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SUPREME COURT
STATE OF WASHINGTON
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NO. 101863-1

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

KAITLYN FLYNN and KEVIN FLYNN,

Petitioners,

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,

Respondents.

**APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Douglass A. North, Judge**

ANSWER OF RESPONDENTS WOODINVILLE ANIMAL HOSPITAL, P.S., AND JOHNSON TO AMICUS CURIAE MEMORANDUM IN SUPPORT OF PETITION FOR REVIEW

**Address:
Financial Center
1215 Fourth Avenue, Suite 1700
Seattle, WA 98161-1087
(206) 292-4900**

**REED McCLURE
By Marilee C. Erickson
WSBA #16144
Attorneys for Respondents
Woodinville Animal Hospital, P.S., and Johnson**

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I. INTRODUCTION

Respondents Woodinville Animal Hospital and Dr. Frei Johnson ("WAH") offer this answer to the Memorandum of Amicus Curiae Animal Legal Defense Fund ("ALDF") in Support of Petition for Review. WAH asks this Court to deny the petition for review because this case involves a purely private issue. Whether pet owners have a negligent infliction of emotional distress ("NIED") claim for the alleged negligent injury to a pet is not an issue of substantial public interest. Assuming, for the sake of argument only, if there is an issue of public interest, any change in Washington law on the issue should be addressed by the legislature and does not require this Court's review.

II. ARGUMENT

A. ALDF'S MEMORANDUM DOES NOT ESTABLISH REVIEW SHOULD BE GRANTED.

ALDF's memorandum does not demonstrate that review is justified here. It does not comply with the Rules of Appellate

Procedure and misconstrues the gravamen of the situation. Review should be denied.

ALDF frames the issue as whether Division I erred in declining to reinstate the NIED claim. (Memo at 2) The actual issue is whether this qualifies for review under RAP 13.4(b). More particularly, is the question of whether pet owners can pursue a NIED claim an issue of substantial public interest which this Court should review. RAP 13.4(b)(4). It is not.

This case involves a private dispute, not one of public interest, let alone substantial public interest. One article in Law.com about this case does not convert this case into a matter of substantial public interest. (Memo at 9-10) One article about *Repin v. State*, 198 Wn. App. 243, 392 P.3d 1174, *rev. denied*, 188 Wn.2d 1023, 398 P.3d 1137 (2017), does not convert this case into a matter of substantial public interest. (Memo at 10) And a newspaper article about a Wyoming lawsuit does not make anything about this case a matter of substantial public interest in Washington state. (Memo at 10)

If anything about this case could be interpreted as matter of substantial public interest, the legislature not this Court should address the issue. ALDF quotes from Judge Fearing's concurrence in *Repin* that expresses his view that Washington law should change. (Memo at 7-8) Yet ALDF ignores the opinion of the two-judge majority. Judges Korsmo and Lawrence-Berrey, who wrote that they would "leave it for the legislature to weigh the benefits and costs of" any change in Washington law. 198 Wn. App. 287. Any change in Washington law should be decided by the legislature and does not justify this Court's review.

Moreover, ALDF assumes facts that are not established in the record. For example, it contends that Mr. Flynn experienced emotional distress resulting from the death of the Flynns' pet. (Memo at 2-3) ALDF does not cite to any record references as required. RAP 10.3(a)(5); RAP 13.4(c)(6), (e). The Flynns offered no expert testimony to establish what caused Mr. Flynn's emotional distress. The sealed portions of the clerks' papers

contain self-serving declarations/affidavits from the Flynns about their situation and their interaction with their pet. (CP 165-70) None of these submissions provide proof of emotional distress. Review should be denied.

B. WASHINGTON TORT LAW IS NOT AS EXPANSIVE AS ALDF ARGUES.

ALDF's memorandum is premised on the assumption that Washington tort law fully compensates and makes whole any injured party. Washington law is not so expansive. Not every act that causes harm results in liability or entitles one to recovery. *Cunningham v. Lockard*, 48 Wn. App. 38, 44-45, 736 P.2d 305 (1987), *citing Hunsley v. Giard*, 87 Wn.2d 424, 434, 553 P.2d 1096 (1976), *overruled in part on other grounds by Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 60, 176 P.3d 497 (2008). Washington courts have consistently recognized that NIED claims are a limited tort theory of recovery. *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 60, 176 P.3d 497 (2008). This Court has acknowledged the necessity of limitations of NIED claims stating:

> [U]nless a reasonable limit on the scope of defendants' liability is imposed, defendants would be subject to potentially unlimited liability to virtually anyone who suffers mental distress caused by the despair anyone suffers upon hearing of the death or injury of a loved one.

Gain v. Carroll Mill Company, 114 Wn.2d 254, 260, 787 P.2d 553 (1990), *quoted* in *Colbert*, 163 Wn.2d at 52.

ALDF cites *Shoemake v. Ferrer*, 168 Wn.2d 193, 198, 225 P.3d 990 (2010), for the proposition that the "guiding principle of tort law is to make the injured party" whole. (Memo at 3-4) The quote from *Shoemake* and the principle cannot be read in isolation. The context is important. *Shoemake* was a legal malpractice case with admitted liability. The only issue was the amount of damages---whether the attorney who admitted liability was allowed to deduct the attorney's contingent fee from the plaintiffs' damages. The Supreme Court concluded the attorney's fee was not to be deducted from the damages because an attorney's fee was forfeited. *Shoemake* concerned pecuniary damages---calculating economic damages.

