Washington Supreme Court

Supreme Court Docket No. 101863-1

Division I Docket No. 84106-8

King Cy. Sup. Ct. Cause No. 21-2-13175-8SEA

KAITLYN FLYNN, et al.,

Plaintiffs-Petitioners,

-against-

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

Defendants-Respondents.

CORRECTED PETITION FOR REVIEW BY WASHINGTON SUPREME COURT

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I. IDENTITY OF PETITIONER

KAITLYN FLYNN and KEVIN FLYNN, through Adam P. Karp, petition for review under RAP 13.4(b)(4).

II. COURT OF APPEALS DECISION

The Flynns seek reversal of the attached Court of Appeals decision (**Exh. A**) and Orders on Summary Judgment (**Exh. B**).

III. ISSUES PRESENTED FOR REVIEW

Did the Court of Appeals err in:

1. Refusing to reinstate the common law claim of corporate negligence against Defendants BluePearl Washington Practice Entity, P.C. ("BluePearl") and Woodinville Animal Hospital, P.S. ("WAH")?

2. Refusing to reinstate the common law claim of negligent infliction of emotional distress against all Defendants?

IV. STATEMENT OF THE CASE

The Flynns acquired Clementine, a female Pug, in 2019. Suffering from diagnosed emotional disabilities, for which he was under treatment by a health care provider, Clementine became Mr. Flynn's emotional support animal ("ESA"). She died on 1.20.21 at BluePearl following a surgery performed by Defendant Kent Vince, who attempted to correct a bladder rupture that took place while she was at WAH. The Flynns raced her from WAH to BluePearl in that period of crisis and observed her suffering. **CP 165.**

In just two years, the Flynns spent approximately $9000 on

Clementine. Money was no object as she was family. Aside from large numbers of toys, clothing accessories, beds, blankets, dishes, crates, a travel kennel, and play pen, they bought her two sets of pet stairs (to ascend to their bed and couch), and let her ride along with their older pug Comrade in his stroller, that is, when they were not exercising her two miles a day. Comrade's leash was emblazoned with the label "**Emotional Support**." Comrade was his ESA until he passed in October 2020, only three months before Clementine did. Clementine assumed that role in Comrade's stead. **CP 165-166.**

Clementine sensed when he and his wife were ill at ease or depressed and would intervene to ameliorate their conditions. For about eight years, Mr. Flynn had suffered from various mental health conditions for which he saw a psychiatrist and took medication. Clementine was taking over as his ESA from Comrade. When he began to have panic attacks, she would immediately calm him, the reason why the Flynns always called her "Nurse Pug." Clementine was always the best medicine. She slept with Mr. Flynn every night and literally had to have her head on the pillow, with occasionally her face on theirs. It destroyed him emotionally not having a cuddler to ease the nightly transitions. **CP 167.**

As a direct consequence of Clementine's suffering and death following her ruptured bladder, Mr. Flynn experienced frequent insomnia,

inability to focus, and depression. For at least six months after her passing, he found it difficult to feel any joy in life. His business also suffered as a result of lacking motivation. Mr. Flynn saw his psychiatrist, noting his devastation, physical symptomatology, and need for additional treatment. Clementine was not merely a "pet." **CP 169-171.** Nor was she just "injured" by garden-variety "negligence."

The Flynns sued WAH for corporate negligence, NIED, and breach of veterinary services contract; WAH's employee, veterinarian Nichole Frei-Johnson, for professional negligence and NIED; BluePearl for corporate negligence, NIED, and breach of veterinary services contract; and BluePearl's employee, boarded veterinary surgeon Vince, for professional negligence and NIED. **CP 9-10.** As admitted in discovery, WAH and BluePearl failed to implement any policies or procedures to address numerous patient care practices at issue in this case. **CP 68, 163.**

WAH, a professional services corporation advertises itself as operating like any other human hospital in providing a "full-service companion animal facility" with "comprehensive veterinary care throughout the life of your pet," including "preventative medicine, general dentistry, general surgery, and radiology" with "in-house laboratory to provide rapid diagnostics and years of experience in a wide range of

treatment modalities."[1] **CP 2.** WAH has three veterinarians, a hospital manager, veterinary technician, four veterinary assistants, three veterinary receptionists, and a kennel assistant. WAH advertises wellness exams, internal medicine, vaccinations, digital radiology, dental care, and surgery. **CP 130-149.** The WAH invoices are issued by the hospital itself, not separately by each veterinarian or a radiology department. **CP 155-157.**

BluePearl, a professional corporation, advertises itself as a "20,000 square-foot hospital" and "24-hour pet hospital" with "CT scanner, MRI, digital radiography, ultrasonography, fluoroscopy and endoscopy, along with a new on-site commercial pathology lab," where "experienced veterinarians, vet technicians and support staff work closely together to provide the comprehensive, compassionate care your pet needs and deserves."[2] It conveys its exclusive focus on "emergency treatment and advanced specialty veterinary care." **CP 45-52.** BluePearl billed the Flynns $8251.38. **CP 58-62.** BluePearl is headquartered in Tampa, Florida and defines itself as a "national network of emergency and specialty pet hospitals."[3] It boasts over 100 hospitals in 29 States and employs thousands of veterinarians, veterinary technicians, and other professionals.[4]

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[1] Woodinvilleanimal.com (accessed 4.5.23)
[2] Bluepearlvet.com/hospital/Kirkland-wa (accessed 4.5.23)
[3] Bluepearlvet.com/our-story (accessed 4.4.23)
[4] https://en.wikipedia.org/wiki/BluePearl_Specialty_and_Emergency_Pet_Hospital (accessed 4.4.23); https://www.instagram.com/bluepearlvet/ (accessed 4.4.23)

On 4.25.22, the Honorable Douglass A. North granted BluePearl/Vince's motion for partial summary judgment dismissal of the corporate negligence and NIED claims against those moving Defendants. **Exh. B.** On 5.12.22, Judge North entered a similar order as to WAH/Frei-Johnson. **Exh. B.** And on 5.31.22, over BluePearl/Vince's objection, Judge North granted the Flynns' motion to finalize and certify his 4.25.22 and 5.12.22 orders for immediate appeal. **Exh. B.** On 3.6.23, Division I of the Court of Appeals affirmed the trial court. This petition for review follows.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. RAP 13.4(b)(4) – Substantial Public Importance

Issues of first impression that affect not only the parties at bar but potentially thousands of other daily interactions throughout this State, warrant review under RAP 13.4(b)(4). *State v. Watson,* 155 Wn.2d 574, 577 (2005). By a conservative estimate, there are hundreds of veterinary clinics and hospitals in Washington, in virtually every city, rural or urban. According to Loralei Walker, Program Manager for the Washington State Department of Health, as of 4.4.23, there are 4406 licensed veterinarians in Washington,[5] who are responsible for examining millions of pets each year. Per the 2022 U.S. Census, Washington has about 7.8 million inhabitants and

[5] Confirmed by phone call by author on 4.4.23.

approximately 2.9 million households.[6] The American Veterinary Medical Association's *2017-2018 U.S. Pet Ownership & Demographics Sourcebook* observed that 62.7% of all Washington households (then 1.78 million) owned pets in 2016.[7] 42.8% owned dogs[8] and 30.5% owned cats.[9] The American Pet Product Association's *2021-2022 National Pet Owners Survey* determined that 86.9 million homes (66% of all U.S. households). All told, in 2022, Americans spent $136.8 billion on their pets.[10] And if Seattle is illustrative, there are more dogs and cats living within city limits than children, reflecting our unabashedly cynophilic and ailurophilic culture.[11]

