

NO. 94389-3

THE SUPREME COURT
FOR THE STATE OF WASHINGTON

Robert Repin,

Petitioner (Plaintiff)

v.

State of Washington, et al.

Respondents (Defendants).

***AMICI CURIAE* BRIEF OF WASHINGTON STATE
VETERINARY MEDICAL ASSOCIATION,
AMERICAN KENNEL CLUB, CAT FANCIERS'
ASSOCIATION, ANIMAL HEALTH INSTITUTE,
AMERICAN VETERINARY MEDICAL
ASSOCIATION, NATIONAL ANIMAL INTEREST
ALLIANCE, AMERICAN PET PRODUCTS
ASSOCIATION, AMERICAN ANIMAL HOSPITAL
ASSOCIATION AND PET INDUSTRY JOINT
ADVISORY COUNCIL IN SUPPORT OF
RESPONDENTS**

Heather A. Hedeem,
WSBA No. 50687*
SHOOK, HARDY & BACON, L.L.P.
701 Fifth Avenue, Suite 6800
Seattle, WA 98104
(206) 344-7600
* *Counsel of Record*

Victor E. Schwartz,
DCBA No. 406172
Phil Goldberg,
DCBA No. 489688
SHOOK, HARDY & BACON, L.L.P.
1155 F Street, NW, Suite 200
Washington, DC 20004
(202) 783-8400

Counsel for *Amici Curiae*

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A. STATEMENT OF THE CASE

Amici adopt Defendants' summary of the dispute in question to the extent relevant to the issues raised in this *amici curiae* brief.

B. QUALIFICATIONS AS *AMICI*

Amici animal owner and welfare groups are the Washington State Veterinary Medical Association, American Kennel Club, Cat Fanciers' Association, Animal Health Institute, American Veterinary Medical Association, National Animal Interest Alliance, American Pet Products Association, American Animal Hospital Association, and Pet Industry Joint Advisory Council. These non-profit associations, which promote pet welfare and responsible ownership, have a substantial interest in ensuring the State's laws promote sound pet welfare and ownership policies. The liability theories sought here are contrary to these goals. A statement of interest of each amicus is included in the motion for leave to file this brief.

C. SUMMARY OF ARGUMENT

This Petition raises an issue of settled law. *Amici* appreciate the hardship of losing a pet, particularly when end-of-life decisions are made. But, Washington, as do other states, carefully limits when a person may seek emotion-based damages. Injuries to pets, just as to human best friends, many close relatives and cherished possessions, do not fit within these restrictive categories. See *Hunsely v. Giard*, 87 Wn. 2d 424, 533

P.2d 1096 (1976). The Court of Appeals followed these long-standing principles in identifying and enforcing the liability boundaries in this case.

The Court of Appeals ruling is also aligned with courts around the country in not allowing emotion-based damages for negligence involving pets. Pet injury claims have now arisen in about thirty-five states. In large part, this litigation is the result of a concerted effort by some animal rights lawyers to make generational changes in the law.¹ The judicial response has been remarkably consistent: regardless of the court, common law theory asserted, or circumstance, courts have applied well-established law leading to a broad rejection of emotion-based liability for pet injuries.

Amici, who are pet owner and pet welfare groups, submit this brief to make clear to the Court that injecting emotion-based liability into pet care is not the pro-pet position. If, as here, allowing owners to be present during procedures opens the door to emotion-based liability, veterinarians, groomers and other pet care providers will have no choice but to exclude owners, even when he or she may be useful or comforting to a pet. Otherwise, costs of pet care services and products will go up to include this new liability. If pets do not receive care, including owner-present euthanasia, because of this added cost, they will suffer. As courts have

¹ See Richard L. Cupp Jr., *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 SAN DIEGO L. REV. 27 (2009).

found, a few owners may benefit from these awards, but pets do not.

Currently, Washington law provides a stable legal system that enables responsible ownership, deters abuse, and promotes innovative, affordable, and quality care. The drastic changes Petitioner seeks to the State's liability laws, if warranted, should be left to the Legislature, where the many interests at stake can be fully assessed and properly balanced.

D. ARGUMENT

1. The Court of Appeals Ruling Keeps Washington Within Mainstream American Jurisprudence

The recovery Petitioner seeks is not available in any state. Courts throughout the country have rejected claims for emotion-based liability in cases alleging negligent, non-malicious injury to a pet. These claims have been pled under various causes of action, including negligence and breach of contract, and as a measure of damages, such as sentiment or loss of companionship. See Phil Goldberg, *Courts and Legislatures Have Kept the Proper Leash on Pet Injury Lawsuits: Why Rejecting Emotion-Based Damages Promotes the Rule of Law, Modern Value, and Animal Welfare*, 6 Stan. J. of Animal L. & Pol'y 30 (2013) (providing a case law survey).

