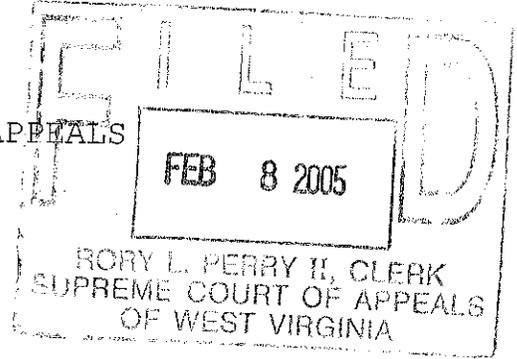


Appeal No. 32288

IN THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

at Charleston



HELEN TRACY CARBASHO,

Appellant/Plaintiff,

v.

MICHAEL S. MUSULIN,

Appellee/Defendant.

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On Appeal from the Circuit  
Court of Brooke County, WV

Civil Action No. 02-C-19

Judge James P. Mazzone

**BRIEF OF APPELLEE**

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TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION . . . . .	1
STATEMENT OF THE CASE . . . . .	2
STATEMENT OF FACTS . . . . .	3
DISCUSSION . . . . .	4
ARGUMENT . . . . .	6
I.    WEST VIRGINIA CODE § 19-20-12 ESTABLISHES A CAUSE OF ACTION AND DAMAGES RECOVERABLE FOR THE LOSS OF A DOG. THE DAMAGES ARE LIMITED TO THE ASSESSED VALUE OF THE DOG. . . . .	6
II.   NON-ECONOMIC GENERAL DAMAGES, INCLUDING EMOTIONAL DISTRESS, LOSS OF COMFORT, COMPANIONSHIP AND LOVE FOR THE LOSS OF A DOG ARE NOT RECOVERABLE UNDER WEST VIRGINIA LAW . . . . .	9
CONCLUSION . . . . .	14

TABLE OF AUTHORITIES

Page

Cases

Haines v. Hampshire County Commission,  
\_\_ S.E.2d \_\_ (2004) (No. 31702). . . . 1, 4, 5, 7, 8, 9, 10, 12

Julian v. DeVincent, 155 W.Va. 320,  
184 S.E.2d 535 (1971) . . . 1, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14

Mitchell v. Heinrichs, 27 P.3d 309, 314 (Alaska, 2001) . . . 13

Oberschlake v. Veterinary Association Animal Hospital,  
151 Ohio App.3d 741, 785 N.E.2d 881 (2003) . . . . . 11

Stenger v. Hope Natural Gas Company, 139 W.Va. 549,  
80 S.E.2d 889 (1954) . . . . . 11

Statutes

Ohio Revised Code § 953.03 . . . . . 11

West Virginia Code § 19-20-1 . . . . . 11

West Virginia Code § 19-20-11 . . . . . 1, 4, 5, 7

West Virginia Code § 19-20-12 . . . 1, 3, 5, 6, 7, 8, 9, 10, 14

Treatises and Miscellaneous

Volume 5C, *Michie's Jurisprudence*, Damages, § 35 . . . . . 11

## INTRODUCTION

The plaintiff seeks reversal of West Virginia law that precludes recovery of non-economic/general damages for the loss or injury to a dog. The damages sought by the plaintiff, the subject of the Circuit Court's Order granting Defendant's Motion for Summary Judgment have repeatedly been rejected by this Court, most recently in Haines v. Hampshire County, \_\_S.E.2d\_\_ (2004) (No. 31702).

In his Order of March 30, 2004, Judge Mazzone correctly applied West Virginia law which prohibits the recovery of non-economic damages for the loss of a dog pursuant to Julian v. DeVincet, 155 W.Va. 320, 184 S.E.2d 535 (1971), and *West Virginia Code § 19-20-12*. (TC Order 3/30/04, Index No. 259)

This Court in Haines, citing and quoting Julian, held that "damages for sentimental value or mental suffering" are not recoverable. Haines at 10. The plaintiff seeks to revisit this issue, this time under the flag of "special value," a concept of damages first noted in Julian. Julian, at 536. However, as this Court held in Haines, a dog which is lost or injured that is not "assessed as personal property" pursuant to *West Virginia Code § 19-20-11* has "indeterminable value" and cannot be the subject of monetary damages. Haines, at 10.

