

Appeal No. 32288

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

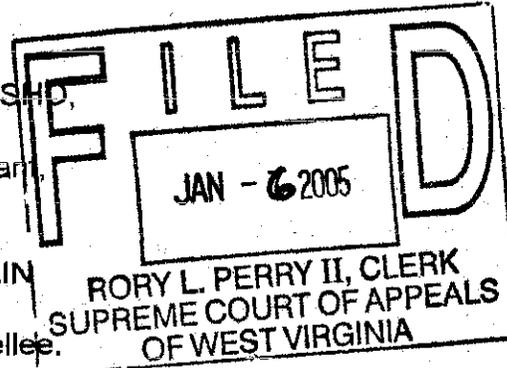
HELEN TRACY CARBASHO,

Plaintiff Below, Appellant,

vs.

MICHAEL S. MUSULIN

Defendant Below, Appellee.



On Appeal From The Circuit Court of Brooke County, West Virginia
Honorable James P. Mazzone, Judge

APPELLANT'S BRIEF IN SUPPORT OF APPEAL FROM SUMMARY
JUDGMENT ENTERED ON MARCH 30, 2004

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TABLE OF CONTENTS

	<u>Page</u>
I. PROCEEDINGS AND NATURE OF THE RULING BELOW	1
II. STATEMENT OF THE FACTS	3
III. STANDARD OF REVIEW	4
IV. ASSIGNMENT OF ERROR RELIED UPON ON APPEAL	5
V. POINTS AND AUTHORITIES RELIED UPON HEREIN	5
VI. ARGUMENT	6
VII. CONCLUSION	15

I. PROCEEDINGS HAD HEREIN AND NATURE OF THE RULING BELOW

This is an appeal from the Order of the Circuit Court of Brooke County, granting summary judgment in favor of the defendant and Appellee herein, Michael Musulin. The incident which gave rise to the underlying action was an automobile accident on June 8, 2001, during which Michael Musulin, was responsible for injuring the Appellant and causing the death of her pet dog, Groucho. The Appellant filed a complaint in the Circuit Court of Brooke County on February 19, 2002, alleging various causes of action, requesting compensatory, emotional and punitive damages. (Record Index, No. 2, Complaint)

An Order entered by the Circuit Court on March 20, 2003, reflects the plaintiff's acceptance of an offer of judgment for her bodily injuries. (Record Index, No. 244) The damages which the plaintiff was entitled to recover for the death of Groucho thereupon became the sole remaining issue before the Court.

The defendant filed a Motion for Summary Judgment requesting the Court to dismiss the Plaintiff's claim for any loss related to Groucho in excess of the dog's assessed value, which was estimated at somewhere between One Hundred Dollars (\$100.00) and One Hundred Fifty Dollars (\$150.00). (Record Index, No. 250, Defendant's Motion for Summary Judgment Regarding Losses for the Dog.) Relying upon this Court in Julian v. DeVincent, 155 W.Va. 320; 184 S.E. 2nd 535 (1971), that a plaintiff may offer proof of *either* a dog's market value, its pecuniary value, or "*some special value.*" (emphasis added), the Appellant urged the Circuit Court to recognize that the proper measure of damages fro the death of her pet included not only Groucho's fair market value, but also additional evidence to prove his particular and

special value to her. In this regard, the loss of his companionship, as well as evidence showing his "unique role" in the Appellant's life are important elements in calculating his true value to the Appellant for the purpose of awarding damages.

By Order and Memorandum Opinion, dated March 30, 2004, the Circuit Court granted the Defendant's Motion for Summary Judgment limiting the Appellant's recovery for the death of her pet to an amount not to exceed its fair market or assessed value. (Record Index, No. 259, Memorandum of Opinion and Order, Dated March 30, 2004)

The Appellant thereupon petitioned this Court for appeal, and said Petition having been granted, the instant appeal ensued.