The trial court acknowledged, over BluePearl's objection, that the issues raised by the Flynns were ones for which a substantial ground for a difference of opinion existed, which, while not in and of itself defining them as possessing substantial public importance, reflects that they rest on highly fertile soil from which should spring decisions resolving issues that beckon

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[6] Census.gov/quickfacts/WA (accessed 4.4.23).
[7] Sourcebook, 27 (S1-Tab 5).
[8] Sourcebook, 41 (S1-Tab 16).
[9] Sourcebook, 55 (S1-Tab 26).
[10] Americanpetproducts.org/press_industrytrends.asp (accessed 4.5.23)
[11] *See* Diana Wurn, *Seattle's Dog Obsession,* Seattle Magazine (October 2011) ("With more canines than children living within city limits, Seattle has officially gone to the dogs."); Gene Balk, *In Seattle, it's cats, dogs and kids – in that order,* The Seattle Times (February 1, 2013) ("Seattle has more dogs than children. We've practically become famous for it.").

for millions of similarly situated individuals. That both the corporate negligence and NIED issues were borne from the common law about fifty years ago (corporate negligence per *Pedroza v. Bryan,* 101 Wn.2d 226 (1984) and NIED per *Hunsley v. Giard,* 87 Wn.2d 424 (1976)), and were the subject of recurring Washington Supreme Court treatment at regular intervals since, also endorses the view that they are of abiding importance and applicability to Washingtonians, not victims of doctrinal desuetude.[12]

A. Corporate Negligence.

Veterinary hospitals must make equivalent management decisions as their human hospital counterparts, as to staffing and licensing checks, safe and provisioned facilities, functional equipment, adequate supplies, and issues requiring corporate-level intervention and correction of systemic problems. They must also ensure client and patient integrity within its walls and, in so doing, properly monitor and supervise delivery of health care

[12] The Washington Supreme Court heard numerous corporate negligence and NIED cases since 1984, each of which raising issues seen in the veterinary context. *See* **Exh. A.** And consider *Howell v. Spokane & Inland Empire Blood Bank,* 114 Wn.2d 42 (1990) (negligent selection, retention, and supervision of performance of medical staff); *Douglas v. Freeman,* 117 Wn.2d 242 (1991) (negligent supervision of dentist); *Burnet v. Spokane Ambulance,* 131 Wn.2d 484 (1997) (negligently conferring privileges to two doctors who were allegedly unqualified to recognize or treat serious neurological condition); *DeYoung v. Providence Med. Ctr.,* 136 Wn.2d 136 (1998) (negligent supervision of doctor during administration of radiation treatment to patient's eyes); *Lowy v. PeaceHealth,* 174 Wn.2d 769 (2012) (discovery dispute to obtain internal quality assurance records relative to 170 intravenous infusion injuries at hospital, showing pattern of negligence by hospital failing to establish protocols to correct serious and systemic IV infusion procedure problem).

within the hospital. Yet, the Court of Appeals, in affirming, held that "The legislature is in the best position to determine whether the corporate negligence doctrine should be extended to reach animal hospitals." **Exh. A, 9.** This decision, however, mistakes the doctrine's lineage, which was never legislative. Rather, the Court woodenly applied abstract principles to a plainly analogous factual scenario and, in so doing, 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. Rather, they made an unremarkable observation—i.e., human hospitals treat humans; veterinary hospitals treat nonhumans, who are property.

From this truism, they attempt to treat the obvious distinction as both a factual foundation and legal conclusion. *Pedroza* and progeny did not give birth to corporate negligence because its patients were human (vs. nonhuman), but because the hospital itself owed a separate duty of care to its patients comprised of various obligations not reached by an individual health care provider operating in a vacuum. In some instances, patient and client injury will not be attributable to a specific person or persons within the veterinary hospital, but rather more broadly to a failure by the corporation to employ sufficient processes and safeguards to guard against harm. The irony, of course, is that the Court of Appeals held that the

corporate negligence doctrine should not apply here because animals are nonhuman when the same charge can be made against the corporation itself.

Since when did corporations, while bestowed the status of legal persons, not owe commensurate legal duties of care to those they harm? The focus should not be on the species of the patient, but rather the principles of due care that undergird tort law, whether inflicted by fictitious legal persons like corporations or natural legal persons like veterinarians, since, after all, "At common law, **every individual** owes a duty of reasonable care to refrain from causing foreseeable harm in interactions with others." *Beltran-Serrano v. City of Tacoma,* 193 Wn.2d 537, 550 (2019) (emphasis added).

As the Pennsylvania Supreme Court observed in *Scampone v. Highland Park Care Center, LLC,* 618 Pa. 363 (2012), corporate negligence doctrine applies outside the health care context as well:

> Where a corporation is concerned, the ready distinction between direct and vicarious liability is somewhat obscured because we accept the general premise that the corporation acts through its officers, employees, and other agents. *See Tayar v. Camelback Ski Corp., Inc.,* 47 A.3d 1190, 1196 (Pa.2012). The corporation, as principal, assumes the risk of individual agents' negligence under the theory of vicarious liability. *See, e.g., Iandiorio v. **598 Kriss & Senko Enters., Inc.,* 512 Pa. 392, 517 A.2d 530 (1986); *Aiello v. Ed Saxe Real Estate, Inc.,* 508 Pa. 553, 499 A.2d 282 (1985). In this scenario, the corporation's liability is derivative of the agents' breach of their duties of care to the plaintiff. But, this Court has also recognized that a corporation may also owe duties of care directly to a plaintiff, separate from those of its individual agents, such as

> duties to maintain safe facilities, and to hire and oversee competent staff. *See, e.g., Thompson, supra* (corporate hospital owed patient non-delegable duty of care to enforce consultation and patient monitoring policies); *Gilbert v. Korvette, Inc.,* 457 Pa. 602, 327 A.2d 94, 102 (1974) (corporation owed customer non-delegable duty of care to maintain premises); *Dempsey v. Walso Bureau, Inc.,* 431 Pa. 562, 246 A.2d 418 (1968) (corporation owed employee duty of reasonable care in hiring other employees); *accord Atcovitz v. Gulph* ***390*** *Mills Tennis Club, Inc.,* 571 Pa. 580, 812 A.2d 1218 (2002) (if duty exists, corporation may be held directly liable for negligence). Accordingly, as a general proposition, the recognition that a corporation acts through its agents has not been held to be a fatal impediment to haling a corporation into court on direct liability tort claims.

Id., 389-390. In rejecting the view that allowing direct and vicarious liability would spawn jury confusion and undermine simplicity and fairness, *Scampone* held that "The direct and vicarious theories of liability are grounded in distinct policies and serve complementary purposes in the law of torts, with the goal of fully compensating a victim of negligence in the appropriate case." *Id.,* 390.

Pennsylvania resisted the approach taken by the Court of Appeals and Defendants below, i.e., to reject the "precedential mantle" of prior Washington decisions "based simply on formulaic reading" that inquires merely whether a veterinary hospital is a human hospital. "The relevant question," is not whether a human patient is similar or dissimilar to a nonhuman patient, but whether the legal principles apply to describe

corporate veterinary hospitals' legal duty or obligation to their patients and clients, given the considerations which pertain. The approach taken by the Court of Appeals makes too much of the facts in *Pedroza* and is of limited use in developing a principled analysis of relevant considerations with respect to other entities within and without the healthcare field.

