

2021 WL 6884661 (Or.) (Appellate Brief)  
Supreme Court of Oregon.

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review,  
v.  
Kenneth L. HERSHEY, Defendant-Appellant, Petitioner on Review.

No. S067825.  
July 20, 2021.

Klamath County Circuit Court Case No. 17CR66503  
Court of Appeals No. A166962  
Animal Legal Defense Fund, Oregon Humane Society  
Review of the Decision of the Court of Appeals  
Opinion Filed: November 16, 2018  
Author of Opinion: Tookey, Judge  
Before: Armstrong, Presiding Judge, Tookey, Judge, and Shorr, Judge  
Appeal from a Klamath County Circuit Court Judgment, the Honorable Andrea M. Janney

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## \*1 BRIEF OF AMICUS CURIAE

### STATEMENT OF INTEREST

The Animal Legal Defense Fund (“ALDF”) (<http://www.aldf.org/>) is a non-profit organization that works to protect the lives and advance the interests of animals through the legal system. ALDF pursues its mission on behalf of its over 300,000 members and supporters across the country. ALDF files high-impact lawsuits to protect animals from harm, provides free legal assistance and training regarding crimes against animals to prosecutors to assure that animal abusers are held accountable for their crimes, supports robust animal protection legislation, and fights legislation that is harmful to animals. ALDF's priority is to protect the rights of animals, who enrich humans' lives in immeasurable ways. ALDF has also worked since its inception to further the

growth of animal law as a field, and its application to common legal scenarios. Foundational to animal law is the belief that animals have legal significance by reason of their existence as sentient beings, and that significance should be acknowledged by the law where applicable. In the present case, ALDF writes to address the legal significance of animal rights to the concept of pre-conviction forfeiture in cases of animal abuse.

\*2 The Oregon Humane Society (“OHS”) is the Northwest's oldest and largest humane society. Founded in 1868, OHS is dedicated to improving the lives of animals by facilitating adoptions of companion animals, investigating reports of animal abuse and neglect, enforcing animal welfare laws and providing humane education. OHS also is home to the Holman Medical Center, a state-of-the-art animal hospital where, in partnership with the Oregon State University College of Veterinary Medicine, veterinary students complete primary care rotations under the guidance of a full-time OSU faculty member. Over the years, OHS has provided veterinary services, emergency medical treatment, and daily care to hundreds of animals that have been impounded pending resolution of criminal proceedings. OHS pursues its mission with the support of over 18,000 members and receives no tax dollars to fund its programs.

### QUESTION PRESENTED

Is a proceeding under ORS 167.347 to recover the costs of care for seized and impounded animals a forfeiture proceeding of the sort the drafters of the Oregon Constitution would have understood to require a jury trial under Article I, section 17?

### \*3 PROPOSED RULE OF LAW

Article I, section 17 does not apply to proceedings under ORS 167.347.

### STATEMENT OF THE CASE

Defendant seeks review of a Court of Appeals decision upholding a trial court order providing for the forfeiture of 22 dogs, three horses, and seven chickens to the Klamath Humane Society. *State/Klamath County v. Hershey*, 304 Or App 56, 58, 466 P3d 987 (2020). The animals had been seized and impounded by Klamath County Animal Control, and the County had filed a motion for forfeiture under ORS 167.347, which provides:

(1) (a) If an animal is impounded pursuant to ORS 167.345 and is being held by a county animal shelter or other animal care agency pending outcome of a criminal action charging a violation of ORS 167.315 to 167.333, 167.340, 167.355, 167.365 or 167.428, prior to the final disposition of the criminal action, the county or other animal care agency or, on behalf of the county or other animal care agency, the district attorney, may file a petition in the criminal action requesting that the court issue an order forfeiting the animal to the county or other animal care agency prior to the final disposition of the criminal action.

(2) (a) Upon receipt of a petition pursuant to subsection (1) of this section, the court shall set a hearing on the petition. The hearing shall be conducted within 14 days after the filing of the petition, or as soon as practicable.

