Washington State Court of Appeals
Division III

Docket No. 340490

Kittitas Cy. Sup. Ct. Cause No. 142002176

ROBERT REPIN,

Plaintiff-Appellant,

-against-

STATE OF WASHINGTON, et al.,

Defendants-Respondents.

APPELLANT'S RESPONSE TO AMICI CURIAE BRIEF OF WASHINGTON STATE VETERINARY MEDICAL ASSOCIATION, ET AL.

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A. Unpublished Opinion Objection.

Amici curiae WSVMA, AKC, CFA, AHI, AVMA, NAIA, APPA, AAHA, and PIJAC ("*Amici*") have failed to abide by appellate protocols on unpublished appellate opinions. Their brief violates RAP 10.4(h), GR 14.1(a), and GR 14.1(b), and the following case should be disregarded: *Bales v. Judelsohn*, No. 011-268-05 (S.C.Ct.App.2005): an unpublished South Carolina opinion, cited by *amici* at 8, in violation of GR 14.1(b) and South Carolina Rule 220(a), 238(d)(2) (to be cited only "in proceedings in which they are directly involved.")

B. Aside from Pure Speculation, *Amici* Offer No Convincing, Statistically and Empirically Sound Evidence of a Correlation Between Emotion-Based Damages and Higher Costs of Veterinary Care or Other Animal Goods and Services.

Amici, who all have vested commercial and industrial motives to profit by marketing the human-animal bond ("HAB"),[1] harnessing intrinsic and sentimental value, and playing upon the public's deep emotional connection to animal companions, nevertheless seek this court's aid in sanctioning hypocrisy. In so

[1] The AVMA, one of the *amici*, has even developed policies recognizing and relating to the HAB. See www.avma.org/kb/resources/reference/human-animal-bond/pages/human-animal-bond-avma.aspx (accessed Sept. 15, 2016). Canadian veterinarians have recognized that the HAB represents a "paradigm shift" in societal attitudes toward companion animals, and resultantly, veterinary care that profits from bond-centered practice modeling. See Amanda I. Reinisch, *The human-animal bond: A Benefit or a threat to the integrity of the veterinary profession?*, 50(7) Can. Vet. J. 2009 Jul. (713-718) (www.ncbi.nlm.nih.gov/pmc/articles/PMC2696701/ (accessed Sept. 15, 2016). And see Thomas E. Catanzaro, DVM, MHA, FACHE, *Promoting the Human-Animal Bond in the Veterinary Practice*, or what he calls "Bonding the Client to your Practice for Fun and Profit." http://www.vin.com/apputil/content/defaultadv1.aspx?meta=Generic&pId=11274 (accessed Sept. 15, 2016). Articles in veterinary journals promoting the profit of the HAB include Todd W. Lue, Debbie P. Pantenburg et al., *Impact of the owner-pet and client-veterinarian bond on the care that pets receive*, Journal of the American Veterinary Medical Association, Vol. 232:4, Feb. 15, 2008; Katie Burns, *Human-Animal Bond Boosts Spending on Veterinary Care*, Journal of the American Veterinary Medical Association, Vol. 232:1, Jan. 1, 2008; *What are your Clients Willing to Pay?*, Veterinary Economics (August 2007), pp. 100, 104; John W. Albers, *What Pet Owners Really Think About Cost*, Trends magazine (American Animal Hospital Association), May/June 2007, pp. 45-50; *Survey asks how pet owners will respond to an economic downturn*, Journal of the American Veterinary Medical Association, Vol. 232:5, Mar. 1, 2008.

doing, they hope to obtain a judicial subsidy in the form of a cap on damages for companion animal injury and death while the veterinary, breeding, retail pet product sales, and animal pharmaceutical industries continue to sell goods and services exceeding by several orders of magnitude the "market values" they claim should set their maximum liability exposure. By limiting damages for the tortious injury or death to a companion animal to a few hundred dollars, they may continue to entice the animal-loving public to spend thousands of dollars on treats, toys, special clothing, training, veterinary services, and other animal care accoutrements that would never be spent were their customers "rational" consumers regarding companion animals solely as chattel possessed of mere market value, to be discarded when broken or obsolete, like a depreciating Chrysler.

