No. 101863-1

SUPREME COURT OF
THE STATE OF WASHINGTON

COURT OF APPEALS DIVISION I
STATE OF WASHINGTON NO. 84106-8-I

KAITLYN FLYNN and KEVIN FLYNN,

Petitioners.

v.

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

Respondents.

ANSWER TO PETITION FOR REVIEW OF RESPONDENTS BLUEPEARL WASHINGTON PRACTICE ENTITY, P.C., AND KENT J. VINCE, DVM, MSPVM, DACVS

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I. IDENTITY OF RESPONDING PARTY

Defendants-Respondents are BluePearl Specialty Emergency Pet Hospital of Kirkland ("BluePearl"), and Dr. Kent J. Vince ("Dr. Vince").

II. CITATION TO COURT OF APPEALS DECISION

Flynn v. Woodinville Animal Hospital et al., 2023 WL 2366663.

III. ISSUE PRESENTED FOR REVIEW

Whether this Court should deny plaintiffs-petitioners Kevin and Kaitlyn Flynn's Petition for Review, where:

1. This case presents no substantial public interest under RAP 13.4(b)(4);
2. The Court of Appeals' decision is unpublished and therefore has no precedential value;
3. The Court of Appeals' decision in this case does not conflict with any other reported Washington decision; and

4. An extension of the law allowing the recovery of emotional distress damages in this context is more appropriately made by the legislature.

IV. STATEMENT OF THE CASE

BluePearl and Dr. Vince adopt by reference their Statement of the Case in their Brief of Respondents to Division One of the Court of Appeals. Petitioners make a litany of factual assertions that are unsupported by the record. BluePearl and Dr. Vince's Statement of the Case sets the record straight.

A. Petitioners make assertions that the record entirely fails to support.

Petitioners offer factual statements that they fail to support with citations to the record and/or that the record entirely fails to support. The Court should disregard all uncited statements. RAP 10.3(a)(5); RAP 13.4(c)(6); *Hurlbert v. Gordon*, 64 Wn. App. 386, 399-401, 824 P.2d 1238 (1992). Specifically, petitioners make references to respondents'

websites[1], a summary of a phone call petitioner's counsel purportedly had with a representative of the Washington State Department of Health[2], citations to the U.S. Census[3], and various articles[4]. None of these factual assertions are verifiable in the record. Inexplicably, petitioner's Statement of the Case is devoid of any citations to the Clerk's Papers.

Accordingly, the Court should disregard all uncited statements masquerading as facts.

B. Petitioners allege the veterinary services provided by respondents negligently caused the death of Clementine, a female pug

This matter arises out of the death of Clementine, an approximately two-year-old female Pug. CP 1. From approximately January 6, 2021 to January 19, 2021, Clementine had several visits to Woodinville Animal Hospital ("WAH"). CP 3-5. On the afternoon of January 19, 2021, WAH personnel instructed the Flynns to rush Clementine to BluePearl because a

[1] Petition for Review at 4.
[2] *Id.* at 5.
[3] *Id.* at 6.
[4] *Id.*

veterinarian at WAH feared Clementine's bladder may have ruptured. CP 5. The Flynns took Clementine to BluePearl where Dr. Vince successfully performed emergency surgery to repair Clementine's bladder. CP 6. Clementine unfortunately passed away around 11:00 a.m. on January 20, 2021. CP 7.

The Flynns then initiated this lawsuit, bringing claims against BluePearl, Dr. Flynn, WAH, and Dr. Nicole Frie-Johnson, a veterinarian who treated Clementine at WAH. CP 9-10. Specifically, the Flynns pled a corporate negligence claim, a negligent infliction of emotional distress ("NIED") claim, and a breach of contract claim against BluePearl, and they pled a professional negligence claim and a NIED claim against Dr. Vince. *Id*. The Flynns do not allege that any defendant intentionally harmed Clementine.

C. Division I followed settled Washington law and affirmed dismissal of petitioners' claims of corporate negligence and negligent infliction of emotional distress.

