

NO. 98-CI-02954

JEFFERSON CIRCUIT COURT

TRACY SKAGGS
and
JAMES DAVID HARDIN
and
MARK SKAGGS

RECEIVED
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PLAINTIFFS

v.

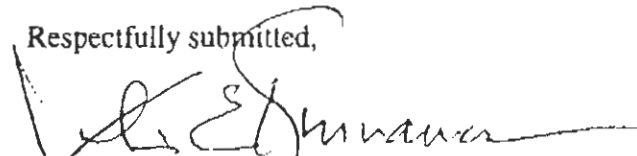
WAL-MART STORES EAST, INC.
and
21ST CENTURY PETS

DEFENDANTS

MOTION FOR PARTIAL SUMMARY JUDGMENT

Come the Defendants, Wal-Mart Stores East, Inc. and 21st Century Pets, by counsel, and respectfully move this Court to enter the Partial Summary Judgment tendered herewith. A Memorandum in Support of this motion is attached hereto.

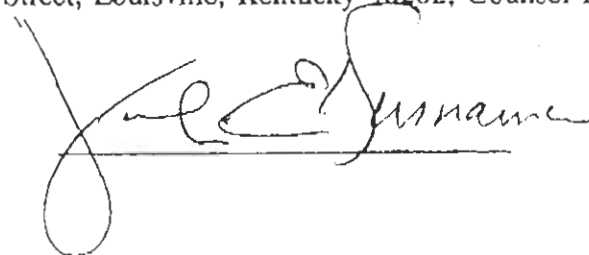
Respectfully submitted,



JULIAN E. KENNAMER
HURLEY & WELLS, P.S.C.
315 Guthrie Green, 4th Floor
Louisville, Kentucky 40202
Counsel for Defendants

CERTIFICATE

This is to certify that a copy of the foregoing was mailed on the ^{20th} ~~2nd~~ day of ^{NOVEMBER} ~~October~~, 1999, to Hon. Katie Marie Brophy, 101 N. Seventh Street, Louisville, Kentucky 40202, Counsel for Plaintiffs.



TRACY SKAGGS
and
JAMES DAVID HARDIN
and
MARKS SKAGGS

PLAINTIFFS

v.

WAL-MART STORES EAST, INC.
and
21ST CENTURY PETS

DEFENDANTS

MEMORANDUM IN SUPPORT OF DEFENDANTS'
MOTION FOR PARTIAL SUMMARY JUDGMENT

This is a property damage claim arising out of the alleged malfunction of a product. The property was a mixed breed dog, owned by the Plaintiff, Tracy Skaggs. The product was an indoor pet boundary fence which functions by way of a collar with low voltage leads powered by a small, DC battery. The product was manufactured by the Defendant, 21st Century Pets, and sold by the Defendant, Wal-Mart Stores East, Inc..

The Plaintiff claims that on or about January 15, 1996 the collar malfunctioned and injured her dog. Afterwards, the dog was taken to a local veterinarian and treated. The veterinarian recommended that the dog either undergo surgery or be put to sleep. The Plaintiff chose the latter.

Plaintiff has testified that the dog was purchased several months before the incident for \$25.00. The Plaintiff has submitted documentation of veterinary expenses of \$191.00. The fence itself cost the Plaintiff \$67.38.

The Plaintiff brought this action in Jefferson Circuit Court, stating causes of action for strict

liability, negligence, breach of "expressed" warranty, breach of implied warranties, fraud and negligent misrepresentation. The Plaintiff seeks compensatory damages for the veterinary expenses and the "mental pain and anguish" that she allegedly suffered as a result of the injury to her dog. Punitive damages are sought by the Plaintiff for her allegations (unsupported) of "fraud", "fraud oppression" and "malice". Although unclear from the Plaintiff's Complaint, it appears that she believes the Defendants knew that the product was dangerous and intentionally misrepresented to the Plaintiff that it was in fact safe for its use as a pet boundary fence. There are no facts recited in the Complaint to support these claims. Furthermore, the Plaintiff has testified in her deposition that she has no evidence that the Defendants intended to defraud her or intentionally cause harm to her dog (Plaintiff's depo. pp 61-63).