That *amici* contend, without a shred of evidentiary, economic, or scientific support, and instead relying on self-serving speculation, that cognizing general damages for reckless or intentional misconduct by a veterinarian during an owner-present euthanasia "will adversely impact pets" and endorse an anti-pet position, is disgraceful. Such sky-is-falling hyperbole, at least in the context of capping recovery to the purchase price of the animal even if dwarfed by substantial veterinary bills, has been judicially rejected. The Kansas Court of Appeals did not hesitate affirming a trial court's award of veterinary bills, citing "long-standing common-sense jurisprudence" to permit the cost to restore an "injured pet dog with no discernible market value," finding "there are no true marketplaces that routinely deal in the buying and selling of previously owned pet dogs," and

perceiving "a distinction between the purely economic value of a horse for hire and a pet dog, like Murphy." *Burgess v. Shampooch Pet Indus. Inc.*, 35 Kan.App.2d 458, 462-63 (2006). *Burgess* approved of a "special value to the owner" instruction, at 461, while rejecting defendant's "hyperbolic[]" claims that its ruling would "open the proverbial 'floodgates' of high dollar litigation on behalf of animals…," at 465.

Thus, either the animal lover who continues spending tens or hundreds of times over the adoption or purchase price of an animal companion, including emergency surgeries that can run thousands of dollars per episode, (1) is an irrational actor, (2) has unusual or peculiar and idiosyncratic reasons for incurring these expenses, distinct from the general public, or, most certainly, (3) the premise urged by *amici* is fundamentally flawed. Citations to academic journals and studies contained in *amicus* Animal Legal Defense Fund's brief, decisions by Washington and non-Washington appellate courts that recognize companion animals are not mere property but something far more dignified and highly regarded, and even news clips and studies found in both amicus briefs, confirm that individuals like Mr. Repin, far from being illogical or solecistic in his attachment to Kaisa, typify the experience of millions of Americans, as has been the custom and tradition for centuries.

> More than 110 million companion animals reside in more than sixty percent of American households. More than sixty million of these are cats, while more than fifty million dogs reside with more than one-third of all Americans. More Americans share their lives with companion animals than with children. Human companions commonly consider their companion animals as members of their families. Almost one-third of the respondents in one study of 122 families felt closer to their dog than to any other family member.

Steven M. Wise, *Recovery of Common Law Damages for Emotional Distress, Loss of Society, and Loss of Companionship for the Wrongful Death of a Companion Animal*, 4 Animal L. 33, 44-45 (1998).

Putting aside that such pragmatic questions as whether nonhuman animals will benefit by reversing the trial court have no place in examining the legal issues at bar, the fact remains that *amici* are engaging in emotional blackmail. They do so by asking the court to insulate incompetent and willful veterinarians from relatively modest general damage awards or force the public to face industry-wide retaliation by banning them from the room when their animals are euthanized. The outcome of such a choice, made not by the clients, who are unable to obtain and administer controlled euthanizing substances, will be to engage in sloppy and potentially dangerous, do-it-yourself methods in the form of a mishandled firearm (or worse).

Further, the AVMA, WSVMA, and AAHA take the untenable position that the prospect of fully and fairly compensating individuals like Mr. Repin will drive their professional members to shirk the professional directives outlined by the AVMA itself in Section 15.3 of the *AVMA Guidelines for the Euthanasia of Animals* (2013 ed.). At page 13, the Guidelines counsel that veterinarians "should strive to euthanize animals within the animals' physical and behavioral comfort zones (eg, preferred temperatures, natural habitat, home) and, when possible, prepare a calming environment." CP 257. In other words, the AVMA urges veterinarians to euthanize with the owner present.

