

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 1999-CA-001573

Craig Lee, et ux., et al.,

Appellants

v.

James O. Cook, et al.,

Appellees

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|
| Appeal from MARION Circuit Court
| Action No. 94-CI-00191
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On Appeal from the Eleventh Judicial Circuit, Marion Circuit Court

BRIEF OF JOHN FOWLER, ESQ. AS AMICUS CURIAE
IN SUPPORT OF APPELLANTS ON THE ISSUE SPECIFIED

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Preliminary Statement

The purpose of this brief is to emphasize the error in the trial court's January 28, 1997 ruling that a plaintiff can recover no more than the fair market value of his dog if the defendant's negligence caused the dog's death. 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 v. Rhodes, 206 Ky. 340, 266 S.W. 1091, 1092 (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, 250 Ky. 223, 62 S.W.2d 789, 791 (1933)

(same); Columbia Gas of Kentucky, Inc. v. Maynard, 532 S.W.2d 3, 6, 1975 Ky. LEXIS 20 (1975) (same); City of Marion v. Nunn, 292 Ky. 251, 166 S.W.2d 298, 301 (1942) (fruit trees). In such cases, the courts have instead followed the broader approach of considering the owner's intended use of the property. Davis, 266 S.W. at 1092.

It is even more obvious in the case of animals than with other property that an animal's actual value might exceed its market value. Such is the case with companion animals, which are valued as unique beings rather than as fungible pieces of chattel that can easily be replaced with little or no lasting consequence to the owner. Of course, consideration of the owner's intended use also allows for consideration of an animal's fair market value where appropriate, such as may be the case with livestock. Therefore, restricting the value of all animals to their resale value fails to comply with Kentucky's paramount rule of fair compensation.

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, 951 S.W.2d 318, 320, 1997 Ky. LEXIS 74 (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. Further, it would not encourage veterinarians to use the same care for animals that, because of their species or breed, have a lower resale value. Therefore,

the broader rule should be used to decide the proper measure for determining the value of animals.

It should be emphasized that this brief serves as a minor starting point from which to correct one portion of the lower court's ruling. It is not intended to address all potentially relevant issues, such as those contained in the parties' briefs.

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 conform with Kentucky law awarding compensatory damages. In setting the proper measure for compensatory damages, the courts in Kentucky have relied wisely on the paramount rule that such a measure should "fairly compensate" that plaintiff. See Davis v. Rhodes, 206 Ky. 340, 266 S.W. 1091, 1092 (1924) (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, 304 Ky. 192, 200 S.W.2d 297 (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, 237 Ky. 10, 34 S.W.2d

738 (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, 1975 Ky. LEXIS 20 (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, 292 Ky. 251, 166 S.W.2d 298 (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 of the property, (2) expense and practicability of replacing the property, (3) amount of use to which property had been subjected, (4) condition at the time of the property's destruction, and (5) any other conditions that affect the property's 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).

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 on taking care of their animals for such things as veterinarian bills, food, kennel lodging and even clothing.

Further, animals are certainly a unique form of property which are considered to have 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, 306 Ky. 753, 754, 209 S.W.2d 318, 319 (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 affection and appreciation, keeping a loyal watch for intruders, and, consequently, helping reduce their owners' fear, stress and loneliness. Accordingly, the Court must consider the intended use of the animal in awarding damages for animal property.

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 plaintiff 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 broken watch that is a family heirloom. 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").¹ 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

¹Courts have held, however, 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. See, e.g., Brown v. Frontier Theatres, 369 S.W.2d 299, 1963 Tex. LEXIS 624 (1963) (holding that for property containing primarily sentimental value, "the most fundamental rule of damages that every wrongful injury or loss to persons or property should be adequately and reasonably compensated requires the allowance of damages in compensation for the reasonable special value of such articles to their owner taking into consideration the feelings of the owner for such property"), citing Green v. Boston & Sowell Railway Co., 128 Mass. 221 (1880), Bateman v. Ryder, 106 Tenn. 712 (1901), Pennington v. Redman Van and Storage Co., 34 Utah 223 (1908), Harvey v. Wheeler Transfer & Storage Co., 227 Wis. 36 (1938).

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, 951 S.W.2d 318, 320, 1997 Ky. LEXIS 74 (1997) (explaining that to meet the purpose of providing compensation 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 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 veterinarians from future carelessness as to animals that have lower resale value (for reasons such as their species or breeding). Surely, a veterinarian knows the approximate value of an alley cat as compared to a Persian. In contrast, applying the "intended use" method will require a negligent veterinarian to more fairly compensate a plaintiff's loss and thus have a deterrent effect on that veterinarian.

Finally, applying the established "intended use" method to animal property conforms with the basic principles stated by the Kentucky Court of Appeals 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 (citation omitted) (emphasis supplied). And so it is the duty of this Court to afford plaintiffs a remedy that 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

Application of the "intended use" method should be broad enough and flexible enough to comply with Kentucky's paramount rule of fairly compensating plaintiffs for their loss. 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, 951 S.W.2d at 320 (1997) (expanding loss of consortium claim to allow child to sue for loss of parent).

The value of the animal will 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 reasons may include, among other things, one or more of the following: (1) economic gain -- such as for meat, dairy, as a farm hand, or for resale, (2) companionship such as a cat or some dogs, (3) home protection, (4) breeding, (5) competition in animal shows, (6) law enforcement, (7) guiding a sight-impaired owner, (8) driving livestock, (9) therapy, (10) acting or modeling, and (11) hunting.

Then the trier of fact can receive guidance 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.

Conclusion

The lower court's order limiting recovery to loss of fair 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 a plaintiff for her loss and has the effect of deterring the defendant from future wrongdoing. Because the lower court's ruling fails in this regard it should be reversed and the lower court instructed on the proper method of determining the value of animals.

Respectfully Submitted,

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