

FILED
SUPREME COURT
STATE OF WASHINGTON
6/5/2023 3:49 PM
BY ERIN L. LENNON
CLERK

Docket No. 54741-74

SUPREME COURT OF THE STATE OF WASHINGTON

KAITLYN FLYNN, et al.,

Plaintiffs-Petitioners,

-against-

WOODVILLE ANIMAL HOSPITAL, P.S., et al.,

Defendant-.

**MEMORANDUM OF AMICUS CURIAE
ANIMAL LEGAL DEFENSE FUND
IN SUIPPORT OF PETITION FOR REVIEW**

ANIMAL LEGAL DEFENSE FUND
Daniel Waltz, WSBA No. 45708
700 Pennsylvania Avenue SE
Washington, DC 20003
(707) 795-2533

Christopher A. Berry (SBN 283987)
525 East Cotati Avenue
Cotati, CA 94931

*Attorneys for Amicus,
Animal Legal Defense Fund*

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. SUMMARY OF INTERESTS AND IDENTITY
OF AMICUS CURIAE..... 1

III. SPECIFIC ISSUE ADDRESSED..... 2

IV. STATEMENT OF THE CASE..... 2

V. ARGUMENT 3

 A. A PLAINTIFF IS NOT MADE WHOLE WITHOUT ABSENT
 COMPENSATION FOR THE NEGLIGENT DEATH OF A
 COMPANION ANIMAL CONSIDERED TO BE A MEMBER
 OF THE FAMILY..... 3

 B. THE AVAILABILITY OF EMOTIONAL DISTRESS
 DAMAGES IN COMPANION ANIMAL CASES IS A
 MATTER OF PUBLIC INTEREST. 8

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

<i>Barking Hound Village, LLC v. Monyak</i> , 299 Ga. 144 (2016)	9
<i>Hendrickson v. Tender Care Animal Hosp. Corp.</i> , 176 Wn. App. 757, 312 P.3d 52 (2013)	5, 9
<i>McDougall v. Lamm</i> , 211 N.J. 203 (2012).....	9
<i>Pickford v. Masion</i> , 124 Wn. App. 257, 98 P.3d 1232 (2004)	5, 7, 9
<i>Repin v. State</i> , 188 Wn.2d 1023, 398 P.3d 1137 (2017)	5
<i>Repin v. State</i> , 198 Wn. App. 243, 392 P.3d 1174 (2017)	5, 7, 9
<i>Sherman v. Kissinger</i> , 146 Wn. App. 855, 195 P.3d 539 (2008)	5, 7, 9
<i>Shoemake ex rel. Guardian v. Ferrer</i> , 168 Wn.2d 193, 225 P.3d 990 (2010)	4
<i>Stephens v. Target Corp.</i> , 482 F.Supp.2d 1234 (W.D. Wash. 2007)	7
<i>Strickland v. Medlen</i> , 397 S.W.3d 184 (Tex. 2013)	9
<i>Womack v. Von Rardon</i> , 133 Wn. App. 254, 135 P.3d 542 (2006)	9

SECONDARY AUTHORITIES

Wagman and DeYoung, <i>Actions Involving Injuries to Animals</i> , 90 AM. JUR. PROOF OF FACTS 3d 1	8
--	---

David K. DeWolf & Keller W. Allen, WASHINGTON PRACTICE: TORT LAW AND PRACTICE § 15.41 (3d ed. 2006).....	4
<i>Recovery of Damages for Emotional Distress Due to Treatment of Pets and Animals</i> , 91 A.L.R. 5th 545.....	8
RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 46 (2012).....	8
RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 47 (2012).....	8

I. INTRODUCTION

Unlike other forms of property, companion animals are valued for the emotional bond they share with their human families. Yet several Court of Appeals decisions have denied emotional distress damages for negligently killed companion animals despite this Court's recognition that the guiding principle of tort law is to make a negligence victim as whole as possible.

The Court of Appeal's decision in this case does not grapple with this guiding principle of tort law, but instead engages in a game of judicial telephone by relying on cases that also did not root their analysis in that guiding principle. The ultimate result is that a plaintiff may only be entitled to a trifling amount of damages in cases involving severe emotional distress following the negligent killing of a beloved animal. This Court should accept review in this case to address this legal anomaly.