II. STATEMENT OF THE FACTS

Shortly before midnight on June 8, 2001, the Appellant and her friend were out for a walk with the Appellant's pet dog, Groucho. Suddenly they saw the headlights of the defendant's car coming toward them as he drove out of the parking lot of a local bar. (Record Index, No. 248, Brief in Support of the Propriety of Non-Economic Damages to Compensate the Plaintiff Herein, citing the Depositions Testimony of Helen Tracy Carbasho, pp. 70, 71, 81) As the car came speeding toward them, the Appellant reached down to pick up Groucho and protect him, but it was too late. (Id.) The defendant's car struck both the Appellant and Groucho, knocking the Appellant to the ground, causing injury to her and fatally injuring her beloved Groucho.

The defendant never stopped to check on the Appellant even though her friend chased the car down the alley. Shortly thereafter he was observed "running" a stop sign as he drove away from the scene of the accident.

The Appellant saw that Groucho tried to run away at first, but it was obvious that he was too badly injured, and he soon collapsed. (Id., citing pp 103, 104) She saw blood coming from Groucho's nose, and she lay down on the pavement with him, trying to soothe and calm him. (Id. citing p. 106) With the help of friends, she eventually managed to get Groucho to an animal hospital located approximately twenty-five (25) minutes away from the scene. She carried him into the hospital wrapped in blankets, which by that time were covered with his blood. (Id.) Unfortunately, Groucho had already died by the time the Appellant got him to the hospital. (Id.) The Appellant lost her pet, her companion, her best friend that night, and by all accounts, she has never recovered from the trauma of that loss.

Appellant's neighbor was able to provide police with the license number and description of the vehicle and later that evening, police officers went to his home where they were met by his mother, Sharon Musulin. She told the police that Michael Musulin, had come home from work much earlier and that he had been sleeping ever since. (*Id.*, citing p.112.) Michael Musulin refused to come to the door when the officers asked if he would speak with them.

The Appellant, a single woman, who lives alone and has no children, had owned Groucho since he was a puppy. For eight and half years, he had been her companion, her friend, her family. She took him with her on frequent road trips and posed with him every year for Christmas cards. Her entire life has been devastated by his loss. Indeed, in describing her feelings over Groucho's death, Appellant testified at her deposition that she "feels like the pain is never going to go away." (*Id.*, citing pp. 135, 136).

III. STANDARD OF REVIEW

Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See Hager v. Marshall, 202 W.Va. 577, 505 S.E. 2d 640 (1998). The Appellant submits that the defendant herein is not entitled to summary judgment as a matter of law.

IV. ASSIGNMENT OF ERROR RELIED UPON ON APPEAL

Appellant submits that the Circuit Court erred in holding that West Virginia law only allows for recovery of the fair market value for the death of a pet dog.

V. POINTS AND AUTHORITIES RELIED UPON HEREIN

A. CASES

Julian v. DeVincent, 155 W.Va. 320; 184 S.E. 2nd 535 (1971)

Brosseau v. Rosenthal, 443 N.Y.S 2d 285 (1980)

Morgan v. Droupa, 702 A. 2d 630, 633, (Vt. 1977)

B. STATUTES

West Virginia Code Section

West Virginia Code Section 19-20-12 (2002)

West Virginia Code Section 19-20-12 (as amended in 2003)

C. ARTICLES

Robin Cheryl Miller, Annotation, *Damages for Injuring or Killing a Dog*
61 A.L.R. 5th 2001

VI. ARGUMENT

The limited issue presently before this Court is the proper measure of damages which the plaintiff may recover for the death of her pet dog, Groucho. While pets are generally classified as "property" under the law, there is certainly no disagreement that their unique nature and the special kind of relationships which exist between pets and their owners, significantly distinguishes them from every other kind of inanimate property. We love them, and we worry about them. We spoil them, and we care for them. We decorate our homes and offices with their pictures, and appreciate their unconditional love for us. They are part of our families, and we grieve for them when they are gone. In a number of jurisdictions, the reality of this difference has prompted questions and raised concerns as to exactly how a pet should be valued for purposes of awarding damages for its injury or death. In this regard, the Appellant has argued throughout the course of this action that West Virginia is, in fact, among those jurisdictions which have, at the very least, implicitly recognized the special and important nature of the value which human owners place upon the love and companionship of their pets. Appellee, on the other hand, contends that our pets are no different than any intangible property and that damages for the loss of a pet in any amount above the assessed or fair market, value of the animal are not recoverable in West Virginia.

