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

DEFENDANTS' REPLY TO MEMORANDUM OF ANIMAL LEGAL DEFENSE FUND, INC. AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS ON THE ISSUE SPECIFIED

The Animal Legal Defense Fund, Inc. (hereinafter "the Fund") has filed an Amicus Curiae Memorandum[1], arguing that the general rule of damages with respect to personal property - as it applies to animals - is "outdated". Rather, it is their claim that a broader, 'intended use' method should be adopted to permit owners of animals used as pets to offer evidence of their "companionship" value to the owner, thus creating what is tantamount to a loss of consortium claim for pet owners in this state. The Fund does not cite any Kentucky case law to support this contention: instead, they rely on a few dated cases dealing with the "household goods/wearing apparel" exception; a case involving fruit trees (which does not stand for what it is purported to); and a recent Kentucky case involving a loss-of-companionship claim for children of a deceased parent, in which general pronouncements of tort law were made in a decision by a sharply-divided Supreme

[1]The Fund is not a party to this action and its Memorandum was filed without leave of the Court to do so.

Court. A review of The Fund's Memorandum will demonstrate that it offers no substance to support its arguments.

The Fund relies heavily on Davis v. Rhodes, 206 Ky. 340, 266 S.W. 1091 (1924). They argue throughout their Memorandum that the Davis court somehow adopted as a 'paramount' rule of damages that a Plaintiff must be fairly compensated. While no one would dispute that general proposition, the Fund's reliance on the Davis case is misplaced for several reasons:

1) The Davis court **never** characterized any rule of damages as "paramount" and the Fund's representation that they are quoting the Davis court is inaccurate. That term was used in an older Connecticut case that was cited in a treatise, that in turn was contained in a lengthy cite from the treatise by the Davis court. To now argue that this "rule" was expressly adopted by the Davis case in their 1924 decision, and has since become an over-arching rule of damages - superceding all others - is a real stretch. It certainly cannot be used to overturn the well-established, contemporary Kentucky law on damages to personalty. See McCarty v. Hall, Ky. App., 697 S.W.2d 955, 956.

2. The Davis case involved the well-established **exception** to the general rule of damages to personal property known as the "household goods/wearing apparel" exception. The Davis court justified the application of this exception to household goods, in part, because their sale in second hand markets would bring so little that the plaintiff "could not replace (the property) save by adding thereto a difference far greater" than its decrease in value from the owner's previous use. Id. at 1092. That is not the situation in the present case. The Plaintiff had recently purchased the dog for $25.00. Obviously, there was no depreciation in its value in the ensuing few months she owned it. She could

have replaced the dog for an equivalent amount (or possibly for no money at all). [2] Furthermore, extension of the rule's exception to animals used as pets is against the weight of authorities from other jurisdictions and is without Kentucky precedent.

3. The Davis court cautioned that the "household goods/wearing apparel" exception would not permit the owner to recover some "fanciful price" for the goods. Id. That is precisely the nature of the evidence the Plaintiff is seeking to use in this case to inflate the value of her $25.00 dog to an amount that will meet or exceed this Court's minimal jurisdictional requirements - $4,000.00 (surely there is not an investor on the planet who would not leap at a return like this!). Presumably, this inflation is going to be achieved by using "feelings of sadness and anger" as referenced in the Plaintiff's Response Memorandum. This kind of "evidence" will inevitably result in a fanciful value being attached to the dog, is in direct violation of the rule's exception to which the Fund and the Plaintiff argue the dog should be added.

The Fund seeks to reassure this Court that consideration of "intended use" for the valuation of the dog has limitations that will prevent a windfall to the Plaintiff based on speculative, fanciful and/or sentimental factors (such as "sadness" and "anger"?). However, the Fund offers no explanation as to how these safeguards will work in this case where the Plaintiff seeks to turn $25.00 into $4,000.00+ within a few months (a windfall by anyone's standards).

