NO. 98-CI-02954

JEFFERSON CIRCUIT COURT

DIVISION FIVE (5)

DEC 15 1999

TRACY SKAGGS
and
JAMES DAVID HARDIN
and
MARK SKAGGS

PLAINTIFFS

v.

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

DEFENDANTS

DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

From a literary standpoint, the Response filed by the Plaintiff is interesting. However, it lacks cogent arguments to support the three principal points she makes in her Response. The Defendants will undertake to address each of them individually.

1. "(t)he '*rules*' regarding damages for the destruction or death of a dog in Kentucky mandate the consideration of the true value of the loss to the plaintiffs when the '*property*' in question has no market value...."

To make this argument work the Plaintiff has created two fictions: 1) the dog was "a member of the (Plaintiff's) family", and 2) the dog had no fair market value. Were these fictions true, they would still not produce the result the Plaintiff seeks.

No matter how loved or unloved the Plaintiff's pet was when it was injured, the fact remains that in the eyes of the law it was still the Plaintiff's personal property and recovery for injury to the pet was controlled by the well-established rules for damage to personalty. The public policy of this

exchange witness & exhibits 3C dep trial date

Commonwealth with respect to the status of dogs as personal property is set out in the unequivocal language of KRS 258.245(1) which provides that "(a)ll licensed dogs are hereby declared to be personal property...."

The Plaintiff's mis-characterization of the animal as a "member of the family" is designed to elevate her pet to a class somewhere between personal property and a human being, justifying collection of damages for its "intrinsic" value. This would not only be unprecedented in Kentucky courts, but in the majority of jurisdictions in this country. The Court's attention is called to 61 ALR 5th 635. Damages for Killing or Injuring a Dog, page 635, wherein it is stated:

> **"Damages for the death of a dog are fixed at the dog's market value in most jurisdictions**, although in some jurisdictions, if the dog has no market value, damages may be fixed at the dog's value to the owner. In some jurisdictions, damages for the owner's mental suffering, or for punitive damages, also may be available. For example, in Nichols v. Sukaro Kennels, 555 N.W.2d 689, 61 ALR 5th 883 (Iowa 1996), the Court held that, where a dog is killed, ordinarily the proper measure of recovery is the dog's market value at the time of its death; that the intrinsic value of a dog, or its sentimental value to the owner, should not be considered in awarding damages for injury to the dog; and that the owner is not entitled to damages for mental distress." (Emphasis added) Id.

The second fiction the Plaintiff is promoting is that her dog did not have any market value. Obviously, this is designed to fit into the exception that some jurisdictions (not the majority) have fashioned in the case of pets. However, Plaintiff testified in her deposition that the dog had been purchased a few months before its injury for $25.00 (Skaggs depo, p.7). Clearly, the dog had a market value which the Plaintiff had willingly paid shortly before the accident.

Confronted with no Kentucky authorities to support her position, the Plaintiff has fashioned a two-prong argument: 1) citing several cases from "enlightened", foreign jurisdictions (representing the minority view), the Plaintiff encourages this Court to apply the rule from those decisions in this

case, and 2) citing two Kentucky cases that have fashioned an exception to the general rule for two distinct categories of personal property, the Plaintiff urges this Court to add pet animals to the categories excepted in those cases.

The first of these two cases is Columbia Gas of Kentucky, Inc. v. Maynard, Ky., 532 S.W.2d 3 (1975). The Court was confronted with a homeowner who had lost household goods and wearing apparel as the result of a fire. The following excerpt from that decision states the relevant law:

> **"Regardless of the kind of property of type of proceeding, when the criterion of recovery is fair market value, what the property may have been worth to the owner is irrelevant (citation omitted).** So, if market value had been the correct measure of damages for all of the property lost by Maynard, his evidence of what it was worth to him would not have raised a submissible issue of damages. **However, this Court has recognized that market value is not a fair basis of compensation for the loss of 'household goods and wearing apparel', the proper measuring being 'the actual value in money... to the owner for the purpose for which they were intended and used... excluding sentimental or fanciful value which for any reason he (the owner) might place upon them.'** (citation omitted), (Emphasis added) Id. at 6

The Court in Columbia Gas restated in no uncertain terms the general rule employing market value as the measure of damages, while acknowledging a narrow exception for "household goods" and "wearing apparel". Nowhere in this exception is there a suggestion that it would be extended to cover an animal that has been adopted as a pet. Indeed, the very damages sought by the Plaintiff in this case are of a sentimental nature based on her emotional attachment to her pet. This is evident from the arguments in her Response that "intrinsic" value could include compensation for "feelings of sadness and anger" at the loss of companionship of her dog. To value the dog based upon these emotions would violate the express prohibition against sentimental or fanciful value.

The second Kentucky case upon which the Plaintiff relies in support of this argument is Kerns v. Sparks, 296 S.W.2d 731 (1956). Among other things, the Plaintiff there was seeking loss

of profits from two songs he had recorded. The recordings had been lost as a result of the Defendant's negligence. While finding that the Plaintiff's estimate of his loss was "speculative", the Court held that the Plaintiff was entitled to recover at least the cost of reproducing the recordings, and in support of that ruling cited the rule set out in 15 Am. Jur., Damages, §125, page 534 (cited in its entirety in the Plaintiff's Response). The cited rule deals with property that is so unique there is no market value. That rule simply does not apply here - the Plaintiff's dog did in fact have an ascertainable - though modest - market value.

