STATE OF MICHIGAN

COURT OF APPEALS

KALLIE ROESNER, Plaintiff-Appellant,	UNPUBLISHED December 14, 2010
V ROBERT TYLER and HELEN HOURDAKIS, Defendants-Appellees.	No. 290948 Oakland Circuit Court LC No. 2007-085144-NO
KALLIE ROESNER, Plaintiff-Appellee,	
V ROBERT TYLER and HELEN HOURDAKIS, Defendants-Appellants.	No. 293410 Oakland Circuit Court LC No. 2007-085144-NO

Before: MURRAY, P.J., and DONOFRIO and GLEICHER, JJ.

PER CURIAM.

This case presents the third appellate installment of a seven-year saga of strife in Oakland County horse country. Reminiscent of the historic feud between the Hatfields and the McCoys, these parties have fought with pleadings rather than guns. In the wake of their bitter quarrel, the litigants have left a trail of legal actions in a variety of courts, commissions and departments. The current chapter concerns events that unfolded when dogs owned by defendants, Robert Tyler and his wife Helen Hourdakis, spooked a horse being ridden by plaintiff Kallie Roesner. Plaintiff sued defendants, asserting negligence, strict liability and intentional tort claims. The circuit court dismissed the action in its entirety. We affirm in part, reverse in part, and remand.

I. UNDERLYING FACTS AND PROCEEDINGS

The discord between plaintiff and defendants originated with a property dispute. The parties own and reside on large abutting tracts of land on Delano Road in Oxford Township. In

2003, plaintiff hired workers to clear underbrush on the property line, in preparation for erecting a fence. Later, plaintiff used a tractor to clear the same area. Tyler believed that plaintiff and the tractor had destroyed bushes on his land and requested that she "leave my property." Tyler recounted, "I finally told her take your tractor off my property or I will drag it through the fence line." Plaintiff recalled that Tyler threatened "to take my tractor and smash me and my fence to bits with it."

On July 24, 2004, plaintiff filed a variance application with the Oxford Township Zoning Board of Appeals (ZBA), requesting a reduction of the side-yard setback on the property line she shared with defendants. At that time, plaintiff chaired the Oxford Township ZBA. In response to plaintiff's zoning application, Tyler, an attorney, filed a complaint in the Oakland Circuit Court against plaintiff, her husband, Oxford Township, and the ZBA, urging a halt of the zoning board process "until such time that the Court is satisfied that all necessary elements are in place in order to ensure a fair process."[1] In August 2004, Tyler filed a separate action sounding in trespass premised on the tractor incursion onto his property. In the complaint, Tyler also averred that plaintiff was illegally conducting a riding academy and stable business on her premises.[2]

Plaintiff disqualified herself from considering her own variance application, and the ZBA denied the application. In 2006, Tyler's trespass action settled. But peace was not at hand, and on July 1, 2006, hostilities flared anew. That day, plaintiff and several family members rode their horses down the road fronting Tyler's property, at which time, according to plaintiff, Tyler glared at them. When plaintiff's riding party returned hours later, plaintiff described that Tyler smiled at them, "made a hand gesture," and one of Tyler's dogs "went nuts." Plaintiff testified that the dog had been hidden from view behind a bush before Tyler incited it to "lung[e]" at the riders. Plaintiff related that the dog "hit the end of the chain," but acknowledged that it did not leave Tyler's property. Plaintiff claimed that in response to the dog's actions, her horse "spun very abruptly" and "bolted forward," and that while struggling to remain in the saddle, she sustained injuries requiring a brief hospitalization.

On July 28, 2006, plaintiff and several friends again rode past defendants' home. Plaintiff's dog, Mugsy, and a dog belonging to one of her friends, Teddy, accompanied the riding party. As the riders approached Tyler's driveway, plaintiff heard "a bang" emanate from the direction of defendants' house that sounded "[l]ike a door closing." Plaintiff then saw two of

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[1] The complaint identified the plaintiffs as "Residents of Charter Township of Oxford."