In light of the foregoing, Judge Mazzone's Order finding that plaintiff is entitled only to those damages "permitted by statute" should be affirmed. (TC Order, 3/30/04, Index No. 259)

STATEMENT OF THE CASE

The plaintiff filed suit against Mr. Musulin for an automobile accident which occurred on June 8, 2001. (Complaint, Index No. 2) The plaintiff alleged that she was injured while walking her dog. In addition to her personal injury claims, the plaintiff claimed that, "[a]s a direct and proximate cause of the actions of the defendant Michael S. Musulin, plaintiff Helen Tracy Carbasho's dog, Groucho, was killed." (Complaint, Paragraph 22, Index No. 2) Plaintiff made no specific claim for monetary damages for the value of the dog but made a claim for the "loss of love, companionship and comfort of her dog." (Complaint, Paragraph 23, Index No. 2) In addition to the negligence claim, plaintiff claimed that Mr. Musulin's acts were done "wilfully and maliciously." (Complaint, Paragraph 24, Index No. 2)

All of plaintiff's claims were settled except "the property damage value of the dog, Groucho, and whether or not sentimental value, emotional distress and emotional attachment are recoverable damages in West Virginia for the loss of the dog." (TC Order

4/10/03, Index No. 244)<sup>1</sup> Ultimately, Mr. Musulin filed a Motion for Summary Judgment on the remaining claim of non-economic/general damages alleged by the plaintiff.<sup>2</sup> The plaintiff argued that West Virginia law should provide for damages in excess of the assessed value and that *West Virginia Code § 19-20-12* does not apply in this case. (See Index Nos. 248 and 253)

Judge Mazzone granted Defendant's Motion for Summary Judgment, ordered that non-economic/general damages are not recoverable for the loss of the dog, and plaintiff was limited to those damages set forth in *West Virginia Code § 19-20-12*, i.e., the assessed value of the dog. (TC Order 3/30/04, Index No. 259)

#### STATEMENT OF FACTS

The defendant negligently caused the death of the plaintiff's dog on June 8, 2001. The plaintiff originally alleged that the defendant wilfully and maliciously killed her dog. (Complaint, Paragraph 24, Index No. 2) In support of her appeal, the plaintiff insists on realleging certain matters denoted as facts

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<sup>1</sup> It could be proffered that the plaintiff never made a claim for the value of her dog and that her only claim was for general damages such as the loss of comfort, love and companionship. See, e.g., Complaint, Paragraph 22, Index No. 2.

<sup>2</sup> The plaintiff concedes in her Petition that the dog has no assessed value. The plaintiff has never proffered any evidence as to the fair market value of the dog. The defendant proffered that the dog had a market value of \$150.00. (Defendant's Brief in Response, Index No. 255)

that have not been made part of the record. These matters, which are mistakenly identified as facts, seek to paint the defendant in a most unsympathetic light and are contested by appellee. (Defendant's Motion for Summary Judgment, Index No. 250) Without reiterating the testimony in defendant's deposition that contradicts plaintiff's negative and innuendo-based version of events leading to the death of her dog, the defendant admits that he negligently caused the death of the plaintiff's dog. As Judge Mazzone's ruling on Defendant's Motion for Summary Judgment was based on statutory and common law limitations on such damages, the dearth of facts made part of the record is not an issue with respect to this appeal.

#### DISCUSSION

In Haines v. Hampshire County Commission, \_\_ S.E.2d \_\_ (2004) (#31702), the Court, citing West Virginia Code § 19-20-11 and Julian v. DeVincent, 155 W.Va. 320, 184 S.E.2d 535 (1971) affirmed the dismissal of an Amended Complaint for "failing to state a claim" for the loss of a dog, as such claims were "without merit" because "the dog was not assessed as personal property"; the "claim for monetary damages would be indeterminable in light of West Virginia Code § 19-20-11 (1951); and, West Virginia law as enunciated in Julian "disallowed damages for sentimental value or mental distress." Haines at 10. Furthermore, West Virginia Code

§ 19-20-12 limits civil damages for the destruction of dogs to the "assessed value of the dog." *West Virginia Code § 19-20-12(a)* (1984) Earlier, this Court, in Julian, addressing the destruction of the dog in a situation not covered by *West Virginia Code § 19-20-12*, held that "damages for sentimental value and mental suffering are not recoverable." Julian at 536.