BluePearl and Dr. Vince then moved for summary judgment dismissal of the Flynns' claims of corporate

negligence and NIED, because these are not viable claims under settled Washington law in the context of alleged veterinary malpractice. CP 22-27. On April 25, 2022, Judge North granted BluePearl and Dr. Vince's motion and dismissed these claims against them. CP 117-118. On May 12, 2022, Judge North dismissed these claims against WAH and Dr. Frei-Johnson. CP 119-122. On May 31, 2022, Judge North granted the Flynn's motion to finalize and certify these orders for immediate appeal. CP 125-126.

Division One affirmed dismissal of the claims of corporate negligence and NIED. Petition for Review, Ex. A. With respect to the corporate negligence claim, Division One properly found the doctrine has never applied to animal health care facilities in Washington. Petition for Review, Ex. A, 1. With respect to the NIED claim, Division One correctly determined Washington law has never allowed recovery of emotional distress damages arising out of the negligent injury or death of an animal companion. Petition for Review, Ex. A,

2. Division One reasoned that the legislature is in the best position to determine whether the corporate negligence doctrine should be extended to reach animal hospitals or whether emotional distress damages should be recoverable in this context. Petition for Review, Ex. A, 9 - 11. This Petition for Review followed.

V. ARGUMENT

A. Petitioners do not argue that grounds for review exist under RAP 13.4(b)(1), (2) or (3).

Petitioners assert grounds for Supreme Court review under RAP 13.4(b)(4) only. Petitioners do not offer any argument in support of any other basis for this court to accept review. Petitioners therefore concede that review is not warranted under either RAP 13.4(b)(1), (2) or (3).

B. Petitioners meet none of the requirements for Supreme Court review under RAP 13.4(b).

Pursuant to RAP 13.4, this Court will grant a petition for review only:

> (1) if the decision of the Court of Appeals is in conflict with the decision of the Supreme Court; or
> (2) if the decision of the Court of Appeals is in

> conflict with the decision of another division of the Court of Appeals; or (3) if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Petitioners claim – wrongly – that grounds for review exist under RAP 13.4(b)(4). However, this petition for review should be denied because it fails to satisfy any basis for Supreme Court review.

Furthermore, nothing in RAP 13.4 or in Washington law entitles petitioners to review by this Court simply because they disagree with the Court of Appeals' decision:

> [I]t is a mistake for a party seeking review to make the perceived injustice the focus of attention in the petition for review. RAP 13.4(b) says nothing in its criteria about correcting isolated instances of injustice. This is because the Supreme Court, in passing upon petitions for review, is not operating as a court of error. Rather, it is functioning as the highest policy-making judicial body of the state. ...
>
> The Supreme Court's view in evaluating petitions is global in nature. Consequently, the primary focus of a petition for review should be on why there is a compelling need to have the issue or

> issues presented decided *generally*. The significance of the issues must be shown to transcend the particular application of the law in question. Each of the four alternative criteria of RAP 13.4(b) supports this view. The court accepts review sparingly, only approximately 10 percent of the time. Failure to show the court the "big picture" will likely diminish the already statistically slim prospects of review.

Wash. Appellate Prac. Deskbook § 27.11 (1998) (italics in original).

Here, petitioners assert that the issues presented for review are whether Division One "erred" by (1) "refusing to reinstate the common law claim of corporate negligence"; and (2) "refusing to reinstate the common law claim of negligent infliction of emotional distress." Petition for Review at 1. Neither assertion is true. Yet even if they were, none of RAP 13.4(b)'s four enumerated grounds permits Supreme Court review merely to correct errors by the Court of Appeals. Rather, appellants must show that this case is sufficiently exceptional to "transcend the particular application of the law in question." Wash. Appellate Prac. Deskbook § 27.11. Petitioners show nothing of the sort. Thus, neither of these

assertions meets RAP 13.4 to warrant the extraordinary step of review by this Court.

C. This case presents no issues of substantial public interest that should be determined by this Court under RAP 13.4(b)(4).

1. The Court should disregard petitioners' references to materials not in the record.

The Flynns contend this petition involves an issue of substantial public interest that should be determined by this Court. Petition for Review at 5. As an introductory matter, petitioners violate a fundamental principle of appellate practice by both failing to cite to the Clerk's Papers and attempting to introduce materials not reviewed by the superior court when it rendered its decision. *Supra*, § IV. A. An appellant must provide "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." RAP 10.3(a)(6); *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998). Petitioners have unequivocally failed to do so, and this Court should deny review for that reason alone.

