

**KENTUCKY COURT OF APPEALS
CASE NO. 1999-CA-001759**

RICHARD J. AMMON, et al

APPELLANTS

vs.

VIRGIL WELTY, et al

APPELLEES

**MOTION TO BE PERMITTED
TO FILE AMICUS CURIAE BRIEF**

Comes the Animal Legal Defense Fund, Inc. (hereafter, ALDF) pursuant to CR 76.12 §7 and moves this Honorable Court to permit the filing of an Amicus Curiae Brief in this matter. In support of the Amicus Curiae's Motion, it states as follows:

I.

THE NATURE OF MOVANT'S INTEREST

Movant is a national non-profit (Section 501(c)(3)) organization comprised of lay members of the public, attorneys, law professors, judges and law students. Movant exists for the primary goal of protecting the lives and interests of animals and endeavors to enhance the welfare and status of animals through the enforcement of statutes, ordinances, regulations and common law principals. Movant is uniquely interested in the issue presently before this Court regarding the appropriate and fair damages available to an individual who has lost his or her beloved pet, as fair compensation is the cornerstone of laws designed to protect animals.

II.

**THE POINTS TO BE PRESENTED IN THE
AMICUS CURIAE'S BRIEF AND THE RELEVANCE
TO THE DISPOSITION OF THE CASE**

PRELIMINARY STATEMENT

The Movants wish to submit an Amicus Curiae Brief to emphasize the error in the trial court's June 29, 1997 ruling that a plaintiff can recover nothing for the illegal killing of their pet dog because he was a "mutt" and thus, had no fair market value. This unexplicated conclusion fails to comply with the "paramount" rule of damages recognized in Kentucky, to wit, that a successful plaintiff must receive fair compensation for a loss. Davis, Agent, Etc. v. Rhodes, 266 S.W. 1091, 1092 (Ky. 1924) (citation omitted). The general subordinate rule for damage to property is that a plaintiff is limited to recovering the fair market value of her property. Id. at 1091. However, as the Court of Appeals said, "this general rule is not of universal application." Id. Rather, if a "subordinate" rule will not fairly compensate a plaintiff for her loss, the subordinate rule must yield to the paramount rule requiring fair compensation. Id. at 1092.

With this guiding principle, Kentucky courts will create an "exception or modification" to the general subordinate rule in order to accomplish the goal of fair compensation. Id. For example, Kentucky courts have departed from the general rule when confronted with property with no fair market value or where such was less than its actual value to the owner. See, e.g., Id. at 1092 (household goods and wearing apparel), Union Light, Heat & Power Co. v. Heving, 62 S.W.2d 789, 791 (Ky. 1933) (same), Columbia Gas of Kentucky, Inc. v. Maynard, 532 S.W.2d 3, 6 (Ky. 1975) (same), City of Marion v. Nunn, 166 S.W.2d 298, 301 (Ky. 1942) (fruit trees). In such cases, the

courts have instead followed the broader approach of considering the owner's intended use of the property. Id.

It is even more obvious in the case of living companion animals than with other property that a companion animal's actual value might exceed its market value. Such an animal is valued as a unique being, rather than as a fungible piece of chattel, which can easily be replaced with little or no lasting consequence to the owner. Therefore, the broader rule should be used to decide the proper measure for determining the value of animals.

Finally, applying a fair market value approach to animal property fails to comply with the basic purposes of tort law: "to compensate one for the harm caused by another and to deter future wrongdoing." See Giuliani v. Guiler, M.D., 951 S.W.2d 318, 320 (Ky. 1997). After all, limiting recovery to fair market value for a mutt adopted from a pound (with little or no resale value) would not truly compensate its owner for the harm caused. It would not encourage veterinarians to use the same care for animals that, because of their species or breed, have a lower resale value. And, as in this case it would not guard against the intentional and illegal killing of a family pet. Therefore, the broader rule should be used to decide the proper measure for determining the value of animals.