Restatement (2nd) of Torts § 323 has been adopted as defining nondelegable duties of corporations to plaintiffs, including in Pennsylvania as to hospitals (see *Riddle Mem. Hosp. v. Dohan,* 504 Pa. 571 (1984)). Importantly, it contemplates duties owed for protection of property:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person **or things,** is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (2nd) Torts 323 (emphasis added). Washington courts have adopted this *Restatement* provision. *See, e.g., Norg v. City of Seattle,* 18 Wash.App.2d 399, 408-409 (2021).

These equitable aims of negligence decisional law are not peculiar to Pennsylvania, but govern in any legal environment, one that does not

depend on statute, nongovernmental standards, or by-laws, to function. Thus, whether Ch. 7.70 RCW applies to veterinarians is irrelevant,[13] for it provides merely a statutory gloss on certain causes of action against enumerated individuals and entities and has no influence on common law. Thus, far from serving as a reason to decline to extend the doctrine to veterinary hospitals, caselaw provides a ready template upon which veterinary plaintiffs may prove hospital breach – e.g., looking to American Animal Hospital Association ("AAHA") and American Veterinary Medical Association ("AVMA") standards and, in this case, BluePearl's and WAH's by-laws. The Washington Department of Health also has enacted highly detailed standards regarding veterinary facilities and practices (WAC 246-933-310--246-933-350), registered entities to provide limited veterinary services (WAC 246-933-501--246-933-590), administration of legend, nonlegend, and controlled substances (WAC 246-935-400--246-935-990), and registered veterinary medication clerks (Ch. 246-937 WAC).

In sum, no relevant dissimilarities exist to deny the equitable and judicious extension of a common law tort doctrine to a litigation-adjacent

[13] The Department of Health also disciplines veterinarians using the same procedural machinery (Ch. 18.130 RCW) wielded against human health care providers. Indeed, pharmacists, who are explicitly defined as health care providers under RCW 7.70.020(1) ("a … pharmacist"), are expressly charged with the preparation and delivery of drugs to nonhumans. See nonhuman references in RCW 18.64.011(10); RCW 18.64.011(14); WAC 246-945-016.

area, filling liability lacunae that if left open would only do substantial injustice. But perhaps the best argument in favor of accepting review is that, as to corporate negligence, not a single court anywhere in the country has addressed the question of whether a veterinary hospital, particularly one that is highly corporatized[14] like BluePearl (owned by Mars Inc.[15]), owes a hospital-level duty of care to its clients and patients irrespective of independent duties of its veterinarians. Thus, the question raised here is one of substantial public importance *in the national theater* as well, and Washington would be the first State to speak to the matter.

The corporatization of the veterinary profession has caught the attention of FTC regulators, signaled the demise of the privately-owned veterinary hospital, imposed quotas to push veterinary employees to sell whatever diagnostics, vaccines, and procedures they could, and resulted in a declining level of care.[16] Not only does this raise concerns about

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[14] R. Scott Nolen, *The corporatization of veterinary medicine: Corporation's involvement in historically entrepreneurial profession generates uncertainty, JAVMA News* (11.14.18) [https://www.avma.org/javma-news/2018-12-01/corporatization-veterinary-medicine] (accessed 4.4.23). Nolen observes that, back in 2018, VCA operated over 800 clinics in North America, corporations owned about 10% of all general companion animal practices, and 40-50% of all referral practices, and that Mars Inc. bought out Banfield, BluePearl, Pet Partners, and VCA as of 2017. Banfield Pet Hospital, which is a familiar adjunct to Petsmarts nationwide, has over 1000 hospitals. Banfield.com/en/about-banfield (accessed 4.4.23).

[15] Mars.com/made-by-mars/petcare (accessed 4.4.23) (buying out Banfield, VCA, BluePearl).

[16] An estimated 75% of specialty veterinary practices are corporately owned. In June 2022, the FTC forced sales of some practices over concerns that ownership was becoming too concentrated. Linda Carroll, *Veterinary Practices are Increasingly Corporately Owned, and Pets Owners Pay the Price,* Observer (3.19.23)

corporations interfering with the professional discretion of veterinarians, but fails to render corporate misdeeds in the veterinary profession visible to the law of torts that half a century ago acknowledged, and rectified, the precise ills afflicting the human hospital. With so many lives and billions of dollars at stake, has not the time come for this court to examine this pressing issue?

B. NIED.

Five decisions of the Washington Court of Appeals, yet not a single one from the Washington Supreme Court, have touched upon emotional distress damage recovery from harm to nonhumans – *Pickford v. Masion,* 124 Wash.App. 257 (2004), *Womack v. Von Rardon,* 133 Wash.App. 254, 263 (2006), *Sherman v. Kissinger,* 146 Wash.App. 855 (2008), *Hendrickson v. Tender Care Animal Hosp. Corp.,* 176 Wash.App. 757 (2013), and *Repin v. State,* 198 Wash.App. 243 (2017). Only two of those addressed NIED – *Pickford* and *Repin.* Presenting the latest word on the subject, albeit in a matter where the plaintiff expressly sought to end his non-emotional support dog's life (in contrast to the Flynns trying to save Clementine, an ESA), *Repin* was decided thirteen years after *Pickford.* As noted below, it did not

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[https://observer.com/2023/03/veterinary-practices-are-increasingly-corporately-owned-and-pets-owners-pay-the-price/] (accessed 4.4.23); Ross Kelly, *NVA expansion in US hits antitrust snag,* VIN News Service (6.23.22) https://news.vin.com/default.aspx?pid=210&Id=11000033 (accessed 4.4.23)

categorically reject NIED but held that Repin did not provide evidence of objective symptomatology. *Repin,* 264. Additionally, then Chief Judge Fearing authored a separate concurrence urging this Court to accept review. *Id.,* 279-80.

In the instant matter, the Court of Appeals sang the refrain that because pets, even emotional support and service animals, are personalty, NIED does not apply. In reaching this conclusion, however, not a single Washington Supreme Court case addressing any element of NIED was cited. Even still, this assertion that animals are property so nothing more need be said grossly misses the mark. Such a reductive treatment of the issue, sadly, disregards numerous other pronouncements that call it into doubt. *Pickford,* at 263, the NIED case cited at length below, acknowledged that Buddy was "much more than a piece of property[.]" Other Washington courts and the Ninth Circuit have made similar acknowledgements that bespeak strong cognitive dissonance: *Mansour v. King Cy.,* 131 Wash.App. 255 (2006)("the bond between pet and owner often runs deep and that many people consider pets part of the family"; recognizing "emotional importance of pets to their families."); *Rabon v. City of Seattle,* 107 Wash.App. 734, 744 (2001) (liberty interest more apposite than property interest in evaluating due process rights in person's dog and greater than same interest in a car); *San Jose Charter of Hells Angels Motorcycle Club v. City of San*

Jose, 402 F.3d 962, 975 (9 Cir. 2005) ("The emotional attachment to a family's dog is not comparable to a possessory interest in furniture."); *Rhoades v. City of Battleground,* 115 Wash.App. 752, 766 (2003) ("pets are not fungible" and private interest in keeping pets is "greater than a mere economic interest."); *Womack,* at 263 (new cause of action for malicious injury to pet premised on intrinsic value); *Repin,* at 284 (Fearing, C.J., concurring)("Many decisions, including Washington decisions, recognize the bond between animal and human and the intrinsic and inestimable value of a companion animal.")