II. SUMMARY OF INTERESTS AND IDENTITY OF AMICUS CURIAE

The Animal Legal Defense Fund (ALDF) is a national non-profit organization with a mission to protect the lives and

advance the interests of animals through the legal system. ALDF has attorneys and supporting members in Washington and across the nation. ALDF is involved in every aspect of animal law and has nearly fifty years of experience litigating cases and analyzing legal issues concerning animals. ALDF's practical expertise includes tort damages relating to companion animal death and the legal status of animals which are squarely at issue in this case.

III. SPECIFIC ISSUE ADDRESSED

Did the Court of Appeals err in refusing to reinstate the common law claim of negligent infliction of emotional distress against all Defendants?¹

IV. STATEMENT OF THE CASE

This case involves a lawsuit against veterinarians and veterinary corporations for NIED, professional negligence, breach of veterinary contract, and corporate negligence stemming from the death of Kaitlyn and Kevin Flynn's dog, Clementine. Clementine was an emotional support animal that

¹ ALDF's submission of a brief on only the damages issue does not signal that the corporate negligence issue is unimportant. Rather, it simply indicates ALDF's eagerness to share its broad and specific expertise relating to tort damages in companion animal cases.

the Flynnns treated like a member of the family and spent thousands of dollars on for veterinary care and comfort. Clementine died after a surgery performed by the defendants. As a result of her death, Mr. Flynn subsequently experienced emotional distress for several months, and that emotional distress manifested with physical symptomatology and impaired his personal functioning.

The Court of Appeals affirmed the trial court’s dismissal of the NIED claim, quoting prior appellate case law for the proposition that “a pet owner has no right to emotional distress damages or damages for loss of human-animal bond based on the negligent death or injury to a pet.”

V. ARGUMENT

A. A PLAINTIFF IS NOT MADE WHOLE WITHOUT ABSENT COMPENSATION FOR THE NEGLIGENT DEATH OF A COMPANION ANIMAL CONSIDERED TO BE A MEMBER OF THE FAMILY.

This Court should grant review because the Court of Appeal’s decision undermines longstanding precedent that “[t]he guiding principle of tort law is to make the injured party as whole as possible through pecuniary compensation.” *Shoemake ex rel. Guardian v. Ferrer*, 168 Wn.2d 193, 198, 225

P.3d 990, 992-95 (2010, quoting David K. DeWolf & Keller W. Allen, WASHINGTON PRACTICE: TORT LAW AND PRACTICE § 15.41, 491 (3d ed. 2006).

In cases involving companion animal death, the lost emotional bond to the animal—and ensuing emotional distress—is precisely the injury that warrants compensation. Animals hold a unique status in our society and in our families that sets them apart from other types of property. People regard animals as family members and their death can cause emotional distress comparable to the loss of a human family member. According to the Harris Poll reached a similar result, finding that 95 percent of people consider companion animals to be a member of the family. Larry Shannon-Missal, *More Than Ever, Pets are Members of the Family*, THE HARRIS POLL (2011), <https://perma.cc/27CU-7X93>. The American Veterinary Medical Association (AVMA) reached a similar result, finding that 80 percent of Americans view their “pets” as “family members” while another 17 percent considered them to be “companions” and only 3 percent regarded them as “property.”

AVMA PET OWNERSHIP AND DEMOGRAPHICS SOURCEBOOK,
p.16 (2017-2018 ed.).²

While the Washington Supreme Court has not reviewed the question of emotional distress damages for companion animals, the Court of Appeals has weighed in that “emotional distress damages or damages for loss of human-animal bond” are not available in cases of negligence. Slip op. at 10, citing *Repin v. State*, 198 Wn. App. 243, 263-64, 392 P.3d 1174, 1184 (2017), *review denied Repin v. State*, 188 Wn.2d 1023, 398 P.3d 1137 (2017). This outcome stands at odds with the compensatory principle of tort law, which is not discussed in the appellate decision in this case nor the previous holdings that it relies on. *See Pickford v. Mason*, 124 Wn. App. 257, 259-63, 98 P.3d 1232, 1233-35 (2004); *Sherman v. Kissinger*, 146 Wn. App. 855, 870-77, 195 P.3d 539, 546-50 (2008); *Hendrickson v. Tender Care Animal Hosp. Corp.*, 176 Wn. App. 757, 762-67, 312 P.3d 52, 54-57 (2013).