ARGUMENT

I.

WHERE FAIR MARKET VALUE DOES NOT FAIRLY COMPENSATE A PLAINTIFF, COURTS IN KENTUCKY LOOK TO ALTERNATIVE METHODS TO MEASURE THE VALUE OF PROPERTY

Application of the fair market value method to animal property fails to comply with Kentucky law awarding compensatory damages. In setting the proper measure for compensatory

damages, the courts in Kentucky have wisely relied on the paramount rule that such a measure should "fairly compensate" that plaintiff. See Davis, Agent, Etc. v. Rhodes, 266 S.W. 1091, 1092 (Ky. 1925) (citation omitted).

Of course, in many circumstances a plaintiff can fairly be compensated with an award based on the fair market value of the destroyed property. See, e.g., Louisville & N.R. Co. v. Lankford, 200 S.W.2d 297 (Ky. 1947)(regarding the destruction of property in a grocery store, the court held that personalty should be measured by fair market value); Petroleum Exploration v. White, 34 S.W.2d 738 (Ky. 1931)(fair market value applied to measure damage to cattle which were held for the purpose of resale).

However, the fair market value method does not always fairly compensate a plaintiff for an actual loss. In such cases, Kentucky courts have crafted an alternative standard in order to foster the State's policy of fairly compensating plaintiffs. For example, the Kentucky Court of Appeals (the highest court before 1976) repeatedly has held that household goods and wearing apparel could not properly be valued based on their fair market value because they were worth more to the owner than the price at which they could be sold. See Union, 62 S.W.2d at 791 (defining household goods as "articles that are necessary for the enjoyment of the home and are more valuable to the owner than the price at which they could be sold"); see also, Davis, 266 S.W. at 1092; Columbia Gas of Kentucky, Inc. v. Maynard, 532 S.W.2d 3 (Ky. 1975).

In such cases, the Court of Appeals rejected the fair market value approach and instead decided the property's value to the owner based on the owner's intended use of such property, less any fanciful or sentimental value. See Union, 62 S.W.2d at 791; Davis, 266 S.W. at 1092; Columbia, 532 S.W.2d at 6; see also City of Marion v. Nunn, 166 S.W.2d 298 (Ky. 1942)(deciding

the value of fruit trees by their "intended use"). As stated by the Court of Appeals in Columbia, such an award may be supported by, among other things, "the owner's estimate of what the items were worth to him, unless so obviously preposterous as to be devoid of probative value." 532 S.W.2d at 6. Fact finders determine the actual value of such property by considering such factors as: (1) original cost, (2) expense and practicability of replacing them, (3) amount of use to which property had been subjected, (4) condition at the time of their destruction, and (5) any other conditions that affect their value to the owner. Davis, 266 S.W.2d at 1092 (listing factors 1, 2, and 5); Union, 62 S.W.2d at 791 (listing factors 1, 3, 4, and 5).

Of course, proper application of this method might best be left to the trial court. However, the method applied should be broad enough and flexible enough to comply with Kentucky's paramount rule of fairly compensating plaintiffs for their loss.

II.

**THE BROADER "INTENDED USE" METHOD
SHOULD BE APPLIED TO ANIMALS WHICH
ARE OFTEN HELD FOR REASONS THAT
ARE NOT PURELY ECONOMIC**

Even more than with household goods and wearing apparel, the actual value humans place on their pets tends to outweigh the price at which the animals could be resold. This becomes obvious from the amount of money owners spend taking care of the animal for such things as veterinarian bills, food, kennel lodging and even clothing.