2. This Court's jurisprudence on what constitutes an issue of substantial public interest shows review should be denied.

This petition plainly does not concern an issue of substantial public interest that should be determined by this Court. This Court has addressed what constitutes an issue of public interest:

> The criteria to be considered in determining whether sufficient public interest is involved are: (1) the public or private nature of the question presented; (2) the desirability of an authoritative determination which will provide future guidance to public officers; (3) the likelihood that the question will reoccur.

Dep't of Ecology v. Adsit, 103 Wn.2d 698, 705, 694 P.2d 1065 (1985); *Sorensen v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). Case laws shows that a question that meets these criteria will almost always implicate constitutional principles or the validity of statutes or other legislative enactments. *In re Myers*, 105 Wn.2d 257, 714 P.2d 303 (1986); *Gen. Tel. Co. of the Northwest, Inc. v. City of Bothell*, 105 Wn.2d 597, 716 P.2d 879 (1986); *Adsit*, 103 Wn.2d at 705; *State ex rel. Chapman v. Superior Court*, 15 Wn.2d 637, 642-

43, 131 P.2d 958 (1942); *State ex rel. Yakima Amusement Co. v. Yakima County*, 192 Wn. 179, 73 P.2d 759 (1937).

Here, this petition does not present a question that is public in nature, impact the conduct of governmental officers, or pose a constitutional or statutory challenge. It is a dispute between private parties concerning the death of a dog due to alleged veterinary malpractice.

Inexplicably, petitioners cite to *State v. Watson*, 155 Wn.2d 574, 577 (2005). There, the Court of Appeals issued an opinion finding a memorandum by the county prosecuting attorney to all county superior court judges, announcing that, as a general policy, the prosecuting attorney's office would no longer recommend drug offender sentencing alternative ("DOSA") sentences, constituted an improper ex parte communication with the trial court. *Id.* at 576. This Court determined the ruling of the Court of Appeals involved an issue of substantial public interest under RAP 13.4(b)(4), as the holding had "sweeping implications" with the potential to affect

every sentencing proceeding in Pierce County after November 26, 2001, where a DOSA was or is at issue. *Id.* at 577.

Here, in stark contrast to *Watson*, there are no "sweeping implications" from Division One's opinion affirming dismissal of claims that are not available under settled Washington law. Thus, the petition does not involve an issue of substantial public interest, and this Court should deny review.

3. Division One's decision to issue an unpublished opinion further suggests this case does not involve issues of substantial public interest.

The Court of Appeals' decision to issue only an unpublished opinion in this case further shows that the Supreme Court should deny review. In issuing the opinion as an unpublished opinion, the Court of Appeals determined that it has no precedential value:

> Each panel shall determine whether a decision of the court has **sufficient** precedential value to be published as an opinion of the court. Decisions determined not to have precedential value shall not be published.

RCW 2.06.040 (emphasis added).

"In enacting this amendment the legislature recognized that opinions which do not have sufficient precedential value to affect the common law of our state should not be published." *State v. Fitzpatrick*, 5 Wn. App. 661, 669, 491 P.2d 262 (1971), *rev. denied,* 80 Wn.2d 1003 (1972). To continue publication of cases that merely restate established principles of law inevitably complicates legal research. *Id*.

RAP 12.3(e) sets forth criteria for a party or other interested persons to move for publication for a Court of Appeals decision. By issuing an unpublished decision, the Court of Appeals in this case impliedly rejected those criteria, including whether the decision (1) determines an unsettled or new question of law or constitutional principle; (2) modifies, clarifies or reverses an established principle of law; (3) is of general public interest or importance; or (4) is in conflict with a prior opinion of the Court of Appeals.

One of the criteria under RAP 12.3(e) is "whether the decision is of general public interest or importance." RAP

12.3(e)(5). This criterion closely resembles the "substantial public interest" ground for Supreme Court review under RAP 13.4(b)(4). Again, by deciding not to publish this decision, the Court of Appeals impliedly concluded that no such public interest or importance exists. This Court should reach the same conclusion.

As a practical matter, the unpublished status of the Court of Appeals' decision means that it has no precedential value of any kind. *State v. Sanchez*, 74 Wn. App. 763, 765, 875 P.2d 712 (1994). Therefore, there exists no need for this Court to accept review to supposedly "set the record straight" even if it disagrees with the Court of Appeals' decision in this case, because that decision will have no legal effect on the status of other litigants in cases involving the same or similar issues.

