

No. COA11-1102

NORTH CAROLINA COURT OF APPEALS

NANCY L. SHERA & HERBERT K.)
SHERA, SR.,)
)
Plaintiffs-Appellants,)
)
v.)
)
NORTH CAROLINA STATE UNIVERSITY)
VETERINARY TEACHING HOSPITAL,)
)
Defendant-Appellee.)

From The North Carolina
Industrial Commission
I.C. No. TA-21244

AMICUS CURIAE ANIMAL LEGAL DEFENSE
FUND BRIEF REGARDING VALUATION OF LACI

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OF NORTH CAROLINA

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AMICUS CURIAE ANIMAL LEGAL DEFENSE

FUND BRIEF REGARDING VALUATION OF LACI

ISSUE PRESENTED

I. DID THE INDUSTRIAL COMMISSION COMMIT REVERSIBLE ERROR IN REFUSING TO APPLY INTRINSIC VALUE TO DETERMINE THE PLAINTIFFS' DAMAGES RELATED TO THE DEATH OF LACI?

STATEMENT OF THE CASE

The Statement of the Case as set forth in Plaintiffs-Appellants' Brief in this matter is hereby adopted and incorporated as though fully set forth herein. N.C.R. App. P. 28(f).

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

The Statement of the Grounds for Appellate Review as set forth in Plaintiffs-Appellants' Brief in this matter is hereby adopted and incorporated as though fully set forth herein. N.C.R. App. P. 28(f).

STATEMENT OF THE FACTS

The Statement of the Facts as set forth in Plaintiffs-Appellants' Brief in this matter is hereby adopted and incorporated as though fully set forth herein. N.C.R. App. P. 28(f).

STATEMENT OF INTEREST OF ANIMAL
LEGAL DEFENSE FUND AS AMICUS

The Animal Legal Defense Fund (ALDF) is a national non-profit organization of attorneys and supporting members that specializes in the just treatment of animals under the law. ALDF's mission is to protect the lives and advance the interests of animals through the legal system. ALDF is involved in every aspect of animal law and has more than thirty years of experience litigating cases and analyzing legal issues concerning animals. ALDF and its member attorneys have

litigated many cases involving the exact issue presented by this case.

ARGUMENT

THE INDUSTRIAL COMMISSION COMMITTED REVERSIBLE ERROR
IN REFUSING TO APPLY INTRINSIC VALUE TO DETERMINE THE
PLAINTIFFS' DAMAGES RESULTING FROM LACI'S DEATH?

In a case like this one, an animal's market value is not the appropriate measure of damages. Compensatory damages beyond market value must be awarded here because Defendant deprived the Sheras of a special kind of "property"—Laci, their longtime companion. Unlike other property, Laci cannot be replaced in the marketplace. Indeed, like any companion, she cannot be truly replaced at all. Laci was indisputably distinct from other property: she was a living, breathing, feeling individual with whom the Sheras formed a meaningful relationship. The Sheras, like millions of companion animal owners, feel that when they lost Laci, they lost an important member of their family. There is no market value for Laci, and her true, actual value far exceeds the cost of a replacement companion of the same species.

To fulfill the basic goal of the tort system—to make the plaintiff whole again—the trier of fact should consider all identifiable aspects of the Shera's loss, including the value they placed on Laci. This method of calculating Laci's value and the Sheras' damages is described in different jurisdictions

as "actual value to the owner," "intrinsic value," "special value," and "peculiar value."

This special valuation approach is consistent not only with traditional rules regarding damages, but also with the way courts and legislatures recognize the special place of companion animals in society. The Industrial Commission should have applied intrinsic value in order to determine the appropriate damages for Plaintiffs.

I. COMPANION ANIMALS AND THE LAW

A. Animals' Status As "Property" Under Law Does Not Limit Or Prefigure The Damages Available.

The fact that companion animals are considered personal property is no barrier to the damages sought here. "Property" simply describes the "bundle of rights" that an owner maintains with regard to the item designated as "property."¹ More than a century ago, the Supreme Court of Georgia recognized:

[A]nything to which a person may hold a legal title is property, whether it has any market value or not. It may have intrinsic value, but no exchangeable value. It may serve a useful purpose, and yet be unsalable and unexchangeable. No one may want it, or have a use for it, except he who possesses it, and yet to him it may be a thing of value; that is, of intrinsic value, something that can be utilized in the accomplishment of his purposes or the attainment of his desires.²

¹ See generally Denise R. Johnson, *Reflections on the Bundle of Rights*, 32 Vt. L. REV. 247 (2007).