As found by Judge Mazzone in his Order granting Defendant's Motion for Summary Judgment, the plaintiff's damage claims are limited to the applicable statute, *West Virginia Code § 19-20-12*, which clearly limits damages to the assessed value of a dog. Here, the plaintiff concedes that her dog has no assessed value. (TC Order 3/30/04, Index No. 259) and See, *West Virginia Code § 19-20-11*.

The plaintiff's position herein ignores this Court's holding concerning damages permissible for the loss of a dog, set forth most recently Haines. Instead, plaintiff attempts to bootstrap that which is prohibited, i.e., damages for the emotional distress, love, companionship and comfort of her dog into an evidentiary issue related to the calculation of "special value," despite the obvious and clear stricture concerning general damages for the loss of a dog in particular and personal property in general. Plaintiff's position herein is simply not the statutory or common law of the State of West Virginia.

ARGUMENT

- I. **WEST VIRGINIA CODE § 19-20-12 ESTABLISHES A CAUSE OF ACTION AND DAMAGES RECOVERABLE FOR THE LOSS OF A DOG. THE DAMAGES ARE LIMITED TO THE ASSESSED VALUE OF THE DOG**

The Circuit Court correctly ruled on Defendant's Motion for Summary Judgment that *West Virginia Code § 19-20-12* limits recovery of plaintiff's damages for the loss of her dog to that permitted by statute. (TC Order 3/30/04, Index No. 259) The version of *West Virginia Code § 19-20-12* which existed on the date of the incident states that:

Any person whose dog . . . shall be killed or injured, wrongfully or unlawfully, by any other person shall have a right of action against the person . . . ***but in no case involving a dog can recovery be had in excess of the assessed value of such dog.***

Id. (emphasis added)

In Julian, while addressing a situation where a dog was killed by another dog, not a person, this Court found that *West Virginia Code § 19-20-12* "clearly deals with recovery in civil actions against a person who kills or injures a dog belonging to any person . . ." Julian at 536. In Julian this Court noted that the statute did not apply in that case simply because the case involved a dog killing another dog. However, the Court's holding clearly established that *West Virginia Code § 19-20-12* applied to all civil actions for recovery of damages for the death of a dog caused by a person.

The holding in Julian concerning *West Virginia Code § 19-20-12* was implicitly reiterated in the Haines decision where this Court, ruling on the efficacy of an Order granting a Motion to Dismiss for failure to state a claim, held that a plaintiff's claim for monetary damages for the loss of a dog "is without merit as the appellants admit that the dog was not assessed as personal property . . . [t]hus their claim for monetary damages would be indeterminable in light of *West Virginia Code § 19-20-11* (1951)." Haines at 10.

In this case, Judge Mazzone correctly ruled as a matter of law that recovery for a dog which is killed as the result of negligence is limited to those damages "permitted by statute." (TC Order 3/30/04, Index 259)

The plaintiff wishes to have this Court ignore the existing language, and authority of *West Virginia Code § 19-20-12*. The plaintiff argues that this statute should not apply because there was no finding of criminal liability against the defendant in that her Complaint only sounded in negligence, "not an intentional, wilful and unlawful killing of the appellant's dog."<sup>3</sup> (Plaintiff's Brief, Page 8)

The crux of plaintiff's position herein is the argument to reconstrue not only statutory law, i.e., *West Virginia Code § 19-*

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<sup>3</sup>It should be noted that the plaintiff's Complaint alleged that the defendant wilfully and maliciously caused the death of her dog. (Complaint, Paragraph 24, Index No. 2)

20-12, but also common law, specifically Julian and Haines. Clearly, *West Virginia Code § 19-20-12* addressed those situations where dogs are killed or injured "wrongfully" and deals with recovery in civil actions against a person who kills or injures a dog belonging to any person." *West Virginia Code § 19-20-12(a)* and Julian at 536. To argue that *West Virginia Code § 19-20-12* does not apply is to ignore the clear unambiguous language of the statute and at least two West Virginia Supreme Court cases relying thereon. See, Julian and Haines.