4. An extension of the law allowing the recovery of emotional distress damages in this context is more appropriately made by the legislature.

Again, under RAP 13.4(b)(4), this Court may grant review "if the petition involves an issue of substantial public

interest **that should be determined by the Supreme Court**." Emphasis added. Here, the radical extension of liability sought by petitioners is more appropriately made by the legislature.

There is no recognized cause of action in Washington for wrongful death of a companion animal. *Sherman v. Kissinger*, 146 Wn. App. 855, 860 n.1, 195 P.3d 539 (2008). Although petitioners do not couch their claim in terms of the wrongful death of Clementine, petitioners do seek emotional distress damages for the loss of that relationship. Petitioners' claims are no more than wrongful death claims repurposed as NIED claims.

"[C]ourts of this state have long and repeatedly held, causes of action for wrongful death are strictly a matter of legislative grace and are not recognized in the common law." *Philippides v. Bernard*, 151 Wn.2d 376, 390, 88 P.3d 939 (2004). Indeed, since the legislature has created a comprehensive scheme governing who may recover for wrongful death and survival, there is no room for this Court to

act in that area. *See Windust v. Dep't of Labor & Indus*., 52 Wn.2d 33, 36, 323 P.2d 241 (1958) ("A legislative enactment, intended to be comprehensive upon a subject, preempts that field").

The legislature has made various, difficult policy decisions regarding who may recover for wrongful death, allowing spouses, domestic partners, children, and parents of minor children to sue for wrongful death. RCW 4.24.010, RCW 4.20.020. But it has also decided that there is no cause of action for other relationships, such as parents of adult children and siblings (except when financially dependent), grandparents, and dear friends. *See* RCW 4.20.020. Similarly, the legislature did not create a cause of action to recover for the wrongful death of a companion animal. *See id.*

Importantly, in 2008, the legislature considered, and failed to adopt, a cause of action for "wrongful injury or death of a companion animal." *See* H.B. 2945, 60th Leg., Reg. Sess. (Wash. 2008). Yet petitioners invite this Court to accept

review, because "societal mores have evolved" and "the time is nigh" for Washington to allow recovery of emotional distress damages for the negligent death of a companion animal. Petition for Review at 21. Petitioners are mistaken. The legislature has decreed who may recover for wrongful death. There is no gap for this Court to step in and fill.

Thus, the petition does not involve issues of substantial public interest that should be determined by this Court.

5. Petitioners are not without a remedy.

In an attempt to persuade this Court that the petition raises issues of substantial public importance, petitioners act as if their dismissed causes of action of corporate negligence and NIED leave them without a remedy. Not so. If petitioners manage to prove their claims of professional negligence against respondents, Washington has a three-part analysis for the measure of damages for the loss of personal property. *McCurdy v. Union Pac. R. Co.*, 68 Wn.2d 457, 413 P.2d 617 (1966).

The presumptive measure of damages for the negligent destruction of personal property, including a companion animal, is the fair market value of the property. *Sherman*, 146 Wn. App. at 870. If petitioners meet their burden of establishing that the dog both has no fair market value and cannot be replaced, the dog's value to its owner (also referred to as intrinsic value) may be considered in determining damages. *Id.* at 874. In determining intrinsic value, the finder of fact must consider objective evidence of the dog's utility and services and not the value the owner attributes to the dog's companionship or other sentimental value. *Id.* at 871-72.

Petitioners cite to no authority in support of the proposition that a desire to drastically expand the gamut of available remedies to aggrieved pet-owners constitutes an issue of substantial public interest that should be determined by this Court. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found

none." *DeHeer v. Seattle Post–Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

Thus, because petitioners offer no authority establishing that their petition involves issues of substantial public interest that should be determined by this Court, review should be denied.

D. The Court of Appeals' decision in this case does not conflict with any other reported Washington decision.

1. Corporate Negligence

While petitioners do not expressly argue grounds for review exist under RAP 13.4(b)(1) or (2), petitioners claim Division One "disregarded the underlying circumstances that commended the doctrine in the first place when it stated animals are not humans, Washington precedent only applies to humans, so no further analysis is required." Petition for Review at 8. Division One did no such thing.

