* ***Transportation Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis. 2d 281, 289, 507 N.W.2d 136 (Ct. App. 1993). If so, the court must then examine the evidentiary record to determine whether there is a

genuine issue as to any material fact, and, if not, whether a party is entitled to judgment as a matter of law. *See* ***id***.

¶8 We hold that the trial court properly granted summary judgment on Rabideau's claim for the lost property value of her dog because, after examining the pleadings, it is clear Rabideau did not seek damages for loss of property. Wisconsin adheres to a "notice-pleading" philosophy. *See* ***Midway Motor Lodge v. Hartford Ins. Group***, 226 Wis. 2d 23, 34-35, 593 N.W.2d 852 (Ct. App.), *review denied*, ___ Wis. 2d ___, 602 N.W.2d 759 (Wis. Aug. 24, 1999) (No. 98-0615). "Yet, if 'notice pleading' is to have any efficacy at all, the complaint must give the defendant fair notice of not only the plaintiff's claim but 'the grounds upon which it rests' as well." ***Id***. at 35. "[I]t is not enough to indicate merely that the plaintiff has a grievance, but sufficient detail must be given so that the defendant, and the court, can obtain a fair idea of what the plaintiff is complaining, and can see that there is some basis for recovery." ***Hlavinka v. Blunt, Ellis & Loewi, Inc.***, 174 Wis. 2d 381, 403-04, 497 N.W.2d 756 (Ct. App. 1993) (citations omitted). The way this is done is by setting forth an allegation covering each element of the claim for relief. *See* ***Midway Motor Lodge***, 226 Wis. 2d at 35.

¶9 In her complaint, Rabideau did not state in any way that she was seeking damages for the lost property value of her dog. Giving Rabideau's complaint a liberal reading, as we must, it does plead all four elements of a tort. But that tort is not one alleging property loss. Instead, it is a claim for personal injuries. This can be gleaned by the fact that the only "actual damages" she pleads are damages to herself, not damages for the lost property value of her dog. Her complaint states, "City of Racine Police Officer Thomas Jacobi shot and killed my dog, Dakota, and caused *me* to collapse and require medical attention." (Emphasis

added.) Rabideau, for instance, does not state in her complaint that because Jacobi shot her dog, she collapsed, required medical attention and *lost the property value of her dog*. Because Rabideau has not pled the lost property value of her dog as part of her "actual damages," we cannot and will not construe her complaint as one for damage to property by the tortious action of another.

¶10 We hold that the trial court also properly granted summary judgment on Rabideau's claim for emotional distress.[2] While there is a factual dispute regarding why Jacobi shot Rabideau's dog, none of these disputed facts are material to whether Rabideau has a claim for emotional distress. Even under Rabideau's view of the facts of this case, as a matter of law, she still cannot state a claim for either negligent or intentional infliction of emotional distress.

¶11 "[A]ny plaintiff claiming negligent infliction of emotional distress, including a bystander, must prove three elements, that the: (1) defendant's conduct fell below the applicable standard of care; (2) plaintiff suffered an injury; and (3) defendant's conduct was a cause-in-fact of the plaintiff's injury." ***Rosin v. Fort Howard Corp.***, 222 Wis. 2d 365, 368, 588 N.W.2d 58 (Ct. App.), *review denied*, 222 Wis. 2d 676, 589 N.W.2d 630 (Wis. Dec. 15 1998) (No. 98-0861). Negligent infliction of emotional distress has historically raised two concerns: that claims are genuine and that the financial burden placed on the defendant is fair. *See* ***id***. at 369. Three critical factors help guarantee that the claim is genuine and that allowing recovery will not unreasonably burden the defendant or contravene other public policy considerations. *See* ***id***.

[2] While the trial court only discussed Rabideau's failure to state a claim for negligent infliction of emotional distress, Rabideau mentions intentional infliction of emotional distress in her brief. We discuss both claims.