[2] In yet another case, Tyler sued plaintiff in September 2007 for defamation, "intentional actions," abuse of process, malicious prosecution, civil stalking, and intentional infliction of emotional distress. The Oakland Circuit Court summarily dismissed Tyler's claims, and this Court affirmed. *Tyler v Roesner*, unpublished opinion per curiam of the Court of Appeals, issued June 8, 2010 (Docket Nos. 286918, 287401, 288239, 2888240). In *Roesner v Hutchings*, unpublished opinion per curiam of the Court of Appeals, issued May 6, 2010 (Docket No. 289187), this Court considered another dispute arising generally from the neighborhood feud.

defendants' dogs, Eli and Evie, leap into the road.[3] A car swerved to avoid the dogs, and plaintiff's horse spun. Plaintiff testified that in "[l]ess than three seconds" she regained control of the horse. Meanwhile, plaintiff saw Eli bite Mugsy in the neck and leg, and observed Evie bite Teddy. Hourdakis then emerged from defendants' home and called the dogs. Plaintiff contends that she suffered serious injuries as a result of this encounter with defendants' dogs, including a broken nose, a wrist injury, whiplash and a herniated disk.

In August 2007, plaintiff commenced the instant action in the Oakland Circuit Court.[4] Her complaint asserted seven counts: (1) common-law negligence, (2) negligent violation of the state leash law, MCL 287.262, (3) common-law strict liability, (4) assault, (5) assault and battery, (6) stalking, and (7) intentional infliction of emotional distress. Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), (8) and (10). Plaintiff filed a (C)(10)-based cross-motion for partial summary disposition, contending that as a matter of law defendants had violated MCL 287.262 and bore strict liability for their dogs' conduct. In a written opinion and order entered on February 25, 2009, the circuit court granted defendants' motion for summary disposition and denied plaintiff's cross-motion. In July 2009, the circuit court denied defendants' motion for costs and fees. Both sides now appeal.

II. SUMMARY DISPOSITION STANDARD OF REVIEW

Plaintiff contests the circuit court's summary disposition ruling, which we review de novo. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). Because the parties attached and referenced documentary evidence and deposition testimony beyond the pleadings, we treat their motions as governed by the standards set forth in MCR 2.116(C)(10). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen*

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[3] Eli is an English Setter. Evie is a Leonberger. Defendants also own a second Leonberger named Geppetto, who followed Evie toward the road. The parties dispute whether Gepetto ever left defendants' property.

[4] Between July 28, 2006 and the date plaintiff filed her complaint in this case, the parties fought several intermediary legal battles. Plaintiff submitted an incident report to Oxford Township concerning the July 28, 2006 events. The township apparently declined to take any action. In October 2006, plaintiff filed an ex parte personal protection order (PPO) application against defendants in the Lapeer Circuit Court, which denied the petition. Tyler commenced an action in the Oakland Circuit Court to prevent Oxford Township from seizing his dogs. Oxford Township agreed to forebear. On January 2, 2007, Tyler drove by plaintiff's property and allegedly made a shooting gesture with his hand. Plaintiff videotaped the incident and gave the recording to the Oakland County sheriff. The officer who viewed it concluded that the video did not reveal a shooting gesture. Tyler informed the officer that "if he did pause it may have been to see if [plaintiff's] chickens were in his paddock area again." On January 13, 2007, plaintiff filed an incident report with the Oakland County sheriff, speculating that Tyler had poisoned three of her chickens.

Motors Corp, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183.

III. LEASH LAW CLAIM

Plaintiff first challenges the circuit court's summary dismissal of her claim under MCL 287.262, the Dog Law of 1919, which provides in relevant part:

> It shall be unlawful . . . for any owner to allow any dog, except working dogs such as leader dogs, guard dogs, farm dogs, hunting dogs, and other such dogs, when accompanied by their owner or his authorized agent, while actively engaged in activities for which such dogs are trained, to stray unless held properly in leash.[5]

The circuit court reasoned that the dogs had not run into the road without defendants' permission, and thus defendants did not violate the statute because "they did not 'allow' their dogs to leave the property." The court opined that "although defendants' dogs, like Plaintiff's dog was [sic] off their property without a leash, the Court finds that there was no violation of the statute." Plaintiff maintains that the evidence indisputably establishes a statutory violation, giving rise to a presumption of negligence and meriting partial summary disposition in her favor.

Given that no evidence reflects that defendants' dogs strayed unleashed during the July 1, 2006 incident, or that Tyler ever allowed any of his dogs to stray from defendants' property, the circuit court properly granted Tyler summary disposition of the leash law claim. However, available evidence agrees that on July 28, 2006, Hourdakis allowed Evie and Gepetto to go outside without a leash. As Hourdakis testified at her deposition:

> I had been out in the yard doing work. Came in to clean up and cool off. Reached down, got the tether through the door, hooked up Eli, slid the sliding glass door open, let Evie and Gepetto out, at which time Evie bound[ed] down the stairs.
>
> And a black dog was on my property close to the dining room patio area. Evie was barking. I called for her to come.

