IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JILL DAMIANO and DAVID DAMIANO,	)	**No. 29416-1-III**
Appellants,	)	**Division Three**
v.	)	
JON CHARLES LIND; and the marital community comprised of JON CHARLES LIND and SUELLEN LIND,	)	**UNPUBLISHED OPINION**
Respondents.	)	

Kulik, C.J. — This is a dispute between next door neighbors over the disappearance of a cat named Boo. Jill and David Damiano filed a lawsuit against Jon and Suellen Lind, asserting that Mr. Lind trapped Boo and then abandoned, injured, or killed Boo so that Boo was not found and has never returned home to the Damianos.

The trial court granted summary judgment in favor of the Linds on the Damianos' claims of bailment, negligence, malicious injury to a pet, trespass to chattels, conversion, outrage, gross negligence, and fraud.

We review a summary judgment dismissal de novo to determine whether issues of material fact exist. We consider all facts and reasonable inferences in the light most favorable to the Damianos.

We affirm the dismissal of the claims based on bailment, negligence, outrage, gross negligence, and malicious injury to a pet. We reverse dismissal of the trespass to chattels, conversion, and fraud claims and remand for trial.

FACTS

On July 24, 2009, Ms. Damiano woke up at about 5:00 a.m. because her cat, Boo, was meowing loudly. Ms. Damiano recognized Boo's meows. Boo's habit was to come home early in the morning after being let out the previous evening. Consequently, Ms. Damiano assumed that Boo was sitting on the back porch waiting for his breakfast.

When Ms. Damiano did not find Boo on the back porch, she followed the meows over to her neighbors'—the Linds'—garage. At the time, Ms. Damiano believed that Boo was stuck in a small space in the Linds' garage. Not wanting to wake the Linds, Ms. Damiano spent the next hour going in and out of her home to call Boo. Ms. Damiano last heard Boo's meows sometime around 6:15 a.m.

Finally, Ms. Damiano dressed to go to the store. Before she left, she knocked on the Linds' door, but no one answered. At approximately 7:05 a.m., Ms. Damiano left for

the store. While driving away, Ms. Damiano saw Mr. Lind driving back toward his home in his sport utility vehicle (SUV). Mr. Lind smiled and waved. Ms. Damiano was surprised that she had not seen him leave in his vehicle because she had been in her backyard numerous times that morning.

Ms. Damiano made a u-turn and followed Mr. Lind home. Ms. Damiano told Mr. Lind that she had heard Boo's meows in his garage. She offered to trade Boo for some zucchinis and to pay for any damage he might have caused. Mr. Lind turned "'beet'" red and stuttered, "'Cat . . . cat . . . no, I haven't seen a cat.'" Clerk's Papers (CP) at 100. Mr. Lind said that they could look in the garage. Mr. Lind told Ms. Damiano that he had not seen a cat in his garage. Mr. Lind also stated that there was a trap by the deck. He explained that carpenters were coming soon to enclose his deck because cats fought under it.

According to Ms. Damiano, Mr. Lind's demeanor continued to be out of character; he was sweating profusely and he seemed agitated. After Ms. Damiano went home, Mr. Lind worked in his backyard for most of the day. Several times, Ms. Damiano tried to get Mr. Lind's attention to ask about Boo, but Mr. Lind would not acknowledge her.

The morning of the incident, Mr. Lind prepared a voluntary witness statement for the Chewelah Police Department. Mr. Lind stated that he trapped a "dark colored feral

cat" in the late evening of July 23, 2009, or the early morning hours of July 24. CP at 78. Mr. Lind explained that he immediately released the cat on his driveway and that it ran south across the street to the field.

Mr. Lind stated that when Ms. Damiano came over to ask about her cat:

> I did not mention I'd caught a cat (unknown owner) that morning because [Ms. Damiano] didn't ask and I felt like a total idiot just then. I am very sorry for this outcome but I do not believe I caused any harm to the cat. I also do not know the ownership of the cat I trapped.

CP at 78. Ms. Damiano stated that all the cats she saw in the neighborhood were pets. A neighbor stated that she had seen no coyotes in the area.