In determining that the legislature is in the best position to determine whether the corporate negligence doctrine should extend to animal hospitals, Division One thoroughly analyzed

the origins of the doctrine and how animals are treated differently than humans under Washington law. Petition for Review, Ex. A at 4-9. Specifically, Division One noted that this Court recently reiterated that pets, as a matter of law, are considered personal property. *State v. Abdi-Issa*, 199 Wn.2d 163, 171, 504 P.3d 223 (2022) (citing *Sherman*, 146 Wn. App. at 870). Critically, the *Sherman* court concluded Chapter RCW 7.70, which governs all civil actions for damages that occur as a result of health care, does not apply to the treatment of animals by veterinarians. *Id.* at 867. Division One properly found that the Washington Pattern Jury Instruction ("WPI") on corporate negligence discusses cases and standards of care only pertaining to full service hospitals, including multiple references to RCW 7.70. 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 105.02.02 (7th ed. 2022) (WPI).

Petitioner's suggestion that Division One's decision somehow misapplied the corporate negligence doctrine is

plainly mistaken. Accordingly, because Division One's decision is in harmony with all reported Washington decisions, this Court should deny review.

2. NIED

Petitioners suggest that Clementine's status as an emotional support animal ("ESA") bears some sort of legal significance. It does not. "Although, [courts] have recognized the emotional importance of pets to their families, legally they remain in many jurisdictions, including Washington, property." *Mansour v. King County*, 131 Wn. App. 255, 267, 128 P.3d 1241 (2006). As Division One correctly noted, "the gravamen is not the degree of the emotional connection between the owner and its animal, but the fact that animals, whether they are pets or emotional support animals, are still considered property – even when there is a profound emotional connection." Petition for Review, Ex. A at 13. Petitioners' emphasis on Clementine's status as "a canine of a different legal pedigree" is

simply a distinction without a difference. Petition for Review at 16.

"Washington law is clear 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." *Hendrickson v. Tender Care Animal Hospital Corp*., 176 Wn. App. 757, 762, 312 P.3d 52 (2013). In *Repin v. State*, 198 Wn. App. 243, 270 (2017), the court confirmed that *Hendrickson* and *Sherman* follow a strict rule that denies a pet owner emotional distress damages for loss of a human-animal bond based on the negligent death or injury to a pet.

Further, in *Pickford v. Masion*, 124 Wn. App. 257, 98 P.3d 1232 (2004), plaintiffs alleged claims for NIED, malicious infliction of emotional distress, and destruction of the guardian-companion animal relationship following an attack by two dogs on another dog. *Id.* at 259. The trial court dismissed the claims, and plaintiffs appealed. *Id.* In rejecting all of the claims, the court declined "to extend [recovery in tort] to loss of

companionship for death or injury to a pet. In Washington, damages are recoverable for the actual or intrinsic value of lost property but not for sentimental value." *Id.* at 263. The *Pickford* court went on to dispose of the same argument petitioners raise here. The court noted that: "**Such an extension of duty and liability is more appropriately made by the legislature**." *Id*. (Emphasis added).

Similarly, in *Hendrickson*, a veterinary malpractice action, Division Two reasoned it would be improper to legislate from the bench: "If there is to be a change of the common law, we believe a more prudential approach would be for the Legislature to consider the matter prior to such a change occurring." *Hendrickson* 176 Wn. App. at 772 (quoting *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 448, 815 P.2d 1362, 1374 (1991) (as part of the *Hendrickson* court's justification for refusing to extend the availability of emotional distress damages for the breach of a bailment contract for veterinary services).

Because Division One's decision is in harmony with established Washington law, this Court should deny review.

VI. CONCLUSION

Petitioners have not presented grounds under RAP 13.4(b) on which this Court should grant review. Accordingly, respondents respectfully ask that the Flynns' Petition for Review be denied.

Respectfully submitted this 4th day of May, 2023.

I certify that this memorandum contains 3,780 words, in compliance with RAP 18.17.

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By: s/ Andrew H. Gustafson

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on May 4, 2023, I caused service of the foregoing pleading on each and every attorney of record herein via Supreme Court E-filing Portal:

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DATED this 4th day of May, 2023.

s/ Jessica Leonard
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