Indeed, the AVMA devoted an entire section to the human component of euthanasia and the foreseeable emotional impact thereon, describing "six settings in which the Panel was most aware of the potential for substantive psychological impacts of animal euthanasia on people." See Sect. 15.5, titled HUMAN BEHAVIOR, at pages 14-15. CP 258-59. The first setting discussed is the "veterinary clinical setting … where owners have to make decisions about whether and when to euthanize." It adds, "Owners should be given the opportunity to be present during euthanasia, when feasible, and they should be prepared for what to expect." *Id*., at 14. CP 258. It is highly unlikely that any WSVMA- or AVMA-affiliated veterinarian, or AAHA-accredited hospital, would so disregard such directive, and certainly not an entire industry. Whether deemed disingenuous or contradictory, *amici*'s reasoning should be disregarded.

Thus, *amici*'s premise – that the emotional connection to the owner-guardian should be exploited for profitable transactions at the cash register, but should be ignored in the court room – is as ethically questionable as it is legally unsound. Such a position also abuses the reality that animal-related goods and services (such as those provided by *amici* and Respondents) have an inelastic demand (i.e., they do not respond to price changes as would other goods, since the societal mores that regard companion animals as members of the family will overcome the discouraging effect of slight and even moderately significant increases in cost for such necessaries as veterinary care). Remember that most animal guardians spend more in the first few years than the cost to originally adopt or purchase the animal in question. *See, supra,* Wise, at 47 (discussing how

companion animals are property of a different order, a fact that explains why small animal veterinarians are still in business).

What drives this willingness to spend more to "repair" or "maintain" than to "replace" except intrinsic value and the HAB? The class of doting pet owner-guardians (such as Mr. Repin) will spend what it takes for family, and the veterinary industry knows this. Amici AVMA and AAHA, and the Association of American Veterinary Medical Colleges authored a report finding little price elasticity of demand for veterinary services and that 58% would continue to use their veterinarian with a 20% price increase. *See* Brown and Silverman, *The Current and Future Market for Veterinarians and Veterinary Medical Services in the United States,* Exec. Summary, 215(2) JAVMA 161, 166+ (July 15, 1999). http://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=D3AB11DEBACCC8D8D333FDAA44D773F2?doi=10.1.1.204.4174&rep=rep1&type=pdf (accessed Sept. 15, 2016). The result is an industry with little or no risk exposure to a general economic slowdown. *Amici*, like Respondents, want the court to subvert common law principles by endorsing market asymmetry by way of a double standard rule of compensation. Such dramatic redistributions of wealth should be left to the legislature.

Importantly, *amici* do not deny that their clients and customers are willing and eager to pay many times over the purchase or adoption price for their animal because of the strong familial and emotional connection. Instead, they make sweeping conclusions, unsupported by solid evidence, that allowing what the law already permits in the form of intrinsic value and general damages for certain

tortious acts will result in a trickling-down of higher prices that will reduce the level of animal care provided nationwide. No economists were commissioned by *amici* to reach these conclusions. Instead, they predominantly cite to a few newspaper articles referencing polls and law reviews articles, where two of the primary or contributing writers are also attorneys for *amici*, Mr. Schwartz and Mr. Goldberg.[2] Such a "showing" hardly passes muster.

In contrast, the court should evaluate the detailed quantitative and legal examination of Christopher Green, now Executive Director of Harvard Law School's Animal Law & Policy Program, directly addressing the baseless claim that allowing emotional damages arising from reckless or intentional misconduct will somehow cripple the veterinary industry, spur "defensive medicine," and cause tremendous harm to animals. Christopher Green, *The Future of Veterinary Malpractice Liability in the Care of Companion Animals*, 10 Animal L. 163 (2004). Similar arguments have been made, relying on poor data and misleading claims, with respect to noneconomic damage claims against human health care providers. *See* Randy Gordon, *A Tale of Two Initiatives: Where Propaganda Meets Fact in the Debate Over America's Healthcare*, 4 Seattle J. Soc. Just. 693 (Spr/Sum 2006).