Mr. Lind periodically sets a live trap on his premises. He baits the trap with a can of tuna. Mr. Lind maintains that he sets traps because of the skunk problem in the neighborhood. In the last three years, Mr. Lind says he has unintentionally trapped three cats.

Mr. Lind asserts that he never relocated or killed animals in his traps. He maintains that on the night of July 23, 2009, he set the trap near the deck, not in the garage. Mr. Lind told Ms. Damiano that cats fought under the deck. He did not mention seeing any skunks under the deck.

Officer Brandon Molett stated that:

> Jon Lind admitted to me that he trapped the Damianos' cat, Boo, but did not know it was their cat until later that morning, after he allegedly released

> Boo and spoke to Mrs. Damiano.

CP at 73.

The Damianos searched for Boo in the town of Chewelah for an extended period. They posted signs, knocked on doors, and walked trails. The Damianos never found Boo, even though his habit was to come home early in the morning every day. Ms. Damiano said that, "Our hearts are broken and a part of us died with [Boo]. We worry about how scared [Boo] was on that horrible morning." CP at 116. One month after Boo disappeared, another neighbor had two missing cats in one week. That neighbor had not seen any coyotes in the area.

The day of Boo's disappearance, Ms. Damiano did not see Boo on the Linds' property. No one observed the Linds harm, injure, or kill Boo. Ms. Damiano has no evidence of any injury to her cat. She does not know whether Boo is alive or dead. Ms. Damiano alleges that she has suffered the loss of her pet and emotional distress due to that loss.

The Damianos filed this action against the Linds, alleging claims of bailment, negligence, malicious injury to a pet, trespass to chattels, conversion, outrage, gross negligence, and fraud. The trial court dismissed these claims on summary judgment. This appeal follows.

ANALYSIS

A motion for summary judgment will be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Hubbard v. Spokane County*, 146 Wn.2d 699, 707, 50 P.3d 602 (2002) (quoting *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000)). The court must consider all facts and reasonable inferences in the light most favorable to the nonmoving party. *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 452, 842 P.2d 956 (1993). "The nonmoving party must set forth specific facts showing a genuine issue and cannot rest on mere allegations." *Baldwin v. Sisters of Providence*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989)).

Motion to Strike. The Linds contend the trial court erred by denying their motion to strike various witness statements. In their brief, the Linds set out a few rules of evidence and then list whole pages or series of pages for this court to review. Without specificity, the Linds sometimes include a short comment, and sometimes do not, e.g., "CP 73, *Second Declaration of Brandon R. Molett*," or "CP 96-110, hearsay and irrelevant evidence throughout," with no comment. Resp'ts' Br. at 10.

Briefs should contain "argument in support of issues presented for review," along

with citations to authority and references to the record. RAP 10.3(a)(6). We decline to review the court's decision to deny the motion to strike because the Linds' briefing lacks sufficient specificity for review.

Evidence on Summary Judgment. The Linds rely on *Schmidt v. Pioneer United Dairies*, 60 Wn.2d 271, 373 P.2d 764 (1962) for the principle that a jury should not be permitted to speculate as to equally reasonable inferences. However, *Schmidt* was decided after a jury trial and applied the sufficiency of the evidence standard, not the summary judgment standard. *Id.* at 272. We apply the summary judgment standard here.

The Linds assert that the Damianos' case is based on speculation. The Damianos point to an accidental death case, *Englehart v. General Electric Co.*, 11 Wn. App. 922, 527 P.2d 685 (1974). In *Englehart*, the court allowed an accidental death to be proved by a reasonable inference from circumstantial evidence. *Id.* at 926. Significantly, circumstantial and direct evidence are accorded equal weight. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004).

We must consider the facts and all reasonable inferences in the light most favorable to the Damianos. Here, the facts and inferences raise questions of material fact with regard to the Damianos' claims of trespass to chattels, conversion, and fraud.

Breach of Bailment Claim. The Damianos assert that Mr. Lind breached his

bailment obligations by releasing Boo rather than returning him to the Damianos.