The Fund also cites City of Marion v. Nunn, Ky., 166 S.W.2d 298 (1942) to support their arguments. That case involved damage to fruit trees on the plaintiff's farm. The Court held there that as to the trees that were injured, but not killed "...the measure should be the difference in the

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[2]The Court is reminded that the Plaintiff was given the option by her veterinarian of having the dog's injury surgically repaired. Instead, the Plaintiff had the dog put to sleep. (Skaggs depo. pp. 50,53-54).

reasonable value of same just before and after the fire...." Id. at 302. The Court omitted 'market value' from the value because "growing fruit trees have no such value". Id. As to the trees that were killed "...the measure is the reasonable market value" at the time of destruction. Id.

Neither of the measures of damages referenced in the Nunn case apply to animals used as pets. Damaged trees attached to the land clearly have no market value; destroyed trees do have market value, based on tangible elements of replacement cost, loss of production, etc.. An injured - but recovered - animal still has market value, though arguably diminished. A deceased animal has market value based upon its replacement cost. The Nunn case certainly does not endorse the determination of value of damaged trees based upon their "intended use" as misquoted in the Fund's Memorandum. Neither does it offer justification for creating a new exception to the general rule so as to permit "companionship" evidence to enhance an animal's value.

The Fund suggests in its Memorandum that courts in Kentucky use five factors to determine the actual value of damaged property to its owners. However, those elements have been lifted from cases that have applied the "household goods/wearing apparel" exception. Nowhere have they been applied to animals used as pets. Furthermore, four of the five elements offer the Plaintiff in this case no help whatsoever; the fifth is a catch-all that would allow "intended use" evidence in cases where the property has no market value.

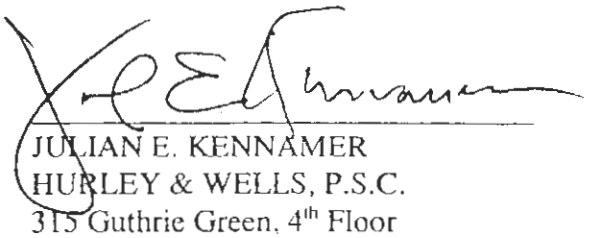
The Fund seeks to justify exclusion of animals as pets from the general rule of damages on the basis that state and federal legislation has been enacted to protect them from abuse. However, Kentucky has also enacted legislation specifically categorizing dogs as "personal property" (KRS 258.245(a)), and limiting damages for the destruction of a dog by a peace officer to $100.00 (KRS 258.305). These statutes are also expressions of public policy in Kentucky and certainly do not

suggest that dogs are viewed as "unique" forms of property as claimed by the Fund.

The Fund proposes that consideration of the "intended use" method of valuation could include several factors such as: 1) economic gain; 2) companionship; 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. All but two of these nine factors would be directly relevant to the animal's fair market value, thereby not requiring creation of a new exception to the general rule. The "therapy" factor is so intangible as to be worthless as a rational standard of value. The last factor, "companionship", is also so subjective as to be inherently speculative. This concept is nothing more than a loss of consortium claim for animals. This claim has never been recognized in Kentucky. Furthermore, it took a sharply divided court in Giuliani v. Giuler, Ky., 951 S.W.2d 318 (1997) to extend such claims to children for the loss of their parents' companionship. It is incomprehensible that the same court would now extend such claims to pet owners.

The Fund argues that the "deterrent" purpose of tort law would be better served if plaintiffs could recover more than the fair market value of their damaged personal property. Therefore, plaintiffs should be given greater latitude to increase the value of their personal property in order to further deter negligent manufacturers. The law of damages to personal property, as well as real property, has evolved over many years; it is safe to assume that this policy issue has been weighed in the hundreds of decisions that have applied the rules of law for damages to personal property. The law has struck a balance between the competing issues of fair compensation to such plaintiffs and the issue of deterence of negligent behavior. That balance should be respected.

Respectfully submitted,



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CERTIFICATE

This is to certify that a copy of the foregoing was mailed on the 14th day of December, 1999, to Hon. Katie Marie Brophy, 101 North Seventh Street, Louisville, Kentucky 40202, Counsel for Plaintiffs.