For the reasons set forth below, the Appellant submits that the Circuit Court erred in granting summary judgment to the Appellee on the issue of damages. It is further submitted that said judgment should be reversed and that the action should be remanded to the Circuit Court so that the Appellant can present evidence to prove

the true and special value of her for a determination of the actual and true value of the Appellant's beloved pet, Groucho, based on the criteria set forth herein.

This Court has already held that to recover damages for the loss of a dog, a plaintiff may prove the dog's market value, its pecuniary value, or "*some special value.*" Julian v. DeVincent, supra (Emphasis added.) In Julian, the appellant's dog ran onto the plaintiff's porch, where it attacked and killed the plaintiff's small dog. Plaintiffs sued for the death of their dog, and the lower court entered judgment in their favor, for what it termed the "value of the dog," in the amount of One Hundred Seventy Eight Dollars and Seventy Cents (\$178.70). The amount was based upon an itemized stipulation of costs submitted by the parties and also included the amount of One Hundred Dollars (\$100.00) for "sentimental value" and "mental cruelty" suffered by the plaintiff's children. On appeal, the defendants claimed that the plaintiffs were not entitled to recover any amount of damages for the death of their dog based upon West Virginia Code Section 19-20-12, which provides 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 who shall so kill or injure such dog, but in no case can recovery be had *in excess of the assessed value of such dog.*" (emphasis added) Since the plaintiff's dog had not been assessed, and therefore had no "*assessed value,*" the defendants argued that there could be no recovery of damages for its loss.

While the Court refused to hold that an owner's failure to have a dog assessed for tax purposes establishes that the dog has no value, it is also recognized that there can be no recovery of damages for the death or injury of a dog unless sufficient

evidence is presented to establish either its market value, its pecuniary value, or some "special value." Julain v. DeVincent, supra. Since the plaintiffs had offered no such proof, and there had been no agreement by the parties as to the value of the dog which was killed, there could be no recovery. The Court also noted that Section 19-20-12 is "primarily concerned with the protection of registered dogs and criminal offenses in connection therewith" (Id.) A violation of the statute constitutes a misdemeanor and occurs when a person "intentionally and unlawfully" kills or injures, or causes the death or injury, of a registered dog or any dog..., which is owned, kept and maintained as a pet by any person." Id. citing W.Va. Code Section 19-20-12.

Since the plaintiff's dog in Julian had not been killed by a person, but by another dog, the Court determined that Section 19-20-12 did not apply to the facts before it and declined to base its decision on the statute. The Appellant herein has likewise maintained that Section 19-20-12 is not applicable to her case. Indeed, there has been no finding of criminal liability against Michael Musulin regarding the death of Groucho, and the underlying complaint does not seek relief pursuant to the statute. Instead, the Appellant's complaint sounds in tort and has, as its basis, an automobile accident and not an intentional, willful and unlawful killing of the Appellant's dog.

The Appellant submits that the significance of the holding in Julian is its pronouncement of the law in West Virginia regarding the proper measure of damages for the death of a dog. (See "Damages for Injuring or Killing a Dog," Annotation, 61 A.L.R. 5th 2001, summarizing the West Virginia standard for calculating damages as "either the dog's value to its owner, or the dog's market value, the Court not, or

apparently not, indicating a preference between the two....") Recognition by the Court that the value of a pet includes its "special value," sets the stage, so to speak, for grieving pet owners to offer specific evidence prove the value of their pets to them.

In granting the defendant's motion for summary judgment, the Circuit Court opined that if Section 19-20-12, and its limitation on the amount of damages recoverable, was not, in fact, controlling with respect to the Appellant's underlying claim then, "at issue sub judice is the *appropriateness* of allowing for the recovery of non-economic damages over the loss of a pet." (Record Index, No. 259, Memorandum of Opinion and Order, supra.) The Court thereupon concluded that there is no West Virginia authority which supports an award of non-economic damages in an action involving the death of a dog. (Id.) Citing West Virginia Code Section 19-20-01 as evidence of the legislative intent that "any dog shall be and is hereby declared to be personal property within the meaning and construction of the laws of this state....," the Court held that the measure of damages is thus the fair market value of such "property" at the time of its destruction. (Id.)