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[5] In a rare show of agreement, the parties refer to this statute as the leash law. We adopt that term.

> Next thing I know, Evie is heading towards the road; Gepetto is following her.
>
> I am now running after my dogs. …
>
> I look up. I see three horses. I see two other dogs, including the black dog, up with the riders.
>
> I grab Evie by the collar, proceed to walk across the road, grab Gepetto by the collar, who is on my property, go to the house, put them in, get Eli, take him off his tether, put him in the house.

In *Zeni v Anderson*, 397 Mich 117, 143; 243 NW2d 270 (1976), the Supreme Court instructed:

> An accurate statement of our law is that when a court adopts a penal statute as the standard of care in an action for negligence, violation of that statute establishes a prima facie case of negligence, with the determination to be made by the finder of fact whether the party accused of violating the statute has established a legally sufficient excuse.

This Court in *Cassibo v Bodwin*, 149 Mich App 474, 476-477; 386 NW2d 559 (1986), considered whether a violation of the leash law could establish a rebuttable presumption of negligence. The defendants' dog in *Cassibo* "ran loose," causing the plaintiff son to lose control of his bicycle and fall to the pavement, where a vehicle struck him. *Id*. at 476. The plaintiffs neglected to plead a violation of MCL 287.262, and the trial court denied their motion to amend the complaint. *Id*. This Court held that the trial court had erred in not permitting the plaintiffs to amend their pleadings to allege a violation of the leash law, explaining, "Whereas a violation of an ordinance is only evidence of negligence, violation of a statute creates a rebuttable presumption of negligence." *Id*. at 477. Violation of the leash law thus requires the offending party to overcome a presumption of negligence.

We reject the circuit court's interpretation of the statute as excusing liability if a dog strays without the owner's permission. MCL 287.262 commands that an owner may not "allow any dog … to stray unless held properly in leash." "The word 'allow' is defined in *The American Heritage Dictionary of the English Language* as 'to let do or happen; permit.'" *Town & Country Lanes, Inc v Liquor Control Comm*, 179 Mich App 649, 657-658; 446 NW2d 335 (1989). Here, Hourdakis undisputedly permitted Evie to go outside defendants' home without a leash. Hourdakis did not necessarily anticipate that the dogs would leave defendants' property, but the statute's mandate that an owner maintain her dog on a leash qualifies as unambiguous and unconditional. We find further support for our conclusion in *Trager v Thor*, 445 Mich 95, 106 n 12; 516 NW2d 69 (1994), where our Supreme Court instructed, "A duty to constantly control an animal may be imposed by statute, such as the obligation to properly hold a dog in leash. MCL 287.262 . . . . See also *Rickrode* [*v Wistinghausen*, 128 Mich App 240, 247; 340 NW2d 83 (1983)] (the violation of a city ordinance requiring cats to be kept confined or leashed is evidence of negligence)."

At oral argument, counsel for defendants urged that the leash law lacked applicability to these facts because Evie had not truly "strayed," as prohibited by the statute. Again, however, we find the statutory language unambiguous and fatal to defendants' contention. *Webster's New World Dictionary, Second College Edition* (1970) defines "stray," in pertinent part, as "to wander from a given place, limited area, direct course, etc., esp. aimlessly; roam; rove." The record evidence supports that when Hourdakis opened the door, she allowed Evie to wander away from the house and rove unleashed in the neighborhood. That Hourdakis ran after the dogs when she heard a commotion does not alter the fact that she freed the dogs from the house without restraints, and the dogs became free to roam. Because the facts establish a colorable violation of MCL 287.262, the circuit court incorrectly granted defendants summary disposition of plaintiff's leash law claim.

Notwithstanding that plaintiff has established a possible leash law violation, she is not entitled to summary disposition with respect to this claim. The violation of a penal statute "establishes only a prima facie case of negligence, a presumption which may be rebutted by a showing on the part of the party violating the statute of an adequate excuse under the facts and circumstances of the case." *Zeni*, 397 Mich at 129-130 (footnotes omitted). In *Zeni*, the Michigan Supreme Court examined the assured clear distance provision and other statutes creating rebuttable presumptions, and concluded that the alleged wrongdoer should have "an opportunity to come forward with evidence rebutting the presumption of negligence." *Id*. at 143. Although a penal statute violation gives rise to a presumption of negligence, the finder of fact must ascertain whether "a legally sufficient excuse" exists for the statutory violation. *Id*. If an excuse is found, "the appropriate standard of care then becomes that established by the common law." *Id*. Hourdakis submits that she did not anticipate that the dogs would leave the property, and that Evie did so only because one of plaintiff's unleashed dogs had illegally entered onto defendants' land. Consequently, a jury must decide whether the circumstances present evidence rebutting the presumption of negligence arising from Hourdakis' apparent violation of the leash law.

