

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

September 21, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-1969

STATE OF WISCONSIN

IN COURT OF APPEALS  
DISTRICT IV

IN RE THE ESTATE OF  
WILLIAM G. EASTMAN, DECEASED:

JAMES P. WATKINS,

Appellant,

v.

ESTATE OF WILLIAM G. EASTMAN,

Respondent.

APPEAL from a judgment of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Dykman, Sundby, and Vergeront, JJ.

PER CURIAM. James P. Watkins appeals *pro se* from a judgment dismissing his claim against the Estate of William G. Eastman. The claim is

based on Eastman's shooting of Watkins's dog. We reverse insofar as the judgment dismissed the claim for damages under § 174.01(3), STATS. We affirm in all other respects.

Watkins's claim against the Estate sought damages for Eastman's killing of his "purebred Siberian Husky," Norton. Watkins stated that he had been "emotionally devastated," and he sought \$50,000 to compensate for "the loss of Norton and to pay for psychological help." Watkins later amended the amount claimed to \$150,000. The trial court granted a motion to dismiss at the close of Watkins's case. It concluded that Eastman's shooting of the dog was permitted under § 174.01(1)(b), STATS. The court also made other rulings which we will discuss below.

A person who illegally kills a dog is liable to the owner for double damages resulting from the killing. Section 174.01(3), STATS. A person may intentionally kill a dog if a domestic animal that is owned by the person is threatened with serious bodily harm by the dog; the dog is on property owned by the person; and other restraining actions were tried and failed, or immediate action is necessary. Section 174.01(1)(b). Watkins does not dispute that Norton was on Eastman's property or that Eastman's pheasants were domestic animals. He argues that the circumstances of the shooting did not otherwise satisfy the statute.

Eastman was the only known witness to the shooting of the dog. Watkins attempted to testify about what Eastman told him about the incident, but the trial court sustained the Estate's objection under § 885.16, STATS., the "dead man's statute." The only account of the incident at trial was provided by a sheriff's deputy who investigated at Watkins's request.

According to the deputy, Eastman said that when he first arrived two dogs were outside his pheasant pen, chasing pheasants that were inside the pen. Eastman said the dogs caused the birds to fly over the wall of the pen, at which time the dogs were killing them. When Eastman approached, the dogs "broke and started to run." Eastman did not say whether he did anything after he saw the dogs and before shooting at them. Eastman showed the deputy where he was when he shot at the dogs. It was a short distance from the pheasant pen. He shot at one dog and missed, and then shot at Watkins's dog

and hit it. The deputy estimated, on the basis of Eastman's account, that the dog was approximately 120 yards away from the pen when shot. Eastman told the deputy that "he felt that it would be a problem if they were allowed to escape, and due to the fact that he didn't know who the animals belong to, he fired at them."

Watkins also presented the testimony of an animal pathologist at the Animal Health Laboratory in Madison who performed an autopsy on Norton. He testified that one bullet "severed the tail and then went in just right lateral to the anus, and it traveled a path almost directly to the right hip and fractured the bones of the hip as well as the head of the femur." This was not a fatal wound, "providing the dog could have been taken to a facility that would handle the shock and the cardiovascular effects" of the event. The fatal wound was a shot to the head.

The circumstances of the fatal shot are not clear from the testimony. It appears that Eastman went to the wounded dog and shot it again, although so far as we can determine there was no testimony expressly to that effect.<sup>1</sup> The trial court appeared to find that this was what occurred.

In its decision, the trial court noted that the dogs were running away, but it accepted Eastman's explanation that "immediate action was necessary to prevent the dogs from escaping, only to come back at a later time to continue to harm his birds." The court further acknowledged that Watkins "makes a compelling argument that injuring the dog would have been enough and that killing it was unnecessary." However, the court concluded that shooting the dog a second time was justified because Eastman could not approach it to look for tags and it would have been cruel to leave it there.

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<sup>1</sup> In questioning the deputy, Watkins read the following sentences from the deputy's report: "Mr. Watkins was very upset by the fact that Mr. Eastman would shoot and kill a dog after he had already wounded it due to the fact that he may have been able to save the animal." "He feels that Mr. Eastman should be charged with something criminal, not only due to the fact that he had shot his dog, but that he had also shot the dog in the head at close range, killing without his permission." The deputy testified that these were true statements. However, the excerpts state only the feelings and opinions of Watkins, and do not actually state as fact that a second shot was fired. The report itself was not offered.