\*\*\*\*\*

\*4 (3) At a hearing conducted pursuant to subsection (2) of this section, the petitioner shall have the burden of establishing probable cause to believe that the animal was subjected to a violation of ORS 167.315 to 167.333, 167.340, 167.355, 167.365 or 167.428. The defendant or any other claimant shall have an opportunity to be heard before the court makes its final finding. If the court finds that probable cause exists, the court shall order immediate forfeiture of the animal to the petitioner, unless the defendant or any other claimant, within 72 hours of the hearing, posts a security deposit or bond with the court clerk in an

amount determined by the court to be sufficient to repay all reasonable costs incurred, and anticipated to be incurred, by the petitioner in caring for the animal from the date of initial impoundment to the date of trial.

In the Court of Appeals, defendant assigned error to the trial court's denial of his motion for a jury trial. *Id.* at 59-60. Citing *State v. 1920 Studebaker Touring Car, et al.*, 120 Or 254, 263, 251 P 701 (1927), and *State v. Curran*, 291 Or 119, 628 P2d 1198 (1981), defendant likened the proceeding as one for the forfeiture of property as punishment for wrongdoing and argued that, “as a blanket rule, Article I, section 17, requires a jury trial in forfeiture proceedings because those proceedings would have been tried to a jury in 1857.” 304 Or App at 62. The Court of Appeals affirmed the trial court's ruling, holding that an action under ORS 167.347 was unlike the forfeiture proceedings previously addressed by this court and, therefore, was not governed by Article I, section 17. *Id.* at 72. Defendant sought review, which this court granted. *State/Klamath County v. Hershey*, 366 Or 825, 470 P3d 368 (2020).

## \*5 SUMMARY OF ARGUMENT

Article I, section 17, of the Oregon Constitution guarantees that “in all civil cases, the right to Trial by Jury shall remain inviolate.” This court has held that Article I, section 17, applies to only those classes of cases in which the right to a jury trial was customary at the time the constitution was adopted, or cases of like nature. In this case, the Court of Appeals correctly held that Article I, section 17, does not apply to a proceeding brought under ORS 167.347, because ORS 167.347 creates a class of proceeding that did not exist at the time the constitution was adopted, and is unlike the type of common-law forfeiture proceedings this court has previously analyzed under Article I, section 17.

The practice of forfeiture in the United States at the time the Oregon Constitution was drafted traced back to English law, which recognized three concepts of forfeiture, all of which served a punitive purpose. There was no common-law mechanism for the *remedial* forfeiture of animals whose owner had not provided proper care. Animal shelters and care facilities did not exist at the time the Oregon Constitution was drafted, and there were no mechanisms for the seizure and impoundment of abused or neglected animals.

Since the late 19th century, however, animal welfare and animal rights movements have led to the enactment of laws designed to protect animals \*6 from cruelty, including provisions for placing abused and neglected animals in the care of specialized facilities pending the outcome of criminal proceedings against alleged abusers. Those facilities in turn have their own obligations to ensure the animals placed in their care do not suffer further abuse - costly obligations that, were it not for the seizure of the animals, otherwise would fall to the animals' owner.

ORS 167.347 provides a mechanism for the agency to pass those obligations back to the owner through the assessment of a bond to cover the costs of care. Forfeiture of the animals to the agency for disposition occurs only when the owner is unwilling or unable to post the bond and is solely for the purpose of allowing the agency to defray its costs by rehoming or otherwise appropriately disposing of the animals. Thus, the traditional concepts of punitive forfeiture are inapplicable to proceedings to enforce ORS 167.347, and the case law upon which defendant relies to assert a right to a jury trial is neither relevant nor controlling. This court should affirm the decision of the Court of Appeals.

