

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0381**

Peggy R. Ek,
Appellant,

Richie Lee Vessel,
Plaintiff,

vs.

Jacquelynn Massengill,
Respondent.

**Filed February 27, 2023
Affirmed
Segal, Chief Judge**

Hennepin County District Court
File No. 27-CV-19-16890

Peggy Ek, Cottage Grove, Minnesota (pro se appellant)

Jacquelynn Massengill, Richfield, Minnesota (pro se respondent)

Considered and decided by Bjorkman, Presiding Judge; Segal, Chief Judge; and
Reilly, Judge.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

Appellant challenges the summary-judgment dismissal of her claims arising out of respondent's alleged tortious conversion of a dog named Bandit. Appellant argues that she should have been allowed a trial on her claims. We affirm.

FACTS

In July 2019, appellant Peggy R. Ek initiated an action in conciliation court against respondent Jacquelynn Massengill seeking to recover \$2,500 in damages, plus costs and fees, based on Massengill's alleged tortious conversion of a dog named Bandit. Ek also demanded that Bandit be returned. The statement of claim and summons indicated that Bandit belonged to Ek's son, Richie Lee Vessel.¹ In early 2019, Vessel and Massengill lived in the same apartment complex. Vessel was arrested in February 2019 and signed over Bandit to Massengill at that time. Ek alleged that Vessel only signed over Bandit because a police officer told Vessel that the dog would be euthanized if Vessel did not find someone to take custody of him. Ek alleged that Vessel now wanted Bandit to be given to Ek.

The referee in conciliation court denied Ek's claim and found that Ek failed to demonstrate a basis for relief. Ek filed a demand to remove the matter to district court and requested that the matter be tried to a jury. At the pretrial hearing, Massengill informed the district court that she was no longer in possession of Bandit and Bandit was in permanent foster care due to his medical conditions. Bandit was close to 13 years old and had significant health issues.

Based on Massengill's representation that she no longer had possession of Bandit, the district court issued an order for submissions. The district court explained that "[g]iven the state of the law, [Ek and Vessel] do not have a viable remedy against Massengill unless

¹ Vessel was named as a plaintiff in this matter but has never appeared or otherwise participated in the proceedings.

[Massengill] possesses Bandit or Bandit has some market value.” The district court further noted that Massengill “consistently maintained that she is not in possession of Bandit” and that the court “c[ould not] require Massengill to deliver property that is not in her possession.” The district court therefore ordered Ek to file “competent evidence that either (a) [Massengill] currently possesses the dog at issue or (b) the dog at issue has some market value,” and indicated that if the evidence was “not filed or otherwise lacking, the Court will grant summary judgment in favor of [Massengill] and dismiss this action.”

Following Ek’s submission of evidence, the district court granted summary judgment in favor of Massengill. The district court observed that the evidence submitted “only show[ed] that Massengill had the dog for [a] period in early 2019,” that a letter from the property manager where Massengill and Vessel lived “describe[d] Massengill’s possession and care of the dog in the past tense,” and “[t]hus, by early 2020, Massengill no longer had the dog.” The district court also determined that Ek had “not shown in [the] submissions that Bandit has more than a negligible market value.” The district court therefore “conclude[d] that [Ek has] not shown there is any issue of material fact, and [Massengill] is entitled to summary judgment.” The district court thus dismissed the case and entered judgment in favor of Massengill. Ek now appeals.

DECISION

On appeal from the grant of summary judgment, this court reviews de novo “whether genuine issues of material fact exist and whether the district court erred in applying the law.” *Ruiz v. 1st Fid. Loan Servicing, LLC*, 829 N.W.2d 53, 56 (Minn. 2013). “We view the evidence in the light most favorable to the party against whom summary

judgment was granted.” *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). A genuine issue of material fact exists when there is sufficient evidence that could lead a rational trier of fact to find for the nonmoving party. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997).

Ek argues that the district court erred in granting summary judgment and that she should have received a jury trial on her claims. Massengill did not move for summary judgment; the district court granted summary judgment on its own initiative. We first consider the district court’s authority to consider summary judgment on its own initiative and then analyze the court’s decision to grant summary judgment.

Pursuant to Minn. R. Civ. P. 56.06:

After giving notice and a reasonable time to respond,
the court may:

- (a) grant summary judgment for a nonmovant;
- (b) grant the motion on grounds not raised by a party; or
- (c) consider summary judgment on its own initiative
after identifying for the parties the material facts that may not
be genuinely in dispute.

