IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

CAROL NAPLES	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 08C-01-093 PLA
	)	
WILLIAM MILLER and	)	
LYNN MILLER, Husband and Wife,	)	
	)	
Defendants.	)	

Submitted: April 15, 2009
Decided: April 30, 2009

Upon Defendants' Partial Motion for Summary Judgment
GRANTED;
Upon Plaintiff's Motion for Summary Judgment
DENIED

Stephen B. Potter, Esquire, POTTER, CARMINE & ASSOCIATES, P.A., Wilmington, Delaware, Attorney for Plaintiff.

Jeffrey A. Young, Esquire, YOUNG & MCNELIS, Dover, Delaware, Attorney for Defendant.

ABLEMAN, JUDGE

This is the Court's decision on Cross-Motions for Summary Judgment filed by Defendants William Miller and Lynn Miller ("the Millers") and Plaintiff Carol Naples. This lawsuit involves a dog fight between the Millers' dog "Ricky" and Plaintiff Carol Naples's dog "Peanut." The Millers' motion seeks judgment in their favor for claims for past and future veterinary bills, emotional distress and mental anguish, and punitive damages. Plaintiff requests summary judgment on the basis of affidavits establishing the amount of Ricky's veterinary expenses. For the reasons set forth more fully hereafter, the Millers' Motion for Summary Judgment, treated as a Motion for Partial Summary Judgment, is granted, and Plaintiff's Motion for Summary Judgment is denied.

Factual and Procedural Background

This property damage action arises from an incident that occurred in the parties' yards on April 27, 2007, involving their respective dogs: Ricky, a three-legged bloodhound that the Millers rescued, and Peanut, a Yorkshire terrier purchased by Ms. Naples six weeks earlier. The parties are neighbors whose properties share a common boundary divided by chain link and wooden fences that were installed by the Millers in order to prevent Ricky and Ms. Naples' three dogs from fighting. In her complaint, Ms. Naples alleges that Ricky entered her yard and caused physical injury to Peanut.

After the altercation, Peanut was treated at VCA Vet Specialty Center of Delaware on April 28, 2007, and the following day at the Matthew J. Ryan Veterinary Hospital of the University of Pennsylvania. Plaintiff asserts that Peanut's treatment necessitated more than fourteen thousand dollars in veterinary expenses.

While Ms. Naples has accurately labeled the civil case type as an action for "Property Damage," the Complaint seeks more than the value of the property. Plaintiff also seeks recovery for past and future veterinary expenses, for her emotional distress as a result of the incident, and for punitive damages. It is these latter three requests that are the subject of the instant motion.

Parties' Contentions

In their Motion for Summary Judgment, the Millers seek the entry of judgment in their favor on Naples's claims for past and future veterinary care and treatment, emotional distress, and punitive damages. The Millers submit that veterinary expenses are not compensable in a property damage case. They further argue that there is no basis in law to substantiate any recovery for emotional distress and mental anguish for the loss of personal property. The Millers also contend that Plaintiff's punitive damage claim cannot be sustained in the absence of an allegation of recklessness.

Furthermore, it is argued that no reasonable interpretation of the facts in this case amounts to a viable theory supporting an award of punitive damages against Ricky's owner, because such a claim requires a finding of conduct that is "outrageous" or the result of an "evil motive" or a "reckless indifference to the rights of others."[1]

In response to the motion, Naples disputes the contention that a pet has market value, and relies exclusively upon the language in 7 *Del. C.* § 1711 that makes the owner of a dog liable in damages for "any loss to person or property." Plaintiff does not address the manner in which damages are to be measured. Although Plaintiff makes light of the concept of "market value" for an injured dog, she provides no authority to support this position, and instead relies solely upon criticism of the Millers' market value approach.

As will be shown *infra*, under Delaware law, a dog is in fact personal property and, as such, any damages for loss or injury must generally be measured by market value.[2] Moreover, there is no recovery under Delaware

[1] *Jardel v. Hughes*, 523 A.2d 518, 529 (Del. 1987).

[2] Contrary to Plaintiff's suggestion that a market value approach must be incorrect because there is no identifiable "market for injured family pets," the assessment of market value is based upon the dog's value *prior* to the events causing the dog's injury or death. *See, e.g.,* 61 A.L.R. 5th 635 *Damages for Killing or Injuring Dog* (1998).

law for injured pets' veterinary expenses to the extent they exceed a pet's value, nor does Plaintiff's punitive damage claim withstand scrutiny.[3]