The Flynns urged Division I to distinguish *Pickford* by noting that Clementine was a canine of a different legal pedigree. Under modern nomenclature, Clementine was an "assistance animal." See *Assessing a Person's Request to Have an Animal as a Reasonable Accommodation Under the Fair Housing Act,* U.S. Department of Housing and Urban Development, FHEO Notice: FHEO-2020-01.[17] Tantamount to a physical extension, death to Clementine constituted personal injury to Mr. Flynn, for a vital support to his psychological integrity was eliminated, causing instability and physical manifestations of harm. Unlike Buddy, Pickford's dog who sustained "permanent injuries to his shoulder, esophagus, and throat" but

[17] https://www.hud.gov/sites/dfiles/PA/documents/HUDAsstAnimalNC1-28-2020.pdf (accessed 8.12.22)

lived (*id.,* 259), and who was not Pickford's assistance animal, Clementine was an ESA and did not suffer mere "injury" or threat thereof, but actually died. Further, Clementine passed not from ordinary negligence, but acts and omissions by learned, licensed, and heavily regulated professionals who entered into a special triadic relationship for hire [WAC 246-933-320 [Veterinarian-client-patient relationship]) to prudently perform veterinary services consistent with the "do no harm mandate" of the American Veterinary Medical Association's Veterinarian's Oath.[18]

Where a precious animal has been entrusted (under a bailment for mutual benefit) to learned Defendants who have been given the privilege by the State to practice the craft of their choosing; where they are possessed of specialized knowledge within the context of a codified legal relationship; where the vast majority of their clientele are companion animal owners they know are regarded as family members and assistance animals from whose bond all veterinarians profit, any holding declining NIED to a righteous, disabled plaintiff would run counter to public policy. Indeed, *Repin* observes:

> Regardless, pet owners hold a personal interest, not simply an economic interest, in companion animals. Pets possess an enormous hold on Washington residents, as illustrated by Kaisa being the sole companion of Robert Repin. Washingtonians devote hours to walking, playing, feeding,

[18] https://www.avma.org/resources-tools/avma-policies/veterinarians-oath (accessed 8.12.22)

> stroking, and caring for pets. Washingtonians mourn the death of a pet. In turn, pets return hours of love, devotion and companionship to owners. **Veterinarians know well the devotion that owners possess toward pets. Small animal veterinarians uncynically and legitimately make money from this devotion**.

Repin, 283 (Fearing, C.J., concurring) (emphasis added). Veterinarians owe several other codified duties of care which, if violated, result in a finding of unprofessional conduct and discipline by the Department of Health.[19]

Alas, where did the Court of Appeals's human-only limitation arise? Not from the Washington Supreme Court, which adopted NIED in 1976 but was careful to set no bar on the class of persons whose peril might stimulate mental distress, adding there was no "absolute boundary." While individuals were imperiled in *Hunsley,* that they were human or nonhuman was never dispositive and this Court imposed no homocentric limitation, much less upon those who rely on nonhumans for their own mental and physical health. Rather, *Hunsley* quoted from *Rodrigues v. State,* 52 Haw. 156 (1970) in refusing to limit the class of those concerned with the well-being of the imperiled individual. Indeed, *Rodrigues* stated a rule allowing NIED due to negligent destruction of inanimate personalty. Eleven years

[19] *See* Uniform Disciplinary Act at RCW 18.130.180(4); RCW 18.92.046 (applying Uniform Disciplinary Act to veterinarians); RCW 18.92.240 (misdemeanor to practice veterinary medicine without a license). Veterinarians also owe administratively-inspired duties to patients and clients, such as WAC 246-933-030, WAC 246-933-060, WAC 246-933-080, WAC 246-933-200, and WAC 246-933-345.

later, the Hawaii Supreme Court applied NIED to the case of a dog killed due to negligence. *Campbell v. Animal Quarantine Station,* 63 Haw. 557 (1981).

To date, this Court has not addressed whether NIED extends to nonhumans, whether as a direct or bystander claim. No Supreme Court case since *Hunsley* ever specifically imposed a consanguinity limitation, either. Rather, the only median barriers to keep litigants in their lanes were objective symptomatology proved by medical evidence (*Hegel v. McMahon,* 136 Wn.2d 122 (1988)) and presence at or shortly after the tortious event (*Gain v. Carroll Mill,* 114 Wn.2d 254 (1990) and *Colbert v. Moomba Sports,* 163 Wn.2d 43 (2008)). While, to be sure, Supreme Court cases reference "family members" as those who may raise NIED claims, the question of blood, marriage, degree of separation, or nature of relationship between bystander and victim has not been at issue before this Court. And here, where the animal is owned by the plaintiff, NIED is best examined as a direct, not bystander, claim (i.e., with direct harm to the "owner"), putting it in an entirely different category than bystander NIED jurisprudence.

Thirty-three years ago, Justice Brachtenbach presaged that one day this court would have to sort out the "substantial confusion" that resulted from loose NIED language. *Gain,* 266-67. He explained what continues to bedevil the courts in this State:

> Nonetheless, the majority causes substantial confusion for future cases. The majority haphazardly refers to the relationship as involving a "family member," a "loved one," a "relative," and the "victim." The majority provides no guidance as to the legal meaning of these imprecise and unnecessary categories. **I assume that the majority's loose language will, someday, require us to decide whether a pet is a family member or a loved one**. There is a split of authority on that one. *Roman v. Carroll,* 127 Ariz. 398, 621 P.2d 307 (1980) holds no; *Campbell v. Animal Quarantine Station,* 63 Hawaii 557, 632 P.2d 1066 (1981) holds yes.
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> *Hunsley v. Giard, supra,* ruled on this precise point; its holding is gratuitously confused by the majority. We said:
>
> > We decline to draw an absolute boundary around the class of persons whose peril may stimulate the mental distress. This usually will be a jury question bearing on the reasonable reaction to the event unless the court can conclude as a matter of law that the reaction was unreasonable.
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> *Hunsley,* 87 Wash.2d at 436, 553 P.2d 1096.

Gain, 266-67 (emphasis added). And no judge has ever concluded as a matter of law that emotional distress from the death of a pet would be "unreasonable." Respectfully, the day to meaningfully interrogate Justice Brachtenbach's query and decide whether not just a "pet" falls within the NIED doctrine, but an assistance animal – be it emotional support, therapy, or service – has come. Indeed, when Division III decided *Repin,* it, too, remained unclear about NIED's application to pets, stating, "We do not know if this rule extends to emotional distress suffered as a result of observing one's pet suffer." *Id.,* 265.

Societal mores have evolved since Arizona and Hawaii determined the question over forty years ago, evidence enough that this was an issue of substantial public importance in two other States nearly two generations ago. The time is nigh for Washington to do the same, especially with the younger generations gravitating toward animal companionship at even higher rates than Boomers and Generation Xers. A 2022 *Consumer Affairs* survey reported that 57% of participants aged 27-42 professed lover for their pets more than their siblings and 50% claimed to love their pets more than their own mothers. Millennials are also less likely to have children and more likely to have pts than prior generations. Fifty-eight percent of Millennials stated they would rather have pets than kids.[20]

In addition to possessing obligations as fiduciaries and bailees,[21] veterinarians and veterinary hospitals routinely have pain management dialogues and elaborate end-of-life discussions, taking into account the psychological fragility of the client that attends these interactions. Yes, animals are *personal* property, but in a legal relationship unhesitatingly moving from mere owned chattel to close family member and assistance

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[20] *Millennials prefer pets to children (Survey),* 5.17.22: https://www.consumeraffairs.com/pets/pets-are-family.html (accessed 4.4.23)

[21] Veterinarians are "in a position of a bailee for hire and a fiduciary as far as the care and protection of this personalty is concerned. In handling this property of his clients, he owes a deep and abiding obligation of honesty and integrity as to his treatment and their care." *Thorpe v. Bd. of Examiners in Veterinary Medicine*, 104 Cal.App.3d 111, 117 (1980).

animal, defining our identities in a close and intimate, familial and dependent, and lasting connection that when destroyed by negligence causes grievous harm that veterinarians, above all, should foresee.

