

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 31, 2006

Cornelia G. Clark
Clerk of Court of Appeals

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.

Appeal No. 2006AP231

Cir. Ct. No. 2005SC295

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

CHRISTOPHER J. KLAHN,

PLAINTIFF-RESPONDENT,

V.

PATRICIA VAJGRT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marquette County:
RICHARD O. WRIGHT, Judge. *Modified and, as modified, affirmed.*

¶1 HIGGINBOTHAM, J.¹ This is a case about a dog named Lucky, and the circumstances surrounding Lucky's not-so-lucky demise. Patricia Vajgrt appeals from a small claims court judgment and \$2,500 damages award to her neighbor and Lucky's owner, Christopher Klahn, in a case arising from Lucky's death. We conclude there was sufficient evidence supporting the trial court's liability determination against Vajgrt. We also conclude, however, that Klahn has waived his claim for damages in excess of the special damages awarded him of \$1,072.78 by failing to refute Vajgrt's challenge to the court's damage award. Finally, we reject Vajgrt's contention that the small claims court refused to allow her to testify or present her case and that its verdict was otherwise procedurally inappropriate. We affirm the judgment as modified, reducing the award from \$2,500 to \$1,072.78.

BACKGROUND

¶2 On November 1, 2005, Klahn filed a complaint with the Marquette County Small Claims Court alleging that on at least two occasions beginning around October 6, 2003, Vajgrt had poisoned his dog by feeding Lucky food tainted with antifreeze.² As a result, Klahn claimed, Lucky began exhibiting symptoms of the poisoning on October 7; the poisoning was so severe Lucky ultimately had to be euthanized. Lucky died on October 12, 2003. Lucky's necropsy revealed that he had died as a result of "acute tubular nephrosis secondary to oxalate/as ethylene glycol toxicosis," or, in lay terms, consumption

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 During testimony taken during the trial, the earliest date of potential poisoning perceived by a witness was later narrowed down to October 4, 2003.

of antifreeze. Lucky's veterinarian testified that it would take about one and a quarter cups of undiluted antifreeze to cause Lucky's demise.

¶3 During the small claims trial, Lucky's veterinarian testified that when Lucky was brought in for treatment, the Klahns reported that Lucky's vomiting had begun shortly after they saw Lucky eating out of the compost pile in Vajgrt's garden. In addition, Klahn produced five witnesses who testified to seeing plates of various types of food in Vajgrt's garden, with two of the witnesses also testifying that they saw Lucky eat some of the food. Vajgrt acknowledged having a compost pile in her yard, but denied putting plates of food out in her garden or ever having antifreeze on her property. A detective who interviewed Vajgrt while investigating the case for possible criminal conduct testified that "[s]he did deny it, of course." Vajgrt's testimony revealed a history of her displeasure with Lucky leading up to the poisoning; she testified that she had complained to Mr. and Mrs. Klahn and called the police several times to report Lucky being on her property unleashed numerous times.

¶4 After taking evidence on damages, the court entered judgment in Klahn's favor and awarded him damages of \$2,500, including \$1,072.78 as special damages³ for veterinary and euthanasia expenses caused by Lucky's poisoning. We will discuss additional facts in the course of our discussion. Vajgrt appeals the judgment of liability and that part of the damage award exceeding special damages.

³ While the small claims court did not explicitly refer to the damages awarded for Lucky's medical and euthanasia bills following the poisoning as "special damages," by definition they are special damages, and we refer to them as such. *See* BLACK'S LAW DICTIONARY, defining special damages as "[d]amages that are alleged to have been sustained in the circumstances of a particular wrong." BLACK'S LAW DICTIONARY 419 (8th ed. 2004).

DISCUSSION

I. THE EVIDENCE OF LUCKY'S POISONING

¶5 We will uphold a circuit court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2); *see also Teubel v. Prime Dev., Inc.*, 2002 WI App 26, ¶12, 249 Wis. 2d 743, 641 N.W.2d 461. The trial court "is the ultimate arbiter of the credibility of the witnesses, and of the weight to be given to each witness's testimony This court will not reverse a trial court's credibility determination unless we could conclude, as a matter of law, that no finder of fact could believe the testimony." *Id.*, ¶13 (citations omitted).