IV. STRICT LIABILITY

Plaintiff next challenges the circuit court's decision to grant defendants summary disposition of her strict liability claim, asserting that defendants' dogs had "dangerous propensities" and posed a risk of harm to people and animals. At common law, strict liability for harm done by an animal attaches when three elements exist: "(1) one is the possessor of the animal, (2) one has scienter of the animal's abnormal dangerous propensities, and (3) the harm results from the dangerous propensity that was known or should have been known." *Trager*, 445 Mich at 99. In plaintiff's estimation, "[t]he undisputed facts" establish all three elements.

The record belies plaintiff's assertion. Despite that defendants' Leonbergers are large dogs, weighing 160 and 80 pounds, no record evidence suggests that either animal ever exhibited "abnormal[ly] dangerous propensities." Rather, the evidence reveals that all three of defendants' dogs generally conducted themselves in a manner entirely consistent with normal canine

behavior. The dogs barked, chased small animals, and behaved in protective fashion around family members. We have found no evidence of record substantiating that the Leonbergers had ever left the property before the July 28, 2006 affray, or had ever previously disrupted a horse's travel on Delano Road.[6] After our careful review of the voluminous record evidence concerning defendants' dogs, we detect no basis whatsoever for a finding that they harbored abnormally dangerous propensities. Therefore, we affirm the circuit court's grant of summary disposition to defendants with regard to plaintiff's strict liability claim.

V. GENERAL NEGLIGENCE

Plaintiff further asserts that the circuit court erred by summarily dismissing her general negligence claim. In granting summary disposition of this count, the circuit court ruled that because no evidence suggested that defendants' dogs posed an unreasonable risk of harm, defendants owed no duty to keep the dogs under constant control:

> There is no evidence that Defendants' dogs ever charged and/or attacked any riding party before. In fact, except for a few isolated incidents, years before the events at issue here, Defendants' dogs remained on their property. And because their dogs had no known dangerous propensities and had never injured a person or dog before, Defendants had no duty to keep their dogs under constant control . . . .

In *Trager*, 445 Mich at 104, our Supreme Court adopted 3 Restatement of Torts, 2d, § 518b, which the Court summarized as "subject[ing] the possessor or harborer of a domestic animal with no scienter of a dangerous propensity to 'liability for harm done by the animal if, but only if, he is negligent in failing to prevent the harm.'" The Supreme Court prescribed the following analysis as appropriate in deciding whether an animal owner possesses a duty of care:

> [I]t is necessary to keep in mind the normal characteristics of the animal that caused the injury, as well as any abnormally dangerous characteristics of which the defendant has knowledge. It is the province of the court to determine if duty exists. Dogs, and some other domestic animals, are generally regarded as so unlikely to do substantial harm that their possessors have no duty to keep them under constant control. Consequently, a mere failure to do so would not constitute breach of any duty of care. However, if the possessor of such an animal … has knowledge of some dangerous propensity unique to the particular animal, *or is aware that the animal is in such a situation that danger of foreseeable harm might arise, the possessor has a legally recognized duty to control the animal to the extent reasonable to guard against that foreseeable anger*. [*Id*. at 105-106 (emphasis added, footnotes omitted).]

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[6] Eli, the English setter, ran to a neighbor's yard on two occasions. Subsequently, defendants tethered him when he was outside.

"Whether a domestic animal has exhibited ill temper or aggressive behavior sufficient to apprise the owner of an unusually or abnormally violent disposition is generally a question for the finder of fact." *Hiner v Mojica*, 271 Mich App 604, 610; 722 NW2d 914 (2006).

The evidence here establishes defendants' awareness that horses passed by their home on a daily basis. Tyler further admitted, "[I]t's fairly common in the equine industry that dogs can bother horses." But no evidence tends to prove that Tyler breached a duty of care during the July 1, 2006 incident in which one of the dogs "lunged" at plaintiff's horse. Tyler and the dog remained on Tyler's property throughout the event, and the dog remained leashed. Under these circumstances, we do not find that Tyler violated any duty of reasonable care, and affirm the circuit court's grant of summary disposition to him with regard to this aspect of plaintiff's negligence claim.