VI. CONCLUSION

The Court of Appeals, perhaps out of appropriate deference to this Court, did not feel empowered to extend or define common law. Such profound task rests in this Court's hands and presents a precious, and long-overdue, opportunity to adjudicate these important matters of national import.

Dated this 5.5.23,

[Certified RAP 18.17(c)(10) compliant at 4988 words]

ANIMAL LAW OFFICES, PLLC

Adam P. Karp, WSB No. 28622
Attorney for the Flynns

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 5.5.23, I caused a true and correct copy of the foregoing to be served upon the following person(s) in the following manner:

[X] ACORDS portal

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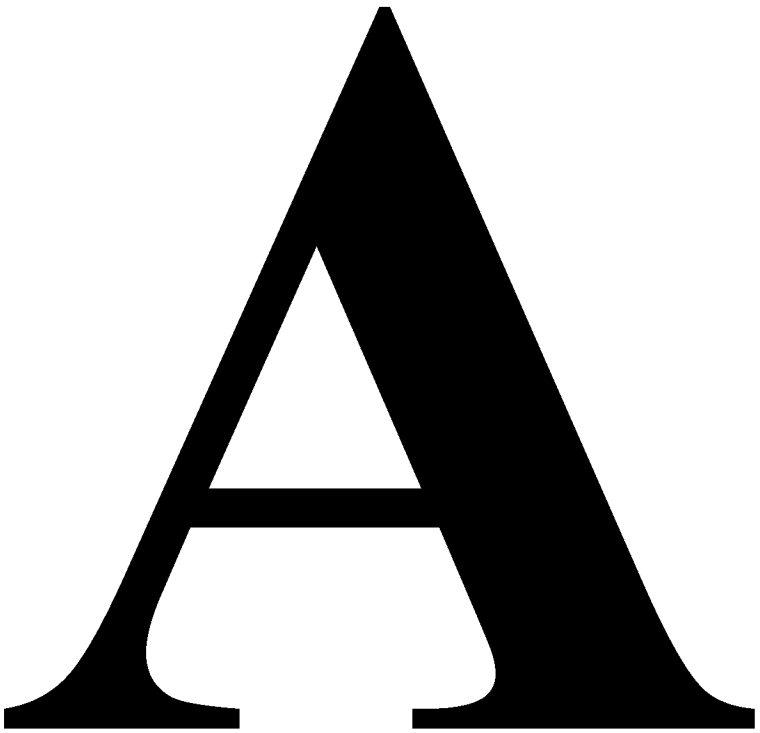

FILED
3/6/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KAITLYN FLYNN AND KEVIN FLYNN,

Appellants,

v.

WOODINVILLE ANIMAL HOSPITAL, P.S., a Washington professional service corporation; NICHOLE K. FREI-JOHNSON, DVM and her marital community/domestic partnership; BLUEPEARL WASHINGTON PRACTICE ENTITY, P.C., doing business as BLUEPEARL SPECIALTY + EMERGENCY PET HOSPITAL of Kirkland; KENT J. VINCE, DVM, MSPVM, DACVS and his marital community/domestic partnership;

Respondents.

No. 84106-8-I

DIVISION ONE

UNPUBLISHED OPINION

COBURN, J. — After the death of the Flynns' dog that received care from two veterinary entities, the Flynns sued respondents asserting multiple claims, including corporate negligence and negligent infliction of emotional distress (NIED). The trial court granted respondents' joint motion for partial summary judgment dismissing claims for corporate negligence and NIED. The corporate negligence doctrine has not been applied to animal health care facilities in

Washington, and Washington law has never provided for NIED claims arising out of the negligent injury or death of an animal companion. Therefore, we affirm.

FACTS

Kaitlyn and Kevin Flynn acquired their pug, Clementine, in 2019. The Flynns owned an older pug named Comrade, who was Kevin's[1] emotional support animal until Comrade's death in 2020. Kevin suffers from general anxiety disorder for which he is under a doctor's care and prescribed medications. Three months before Comrade passed, Clementine assumed the role of providing emotional support to Kevin.

In January 2021, the Flynns told Woodinville Animal Hospital, P.S. (WAH) they were concerned Clementine might have a urinary tract infection. Over a period of three weeks, the Flynns continued to call WAH and bring Clementine to WAH for care. On January 19, 2021, WAH instructed the Flynns to take Clementine to BluePearl Specialty Emergency Pet Hospital[2] (BluePearl) because WAH feared that Clementine's bladder may have ruptured. Clementine underwent emergency surgery at BluePearl to repair her bladder. While recovering from surgery at BluePearl, Clementine went into septic shock. Clementine died the next morning. Following Clementine's death, Kevin experienced insomnia, inability to focus, and depression. He sought care from his psychiatrist who increased his medication dosages.

[1] We refer to Kevin Flynn by his first name for clarity because he and Kaitlyn share the same last name.

[2] Respondent BluePearl Washington Practice Entity, P.C. does business as BluePearl Specialty Emergency Pet Hospital of Kirkland.

The Flynns filed a complaint against BluePearl, Dr. Kent Vince, WAH, and Dr. Nichole Frei-Johnson. The Flynns allege corporate negligence, negligent infliction of emotional distress (NIED), and breach of contract against both BluePearl and WAH. The Flynns also allege professional negligence and NIED against both Vince and Frei-Johnson.

BluePearl and Vince filed a motion for partial summary judgment asserting that the corporate negligence doctrine only applies to full-service hospitals that treat humans, and NIED damages cannot be awarded for claims that arise out of the negligent death or injury of a pet. The court granted the motion. Then, by stipulated order, the court also dismissed corporate negligence and NIED claims against WAH and Frei-Johnson for the same basis while preserving the Flynn's right to appeal.[3] The trial court then, over the objection of BluePearl and Vince, granted the Flynn's motion under RAP 2.3(b)(4) for finality and certification of both dismissal orders. The Flynns appeal.

DISCUSSION

A motion for summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56(c). A

[3] WAH and Frei-Johnson had moved to join the partial summary judgment motion to dismiss the corporate negligence and NIED claims. The Flynns objected. In its order granting the partial summary judgment motion, the trial court reviewed the motion to join and the Flynn's objection, but did not address that motion in its order granting the partial summary judgment motion.

superior court's decision on summary judgment is reviewed de novo. Boyd v. Sunflower Props. LLC, 197 Wn. App. 137, 142, 389 P.3d 626 (2016).

Corporate Negligence Doctrine

The Flynns contend that the trial court erred as a matter of law when it dismissed the claims of corporate negligence against BluePearl and WAH. We disagree.

