FILED
FEB 25 1987
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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LEAH SCHADE,	)	
Plaintiff-Appellee,	)	Filed February 25, 1987
vs.	)	
CEDAR RAPIDS ANIMAL SHELTER,	)	6-481 86-261
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Linn County (LA 9640) - Thomas M. Horan, Judge.

Defendant appeals a judgment awarding plaintiff actual and punitive damages for the transfer of her dog to a hospital for medical experimentation. **AFFIRMED IN PART; REVERSED IN PART.**

David F. McGuire and Andrew P. Matthews of the Cedar Rapids City Attorney's Office, Cedar Rapids, Iowa, for defendant-appellant.

Michael E. Sheehy and Mary K. Hoefer of the Tom Riley Law Firm, Cedar Rapids, Iowa, for the plaintiff-appellee.

Considered by Schlegel, P.J., Hayden, and Sackett, JJ.

The defendant, a municipal animal shelter, appeals a judgment awarding plaintiff actual and punitive damages for the transfer of her dog to a hospital for medical experimentation. We affirm in part and reverse in part.

Employees of the Cedar Rapids Animal Shelter captured a dog which was running loose with a collar and a broken chain. Within about a day after the capture, the dog was transferred to the University of Iowa for medical experiments. Within a few days of its transfer to the University, the dog died as a result of an experimental procedure.

The dog's owner, Leah Schade, had called the shelter on the morning after the dog's capture to ask if the dog were at the shelter. She asserts that she was not told of the dog's capture by the shelter until it was too late to rescue the dog from University experimenters.

After learning the dog's fate, Leah Schade filed the present lawsuit against the Cedar Rapids Animal Shelter. The suit was tried to the court, which awarded Schade compensatory damages of $500 and punitive damages of $5,000. (The operative facts of this case occurred in October 1981, at a time when Iowa statutes still permitted claims for punitive damages against governmental subdivisions.) In ruling in favor of Schade, the district court noted that Cedar Rapids ordinances imposed upon the shelter a duty to retain each animal for a minimum of three days before disposing of the animal.

Our scope of review is on errors of law. Iowa R. App. P. 4.

I.

The shelter first contends the district court improperly relied on items not introduced into evidence. The items in question are a city ordinance requiring a three-day delay before disposal of an animal and an answer to an interrogatory in which the shelter allegedly admitted that it does not always observe the

three-day waiting period. Questions not presented to and not passed on by the trial court cannot be raised or reviewed upon appeal. Shill v. Careage Corp., 353 N.W.2d 416, 420 (Iowa 1984). Defendants did not reveal to the trial court the error it now claims on appeal. No posttrial motion was made alerting the court to a potential error. See State Farm Mutual Auto Insurance Co. v. Pfilbsen, 350 N.W.2d 202, 206 (Iowa 1984). Thus, nothing is presented for review as to this issue. Even if we had found error preserved on this issue it would certainly not have been prejudicial. Iowa Code section 351A.3 (1981) provided similar language to the city ordinance. The shelter's action could be found a violation of either city ordinance or state statute, even without a consideration of the interrogatory in question.

II.

The shelter next contends that Schade's testimony as to the dog's market value was inadmissible because there was no showing that she was qualified to give an estimate of the dog's market value and because her testimony was based, in part, on unreliable newspaper advertisements. The shelter maintains that without such inadmissible testimony, there was insufficient evidence of the dog's value to permit an award of compensatory damages. An owner of property may testify about its value. Kimmel v. Iowa Realty Company, Inc., 339 N.W.2d 374, 380-81 (Iowa 1983). Schade's evidence as to her opinion of the dog's value was admissible. No contrary evidence as to value was introduced by the shelter. Findings of fact in a law action are binding upon us if supported by substantial evidence. Iowa R. App. P. 14(f)(1). The evidence presented was sufficient to sustain the court's finding that $500 was a proper amount of compensatory damages.

III.

The shelter contends that the dog was not legally property under Iowa Code section 351.25 because it was not wearing license tags attached to its collar. The shelter argues that compensatory damages were improper because the dog was not property.

Iowa Code sections 351.25 and 351.26 provides:

> **351.25 Dog as property.**
>
> All dogs under six months of age, and all dogs over said age and wearing a collar with a valid license tag attached thereto, shall be deemed property. Dogs not so provided with license tag shall not be deemed property.
>
> **351.26 Right and duty to kill unlicensed dog.**
>
> It shall be lawful for any person, and the duty of all peace officers within their respective jurisdictions unless such jurisdiction shall have otherwise provided for the seizure and impoundment of dogs, to kill any dog for which a license is required, when such dog is not wearing a collar with license tag attached as herein provided.