Analysis

It is indeed true that Delaware law provides that the owner of a dog is liable for any injury, death, or loss to person or property that is caused by such dog.[4] That does not mean, however, that damages to property—here, to Peanut—can be measured as if Peanut were a human being. Section 1708 of Title 7 clearly defines a dog as personal property, which makes it subject to the same measure of damages as a sofa, a car, a rug, a vase, or any other inanimate item of property.[5] If Ricky had chewed Plaintiff's $4,000.00 oriental rug, she may recover the value of the rug—or if he had broken a vase, the value of the vase. However devoted Plaintiff may be to Peanut, under Delaware law, Peanut is no different from any other item of personal property, and thus, provided a market value can be established, the proper

[3] To be sure, Plaintiff could not find a more avid dog lover than the Judge assigned to this case. Notwithstanding my strong personal emotional attachment to my own pet, I am still duty-bound to apply the law that establishes that a dog—or any pet for that matter—is personal property, not a person. And while a dog may be loved as any other family member, in the eyes of the law, this case is no different from any other property damage claim.

[4] 7 *Del. C.* § 1711.

[5] *See also*, *Klair v. Day*, 1988 WL4756 (Del. Super. 1988); *Pan Am Airways v. United Aircraft Corp*., 192 A.2d 913, 918-19 (Del. Super. 1963), *aff'd*, 199 A.2d 758 (1964).

measure of damages for injury to Peanut cannot exceed Peanut's market value.

Plaintiff's claim for past and future veterinary expenses is simply not recoverable under Delaware law because our law does not consider Peanut as a living thing, but only as a chattel. Accordingly, the types of expenses recoverable in personal injury actions are not included in the measure of damages. Veterinary expenses may be relevant in pet injury cases as a form of "repair" cost offering a measure of the plaintiff's property damages, but they are not directly recoverable by analogy to a claim for medical expenses in a personal injury action.[6] It may be true, as Immanuel Kant claimed, that we can judge the heart of a man by his treatment of animals; nevertheless, the man who causes an animal to be injured is not necessarily judged liable for the full costs of treatment.

Notwithstanding the arguments that Plaintiff asserts suggesting the absurdity of this position, none of these contentions are supported by case law, and none of them overcome the plain language of the statute. For example, Plaintiff questions the defense reasoning because it would mean a pound dog is worth only zero, and not the additional expenses one incurs in

[6] *See, e.g.*, *Nichols v. Sukaro Kennels*, 555 N.W.2d 689, 692 (Iowa 1996) ("There may be other elements of damage such as expense of treatment . . . . But whether an animal is injured or destroyed the total damages ordinarily recoverable may not exceed its value prior thereto.").

adopting a dog. Depending upon what evidence involving the dog's value was available, a case involving an injured or killed pound dog may be controlled by case law holding that when the general rule of measuring property damages at the fair market value of the property cannot be followed because no market value can be established, "the value [of the property] to the owner will be given."[7] This exception to the general market value rule would not seem to apply to this case, given that Peanut was apparently purchased in a market transaction mere weeks before being injured. Moreover, regardless of how the value of the injured pet is established, Delaware law does not provide for recovery of past and future veterinarian expenses in excess of that value, for the pain and suffering of either dog or owner, or for any of the damages routinely sought in a personal injury case—as distinguished from a property damage claim.[8]

[7] *See Woodland Manor v. Anderson*, 1997 WL 33471238, at *2 (Del. Com. Pl. Jan. 6, 1997) ("Where no market value is available, the value to the owner will be given." (citing 22 AM. JUR. 2D Damages § 438)); *Baker v. Wilson*, 1996 WL 33399256, at *2 (Del. Com. Pl. Feb. 28, 1995) (citing CHARLES T. MCCORMICK, DAMAGES §§ 44-45 (1935)); *see also McDonald v. Ohio State Univ. Veterinary Hosp.*, 644 N.E.2d 750 (Ohio Ct. Cl. 1994); 22 AM. JUR. 2D *Damages* § 290 ("If personal property had a market value, no recovery can be had on the basis of its value to the owner individually, apart from its market value. However, if the market value would not be a fair compensation for a personal loss, a plaintiff is sometimes permitted to recover the value of the item to him or her." (citation omitted)).

[8] Ironically, Plaintiff repeatedly refers to the fact that the defendants have provided no authority for their market value argument, while at the same time offering no authority whatsoever to dispute the statutory provision upon which the defendants' position is

While the Court is mindful that dogs are often beloved family members, and that many owners will spend inordinate sums of money to keep their pets healthy, the law in Delaware has not advanced to the point where it has carved out a personal injury action for injured dogs, wherein expert veterinary witnesses would testify, medical expenses would be placed in evidence, and pain and suffering and the degree of permanency would be measured by a jury. Obviously, the animal cannot be deposed, there is no provision for independent veterinary examinations, a pet dog is not likely to have lost earning capacity, and there is no loss of consortium claim (as dogs do not marry), nor are there any other similarities between a personal injury case involving an injured human plaintiff and an owner's loss of her dog, as in this case. If a change in the law is to occur, it is up to the Legislature, not the Courts, to decide that a dog named Fido, a cat named Boots, a hamster named Harry, or a fish called Wanda can have some new species of personal injury action brought on their behalf. For now, however, Peanut is personal property under the law, and the maximum value Ms. Naples can recover is no greater than Peanut's market value—which Defendants suggest will be the price for which Ms. Naples purchased Peanut weeks before the