The doctrine of corporate negligence is based on a nondelegable duty that a hospital owes directly to its patients. Douglas v. Freeman, 117 Wn.2d 242, 248, 814 P.2d 1160 (1991). Four duties owed by a hospital under the doctrine of corporate negligence are: (1) to use reasonable care in the maintenance of buildings and grounds for the protection of the hospital's invitees; (2) to furnish the patient supplies and equipment free of defects; (3) to select its employees with reasonable care; and (4) to supervise all persons who practice medicine within its walls. Id. The standard of care hospitals are held to is that of an average, competent health care facility acting in the same or similar circumstances. Ripley v. Lanzer, 152 Wn. App. 296, 324, 215 P.3d 1020 (2009) (citing Pedroza v. Bryant, 101 Wn.2d 226, 233, 677 P.2d 166 (1984)). This standard is generally defined by the Joint Commission on Accreditation of Hospitals standards and the hospital's bylaws. Id. "Other decisions have found the standard of care for hospitals defined by statute." Douglas, 117 Wn.2d at 248-49 (citing Byerly v. Madsen, 41 Wn. App. 495, 504, 704 P.2d 1236 (1985); Schoening v. Grays Harbor Cmty. Hosp., 40 Wn. App. 331, 335, 698 P.2d 593 (1985).

In 1984, our Supreme Court adopted the doctrine of corporate negligence for the first time applying it to hospitals in Washington. Pedroza, 101 Wn.2d at 233. The Pedroza court discussed Illinois case Darling v. Charleston Cmty. Mem. Hosp., 33 Ill.2d 326, 211 N.E.2d 253 (1965), where the doctrine of corporate negligence was introduced into common law. Pedroza, 101 Wn.2d at 229. The court explained that Darling established the concept that a hospital had an independent responsibility to patients to supervise the medical treatment provided by members of its medical staff. Pedroza, 101 Wn.2d at 229 (citing Darling, 33 Ill.2d at 326). The Darling court determined that the hospital can be liable for its own negligence and not just through respondeat superior on the negligence of the physician. Id.

The Pedroza court explained that although Washington had not yet expressly adopted the fundamental principle of the theory, it had previously recognized that a hospital owed an independent duty of care to its patients. Pedroza, 101 Wn.2d at 232-33 (citing Pederson v. Dumouchel, 72 Wn.2d 73, 431 P.2d 973 (1967); Osborn v. Public Hosp. Dist. 1, 80 Wn.2d 201, 205, 492 P.2d 1025 (1972). In Pederson, the court held that a hospital violated the duty of care it owed its patients when it permitted an operation without the presence of a medical doctor in the operating room. Pederson, 72 Wn.2d at 80. In Osborn, the court stated that a hospital had a statutory duty with respect to patient care

independent of the duty of care chargeable to the patient's attending physician. Osborn, 80 Wn.2d at 205.[4]

The Flynns argue that under the Washington Administrative Code, veterinary medical facilities have similar construction and maintenance codes to medical facilities that treat humans. They similarly argue that veterinarians are held to the same expectations as physicians,

> particularly where they furnish not only the surgeon and primary care provider (here, Vince and Frei-Johnson), but the examination room, operating room, advanced diagnostic equipment, all nursing support, an entire recovery and intensive care unit for postoperative convalescence and monitoring, all supplies and equipment, and a building in which to house all medical minutiae, with all such services are billed directly by the hospital to the client.

While it may be true that society expects animal hospitals to care for animals similarly to how human hospitals provide care for humans, it is well established that animals are treated differently than humans under Washington law. Notably, our Supreme Court has just 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 v. Kissinger, 146 Wn. App. 855, 870, 195 P.3d 539 (2008)).

In Sherman, this court held that the medical malpractice statute, chapter 7.70 RCW (which governs all civil actions for damages that occur as a result of health care), did not apply to the treatment of animals by veterinarians or

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[4] The Flynns argue that Douglas extended the doctrine of corporate negligence from a hospital to a dental clinic. But the dental clinic at issue was operated by Providence Hospital. Indeed, the named defendants in the lawsuit were dental intern Mark Freeman and "Sisters of Providence in Washington, d/b/a Providence Medical Center." See Douglas, 117 Wn.2d at 242, 245.

veterinary clinics. Sherman, 146 Wn. App. at 860. This court concluded that "[b]ased on the plain and unambiguous language of chapter 7.70 RCW. . . the act applies only to human health care, and does not apply to veterinarians or veterinary clinics."[5] Id. at 867.

The Flynns ask this court to disregard Sherman, arguing that because the claim of corporate negligence is borne out of common law, the fact that chapter 7.70 RCW does not apply to veterinarians and veterinary hospitals does not matter in the instant case. However, in adopting the doctrine of corporate negligence, the Pedroza court did so within the context of hospitals that treated humans. Corporate negligence has only been applied to hospitals that treat humans.

The Flynns cite to Baechler v. Beaunaux, 167 Wn. App. 128, 135, 272 P.3d 277 (2012), for its holding that veterinary malpractice claims are treated much like those against medical malpractitioners based on the similarities in training, licensing, and credentialing. However, in that case, the court discussed whether veterinarian expert opinions were necessary to decide whether a veterinarian's practice fell below a reasonable standard of care to support a claim of negligence. Baechler, 167 Wn. App. at 135. The court stated,

> Doctors of Veterinary Medicine are professionals who, like other professionals, must be properly schooled, pass an examination, and then be licensed. . . . In short, veterinarians practice a profession that requires extensive scientific training, clinical

[5] The Legislature also differentiates veterinarians and physicians in other chapters of the RCW. See ch. 18.92 RCW (applying to "Veterinary medicine, surgery, and dentistry" while chapter 18.71 RCW applies to "Physicians"); see also ch. 70.41 RCW (governing "Hospital Licensing and Regulation," but not mentioning veterinary hospitals or animals).

> experience, and a license from the state before they can practice. Their opinions and the opinions at issue here (diagnosis of disease and its proper management) are then expert opinions and necessarily subject to criticism only by other veterinarians.

Id. at 133-34. The Baechler court held, in the context of expert opinions, veterinarians, like physicians, are professionals, and their expert opinions regarding standard of care are necessary in negligence cases against veterinarians.

Additionally, the Flynns cite to a Ninth Circuit case, Clark v. United Emergency Animal Clinic, Inc., 390 F.3d 1124 (9th Cir. 2004), to support its contention that veterinarians are similar to physicians. In that case, the Ninth Circuit held that, under the language of the Fair Labor Standards Act (FLSA), veterinarians were analogous to physicians and other health care providers and thus fell within the practice of medicine exception to the salary basis requirement and were exempt from the overtime requirements of the FLSA. Clark, 390 F.3d at 1124. However, this holding is specific to the language of the FLSA and does not help the Flynns. Again, while physicians and veterinarians are comparable in some respects, this does not change the fact that Washington treats animals as property under the law.

The Flynns also turn to civil Washington Pattern Jury Instruction (WPI) 105.02.02, on corporate negligence, underscoring how it allows for a fill-in-the-blank option for when a hospital owes an independent duty of care. The Flynns point to the instruction's note on use directions that the instruction's blank bracket is for "such other duty as the court finds legally applies and is supported by the evidence." 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS:

CIVIL 105.02.02 (7th ed. 2022) (WPI). But the comment to WPI 105.02.02 only discusses cases and standards of care involving full service hospitals providing care to humans, referencing Pedroza, Douglas, and Osborn, among other cases. Id. It specifies that Washington decisions have held that the standard of care may be defined by statute and that the "second paragraph of the instruction defines the duty of reasonable care using the language of RCW 7.70.040." Id. As stated previously, chapter 7.70 RCW applies only to human health care, and does not apply to veterinarians or veterinary clinics.

As this court observed in 2006, "although we 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). Two years later, this court held that the medical malpractice "act applies only to human health care, and does not apply to veterinarians or veterinary clinics." Sherman, 146 Wn. App. at 867. The legislature "'is presumed to be aware of judicial interpretation of its enactments,' and where statutory language remains unchanged after a court decision the court will not overrule clear precedent interpreting the same statutory language." Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 147, 94 P.3d 930 (2004) abrogated on other grounds (quoting Friends of Snoqualmie Valley v. King County Boundary Review Bd., 118 Wn.2d 488, 496-97, 825 P.2d 300 (1992)).