## ARGUMENT

Article I, section 17, of the Oregon Constitution provides: “In all civil cases the right of Trial by Jury shall remain inviolate.” This court has recognized, however, that Article I, section 17, “does not give \* \* \* a right \*7 to a jury trial in *all* civil matters.” *Molodyh v. Truck Insurance Exchange*, 304 Or 290, 295, 744 P2d 992 (1987) (emphasis in original). Rather, “a jury trial is guaranteed only in those classes of cases in which the right was customary at the time the [Oregon] constitution was adopted or in cases of like nature.” *Id.*, 304 Or at 295. In other words, the fact that a court proceeding has certain “civil” attributes is

not enough to implicate Article I, section 17. Instead, the civil action at issue, or one of an analogous nature, must have existed when the Oregon Constitution was adopted. *Horton v. OHSU*, 359 Or 168, 243, 376 P3d 998 (2016); *Greist v. Phillips*, 322 Or 281, 293-95, 906 P2d 789 (1995). The Court of Appeals correctly concluded that an action under ORS 167.347 was unlike any that existed at the time the constitution was adopted. The Court of Appeals also correctly concluded that a proceeding to enforce the payment of a bond to cover the cost of care for impounded animals or risk forfeiture was not a true “forfeiture” proceeding for purposes of Article I, section 17.

### A. Forfeiture of Animals at Common Law

As the Court of Appeals correctly observed, a claim by an animal care agency to recoup its costs of care for neglected and abused animals, either through the posting of a bond or forfeiture in lieu of bond, “is not a claim that predated Article I, section 17.” *State/Klamath County v. Hershey*, 304 Or App 56, 63, 466 P3d 987, 994 (2020). Although the concept of forfeiture \*8 has ancient roots, the forfeiture laws with which the Oregon Constitution's drafters would have been most likely familiar were the punitive forfeitures practiced in England: escheat of estate to the sovereign as punishment for a felony or treason; forfeiture of inanimate or animate property that caused accidental death (the doctrine of deodand); and statutory forfeiture of property used in violation of the customs and revenue laws. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 US 663, 682, 94 S Ct 2080, 40 L Ed 2d 452 (1974). All three types of forfeiture served, at least in part, a common punitive purpose. *Austin v. United States*, 509 US 602, 611, 113 S Ct 2801, 125 L Ed 2d 488 (1993).

Of the three, the only type of forfeiture that was regularly practiced in the United States was the last: forfeiture of property used in furtherance of a felony, pursuant to statute. *Id.*; see also *C.J. Hendry Co. v. Moore*, 318 US 133, 139, 63 S Ct 499, 87 L Ed 663 (1943) (“Long before the adoption of the Constitution the common law courts in the Colonies - and later in the states during the period of Confederation - were exercising jurisdiction *in rem* in the enforcement of forfeiture statutes.”); *Parker-Harris Co. v. Tate*, 135 Tenn 509, 188 SW 54 (1916) (noting that “[t]o the credit of American jurisprudence, from the outset the doctrine [of deodand] was deemed to be so repugnant to our ideas of justice as not to be included as a part of the common law of this country.”).

\*9 Notably, *none* of the forms of forfeiture with which the drafters would have been familiar served the remedial purpose of caring for and rehabilitating animals seized from a neglectful or abusive owner pending a criminal proceeding against the owner. As discussed below, that was in no small part because the drafters would have little reason to consider the welfare of animals apart from their value as property.

### B. Animal Rights and Animal Welfare

Animal neglect and abuse were not crimes under common law. *People v. Harris*, 405 P3d 361, 371 (Colo App 2016). This is in part because Western tradition generally viewed animals as morally indistinguishable from inanimate objects, devoid of both reason and feeling, and therefore not susceptible to abuse. Sande L. Buhai, *Pets As Property: Signs of Change in the Law of Judgment Collections*, 26 *Animal L.* 171, 174-75 (2020); see also Margit Livingston, *Desecrating the Ark: Animal Abuse and the Law's Role in Prevention*, 87 *Iowa L. Rev.* 1, 9 (2001) (reviewing various philosophers' views regarding animal sentience). Indeed, to the extent any laws addressed an animal's status, those laws gave the greatest protection to those animals deemed “useful,” such as cattle and sheep. David Favre, *Living Property: A New Status for Animals Within the Legal System*, 93 *Marq. L. Rev.* 1021, 1026 (2010). Even then, what animal owners chose to do with their own property was their own business. Diane L. Beers, *For the \*10 Prevention of Cruelty: The History and Legacy of Animal Rights Activism in the United States 20* (Swallow Press 2006).