It is arguably of interest that the Circuit Court based this decision on a case decided by this Court in 1954 wherein recovery was sought against a gas company for damages to the plaintiff's house, fixtures, and furniture as the result of a natural gas explosion and subsequent fire. (Id. citing Stenger v. Hope Natural Gas Co., 139 W.Va. 549, 80 S.E. 2d 889 (1954)). Certainly the death of a pet is not the same as losing an inanimate object, and the exercise of comparing the two only serves to emphasize the inherent unfairness in viewing pets in the same way that we do

inanimate property objects when it comes to damages for injury or destruction.

The Circuit Court also specifically rejected the applicability of Julian to the Appellant's case, or for that matter to any case, as a means of proving that the value of a pet is more than its mere market value. Indeed, interpreting Julian in such a manner, according to the Circuit Court, is to engage in an overly "broad" reading of the case. In this regard, the Court cited what it characterized as "persuasive authority from other jurisdictions," which it claims "substantiates" the position that the recovery of non-economic damages is prohibited in cases involving the loss of a dog. (Id.) The Appellant submits however, that some of the cases, referred to and relied upon by the Circuit Court do not, in fact, stand for propositions for which they have been cited.

Perhaps the most obvious of these is the Wisconsin case of Rabideau v. City of Racine, 243 Wis. 2d 486, 627 N.W.2d 795, 798 (2001). In an effort to demonstrate that it does in fact understand that a pet's market value can never come close to its true value, which results from the emotional bond and unique relationship pets and their owners enjoy, the Court quotes the Rabideau opinion, which acknowledges that labeling a dog as "property" fails to adequately describe the value human beings place upon the companionship that they enjoy with a dog." (Id., quoting Rabideau v. City of Racine, supra) In this regard, the Circuit Court then explains that despite the Rabideau court's sympathy for the result, it nevertheless refused to extend the law in such a manner as to allow recovery for non-economic damages." (Id.)

Examination of Rabineau, however, discloses that the Wisconsin Court in fact never even reached the issue of non-economic damages. Indeed, the Court found

that the plaintiff had altogether failed to allege property loss as part of her cause of action. Instead, her complaint stated only a claim for personal injuries. This conclusion, according to the Court, "can be gleaned by the fact that the only actual damages she pleads are damages to herself, not damages for the lost property value of her dog." (*Id.* citing Rabineau) Thus, because of the plaintiff's failure to plead the value of her dog as part of her "actual damages," the court said that: "we cannot and will not construe her complaint as one for *damages to property* by the tortious action of another." (*Id.*) (emphasis added)

In addition, some of the other decisions cited by the Circuit Court, which, denied recovery to the plaintiffs therein, did so not because the cases involved injuries to pets, but rather because the alleged claims were missing certain elements or were not sufficiently plead. A significant number of the cases, furthermore, were limited to the question of whether emotional and mental damages based on claims of negligent or intentional infliction of emotional distress are permissible in cases involving the death or injury of pets. As such, these cases likewise do not address the matter under consideration here regarding the proper measure of damages in assessing a pet's intrinsic or actual property value. Indeed, the Rabideau court held that the facts before it would not support a claim for negligent infliction of emotional distress, but indicated that it could envision circumstances wherein certain facts might support a claim for intentional infliction of emotional distress. (*Id.*) Significantly, it was the difficulty presented by the plaintiffs request to allow a cause of action for negligent infliction of emotional distress which was the subject of the "public policy" discussion engaged in by the Rabideau court and thus mistakenly cited by the

Brooke County Circuit Court to show that its summary judgment decision is "in accord" with other jurisdictions, which are likewise "concerned" over the precedent which may be created by allowing owners of pets to recover non-economic damages. Likewise, in Carroll v. Rock, also cited by the Circuit Court, the holding by the Georgia Supreme Court was limited to a finding that under the facts of the case, the defendant's conduct was not sufficiently outrageous or egregious enough to state a claim for the intentional infliction of emotional distress.