The legislature is in the best position to determine whether the corporate negligence doctrine should be extended to reach animal hospitals. We conclude

the trial court did not err in dismissing the claim of corporate negligence as a matter of law on summary judgment.

Negligent Infliction of Emotional Distress

The Flynns next contend that the court erred in dismissing their NIED claims. We disagree.

The tort of negligent infliction of emotional distress encompasses three elements: (1) the emotional distress is within the scope of foreseeable harm of the negligent conduct, (2) the plaintiff reasonably reacted given the circumstances, and (3) objective symptomatology confirms the distress. Repin v. State, 198 Wn. App. 243, 263-64, 392 P.3d 1174 (2017).

"[I]t is well established 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." Sherman, 146 Wn. App. at 873 (citing Pickford v. Masion, 124 Wn. App. 257, 260, 98 P.3d 1232 (2004)). In Pickford, the plaintiff appealed a summary judgment dismissal of her claims for NIED she suffered when other dogs attacked and mauled her pet dog. Pickford, 124 Wn. App. at 258. The Pickford court held that the plaintiff was not entitled to recover damages for NIED or damages for loss of companionship and the human-animal relationship for the negligent death or injury of a pet. Id. at 260.

The Flynns argue that Pickford is significantly dissimilar to the instant case for multiple reasons. First, the pet in Pickford was injured but did not die, whereas Clementine died. Second, Clementine was not just a pet, but an

emotional support animal. Third, the defendants in the instant case are experts and not lay defendants as in Pickford. Fourth, the plaintiff and defendants in Pickford were strangers to each other; whereas the Flynns hired the respondents to provide a service. Those distinctions do not change the material similarity that the Flynns and the plaintiff in Pickford both filed NIED claims based on animals that are considered property in Washington.

In Hendrickson, the court rejected a dog owner's request for emotional damages under a breach of contract claim when the dog died following treatment by an animal hospital. Hendrickson v. Tender Care Animal Hosp. Corp., 176 Wn. App. 757, 760, 312 P.3d 52 (2013). The court observed that the very same cases that recognize the existence of emotional suffering resulting from the injury to or loss of a companion animal, also "uniformly recognize the historic treatment of those animals as property under Washington law and the limitation on emotional distress damages for such injury except in cases of malicious or intentional infliction of injury to those animals." Id. at 767. The court reasoned that if there is to be change of the common law, the court believed it to be a more prudential approach for the legislature to consider the matter prior to such a change occurring. Id. (citing Gaglidari v. Denny's Restaurants, Inc., 116 Wn.2d 426, 815 P.2d 1362 (1991)).

To support their argument that Clementine as an emotional support animal was a "canine of a different legal pedigree," the Flynns cite a 2020 Fair Housing and Equal Opportunity notice that explains certain obligations of housing providers under the Fair Housing Act with respect to interactions with people who

have service or "support" animals.[6] However, a legal recognition that animal owners may have rights in a different context does not establish a right to claim emotional distress based on negligent acts that caused an animal's death or injury.

For example, in Abdi-Issa, a recent criminal case, the defendant intentionally harmed the victim's dog and was convicted of animal cruelty. Abdi-Issa, 199 Wn.2d at 168. The defendant argued that because an animal is not a person, animal cruelty could not qualify as a domestic violence offense because only a human, and not an animal, can be a victim of domestic violence. Id. at 171. In rejecting that argument, the Supreme Court recognized that the legislature intends that perpetrators of domestic violence not be allowed to further terrorize and manipulate their victims by using the threat of violence toward pets. Id. at 173. The court reasoned that many of the enumerated domestic violence crimes are against property and that "'[p]ets, as a matter of law, are considered personal property.'" Id. at 180 (Stephens, J., concurring in part, dissenting in part) (quoting Abdi-Issa, 199 Wn.2d at 171).

The Flynns contend that this is a case of first impression because Clementine was not a pet, but an emotional support animal. The Flynns' contention appears to suggest that because Clementine was an emotional support animal, emotional distress negligently inflicted because of her death rises

[6] Off. of Fair Hous. & Equal Opportunity, U.S. Dep't of Hous. & Urb. Dev., Notice No. FHEO-2020-01 (Jan. 28, 2020) (distinguishing between (1) "service animals," and (2) "support animals" that do work, perform tasks, provide assistance, and/or provide therapeutic emotional support for individuals with disabilities), https://www.hud.gov/sites/dfiles/PA/documents/HUDAsstAnimalNC1-28-2020.pdf.

above claims of emotional distress from the deaths of ordinary pets. However, 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.

The trial court did not err in dismissing the NIED claims.

Attorney Fees

We decline to grant WAH's and Frei-Johnson's request for attorney fees because they did not provide a basis for which they are entitled such fees. RAP 18.1(a) permits an award of attorney fees and expenses on appeal "[i]f applicable law grants to a party the right to recover" them. "Argument and citation to authority are required under the rule to advise us of the appropriate grounds for an award of attorney fees as costs." Wachovia SBA Lending, Inc. v. Kraft, 165 Wn.2d 481, 493, 200 P.3d 683 (2009).

CONCLUSION

We affirm the trial court dismissing all the corporate negligence and NIED claims by granting the motion for partial summary judgment and entering the stipulated order.

Coburn, J.

WE CONCUR:

Díaz, J.

Bowman, J.

B

Hon. Douglass A. North

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

KAITLYN FLYNN and KEVIN FLYNN,

Plaintiffs,

vs.

WOODINVILLE ANIMAL HOSPITAL, P.S., a Washington professional service corporation; NICHOLE K. FREIJOHNSON, DVM and her marital community/domestic partnership; BLUEPEARL WASHINGTON PRACTICE ENTITY, P.C., doing business as BLUEPEARL SPECIALTY EMERGENCY PET HOSPITAL of Kirkland; KENT J. VINCE, DVM, MSPVM, DACVS and his marital community/domestic partnership;,

Defendants.

No. 21-2-13175-8 SEA

ORDER GRANTING DEFENDANT BLUEPEARL AND DEFENDANT VINCE'S MOTION FOR PARTIAL SUMMARY JUDGMENT

~~[PROPOSED]~~ D. A. N.

THIS MATTER, having come before the Court on Defendant BluePearl and Defendant Vince's Motion for Partial Summary Judgment, the Court having reviewed the records and files herein, and specifically:

1. Defendant BluePearl and Defendant Vince's Motion for Partial Summary Judgment;

2. Plaintiffs' Opposition to Defendant BluePearl and Defendant Vince's Motion for Partial Summary Judgment;

3. The Declaration of Adam P. Karp;

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4. The Declaration of Kevin Flynn;

5. The Reply in Support of Defendant BluePearl and Defendant Vince's Motion for Partial Summary Judgment;

6. Defendant Woodinville Animal Hospital and Frei-Johnson's Joinder;

7. Plaintiffs' Response to Joinder;

and the Court being fully advised in the premises, now, therefore, it is HEREBY ORDERED that

1. Defendant BluePearl and Defendant Vince's Motion for Partial Summary Judgment is hereby GRANTED.

2. Plaintiffs' claims for Negligent Infliction of Emotional Distress and Corporate Negligence against BluePearl are hereby dismissed with prejudice.

3. Plaintiffs' claim for Negligent Infliction of Emotional Distress against Dr. Vince is hereby dismissed with prejudice.