¶6 Vajgrt concedes that Klahn proved that Vajgrt was unhappy with Lucky coming on to her property, that Lucky was found eating from plates of food placed in Vajgrt's garden, and that Lucky became ill from ingesting over a cup's worth of antifreeze. Nonetheless, she argues that Klahn failed to prove that Vajgrt killed Lucky. In other words, Vajgrt asserts there was no "evidence that the defendant did anything to the plaintiff's dog other than to report it was loose and on defendant's property" or that the defendant ever did anything mean to the plaintiff's dog. We disagree.

¶7 Vajgrt ignores our standard of review. The record in this case reveals sufficient evidence supporting the trial court's factual findings, which Vajgrt has not established are clearly erroneous. Several witnesses testified they saw plates of food left in Vajgrt's garden and that they personally observed Lucky eat the food. There was also credible evidence in the form of expert testimony and the necropsy report that shortly after eating food from Vajgrt's yard, Lucky died of poisoning. This evidence supplemented Vajgrt's own testimony of being unhappy with Lucky being on her lawn and trying to get Lucky off her property to no avail

prior to the poisoning. Although Vajgrt denied that she put out plates of food in her garden, the small claims judge, as the finder-of-fact, apparently chose to give little weight to her testimony on this topic. Instead, it appears that the small claims court found more credible the testimony of Klahn's five witnesses, in conjunction with other circumstantial evidence. This is a credibility determination to which we give due regard. WIS. STAT. § 805.17(2); *Teubel*, 249 Wis. 2d 743, ¶13.

¶8 Vajgrt further suggests in her briefing that Lucky could have been poisoned elsewhere since “there is abundant testimony that the dog frequently ran loose in the neighborhood.” However, the trial transcript does not support such an assertion. Rather, other than testimony about Lucky entering Vajgrt's yard, only one witness testified that he had seen Lucky elsewhere in the neighborhood without a leash, and only approximately thirty feet from Klahn's residence.

¶9 Finally, Vajgrt implicitly argues that testimony from Klahn and another neighbor that they had antifreeze on their property establishes that Lucky had access to antifreeze other than through her. Vajgrt's characterization of Klahn's and his neighbor's testimony is incomplete. The trial transcript reflects that both Klahn and his neighbor testified that although they had antifreeze on their properties, the antifreeze was stored in *sealed* containers, thus creating the reasonable inference that the antifreeze would not have been accessible to Lucky in the amount Klahn's veterinary expert testified was necessary to kill the dog.

¶10 In short, we find the small claims court's findings reasonably based on the testimony of believable witnesses and other sufficient evidence. We consequently reject Vajgrt's argument that the court's findings were clearly erroneous.

II. DAMAGES FOR LUCKY

¶11 Vajgrt argues that there was insufficient evidence for the court's \$2,500 damage award and that the damage award was excessive. We conclude Klahn has waived any argument that he is entitled to the full damage award. Consequently, we do not determine whether the award was excessive.

¶12 In reviewing damage awards, we will sustain a damage award if it is supported by any credible evidence. *Gyldenvand v. Schroeder*, 90 Wis. 2d 690, 697, 280 N.W.2d 235 (1979). We do not substitute our judgment for that of the trial court as the fact finder, but limit review of damage awards to a determination of whether the award was within reasonable limits. *Cords v. Anderson*, 80 Wis. 2d 525, 552-53, 259 N.W.2d 672 (1977). We view the evidence in the light most favorable to support the damage award. *Id.*, at 553. However, a damage award cannot be based on mere conjecture. *Novo Indus. Corp. v. Nissen*, 30 Wis. 2d 123, 131, 140 N.W.2d 280 (1966). A plaintiff must establish the amount of loss through credible evidence, providing sufficient data from which the finder of fact could properly estimate the amount of damages. *Plywood Oshkosh, Inc. v. Van's Realty & Constr. of Appleton, Inc.*, 80 Wis. 2d 26, 31-32, 257 N.W.2d 847 (1977). We will not sustain a damage award where plaintiff provided no underlying facts upon which a damage estimate was based. *Id.* at 31-32.

