

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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JON H. HAMMER. :

Plaintiff, :

Index No. 600029/2000

-against- :

THE AMERICAN KENNEL CLUB and
THE BRITTANY CLUB OF AMERICA a/k/a
THE AMERICAN BRITTANY CLUB, INC. :

Defendants. :

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MEMORANDUM OF LAW OF
AMICUS CURIAE. IN DEFENSE OF ANIMALS

In Defense of Animals, by its attorneys Egert and Trakinski, respectfully submits this memorandum of law, together with the affidavit of Elliot M. Katz, D.V.M., to assist the Court in determining whether the amputation of dogs' tails, commonly known as tail docking, violates N.Y. Agriculture and Markets Law §353 ("§353") and whether defendants, by endorsing tail docking as a means of meeting their prescribed breed standards, are furthering acts of cruelty in violation of §353.

Preliminary Statement/Interest of Amicus Curiae

In Defense of Animals ("IDA") is a national nonprofit animal advocacy organization with over 70,000 members, approximately 9,000 of whom reside in New York State. The organization, headquartered in Mill Valley, California has regional offices across the United States, including its northeast regional office in Ardsley, New York. IDA is dedicated to ending the abuse of animals

by defending their rights, welfare and habitat, as well as educating the public about the mutual benefits of exercising compassion toward animals. The organization's varied accomplishments range from providing emergency rescue services and medical care to animal victims of natural disasters, to investigating and exposing fraud in research laboratories. In furtherance of its goal of protecting animals, IDA has initiated lawsuits and acted as *amicus curiae* in actions throughout the United States. (Affidavit of Elliot M. Katz, D.V.M., sworn to April 7, 2000 ("Katz Affidavit"), ¶¶ 1-3.)

IDA respectfully submits this memorandum of law to assist the Court in determining:

1. Whether the amputation or "docking" of dogs' tails, carried out solely for cosmetic purposes, constitutes cruelty under N.Y. Agriculture and Markets Law §353 ("§353"); and
- 2) Whether the American Kennel Club ("AKC") and the American Brittany Club ("Brittany Club") are furthering acts of cruelty in violation of §353 by promoting the practice of tail docking.

The recitation of facts set forth below is limited to procedures, consequences, and policies regarding tail amputation. As to other relevant facts, we respectfully refer the Court to allegations previously submitted by the parties.

FACTS

Tail "docking" is the customary term for the amputation of all or part of a dog's tail. The amputation is most frequently performed for the purely cosmetic purpose of meeting an AKC approved breed standard that calls for a tail of a particular length. Dog breeders commonly dock

the tails of puppies without the use of anesthesia when the animals are between two and five days old by affixing a rubber band or other ligature around the puppy's tail. The ligature cuts off blood flow to the tail ultimately causing dry gangrene. The tail falls off after about three days (Katz Affidavit, ¶¶ 5, 6.) One veterinarian has compared this "banding" method to "slamming one's finger in a car door and leaving it there." (Katz Affidavit, ¶ 7, Exhibit A, Jean Hofve, D.V.M., Animal Protection Institute's Report, Cosmetic Surgery for Dogs and Cats, submitted to the San Francisco Commission of Animal Control and Welfare, an advisory commission to the Board of Supervisors ("API Report"), at p. 1.)

If a veterinarian performs the docking, anesthesia may be used and the tail is cut with surgical scissors. Sutures are used to close the wound. (Katz Affidavit, ¶ 9.) If not given anesthesia, most puppies will cry out and struggle during and after the procedure. (Katz Affidavit, ¶ 7, Exhibit A (API Report).) In addition to experiencing pain, puppies with docked tails risk serious potential side effects, including infection, blood loss and systemic toxicity from local analgesics. (Katz Affidavit, ¶ 15.) Botched tail docking has necessitated emergency surgery and euthanasia. *Id.* The procedure, with its attendant pain and potential for serious medical complications, provides no benefit to the dog. (Katz Affidavit, ¶ 14, Exhibit B (American Veterinary Medical Association Position Statement on Ear Cropping and Tail Docking of Dogs ("AVMA Position Statement").)

