

To be argued by
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Supreme Court
State of New York
Appellate Division — First Department

JON H. HAMMER,

Plaintiff-Appellant,

against

THE AMERICAN KENNEL CLUB and BRITTANY CLUB OF AMERICA
aka THE AMERICAN BRITTANY CLUB, INC.,

Defendants-Respondents.

**REPLY BRIEF OF PLAINTIFF-APPELLANT
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PRELIMINARY STATEMENT

Plaintiff-Appellant submits this reply brief as a rebuttal to briefs of The American Kennel Club (hereinafter "AKC") and The American Brittany Club (hereinafter "ABC").

STATEMENT OF FACTS

Appellant respectfully refers to the factual statement in his main brief. This statement is limited to rebuttal. The AKC brief (fn. 3, p. 12) and the ABC brief (fn. 3 p. 8) assert that Plaintiff seeks to mislead this Court regarding the severe impact imposed by the AKC Brittany tail standard. It is not disputed that an undocked Brittany tail "shall be severely penalized" (R-15, 99, par. captioned "Neck, Topline, Body"). AKC Executive Secretary Crowley states that failure to conform to Brittany standards subjects the canine to being "heavily penalized" and "so severely penalized as to effectively eliminate them from competition" (R-61). There is a manifestly clear inference from Mr. Crowley's statement that being "severely penalized" (undocked tail) and "heavily penalized" are, for practical purposes, *in pari materia*, both serving "to effectively eliminate...from competition". Appellant's's reference to Crowley's disingenuous parsing and its obvious inference certainly does not constitute an "attempt to mislead the Court". The impact of an undocked tail is clear. See AKC's Complete Dog Book at p. 29-31 (R-61).

AKC submits that the American Veterinary Medical Association (hereinafter "AVMA") "does not prohibit tail docking...for cosmetic purposes"(AKC brief fn. 2, p. 10). In a formal resolution AVMA states, *inter alia*:

"Ear cropping and tail docking in dogs for cosmetic reasons are not medically indicated nor of benefit to the patient. These procedures cause

pain and distress, and as with all surgical procedures are accompanied by inherent risks of anesthesia...(R-148).

AVMA acknowledges in its statement about this resolution that it does not prohibit veterinarians from performing tail docking (R-148); it has no power to prohibit same. AVMA does, however, have the authority to make a medical determination that canine tail docking is "not medically indicated" and causes "pain and distress" (R-148). This is precisely the result of tail docking and the AVMA determination to that effect is evident. If this Court accepts this undisputed statement from the most authoritative body in the nation on animal treatment, then this Court must find - as a matter of law - that the practice of tail docking is cruel and in derogation of Section 353. The AVMA condemnation of tail docking as a causation of pain - with or without anesthesia - is evident (R-148). Moreover, the only New York public welfare entity expressing an opinion on this issue - the Humane Society of New York - confirms the factual bases for a violation of the New York animal cruelty law (R-165). The New York City Animal Medical Center also condemns cosmetic tail docking (R-162).

Respondents allege that none of Plaintiff's expert veterinarians assert the position that tail amputation with anesthesia creates pain or physical problem (AKC brief fn. 7, p. 17). This is controverted by the record (R-148). Moreover, it is undisputed that tail docking is routinely performed by breeders without anesthesia (R-154, 165, 168, 174, 183). This practice is the result of the AKC/ABC Brittany standard (R-41), which is controlled by the AKC board of directors (R-142, 144).

AKC asserts in its brief that Plaintiff admits that economics, custom and cosmetics justify the arcane practice of tail docking (AKC brief p. 16). This is a palpable distortion of the record.

What Plaintiff said in the Court below was:

“The Defendants and the breeders, on the altar of arcane custom, cosmetics and economics seek to trivialize this essential aspect of canine anatomy” (R-144).