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[2] Mr. Goldberg's article, *Courts and Legislatures Have Kept the Proper Leash on Pet Injury Lawsuits: Why Rejecting Emotion-Based Damages Promotes The Rule of Law, Modern Values, and Animal Welfare*, 6 Stanford J. Anim. L. & Pol'y 30 (2013), though criticizing Christopher Green, Note, *The Future of Veterinary Malpractice Liability in the Care of Companion Animals*, 10 Animal L. 163 (2004), never actually cites to any authority supporting the proposition that allowing such damages will cause increased insurance premiums and pass-along costs to the consumer. See 70-71. Instead of adducing hard evidence, Goldberg resorts to citing an *opinion column* by an editor at the Wall Street Journal, and makes much of the mere existence of appellate decisions involving animals which, of course, has nothing to do with rates. See pages 76-78.

The court should also consider that all industry groups represented by *amici* offer liability insurance to their members, providing an important pooled risk buffer to absorb the purported avalanche of lawsuits that are feared to result in outlandish verdicts – none of which has been cited by *amici* anywhere in the nation. The Supreme Court of Hawaii, in extending the NIED theory to animal deaths, found that since the 1970 decision of *Rodrigues v. State*, 52 Haw. 156 (1970) (which created the NIED cause of action), "there has been no 'plethora of similar cases'" and "the fears of unlimited liability have not proved true." *Campbell v. Animal Quarantine Station*, 63 Haw. 557, 564 (1981).

Should this court implement *amici* and Respondents' position, it will be undermining the civil justice system's purpose to deter negligent, reckless, and intentional professional conduct. When liability exposure can be judicially constrained to artificially low levels, any aftermath of wrongdoing will be accepted as the cost of doing business. An historical example is the explosive Ford Pinto scandal of the 1970s. If the damages resulting from recklessly and intentionally harming dearly beloved companion animals exclude emotional distress, and are limited to, as here, a few hundred dollars, then there will be little to no incentive to change professional or corporate behavior to increase safety standards and prevent foreseeable loss. Yet this is exactly the outcome *amici* recommend, and, in so doing, actually cause greater harm to animals and those who love and rely on them, while at the same time enjoying a windfall from the huge demand and resultant profits of their animal-related goods and services. Additionally, if the exposure remains so minimal (e.g., a plaintiff is told, in

essence, to adopt another dog from a shelter for $60), then no lawyer would take a case on behalf of those with undisputedly meritorious claims. Resultantly, few, if any, suits would be brought, and the dual purposes of the civil justice system would be thwarted.[3]

C. False Conflation of Animal Value with Emotion-Based Damages and Misrepresentative and Deceptive Survey.

A good portion of *amici*'s brief wrongly conflates the economic damage concept of sentimental value, as discussed in *Mieske v. Bartell Drug Co.,* 92 Wn.2d 40, 45-46 (1979) (allowing *usual* sentimental value to include what is "governed by feeling, sensibility or emotional idealism" but not *unusual* sentiment in establishing the intrinsic value to the owner), with the noneconomic damage concept of emotional distress. One involves property damage, the other personal injury, and neither is mutually exclusive nor duplicative. This doctrinal line-blurring contaminates *amici*'s analysis to the point that several citations and arguments concerning the value of Kaisa and loss of her companionship are simply not germane to this matter. Hence, references to these cases should be disregarded as irrelevant. They are: *Mitchell v. Heinrichs,* 27 P.3d 309 (Ak.2001); *Barking Hound Vill., LLC v. Monyak,* 787 S.E.2d 191 (Ga.2016); *Jankoski v. Preiser Animal Hosp. Ltd.,* 510 N.E.2d 1084 (Ill.App.1987); *Burgess v.*