ARGUMENT

POINT I

TAIL AMPUTATION, CARRIED OUT SOLELY FOR COSMETIC PURPOSES, CONSTITUTES CRUELTY IN VIOLATION OF N.Y. AGRICULTURE AND MARKETS LAW §353 NOT §353-a

New York State's animal cruelty laws are codified in various provisions of the Agriculture and Markets Law. See N.Y. Agriculture and Markets Law §§ 350 - 370. Section 353 states, in pertinent part

A person who . . . unjustifiably injures, maims, mutilates or kills. . . or causes, procures or permits any animal to be overdriven, overloaded, tortured, cruelly beaten, or unjustifiably injured, maimed, mutilated or killed . . . or who willfully sets on foot, instigates, engages in, or in any way furthers any act of cruelty to any animal, or any act tending to produce such cruelty, is guilty of a misdemeanor."¹

The Plaintiff erred in asking this Court to consider his claims under §353-a, which elevates to a felony acts of "aggravated cruelty" perpetrated on companion animals.² While the facts as alleged in this case may not constitute a violation of §353-a, the act of tail amputation should be prohibited under the plain meaning of §353. This provision, which proscribes "unjustifiably" injuring, maiming, or mutilating an animal, or "causing, procuring or permitting" such acts, should have been invoked. Amputating a dog's tail is by definition "mutilation."³

¹Section 350(1) states that "[a]nimal" as used in this article, includes every living creature except a human being."

²Aggravated cruelty is defined as "conduct which: (i) is intended to cause extreme physical pain; or (ii) is done or carried out in an especially depraved or sadistic manner." N.Y. Agriculture and Markets Law § Section 353-a(1).

³"Mutilate" is defined as "to cut off, damage, or spoil an important part of." Webster's New World Dictionary's of the American Language 397 (Revised ed. 1984). Australian Veterinary Association

Furthermore, "cruelty" is defined under §350 of the Agriculture and Market Law as "every act, omission, or neglect, whereby unjustifiable physical pain . . . is caused or permitted." There is a consensus among the veterinary community that tail docking does cause pain, as well as pose significant medical risk. The American Veterinary Medical Association (AVMA) recently concluded that tail docking procedures provide no benefit to the dog and "cause pain and distress, and, as with all surgical procedures, are accompanied by inherent risks of anesthesia, blood loss and infection." (Katz Affidavit, ¶ 14, Exhibit B, AVMA Position Statement). This position was endorsed by the American Animal Hospital Association, the California Veterinary Medical Association, the Oregon Veterinary Medical Association, the Rhode Island Veterinary Medical Association, the Vermont Veterinary Medical Association and the American Association of Food Hygiene Veterinarians. Id.

Among the countries that have completely banned, or severely restricted cosmetic tail docking are: Sweden, Finland, Denmark, the United Kingdom and Germany. (Katz Affidavit, ¶ 16.) Major foreign veterinary associations have also spoken out. The Canadian Veterinary Medical Association has stated that it opposes "surgical alteration of any animal for purely cosmetic purposes" and "encourage[s] breed associations to change their breed standards so that cosmetic procedures are not required." (Katz Affidavit, Exhibit C, Position on Cosmetic Surgery of the Canadian Veterinary Medical Association.) The Australian Veterinary Association's policy statement calls for an end to tail docking and other cosmetic surgical procedures, pointing out that "anatomical studies indicate that [young animals] are superbly capable of feeling pain, and

Vice President, Dr. Roger Clarke, lists among the tail's important and useful functions "maintaining balance and showing emotions." (Katz Affidavit, Exhibit D, Australian Veterinary Medical Association's Media Release on Amputation of Dog's Tails ("AVA Statement") (Sept. 9, 1998).)

biochemical studies show that they do suffer short and long term effects from surgery comparable to docking." (Katz Affidavit, Exhibit D (AVA Statement).)