If one were to assume, for the sake of argument, that the Plaintiff's dog had no market value (which presumably disappeared in the few months after she purchased it) and, further, that it was of such a unique nature as to justify being excluded from the general rule, it is difficult to see how the elements listed in the exception to the rule set forth in Kerns v. Sparks, supra, could apply in this case. The kind of evidence the Plaintiff is seeking to use to inflate the value of her dog is obviously inconsistent with the evidence permitted in the Kerns case. It is clear from that decision that the Court there would not permit speculative evidence; rather, the value must be based upon some tangible measurement such as the elements listed in the rule cited in that decision. Applying those elements, it is difficult to see how they could be used to convince reasonable men in this case that the value of the Plaintiff's dog met this Court's minimal jurisdictional requirements[1].

2. "[t]o the extent existing but old' law does not recognize emotional pain and suffering

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[1] The Plaintiff testified in her deposition that she had her dog put to sleep when she was advised by the veterinarian that corrective surgery would have cost $400-$500 (Skaggs depo, pp.50, 53-54). If nothing else, this is conclusive evidence that the value of the dog to the Plaintiff did not exceed that amount.

The Plaintiff seeks to recover monetary damages for her "emotional distress" claim. She cites several cases from other jurisdictions to support her claim. Without delving into a discussion of each, the short answer is - not only is her argument against the weight of authorities in a majority of jurisdictions but it is also unsupported by any authority originating in this Commonwealth. Furthermore, there are strong policy arguments against such a rule. For instance, to allow such damages would open a flood gate of litigation involving pet owners claiming deep attachment to their animals (cats, dogs, horses, and why not rabbits, birds, gerbils, ducks - where do you draw the line?). Tearful plaintiffs would recount fond memories of petting their dogs, grooming their horses, talking to their birds or feeding their rabbits. Speculative, sentimental and fanciful damages would be the inevitable result. This is expressly prohibited by Kentucky law.

Even more importantly, were the Court to permit Plaintiff to recover damages for emotional distress resulting from injury or death to a pet, it would result in a bizarre incongruity in Kentucky law. As pointed out by these Defendants in their Memorandum in Support of Partial Summary Judgment, it is a well-established, long-standing rule in Kentucky that in negligence cases there is no recovery for mental anguish when there is no physical contact or injury to the Plaintiff. Deutsch v. Shein, Ky., 597 S.W.2d 141 (1980); Wilhoite v. Cobb, Ky. App., 761 S.W.2d 625 (1988); Motorist Mutual Insurance Co. v. Glass, Ky., 996 S.W.2d 437 (1999). In fact, in the Wilhoite case the Plaintiff was prohibited from making a claim for mental anguish as a result of seeing her child killed. To allow the owner of an animal to collect damages for mental anguish associated with an injury to the animal when the law prohibits such damages associated with the death of a child would be an absurdity.

3. "...(s)ince the Kentucky Supreme Court's decision in Williams v. Wilson, 927 S.W.2d

3. **"...(s)ince the Kentucky Supreme Court's decision in Williams v. Wilson, 927 S.W.2d 260 (1998), punitive damage recovery is now based on the common law standard of culpability".**

The case of Williams v. Wilson, supra, has no relevance in this case. As this Court well knows, the Williams case overturned the "subjective awareness" standard contained in KRS 411.184(1)(c). However, the Supreme Court specifically stated that it was expressing no opinion with respect to KRS 411.184(2) - the "clear and convincing" standard required by the statute. Id. at 269. Clearly, this standard of proof is still the law in Kentucky notwithstanding the Plaintiff's befuddling arguments to the contrary.

The Plaintiff repeatedly hurls allegations of "gross" negligence and "reckless disregard" of their rights allegedly perpetrated on them by the Defendants. While the accusations are plentiful, the evidence is not. In fact, there is a **complete** absence of **any** evidence in the record to give credence to these charges. This case was filed over 1-1/2 years ago and Plaintiff has not yet produced one wit of evidence to establish a claim for punitive damages, clear and convincing or otherwise. Indeed, she was questioned at length in her deposition and was unable to cite any facts to support her punitive damage claim (Skaggs depo, pp.59-63). Her Response suggests that she is saving the evidence for trial.

The Plaintiff cannot simply rely on unsupported claims in her Complaint. She must come forth with some probative evidence to support those claims. As stated by the Kentucky Supreme Court in Steelvest, Inc. v. Scansteel Services Center, Inc., Ky., 807 S.W.2d 476 (1991): "...(u)nder both the Kentucky and the federal approach, a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that

If the Plaintiff has some proof that a genuine issue of material fact exists with respect to her entitlement to punitive damages it is her **duty** to come forth with some proof to support her claim. Neel v. Wagner-Shuck Realty Company, Ky. App., 576 S.W.2d 246, 250 (1978). *See* also Conley v. Hall, Ky., 395 S.W.2d 575 (1965); and Tarter v. Arnold, Ky., 343 S.W.2d 377 (1960). Otherwise, the Court should dismiss that part of her Complaint.

These Defendants are not going to address the matters discussed in unreported rulings of other divisions of Jefferson Circuit Court or in instructions from cases in Franklin Circuit Court. Reliance on such "authorities" is highly improper and violates the spirit, if not the letter, of CR 76.28(4)(c).

In conclusion, the Plaintiff and her counsel appear to be on a crusade, promoting animal rights. However, passion cannot be allowed to overwhelm reason. It is respectfully submitted that the well established rules of damages in Kentucky will, if justified, adequately compensate the Plaintiff for her tangible loss. However, there is no permissible rule of damages that will allow her to pursue intangible, subjective, sentimental damages for the alleged "intrinsic" value of her dog. Furthermore, under Kentucky law she cannot maintain a mental anguish, emotional distress type of claim for injury to her dog. Finally, there is no evidence in the record to support the unsubstantiated claims of "gross negligence", that would justify award of punitive damages. For the foregoing reasons these Defendants' Motion for Partial Summary Judgment should be granted.

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 N. Seventh Street, Louisville, Kentucky 40202, Counsel for Plaintiffs.