² *Moody v. State*, 56 S.E. 993, 994 (Ga. 1907).

This recognition of the need for special valuation of unique property is directly on-point when evaluating damages for the loss of companion animals. The property designation means only that the owner has a protectable interest. It does not restrict the type of remedy or amount of compensation that courts may afford to the owner.

B. The Law Views Companion Animals Differently Than Any Other Type Of Property.

Legislatures and courts make it resoundingly clear that nonhuman animals should not be treated like the inanimate possessions that fall into traditional categories of personal property. Every American jurisdiction gives unique legal protections to companion animals. This body of law reflects legislative and judicial recognition of the special place companion animals occupy in our society and the differential treatment logically extends to evaluating damages for their loss.

1. Animals Receive Special Protections Unlike Other Forms Of Property.

From criminal anti-cruelty laws to custody cases, animals receive special consideration as sentient property that no other type of property receives. These protections reflect the legal recognition that animals' status as property does not mean they must be treated like other forms of property.

Other than laws regarding animals, no other law treats the abuse or intentional destruction of one's own property as a crime—but every state anti-cruelty law does so for animals.³ Animals also receive special consideration not extended to other kinds of property in divorce cases. And, unlike other property, recognition of companion animals' value to their owners is codified in state and federal legislation, keeping owners and their companion animals together even in times of natural disaster.⁴

2. The Law Should Reflect The True Value Of Companion Animals In Society.

Overwhelming empirical evidence likewise demonstrates that Americans do not consider companion animals to be like any other type of property.⁵ This change in attitude has developed over the last thirty years, evidencing a major shift in the public's attitude toward companion animals.⁶

In addition to the personal rewards that animal

³ See N.C. Gen. Stat. § 14-360 (2009); N.C. Gen. Stat. § 14-163.1 (2009).

⁴ Pets Evacuation and Transportation Standards Act of 2006, Pub. L. No. 109-308, 120 Stat. 1725 (codified at 42 U.S.C. §§ 5121, 5196, 5196b, 5170b(a)(3)).

⁵ William C. Root, "Man's Best Friend": Property or Family Member? An Examination of the Legal Classification of Companion Animals and Its Impact on Damages Recoverable for Their Wrongful Death or Injury, 47 VILL. L. REV. 423, 423 (2002).

⁶ See *id.*

companionship offers, two decades of studies confirm the health benefits derived from human-animal companionship.⁷ In one study that examined the effects of companion animals on one-year survival after acute heart attacks, researchers found "strong evidence" that companion animals promote cardiovascular health by supplementing social support systems.⁸

Such studies demonstrate what most companion animal guardians already know: animals are not fungible, replaceable pieces of property; their value is intrinsic and relational.

II. DAMAGES FOR COMPANION ANIMALS SHOULD BE MEASURED BY THE ANIMALS' ACTUAL VALUE TO THEIR OWNERS.

It is axiomatic that the basic purpose of the tort system is to make plaintiffs whole again, or to approximate wholeness to the greatest extent judicially possible.⁹ When a plaintiff has lost an animal companion, traditional rules of property

⁷ Gregg A. Scoggins, Note, *Legislation Without Representation: How Veterinary Medicine Has Slipped Through the Cracks of Tort Reform*, 1990 U. ILL. L. REV. 953, 973, 973 nn.179-80 (1990).

⁸ Erika Friedmann & Sue A. Thomas, *Pet Ownership, Social Support, and One-Year Survival After Acute Myocardial Infarction in the Cardiac Arrhythmia Suppression Trial (CAST)*, 76 AM. J. CARDIOLOGY 1213, 1217 (1995).

⁹ See, e.g., *Nesselrode v. Exec. Beechcraft, Inc.*, 707 S.W.2d 371, 386 (Mo. 1986) (citing *McCormick on Damages*, § 137 (1935)).

valuation may fail to compensate her.¹⁰ Courts recognize that replacement value and market value measures of calculating damages often leave plaintiffs uncompensated or under-compensated; this unfairness has mandated variations in damages theory.¹¹ Thus, owners of unique property are entitled to special calculations if the value to the owner is greater than the exchange value.¹²

A. In Assessing Damages, Courts Treat Cases Involving Animals Differently Than Those Involving Inanimate Forms Of Property.