An element of cruelty under the statute is a lack of justification. In People v. Voelker, 172 Misc.2d 564, 658 N.Y.S.2d 180 (N.Y. City Crim. Ct.1997), the defendant was charged with a violation of §353 for decapitating three iguanas. On a motion to dismiss, defendant claimed that because he had filmed the decapitations on television, his actions were justified on first amendment grounds. The Court, in rejecting defendant's argument, found that justification "must be of the type to preserve the safety of property or to overcome danger or injury." Voelker, 172 Misc.2d at 568, 658 N.Y.S.2d at 183.

Cosmetic tail docking is performed for the purpose of emulating a breed standard. It does not promote the integrity of a breed line, but rather artificially conforms an individual dog to an "ideal dog" standard. The interest which some people may have in viewing or showing dogs of certain breeds with artificially short tails should not pass as justification for tail docking under the statute. The statute's prohibition against cruelty should not be applied only to malignant acts, but also to acts which, though common, nonetheless cause pain and suffering in animals.

POINT II

THE AKC AND THE BRITTANY CLUB, BY PROMOTING TAIL DOCKING, ARE FURTHERING ACTS OF CRUELTY WITHIN THE MEANING OF § 353

Breed standards set forth a description of the "ideal" standard for a particular breed of dog, including such characteristics as structure, gait and temperament. (Affidavit of Mary Jo Trimble in Support of Defendant Brittany Club's Motion to Dismiss ("Trimble Affidavit"), ¶ 5.)

The AKC and American Brittany Club consider breed standards the “sine quo non” and “heart,” respectively, of conformation sports, both stating that they “enhance the interests of a breed by encouraging breeding to an ideal standard.” (Memorandum of Law in Support of the AKC’s Motion to Dismiss (“AKC Memorandum”), at 16-17); (Memorandum of Law in Support of the Brittany Club’s Motion to Dismiss (“Brittany Club Memorandum”), at 31.) Indeed, the AKC deems breed standards of such consequence in maintaining the integrity of the sport that its Constitution sets forth the objective of the club as being, in part

to regulate the conduct of persons interested in breeding, registering, selling, purchasing, exhibiting and running purebred dogs, to prevent, detect, and punish frauds in connection therewith, to protect the interests of its members.

(Charter, Constitution and Bylaws of the American Kennel Club, Inc., (“AKC Constitution”), Article III, Exhibit A, hereto.)

While promoting the integrity of breed standards, however, defendants condone the wholly incompatible practice of tail docking, even encourage it by “severely penaliz[ing]” those who decline to artificially conform their dogs by mutilating them.⁴ The AKC Position Statement on Ear Cropping, Tail Docking and Dewclaw Removal reads as follows: “The American Kennel Club recognizes that ear cropping, tail docking, and dewclaw removal, as described in certain breed standards, are acceptable practices integral to defining and preserving breed character

⁴The current standard for Plaintiff’s dog, a Brittany, as promulgated by the American Brittany Club and approved by the AKC includes “[t]ailless to approximately four inches, natural or docked...Any tail substantially more than four inches shall be severely penalized.” (Trimble Affidavit, ¶ 12; Affidavit of James Crowley in Support of the AKC’s Motion to Dismiss (“Crowley Affidavit”), ¶ 16.)

and/or enhancing good health.” (Exhibit B hereto.) However, amputation does not promote the integrity of the breed standard, as the AKC claims. In fact, it corrupts the standard. When a puppy is two to five days old, it cannot be determined how long his or her tail might grow if left intact, yet this is the age when most puppy’s tails are docked. (Katz Affidavit, ¶ 11.) Routine tail docking thus becomes an impediment to those who wish to selectively breed their dogs for naturally short tails. (Katz Affidavit, ¶ 12.) For example, the original Brittany standard required that the tail be short at birth. Only when subsequent breeding began producing some dogs with long tails was the requirement of a naturally short tail dropped and artificially short tails by docking officially sanctioned. (Katz Affidavit, ¶ 10; Crowley Affidavit, ¶¶ 13, 14; Trimble Affidavit, ¶ 9.) Today, Brittany’s are no longer even bred for tail conformation: their tails are simply docked.

