

FILED
SUPREME COURT
STATE OF WASHINGTON
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CLERK

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 TO PETITION FOR REVIEW OF RESPONDENTS
WOODINVILLE ANIMAL HOSPITAL, P.S., AND JOHNSON

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

Address:

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

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I. NATURE OF THE CASE

This case involves a claim for injury and death of an animal allegedly due to veterinary negligence. The superior court granted partial summary judgment dismissing the claims for corporate negligence and negligent infliction of emotional distress (NIED) because neither claim is recognized in Washington for injury or death of an animal. Division I of the Court of Appeals affirmed. Petitioners ask this Court to accept review. Respondents Woodinville Animal Hospital and Dr. Frei Johnson (“WAH”) ask this Court to deny the petition.

II. ISSUES PRESENTED

1. Should this Court decline to accept the petition and disregard portions of the petition where Petitioners have failed to comply with the requirements of RAP 13.4?

2. Should this Court decline to accept the petition where the Court of Appeals correctly affirmed the superior court’s order?

3. Should this Court decline to accept the petition where the Court of Appeals' decision does not conflict with any decision of this Court or of the Court of Appeals?

4. Should this Court decline to accept the petition where the Court of Appeals' decision does not involve any constitutional issues?

5. Should this Court decline to accept the petition where the Court of Appeals' decision does not involve any issue of public interest?

III. STATEMENT OF THE CASE

This Court should disregard petitioners' references to multiple sources which are neither part of the record nor legal authority.¹ For example, petitioners cite as "record" the respondents' websites, a summary of a phone call petitioners' counsel had on April 5, 2023, with a Department of Health

¹ On May 5, 2023, this Court permitted petitioners to amend their petition to add CP references. Notably several references are to sealed portions of the Clerk's Papers.

representative, citations to the U.S. Census, and quotes and citations from articles. (Petition at 4-6, 13-14-21) These materials were not before the superior court and not before the Court of Appeals. Petitioners seemingly ask this Court to take judicial notice of extrinsic materials. Judicial notice is limited to adjudicative facts. ER 201; *Cameron v. Murray*, 151 Wn. App. 646, 658-59, 214 P.3d 150 (2009) (scientific articles are not adjudicative facts of which judicial notice may be taken).

This Court should disregard these portions of the Petition/Amended Petition.

A. STATEMENT OF FACTS AND PROCEDURE FROM THE COURT OF APPEALS' DECISION.

Respondents WAH rely on the statement of case from Division I's opinion²:

² Because respondents WAH are relying on the statement of the case from the Court of Appeals' opinion, respondents WAH are not providing separate references to the clerk's papers.

Kaitlyn and Kevin Flynn acquired their pug, Clementine, in 2019. The Flynns owned an older pug named Comrade, who was Kevin's 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 (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.

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. 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.

(Slip op. at 2-3) (footnotes omitted).

B. UNPUBLISHED DECISION OF COURT OF APPEALS' OPINION.

In an unpublished decision, the Court of Appeals affirmed the superior court's order dismissing the corporate negligence claim and the (NIED) claim. (Slip op. at 1-2) The Court of Appeals held that corporate negligence claims are only recognized in Washington for medical facilities that provide care for humans. (*Id.* at 7) There is no authority to extend corporate negligence to animals. Washington law applies different principles to humans and animals. (*Id.* at 6) While there can be close emotional bonds between humans and animals, under the law, animals are considered property. (*Id.* at 13) Any change in Washington law is best left to the legislature. (*Id.* at 9)

The Court of Appeals held that the owner of an animal does not have a claim for NIED for the injury or death of the animal. Animals/pets are personal property. (*Id.* at 13) The Court of Appeals followed the 2004 appellate court decision in *Pickford v. Masion* which ruled there is no right to emotional

distress damages or damages for the loss of the human-animal bond for injury or death of an animal. (Slip op. at 10-11)

Petitioners ask this Court to accept review. This Court should deny the petition.

IV. ARGUMENT

This Court only accepts review if one or more RAP 13.4(b) criteria exist:

A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision 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.

Petitioners contend this case qualifies for review under RAP 13.4(b)(4) because it involves an issue of substantial public “importance.” (Petition at 5) This case does not meet the RAP 13.4 criteria for acceptance of review. This Court should deny review.

A. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT CORPORATE NEGLIGENCE APPLIES ONLY TO MEDICAL PROVIDERS THAT TREAT HUMANS.

