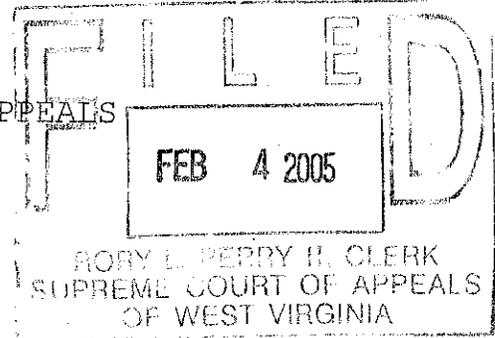


Appeal No. 32288

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

at Charleston



HELEN TRACY CARBASHO, :
 :
 Appellant/Plaintiff, : On Appeal from the Circuit
 : Court of Brooke County, WV
 :
 v. : Civil Action No. 02-C-19
 :
 MICHAEL S. MUSULIN, : Judge James P. Mazzone
 :
 Appellee/Defendant. :

APPELLEE'S RESPONSE TO AMICUS

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INTRODUCTION

The Amicus Brief by the Animal Legal Defense Fund on behalf of the appellant offers only policy arguments in support of the it's position that West Virginia law should allow for recovery of general damages for the loss of a dog. It does so without even a reference to West Virginia statutory or case law on the issue of damages recoverable for the loss of property. In focusing on the philosophical nature of the bond between an animal and a human and arguing for the creation of new law, and the establishment of a special class of property, Amicus makes no reference to the current statutory and/or case law directly juxtaposed to same and offers no mechanism by which the Court could reverse West Virginia statutory and common law prohibiting recovery of these damages.

DISCUSSION

Amicus postulates that West Virginia should recognize a special class of personal property, the destruction of which would allow unlimited general damages, especially sentimental, emotional distress-type damages not currently recoverable for the loss of personal property. *West Virginia Code § 19-20-1* clearly defines dogs as personal property:

Any dog shall be and is hereby declared to be personal property within the meaning and construction of the laws of this state. . . .

West Virginia Code § 19-20-1

West Virginia Code § 19-20-12, at the time of the within matter, specifically limited recovery for the loss of a dog to its assessed value. The new version of § 19-20-12 has no such limitation, but West Virginia, in defining dogs as personal property, clearly established the measure of damages to be the difference of the fair market value before and after the loss. See, e.g., Stenger v. Hope Natural Gas Company, 139 W.Va. 549, 80 S.E.2d 889 (1954). In a case where the market cannot be ascertained, other factors may be considered such as "pecuniary value" or "special value," but general damages "for sentimental value or mental suffering are not recoverable." Julian v. DeVincent, 155 W.Va. 320, 184 S.E.2d 535, 536.

Amicus argues for a flexible standard of "actual value" to an owner which ultimately is another way of saying "general damages." For instance, Amicus argues implicitly that Ohio is a state where such a standard is used to determine the value of a dog, citing McDonald v. Ohio State University Veterinary Hospital, 645 N.E. 2d 750 (Ct. of Cl., 1994). However, Ohio follows the rule set forth in Julian and Haines v. Hampshire County Commission, __ S.E.2d __, (2004) (No. 31702) that "does not recognize non-economic damages for injury to companion animals" on the grounds that same are personal property. Oberschlake v. Veterinary Associates Animal

Hospital, 151 Ohio App.3d 741, 785 N.E.2d 811, 814 (2003) citing *Ohio Revised Code* § 955.03.¹

In support of a new standard of damages, i.e., actual value, which would include recovery for general damages prohibited in West Virginia, Amicus argues that owners of dogs suffer greater damages than those persons who loose other property that may also hold sentimental value.

West Virginia Code § 19-20-11 states that "[a]n owner of any dog above the age of six months shall be permitted to place a value on such dog and have such dog assessed as personal property." *West Virginia Code* § 19-20-11. In other words, an owner, if he or she so chooses, can place a value on the dog, and have it assessed. Theoretically, a dog owner in West Virginia who is attached to his dog and has the type of bond described by Amicus, can place a corresponding value on such dog. Of course, with the privilege of such ownership and the ability to place a value on a dog, comes the responsibility of the appropriate property tax, a burden that most owners do not undertake. In essence, West Virginia already accounts for the special relationship between a dog and his owner

¹ The Court in Oberschlake, in considering the argument to extend damages for the loss of a companion animal to include general damages, cites a number of decisions from other jurisdictions also prohibiting said damages including, Krasnecky v. Meffen, 56 Mass. App. Ct. 418, 757 N.E.2d 1286 (2002) and Harabes v. Barkery, Inc., 348 N.J. Super. 366, 791 A.2d 1142 (2001). Oberschlake, supra, at 815.

by allowing an owner to establish its value, a mechanism, while not perfect, actually accounts for the uniqueness of the property.

Ultimately, Amicus takes the position that longstanding statutory law must be changed, common law must be reversed and West Virginia should take a more sympathetic approach to the issue of civil damages for the loss of a dog. This position, while having some emotional appeal for all of us dog lovers simply fails to account for the essential paradigm underpinning West Virginia statutory and common law; that of dogs and animals as personal property of their owners.

It could be argued that the bond which exists between humans and their dogs could be better addressed by promoting the adoption of the thousands of dogs, who inhabit the animal shelters of this state, as opposed to the creation of a new class of property creating a clear source of conflict in the law of civil damages.

CONCLUSION

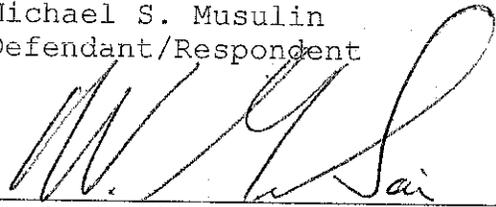
In proffering the creation of a new civil recovery for general damages for the loss of personal property, Amicus fails to address current West Virginia statutory and common law prohibiting same. In suggesting the creation of a new class of personal property for which such recovery could be obtained, Amicus merely restates the undeniable proposition that owners have a sentimental attachment to their pets. Notably absent from its stated position is an analysis

of the law which forms the basis for the prohibition of such damages and an analysis of the failure of the West Virginia legislature and courts to adopt its position in light of its assertion that animals are treated differently under the law than all other forms of personal property. These policy considerations have ultimately been rejected by the legislature and by this Court as recently as November 2004 in Haines. As such, the lower court's order prohibiting recovery of such damages should be affirmed.

Respectfully submitted,

Michael S. Musulin
Defendant/Respondent

By:



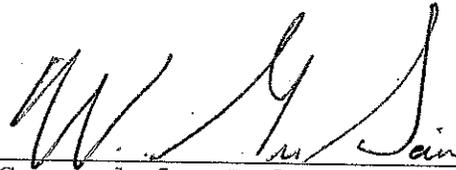
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CERTIFICATE OF SERVICE
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The foregoing was served upon the following via U.S. mail,
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