ENTERED this 25th day of April, 2022.

Douglass A. North

Hon. Douglass A. North

Presented by:

LEE SMART, P.S., INC.

By: _____
Kyle J. Rekofke, WSBA No. 49327
Of Attorneys for Defendant BluePearl
and Defendant Dr. Vince

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The Honorable Douglass North

IN THE SUPERIOR COURT, STATE OF WASHINGTON
FOR KING COUNTY

KAITLYN FLYNN and KEVIN FLYNN, Plaintiffs, vs. WOODINVILLE ANIMAL HOSPITAL, P.S., a Washington professional service corporation; NICHOLE K. FREI-JOHNSON, DVM and her marital community/domestic partnership; BLUEPEARL WASHINGTON PRACTICE ENTITY, P.C., doing business as BLUEPEARL SPECIALTY EMERGENCY PET HOSPITAL of Kirkland; KENT J. VINCE, DVM, MSPVM, DACVS and his marital community/domestic partnership, Defendants.	No. 21-2-13175-8 SEA STIPULATION AND ORDER RE DISMISSAL OF CORPORATE NEGLIGENCE AND EMOTIONAL DISTRESS CLAIMS

I. STIPULATION

Plaintiffs, Defendant Woodinville Animal Hospital, P.S., and Defendants Johnson stipulate as follows:

1. The court has already granted Defendants BluePearl and Vince's Motion for

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Partial Summary Judgment dismissing Plaintiffs' emotional distress claims against them. In the same order, the court also dismissed Plaintiffs' corporate negligence claims against Defendant BluePearl.

2. Defendants Woodinville Animal Hospital, P.S. and Defendants Johnson intend to bring a motion for the same relief. Plaintiffs would oppose the motion on the same grounds as set forth in their opposition to Defendants BluePearl and Vince's motion, and in opposition to Defendants Woodinville Animal Hospital, P.S. and Johnson's joinder.

3. Because the order on BluePearl and Vince's motion is the law of the case, the court would dismiss Plaintiffs' emotional distress claims against Defendant Woodinville Animal Hospital, P.S. and Defendants Johnson, and would also dismiss the corporate negligence claim against Defendant Woodinville Animal Hospital, P.S.

4. To avoid a waste of the court's time and to save the parties from incurring unnecessary expense, the parties stipulate to the dismissal of the emotional distress and corporate negligence claims. In so doing, Plaintiffs do not waive their right to appeal on these issues and affirmatively state that they do, in fact, intend to appeal. Further, Plaintiffs have filed a motion seeking CR 54(b) certification of those issues for immediate appeal.

5. To preserve the record for appeal, in addition to the materials filed in response to Defendants BluePearl and Vince's motion for partial summary judgment, which are incorporated by reference as part of Plaintiffs' position here, Plaintiffs attach to this stipulation the *Second Karp Declaration* with the exhibits that they believe are necessary to create a record on the emotional

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distress claims against Defendants Woodinville Animal Hospital, P.S. and Johnson and on the corporate negligence claim against Defendants Woodinville Animal Hospital, P.S.

COREEN WILSON WSBA #30314
Attorney for Defendants Woodinville Animal Hospital, P.S and Johnson

ANIMAL LAW OFFICES, PLLC

ADAM P. KARP WSBA #28622
Attorney for Plaintiffs

II. ORDER

NOW, THEREFORE, for the reasons set forth above, and pursuant to the stipulation of the parties, the court ORDERS:

1. Plaintiffs' emotional distress claims against Defendant Woodinville Animal Hospital, P.S. and Defendants Johnson are hereby DISMISSED.
2. Plaintiffs' corporate negligence claim against Defendant Woodinville Animal Hospital, P.S. is hereby DISMISSED.
3. The court will rule separately on Plaintiffs' motion for certification of this order and the 4.25.22 order granting partial summary judgment on Defendants BluePearl and Vince's motion.

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DATED this 12th day of May, 2022.

Douglass A. North
JUDGE DOUGLASS NORTH

Presented By:

Coreen Wilson
COREEN WILSON WSBA #30314
Attorney for Defendants Woodinville Animal Hospital, P.S and Johnson

ANIMAL LAW OFFICES, PLLC

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING – SEATTLE DIVISION

KAITLYN FLYNN and KEVIN FLYNN, Plaintiffs, vs. **WOODINVILLE ANIMAL HOSPITAL, P.S.,** et al.; Defendants.	Case No.: 21-2-13175-8SEA **ORDER GRANTING PLAINTIFFS' MOTION FOR FINALITY AND CERTIFICATION** ***Clerk's Action Required***

This matter came before the Court on Plaintiff **KEVIN and KAITLYN FLYNN's** motion for Order of Finality and Certification. The Court, having heard and considered the pleadings of counsel on the underlying motion, and being fully advised in the premises;

IT IS HEREBY ORDERED that Plaintiffs' Motion is **GRANTED**, and that:

1. There is no just reason for delaying appeal from this Court's 4.25.22 Order Granting Defendant's Motion for Partial Summary Judgment, or the soon-to-be-presented Order on the same issues as to co-Defendants Woodinville Animal Hospital and Frei Johnson.

2. Based on this Court's 4.25.22 Order and ~~soon-to-be-presented~~ 5/12/22 D.N.J. companion Order, the parties will suffer significant financial hardships—in terms of litigating an arbitration and possible trial *de novo*—solely for the Plaintiffs to preserve their right to appeal this order under RAP 2.2(a)(1). Moreover, the Plaintiffs will risk imposition of significant attorney's fees and costs per SCCAR 7.3, even if they prevail, should they be forced to proceed with a trial *de novo*, a risk they would bear solely to preserve the right to appeal that would otherwise be allowed as a matter of right.

3. Furthermore, this Court's 4.25.22 order and ~~soon-to-be-presented~~ 5/12/22 companion Order would require the Plaintiffs to litigate the issue of liability without a possibility of recovering general damages, should the appellate court find this Court ruled in error on the NIED cause of action. It would also invite a retrial should the appellate court find that corporate negligence for direct

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wrongdoing by the corporate defendants is a stand-alone action irrespective of vicarious liability.

4. Additionally, this Court's 4.25.22 Order and ~~soon-to-be-presented~~ 5/12/22 companion Order may result in the undue burden of an arbitration and trial *de novo* followed by a remand and retrial, or, if not forced into arbitration, a trial followed by a remand and retrial.

5. Delay in finalizing this Court's Order and ~~soon-to-be-presented~~ 5/12/22 companion Order under CR 54(b) would result in significant detriment to both parties, as explained above.

6. This Court's 4.25.22 Order and ~~soon-to-be-presented~~ 5/12/22 companion Order shall be deemed a final judgment under CR 54(b) and for purposes of appeal under RAP 2.2(a)(1).

7. This Court's 4.25.22 Order and ~~soon-to-be-presented~~ 5/12/22 companion Order are certified under RAP 2.3(b)(4) as involving controlling questions of law as to which there is a substantial ground for a difference of opinion. Immediate review of these orders may materially advance the ultimate termination of the litigation.

Entered this 31st day of May 2022

Douglass A. North
King County Superior Court Judge
Douglass A. North

Presented by:

ANIMAL LAW OFFICES, PLLC

Adam P. Karp, WSB 28622
Attorney for Plaintiffs

Approved as to form:

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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_Motion_20230505085418SC001527_2829.pdf
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Comments:

Exhibits A and B to the PFR were inadvertently omitted before filing the motion for leave to file the corrected PFR. No other changes to motion or petition.

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