Division I applied established law that corporate negligence applies only to hospitals that treat human patients. Slip op. at 7; *Douglas v. Freeman*, 117 Wn.2d 242, 248, 814 P.2d 1160 (1991); *Pedroza v. Bryant*, 101 Wn.2d 226, 233, 677 P.2d 166 (1984). Division I also noted that Washington appellate courts have declined to apply medical malpractice statutes to veterinarians or veterinary clinics. Slip op. at 6-7; *Sherman v. Kissinger*, 146 Wn. App. 855, 860, 195 P.3d 539 (2008).

Division I correctly noted that under Washington law, human beings are different than animals. Under Washington law and the law of most jurisdictions, animals are property. Slip op. at 9, citing *Mansour v. King County*, 131 Wn. App. 255, 267, 128 P.3d 1241 (2006). The principle that human beings are different than animals was recognized again in *Sherman*, 146 Wn. App. at 867. Nothing in Washington law has changed---either through appellate decisions or legislative action. The Court of Appeals

correctly decided that corporate negligence does not apply to veterinary clinics.

Petitioners attempt to attack the Court of Appeals decision by suggesting that owners of animals might not have a remedy. (Petition at 8) The issue of professional negligence remains in this case for resolution at the superior court. Speculating about what might happen in some future hypothetical situation changes nothing about correctness of the Court of Appeals decision. This Court should deny review.

For the first time in this case, petitioners cite to Pennsylvania law to support their contention that corporate negligence should apply to veterinary clinics. (Petition at 9-10) These new arguments need not be considered because they were not raised previously. Should this Court choose to look at the arguments, they should be rejected. *Scampono v. Highland Park Care Center, LLC*, 618 Pa. 363, 57 A.3d 582 (2012) involved a nursing home, a health care facility with human patients. And petitioners appear to argue that because Pennsylvania has

adopted RESTATEMENT (SECOND) OF TORTS § 323 (1965), the RESTATEMENT should apply in Washington and that the RESTATEMENT supports petitioners' theory that corporate negligence should apply to veterinary clinics. (Petition at 11) Nothing in these new arguments demonstrates that the Court of Appeals' decision was incorrect, let alone that this case qualifies for review of this Court. This Court should deny review.

B. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT NIED CLAIMS ARE NOT RECOGNIZED FOR INJURY OR DEATH TO ANIMALS.

The Court of Appeals 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.

In Washington, animals including beloved pets are considered property. No Washington court has applied the narrowly recognized claim of NIED to owners of injured or dead animals. This Court should deny review.

C. THIS CASE DOES NOT MEET ANY RAP 13.4(b) CRITERIA FOR REVIEW.

Petitioners refer to only one portion of RAP 13.4(b) as grounds for review: that this case involves an issue of substantial public importance. (Petition at 5) RAP 13.4(b)(4) actually states an issue of substantial public interest. This case does not qualify for review under RAP 13.4(b)(4).

This case involves a private dispute. It does not involve an issue of public interest, let alone an issue of substantial public interest. Finally, should this Court conclude this case involves any issue of public interest, any issue should be decided by the legislature not this Court.

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; and (3) the likelihood that the question will reoccur.

Dept. 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).

The fact that the Court of Appeals' opinion is not published demonstrates the case does not involve an issue of substantial public interest. 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). A party or any interested person may move to publish an opinion under criteria that reflect the grounds justifying a petition for review. RAP 12.3(e) sets forth criteria for a party or other interested person 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.

Assuming for the sake of argument only that this case involves any issue of public interest and even of substantial public interest, the case still does not meet the RAP 13.4(b)(4) grounds for review. The issues in this case should not be determined by this Court. As the Court of Appeals noted, the positions proposed by petitioners are for the legislature. This Court should deny review.

V. CONCLUSION

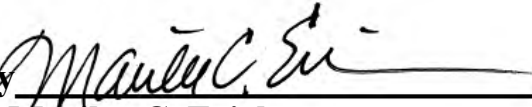
This case has not met any of the criteria of RAP 13.4(b). The petition should be denied.

CERTIFICATE OF COMPLIANCE

I certify that the Answer to Petition for Review contains 2,111 words.

Dated this 5th day of May 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 May 5, 2023, a copy of the foregoing Answer to 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

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

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

Dated this 5th day of May, 2023, at Seattle, Washington.



Angelina de Caracena

060349.099739/1557527

REED MCCLURE

May 05, 2023 - 4:28 PM

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Sender Name: Angelina de Caracena - Email: adecaracena@rmlaw.com
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