The shelter contends that a reading of these two sections together as applied to the Schade dog mandates a conclusion that the dog was not property. We cannot agree. The dog was properly licensed, although no tag was attached to the collar at the time the dog was picked up. Without deciding whether the shooting of a licensed dog who was not at the time of the shooting wearing its tag would give rise to liability, the facts of this case reveal that the shelter knew or should have known that the Schade dog was property. After the dog was picked up, Mrs. Schade called the shelter. The shelter told her that her dog had been apprehended by shelter employees. When Mrs. Schade went to pick up the dog, the shelter told her that there had been a mix-up and that her dog had been sent to Iowa City for experimentation. According to testimony from an employee of the shelter, "It was just it was a wrong number on the

wrong day." Furthermore, Iowa Code section 351A.3 requires the shelter to hold a dog for three days before transferring it to a research institute for experimentation. This was not a case of the shooting of a licensed dog by accident; rather, it was the case of the mistaken handling of a dog that shelter personnel knew or should have known was someone's property.

IV.

The shelter also contends the evidence was insufficient to prove Schade's ownership of the dog. The shelter asserts the evidence did not establish that the dog in question belonged to Schade rather than to her former husband who had initially acquired the dog and had purchased its license tags. The shelter also asserts the evidence did not establish that the dog sent for experimentation had been the Schade dog rather than another similar dog. The trial court found that Leah Schade, the wife, was the dog's owner. Findings of fact in a law action are binding upon us if supported by substantial evidence. Iowa R. App. P. 14(f)(1). The record shows by substantial evidence that Leah Schade was the owner of the dog and that she harbored the dog. See Iowa Code § 351.2. The trial court heard evidence that the dog was considered the family dog, that Leah Schade originally purchased and cared for the dog, that she "harbored" the dog in her house. The trial court accurately concluded that the evidence was sufficient to prove that Leah Schade was the "owner" of the dog under Iowa Code section 351.2.

Similarly, the record reveals substantial evidence that the Schade dog was the dog destroyed at the hospital. Shelter employees testified they had previously picked up the Schade dog and were familiar with it. Until trial, the shelter never expressed any doubt that the dog they sent to the hospital was the Schade dog. An employee at the hospital testified that the shelter specified ". . . it was no doubt it was the larger of the two dogs that they wanted

back." This reference was to the Schade dog. In light of the evidence presented, the trial court did not err in concluding that the dog sent to the hospital was the Schade dog.

V.

The shelter contends that it is not a legal entity and therefore cannot be held legally responsible for damages. The shelter contends that the plaintiff's petition should have named the City of Cedar Rapids as defendant rather than the "Cedar Rapids Animal Shelter." This claim is without merit. The shelter did not raise this issue before trial and now relies solely on the so-called "affirmative defense" that in its answer to plaintiff's petition it asserted, "The Cedar Rapids Animal Shelter cannot be held legally liable or responsible for any damages in this matter." The sufficiency of the pleadings was not questioned at trial. If the defendant wished to argue that plaintiff was suing the wrong party, such a claim should have been urged at an appropriate time. Instead it appeared and defended the action. Objections to personal jurisdiction will be deemed waived unless raised at first opportunity or in due or reasonable time." In re Marriage of Ivins, 308 N.W.2d 75, 77 (Iowa 1981). If defendant thought that it was not the proper party defendant to the cause of action, it should have urged this position at an appropriate time; plaintiff would then have been entitled to amend to the proper proceeding. See Rockenfield v. Kuhl, 242 Iowa 213, 218, 46 N.W.2d 17, 20 (1951). If there was a defect of the parties it was apparent on the face of the petition and waived by defendant's failure to object. Id.

We need not determine here whether section 613A.2 establishes that the shelter as a "department" is equivalent to a "unit of local government" and therefore in all situations to be an entity which can sue or be sued. See City of Spencer v. Hawkeye Insurance Co., 216 N.W.2d 406, 411-12 (Iowa 1974).

However, we do note that in Flynn v. Lucas County Memorial Hospital, 203 N.W.2d 613, 615 (Iowa 1973), the Iowa Supreme Court held that a county hospital was subject to chapter 613A. Appellant offers no reason why a dog shelter, like a county hospital, would not fall within the ambit of 613A.

VI.

Finally, the shelter contends the award of punitive damages was not supported by the evidence. Punitive damages are appropriate where a defendant acts maliciously. Beeck v. Aquaslide 'N' Dive Corp., 350 N.W.2d 149, 167 (Iowa 1984). The malice may be express, such as personal spite, or implied, as where the defendant acts illegally or improperly with willful or reckless disregard for another's rights. Id. The award of punitive damages is within the trial court's discretion. Id. We reverse a district court's decision for abuse of discretion only when such discretion was exercised on grounds or for reasons clearly untenable or for an extent clearly unreasonable. Glenn v. Farmland Foods, Inc., 344 N.W.2d 240, 243 (Iowa 1984). We think, in the particular circumstances of this case, it was clearly untenable to find defendant's conduct constituted willful or reckless disregard for another's rights. The evidence revealed no more than a negligent mix-up of the dogs. The evidence presented at trial did not reveal this incident to be more than an isolated incident, nor a general policy of the shelter. The shelter took affirmative steps to cure its error. We therefore reverse the trial court's award of punitive damages to the defendant. We affirm its award of compensatory damages.

AFFIRMED IN PART; REVERSED IN PART.