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SUPREME COURT OF THE STATE OF WASHINGTON

JULIE HENDRICKSON,

Petitioner,

vs.

TENDER CARE ANIMAL HOSPITAL CORP., *et. al.*,

Respondents.

ANSWER TO PETITION FOR REVIEW

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I. Introduction

Julie Hendrickson petitioned this Court to review part of the Court of Appeals' decision in *Hendrickson v. Tender Care Animal Hospital*, — P.3d —, 2013 WL 5752157 (2013).

Under RAP 13.4(b), this Court may accept discretionary review of a Court of Appeals decision terminating review 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 decision of another division 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.

Ms. Hendrickson makes two arguments as to why this Court

should accept review of the Court of Appeals' decision:

- (1) Whether Washington citizens should be able to obtain damages in tort under a theory of emotional distress for the death of a domestic animal is an issue of substantial public interest; and

(2) The Court of Appeals' decision is in conflict with another decision of the Court of Appeals.

For purposes of this Response, Respondents adopt and incorporate the facts as set forth in the decision of the Court of Appeals.

II. Response

Ms. Hendrickson takes issue with only one aspect of the decision of the Court of Appeals. Specifically, Ms. Hendrickson seeks review of the Court of Appeals' order affirming the trial court's summary dismissal of Ms. Hendrickson's claim for emotional distress damages resulting from the death of her dog under a theory of breach of a bailment contract.

Ms. Hendrickson's first argument is that it presents an issue of first impression that affects "not only the parties at bar but potentially thousands of other daily interactions throughout this State" and, therefore, should be reviewed by the Supreme Court under RAP 13.4(b)(4).

Ms. Hendrickson's second argument is that the Court of Appeals' decision is in conflict with decisions of other divisions of the Court of Appeals, and, therefore, should be re-

viewed under RAP 13.4(b)(2).

Both arguments fail since the Court of Appeals' decision is in perfect compliance with the law of the State of Washington.

1. This case presents no issue of first impression.

Ms. Hendrickson argues that the Court of Appeals erred "by categorically rejecting emotional distress damages upon proof of reckless breach of a veterinary contract." Petition for Review, p. 1. On page 14 of her petition for review, Ms. Hendrickson frames the issue she is seeking this Court to review as "whether the bailment contract to provide veterinary care for a[n animal] ... is the type for which emotional distress damages are recoverable under *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 815 P.2d 1362 (1991)."

Gaglidari concerns whether an individual could obtain emotional distress damages for breach of an employment contract. This Court recognized that "[t]he traditional common law doctrine provides that tort damages for emotional distress caused by breach of an employment contract are not recoverable," and concluded that "[no] change is warranted either on the basis of common law, the Restate-

ment of Contracts, Washington Precedent, or public policy.”
Gaglidari, 117 Wn.2d at 440, 815 P.2d 1362.

Gaglidari held that it was error for the trial court to allow *Gaglidari* to seek emotional distress damages for the breach of her employment contract. *Gaglidari*, 117 Wn.2d at 448, 815 P.2d 1362. *Gaglidari* discusses *Thomas v. French*, 30 Wn. App. 811, 638 P.2d 613 (1981), *reversed on other grounds*, 99 Wn.2d 95 659 P.2d 1097 (1983) and *Cooperstein v. Van Natter*, 26 Wn. App. 91, 611 P.2d 1332 (1980) and how the courts in those cases had “announced a general right to recover emotional distress damages in contract actions.” *Gaglidari*, 117 Wn.2d at 444-445, 815 P.2d 1362.

The *Gaglidari* court concluded *Thomas* and *Cooperstein* were based on an overbroad reading of the Restatement of Contracts § 341 (1932) and then held, “we have yet to erase the traditional distinction between tort and contract damages in order to award damages for emotional distress on an ordinary breach of contract action. Anything to the contrary in *Thomas* or *Cooperstein* is specifically disapproved.” *Gaglidari*, 117 Wn.2d at 444-445, 815 P.2d 1362.

Contrary to Ms. Hendrickson’s claims, *Gaglidari*

made clear that *Cooperstein* and *Thomas* are no longer good law for the proposition that emotional distress damages may always be recovered in an action for breach of a contract. Further, again contrary to Ms. Hendrickson's claims, *Gagliardi* made clear that the Restatement (Second) of Contracts § 353 was not "more expansive" than the earlier § 341 and did not create a "more expansive" and broadened doctrine than that announced in *Cooperstein* and *Thomas*:

While at first glance section 353 might appear to support the creation of a new theory of recovery, the comments, illustrations and cases cited belie this reading. Comment *a* demonstrates a strong intent to maintain the traditional focus on types of contracts, not types of breaches.

The comment's clear focus is the nature of contract. The type of breach is not even discussed. Moreover, with the exception of omitting engagements to marry as a covered type of contract, comment *a* is substantially the same as its predecessor in the original Restatement which was consistently interpreted to limit emotional distress damages to specific types of contracts. Rather than a break with the traditional rule, Restatement (Second) of Contracts § 353 is more properly viewed as carrying forward the traditional focus on the character of the contract. We also note no jurisdiction has suggested there is a substantive difference between section 341 and section 353.

Gaglidari, 117 Wn.2d at 443-444, 815 P.2d 1362.