As these courts have explained, a relational attachment, including to a pet, "is unquestionable. But, it is also uncompensable." *Strickland v. Medlen*, 397 S.W.3d 184, 190 (Tex. 2013). There is no doubt that losing a

pet or watching it suffer is emotionally impactful, but similar situations involving fiancés, human best friends and cherished possessions also do not create emotion-based liability. *See Rabideau v. City of Racine*, 627 N.W.2d 795, 801 (Wis. 2001) (“[T]his rule of nonrecovery applies with equal force to . . . a best friend who is human as it does to a plaintiff whose best friend is a dog.”); *Krasnecky v. Meffen*, 777 N.E.2d 1286, 1287-90 (Mass. App. Ct. 2002) (“It would be illogical . . . to accord the plaintiff greater rights than would be recognized in the case of a person who suffers emotional distress as a result of the tortiously caused death of a member of his immediate family.”). Common law and wrongful death acts, including in Washington, largely limit such recoveries to spouses and children.²

Pet injury claims have arisen under a wide variety of scenarios, from pet-on-pet injuries³ to veterinary malpractice claims like the one at bar. *See, e.g., McMahon v. Craig*, 97 Cal. Rptr. 3d 555, 564 (Cal. Ct. App. 2009) (“Regardless of how foreseeable a pet owner’s emotional distress may be . . . we discern no basis in policy or reason to impose a duty on a veterinarian to avoid causing emotional distress to the owner of

² *See* RCW § 4.24.010 (limiting emotional damages to spouses and dependent parents and children); *Ueland v. Pengo Hydra-Pull Corp.*, 103 Wn.2d 131, 136, 691 P.2d 190 (1984) (limiting loss of companionship to spouses, children and parents).

³ *See McDougall v. Lamm*, 48 A.3d 312 (N.J. 2012) (owner was walking her dog when a neighbor’s pet violently attacked and killed her dog).

the animal being treated.”); *Shera v. N.C. State Univ. Veter. Teach’g Hosp.*, 723 S.E.2d 352, 357 (N.C. Ct. App. 2012) (The owner-pet bond “can neither be quantified in monetary terms nor compensated for under our current law.”); *see also Goodby v. Vetpham*, 974 A.2d 1269 (Vt. 2009); *Kaufman v. Langhofer*, 222 P.3d 277 (Ariz. Ct. App. 2009); *Kennedy v. Byas*, 867 So. 2d 1195 (Fla. 1st DCA 2004); *Koester v. VCA Animal Hosp.*, 624 N.W.2d 209 (Mich. Ct. App. 2000).

Many courts have expressed their appreciation for the love between owners and pets while separating this affection from creating new liability law. *See, e.g., Pacher v. Invisible Fence of Dayton*, 798 N.E.2d 1121, 1125-26 (Ohio Ct. App. 2003) (“Without in any way discounting the bonds between humans and animals, we must continue to reject recovery for noneconomic damages.”). The *Restatement of the Law Third, Torts: Liability for Physical and Emotional Harm* captures this balance:

Although harm to pets (and chattels with sentimental value) can cause real and serious emotional harm in some cases, lines – arbitrary at times – that limit recovery for emotional harm are necessary. Indeed, injury to a close personal friend may cause serious emotional harm, but that harm is similarly not recoverable under this Chapter.

Sec. 47 cmt. m (2012); *see also* Victor E. Schwartz & Emily J. Laird, *Non-economic Damages in Pet Litigation: The Serious Need to Preserve a Rational Rule*, 33 Pepp. L. Rev. 227, 236 (2006).

The Court of Appeals rulings, both here and in other pet cases, are in concert with this national jurisprudence. *See Repin v. State*, 198 Wn. App. 243 (2017) (finding each claim for emotion-based damages fails to state a cause of action); *see also Sherman v. Kissinger*, 146 Wn. App. 855, 873, 195 P.3d 539, 548 (2008) (“[I]t is well established that a pet owner has no right to emotional distress damages or damages for loss of human-animal bond . . .”); *Pickford v. Masion*, 124 Wn. App. 257, 262-63, 98 P.3d 1232 (2004) (rejecting emotional distress and loss of companionship); *Hendrickson v. Tender Care Animal Hosp. Corp.*, 176 Wn. App. 757, 312 P.3d 52 (2013) (contract claims); *Womack v. Von Rardon*, 133 Wn. App. 254, 135 P.3d 542 (2006) (requiring malicious injury for such damages); *Mansour v. King County*, 131 Wn. App. 255, 266, 128 P.3d 1241 (2006) (recognizing “the bond between pet and owner often runs deep”). Thus, there is also no split among the courts to resolve.