Further, animals are certainly a unique form of property and are considered to have some sort of value outside of their resale value. This is evidenced by the existence of special laws, both state and federal, protecting animals from mistreatment by even their owners. See, e.g., KRS §525.130

(criminal animal cruelty law); KRS § 436.610 (allowing confiscation of animals for animal cruelty); and The Animal Welfare Act of 1976, codified at 7 U.S.C. §§2131-2159 (regulating the transportation, purchase, sale, housing, care, handling, and treatment of animals, with the intent of fostering humane treatment and care of animals and protecting animal owners from theft of their animals). Further, courts in Kentucky have long recognized the unique bond between humans and their animal companions. See, e.g., Tennessee Valley Authority v. Stratton, 209 S.W.2d 318, 319, 306 Ky. 753, 754 (Ky. 1948) (in a case involving the death of a dog, the court noted that, "[t]he hound that runs the bushytail with enthusiasm is just a little lower in the fox hunter's affections than his children.").

Thus, the actual value of a family's mutt adopted from the pound, who has no particular talent outside of its ability to show deep affection and chase a ball, is certainly higher than any modest price at which it could be sold. Animal companions are capable of showing their owners an immeasurable amount of affection and appreciation, keeping a loyal watch for intruders, and consequently helping reduce the owner's fear, stress or loneliness.

III.

THE "INTENDED USE" METHOD CONTAINS APPROPRIATE LIMITATIONS ON THE AMOUNT OF RECOVERY AVAILABLE

Courts must balance the goal of providing fair compensation with the danger of providing plaintiffs a windfall. Davis, 266 S.W. at 1092 (citation omitted)(adopting position that the cardinal rule is to afford plaintiff fair compensation for his loss and no more). The "intended use" method, when carefully applied, achieves this dual objective. Specifically, while providing compensation for a plaintiff's actual loss, the "intended use" method excludes recovery for fanciful or sentimental

value placed on property. Columbia, 532 S.W.2d at 6; Davis, 266 S.W. at 1092. Of course, whether the claimed value is real rather than fanciful must be decided based on the facts of a given case.

Further, it must be recognized that a pet cannot be reduced to an item of purely sentimental value, such as a ticket stub from a special event, a plastic ring given by a first love, or a broken watch that is a family heirloom.¹ Zager v. Dimilia, 524 N.Y.S.2d 968, 138 Misc.2d 448, 449 (Village Ct. 1988) (holding that a family dog has value "separate and distinct from sentiment"). There is more value to our pets: they are our companions; they help us teach our children about responsibility, they provide psycho-therapeutic benefits; they make exercising more enjoyable; perhaps most importantly, not only are pets the object of our affection, but they return affection as well. Therefore, allowing recovery based on the intended use of a pet will not produce a damage award that contains an element of recovery that otherwise would not be recoverable.

IV.

THE FAIR MARKET VALUE APPROACH FAILS TO SATISFY BASIC TORT PRINCIPLES AS APPLIED IN KENTUCKY

As a final matter, applying the fair market value approach to animals does not comply with basic tort principles and reflects outdated views on animal companions. The basic purposes of tort law are: (1) "to compensate one for the harm caused by another and" (2) "to deter future wrongdoing." Giuliani v. Guiler, M.D., 951 S.W.2d 318, 320 (Ky. 1997)(explaining that to meet this purpose the common law must adapt to changing times, and expanding the common law to allow a child to sue for loss of consortium with monetary damages for the loss of love and affection). As

¹Courts have stated that even for such property as heirlooms, which may contain only sentimental value to their owner, sources other than fair market value must be used if applying fair market value would be manifestly unfair.

explained above in more detail, the fair market value (resale value) of an animal might be nothing or so low that such a measure would not compensate its owner for what truly was lost. Where the value of a pet to its owner does not relate to its resale value, should that pet owner be deprived compensation for the actual harm done to him simply because his pet is not in perfect condition or, literally, not from a good family? Obviously such a valuation method would not comport with the basic tort principle of compensating for loss.

Further, this rule does not deter people from future carelessness or intentional acts as to animals who have lower resale value (for reasons such as their species or breeding). In contrast, applying the "intended use" method will require a tortfeasor to more fairly compensate a plaintiff's loss and thus have a deterrent effect on that tortfeasor and other potential tortfeasors.