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premised. That provision, which Plaintiff conveniently ignores, is in fact the controlling authority in this case.

altercation. Plaintiff's efforts to anthropomorphize Peanuts are simply unavailing.

Plaintiff's demand for damages for negligent infliction of emotional distress similarly cannot be sustained because the damage in this case was inflicted on property, i.e., Peanut. There was no impact upon Ms. Naples, nor was she in the zone of danger, and there are no aggravating circumstances where intentional or reckless conduct was involved.[9]

Indeed, courts have generally been reluctant to permit a plaintiff to recover damages for emotional distress or mental anguish caused exclusively by damage to the plaintiff's property in the absence of an impact or zone of danger risk, even when the mental distress results in serious physical injuries.[10]

The Delaware Supreme Court decision in *Pritchett v. Delmarva Builders, Inc.*[11] is illustrative of the rule in this state. The plaintiffs in that case were a mother and her two daughters. After their home caught on fire, the damage was repaired by defendants, and the plaintiffs resumed living in the house, which caught on fire again the following year. None of the

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[9] *See Robb v. Penn. R.R. Co.*, 210 A.2d 709 (Del. 1965); *Pritchett v. Delmarva Builders, Inc.*, 1998 WL 283376, at *4 (Del. Super. Feb. 27, 1998).

[10] *Pritchett*, 1998 WL 283376, at *3.

[11] 1998 WL 283376.

plaintiffs were home at the time of the second fire. When they were advised of the situation, they returned to observe their home ablaze for the second time.

In their Complaint, plaintiffs alleged that the contractors acted negligently and recklessly by falsely representing that the home had passed an electrical inspection. The Complaint sought damages for emotional and psychological injuries sustained as a result of witnessing the destruction of the home.

The Delaware Supreme Court framed the issue simply as follows:

> Are the people who allegedly caused the house to catch on fire liable for the emotional distress which a mother and her two daughters sustained as a result of watching the house burn from a safe distance?[12]

In rejecting a foreseeability analysis, the Court traced the evolution of the law on emotional distress damages in Delaware, and noted that recovery for negligent infliction of emotional distress is not available to one who witnesses damage to property absent an impact or zone of danger risk, even if such mental distress produces significant physical consequences or injuries. The Court noted that the issue was whether the Court should adopt a standard requiring that each case be analyzed under its own facts to

[12] *Id.* at *1.

determine if the foreseeable consequences of the negligent act would include the infliction of emotional distress, regardless of whether there was an impact within the zone of danger.[13] The Court declined to adopt such a rule:

> If such a standard were adopted, a person would be liable for unusual and extraordinary damages that would not ordinarily be expected to flow from an act which merely damages property. Furthermore, we must remember that a negligent act is generally one of omission. An act is done which the actor should have, but did not, perceive as creating an unreasonable risk of harm.
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> * * *
>
> The cases which hold that there can be no cause of action for emotional distress arising out of merely witnessing the negligent destruction of property represent the better rule in my view.[14]

Thus, in this case, the allegations in paragraph 10 of the Complaint, which seek damages for emotional distress and mental anguish as a result of the negligence of the defendants, do not state a cause of action under Delaware law and must therefore be dismissed. Again, while the Court is mindful that loss of, or injury to, a pet may be a devastating emotional experience, under our law the dog is property, not a person, no matter how great an effort has been made on the part of the owner to humanize it.

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[13] *Id.* at *3.

[14] *Id.* at *4.

Similarly, since the Complaint does not allege reckless, extreme, or outrageous conduct on the part of defendants, a cause of action does not lie for damages for emotional distress on that basis either.

Finally, the Plaintiff requests punitive damages. While Plaintiff is understandably disturbed and aggrieved by the injuries that Peanut sustained, nowhere in the Complaint are there any allegations of conduct on the part of the Millers that would even come close to the standard of behavior required to justify the imposition of punitive damages. Accordingly, Plaintiff's claim for punitive damages as a result of this dog fight is also dismissed.