² It is consistent for the law to generally regard animals as property while recognizing their special status and unique value to owners who regard them as family.

By precluding damages for emotional distress or loss of human-animal bond, the Court of Appeals decision effectively devalues relationships with companion animals to virtually nothing in many circumstances.

While the Court of Appeals decision in this case specifically pertains to NIED, there is no clearly established alternative to account for the value of emotional bond or distress. In cases involving trespass or conversion of personal property, courts may award damages based on market value, replacement value if there is no market value, or intrinsic value if there is neither market nor replacement value. *McCurdy v. Union Pac. R.R.*, 68 Wn.2d 457 (1966). However, companion animals often have no meaningful market value, particularly when they are sick, elderly, sterilized, or not a “designer” breed.³ Companion animals also have no replacement value because the special bond, history, and personality of an animal is irreplaceable. Lastly, the case law regarding animals’ intrinsic value provides more confusion than clarity about the

³ Put another way, companion animals tend to have market value only under specific circumstances such as when they are very young, marketable for breeding, or trained to perform a useful task.

proper assessment of emotional bonding and distress in tort cases:

[Testimony] concerning loss of the human-animal bond is not admissible under *Pickford*, [but] testimony about whether Ruby is irreplaceable and Ruby's intrinsic value can be admissible. However, the trial court should be mindful of the caselaw that precludes establishing damages on the basis of sentiment or loss of companionship.

See e.g., Sherman, 146 Wn. App. at 874 n.10, 195 P.3d at 549 n.10. In a similar case, a federal district court judge struggled to clearly explain Washington law, saying that “a jury could consider the dog’s utility...in assessing it’s intrinsic value” but that “such an assessment is confined by the limitation on sentimental or fanciful value.” *Stephens v. Target Corp.*, 482 F.Supp.2d 1234, 1236 (W.D. Wash. 2007).

This Court’s stewardship on this issue is sorely needed to ensure alignment with the guiding principles of tort law. It should heed Presiding Chief Judge Fearing’s concurrence in *Repin* urging this Court to review the issue of emotional distress damages:

Principles underlying the law of damages for breach of contract and values basic to the law of negligent infliction of emotional distress call for an award of emotional distress damages to the owner

of a companion animal when a veterinarian commits malpractice and breaches the implied covenant of competent care in the treatment of the pet.

198 Wn. App. at 279-80, 392 P.3d at 1191-92.

B. THE AVAILABILITY OF EMOTIONAL DISTRESS DAMAGES IN COMPANION ANIMAL CASES IS A MATTER OF PUBLIC INTEREST.

The issue of damages in torts involving animals is the subject of widespread discussion in the legal community and the general public. The legal community discussion includes dozens of law review articles, entries in widely read publications like *American Jurisprudence* (*see, e.g.,* Wagman and DeYoung, *Actions Involving Injuries to Animals*, 90 AM. JUR. PROOF OF FACTS 3d 1), and annotations in the Restatements (*see, e.g.,* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM §§ 46-47 (2012)).

Many of these secondary sources cite the same Court of Appeals cases relied upon in the present case, effectively making the Court of Appeals the state's voice in this discussion of public importance. *See, e.g., Recovery of Damages for Emotional Distress Due to Treatment of Pets and Animals*, 91 A.L.R. 5th 545 (citing *Hendrickson, Pickford, Repin, Sherman,*

and *Womack v. Von Rardon*, 133 Wn. App. 254, 135 P.3d 542 (2006)).

Additionally, several state supreme courts have found the topic of tort damages in companion animal cases to be worth reviewing in recent years. *See Barking Hound Village, LLC v. Monyak*, 299 Ga. 144 (2016); *Strickland v. Medlen*, 397 S.W.3d 184 (Tex. 2013); *McDougall v. Lamm*, 211 N.J. 203 (2012). Case law from other states that restricts damages often relies on incongruous logic. Such was the case in *Strickland* where the Supreme Court of Texas acknowledged that sentimental damages would be available in that state for a destroyed family heirloom taxidermy dog, but not for a living dog. *See* 397 S.W.3d at 194.