The fact that the statute has been amended slightly, eliminating the civil recovery limitation, is of no consequence to the clear unambiguous nature of the statute that existed at the time of the event.<sup>4</sup> See, e.g., Julian and Haines. See also, West Virginia Code § 19-20-12 eff. 5/28/03. The plaintiff apparently does not argue that the version of *West Virginia Code § 19-20-12* that existed at the time of the event is somehow inapplicable based on some principle of statutory construction. Her only position is that it is inapplicable to a civil action involving the tortious killing of a dog.

Plaintiff provides no analysis regarding why the tortious killing of dog would entitle the aggrieved party to a greater

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<sup>4</sup>It appears that the amendment eliminating the civil recovery limitation was due in no small part to the lobbying efforts of the appellant herein during the pendency of her case against the defendant.

recovery than the criminal killing of a dog. In any case, a reading of *West Virginia Code § 19-20-12* that limits its application to matters of criminal liability is to ignore the language of the statute which expressly provides for not only "unlawful" activity but also "wrongful" acts. *West Virginia Code § 19-20-12(a)* and Julian.

Judge Mazzone's ruling on Defendant's Motion for Summary Judgment, limiting the plaintiff to those damages allowed by statute and prohibiting the plaintiff from recovery of general non-economic damages for the loss of her dog, was clearly consistent with *West Virginia Code § 19-20-12*, Julian and Haines, and must be affirmed.

II. NON-ECONOMIC GENERAL DAMAGES, INCLUDING EMOTIONAL DISTRESS, LOSS OF COMFORT, COMPANIONSHIP AND LOVE FOR THE LOSS OF A DOG ARE NOT RECOVERABLE UNDER WEST VIRGINIA LAW

The status of West Virginia law on the issue of general damages for the loss of a dog is as clear and unambiguous as *West Virginia Code § 19-20-12*; there can be no recovery for these elements of damages. See, Julian and Haines. As this Court noted in Haines:

Appellants correctly recognized the difficulties with their own argument as they cite this Court's holding in Julian v. DeVincent, 155 W.Va. 320, 184 S.E.2d 535 (1971), which *disallowed damages for sentimental value or mental distress*.

Haines at 10 (emphasis added).

Whether several other states allow such damages (the vast majority do not); whether the appellant's request for such damages has morphed into an evidentiary issue as opposed to an element of damage (which it does); or, whether it is socially and philosophically a more enlightened approach, the fact remains that the damages claimed by the appellant, the subject of Judge Mazzone's ruling on Defendant's Motion for Summary Judgment, are not recoverable under West Virginia law.

Judge Mazzone correctly identified and applied existing law when he ruled the damages were not recoverable. His decision was ultimately indirectly ratified by this Court's decision in Haines, which was decided months after the lower court's ruling. Again, general damages for the loss of a dog are not recoverable. In fact, such a claim for these damages may be dismissed as a matter of law for failing to state a claim. (See, Haines)

The appellant first argues that the stricture of *West Virginia Code § 19-20-12*, i.e., "in no case involving a dog can recovery be had in excess of the assessed value of the dog," should not apply. See, *West Virginia Code § 19-20-12(a)* (1984).

Second, the plaintiff argues that the common law should be reversed or read to establish a whole new standard for the assessment of damages for the loss of this particular class of personal property, i.e., dogs. As Judge Mazzone noted in his Order in the underlying matter, West Virginia law simply does not allow

the assessment of general non-economic damages for the loss or destruction of personal property. (See, i.e., Stenger v. Hope Natural Gas Company, 139 W.Va. 549, 80 S.E.2d 889 (1954) [cited by Judge Mazzone in his Order of 3/30/04, Index No. 259]. Also, see Volume 5C, *Michie's Jurisprudence*, Damages, § 35.

The plaintiff does not directly address *West Virginia Code* § 19-20-1, which clearly classifies dogs as "personal property." Apparently, this statute, as well as the common law which defines the damages recoverable for the destruction of personal property, must also be found to be lacking in legal authority or ignored if the plaintiff's argument is to be accepted.

The basis for the plaintiff's position is that dogs are not just "personal property" and that they should be a special class of personal property for which general damages should be recoverable. This is, of course, contrary to the legislature's unambiguous pronouncement contra, as well as established common law set forth in a plethora of West Virginia cases that discuss the damages recoverable for the loss or destruction of personal property.