Punitive damages serve "to punish the person doing the wrongful act and to deter him, as well as others, from similar conduct in the future."[15] A court may award punitive damages only for wanton, willful, or reckless conduct.[16] Specifically, a defendant's conduct must be "outrageous" because of an "evil motive" or a "conscious indifference to the rights of others."[17] To establish defendant's recklessness, a plaintiff must show that

[15] *Ringgold v. Kohl's Dep't Stores, Inc.*, 2006 WL 3842142, at *2 (Del. Super. Dec. 21, 2006) (citing RESTATEMENT (SECOND) OF TORTS § 908 (1979)).

[16] *Id.*

[17] *Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 530 (Del. 1987).

the defendant acted negligently and had a reckless state of mind,[18] such that he must have foreseen or should have foreseen the risk of harm that his conduct would create.[19] Mere inadvertence, mistake, or errors of judgment are insufficient to sustain punitive damages.[20]

In a case such as this, where the plaintiff claims that defendants were negligent in permitting their dog to run at large, in failing to secure their fence, or in failing to warn of Ricky's dangerousness, Plaintiff's burden is substantial. In *Jardel Co., Inc. v. Hughes*,[21] an action where the employee of a tenant in a shopping mall was abducted and raped while leaving her employment, the Delaware Supreme Court held that the owner of the mall was not reckless in failing to hire additional security for the property, even though defendant may reasonably have been on notice of crime in the area. It reasoned that an incident of such magnitude had not been reported in the previous thirteen months and no other customers had been seriously injured.[22]

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[18] *Id.* at 530-31.

[19] *Id.*

[20] *Id.* at 530.

[21] 523 A.2d 518.

[22] *Id.* at 531.

Similarly, the Court in *Eby v. Thompson*[23] held that the defendant railroad company was not reckless in failing to repair a large pothole at a company-owned railroad crossing that caused a motor vehicle accident. The defendants had inspected the pothole and decided to monitor it rather than fix it immediately, in order to determine if it would become a safety risk. The Court noted that the railroad's decision, while probably wrong, was free of any egregious intention or conscious disregard for the public.[24]

In this case, Naples has not alleged nor identified any evidence that suggests recklessness or conscious indifference on the part of the Millers. Rather, the Millers actually took measures to isolate their dog from Plaintiff's dogs by installing the fences that separated the yards. In my judgment, no rational trier of fact could find the Millers' conduct in putting up a fence so their dog could not find his way into the adjoining yard, or even in failing to supervise the dog on their own property "twenty-four/seven," to be outrageous, evil-minded, or indicative of a conscious disregard for public safety.

Even viewing the evidence in the light most favorable to the Plaintiff, the Court is thus convinced that Ms. Naples has failed to meet the substantial

[23] 2005 WL 486850 (Del. Super. Mar. 2, 2005).

[24] *Id.* at *5.

burden of establishing that the Millers exhibited the degree of recklessness required for an award of punitive damages. There being no genuine issue of material fact about whether the Millers were reckless, Naples's punitive damage claim must be dismissed.

Turning next to the Motion for Summary Judgment filed by Plaintiff, it is an overriding principle of tort law that questions of liability are appropriate issues for the trier of fact.[25] Since this Court cannot decide liability based solely upon affidavits presented by Plaintiff, and since liability remains a question of unresolved fact in this case, the Plaintiff's Motion for Summary Judgment must be denied.

Although this ruling precludes the Court from dismissing this case altogether at this juncture, the Court urges counsel to consider seriously whether a trial to determine which of the parties' dogs attacked first, or which was the aggressor, is really cost-effective when the maximum amount of damages the jury can award if Plaintiff prevails is Peanut's market value. Given the amount of counsel fees already expended up to this point, and the additional expense associated with trial, the Court urges counsel to consider

[25] *Roper v. Stafford*, 444 A.2d 289 (Del. Super. 1982); *Rutledge v. Wood*, 2003 WL 139758, at *4 (Del. Super. Jan. 17, 2003).

their potential losses at this point, as the Court strongly suspects that both parties' expenses already far exceed the total value of this litigation.

Conclusion

For the foregoing reasons, Plaintiff cannot recover damages for emotional distress or veterinary expenses, nor does her Complaint allege circumstances justifying the imposition of punitive damages. Furthermore, evidence of veterinary expenses paid for Peanut as a result of the alleged altercation with Defendants' dog will be relevant only to the extent they are offered to establish the amount of property damage at issue in this case. Any damages award will not exceed Peanut's market value prior to the time the damage to Peanut occurred. Accordingly, Defendants' Motion for Partial Summary Judgment is **GRANTED**. Because genuine issues of material fact persist as to liability and amount of damages, Plaintiff's Motion for Summary Judgment is **DENIED**.

IT IS SO ORDERED.

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PEGGY L. ABLEMAN, JUDGE

Original to Prothonotary
cc: Stephen B. Potter, Esquire
Jeffrey A. Young, Esquire