When the market value of property cannot be ascertained or does not adequately compensate the owner, many courts use "a more elastic standard . . . sometimes called the standard of value to the owner."¹³

¹⁰ See, e.g., *Geordie Duckler, The Economic Value of Companion Animals: A Legal and Anthropological Argument for Special Valuation*, 8 ANIMAL L. 199 (2002); Casey Chapman, Comment, *Not Your Coffee Table: An Evaluation of Companion Animals as Personal Property*, 38 CAP. U. L. REV. 187 (2009).

¹¹ See, e.g., RESTATEMENT (SECOND) OF TORTS § 912 cmt. c (1979) ("[T]he value to the user is the measure of recovery, especially when the subject matter cannot be replaced").

¹² *Id.* at § 911 cmt. e.

¹³ North Carolina Pattern Jury Instruction Civil 810.66; *Freeman v. Alderman Photo Company*, 89 N.C.App. 73, 76, 365 S.E.2d 183, 186 (1988); *McDonald v. Ohio State Univ. Veterinary Hosp.*, 644 N.E.2d 750, 752 (Ohio Cl. Ct. 1994) (citing *Bishop v. E. Ohio Gas Co.*, 56 N.E.2d 164, 166 (1944)).

Cases from a variety of jurisdictions demonstrate the appropriateness of going beyond market value in cases like this one. In *Burgess v. Shampooch Pet Industries, Inc.*,¹⁴ the plaintiff sued for veterinary bills after her dog Murphy was injured while visiting Shampooch for grooming.¹⁵ At trial, Shampooch contended that "the damages awarded should be limited to Murphy's market value," not the "cost of repairs" (i.e., the veterinary bills incurred to bring Murphy back to health), which exceeded his alleged market value.¹⁶ The court rejected this contention:

[U]nlike other types of personal property, there are no true marketplaces that routinely deal in the buying and selling of previously owned pet dogs. Moreover, Murphy's real value to Burgess as a household pet is noneconomic and, as a result, is difficult if not impossible to appraise in the purely economic terms of market value. . . . "[I]t is impossible to reduce to monetary terms the bond between man and dog, a relationship which has been more eloquently memorialized in literature and depicted on the motion picture screen."¹⁷

¹⁴ *Burgess v. Shampooch Pet Indus., Inc.*, 131 P.3d 1248 (Kan. Ct. App. 2006).

¹⁵ *Id.* at 1249-50.

¹⁶ *Id.* at 1250.

¹⁷ *Id.* at 1252 (quoting *Zager v. Dimilia*, 524 N.Y.S.2d 968 (J. Ct. 1988)); see also *Corso v. Crawford Dog & Cat Hosp., Inc.*, 415 N.Y.S.2d 182, 183 (N.Y. Civ. Ct. 1979) ("A pet is not an inanimate thing that just receives affection[; she] also returns it.").

Courts in California, Illinois, New York, and Ohio have also held that plaintiffs may recover veterinary expenses in excess of an animal's market value.¹⁸ These cases thus reflect judicial acknowledgement of animals' unique status as sentient property.

Many other courts have also refused to limit recovery to market value. In an Illinois veterinary malpractice case, the court held there was a value to the human-animal relationship and allowed compensation for that loss.¹⁹ In *LaPorte v. Associated Independents, Inc.*,²⁰ a dog owner sued a garbage collector for wrongfully killing her dog.²¹ The Florida Supreme Court held "that the affection of a master for his dog is a very real thing and that the malicious destruction of the pet provides an element of damage for which the owner should recover."²² Florida courts since *LaPorte* have followed this

¹⁸ *Kimes v. Grosser*, 126 Cal. Rptr. 3d 581, 585-86 (Cal. Ct. App. 2011); *Leith v. Frost*, 899 N.E.2d 635, 641 (Ill. App. Ct. 2008); *Zager*, 524 N.Y.S.2d at 970 ("The traditional restriction in personal property cases that the cost of repair should not exceed the market . . . value of the property should not be applied in a case where . . . a living creature is involved."); *Saratte v. Schroeder*, 2009 WL 685272, at *2 (Ohio Ct. App. Mar. 10, 2009).