It is not an anomaly that dogs have been classified as "personal property." See *Ohio Revised Code* § 953.03 which is cited in Oberschlake v. Veterinary Association Animal Hospital, 151 Ohio App.3d 741, 785 N.E.2d 881 (2003) (denying recovery of general non-economic damages for the loss of a dog as same is classified as personal property under Ohio law.) This Court in both Julian and

Haines clearly held that dogs are personal property under West Virginia law and thus general damages are not recoverable for the loss thereof.

In response to the well-settled law in this area, plaintiff argues that the term "special value" used by the Court in Julian should be construed to allow for the types of damages she seeks. Alternatively, the elements, such as sentimental value, loss of companionship, comfort and love, if not separate elements of damage, are evidentiary matters which should be considered by the finder of fact in support of a claim under the "special value" standard. This attempt to bootstrap general damages which are expressly not recoverable under West Virginia law into a matter of evidence to be considered in evaluating "special value" has been implicitly rejected by this Court in Haines.

In Haines, this Court affirmed the dismissal of plaintiff's Amended Complaint seeing monetary damages as well as general damages, ruling as a matter of law that the plaintiff could prove no set of facts which would entitle them to the relief sought. Id., Syl. Pt. 2 and Page 10. There is certainly no authority in West Virginia that would support general damages for the loss of a dog whether or not proffered as an evidentiary issue or an element of damage.

In response to the clear and unambiguous position of the legislature and this Court, ultimately the plaintiff argues that

the damages afforded for the loss of a dog are simply inadequate and do not account for the emotional attachment between an owner and a dog. Plaintiff argues, "special value" must be construed to include general damages. As noted above, this is simply not the law. More importantly, the ramifications of plaintiff's position would require legislation reclassifying dogs and/or pets as a special class of property; the reformation of the common law to allow such damages for this special class of personal property; legislative enactment defining the type of pets, animals, etc., which would be within the special class of personal property; and additional legislative enactment to reconsider the limitations, if any, of such damages or whether the law would allow persons to claim unlimited damages for the loss of their pets. The effect plaintiff's position would have was recognized by Judge Mazzone and cogently described in his Order granting Defendant's Motion for Summary Judgment. (TC Order 3/30/04, Index No. 259)

If it is necessary to affix a meaning or definition to account for the term "special value," given this Court's position in Julian that general/non-economic damages are not recoverable, it may be appropriate to look at such factors as "the cost of replacement, original cost plus the cost to reproduce, . . . the cost of immunizations, the cost of neutering the pet and the cost of comparable training . . . whether the dog was provided for the purpose of breeding . . ." Mitchell v. Heinrichs, 27 P.3d 309, 314

(Alaska, 2001). These are all factors that could be considered under the concept of fair market value of personal property. Even then, the owner may not recover damages for the dog's "sentimental value." Id. Again, this would only apply in situations which were not covered by *West Virginia Code § 19-20-12*. See, Julian.

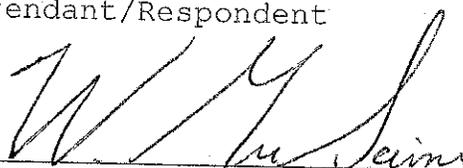
**CONCLUSION**

There is no mechanism, either at common law or statutorily that provides for recovery of general/non-economic damage for the loss of a dog as a result of a tortious act. The recovery is as set forth in *West Virginia Code § 19-20-12*. Thus, Judge Mazzone's Order granting Defendant's Motion for Summary Judgment should be affirmed.

Respectfully submitted,

Michael S. Musulin  
Defendant/Respondent

By:

  
\_\_\_\_\_  
W. Gus Saines, Esq. (#5961)

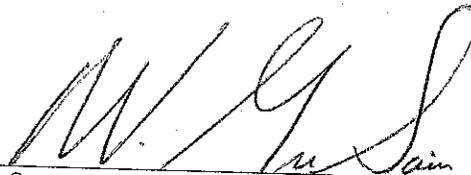
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**CERTIFICATE OF SERVICE**

for  
**BRIEF OF APPELLEE**

The foregoing was served upon the following via U.S. mail,  
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