With respect to plaintiff's negligence allegations relating to the July 28, 2006 incident, we hold that no reasonable juror could conclude that Hourdakis knew or reasonably should have known that allowing the dogs out at the moment she did so on July 28, 2006 placed the riding party in "in such a situation that a danger of foreseeable harm might arise." *Trager*, 445 Mich at 106. Our review of the record uncovered no evidence that defendants' dogs had engaged in any prior altercations with horses in the street as they passed by defendants' house. Defendants' general awareness "that dogs can bother horses" does not suffice to create a genuine issue of material fact that Hourdakis should have foreseen a danger of harm at the moment when she let the dogs out on July 28, 2006. *Id*; see also *Hiner*, 271 Mich App at 612-613. The circuit court thus correctly granted Hourdakis summary disposition of plaintiff's general negligence claim.

VI. INTENTIONAL TORTS

Lastly, plaintiff disputes the circuit court's grant of summary disposition to defendants regarding her claims for assault, battery, stalking and intentional infliction of emotional distress.

A. ASSAULT

An action for assault may lie on a showing of an "intentional unlawful offer of corporal injury to another person by force, or force unlawfully directed toward the person of another, under circumstances which create a well-founded apprehension of imminent contact, coupled with the apparent present ability to accomplish the contact." *VanVorous v Burmeister*, 262 Mich App 467, 482-483; 687 NW2d 132 (2004) (internal quotation omitted). In light of plaintiff's admission that in the course of the July 1, 2006 episode she realized that defendants' dog was tethered and could not reach the road, we conclude that plaintiff could not have harbored a well-founded apprehension of imminent contact. With respect to the July 28, 2006 fracas, no evidence of record suggests that Hourdakis intended the dogs to forcefully injure plaintiff. Plaintiff simply has pointed to no facts supporting that Hourdakis was even aware of plaintiff's presence on Delano Road when Hourdakis opened the door to let the dogs outside. Accordingly, we affirm the circuit court's grant of summary disposition to defendants concerning the assault count.

B. BATTERY

To recover for battery, a plaintiff must demonstrate a "wilful and harmful or offensive touching of another person which results from an act intended to cause such contact." *Smith v Stolberg*, 231 Mich App 256, 260; 586 NW2d 103 (1998) (internal quotation omitted). A battery encompasses an intentional touching of an object "attached to [the plaintiff] and practically identified with" the plaintiff's body. *Espinoza v Thomas*, 189 Mich App 110, 119; 472 NW2d 16 (1991). Because no touching of any kind occurred on July 1, 2006, the circuit court correctly granted summary disposition of plaintiff's battery claim relating to the events of that date. And the record also fails to substantiate that on July 28, 2006 defendants' dogs physically contacted either plaintiff or her horse. Thus, we affirm the circuit court's grant of summary disposition of the battery claim to defendants.

C. STALKING

In 1992, our Legislature criminalized the offense of stalking by enacting MCL 750.411h. The Legislature simultaneously created a civil cause of action against the stalker, MCL 600.2954, which incorporates the elements of criminal stalking. Stalking means "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 750.411h(1)(d). The Legislature defined "harassment" as "conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose." MCL 750.411h(1)(c).

In *Nastal v Henderson & Assoc's Investigation, Inc*, 471 Mich 712; 691 NW2d 1 (2005), the Supreme Court considered whether surveillance conducted to obtain evidence for use in a lawsuit constituted stalking. Drawing on dictionary definitions, the Supreme Court elucidated "that the phrase 'conduct that serves a legitimate purpose' means conduct that contributes to a valid purpose that would otherwise be within the law irrespective of the criminal stalking statute." *Id*. at 723. Given the stalking statute's specific exclusion of "conduct that serves a legitimate purpose," the Supreme Court held that surveillance conducted during the investigation of a lawsuit fell within a "safe harbor," and did not constitute stalking. *Id*. at 723-724.