We have recognized that a district court may grant summary judgment sua sponte, but in doing so cautioned that “[t]he district court, however, must afford the adverse party a meaningful opportunity to oppose such an action.” *Hebrink v. Farm Bureau Life Ins. Co.*, 664 N.W.2d 414, 419 (Minn. App. 2003).

Here, the district court explained in the December 2021 order for submissions that Ek did not have a viable claim for relief unless Massengill still possessed Bandit—in which case the district court could order injunctive relief—or Bandit had some market value—in which case the district court could award compensatory damages. The district court then

stated that “to avoid the inefficiency of impaneling a jury or devoting any further resources to deciding a non-viable claim, the Court will grant summary judgment dismissing this action unless [Ek] produce[s] some competent evidence that (a) Massengill has possession of Bandit or (b) Bandit has market value.” The district court did not grant summary judgment until after Ek submitted evidence in response to the order for submissions. Accordingly, the district court followed the proper procedure before granting summary judgment because it first identified the material issue—whether a viable remedy was available—and did not grant summary judgment until after Ek had the opportunity to present evidence on that issue. *See* Minn. R. Civ. P. 56.06. Ek thus had a “meaningful opportunity to oppose” the action. *Hebrink*, 664 N.W.2d at 419. The district court therefore had the authority to grant summary judgment on its own initiative.

We next turn to the question of whether the district court erred in granting summary judgment on the record here. The district court granted summary judgment based on the determination that Ek failed to establish a viable claim for relief because Massengill no longer possessed Bandit and Ek failed to “show[] in [the] submissions that Bandit has more than a negligible market value.”

“Under Minnesota law, dogs are personal property.” *Zephier v. Agate*, 957 N.W.2d 866, 871 n.2 (Minn. 2021). Historically, “[t]he proper measure of compensatory damages for destroying an animal is the fair market value of the animal.” *Soucek v. Banham*, 524

N.W.2d 478, 481 (Minn. App. 1994) (citing *Harrow v. St. Paul & D. R. Co.*, 44 N.W. 881, 881 (Minn. 1890)), *rev. denied* (Minn. Jan. 25, 1995).²

Following the order for submissions, Ek submitted evidence documenting past veterinary services for Bandit and listings of puppies for sale. As the district court noted, the veterinary records inconsistently list Bandit as a Shih Tzu or Lhasa Apso breed. There is no evidence in the record regarding the circumstances under which Vessel acquired Bandit, and it is therefore unclear if Bandit was adopted from a rescue organization, purchased from a breeder, or how much Vessel paid for Bandit. The listings of dogs for sale that Ek provided were primarily for pure-bred dogs, and all for puppies. But as the district court noted, Bandit was nearly 13 years old at the time the district court considered the matter and had considerable health problems. Indeed, the record indicates that while Massengill was in possession of Bandit she spent nearly “\$1,000 in veterinary bills to address Bandit’s neglected health and dental problems.” And Massengill previously explained that she transferred Bandit to long-term foster care because of his medical conditions. Under these circumstances, no reasonable fact-finder could find Bandit’s fair market value to be comparable to the adoption costs of healthy, pure-bred puppies.

² In *Soucek*, this court held that a party could not seek punitive damages for the loss of a pet because under Minnesota law at that time parties could not seek punitive damages where they suffered only property loss without personal injury. 524 N.W.2d at 480-81. But the supreme court has more recently held that “a plaintiff may seek punitive damages in an action for intentional damage to property where the only damage is to property, subject to the limitations of section 549.20.” *Jensen v. Walsh*, 623 N.W.2d 247, 251 (Minn. 2001). Thus, a party may be able to seek punitive damages for the loss of a pet. But a party must obtain permission from the district court to include a claim for punitive damages, Minn. Stat. § 549.191 (2022), and Ek did not do so. Accordingly, there is no claim for punitive damages in this case.

On this record, we conclude that the district court did not err in determining that Ek failed to show “that Bandit has more than a negligible market value” because there is not competent evidence in the record to establish Bandit’s fair market value. As such there was no possible relief that the district court could have granted even if Ek had established that Massengill stole Bandit, and the district court therefore did not err in granting summary judgment.

Affirmed.