The Respondents have egregiously distorted the record by claiming that such analysis constitutes a concession (R-144, 187). Such factors were cited by Appellant as being utilized by breeders to find a justification for an obsolete cruel practice (R-144, 187), one which is condemned on a worldwide basis (R-156, 168, 178, 185).

AKC maintains that a canine standard is essential to promote competition in the breeding of purebred dogs (AKC brief p. 16). This, however, cannot possibly sanction post-natal amputation of an anatomical element which is essential to canine maneuvering and balance (R-138, 167). Indeed, it is evident that cosmetic tail amputation - euphemistically called docking - corrupts rather than promotes the integrity of breed standards (R-155); see page 11 of Appellant's main brief.

The AKC/ABC consortium seeks to justify tail docking on a plethora of grounds. The record patently reflects (a) the absence of any benefit or rational basis therefor (R-138), (b) the irrational bases on which the standard for tail docking is applied to various similar breeds (R-18, 19, 136), and (c) AKC's own handbook further evinces the inherently inconsistent manner in which the standards are applied (R-143, 144).

ARGUMENT

POINT I

RESPONDENTS HAVE MISCONSTRUED THE
MEANING, SCOPE AND INTENDMENT OF
SECTION 353 N.Y. AGRICULTURE AND MARKETS LAW

As discussed in Point I of Appellant's main brief, basic principles of statutory construction bring tail docking within the scope of the maiming and mutilation strictures of the remedial animal protection provisions of Section 353. AKC/ABC rely on (a) the fact that docking is not explicitly within the statute's verbiage and (b) that animal cruelty in the form of maiming and mutilation (tail docking) is interdicted by the statute only if it is done "unjustifiably". Point (a) is encompassed by Plaintiff's main brief. Webster's Dictionary further supports this common sense analysis. Unjustifiable is defined as "lacking in justice or propriety". Webster's Third New International Dictionary (G&G Merriam 1976) at p. 2502. McKinney's *Statutes*, Section 234, similarly directs the Court as to the useful interpretative application of common dictionary meanings. Respondents disregard the plain meaning of mutilation and maiming, which brings cosmetic amputation of a canine tail within the four corners of the statute.

The *en banc* decision of the D.C. Circuit Court of Appeals is cited not for its *sui generis* factual pattern - as Respondents misapprehend - but rather for the principles of broad statutory construction there enunciated. Animal Legal Defense Fund v. Glickman, 154 F. 3d 426, 444 (D.C. Cir. 1998). Respondents in their briefs seek to minimize the Circuit Court's analysis by indicating to this Court that this decision was reversed at 204 F. 3d 229 (D.C. Cir. 2000). In their zeal to rebut basic principles of statutory construction, Respondents have overlooked the fact that Animal Legal Defense Fund v. Nat'l Ass'n for Biomedical Research, 204 F. 3d 229

(D.C. Cir. 2000) reversed the District Court decision reported at 993 F. Supp. 44 (DDC 1996), not the Circuit Court decision on which Appellant relies. (AKC brief p. 27; ABC brief fn.10, p. 27). In the same vein Respondents would - on irrelevant factual distinctions - have this Court repudiate the statutory construction concepts so eloquently enunciated by Mr. Justice Stevens in PGA Tour Inc. v. Martin, 532 U.S. 661, 689 (2001).

POINT II

RESPONDENTS HAVE MISAPPLIED THE PLAIN MEANING AND LEGISLATIVE PURPOSE OF SECTION 353

Respondents base their argument, in large part, upon the verbiage of Sec. 353, which punishes and interdicts maiming, mutilation or injury only when it is done unjustifiably. It rests with this Court, as a matter of law, to determine what acts are "unjustifiable" and hence in derogation of the statute.