Generally, a bailment is a consensual transaction where a duty of care is recognized. *Collins v. Boeing Co.*, 4 Wn. App. 705, 710, 483 P.2d 1282 (1971). However, in an involuntary or constructive bailment, the possession is involuntarily thrust upon another, as in a possession taken by a finder or a possession by mistake. *Id.* If a bailment exists and the item is lost, a presumption of negligence applies. *Chaloupka v. Cyr*, 63 Wn.2d 463, 466, 387 P.2d 740 (1963). Here, no consensual transaction existed between Ms. Damiano and Mr. Lind. Hence, Ms. Damiano must establish the existence of an involuntary bailment with Mr. Lind regarding Boo.

The Damianos rely on two Washington cases to support their involuntary bailment claim, *Chaloupka* and *Hatley v. West*, 74 Wn.2d 409, 445 P.2d 208 (1968). Neither of these cases involves an involuntary bailment. *Hatley* involved a particular kind of bailment where a person, for consideration, takes in animals for care and pasturing on his or her land. *Hatley*, 74 Wn.2d at 409-10. Here, there was no consideration. *Chaloupka* involved a consensual transaction between Mr. Chaloupka and the repairman. Here, there was no consensual transaction.

The Damianos next seek to impose duties that are not recognized in Washington in the context of pets. They argue that lost property law (chapter 63.21 RCW) mandates

that the finder of a pet who wishes to claim the found pet belonging to an unknown owner, and who seeks to divest the original owner of his title and transfer it by operation, must, within seven days, comply with express statutory requirements. RCW 63.21.010. However, this court has concluded that chapter 63.21 RCW is inapplicable to cases involving pets. *See Graham v. Notti*, 147 Wn. App. 629, 638-39, 196 P.3d 1070 (2008).

The Damianos also point to *Morgan v. Kroupa*, 167 Vt. 99, 103-04, 702 A.2d 630 (1997), where the court imposed obligations on both finders of strays and pet owners. However, lost property law does not apply and the obligations imposed by the *Morgan* court are not consistent with Washington law. The trial court properly dismissed the Damianos' bailment claim.

Negligence Claim. "The elements of negligence are duty, breach, causation, and injury." *Keller v. City of Spokane*, 146 Wn.2d 237, 242, 44 P.3d 845 (2002).

The Damianos assert that Mr. Lind assumed a duty of care to make attempts to reunite the "lost" trapped cat with its owners and to notify law enforcement of the discovery of the cat. Here, the Damianos seek to establish a duty on the finder to return a stray pet to its owner. But the Damianos have cited no Washington authority to support their argument.

The Damianos next argue that Mr. Lind assumed a duty of care to not harm,

kill, or abandon the animal in direct violation of state law. The Damianos point to RCW 16.52.205 (first degree animal cruelty), RCW 16.52.207 (second degree animal cruelty), and RCW 9.08.070 (pet taking).

This argument is unpersuasive. A cause of action in negligence must be based on a statutory or common law rule imposing a duty to refrain from the prohibited conduct and the statute or common law rule must be adopted to protect the plaintiff against harm of the general type. *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 932, 653 P.2d 280 (1982) (quoting *Rikstad v. Holmberg*, 76 Wn.2d 265, 268, 456 P.2d 355 (1969)). These provisions do not meet this test.

The court did not err by dismissing the negligence claim.

Malicious Injury to a Pet. The Damianos argue that the trial court erred by dismissing their claim of malicious injury to a pet. In response, the Linds argue that malicious injury to a pet is not a stand-alone claim but, instead, is a measure of damages applied after it is proven that a defendant intentionally and maliciously injured someone's pet. They also maintain that the Damianos cannot establish that their pet was injured.

In *Womack v. Von Rardon*, 133 Wn. App. 254, 263, 135 P.3d 542 (2006), we recognized malicious injury as a stand-alone cause of action. The elements of a malicious injury to a pet claim are proof of malice and injury. *See id.* Ms. Womack

received $5,000 for the harassment of her son and her emotional distress caused when her cat was set on fire and later euthanized. *Id.* at 262-63.

The Damianos cannot show a malicious injury. We conclude that dismissal of the malicious injury to a pet claim was proper.