Animals are personal property, specifically corporeal personal property. Black's Law Dictionary, Fourth Edition, p.1382. Therefore, the rule of damages for injury to personal property apply in this case. That rule was most recently set out in *McCarty v. Hall*, Ky.App., 697 S.W.2d 955:

It is the law of this Commonwealth that the proper measure of damages for injury to personal property is the difference in the fair market value of the property before and after the accident (cites omitted). *Id.* at 956.

The rule has been applied to animals in two Kentucky cases: *Schulte v. Louisville & N.R. Co.*, Ky., 108 S.W. 941 (1908) (horses) and *Petroleum Exploration v. White*, 237 Ky. 10, 34 S.W.2d 738 (1931) (cattle).

In the present case, the Plaintiff is not seeking the fair market value for her property - the proper measure of damages. Instead, her Complaint demands compensation for her out-of-pocket expenses for treatment of the dog, and "mental pain and anguish" she allegedly suffered. Arguably,

the former are appropriate damages; clearly, the latter are not. In *Wilhoite v. Cobb*, Ky.App. 761 S.W.2d 625, the Plaintiff sought damages for mental pain and suffering as the result of witnessing the accident that resulted in her infant daughter's death. The Court of Appeals upheld a summary judgment of the lower court, dismissing the claim. The *Cobb* court held:

The long-standing rule in this jurisdiction is that in negligence cases there can be no recovery for fright, shock, or mental anguish which is unaccompanied by physical contact or injury. (Citations omitted) *Id.* at 626

See also *Motorist Mutual Insurance Co. v. Glass*, Ky., 996 S.W.2d 437 (1999) which reiterates this rule.

The Plaintiff in the present case does not claim any injurious personal contact with the product. Therefore, under Kentucky law she cannot recover damages for mental pain and and/or anxiety. Obviously, it would be absurd to allow the owner of an animal to collect damages for mental anguish associated with injury to their pet when the law prohibits such damages associated with the death of a child.

The Plaintiff's claim for entitlement to punitive damages is equally unfounded. There is not one wit of evidence in the record to support her claim. She cites no facts in her Complaint, no facts in her deposition testimony, nor are there any facts in the Defendant's Answers to Interrogatories that would support a claim for punitive damages. KRS 411.184(2) requires that a Plaintiff recover punitive damages only upon proving, **by clear and convincing evidence**, that the Defendant acted with oppression, fraud or malice toward the Plaintiff. In the present case, there is not just a failure of the **sufficiency** of such evidence, but a complete **absence** of evidence to support a claim for punitive damages.

It is respectfully submitted that the Defendants, 21st Century Pets and Wal-Mart Stores East, Inc., are entitled to a partial summary judgment, holding that:

1) The proper measure of damages in this case is controlled by the rules regarding damage to and/or destruction of personal property;

2) Plaintiff is not entitled to recover damages for mental pain and anxiety as the result of injury to her dog; and

3) There being no evidence in the record to support the Plaintiff's claim for punitive damages, such damages are not recoverable in this case.

Respectfully submitted,

Julian E. Kennamer
by [Signature]
JULIAN E. KENNAMER
HURLEY & WELLS, P.S.C.
315 Guthrie Green, 4th Floor
Louisville, Kentucky 40202
(502) 585-4572
Counsel for Defendants

CERTIFICATE

This is to certify that a copy of the foregoing was mailed on the 21 day of October, 1999, to Hon. Katie Marie Brophy, 101 N. Seventh Street, Louisville, Kentucky 40202, Counsel for Plaintiffs.

Julian E. Kennamer
by [Signature]

**MOTORISTS MUTUAL INSURANCE
COMPANY, Appellant,**

v.