Plaintiff's brief on appeal identifies at least 19 acts committed by defendants that she contends constitute stalking. For example, plaintiff alleges that Tyler "drove a vehicle at Appellant," "threatened Appellant and her family with bodily harm on several occasions," "appeared at Appellant's workplace and made derogatory statements concerning Appellant in an effort to get her fired," and "continually photographed and videotaped Appellant and her family." The circuit court ruled that Tyler's acts "are either constitutionally protected activity or conduct that serves a legitimate purpose." The circuit court further found that because plaintiff's personal protection action was dismissed with prejudice in September 2006, the doctrine of res judicata barred plaintiff's stalking claims predating that time.

We decline to deem all the activities described by plaintiff as either constitutionally protected or conduct that serves a legitimate purpose. However, we agree with the circuit court that the doctrine of res judicata bars plaintiff from prosecuting any of defendants' purported stalking actions committed before September 27, 2006, when plaintiff withdrew her PPO petition and consented to dismiss the action with prejudice. "The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action." *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004). Res judicata bars a second lawsuit when (1) the first action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matters contested in the second case were, or could have been, resolved in the first case. *Id*. The res judicata doctrine "bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Id*. The burden of establishing the applicability of res judicata rests on the party asserting the doctrine. *Richards v Tibaldi*, 272 Mich App 522, 531; 726 NW2d 770 (2006).

The instant case and plaintiff's petition for a PPO involve the same parties and many of the same underlying facts. We know of no legal obstacle that would have prevented plaintiff from joining a civil stalking claim with her personal protection action. Pursuant to MCR 2.504, the personal protection action was decided on the merits when plaintiff stipulated to dismiss it with prejudice. Subrule (B)(3) envisions, "Unless the court otherwise specifies in its order for dismissal, a dismissal under this subrule or a dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for failure to join a party under MCR 2.205, *operates as an adjudication on the merits.*" (Emphasis added). Consequently, the doctrine of res judicata bars plaintiff's stalking claims arising before September 28, 2006. On remand, the circuit court must determine which of plaintiff's stalking allegations focus on conduct committed before September 28, 2006. If plaintiff produces factual support for the contentions rooted in actions occurring after September 28, 2006, the circuit court should then consider whether the conduct at issue falls within the safe harbor of constitutionally protected activity or conduct that serves a legitimate purpose. A jury must consider any surviving factually supported allegations of conduct meeting the definition of harassment set forth in MCL 750.411h(1)(c).

D. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

In *Dalley v Dykema Gossett, PLLC*, 287 Mich App 296, 321; 788 NW2d 679 (2010), this Court reiterated the following intentional infliction of emotional distress elements:

> To establish a prima facie claim of intentional infliction of emotional distress, the plaintiff must present evidence of (1) the defendant's extreme and outrageous conduct, (2) the defendant's intent or recklessness, (3) causation, and (4) the severe emotional distress of the plaintiff. … Only when a plaintiff can demonstrate that the defendant's conduct is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community will liability attach. Mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities do not give rise to liability for intentional infliction of emotional distress. Initially, the trial court must determine whether a defendant's conduct qualifies as so extreme and outrageous as to permit recovery for intentional infliction of emotional distress. [Internal quotation omitted.]

Conduct is extreme and outrageous when "the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 603; 374 NW2d 905 (1985) (internal quotation omitted).

Plaintiff contends that defendants "have threatened [plaintiff], including when she had children accompanying her, harassed her at her home and work, allowed their dogs to attack her. . . , filed frivolous suits against her and her family on numerous occasions, [and] continually photographed and videotaped her." According to plaintiff, these actions comprise intentional infliction of emotional distress. The circuit court opined that, "given the relations between the parties and looking at the totality of the circumstances," plaintiff's allegations failed to qualify as "outrageous." After considering the factual bases for and contexts of plaintiff's intentional infliction claims, we conclude that plaintiff has not demonstrated that defendants intended through outrageous conduct to emotionally wound plaintiff. The parties' ready resort to legal process hardly qualifies as an intentional or reckless effort to evoke emotional distress. Rather, both sides have used complaints, petitions and incident reports as ammunition in their mutual combat. Similarly, we cannot conclude that Tyler's resort to intemperate, hostile or even threatening language was intended to inflict emotional pain. Moreover, especially in the bitter circumstances of this feud, the conduct about which plaintiff complains cannot be fairly characterized as either extreme or outrageous. Therefore, the circuit court did not err in granting defendants summary disposition of plaintiff's intentional infliction of emotional distress count.[7]

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. No costs are allowed because none of the parties has fully prevailed. MCR 7.219(A). We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher

[7] Because defendants have not prevailed, we need not consider the merits of their cross-appeal seeking costs and fees in Docket No. 293410.