Often a purchaser of a purebred dog may not have the opportunity to decide whether or not to dock his or her dog’s tail. At the time of purchase, the dog’s tail has already been amputated, as it is the practice of breeders to dock tails long before puppies are old enough to be sold. The breeders understand that unless the puppy meets the sanctioned breed standard of the parent club and the AKC, the puppy will be “worth” less. In addition, the public has come to expect particular breeds to look a certain way. Many people may not even realize that the short tail or pointed ears of a breed they fancy are the result of cosmetic surgery, not nature.

The AKC and Brittany Club further attempt to downplay their roles in perpetuating the practice of tail docking by arguing that:

1. Tail docking is not required;
2. Dogs with tails longer than the standard are not disqualified from competition; and

3. Defendants don't actually perform the docking procedure.

As to not requiring tail docking and not disqualifying dogs who don't meet the tail standard, perhaps defendants would better fulfill their mandate of fostering the "integrity of the breed" as well as "prevent[ing]...frauds" in the breeding of purebred dogs by prohibiting tail docking altogether and disqualifying dogs who do not naturally meet the standard. (Exhibit A. (AKC Constitution). Article III.) This would have the effect of encouraging breeding for tail conformation as opposed to feigning the "ideal type" through the use of painful surgical procedures. The AKC and Brittany Club, themselves, maintain that "Brittanys have tails, which in their natural state may meet the ideal standard set forth" (Crowley Affidavit, ¶ 18; Trimble Affidavit ¶ 5.) Why not just breed these dogs and not those born with long tails?

In spite of their contention that they do not perform tail docking, defendants are clearly accountable for the pervasive use of tail amputation in connection with the breeding of Brittanys. Section 353 encompasses anyone who "instigates . . . engages in, or in any way furthers any act of cruelty to any animal, or any act tending to produce such cruelty." The AKC and the Britany Club promulgate and approve breed standards, sanction acts of cruelty as legitimate means of attaining those standards, and severely penalize those unwilling to engage in these cruel acts. In its own Constitution, the AKC states that a main objective of the club shall be to "regulate the conduct of persons interested in exhibiting, running, breeding, registering, purchasing and selling dogs . . . and to prevent and punish frauds therein." Emphasis added. (Exhibit A. (AKC Constitution). Article III.) They cannot now distance themselves from the cruel conduct which has become a de facto requirement for meeting their standard.

Finally, defendants claim that the Court, in evaluating whether tail docking contravenes

the Agriculture and Market Law, would be scrutinizing breed standards, thereby involving itself in the internal governance and rules of competition of private not-for-profit sporting organizations. (AKC Memorandum, at 18; Brittany Club Memorandum, at 31.) However, breed standards are not at issue here. At issue is defendants' promotion of an inhumane practice as a legitimate means of meeting its standard. As discussed above, breeding for naturally short tails, as opposed to tail docking, would actually accomplish defendants' stated priority of maintaining "the purity of thoroughbred dogs" and would not promote cruelty. (Crowley Affidavit, ¶ 2; Trimble Affidavit, ¶ 3.)

Defendants' reliance on Jessup v. American Kennel Club, Inc., 61 F. Supp.2d 5 (S.D.N.Y. 1999) is misplaced. (AKC Memorandum, at 16; Brittany Club Memorandum, at 30.) In Jessup, a class action antitrust suit was brought against the AKC and the Labrador Retriever Club, Inc. claiming, inter alia, a conspiracy "to adopt a height requirement that would effectively exclude plaintiffs from the market for champion Labs." 61 F.Supp. at 10. The breed standard at issue in that case did not include tail docking or other forms of amputation, and unlike the instant case, did not involve any claims that defendants were in violation of animal cruelty provisions with regard to their promulgated standards.