The issue of damages for companion animals is also of interest to the general public in media coverage in this state and throughout the country, oftentimes fueled by developments in the legal realm. The Court of Appeals decision in this case generated news coverage. *See* Brennan, Riley, *Man's Best Friend?: State Court Rules Pets Are Property, Dismissing Emotional Distress and Contract Claims Against Veterinary*

Entities, LAW.COM (Mar. 13, 2023), <https://perma.cc/GPM9-N5PW>. In 2017, this Court's denial of a petition for review in *Repin* generated publicity. See Nolen, R. Scott, *Court rejects emotional distress claims for dog's death*, AVMA (Sept. 27, 2017) <https://perma.cc/7DYB-T77E>.

Elsewhere in the country, the Casper Star Tribune covered a recent Wyoming Supreme Court hearing whether emotional distress damages were available in a case where a family helplessly watched their dogs die in illegally set snares on public land. Saric, Sofia, *Wyoming Supreme Court hears appeal at Casper College*, CASPER STAR TRIBUNE (Apr. 12, 2023), <https://perma.cc/E8ST-T8DY>.

The availability of emotional distress damages is not just a private concern of the aggrieved pet owners, but a matter of public interest in Washington and throughout the country that speaks to our societal values and commitment to fairness. This Court should grant review.

CONCLUSION

Unlike other forms of property, companion animals share a familial emotional bond with their humans. The Court of

Appeals decisions in this state prohibiting recognition of emotion distress damages deviates from the guiding principle of tort law to make victims of wrongdoing as whole as possible. This Court should accept review in this case to exercise stewardship over this important legal question.

Respectfully submitted this 5th day of June 2023.

The first undersigned attorney certifies that this brief contains 1,836 words.

s/ Daniel Waltz

Daniel Waltz, WSBA No. 45708
ANIMAL LEGAL DEFENSE FUND
700 Pennsylvania Avenue SE
Washington, DC 20003

Christopher A. Berry
ANIMAL LEGAL DEFENSE FUND
525 E. Cotati Ave.
Cotati, CA 94931

Attorneys for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2023, I caused a copy of the foregoing MOTION OF ANIMAL LEGAL DEFENSE FUND TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER was served on the following below by filing via the Washington State Appellate Court's Electronic Filing Portal:

Adam P. Karp: adam@animal-lawyer.com

Kyle Rekofke: krekofke@grsm.com

John C. Versnel and Andrew Gustafson: jcv@leesmart.com; ag@leesmart.com; cmt@leesmart.com; aa@leesmart.com; sjc@leesmart.com

Marilee C. Erickson: merickson@rmlaw.com; adecaracena@rmlaw.com

s/ Daniel Waltz

Daniel Waltz, WSBA No. 45708
Animal Legal Defense Fund
700 Pennsylvania Avenue SE
Washington, DC 20003

Attorneys for Amicus Curiae

ANIMAL LEGAL DEFENSE FUND

June 05, 2023 - 3:49 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 101,863-1
Appellate Court Case Title: Kaitlyn Flynn and Kevin Flynn v. Woodinville Animal Hospital, et al.

The following documents have been uploaded:

- 1018631_Briefs_20230605153051SC604134_7769.pdf
This File Contains:
Briefs - Amicus Curiae
The Original File Name was 2 Brief Flynn ALDF Amicus.pdf
- 1018631_Motion_20230605153051SC604134_0104.pdf
This File Contains:
Motion 1 - Amicus Curiae Brief
The Original File Name was 1 Motion Flynn ALDF Amicus.pdf

A copy of the uploaded files will be sent to:

- adam@animal-lawyer.com
- adecaracena@rmlaw.com
- ag@leesmart.com
- jcl@leesmart.com
- jcv@leesmart.com
- krekofke@grsm.com
- ltl@leesmart.com
- merickson@rmlaw.com
- sr@leesmart.com

Comments:

Sender Name: Daniel Waltz - Email: dwaltz@aldf.org

Address:

ANIMAL LEGAL DEFENSE FUND
THE YARD, 700 PENNSYLVANIA AVENUE SE
WASHINGTON, DC, 20003

Phone: 707-795-2533 - Extension 1066

Note: The Filing Id is 20230605153051SC604134