> First, the injury the victim suffered must have been fatal or severe. Second, the victim and the bystander-plaintiff must be related as spouses, parent-child, grandparent-grandchild, or siblings. Third, the bystander-plaintiff must have "observed an extraordinary event, namely the incident and injury or the scene soon after the incident with the injured victim at the scene."

Id. at 369-70 (citation omitted). Also, the Wisconsin Supreme Court has held that "it is unlikely that a plaintiff could ever recover for the emotional distress caused by negligent damage to his or her property." ***Kleinke v. Farmers Coop. Supply & Shipping***, 202 Wis. 2d 138, 145, 549 N.W.2d 714 (1996).

¶12 Rabideau's claim for negligent infliction of emotional distress fails as a matter of law for two reasons. First, Rabideau and her dog were not related as spouses, parent-child, grandparent-grandchild, or siblings. Second, Rabideau's dog is property, and the Wisconsin Supreme Court has held that recovery for negligent infliction of emotional distress due to property loss is unlikely. *See* ***id***. 145.

¶13 We also hold that Rabideau's claim cannot survive summary judgment on the basis that the complaint, liberally read, states a claim for intentional infliction of emotional distress. A plaintiff may recover for intentional infliction of emotional distress if four factors are established. *See* ***Alsteen v. Gehl***, 21 Wis. 2d 349, 359, 124 N.W.2d 312 (1963). First, the plaintiff must demonstrate that the defendant's conduct was intentional. *See* ***id***. Second, the plaintiff must prove that the defendant's conduct was extreme and outrageous. *See* ***id***. Third, the plaintiff must demonstrate that the defendant's conduct was the cause-in-fact of the plaintiff's injury. *See* ***id***. at 360. Finally, the plaintiff must show that he or she suffered an extreme disabling emotional response to the defendant's conduct. *See* ***id***. Specifically, "[t]he plaintiff must demonstrate that he [or she] was unable to function in his [or her] other relationships because of the

emotional distress caused by defendant's conduct. Temporary discomfort cannot be the basis of recovery." ***Id***. at 360-61.

¶14 Rabideau fails to state a claim for intentional infliction of emotional distress because three of the four elements are not met. First, there is no evidence that Jacobi intended to harm Rabideau. Under Rabideau's view of the facts, Jacobi intended to harm Rabideau's dog. However, it does not necessarily follow that Jacobi intended to harm Rabideau by intending to harm her dog. Testimony of both parties indicates they were not well acquainted prior to the shooting. For this reason, no evidence exists that Jacobi had any motive to kill Rabideau's dog as a means of harming Rabideau.

¶15 Second, in this case Jacobi did not act extremely or outrageously by shooting Rabideau's dog. We must assume that Rabideau's version of the facts is true and that Rabideau's dog was merely sniffing Jacobi's dog. This being so, Jacobi's act of shooting Rabideau's dog was unreasonable, but not extreme or outrageous. At the time of the shooting, Rabideau had failed to control her dog by keeping it on her property and away from Jacobi's dog. Jacobi had some legitimate interest in preventing an uncontrolled dog from harming his dog, even if—taking the facts in a light most favorable to Rabideau—his reaction was unreasonable.

¶16 Third, Rabideau's claim fails because there is no evidence that Rabideau suffered "an extreme disabling emotional response" and was "unable to function in [her] other relationships because of the emotional distress." ***Id.*** at 360. Rabideau's injuries were temporary. She passed out, went to the hospital and was treated and released without an overnight stay. There is no evidence that Rabideau's injuries, beyond causing her to initially pass out, made her unable to

function in her relationships. Because Rabideau failed to meet three of the four elements of a claim for intentional infliction of emotional distress, no valid claim for intentional infliction of emotional distress exists.

¶17 The trial court held that Rabideau's claims were frivolous. *See* WIS. STAT. § 814.025(3)(b). Whether a claim is frivolous is a question of law which we review de novo. *See* ***Lamb v. Manning***, 145 Wis. 2d 619, 628, 427 N.W.2d 437 (Ct. App. 1988). "A frivolous claim is one that is asserted by an attorney who knows or should have known the position was without a reasonable basis in law or equity and unsupported by any reasonable argument for extension or modification of existing law." ***Associates Fin. Servs. Co. v. Hornik***, 114 Wis. 2d 163, 174-75, 336 N.W.2d 395 (Ct. App. 1983). We affirm the trial court's finding that Rabideau's claims were frivolous.