Respondents assert essentially two bases to justify tail docking in order to have it pass muster under Sec. 353. First, the tail amputation provision affecting Appellant's canine is admittedly part of the "standard" for Brittany dogs (R-60, 61, 99). The standard is promulgated ostensibly "to guide breeders...to breed better quality dogs (R-117). This position is lacking in a scintilla of substance (Point IV Appellant's main memorandum) and cannot be said to justify maiming in the form of tail docking. The second purported justification is that a long tail constitutes a hazard when hunting in the brambles (R-121). This analysis has been demonstrated to be totally specious (R-137, 138, 139, 170, 171). Respondents disingenuously argue that Appellant concedes that "economics, custom and cosmetics" justify tail docking (AKC brief p. 3,

16; ABC brief p. 16); as set forth *supra* at page 3, this is patently contrary to the record (R-144, 187); *supra* at page 3 of this brief.

The fact that breeders have been engaged in the cosmetic amputation of Brittany tails for nearly a century does not provide justification for the continuance of this practice of patent cruelty. The citation to then Professor O. W. Holmes in his seminal 1881 work on The Common Law was cited as a preamble to the argument that society evolves by dint of judicial foresight. The history of our nation's laws confirms same. Such is obviously the case with respect to the evolution of community standards and legislative enactments in the realm of animal cruelty.

The Sec. 353 reference to "unjustifiably" presents a question of statutory construction to be determined by this Court, as a matter of law. Webster's Third New International Dictionary, *supra* at page 4 of this brief, defines unjustifiable as "lacking in propriety or justice". Certainly cosmetic tail amputation causing canine pain and cruelty does not conform to this commonly accepted criterion.

Whether an act of cruelty and infliction of pain is "unjustified" and hence interdicted by Sec. 353, is a question to be determined by this Court, as a matter of law, based upon the prevailing moral standards of the community. People v. Voelker, 172 Misc. 2d 564, 568, 658 N.Y.S. 2nd 180 (Crim Ct Kings 1997). Moreover, the justification must be of a nature to preserve the safety of the property or overcome danger or injury. *id.* Cosmetic tail docking certainly does not pass muster under such a standard. Just as the Court in Bunis v. Conway, 17 A.D. 2d 207, 234 N.Y.S. 2d 435 (4th Dept. 1962) determined the question of pornography as one of law, this appeal should construe the applicability of Sec. 353 to cosmetic tail docking as an issue of law. If a brittany canine's tail were injured or in a state of serious physical deterioration, tail docking

might then be medically justified. Such is not the case with respect to the standard before this Court.

Respondents argue that a suit would lie only against the district attorney. They disregard the plain language of Sec. 353, which punishes those whose act "causes, procures" the subject animal cruelty. The Court below, in its interlocutory opinion, found that the "widespread practice [tail docking] appears to be attributable, in large part, to the AKC tail standard" (R-41). The Respondents are entities which have caused or procured this practice in derogation of law and are thus proper parties (Point IV Appellant's main brief).

Respondents further argue (AKC brief p. 25) that inquiry is required into the actor's requisite culpable state of mind, which might involve a question of fact. However, no malicious state of mind is even required for a Sec. 353 violation and, hence, no question of fact pertaining thereto is extant. People v. O'Rourke, 83 Misc. 2d 175, 179, 369 N.Y.S. 2d 335 (Crim Ct NYC 1975).

POINT III

RESPONDENTS HAVE MISAPPREHENDED THE EVOLUTION OF SECTION 353

The ABC brief (p.21) asserts that "New York's animal cruelty statutes were first enacted in 1965". People v. Bunt, 118 Misc. 2d 904, 462 N.Y.S. 2d 142 (Just Ct. Dutchess 1983), contains an extensive analysis on the history and evolution of Sec. 353. The statute had its genesis in the 1909 penal law, and possibly even earlier.

The Court in Bunt, *id.*, noted that while the statute (Sec. 353) is "not well drafted", it is evident that the prevailing moral standards of the community determine whether the act of

cruelty is statutorily justified. 118 Misc. 2nd at pp. 908-909. The Court in Bunt utilized a common sense approach in construing the statute, not allowing grammatical drafting imperfections to frustrate the clear purpose of the legislature. See discussion of Sec. 353 at 74 St. John's L. Rev. 287, 289 (2000). Respondents' arguments are at variance with every element of common sense and current community standards.