Jeffrey GLASS; Garnett Doyle Glass;
Brenda Glass; Gregg Y. Neal, Attor-
ney; and Kentucky Farm Bureau Mu-
tual Insurance Company, Appellees.

Kentucky Farm Bureau Mutual
Insurance Company,
Appellant,

v.

Jeffrey Glass; and Motorists Mutual
Insurance Company, Appellees.

Jeffrey Glass; Garnett Doyle Glass;
Brenda Glass; and Gregg Y.
Neal, Cross-Appellants,

v.

Motorists Mutual Insurance Company;
and Kentucky Farm Bureau Mutual
Insurance Company, Cross-appellees.

Nos. 95-SC-972-DG, 95-SC-980-
DG and 96-SC-300-DG.

Supreme Court of Kentucky

Oct. 30, 1997.

As Modified on Grant of Rehearing
Feb. 18, 1999.

Rehearing Denied Aug. 26, 1999.

Automobile accident victim and his parents brought action against automobile insurers to recover underinsured motorist (UIM) benefits and damages for bad faith in connection with settlement. The Circuit Court, Shelby County, William F. Stewart, J., entered judgment on jury verdict in favor of victim and parents. Insurers appealed. The Court of Appeals reduced UIM benefits and affirmed. Review was granted. The Supreme Court, Cooper, J., held that: (1) victim was not entitled to UIM benefits for injuries sustained as passenger in his vehicle, and (2) the insurers did not act in bad faith in settling claim.

Reversed in part and affirmed in part.

Lambert, C.J., dissented, dissented from decision on rehearing, and filed opin-

ions joined by Stumbo and Wintersheimer, JJ.

1. Automobiles ⇨224(8), 226(3)

Passenger injured while riding in a vehicle operated by an intoxicated driver can be charged with contributory fault; any judgment in favor of the plaintiff passenger is reduced by the amount of the judgment which correlates with his percentage of fault.

2. Insurance ⇨2760

Automobile liability coverages cannot be stacked.

3. Insurance ⇨3389

Testimony by structured settlement specialist was alone sufficient to create a jury issue as to whether automobile insurers and accident victim had reached settlement.

4. Compromise and Settlement ⇨5(3)

Fact that a compromise agreement is verbal and not yet reduced to writing does not make it any less binding.

5. Contracts ⇨29

If a dispute exists as to whether an oral agreement was reached, the issue is to be resolved by a jury.

6. Evidence ⇨473(3)

Lay witness may testify on the basis of observation and appearance that another person was intoxicated at a given point in time.

7. Parent and Child ⇨3.2

Parents' expenses incurred on behalf of their adult child following automobile accident were not recoverable directly from the tort-feasor or his liability insurers, but were owed to them by the child.

8. Damages ⇨51

Parent does not have a personal cause of action for mental anguish resulting from an injury to his or her child.

NO. 98-CI-02954

JEFFERSON CIRCUIT COURT

DIVISION FIVE (5)

TRACY SKAGGS
and
JAMES DAVID HARDIN
and
MARK SKAGGS

PLAINTIFFS

v.

WAL-MART STORES EAST, INC.
and
21st CENTURY PETS

DEFENDANTS

PARTIAL SUMMARY JUDGMENT

This matter coming before the Court on the Defendants' Motion for Partial Summary Judgment, and the Court having considered the Memorandum of Authorities submitted by the Defendants, Wal-Mart Stores East, Inc. and 21st Century Pets, and otherwise being sufficiently advised:

IT IS HEREBY ORDERED AND ADJUDGED that, if supported by the preponderance of the evidence, the Plaintiff shall be entitled to recover the fair market value of her property and any out-of-pocket expenses she incurred as a result of damage to her property. The Plaintiff shall not be entitled to recover damages for mental pain, anguish or anxiety.

There being no evidence in the record to support the Plaintiff's claim for punitive damages, such damages are not recoverable in this case.

JUDGE

Date: _____

Submitted by:

Julian E. Kennamer
Julian E. Kennamer
[Signature]