¶18 Rabideau should have known that her claims for property loss and both negligent and intentional infliction of emotional distress were not supported by existing law. As discussed previously, existing pleadings law requires that a plaintiff plead a cause of action in sufficient detail, which Rabideau failed to do regarding her claim for property loss. Rabideau also failed to allege facts to support all the elements of a claim for either negligent or intentional infliction of emotional distress. Not only did Rabideau state claims which she should have known were not supported by existing law, she also made no reasonable argument to the trial court why that court should extend, modify or reverse the existing law.

¶19 The City asks that we hold this appeal to be frivolous. We refuse to do so. It is true that much of Rabideau's appeal is frivolous. The arguments about loss of property damage, negligent infliction of emotional distress and the intentional infliction of emotional distress are just as frivolous on appeal as they

were in the trial court. But one other argument of Rabideau's is not only not frivolous, it is correct. And the City's response to that argument is completely without merit.

¶20 This argument by Rabideau is that the trial court improperly made findings of fact in a summary judgment proceeding. It is unquestionably the law in Wisconsin that, in deciding whether to grant summary judgment, the trial court does not decide issues of credibility or weigh the evidence. *See* ***Fortier v. Flambeau Plastics Co.***, 164 Wis. 2d 639, 665, 476 N.W.2d 593 (Ct. App. 1991). Yet, in spite of this clear law, the City cavalierly asserted in its brief that the trial court not only found facts and weighed the credibility of the opposing affidavits and depositions before it, but that it properly did so.

¶21 This is simply not the law in Wisconsin. "The summary judgment procedure is not a trial on affidavits." ***Nelson v. Albrechtson***, 93 Wis. 2d 552, 556, 287 N.W.2d 811 (1980) (citation omitted). The City's failure to acknowledge this clear tenet of the law is nearly a frivolous act in and of itself.

¶22 When determining whether Jacobi was privileged to shoot Rabideau's dog under WIS. STAT. § 174.01, the trial court improperly found facts and weighed the credibility of the witnesses—witnesses that it never saw. The court stated that the facts of this case were "substantially undisputed," but then found the facts as claimed in Jacobi's affidavit and deposition to be the true facts. However, the affidavits and depositions of the parties clearly indicate that material facts pertaining to this statute were disputed. The trial court chose the version of

material facts most favorable to the City, which is improper during summary judgment.[3]

¶23 We recognize that this improper use of summary judgment procedure is moot because the trial court still properly granted summary judgment. Even if the finder of fact concluded that the City was not privileged under WIS. STAT. § 174.01, Rabideau could recover no damages pursuant to her complaint. However, we hold that this appeal is not frivolous in light of the fact that there was a legal basis for challenging the trial court's summary judgment procedure coupled with the City's adamant insistence that the trial court's action was proper. Since both briefs contain material clearly at odds with the law, both briefs are—in some fashion—frivolous. This court therefore refuses to find Rabideau's appeal to

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[3] The trial court's decision stated the following:

> The Plaintiff's dog was shot by Thomas Jacobi, while he was acting as a police officer. The Plaintiff's dog was attacking Jacobi's dog in the presence and immediately adjacent to Jacobi, Rebecca Jacobi, his wife, and their child. The facts from the affidavits and deposition testimony, viewed most favorably to the Plaintiff, unequivocally establish that immediate action was necessary in order for Jacobi to protect himself and his family and the Jacobi's dog. The Plaintiff's dog was attacking without any restraint being offered by the Plaintiff; there is no evidence of any meaningful restraint by the Plaintiff concerning her dog.

be frivolous. Despite our holding regarding this last issue, we will still allow the City to assess costs for this appeal.

By the Court.—Judgment affirmed.

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