In the United States, it was not until the late nineteenth century that “there was a clear transition in the laws dealing with animals - from mere protection of the property interests of owners and the economic value of those interests, which did not restrict what an owner could do to her own animal, to concerns about the animals themselves, regardless of the actor.” Favre, 93 *Marq.*

L. Rev. at 1027. The first organization dedicated to the protection of animals in the United States was not established until 1866 - seven years after the adoption of the Oregon Constitution - when Henry Bergh established the American Society for the Protection of Animals (“ASPCA”) in New York. The first legislation for the protection of animals was enacted in 1867, again in New York. N.Y. Rev. Stat. §§ 375.2-.9 (1867).<sup>1</sup> Oregon did not have a humane society until 1868, a full nine years after the adoption of the state constitution. At the time, it was one of only \*11 four such organizations in the country. <https://www.oregonhumane.org/about-us/our-story> (last visited June 25, 2021).

In the years since the founding of the ASPCA and the passage of early anti-abuse legislation, the notion that animals are more than mere property has gained significant traction in society. But even into the late twentieth century, the notion that animals were sentient beings capable of suffering and, therefore, entitled to legal status, was considered a radical idea. Peter Singer, *Animal Liberation at 30*, New York Review of Books, Vol. 50, No. 8 at 1.

### C. Current Oregon Law Regarding Animal Rights and Status as Property

Animal rights in Oregon have come a long way since 1859. The Oregon legislature recently declared that “[a]nimals are sentient beings capable of experiencing pain, stress and fear”; that “[t]he suffering of animals can be mitigated by expediting the disposition of abused animals that would otherwise languish in cages while their defendant owners await trial”; and that “[t]he State of Oregon has an interest in facilitating the mitigation of costs of care incurred by a government agency, a humane investigation agency or its agent or a person that provides treatment for impounded animals[.]” ORS 167.305(1), (2), (5).

\*12 This court has also recognized the “distinctive nature of animals as property.” *State v. Newcomb*, 359 Or 756, 767, 375 P3d 434 (2016). In *Newcomb*, the defendant had argued her dog, Juno, was “no different than a folder or a stereo or a vehicle or a boot” or other items of personal property. *Id.*, 359 Or at 761. This court disagreed:

A dog is personal property under Oregon law, a status that gives a dog owner rights of dominion and control over the dog. *But Oregon law simultaneously limits ownership and possessory rights in ways that it does not for inanimate property. Those limitations, too, are reflections of legal and social norms. Live animals under Oregon law are subject to statutory welfare protections that ensure their basic minimum care, including veterinary treatment. The obligation to provide that minimum care falls on any person who has custody and control of a dog or other animal.*

359 Or at 771 (emphasis added).

Significantly, this court also observed that “[n]ot all things that can be owned and possessed as personal property merit the same constitutional protection in the same circumstances.” *Id.* at 766.<sup>2</sup>

As relevant to the present case, this court and the Court of Appeals have held the “victim” of animal abuse and or neglect is *not* the animal's owner or the public at large but, rather, *the animals themselves*, thus \*13 justifying multiple convictions for the abuse or neglect of multiple animals. *State v. Nix*, 355 Or 777, 797-98, 334 P3d 437 (2014), *vacated* 356 Or 768 (2015); *State v. Hess*, 273 Or App 26, 35, 359 P3d 288 (2015), *rev den* 358 Or 529 (2016) (adopting and applying reasoning in *Nix*); *State v. Setere*, 306 Or App 654, 476 P3d 117 (2020), *rev den* 367 Or 535 (2021). Recognizing the abused animal as the *victim* of the charged crime, and not merely a piece of property bearing some relation to the crime, is key to understanding why the proceeding described in ORS 167.347 is unlike any common-law forfeiture proceeding and, therefore, not subject to the jury-trial rights of Article I, section 17.