Respondents rely extensively on the Watertown City Court decision in People v. Rogers, 183 Misc. 2d. 538, 703 N.Y.S. 2d 891 (City Court Watertown 2000). Indeed, the ABC brief (p. 17) states that Rogers was "wholly ignored by Appellant". In fact, the Court below wholly ignored it as well, even though it was brought to its attention by Defendants. The rationale of the Rogers case is questionable at best. The Rogers case was a criminal prosecution with a wholly different burden of proof; it was not a declaratory judgement action, and there was no expert documentary testimony of the type presented below to the Court in the case at bar.

The Respondents assert, in reliance upon Rogers, that the legislative determination to authorize tail docking of horses (Section 368 Agriculture and Markets Law) and ear cropping of dogs (Section 365 Agriculture and Markets Law) - both under certain conditions - requires that Section 353 should be read as an endorsement of canine tail docking. On the contrary, the legislature in Section 353 proscribed cruelty to animals, and in its discretion exempted canine ear cropping and equine tail docking from the Section 353 animal cruelty sanctions. The clear implication therefrom is that canine tail docking, which is patently cruel, is interdicted by Section 353.

Finally, Respondents have raised certain other arguments which can only be characterized as the classic 'red herring'. The plethora of references to separation of power, various civil rights

statutes, equal protection, *et al.*, are no more than a well articulated effort seeking to divert the Court from the issues under Sec. 353.

Lastly, Respondents submit that they are immune from court intervention because they are private organizations. This relic of an argument has long since been debilitated. (See Point V Appellant's main brief).

The record is unrefuted that AKC is a national monopoly (R-13, 161, 162). The ABC brief (p. 31) submits that "Appellant's monopoly arguments...are wholly unsupported by law"; such is clearly not the case. (See Point IV of Appellant's main brief). Moreover, in an effort to regress the state of the law, Respondent ABC resorts to a factual statement which is not part of the record and is not before this Court; reference is made by Respondent, *dehors* the record, to the "United Kennel Club and other breed clubs" (ABC brief p. 31). It is undisputed that AKC is a national monopoly in the showing and breeding of purebred dogs (R-161). Appellant seeks no private right of action to enforce Sec. 353, but only declaratory relief to construe the statute.

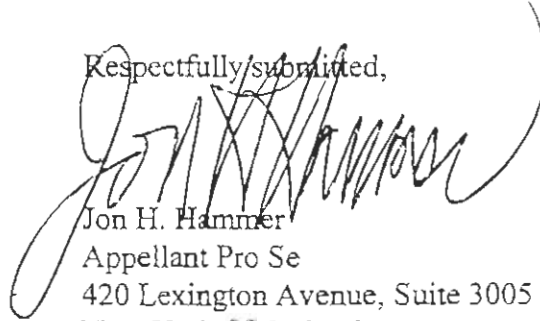
In Point III of the AKC brief and Point IV of the ABC brief, Respondents argue that their internal standards are exempt from judicial scrutiny and supervision because they are legally private organizations. This argument is palpably spurious. (See Point IV Appellant's main brief). No organization, public or private, may with impunity cause or procure a violation of state law. If Respondents procure or cause a violation of Sec. 353 - which is central to this appeal - and they have, as Appellant has demonstrated beyond peradventure - they, as with any citizen or entity are subject to the power of the court to redress their conduct, as Mr. Justice Stevens articulated in P.G.A. Tour v. Martin, 532 U.S. 661 (2001).

CONCLUSION

For the foregoing reasons and those set forth in Appellant's main memorandum, it is respectfully submitted that the judgment below should be reversed and summary judgement should be directed in favor of Plaintiff-Appellant.

New York, New York
September 12, 2002

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Jon H. Hammer', is written over the typed name and extends upwards into the 'Respectfully submitted,' line.

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