¹⁹ *Jankoski v. Preiser Animal Hosp., Ltd.*, 510 N.E.2d 1084, 1087 (Ill. App. Ct. 1987).

²⁰ *LaPorte v. Associated Indeps., Inc.*, 163 So. 2d 267 (Fla. 1964).

²¹ *Id.* at 267-68.

²² *Id.* at 269.

precedent.²³ Other courts across the country have also recognized the inadequacy of market value valuation for companion animals.²⁴

B. Courts And Juries Regularly Award Damages For The Loss Of Unique Property, Regardless Of The Ambiguities Of Calculating Such Damages.

Although calculating an animal's actual value to her owner may seem a difficult task, in reality it is no more incalculable than the market value or replacement cost of a pre-owned pet. Of course, there is no market for older cats and dogs, especially those adopted from shelters or those who have various ailments.²⁵ Thus, regardless of the calculation used for damages, the results will be imprecise, but that has never been a barrier to recovery: damages are routinely available for property whose market value is difficult to determine.²⁶ This

²³ See *Johnson v. Wander*, 592 So. 2d 1225, 1226 (Fla. Dist. Ct. App. 1992); *Knowles Animal Hosp., Inc. v. Wills*, 360 So. 2d 37, 38-39 (Fla. Dist. Ct. App. 1978); *Wertman v. Tipping*, 166 So. 2d 666, 668 (Fla. Dist. Ct. App. 1904).

²⁴ See *Mitchell v. Heinrichs*, 27 P.3d 309, 313-14 (Alaska 2001); *Anzalone v. Kragness*, 826 N.E.2d 472, 478 (Ill. App. Ct. 2005); *Demeo v. Manville*, 386 N.E.2d 917, 918-19 (Ill. App. Ct. 1979); *Quave v. Bardwell*, 449 So. 2d 81, 84 (La. Ct. App. 1984); *Blauvelt v. Cleveland*, 190 N.Y.S. 881, 883 (N.Y. App. Div. 1921); *Zeid v. Pearce*, 953 S.W.2d 368, 369 (Tex. Ct. App. 1997).

²⁵ *Burgess*, 131 P.3d at 1252.

²⁶ See, e.g., *Mieske v. Bartell Drug Co.*, 593 P.2d 1308, 1311 (Wash. 1979); Restatement (Second) of Torts § 912 cmt. a (1979).

rule is applicable in cases involving injuries to, and the death of, companion animals.²⁷

How does a court or jury decide the proper amount of damages in this kind of case? As in other cases involving property that is difficult to put a dollar amount on, the court should permit testimony from the plaintiff about the value of the animal to her and let the fact-finder award an amount it believes is appropriate based on that testimony.

As the Illinois Court of Appeals has noted "there is no formula for computing the value of the pet to her owner."²⁸ Absent such a formula, the plaintiff must be given the opportunity to explain to the fact-finder why she valued the animal as she did. The fact-finder's task is to "consider the evidence objectively from the perspective of a reasonable owner in the plaintiff's position" and come to a reasonable award that best compensates the plaintiff for her loss.²⁹

But the "actual value to the owner" inquiry is not an untethered one: judicial controls are in place to avoid abuse and excessive awards. For example, many jurisdictions exclude

²⁷ See, e.g., *Sherman v. Kissinger*, 195 P.3d 539, 548 (Wash. Ct. App. 2008).

²⁸ *Anzalone*, 826 N.E.2d at 478.

²⁹ *Sherman*, 195 P.3d at 548.

damages for "sentimental value."³⁰ This, however, does not exclude all damages based on emotion or feeling; rather it excludes only those damages that result from "'indulging in feeling to an unwarranted extent'" or those that are "'affectedly or mawkishly emotional.'"³¹ Courts thus can limit unwarranted and excessive awards without depriving the plaintiff of a recovery that would approximate her true loss.