Conversion and Trespass to Chattels. Conversion is "'the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it.'" *Consulting Overseas Mgmt., Ltd. v. Shtikel*, 105 Wn. App. 80, 83, 18 P.3d 1144 (2001) (quoting *Wash. State Bank v. Medalia Healthcare, LLC*, 96 Wn. App. 547, 554, 984 P.2d 1041 (1999)). Wrongful intent is not an element of conversion, and good faith is not a defense. *Paris Am. Corp. v. McCausland*, 52 Wn. App. 434, 443, 759 P.2d 1210 (1988). "'Therefore, neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are of the gist of the action [in conversion].'" *In re Marriage of Langham & Kolde*, 153 Wn.2d 553, 560, 106 P.3d 212 (2005) (quoting *Judkins v. Sadler-MacNeil*, 61 Wn.2d 1, 4, 376 P.2d 837 (1962)).

Trespass to chattels is something less than a conversion. It is the intentional interference with a party's personal property without justification that deprives the owner of possession or use. Restatement (Second) of Torts § 217 (1965). While a plaintiff must

show that the interference was intentional, no intent to deprive the owner must be shown. *Judkins*, 61 Wn.2d at 4 (quoting *Poggi v. Scott*, 167 Cal. 372, 375, 139 P. 815 (1914)).

The Damianos argue that a conversion claim is established by showing that the party deprived the owner of his property "'by the act of another assuming an unauthorized dominion and control.'" *Lincecum v. Smith*, 287 So. 2d 625, 627 (La. Ct. App. 1973) (quoting 89 C.J.S. Trover & Conversion § 7 (1955)).

In *Lincecum*, the Lincecums' sick puppy disappeared from their yard. Mr. Smith found the puppy and later had it euthanized because it was almost blind. *Id.* at 626-27. The Lincecums filed a conversion claim against Mr. Smith and the organization that euthanized the puppy. The trial court found no negligence by the defendants. *Id.* at 627. However, the appellate court concluded that when Mr. Smith authorized the euthanasia of the puppy, he committed a wrongful conversion because he exercised a complete interference with the Lincecums' ownership rights. *Id.* at 628. Also, applying the finder's law of Louisiana, the court also noted that Mr. Smith had a duty to look for the owners. *Id.*

The Linds maintain that *Lincecum* is inapplicable because it is based on finder's law. They point out that this court has rejected the application of chapter 63.21 RCW to cases involving pets. *Graham*, 147 Wn. App. at 638-39. Nevertheless, *Lincecum* is

helpful because of its statement regarding Mr. Smith's conversion of the property. The conversion claim here need not be based on finder's law.

To prove their conversion claim, the Damianos must show that Mr. Lind willfully interfered, without lawful justification, and denied them their possession of Boo. To prove their trespass to chattels claim, the Damianos must show an intentional interference with a party's personal property without justification, depriving the owner of possession or use. The Damianos have raised a question of fact as to whether Mr. Lind willfully or intentionally interfered with their possession of Boo.

Trespass to chattels requires intentional interference with a party's personal property without justification that deprives the owner of possession or use. The party is not required to prove intent to deprive the owner. Here, Mr. Lind intentionally interfered with the Damianos' right of possession by trapping Boo.

The Linds argue that the trap was lawful pursuant to RCW 7.48.230. RCW 7.48.230 provides that any person may abate a public nuisance which is *specially injurious* to him by removing, or if necessary, destroying the thing which constitutes the same, without committing a breach of the peace, or doing unnecessary injury.

In his answer to interrogatory 34, Mr. Lind stated that "animals have caused damage to landscaping and gardens as well as defecated on [the Linds'] property." CP at

87. The Linds did not explain the extent of the damage, and they did not specify what kind of animal. Even if we assume that a pet cat is a "public nuisance," the evidence does not establish that Boo was "specially injurious" to the Linds. There is no evidence that Boo was "specially injurious" to Mr. Lind.

The Linds next contend that the trap was authorized and did not require a permit. They maintain that the purpose of the trap was to trap skunks. A review of Washington law reveals that the Linds were required to have a permit to trap skunks. To trap fur bearing animals requires a license. RCW 77.65.450. A recreational license is required to trap or take wild animals. RCW 77.32.010(1). Former RCW 77.36.030(1) (1996) allowed the trapping or killing of "wild animals or wild birds" without a license in an emergency situation if they are "damaging crops, domestic animals, or fowl." The Linds cannot show that the trap was authorized. They had no permit and there is no evidence of damage to crops, domestic animals, or fowl.