[3] *See Restatement (2nd) Torts* § 901 (1979), *Spokane Truck & Dray Co. v. Hoefer,* 2 Wash. 45 (1891), *Babcock v. State,* 112 Wn.2d 83, 113 (1989)(Utter dissenting))("The law of torts serves two functions: it seeks to prevent future harm through the deterring effect of potential liability and it provides a remedy for the damages suffered."); *Any v. Martin,* 154 Wn.2d 477 (2005)(Chambers dissenting)("Tort actions are maintained for a variety of reasons, including the deterrence of wrongful conduct. *Ford v. Trendwest Resorts, Inc.,* 146 Wn.2d 146, 154 (2002)[.]"); *see also* Learned Hand, 3 A.B.C.N.Y. Lectures on Legal Topics 87 (1926) (noting that lawsuits are to "adjust human differences" and to settle a dispute; admissions or findings of liability adjust human difference and settle the dispute).

Shampooch, 131 P.3d 1248 (Kan.App.2006),[4] *Wilcox v. Butt's Drug Stores, Inc.*, 35 P.2d 978 (N.M.1934),[5] *DeJoy v. Niagara Mohawk Power*, 786 N.Y.s.2d 873 (N.Y.App.2004); *Daughen v. Fox*, 539 A.2d 858 (Pa.Super.1988).

The Court may note duplication between the briefs of *amici* and Respondents, for their 50-State surveys resemble one another. For the reasons set forth in Mr. Repin's reply brief, the same cases cited by *amici* should be disregarded. See *Reply Brief*, at Appendix (15-19). Nonetheless, additional criticisms follow:

Delaware: *Naples v. Miller*, 2009 WL 1163504, at *3, aff'd 992 A.2d 1237 (Del.2010) (unpubl.), concerned only NIED, yet held that emotional damages would be recoverable based on "impact or zone of danger risk";

Georgia: *Barking Hound Vill., LLC v. Monyak*, 787 S.E.2d 191 (Ga.2016) only addressed valuation, not recovery of emotional distress damages; *Holbrook v. Stansell*, 562 S.E.2d 731, 733 (Ga.App.2002) rejected emotional distress damages based on its much more conservative negligent infliction rule, which required direct impact and physical injury, unlike Washington.

Idaho: *Gill v. Brown*, 695 P.2d 1276 (Id.App.1985) is completely taken out of context and ignores *the very next sentence* of the opinion, which states, "However, a claim for damages for emotional distress and mental anguish may be asserted in connection with the independent torts of negligent or intentional infliction of emotional distress." *Id.*, at 1277.

Minnesota: *Soucek v. Banham*, 503 N.W.2d 153 (Minn.App.1993) did not address IIED because plaintiffs "abandoned the theory" and, while it rejected that Plaintiff could prove NIED, it found the claim otherwise cognizable and endorsed a "zone of danger" variant. *Id*., at 163-64. Lastly, *amici* misrepresent the assertion made by the *Soucek* court. It did not say there was "'no law supporting' emotional distress or noneconomic damages for injuries to a pet." Rather, it found no law supporting "respondent's derivative claim," i.e., transferring a willful or malicious intent from that directed by defendant at plaintiff's dog to plaintiff himself. No such claim is made here.

[4] This case, incidentally, supports recovery of special or intrinsic value of an animal and rejects market or replacement value. See 461.

[5] This case actually rejects market and replacement value recovery and permits special or intrinsic value in case where dog is killed by strychnine poisoning.

Missouri: *Wright v. Edison*, 619 S.W.2d 797 (Mo.App.1981) pertains fundamentally to damage to a home, and only incidentally to animals, specifically, seeking future damages in relation to cats "made nervous because of being confined in one of the rooms of the house while plaintiffs were in Florida." No claim for general damages was made in relation to the cats, and there no testimony regarding personal injury to the plaintiffs.

Nevada: *Thomson v. Lied Animal Shelter*, 2009 WL 3303733 (D.Nev.2009) found NIED and IIED cognizable in the death of an animal but dismissed the claims on the merits, in part because the plaintiff was not present (unlike here) when his dog was euthanized without notice. *Id*., *7-*9.