Shoemake cites to *Aker Verdal A/S v. Neil F. Lampson, Inc.*, 65 Wn. App. 177, 183, 828 P.2d 610 (1992), which also involved an issue of how to measure economic damages. *Aker Verdal* involved a question about what exchange rate should apply for a Norwegian plaintiff's judgment. Neither case dealt with noneconomic damages. Both dealt with economic damages and how to measure economic damages. *Shoemake* and *Aker* do not support ALDF's assumption that any tort claimant is entitled to recover noneconomic damages and be made whole.

C. DIVISION I CORRECTLY CONCLUDED THAT NIED CLAIMS ARE NOT RECOGNIZED FOR INJURY OR DEATH TO ANIMALS.

Washington law is clear and consistent that pets are property and there is neither a basis for a NIED claim nor a basis for emotional distress damages. Division I properly concluded that Washington law does not recognize NIED for owners of injured or dead animals. Slip op. at 10-13; *Repin v. State*, 198 Wn. App. 243, 263-64, 392 P.3d 1174, *rev. denied*, 188 Wn.2d 1023 (2017); *Hendrickson v. Tender Care Animal Hosp. Corp.*,

176 Wn. App. 757, 767, 312 P.3d 52 (2013), *rev. denied*, 179 Wn.2d 1013 (2014); *Pickford v. Masion*, 124 Wn. App. 257, 260, 98 P.3d 1232 (2004). The Court of Appeals decision is consistent with established Washington law.

Contrary to ALDF's memorandum, Judge Robart did not struggle to explain Washington law. In *Stephens v. Target Corp.*, 482 F. Supp. 2d 1234, 1236 (W.D. Wash. 2007), Judge Robart dismissed the case because Washington law does not allow parties to recover emotional distress damages associated with the loss of personal property or injury to a pet.

Division I's opinion and Washington's law are consistent with the majority rule across the United States. Goldberg, *Courts and Legislatures Have Kept the Proper Leash on Pet Injury Lawsuits*, 6 STAN. J. ANIMAL L. & POL'Y 30, 33 (2013). The three non-Washington cases cited by ALDF rejected pet owners' arguments that they could recover non-economic damages for the loss of a pet. *Barking Hound Village, LLC v. Monyak*, 787 S.E.2d 191 (Ga. 2016); *Strickland v. Medlen,* 397 S.W.3d 184

(Tex. 2013); and *McDougall v. Lamm*, 48 A.3d 312 (N.J. 2012). Washington's law is consistent with the majority rule across the United States.

ALDF argues that because people consider their pets as family members and have an emotional bond with their pets, any pet injury that is a result of someone's negligence justifies an award of emotional distress damages. (Memo at 3-4) An emotional bond is not justification for tort recovery. Under that rationale, an injury or damage to anything that a person treasures would justify a tort claim for noneconomic damages. Such unlimited claims are neither rational nor reasonable. Division I correctly decided this case. This Court should deny review.

III. CONCLUSION

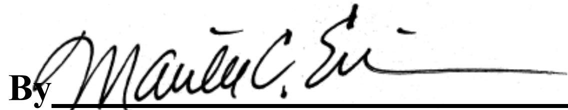
This case does not meet the RAP 13.4(b) criteria for review. The petition should be denied.

CERTIFICATE OF COMPLIANCE

I certify that the Answer to Memorandum of Amicus Curiae Animal Legal Defense Fund in Support of Petition for Review contains 1,305 words.

Dated this 28th day of June 2023.

REED McCLURE



By________________________

Marilee C. Erickson
WSBA # 16144
Attorneys for Respondents
Woodinville Animal Hospital,
P.S., and Johnson

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2023, a copy of the foregoing Answer to Memorandum of Amicus Curiae Animal Legal Defense Fund in Support of Petition for Review was served on the following below via the Washington State Appellate Court's Electronic Filing Portal:

Adam P. Karp
Animal Law Offices, PLLC
114 W. Magnolia St., Ste. 400-104
Bellingham, WA 98225
adam@animal-lawyer.com

Kyle Rekofke
Gordon Rees Scully Mansukhani
701 5th Ave Ste 2100
Seattle, WA 98104-7084
krekofke@grsm.com

John C. Versnel, III
Andrew H. Gustafson
Lee Smart, PS, Inc.
701 Pike St., Ste. 1800
Seattle, WA 98101
jcv@leesmart.com
ag@leesmart.com

Daniel Waltz
Animal Legal Defense Fund
700 Pennsylvania Ave. S.E.
Washington, DC 20003
dwaltz@aldf.org

Christopher A. Berry
525 E. Cotati Ave.
Cotati, CA 94931
cberry@aldf.org

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 28th day of June, 2023, at Seattle, Washington.

Angelina de Caracena

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REED MCCLURE

June 28, 2023 - 3:57 PM

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- krekofke@grsm.com
- ltl@leesmart.com
- mclifton@rmlaw.com
- paralegal@aldf.org
- sr@leesmart.com

Comments:

Answer of Respondents Woodinville Animal Hospital, P.S., and Johnson to Amicus Curiae Memorandum in Support of Petition for Review

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Sender Name: Angelina de Caracena - Email: adecaracena@rmlaw.com
Filing on Behalf of: Marilee C. Erickson - Email: merickson@rmlaw.com (Alternate Email:)

Address:
1215 Fourth Ave., Ste. 1700
Seattle, WA, 98161
Phone: (206) 386-7060

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