These facts and reasonable inferences raise issues of material fact as to the Damianos' claims of conversion and trespass to chattels. The trial court erred by dismissing these claims.

Outrage Claim. The tort of outrage requires proof of three elements: (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and

(3) actual result to the plaintiff of severe emotional distress. *Reid v. Pierce County*, 136 Wn.2d 195, 202, 961 P.2d 333 (1998).

A claim for outrage must be based on conduct "'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.'" *Womack*, 133 Wn. App. at 261 (quoting *Kloepfel v. Bokor*, 149 Wn.2d 192, 196, 66 P.3d 630 (2003)). In *Womack*, an outrage claim was dismissed even though Ms. Womack's cat was purposely set on fire and later euthanized because of the severity of its burns. *Id.* at 260-61. The court concluded that the evidence was insufficient on the question of intent and the necessary severity. *Id.* at 261.

The trial court did not err by dismissing the Damianos' outrage claim.

Gross Negligence. The Damianos argue that the trial court erred by dismissing their claims based on gross negligence.

Gross negligence is negligence that is substantially and appreciably greater than ordinary negligence. *Nist v. Tudor*, 67 Wn.2d 322, 331, 407 P.2d 798 (1965). Gross negligence is the failure to exercise slight care. This does not mean the total lack of care but, rather, care substantially less than the quantum of care inherent in ordinary negligence. *Id.* Ordinary negligence is "the act or omission which a person of ordinary

prudence would do or fail to do under *like* circumstances or conditions." *Id.* There is no issue of gross negligence without "substantial evidence of serious negligence." *Id.* at 332.

The Damianos argue that Mr. Lind's failure to notify Ms. Damiano that he had trapped a cat constituted gross negligence. They maintain that in a bailment for the benefit of the bailee, the bailee owes an extraordinary duty of care. In their view, Mr. Lind's failure to fulfill these duties resulted in acts of gross negligence.

We concluded above that the Damianos' bailment-based arguments are not persuasive. As a result, we also conclude the gross negligence claim was properly dismissed.

Fraud. To establish a fraud claim, the Damianos must show by clear, cogent, and convincing evidence all of the elements of fraud: "(1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff." *Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996).

The Linds argue that the Damianos cannot show fraud because the Mr. Lind did

not see or trap a cat in his garage. However, Officer Molett stated that Mr. Lind told him that Mr. Lind had trapped a cat and later learned that it was Boo. Ms. Damiano last heard Boo's meows at 6:15 a.m. At some point, Mr. Lind went out to his SUV. And when Ms. Damiano confronted Mr. Lind at approximately 7:05 a.m., Mr. Lind denied seeing a cat. Nor did he admit he had trapped a cat. Taking the facts in the light most favorable to the Damianos, their fraud claim is proper.

The Linds also argue that the Damianos were not ignorant of the material facts and did not actually rely on any statements made by Mr. Lind. However, the evidence shows that the Damianos continued to search for Boo over an extended time period, in town, and by walking trails, knocking on doors, and posting notices about Boo.

The Linds assert that Ms. Damiano had no right to rely on any purported statement made by Mr. Lind. Here, Ms. Damiano heard Boo's meows on the Linds' property and Boo had not returned home. Ms. Damiano had a right to rely on the statement made by Mr. Lind that he had not seen a cat.

The court erred by dismissing the fraud claim.

Attorney Fees. The Linds maintain that this appeal is frivolous, and they request an award of attorney fees pursuant to RAP 14.1, 14.2, 18.1 and 18.9. This is not a frivolous appeal; thus, we deny the Linds' request for attorney fees.

We affirm in part and reverse in part. We affirm the dismissal of bailment, negligence, malicious injury to a pet, outrage, and gross negligence and reverse dismissal of the trespass to chattels, conversion, and fraud claims, and remand for trial.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, C.J.

WE CONCUR:

_____ _____
Sweeney, J. Brown, J.