The Circuit Court also claimed that it could not find no basis of authority in West Virginia for making a distinction between animals and other kinds of property with respect to the calculation of damages under the law. In this regard, the Court even stated that while the Legislature may at some point draw a distinction between the two types of property, until such time, the Court's power is limited to applying the law and not creating it. In this regard, the Appellant submits that it is worth noting, if only for the purpose of completing the record herein, that between the time that Appellant filed the underlying cause of action and the date upon which the Court entered its order of summary judgment in favor of the defendant, the Legislature did, in fact, amend West Virginia Code Section 19-20-12 to eliminate the civil recovery limitation of the assessed value of the dog. Thus, recovery of damages for the death of a beloved pet is no longer constrained by the limitation of fair market value.

While this Court has had occasion to acknowledge and express its sympathy for pet owners who lose their companion animals, the Appellant submits that the present case affords the Court a perfect opportunity to consider and clarify what kind of evidence in addition to fair market value, is admissible to prove a pet's "special

value." In this way, other grieving pet owners, who find themselves in a situation like that of this Appellant can be fully and fairly compensated for their loss. In this regard, factors which other courts have considered in establishing value include a pet's qualities, its characteristics and how it is personally suited to its owner. The companionship and affection provided by a pet are also important elements of value in determining compensatory damages. So too are the beneficial effects on a plaintiff's physiological and psychological health and well being.

Indeed, the importance of the "loss of companionship" factor in valuing a pet simply cannot be over-stated, and evidence of the "unique role" played by a pet in an owner's life has thus been recognized as "an element of the dog's actual value" to a plaintiff. Brosseau v. Rosenthal, 443 N.Y.S 2d 285 (1980). In Brosseau, a plaintiff in a somewhat similar situation to the Appellant herein testified about the psychological trauma associated with the loss of her pet. The Court in that case was quick to both recognize and emphasize the importance of the close and special relationship between the plaintiff and her dog. "To this retired woman who lived alone, this pet was her sole and constant companion." Id. Certainly the same is true of the Appellant herein. Evidence of a pet's value based upon the loss of its companionship focuses upon the bond which exists between an owner and his or her pet and the lost value of that relationship. In this respect, it is clearly different and to be distinguished from evidence regarding the manner in which the pet was injured and the plaintiff's emotional or sentimental reactions to the tragic event.

Furthermore, the fact that such damages are not always capable of being calculated with absolute mathematical accuracy, does not bar recovery by the

plaintiff. Id. The loss of companionship suffered by the plaintiff must be considered as "an element of the dog's actual value." Nor does the fact that a plaintiff's dog may have no specific "ascertainable market value" limit recovery relative to a dog's value. Indeed, as the Vermont Supreme Court recognized, like most pets, the worth of a mixed breed dog, such as Groucho, "is not primarily financial but emotional; its value derives from the animal's relationship with its human companions." Morgan v. Kroupa, 702 A. 2d 630, 633, (Vt. 1977)

Clearly, as this Court has at least implicitly recognized, the real "worth" of a pet is not primarily financial, but emotional, and its value derives to a significant degree from the nature of the relationship between the pet and its owner. The chance to produce evidence beyond a pet's fair market value will result in compensation to pet owners which more accurately reflects the true value of their pets.

VII. CONCLUSION

The plaintiff herein shared every aspect of her life with her beloved pet dog. When a companion animal is killed by the act of another, the owner is entitled to compensation. Our pets obtain a determinable value specifically by virtue of what they represent or what they are worth us, as their owners. The Appellant submits that this value is the proper measure of damages in our tort system, which has as its goal the adequate compensation of plaintiffs for losses caused by defendants. The extensive protections and values animals are given under American law emphasizes the rationale behind the special measure of damages already recognized in a number of jurisdictions, and to date, at least implicitly by this Court as well. For the reasons set forth above, the Appellant submits that an award of damages which compensates her for Groucho's "special value," based each and every one on the factors and evidence discussed herein, is the only proper and just remedy herein pursuant to West Virginia law.

Respectfully submitted,

TRACY HELEN CARBASHO,
Plaintiff/Appellant,

BY:

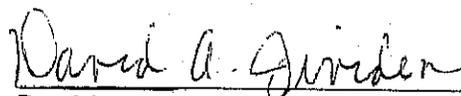


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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of January, 2005, I served the foregoing Appellant's Brief in Support of Appeal from Summary Judgment Entered on March 20, 2004 upon all counsel of record, by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

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