In this case, the Sheras have presented evidence by which the trier of fact can evaluate their damages. Laci's market value is non-existent and she simply cannot be replaced with a similar dog, given the uniqueness of the bond she shared with and functions she performed for the Sheras. While Laci's actual value is unique and personal to the Sheras, it is still of a type and nature that courts recognize as reasonable, significant, and compensable. The tort rules described above can easily be applied to evaluate the Sheras damages here.

³⁰ See, e.g., *Mieske*, 593 P.2d at 1311.

³¹ *Id.* ("What is sentimental value? The broad dictionary definition is that sentimental refers to being 'governed by feeling, sensibility or emotional idealism. . . .' Webster's Third New International Dictionary (1963). Obviously that is not the exclusion contemplated by the statement that sentimental value is not to be compensated. If it were, no one would recover for the wrongful death of a spouse or a child. Rather, the type of sentiment which is not compensable is that which relates to 'indulging in feeling to an unwarranted extent' or being 'affectedly or mawkishly emotional. . . .' Webster's Third New International Dictionary (1963).").

C. This Court Should Adopt A Measure Of Damages Based On Actual Value.

As described above, legal precedent supports the application of the "actual value" measure of damages where defendants kill or injure plaintiffs' animals and where plaintiffs can prove that value. ALDF urges this Court to adopt the positions discussed above—positions that courts have been applying for years—and to incorporate into the measure of damages the commonsense notion that the value of sentient, living beings who provide significant value and form long-lasting relationships with humans should be measured in a different way than inanimate pieces of property. By this suggestion, ALDF is not contending that actual value damages should be awardable for any case in which defendants wrongfully destroy or injure plaintiffs' property. Rather, because of the special nature of companion animals like Laci, they should be treated differently. The case law and legislation described above are manifestations of an overwhelming trend to treat animals differently from other property, and support an "actual value to plaintiff" measure of damages.

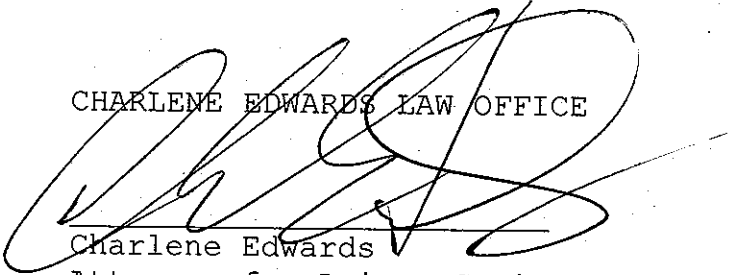
CONCLUSION

Courts have long recognized the central role of companion animals in American families. As Justice Andell of the Texas Supreme Court noted: "[C]ourts should not hesitate to

acknowledge that a great number of people in this country today treat their pets as family members. Indeed, for many people, pets are the *only* family members they have.”³² ALDF urges this Court to acknowledge that animals’ value to their human companions far exceeds what they would fetch on the open market. Accordingly, this Court should adopt the actual value approach to Laci’s valuation, thereby permitting the Sheras to recover damages that adequately compensate her for her loss.

This the 13th day of October, 2011.

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³² Bueckner v. Hamel, 886 S.W.2d 368, 378 (Tex. Ct. App. 1994) (Andell, J., concurring).

CERTIFICATE OF SERVICE

This is to certify that the foregoing *AMICUS CURIAE ANIMAL LEGAL DEFENSE FUND BRIEF REGARDING VALUATION OF LACI* was served on the parties by depositing it in the United States Mail, postage prepaid to the parties at the following addresses:

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This the 13th day of October, 2011.


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No. 11-1102

NANCY L. SHERA and
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Plaintiffs,

V

N.C. STATE UNIVERSITY
VETERINARY TEACHING
HOSPITAL,
Defendant.

ORDER

The following order was entered:

The motion filed in this cause on the 17th of October 2011 and designated 'Motion for Leave to File Amicus Curiae Animal Legal Defense Fund Brief Regarding Valuation of Laci' is allowed. The attached brief shall be printed.

By order of the Court this the 19th of October 2011.

WITNESS my hand and official seal this the 19th day of October 2011.

John H. Connell
Clerk, North Carolina Court of Appeals

Copy to:
Ms. Calley Gerber, Attorney at Law, For Shera, Nancy L., et al
Ms. Olga Vysotskaya, Assistant Attorney General, For N.C. State University Veterinary Teaching Hospital
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