As pointed out by the Court of Appeals, “Washington law is clear 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.’” *Hendrickson*, --- P.3d ----, 2013 WL 5752157, at *5, citing *Sherman v. Kissinger*, 146 Wn. App. 855, 873, 195 P.3d 539 (2008). Only a “malicious injury to an animal can support a claim for emotional distress damages.” *Sherman*, 146 Wn. App. at 873, 195 P.3d 539. The Court of Appeals noted these aspects of Washington law and then correctly concluded that this case involved neither situation. *Hendrickson*, --- P.3d ----, 2013 WL 5752157, at *5, n. 2.

Nothing in *Cooperstein*, *Thomas*, *Gaglidari*, or the Restatement of Contracts supports Ms. Hendrickson’s argument that emotional distress damages are available in an action for breach of a contract to perform veterinary services. The law is well settled in Washington that emotional distress damages are not generally available in a breach of contract claims.

In the context of the injury or death of animals, dam-

ages for emotional distress are available only as a result of a malicious injury to the animals. Ms. Hendrickson fails to establish that this case presents any issue of first impression of substantial public interest warranting review under RAP 13.4(b)(4).

2. The decision of the Court of Appeals is not in conflict with any decision of any division of the Court of Appeals.

Ms. Hendrickson fails to identify any case from any division of the Court of Appeals of the State of Washington with which Division II's decision in this case is in conflict. As discussed above, the Court of Appeals' decision in this case comports fully with the law in this State.

Division I of the Court of appeals has held that "It 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" and that only a "malicious injury to an animal can support a claim for emotional distress damages." *Sherman*, 146 Wn.App. at 873, 195 P.3d 539. *Sherman* cited a Division II case, *Pickford v. Marrison*, 124 Wn. App 257, 98 P.3d 1232 (2004) to support this conclusion.

In *Pickford*, Division II held that the plaintiff was not entitled to recover damages for negligent infliction of emotional distress or damages for loss of companionship and the human-animal relationship for the negligent death or injury of a domestic animal. *Pickford*, 124 Wn. App at 260-263, 98 P.3d 1232.

In *Womack v. Von Rardon*, 133 Wn.App. 254, 135 P.3d 542 (2006), Division III of the Court of Appeals noted that “the *Pickford* court left open whether malicious injury to an animal may be the cause of emotional distress damages in Washington because their facts ... raised solely negligent injury.” *Womack*, 133 Wn. App. at 263, 135 P.3d 542. *Womack* held:

For the first time in Washington, we hold malicious injury to a pet can support a claim for, and be considered a factor in measuring a person's emotional distress damages. The damages are consistent with actual and intrinsic value concepts as found in *Pickford* because, depending upon the particular case facts, harm may be caused to a person's emotional well-being by malicious injury to that person's pet as personal property.

Womack, 133 Wn. App. at 263-264, 135 P.3d 542.

Thus, Division II's decision in this case that emotional distress damages were not available for the breach of a veter-

inary services contract is in complete harmony with the law of Washington and does not conflict with any decision of any other division of the Court of Appeals. Emotional distress damages are only available for the death of an animal caused by malicious action.

Finally, as discussed above, Washington law does not allow recovery of emotional distress damages in an action for breach of contract. The Court of Appeals pointed this out:

Hendrickson has failed to submit, and this court is not aware of, any Washington case applying the Restatement rule and creating a claim for emotional distress damages arising out of a contract action ... Accordingly, we hold that the trial court did not err when it dismissed Hendrickson's claims for reckless breach of bailment contract and emotional distress damages.

Hendrickson, --- P.3d ----, 2013 WL 5752157, at *10.

The Court of Appeals Decision is not in conflict with any case from any other division of the Washington Court of Appeals.

3. The Supreme Court should not overrule the Legislature's decision to leave time-tested law as it is.

In the 2008 legislative session, the Washington Legislature considered, *but did not adopt*, a bill creating "a cause

of action for the wrongful injury or death of a companion animal." House Comm. on Judiciary, H.B. Rep. on H.B. 2945, 60th Leg., Reg. Sess. (Wash.2008).¹ Ms. Hendrickson's petition, in effect, asks this Court to adopt legislation the Legislature declined to enact. Clearly the Legislature is content with the ancient wisdom of the common law and, hence, this issue is not one of "substantial public interest" that requires this court's attention.

III. Conclusion

Since the dawn of civilization, the affection people have for their domestic animals has been chronicled. *See, e.g.,* CAT IN ANCIENT EGYPT by Jaromir Malek, 2nd Rev. Ed., c. 2006 British Museum Press. Ms. Hendrickson offers this Court nothing new or different.

Ms. Hendrickson does not present any issue of first impression of substantial public interest such that review of this case is proper under RAP 13.4(b)(4).

Further, the decision of the Court of Appeals in this case is not in conflict with any other decision such that review would be proper under RAP 13.4(b)(2).

¹ Ms. Hendrickson's counsel attended the committee hearing and thus

is well aware of this fact.

This court should deny Ms. Hendrickson's Petition for Review and affirm the decision of the Court of Appeals.

DATED this 13th day of November, 2013.

Respectfully submitted,



John W. Schedler, WSBA No 8563
Attorney for Respondents

CERTIFICATE OF SERVICE

I certify under penalty of perjury and the laws of the State of Washington that on 13 November 2013 I caused service of the foregoing on each and every attorney of record herein:

**VIA EMAIL ATTACHMENT [PDF] AS AGREED
BETWEEN COUNSEL**

Adam Karp: ADAM@ANIMAL-LAWYER.COM

DATED this 13th day of November 2013 at Mercer Island, Washington.



John W. Schedler, WSBA No 8563

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Ladies & Gentlemen:

Attached is respondent's Answer to the Petition for Review in this cause.

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