#### D. Unlike Traditional Forfeiture Proceedings, ORS 167.347 Serves a Solely Remedial Purpose

As in the Court of Appeals, defendant has seized on the legislature's use of the term “forfeiture” in ORS 167.347 and argues that, under *Studebaker*, *Curran*, and the ancient sources of common law underlying those cases, he is entitled to a jury trial. But the “forfeiture” contemplated by ORS 167.347 is wholly unlike forfeitures at common law. It is not designed to punish the owner of impounded animals but, rather, to remediate the costs of caring for the animals.

A peace officer who has entered premises pursuant to a search warrant or other lawful manner may seize and impound any animal for whom “there \*14 is probable cause to believe [the animal] is being subject to treatment in violation” of the statutes defining animal abuse, animal neglect, and animal abandonment.” ORS 167.345(2). A court may order seized animals be held “at any animal facility in the state,” and the receiving facility is required to provide the impounded animals with adequate food, water, and veterinary care. ORS 167.345(4)(a). *See also* Newcomb, 359 Or at 771 (“The obligation to provide that minimum care falls on any person who has custody or control of a dog or other animal.”). Because the animals are not owned by the receiving facility, however, that facility cannot mitigate or recoup its costs by finding adoptive homes for the animals. Thus, the impounding facility must bear the costs of care that, but for the animals' seizure, would be the legal responsibility of their owner, and it must bear those costs for the pendency of what could be lengthy criminal proceedings.

To help defray those costs, the impounding facility may petition the court under ORS 167.347 to have the animals in its care “forfeited” to its possession. ORS 167.347 sets out specific procedures the petitioner must follow and requires the petitioner prove probable cause to believe that the animal had been subjected to a violation of one or more of the statutes defining animal offenses. ORS 167.347(3). Significantly, although ORS 167.347(3) provides that, upon proof of probable cause, “the court shall order immediate forfeiture of the animal to the petitioner,” the statute further \*15 provides that the defendant-owner can *avoid* forfeiture by posting a security deposit or bond “in an amount determined by the court to be sufficient to repay all reasonable costs incurred, and anticipated to be incurred, by the petitioner in caring for the animal from the date of the initial impoundment to the date of trial.” *Id.* If the forfeiture were designed to be punitive, the Oregon legislature would not have included a mechanism by which the defendant-owner could avoid the forfeiture.

To be sure, ORS 167.347 applies only to animals who are being held pending final disposition of a criminal prosecution - but it does not prescribe forfeiture as a *punishment* for any of those offenses. A separate statute addresses punitive forfeiture:

In addition to and not in lieu of any other sentence it may impose, a court may require a defendant convicted under ORS 167.315 to 167.333, 167.340, 167.355 or 167.365 to forfeit any rights of the defendant in the animal subjected to the violation[.]

ORS 167.350(1)(a).

In short, the sole purpose of a proceeding under ORS 167.347 is to allow for the care and feeding of animals alleged to be the victims of a crime, and to ensure that the agency in whose care those animal victims have been entrusted is not subjected to financial hardship. As this court has previously observed, “courts have always possessed summary powers to prevent hardships, irregularities and abuses, which would otherwise take \*16 place in the course of proceedings” and, “[a]s to them, the right to a trial by jury has never existed[.]” *Studebaker*, 120 Or at 262.

#### CONCLUSION

For the reasons set forth above, amici ALDF and OHS ask this court to affirm the decision of the Court of Appeals.

Respectfully submitted, s/ *David B. Rosengard*

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### Footnotes

- 1 Some commentators point to a 1641 enactment by the Massachusetts Bay Colony as the first anti-cruelty statute in the New World, but case law at the time indicates that “the statute was principally concerned with preserving public morals” and not with protecting the animals. Mary Walsh, *Feeding Fido: The Case for Restitution in Ohio Animal Cruelty Convictions*, 26 *Animal L.* 417, 422-23 (2020); *see also* Beers at 20 (“Liberties 92 and 93 unquestionably established a significant legal precedent for animals, but the motivating principles behind them, property and religion, underscored decidedly human interests.”).
- 2 In *Newcomb*, this court was analyzing the application of the search-and-seizure provisions of the Oregon and federal constitutions, but the reasoning is equally applicable to the application of Article I, section 17, to a proceeding under ORS 167.347.