New Jersey: *McDougall v. Lamm*, 48 A.3d 312 (N.J.2012) only evaluated NIED.

Vermont: *Goodby v. Vetpharm*, 974 A.2d 1269 (Vt.2009) would have permitted an NIED claim if plaintiff were within the zone of danger (as was Mr. Repin). *Id*., at 1274.

Washington: *Sherman v. Kissinger*, 146 Wash.App. 855 (2008) did not examine the cognizability of emotional distress damages arising from breach of contract, outrage, or NIED. However, it explicitly held that such damages would be recovered for such intentional torts as trespass to chattels and conversion, claims made by Mr. Repin here. *Id*., at 873 fn. 8.

D. Other Rebuttal Points.

At 15, *amici* claim that the contract at bar sought "to end his dog's suffering," irrespective of his choice to be present, distinguishing it from a funeral parlor contract, which "is not to service the deceased, but to prepare the deceased solely to facilitate mourners' emotional needs." First, WSU/CVM specifically contemplates that owners will attend the euthanasia of their animals, having gone so far as to dedicate a "quiet room" to this end, one complete with comfortable furnishings, a carpeted floor, and a calming atmosphere to owner and animal. CP 59:22—60:6; 61:22-24 (explaining getting comfortable, lying down on floor with Kaisa). Unlike a traditional funeral home contract, which involves post-mortem

handling, this contract sought to bring about the humane passing of a beloved family member from an ante-mortem to a post-mortem state.

The discussion between Cohn-Urbach and Mr. Repin about what was supposed to occur furthered the understanding that this contract would be performed in the presence of, and in close contact with, Mr. Repin. That *amici*, who cite the rise in home euthanasias by mobile veterinarians, fail to appreciate this essential feature of both the mutual expectations and standardized protocols of modern-day euthanasia shows their selective attention to detail. It also reveals their folly in denying that the euthanasia attempted at WSU/CVM had every bit as much to do with the owner's emotional needs as it did that of the soon-to-be deceased animal. Under such circumstances, foreknowledge of an owner's emotional vulnerability (of which there was ample in Mr. Repin's case) goes to the heart of foreseeability under the *Restatement* relative to both breach of contract and outrage.

At 16, amici argue that NIED fails given that Mr. Repin was not at risk of being physically impacted by Defendants' negligent act. In so doing, they ignore the summary judgment standard and plain allegations that, due to Defendants' tortious acts, Mr. Repin was placed in immediate physical jeopardy from his own dog. *Amici* fundamentally misunderstand that Mr. Repin raises not a bystander claim, but a direct one.

Finally, at 19, *amici* talk about euthanasia excitatory response and assert that this was what Kaisa experienced and, thus, "cannot support large emotion-based liability." They ignore undisputed evidence. Cohn-Urbach specifically

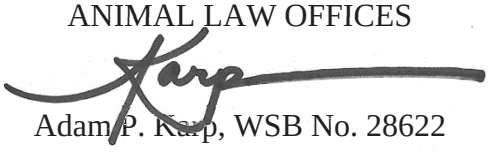
rejected that Kaisa was exhibiting secondary excitatory response. CP 209 (109:13-21). Dr. Peterson concurs. CP 241. Regardless, all authoritative euthanasia standards recognize that such response would prove emotionally upsetting to the present owner.

E. Conclusion.

For the reasons stated above, *amici*'s brief should be disregarded as largely immaterial to the issues at bar, incorrect in its discussion of Washington law, and both hypocritical and unsupported with respect to its doomsaying fears that fully and fairly compensating animal owners will devalue and imperil animal welfare.

Dated this September 16, 2016

ANIMAL LAW OFFICES



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 16, 2016, I served the foregoing upon the following person(s) in the following manner:

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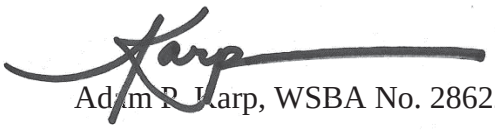

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