Finally, applying the established "intended use" method to animal property conforms with the basic principles stated in Giuliani:

"The law is both a progressive and resourceful science, and is ever alert to accommodate itself to the constant changing circumstances and conditions of society ... [W]hen it is necessary to employ a remedy to fit alternate situations and conditions, it is not only proper, but it is the duty of courts to do so to the end that justice may be administered." (951 S.W.2d at 321) (emphasis supplied).

And, so it is the duty of this Court to afford plaintiffs a remedy which fairly compensates them for their loss. By applying the "intended use" method to animal property, the Court will fulfill this duty.

V.

**HOW TO APPLY THE "INTENDED USE"
METHOD TO ANIMALS**

Placing a value on a living domestic animal, especially a companion animal, might be a difficult task for a jury. Certainly, it would be far easier to allow recovery for no more than an animal's resale or fair market value. But, triers of fact make many difficult decisions. For example, they are asked to compute the value of a lost limb, the value of pain and suffering, and even the value of lost love and affection. See, e.g., Giuliani v. Guiler, M.D., 951 S.W.2d 318, 320 (Ky. 1997)(expanding loss of consortium claim to allow child to sue for loss of parent).

The value of the animal should be based on consideration of such factors as were considered by the owner in obtaining and/or holding the animal, i.e., the intended use. This method will account for animals held for a number of reasons, such as: (1) economic gain -- e.g., for meat, dairy, or for resale; (2) companionship such as a cat or some dogs, (3) home protection, (4) competition in animal shows, (5) breeding, (6) driving livestock, (7) acting or modeling, (8) guiding a sight-impaired owner, (9) hunting and (10) law enforcement.

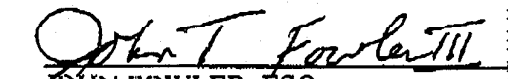
The trier of fact can then receive guidance or instruction on how to properly measure the value of companionship, training costs, a good breed, lost income derived from an animal, resale value and any other factors the court deems necessary in order to allow an award that fairly compensates the plaintiff for her actual loss.

**AMICUS CURIAE'S BRIEF IS RELEVANT
TO THE DISPOSITION OF THE CASE**

The lower court's order denying all recovery in the face of the illegal activity of the Appellee because Hair Bear had no market value is based on an outdated view of animals and accepts the

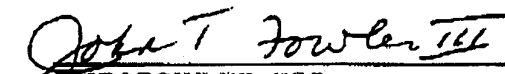
easier, rather than proper, method of determining the value of this unique form of property. Under Kentucky law, the court is compelled to apply a method that fairly compensates the Appellants for their losses and has the effect of deterring the Appellees from future wrongdoing. Because the lower court's ruling fails in this regard, Movant should be permitted to file an Amicus Curiae Brief explaining why the trial Court should be reversed and the lower Court instructed on the proper method of determining the value of animals.

Respectfully Submitted,


JOHN FOWLER, ESQ.
121 South 7th Street
Louisville, Kentucky 40202
(502) 582-1347

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was mailed to Mr. Roy Kimberly Snell, Mr. William P. Croley, 115 W. Main Street, P. O. Box 229, LaGrange, Kentucky 40031, Ms. Katie M. Brophy, 101 N. Seventh Street, Louisville, Kentucky 40202, Judge Dennis Fritz, c/o Oldham Circuit Court, 100 W. Main Street, LaGrange, Kentucky 40031, and to the Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601, on this the 13th day of March, 2000.


JOHN FOWLER, ESQ.

ANIMAL LEGAL DEFENSE FUND

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127 FOURTH STREET
PETALUMA, CA 94952
Phone: (707) 769-7771
Fax: (707) 769-0785
E-mail: info@aldf.org
Website: www.aldf.org

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Hi,

This amicus is essentially similar to the one submitted in Skaggs v. Wal-mart stores. There may also be an additional "valuation" brief which I will forward if/when I get a copy.

Let me know if you need anything else.

Steve

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