In reviewing a trial court's decision to dismiss at the close of the plaintiff's case, we are to give "substantial deference" to the trial court's ability to assess the evidence, and should set aside the dismissal only if the court was "clearly wrong." *James v. Heintz*, 165 Wis.2d 572, 577, 478 N.W.2d 31, 33 (Ct. App. 1991). We must view the evidence in the light most favorable to the plaintiff. Section 805.14(1) and (3), STATS.

We conclude that, under any view of the evidence, the trial court was clearly wrong in ruling that Eastman's actions were in compliance with § 174.01(1)(b), STATS. That statute is written in the present tense: "if a domestic animal ... *is threatened* with serious bodily harm ...." (Emphasis added.) A dog that was 120 yards from the pen and running away was not threatening serious bodily harm to the pheasants. The fact that the dog had previously threatened harm, and might again at some later time, does not make the killing authorized. The purpose of this statute appears to be to create a high standard for killing dogs, as opposed to that which might be applied to "nuisance" wild animals. The authority to kill a dog ends when the domestic animal no longer faces an immediate threat. Once Watkins's dog fled, Eastman had other options for preventing future harm, such as contacting the proper animal control authority.

The evidence also does not show that Eastman's actions satisfied the final provision of the statute. There is no evidence that he tried and failed in other restraining actions, or that immediate action was necessary. The fact that the dog might later return did not make immediate killing necessary, since other measures were available. Contrary to the trial court's conclusion, the statute does not allow killing of a dog if immediate action is necessary to prevent it from escaping and returning at a later time.

If, as the trial court concluded, Eastman shot the dog a second time as an act of mercy, this act was not permitted by any exception in the statute. The only persons allowed to kill dogs are fish and game wardens, officers controlling rabies or acting pursuant to court order, dog pound officers, veterinarians, and dog owners killing their own dogs in a proper and humane manner. Section 174.01(2), STATS.

Therefore, we conclude the trial court erred in granting the Estate's motion to dismiss Watkins's claim for damages under § 174.01(3), STATS. On

remand, the trial court shall allow the Estate to present its evidence, if any, and shall otherwise resolve the remainder of this claim.

Watkins argues that the trial court erred by ruling that § 885.16, STATS., bars his testimony as to what Eastman told him about the shooting incident. That statute provides in relevant part that no person shall be examined in respect to any communication by the person with a deceased person in which the opposite party sustains his or her liability to the cause of action from, through, or under the deceased person. In other words, a claimant, such as Watkins, cannot testify about a conversation with a deceased person if the party opposing Watkins (here, the Estate) may be liable because of its relationship with the deceased person. The purpose of the statute is to prevent the possibility that a one-sided description of such a conversation will be presented to the court. The trial court properly concluded that Watkins is barred from describing what Eastman said in order to make a claim against the Estate.

As he explained at the hearing, Watkins also seeks damages for intentional infliction of emotional distress. The trial court dismissed this claim on the ground that Eastman's conduct was not extreme or outrageous because the shooting was legal. Because we have reached a different conclusion as to the shooting, this rationale is not grounds for dismissing the claim for intentional infliction of emotional distress. However, we may affirm when the trial court's decision was correct, although for the wrong reason. *State v. Alles*, 106 Wis.2d 368, 391, 316 N.W.2d 378, 388 (1982). One of the necessary elements of this claim is that the defendant intended to cause emotional distress. *Bowen v. Lumbermens Mut. Casualty Co.*, 183 Wis.2d 627, 639, 517 N.W.2d 432, 437 (1994). The evidence, viewed in the light most favorable to Watkins, does not establish this element. There is no evidence that in shooting at the dogs Eastman intended to cause emotional distress to their owners.

Watkins argues that he is entitled to an accounting of the Estate under § 858.03, STATS. That statute concerns inventories. At the hearing, Watkins cited § 862.11, STATS., which deals with accounts. Watkins's argument is based upon him being a "person interested," as that term is used in those sections. However, he is not a "person interested" as defined in § 851.21, STATS. Watkins is not entitled to an inventory or an account.

Watkins argues that he is entitled to damages for emotional harm that was done to him by Eastman's suicide. However, there is no legal theory upon which Watkins can recover for his feelings about Eastman's suicide.

Watkins argues that Eastman recklessly endangered the public when he fired at the dogs. This argument has no relevance to Watkins's claim against Eastman's Estate.

Watkins argues that he should have been allowed to try his case to a jury. There is no right to a jury trial in probate cases. *In re Estate of Elvers*, 48 Wis.2d 17, 22, 179 N.W.2d 881, 884 (1970).

Watkins also makes several other arguments which are without merit or are mooted by our resolution of the issues above.

On remand, the trial court shall allow the Estate to present its evidence in opposition to Watkins's claim under § 174.01(3), STATS., and shall resolve any remaining issues related to that claim.

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

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.