2. Pet Care Services, Including Euthanasia, Do Not Give Rise To Emotion-Based Liability

Petitioner re-casts the legal theories here in an attempt to overcome this overwhelming body of law. He suggests that his contract with the veterinarian allowed for emotion-based damages, or that he was the direct victim of the alleged negligence because he was holding his dog when it reacted to the euthanasia drugs. Petitioner acknowledged in the briefing

below that the new law he seeks would subject “any person or entity,” including veterinarians, “groomers, trainers, and boarders” to emotion-based liability whenever a pet is injured from inadequate services. *See* Pl. Br. at 16. To borrow from *Gaglidari v. Denny’s Restaurant*, the “quantum leap” Petitioner urges the court to take “is justified neither by the cases of other jurisdictions, the Restatement, Washington law, nor public policy.” 117 Wn.2d 426, 448, 815 P.2d 1362, 1374 (1991).

Parties to a contract define their own obligations, rewards and risks. Emotion-based harms are not compensable unless specified in a contract or a contract is “uniquely intended to protect” a party’s state of mind. *Id.* at 446, 1373. Veterinary services, including owner-present euthanasia, do not fit in either category. *See Hendrickson*, 176 Wn. App. at 766-67, 312 P.3d at 56-57. A veterinarian is retained to provide services to a pet, not to preside over an owner’s well-being. Petitioner’s presence to comfort his dog does not change the essence of this contract.

Petitioner’s zone of danger claim also fails to the extent there is a “zone of danger” exception in Washington: he was neither the direct victim of the Defendant’s alleged negligent act nor at risk of being physically impacted by the Defendant’s act. Rather, he dealt with the consequences of the veterinarian’s alleged malpractice to his dog, which is

different from being in the zone of danger of the act itself. Petitioner's other creative pleadings fail for reasons stated in the ruling below.

If Petitioner is allowed to blur these liability lines, it would impact situations far beyond this case. Owners are often present to comfort a pet or assist a veterinarian, particularly in rural and in-home practices. Parents accompany children in doctor offices, including having a child on a lap when receiving shots. Family members are often needed when mentally ill or elderly patients receive care. Under Petitioner's theories, a lawsuit for emotional distress would be born any time a pet or human patient has a reaction that physically impacts and upsets the attendant person.

3. Allowing Emotion-Based Liability Will Jeopardize Important Pet Care Services

Finally, pet welfare and social public policy weigh heavily against creating the emotion-based damages Petitioner seeks. As discussed, if owners are excluded, pets may not get the assistance or comfort they need.

With respect to euthanasia, this practice had a quiet room and the owner brought the dog's blanket to provide comfort. Some veterinarians provide these services in homes so pets can be in familiar surroundings. While euthanasia "can be very quick and peaceful, the body can react during and after the injection in ways that can be unexpected." Beth Guerra, DVM, *ACCES for Pet Health*, Seattle Post-Intelligencer Blog

Post, March 31, 2011; *see also* AVMA Guidelines for the Euthanasia of Animals: 2013 Edition 12, Am. Veterinary Medical Assoc. (explaining “vocalization, and reflex struggling, can be attributed to the second stage of anesthesia”). “These reactions can be alarming to owners.” *Id.* In these situations or when something goes wrong, as alleged here, a veterinarian’s obligation must be solely to the pet, not the owner’s well-being.

Further, pets will see no benefit if veterinary care resembles human healthcare with emotion-based liability increasing costs and dictating care. Already, the Legislature expressed concern that “low income households may not receive needed veterinary services for household pets.” RCW § 18.92.250. The same is true for other pet care services. If Washington is to dramatically change the law and have a wrongful death act for pets, the Court would be wise to defer that decision to the Legislature. *See, e.g., Kondaurov v. Kerdasha*, 629 S.E.2d 181, 187 (Va. 2006) (This “sweeping change in the law” is “properly left to legislative consideration.”).

E. CONCLUSION

For the foregoing reasons, *Amici* respectfully ask the Court to decline the Petition for Review.

RESPECTFULLY SUBMITTED this 19th day of June, 2017.

SHOOK HARDY & BACON, LLP

By: / Heather A. Hedeem /
Heather A. Hedeem, WSBA No. 50687
Victor E. Schwartz, DCBA No. 406172
Phil Goldberg, DCBA No. 489688
Attorneys for *Amici Curiae*

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on June 19, 2017, I caused service of the foregoing pleading on each and every attorney of record herein via electronic filing through the Washington State Appellate Courts' Secure Electronic Filing Portal to the following individuals.

Adam P. Karp
425 Crown Plaza Building
114 West Magnolia Street
Bellingham, WA 98225
(360) 738-7273

Robert W. Ferguson
Jason D. Brown
Office of the Attorney General
1116 W. Riverside Ave., Suite 100
Spokane, WA 99201
(509) 456-3123

/ Heather A. Hedeem /
Heather A. Hedeem

SHOOK HARDY & BACON

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Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 94389-3
Appellate Court Case Title: Robert Repin v. State of Washington and Washington State University, et al.
Superior Court Case Number: 14-2-00217-6

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Address:

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SEATTLE, WA, 98104-7066

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