¶13 We conclude Klahn has waived any claim for damages beyond the special damages of \$1,072.78 for veterinary medical and euthanasia bills resulting from Lucky's poisoning. Vajgrt appears to concede that Klahn is entitled to this amount of damages. However, on appeal, Klahn fails to counter Vajgrt's challenges to the balance of the damage award. Because Klahn does not refute Vajgrt's arguments challenging the damage award, we consider this point

conceded. See *Charolais Breeding Ranches, Ltd. v. FPC Secs.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

III. PROCEDURAL CLAIMS: VAJGRT'S DAY IN COURT

¶14 Vajgrt makes the following procedural challenge:

At the close of the Plaintiff's case, the Defendant moved for dismissal on the grounds that Plaintiff had failed to meet it's [sic] burden of proof. The Judge granted Plaintiff an opportunity to argue this issue and after doing so, the Judge not only ruled on the motion for dismissal but also ruled on the case without affording the Defendant an opportunity to present it's [sic] evidence or it's [sic] arguments.

Vajgrt describes the judge's ruling procedure as inappropriate "summary judgment." She also contends the court denied her the opportunity to testify on her own behalf. We disagree.

¶15 Vajgrt apparently misunderstands the nature of small claims proceedings, which are by definition informal. WISCONSIN STAT. § 799.209, which sets forth the procedures for small claims courts, provides in relevant part that:

At any trial, hearing or other proceeding under this chapter:

(1) The court or circuit court commissioner shall conduct the proceeding *informally*, allowing each party to present arguments and proofs and to examine witnesses to the extent reasonably required for full and true disclosure of the facts.

....

(3) The court or circuit court commissioner may conduct questioning of the witnesses and shall endeavor to ensure that the claims or defenses of all parties are fairly presented to the court or circuit court commissioner.

(4) The court or circuit court commissioner shall 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.

(Emphasis added.) The supreme court has “noted the philosophy that small claims practice should be more summary and proceedings more speedily terminated than in other kinds of civil actions.” *Highland Manor Assocs. v. Bast*, 2003 WI App 130, ¶9, 265 Wis. 2d 455, 665 N.W.2d 388; *see also Mock v. Czemierys*, 113 Wis. 2d 207, 210, 336 N.W.2d 188 (Ct. App. 1983) (“small claims practice is summary and designed to be terminated more readily than other kinds of civil actions”).

¶16 Here, the record shows the court conducted a proper small claims trial. At the beginning of the trial the court swore in all witnesses, including the parties. The court then took up Vajgrt’s motion to dismiss; following a brief statement in support of Vajgrt’s motion made by Vajgrt’s attorney, the court denied the motion and proceeded to hold the trial. Testimony was taken by Klahn, his veterinarian expert, Dr. Roxanne Cliff, a police detective and five other witnesses. Vajgrt’s attorney was given the opportunity to cross-examine these witnesses. The court then gave Vajgrt’s attorney the opportunity to question Vajgrt. After taking testimony on liability, the court examined Klahn⁴ on damages; Vajgrt’s attorney chose not to cross-examine him on this topic. Vajgrt’s attorney moved to dismiss the complaint, which the court denied. The court then granted judgment after explaining its reasons for doing so. It is abundantly clear

⁴ Klahn was unrepresented at the small claims trial.

that the court held a proper small claims trial, including allowing Vajgrt the opportunity to present evidence on her own behalf.

CONCLUSION

¶17 We conclude the small claims court's findings of fact are not clearly erroneous and support its finding of liability on the part of Vajgrt. We also conclude Klahn waived Vajgrt's challenge to the court's damage award. Consequently, based on Vajgrt's concession that Klahn is entitled to special damages of \$1,072.78, we remand for the small claims court to modify the judgment decreasing the amount of Klahn's damages from \$2,500 to \$1,072.78. Finally, we conclude there were no procedural irregularities in the manner by which the small claims court conducted the small claims trial.

By the Court.—Judgment modified and, as modified, affirmed.

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

